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OPERATIONAL LAW MANUAL

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CHAPTER 1

INTRODUCTION

SECTION 1

INTRODUCTION

1. Since 1990, the number of CF operational missions has increased by 300 per cent when compared to the 1945 - 1989 time period.[1]

2. Domestic operations since 1990 have included: the Oka crises, the Québec and Manitoba floods, the ice storms of Ontario and Québec, the G8 summits in Halifax and Kananaskis, the Swissair crash, British Columbia forest fires, Y2K, Hurricane Juan in Nova Scotia, thousands of sovereignty and search and rescue missions, NORAD mission protecting Canadian airspace, the 'Turbot War', hundreds of incidents of assistance to other government departments' operations relating to illegal fishing, counter-drug smuggling, and intercepting ships carrying illegal migrants and environmental protection.

3. International operations have included: the armed conflict combat missions of the 1991 Gulf War, the 1999 Kosovo air campaign and the post-11 September 2001 Campaign Against Terrorism in international waters and airspace and in Afghanistan, complex peace support operations in Bosnia, Haiti, Somalia, East Timor, and in the Northern Arabian Gulf, traditional peacekeeping and observer operations in the Middle East, Rwanda, the Democratic Republic of Congo, Sudan, Ethiopia and Eritrea, Cambodia and Latin America, humanitarian assistance missions, at times with the Disaster Assistance Response Team (DART), in Honduras, Turkey, Sri Lanka and the United States, as well as evacuation operations of Canadian citizens in Haiti and Lebanon.[2]

4. Each and every one of the above missions involved the provision of legal advice in a multitude of areas. Primarily, legal advice focused on identifying the legal authority for the CF to carry out the operation and the inextricably linked parameters that defined what the CF, and its members, could or could not do. Additional areas focused on a broad spectrum of legal issues that facilitated the operations from discipline, to contracting, claims, and so on.

5. Just as the nature of domestic and international operations are unquestionably becoming more complex, so too is the operational legal framework within which the commander must function. The challenge for commanders is to obtain timely and accurate operational legal advice in order to ensure that the mission is successfully executed within the rule of law.

SECTION 2

OPERATIONAL LAW AND THE ROLE OF THE OPERATIONAL LEGAL ADVISOR

6. Operational law is that body of domestic and international law that applies to the conduct of all phases of a CF operation at all levels of command.

7. The particular bodies of law that will be relevant to the operational legal advisor and commander will vary depending upon the nature of the mission. The following legal areas are relevant:

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[1] Government of Canada, "Canada's International Policy Statement, A Role of Pride and Influence in the World" at 8, online: Department of Foreign Affairs and International Trade <http://www.forces.gc.ca/site/reports/dps/pdf/dps_e.pdf> [DPS].
[2] DPS, *ibid*. at 28.

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a. Constitutional law, including the *Canadian Charter of Rights and Freedoms* (i.e., protecting rights and liberties); the *Constitution Act, 1867* (i.e., creating a federal system dividing power between the provincial and federal levels); and important constitutional 'conventions' (i.e., relating to such things as responsible government).[3]

b. The common law, particularly as it relates to the exercise of the Crown prerogative. The exercise of the Crown prerogative is often manifested through the creation of Orders-in-Council and Memoranda of Understanding.

c. Various federal statutes including: the *National Defence Act*, the *Criminal Code of Canada*, the *Emergencies Act*, the *Emergency Preparedness Act*, the *Crimes Against Humanity and War Crimes Act*, the *Geneva Conventions Act*, The *Fisheries Protection Act*, The *Coastal Fisheries Protection Act*, The *Canadian Environmental Protection Act*, the *Immigration Act*, the *Oceans Act*, the *Crown Liability Act*, etc.

d. The hundreds of treaties, as well as customary international law, in the areas of: the use of force (*jus ad bellum*), the law of armed conflict (*jus in bello*), weapons law, defence organisations, information and intelligence law, United Nations law, human rights law, international criminal law, refugee law, law of the sea, air and space law, environmental law, status of forces agreements, etc.

8. The role of the operational legal advisor is to facilitate the lawful conduct of operations by providing timely and accurate legal advice to the commander at the strategic, operational, and tactical levels at all phases of the operation. In order to carry out this role, the commander must include the legal advisor at the appropriate phase of the mission so that proper planning and mission execution can occur.

SECTION 3

OVERVIEW OF THE OPERATIONAL LAW MANUAL

9. Given the broad and diverse body of law that may impact upon operations, this manual consists of six parts.

10. Part I provides an overview and discusses the evolving nature and complexity of CF operations, the concept of 'national security' and the legal framework.

11. Part II outlines the overarching political and legal structures that, in turn, define the role of the CF within Canada's federal democratic system. This sets the stage for a discussion on the Government's authority to deploy the CF within Canada as well as outside of Canada. Particular focus is given to the exercise of the Crown prerogative.

12. Part III shifts to analyzing the legal bases for domestic operations. Chapter 6 includes an examination of the legal authorities when the CF assists the federal, provincial or municipal authorities in providing services or by public service such as loans of equipment, shelter, or personnel for disaster relief. Chapter 7 discusses CF assistance to law enforcement authorities such as the RCMP, Fisheries Canada, provincial and municipal law enforcement authorities, as well as the requisition of the CF by provincial authorities (i.e., Aid of the Civil Power). Chapter 8 gives particular focus to various legal issues relating to the use of force while Chapter 9 discusses the important issue of peace officer status and how it relates to issues of individual criminal and civil liability.

[3] A constitutional 'convention' is a traditional political practice that has evolved to the point of being constitutionally binding on the political branches of government.

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13. Part IV examines the various international legal authorities for international deployments with particular focus on those that authorize the use of force. Chapter 10 introduces international law, discussing both the relevant treaty and customary international legal bases that may provide authority for the conduct of operations. Chapter 11 provides an overview of the international legal framework authorizing states to use force internationally. Chapter 12 begins the discussion by focusing on the general prohibition against using force as found in Article 2(4) of the UN Charter. Chapter 13 examines the international law of self-defence. Chapter 14 discusses the legal framework of peacekeeping while Chapter 15 analyzes the legal authority to enforce UN Security Council Resolutions with military force. Chapter 16 discusses other legal authorities to use force that do not rely upon the UN Charter, such as humanitarian intervention or the rescue of nationals abroad.

14. Part V canvasses some of the key legal regimes that often impact on domestic or international operations. These include: the law of armed conflict (Chapter 17), international human rights law (Chapter 18), treaty law (Chapter 19), the law of the sea and related maritime domestic law (Chapter 20), air law (Chapter 21), space law (Chapter 22), intelligence law (Chapter 23), information law (Chapter 24), key treaty based defence alliances: NATO and NORAD (Chapter 25), status of forces agreements (Chapter 26), and arrangements not governed by international law, such as MOUs (Chapter 27).

15. Part VI focuses on some operational legal topics that recur during domestic and international operations. These include: rules of engagement and targeting (Chapter 28), detainees and PWs (Chapter 29), environmental law (Chapter 31), contracting (Chapter 32), claims (Chapter 33), discipline (Chapter 34), liability to serve (Chapter 35), pension issues (Chapter 36), legal assistance (Chapter 38), command of operational deployments (Chapter 39), and the deployment of the operational legal advisor (Chapter 40).

SECTION 4

THE BEGINNING: THE FIRST EDITION

16. Importantly, this manual is not an exhaustive review of the law. Rather, it is a very general overview for the operational legal advisor and the commander of some of the more common areas of the law that impact on operations or arise during the various phases of an operation. It attempts to strike a balance between providing a general overview of the law and drilling down to a specific, detailed discussion of the law. It is not designed to be a 'how to' manual for legal advisors. Furthermore, its primary focus is the law rather than policy, operations, or administration.

17. Lastly, this is the first, and not the last, edition of the Operational Law Manual. Inevitably, this manual will undergo revision as the legal framework within which operations occur continues to transform. It is hoped that the manual will be the object of constructive criticism by both legal advisors and operators alike. This process can only strengthen the manual, promote the rule of law and contribute to the successful execution of all CF operations.

18. Constructive comments for improvement should be directed to:

Director of Law/ Training
Office of the Judge Advocate General
National Defence Headquarters
11th Floor, Constitution Building
305 Rideau Street
Ottawa, Ontario
Canada
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CHAPTER 2

NATIONAL SECURITY AND OPERATIONAL LAW

SECTION 1

INTRODUCTION

1. This chapter provides an overview of how 'national security' and 'national defence' are being redefined by evolving policy, organizational, and legal perspectives. It is important to note that as the nature of the 'threat' is transforming, so too is the governmental definition of 'national security' and 'defence.' CF operations are increasing in complexity and intensity. At the same time, the legal framework within which these domestic and international operations are occurring is becoming more complex. Indeed, the role of the operational legal advisor, and the way in which commanders have incorporated legal advice at the strategic, operational, and tactical levels, have been significantly transformed since the pre-Oka and 1991 Gulf War period. It is imperative that the operational legal advisor have a detailed understanding of the various legal regimes applicable to any operation and that the commander incorporate legal advice at the appropriate operational phase to facilitate the lawful and successful conduct of operations.

SECTION 2

HISTORICAL INCREASE IN OPERATIONAL TEMPO: 1990 ONWARD

2. Since 1990, the number of CF operational missions has increased by 300 per cent when compared to the 1945 - 1989 time period.[1] Some of the operations have included: the armed conflict combat missions of the 1991 Gulf War, the 1999 Kosovo air campaign and the post-11 September 2001 Campaign Against Terrorism in international waters and airspace and in Afghanistan, also complex peace support operations in Bosnia, Haiti, Somalia, East Timor and in the Northern Arabian Gulf, traditional peacekeeping and observer operations in the Middle East, Rwanda, the Democratic Republic of Congo, Sudan, Ethiopia and Eritrea, Cambodia and Central America, humanitarian assistance missions, at times with the Disaster Assistance Response Team (DART), in Honduras, Turkey, Sri Lanka and the United States, as well as evacuation operations of Canadian citizens as in Haiti and Lebanon,[2] the Oka crises, the Quebec and Manitoba floods, the ice storms of Ontario and Québec, the G8 summits in Halifax and Kananaskis, the Swissair crash, the British Columbia forest fires, Y2K, Hurricane Juan in Nova Scotia, thousands of sovereignty and search and rescue missions, the NORAD mission protecting Canadian airspace, the 'Turbot War,' hundreds of incidents of providing assistance to other government departments' operations relating to illegal fishing, counter-drug smuggling, and intercepting ships carrying illegal migrants, as well as environmental protection.

SECTION 3

THE EVOLVING COMPLEXITY OF 'THREATS,' 'NATIONAL SECURITY' AND 'NATIONAL DEFENCE'

3. National security concerns such matters as "threats that have the potential to undermine the security of the state or society."[3] Current national security priorities include "[p]rotecting

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[1] Government of Canada, "Canada's International Policy Statement, A Role of Pride and Influence in the World" at 8, online: Department of Foreign Affairs and International Trade <http://www.forces.gc.ca/site/reports/dps/pdf/dps_e.pdf> [*DPS*].
[2] *DPS*, *ibid.* at 7-9, 28.
[3] Government of Canada, "Securing an Open Society: Canada's National Security Policy" at 3, online: Privy Council Office <http://www.pco-bcp.gc.ca/default.asp?Page=Publications&Language=E&doc=NatSecurnat/natsecurnat_e.htm> [*NSP*].

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Canada and the safety and security of Canadians at home and abroad", "[e]nsuring that Canada is not a base for threats to our allies" and "[c]ontributing to international security."[4]

4. As noted in the *National Security Policy* (*NSP*), and the Defence Policy Section (*DPS*) of *Canada's International Policy Statement* (*IPS*),[5] the complexity, nature and concept of actual threats to national security have evolved:

> An increasingly interdependent world has tightened the links between international and domestic security, and developments abroad can affect the safety of Canadians in unprecedented ways. Today's front lines stretch from the streets of Kabul to the rail lines of Madrid to our own Canadian cities. The Government has made a commitment to respond to potential threats to Canadian security before they reach our shores.[6]

5. The re-definition of the 'front lines' has caused a blurring between what was previously distinctly viewed as 'domestic' and 'international' security. This has resulted in an "imperative to change our conception of security threats."[7] The *NSP* notes:

> We have always faced threats to our national security. As we move forward into the 21st century, we face new and more complex ones. Today, individuals have the power to undermine our security in a way that only hostile states were once able to accomplish ... National security deals with threats that have the potential to undermine the security of the state or society. These threats generally require a national response, as they are beyond the capacity of the individuals, communities or provinces to address alone ... Given the international nature of many of the threats affecting Canadians, national security also intersects with international security.[8]

6. Consequently, the 'front lines' indeed connect Kabul to Madrid and Canadian cities as the potential for non-state entities, such as terrorists, to use force to a level previously reserved for state militaries is now a reality. The transformed nature of what constitutes a threat to Canadian security is, however, by no means exclusively influenced by the emergence of terrorism. Other threats and security issues, as identified by the Government, cover a wide range of situations and include: terrorism (i.e., including the 12 November 2002 taped message where Osama Bin Laden identified Canada as a target), the proliferation of weapons of mass destruction, failed and failing states (e.g., pre 2002 Afghanistan, Somalia and Haiti), intra and inter state conflict, (e.g., the Former Yugoslavia), natural disasters (e.g., ice storms, floods), critical infrastructure (i.e., computer network attack), organized crime (e.g., counter drug ops), pandemics (i.e., SARS and a feared influenza epidemic), and environmental degradation (i.e., illegal fishing, climate change and its impact on opening up Arctic waters to commercial shipping).[9] Combined, these new threats create a "complex security environment."[10]

7. The *DPS* has commented on how operations have become more complex when contrasted with traditional peacekeeping roles as follows:

> Military experts have compared today's complex and chaotic operational environment to a 'three block war.' This term speaks to the increasing overlaps in the missions armed forces are being asked to carry out at any one time, and the resulting need for integrated operations. Our land forces could be engaged

[4] *NSP*, *ibid*. at 5.
[5] *DPS*, *supra* note 1.
[6] *DPS*, *supra* note 1 at 5.
[7] *DPS*, *supra* note 1 at 7.
[8] *NSP*, *supra* note 3 at 1-3.
[9] *NSP*, *ibid*. at 7-8; *DPS*, *supra* note 1 at 5-7; *DPS*, *supra* note 1 at 1.
[10] *NSP*, *supra* note 3 at 1, 5.

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> in combat operations against well-armed militia forces in one city block, stabilization operations in the next block, and humanitarian relief and reconstruction two blocks over. Transition from one type of operation to another often happens in the blink of an eye, with little time to react. At the same time, our naval forces in adjacent coastal areas might be supporting troops ashore while enforcing a maritime exclusion zone, and our air forces could be flying in supplies and humanitarian aid, while standing by to directly engage a determined opponent.[11]

8. The changed nature of the threats has impacted not only on the policy aspects of how national security and defence are defined but also on how the Government and the CF/DND has been reorganized. Some of the key developments have included: the issuance of the first *NSP*, the creation of a interdepartmental *IPS*, the creation of the Ministry of Public Safety and Emergency Preparedness, the creation of a Cabinet Committee on Security, Public Health and Emergencies, appointment of a National Security Advisor, creation of a Government Operations Centre, and the creation of a Bi-National Planning Group within NORAD, to name a few. Within the Department some of the most recent re-organizational changes have included: the creation of the new position of Associate Minister of National Defence and Minister of State (Civil Preparedness), assignment of MND as the lead for the coordination of on-water response to a marine threat or a developing crises in the exclusive economic zone, and the establishment of Marine Security Operations Centres. Within the CF, a fundamental reorganization and 'transformation' is underway so that the CF may better respond to the challenges posed by the new complex operational and security environment.

9. The transformation and new vision for the CF requires a fully integrated and unified approach to operations in a number of ways including transforming the command structure so that the ability of the CF to deploy domestically and internationally will be enhanced.[12] Consequently, Canada Command (CanadaCOM), the Canadian Expeditionary Force Command (CEFCOM), Canadian Special Operations Command (CANSOFCOM), Canada Operational Support Command (CANOSCOM) and the Strategic Joint Staff (SJS) have been created. Transformation will also significantly impact decision-making through the devolution of responsibilities and authorities to the operational commanders. This in turn will create a greater need for accurate and coordinated legal advice at all levels of command. In response, the Office of the JAG has transformed and reorganized the way in which it provides legal advice to these Commands.

SECTION 4

THE EVOLVING COMPLEXITY OF THE LEGAL FRAMEWORK

10. The evolving conceptualization of the 'threats,' 'national security,' and 'national defence' has also occurred within the domestic and international legal framework that provides the basis for CF operations and shapes their nature and scope.

11. As noted, the Government of Canada has re-conceptualized 'threats' in a way which is no longer restricted to state-on-state, cross border use of military force. Similarly, the UN Security Council's practice has evolved. The Security Council has regarded a much broader range of events as constituting a 'threat to the peace or breach of the peace' as the term is used in Article 39 of the UN Charter. This is significant, as an Article 39 determination that a threat or breach of the peace exists is a legal prerequisite for the authorization of military force for UN enforcement operations by the Security Council, acting under Chapter VII of the UN Charter.[13]

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[11] *DPS*, *supra* note 1 at 8.
[12] *DPS*, *ibid.* at 11.
[13] See Chapter 15 of this manual.

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12. Since 1991, a number of situations have been declared by the Security Council as a 'threat' in accordance with Article 39 that previously would not have been so considered. These include: violations of human rights, violence within a state, terrorism, failure to adhere to democratic election results, natural disasters and epidemics. Prior to the 1991 Gulf War, 659 Security Council Resolutions were issued in the UN's 46 years. Since then, 930 resolutions have been issued over the 14-year period from 1991 to 2005. Most authorized military missions were not traditional peacekeeping operations but rather what have been referred to as enforcement or 'stability' operations.

13. Likewise, the legal understanding of 'armed attack,' 'armed conflict,' 'self-defence,' and 'human rights' has evolved as the nature of these new threats changes. Importantly, these legal transformations have impacted directly on how states have historically employed military force. Prior to 11 September 2001, a traditional approach to 'armed attack' and 'self-defence' had not included the use of force by, or against, a non-state entity. On 24 October 2001, the Government of Canada notified the Security Council, pursuant to Article 51 of the UN Charter, that it would employ military force outside of Canada in exercise of self-defence against Al Qaeda and the Taliban. Subsequently, land, sea, and air forces have been deployed in Afghanistan, and on and over international waters. Similarly, Canada, as a party to the North Atlantic Treaty, invoked the collective self-defence clause contained in Article 5 for the first time in the history of NATO.[14]

14. Meanwhile in the late 1990s, concern for the serious violations of human rights in Kosovo prompted Canada to participate in the Kosovo air campaign and subsequently launch a significant policy initiative entitled the "Responsibility to Protect,"[15] a concept subsequently endorsed in broad terms by the United Nations.[16]

15. Recognizing the growing concern of the unlawful proliferation of weapons of mass destruction by rogue states and non-state entities, the NORAD Treaty was amended in 2004 so that NORAD, as part of its aerospace and warning mission, could conduct "aerospace warning in support of the designated commands responsible for missile defence of North America."[17] This amendment followed the ratification of another treaty creating a Bi-national Planning Group within NORAD in 2002 designed to enhance Canada/US maritime surveillance, intelligence sharing and threat assessment, and prepare contingency plans to improve coordination of military support to civilian authorities.[18] Again, in response to growing concerns over the proliferation of weapons of mass destruction, Canada became a participant in the Proliferation Security Initiative (PSI) in 2004. The PSI principles seek to use, and enhance, existing domestic and international legal frameworks to act against entities of proliferation concern.[19]

16. Domestically, the legislative and common law basis supporting and shaping CF operations has evolved within the complex operational and security environment. As the role of the CF has evolved, new legal bases have been created, and existing legal authorities, have been modified to support operations. This includes the creation of section 273.6 of the *NDA* which provides a legal basis for the CF to provide 'public service,' including assistance to law enforcement agencies. Other changes have included modifications to existing legislation such as: *The Coastal Fisheries Protection Act*, the *Criminal Code*, and the *Fisheries Protection Act*.[20] Legislative developments also include the creation of various domestic offences for violations of the Laws of Armed Conflict as described in the *Crimes Against Humanity and War Crimes Act*[21] and the creation of 'terrorism' offences under the *Criminal Code*. Additionally, Memorandum of

[14] See Chapter 25 of this manual.
[15] See Chapter 16 of this manual.
[16] 2005 *World Summit Outcome*, GA Res. 60/1, UN GAOR, 60th Sess., UN Doc. A/60/PV8 (2005) at para. 138 *et seq*, online: United Nations <http://www.un.org/Depts/dhl/resguide/r60.htm>.
[17] See Chapter 25 of this manual.
[18] See Chapter 25 of this manual.
[19] See Chapter 20 of this manual.
[20] See Chapter 7 of this manual.
[21] See Chapter 17 of this manual.

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Understanding (MOU)[22] and Orders in Council (OIC) have facilitated the exercise of the Crown prerogative, a common law concept, to enhance the provision of services, or assistance to other government departments by the CF. These MOUs/OICs include: *Canadian Forces Assistance to Provincial Police Forces Directions, Assistance to Federal Penitentiaries Order, Canadian Forces Armed Assistance Directions, CF Assistance in Support of the RCMP in its Drug Law Enforcement Role, Surface Ship Patrols and Aerial Fisheries Surveillance.*[23]

17. Whether on international or domestic operations, the law and the role of the operational legal advisor are increasingly crucial given the complexity of law regulating the authority, scope, and parameters of any military operation. Commanders must understand during all phases of an operation what the CF, and individual members, can and cannot lawfully do. Consequently, legal advisors at all levels must have a detailed understanding of relevant legal authorities which may impact upon operations and must advise accordingly during all phases of an operation.

18. As noted, recent CF international operations bear little resemblance to traditional peacekeeping missions. Modern CF operations are far more complex and dangerous. The transiting of the three blocks of combat, stability, and humanitarian relief operations can now happen within a limited geographic area and time-frame.

19. Indeed, in recent years the CF has been actively involved in conducting operations simultaneously in two or three blocks. For example, land operations in Afghanistan were involved in combat operations as parties to an armed conflict against the Taliban and Al Qaeda in exercise of self-defence, as well as stability operations as authorized by the Security Council in International Assistance Force (ISAF) operations. Similarly, the CF naval forces were enforcing Security Council resolutions against Iraq and, at the same time, carrying out operations within the armed conflict against Al Qaeda and the Taliban in the Northern Arabian Gulf region.

20. The complexity of the legal framework has increased. Now it is not uncommon for a number of distinct legal regimes - not just the Laws of Armed Conflict (LOAC) - to have a direct impact on operations. Today's operational legal advisor may be required to be knowledgeable, and advise on a number of different legal regimes including: the law of the sea,[24] air and space law,[25] international human rights law,[26] information operations and intelligence law, and[27] various treaties including Status of Forces Agreements[28] and MOUs.[29] In addition to understanding these distinct bodies of law, a legal advisor must also understand the interrelationship between them.[30] During combat and stability operations, it is not uncommon for all the above-noted regimes to apply with parts of each regime being limited in certain areas by other regimes. For example, the apprehension and transfer of detainees will undoubtedly trigger LOAC as well as human rights law. The UN law on use of force may restrict the application of the law of the sea or air law.

21. Throughout any operation there will also be a variety of legal issues, which, if not managed, can take the focus away from mission success. These include legal issues relating to: contracting,[31] claims,[32] death/service estates,[33] legal status of reservists and liability to serve,[34] legal assistance,[35] environmental law,[36] and importantly, discipline.[37]

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[22] See Chapter 27 of this manual.
[23] See Chapter 7 of this manual.
[24] See Chapter 20 of this manual.
[25] See Chapters 21 and 22 of this manual.
[26] See Chapter 18 of this manual.
[27] See Chapters 23 and 24 of this manual.
[28] See Chapter 26 of this manual.
[29] See Chapter 27 of this manual.
[30] See Kenneth W. Watkin, "Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict" (2004) 98 Am. J. Int'l L. 1, online: American Society of International Law <http://www.asil.org/ajil/watkin.pdf#search=%22Controlling%20the%20Use%20of%20Force%3A%20A%20Role%20for%20Human%20Rights%20Norms%20in%20Contemporary%20Armed%20Conflict%22>.
[31] See Chapter 32 of this manual.

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22. Any of these above topics can impact and consume the focus of an operational commander if not properly anticipated and addressed at the appropriate time. An operational legal advisor must be up to date in all these areas to ensure the success of a CF operation is not compromised and the rule of law is maintained. Accurate and timely legal advice at the appropriate level facilitates the lawful conduct of operations.

SECTION 5

CONCLUSION

23. Given the nature of 'threats' to Canada, which now go beyond traditional notions of military force employed by hostile states, the scope of 'national security' has dramatically evolved. This has caused erosion in what was once considered a distinction between 'domestic' and 'international' security and in turn has triggered a 'transformation' in the way in which the CF is organized to respond to threats. Both the nature of the threats and the nature of CF operations have significantly increased in tempo and complexity since 1991. Likewise, the legal framework that shapes both domestic and international operations has become far more sophisticated and complex. The challenge is to ensure that operational legal advisors have a firm understanding of all relevant law that may impact on operations, and that commanders properly incorporate legal advice in the planning and execution of operations so that the lawful conduct of operations can be enhanced. In other words, today's operational legal advisors must be prepared to practice 'Three Block Law' to address 'Three Block War' legal issues.

[32] See Chapter 33 of this manual.
[33] See Chapter 37 of this manual.
[34] See Chapter 35 of this manual.
[35] See Chapter 38 of this manual.
[36] See Chapter 31 of this manual.
[37] See Chapter 34 of this manual.

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CHAPTER 3

THE CANADIAN POLITICAL SYSTEM

SECTION 1

INTRODUCTION

1. An understanding of the Canadian political system is required in order to understand some of the key legal processes relating to the deployment of the CF on certain domestic and international operations. For example, an understanding of the constitutional divisions of powers between the federal and provincial governments is required to advise on the deployment of the CF in Aid of the Civil Power. Without an understanding of the parameters of authority amongst the various federal ministers, the various interdepartmental MOUs allowing the CF to assist various law enforcement agencies will not be situated in their proper context. Likewise, without understanding the role of Cabinet, the Government and Parliament, it will be difficult to understand the legalities of deploying the CF internationally in exercise of the Crown prerogative.

2. Consequently, the purpose of this chapter is to map out a basic overview of the Canadian political system so that a deeper understanding of the various legal aspects of operations, as discussed in subsequent chapters, can be acquired.

SECTION 2

FEDERAL GOVERNMENT

Form of Government

3. The Constitution is the supreme law of Canada.[1] Therefore, every action of the government must comply with the Constitution and must be predicated upon the rule of law.[2] Governments have a duty to defend and uphold the Constitution, and to ensure that they do not exceed their constitutional mandates.

4. The *Constitution Act, 1867,*[3] the most foundational of Canada's constitutional documents, is the fundamental source of political and legal authority in Canada.[4] It establishes the basic structure of the Canadian state.

5. Canada's constitutional structure has several important qualities. Like many political systems worldwide, Canada has a 'separation of power' between three branches of government. Broadly speaking, the legislative branch creates laws, the executive branch implements these laws and an independent judiciary adjudicates disputes[5] by applying statutory law, the common law (i.e., in provinces outside Quebec), and constitutional principles.

6. Canada is a constitutional monarchy, meaning that the head of state is a monarch whose powers are limited by a constitution. Canada is also a parliamentary democracy, in which the functions of executive government devolve from the titular head of state to the political executive. This means that in practice, executive decisions in Canada take place in the context of Canada's system of 'responsible government.' At its heart, responsible government in Canada means that

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[1] *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 52.
[2] *Reference Re Secession of Quebec*, [1998] 2 S.C.R. 217 (Factum of the Attorney General of Canada).
[3] *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5 [*Constitution Act, 1867*]. The *Constitution Act, 1867*, was originally named the *British North America Act, 1867*. It was renamed by the *Constitution Act, 1982*. It is the key document in the Canadian Constitution.
[4] See, *e.g.*, James John Guy, *People, Politics and Government, a Canadian Perspective*, 5th ed. (Toronto: Prentice Hall, 2001) at 294.
[5] Peter W. Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 2000) at 1.

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the federal Cabinet (the effective pinnacle of the executive branch) is made up, normally, of elected members of the House of Commons and occasionally from the unelected Senate. Through this mechanism, the Cabinet or executive branch is always accountable to the elected House and must maintain the confidence of a majority of its members to remain in power.

7. Canada is a federal state, in that jurisdiction is shared between two orders of government: federal (or central) and provincial. The *Constitution Act, 1867* sets out the federal structure and establishes the federal Parliament and provincial legislatures. Importantly, the *Constitution Act, 1867* assigns each order of government, federal and provincial, exclusive authority to legislate in respect of certain subjects. A rich court jurisprudence has developed through the interpretation of this division of powers. On the whole, most matters can be fit into one of the listed federal or provincial powers. In rare circumstances, however, courts have concluded that a matter is not anticipated by the list included in the *Constitution Act, 1867*. In these uncommon situations, the courts have left the matter to be legislated by the federal Parliament, pursuant to its overarching power to legislate "for the Peace, Order, and Good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces."[6]

Legislative Branch of Government

8. The legislative branch is the major forum for the debate of political ideas and options.[7] Its classic function is to pass laws and to scrutinize the activities of the executive branch. In the Canadian system of government, the legislative branch is the only 'sovereign' entity. In the British tradition, Parliament could pass what ever law it wished, and was supreme over the other branches of government. In Canada, absolute parliamentary supremacy has been curbed by the division of powers between the federal and provincial levels, by the *Charter* and by certain other unwritten principles of constitutional law. Nevertheless, so long as it does not violate one of these constitutional limitations on its sovereignty, Parliament may pass whatever law it deems appropriate.

Parliamentary Government

9. The Canadian parliamentary system finds its roots in the traditions of the British Parliament. Under the Canadian Constitution, the federal legislature (Parliament) is composed of the Queen (as represented by the Governor General), and the two 'houses': the House of Commons and the Senate. The consent of all three is necessary for the passage of legislation.

10. Legislation passed by Parliament is issued in the form of statutes, such as the *National Defence Act*[8] (*NDA*), which provides for the establishment of the Department of National Defence[9] (DND) and the Canadian Forces (CF).[10]

The Governor General

11. As previously mentioned, the monarch is the head of state for Canada.[11] The monarch is represented in Canada federally by the Governor General, appointed by the Queen on the advice of Canada's Prime Minister.[12]

12. The Governor General's legislative branch duties include giving royal assent to bills passed by the House of Commons and the Senate.[13]

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[6] *Constitution Act, supra* note 3, s. 91.
[7] G. Tardi, *The Legal Framework of Government* (Aurora: Canada Law Book, 1992) at 64.
[8] *National Defence Act*, R.S.C. 1985, c. N-5 [*NDA*].
[9] *Ibid.*, s. 3.
[10] *Ibid.*, s.14.
[11] *Constitution Act, 1867,supra* note 3, s. 9.
[12] The Governor General is represented provincially by Lieutenant Governors, appointed by the federal executive.

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The Senate

13. The Senate, or upper house of Parliament, ordinarily consists of 105 senators appointed by the Governor General on the advice of the Prime Minister.[14] There are a fixed number of Senate appointments allocated by region of the country, a system originally intended to ensure that each province and territory had a proportionate voice in the Senate. The Senate currently plays four main roles on the Canadian political scene, all of which are complementary to the functions of the House of Commons: (1) legislative, (2) investigative,[15] (3) regional representation, and (4) protection of linguistic and other minority rights.[16] The Senate has been granted the power to initiate bills,[17] amend bills proposed by the House of Commons, or reject them. No bill can become law until the Senate has given its approval.

The House of Commons

14. The House of Commons, or lower house of Parliament, is currently composed of 308 elected Members of Parliament, each representing one of the country's electoral districts (i.e., ridings). Although the population of ridings varies,[18] the make up of the House of Commons approximates representation by population: with some exceptions, seats are assigned to provinces in keeping with their proportion of the Canadian population and then riding boundaries are assigned to ensure reasonable parity in riding population size. The Canadian Constitution requires the election of a new House of Commons at least every five years.[19] The House of Commons has the power to initiate a bill dealing with any subject matter properly within the legislative competence of Parliament, and to amend or reject bills proposed by the Senate. In fact, most proposed federal laws, including all bills that involve raising revenue or spending money, are introduced in the House of Commons.

Executive Branch of Government

15. As discussed, the federal[20] executive branch of government in Canada consists of the Queen, as represented by the Governor General. The *Constitution Act, 1867* also contemplates a 'Queen's Privy Council of Canada' to aid and assist the Governor General. By constitutional convention, however, the powers of the Privy Council are in fact exercised by the federal Cabinet – a collective body comprising the Prime Minister and ministers. Further, by constitutional convention, the monarch and the Governor General almost never exercise their powers unilaterally, instead responding to the instruction of Cabinet (or occasionally, the Prime Minister alone for some responsibilities). Thus, as a practical reality, Cabinet lies at the pinnacle of the federal executive. The Prime Minister's special role flows in large measure from his or her authority to determine the composition of the ministry (that is, to instruct the Governor General to appoint or dismiss people from ministerial posts). The Prime Minister is also the member who calls the meetings of Cabinet and eventually defines the Cabinet 'consensus.'

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[13] As the monarch's representative in Canada at the federal level, the Governor General has executive branch duties as well, including reading the Speech from the Throne, signing state documents, summoning, opening and ending sessions of Parliament, dissolving Parliament for an election and presiding over the swearing-in of the Prime Minister, the Chief Justice of Canada and cabinet ministers, as well as serving as the Commander-in-Chief of the Canadian Forces. This last duty is a ceremonial one, as the Governor General does not exercise any specific command function.
[14] Senators are appointed by the Governor General acting on the advice of the Prime Minister.
[15] Investigations are by Special Senate Committee, into issues of social or economic importance to the country.
[16] Standing Committee on Legal and Constitutional Affairs, *Report on Certain Aspects of the Canadian Constitution* (Ottawa: Senate of Canada, 1980).
[17] Except bills providing for the expenditure of public money or imposing taxes.
[18] A rough average is 100,000 Canadians per riding.
[19] *Constitution Act, 1982, supra* note 1, s. 4.
[20] This part deals with the federal executive only. The provinces also have executive branches with different structures, and, of course, different players.

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16. The function of the executive branch is, broadly speaking, to implement the laws of Canada. The executive branch has the authority to make decisions and to develop government policies relating to those matters over which the federal Parliament has legislative authority,[21] always bearing in mind that because of the mechanism of responsible government, the ministry must maintain the confidence of the House of Commons in respect of those decisions and policies. The executive branch performs the majority of its duties through the intermediary of the federal departments and agencies, special boards, commissions and state-owned or 'Crown' corporations.

17. The legislature is the only sovereign branch in Canada's constitutional order. In comparison, the executive branch has much more limited powers, flowing almost exclusively from that authority delegated to it by Parliamentary statute and, to a lesser extent, from the 'Royal' or 'Crown' prerogative. In the main, the executive branch functions in accordance with the authority conferred on it by statutes – laws passed by Parliament. However, for some functions the Crown prerogative remains important. For example, the conduct of foreign affairs, including the making of treaties and other acts of state in matters of foreign affairs, as well as decisions respecting the use of the Canadian Forces, remain part of the Crown prerogative power in Canada.[22] The Crown prerogative is not defined in any statute, but consists of the powers and privileges accorded to the Crown by the common law, or judge-made law. Put another way, the Crown prerogative is the residue of powers once exercised by the monarch personally that have not been stripped away by subsequent Parliamentary statute law. As this definition suggests, the Crown prerogative persists only with the forbearance of the legislature. In decisions discussing the Crown prerogative, the courts have consistently held that the prerogative is confined to those areas of traditional executive government powers where no statute law has occupied the field.

Prime Minister

18. While the Monarch is the head of state in Canada, the Prime Minister is the head of government. The Prime Minister is officially appointed by the Governor General. By constitutional convention, the Governor General appoints a person capable of securing the confidence of the House of Commons – that is, a majority of votes in that chamber. In practice, the Governor General almost always selects the leader of the political party that holds the greatest number of seats in the House of Commons (although once in Canadian history the Prime Minister was the leader of the second largest party in the Commons, but one who temporarily commanded a majority in the Commons by acting in coalition with a third, smaller party). Among other things, the Prime Minister has the power to instruct the Governor General as to appointment and dismissal of ministers and determines the responsibility of these ministers when functioning in Cabinet. The Prime Minister also instructs the Governor General on when Parliament will be dissolved for an election and when a reconstituted Parliament will be summoned into session following that election.[23] Thus, the timing of elections is almost always a matter determined by the Prime Minister. Only when the incumbent ministry loses the confidence of the Commons – through the device of a non-confidence vote – is the Prime Minister compelled to either resign his or her ministry or seek dissolution of Parliament, triggering an election.

Ministers: Parliamentarians with Portfolio

19. The Prime Minister usually appoints ministers from among those elected to the House of Commons,[24] although Canadian practice permits senators to also hold ministerial posts. Ministers are usually appointed to carry out the powers, duties and functions of a specific portfolio

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[21] The courts have held that the division of executive power between the federal and provincial executives mirrors the division of legislative power set out in the *Constitution Act, 1867*.
[22] Hogg, s*upra* note 5 at 11. The exercise of the Crown prerogative in matters involving national defence and the use of the CF will be discussed in Chapter 5.
[23] Although these decisions are actually taken by the Governor General on the advice of the Prime Minister.
[24] The Prime Minister will typically grant portfolios to MPs from his or her own party.

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related to a matter of public concern under federal jurisdiction.[25] Such matters typically include health, foreign affairs, finance, industry, environment, national defence and immigration. By statute, Parliament has usually created a government department in each of these and other areas and in that statute, assigned particular responsibilities to the responsible Minister. For example, the *National Defence Act* designates the Minister of National Defence (MND) as the minister who is responsible, answerable and accountable to the House of Commons for this portfolio.[26]

The Cabinet

20. The Cabinet is, in political reality, the supreme executive authority in Canada.

21. The Cabinet is composed of members of the House of Commons and an occasional senator, typically about 30 in number, selected by the Prime Minister. Normally, the Prime Minister will appoint a Cabinet that consists of all those members of the House of Commons holding portfolios.[27] By custom, when possible, there is at least one Cabinet minister per province.

22. The Cabinet stands or falls together, a concept also known as the 'collective responsibility of the Cabinet.' Most dramatically, a vote of non-confidence in the House of Commons precipitates the 'fall of the government,' either by sparking new elections or the tendering of the ministry's resignation with the Governor General. For this reason, individual ministers must continually seek consensus for their goals, policies, programs, and means of implementation, as decisions often affect the whole Cabinet.

The Governor General in Council

23. Legislation often requires a decision to be made by the 'Governor General in Council' or 'Governor in Council.' Technically, this is the Governor General, as advised by the Privy Council of Canada.[28] In practice and by constitutional convention, the Cabinet will make the decision and then send the 'order' or the 'minute' of the decision to the Governor General for signature. Although the Governor General technically has the power to refuse Cabinet's advice, by custom the Governor General's involvement in this process is ceremonial.[29]

The Judiciary

24. Canadian courts are the guardians of the Constitution, charged with ensuring that the rule of law prevails.[30] To accomplish this goal, and because in some cases the judiciary must evaluate the constitutionality and legality of legislative and executive actions and make a decision affecting the rights and obligations of government authorities, the judiciary must be independent of government.[31] In Canada, the constitutional framework of the judicial branch of the federal government is set out in the *Constitution Act, 1867* and *the Constitution Act, 1982*. While the judicial branch is part of the state in the broadest sense of the word, in legal terms the judicial institutions act separately from both the legislative and executive branches of government.

The Supreme Court of Canada

[25] *Constitution Act, 1867, supra* note 3, s. 91.
[26] *NDA*, *supra* note 7, s. 4.
[27] Although this need not be the case: the Prime Minister may appoint members of Parliament without portfolios, or Senators, to Cabinet.
[28] The Governor General is, again in theory, advised by the Privy Council, the functioning part of which is Cabinet.
[29] Hogg, *supra* note 5 at 196.
[30] *Amax Potash Ltd* v. *Government of Saskatchewan,* [1977] 2 S.C.R. 576 at 590; *The Queen* v. *Beauregard,* [1986] 2 S.C.R. 56 at 71-72.
[31] *Ref Re: Remuneration of Judges of the Provincial Court (P.E.I.),* [1997] 3 S.C.R. 3.

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25. The Supreme Court of Canada (SCC) is the highest court in Canada and is the final court of appeal. It is made up of nine judges appointed by the Governor General on the advice of the federal Cabinet. The SCC has jurisdiction over disputes in all areas of the law, including constitutional, criminal, administrative, and civil matters. One of its principal functions is the interpretation of the Constitution, and its decisions assist in defining the limits of federal and provincial executive and legislative power. The right of appeal is not automatic. While the SCC will hear appeals from some types of court decisions as a matter of right, in the majority of instances the SCC must grant 'leave' to file the appeal. Such leave will only be granted in special circumstances. Typically, the SCC will only grant leave for cases dealing with issues of significant national importance.

The Federal Court of Canada

26. The Federal Court of Canada (FCC) is a court created by statute and as such, exercises only those powers specifically conferred on it by statute (i.e., the *Federal Courts Act*).[32] The Federal Courts are courts of law, equity and admiralty, divided into the Federal Court (a trial level court) and the Federal Court of Appeal. The Federal Court (once known as the 'Trial Division') reviews disputed decisions of federal boards, commissions and tribunals to ensure their legality through a process of judicial oversight known as administrative 'judicial review.' It has jurisdiction over matters including inter-provincial and federal-provincial disputes, as well as other matters of Canada-wide application or importance. The Federal Court of Appeal (once known as 'Appeal Division') hears appeals from the Federal Court and the Tax Court of Canada, and performs a judicial review function in relation to certain formal federal administrative tribunals. While the Federal Courts are based in Ottawa, the judges of both courts may sit in locations across the country. Decisions of the Federal Court of Appeal may, in certain circumstances, be appealed to the SCC.

The Court Martial Appeal Court of Canada

27. The Court Martial Appeal Court (CMAC) is made up of judges appointed by the federal executive, who may in law be drawn from the pool of judges who sit on the FCC or provincial superior courts of criminal jurisdiction.[33] In practice, CMAC judges are normally drawn from the Federal Court of Appeal. The CMAC deals primarily with appeals from decisions of courts martial.[34] Subsequent appeals from the CMAC may, in certain circumstances, be made to the SCC.

Provincial Courts

28. Provinces have at least three levels of courts. Lower or provincial court is a trial court of first instance for most criminal matters, and the vast majority of criminal trials take place at this level, including trials of all summary offences[35] and certain indictable offences. A superior court (also called 'Supreme Court' or 'Court of Queen's Bench,' depending on the province) has jurisdiction to hear civil or criminal matters in any area, and at any level, except for those matters reserved exclusively for the provincial court. The decision of a superior court can be appealed to the provincial Court of Appeal, the highest court in the province. In certain cases, a decision rendered by a provincial Court of Appeal may be appealed to the SCC.

[32] *Federal Courts Act*, R.S. 1985, c. F-7. This is in contrast to the Superior Courts of the provinces, which are courts of inherent jurisdiction under the Constitution.
[33] *NDA, supra* note 7, s. 234.
[34] Not all court martial decisions may be appealed: Section 230 of the *NDA* lists the grounds of appeal available to a person subject to the Code of Service Discipline (CSD). *NDA*, *supra* note 7, s. 230.
[35] Or low-level offences at Canadian federal criminal law. Summary offences should not be confused with 'summary trials,' which take place under the CSD for a range of offences.

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SECTION 3

PROVINCIAL GOVERNMENTS

Provincial Legislatures

29. Provincial legislatures are *unicameral* legislative assemblies (i.e., meaning one house, as opposed to the *bicameral* federal Parliament composed of two houses) of varying size in each of the ten provinces. Canadian Territories are the responsibility of the federal government. Provincial legislatures are headed by a Lieutenant Governor who is appointed by the Governor General of Canada. The position of Lieutenant Governor is now largely symbolic and such individuals wield little actual power in matters of provincial governance. The Premier of the province is the true decision-maker and leader of the government.

30. In the *Constitution Act, 1867*, the powers of government in Canada were divided between the federal and provincial levels.[36] The federal government was given the authority to legislate in areas of primarily national concern, such as defence, taxation, and criminal law. Provinces were given responsibility for areas considered important in maintaining their specific identities, cultures and special institutions, as well as a number of other key areas such as education and healthcare. Provincial legislatures are therefore empowered to pass laws relating to those matters for which they have been granted jurisdiction under the Constitution. However, those laws have no effect outside the boundaries of the province.

SECTION 4

DEPARTMENT OF NATIONAL DEFENCE AND CANADIAN FORCES

31. Passed by the federal Parliament under the authority of the Constitution[37], the *National Defence Act* (*NDA*) establishes the organisation and structure of the Department of National Defence (DND)[38] and the Canadian Forces (CF).[39] DND and the CF are two distinct but complementary organisations under the authority of the Minister of National Defence (MND). The MND, the Deputy Minister (DM) and the Chief of the Defence Staff (CDS) are accountable and responsible (in both legal and practical terms), for the use of the power and resources within these organisations with which they are entrusted by Parliament. The CF and DND work to implement, either individually or jointly, the decisions and direction received from the MND and the Government.

Department of National Defence

32. DND exists to provide advice on defence matters to the MND, and to support the CF. It works in a unified defence team with the CF to fulfill the defence mandate. As discussed, DND is ultimately accountable to Parliament and is also responsive to the so-called 'central agencies' of government such as the Privy Council Office (i.e., essentially the Prime Minister's department), the Treasury Board Secretariat of Canada (TB) and the Department of Finance. DND is governed by the provisions of the *NDA*, but is also subject to the *Financial Administration Act* and regulations passed by the TB.

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[36] *Constitution Act, 1867*, *supra* note 3, ss. 91 and 92.
[37] *Constitution Act, 1867*, *ibid*., s. 91(7). Section 91(7) gives exclusive jurisdiction to the Parliament of Canada over matters related to Militia, Military and Naval Service and Defence.
[38] *NDA*, *supra* note 7.
[39] *Ibid.*

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Minister of National Defence

33. The MND is responsible for the management and direction of the CF and all matters relating to national defence.[40] The MND is the government's principle spokesperson for defence matters, both within Cabinet and externally on its behalf. Furthermore, the MND is responsible for the construction and maintenance of all defence establishments,[41] works for the defence of Canada, and defence research.[42]

34. The MND is legally responsible and accountable to both the PM (and Cabinet) and Parliament for the decisions and actions of the CF and DND pertaining to the following matters:

a. the administration of the relevant portions of several laws such as the *NDA*, the *Aeronautics Act*, the *Visiting Forces Act*, the *Canadian Forces Superannuation Act*, the *Garnishment Attachment and Pension Diversion Act*, and the *Pension Benefit Division Act*;

b. the management and direction of the CF and all matters relating to national defence;

c. the advancement of civil preparedness in Canada for emergencies of all types; and

d. the development and articulation of Canada's defence policy.

35. The Minister's role in developing defence policy is crucial. The MND's principal advisors are the Deputy Minister (senior civilian advisor) and the Chief of the Defence Staff (senior military advisor). The Government's statement on defence policy may be set out in a defence 'White Paper,' in speeches and in parliamentary debates in the House of Commons. Once a government decision respecting defence has been made, it becomes the responsibility of the CF and DND to take the appropriate measures to give effect to the decision. The MND is supported by National Defence Headquarters (NDHQ) staff and CF personnel.

36. While the MND has, technically, the defence portfolio, under the principle of collective responsibility of the Cabinet, the Minister must bring all significant changes in defence policy, new major operational commitments or capital acquisitions to the Cabinet for discussion and decision.

Deputy Minister of National Defence

37. The senior civilian public servant in the DND is the Deputy Minister of National Defence (DM), who is appointed under the authority of the *NDA*.[43] The DM is authorized to exercise all of the MND's powers over the DND except for the power to make regulations. As a result, the DM is first responsible to the MND but is also ultimately responsible to the PM (and Cabinet), the TB and the Public Service Commission.

38. The DM is the MND's civilian advisor and is responsible for policy, finance, materiel, civilian personnel, infrastructure and environment, international defence relations, and corporate services, as well as supporting the MND's office administratively.

Canadian Forces

39. Established by statute,[44] the CF has as its primary duty the protection of Canada and its citizens from threats to national security.[45] The CF is composed of three components: the

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[40] *Ibid.*, s. 4.
[41] *Ibid.*, s. 4(a). According to *NDA* s. 2(1), defence establishments constitute "any area or structure under the control of the Minister, and the materiel and other things situated in or on any such area."
[42] *Ibid.*, s. 4(a), (b).
[43] *Ibid.*, s. 7.
[44] *NDA*, *supra* note 7.

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Regular Force, the Reserve Force and the Special Force.[46] Each of the components is formed of such units and other elements as are organized by and under the authority of the MND.[47] The allocation of units and elements to formations and commands is at the discretion of the MND.[48]

40. The Minister's organisational authority over the CF is exercised through the issuance of Ministerial Organization Orders (MOO). A MOO describes units, states whether the unit belongs to either the Regular or Reserve Force, and specifies to which command the unit is allocated. It is under the authority of a MOO that the CDS can issue a Canadian Forces Organization Order (CFOO), which provides greater detail concerning the unit and its chain of command.

41. The CF is a separate and distinct entity from DND. It has its own chain of command.

Chief of the Defence Staff

42. Appointed by the Governor in Council on the advice of the PM, the Chief of the Defence Staff (CDS) holds the highest rank in the CF and is the MND's senior military advisor. Subject to regulations, and under the direction of the MND, the CDS has control and administration of the CF.[49]

National Defence Headquarters

43. Created in 1972, National Defence Headquarters (NDHQ) is an integrated organization where military and civilian personnel work side by side in the management of Canada's defence policies. NDHQ is home to Assistant Deputy Ministers (ADMs) and military Senior Advisors (SAs) responsible to the DM or the CDS.[50] Co-location enables efficient control and command. In addition to its advisory role, the main responsibilities of NDHQ are:

a. to ensure that the military tasks and defence activities ordered by the executive are carried out effectively and efficiently;

b. to provide cost effective organisation for the acquisition and provision of materiel and other resources to the CF; and

c. to ensure that government-wide policies and practices are followed in the management of DND and the CF.

SECTION 5

CONCLUSION

44. A general understanding of the Canadian political system is essential to understanding the overarching legal framework that determines how the CF deploys domestically and internationally. Without a firm understanding of the political and legal division of political power within the Canadian federal state, an operational legal advisor will not be able to fully understand the structure, dynamics or context upon which the political direction for the CF to lawfully deploy is given. Consequently, the ability to anticipate legal issues will be diminished.

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[45] Government of Canada, *1994 White Paper on Defence*, online: Department of National Defence Policy Group <http://www.forces.gc.ca/admpol/eng/doc/white_e.htm>.
[46] The Special Force is not a permanent component of the CF. The Governor in Council may establish the Special Force in specific circumstances. Refer to *NDA, supra* note 7, s. 16 for details.
[47] *Ibid.,* s. 17.
[48] *QR&O* 2.08.
[49] *NDA*, s*upra* note 7, s. 18.
[50] These senior advisors include ADM (Policy), ADM (Finance and Corporate Services), ADM (Material), ADM (Infrastructure and Environmental), DM Human Resources Group consisting of ADM (HR-Mil) and ADM (HR-Civ), the Chief of the Maritime Staff, Chief of the Land Staff, Chief of the Air Staff, and the JAG.

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CHAPTER 4

THE RULE OF LAW

SECTION 1

GENERAL

1. The military in a democracy is unique in that the military power of the state is concentrated in the hands of a relatively small number of non-elected government officials. This unique status inevitably leads to a variety of laws designed not only to control the armed forces, but to assist in ensuring that societal values are maintained within the military. Indeed, one of the dangers to any civilian government is an armed force that it does not adequately control and which does not identify with the broader societal goals.[1]

2. The CF has played a significant role both domestically and internationally over the past decade in assisting with the maintenance of what is known as the 'Rule of Law.' The very nature of the military as an instrument for carrying out governmental direction, and the fact that the military is subordinate to the civil authority, necessitates that military leaders have an understanding of the principles of the rule of law and integrate them into both domestic and international operations.

3. Canadian society as a whole functions under the rule of law. As indicated in *Leadership in the Canadian Forces: Conceptual Foundations,*[2] the rule of law is more than a set of laws:

> Under the rule of law, the law is the means by which social order is established. Laws not only set out the structural framework for the governance of society; they also express and codify the central values of society. Competing forms of social control, such as rule by arbitrary power or force, offer little protection for the rights and security of individuals.[3]

4. There are various definitions of the rule of law. One definition notes that the rule of law includes the following principles:

a. powers exercised by officials must be based upon authority conferred by law;

b. the law itself must conform to certain standards of justice, both substantial and procedural;

c. there must be a substantial separation of powers between the executive, the legislature and the judiciary;

d. the judiciary is not subject to the control of the executive; and

e. all persons are subject to the rule of law, which is applied on the basis of equality.[4]

5. The Supreme Court of Canada (SCC) has repeatedly discussed the importance of the rule of law. For the SCC, the rule of law includes three requirements:

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[1] B-GG-005-027/AF-011, Military Justice at the Summary Trial Level, p. 1-2.
[2] A-PA-005-000/AP-004, Leadership in the Canadian Forces: Conceptual Foundations. See also Colonel P.J. Olson, "Promoting the Rule of Law – A Value Apart" (2005) 7 NSSC Canadian Forces College 1.
[3] A-PA-005-000/AP-004, p. 36.
[4] Ian Brownlie, *The Rule of Law in International Affairs* (The Hague/London/Boston: Kluwer Law International, 1998) at 213 - 214.

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> The first recognizes that 'the law is supreme over officials of the government as well as private individuals, and thereby preclusive of the influence of arbitrary power' ... The second 'requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order' [i.e., laws have to exist]... The third requires that 'the relationship between the state and the individual ... be regulated by law'.[5]

6. At its core, the rule of law means that law applies to all members of society equally, including the government and its officials. Power must be exercised in accordance with the law, not arbitrarily. This rule obviously applies to leaders and decision-makers within the CF and DND, as much as to any other government official.

SECTION 2

CANADIAN LEGAL FRAMEWORK

International Law

7. International law developed in order to regulate the relations between and among its subjects (i.e., sovereign states, international organizations, and in some few instances, individuals). International law therefore includes rules agreed upon and agreements entered into between and among different countries. International law regulates, in whole, or in part, issues such as the use of force, armed conflict, means and methods of warfare, maritime and aerial navigation and human rights.

8. Institutions such as the United Nations (UN) are indicative of the efforts of states to increase the rule of law in the international context. Other examples include the growth of international agreements concerning the law of armed conflict and the recent development of the International Criminal Court (ICC). Nevertheless, one cannot say that all countries comply with the rule of law. It is a continuing process, evolving with events that shape our world. Much of this manual demonstrates that international law provides rules with which CF personnel are expected to comply.

9. During international operations, the use of force by the CF is governed by a combination of international laws, including alliance and coalition agreements, UN resolutions and mandates, Canadian domestic law, and the law of the host nation (if applicable).[6] However, the use of force by CF elements deployed on international operations is provided for by Canadian rules of engagement, as authorized by the CDS.[7] It is essential, therefore, to understand the way the rule of law operates in the Canadian legal framework.

Constitution Act, 1867

10. The key statute governing the CF is the *National Defence Act* (*NDA*). But even this statute must be assessed against a rule of law standard. It must be authorized by and be consistent with the Canadian Constitution, including the division of powers between the federal and provincial levels and the *Charter,* as interpreted by the Canadian courts.

11. Under the *Constitution Act, 1867*, subjects are assigned to either the provincial or federal levels. Generally speaking, statutes dealing with national, international and inter-provincial matters fall within the legislative powers of Parliament (i.e., the federal level), whereas matters of a local or provincial nature fall within the jurisdiction of the provincial legislatures. Subsection 91(7) of the *Constitution* assigns the federal government responsibility for "Militia, Military and

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[5] *British Columbia v. Imperial Tobacco*, 2005 SCC 49 at para. 58.
[6] B-GG-005-027/AF-011, p.1-1.
[7] See Chapter 28, Rules of Engagement and Targeting, in this manual.

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Naval Service, and Defence"[8] and the *NDA* is enacted pursuant to this federal source of legislative jurisdiction. For this reason, the CF is primarily affected by federal law as a federal government institution.

12. Also notable, the *Constitution* gives the federal Parliament the general authority to "make laws for the Peace, Order and Good Government of Canada."[9] The SCC has interpreted this phrase as authorizing federal legislation in response to an emergency or a matter of national concern that could not be addressed effectively by provincial legislation.

Canadian Charter of Rights and Freedoms

13. In 1982, the *Canadian Charter of Rights and Freedoms* (*Charter*) was embedded into the *Constitution*.[10] The *Charter* established a series of individual rights that have the effect of constraining the powers of Parliament and provincial legislatures, as well as their respective executive branches. No level of government can infringe upon these rights unless the infringement is a reasonable limit that can be demonstrably justified "in a free and democratic society."[11] Some of the *Charter* rights may also be overridden by the 'notwithstanding clause,' a provision in the *Charter* allowing legislatures to enact a law that persists 'notwithstanding' a violation of certain *Charter* rights. In practice, the notwithstanding provision has only been enacted in legislation twice, both times by provincial legislatures.

14. Court cases often turn on the interpretation of the *Constitution* or other statutes and regulations made by government. In the Canadian legal system and especially in the common law jurisdictions (i.e., all provinces except Quebec), courts develop a series of legal precedents, which then bind or at least influence subsequent decisions and ensure that decisions are made on a reasonably consistent basis.[12] In the absence of specific statutory or regulatory provisions governing a particular issue, court decisions provide a body of law upon which government administrators can rely. Because of their role, the courts are generally viewed as the final arbiters of fair administrative decision-making in government. Of course, if non-constitutional court precedent develops in a manner unwelcome by the legislature, it may be supplanted by legislation. Constitutional court precedent, however, is less vulnerable to legislative reversal. Canada's written constitution is very difficult to amend, usually requiring substantial support from both the federal and provincial levels of government.

15. For this reason, and because the *Charter* has given Canadian courts the constitutional authority to review the substance of legislation passed by Parliament and the provincial legislatures,[13] courts now have an enormous impact on law and governance in Canada. More than scrutinizing legislation, the courts today also insist that the executive branch apply the *Charter* standards when exercising its powers; for instance, in making administrative decisions.

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[8] *Constitution Act 1867,* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5, s. 91(7).
[9] *Ibid.*, s. 91.
[10] *Constitution Act 1982*, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, s. 52 [*Constitution Act 1982*]. Section 52 of the *Constitution Act 1982* states:

> (1) The *Constitution* of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the *Constitution* is, to the extent of the inconsistency, of no force or effect.
> (2) The *Constitution* of Canada includes:
> > (a) the *Canada Act 1982*, including this Act;
> > (b) the Acts and orders referred to in the schedule; and
> > (c) any amendment to any Act or order referred to in paragraph (a) or (b).
>
> (3) Amendments to the *Constitution* of Canada shall be made only in accordance with the authority contained in the *Constitution* of Canada.

[11] *Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 1 [*Charter*].
[12] *Stare decisis* represents a policy of courts to stand by precedent and not disturb settled principle of law as applicable to a certain state of facts: *Black's Law Dictionary*, 7th ed., *s.v.* "*stare decisis*".
[13] *Constitution Act 1982*, *supra* note 10, s. 24.

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Regulations

16. Parliament is a sovereign legislative body, empowered to pass laws of any sort, so long as these comply with constitutional limitations. In practice, however, the handful of legislators who comprise Parliament would be incapable of administering every aspect or detail of day-to-day operations of the executive branch through detailed parliamentary legislation. Therefore, statutes normally delegate some law-making powers function to the executive itself. These statutory provisions authorize the executive to introduce more detailed legislative rules in the form of 'regulations.'

17. Regulations are laws that supplement and amplify the framework provided by statute law. They are normally enacted by the Governor in Council (GiC),[14] the Treasury Board Secretariat of Canada (TB), or a departmental minister. Individual statutes specify which executive entities are authorized to make regulations and the matters that are subject to regulation. Regulations are of particular importance in the CF, where the day-to-day operation and administration of the military is controlled under the authority of such instruments as the *Queen's Regulations and Orders for the Canadian Forces* (*QR&O*s). The *QR&O*s amplify the subjects and procedures that are established by the parent statute, the *NDA*.

Orders, Directives and Instructions

18. The *NDA* charges the CDS with the "control and administration" of the CF. Unless otherwise directed by the GiC, all orders and instructions to the CF must be issued by or through the CDS "to give effect to the decisions and to carry out the directions of the Government of Canada or the Minister [of National Defence]."[15] This body of internal rules, orders and directives is generally contained in the Canadian Forces Administrative Orders (CFAOs), Defence Administrative Orders and Directives (DAODs), CF general distribution messages (CANFORGENs), as well as other directives and orders issued from time to time by or under the authority of the CDS. The general authority to issue such directions is legislative in nature, as it is derived by the *NDA* and the regulations made pursuant to that Act, even though the specific orders, directives and rules are made without any legislative authority referring specifically to the subject of the directions.

19. Officers and NCMs, by virtue of their rank or position, may issue lawful orders to subordinates.

SECTION 3

LEGAL FRAMEWORK OF THE CF AND DND

General

20. The line of legal authority that establishes DND and the CF is straightforward. It can be traced from subsection 91(7) of the *Constitution* to the *NDA*, from the *NDA* to its subordinate regulations, as embodied in the *QR&O*s and other regulations, and then finally to orders, instructions and directives that are issued under the overarching legislative authorities. In effect, this structure is the legal authority which duly authorizes every aspect of the management and operations of the CF.

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[14] 'Governor in Council' means the Governor General of Canada acting by and with the advice of, or by and with the advice and consent of, or in conjunction with, the Queen's Privy Council for Canada: s. 35 of the *Interpretation Act*, R.S.C. 1985, c. I-21.
[15] *National Defence Act*, R.S.C. 1985, c. N-5, s.18 [*NDA*]; *QR&O* 1.23.

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21. The *NDA* sets out the powers of the GiC to make regulations for the "organization, training, discipline, efficiency, administration and good government" of the CF. The *NDA* further authorizes the MND to make regulations for the "organization, training, discipline, efficiency, administration and good government" of the CF.[16] The statute also authorizes the TB to make regulations prescribing the rates and conditions of issue of pay and allowances of officers and non-commissioned members.[17] There are, however, express limits placed on the MND's capacity to make regulations affecting the CF. For example, the MND cannot make regulations that are within the purview of the GiC or the TB.[18]

22. The *NDA* also provides the legal authority for establishing the organization of the CF, its components, units and other elements.[19] In particular, the CF can consist only of units or elements that are authorized by or under the authority of the MND.[20] The notion of components, units or other elements is important to the determination of a commanding officer's (CO) actual powers since a CO is specifically defined as:

a. except when the CDS otherwise directs, an officer in command of a base, unit or element; or

b. any other officer designated as a commanding officer by or under the authority of the CDS.[21]

23. Canadian Forces Organization Orders (CFOOs) are orders from the CDS, promulgated to formalize the organization of the CF. They are organizational documents and are not intended for use as an authority for other than organizational purposes. They are published under the authority of the CDS, for each command, formation, unit or other element of the CF. CFOOs normally describe a unit or other element's role, command and control relationships, and channels of communication.

24. Ministerial Organization Orders (MOOs) are orders from the MND. They are the authority for the creation, amalgamation or disbandment of units of the CF. MOOs also determine the component of the CF to which the unit will belong. In addition, MOOs are used to establish commands and formations, and assign units to particular commands and formations. MOOs are published under the authority of the MND, for each command, formation, unit or other element of the CF.

25. *QR&O*s amplify this organizational concept by prescribing that command shall generally be exercised by:

a. the senior officer present;

b. in the absence of an officer, the senior non-commissioned member present; or

c. any other officer or non-commissioned member, where specifically authorized by the CDS, an officer commanding a command or formation, or a commanding officer.[22]

26. For an elaboration on command, see chapter 39 (Command of Operational Deployments).

[16] *NDA*, *ibid*., s. 12(2).
[17] *Ibid*., s. 12(3).
[18] *Ibid*., s. 13.
[19] *Ibid*., ss. 14-17.
[20] *Ibid*., s. 17.
[21] *QR&O* 1.02.
[22] *QR&O* 3.20.

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SECTION 4

OBLIGATIONS AND CONDITIONS OF SERVICE

Concepts of Service

27. The *NDA* prescribes the duties, obligations and liabilities that apply to members of the CF. All officers and NCMs of the regular force are "at all times liable to perform any lawful duty."[23] Reserve force officers and NCMs may be ordered to train or be "called out on service to perform any lawful duty other than training" under the regulations or direction of the GiC.[24] Even the notion of duty is defined in general terms by the *NDA*, as it means "any duty that is military in nature and includes any duty involving public service authorized under [*NDA*] section 273.6."[25] For an elaboration, see Chapter 35 (Liability to Serve).

28. In addition to setting out the organization of the CF and DND, the *NDA* establishes and reflects the core values and precepts of military service, namely:

a. the concepts of duty and the unlimited liability assumed by regular force members and reserve force members on active service;

b. subordination and obedience to authority;

c. the strict obligation to obey lawful commands;

d. individual and collective discipline; and

e. the obligation to promote the welfare of subordinates.[26]

29. The *QR&O*s identify the legal obligations of military personnel. All officers and non-commissioned members (NCMs) must be familiar with, observe and enforce the *NDA*, the *QR&O*s and all other regulations, rules and orders that relate to the performance of their duties. They must ensure the proper care and maintenance, and prevent the waste of, all public property. They must care for the welfare of subordinates in addition to reporting contraventions of the previously mentioned statutes, regulations or directives.[27] *QR&O* Chapter 19 (Conduct and Discipline), which requires all officers and NCMs to obey all commands that are not 'manifestly unlawful',[28] prescribes additional direction regarding the conduct of CF members.[29]

SECTION 5

CONCLUSION

30. The importance of the rule of law to Canada as a democracy and the commitment of the CF to ensure the existence of public order cannot be understated. It is a commitment that permeates all levels of the chain of command.[30]

[23] *NDA*, *supra* note 15, s. 33(1).
[24] *Ibid.,* s. 33(2).
[25] *Ibid.,* s. 33(4).
[26] A-PA-005-000/AP-004, p. 38.
[27] *QR&O* 4.02 and *QR&O* 5.01.
[28] The definition of a 'manifestly unlawful' order is provided in *R. v. Finta*, [1994] 1 S.C.R. 701 at para. 239 (QL), 112 D.L.R. (4th) 513, namely: "one that offends the conscience of every reasonable, right-thinking person; it must be an order which is obviously and flagrantly wrong. The order cannot be in a grey area or be merely questionable; rather it must patently and obviously be wrong".
[29] *QR&O* 19.015.
[30] B-GL-300-000/FP-000, The Army, p. 24.

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31. The law impacts on the activities of the CF across the entire operational spectrum. CF commanders must therefore have a sound grasp of its general content when conducting domestic or international operations.

32. Broadly speaking, the law can be considered to affect the conduct of CF operations in two ways. First, there must be a legal basis or mandate for the deployment of the CF on any operation, either domestic or international, or both. Second, all operations must be executed in accordance with the law. In particular, the use of force by deployed CF members must be in accordance with direction from the CF chain of command, and must be no more than is legally permissible in the circumstances.

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CHAPTER 5

THE CROWN PREROGATIVE AND ITS USE TO DEPLOY THE CF

SECTION 1

INTRODUCTION

1. The federal government derives its power from the Canadian Constitution, federal statutes and the common law. The Crown prerogative arises from common law. It entitles the government to exercise its power to act even in the absence of specific statutes. For example, the authority to defend Canada, and to deploy the CF internationally, is found in the Crown prerogative, as statues do not govern these activities. It is the executive branch of government that exercises the Crown prerogative. Parliament may legislate and extinguish an existing Crown prerogative, but it does not have a role in exercising an existing prerogative power.

2. Historically speaking, the exercise of the Crown prerogative has been a very important legal basis for the conduct of CF domestic and international operations. In this regard it is significant to note that the legal basis to deploy the CF internationally is not found in federal legislation, including the *NDA*, but rather is found in the exercise of the Crown prerogative. This chapter will briefly overview the legal nature of the Crown prerogative.

SECTION 2

DEFINITION OF THE CROWN PREROGATIVE

3. The Crown prerogative is the residue of powers once exercised personally by the monarch, as curtailed over the centuries by Parliamentary statutes. Because its exact scope is often uncertain, it falls to the common law courts to determine whether a given prerogative exists or not and its extent. For this reason, the 'Crown prerogative'[1] refers to "the powers and privileges accorded by the common law to the Crown."[2]

4. As is clear from the definition, it is the common law, or 'judge-made' law, that determines the extent of the Crown prerogative. A non-exhaustive catalogue of general subject matters for which the courts have found that prerogatives exist includes:

a. foreign affairs;
b. war and peace;
c. treaty-making;
d. other acts of state in matters of foreign affairs; and
e. defence.

5. Other contents include powers and privileges respecting passports, power of mercy, diplomatic appointments, administration and disposal of public lands, armorial bearings, and honours and titles.[3]

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[1] The Crown prerogative is also referred to as the 'royal prerogative.'
[2] Peter W. Hogg, *Constitutional Law of Canada*, Looseleaf ed. (Scarborough: Thomson Carswell, 1997) at 1.9; *Black v. Chrétien et al.* (2001), 54 O.R. (3d) 215 (C.A.) at 224 [*Black*].
[3] Paul Lordon, *Crown Law* (Toronto: Butterworths, 1991) at 75-105. It should be noted that the above list does not include reference to the prerogatives styled 'personal prerogatives' of the Governor General. Such personal prerogatives relate to matters such as the appointment or dismissal of the Prime Minister, or the dissolution of Parliament. These powers are theoretically exercised upon the Governor General's own discretion, but in practice follow directly from election results, parliamentary votes, or are directed by the Prime Minister.

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6. Ultimately, and importantly, the content of the Crown prerogative is not static, nor absolutely defined. As noted, a power or privilege that historically belonged to the Crown may be extinguished by the passage of legislation.[4]

SECTION 3

THE EXERCISE OF THE CROWN PREROGATIVE

7. At the time of confederation in 1867, the Crown prerogative power was exercised from England. As a result of Canada's evolution to statehood,[5] the exercise of the Crown prerogative now rests with the Canadian executive, at either the federal or provincial levels depending on whether the prerogative concerns a matter falling within the purview of the federal or provincial division of powers.

8. As was discussed in detail at Chapter 3, Canada is a constitutional monarchy, meaning that the executive authority in Canada rests with the monarch, with such authority limited by the Constitution. By the terms of the Canadian Constitution and by convention, executive authority, including authority grounded in the Crown prerogative, is exercised by the political government, with the monarch having a ceremonial role.[6]

9. As a federal country, Canada has two 'orders' of government: federal and provincial. The system of apportionment of Crown prerogative powers between the federal and provincial governments has been held to mirror the division of legislative powers contained at sections 91 and 92 of the *Constitution Act, 1867.*[7] For example, under section 91(7) of the *Constitution Act, 1867,* the Parliament of Canada has legislative authority over matters coming within the subject of "Militia, Military and Naval Service, and Defence." Accordingly, those prerogative powers and privileges concerning matters coming within the subject of "Militia, Military and Naval Service, and Defence," are exercised by the federal government.

10. The federal Crown prerogative is exercised by the Governor General, the Prime Minister, Cabinet and, in some cases, individual Cabinet ministers.[8] Which authority is appropriate to exercise a specific Crown prerogative is a matter of convention. The matter is discussed here only in reference to the use of the Crown prerogative power to deploy the CF. It is important to remember that the Crown prerogative is vested in the executive government, not the legislature.[9] Accordingly, Parliament does not play any role in the exercise of the federal Crown prerogative. Parliament's part is to oversee the government generally, through the system of responsible government.[10]

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[4] Importantly, and as will be discussed later, neither the *NDA* nor any other statute specifically authorizes the deployment of the CF on international operations: the Crown prerogative remains the source of authority for the deployment of the CF on international operations.

[5] This process definitively ended with the *Statute of Westminster, 1931*.

[6] The fact that the Crown prerogative power is not, in fact, exercised by the formal head of state but rather by other entities has some source in law, but derives mostly from convention. As Hogg puts it at 1.9 "an extraordinary feature of the system of responsible government is that its rules are not legal rules in the sense of being enforceable in the courts. They are conventions only. The exercise of the Crown's prerogative powers is thus regulated by conventions, not laws." This said the courts have developed the common law to address some issues concerning the exercise of the Crown prerogative. For example, and as will be discussed later, the court in *Black*, *supra* note 2, made it clear that Crown prerogative powers may be exercised not only by the Governor General, but also by the Prime Minister and other ministers. Further, because an issue never arose in respect of the exercise of the Crown prerogative power by Cabinet in the facts forming the basis for *Operation Dismantle* v. *The Queen* (1985), 18 D.L.R. (4th) 481 (S.C.C.), we may assume that the SCC, which ultimately heard that case, accepts that Cabinet may exercise Crown prerogative powers in certain instances.

[7] Hogg, *supra* note 2 at 9.2 Note 9. See also Lordon, *supra* note 3 at 68.

[8] Lordon, *ibid*. at 71; *Black, supra* note 2 at 226.

[9] Lordon, *ibid*. at 72.

[10] O. Hood Phillips and Paul Jackson, *O. Hood Phillips' Constitutional and Administrative Law*, 7th ed. (London: Sweet & Maxwell, 1987) at 269ff.

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SECTION 4

CROWN PREROGATIVE AND ITS USE TO DEPLOY THE CF INTERNATIONALLY

11. The courts and academics have consistently held that the deployment of the CF on international military missions is within the Crown prerogative, and therefore, that it has not been extinguished by the passage of legislation.[11] Therefore, it is important to stress that the legal basis to deploy the CF internationally is not found in the NDA or any other legislation.

12. As discussed, the Crown prerogative power in respect of a decision to deploy the CF outside of Canada in support of a military operation is a prerogative exercised by the federal, as opposed to a provincial, executive.

13. The three authorities who, in theory, may exercise the Crown prerogative to deploy the CF are, in order of pre-eminence: Cabinet[12], the Prime Minister[13] and the Minister of National Defence (MND), with the concurrence of the Minister of Foreign Affairs (MFA).[14]

14. The federal executive has developed several mechanisms to record a decision to deploy the CF:

a. if Cabinet, sitting as a whole body, is exercising the power, then the decision may take the form of a decision taken in response to a Memorandum to Cabinet (MC). The decision may be recorded or articulated in an Order-in-Council (OIC) or Record of Decision (RD).

b. any of Cabinet, the Prime Minister, or the MND and MFA, with concurrent Prime Ministerial notification or concurrence, may exercise the power and express the nature of what has been decided through the issuance of what has generally been referred to as a 'strategic objective letter.' The strategic objective letter clearly and unequivocally defines the policy, operational, legal, geographic, and temporal scope of the CF deployment. It has been one of the instruments used to record the exercise of the Crown prerogative for most CF deployments since 11 September 2001.[15] As noted above, a MC or Cabinet decision may record a decision as well.

15. Current practice has the Canadian Parliament formally informed of a decision to deploy the CF internationally, if at all, through the holding of a 'take-note debate.' A 'take-note debate' is

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[11] See *e.g. Aleksic* v. *Canada (Attorney General)* (2002), 215 D.L.R. (4th) 720 (Ont. Div. Ct.) at 732; *Turp* v. *Chrétien* (2003), 111 C.R.R. (2d) 184 (F.C.) at 188; *Chandler* v. *D.P.P.*, [1962] 3 All E.R. 142 at 146 (H.L.) (per Lord Reid); Phillips and Jackson, *supra* note 10 at 270ff; Lordon, *supra* note 3 at 80ff.

[12] As has been discussed Cabinet, by convention, 'advises' (*i.e.* directs) the Governor General, and through this mechanism the Cabinet is empowered to make Crown prerogative decisions. The 12 June 1963 decision of Cabinet to participate in UNYOM mission in Yemen is an example of a Cabinet exercise of the Crown prerogative power to deploy the CF internationally.

[13] By convention the Prime Minister has great power over the Cabinet, and 'defines the consensus': see *e.g.* Hogg, *supra* note 2 at 9.3(d). Prime Minister Mulroney's decision made 10 August 1990 to deploy the CF to the Arabian Gulf following the Iraqi invasion of Kuwait is an example of the Prime Minister using Crown prerogative authority to deploy the CF internationally.

[14] Any decision to deploy the CF in support of a military operation outside of Canada directly concerns two federal departments: Foreign Affairs Canada and the Department of National Defence, and their respective elected ministers, the Minister of Foreign Affairs, and the Minister of National Defence. This is by virtue of the previously noted powers of Crown prerogative held by the Federal Government in matters of foreign affairs and international relations as well as national defence. As was discussed above, ministers are members of the Privy Council, and of the Cabinet, and thus have, in Lordon's words at 71, "some powers of the nature of prerogatives". See also *Black*, *supra* note 2 at 226 where the court stated in *obiter*, citing Lordon, "other Ministers of the Crown may also exercise the Crown prerogative."

[15] For example, strategic objective letters have been used for Op Apollo and Op Athena in Afghanistan, Op Halo in Haiti, and Op Boreas in Bosnia. With respect to this recent practice it should be noted that MND and MFA have not exercised the Crown prerogative by simply 'notifying' the Prime Minister of their decision, but rather have jointly in a single letter, or in two mirror image letters sent concurrently to the Prime Minister, sought and acquired the Prime Ministerial concurrence of their decision to deploy.

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a special form of debate that is held in the House of Commons when a Minister moves a non-votable motion to solicit the views of Members on some aspects of government policy.

16. It is notable that there have been instances where, for political reasons, the government of the day has debated deployment in Parliament and sought approval for Canadian military involvement in a conflict. In 1990, for instance, Canada's foreign minister moved a motion in the House of Commons calling for the "dispatch of members of the Canadian Forces to take part in the multinational military effort in and around the Arabian Peninsula." This motion was amended to support "sending of members, vessels and aircraft of the Canadian Forces to participate in the multinational military effort in and around the Arabian Peninsula" and was passed on October 23, 1990.[16] Several other motions reaffirming Canadian support for the use of military force in the region were passed as the situation escalated in the Gulf. A defeat of these motions would have been politically difficult for the government, but the failure to carry a simple parliamentary motion would not have impaired the government's prerogative power to deploy the CF.

17. The House of Commons may play a role in ongoing CF operations by exercising its control over the finances of government. The House of Commons has an essential role in the 'Business of Supply' (i.e., the appropriations process), by assessing funding for the CF generally, and for specific missions.

18. As is discussed more fully elsewhere in this manual, once the decision to deploy the CF has been taken by the federal executive, and once general executive strategic guidance has been set out, the exact methods by which the associated mission is prosecuted are developed and implemented by the CDS and the chain of command.

SECTION 5

CROWN PREROGATIVE - DEFENCE OF CANADA AND DOMESTIC OPERATIONS

19. In the above discussion of Crown prerogative it was noted that war and peace, treaty making, and defence are some of the powers that could be exercised by the executive as a Crown prerogative. To defend against an attack on Canadian territory, the government does not need to ask Parliament. In some cases, the government has exercised the Crown prerogative for defence by making multilateral[17] or bilateral treaties[18] for collective defence with other nations. Significantly, the authority to defend Canada against an armed attack lies with the government, not with individual CF commanders. This important principle is reflected in the CF Use of Force Manual.[19]

20. CF assistance to law enforcement agencies was formerly authorized by Order in Council, through the government's exercise of the Crown prerogative.[20] In 1998, Parliament enacted an amendment to the *NDA* that gave the Governor in Council and the MND the power to authorize the CF to perform any duty as a public service.[21]

SECTION 6

CONCLUSION

[16] House of Commons Journals 234 (October 23, 1990) at 2157.
[17] *North Atlantic Treaty*, also called the *Treaty of Washington*, was signed in Washington D.C. on 4 April 1949, and came into force on 24 August 1949, after the deposition of the ratifications of all signatory states.
[18] North American Aerospace Defence Command (NORAD) established in 1958, is a bi-national US and Canadian organization.
[19] B-GJ-005-501/FP-000, CF Use of Force Manual.
[20] Examples include *CFAPPFD* OIC 1996-833, CFAADs P.C. OIC 1993-624.
[21] *National Defence Act,* R.S.C., 1985, c. N-5, s. 273.6(1) [*NDA*].

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21. The federal government derives its power from both statute and the Crown prerogative. The authority to defend Canada, or even to deploy the CF internationally, is found in the Crown prerogative. In some circumstances, the government may exercise the Crown prerogative to enter into treaties specifically for the defence of Canada and its allies. The executive branch of government exercises the Crown prerogative; Parliament does not have a role.

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CHAPTER 6

DOMESTIC OPERATIONS: PROVISION OF SERVICES AND PUBLIC SERVICE

SECTION 1

INTRODUCTION

1. Canada's history is replete with examples where the CF has played a role in preserving order or in assisting the Canadian public, including federal, provincial, or municipal governments, in times of need. Nevertheless, to call upon the CF to perform tasks normally undertaken by civilians is an unusual event that departs from the traditional role of the military, which is to meet external threats or aggression against the nation. As will be elaborated further in Chapter 7 in respect of assisting civilian law enforcement agencies, the CF does not have an independent mandate to perform routine law enforcement activities. As with most aspects of national defence, the use of the armed forces in a domestic role is based on Crown prerogative power, as well as statutory power. This chapter identifies the legal bases upon which the CF relies when providing assistance to civilian authorities or the Canadian public and examines a number of associated legal issues.

SECTION 2

MANDATE

2. Under Canadian constitutional law there is a division of powers between the federal and provincial governments. The federal government is responsible for militia, military, naval services and defence.[1] The provincial governments have responsibility over the administration of criminal law and local or civil matters in the province.[2] Because of this division of powers, the federal government does not have an automatic right to intervene when a disaster or law enforcement issue occurs within a province. If provinces require federal resources, including the CF, they must request such assistance. The CF may provide the requested assistance when authorized, normally after it is determined that the assistance is in the national interest and that it is necessary in order to allow the civilian authorities to deal effectively with the situation.

3. The mandate of the CF to provide assistance to civilian authorities or the public, or to perform public service, is to a large extent a question of process. In very simple terms, compliance with the process involves identifying who can ask for CF assistance, and relative to the request that was made, who can approve the provision of the requested assistance. In other words, the legal basis for the CF to provide assistance to civilian authorities is created when a request is made by the appropriate civilian authority, pursuant to legislation or some other legal instrument, and a duly authorized authority approves the request.

SECTION 3

EXERCISING THE MANDATE

4. The exercise of the CF mandate to provide assistance to civil authorities or to perform public service is governed by statutory provisions in legislation such as the *Charter of Rights and Freedoms*, the *Criminal Code*, the *Emergencies Act*, and the *National Defence Act (NDA)*. For example, pursuant to section 273.6 of the *NDA* the Governor in Council and the Minister of National Defence (MND) can authorize the CF to perform any duty involving public service and to

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[1] *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5, ss. 91(7), (27) [*Constitution Act, 1867*].
[2] *Ibid.*, ss. 92(14), (16).

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provide assistance in respect of any law enforcement matter. Similarly, the *Emergencies Act*[3] provides a statutory basis for the deployment of the CF domestically in the event of either a public welfare emergency or a public order emergency when the federal Governor in Council may cause the CF to be employed within Canada as a special temporary measure. Notably, the *Emergencies Act* requires consultation with provincial authorities. It is important to note that the power or authority of the provincial authorities is not displaced by the federal government's intervention.[4] It should also be noted that the *Emergencies Act* is not exhaustive of the measures that the federal government could take in dealing with an emergency, and to that extent, the Crown prerogative has been preserved.[5]

5. The Governor in Council, through the exercise of the Crown prerogative, has created a number of Orders in Council that set out procedures and conditions relative to specific circumstances when the CF might be authorized to provide assistance to civilian law enforcement. These instruments will be considered in more detail in Chapter 7.

6. The MND, pursuant to section 4 of the *NDA* has authority over the management and direction of the CF, including the statutory authority to make regulations concerning, among other things, the organization, administration and good government of the CF.[6] It is pursuant to this authority that the MND has issued direction respecting the provision of services to civilian agencies in the form of a *Ministerial Order*.

7. It is important to remember that, as described in section 4 of Chapter 3, control and administration of the CF is exercised by the CDS. The CDS exercises his authority subject to the direction of the MND or the Governor in Council, but all orders or instructions to the CF to carry out the directions or decisions of the Government of Canada or the MND must be issued by, or through, the CDS.[7]

SECTION 4

PROVISION OF SERVICES

General

8. The CF is frequently asked to provide assistance in the form of a wide range of materiel and services, or the temporary use of real property, for which no specific authority exists in statute or Orders in Council to permit the provision of the requested assistance. This assistance may involve a short-term loan of items such as tents or mobile cooking facilities, the temporary use of an armoury, or it may involve large-scale disaster relief. The provision of these types of materiel, real property and services to civilian authorities is governed by Treasury Board of Canada Secretariat regulations and policies, and by the *Ministerial Order for the Provision of Services Policy* (PSP).[8]

DND Provision of Services Policy

9. The PSP sets out the policy and procedures applicable to the provision of services by DND and the CF to non-defence agencies in response to a request from those agencies for the use of defence resources. For purposes of the PSP, "service" is defined as "any service, good or use of a facility." Given this broad definition, the PSP accordingly accommodates a broad and flexible application.

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[3] *Emergencies Act,* R.S., 1985, c. 22 (4th Supp.).
[4] See, for example*, ibid.,* ss. 20, 25.
[5] *Ibid.*, s. 2(2).
[6] *Ibid.*, s. 12.
[7] *Ibid.*, s. 18.
[8] B-GS-055-000/AG-001, Provision of Services Policy (PSP).

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10. Often requests for CF equipment or personnel are made at the last moment and in response to an urgent situation. To address this need, the PSP was developed to permit rapid and flexible responses to requests. The PSP includes a delegation of approval authority by the MND that permits commanders to deal with the majority of requests for CF equipment and services at the lowest practical level. The PSP sets out:

a. approval authorities for various services;
b. types of services;
c. provisions for cost recovery and waiver of costs;
d. provisions for recording of services rendered; and
e. directions for provision of some limited services to law enforcement agencies.

11. The PSP stipulates a number of conditions that must be met before a service or material is provided. The CF will not provide assistance if the provision of the service or materiel will result in an unacceptable degradation of defence readiness or the capability to carry out defence activities. The CF will also not provide the requested service or materiel if to do so will adversely affect the confidence that the public has in the CF. Additionally, requested assistance should not be provided if DND/CF will be placed in competition with private industry, or if the service or materiel requested is to be provided on a continuing basis – other government departments should be encouraged to develop their own capabilities.

12. The following are recent examples of large-scale humanitarian aid operations conducted under the auspices of the PSP:

a. 1996 - following flash floods in the Saguenay region of Quebec;
b. 1997 - to save lives and protect property during the Manitoba flood;
c. 1998 - to protect life and recuperate damage caused by the ice storm in eastern Ontario and Quebec; and
d. 2003 – to fight forest fires in British Columbia.

13. It should be noted that the PSP does not apply to CF assistance to civilian law enforcement authorities when the assistance requested relates to law enforcement operations.[9] In some situations under the PSP, CF services may initially be provided by operational level commanders, however, due to the significance, scale, or complexity the operation may become a national concern requiring a coordinated response from the national command level. This may result in the operation evolving into a public service operation, pursuant to subsection 273.6(1) of the *NDA*. At times during humanitarian relief operations, civilian authorities may request further CF assistance for law enforcement operations purposes. Such requests cannot be authorized under the PSP and require the staffing of separate requests using the procedures described in Chapter 7.

14. While the PSP is applicable to humanitarian assistance requests, there is a special regime in place for airborne search and rescue (SAR). A 1951 Cabinet Directive assigned responsibility to the Royal Canadian Air Force for the coordination of SAR resources within Canadian territory, including maritime SAR using aircraft. This responsibility has been maintained by the CF and funding for this activity is provided in the departmental budget. It should be noted that ground-based SAR, such as land searches for lost persons, is a provision of a service to which the PSP applies. Marine-based SAR is primarily the responsibility of the Coast Guard.

Non-Defence Use of DND Real Property

[9] For example, the PSP does not apply to assistance provided pursuant to *NDA* s. 273.6(2), *CFAPPFD*, *CFAAD* or *NDA* Part VI (Aid of the Civil Power).

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15. From time to time the CF receives requests for use of a DND facility (e.g., use of an armoury to shelter the homeless). When these requests are received by operational level commanders, they must be referred to the appropriate Level 1 custodian for approval.[10] A license to use real property should be used to set out all applicable terms including the duration and cost recovery of the temporary accommodation. The civil authority must accept all legal liability associated with their use of the real property.

16. Conditions must be attached to the opening of a defence establishment for use as a temporary shelter or for any other purposes. For example, if a defence establishment will be used as a temporary homeless shelter, the municipality requesting its use must agree to retaining responsibility to operate and manage the shelter program including the provision of any necessary equipment, food services and security personnel. The CF will only provide the facilities; supervision of the guests will remain the responsibility of the civil authority at all times. The CF will however continue to be responsible for the physical security of the armoury and defence assets.

SECTION 5

CF SUPPORT AS A PUBLIC SERVICE

17. As noted above, in addition to the provision of services under the PSP, CF support to civilian authorities may be provided as a public service. Subsection 273.6(1) of the *NDA* provides that either the Governor in Council or the MND may authorize the CF to perform any duty involving public service.

18. The term 'public service' is not defined in the *NDA* except in the context of the liability of members of the CF to perform any lawful duty. The *NDA* provides that 'duty' includes both those duties that are military in nature, and 'public service' as authorized under section 273.6.[11] The term 'public service' therefore applies to a wide variety of CF activities involving the provision of assistance to the Canadian public and civilian authorities. It includes both assistance of a civic or humanitarian nature, as well as assistance in respect of any law enforcement matters.

19. Subsection 273.6(1) permits a broad range of originators to request CF assistance and it may be authorized by either the Governor in Council or the MND. In addition, the Governor in Council or the MND may, without an external request, determine that the CF should be directed to provide public service.

20. At times a humanitarian relief operation that is initiated on a relatively small scale and within the delegated authority of a local or regional commander under the PSP may evolve into an activity that exhausts local resources or exceeds the ability and financial authority of the local commander. In such circumstances, recourse may be made to section 273.6(1) of the *NDA*, seeking the authority of either the Governor in Council or the MND to commit further resources and expend funds at a higher level than is permitted to the local commander. Depending on the nature of the operation, the MND may also declare an operation authorized pursuant to subsection 273.6(1) of the *NDA* as a 'special duty operation' for the purposes of the *Pension Act*.[12]

SECTION 6

CONCLUSION

[10] A-FN-100-002/AG-006, Delegation of Financial Authorities.
[11] *National Defence Act,* R.S.C, 1985, c. N-5, s. 33(4).
[12] See Chapter 36, paras. 23-26 of this manual.

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21. When a disaster or other humanitarian crisis occurs within a province, the federal government may invoke its powers under the *Emergencies Act* and employ the CF as a temporary measure to deal with the crisis. However, beyond this extraordinary legislated authority the federal government does not have an automatic right to intervene and provincial authorities must request federal assistance, including the assistance of the CF. The CF mandate for providing assistance to civilian authorities is limited to that which is authorized pursuant to legislation or some other legal instrument. The legal basis for CF provision of services and public service is found in legislation, regulations, and MND Orders.

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CHAPTER 7

DOMESTIC OPERATIONS:
CF ASSISTANCE TO LAW ENFORCEMENT AGENCIES AND AID OF THE CIVIL POWER

SECTION 1

INTRODUCTION

1. The primary role of the CF is to defend Canada. Nevertheless, the CF has often been requested to assist civilian law enforcement agencies in the conduct of their operations, and has been called out in aid of the civil power on three occasions in modern times. Although the CF does not have a standing mandate for the general enforcement of the laws of Canada, the organization, training and equipment of the CF give it capabilities sought after by civilian authorities to permit them to effectively deal with a law enforcement matter, or to restore or preserve order in the event of riots or disturbances that are beyond the ability of civilian authorities to control.

2. Both civilian law enforcement agencies and other federal government departments may request CF assistance. Municipal, provincial and territorial law enforcement agencies have the primary responsibility to enforce laws within their areas of responsibility. The RCMP, in its federal law enforcement role, as well as other government departments such as the Department of Fisheries and Oceans, have the primary responsibility to enforce the federal laws within their respective mandates. If CF assistance is authorized, it is provided in support of the law enforcement agency that has jurisdiction over the matter. The requesting law enforcement agency retains responsibility for the management and execution of the law enforcement matter, including the acquisition of judicial warrants, collection and retention of evidence, arrest and detention of persons, and the activities associated with the prosecution of those charged with offences.

3. The requisitioning of the CF by a provincial attorney general and the resultant call out of the CF in aid of the civil power is governed by a separate statutory regime set out in Part VI of the *NDA*. A reminder of an earlier age when civilian police forces were nascent and less capable than today, aid of the civil power remains a significant tool that may be employed at the request of provincial authorities. While the CF may take control for purposes of restoring order during an aid of the civil power operation, the role of the CF is to assist the civil authorities in maintaining law and order. The CF does not replace the civil authorities who retain overall responsibility.

SECTION 2

LEGAL FRAMEWORK - GENERAL

4. Prior to 1998,[1] a patchwork of legal instruments had been created to deal with the use of the CF in preserving public order in situations that do not involve the invocation of Part VI of the *NDA* (aid of the civil power). The *Canadian Forces Assistance to Provincial Police Forces Directions (CFAPPFDs)*[2] and the accompanying *Principles for Federal (Military) Assistance to Provincial Policing* filled a void by providing clear government policy guidance and direction in respect of support to provincial authorities responsible for law enforcement. At the federal level there exists a diverse number of orders in council and interdepartmental arrangements. For example, the *Canadian Forces Armed Assistance Directions (CFAADs),*[3] which might be characterized as the federal counterpart to Part VI of the *NDA*, creates a procedure whereby the

[1] The 1998 amendments to the *NDA* included the introduction of the concept of 'public service' as a lawful duty under section 33, and enacted the public service provisions found in section 273.6.
[2] *Canadian Forces Assistance to Provincial Police Forces Directions (CFAPPFD)*, P.C. 1996-833, C. Gaz. 1996.II (4 June 1996).
[3] *Canadian Forces Armed Assistance Directions (CFAAD)*, P.C. 1993-6245, C. Gaz. 1993.II (30 March 1993).

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federal RCMP can seek the assistance of the military in cases where the RCMP is unable to deal effectively with disturbances of the peace affecting the national interest. The CF also provides assistance to a number of federal government departments and agencies responsible for law enforcement, pursuant to memoranda of understanding (MOU) which, for their legal validity, rely on the MND's broadly defined powers and responsibilities set out in section 4 of the *NDA*.[4] Since 1998, subsection 273.6(3) of the *NDA* has been available as authority for the creation of MOU providing for law enforcement support of a minor nature that involves support of a logistical, technical or administrative nature and is not operational support in respect of an actual or imminent law enforcement operation.

5. As is the case with assistance to civilian authorities generally, a critical first step in addressing a request from a civilian law enforcement agency is to determine who is making the request, what type of assistance is being requested, and who has the authority to approve the request. The request process and approval authority will vary according to the legal instrument used. Analyzing the request in this way will identify which legal instrument is most appropriate for use in the circumstances. Requests for assistance must be made and authorized at the appropriate level.

6. As a general starting point when examining the legal basis upon which CF assistance is to be provided, a statutory basis is to be preferred over one that is based solely on an exercise of the Crown prerogative. Generally speaking, statutory provisions are more clear and transparent as to their legal effect and meaning when compared to a decision made pursuant to the Crown prerogative. In this respect, the *NDA* provisions most relevant for purposes of providing legal authority for CF support to law enforcement are found at section 273.6 (Public Service) and Part VI (Aid of the Civil Power). On the other hand, the legal basis relied on for the creation of the principal Orders in Council relating to CF assistance to civilian law enforcement agencies (i.e., *CFAADs* and the *CFAPPFDs*) is the Crown prerogative. These Orders in Council predate the enactment of section 273.6 of the *NDA*. The question therefore arises whether the Orders in Council remain as self-standing authorities or whether the enactment of section 273.6 has supplanted these prerogative instruments.

7. Section 273.6 of the *NDA* may be applied to a broad range of circumstances involving requests from civilian authorities for CF assistance in respect of law enforcement matters. It can generally be relied on even in circumstances where one of the Orders in Council might be applied. These orders in council have not been revoked since the enactment of section 273.6 of the NDA, and there is no intent to seek their revocation. What then is the legal effect of the continued existence and use of these Orders in Council? The answer may be found in subsection 273.6(4) of the *NDA*, which provides that the MND's authority under section 273.6 is subject to directions issued by the Governor in Council. Taking this approach, these instruments may be used as interpretative or implementing directions that provide additional guidance on how section 273.6 operates in certain circumstances. Seen in this light, the procedural aspects of the *CFAADs,* including the provisions for prepositioning a military force at the site of a disturbance, are not inconsistent with the authority of the MND under subsection 273.6(2) to approve the subsequent request from the Minister PSEP to commit the military force to take action as contemplated and detailed in the *CFAADs*. Similarly, the *CFAPPFDs* and its accompanying Principles continue to be relevant and provide guidance in respect of the matters to be considered before a request for assistance from a provincial police force may be approved. This guidance and amplifying direction are not inconsistent with the authority of the MND under subsection 273.6(2) of the *NDA*.

8. The analysis of requests for assistance from provincial police forces differs in several ways from the analytical approach to requests from another federal government department or

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[4] Until 2004, when a new MOU was created pursuant to section 273.6 of the *NDA*, all previous RCMP-CF Counter-drug MOU relied on the MND's section 4 powers and authority. The 1994 CF-DFO MOU related to fisheries surveillance and enforcement was concluded under that Ministerial authority as well.

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law enforcement agency. Generally speaking, the principle that all other avenues of assistance should be exhausted before seeking the support of the CF need not apply to requests from other federal authorities. While the principle that the use of the military against the citizens of the country should only occur as a last resort continues to have application, the objectives of federal law enforcement policies may involve cooperative arrangements to rationalize the use of available federal resources, including the CF. Thus, there will be noticeable differences between the wider range of situations when assistance will be provided at the federal level to the RCMP and other government departments and the more narrow scope of when the CF will provide support to provincial law enforcement agencies.

9. While the *CFAPPFDs* expressly recognize that not all forms of CF support require high level ministerial approval, the support that is provided tends to be case specific and not of an on-going nature. In contrast, the law enforcement support role that the CF plays in the federal sphere tends to be done on a recurring basis and often involves Minister to Minister arrangements found in MOUs. Furthermore, while the support to provincial law enforcement authorities typically involves traditional police work, assistance at the federal level involves a number of different law enforcement activities including hostage rescue and counter-terrorist operations, VIP protection, or providing a strong federal security posture during high profile events such as occurred during the 1976 Olympics and the Kananaskis G8 Meeting, supporting RCMP counter-drug operations, contributing to the NORAD counter-drug program, assistance to Corrections Canada in the event of disturbances at federal penitentiaries, and providing support to the Department of Fisheries and Oceans for the enforcement of federal fisheries legislation. In addition, the CF has provided, on an ad-hoc basis, assistance to customs and immigration officials in respect of counter-contraband and illegal immigrant operations. While the predominant requester of assistance is the RCMP, they are not the sole federal law enforcement agency that looks to the unique resources and capabilities of the CF for support.

SECTION 3

CF ASSISTANCE TO PROVINCIAL LAW ENFORCEMENT AGENCIES

General

10. Prior to the creation of the *CFAPPFD*, doubt existed about the extent to which the CF could be authorized to provide law enforcement assistance. Section 4 of the *NDA* provided the only statutory basis permitting the MND to approve the assistance. The broad scope of this section gave rise to arguments that its interpretation should be limited to matters of national defence and not be extended to law enforcement matters that were not clearly within the defence mandate (i.e., aid of the civil power). The *CFAPPFD* clarified the issue by providing clear direction, including the enunciation of the conditions that had to be met before the CF assistance could be approved.

11. Since 1998, assistance to provincial law enforcement agencies may be made pursuant to section 273.6 of the *NDA* and the *CFAPPFD*. Together, these legal instruments set out the conditions or factors to be considered before the request can be approved, as well as the process to be followed for the submission of the request.

CF Assistance to Provincial Police Forces Directions (CFAPPFD)

12. The *CFAPPD* and its accompanying *Principles* require that the provinces must look to their own resources first. If unable to meet their needs from their own resources, the provincial police force must then seek the assistance of the RCMP. Only after having exhausted those steps should a request be made for CF support. The *CFAPPFD* process requires the provincial minister responsible for policing to submit a request to the federal Minister of Public Safety and Emergency Preparedness Canada (MPS) advising that the provincial police force is or may be unable to deal effectively with a disturbance of the peace that is occurring or may occur. If

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PSEPC cannot respond with RCMP resources, the MPS may consult with the MND to seek CF assistance.

13. The *CFAPPFD* requires that the following conditions be met before a request for CF support will be approved:

   a. the provincial minister responsible for policing must submit a written request to PSEPC detailing reasons for the request;

   b. the MPS and the MND must consult and both ministers must be satisfied that,

      i. the disturbance of the peace affects, or is likely to affect, the national interest, and
      ii. the disturbance cannot be effectively prevented, suppressed or otherwise dealt with except with the assistance of the CF;

   c. once so satisfied the MPS may submit a request to the MND for CF operational assistance.

14. If the MND approves the request he will authorize the CDS to dispatch a military force. The CDS or his designate will determine the strength, composition, arms and equipment of the force to be dispatched, and the members of the force dispatched to the site of the disturbance will act as a military force under command and control of an appointed military commander. The civilian police force retains general management of the response to the disturbance. The military commander, under the general direction of the civilian police may take any action that the military commander considers necessary to assist the police force in dealing with the disturbance of the peace.

15. CF assistance provided under this Order in Council is provided on a cost recovery basis and the province must accept liability regarding the use of the CF in support of the police operation.

16. The *Principles* accompanying the *CFAPPFDs* established categories of assistance, as well as how the approval of these various categories could be achieved. The guidance contained in the *Principles* have been further refined in directions to the CF in which the MND, through the CDS, has delegated to operational commanders approval authority for certain categories of assistance.[5]

17. Determining whether a request for CF assistance involves operational equipment or a disturbance of the peace is an essential first step in determining who can authorize the assistance. The four classes of operational assistance and the associated approval authorities are:

   a. Class 1 – CF personnel and operational equipment when the disturbance of the peace is occurring or may occur. Approval authority for this class has been retained by the MND;

   b. Class 2 – non-operational equipment when the disturbance of the peace is occurring or may occur. Approval authority for this class has been delegated to the commanders of operational level formations;

[5] CDS Letter of Direction, *Delegation of Approval Authority for Classes of CF Assistance – CF Support to Provincial and Territorial Law Enforcement Operations*, 29 November 1996.

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c. Class 3 – CF personnel and operational equipment when there is no potential for the occurrence of a disturbance of the peace. Approval authority for this class has been delegated to the commanders of operational level formations; and

d. Class 4 – support for other than law enforcement operations, including CF personnel, operational or non-operational equipment, and use of ranges, training areas and other infrastructure facilities. Approval authority for this class has been delegated to the lowest possible level of approval authority as described in the Provision of Services Policy.

These categories apply only to provincial requests for assistance, they do not apply to federal requests for assistance.

18. Given their importance in determining the class of support that may be provided and who may approve the request, it is important to understand what is meant by operational equipment and to recognize when a disturbance of the peace may be occurring.

a. Operational equipment: Operational equipment is defined as any CF equipment which, by its nature, is intended for the employment of force or as a means to deliver such capability or whose presence could be perceived by the public as being intended for the application of force. When dealing with equipment such as armoured vehicles, weapons and other war fighting equipment, the definition of "operational equipment" is self-evident. The operational nature of other CF resources is often uncertain and the potential for their employment in a role associated with the direct employment of force will require careful consideration of the specific circumstances surrounding their potential use.

b. Disturbance of the peace: Disturbance of the peace is defined as any situation where the conduct enumerated at section 175 of the *Criminal Code* (e.g., fighting, screaming, shouting, swearing, using insulting or obscene language, being drunk, etc.) causes an interference with the ordinary and customary use by the public of a public place.[6] Although the *Criminal Code* definition may be met by very low levels of public disorder or misconduct, the *CFAPPFD* requires that the level of disturbance be such that it affects, or is likely to affect, the national interest, and that the provincial police are unable to effectively prevent, suppress or otherwise deal with the disturbance without the assistance of the CF.

Provincial Policing and the Application of Subsection 273.6(2) of the *NDA*

19. Subsection 273.6(2) provides as follows:

> The Governor in Council, or the Minister on the request of the Minister of Public Safety and Emergency Preparedness or any other Minister, may issue directions authorizing the Canadian Forces to provide assistance in respect of any law enforcement matter if the Governor in Council or the Minister, as the case may be, considers that:
>
> (*a*) the assistance is in the national interest; and
>
> (*b*) the matter cannot be effectively dealt with except with the assistance of the Canadian Forces.

20. For the purposes of CF assistance to provincial policing authorities, a request made pursuant to this subsection for CF support must be routed through provincial ministers responsible for policing to their federal counterpart, the MPS. It is the federal Minister who, after

[6] *R. v. Lohnes*, 69 C.C.C. (3d) 289 (S.C.C)(QL).

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having considered the provincial minister's request, determines that the request should be made to the MND. Consideration of the provincial request by the MPS and the MND should include the guidance found in the *CFAPPFD* and the accompanying *Principles*. However, as subsection 273.6(2) has a broader applicability than the Order in Council, it is not necessary for the approval of assistance under this statutory provision for there to be a determination that there exists or is likely to exist a disturbance of the peace. It is sufficient for the purposes of subsection 273.6(2) that the provincial law enforcement matter in question is such that providing the requested assistance is in the national interest and the provincial police cannot effectively deal with the matter except with CF assistance.

SECTION 4

CF ASSISTANCE TO FEDERAL LAW ENFORCMENT AGENCIES AND OTHER FEDERAL GOVERNMENT DEPARTMENTS

General

21. Assistance to federal law enforcement agencies and other federal government departments can be provided pursuant to a number of legal instruments. These include *NDA* subsection 273.6(2), other federal statutes (e.g., *Coastal Fisheries Protection Act*), Orders in Ccouncil, and Minister-to-Minister arrangements created by MOU. Requests for CF support falling outside of existing Orders in Council and MOU should be made under *NDA* subsection 273.6 (2).

22. As mentioned earlier in this chapter, the provisions of section 273.6 of the *NDA* and existing Orders in Council and MOU should be examined together carefully in given circumstances in order to arrive at a correct application of subsection 273.6(2). Existing Orders in Council such as the *CFAAD* and the *Assistance to Federal Penitentiaries Order*[7] provide additional guidance that assists in applying the statutory provision. To the extent that there may be an inconsistency between section 273.6 of the *NDA* and any of the Orders in Council or MOU, the provisions of the statute would prevail.

Assistance to Federal Penitentiaries Order

23. The *Assistance to Federal Penitentiaries Order* authorizes the MPS or the Commissioner of Penitentiaries to obtain military assistance from the CDS for the purpose of aiding in suppressing, preventing or otherwise dealing with a disturbance which occurs, or is likely to occur, and which is beyond the powers of the penitentiary staff to suppress or prevent. There are two possible scenarios that may lead to a request for CF assistance. These are:

a. any circumstance that would reduce the number of Correctional Services officers available to supervise a penitentiary below acceptable limits (e.g., a strike of penitentiary guards); and

b. any major riot or other disturbance at a federal penitentiary.

In either of the above scenarios, the CF is the last line of response in Correctional Services Canada (CSC) contingency plans. CSC will initially respond by reallocating internal CSC resources. If these prove insufficient, then the RCMP and other locally available police resources would be called upon to provide assistance. Only after these measures have been exhausted without success would the CF be requested to provide assistance. This Order in Council has not been invoked since its inception in 1975.

[7] *Assistance to Federal Penitentiaries Order*, P.C. 1975-131, C. Gaz. 1997.II (23 January 1975).

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24. A request for CF support may be made orally or in writing, but if oral it must be confirmed in writing as soon as possible. Upon receipt of a request, the CDS must respond by despatching a military force to the penitentiary. However, the CDS, or his designate, will determine the strength, composition, arms and equipment of the military force to be despatched. The CF members of the force despatched will act at all times as a military body under the command and control of their military supervisors.

25. Each Joint Task Force Headquarters maintains contingency plans for provision of assistance to the federal penitentiaries in their region and conducts liaison with them on a regular basis. An important aspect of regular reconnaissance visits to the penitentiaries is to enable the identification of the type of inmate population that is resident in the institution. This information is significant for purposes of understanding the level of force that may be required in the event a military force is required to deploy there.[8]

26. Except in the most extreme circumstances, the CF role in assistance to CSC will be external perimeter security in order to prevent the unlawful entrance or exit of persons to and from the penitentiary. The Order in Council does, however, provide for CF members to become involved in duties within the institutions that may necessitate them being in direct contact with inmates. The Order in Council requires that, if time permits, the officer in command of the military force shall seek authorization from the CDS before complying with any request for military assistance beyond perimeter security. The CDS will only authorize such additional support with the concurrence of the MPS or the Commissioner of Penitentiaries.

27. Two additional matters concerning this Order in Council are of note. First, there is no express mention of a role for the MND in the receipt and approval of a request under this Order in Council. To the extent that the MND's authority under section 273.6 of the *NDA* and this Order in Council are inconsistent in respect of authorizing CF assistance for a law enforcement matter, the provisions of the statute prevail and the Order in Council must be read to include a requirement for the MPS to make the request for CF assistance to the MND. The second item of note is that this Order in Council does not apply to provincial prisons and a request for CF assistance from provincial authorities would have to be made through the MPS, pursuant to the *CFAPPFD* and subsection 273.6(2) of the *NDA*.

Canadian Forces Armed Assistance Directions (*CFAAD*)

28. This Order in Council provides a process for the federal RCMP to request CF support to deal with disturbances of the peace involving offences under the *Criminal Code of Canada*[9] or the *Security Offences Act*[10] involving terrorists, hostage-taking or violence aimed at internationally protected persons, such as diplomats. It sets up a two-stage response to such requests: the first stage is dealt with without ministerial involvement and permits positioning the CF at the site of a disturbance while the second stage involves ministerial approvals for the commitment phase of the operation.

29. In the first stage, the Commissioner of the RCMP, if satisfied that the RCMP is not able to deal effectively with a disturbance of the peace affecting the national interest that is occurring or may occur, is authorized by this Order in Council to request the CDS to position a military force in anticipation of a request for armed assistance. The CDS may dispatch a force in such strength

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[8] Subsection 25(5) of the *Criminal Code* provides for the use of deadly force against inmates escaping from a penitentiary if there exists belief on reasonable grounds that <u>any</u> inmate at the penitentiary poses a threat of death or grievous bodily harm to anyone and the escape cannot be prevented by reasonable means in a less violent manner. See also, section 32(2) of the *Criminal Code*, which provides that persons bound by military law are justified in obeying any command given by their superior officer for the suppression of a riot, unless that order is manifestly unlawful. *Criminal Code*, R.S.C. 1985, c. C-46 [*Criminal Code*].
[9] *Ibid*.
[10] *Security Offences Act*, R.S.C. 1984, c. 21 as amended.

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and composition, and with such arms and equipment, as the CDS or his delegated officer determines appropriate for the circumstances.

30. In the second stage, once satisfied that the RCMP is or may be unable to deal effectively with the disturbance of the peace affecting the national interest that is occurring or about to occur, the Minister PSEP will send a request to the MND for the provision of armed assistance by the CF to the RCMP for the purpose of "assisting in suppressing, preventing or otherwise dealing with the disturbance." In responding to the MPS's request, the MND may authorize the CDS to direct a commander to the site of the potential or actual disturbance to take "whatever lawful action is deemed appropriate in the circumstances to deal with the disturbances." However, notwithstanding the Ministerial approval, it remains for the on-site police commander to make the final determination whether to employ military force. That police commander must first determine that the resources of the police present at the site of the incident are unable to deal with the disturbance and then request the military commander to take charge of the response to the disturbance of the peace. At this time, although the general management of the police response at the site remains the responsibility of the police, the military commander will take control for purposes of employing military force to resolve the incident.

31. The *CFAAD* was created at the time that the CF took over the counter-terrorist and hostage-rescue role from the RCMP. Its initial purpose was to facilitate the use of JTF2 in support of the RCMP. However, the Order in Council does not mention JTF2 and the CDS may designate any unit or element of the CF to provide armed assistance to the RCMP, including, for example, the nuclear biological chemical response team (NBCRT).

Federal Law Enforcement and the Application of *NDA* subsection 273.6(2)

32. The vast majority of CF domestic operations are initiated by a request for assistance from Canadian civilian authorities. This is certainly the case in respect of CF assistance provided in response to requests for law enforcement assistance from provincial police, as well as requests from the RCMP and other federal government departments and law enforcement agencies. However, *NDA* subsection 273.6(2) preserves the ability of the Governor in Council to act on its own authority to issue a direction authorizing the CF to provide law enforcement assistance. The Governor in Council may issue such direction in the absence of a request from any civilian law enforcement agency, and is not constrained by having to await a request from the MPS. The Governor in Council may exercise this authority whenever it considers that CF assistance in respect of any law enforcement matter may be in the national interest and the matter cannot be effectively dealt with except with the assistance of the CF.

33. Requests for CF assistance from other government departments and federal law enforcement agencies must be submitted by the responsible minister to the MND. If possible, consultation between departments will first include a referral of the matter to the MPS for consideration of support by the federal RCMP. If the RCMP cannot provide the necessary response, then the MPS may refer the request directly to the MND or return the matter to the responsible Minister who would then make the request for assistance to the MND.

34. Once the MND receives the request, the MND must determine if the assistance is in the national interest, and that the matter cannot be effectively dealt with except with the assistance of the CF. If this two-part test is met, the MND may authorize the CF to provide the requested assistance.

35. In some cases a request may be made for ongoing CF support to law enforcement. Such assistance may be approved under *NDA* subsection 273.6(2) and, with MND concurrence, the details of the support can be set out in a MOU.

CF Assistance Pursuant to Memoranda of Understanding (MOU)

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36. MOU are administrative arrangements that are not legally binding upon the participants, but which are very useful for setting out the nature and extent of cooperative arrangements between the participants. In the present context, MOU have often been developed to facilitate the provision of support on an on-going basis by the CF to another department or agency of the federal government. Where the provision of such on-going support requires MND approval, as is the case with law enforcement assistance, MOU obviate the need to repeatedly seek MND approval as each incidence of support arises.

37. The following examples of existing MOU with other federal government departments or agencies relating to CF assistance in law enforcement operations are examined in detail below:

a. MOU respecting CF Assistance in support of the RCMP in its Drug Law Enforcement Role, dated 20 January 2005; and

b. MOU between the Department of Fisheries and Oceans (DFO) and the CF respecting Surface Ship Patrols and Aerial Fisheries Surveillance, dated 17 June 1994.

MOU Respecting CF Assistance to RCMP Counter-Drug Operations

38. The RCMP has the jurisdiction and the responsibility to enforce Canada's drug laws and is the lead agency for drug interdiction. Over the years, the RCMP has frequently sought the specialized assistance that the CF is capable of providing in order to more efficiently exercise its counter-drug mandate. CF support was provided under the terms of various MOU that were reviewed on a periodic basis. The latest renewal occurred in response to a request made by the MPS, pursuant to subsection 273.6(2) of the *NDA*. The MND authorized the renewal and the details of the CF support are set out in a MOU signed between the CF and the RCMP.

39. The MOU requires the RCMP to submit individual requests for each proposed counter-drug activity with sufficient detailed information about the requirements of the operation in order for the appropriate CF support to be identified and approved. The type of support that is often provided to the RCMP includes intelligence sharing and liaison, and surveillance of specific vessels, aircraft and vehicles of interest by military surveillance assets. For example, the CF supports RCMP counter-drug operations on the east and west coasts by providing aircraft detection and surveillance of suspected drug importation vessels. In addition, the CF may assist in interdiction operations against identified vessels, aircraft and vehicles.

40. Other forms of assistance that are consistent with the MOU may also be provided. An example is OP SABOT, a national marijuana eradication program. The CF assists by locating the marijuana fields and transporting the RCMP to the sites so that RCMP officers may then destroy the fields.

41. It should be remembered that the CF is not obligated by the terms of the MOU to provide assistance every time that it is requested. CF support to the RCMP in its drug law enforcement role is subject to any overriding operational requirements of the CF and the availability of resources.[11] The MOU also provides that CDS authorized rules of engagement (ROE) provide authority for CF members to use force when supporting an RCMP counter-drug operation.[12]

MOU Respecting CF Assistance to the Department of Fisheries and Oceans

[11] MOU between the CF/RCMP, *CF Assistance in support of the RCMP in its Drug Law Enforcement Role*, dated 20 January 2005. Paragraph 5.2.1 provides that military resources such as ships and aircraft are always subject to diversion to higher operational priority taskings at the discretion of the CDS.
[12] *Ibid.* at para. 9.2.

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42. The Department of Fisheries and Oceans (DFO) has the responsibility and jurisdiction to enforce Canada's fisheries laws. Pursuant to the provisions of an MOU concluded between the CF and DFO, the CF supports DFO surveillance and enforcement activities in waters of Canadian jurisdiction, and those waters where Canada has international fisheries commitments.[13] This support is provided through CF ship patrols and aerial surveillance. The MOU describes the administrative arrangements for CF support to DFO for routine fisheries surveillance patrols (FISHPATS).

43. The MOU contemplates the use of force when dealing with uncooperative vessels at sea.[14] If enforcement activities are required against a Canadian ship suspected of violating Canadian fisheries law, upon request of the onboard DFO Fishery Officers, the Commander of the HMC Ship will, if necessary and appropriate, use escalating levels of force in accordance with CDS authorized ROE and MARCOM orders to secure compliance with Fishery Officer directions (to the uncooperative vessel). If enforcement activities are required against a foreign ship, then considerable caution must be exercised and the consultative and approval process set out in the MOU must be followed.[15] After appropriate consultation between the Minister DFO and the Minister of Foreign Affairs, the Minister DFO may make a specific request for CF assistance to the MND.

Legal Protection for CF Members Providing Support to the Department of Fisheries and Oceans

44. The CF is authorized to assist in the protection of Canadian fisheries. A 1970 Order in Council[16] designated commissioned officers of the CF as 'Fisheries Protection Officers' for purposes of enforcing the provisions of the *Coastal Fisheries Protection Act,*[17] as well as the provisions of three other statutes dealing with fisheries (which have since been repealed).

45. Under the *Coastal Fisheries Protection Act*, 'protection officers'[18] are authorized to take a variety of law enforcement actions, including boarding to determine compliance with the *Act*, taking a vessel to port, searching cargo, examining the master and crew under oath, arresting without a warrant for offences under the fisheries acts, seizing a vessel and goods and, maintaining custody of vessels and goods seized. Additionally, in accordance with regulations made pursuant to the *Act*, a protection officer may take enforcement action that is consistent with the *Act* in respect of foreign vessels that are located on the high seas but which are suspected of having engaged in unauthorized fishing in Canadian fisheries waters.[19]

46. In addition to the designation under the 1970 order in council, in July 1994, under the authority of subsection 5(2) of the *Fisheries Act*,[20] the Deputy Minister of Fisheries issued a certificate designating officers and non-commissioned officers of the CF as a class of 'fishery officers' under subsection 5(1), for those periods of time when, in accordance with operational orders, CF members are performing duties or functions under the *Fisheries Act* or the *Coastal Fisheries Protection Act*. The *Fisheries Act* confers on a fishery officer the power of search with and without a warrant, the power of arrest and the power of seizure.[21] This class designation has therefore provided considerable powers and legal protection to members of the CF when performing duties in support of DFO. Due to the nature of these duties, when performing duties

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[13] *MOU between the Department of Fisheries and Oceans and the CF Respecting Surface Ships, Patrols and Aerial Fisheries Surveillance*, 17 June 1994.
[14] *Ibid.* at para. 11.
[15] *Ibid.*, s. 10 and Annex D.
[16] P.C. 1970-1512, 9 September 1970 (untitled).
[17] *Coastal Fisheries Protection Act*, R.S.C. 1985, c. C-33, as amended [*Coastal Fisheries Protection Act*].
[18] Section 2 of that *Act* defines 'protection officer' as including any person authorized by the Governor in Council to enforce the Act, a member of the RCMP and a 'fisheries officer' within the meaning of the *Fisheries Act*.
[19] *Coastal Fisheries Protection Act, supra* note 17, s. 7.01(1).
[20] *Fisheries Act*, R.S.C. 1985, c. F-14, as amended.
[21] *Ibid.*, ss. 49-51.

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as fishery officers enforcing these acts, CF members have 'peace officer' status pursuant to the definition of "peace officer" in the *Criminal Code*.[22]

SECTION 5

AID OF THE CIVIL POWER (*NATIONAL DEFENCE ACT* - PART VI)

47. Part VI of the *NDA* provides the Attorney General of a province the power to require the CF to be called out in aid of the civil power for a situation involving a riot or disturbance. This power was invoked in 1969 during the Montreal police strike, the 1970 FLQ crisis, and most recently in 1990 to deal with the Oka crisis.

48. The CF, or any part of it, is liable to be called out for service in aid of the civil power. That can occur if, in the opinion of the Attorney General of an affected province, there is a riot or disturbance of the peace that occurs or is likely to occur and which is beyond the powers of the civil authorities to suppress, prevent or deal with.[23] All CF members of the regular force are liable to serve in aid of the civil power. Members of the reserve force cannot be obligated to serve without their consent.[24]

49. The provincial Attorney General may of his own volition, or on the request of a judge, make a written requisition to the CDS, or to an officer the CDS designates, requiring the CF to provide service in aid of the civil power.[25] Once the requisition is received, the CDS or his designate shall, subject to such directions as the MND considers appropriate in the circumstances and in consultation with that Attorney General and the Attorney General of any other province that might be affected, comply with the request by calling out such part of the CF that the CDS or his designate considers necessary for the purpose of suppressing or preventing any actual riot or disturbance or any riot or disturbance that is considered as likely to occur.[26]

50. The requisition made by the Attorney General can be in the form set out at section 279 of the *NDA*. The form may be varied to suit the facts of the case, however the requisition must contain the specific information listed at section 280 of the *NDA*. In particular, the requisition must state that the Attorney General has received information that a riot or disturbance is beyond the powers of the civil authorities to suppress or prevent or to deal with, and that the CF is required in aid of the civil power. Further, the Attorney General must be satisfied that the CF is required to deal with the riot or disturbance.

51. Statements of fact, and promises and undertakings contained in the requisition, are conclusive and binding on the province making the requisition. In addition, statements of fact in the requisition are not open to dispute by the CDS.[27]

52. Within seven days after making the requisition, the Attorney General of the province must cause an inquiry to be made into the circumstances that lead to the call out of the CF. The Attorney General is required to send a report on the circumstances to a designated member of the Privy Council of Canada.[28]

53. When the CF is called out for service in aid of the civil power, it does not replace the civil authorities, it assists them in the maintenance of law and order.[29] While on aid of the civil power duties, CF members will have the powers and duties of constables. Further, by virtue of section 2

[22] *Criminal Code*, *supra* note 8, s. 2; see also *QR&O* 22.01(1), (2).
[23] *National Defence Act*, R.S.C. 1985, c. N-5, s. 275 [*NDA*].
[24] *Ibid*., s. 276.
[25] *Ibid*., s. 277.
[26] *Ibid*., s. 278.
[27] *Ibid*., ss. 280(3), (4).
[28] *Ibid*., s. 281.
[29] *QR&O* 23.03(1).

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of the *Criminal Code*, they also have the powers and protections of peace officers. However, CF members are not peace officers for all purposes and are not obligated to enforce civil laws, as would be the case for civilian police officers.[30] CF members must act as a military body, but each member will remain individually liable to obey the lawful orders of their superior officers.[31]

54. The CF members called out in aid of the civil power will remain on duty in such strength as the CDS or his designate deems necessary and until the provincial Attorney General gives notice that the CF are no longer required.[32]

55. The costs for calling out the CF in aid of the civil power, and services rendered by the CF, must be paid out of the Consolidated Revenue Fund.[33]

SECTION 6

CONCLUSION

56. Although the CF does not have a standing mandate to enforce the laws of Canada, other than in relation to CF members and defence establishments, both provincial and federal law enforcement agencies and other government departments may request CF assistance to enforce laws within their respective jurisdictions. There are several legal instruments through which the CF may be authorized to assist law enforcement agencies in the execution of their mandate. Normally, the assistance requested is for a unique or special skill, capability or equipment only available from within the CF. The request process and approval authority will vary according to the legal instrument used. Consequently, legal advisors must be aware of the various legal instruments and their respective processes. Requests for assistance must be made and authorized at the appropriate level. If CF assistance is provided, it is always provided in support of the law enforcement agency of the jurisdiction. That law enforcement agency retains responsibility for the general management of the law enforcement operation.

[30] But, note subsection 32(2) and section 69 of the *Criminal Code* which makes it an offence for a peace officer to fail to take all reasonable steps to suppress a riot if the peace officer has received notice that there is a riot within his jurisdiction. *Criminal Code*, *supra* note 8, s. 32(2), s. 69.

[31] *NDA*, *supra* note 23, s. 282.

[32] *Ibid.*, s. 283.

[33] *Ibid.*, s. 285.

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CHAPTER 8

USE OF FORCE IN DOMESTIC OPERATIONS

SECTION 1

INTRODUCTION

1. CF operations must be conducted in accordance with the rule of law. During law enforcement assistance operations it may become necessary to take action for the maintenance of law and order. This could put members of the CF in a position where they may have to use force against their fellow citizens. Even during humanitarian assistance operations circumstances may arise during which civilian police are not present when crimes might be committed in the presence of CF members. An expectation may exist in the minds of the Canadian public that in such circumstances the CF members will take action to prevent or stop the commission of crimes. How CF members respond to circumstances where force may be necessary during domestic operations will reflect how well they understand the principles underlying the rule of law, and how well they understand the limits that the law imposes on the permissible use of force.

2. The basis for the use of force in domestic operations is statute law, primarily the *Criminal Code*.[1] This legal foundation has been incorporated into procedures developed to allow the military chain of command to control the use of force. This has been accomplished through the creation of guidance in policy and doctrine such as the CF manual, the *Use of Force in CF Operations*.[2] CF policy and doctrine provide the following start points for considering the use of force in domestic operations:

a. the use of force is controlled by the chain of command through implementation of CDS authorized rules of engagement (ROE) or similar use of force directions;[3]
b. self defence is related to, but separate from, ROE and applies no matter what other factors are present;
c. self defence is not controlled by ROE, but may be restricted for operational or policy reasons;
d. self defence includes defending oneself and any other member of the CF from a hostile act or demonstrated hostile intent; and
e. all other uses of force are controlled by ROE.

This chapter will examine the use of force in domestic operations, both through the use of ROE and through the exercise of the right of self defence.

3. The *Criminal Code* authorizes the use of force in defence of persons and property, or to prevent the commission of certain serious crimes in separate but related categories that at times overlap. As a result, the use of force may at times be justified under more than one section of the *Criminal Code*.[4]

SECTION 2

SELF DEFENCE

[1] *Criminal Code*, R.S.C. 1985, c. C-46.
[2] B-GG-005-004/AF-005, Use of Force in CF Operations.
[3] Military police personnel performing military police duties are authorized to use force in accordance with CFPM directives rather than ROE.
[4] *R. v. Baxter* (1975), 27 C.C.C. (2d) 96, at 113 (Ont. C.A.)(QL).

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4. The *Criminal Code* sections dealing with self defence have in common a concept of 'justified use of force.' This reflects the influence of a common law principle that in circumstances where the use of force is necessary, the harm sought to be prevented could not be prevented by less violent means and the injury done, or reasonably expected to be done, is not disproportionate to the harm it is intended to prevent. Thus, the law authorizes the use of force in circumstances where it is necessary and justifiable, but absent necessity and the justification prescribed in the law, the use of force would be unlawful.

5. Section 34 of the *Criminal Code* requires that to justify the use of force to repel an unprovoked assault, the force used cannot be intended to cause death or serious bodily harm and it can not exceed that which is necessary to defend oneself. Anyone who is unlawfully assaulted and who causes death or serious bodily harm in repelling the assault is justified in having used such force, but only if the use of such force to repel the attack is based on a reasonable apprehension of death or serious injury from the violence of the assault, and if the person attacked had a reasonable belief that there was no other way to protect oneself from death or serious injury.

6. Similarly, section 37 of the *Criminal Code* sets out the conditions under which it is justified to use force to prevent an assault on oneself or anyone under one's protection. To be justified, the force used must be no more than is necessary to prevent the assault or the repetition of the assault. The *Criminal Code* does not define the term 'under protection,' but it would likely include members of one's immediate family and anyone whom the person has a legal duty to protect, such as a person detained by a CF member.

SECTION 3

USE OF FORCE TO PROTECT PROPERTY

7. Under Canadian law there is no legal basis to defend property with deadly force unless there also exists a coincident threat of death or serious bodily harm to a person. Section 27 of the *Criminal Code* provides justification for the use of as much force as is reasonably necessary to prevent the commission of serious offences that would likely cause immediate and serious injury to any person or their property. What constitutes reasonable and necessary force is a question of fact that will vary depending on the prevailing circumstances at the time the force is used. Section 27 should be read together with other *Criminal Code* sections relating to the protection of property as the amount of permissible force that may be used varies with the class of property in question and whether the harm to the property poses a danger to any person.

8. The right to protect different classes of property is expressly provided for in sections 38 to 42 of the *Criminal Code*. Subject always to the requirement that no more force than necessary be used, as a general rule, progressively more force may be used as one moves from defending personal (i.e., movable) property in one's possession to defending real property or a dwelling house. The greatest level of force may be justified when the defence of property is inextricably linked to defending persons from a threat of death or grievous bodily harm. The extent to which force may be used also varies with the situation. In all cases, the legal justification to use force to protect property is based upon the threat to the individual attempting to prevent the trespassing, theft, damage or destruction of the property, or the threat to other persons that would be caused by the trespassing, theft, damage or destruction of the property.

9. During some domestic operations, CDS approved ROE may authorize CF members to use non-deadly force to defend specified property. This would not prevent CF members from using reasonable and justified force, up to and including deadly force, in self defence should the trespassing, theft, damage or destruction of the property likely cause the death or serious injury to CF members or any person.

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SECTION 4

USE OF FORCE AND MAINTENANCE OF LAW AND ORDER

10. The maintenance of law and order is primarily the responsibility of the civilian police authorities. Except in those cases where they are employed in a law enforcement assistance role, or when performing aid of the civil power duties, CF members have no special status or obligation to enforce the law. When employed in a law enforcement assistance or aid of the civil power role, CF members will be issued ROE specifically designed to enable them to carry out authorized law enforcement tasks. When employed on other domestic operations, such as humanitarian assistance missions, the law permits, but does not require, CF members to intervene to stop the commission of an offence that might occur in their presence. In these circumstances it would not be possible to issue ROE authorizing the use of force as the chain of command cannot lawfully require CF members to take action. However, in these circumstances the CF members would have the same right as ordinary Canadians to intervene to stop the crime.

11. Although the *Criminal Code* contains specific provisions empowering police officers and others with peace officer status to use reasonable force to do what they are authorized or required to do to enforce or administer the law, the *Criminal Code* also contains a number of provisions that provide justification for ordinary persons, including CF members not engaged in law enforcement assistance operations, to use force when taking action to prevent the commission of an offence. The most common circumstance under which ordinary persons may be legally justified in using force to uphold the law and restore order is in the prevention of a breach of the peace or the commission of an indictable offence (i.e., a serious offence for which the offender could be arrested without a warrant). As noted earlier, section 27 of the *Criminal Code* provides that anyone is justified in using as much force as is reasonably necessary to prevent the commission of an indictable offence. Section 30 of the *Criminal Code* provides that anyone who witnesses a breach of the peace may use as much force as is reasonably necessary to stop the breach and to detain the person breaching the peace in order to place him or her into the custody of a peace officer.

12. CF members who are authorized to assist law enforcement agencies will receive specific orders to carry out their assigned duties, including ROE and direction related to which weapons will be authorized for use during the law enforcement assistance operation. Further, while performing their assigned duties they will have peace officer status, providing them with protection from criminal and civil liability. On that subject, see Chapter 9 concerning Peace Officer Status.

SECTION 5

UNLAWFUL USE OF FORCE

13. CF members are individually liable for the force used by them. A CF member who acts outside the scope of what the law authorizes to be done, or who acts on a belief or grounds that are not reasonable in the circumstances, or who uses more force than is reasonable and justifiable as necessary in the circumstances to achieve the purpose for using the force, may be held to have used excessive force. This may result in charges under either the *Criminal Code* or the *Code of Service Discipline*. Pursuant to section 26 of the *Criminal Code*, everyone authorized by law to use force is criminally responsible for using excessive force according to the nature and quality of the act that constitutes the excess.

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SECTION 6

CONCLUSION

14. In domestic operations the use of force by CF members is based on Canadian law and controlled by the chain of command in accordance with ROE or a use of force directive approved and issued by the CDS. Whether ROE are authorized or not, CF members retain the right of self defence. Canadian law recognizes the right of all Canadians, including members of the CF, to use reasonable and justifiable force to protect oneself, and others under their protection. In some limited circumstances, force may be used to protect property. CF members who are authorized to assist law enforcement authorities will have peace officer status and may be authorized to use force to carry out their duties. Any force used must be both reasonable and necessary in the circumstances.

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CHAPTER 9

PEACE OFFICER STATUS

SECTION 1

INTRODUCTION

1. This chapter examines 'peace officer status' and its application to CF members. Peace officer status is a term most often associated with police officers. However, historically the classes of officials charged with responsibility to protect the peace included persons other than police officers. This continues today. The historical roots of the term are reflected in the definition of 'peace officer' in section 2 of the *Criminal Code*[1] which sets out an extensive list of public authorities responsible for preservation and maintenance of the public peace, or who are authorized to perform duties and functions related to enforcing Canadian law. The list includes mayors, designated Correctional Service officers, prison guards, police officers, customs officers, fisheries officers, pilots, sheriffs, and constables, as well as officers and non-commissioned members of the CF under certain conditions or in certain circumstances.

2. The *Criminal Code* also refers to the term 'public officers,' the definition of which includes officers of the CF. In the past, these terms were interchangeable; all peace officers were public officers. This is reflected in a number of sections of the *Criminal Code*[2] where reference is made to both peace officers and public officers having certain authority to enforce the law. While the status and protection afforded to public officers in the *Criminal Code* may be significant in some circumstances, peace officer status provides the broadest protection under the law.

3. Peace officer status is important for CF members tasked with domestic law enforcement duties from two perspectives. First, the status provides lawful justification for the use of force in upholding the law or when executing tasks in the administration of the law. Second, peace officer status provides CF members with some protection from criminal and civil liability for actions taken when they are employed on assistance to law enforcement duties.

SECTION 2

PROTECTIONS PROVIDED BY LAW

4. CF personnel may benefit from a number of protections provided by the law. The *Criminal Code* provisions relating to self-defence,[3] or the use of reasonable force to prevent the commission of serious crimes[4] (both of which are available to all Canadians) may provide CF members legal protection in circumstances where it is not entirely clear that they are entitled to the protections arising from peace officer status. Additionally, CF members can and should rely on their public officer status under section 25 of the *Criminal Code* to provide them with protection from personal liability when they are acting under authority of the law to do what they are required to do in the administration or enforcement of the law. However, as noted above, peace officer status provides the broadest protection under the law.

5. The *Criminal Code* provides specific powers to peace officers in a number of important areas that involve duties for which CF personnel may be tasked during law enforcement assistance operations. Generally, these tasks arise in circumstances where CF personnel are employed in roles that require them to perform essentially the same functions as police officers (e.g., when civilian law enforcement resources are inadequate), or in circumstances where the

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[1] *Criminal Code of Canada,* R.S.C. 1985, c. C-46, s. 2.
[2] For example, *ibid.,* s. 25(1).
[3] *Ibid.,* s. 34.
[4] *Ibid.,* s. 27.

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civilian police are incapable of restoring and maintaining public order (i.e., the CF acts as a force of last resort). In either circumstance, for both moral and legal reasons, CF personnel so deployed should have the same lawful authority to conduct their assigned duties as do civilian police officers, and they should have the same legal protection when performing those duties as is provided to civilian police officers.

SECTION 3

DUTIES AND OBLIGATIONS OF PEACE OFFICERS

6. At common law, peace officers had a duty to uphold the peace. This duty was greater than the duty imposed on ordinary citizens to keep the peace. The duty of the average citizen to take reasonable steps to prevent or stop a breach of the peace was but an imperfect obligation. The citizen did not have to risk life or limb to do so.[5] Peace officers, on the other hand, were obligated by law to intervene and consequently, were liable to prosecution for the common law offence of neglect of duty if they failed to so act.[6]

7. The duty of peace officers is not as broadly defined under Canadian law as it was under the common law.[7] The only duty to act appears in relation to enforcement actions associated with dispersing riots following the reading of a proclamation.[8] The failure of a peace officer to take reasonable steps to suppress a riot is an offence.[9]

8. The majority of references to 'peace officer' in the *Criminal Code* are in the context of setting out the authority to act and the justification for using reasonable force when taking required action. The *Criminal Code* is not the principal basis for holding police officers accountable for failures or neglect in the performance of their duties, although criminal liability could arise in cases involving, for example, criminal negligence. Police officers are most likely to be held to account for their conduct under provincial police statutes and the disciplinary codes governing the police that are created pursuant to those provincial statutes.

9. The liabilities of members of the CF when performing law enforcement assistance duties approximate those of the civilian police. However, apart from the specific statutory duty to take reasonable steps to suppress a riot, there is no broad common law duty to enforce the law and CF members cannot be expected to perform general law enforcement duties as would be expected of civilian police officers. The actions and conduct of CF members will be subject to the same *Criminal Code* provisions as applies to police officers, but while the police officers' conduct is governed by police disciplinary codes, CF members remain subject to the *Code of Service Discipline* (*CSD*).

10. The *Criminal Code* contains many provisions setting out specific powers unique to peace officers and the actions they are authorized to take in maintaining the peace. Generally these powers relate to the use of reasonable force to suppress breaches of the peace, powers of arrest, and authority to conduct searches. CF members, other than Military Police, receive little or no training regarding offences and the scope of powers to arrest and search. Therefore, the duties of military personnel during law enforcement assistance operations must be governed by their military tasking, and the use of force must be controlled by the chain of command through the application of CDS authorized rules of engagement.[10]

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[5] *R. v. Atkinson,* (1869) XI Cox C.C. 330. But note section 129 of the *Criminal Code* that makes it an offence for any person not to assist a peace officer in making an arrest or in preserving the peace after the peace officer has given reasonable notice that the person's assistance is required.
[6] *R. v. Dytham,* [1979] All E. R. 641 (C.A.).
[7] Section 8 of the *Criminal Code* incorporates the common law, but section 9 prohibits convictions for common law offences.
[8] *Criminal Code, supra* note 1, s. 33.
[9] *Ibid.*, s. 69.
[10] For further information on the use of force by CF members in a law enforcement assistance role, see Chapter 8 of this manual.

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SECTION 4

PEACE OFFICER STATUS

11. Peace officer status arises by operation of law. There is no additional formality such as the taking of an oath or an official appointment before the status comes into effect. Rather, the law confers the status when certain facts are present. For CF personnel deployed on domestic operations, peace officer status is time, situation and duty dependent. CF personnel do not assume peace officer status simply because they are employed on a domestic operation.

12. Generally speaking, members of the CF have the status of a peace officer only at those times during a law enforcement assistance operation when they are performing duties related to enforcing the law. Examples of such duties include assisting a civilian police officer in arresting a person suspected of having committed a crime, providing security or protection to certain designated persons or property, or performing general patrol duties or traffic control ordinarily performed by civilian police officers. The status ceases to have effect when the CF members are no longer engaged in duties related to law enforcement and the status may not attach to those deployed on the operation in a role that does not require them to perform law enforcement duties.

13. CF members called out for service in aid of the civil power, pursuant to Part VI of the *NDA*, retain peace officer status throughout the time that they are called out. Section 282 of the *NDA* provides in part that CF members called out for service in aid of the civil power have "... in addition to their powers and duties as officers and non-commissioned members, all of the powers and duties of constables, so long as they remain so called out, but they shall act only as a military body ..."[11] The effect of being deemed constables pursuant to this provision is two-fold. First, constables are peace officers as defined in section 2 of the *Criminal Code*. Second, the stipulation that they continue to act as a military body means that while they may have the powers and duties of constables, CF members are not to be considered constables in the service of the civil authorities and they are not required to exercise the powers and duties associated with that status at all times. They continue to be governed by the *CSD* and must obey the orders of their military superiors.

14. Article 22.01(2) of *Queen's Regulations and Orders* (*QR&O*)[12] prescribes those circumstances in which CF members with peace officer status are performing duties that actually require them to have the powers and duties of peace officers. The article provides that CF members will have the powers of peace officers when performing lawful duties resulting from a specific order or established military custom or practice related to any of the following matters: the maintenance or restoration of law and order, the protection of property, the protection of persons, the arrest or custody of persons, or the apprehension of persons who have escaped from lawful custody or confinement. Article 22.01(3) further provides that, for purposes of the definition of peace officer in the *Criminal Code*, when CF members are enforcing Canadian law during law enforcement assistance operations the duties they perform are to be considered as duties requiring them to have the powers and duties of peace officers.[13]

15. Examples of when CF members are enforcing Canadian law include a wide range of law enforcement assistance operations authorized pursuant to statute, orders in council or other legal instruments. For example, CF law enforcement support is provided to the Department of Fisheries and Oceans pursuant to an interdepartmental memorandum of understanding and

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[11] *National Defence Act*, R.S.C. 1985, c. N-5, s. 282.
[12] *QR&O* 22.01 was brought into effect following the 1970 FLQ crisis in order to allow CF personnel to be employed on law enforcement assistance duties outside the scope of Part VI of the *NDA* – Aid of the Civil Power.
[13] Military police are considered separately for purposes of the *Criminal Code* definition of peace officer. *QR&O* 22.01(2) applies to military police personnel, but their peace officer status has been judicially interpreted as being restricted to the powers and duties they may be required to exercise under that article in respect of persons subject to the *Code of Service Discipline* and to protection of defence establishments.

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involves enforcement of Canadian fisheries legislation. Coincidentally, pursuant to that legislation, CF members are also named as fisheries officers, another category of peace officer recognized in the *Criminal Code*.[14] Similarly, the CF provides law enforcement assistance to the RCMP counter-drug program in accordance with the provisions of a different MOU.[15] Pursuant to *QR&O* article 22.01(3) the duties performed by CF members under these legal instruments are such that they would be considered duties requiring the CF members to have the powers and status of peace officers.

16. CF personnel employed on other than law enforcement assistance operations, such as humanitarian assistance operations, do not have peace officer status and the law provides them with no additional authority or powers. In effect, their status is no different from any ordinary Canadian citizen. In certain situations, ordinary citizens are justified in taking action to enforce the law, particularly when it is necessary to act immediately in order to preserve the life of a victim of crime, or to come to the aid of a police officer in need of assistance. During operations other than law enforcement operations, CF members are not obliged to intervene to stop the commission of an offence and their chain of command may lawfully order them not to intervene to stop a criminal offence in a particular circumstance.

SECTION 5

DISCLOSURE OF INFORMATION AND CIVIL CLAIMS

17. When the CF provides support to law enforcement authorities a consequence can be that CF members may be required to provide evidence or testify as witnesses in criminal trials. In criminal prosecutions, all relevant witnesses will likely receive a subpoena to appear as a witness in the case. Accurate and complete records of all CF law enforcement assistance operations must be kept, including descriptions of contact with suspects and the identities of CF members involved in enforcement activities.

18. CF support to law enforcement authorities imposes obligations upon the CF to ensure the proper logging of information and the retention of evidence. In Canada there is a legal obligation on the prosecution to disclose all relevant evidence to the accused.[16] In cases when the CF assists law enforcement, care must be taken to retain original documents and records. This material may be required to be disclosed to an accused by the prosecution.

19. The disclosure of information collected by the CF during any domestic operations may cause some concern. In particular, there may be a request made by the prosecution or a civil litigant to gain access to information related to national security, or the possibility may arise of having to disclose intelligence information obtained from foreign sources that are subject to non-disclosure agreements. Before any documents or records are provided to the prosecution or disclosed in a civil proceeding, a review of the material shall be made to ensure that classified information is not disclosed without proper safeguards. For cases involving the disclosure of potentially injurious information, legal assistance should be sought from the Office of the Judge Advocate General. In some cases ‘potentially injurious information’ or ‘sensitive information’ (i.e. information relating to international relations, national defence, or national security), may be protected from disclosure. There is a specific procedure for obtaining judicial authorization for the non-disclosure of such information.[17] This procedure is handled by the federal Department of Justice. The application for non-disclosure must be made as soon as possible once such information is identified.

[14] See Chapter 7 of this manual.
[15] See Chapter 7 of this manual.
[16] In *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, the Supreme Court of Canada held that the Crown is required to produce to the defence all relevant information, whether or not the Crown intends to introduce it into evidence and whether or not it is inculpatory or exculpatory.
[17] *Canada Evidence Act*, R.S.C. 1985, c. C-5, s. 38.

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20. A claim against the Crown may arise as a result of CF actions during domestic operations. CF members participating in domestic operations may be subpoenaed to appear as witnesses in a civil claims proceeding or lawsuit. Members may only respond to such subpoena after obtaining direction from their chain of command.[18] Incidents involving damage or harm done to third parties by the CF during an operation must be thoroughly investigated and a complete report provided to the Director, Civil Claims and Litigation. No admission of liability may be made by any CF member unless authorized to do so.[19] In some cases, legal representation may be provided to CF members pursuant to a Treasury Board policy.[20]

SECTION 6

TREATMENT OF DETAINEES DURING DOMESTIC OPERATIONS

21. During assistance to law enforcement operations, the supported civilian law enforcement authorities will retain responsibility for the arrest of any persons that may be detained by CF members. CF members may be required to assist civilian police to arrest or detain persons suspected of having committed an offence or to prevent a breach of the peace. In some circumstances, the CF members may arrest or detain persons in the absence of civilian police when doing so is considered necessary to preserve life or prevent property damage.

22. With the exception of Military Police personnel, CF members are not trained on arrest procedures, including the requirement to caution individuals of their rights under the *Charter of Rights and Freedoms* when an arrest is made. While CF members normally should not be required to deal directly with detained persons, they must be aware that the act of arrest or detention imposes legal obligations on the persons making the arrest. As a minimum, any person apprehended or detained by CF members must be advised of the reason for their arrest or detention, and told that they will be advised of their legal rights by a civilian police officer upon delivery to the civilian police authorities. Detained persons shall be handed over to civilian authorities as soon as possible.

23. The force that may be employed by the CF member when making arrests will be as provided for in CDS authorized rules of engagement. When CF personnel arrest or detain a person, they become responsible to protect that person from any harm. To ensure the safety of the detainee as well as themselves, CF members may search a detainee for weapons or other means of inflicting harm on themselves or the CF members.[21] At all times, detained persons are to be treated humanely and with respect.

SECTION 7

CONCLUSION

24. CF participation in domestic operations may involve contact with the public. Duties associated with assisting civilian law enforcement authorities can result in contact involving the use of force. Having peace officer status when performing law enforcement duties will provide CF members with lawful justification for using force and legal protection from criminal and civil liability. Additionally, for those CF operations that lead to court proceedings, CF members, and their operational records, may be required as witnesses and evidence. The potential requirement for CF members to testify in criminal or civil proceedings gives rise to the need to maintain complete and accurate records of all CF domestic operations.

[18] *QR&O* 19.55 (Attendance as Witness in Civil Court).
[19] *QR&O* 19.41 (Admission and Acceptance of Liability).
[20] See Chapter 33 dealing with claims against the Crown and Chapter 38 in respect of Legal Assistance.
[21] See *Criminal Code, supra* note 1, s. 27 for the legal basis to use as much force as is reasonably necessary to prevent the commission of certain serious offences that would likely cause immediate and serious injury to any person.

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CHAPTER 10

INTRODUCTION TO INTERNATIONAL LAW

SECTION 1

INTRODUCTION

1. Formal legal regulation of international military operations and armed conflict has a lengthy historical pedigree dating back to the mid-nineteenth century. International law relating to military operations expanded dramatically in both scope and complexity throughout the twentieth-century. To understand the nature of these international law obligations, and to apply them effectively in the context of military operations, requires a prior understanding of important background concepts. This chapter provides this information, and addresses the sources, subjects and application of international law.[1]

2. International law developed to regulate the conduct of states in their relations with one another, establishing binding obligations that may give rise to a legal claim against the offending states if breached.[2] International legal obligations apply to all state organs, including their respective national armed forces.[3] As a result, the CF is bound to comply with all of Canada's international legal obligations. Failure of the CF or its individual members to comply with these obligations may give rise to the legal responsibility of Canada for the resulting breach. Increasingly, international law also applies directly to other international actors, non-governmental organisations and even individuals. In some circumstances, members of the CF may even bear individual responsibility for breaches of international law, particularly in the context of international criminal acts.

SECTION 2

DEFINITION OF INTERNATIONAL LAW

3. The following section discusses the process for determining the content of international legal obligations. There are three generally recognized primary sources of international law: treaties, international custom and general principles of law.[4] This section assesses each of these sources individually.

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[1] See John Currie, *Public International Law* (Toronto: Irwin Law, 2001), Hugh Kindred *et al.*, *International Law: Chiefly as Interpreted and Applied in Canada*, 6th ed., (Toronto: Emond Montgomery, 2000), Ian Brownlie, *Principles of Public International* Law, 6th ed. (Oxford: Oxford University Press, 2003), and Malcolm Shaw, *International Law*, 5th ed. (Cambridge: Cambridge University Press, 2003).

[2] See *Case Concerning the Factory at Chorzów (Claim for Indemnity) (Merits)* (1928), P.C.I.J. (Ser. A) No. 13 at 29 [*Chorzów Factory*], establishing that "[i]t is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation."

[3] There is no doubt that as a matter of law, a state bears responsibility for internationally wrongful acts committed by its own armed forces. See *British Claims in the Spanish Zone of Morocco* (1925), 2 R.I.A.A. 617. This responsibility attaches even if members of the armed forces act outside of their lawful authority, provided their actions are not purely personal in nature. See J. Crawford, *The International Law Commission's Articles on State Responsibility* (2002). In armed conflict, a strong case can be made that all the acts of the armed forces give rise to a duty for the State to pay compensation (if the acts are contrary to international law), even if they are purely private in nature (e.g. looting). See also Art. 3 Hague Convention No. IV, 1907 and the article by F. Kalshoven, "State Responsibility for the Acts of Armed Forces" (1991) 40 I.C.L.Q. 827.

[4] These three primary sources of international law are expressly delineated in the *Statute of the International Court of Justice*, 26 June 1945, Can. T.S. 1945 No. 7 [ICJ Statute], Art. 38(1) of which provides, in part:

> The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

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Treaties

4. The term 'treaty' refers to any agreement between two or more states that is intended to establish obligations as a matter of international law.[5] It does not matter what the document itself is called, so long as this intent exists and persons with the authority to bind their respective states adopt the treaty.[6] Thus, as a matter of international law, the UN Charter,[7] the Geneva Conventions,[8] their Additional Protocols,[9] and the Rome Statute of the International Criminal Court[10] all establish treaty obligations. Canada is a party to these and numerous other multilateral treaties regulating or relating to the conduct of military operations.[11]

5. The express consent of a state is required before it is bound to comply with any treaty obligations.[12] As a result, treaties generally create rights and obligations for some states and not others.

> (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
> (b) international custom, as evidence of a general practice accepted as law;
> (c) the general principles of law recognized by civilized nations;
> (d) subject to the provisions of Article 59 [limiting the binding effect of judgments to particular cases], judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Art. 38(1) does not establish a hierarchical relationship between the three primary sources of international law, although it does recognize subsidiary sources for assisting in their determination. Originally intended as an expression of the Court's jurisdiction, this provision is now generally recognized as a key statement of the sources of international law in all circumstances. See also Currie, *supra* note 1 at 79-84; Brownlie, *supra* note 1 at 3.

[5] Legal rules governing the creation and interpretation of treaty obligations are codified in the *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 U.N.T.S. 331 [Vienna Convention]. Drafted in 1969, this treaty entered into force in 1980. Canada is a party to this treaty. Most provisions of the Vienna Convention rest on similar customary international legal principles relating to treaty implementation. See Currie, *supra* note 1 at 106-7. Vienna Convention, Art. 2(1), addresses issues relating to a treaty's title. Relevant international agreements are discussed further in Chapter 22 of this manual. It is important to note that international treaties, including agreements, create legally-binding obligations between states, while other arrangements such as a Memorandum of Understanding (MOU) do not. This is elaborated on at Chapter 25 of this manual.

[6] See Vienna Convention, Arts. (2)(1)(a), 7.

[7] *Charter of the United Nations*, 26 June 1945, Can. T.S. 1945 No. 7 [UN Charter].

[8] *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 12 August 1949, 75 U.N.T.S. 31; *Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked of Armed Forces at Sea*, 12 August 1949, 75 U.N.T.S. 85; *Geneva Convention Relative to the Treatment of Prisoners of War*, 12 August 1949, 75 U.N.T.S. 135; and *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 75 U.N.T.S. 287.

[9] *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict*, 15 August 1977, UN Doc. A/32/144; and *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflict*, 15 August 1977, UN Doc. A/32/144.

[10] *Statute of the International Criminal Court*, UN Doc. A/CONF.183/9 (1998) [Rome Statute].

[11] Many of the most important multilateral treaties governing military operations to which Canada is a party are included in B-GG-005-027/AF-022, Collection of Documents on the Law of Armed Conflict, produced by the Office of the Judge Advocate General.

[12] Typically, the terms of a treaty will itself establish the mechanism by which states become bound by its provisions. While the process will vary, and each treaty must be assessed on its own terms, certain general requirements must always be present to establish binding obligations. A state must then signal its intent to be bound by the specific terms of the treaty, sometimes simply through signature but frequently through the more formal process of ratification. This process will generally be determined by the terms of the treaty. Signature alone is often not sufficient, although it may establish a preliminary legal obligation not to undermine the object and purpose of the treaty. See Vienna Convention, Art. 18(a). Typically, particularly for multilateral treaties, a state must also ratify a treaty, signalling its formal consent to be bound through an express written instrument to that effect. The ratification process is governed by domestic legal requirements, which vary from state to state. In Canada, ratification occurs through Order-in-Council, a process controlled by Cabinet, and does not require the approval of Parliament (although actual treaty implementation might require domestic legislative changes approved by this body). Once a state has signalled its intent to be bound, legal obligations will arise for it on the entry-into-force of the treaty. A treaty will enter into force pursuant to its own terms. Typically, this requires a specific number of state ratifications. Once this threshold is reached, the treaty establishes binding legal obligations for all state parties (i.e., ratifying states), but not for any other states. Depending on the terms of the treaty, it may be possible for other states to join the treaty regime after entry-into-force of the treaty (particularly if they are prior signatories). Once such obligations are established, state parties continue to be bound until the suspension or termination of the treaty, or their withdrawal.

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States that are bound by a treaty are considered to be 'states parties' to the treaty regime in question and must comply, in good faith,[13] with all of the provisions to which they have agreed.[14] In contrast, states that are not parties to a particular treaty regime are not required to comply with its provisions. Thus, in determining Canada's international legal obligations it is necessary to identify the treaties to which it is a party. In the case of many law of armed conflict (LOAC) treaties, which operate on the basis of reciprocity, it is important to determine whether other states are parties as well. In many LOAC treaties, such as Additional Protocol I (AP I), a state party would only be compelled to abide by the treaty if it was involved in an international armed conflict against another AP I party.[15]

6. Further, it is also important to consider Canadian state practice, as well as the practice of other states "in the application of the treaty which establishes the agreement of the parties regarding its interpretation," as well as any special meaning given to a term if the parties so intended.[16]

Customary International Law

7. Unlike treaty provisions, which only bind states parties, customary international law binds all states without requiring their prior express consent.[17] Customary legal principles result from the evolution of state practice and attitudes rather than from the formal negotiation of binding agreements. The 'crystallisation' of a norm into a binding principle of customary international law requires that two threshold criteria be met: established state practice supporting the principle and a belief by states generally, that this practice is legally required (*opinio juris sive necessitatis*).[18]

8. A number of factors must be assessed to determine the sufficiency of state practice supporting the existence of a particular norm. These will include its duration, uniformity and consistency.[19] Each factor provides evidence either supporting or undermining the existence of a customary norm, but none is necessarily determinative on its own. Rather, these factors, considered together, must illustrate the existence of established state practice supporting the norm in question.

9. However, state practice alone is not sufficient to establish a binding principle of customary international law. *Opinio juris* in support of the principle is also required; that is, the acceptance by States

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[13] The legal doctrine of *pacta sunt servanda* requires states to comply in good faith with their treaty obligations. See Vienna Convention, Art. 26. Clearly, without such an obligation, the international treaty regime would be weakened significantly.
[14] A state is bound by all provisions of a treaty to which it is a party, when it enters-into-force, unless the state enters a reservation limiting the application to it of particular terms. Reservations are typically permitted unless the treaty provides otherwise or they would be incompatible with the "object and purpose" of the treaty regime itself. Vienna Convention, Art. 19. See also *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, [1951] I.C.J. Rep. 15.
[15] B-GG-005-027/AF-022, *supra* note 11, identifies whether Canada is a party to each of the relevant treaties on the Law of Armed Conflict.
[16] See Vienna Convention, *supra* note 5, Arts. 31(3)(b) and 31(4).
[17] The legal doctrine of 'persistent objector' status suggests that a state may exempt itself from an otherwise-universal customary legal obligation if it objects clearly and consistently to the application of the norm from the outset of its crystallization. *Fisheries Case (United Kingdom v. Norway)*, [1951] I.C.J. Rep. 16. However, in practice, all states are typically bound to comply once a principle attains customary international legal status. It is nonetheless possible for a regional customary norm to develop, elevating regional legal obligations above general customary international requirements. For example, an argument may be advanced that this has occurred in the field of human rights in Europe. See *e.g.* Currie, *supra* note 1, chapter 5; and, Brownlie, *supra* note 1 at 4-11, for a more detailed discussion of the universal character of customary international law.
[18] See *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. The Netherlands)*, [1969] I.C.J. Rep. 3, 44.
[19] Duration refers to the length of time the practice in question has occurred, and the longer that period is the stronger its support. Uniformity addresses the qualitative aspect of state practice, asking how many states conduct themselves in any specific manner; while universality is not required, the more states the better, particularly if those states are directly affected by the norm in question. Consistency assesses the conduct of particular states, in order to determine the degree of their adherence to the purported norm. See Currie, *supra* note 1, chapter 5; and, Brownlie, *supra* note 1 at 4-11 for more detailed treatment of these and other factors applicable to customary state practice determinations.

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(express or implied), that the practice in question is required by law, or, in the case of a permissive rule, the assertion by States (again, express or implied), that the practice is permitted by law.[20]

10. While a state may not have ratified a particular treaty, it may still be bound by its substantive content by virtue of the fact that this content reflects customary international law. For example, a number of states have not ratified AP I but acknowledge that many of its articles reflect customary international law.[21]

11. A new customary legal principle can evolve from state practice violating an existing norm, provided the new practice is justified on the basis of legal arguments and supported by other members of the international community on this basis. This is an important element of the international legal order, providing a mechanism for the evolution of legal norms to reflect changing state practice and values, without requiring lengthy and cumbersome treaty negotiations or a global legislature. However, the resulting ambiguity means that while the general process for determining customary international obligations is fairly simple, its application in any given situation often involves complex legal analysis.[22]

12. Numerous customary international legal principles regulate or otherwise relate to the conduct of military operations. For example, the general legal prohibition on the threat or use of force in international relations exists as a matter of customary international law in addition to its treaty status pursuant to the UN Charter.[23] The minimum humane treatment obligations established in Common Article 3 of the Geneva Conventions are also considered to have customary legal status applicable to all subjects of international law.[24]

General Principles of Law

13. All legal systems rest upon basic principles that allow them to regulate conduct and settle disputes effectively and efficiently. The third primary source of international law, general principles of law,[25] recognizes the importance of this foundation, permitting the incorporation of these general

[20] Indicators of *opinio juris* are often more difficult to assess than evidence of state practice. Here, for example, one must look to specific legal justifications offered by state representatives for their actions (which are infrequent), and other factors, including state adoption of similar principles in treaty negotiations or condemnation of contrary practice by others as illegal

[21] See Michael J. Matheson, “Session one: The United States position on the relation of customary international law to the 1977 protocols additional to the Geneva Conventions,” (1987) 2 Am. J. Int’l. L. & Pol’y 415. See also Greenwood, “Customary Law Status of the 1977 Geneva Protocols” in Delissen and Tanja, eds., *Humanitarian Law of Armed Conflict* (Dordrecht: Maritinus Nijhoff, 1991) 93 and ”The First Geneva Protocol in the Gulf Conflict” in Rowe, ed., *The Gulf War 1990-91 in International and English Law* (London: Routledge and Sweet & Maxwell, 1993) 63.

[22] For example, customary legal obligations may arise from multilateral treaty regimes, particularly where non-state parties also recognize the legal status of the underlying principles. The resulting customary principle, even if identical to the treaty provision, will have separate existence as a matter of international law. This is important as jurisdictional limitations may prevent a particular judicial forum from applying particular legal obligations, as when the ICJ in *Nicaragua* was precluded from assessing American obligations under the UN Charter, but it nonetheless found American activities to have violated that state’s customary international legal obligations. *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, [1986] I.C.J. Rep. 14 [*Nicaragua*]. In some circumstances, state acquiescence in the conduct of other states may be sufficient to establish the existence of a principle of customary international law, if it signals acceptance of the legality of the practice in question.

[23] Art. 2(4) of the UN Charter prohibits the threat or use of force, subject to the express exceptions of self-defence (Art. 51) and UN Security Council enforcement measures (authorized pursuant under Chapter VII of the UN Charter). In *Nicaragua* at 101, the ICJ recognized that this prohibition had attained customary international legal status as well.

[24] Common Art. 3 of the four 1949 Geneva Conventions establishes a minimum standard of treatment for persons in non-international armed conflicts. As a matter of treaty law, this principle binds only states parties (and persons operating on their territory). However, the ICJ recognized the customary legal status of this principle in *Nicaragua* at 114, concluding that it established a ‘minimum yardstick’ for the conduct of any hostilities.

[25] The additional ICJ Statute qualification of ‘recognized by civilized nations’ simply reflects this treaty’s early-twentieth century genesis (building on the *Statute of the Permanent Court of International Justice* within the League of Nations). It does not establish a ‘civilization’ hierarchy between different states in the current international legal order, which is instead founded on their sovereign equality pursuant to Art. 2(1) of the UN Charter. See Currie, *supra* note 1 at 86.

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principles to ensure the effective functioning of the international legal order.[26] Some of the most important general principles of law that are recognized within the international context are the requirements that any breach of a legal obligation gives rise to a corresponding remedy for the aggrieved party,[27] and the obligation of all states to comply with their legal obligations in good faith.[28]

Subsidiary Sources

14. Numerous subsidiary sources are available for assistance in establishing the specific content of each of the three primary sources of international law (treaties, custom and general principles).[29] These may include judicial decisions[30] and academic writing[31] on international legal topics. Subsidiary sources do not establish legal obligations in and of themselves, but rather provide helpful and often authoritative tools to discern their content.

SECTION 3

SUBJECTS OF INTERNATIONAL LAW

15. International law developed to regulate the conduct of states in their relations with one another. It is not surprising, therefore, that states continue to be the primary subjects of international law. Indeed, until the twentieth century it was generally believed that international law only applied to states. However, the past few decades have seen limited international legal rights and obligations arise directly for other entities, including inter-state and non-governmental organisations, as well as individuals in some circumstances.[32]

States

16. States remain the pre-eminent international legal entities. Indeed, most international legal obligations are owed by states to other states.[33] Similarly, it is only the practice of states – and not other subjects of international law – which can directly create customary international law. Historically,

[26] General principles of law typically establish broad principles, rather than specific obligations in discrete areas of international law, and as such, have less relevance to determining specific operational law issues than treaties or customary law.
[27] See *Chorzow Factory*, *supra* note 2.
[28] The doctrine of *pacta sunt servanda*, discussed above in the context of international treaty obligations.
[29] For example, the ICJ Statute refers at Art. 38(1)(d) to "judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law," while recognizing that Court decisions have no express binding authority on third-party states.
[30] International judicial decisions typically do not establish binding legal obligations for states not party to the dispute in question. For example, Art. 59 of the ICJ Statute expressly states that "[t]he decision of the Court has no binding force except between the parties and in respect of that particular case." Nonetheless, international courts and arbitral panels, including the ICJ, refer frequently to prior judicial decisions, both their own and others, as 'subsidiary means' in order to assist in determining the content of state international legal obligations in subsequent cases. National court decisions, particularly those from the highest level (e.g. the Supreme Court of Canada), may also be of assistance in such determinations in some circumstances.
[31] For example, all of the treatises listed in note 3 of this chapter would be considered subsidiary sources of international law, useful for the purposes of determining its content but not establishing legal obligations in their own right.
[32] The direct application of international law results from possession of (limited) 'international legal personality.' This status permits claims directly by and against the entity in question, as well as its undertaking of specific legal obligations. Full international legal personality vests only in states. To the extent that other entities possess such status, it results from state extension of personality to them for a specific, limited purpose. For example, the UN possesses the personality necessary to permit it to fulfill the functions assigned to it by its member states. *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, [1949] I.C.J. Rep. 174 [*Reparation*].
[33] The beneficiaries of these obligations may in some circumstances be individuals, however. For example, most humanitarian and human rights treaties establish state-to-state legal obligations, but these apply for the clear benefit of individuals within the territory of states parties.

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international law has required four criteria for statehood: a permanent population, a defined territory, a system of government and the capacity to engage in international relations.[34]

17. The international legal order is premised on the sovereign independence of states.[35] Although sovereignty is not and has never been absolute,[36] states still maintain significant legal control over activities occurring within their territory. This is protected by international legal obligations for states to refrain from interference in the domestic affairs of other states[37] and a general legal prohibition on the threat or use of force in international relations.[38] States are free to limit the exercise of their sovereignty through international legal agreements.[39]

Non-state Actors

18. Recently, specific non-state actors have also acquired limited rights and obligations as a matter of international law. Some organisations, such as the UN, exist separately from their member states on the international legal plane. The UN possesses some rights, and the capacity to enforce them, at international law.[40] This limited international legal personality is necessary for the organisation to function in the manner intended by its member states. Some other organisations (e.g., the European Union and the North Atlantic Treaty Organisation), also possess limited international law personality, while others do not. Separate legal status will depend on the intention of states when creating the organisation in question.[41]

19. Individuals have also attained some rights and responsibilities at international law, particularly since the mid-twentieth century. This has been most notable in the fields of international human rights and criminal law. Under international criminal law, individuals including military commanders, face potential direct criminal sanction for violations of international law.[42]

SECTION 4

ENFORCEMENT OF INTERNATIONAL LEGAL OBLIGATIONS

20. A number of domestic and international legal mechanisms exist to facilitate and ensure compliance with international legal obligations and for international dispute resolution.[43] The International Court of Justice (ICJ) is the principal legal organ of the UN system, although its jurisdiction is limited to

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[34] The international legal definition of state characteristics is found in the 1933 *Convention on the Rights and Duties of States*, 26 December 1933 [Montevideo Convention]. With a small number of formal adherents (i.e., the United States and Latin America), this is a good example of the evolution of a norm of customary international law from principles delineated in a multilateral treaty. The Montevideo Convention standards are now generally accepted as requirements for statehood. See Currie, *supra* note 1 at 20.
[35] See UN Charter, Arts. 2(1) and 2(7). See also *Nicaragua*, *supra* note 22 at 111. Apart from minimum criteria such as these, however, the existence of a state does not require the establishment of diplomatic relations with it by other members of the international community, which is a voluntary sovereign act within the discretion of those states.
[36] The peace treaties of Westphalia in 1648, catalysts for the modern state system, themselves recognized limitations on state sovereignty with respect to treatment of religious minorities.
[37] *Nicaragua*, *supra* note 22 at 106.
[38] This general prohibition exists as a matter of both customary and treaty law. It is subject to express exceptions for self-defence and UN Security Council enforcement measures.
[39] International legal obligations are compatible with state sovereignty so long as they do not place an entity under the legal control of another state. *Customs Regime Between Germany and Austria* (1931), Advisory Opinion, P.C.I.J. (Ser. A/B) No. 41. See also Currie, *supra* note 1 at 25-8.
[40] *Reparation*, *supra* note 32.
[41] *Ibid*.
[42] See the Rome Statute, establishing individual international criminal sanctions for the commission of war crimes, crimes against humanity and genocide.
[43] All states have a legal obligation to settle their disputes peacefully and the UN Charter provides numerous mechanisms to facilitate this goal. See UN Charter, Chapter VI.

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cases where states expressly consent to its role.[44] The ICJ can also provide advisory opinions when requested to do so by the General Assembly or the Security Council.[45] Numerous other fora exist for the voluntary submission of international disputes for settlement, ranging from *ad hoc* bilateral mediation to institutionalized binding judicial mechanisms. Some human rights treaty arrangements even permit individuals to bring claims directly against their own states in an international forum.[46]

21. Criminal prosecution of individuals before international courts is also possible, albeit unusual. In the early 1990s, the UN Security Council established two *ad hoc* criminal tribunals to address major international crimes committed in the former Yugoslavia and Rwanda. In 2002, state parties to the Rome Statute established a permanent International Criminal Court (ICC) with jurisdiction over individuals accused of genocide, crimes against humanity and war crimes.[47]

22. Enforcement of international legal obligations may also take place pursuant to domestic legislation. In Canada, for example, federal legislation authorizing such enforcement includes: the *Code of Service Discipline* enacted pursuant to the *National Defence Act*, the *Geneva Conventions Act,* the *Crimes Against Humanity and War Crimes Act* and the *Criminal Code of Canada*.

SECTION 5

CONCLUSION

23. Extensive international legal principles apply to the conduct of military operations by the CF. These obligations are a result of Canada's international treaty commitments, the 'crystallisation' of customary international legal norms, and the application of general principles of law. As noted, while numerous mechanisms exist to address breaches of international law, most compliance with international legal obligations results from their voluntary acceptance by states, organisations and individuals.

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[44] The ICJ Statute at Art. 36 requires state acceptance of the Court's jurisdiction, providing a mechanism for *ad hoc* or blanket state acceptance. Most states have not granted the ICJ unlimited authority to adjudicate international legal disputes concerning them. For example, limitations on Canada's acceptance of the Court's jurisdiction prevented the Court from addressing a Spanish legal claim arising from Canada's 1995 seizure of the fishing vessel *Estai*. *Fisheries Jurisdiction Case (Spain v. Canada)*, Jurisdiction of the Court, 4 December 1998, [1998] I.C.J. Rep. 432. States may also authorize ICJ jurisdiction to address treaty disputes within the dispute settlement provisions of the treaty itself. See for example, the *Convention on the Prevention and Punishment of Genocide*, 9 December 1948, 78 U.N.T.S. 277, Art. IX.

[45] For example, see the Nuclear Advisory opinions and the Wall case.

[46] See the *Optional Protocol to the International Covenant on Civil and Political Rights*, 16 December 1966, 999 U.N.T.S. 171.

[47] As of 1 January 2005, 97 states had ratified the Rome Statute. The Rome Statute provides at Art. 13 that the International Criminal Court has jurisdiction over serious crimes committed by the nationals, or on the territory of, state parties, or in other cases specifically referred to it by the UN Security Council or by non-party states.

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CHAPTER 11

THE LEGAL FRAMEWORK FOR THE USE OF FORCE BY STATES

SECTION 1

INTRODUCTION

1. This chapter provides an overview of key sources of international law that provide Canada and the CF with a legal basis to use force (*jus ad bellum*). Section 2 identifies and discusses the key treaties, in particular the UN Charter,[1] and then provides an overview of the customary international legal basis supporting the use of force while deployed on international operations. Section 3 provides examples of various types of international operations conducted by the CF, pursuant to differing legal bases, including: self-defence, peacekeeping, enforcement of UN mandates and humanitarian intervention, as well as other non-UN sanctioned interventions. Each of these distinct legal bases will then be analyzed individually in subsequent chapters of this Part of the Manual.

SECTION 2

THE KEY LEGAL SOURCES

2. As noted in the preceding chapter entitled 'Introduction to International Law' the principal sources of international law include both treaty and customary international law. This applies equally to the international law on the use of force.

Key Treaties

3. The most influential treaty defining the international law on the use of force is the UN Charter. Other treaties such as the North Atlantic Treaty[2] (sometimes referred to as the Washington Treaty) and the North American Aerospace Defence Agreement[3] are also particularly significant to Canada. Building upon the UN Charter and customary international law, these latter regional defence agreements demonstrate how legal rights and obligations concerning the use of force are implemented and coordinated amongst allies.

The UN Charter – An Overview[4]

4. The UN Charter is a treaty that came into force in 1945 and emerged from the devastating experiences of World War II. The Preamble notes that the 'Peoples of the United Nations' are determined to "save succeeding generations from the scourge of war."[5] Key purposes of the UN, as defined in the UN Charter, are to "maintain international peace and security,"[6] "develop friendly relations"[7] and to "achieve international co-operation in solving international problems."[8]

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[1] *Charter of the United Nations*, 26 June 1945, Can. T. S. 1945 No. 7, online: UN <http://www.un.org/aboutun/charter/index.html> [UN Charter].
[2] See *North Atlantic Treaty*, 4 April 1949, online: NATO Publications <http://www.nato.int/docu/basictxt/treaty.htm> [*North Atlantic Treaty*]. See also chapter 25 for a discussion on NATO.
[3] *North American Aerospace Defence Agreement,* 12, May 1958, Can T.S. 1958 No. 9, online: NORAD <http://www.norad.mil/about_us/NORAD_agreement.htm> [NORAD Agreement]. See chapter 25 for a discussion on NORAD.
[4] See generally Conforti, *The Law and Practice of the United Nations*, 3rd ed. (The Hague: Kluwer Law International, 2005) c. 1; Simma, ed., *The Charter of the United Nations: A Commentary*, 2nd ed. (Oxford: Oxford University Press, 2002); White, *Keeping The Peace* (Manchester: Manchester University Press, 1997) c. 4 – 6; Goodrich and Hambro, *Charter of the United Nations, Commentary and Documents*, 2nd ed. (Boston: World Peace Foundation, 1949).
[5] UN Charter, *supra* note 1.
[6] *Ibid.*, art. 1(1).
[7] *Ibid.*, art. 1(2).
[8] *Ibid.*, art. 1(3).

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5. In pursuance of these purposes, the UN is guided by a number of key principles. The two most relevant to this chapter are: sovereignty and a general prohibition on the use of force.

6. As stated in the UN Charter, "The Organization is based on the principle of the sovereign equality of all its Members."[9] This is supported by the further provision that apart from enforcement measures authorized by the Security Council, "[n]othing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state…"[10]

7. Importantly, state sovereignty is reinforced by Article 2(4) - the general prohibition on the use of force.[11] Article 2(4) reads:

> All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

8. In order to facilitate the maintenance of "international peace and security" and ensure that "Members refrain from the threat or use of force," the UN Charter creates a collective security structure anchored by the UN's principal organs, the General Assembly and the Security Council. While there are many differences between these two bodies, relating to their structure and power, the most significant legal difference is that the Security Council has the international legal authority to make decisions that are binding upon all member states, including decisions that authorize the use of armed force against a particular state, whereas the General Assembly does not. It is this binding and potentially coercive power that distinguishes the Security Council from the General Assembly.

The General Assembly[12]

9. The General Assembly is composed of representatives from all Members of the UN, each with equal voting weight.[13] While it exercises UN budgetary authority, it does not have any binding authority in matters relating to the use of force or the maintenance of international peace and security. Rather its powers on matters relating to "the maintenance of international peace and security"[14] or "in respect of any dispute or situation"[15] are effectively restricted to: making "recommendations,"[16] "discussing"[17] or calling "the attention of the Security Council" to a particular matter.[18]

10. These powers of discussion and recommendation are further limited by the requirement to refer any questions "on which action is necessary" to the Security Council[19] and to refrain from making any recommendations with regard to a "dispute or situation" while the Security Council is exercising its powers or functions assigned to it.[20] Importantly, however, this limited power of the General Assembly to make

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[9] *Ibid., art.* 2(1).
[10] *Ibid., art.* 2(7). As will be discussed below, the principle of non-intervention within the domestic jurisdiction of any state is not prejudicial to Chapter VII enforcement powers.
[11] Article 2(4) applies to all force, regardless of whether it constitutes a technical state of war. See *e.g.* Malanczuk, ed., *Akehurst's Modern Introduction to International Law*, 7th ed. (New York: Routledge, 1997) at 309.
[12] See generally Conforti, *supra* note 4 at c.3, s. 3; Simma, *supra* note 4 at c. 4; White, *supra* note 4 at c. 4 –6; Sloan, *United Nations General Assembly Resolutions in Our Changing World* (Ardsley-on-Hudson: Transnational Publishers, 1991); Peterson, *The General Assembly in World Politics* (Boston: Allen & Unwin, 1986); Suy, "The Role of the United Nations General Assembly" in Abi-Saab, ed., *The Changing Constitution of the United Nations* (London: British Institute of International and Comparative Law, 1997) 55.
[13] UN Charter, *supra* note 1, art. 9(1).
[14] *Ibid.,* art. 11(2).
[15] *Ibid.,* art. 12(1).
[16] *Ibid.,* arts. 10 and 11(2). But see art. 14.
[17] *Ibid.,* art. 11(2).
[18] *Ibid.,* art. 11(3).
[19] *Ibid.,* art. 11(2).
[20] See art. 12(1). The scope of Articles 11(2) and 12(1) have been shaped over time by state practice and judicial decisions and will be discussed in more detail below. Nonetheless, it is important to remember that the role of the General Assembly is restricted to non-binding powers in matters relating to international peace and security.

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recommendations provides it with a legal basis to facilitate the creation of a 'peacekeeping' force, when the consent of the parties is obtained.[21]

The Security Council[22]

11. As noted, the Security Council has substantial binding authority. Through Article 24(1) of the UN Charter, "[m]embers confer on the Security Council primary responsibility for the maintenance of international peace and security." Binding legal authority is established by Article 25, which provides that "[t]he Members of the United Nations agree to accept and carry out the decisions of the Security Council."

12. The Security Council consists of 15 Members of the UN including 5 permanent Members and ten non-permanent Members.[23] Binding decisions of the Security Council usually take the form of a resolution and require an affirmative vote of nine Members "including the concurring votes of the permanent members."[24]

13. Under Chapter VI of the UN Charter entitled 'Pacific Settlement of Disputes,' there are a number of ways in which the Security Council may be informed of a matter relating to international peace and security. Any Member of the UN may bring 'any situation' to the attention of the Security Council in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security.[25] The General Assembly may also refer a matter to the Security Council. Alternatively, the Security Council may seize a matter on its own initiative.

14. In turn, pursuant to Chapter VI, the Security Council may 'recommend' procedures or methods to address the matter referred to it (though it may not take a binding 'decision' under this Chapter).[26] These might include recommendations on ways in which to settle disputes.[27] Importantly, this authority allows the Security Council to facilitate the creation of 'peacekeeping' forces when the consent of the relevant states is obtained.[28] The key legal point to emphasize in relation to Chapter VI is that the Security Council's powers are limited to making 'recommendations,' in contrast to its powers under Chapter VII which allow it to make binding 'decisions.'

15. Chapter VII of the UN Charter, entitled 'Action with Respect to Threats to the Peace, Breaches of the Peace and Acts of Aggression' – empowers the Security Council to take action up to and including measures involving the use of armed force, in specific situations.

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[21] The legal basis for the facilitation by the General Assembly for peacekeeping will be discussed in Part IV, chapter 14, Section 3.

[22] See generally Conforti, *supra* note 4, c. 3, s. 2; Simma, *supra* note 4 at c. 5; Sohn, "The Security Council's Role in the Settlement of International Disputes" (1984) 78 AJIL 402; Beagan, "Developments in the United Nations Security Council" (2001) 7 New Engl Int'l & Comp Law Annual 209; Bailey and Daws, *The Procedure of the UN Security Council*, 3rd ed. (Oxford: Oxford University Press, 1998); Kirgis, "The Security Council's First Fifty Years" (1995) 89 AJIL 506.

[23] UN Charter, *supra* note 1, art. 23. The permanent Members are China, France, Russia, United Kingdom and the United States. Russia continued the permanent membership of the former USSR on the latter's dissolution, with the support of the other members of the Commonwealth of Independent States. See Malanczuk, *supra* note 11 at 373. The 10 non-permanent Members are elected for a non-renewable term of two years.

[24] *Ibid.*, art. 27. This effectively provides each permanent Member with a veto on non-procedural Security Council decisions. As with many other provisions of the Charter, state practice and judicial decisions have influenced how "affirmative" and "concurring" votes are interpreted. An abstention by a permanent Member is not deemed to be non-concurring. Only an express negative vote constitutes non-concurrence and prevents a resolution from passing regardless of the level of support from other Security Council Members. See *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970),* Advisory Opinion, [1971] I.C.J. Rep. 16 at 22. Under Article 27(3) each permanent Member of the Security Council has a veto on non-procedural questions. The veto in Article 27(3) is negative vote by a permanent Member of the Security Council and results in the failure of the Security Council to adopt a draft resolution thereby preventing the Council from taking a decision on a particular matter. See Simma, Brunner and Kaul, "Article 27" in Simma, *supra* note 4 at 514.

[25] *Ibid.*, art. 35(1).

[26] *Ibid.*, art. 36.

[27] *Ibid.*, art. 37(2).

[28] The legal basis for the Security Council to facilitate the creation of a peacekeeping force is discussed in Part IV, chapter 14, Section 3.

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16. Following a determination by the Security Council of the existence of any "threat to the peace, breach of the peace, or act of aggression," the Security Council then has a number of available options under the authority of Chapter VII.[29]

17. These options include the legal authority to: "call upon the parties concerned to comply with such provisional measures as it deems necessary or desirable,"[30] take "measures not involving the use of armed force... to give effect to its decisions" (including, e.g., embargoes, sanctions or the severance of communications or diplomatic relations)[31] or "take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security."[32] In short, by making an 'Article 39 determination,' the Security Council, triggers its own authority to take measures up to and including the use of armed force in order to give effect to its decisions and to maintain or restore international peace and security.

18. Importantly, the mechanism originally designed by the Charter's drafters to 'give effect' to binding Security Council decisions has never been realized in practice. It was initially envisioned that Members would make available, portions of their armed forces to the Security Council, pursuant to formal agreements with the UN[33] and also "hold immediately available national air-force contingents for combined international enforcement action."[34] The strength, degree of readiness and plans for their use were to have been defined by the above-mentioned agreements. Decisions regarding the application of armed force were to have been made by the Security Council with the assistance of a "Military Staff Committee ... responsible under the Security Council for the strategic direction of any armed forces placed at the disposal of the Security Council."[35] To date, no state has concluded an 'Article 43 agreement' with the UN.

19. However, the absence of Article 43 agreements, while it means that no state can be *required* to make forces available for a United Nations enforcement operation, does not prevent states *voluntarily* contributing units of their armed forces for enforcement action. Starting with the response to the Iraqi invasion of Kuwait in 1990[36], the Security Council has on several occasions authorized the use of force by groups of states or standing alliances such as NATO. The practice has been for the use of force to be undertaken by national forces under national command, rather than by UN forces as such. The UN Charter provides that such action may be taken by all or some Members as determined by the Security Council.[37] Action may be undertaken through the use of "international agencies"[38] or "regional arrangements or agencies."[39] However, the use of regional arrangements for enforcement action can only occur within the limits set by "the authorization of the Security Council."[40]

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[29] *Ibid.*, art. 39. Chapter 15, Section 3 will discuss how the term "threat to the peace, breach of the peace, or act of aggression" has been defined and developed. For further reading on Article 39 and its application see Freudenschuβ, "Article 39 of the UN Charter Revisited: Threats to the Peace and the Recent Practice of the UN Security Council" (1993) 46 Austrian J Publ Intl Law, 1; Gill, "Legal and Some Political Limitations on the Power of the UN Security Council to Exercise its Enforcement Powers Under Chapter VII of the Charter" (1995) 26 NYIL 33.
[30] *Ibid.*, art. 40.
[31] *Ibid.*, art. 41.
[32] *Ibid.*, art. 42.
[33] *Ibid.*, art. 43. See Bowett, *United Nations Forces, A Legal Study of the United Nations Practice* (London: Stevens & Sons, 1964); Seyersted, *United Nations Forces in the Law of Peace and War* (Leyden: A.W. Sijthoff, 1966); Halderman, "Legal Basis for United Nations Armed Forces" (1962) 56 AJIL 971. For a discussion on a United Nations Standing Force and United Nations Standby Force see Miller, "Universal Soldiers: U.N. Standing Armies and the Legal Alternatives" (1993) 81 Georgetown Law Jn. 773; Sise, "Illusions of a Standing United Nations Force" (1995) 28 Cornell Int'l Law Jn. 645; Scheffer, "United Nations Peace Operations and Prospects for a Standby Force" (1995) 28 Cornell Int'l Law Jn. 649; Morrison, "The Theoretical and Practical Feasibility of a United Nations Force" (1995) 28 Cornell Int'l Law Jn. 661; Telhami, "Is a Standing United Nations Army Possible? Or Desirable?" (1995) 28 Cornell Int'l Law Jn. 673.
[34] UN Charter, *ibid.*, art. 45.
[35] *Ibid.*, arts. 46 and 47. The Military Staff Committee was to have consisted of the Chiefs of Staff of the permanent Members of the Security Council.
[36] See SCR 678 (1990) – coalition forces acted pursuant to its authorization.
[37] UN Charter, *supra*, note 1, art. 48(1).
[38] See *ibid.*, art. 48(2).
[39] See *ibid.*, art. 52(1).
[40] See *ibid.*, art. 53. However, an exception is contained in Article 53 for measures against "any enemy state", defined in Article 107 as "any state which during the Second World War has been any enemy of any signatory to the present Charter." This is generally

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20. Finally, and perhaps most importantly, unless the Security Council takes 'necessary measures' the collective security structure does not "impair the inherent right of individual or collective self-defence when an armed attack occurs against a Member…"[41]

UN Collective Security Structure: Summary

21. Because the collective security structure envisaged by the drafters of the UN Charter did not develop and the UN has no military enforcement capacity of its own, the Security Council has instead relied upon the authorization of enforcement activities to "coalitions of the willing" or "regional agencies" that have typically retained authority for planning as well as "strategic direction." The current enforcement practice is generally for the Security Council to authorize Member States to carry out enforcement actions against states or other entities by way of resolutions issued under the authority of Chapter VII.[42]

22. The other principal method currently used by the UN to facilitate the deployments of Member States' military forces to other states is through the creation of peacekeeping forces. As with the current method of taking enforcement action, 'peacekeeping' was never envisaged by the drafters of the Charter. Like enforcement action, however, the legal authority to facilitate the creation of peacekeeping is firmly based on the legal authority found in the Charter. As discussed in detail in chapter 14, the legal basis for peacekeeping rests on the consent of the parties coupled with the authority of the General Assembly or the Security Council to make 'recommendations' in matters relating to the purposes of the UN, including the pacific settlements of disputes in the maintenance of international peace and security.

23. The current methods by which enforcement action and peacekeeping operations are organized were never expressly provided for in the UN Charter or contemplated by its drafters. This is not to say, however, that their legal bases do not rest on the key provisions of the Charter. As will be discussed in subsequent chapters, key aspects of the collective security structure such as the general prohibition on the use of force (Article 2(4)), the right of self-defence (Article 51), peacekeeping (generally Chapter VI) and peace enforcement (generally Chapter VII) have all developed and evolved over time through state and organisational practice.

24. The UN Charter is indeed a 'living document' that must be interpreted over time, in light of factors such as state practice and judicial decisions. As noted in Chapter 10 (Introduction to International Law), interpretation of treaties can be modified over time by the practice of states. Consequently, as a result the dynamic political context that transpired since the UN Charter's inception[43], the various political developments have influenced the role and degree of activity of both the General Assembly and Security Council. This, in turn, has influenced legal interpretation of the UN Charter. This process has sustained new practices with respect to: the general prohibition on the use of force, self-defence and the legal basis for peacekeeping and enforcement action.

Other Treaties

25. Other treaties are relevant when identifying the legal framework on the use of force during international operations. Most notably for Canada these include defence alliance treaties such as the North Atlantic Treaty and the North American Aerospace Defence Agreement. These treaties both create defence arrangements that may be utilized for the exercise of self-defence under Article 51 of the UN Charter or customary international law.[44] These treaties will be further discussed in Part V, chapter 25,

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viewed as a historical anachronism reflecting the origins of the UN as an arrangement of the Allied states during the Second World War. (*i.e.* the Axis powers were not original Members).

[41] *Ibid.*, art. 51. The right of self-defence will be discussed in Part IV, chapter 13.

[42] The legal framework in which the Security Council authorizes enforcement actions will be discussed in Part IV, chapter 15.

[43] Some of the more significant shifts in political context have included the initial dominance of the Allied wartime alliance as drafters, the Cold War (and grid locked Security Council) which first witnessed a General Assembly led by the West then later the nonaligned and "postcolonial" nations, the thaw of the Cold War and activation of the Security Council in 1990 with the "Gulf War".

[44] See *North Atlantic Treaty*, *supra* note 2, art. 5.

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'regional arrangements' contemplated by Article 53 of the UN Charter.[45] Legal aspects of the NATO and NORAD treaty relationships will be discussed in Chapter 25.

26. Treaties such as those establishing NATO and NORAD create a legally binding obligation between States to collectively implement the legal rights to use force that may arise under the UN Charter or customary international law. A key point to remember is that, unlike the UN Charter, these treaties do not in themselves create a legal basis upon which to use force.

27. Many other treaties may also be applicable to and shape international operations, including but not limited to: the *UN Convention on the Law of the Sea* (UNCLOS), the *Chicago Convention on International Civil Aviation* and the International Covenant on Civil and Political Rights (ICCPR).

Customary International Law

28. International law, including the law governing the use of force, consists of not only treaty law but also customary international law. As will be recalled, customary international law is created through state practice and *opinio juris* or the belief by states that their actions are legally required.[46]

29. While the UN Charter is certainly one of the most, if not the most significant, legal source of international law on the use of force it is very important to remember that it is not the sole source of law. Importantly, customary international law creates a separate and distinct basis upon which states may use force in defined circumstances.[47]

30. Customary international law may provide a legal basis to use force in a variety of international operations including: self-defence, peacekeeping, humanitarian intervention and intervention based on invitation or host state consent. Additionally, as alongside the UN Charter, customary law also establishes a general prohibition on the use of force in international relations.[48]

31. Consequently, there may very well be operations where there is overlapping or a mutually reinforcing legal basis where both the UN Charter and customary international law apply.[49] The relationship can be quite complex and the operational commander and legal advisor must be able to precisely identify the various legal bases in order to define the legal parameters or scope of operations.[50]

SECTION 3

CONCLUSION

32. Across the 'spectrum of conflict,' the CF has deployed on a variety of international operations relying on treaty law (the UN Charter) or customary international law or a combination of both.

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[45] For example the utilization of NATO as a "regional arrangement" for Implementation Force (IFOR) and Stabilization Force (SFOR) operations in the Former Yugoslavia.
[46] *North Sea Continental Shelf (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands)*, [1969] I.C.J. Rep. 3.
[47] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, [1986] I.C.J Rep. 14 [*Nicaragua Case*].
[48] *Ibid.*
[49] Some states, including Canada have taken part in UN Security Council sanctioned operations which have also, simultaneously been supported by some customary legal basis. For example Security Council Res 678 (1990) authorized the use of "all necessary means to…" while Canada and many states could have also relied on the exercise of collective self-defence based on a request for assistance by Kuwait. Similarly, the CF deployed to Bosnia under the authority of SCR 1031 (1995) which created the authorization to use all necessary means to implement Annex 1A of the Dayton Accord. The use of force to implement Annex 1A as well as the authority to enter Bosnia was also the product of State consent.
[50] For example, the CF has deployed into Afghanistan on the basis of three distinct legal bases since 2001: the inherent right of individual and collective self-defence (as reaffirmed) recognized in SCR 1368 (2001) and 1373 (2001), the "consent" of the new post Taliban government of Afghanistan and also as part of the International Security Assistance Force (ISAF) to implement the military aspects of the Bonn Agreement as initially authorized in SCRs 1386 (2001) and subsequent SCRs. Not all CF units deployed under the authority of all three distinct legal bases. Knowing the legal bases upon which your unit is acting, or not acting, will have operational impact on the way in which force is authorized in the OPLAN, ROE or Targeting Directive.

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33. From a legal perspective the key types of international operations that the CF has participated in include: self-defence[51], traditional peacekeeping[52], UN sanctioned enforcement action[53] often referred to as complex peace support and stabilization operations, maritime interdiction operations[54], protection of property abroad[55] including evacuation operations or intervention by host state invitation/consent.[56]

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[51] For example, the exercise of individual and collective self-defence as part of the "Campaign Against Terrorism" in response to the tragic events of 11 September 2001.
[52] For example, operations in Eritrea in 2000.
[53] For example, IFOR/SFOR operations from 1996-2004 in Bosnia, East Timor in 1999 and ISAF operations in Afghanistan in 2003-2005.
[54] For example, the naval interdiction of vessels based on flag state consent as contemplated within the framework of the Proliferation Security Initiative. See chapter 20, Law of the Sea, in this Manual.
[55] For example, the recovery of CF property on board the GTS Katie in 2000.
[56] For example, Disaster Assistance Response Team interventions in Honduras in 1998, Turkey in 1999 and Sri Lanka in 2005.

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CHAPTER 12

THE GENERAL PROHIBITION ON THE USE OF FORCE IN INTERNATIONAL RELATIONS

SECTION 1

INTRODUCTION

1. The principle that the use of force is generally prohibited as a means of resolving differences is the starting point for any legal review of the international law relating to international operations. As with most general rules, there are exceptions. This chapter explores the general rule on the prohibition of force. Subsequent chapters explore the exceptions.

2. This chapter will first map out the legal framework of the general prohibition on the use of force, addressing some contemporary legal issues that help refine the legal scope and ambit of what is being discussed. It concludes by highlighting the relevance of this topic to CF planning, authorization and conduct of operations. This is an issue that is the subject of both scholarly review[1] and judicial review.[2]

SECTION 2

HISTORICAL CONTEXT ON THE GENERAL PROHIBITION ON THE USE OF FORCE

3. The Preamble of the UN Charter begins, "We the peoples of the United Nations determined to save succeeding generations from the scourge of war, which twice in our lifetime brought untold sorrow to mankind..." Clearly, the drafters – predominantly the Allied powers of World War II – wished to avoid the international failure that had led to this conflict.[3] The UN Charter's attempt to create a general prohibition on the use of force by states followed a long historical process of similar attempts by previous generations, perhaps most notably the *Covenant of the League of Nations*[4] and the 1928 Kellogg-Briand Pact.[5] The UN Charter, and Article 2(4) in particular, had its historical underpinnings and evolutionary basis in the Covenant and the experiences of World War II. Indeed, earlier drafts of the UN Charter had been completed by 1942. One such draft began by noting that the overarching purpose was the desire to prevent "the use of force or threats of force in international relations except by authority of the international organization itself."[6] This general prohibition became the UN Charter's cornerstone, and was the product of a "... deeply rooted rule of international law embodying a fundamental presumption that the use of force by states in pursuit of their national interests poses an

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[1] See generally Ian Brownlie, *International Law and the Use of Force by States* (Oxford: Oxford University Press, 1963); Edward Gordon, "Article 2(4) in Historical Context" (1985) 10 Yale JIL 271; Christine Gray, *International Law and the Use of Force*, 2nd ed. (New York: Oxford University Press, 2004) c. 2; Peter Malanczuk, ed., *Akehurst's Modern Introduction to International Law*, 7th ed. (New York: Routledge, 1997) c. 22; Thomas M. Franck, *Recourse to Force: State Action Against Threats and Armed Attacks* (Cambridge: Cambridge University Press, 2002) c. 2.

[2] See *Case Concerning the Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, [1986] I.C.J Rep. 14; *Oil Platforms (Islamic Republic of Iran v. United States of America)*, [1996] I.C.J. Rep 803; *Legality of the Threat or Use of Nuclear Weapons,* Advisory Opinion, [1996] I.C.J. Rep. 66; *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, [1980] I.C.J. Rep. 3; *DRC v. Uganda* [2005] I.C.J. Rep.

[3] See Bruno Simma, ed., *The Charter of the United Nations: A Commentary*, 2nd ed. (Oxford, Oxford University Press, 2002) at 114; Brownlie, *supra* note 1 at c.1-6; Ian Brownlie, "The United Nations Charter and the Use of Force, 1945-1985" in Antonio Cassese ed., *The Current Legal Regulation of the Use of Force* (Dordrecht: Martinus Nijhoff Publishers, 1986) at 491; Malanczuk, *supra* note 1, c. 2.

[4] *Covenant of the League of Nations (Including Amendments adopted to December, 1924)*, 14 February 1919, online: Yale Law School <http://www.yale.edu/lawweb/avalon/leagcov.htm> [Covenant].

[5] *1928 Kellogg-Briand Pact*, 27 August 1928, online: Yale Law School <http://www.yale.edu/lawweb/avalon/kbpact/kbpact.htm> [Kellogg-Briand Pact].

[6] Gordon, *supra* note 1 at 274.

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unacceptable danger to the larger community."[7] Article 2(4) is now considered to be reflective of customary international law.[8]

4. Some of the most significant ideas that shaped what was eventually to become Article 2(4) included the desire to regulate all 'use of force' – not simply war[9], procedurally restrict unilateral decisions to use force in situations of self defence only and ensure that any recourse to force beyond self defence was collectively, not individually, determined.

SECTION 3

THE RULE

5. As noted in the previous chapter, Article 2(4) states "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

6. This general prohibition on the use of force is also seen as reflective of customary international law.[10]

SECTION 4

KEY CONTEMPORARY OPERATIONAL LAW ISSUES: THE SCOPE OF ARTICLE 2(4)

7. As with any UN Charter provision or general statement of a legal rule, the exact meaning and precise scope of Article 2(4) will undoubtedly continue to be the subject of some debate, for a variety of reasons.[11] First, as a simple textual matter, words or phrases may often sustain more than one meaning.[12] Second, as noted in the previous chapter, the UN Charter and international law in general is dynamic, not static, and is shaped by state practice, opinio juris and judicial decisions.[13]

8. This section provides a brief overview of some of the more significant legal issues that have arisen from Article 2(4) and its customary law equivalent.

Operations Against the Territorial Integrity or Political Independence

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[7] *Ibid.* at 274 - 275.

[8] See generally Brownlie, *supra* note 1 at 251 - 256.

[9] The regulation of 'war' in the Covenant and Kellogg-Briand Pact, as opposed to all types of force (e.g. reprisals, blockades and self help) was seen by the UN Charter's drafters as a 'loop hole' that needed to be addressed.

[10] See especially *Nicaragua Case*, *supra* note 2. Reference to key evidence supporting this principle frequently includes two General Assembly resolutions: *The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, GA Res. 2625(XXV), UNGAOR, 25th Sess., Supp. No. 28, UN Doc. A/8082 (1970) 121; and the *Definition of Aggression*, GA Res. 3314 (XXIX), UNGAOR, 29th Sess., Supp. No. 19, UN Doc. A/9619 and Corr. 1 (1974) 142.

[11] For further reading on the scope of Article 2(4) see also Simma, *supra* note 3 at 112; Stuart Ford, "Legal Processes of Change: Article 2(4) and the Vienna Convention on the Law of Treaties" (1999) 4 Journal of Armed Conflict Law 75; John Becker, "The Continuing Relevance of Article 2(4): A Consideration of the Status of the UN Charter's Limitations on the Use of Force" (2004) 32 Denv. J. Int'l Law & Policy 583.

[12] See Rosalyn Higgins, *Problems and Process: International Law and How We Use it* (Great Britain: Oxford University Press, 2000) at 240 where she notes "almost every phrase in Article 2(4) and Article 51 is open to more than one interpretation."

[13] Gray, *supra* note 1 at 4. As Gray has framed the issue "should the *Charter* be seen as open to dynamic and changing interpretation on the basis of subsequent state practice, or should the prohibition on the use of force in Article 2(4) rather be seen as having a fixed meaning, established in 1945 on the basis of the meaning of the words at that date in light of the preparatory works and the aims of the founders?" This comment by Gray is equally applicable to other key provisions of the United Nations Charter, most notably, Article 39 (threat to the peace), Article 41 (measures not involving the use of armed force), Article 42 (measures involving the use of armed force) and Article 51 on self defence. Also, as noted by Franck, *supra* note 1 at 6, "Ordinary treaties are not 'living trees' but international contracts to be construed in strict accord with the black-letter text. Not so the Charter…Each principal organ and the members thus continuously interpret the Charter and do so in accordance with the requisites of ever-changing circumstances."

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9. One of the more controversial aspects of Article 2(4) has focused on the legal wording of "... against the territorial integrity or political independence of any state..." As a general rule, states are prohibited from entering the territory or remaining within the territory of another, through use or threat of force and without the state's consent.[14] The absence of an intention to annex territory or to remain in it for any length of time will not prevent a military incursion from being a violation of the 'territorial integrity' of the other state.

10. Whether an intervention involving the use or threat of force does, or does not, violate the territorial integrity of a state is fundamentally a question of fact. However, if force is used on another state's territory, this does not necessarily mean that the action or intervention is unlawful. For example, such action may be justified legally on many grounds. This includes the exercise of self defence, either against the target state or in the context of a threat that another state was unable or unwilling to contain, as well as situations where interventions were sanctioned by a Chapter VII Security Council resolution.[15] In short, whether a state's actions in sending its forces onto the territory of another state constitutes a violation of the general prohibition on the use of force will frequently depend upon whether it can bring its action within one of the exceptions to that general prohibition.

11. It is also important to remember that Article 2(4) also prohibits any threat or use of force by a state in its international relations which, although not directed against the territorial integrity or political independence of another state, is for some other reason inconsistent with the purposes of the United Nations. Since the foremost purpose of the United Nations is the maintenance of international peace, it is likely that any use or threat of force by a state in its international relations will be held to violate Article 2(4) unless it can be justified by reference to one of the recognized exceptions considered in the following chapters.

Threat or Use of Force

12. Another area of discussion has focused on the meaning of "threat or use of force."[16] As a general comment, the 'force' referred to in Article 2(4) is considered to be restricted to military or armed force and not other types such as political, economic, or psychological force.[17] As technology develops, the military's use of non-kinetic forms of force, particularly within the sphere of a computer network attack, will continue to be the subject of legal debate concerning the definition of 'force.'[18]

13. The precise scope of what constitutes a 'threat' has been the subject of some debate. One definition of a 'threat' that has gained acceptance is: an express or implied promise by a government of a resort to force, conditional on non-acceptance of certain demands of that particular government.[19] In these circumstances, "if the promise is to resort to force in conditions

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[14] See *Corfu Channel Case*, [1949] I.C.J. Rep. 4.

[15] The intervention into the territory of a state that is unwilling or unable to contain a threat that is of a sufficient level to trigger a right of self defence does not violate international law but rather is the lawful exercise of the right of self defence. Within the context of Afghanistan and military operations against the Taliban and Al Qaeda see generally Christopher Greenwood, "Pre-emptive Force: Afghanistan and Iraq" 4 San Diego Int'l L.J. (2003) 7-37; Sean Murphy, "Terrorism and the Concept of 'Armed Attack' in Article 51 of the U.N. Charter" (2002) 43 Harvard Int'l L.J. 41; Giorgio Gaja, "In what Sense was there an Armed Attack?" (2002) EJIL, Discussion forum (http://www.ejil.org/forum_WTC/ny-gaja.html); and Eric Myjer and N.D. White, "The Twin Towers Attack: An Unlimited Right to Self Defence?" (2002) 7 J. Confl. & Sec. L. 5. See also the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (2004), Advisory Opinion, I.C.J. No. 131.

[16] According to the prohibition contained in Art. 2(4), it is not only the use of force that is prohibited but also the threat of the use of force. See the *Legality of Nuclear Weapons* Case, *supra* note 2 at 823.

[17] See Roling, *supra* note 1 at 4; Brownlie, *supra* note 1 at 361-362; Yoram Dinstein, *War, Aggression and Self Defence*, 4th ed. (Cambridge: Cambridge University Press, 2006) at 81 who holds that psychological or economic pressure does not come within the purview of the prohibition on the use of force contained in Article 2(4) unless it is coupled with at least the threat of the use of force. See also Albrecht Randelzhofer, "Article 2(4)" in Simma, *supra* note 3 at 112.

[18] See chapter 24 on Information Operations. See also Michael Schmitt and Brian O'Donnell, eds., "Computer Network Attack and International Law" (2002) 76 International Law Studies; Michael Schmitt, "Computer Network Attack and the Use of Force in International Law: Thoughts on a Normative Framework" (1999) 37 Col Transntn'l L. 885.

[19] Brownlie, *supra* note 1 at 364.

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in which no justification for the use of force exists, the threat itself is illegal."[20] However, it is not a threat of force for a state to make clear that it will defend itself if it is attacked and the policy of deterrence has not been considered to contravene the general prohibition stated in Article 2(4).

Article 2(4) and Host Nation Consent

14. Another issue concerns the relationship between Article 2(4) and the consent of the host state.[21] This issue may arise in a number of circumstances, including the stationing of a foreign military within the territory of a host state and the acceptance of an invitation to use armed force within the host state to assist the host government.

15. Consent may form a valid legal basis for international military operations. It is one of the exceptions to the general prohibition on the use of force. There are also customary international law exceptions and exceptions founded in Chapter VII of the UN Charter (i.e., Article 42 and Article 51). Under customary international law, the host state may consent to a foreign military entering its territory and, in some cases, using force. The consent to position a foreign military force within a host state often takes the form of an agreement or arrangement (e.g., a treaty in the form of a Status of Forces Agreement (SOFA), an exchange of Diplomatic Notes or a Memorandum of Understanding (MoU).[22]

16. At times an agreement or an arrangement between states can be done rather informally and routinely, particularly those relating to short-term positioning or transit through airspace or territorial waters.

17. A foreign state may be invited into a host state with the express purpose of using armed force. This can occur during an armed conflict, internal security operations or disturbances of lesser intensity. As a general rule, states may accept an invitation from another state to assist it in a variety of operations such as peacekeeping, rescuing nationals or quelling internal disturbances. Consensual intervention in full-fledged civil wars has less clear support at international law, as these situations may raise concerns relating to whether the correct lawful authority has given its consent and whether such an intervention would conflict with the right of self-determination.[23]

18. Additionally, consent to enter and remain within a host state can occur without a Chapter VII authorization. Consequently, the legal relationship between the various legal bases to enter a country can be complex and layered.[24]

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[20] *Ibid.*
[21] For further information on Host State Consent and the Use of Force see Louise Doswald Beck, "The Legal Validity of Military Intervention by Invitation of the Government" (1985) 56 BYIL 189; Rein Mullerson, "Intervention by Invitation" in Lori F. Damrosch and Scheffer, eds., *Law and Force in the New International Order* (Boulder: Westview Press, 1991); Christine Gray, *Re-Leashing the Dogs of War: International Law and the Use of Force* (New York: Oxford University Press, 2003) at 13; Christine Gray, "Case Study: Host-State Consent and United Nations Peacekeeping in Yugoslavia" (1996) 7 Duke J. Comp. & Int'l L. 241; David Wippman, "Military Intervention, Regional Organizations, and Host State Consent" (1996) 7 Duke J. Comp. & Int'l L. 209.
[22] Status of Forces Agreements (SOFAs) are discussed in Part V, Chapter 24, Memorandums of Understanding (MoU) are discussed in Part V, Chapter 25. For a useful legal overview of treaties including SOFAs and the differences when compared to MOUs see Anthony Aust, *Modern Treaty Law and Practice* (Cambridge: Cambridge University Press, 2000) at c. 2 - 3.
[23] Both these types of scenarios were particularly relevant during the Cold War where issues about the invitation from 'puppet regimes' arose or when national liberation movements were fighting racist regimes. See Brownlie, *supra* note 1; Oscar Schachter, "The Right of States to Use Armed Force" (1984) 82 Mich L. Rev. 1620 at 1644-46; and Higgins "The Attitude of Western States Towards Legal Aspects of the Use of Force" in Cassese, *supra* note 3 at 435-438.
[24] For example, IFOR/SFOR operations occurred both under the authority of SCR 1031 (1995) as well as the consent of the relevant states as expressed through the Dayton Accord and the SOFA between the relevant states and NATO. In other circumstances, a Chapter VII UN mandate may oblige the host or target state to apply the UN Model SOFA as was the case when the CF deployed to Haiti under SCR 1529 (2004) or when CF members of SHIRBRIG deployed to Sudan under SCR 1590 (2005). As noted, at times, the CF will be in a country solely on the agreement between states through a SOFA (e.g., under the NATO SOFA) or by way of Diplomatic Note (e.g., the Dominion Republic in 2004, Haiti in 2004 and Kenya for Central African Republic operations in 2003).

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19. Commanders and operational legal officers must be able to identify the specific legal bases upon which they are operating and the precise scope of what is being consented to by the host state. Article 2(4) may indeed be violated if a visiting force enters or remains within a host state, without consent or once consent has been revoked. Additionally, concerns about Article 2(4) violations may arise if a state uses force that is beyond the host state's consent.[25]

The 'Gap'

20. A final contemporary legal issue relating to Article 2(4) is sometimes referred to as the 'Gap' issue. Article 51 of the UN Charter recognizes the right of self defence "if an armed attack occurs..." By contrast, Article 2(4) speaks of a prohibition on the "threat or use of force..." This issue presents an element of complexity when viewing the UN Charter as a 'watertight' system.

21. While this issue will be discussed further in Chapter 13 (Self Defence), it would appear that there are less grave forms of force that may not constitute an armed attack.[26] This may be of operational legal significance particularly in situations of UN enforcement actions where land troops, aircraft or naval vessels inadvertently infringe upon the territory of an effected state, which may argue that its right of self defence has been triggered.

SECTION 5

CONCLUSION

22. The legal starting point for any CF international operation should commence with the assumption that there is a general legal prohibition against using force. By starting with this assumption, planners, commanders and legal advisors at all levels will be forced to scrutinize and precisely identify all possible relevant legal authorities. This, in turn, will require each individual legal basis to be examined and its scope of authorized acts to be identified and worked into the key documents such as operational plans (OPLANS) and rules of engagement (ROEs). The various possible answers to this fundamental threshold question will be canvassed in subsequent chapters.

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[25] See Dinstein, *supra* note 17. See also Chapters 26 and 27 on SOFAs/MOUs and Chapter 16, Other International Operations, Section 4 for a further discussion on international operations based on invitation or consent.

[26] Not every use of force contrary to Article 2(4) may be responded to with armed self defence. A comparison of the provisions contained in Article 2(4) and Article 51 indicates that an armed attack is much narrower than a threat or use of force. If the two Articles are read together, the conclusion is that any state affected by the unlawful use of force by another state not reaching the threshold of an armed attack may only respond by means falling short of the threat or use of force. See Dinstein, *supra* note 17 at 174; Higgins, *supra* note 12 at 240 and Gray, *supra* note 1 for a discussion of the 'Gap' issue.

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CHAPTER 13

SELF DEFENCE

SECTION 1

INTRODUCTION

1. The right of self defence is one of the express exemptions found in the UN Charter to the general prohibition on the use of force. This chapter provides an overview of the right of individual and collective self defence and highlights some of the current key legal issues relating to its scope and ambit. The right of self defence has been the legal basis for the deployment of the CF during the 1991 Gulf War and the current 'Campaign Against Terrorism.' Furthermore, the right of collective self defence forms the legal foundation upon which the two most significant Canadian defence treaties – The North Atlantic Treaty and The NORAD Agreement, rest.[1]

SECTION 2

ARTICLE 51 AND ITS CUSTOMARY INTERNATIONAL LAW COUNTERPART

2. Article 51 of the UN Charter states:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

3. Public international law is comprised of both treaty law and customary international law. The right of individual and collective self defence in customary international law operates and retains a 'separate existence'[2] from Article 51 and continues to "exist and apply, separately from international treaty law..."[3]

SECTION 3

THE NATURE AND SCOPE OF SELF DEFENCE

4. This section will overview some of the key legal issues which currently exist in relation to the law of self defence and which may have an impact on the decision of whether to deploy the CF and on how force is to be used if such a decision to deploy is made.

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[1] See generally Bowett, *Self Defence in International Law* (New York: Fredrick A. Praeger, 1958); Brownlie, *International Law and the Use of Force By States* (Oxford: Clarendon Press, 1963); Brownlie, "The Use of Force in Self Defence" (1961) 37 BYIL 183; Alexandrov, *Self defence Against the Use of Force in International Law* (Kluwer Law International, 1996); Dinstein, *War, Aggression and Self defence,* 4th ed. (Cambridge: Cambridge University Press, 2006); Schachter, "Self defence and the Rule of Law" 83 AJIL 259; Gray, *International Law and the Use of Force*, 2nd ed (New York: Oxford University Press, 2004); for key cases see: *(1987) Case concerning United States Diplomatic and Consular Staff in Tehran (United States of America v Iran),* [1980] I.C.J. Rep 3 [*Tehran Hostages Case*]; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America),* [1986] I.C.J. Rep 14 [*Nicaragua Case*]; *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, [1996] I.C.J. Rep 66 [*Legality of Nuclear Weapons*]; *Iranian Oil Platforms (Iran v. United States of America),* [2003] ICJ Reports [*Oil Platforms*]; *Legal consequences of the construction of a Wall in the Occupied Palestinian Territory* [2004] ICJ Reports [*The Wall Case*].

[2] *Nicaragua Case*, *supra* note 1 at 178 and 179.

[3] *Ibid*. at 179.

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'Armed Attack'

5. While the UN Charter recognizes the right of self defence "when an armed attack occurs," it does not define what is meant by an 'armed attack.' There is a consensus on the proposition that an armed attack includes kinetic force applied by the armed forces of a state.[4]

6. As a general statement 'armed attack' includes military force,[5] which usually takes the form of kinetic force but may include, depending on the circumstances, activities like a computer network attack when the scale and effects of these activities have destructive consequences. International law makes a distinction between "most grave forms" (e.g., armed attacks) from "less grave forms." In short, the "scale and effects" of a particular use of force will be assessed with some instances of force being of "lesser gravity than an armed attack." Additionally, as the tragic

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[4] The ICJ in the *Nicaragua Case* used the *Definition of Aggression* GAR 3314 (XXIX) 1974 [*Definition*] as guidance when defining 'armed attack.' Many examples cited in the *Definition* refer to classic military uses of force including bombardment, "[a]n attack by the armed forces of a state on the land" and "[t]he invasion …of the territory of another state…"

[5] In making this general statement it is recognized that some degree of controversy exists as to whether the force must pass a certain level of intensity, non kinetic military activities such as computer network attack fall within the definition, non-state entities not acting on behalf of a state can commit an armed attack, and economic or political coercion can constitute an armed attack. In the *Nicaragua Case,* the distinction made by the ICJ between uses of force that are 'most grave' and 'less grave' has been the source of considerable controversy. Many commentators feel that the requirements of necessity and proportionality are applicable when responding to any use of force, regardless of its scale and effects, when acting in self defence. (See Higgins, *Problems and Process* (Cambridge: Cambridge University Press, 1994). One writer has properly noted that

> The criteria of 'scale and effects' …are particularly relevant in appraising what counter-action taken in self-defence, in response to an armed attack, is legitimate. .But unless the scale and effects are trifling, below the *de minimis* threshold, they do not contribute to a determination whether an armed attack has unfolded.. There is certainly no cause to remove small scale armed attacks from the spectrum of armed attacks (Dinstein, *supra* note 1 at 176).

If indeed the difference between an armed attack and 'less grave' uses of force is "one of degree rather than of kind" (Gray, *supra* note 1 at 46) then the *de minimis* threshold must be very low. In the *Oil Platforms* case, *supra* note 1 at 73, the Court noted that it does not exclude the possibility that the mining of a single military vessel might be sufficient to bring into play the 'inherent right of self-defence.' See generally Schmitt and O'Donnell, eds., "Computer Network Attack and International Law" (2002) 76 Int'l Law Studies; Schmitt, "Computer Network Attack and the Use of Force in International Law: Thoughts on a Normative Framework" (1999) 37 Col. J. Transnat'l L. 855; Barkham, "Information Warfare and International Law on the Use of Force" (2001) 34 N.Y.U.J. Int'l L. & Pol. 57. The ICJ in *Nicaragua* conceded, that irregulars acting on behalf of a state could commit an armed attack. This is consistent with the *Definition of Aggression*, which included in its definition of aggression, "[t]he sending by or on behalf of a state of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another state…." However, a distinct legal issue arises in the case of whether a non-state entity, acting on its own, can commit an 'armed attack.' This situation arose from the events of 11 September 2001. In response to the attack carried out by Al-Qaeda the Security Council issued SCR 1368 (2001) and 1373 (2001), which recognized and reaffirmed the right of self defence. Implicit in this was a finding that an armed attack (a prerequisite for self defence) must have occurred. On 24 October 2001 Canada informed the Security Council that it was taking military action against Al-Qaeda as an exercise of individual and collective self defence. Clearly, from a Canadian perspective, a non-state entity can commit an armed attack and self defence can be exercised. See Murphy, "Terrorism and the concept of "Armed Attack" in Article 51 of the U.N. Charter" (2002) 43:1 Harvard Int'l L.J. 1; Gaja, "In What Sense Was There An "Armed Attack"?" (2002) E.J.I.L. 3. In the *Wall Case supra* note 1, the ICJ gave an advisory opinion concerning the "legal consequences arising from the construction of the wall being built by Israel…"
In the course of addressing the question the Court noted at para. 139 that:

> Article 51 of the Charter thus recognizes the existence of an inherent right of self-defence in the case of an armed attack by one State against another. However, Israel does not claim that the attacks against it are imputable to a foreign State.

The Court continues by noting that the threats, which Israel claims it is responding to in self defence

> originate within, and not outside, that territory. The situation is thus different from that contemplated by Security Council resolutions 1368 (2001) and 1373 (2001) and therefore Israel could not in any event invoke those resolutions in support of its claims to be exercising a right of self-defence. Consequently, the Court concludes that Article 51 of the Charter has no relevance in this case.

The ambiguity of those passages raises a number of issues. It appears to suggest that self defence can only be exercised if a state is attacked by another state. This is problematic given post 9/11 state practice in relation to non-state actors and both SCR 1368 and SCR 1373.

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events of 11 September 2001 have demonstrated armed attacks can be committed by non-state entities using non-military, unconventional or improvised means, i.e. hijacked civilian airlines.

'Occurs': Self defence, Anticipatory Self defence, and Pre-emptive Self defence

7. A right of self defence arises when an armed attack 'occurs.' Legal debates have focused on whether a state can respond in self defence only after the blow has landed, when the threat of the attack is imminent or merely a possibility.[6]

8. Generally speaking, the right of self defence arises whenever an armed attack has occurred or when the threat of an armed attack is imminent rather than merely possible. In what is referred to as the *Caroline Formula*, the right of self defence arises when there is "a necessity of self defence, instant, overwhelming, leaving no choice of means, and no moment of deliberation."[7]

9. The nature of the threat and the means of attack will be considerations in predicting the attack and determining whether the threat is imminent. Consequently, activities taken by terrorists who do not distinguish themselves from the civilian population when preparing and carrying out an attack will be relevant. Likewise, the characteristics of a weapon system will also be considered. This would include consideration of not only the procedures involved in activating the system but its destructive capacity as well. For example, the nature of launching a weapon of mass destruction (WMD), when contrasted with the firing of a rifle, will be considered in the determination of imminence.[8]

10. The use of force in defence of a threat that is imminent has sometimes been referred to as anticipatory self defence. Generally speaking, states that have responded to imminent threats have characterized their actions as self defence rather than anticipatory self defence.[9] This is primarily for two reasons: first, there is no need to qualify self defence as anticipatory given that the law of self defence allows for action when a threat is imminent. Second, terms such as 'anticipatory' or 'pre-emptive' are used in a variety of ways and any qualification of self defence as anticipatory will inevitably lead to unnecessary debate. Consequently, when states act in self defence to threats that are imminent, reference is made to self defence, not anticipatory self defence.

Defence of Nationals Outside the Territory of the State

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[6] Within this debate, various concepts such as 'anticipatory,' 'pre-emptive,' 'preventive' or 'interceptive' have been used to qualify self defence. Further confusion has developed as these adjective terms have been defined differently on various occasions. See Brownlie, *supra* note 1 as representative of those who do not precisely define armed attack but imply that the blow must land or trespass must occur. Bowett, *supra* note 1 suggests that an attack which has not yet landed but is 'imminent' creates a legal basis for 'anticipatory' self defence. Dinstein, *supra* note 1 is of the view that self defence only arises when the armed attack occurs. His sophisticated analysis distinguishes between attacks, which are 'merely foreseeable,' 'preventable' or 'conceivable' and those attacks, which begin with an 'irreversible course of action' where 'the die is cast.' Others have held out a 'pre-emptive' notion of self defence. See Wedgwood, "The Fall of Saddam Hussein: Security Council Mandates and Pre-emptive Self defence" (2003) 97 A.J.I.L. 576; Sapiro, "Iraq: The Shifting Sands of pre-emptive Self defence" (2003) 97 AJIL 599; Taft and Buchwald, "Pre-emption, Iraq and International Law" (2003) 97 A.J.I.L. 557. Greenwood, "Pre-emptive Force: Afghanistan and Iraq" (2003) 4 San Diego Int'l L.J. 7-37.

[7] The *Caroline Formula* was created during an exchange of letters between the US Secretary of State and a UK Minister, which attempted to resolve whether an attack by British forces on a ship named the *Caroline*, anchored in US waters with Canadian rebels on board who were preparing to attack Canada fell within an act of self defence. See Jennings, (1938) A.J.I.L. 32. The *Caroline* stands as authority for not only the right to use force in defence of an imminent threat but also the right to exercise self defence against non-state entities. Within the context of using force in self defence against Al-Qaeda – a non state entity – see Greenwood "International Law and the War Against Terrorism" (2002) 78 Int'l Affairs 2 at 301.

[8] See de Chazournes and Sands, eds., *International Law, the International Court of Justice and Nuclear Weapons* (New York: Cambridge University Press, 1999); Gardner, "Neither Bush nor the Jurisprudes" (2003) 97 A.J.I.L. 585.

[9] See Gray, *supra* note 1 at 139 fn 24.

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11. Armed attacks on state property and state officials outside the territory of a victim state (e.g. warships and military members), will give rise to a right of self defence.[10] With respect to private citizens it is expected that the host state will defend those nationals in situations where citizens are being attacked or threatened. Where a host nation is unwilling or unable to defend those foreign nationals, a legal right to protect nationals abroad exists. This right is viewed either as an act of self defence or a right that exists in customary law independent from the right of self defence.[11]

Necessity and Proportionality

12. The use of force in self defence is restricted to that which is necessary and proportional to meet the lawful objective of removing the threat or defending against the attack.[12]

Geographic and Temporal Parameters

13. Military responses in self defence are not limited to the geographic location in which the armed attack occurred or within any pre-determined time frame. Rather, the geographic and temporal parameters of a response are defined by the principles of necessity and proportionality.[13]

The 'Until Clause' of Article 51

14. Article 51 recognizes the right of a state to act in self defence "until the Security Council has taken measures necessary to maintain international peace and security." Debate has arisen as to the effect of this limitation, particularly in circumstances where self defence is being exercised and the Security Council has issued resolutions on the matter. In these situations, such as the 1991 Gulf War and the post 9/11 'Campaign Against Terrorism,' the Security Council measures would have to have eliminated the threat in order for the limitation contained in the 'until clause' to come into effect.[14]

The Reporting Requirement of Article 51

15. Pursuant to Article 51 of the UN Charter, members who exercise their right of self defence shall "immediately" report their actions to the Security Council. Failure to make such a report will not affect the legality of the actions taken.[15] However, the reporting to the Security Council, usually by way of an 'Article 51 letter,' will provide important evidence of a State's assertion that it is acting in self defence. Conversely, failure to report may be considered when a

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[10] For example, the *Definition of Aggression*, *supra* note 4, cites "[a]n attack…on the…marine and air fleets of another state." See also the *Oil Platforms* decision, *supra* note 1 at 72, where it is stated that it does "not exclude the possibility that the mining of a single military vessel might be sufficient to bring into play the inherent right of self-defence." Article 6 of the *North Atlantic Treaty* contemplates an attack on NATO military assets in the North Atlantic as an example of an armed attack.

[11] See Bowett, "The Use of Force for the Protection of Nationals Abroad", *supra* note 1; Gray, *supra* note 1 at 126-129; Alexandrov, *supra* note 1 at 188-213; Ronzitti, *Rescuing Nationals Abroad Through Military Coercion and Intervention on Grounds of Humanity* (Dordrecht, Boston, London: Martinus Nijhoff Publishers, 1985); Akehurst, 'The Use of Force to Protect Nationals Abroad" (1977) 5 Int'l Rel. 3; Gordon, "Use of Force for the Protection of Nationals Abroad: The Entebbe Incident" (1977) 9 Case W. Res. J. Int'l L. 117; *Tehran Hostages Case*, *supra* note 1.

[12] See Chapter 28, Section 7 of this manual. The proposition that force used in self defence must be necessary and proportionate is not controversial. See the *Caroline Case* as presented in Jennings, *supra* note 9; the *Nuclear Advisory Opinion, supra* note 1 at para 141-143; *Nicaragua Case, supra* note 1 at para. 193; *Oil Platforms*, *supra* note 1 at para. 73. See also B-GG-005-027/AF-021, The Law of Armed Conflict at the Operational and Tactical Level, pp. 2-10 and 2-3.

[13] See Dinstein, *supra* note 1 at 210-211.

[14] See Gray, *supra* note 1 at 104-105; Halberstam "*The Right to Self defence once the Security Council Takes Action*" (1995-6) 17 Michigan J. Int'l L. 229; Greenwood, "New World Order or Old" (1992) 55 Mil. L.R. 153; Rostow, "Until What? Enforcement Action or Collective Self defence?" (1991) 85 A.J.I.L. 506; Dinstein, *supra* note 1 at 189. See also Chaynes, "The Use of Force in the Persian Gulf" in Damrosch and Scheffer, eds., *International Law and Force in the New International Order* (Boulder: Oxford, 1991).

[15] See Dinstein, *supra* note 1 at 189-191; Gray, *supra* note 1 at 155-156 and Greig, "Self defence and the Security Council: What does Article 51 require?" (1991) 40 I.C.L.Q. 366.

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State's claim of self defence is scrutinized by UN Members.[16] Before it commenced its 'Campaign Against Terrorism,' Canada informed the Security Council that it would respond in individual and collective self defence against Al-Qaeda and the Taliban.[17]

Security Council Resolutions: Enforcement Action, Self Defence or Both?

16. On occasion, a situation may arise when the legal authority for self defence exists and the Security Council then issues one or more resolutions. At this moment, the complexity of the legal framework authorizing the use of force increases. An immediate issue will be whether the Security Council has triggered the 'until clause' and has taken 'measures necessary' sufficient to extinguish the right of self defence. If not, the resolution will have to be scrutinized in order to precisely determine what, if anything, it authorizes beyond what would be permissible under the right of self defence.

17. The existence of a right of self defence coupled with Security Council resolutions addressing the same situation have arisen in a number of international operations involving the CF. These include Korea in the 1950s, the 1991 Gulf War and the 'Campaign Against Terrorism.' Issues such as whether troops can cross into North Korea or Iraq as an exercise of self defence or as part of the authorization to "restore international peace and security in the area" arose. Likewise, the relationship between a mandate to "restore international peace and security" or "the maintenance of security in Kabul" is different than acting in self defence against Al-Qaeda.[18] These types of issues will have a direct impact on the OPLAN, ROE, and the targeting framework. Consequently, it will be important to identify the distinct legal bases upon which an operation may rest as well as the precise scope of operations which each legal basis may provide.

Collective Self Defence

18. The legal prerequisites for the exercise of individual self defence are equally applicable to collective self defence – an armed attack having occurred or the imminent threat of an armed attack about to occur. Consequently, when a state is the victim of an armed attack it may 'request' other states to assist in its defence. NATO and NORAD are the two most relevant Canadian 'regional arrangements' which facilitate the collective implementation of self defence.[19] On 2 October 2002, Canada and the other NATO states invoked the collective self defence mechanism contained within Article 5 of the North Atlantic Treaty.

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[16] See the *Nicaragua Case*, *supra* note 1 at paras. 235-236.
[17] See letter to the President of the UN Security Council from the Canadian Chargé d'Affaires 24 October 2001.
[18] See Gray, *supra* note 1 at 148 and 153-154; White, *Keeping the Peace* (Manchester: Manchester University Press, 1997) at 52-55; Greenwood, *supra* note 16 and Alexandrov, *supra* note 1 at 252-278.
[19] See Gray, *supra* note 1 and Alexandrov, *supra* note 1. Article 52 of the UN Charter recognizes the existence of 'regional arrangements' as an entity that may promote international peace and security.

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CHAPTER 14

PEACEKEEPING

SECTION 1

INTRODUCTION

1. Canada has a long history of involvement in peace support operations (PSO).[1] Establishing a PSO is one of the options available to the international community to assist in the resolution of a conflict. They are authorized in support of the political objectives of internationally recognized organisations such as the United Nations (UN). PSOs include conflict prevention, peacemaking, traditional and complex peacekeeping, and peace building. This chapter identifies the legal characteristics of peacekeeping, the legal basis upon which peacekeeping operations may rest, and some of the more common contemporary legal issues that may impact on the planning and conduct of peacekeeping operations.

2. Peacekeeping has been defined in many operational, political and legal ways. Central to any legal definition are three legal characteristics or prerequisites: the consent of the states involved, the limitation of the use of force by peacekeepers to situations of self defence and neutrality. Fundamentally, the traditional legal basis for peacekeeping rests on the consent of the parties to a conflict, in particular the host state, to the creation and presence of a peacekeeping force within its territory. This consent to allow a peacekeeping force to supervise a peace agreement may be facilitated by the General Assembly, the Security Council or other organs of the UN. Customary international law, based on state consent and agreement, can also support a peacekeeping operation without reliance on the UN Charter.

3. While many legal issues arise with reference to peacekeeping operations, some of the more significant ones center on the nature and scope of the requisite consent and the parameters of self defence. Other legal issues of operational significance relate to command and control, mandate ambiguity and the transformation of a peacekeeping operation into a peace enforcement operation.[2]

SECTION 2

THE LEGAL CHARACTERISTICS OF PEACEKEEPING

4. UN peacekeeping has traditionally relied on the consent of the opposing parties and involves the deployment of neutral forces to implement an agreement approved by those parties. By contrast, in cases of enforcement action, the Security Council gives Member States the authority to take ‘all necessary measures’ to achieve a stated objective. Unlike peacekeeping, consent of the parties is not necessarily required for enforcement actions.

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[1] B-GJ-005-307/FP-030, Peace Support Operations.

[2] See generally White, *Keeping The Peace* (Manchester: Manchester University Press, 1997); Malanczuk, ed., *Akehurst's Modern Introduction to International Law*, 7th ed. (New York: Routledge, 1997) at c. 22; Simma, ed., *The Charter of the United Nations: A Commentary*, 2nd ed. (Oxford: Oxford University Press, 2002); Sarooshi, “The United Nations Collective Security System and the Establishment of Peace” (2001) 53 Current Legal Problems 621; Dinstein, *War, Aggression and Self-Defence*, 4th ed. (Cambridge: Cambridge University Press, 2006) at c. 10; Gray, *International Law and the Use of Force*, 2nd ed. (New York: Oxford University Press, 2004) at c. 7; Bothe & Dörschel, eds., *UN Peacekeeping: A Documentary Introduction* (London: Kluwer Law International, 1999); and Franck, “The United Nations as Guarantor of International Peace and Security: Past, Present and Future” in Tomuschat, ed., *The United Nations at Age Fifty: A Legal Perspective* (The Hague: Kluwer International Law, 1995) 25.

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SECTION 3

THE LEGAL BASIS FOR PEACEKEEPING

The UN Charter

5. Peacekeeping[3] is not expressly provided for in the UN Charter, nor did the drafters of the UN Charter ever envisage peacekeeping. Whether based in part under the authority of the UN Charter, or solely upon customary international law, the fundamentally important legal basis upon which peacekeeping rests is the consent of the parties to a conflict and the troop contributing nations.[4] Any deployment of forces within the territory of the parties to a conflict for the purposes of supervising a peace agreement without their consent must rest upon some other binding legal authority (i.e., usually a Chapter VII Security Council resolution), and consequently places the international operation outside the legal definition of peacekeeping.

6. Given the legal requirement of states' and parties' consent, it would be legally incorrect to state that the UN Charter is the legal basis that creates peacekeeping. Rather, the UN Charter provides legal authority for both the General Assembly and the Security Council to facilitate (i.e., organize, plan or finance), the creation of a peacekeeping force when the consent of the parties involved is obtained.[5]

The General Assembly

7. The General Assembly has the legal authority to consider, to discuss, and to make recommendations (but not to make decisions) "relating to the maintenance of international peace and security…"[6] The General Assembly may also, subject to limitations identified below, "recommend measures for the peaceful adjustment of any situation…"[7] These limits on the powers of recommendation are twofold: any recommendation "on which action is necessary shall be referred to the Security Council…" and "the General Assembly shall not make any recommendation…" regarding any dispute or situation while the Security Council is exercising its function with respect to that matter.[8]

8. Within this legal framework the General Assembly passed the *Uniting For Peace Resolution*,[9] which became the General Assembly's focal point, or outline, for facilitating the creation of peacekeeping forces and monitoring situations related to international peace and security. During its active period between 1945 and 1970 the General Assembly facilitated the

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[3] As has been stated by White, *supra* note 2 at 208:

> To the international lawyer peacekeeping represents an intriguing puzzle, raising in particular such questions as the constitutional basis for such operations; whether nations hosting peacekeeping operations are surrendering their sovereignty; whether such forces can use force beyond that required for self defence; and which political organ of the United Nations can authorize such forces.

[4] White, *ibid*. at 232. See also Di Blase, "The Role of the Host State's Consent with Regard to Non-Coercive Actions by the United Nations" in Cassese, ed., *United Nations Peace-keeping* (The Netherlands: Sijthoff & Noordhoff International Publishers, 1978) at 55; Higgins, "A General Assessment of United Nations Peace-keeping" in Cassese, *ibid.* Gray, *supra* note 2 at 232 indicates that not only should the consent of the host state be sought, but also of the warring factions. Not so much as a legal obligation but to secure the effectiveness of the operation. See Gray, "Case Study: Host-State Consent and United Nations Peacekeeping in Yugoslavia" (1996) 7 Duke J. Comp. & Int'l L. 241; Wippman, "Military Intervention, Regional Organizations, and Host State Consent" (1996) 7 Duke J. Comp. & Int'l L. 209.

[5] According to White, *ibid* at 225, both the Security Council and the General Assembly have the powers to create peacekeeping forces, however politically speaking the peacekeeping function of the United Nations falls with the Security Council as it is this organ that possesses primary responsibility for the maintenance of international peace and security.

[6] See the *Charter of the United Nations*, 26 June 1945, Can. T. S. 1945 No. 7, Article 10 and 11, online: United Nations <http://www.un.org/aboutun/charter/index.html>.

[7] *Ibid.*, art. 14.

[8] *Ibid.*, art. 11(2), 12(1). As discussed below, the two limitations have been judicially considered.

[9] *Uniting for Peace Resolution*, GA Res. 377(V), UNGAOR, 5th Sess., Supp. No. 20, UN Doc. A/1377 (1950) 10.

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creation of the United Nations Emergency Force (UNEF)[10] and the United Nations Operation in the Congo (ONUC).[11] The utilization of its powers to finance these forces was challenged in a case before the International Court of Justice (ICJ), which ruled in favour of the General Assembly's authority in relation to UNEF and ONUC.[12]

An Expansive Reading of General Assembly Powers

9. Through a series of decisions, including the *Certain Expenses Case*, the ICJ has applied the doctrines of implied[13] and inherent[14] powers when interpreting the UN Charter and determining the scope and ambit of the authority of the General Assembly, as well as that of the Security Council. The effect of applying these legal doctrines is that both bodies were accorded more power than what would have been possible under a more formal reading of the UN Charter's express provisions.

10. By utilizing these two legal doctrines, the ICJ provided an expansive, rather than formalistic and textual, interpretation of the General Assembly's powers. Under the doctrine of implied powers "the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties."[15] Consequently, the General Assembly is limited only by the principles and purposes found in the UN Charter (e.g., maintain international peace) and this treaty's express wording. An example of an expressly worded limitation is found in Articles 10 through 14, which limit the General Assembly to making recommendations, and not decisions on which action is required, and not while the Security Council is exercising its functions on the matter (unless requested).[16]

11. As a final point, the legal authority of the General Assembly to make recommendations facilitating the creation of peacekeeping, when coupled with state consent, remains. In practice, however, the powers of the General Assembly in this area have rarely been exercised[17] and the majority of peacekeeping operations have been created as a result of decisions of the Security Council.

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[10] UNEF was established by the General Assembly in 1956 in response to an invasion of Egypt by British, French and Israeli forces. It was mandated to secure the cease-fire with the co-operation of the parties to the conflict, to supervise the withdrawal of foreign troops and to patrol the armistice line. The Secretary General of the United Nations stated that UNEF had no rights other than those necessary for the execution of the functions assigned to it by the General Assembly.
[11] ONUC was established in 1960 when the Secretary General of the United Nations invoked Article 99 of the UN Charter allowing him to bring to the attention of the Security Council the matter involving Belgium and the Congo. Several resolutions were subsequently passed by the Security Council but failed to give ONUC a proper mandate. The only authoritative mandate of ONUC came from the International Court of Justice in the *Certain Expenses Case*, *infra* note 12.
[12] The *Certain Expenses of the United Nations*, Advisory Opinion, [1962] I.C.J. Rep. 151 [*Certain Expenses Case*].
[13] *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, [1949] I.C.J. Rep. 174. The Court held the Organization must be deemed to have those powers, which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to be performance of its duties.
[14] In *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970),* Advisory Opinion, [1971] I.C.J. Rep. 16. the Court examined the authority of the Security Council and noted that "[t]he members of the UN have conferred upon the Security Council powers commensurate with its responsibility for the maintenance of peace and security. The only limitations are the fundamental principles and purposes found in Chapter I of the Charter." See Sarooshi, *The United Nations and the Development of Collective Security* (New York: Oxford University Press, 1999) for a detailed analysis.
[15] *Reparation for Injuries Suffered in the Service of the United Nations*, *supra* note 13.
[16] Both these express limits have been judicially considered. See the discussion at footnote 13. This not only has implications for the General Assembly but also for the Security Council, particularly with respect to its powers to take enforcement action in light of the absence of 'Article 43 Agreements.' This will be addressed in the next chapter.
[17] A review of the General Assembly's potential powers and possible rekindled role in the realm of international peace and security arose as a result of concern over possible 'Security Council gridlock,' for example, during the Kosovo air campaign and more generally in situations of extreme humanitarian crises where the Security Council may be unable or unwilling to act. See International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (Ottawa: International Development Research Centre, 2001).

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The Security Council's Peacekeeping Powers

12. The Security Council likewise has the legal authority to issue recommendations that are non-binding but which relate to any dispute likely to endanger the maintenance of international peace and security.[18] As with the powers of the General Assembly, this Security Council authority, contained within Chapter VI of the UN Charter, should be interpreted broadly, applying the doctrines of implied and inherent powers.[19] Also, as is the case with the General Assembly, the legal authority to create a Chapter VI peacekeeping force is dependant on the consent of the parties.[20]

13. The Security Council could also create a peacekeeping force under Chapter VII, Article 40, with a mandate to supervise a peace agreement between two or more parties, but without authorization to "use all necessary means." This arrangement would be consented to by the parties.[21] It is important to note that in this Chapter VII peacekeeping scenario, two distinct legal bases would exist: first, state consent (customary international law), possibly expressed through a treaty (the peace agreement), and second, a binding decision of the Security Council.[22] The Security Council has also authorized a peacekeeping force to supervise a peace agreement, with the consent of the parties, while giving the force Chapter VII enforcement powers for very limited purposes unrelated to monitoring the peace agreement.[23]

14. These scenarios can be legally complex and it is important to be aware of the parameters of action permitted under each legal authority. This is particularly so in cases where the CF is deployed under dual authorities (host state consent and a Chapter VII mandate) and there is the possibility of one legal base being removed, either through the withdrawal of state consent or in non-renewal of the mandate.[24]

15. The key points for the purposes of this Section are threefold. First, with state consent, the Security Council has the authority to facilitate the creation of a peacekeeping force under Chapter VI. Second, it is possible for a peacekeeping force to be created under Chapter VII, if the parties consent and force is restricted to self defence. Third, any force that is created without the consent of the parties, even if force is limited to self defence, would not fall within the legal definition of a peacekeeping force.

The Customary International Legal Basis For Peacekeeping

16. The fundamental legal requirement for peacekeeping is the consent of the parties. For conflicts between states this involves the consent of the states parties to the conflict and the

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[18] *Supra* note 6, arts. 33 and 36(1). See White, *supra* note 2 at c. 2.
[19] See Sarooshi, *supra* note 2; as well as *supra* note 17.
[20] White, *supra* note 2 at 227 states:

> The competence of the Security Council in the area of peacekeeping is much less controversial. Although there is no express power granted in the UN Charter allowing for the creation of Peacekeeping forces, the arguments for recognizing that the Council has power to create a Peacekeeping force are much clearer than those put forward for the Assembly. First, according to Article 24(1), …"primary responsibility….[in matters] of international peace and security." Given that the main aim of the UN is to achieve international peace and security it is recognized that Article 24(1) confers upon the Council general powers to achieve these purposes. This is implicitly recognized in Article 24(2) which states that "the Security Council shall act in accordance with the Purposes and Principles of the United Nations."

See also Bothe & Dörschel, *supra* note 2 at XV and Simma, *supra* note 2 at 684.
[21] See SCR 1320 (2000) on the situation between Eritrea and Ethiopia and SCR 981 (1995) on establishment of the UN Confidence Restoration Operation in Croatia (UNCRO).
[22] See SCR 1270 (1999) on the situation in Sierra Leone. Peacekeeping whose presence was based on host state consent and force limited to self defence and whose creation was based upon General Assembly resolutions (UNEF1 Egypt 1956 GA Res. 998), the same but based on SC Chapter VI powers (SCR 858 (1993) on the creation of the UNOMIG in Georgia, SCR 1320 (2001), on the situation in Ethiopia and Eritrea deploying peacekeeping personnel within UNMEE), peacekeeping again based on host state consent in Yugoslavia, SCR 743 (1992).
[23] See SCRs 1547, 1585, 1588 and 1590 in relation to Sudan.
[24] As threatened by Croatia in 1992 UNCRO (SCR 981) operations.

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peace agreement. For non-international armed conflict[25], this involves the consent of the parties to the conflict. Customary international law provides a distinct and separate legal basis for peacekeeping, which is independent of the UN Charter, resting on the parties' consent to accept a peacekeeping force.[26]

SECTION 4

CONTEMPORARY OPERATIONAL LAW ISSUES: PEACEKEEPING

17. While on the surface peacekeeping appears straight forward, a number of legal issues of significance to operational planners and commanders may arise. These include issues relating to the nature and scope of consent and self defence, mixed or dual legal authorities, mandate ambiguity, and, command and control issues.

Consent

18. It has been noted that the key legal requirement for a peacekeeping operation is consent. The precise scope and ambit of consent may require definition. Consequently, individual contributing countries, as well as the UN, often rely upon Status of Forces Agreements (SOFAs) that define many of the above issues. The key point to emphasize is that operational planners should identify exactly what the requirements are for a particular CF mission and through policy advisors obtain the consent of the host state, by way of a SOFA, Memoranda of Understanding (MOU) or Diplomatic Note, in advance of arriving in theatre. At times this will be done in coordination with the UN.[27]

Self Defence

19. Traditionally, peacekeeping forces have been restricted to using force in self defence only.[28] Indeed, as noted above – self defence, neutrality and consent have been the hallmarks of eacekeeping. Historically, self defence has been viewed as being restricted to defending members of the peacekeeping forces. However, from the early 1990s onward there have been attempts to redefine 'self defence.' Generally speaking, these redefinitions of self defence have usually emerged in situations where the security situation on the ground is deteriorating but the political will to alter the mandate to an enforcement operation does not exist. An example of this occurred when the CF was deployed in the Former Yugoslavia as part of UNPROFOR.[29] Such an expanded self defence concept has historically been included within UN Rules of Engagement or been expressly provided for in a Security Council resolution.[30] At other times, self defence may be expanded to include protecting local civilians from serious crimes or to defend the

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[25] For a definition of international armed conflict and non-international armed conflict, see chapter 17.
[26] See Gray, *supra* note 2 at 232. There is some debate as to whether the consent of non-state parties to the conflict is legally required. From a practical viewpoint the consent of the parties to a conflict will be required. Two examples of peacekeeping occurring based on the consent of the parties without a UN role would be the long standing Multinational Force and Observers (MFO) between Egypt and Israel in the Sinai, and the Australian-led operation in 2003 in the Solomon Islands. As stated by White, *supra* note 2 at 231:

> A genuinely consensual peacekeeping operation undertaken by an organisation outside the UN does not require the permission of the UN before it is undertaken…Consensual, neutral peacekeeping conforms with the UN Charter and is a mechanism developed to facilitate the settlement of disputes.

[27] See Bothe & Dörschel, *supra* note 2 at 59 for the UN Model SOFA; see also Garvey "United Nations Peacekeeping and Host State Consent" (1970) 64 A.J.I.L. 241and Di Blasé, *supra* note 4. For a discussion on SOFAs see Chapter 26. For examples of where the UN Model SOFA has been implemented in a SCR, see SCR 1529 dealing with Haiti in 2004 and SCR 1590 dealing with the Sudan in 2005.
[28] For further reading on the use of force in self defence see Findlay, *The Use of Force in UN Peace Operations* (Oxford: Oxford University Press, 2002).
[29] SCR 743 (1992).
[30] See Cox, "Beyond Self-Defence: United Nations Peacekeeping Operations & the Use of Force" (1999) 27 Denv. J. Int'l L. & Pol'y 239 at 250-255.

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increasingly present humanitarian or civilian UN personnel.[31] More broadly, UN peacekeeping forces at times have been authorized to simply defend the mission as a whole.

20. The authorization for the Canadian Forces to operate within an expanded concept of self defence would require Government of Canada approval implemented by the Chief of Defence Staff. Such authority would be found in the operations order or fragmentary orders and rules of engagement.[32] This issue may impact not only national rules of engagement but also the coordination of the use of force amongst the various troop contributing nations, which may very well have divergent national approaches to this issue.

21. Another continuing area of legal complexity is the potential for a peacekeeping operation to rely on dual or distinct legal authorities that will not be identical, but generally are overlapping and mutually reinforcing. As discussed in the preceding section, this occurs when consent is obtained and legal authority is also provided under a Chapter VII mandate. While in stable circumstances this would not trigger ongoing legal issues of operational consequence, it has the potential to do so if one of the legal bases (consent or the UN mandate) is revoked or modified. This has typically occurred through a legal and operational mandate shift from peacekeeping to enforcement actions. Some of the historic moments when these types of shifts occurred have involved the CF. For example, shifts during UNPROFOR, the United Nations Assistance Mission for Rwanda (UNAMIR) and the United Nations Operation in Somalia 2 (UNOSOM2) all involved the blurring of the line (in an operational and legal sense) between traditional understandings of peacekeeping and enforcement operations.[33]

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[31] See SCR 1101 (1997) on the situation in Albania or SCR 1125 (1997) on the situation in the Central African Republic.
[32] See Cox, *supra* note 30. As has been noted by Annan, "Peacekeeping in Situations of Civil War" (1994) Int'l Law & Pol. 26:6 at 623:

> [T]he definition of peace-keeping itself has been forced to expand with the rest of the parameters. For more than forty of forty-five years, peace-keeping was broadly understood to involve the use of multinational military personnel, armed or unarmed, under international command and the consent of the parties, to help control and resolve conflict.... In the last five years, however, hardly a single one of these parameters has remained untouched. The need for consent ....was overridden…[v]olatile situations in the field made it necessary to expand the definitions of both self-defence and justified use of force.

[33] See Chapter 15.

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CHAPTER 15

ENFORCING UN MANDATES

SECTION 1

INTRODUCTION

1. The Security Council, unlike the General Assembly, has the legal authority to make decisions that are binding on states. This Security Council power includes the legal ability to authorize measures up to and including the use of force against a target state or non-state actor. Consequently, the Security Council has the legal authority not only to impose non-coercive sanctions on a target state, but also to authorize the use of force in a variety of scenarios. For example, this could include authorizing force to enforce sanctions, provide a secure environment to deliver humanitarian aid, enforce the terms of a peace agreement, or restore international peace and security in a particular region. Sometimes these operations have been referred to as "complex peace support and stabilization missions" and, within the context of naval operations, "maritime interdiction operations."

2. This chapter sets out the legal authority of the Security Council to authorize the use of force to enforce UN mandates. In section 2, enforcement operations will be contrasted with UN 'peacekeeping' operations. In section 3, the legal procedures and basis for authorizing force will be examined. Section 4 assesses how the current practice of authorizing the use of force has developed as a matter of law in a way not envisaged by the UN Charter's drafters or expressly provided for in this treaty. Section 5 then outlines the main types of UN enforcement operations that have been, or may be undertaken by the CF. Some of the current legal issues arising from use of force authorizations are reviewed in section 6. Finally, in section 7, the key legal aspects of enforcement operations and their relevance to CF planning, authorization and the conduct of enforcement operations are discussed.[1]

SECTION 2

THE DISTINCTION BETWEEN UN ENFORCEMENT OPERATIONS AND PEACEKEEPING OPERATIONS

3. The two key legal points distinguishing UN enforcement operations from peacekeeping[2] are that in enforcement operations, states are expressly authorized to use force beyond self defence to enforce a particular Security Council mandate and that the use of this force within, or against the 'target' state is not based on the specific consent of that state.[3] In short, enforcement operations are coercive while peacekeeping operations are consensual.[4]

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[1] See generally: White, *Keeping The Peace* (Manchester: Manchester University Press, 1997); Gray, *International Law and the Use of Force* (New York: Oxford University Press, 2004); Franck, *Recourse to Force* (Cambridge: Cambridge University Press, 2002); Franck, *Fairness in International Law and Institutions* (New York: Oxford University Press, 1995); Dinstein, *War, Aggression and Self-Defence*, 4th ed. (Cambridge: Cambridge University Press, 2006); Freudenschuβ, "Between Unilateralism and Collective Security: Authorizations on the Use of Force by the United Nations Security Council" (1994) 5 E.J.I.L. 492; Gill, "Legal and some Political Limitations on the Power of the UN Security Council to Exercise its Enforcement Powers Under Chapter VII of the Charter" (1995) 26 Nethl. Y. Int'l L. 33; and Simma, ed., *The Charter of the United Nations: A Commentary*, 2nd ed. (Oxford: Oxford University Press, 2002).

[2] See Clemons, "No Peace to Keep: Six and Three Quarters Peacekeepers" (1993) 26 N.Y.U. J. Int'l L. & Pol. 107; and Fink, "From Peacekeeping to Peace Enforcement: The Blurring of the Mandate for the Use of Force in Maintaining International Peace and Security" (1995) 19 Md. J. Int'l L. & Trade 1.

[3] Instead, state consent is expressed through that state's prior acceptance of the provisions of the UN Charter that authorize enforcement actions by the Security Council.

[4] See White, *supra* note 1 at 233 where he states that "What is clear is that if the consent of the government concerned is not given or is withdrawn, then the peacekeeping operation cannot remain on that State's territory, unless the UN is prepared to change its mandate to one of enforcement"; See also Gray, *supra* note 1 at 232-239 for examples of the withdrawal of consent in the cases of UNEF in Egypt and UNAMIR in Rwanda effectively ending those operations; Simma, *supra* note 1.

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4. As noted, peacekeeping and peace enforcement are separate concepts: The two should not be confused. UN peacekeeping has traditionally relied on the consent of the opposing parties and involves the deployment of peacekeepers to implement agreements approved by those parties. In the case of enforcement action, the Security Council gives Member States the authority to take all necessary measures to achieve a stated objective. Consent of the parties is not necessarily required.[5]

SECTION 3

THE LEGAL BASIS FOR UN ENFORCEMENT OPERATIONS

5. As the title of Chapter VII of the UN Charter suggests – "Action With Respect To Threats To The Peace, Breaches of the Peace and Acts of Aggression" – decisions of the Security Council pursuant to this Chapter deal with measures to restore international peace and security, including resort to the use of force in certain circumstance.

Binding Authority

6. Pursuant to Article 25 of the UN Charter, "Members of the United Nations agree to accept and carry out the decisions of the Security Council." Consequently, when the Security Council makes a decision in the form of a Security Council resolution that obliges Member States to act, or to refrain from acting, that decision is 'binding.'[6]

Article 39 – The Existence of Any Threat to the Peace

7. Under the authority of Chapter VII, the Security Council has the legal ability to take decisions involving coercive and non-coercive measures once it makes an "Article 39 determination."[7]

8. Article 39 states:

> The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

9. Consequently, an Article 39 determination that a particular situation constitutes a threat to or breach of the peace, or an act of aggression, is the legal 'tripwire' or 'trigger' that allows the Security Council to authorize coercive action. While 'aggression' is a concept which is defined by law (albeit that that definition is not without controversy), there is no accepted definition of 'threat to the peace' or 'breach of the peace' and the SC enjoys a wide discretion in the application of those terms. In recent years it has treated international terrorism and situations of violence inside certain countries as constituting threats to the peace.

Article 41 – Measures Not Involving The Use of Force

10. Pursuant to Article 41 the Security Council is authorized to:

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[5] United Nations Dept. of Public Information, *A Note on the Authorization Enforcement Action of Others*, online: United Nations <http://www.un.org/Depts/dpko/dpko/intro/enforce.htm>.

[6] See United Nations Charter, Article 103:

> In the event of a conflict between the obligations of the Members of the United Nations under the present *Charter* and their obligations under any other international agreement, their obligations under the present *Charter* shall prevail.

See also ICJ 27 Feb 1998, *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial instance at Lockerbie* (*Libyan Arab Jamahiriya v. United Kingdom*; Judgement of the Court of First Instance (Second Chamber, Extended Composition) 21 Sept 2005, *Yassin Abdullah Kadi v. Council of the European Union and Commission of the European Communities*.

[7] See Abbott, "The United Nations and Intrastate Conflict: A Legislative History of Article 39 of the United Nations Charter" (2002) 8 U.C. Davis J. Int'l L. & Pol. 275.

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> Decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio and other means of communication, and the severance of diplomatic relations.

11. Article 41 decisions, therefore, may include binding decisions for all or some Member States to impose trade restrictions or economic sanctions with respect to a particular target state or entity. It is important to note that while Article 41 is binding on all States, it expressly precludes the use of military force to ensure compliance with the measures adopted. Consequently, in the context of a resolution imposing economic sanctions, Member States are expected to self-regulate through import and export restrictions.

Article 42 – Measures Involving The Use of Force

12. By contrast, Article 42 does create a legal basis for the Security Council to authorize the use of force. Article 42 states:

> Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.

13. Article 42, therefore, authorizes "action... as may be necessary to maintain or restore international peace and security." The action may include "operations by air, sea, or land forces." In short, Article 42 is the legal basis upon which the UN Security Council can authorize the use of force against a state or other entity.[8] In this sense the force used is coercive in that it is applied without the specific consent of the target state and is not limited to self-defence.[9] Rather, a level of force that is "necessary to maintain or restore international peace and security" may be authorized.

SECTION 4

AUTHORIZING UN ENFORCMENT OPERATIONS

Authorizing the Use of Force

14. As outlined in chapter 15, the collective security structure envisaged by the UN Charter did not fully develop. Rather than having armed forces at its disposal, pursuant to 'Article 43 Agreements' and commanding them through the Military Staff Committee, the Security Council has instead authorized enforcement activity by 'coalitions of the willing' or 'regional agencies,' which have retained authority for planning as well as strategic direction. The current practice is for the Security Council to authorize Member States to carry out enforcement actions against target states or entities by way of resolutions issued under the authority of Chapter VII.[10]

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[8] In order for the Security Council to rely on Article 42 it must be of the opinion that the measures provided for in Article 41 would be inadequate or that they have already proved to be inadequate. It is not necessary that Article 41 measures have actually been ordered and implemented and proven ineffective, but rather only that, in the opinion of the Security Council, any measures implemented under Article 41 would be ineffective if implemented. See Frowein and Krisch, "Article 42" in Simma, *supra* note 1 at 753.

[9] Measures taken against a state pursuant to Article 42 constitute enforcement measures against a state and as a sanction it must, by definition, be carried out against the will of the state concerned. Once a state is in agreement with the stationing of military forces in its territory the measures no longer constitute a sanction and the deployment of troops into the territory of the state may no longer be justified under Article 42. See Frowein and Krisch, "Article 42" in Simma, *ibid* at 753.

[10] The legal framework in which the Security Council authorizes enforcement actions is discussed in chapter 15.

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15. Generally, the practice of the Security Council since Resolution 661 (1990 – Gulf War) is to make an express 'Article 39 determination' of the existence of a threat or breach of the peace in the preamble of a resolution, usually in the penultimate paragraph.[11] This is generally followed by an express statement in the last paragraph of the preamble of the resolution that the Security Council is acting under the authority of Chapter VII. In the subsequent numbered and operative paragraphs of the resolution, the Security Council calls upon all Member States, or authorizes designated states or regional agencies, to carry out a specific mandate or mission, often within a specified geographic area or region, against a designated state or entity. Finally, and importantly, the Security Council may additionally authorize Member States to enforce the mandate using up to and including 'all necessary means' or 'all means necessary.' It is the authorization of 'all necessary means' or some variation thereof, that usually provides international legal authority for the coalition or regional agency to use force beyond that required for self defence.[12] Consequently, when relying upon a Chapter VII mandate to deploy the CF for the purposes of enforcing a Security Council mandate, legal advisors must study the relevant resolution(s) to determine who is authorized to do what, against whom, and with what level of force.

16. Historically, the CF has participated in a number of international operations that have enforced UN mandates. These included the use of naval power to enforce sanctions in the Arabian Sea and Gulf Region[13] and off the Yugoslavian[14] and Haitian coasts.[15] CF-18s have been involved with enforcement actions over Bosnia,[16] and later Kosovo,[17] while other CF air assets have been involved with enforcement activities in Haiti,[18] Bosnia,[19] Somalia,[20] East Timor,[21] and Afghanistan,[22] to name a few. CF land forces have conducted enforcement operations in Bosnia,[23] Kosovo,[24] East Timor,[25] Haiti,[26] Somalia[27] and Afghanistan.[28]

The Transformation of UN Practice

17. Between 1945 and the end of the Cold War, it has been estimated that over 160 internal or international armed conflicts occurred [29] leaving over 20 million dead.[30] During this period, there were only two express findings of a "breach of the peace."[31] There were no more than seven findings of a "threat to the peace," and "aggression" was determined to exist in three situations.[32] Article 41 was expressly relied upon on only two occasions.[33] Peacekeeping operations were organized 18 times, only on one occasion with an express Article 39 determination.[34] Operations in Korea may, arguably, be the

[11] However, there are exceptions. See, for example, SCR 1160 (1998).
[12] See *e.g.*: SCR 940 (1994) concerning Haiti; SCR 776 (1992) concerning Bosnia; SCR 814 (1993) concerning Somalia; SCR 1031 (1996) concerning Bosnia; SCR 1244 (2000) concerning Kosovo and SCR 1386 (2001) concerning Afghanistan.
[13] See SCR 665 (1990).
[14] See SCRs 787 (1992) and 820 (1993).
[15] See SCRs 815 (1993), 875 (1993) and 917 (1994).
[16] See SCR 1088 (1996).
[17] See SCR 1244 (1999).
[18] See SCR 940 (1994) and 1524 (2004).
[19] See SCR 1357 (2001).
[20] See SCR 794 (1992) and 814 (1992).
[21] See SCR 1264 (1999).
[22] See SCR 1386 (2001).
[23] See SCR 1088 (1996).
[24] See SCR 1244 (1999).
[25] See SCR 1264 (1999).
[26] See SCR 1524 (2004).
[27] See SCR 814 (1999).
[28] See SCRs 1386 (2001) and 1563 (2004).
[29] Malanczuk, ed., *Akehurst's Modern Introduction to International Law*, 7th ed. (New York: Routledge, 1997) at 391.
[30] See *An Agenda For Peace, Preventive diplomacy, peacemaking and peace-keeping*, UN Sec Gen., A/47/277 – S/24111 (1992), online: United Nations <http://www.un.org/Docs/SG/agpeace.html>.
[31] See SCR 82 1950 on the Complaint of aggression upon the Republic of Korea and SCR 502 (1982) concerning the Falkland Islands; Gray, *supra* note 1 at 197.
[32] See SCRs, 573 (1985), 611 (1988), 387 (1976), 567 (1985), 571 (1985), 574 (1985), 577 (1985) and 455 (1979) concerning Israel, South Africa and Rhodesia; see Gray, *supra* note 1.
[33] Concerning Rhodesia 1966 and South Africa in 1977.
[34] See SCR 50 (1948) organizing UNTSO and the 1948 Palestine Truce Supervision as an example of a reference to Article 39 used within the context of peacekeeping.

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only example of an enforcement action.[35] Between 1945 and 1985 the veto was used 279 times, often in relation to drafted SCRs which were calling for action within the purview of Chapter VII.[36]

18. Clearly, this political context shaped and defined not only the role and activity of the General Assembly and Security Council, but also the way in which states have interpreted and applied key provisions of the Charter.[37] This has not only produced new practices, such as the emergence of peacekeeping and enforcement actions, but, as will be seen below, it has also expanded the circumstances in which enforcement actions can arise.

19. The Security Council had issued 659 resolutions prior to the 1990 invasion of Kuwait by Iraq. By the end of 2005, over 1590 resolutions had been issued. Over 36 peacekeeping missions were formed between 1990 and 2001.[38] Express Article 39 determinations leading to enforcement actions occurred in more than 25 different situations from 1990 to 2001.[39] Contrary to the Charter's drafters' expectations, most of these measures have related to situations occurring within, rather than between, states.

Key Legal Developments

20. A number of key legal developments have occurred following the Cold War. One was the development by the International Court of Justice (ICJ) of the doctrines of implied and inherent powers in respect of Security Council authority. As discussed in Chapter 14, these doctrines do not limit the potential powers of the Security Council to what is expressly provided for in the Articles of the UN Charter. Rather, these doctrines have the combined effect of presuming that the Security Council is operating within its authority (*intra vires*), as long as its actions fall within the purposes of the UN and the express provisions of the UN Charter do not prohibit the actions.[40]

21. Two other interrelated factors contributing to the expansion of the legal authority for enforcement action have been the narrowing of the Article 2(7) definition of 'domestic jurisdiction' and the broadening of what constitutes a threat to international peace and security under Article 39. Article 2(7) supports state sovereignty by requiring that the UN not "intervene in matters which are essentially within the domestic jurisdiction of any state," subject to Chapter VII enforcement measures. Article 39 requires a determination of a threat or breach of the peace before Chapter VII enforcement action can occur. However, driven primarily by political and humanitarian concerns, human rights matters, which were once considered solely within the domestic jurisdiction of a state, are now routinely considered to be of international concern. Likewise, the definition of what constitutes a threat or breach of the peace is no longer conceived of as requiring a threat or use of force between states. As a result, the violation of human rights within a state now routinely triggers an Article 39 determination.[41]

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[35] Others may add ONUC (Congo) and Rhodesia to the list, see Malanczuk, *supra* note 27 at 391 and 423 and Franck, *supra* note 1 at 228-229; Gray, *supra* note 1 at 199; Dinstein, *supra* note 1 at 137-139; and Sarooshi, *The United Nations and the Development of Collective Security* (New York: Oxford University Press, 1999) at 170.
[36] See Gray, *supra* note 1 at 196.
[37] As discussed at chapter 3, Section 2.
[38] *United Nations Peacekeeping*, online: United Nations <http://www.un.org/depts/dpko/dpko/index.asp>, and Gray, *supra* note 1 at 202.
[39] Ku and Jacobson, eds., *Democratic Accountability and the Use of Force in International Law* (Cambridge: Cambridge University Press, 2002) at 20-24 cite similar statistics when calculating the number of UN and NATO applications of military force. For the comparative periods of 1946 to 1989 and 1990 to 2000 they note "force to ensure compliance" and "enforcement" actions occurred 3 times in the first period compared to 23 times in the second period. Similarly "peacekeeping plus state-building" uses of military forces occurred 3 times between 1946-1986 and 23 times in the subsequent period.
[40] See Sarooshi, *supra* note 33. As Freudenschuβ, *supra* note 1 at 526 has commented:

> …the 'common law' approach, for which the most important guide is practice, has gained the upper hand over the Charter fundamentalists. Faced with the impossibility of fitting the authorizations during the Gulf conflict into a neatly numbered pigeon-hole in the Charter, it became the predominant view that the Security Council had created a new instrument and model for the future.

[41] See Cryer, "The Security Council and Article 39: A threat to coherence?" (1996) 1 J. L. Armed Confl. 162; Freudenschuβ, "Article 39 of the UN Charter Revisited: Threats to the Peace and the Recent Practice of the UN Security Council" (1993) 46 Aus. J. Pub. & Int'l L. 1; Wellens, "The UN Security Council and New Threats to the Peace: Back to the Future" (2003) 8 J. Confl. & Sec. L. 15; A key moment in the widening of the interpretation to Article 39 came in 1992 when the UN Heads of State met and agreed that "the non military sources of instability in the economic, social, humanitarian and ecological fields have become threats to

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SECTION 5

MAIN TYPES OF UN ENFORCEMENT OPERATIONS

22. While there are a variety of ways in which enforcement of a UN mandate may be authorized some of the most common types are canvassed in the following paragraphs, including enforcing sanctions, restoring international peace and security in a geographic area, implementing a peace agreement and enforcement for specific tasks.

Enforcing Sanctions

23. Under Article 41, which relates to "measures not involving the use of force," the Security Council may adopt a binding resolution that requires all Member States to refrain from importing or exporting particular items (such as military equipment) from or to a target state. The creation of a sanctions regime or embargo within the context of Article 41 requires Member States to regulate their own conduct and that of their citizens. There is no authority under Article 41 itself to enforce the compliance of other Member States. However, if Member States are subsequently authorized under Article 42 to "use all necessary means" to enforce sanction compliance, they could use force, typically either through a 'coalition of the willing' or through a regional agency (such as NATO). The CF naval forces have been actively involved in a number of maritime interdiction operations that have been designed to ensure that all Member States comply with sanctions imposed by the Security Council. These include naval operations off the coast of Haiti,[42] the former Yugoslavia[43] and Iraq.[44]

Restoring International Peace and Security in a Geographic Area

24. The Security Council has at times authorized the use of force to "restore international peace and security in the area"[45] or to "create a secure environment" in a designated geographical area, "for a humanitarian relief operation."[46]

Implementing a Peace Plan or Agreement

25. More common is an authorization to use force to implement the military aspects of a peace plan. This type of operation is legally distinct from a peacekeeping operation in which force is limited to self defence and the mission is typically to monitor and survey the implementation of a peace agreement by consenting parties. In this type of enforcement operation, force is authorized beyond that necessary for self defence to ensure that relevant portions of a peace agreement identified in the resolution are implemented and completed. The creation of a peace agreement consented to by the parties, subsequently backed by a Chapter VII mandate, has occurred in the Balkans[47] (the Dayton Accord), Kosovo,[48] East Timor[49] and Afghanistan.[50] The CF has participated in all of these enforcement operations.[51]

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international peace and security" (International Law Materials 31 (1992) 759 at 761). No longer was "a threat to peace" tied to notions of military threats. Since then a wide spectrum of situations has been deemed to constitute threats to the peace.
[42] On the law of maritime sanctions enforcement or maritime interdiction operations, see generally McLaughlin, "United Nations Mandated Naval Interdiction Operations in the Territorial Sea" (2002) 51 I.C.L.Q. 249; See SCRs 815 (1993), 875 (1993) and 917 (1994).
[43] See SCRs 787 (1992) and 820 (1993).
[44] See SCRs 661 (1990), 665 (1991), 1483 (2003), 1546 (2004).
[45] See SCR 83 (1950) in the case of Korea and SCR 678 (1990) in the case of Iraq's annexation of Kuwait. Both these resolutions have been the subject of debate over whether they simply reaffirm the right of self defence or go beyond that and authorize the use of force in ways that would not be possible if a State was simply acting in collective self defence. See Gray, *supra* note 1 at 135.
[46] See SCR 794 (1992) concerning the situation in Somalia.
[47] See SCR 1088 (1996).
[48] See SCR 1244 (1999).
[49] See SCR 1264 (1999).
[50] See SCR 1386 (2001).
[51] For further information on the implementation of peace in the former Yugoslavia see Galbraith, "Washington, Erdut and Dayton: Negotiating and Implementing Peace in Croatia and Bosnia-Herzegovina" (1997) 30 Cornell Int'l L.J. 643; Ashton, "Making Peace

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Enforcement for Specific Tasks

26. At times a military operation will only be authorized to use force beyond that required for self defence for precisely defined purposes, rather than through a broader mandate (such as creating a secure environment). These types of authorizations can sometimes be added to a previously mandated peacekeeping operation through Chapter VII. In such situations, the nature of the international operation begins to legally transform from a peacekeeping to a peace enforcement operation.[52] Alternatively, an enforcement operation can be created initially with precisely defined parameters that clearly identify the circumstances within which "all necessary means" may be employed.[53]

SECTION 6

KEY OPERATIONAL LAW ISSUES: ENFORCEMENT OPERATIONS

27. A Security Council authorization to conduct international operations to enforce a particular mandate often raises legal issues that impact on the way in which the Canadian Government defines the Strategic Objectives for a CF deployment, the content of OPLANS and, ultimately, ROEs. This section briefly canvasses some of the legal issues which generally arise.

Enforcing Sanctions Without an "Article 42 Authorization"

28. At times an issue will arise concerning whether a particular Article 41 sanction or embargo can be enforced against other States, or if the territorial integrity of the target state can be violated, in the absence of an Article 42 authorization.[54] As a general statement, a Security Council resolution only authorizes the use of force to enforce a sanction if it expressly provides such authorization[55] or refers to a previously existing mandate that authorizes the use of force.

Self Defence or Enforcement Action - Articles 42 and 51

29. At times the use of force may be expressly authorized in a situation where some states are already using force as an exercise of their right of self defence. In this type of situation legal issues can arise relating to the scope of the legal authorizations to use force, particularly if the threat that triggered the right of self defence is eliminated but a threat to international peace and security continues. The existence of both the exercise of the right of self defence and an enforcement mandate has arisen, for example, in 1950 in Korea,[56] the 1991 Gulf War[57] and the post 11 September 2001 Afghanistan conflict.[58] The CF has participated in all these missions.

Agreements Work: United Nations Experience in the Former Yugoslavia" (1997) 30 Cornell Int'l L.J. 769; Cousens, "Making Peace in Bosnia Work" (1997) 30 Cornell Int'l L.J. 789.

[52] See UNPROFOR SCR 770 (1992), 776 (1992), 779 (1992), Albania SCR 1101 (1997); UNMIH SCR 940 (1994) (Haiti); SCR 1590 (2005).

[53] See SCR 814 (1993) (Somalia), SCR 1590 (2005) (Sudan).

[54] See Higgins, *Problems and Process: International Law and How We Use it* (Great Britain: Oxford University Press, 2000). See *e.g.* SCR 665 (1991) relating to Iraqi sanctions as an example of the express authorization to use force to ensure compliance. SCR 665 (1991) establishes the international legal authority for CF maritime interdiction operations in the Arabian Gulf region from 1991 to present.

[55] See *e.g.* SCR 1356 (2001), creating a limited weapons embargo against Somalia where express authorization to use force was not given.

[56] SCR 83 (1950) raised issues and legal debate about whether force beyond that required for self defence was authorized. This debate was heightened when US led forces crossed the border into North Korea to pursue fleeing North Korean forces. See Gray, *supra* note 1; See also Dinstein, *supra* note 1.

[57] SCR 678 (1991) stated in part: "Authorizes Member States cooperating with the Government of Kuwait (…) to use all necessary means to uphold and implement resolution 660 (1990) and all subsequent relevant resolutions and to restore international peace and security in the area."
See Greenwood, "New World Order or Old? The Invasion of Kuwait and the Rule of Law" (1992) 55(2) Mod. L. Rev. 153; Schachter "United Nations Law in the Gulf Conflict" 85 A.J.I.L. 452.

[58] SCR 1386 (2002) stated in part: "Reaffirming … resolutions 1378 … Supporting international efforts to root out terrorism, in keeping with the Charter of the United Nations, and reaffirming … resolutions 1368 … and 1373 … Authorizes, as envisaged in

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30. When an enforcement mandate is authorized within the same context that sustains the legal right of self defence, care must be taken to ensure that the proposed military operations can be supported on one of the two legal bases. While force used in self defence is directed to eliminating a continuing threat, the use of force to restore international peace and security may go beyond what is permitted in self defence. The importance of precisely analyzing the level of authorized force and its relationship to each distinct legal basis is crucial, particularly when operating within a coalition if some participating states are only authorized to act on one legal basis but not the other.

Host Nation Consent and a Binding Authorization

31. Since the signing of the Dayton Accord it has become more common for parties to an armed conflict to create a peace plan and consent to having it enforced by third-party states. This has occurred in the Balkans,[59] Kosovo,[60] East Timor[61] and Afghanistan.[62] Legal issues relating to the authority to enter the state and the ability to use force to implement, and if need be enforce, the peace plan is based not only on the consent of the parties but also on a resolution. At times the resolution may incorporate all, or a portion of the peace plan, and expressly refer to the consent of the parties. As a matter of law, these types of operations may possibly rest on two distinct legal bases: the consent of the parties, perhaps expressed through treaty (a peace agreement), and a Chapter VII resolution. The details of such an arrangement may be further elaborated in a variety of other instruments such as SOFAs, Military Technical Arrangements (MTAs) or MOUs. Precisely identifying the nature and scope of authority provided by each legal basis will be particularly important should one of the two authorities change in nature or be completely revoked.[63]

Ambiguous Mandates

32. Generally, Chapter VII resolutions will not provide detailed and precise authorizations on the exact parameters within which force is to be used. This is not surprising given the complex subject matter and the fact that often the content of resolutions are a matter of political negotiation[64] requiring constructive ambiguity.[65] While the exact parameters of a mandate may sustain a variety of interpretations, the scope of the CF mandate will often be further defined by the Strategic Objectives provided to the CF by the Government of Canada, and further refined by the CDS-approved OPLAN or Strategic Initiating Directive.

Implied, Retroactive and Re-Triggered Authorizations

33. In the case of the Kosovo air campaign and the 2003 US-led intervention into Iraq, some debate has focused on whether a clear express authorization to use "all necessary means" is required for each specific intervention. It has been suggested that Chapter VII resolutions that do not expressly authorize "all necessary means" may still authorize the use of force by implying such a right given the context within

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Annex 1 to the Bonn Agreement, the establishment for … an International Security Assistance Force … [and] Authorizes the Member States participating in the International Security Assistance Force to take all necessary measures to fulfill its mandate …" SCRs 1368 and 1373 have reaffirmed and recognized the right of individual and collective self defence in response to the tragic events of 11 September 2001. The CF has taken military action against Al-Qaeda and the Taliban both in exercise of individual and collective self defence and also as part of ISAF. Relying on these two distinct legal bases may have implications for issues relating to the way in which armed force is used and in how operations are conducted.

[59] See SCR 1088 (1996).

[60] See SCR 1244 (1999).

[61] See SCR 1264 (1999).

[62] See SCR 1386 (2001).

[63] For example, in 2002 there was the possibility of the SFOR mandate not being renewed. This raised the legal issue of whether participating NATO countries could continue to carry out their duties relying solely on the consent of the states concerned. Likewise, it is not unreasonable to envisage a situation where a party to a peace arrangement may withdraw its consent while the SCR Chapter VII authorization to implement the peace arrangement continues.

[64] For example, see SCR 1441.

[65] See Lobel and Ratner, "Bypassing the Security Council: Ambiguous Authorizations to Use Force, Cease-Fires and the Iraqi Inspection Regime" (1999) 93 A.J.I.L. 124.

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which the resolution was passed,[66] retroactively[67] authorizing the use of force, or, by "re-triggering"[68] a previous resolution and applying it to the current situation. None of these arguments have been adopted by the Government of Canada, and from a legal perspective this line of argument is questionable. Other legal bases, apart from a Security Council Resolution (SCR), have been relied upon by writers to explain the legal authority for the Kosovo air campaign. This would include "humanitarian intervention."

34. Generally, the current practice of the Security Council requires a Chapter VII resolution that expressly authorizes all necessary means or measures to carry out a specific mandate.[69] At times a mandate can be renewed, expressly invoking or relying upon a previous resolution that had authorized force.[70] As it is the Security Council that has created the current process for how force is authorized, it is legally possible and within its authority to modify the current practice.[71] Other legal bases, apart from a SCR have been relied upon by writers to explain the legal authority for the Kosovo air Campaign. This would include "humanitarian intervention."

SECTION 7

CONCLUSION

35. UN enforcement operations or complex peace support and stabilization missions have been the most common type of international operation carried out by the CF since the end of the Cold War. These include enforcement operations involving land, sea and air assets in a variety of geographic locations including Bosnia, Cambodia, the Central African Republic, Sudan, Rwanda, East Timor, Afghanistan and Haiti to name a few.

36. When planning and seeking governmental authorization to deploy, CF planners, policy advisors, operators and legal advisors must pay particular attention to the authorizing Security Council resolution(s) that establish the mission mandate. Usually the mandate will define the mission goals, establish its geographic and temporal parameters, expressly authorize the level of force to be used, and outline command and reporting relationships. It is the authorizing Security Council resolution(s) that will form the parameters for defining the scope of operations, any strategic objectives set by the Government of Canada, the Strategic Initiating Directive, the OPLAN, ROE and possibly targeting restrictions.

37. It is not unusual for the scope of the mission's mandate to be imprecisely defined. In such a case, both governmental direction and CDS direction through the Strategic Initiating Directive will give further precision. In this regard, within the context of coalition operations, it is not uncommon for various troop-contributing nations to have slightly divergent approaches to defining the mission and the nature of force to be used, given national policy and domestic legal considerations.

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[66] See SCR 688 (1991) as some have argued implied the use of force to create "no fly zones" in Iraq. See also SCRs 1160 (1998), 1199 (1998), 1203 (1998) and 1239 (1999) which have been suggested as having the combined effect, when coupled with a voted down draft Russian sponsored resolution condemning NATO action, of implying the authorization for the Kosovo air campaign. Most recently see SCR 1441 on Iraq which threatened "serious consequences" if Iraq did not comply with weapons inspectors.

[67] See SCR 788 (1992) which some have considered as retroactively approving the use of force by ECOWAS in Liberia.

[68] See SCR 678 (1990) and its regular application to the use of force in relation to SCR 1441 (2002) by US and UK intervention into Iraq on 2003. See U.K., Foreign Affairs Committee, *Ninth Report: The Decision to go to War in Iraq* (London: The Stationary Office Limited, 2003); Greenwood, "Iraq: Was it Legal?" (Presentation to the London School of Economics and Political Science, 18 November 2004), online: LSE Office of Development and Alumni Relations <http://www.lse.ac.uk/collections/alumniRelations/reunionsandevents/Reportsandphotos/20041118.htm>. See also Greenwood, "The Legality of the Use of Force: Iraq in 2003" in Bothe, O'Connell and Ronzitti, *Redefining Sovereignty* (New York: Transnational Publishers, 2005) at 387-416. From this perspective SCR 678 is not "retriggered" but has been applicable throughout.

[69] See *e.g.* the key ISAF SCRs 1386 (2001), 1413 (2002), 1444 (2002), 1510 (2003) and 1563 (2004).

[70] For example, the Security Council has issued a series of Iraq sanction resolutions that have been continually modified but constantly enforced. The CF Navy has been particularly active in conducting maritime interdiction operations in the Arabian Gulf and Sea. Throughout this period the authorization to use force to enforce the sanctions regime has been SCR 665 (1991) which states in part: "*Calls upon* those Member States co-operating with the Government of Kuwait which are deploying maritime forces to the area to use such measures commensurate to the specific circumstances as may be necessary under the authority of the Security Council to halt all inward and outward maritime shipping, in order to inspect and verify their cargoes and destinations and to ensure strict implementation of the provisions related to such shipping laid down in resolution 661 (1990)."

[71] See *e.g.* SCR 1529 (2004) creating a Multinational Interim Force replaced by MINUSTAH under SCR 1542 (2004).

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38. Additionally, an added layer of complexity may exist during the planning authorization and execution of a UN enforcement operation if the international deployment is based on more than one legal basis (e.g., a Chapter VII mandate as well as the collective right of self defence or host state consent). In such circumstances, operations may be expanded or narrowed beyond what would otherwise be authorized in a Security Council resolution. This may impact ROE and targeting parameters, and also the way the operation is carried out, particularly if it occurs within a coalition where not all nations choose to rely on all possible legal bases.

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CHAPTER 16

OTHER INTERNATIONAL OPERATIONS

SECTION 1

INTRODUCTION

1. International law is comprised of treaty law as well as customary international law, as outlined in Chapter 10. CF international operations may rest on either or both of these foundations. While the majority of CF international operations may be based on a UN mandate, often in the form of a Security Council resolution, the UN Charter and the legal authority derived therefrom is not the sole legal basis upon which a CF international operation may rest.

2. Other treaties, for example SOFAs, or the UN Convention on the Law of the Sea, establish further legal regimes that may create a foundation for, or otherwise affect, CF international activity. These relevant legal regimes are covered in subsequent chapters.

3. In addition, customary international law provides a separate and distinct legal basis to use force and to conduct international operations.

4. The most recently relevant customary international legal bases upon which CF international operations have relied in the last ten years include self defence, humanitarian intervention, the invitation or consent of a host state and the rescue/evacuation of nationals abroad. Each of these legal bases is addressed individually in this chapter.

SECTION 2

SELF DEFENCE

5. The customary international legal basis of self defence was discussed in Chapter 13 and consequently will not be repeated in this section. Under customary international law, states have a right of self defence, which may be exercised individually or collectively. This right is not extinguished by Article 51 of the UN Charter. Like Article 51, customary international law creates a legal basis that allows states to use force in self defence when they, or their allies, are confronted with imminent or ongoing threats.

6. CF international operations within the framework of the post 11 September 2001 ‘Campaign Against Terrorism’ are based upon the legal right of individual and collective self defence.

SECTION 3

HUMANITARIAN INTERVENTION

7. The UN Charter provides a legal basis allowing the Security Council to authorize military intervention for humanitarian purposes. For example, the CF deployed to Somalia, Haiti and East Timor in the early 1990s for what has been generally viewed as Security Council authorized humanitarian intervention.[1]

8. This section, however, focuses on humanitarian intervention that is not authorized by the Security Council and which instead relies upon customary international law as its legal basis.

9. The issue of whether a customary international right of humanitarian intervention exists surfaced during the 1999 Kosovo air campaign in which the CF and other NATO militaries halted acts of genocide

[1] Greenwood, “International Law and the NATO Intervention in Kosovo” (2000) 49 I.L.C.Q. 927.

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and crimes against humanity being inflicted by the Milosevic regime. Largely as a result of this intervention, the existence of a right of humanitarian intervention has been one of the most debated international legal issues over the last five years.[2]

10. Those who argue that no such right currently exists generally anchor their position on the UN Charter. In particular they rely on Article 2(4),[3] which creates a general prohibition on the use of force subject only to the exceptions of self defence (Article 51) and Security Council authorization (Chapter VII). Those with a restrictive view of the issue generally argue that in the absence of express authorization by the Security Council to use force, a legal basis for humanitarian intervention does not exist. Only those interventions for humanitarian purposes that have been authorized by a Security Council resolution, such as Somalia or East Timor, would be lawful.[4]

11. Importantly, most legal experts in this group acknowledge that international law is dynamic and subject to change. The UN Charter can be reinterpreted over time as a result of state practice, through the development of customary international law. For members of this group, an international right to use military force for humanitarian purposes has not yet crystallized, but they acknowledge that there is a possibility that the law can evolve and may already be developing in this area.[5]

12. The key argument for those rejecting a customary right of humanitarian intervention is that there is currently not sufficient evidence of state practice based upon *opinio juris* – a belief that the action is in accordance with international law – to support the argument that a right to use military force to address serious violations of human rights exists, in the absence of Security Council authorization.

13. Other lawyers in this group, including the former President of the International Criminal Tribunal for the Former Yugoslavia (ICTY), have argued that customary international law could provide a legal basis to intervene militarily for limited humanitarian purposes and, indeed, that international law is moving in this direction. For example, following an overview of historic state practice relating to international human rights, it was concluded that:

> [b]ased on these nascent trends in the world community, I submit that under certain strict conditions resort to armed force may gradually become justified, even absent any authorization by the Security Council.[6]

14. The evolution of international practice based on the UN Charter and customary international law is driven increasingly by an acceptance of the need for effective protection of human rights and a diminishing of the influence of traditional Westphalian respect for the sovereignty of the state. It is the

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[2] For a general review of the various perspectives within the legal debate, useful references include: "Kosovo: House of Commons Foreign Affairs Committee 4th Report, June 2000" (2000) 49 I.C.L.Q. 876; "Editorial Comments: NATO's Kosovo Intervention – Kosovo and the Law of "Humanitarian Intervention" (1999) 93 A.J.I.L. 824; Greenwood, *ibid*.; Chesterman, *Just War of Just Peace*: *Humanitarian Intervention and International Law* (Oxford: Oxford University Press, 2001). Pitzul *et al.*, "The Responsibility to Protect: A Military Legal Comment" (2005) 5:4 Can. Mil. J. 31. The following analysis concerning the debate has been extracted from this article. Other useful readings include: Wheeler, *Saving Strangers: Humanitarian Intervention in International Society* (New York: Oxford University Press, 2000); Franck, *Recourse to Force: State Action Against Threats and Armed Attacks* (Cambridge: Cambridge University Press, 2002), ch. 9; Henkin, "NATO's Kosovo Intervention: Kosovo and the Law of Humanitarian Intervention" (1999) 93 A.J.I.L. 824.

[3] Article 2(4) of the UN Charter states: "All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

[4] Relevant Security Council resolutions are: Somalia, SCR 794 (1992) and East Timor, SCR 1246 (1999), SCR 1264 (1999) and SCR 1272 (1999).

[5] See *e.g.* Cassese, "A Follow-up: Forcible Humanitarian Countermeasures and Opinio Necessitatis" (1999) 10 E.J.I.L. 791. As Brownlie noted before the United Kingdom House of Commons Foreign Affairs Committee following the Kosovo air campaign: "[t]he proponents of humanitarian intervention are distinctly in a minority. More significant, however, is the position in customary international law, which depends upon the practice of States based upon *opinio juris,* that is to say a belief that the action is in accordance with international law. … But there is a burden of proof upon proponents of a change in the customary law. The central point is the absence of evidence of a change of view by a majority of States." Brownlie, "Kosovo Crisis Inquiry: Memorandum on the International Law Aspects" (2000) 49 I.C.L.Q. 894.

[6] Cassese, "Ex incuria ius oritur: Are We Moving Towards International Legitimization of Forcible Humanitarian Countermeasures in the World Community?" (2000) 10 E.J.I.L. 27.

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engine of human rights that has propelled the emergence of a doctrine of humanitarian intervention and a continual redefinition of both "the domestic jurisdiction" under Article 2(7)[7] and a "threat to international peace and security" under Article 39[8] of the UN Charter. Increasingly, serious violations of human rights within the territory of a state that it is unable or unwilling to prevent are being met by military and non-military forms of intervention.

15. Importantly, largely as a result of this evolution, there is also a body of legal opinion asserting that an international legal right of humanitarian intervention already exists.[9] For proponents of such a right, the UN Charter is a 'living tree' subject to changing interpretations as customary norms develop. In short, the UN Charter is not a static legal document, nor is it the sole source of international law. A leading proponent of the existence of a right of humanitarian intervention has observed the following:

> [I]t has been argued that, because the United Nations Charter contains a prohibition of the use of force and no express exception for humanitarian intervention, there can be no question of international law recognizing a right of humanitarian intervention. That is, however, to take too rigid a view of international law.
>
> This approach ignores the fact that international law in general and the United Nations Charter in particular do not rest exclusively on the principles of non-intervention and respect for the sovereignty of the State. The values on which the international legal system rests also include respect for human rights... Upholding those rights is one of the purposes of the United Nations and of international law... Moreover, international law is not confined to treaty texts. It includes customary international law. That law is not static but develops through a process of State practice, of actions and the reaction to those actions. Since 1945, that process has seen a growing importance attached to the preservation of human rights. Where the threat to human rights has been of an extreme character, States have been prepared to assert a right of humanitarian intervention as a matter of last resort.[10]

16. Those who advocate the existence of a customary international law basis for humanitarian intervention cite a long history of state practice as evidence supporting the crystallization of a legal right. This includes various historic moments where military intervention into another sovereign state's territory has occurred without prior Security Council authorization, in situations of humanitarian crisis. Commonly advanced examples include the 1971 Indian intervention into Pakistan, Vietnam's 1978 intervention into Pol Pot's Cambodia, Tanzania's invasion of Uganda (also in 1978), ECOWAS's interventions into Liberia (in 1990), and Sierra Leone (in 1997), the imposition of 'no-fly zones' in northern and southern Iraq, in 1991 and 1992, respectively, and of course, Kosovo.

17. By way of summary, the current debate on whether a right of humanitarian intervention exists focuses on the central point of whether the weight of evidence is sufficient to conclude that such a right has crystallized. Most lawyers in the debate, on either side, acknowledge that customary international law and interpretations of the UN Charter can evolve and support the emergence of a right of humanitarian intervention.

18. The Canadian approach to the issue of humanitarian intervention has resulted in some key moments of state practice. As noted, Canada deployed the CF and participated in the NATO-led Kosovo

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[7] Article 2(7) provides in part that "nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state," subject only to enforcement measures adopted by the Security Council pursuant to its Chapter VII authority."

[8] Article 39 reads, in part: "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall … decide what measures shall be taken in accordance with Articles 41 and 42 …." As noted in Chapter 7, Section 4 the interpretation, which states have given to Article 2(7) and Article 39 has transformed over time. The developments, driven largely by a concern for human rights, have been to give an expansive view of what constitutes a "threat to the peace" and a narrower view of what constitutes "within the domestic jurisdiction of any state."

[9] See especially Greenwood, *supra* note 1. See also the pleadings of Belgium before the International Court of Justice in *Legality of Use of Force (Belgium v. Serbia and Montenegro), (*Provisional Measures), 10 May 1999, CR 99/15.

[10] Greenwood, *ibid*. at 929.

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air campaign in 1999.[11] Furthermore, the Government of Canada is playing a leading role in developing clear and precise rules under which states can and should intervene militarily for humanitarian purposes.[12] In 2000, the Government of Canada announced before the UN General Assembly that it would establish the International Commission on Intervention and State Sovereignty (ICISS) to address issues relating to the responsibility of states when confronted with humanitarian crises. The ICISS produced a report entitled the *Responsibility to Protect*[13] which offers a framework defining when and how military forces may be deployed into another state to address humanitarian catastrophes. The notion of a "Responsibility to Protect" has been advanced by Canada at the UN. During the UN Summit in September 2005, world leaders endorsed the principle that States have a primary responsibility to protect their own populations and that the international community has a responsibility to act when these governments fail in that duty.[14] While this document, like the Report, do not provide a legal basis for humanitarian intervention, they are evidence of *opinio juris.*

SECTION 4

INVITATION OR CONSENT BY A STATE

19. International operations may occur within the territory of another state with the consent of that state. Under customary international law, sovereign states are entitled to invite, or consent to, a foreign military presence within their territorial waters, airspace and on their land.

20. This is routinely done for a variety of purposes not involving peacekeeping (see Chapter 14), including transiting, stationing, conducting exercises, assistance during internal disturbances, enhancement of a defence posture, mutual defence arrangements, and exercising collective self defence.

21. While not legally required, the nature and scope of the consent may be expressed in written form, such as a Status of Forces Agreement (SOFA – see Chapter 26), a Memorandum of Understanding (MOU – see Chapter 27) or Exchange of Notes or Diplomatic Note. The CF has relied upon these types of documents during a wide range of international operations including deployments to other NATO countries, Kuwait, Afghanistan, Bosnia, Haiti, the Dominican Republic, the Congo and Sudan.[15]

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[11] Prior to the commencement of the air campaign the Security Council had passed resolutions SCR 1160 (1998), SCR 1199 (1998) and SCR 1203 (1998), all which determined the situation in Kosovo to be a threat to international peace and security but did not expressly authorize the use of force. During the campaign a Russian sponsored draft resolution condemning the air campaign did not pass. In 1999 the Former Republic of Yugoslavia (FRY) commenced legal action against Canada and 9 other NATO states before the. On 15 Dec 2004 the ICJ ruled that Serbia and Montenegro (formerly the FRY) could not proceed with the matter on the basis of jurisdiction issues. See the ICJ decision of *Legality of Use of Force (Canada v. Serbia and Montenegro*), [2004] I.C.J., online: ICJ <http://www.icj-cij.org/icjwww/ipresscom/ipress2004/ipresscom2004-04_yca_summary_20041215.htm>.

[12] See for example, International Commission in Intervention and State Security (ICISS), *Responsibility to Protect Document – Report of the International Commission on Intervention and State Sovereignty*, December 2001, online: ICISS <http://www.iciss.ca/report2-en.asp> [ICISS Report]. The report notes that "[t]he starting point…should be the principle of non-intervention…Yet there are exceptional circumstances in which the very interest that all states have in maintaining a stable international order requires them to react when all order within a state has broken down or when civil conflict and repression are so violent that civilians are threatened with massacre, genocide or ethnic cleansing on a large scale…Generally expressed, the view was that these exceptional circumstances must be cases of violence which so genuinely "shock the conscience of mankind," or which present such a clear and present danger to international security, that they require coercive military intervention."

[13] ICISS Report, *supra* note 12. Both former Prime Ministers Jean Chrétien and Prime Minister Paul Martin have advanced the ideas contained in the ICISS Report. See, for example, Prime Minister Chrétien's speeches at the opening of the 58th Session of the UN General Assembly, 23 September 2003, and during his Roundtable Discussion at the Progressive Governance Summit, hosted by the United Kingdom Prime Minister Blair in London on 12 July 2002. More recently, Prime Minister Martin promoted the ICISS Report during the 3 February 2004 and also the 5 October 2004 Throne Speeches, in the "Address by the Prime Minister in Reply to the Speech from the Throne." In addition, on 22 September 2004, at the opening of the 59th Session of the UN General Assembly, Prime Minister Martin stated: "International law is moving in the right direction…Thus, customary international law is evolving to provide a solid basis in the building of a normative framework for collective humanitarian intervention. To speed it along, member states should now adopt a General Assembly resolution recognizing the evolution of sovereignty to encompass the international responsibility to people." See also paras. 138-140 of the subsequent *Resolution adopted by the General Assembly, 60/1. 2005 World Summit Outcome*, 24 October 2005, online: United Nations <www.un.org/summit2005/> [World Summit Outcome].

[14] World Summit Outcome, *ibid.* at paras. 138-140.

[15] See *e.g.* the Status of Forces Agreements and Transit Agreements made within the framework of the Dayton Accords. See also the exchange of notes with the Dominican Republic in 2004 to establish a forward mounting base for the evacuation of Canadian nationals from Haiti, the exchange of notes with Haiti in 2004 for the deployment of the Canadian Forces as a part of a temporary multinational force and the Military Technical Agreement between the International Security Assistance Force (ISAF) and the Interim

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22. Furthermore, the consent provided by a state to enter its territory and conduct military operations may, in certain circumstances, be incorporated within a Chapter VII Security Council resolution establishing a distinct and separate legal authority for the presence of foreign troops. A familiar example of this type of situation would be the CF deployment to Bosnia with IFOR and subsequently SFOR, which was legally based upon both an enabling Security Council resolution and also the consent of the State of Bosnia and Herzegovina.[16]

23. Importantly, certain naval and air operations relating to foreign ships and aircraft in international airspace and waters may occur with the consent of the flag state or the state in which the aircraft is registered. For example, the CF could board a foreign vessel in international waters, in the absence of an authorizing Security Council resolution, if flag state consent was obtained.[17] Similarly, a state may request that Canada intercept an aircraft registered in its country while it is flying through international airspace.[18]

SECTION 5

THE RESCUE OF NATIONALS ABROAD

24. In certain circumstances the CF may conduct an international operation within a foreign state for the sole purpose of rescuing Canadians and nationals of other states who request assistance. These are sometimes referred to as non-combatant evacuation operations (NEO). In some circumstances these operations may occur in situations not involving national self defence but arising within a deteriorating security situation or within the context of a civil war where the territorial state is unwilling to assist, or is unable to assist but willing to consent to a CF evacuation operation. In other contexts foreign nationals may be threatened by the state itself. Given the various scenarios in which a NEO could unfold, it is theoretically possible that the rescue of Canadians abroad could occur on the legal basis of state consent or self defence.

25. In this regard two points should be highlighted. First, customary international law recognizes the right of nations to protect their citizens abroad when the host state, for whatever reason, is unable or unwilling to do so. Depending upon the circumstances at the time, the legal basis for entering the foreign state and evacuating Canadians may rely upon state consent or self defence. Second, in such circumstances, the customary international law relating to state consent or self defence provides a legal exception to the general prohibition to the use of force found in Article 2(4) of the UN Charter.[19]

SECTION 6

CONCLUSION

26. From the perspective of those responsible for the planning and authorization of CF international operations, it is important to emphasize that the UN Charter is not the sole, or even a necessary, legal basis upon which the deployment of the CF may rest.

Administration of Afghanistan for the deployment of ISAF and the status of its personnel. See also letter dated 30 May 2005 from The Embassy of Canada to The Ministry of Foreign Affairs, Islamic Republic of Afghanistan.

[16] See SCR 1031 (1995) welcoming implementation of the Dayton Accord and Annex 1A.

[17] In the absence of any other international legal authority (such as, *e.g.*, a binding Security Council resolution or the law of armed conflict), flag state consent is required to board a foreign vessel. A flag state has jurisdiction over ships registered in its country. See *United Nations Convention on the Law of the Sea*, 10 December 1982, Conf.62/122, 21 I.L.M. 1261 (1982), art. 92 (entered into force 16 November 1994).

[18] The authority to intercept an aircraft registered in another state flying in international airspace is the exercise of the Crown prerogative. It should be noted that as a possible legal basis to act the Crown prerogative is exercised on a case-by-case basis and only at the highest level of Government. Consequently, any operational commander reviewing Canada's authority to act on the basis of Crown prerogative should be aware that this may involve a time consuming and uncertain process.

[19] On legal aspects of conducting non-combatant evacuation operations, see generally Day, "Legal Considerations in Noncombatant Evacuation Operations" (1992) 40 Naval Law Rev. 45. See also B-GJ-005-307/FP-050, Non-Combatant Evacuation Operations, p. 4-12, where key legal issues in theatre are discussed including diplomatic personnel, persons seeking asylum or refuge and undertakings by both the host nation and Canada.

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27. As noted in Chapter 10, customary international law may provide a legal basis, distinct from the UN Charter, for an international operation. Customary international law provides a variety of bases that may be relevant depending upon the circumstances.

28. In the absence of another international legal authority, the consent of a territorial state will often provide a sufficient legal basis to conduct an operation in that state. Often the nature and scope of the consent is expressed in writing through a SOFA, MOU or Exchange of Notes. In these circumstances such arrangements often define the nature of the operation, and consequently may impact on the OPLAN and ROE. The other side of state consent is that military planners, in the absence of any other legal basis, must seek the consent of the host state for air, ground or naval transit through, or stationing within, that state's territory.

29. Customary international law also permits the rescue of nationals abroad who are being threatened in circumstances where the host state is unable or unwilling to act. The 2004 intervention by the CF into Haiti during the fall of the government and civil unrest would be a recent example of when this occurred. The 2004 rescue of Canadian citizens by French forces in Côte d'Ivoire would be another example.

30. While subject to some controversy, the CF involvement in the Kosovo air campaign in 1999 would be the most recent example of evidence supporting recognition of a customary international law right of humanitarian intervention.

31. Lastly, and perhaps most importantly, the exercise of the right of self defence is another example of a legal basis to use force in a way that is not reliant on a UN mandate. The most recent example where Canada has relied upon this customary international legal basis is the current Campaign Against Terrorism.[20]

[20] Canada informed the Security Council it was exercising the individual and collective right of self defence against Al Qaeda and the Taliban regime supporting it in a letter dated 24 October 2001. See *Letter Dated 2001/10/24 from the Charge D'Affairs A.I. of the Permanent Mission of Canada to the United Nations Addressed to the President of the Security Council*, UNSC, 56th Sess., S/2001/1005 (1981).

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CHAPTER 17

APPLICABILITY OF THE LAW OF ARMED CONFLICT TO CF INTERNATIONAL OPERATIONS

SECTION 1

INTRODUCTION

1. Various bodies of domestic and international law are considered when authorizing, planning and conducting CF international operations. Most significantly, for the purposes of this chapter, is the applicability of the law of armed conflict (LOAC), sometimes referred to as international humanitarian law (IHL). This chapter identifies the LOAC, its sources, and when as a matter of law and policy it applies to CF international operations. The individual criminal responsibility of CF commanders and members for violations of this law will also be highlighted. Finally, reference to other international legal regimes that may also be applicable will be discussed.

SECTION 2

THE LAW OF ARMED CONFLICT

2. The LOAC[1] has been defined as the body of international law which sets out rules of behaviour in an armed conflict. "It sets out minimum standards applicable to the conduct of hostilities designed to limit unnecessary human suffering, ensure respect for human dignity, and facilitate the restoration of peace."[2]

3. International law includes both treaty law and customary international law. From a CF perspective, the relevant treaty law of the LOAC is identified in the CF publication B-GG-005-027/AF-022, Collection of the Documents on the Law of Armed Conflict. Key treaties include the Hague Conventions,[3] the Geneva Conventions,[4] the Additional Protocols to the Geneva Conventions,[5] as

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[1] See William Fenrick, "The Development of the Law of Armed Conflict through the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia" (1998) 3 Jn of Armed Conflict 197; McCoubrey, *International Humanitarian Law: The Regulation of Armed Conflicts* (Aldershot: Dartmouth Publishing Company Limited, 1990); Fleck, *The Handbook of Humanitarian Law in Armed Conflicts* (Oxford: Oxford University Press, 1995); McCoubrey and White, *International Law and Armed Conflict* (Aldershot: Dartmouth Publishing Company Limited, 1992); Dinstein, *The Conduct of Hostilities in International Armed Conflict*, 3rd ed. (Cambridge: Cambridge University Press, 2004); Bothe et al., *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* (The Hague and Boston: M. Nijhoff, 1982); Rogers, *Law on the Battlefield,* 2nd ed (Manchester: Manchester University Press, 2004).

[2] See B-GG-005-027/AF-023, Code of Conduct for CF Personnel, p. 1-2.

[3] *Hague Conventions of 1907*, 18 October 1907: *Convention III Relative to the Opening of Hostilities, Convention IV Respecting the Laws and Customs of War on Land, Convention V Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, (VI) Relating to the Status of Enemy Merchant Ships at the Outbreak of Hostilities, (VII) Relating to the Conversion of Merchant Ships Into Warships, Convention VIII Relative to the Laying of Automatic Submarine Contact Mines, Convention IX Concerning Bombardment by Naval Forces in Time of War, Convention XI Relative to Certain Restrictions with Regard to the Exercise of the Right of Capture in Naval War, Convention XIII Concerning the Rights and Duties of Neutral Powers in Naval War and Convention XIV Prohibiting the Discharge of Projectiles and Explosives from Balloons.*

[4] *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12,* 1949, 12 August 1949, 75 U.N.T.S. 31; *Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed at Sea of August 12, 1949*, 12 August 1949, 75 U.N.T.S. 85; *Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949*, 12 August 1949, 75 U.N.T.S. 135; *Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949*, 12 August 1949, 75 U.N.T.S. 287.

[5] *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I),* 6 August 1977, [AP I]; *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol II),* 6 August 1977[AP II].

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well as key weapons control treaties such as the Ottawa Convention[6] and the Convention on Certain Conventional Weapons.[7]

4. As a general statement, the substantive provisions of the principal Hague Conventions, and the four Geneva Conventions are also considered reflective of customary international law. Most of the provisions of the two Additional Protocols are likewise considered to reflect customary international law, although, critically, some important provisions of the Protocols are not generally accepted as such.[8] In cases where the existence of a customary international law rule is in doubt, or where the application of a particular treaty rule is in question, the operational commander should seek clarification from a legal advisor.

SECTION 3

WHEN DOES THE LAW OF ARMED CONFLICT APPLY

5. Also as a general statement, the LOAC[9] applies to the conduct of CF international operations whenever Canada is a party to an armed conflict or in belligerent occupation of foreign territory.[10]

6. International law recognizes two types of armed conflict: international armed conflict and non-international armed conflict[11] (sometimes referred to as internal armed conflict or armed conflict not of an international nature).[12]

7. Generally speaking international armed conflict has been defined as the "resort to armed force between States," while non-international armed conflict has been defined as "protracted armed violence between governmental authorities and organized armed groups or between such groups within a State."[13]

SECTION 4

THE APPLICATION OF THE LAW OF ARMED CONFLICT GENERALLY

8. As noted, LOAC applies whenever there is a state of "armed conflict." A widely accepted decision of the International Criminal Tribunal for the Former Yugoslavia (ICTY) has stated:

[6] *Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction*, 18 September 1997, 2056 U.N.T.S. 211.
[7] *Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be Deemed to be Excessively Injurious or to have Indiscriminate Effects*, 10 October 1980, 1342 U.N.T.S. 137.
[8] See generally Greenwood, "Customary Law Status of the 1977 Geneva Protocols" in Delissen and Tanja, eds, *Humanitarian Law of Armed Conflict* (Boston: Dordrecht, 1991); Mullerson, *Ordering Anarchy: International Law in International Society* (The Hague: Kluwer Law International, 2000); Editorial comments in Roberts and Guelff, *Documents on the Law of War*, 3rd ed. (Oxford: Oxford University Press, 2000). For example, art. 1(4), 96(3), etc. of AP 1, *supra* note 5.
[9] On application of the law of armed conflict see Greenwood, "Scope of Application of Humanitarian Law" in Fleck, *supra* note 1 at 39.
[10] There has been, however, some debate concerning whether the recent campaign against terrorism in Afghanistan constitutes a continuing armed conflict, and whether the armed conflict is of an international or a non-international character. See *e.g.* Jinks, "September 11 and the Laws of War" (2003) 28 Yale J. Int'l L. 1; Fitzpatrick, "Jurisdiction of Military Commissions and the Ambiguous War on Terrorism" (2002) 96 A.J.I.L. 345.
[11] On non-international armed conflicts see Moir, "The Implementation and Enforcement of the Laws of Non-International Armed Conflict" (1998) 3 J. Armed Confl. 163; Moir and Matheson, "The Law of Internal Armed Conflict" (2003) 97 A.J.I.L. 466; Blank, "The Laws of War in Shakespeare: International vs. Internal Armed Conflict" (1998) 30 NYU Jn. Int'l Law & Policy 251; Lopez, "Uncivil Wars: The Challenge of Applying International Humanitarian Law to Internal Armed Conflicts" (1994) 69 N.Y.U.L. Rev. 916; Cullen, "The Parameters of Internal Armed Conflict in International Humanitarian Law" (2004) 12 U. Miami Int'l & Comp. L. Rev. 189; Junod, "Additional Protocol II: History and Scope" (1983) 33 Am. U. L. Rev. 29.
[12] For a general discussion on the applicability of the LOAC and the categorization of "armed conflict" see: *Prosecutor v. Dusko Tadic* (1995), C- IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, at para. 70 [Tadic]; Meron, "The Humanization of Humanitarian Law" (2000) 94 A.J.I.L. 239; Greenwood, *supra* note 9; Mullerson, *supra* note 9; Greenwood, "The Scope of Application of Humanitarian Law" in Fleck, *supra* note 1 at 39.
[13] Tadic, *ibid*. at para. 70.

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> International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal armed conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.[14]

SECTION 5

WHAT BODY OF LOAC APPLIES TO WHAT TYPE OF ARMED CONFLICT AS A MATTER OF LAW

Treaty Law

9. As previously discussed in Chapter 10, LOAC is composed of both treaty law and customary international law. The key treaties expressly establish whether they apply to international or to non-international armed conflict, or to both. Most treaties, including the Geneva Conventions and Additional Protocol I (AP I) apply (as a matter of treaty law) only to international armed conflicts between states party to them. In some cases treaties may expressly apply to non-international armed conflict. For example this would include Additional Protocol II (AP II). The Rome Statute[15] as well as the Amended Protocol II of the Convention on Certain Conventional Weapons apply to both types of armed conflict.

10. The Geneva Conventions and AP I 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"[16] or in "all cases of partial or total occupation of the territory of a High Contracting Party..."[17] AP I also covers situations in "which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination..."[18]

11. Treaties on the LOAC are normally applicable only in conflicts between states party to them.[19] It is possible, however, for the Geneva Conventions and AP I to apply in times of armed conflict between a High Contracting Party and a party to the conflict, which is not a High Contracting Party in certain circumstances. AP I[20] and the Geneva Conventions allow a "non-High Contracting Party" to be bound by their terms if the non-High Contracting Party "accepts and applies the provisions thereof."[21]

12. The Geneva Conventions and AP I do not apply (as a matter of treaty law) to situations of non-international armed conflict, or, in the words of the Geneva Conventions, "armed conflict not of an international character,"[22] with the exception of Common Article 3 of the Geneva Conventions.

13. Armed conflicts "not of an international character" are governed by Common Article 3 of the Geneva Conventions and in certain circumstances, AP II. The threshold for application of the two instruments is different. Common Article 3 applies to any conflict not of an international character

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[14] Tadic, *supra,* note 13.
[15] *Rome Statute of the International Criminal Court,* 17 July 1997 2002 C.T.S. 13.
[16] This has always been interpreted as applying to any armed conflict even if the state of war has not been recognized by any of the parties – see Greenwood, "The Concept of War in International Law" 36 I.C.L.Q. 283.
[17] See Common Article 2 of the Geneva Conventions, as well as Article 1(3) of AP I which adopts Common Article 2 in its definition of jurisdiction. "High Contracting Party" refers to a state that has ratified the Geneva Convention and/or the Additional Protocol.
[18] AP I, *supra* note 5, art. 1(4).
[19] Afghanistan is an example of a conflict where Canada is not bound by AP I because the rival belligerent is not a party.
[20] AP I, *supra* note 5, art. 96(2).
[21] See Common Article 2 to the Geneva Conventions of 1949.
[22] See Common Article 3 to the Geneva Conventions of 1949.

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whether it is between government and rebel forces or different rebel factions. There is no requirement that the violence reach a particular level of intensity, although the statement in AP II Article 1(2) that "situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature" are not armed conflicts reflects customary law and is probably applicable to common Article 3 as well. By contrast, AP II applies only to armed conflicts

> which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.[23]

14. Based upon the above discussion, it is apparent that caution must be used when determining whether a particular LOAC treaty applies, as a matter of treaty law, to a particular CF international operation. As a threshold issue, the legal advisor must first determine whether Canada is a party to an "armed conflict." If so, the nature of the armed conflict – international or non-international – must be determined. Then, an assessment must be made as to whether the nature of the armed conflict falls within a particular treaty's scope of application. Subsequently, it must then be determined whether Canada has ratified that treaty. Lastly, the analysis must be made as to whether or not the opposing party to the armed conflict is a High Contracting Party or otherwise agrees to accept and apply the provisions of the treaty.[24] The CF Publication B-GG-005-027/AF-022, Collection of the Documents on the Law of Armed Conflict, [25] is a valuable tool in identifying which treaties Canada has ratified.

Customary International Law of Armed Conflict

15. The scope of LOAC application is far broader under customary international law[26] than it is under treaty law. This is for two reasons. First, treaties apply only to states that are parties to the treaties (often referred to as High Contracting Parties in the LOAC context) and only between such states. In contrast, the customary international LOAC applies to all states that are parties to the armed conflict in question. This is because, as noted in Chapter 10, customary international law is binding on all states in addition to their individual treaty obligations. Second, while the applicability of the various LOAC treaties is defined by the terms of the treaties themselves, it has generally been held that much of the content of these treaties reflects customary international law and in turn, that this customary LOAC is often applicable to both international and non-international armed conflict.[27]

16. The combined effect of these two developments is that customary international LOAC obligations of parties to armed conflict, particularly non-international conflicts, are often more comprehensive and restrictive than their treaty law obligations.

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[23] See APII, *supra* note 5, arts. 1(1), 1(2); Tadic, *supra* note 13 at para 70.

[24] Reciprocity is a legal issue affecting the application of certain treaties as a matter of treaty law. However, some basic legal principles apply to military operations during armed conflict regardless of their acceptance in practice by opposing belligerent forces. See *e.g.*, Common Article 3 of the Geneva Conventions.

[25] See also Roberts and Guelff, ed., *Documents on the Laws of War*, 2nd ed. (Oxford: Oxford University Press, 1989) as a useful reference book listing that have ratified the key LOAC treaties.

[26] For further reading on the application of customary international law in the law of armed conflict see Greenwood, *supra* note 9; *Humanitarian Law of Armed Conflict : Challenges Ahead : Essays in Honour of Frits Kalshoven* (Dordrecht: Martinus Nijhoff, 1991) 93; Meron, "The Geneva Conventions as Customary Law" (1987) 81 A.J.I.L. 348; Greenwood, "Customary International Law and the First Geneva Protocol of 1977 in the Gulf Conflict" in Rowe, ed., *The Gulf War 1990-91 in International and English Law* (London: Sweet and Maxwell, 1993) 63; Meron, "The Continuing Role of Custom in the Formation of International Humanitarian Law" (1996) 90 A.J.I.L. 238; Meron, "The Geneva Conventions as Customary Law" (1987) 81 A.J.I.L. 348; Kontou, *The Termination and Revision of Treaties in the Light of New Customary International Law* (Oxford: Oxford University Press, 1995); Villiger, *Customary International Law and Treaties* (Dordrecht: M. Nijhoff, 1986).

[27] See generally Tadic, *supra* note 13 at paras. 79 to 141. See also, Henckaerts and Doswald-Beck, eds., *Customary International Humanitarian Law* (Cambridge: Cambridge University Press, 2005) as a general reference tool to guide the determination of whether a rule may be customary.

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17. In *Tadic*, the ICTY addressed the issue of what body of LOAC was included within the term "violations of the laws or customs of war." A key issue involved identifying the customary rules of IHL governing non-international armed conflicts. Following a lengthy analysis the Court noted:[28]

> The emergence of the aforementioned general rules on internal armed conflicts does not imply that internal strife is regulated by general international law in all its aspects. Two particular limitations may be noted: (i) only a number of rules and principles governing international armed conflicts have gradually been extended to apply to internal conflicts; and (ii) this extension has not taken place in the form of a full and mechanical transplant of those rules to internal conflicts; rather, the general essence of those rules, and not the detailed regulation they may contain, has become applicable to internal conflicts.
>
> …
>
> Notwithstanding these limitations, it cannot be denied that customary rules have developed to govern internal strife. These rules, as specifically identified in the preceding discussion, cover such areas as protection of civilians from hostilities, in particular from indiscriminate attacks, protection of civilian objects, in particular cultural property, protection of all those who do not (or no longer) take active part in hostilities, as well as prohibition of means of warfare proscribed in international armed conflicts and ban of certain methods of conducting hostilities.
>
> …
>
> Applying the foregoing criteria to the violations at issue here, we have no doubt that they entail individual criminal responsibility, regardless of whether they are committed in internal or international armed conflicts. Principles and rules of humanitarian law reflect "elementary considerations of humanity" widely recognized as the mandatory minimum for conduct in armed conflicts of any kind. No one can doubt the gravity of the acts at issue, nor the interest of the international community in their prohibition.

18. While it is important to note that much of the treaty law of LOAC may also reflect customary international law, which, in turn, may be applicable equally to both international and-non international armed conflicts, operational commanders and legal advisors must not take a general approach and act as if all LOAC is equally applicable to all types of conflict in all circumstances. This is particularly so in the area relating to targeting, combatancy, detainee and prisoner of war status, where significant differences between these legal regimes remain. As noted at the outset of this chapter, the determination of whether a particular rule is legally applicable should be made with the assistance of legal advice. The ICRC has recently completed a report identifying what it feels constitutes customary IHL. While this report has not, and may not in the future, be adopted by the Government of Canada as a definitive statement of customary law binding upon states, the study is an important research tool contributing to our understanding of LOAC.[29]

SECTION 6

WHAT BODY OF THE LAW OF ARMED CONFLICT APPPLIES AS A MATTER OF POLICY

19. Independent of the legal issue of what body of LOAC applies, both the CDS (on behalf of the CF), as well as the Secretary-General of the UN, have issued separate policy statements on when

[28] Tadic, *supra* note 13 at paras. 126, 127, 129.
[29] Henckaerts and Doswald-Beck, eds., *supra* note 30.

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forces operating under their respective authority will apply the LOAC during the conduct of their military operations.

The CF Policy

20. The Code of Conduct for CF Personnel, issued under the authority of the CDS, states:

> The Law of Armed Conflict applies when Canada is a party to any armed conflict. During peace support operations the spirit and principles of the Law of Armed Conflict apply. The CF will apply, as a minimum, the spirit and principles of the Law of Armed Conflict in all Canadian military operations other than Canadian domestic operations.[33]

21. This is an important direction to the operational commander and CF members responsible for the planning and conduct of operations. Its effect is that CF members are to conduct international military operations applying the spirit and principles of LOAC as a minimum, regardless of whether it applies as a matter of law.

The UN Policy

22. In 1999, the UN Secretary-General issued the "Bulletin On The Observance By United Nations Forces of International Humanitarian Law" (Bulletin).[34] The Bulletin is applicable to "United Nations forces conducting operations under United Nations command and control." Consequently, as a general statement, the Bulletin would most commonly apply to traditional peacekeeping rather than coalition operations enforcing a Chapter VII mandate. To the extent that the Bulletin applies to a particular operation:

> The fundamental principles and rules of international humanitarian law set out in the present bulletin are applicable to United Nations forces when in situations of armed conflict they are actively engaged therein as combatants, to the extent and for the duration of their engagement. They are accordingly applicable in enforcement operations, or in peacekeeping operations when the use of force is permitted in self-defence.[35]

SECTION 7

COMMAND AND INDIVIDUAL LEGAL RESPONSIBILITY FOR THE USE OF FORCE DURING CF INTERNATIONAL OPERATIONS

23. Applicable LOAC rules create individual international and domestic legal obligations for all CF members involved in international operations. Indeed, Canada has implemented LOAC obligations domestically through a variety of Canadian statutes including the *NDA*, the *Criminal Code,* the *Geneva Conventions Act,* and the *Crimes Against Humanity and War Crimes Act.* Furthermore, CF commanders are legally responsible and may be held criminally accountable for the acts and omissions of their subordinates who commit offences under the *Crimes Against Humanity and War Crimes Act* if the commanders fail to "exercise control properly over a person under their effective command and control," know, or are "criminally negligent in failing to know, that the person is about to commit, or is committing such an offence,"[36] or fail "to take, as soon as practicable, all necessary and reasonable measures within their power to prevent or repress the commission of the offence." This important legal responsibility of command is elaborated in Chapter 38.

[33] B-GG-005-027/AF-023, p.1-1, para. 2 and p.1-2, para 10; see also B-GG-005-027/AF-021, Law of Armed Conflict at the Operational and Tactical Level, p. 1, paras. 1 and 7; and B-GG-005-004/AF-005, Use of Force in CF Operations (Revision one), p. 1/14 - 3/14, para. 4.
[34] *Bulletin On The Observance By United Nations Forces of International Humanitarian Law,* 38 I.LM. 1656 (1999).
[35] *Ibid*., s.1.
[36] See *Crimes Against Humanity and War Crimes Act*, 2000, c. 24. s. 7(1).

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SECTION 8

THE APPLICABILITY OF OTHER LEGAL REGIMES

24. While the LOAC is clearly of central legal importance when planning, authorizing and conducting international operations, other bodies of law are also significant and covered in separate chapters in this manual. These include:

Human Rights Law – Chapter 18;
Law of the Sea – Chapter 20;
Air Law – Chapter 21;
Space Law – Chapter 22;
International Agreements – Chapter 26;
MOUs and Non-Legally Binding Instruments – Chapter 27; and
Refugee Law – Chapter 30.

SECTION 9

CONCLUSION

25. The conduct of CF international operations will not only be shaped by Canadian domestic law, but also by a diverse body of international law.

26. Most significant is the applicability of the LOAC, which is comprised of both treaty and customary international law. The determination of what LOAC may be applicable, as a matter of law, depends on a number of factors including whether Canada is a party to an armed conflict, whether the armed conflict is international or non-international, the applicable treaties that Canada has ratified and the applicable customary international law. From a policy point of view, the CDS has directed that CF international military operations will “apply, as a minimum, the spirit and principles” of the LOAC, regardless of whether this body of law technically applies or not.

27. It is important to highlight that LOAC contains legal obligations which have been implemented domestically in various Canadian statutes and which create individual and command legal liability and responsibility relating to the planning and conduct of CF operations during times of armed conflict.

28. In addition to LOAC, CF international operations may be governed or affected by other international legal regimes, which may in turn impact on the planning and conduct of operations. Those include human rights law, refugee law, law of the sea, air and space law, and international agreements, MOUs and other instruments. The applicability of these regimes is discussed in separate chapters elsewhere in this manual.

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CHAPTER 18

INTERNATIONAL HUMAN RIGHTS LAW

SECTION 1

INTRODUCTION

1. CF international operations are conducted in complex operational and security environments. Such environments can include the full spectrum of missions ranging from traditional peacekeeping to humanitarian, to peace support, and to armed conflict. Today such operations are often referred to as 'Three Block Wars'[1] where the CF can simultaneously be engaged in armed conflict in one block, peacekeeping or stabilization in a second block and humanitarian assistance and reconstruction in a third block. Frequently there will be no clear line of demarcation between the 'blocks' and the CF will be called upon to carry out tasks in each 'block' and will have to do so regularly without notice.

2. Complex operational and security environments often include complex legal issues. 'Three Block War' legal issues require 'Three Block Law' analysis. Various bodies of domestic and international law apply and must be considered during CF international operations. In terms of international law, there are two key frameworks that influence CF international operations: the law of armed conflict (LOAC) and international human rights law (IHRL). The focus of this chapter is IHRL. In particular, the chapter will identify IHRL, its sources, when it applies as a matter of law and policy, and how it relates to LOAC.

SECTION 2

INTERNATIONAL HUMAN RIGHTS LAW

3. Generally, human rights apply to everyone. IHRL[2] is a set of international rules, established by treaty or custom, on the basis of which individuals and groups can expect or claim certain protection or benefits from governments. Human rights are inherent to all persons as a consequence of being human.

IHRL - Treaty Law

4. The greater part of IHRL is based on treaty law rather than customary law. Modern international human rights law dates from World War II and its aftermath. The United Nations Charter, signed 26 June 1945, acknowledged the importance of human rights and established it as a matter of international concern.[3] The rights and obligations enumerated in the Charter were codified in the Universal Declaration of Human Rights (UDHR).[4] This was the first instrument to identify the fundamental rights and freedoms of all people. Following the Declaration, the UN drafted the International Covenants on Civil and Political Rights (ICCPR) and on Economic,

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[1] For a description of 'three block war' see Government of Canada, "Canada's International Policy Statement: A Role of Pride and Influence in the World - An Overview" at 11, online: Department of Foreign Affairs and InternationalTrade Canada <http://www.dfait-maeci.gc.ca/cip-pic/ips/overview-en.asp>.

[2] For further reading on International Human Rights Law see H. Steiner and P. Alston, *International Human Rights in Context, 2nd ed.* (Oxford: Clarendon Press, 2000); I. Brownlie and G. Goodwin-Gill, *Basic Documents on Human Rights,* 4th ed. (Oxford: Clarendon Press, 2002). See also online: United Nations <http://www.un.org>; African system, online: African Commission on Human and Peoples' Rights <http://www.achpr.org>; American system, online: Inter-American Commission on Human Rights <http://www.cidh.org>; European system, online: European Court of Human Rights <http://www.echr.coe.int>.

[3] *UN Charter*, arts. 1(3), 55 and 56.

[4] *Universal Declaration of Human Rights*, GA Res. 217 (III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) 71. Canada signed the Declaration.

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Social and Cultural Rights (1966).[5] Together with the UDHR, these documents comprise the International Bill of Human Rights.

5. In addition to the ICCPR and the International Covenant on Economic, Social and Cultural Rights, the main IHRL treaty sources are the Convention on Genocide (1948),[6] Convention on Racial Discrimination (1965),[7] Convention on the Discrimination Against Women (1979),[8] Convention against Torture (1984) and Rights of the Child (1989).[9] The main regional human rights instruments are the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), the American Declaration of the Rights and Duties of Man (1948), the American Convention on Human Rights (1969), and the African Charter on Human and Peoples' Rights (1981).

IHRL - Customary Law

6. IHRL also consists of customary international law but to a far lesser degree than treaty law. As the development of IHRL is a relatively new phenomenon, especially when compared to the long historical development of the LOAC, it is difficult to identify those portions that are considered customary law. Given that customary law is developed largely through inter-state practice and *opinio juris*, and given that intra-state practice (i.e., the internal relationships between a state and individuals in its territory) dominates the development of human rights law, it is difficult to confirm what constitutes the customary law of IHRL. While the human rights practice of individual states and, to some extent, of regional human rights systems can contribute to the development of customary norms, this is often insufficient in determining the full nature and scope of the customary law portion of IHRL.

7. Generally, the customary law of IHRL is considered to be those human rights, which are viewed as ‘fundamental’ in that states are bound to respect them in all circumstances. While there is still debate about what constitutes the full range of ‘fundamental’ rights, they commonly reflect the following broad concepts/principles: no arbitrary deprivation of life, the prohibition of genocide, the prohibition of torture and inhumane treatment, the prohibition of slavery, the prohibition on the taking of hostages, no arbitrary detention, and no punishment without a fair trial.

The Application of IHRL

8. As a starting position, IHRL applies at all times, both in peacetime and in situations of armed conflict. However, some IHRL treaties permit governments to derogate from certain rights in situations of public emergency threatening the life of the nation.[10] Derogations must, however, be proportional to the crisis at hand, must not be introduced on a discriminatory basis and must not contravene other rules of international law – including rules of the LOAC. Some human rights are never derogable, such as no arbitrary deprivation of life, the prohibition of genocide, and the prohibition of torture and inhumane treatment.

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[5] *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171, arts. 9-14, Can. T.S. 1976 No. 47, 6 I.L.M. 368 (entered into force 23 March 1976, accession by Canada 19 May 1976)[ICCPR]; International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 999 U.N.T.S. 171 (entered into force 3 January 1976)[ICESC].
[6] *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, 1021 U.N.T.S. 78 (entered into force 12 January 1951) [Genocide Convention]. Canada ratified the Genocide Convention 3 September 1952.
[7] Canada is a Party. Canada ratified the Convention on Racial Discrimination on 14 Oct 1970.
[8] Canada is a Party. Canada ratified the Convention on Discrimination against Women on 10 Dec 1981.
[9] Canada is a Party. Canada ratified the Convention on the Rights of the Child on 13 Dec 1991.
[10] For example the ICCPR Article 4(1): “In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.”

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9. IHRL lays down rules binding states in their relations with individuals. Generally, the state has obligations towards individuals but individuals do not have any towards the state. Importantly, non-state actors (e.g., private corporations, international organizations, non-governmental organizations and private individuals) are not, and cannot be, parties to IHRL treaties. Accordingly, they are not bound by them in their relations with individuals. While there may be growing support for the view that non-state actors, particularly those who exercise government or state-like functions, should be bound to respect human rights norms, the current law does not support this view. It remains that IHRL, both treaty and customary law, only binds states. This is in marked contrast to the LOAC, which can impose obligations directly upon individuals and, in non-international conflicts binds the non-State party as well as the State.

Territorial and Extra-territorial Application of IHRL

10. One of the key current areas of debate is whether IHRL, particularly IHRL treaties, apply beyond the territory of the states that are parties to the treaties. Most treaties indicate they apply to individuals within the territory and jurisdiction of a state party.[11] However, there has been much debate as to what is meant by phrases such as 'within the territory,' 'subject to its jurisdiction' and 'within their jurisdiction.' This debate is particularly relevant to a state's military forces as expansive interpretations of the phrases could result in the extra-territorial application of treaty obligations to their military operations occurring beyond the state's territory.

11. Under usual rules of treaty interpretation and state practice, phrases such as 'within the territory,' 'subject to its jurisdiction' and 'within their jurisdiction' are viewed as meaning that jurisdiction is essentially territorial. However, there is increasing support for arguments that such phrases should be interpreted more broadly to require the extra-territorial application of human rights treaties. For example, the UN Human Rights Committee (UNHRC) in its General Comment 31 on Article 2 of the ICCPR have interpreted the phrase "within their territory and to all persons subject to their jurisdiction" to mean "that a State Party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party."[12] It further noted "[t]his principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation."[13] While the HRC's General Comment is not binding upon states parties, and likely beyond the current state of the law on this issue, it does reflect an expansive view of the application of the ICCPR extra-territorially.

12. Recent cases in the United Kingdom (UK) dealt with alleged breaches of the European Convention on Human Rights (European Convention) and the UK Human Rights Act 1998 (UK HR Act) arising from actions by UK troops in Iraq.[14] Both cases addressed the issue of the extra-territorial application of the European Convention and the HR Act to the actions of UK troops in Iraq by holding that jurisdiction under both instruments is essentially territorial, though there are narrow exceptions to that principle. One such exception relates to diplomatic or consular

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[11] For example the ICCPR Article 2 states: "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status"; the *American Convention on Human Rights*, Article 1 states: "The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition"; and the European Convention Article 1 states: "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention."

[12] Human Rights Committee, *General Comment No. 31 on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant* (29 March 2004) at para. 10, online: UNHCR <http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CCPR.C.21.Rev.1.Add.13.En?Opendocument>.

[13] *Ibid.*

[14] *R. (Al-Skeini and others) v. Secretary of State for Defence,* [2005] E.W.C.A. 1609 (C.A. (Civ. Div.)) and *R. (Hilal Abdul-Razzaq Ali Al-Jedda) v. Secretary of State for Defence*, [2005] E.W.H.C. 1809 (Q.B. (Div. Ct.).

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premises and like situations. For the UK courts a 'like situation' was one where UK troops detained persons in a British military detention centre in Iraq. Thus, persons being detained in UK military detention facilities in Iraq could fall under the jurisdiction of both the European Convention and the UK HR Act and could make claims for breaches of the instruments. These decisions could have far ranging impacts on the conduct of UK military operations when UK forces are deployed outside the UK on any type of mission.

13. To date, the Canadian courts have not addressed the issue of the extra-territorial application of the ICCPR outside the territory of Canada. While it is difficult to predict whether a Canadian court may adopt the expansive view taken by the HRC in its General Comment 31, or the narrower view of the UK courts on the extra-territorial application of the European Convention and the UK HR Act 1998, it may be useful to consider applying the spirit and principles of international human rights law, particularly those reflected in the ICCPR, during all CF international operations.

IHRL and LOAC

14. IHRL does apply in times of armed conflict. The question is, how does it interact with the *lex specialis* of the LOAC? Generally, the LOAC does not apply in peacetime with the exception of certain state obligations to implement and enforce the LOAC. It is well recognized that the international human rights laws apply at all times, whether in times of peace or situations of armed conflict. The International Court of Justice (ICJ) affirmed this principle in the *Legality of the Threat or Use of Nuclear Weapons* Advisory Opinion.[15]

15. The ICJ more recently in its Advisory Opinion on the *Legal Consequences of The Construction of a Wall in the Occupied Palestinian Territory* again reaffirmed this principle.[16] The principle has also been endorsed by the UN High Commissioner for Human Rights (UNHCR),[17] the UNHRC in its General Comment 31 on Article 2 of the ICCPR,[18] and by regional human rights bodies such as the European Court of Human Rights (ECHR)[19] and the Inter-American Commission on Human Rights (IACHR).[20] Conceptually, it is very desirable that both the LOAC and IHRL operate in times of armed conflict as they both promote the protection of humans and the preservation of humanitarian values.

16. That does not mean, however, that every situation which can arise in armed conflict is covered by IHRL. In an important decision in 2001, a Grand Chamber of 17 judges of the ECHR considered a claim by relatives of persons killed when a target in Belgrade was bombarded by NATO aircraft during the Kosovo conflict in 1999.[21] The applicants argued that the attack

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[15] In commenting on the argument that the use of nuclear weapons in war violates the right to life under Article 6 of the International Covenant on Civil and Political Rights (ICCPR), the ICJ noted: "that the protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict, which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself." *Legality of the Threat or Use of Nuclear Weapons,* Advisory Opinion (1996) at para. 25, online: International Court of Justice <http://www.icj-cij.org/icjwww/idecisions.htm>.

[16] *Consequences of Construction of a Wall,* Advisory Opinion (2004) at paras.105-107, online: International Court of Justice <http://www.icj-cij.org/icjwww/idecisions.htm>.

[17] Statement of High Commissioner for Human Rights on Detention of Taliban and Al Qaida Prisoners at US Base in Guantanamo Bay, Cuba, Cuba 16 Jan 2002, online: UNHCR <http://www.unhchr.ch/huricane/huricane.nsf/view01/C537C6D4657C7928C1256B43003E7D0B?opendocument>.

[18] HRC General Comment No. 31 on Article 2 ICCPR, (29 March 2004) at para. 11, online: UNHCR <http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/c92ce711179ccab1c1256c480038394a?Opendocument>.

[19] *Loizidou v. Turkey* (Jurisdiction) (1995) 20 E.H.R.R. 99 at para. 57.

[20] *Abella v Argentina*, IACHR Report 55/97(1997) at paras. 158 & 159 and the *Provisional Measures Decision* note 55, p.730.

[21] *Bankovic* v. *Belgium and Others,* [2001] 123 I.L.R. 94.

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violated Articles 2 (right to life) and 10 (freedom of speech) of the European Convention. They claimed that all of the Member States of NATO were responsible for this violation (with the exception of Canada and the United States which are not bound by the European Convention). The Grand Chamber unanimously rejected the claim on the ground that the European Convention required States Parties to guarantee the rights and freedoms contained in the European Convention only to persons within their jurisdiction. The Grand Chamber concluded that the civilian population of the then Federal Republic of Yugoslavia were not brought within the jurisdiction of the NATO states merely by virtue of the fact that those states were conducting military operations against the former Yugoslavia in the course of which members of the population of Yugoslavia were killed or injured. The effect of this decision appears to be that the European Convention will not apply to many combat activities in international armed conflicts. It is likely that other tribunals will take a similar attitude to the scope of application of other human rights treaties.

17. Even when human rights law does operate during an armed conflict, it must be applied in the context of the *lex specialis* of the LOAC. For example, Article 6 of the ICCPR provides that "[n]o one shall be arbitrarily deprived of his life." While this provision has been held to apply in time of armed conflict,[22] it has generally been considered that the deprivation of life cannot be regarded as arbitrary if it is in accordance with LOAC.[23] Moreover, most human rights treaties have specific provisions, which permit states to derogate from their obligations in times of war, armed conflict or emergencies. The LOAC was designed primarily for conflicts between states, though it has more recently developed rules for non-international armed conflicts (civil wars). It is a detailed code of conduct that has emerged over hundreds of years. It has been the product of judicious compromises between considerations of military necessity and the protection of the victims of armed conflict. It also reflects the considerable experience, not just of states, but also of the International Committee of the Red Cross (ICRC) and non-governmental organizations (NGOs), gained during various conflicts. Conversely, human rights laws (usually treaties) are much more recent, less detailed and less tested than the LOAC. It would be, therefore, incorrect to claim that human rights laws must override the LOAC simply because they appear to provide greater protection for civilians during a conflict.

18. One of the most scrutinized and sensitive issues that frequently draw criticisms from human rights advocates is the handling and treatment of detainees during armed conflict. For example, leading human rights advocates such as Amnesty International (AI) and Human Rights Watch (HRW) have resoundingly criticized the US policy on detainees in the 'War on Terrorism' as breaching the rule of law[24] and a human rights scandal.[25] Lord Steyn, a Law Lord in the UK House of Lords, referred to the situation in Guantánamo Bay and the failure of US Courts (at the time of his comments), to grant *habeas corpus* applications to detainees as "a monstrous failure of justice."[26] He also attacked the US plan to use military commissions to try some of the detainees and implied such commissions would be 'kangaroo' courts.[27] Such criticisms usually involve allegations of violations of several human rights by claiming detainees are being held indefinitely without authority, *in communicado*, and without access to legal counsel. Such claims are serious and can be forceful but seem to ignore the application of the LOAC. Although space does not permit a detailed discussion of each of these claims, some observations are warranted.

19. The lawful detention of persons during an armed conflict cannot be arbitrary because it is being done in accordance with the LOAC. As the ICJ noted in its *Nuclear Weapons* Advisory

[22] Though, in the light of the previous paragraph, probably only to persons within the territory or jurisdiction of the state concerned.
[23] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, *supra* note 15 at para. 25.
[24] See Human Rights Watch Report, "United States: Guantanamo Two Years On", 9 January 2004, online: Human Rights Watch <http://www.hrw.org/english/docs/2004/01/09/usdom6917.htm>.
[25] Amnesty International Report, "Guantánamo Bay: A Human Rights Scandal", online: Amnesty International <http://web.amnesty.org/web/web.nsf/print/guantanamobay-index-eng>.
[26] J. Steyn, "Guantanamo Bay: The Legal Black Hole" (2004) 53 I.C.L.Q. 1 at 11.
[27] *Ibid*, at 3.

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Opinion, no right is absolute, including the most fundamental of all rights, the right to life.[28] The taking of life is intrinsic in an armed conflict and is a lawful act under the LOAC. The capture and detention of persons is also intrinsic in an armed conflict and a lawful act under the LOAC.

20. Under the LOAC, PWs can be held until the cessation of hostilities, whenever that occurs, and do not have a right to legal counsel merely because they are being detained. PWs are not held *in communicado* as the ICRC visits them and they can send and receive letters. Moreover, those who detain persons during armed conflict are obliged to provide minimum humane treatment to the detainees. Common Article 3 to the 1949 Geneva Conventions (GCs) and Article 75 of the 1977 Additional Protocol I (AP I) provide minimum fundamental guarantees for treatment of persons in the power of a party to a conflict. Even if these provisions do not apply as treaty law in the conflict, they do apply as a matter of customary law.[29] These standards of treatment are equal to or greater than the standards of treatment under IHRL.

21. Another standard of humane treatment that could be criticized from a purely human rights perspective is the apparent denial of due process, specifically the denial of the detainees' right to challenge their detention through *habeas corpus* applications during armed conflict. This right is not clearly stated in Article 75 AP I but it could be viewed as being part of customary law. Whether or not it is part of customary law, it is an issue that attracted attention and became the subject of three US Supreme Court cases (*Rasul*, *Hamdi* and *Padilla*).[30] From an LOAC perspective, it is sufficient to highlight that PWs do not have the right to challenge their detention and are held at the discretion of the Detaining Power. This discretion can be challenged by another state (e.g., when a detainee is a national of another state that maintains relations with the Detaining Power), by the Protecting Power or the ICRC. Nevertheless, a Detaining Power may be obliged under its domestic law, or may choose as a matter of policy, to permit PWs to challenge the lawfulness of their detentions.

22. The debates regarding the handling and treatment of detainees during armed conflict often reflect the classic dilemma that is at the core of many states' actions, particularly during the current Campaign Against Terrorism. This dilemma is determining how to balance collective rights and the security of all inhabitants of a state with individual rights. The stakes are extremely high and the choices enormously difficult. It can frequently result in pitting LOAC advocates against IHRL advocates.

23. The LOAC and IHRL are distinct branches of international law. There are important differences, conceptually, legally and practically, between them. In the context of an armed conflict, holding a too fervent belief in the moral and legal superiority of IHRL over the LOAC could be unwise. This could result in unwarranted disregard of the LOAC and a wholly unrealistic conception of the nature of armed conflict. No one can, or should, dismiss the value and relevancy of the LOAC.[31]

24. Likewise, it may be unwise to view the LOAC as the only law that applies during an armed conflict. IHRL law clearly applies during an armed conflict. While many of the rules of the LOAC do effectively balance military necessity and humanitarian concerns, some do not. In areas like treatment of detainees and belligerent occupation, the LOAC may not be as effective as IHRL in protecting individuals. Founded upon universally recognized moral values and

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[28] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, *supra* note 15 at para. 25.

[29] See H.P. Gasser, "Acts of Terror, Terrorism and International Humanitarian Law", (2002) 847 I.R.R.C. 547 at 559 for Article 75 reflecting customary law. See I.C.J. in *Nicaragua Military and Paramilitary Activities (Nicaragua. v. U.S.)*, 1984 I.C.J. Rep. 226 at 258 for Common Article 3 reflecting customary law.

[30] *Rasul et al. v. Bush, President of the United States et al.*, No. 03–334. (28 June 2004); *Hamdi et al. v. Rumsfeld, Secretary Of Defense, et al.*, No. 03–6696 (28 June 2004); *Rumsfeld, Secretary Of Defense v. Padilla et al.*, No. 03–1027 (28 June 2004).

[31] *Contra* Jochnick & R. Normand, "The Legitimation of Violence: A Critical History of the Laws of War" (1994) 35 Harv. Int'l L.J. 49, which challenges the notion that the LOAC serves to restrain or 'humanize' war. They argue the LOAC has been formulated deliberately to privilege military necessity at the cost of humanitarian values. Through law, violence has been legitimated.

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reinforced by legal obligations, IHRL provides a compelling and credible normative framework for addressing some armed conflict issues, particularly in many modern 'Three Block War' conflicts where the lines between types of operations and between combatants and civilians is blurred. The normative framework of human rights law can be used to augment and improve the LOAC.[32] Both types of law can, and should be mutually supportive, particularly in times of armed conflict.[33]

SECTION 3

CONCLUSION

25. CF international operations are increasingly being conducted in complex operational and security environments commonly referred to as 'Three Block Wars.' Such operations will include a variety of legal issues spanning both domestic and international law. Two significant international legal frameworks that will likely be applied, whether as a matter of law or policy, are IHRL and the LOAC.

26. The role and impact of IHRL on CF international operations cannot, and should not, be underestimated. Increasingly, military operations are being scrutinized from an IHRL perspective. While there is considerable legal debate about the application of IHRL treaties to the conduct of military operations outside the territory of a state, there is little doubt that those planning and executing military operations abroad, whether peacekeeping, peace enforcement or armed conflict, should consider applying the spirit and principles of IHRL norms, particularly in the conduct of detainee operations. The application of such norms and principles may better ensure protection and humane treatment of individuals across the spectrum of CF international operations and, therefore, enhance the likelihood of mission success.

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[32] See F. Hampson, "Using Human Rights Machinery to Enforce the International Law of Armed Conflicts" (1992) 31 Revue de Droit Militaire et de Droit de la Guerre 188; Colonel K. Watkin, "Controlling The Use Of Force: A Role For Human Rights Norms In Contemporary Armed Conflict" (2004) 98 A.J.I.L. 1.

[33] For example, recent treaties, such as the *Convention on the Rights of the Child*, its *Optional Protocol on the Participation of Children in Armed Conflict*, and the *Rome Statute of the International Criminal Court* include provisions from both bodies of law.

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CHAPTER 19

TREATIES

SECTION 1

DEFINITION OF TREATY

1. Generally speaking a 'treaty' is an international agreement concluded between states (or sometimes international organisations), usually in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.[1]

2. The following important points flow out of the definition of treaty:

   a. less formal documents, such as those constituted by an exchange of notes, will be considered treaties if they meet the other elements of the definition;[2]

   b. a treaty is between states. If an international company is a party to an agreement, that agreement cannot be considered a treaty;[3]

   c. oral agreements are not treaties. This said, while a treaty must be in written form, an informal written document, such as a fax or email (or an exchange of these), could be a treaty if the other elements of the definition are met;[4]

   d. for an agreement to be a treaty, it must be governed by international law. This means that not only must the agreement *in fact* be governed by international law, but there must have been the *intention* between the parties to the agreement to create obligations under international law;[5] and

   e. a treaty does not have to be signed, although the usual practice is for a treaty to be signed or, at the very least, initialled.[6]

3. The definition of treaty states that an agreement that otherwise meets the definition is a treaty "whatever its particular designation." A treaty need not be called one, and it is not the name of the agreement that determines its status. For various reasons, including those related to practice or political preference, a treaty can be named a Treaty, Exchange of Notes, Convention, Compact, Solemn Declaration, Administrative Agreement, Protocol, Platform, Concordat, Agreed Minute, Terms of Reference, Charter, Statute, or any of a number of other names.[7] A treaty can

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[1] This paragraph is taken from Article 2(1)(a) of the *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 U.N.T.S. 331 (entered into force 27 January 1980)[Vienna Convention]. The *Vienna Convention* deals only with treaties between states. A treaty can also have an international organization as a party, but this type of treaty is clearly not captured by the *Vienna Convention* definition, and is not discussed in this chapter. The *Vienna Convention* is said to represent customary international law. See Anthony Aust, *Modern Treaty Law and Practice* (Cambridge: University Press, 2000) at 14f; "Canadian Treaty Practice" (1980) Can. Y. Int'l L. 312; and "The Law and Practice of International Agreements and Arrangements" (July-December 1993) JAG Newsletter at 3/19 [Law and Practice].

[2] Aust, *ibid* at 15 and 18.

[3] *Ibid*. at 15 –16, 18 and 48. This said, the agreement does not have to be between States expressly. A State is a legal concept. A State may be bound by agreement binding the head of state, the state government, or some other agent acting on behalf of the State. Such an agreement forms a treaty, and international law does not distinguish between a treaty between states and a treaty between state governments.

[4] *Ibid*. at 16f.

[5] *Ibid*. at 17, citing the *Aegean Sea Continental Shelf* case, [1978] I.C.J. Rep 3 at 39-44. An agreement between States can be governed by domestic law, that of one of the parties or a third State, and such an agreement would be considered a contract and not a treaty. Contracts are used between States for purely commercial matters such as purchase and sale of commodities: see Aust at 24f.

[6] Aust, *supra* note 1 at 24.

[7] *Ibid*. at 22; *Canadian Encyclopedic Digest*, 3rd ed., vol. 17, title 81 "International Law", s. 309 [CED].

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also be known through a colloquial name such as the 'Dayton Agreement' or 'Ottawa Convention.'[8]

4. It is important to clearly differentiate between treaties and informal international instruments such as memoranda of understanding (MOUs).[9] Treaties are international agreements,[10] while informal international instruments, such as MOUs, are referred to generically as international arrangements. The fundamental difference between an international agreement and an international arrangement is that the latter is an instrument between states that is not legally binding.[11] MOUs and other international arrangements are discussed more fully in chapter 27.

SECTION 2

TREATY-MAKING POWERS

5. As has been discussed, treaties are made between states. The term state in this context refers to a sovereign independent state.

6. Once it is determined that a state has the power to conclude a treaty, the issue arises as to which entity in that state may exercise this power. As has been said a head of state, other member of the state government, or some other agent acting on behalf of the state might have the capacity to conclude a treaty on behalf of that state.[12] It is the state constitution or government that will determine this issue.

7. In Canada, treaty making is an exercise of the Crown prerogative.[13] Under the Canadian Constitution, executive authority is required to enter into a treaty. Typically, this executive authority is expressed by an order in council issued by the Governor in Council, or approval of a memorandum to Cabinet, authorizing the Prime Minister, Minister of Foreign Affairs, another minister, or a Canadian Ambassador or High Commissioner to sign a treaty on behalf of Canada.[14]

8. The approval of Parliament is not needed in order to enter into a treaty. This said, many treaties are tabled in Parliament and Members of Parliament may raise questions concerning the matters covered therein.[15] The reason for this is that, as is discussed below, most treaties require implementing legislation to make the treaty's terms binding in Canadian law.[16]

9. In Canada, the Department of Foreign Affairs under the Minister of Foreign Affairs is responsible for the conduct of foreign affairs[17], and in the majority of cases it is Foreign Affairs that is given executive authority to negotiate and conclude treaties.[18] Occasionally, however, the

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[8] Aust, *supra* note 1 at 23.
[9] Confusingly, some documents entitled "memorandum of understanding" have the status of treaty. It is important to remember that the terms of a document determine its status, not the document name: see paragraph 3, above. Recent Canadian practice is to be clear as to the legal status of a document by titling it a "treaty" or "MOU" and being clear in the terms of the document as to the intent of the parties with respect to the document.
[10] The term "agreement" is used to signify that the document is binding at law. As has been discussed, treaties are binding at international law. For a discussion of other types of international agreements, see chapter 26.
[11] Aust, *supra* note 1 at 26.
[12] *Ibid.* at 16f.
[13] The Crown prerogative is discussed more fully in chapter 5.
[14] Law and Practice, *supra* note 1 at 5/19.
[15] The approval of a treaty may be sought from both houses of Parliament through a "joint resolution," and the decision as to whether this step will be taken is made by the government of the day. CED, *supra* note 7, s. 317.
[16] Under the Canadian constitution the executive has the authority to conclude treaties, but the authority to make law in Canada is within Parliament's purview. The executive cannot make law in Canada. Implementing legislation is required to make treaty terms Canadian law because if such legislation were not necessary the treaty-making power would grant to the federal executive a de facto legislative power.
[17] *Department of Foreign Affairs and International Trade Act,* R.S.C. 1985, c. E-22, as am. by S.C. 1995, c. 5.
[18] Law and Practice, *supra* note 1 at 5/19.

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executive has granted such authority to other government departments and ministers, including the DND and MND.

SECTION 3

TREATY - MAKING PROCESS

10. The treaty-making process begins with negotiation between states on the text of the contemplated treaty. In Canada, as in many states, executive approval for state representatives to negotiate on behalf of Canada will be required. Such executive approval is granted in the form of a negotiating mandate, and may be granted by Order in Council or approval of a memorandum to Cabinet.[19]

11. Negotiation of a treaty focuses on the text of the articles of the treaty. These articles typically include a statement concerning the intended scope of the treaty, specific terms relating to the subject matter of the treaty, mechanisms for solving disputes, and entry into force.

12. Once a treaty text has been negotiated, the negotiated text is 'adopted.'[20] Adoption may be done by initialling the text. A treaty is 'concluded' after adoption. Typically, a bilateral treaty is concluded when it is signed by both states.[21] Formal adoption and conclusion of treaties may affect rights and obligations of concerned states under the customary international law and the *Vienna Convention*.

13. Once a treaty is concluded, a state may signify its consent to be bound by the treaty's terms.[22] A state may signify such consent through signature, exchange of instruments constituting a treaty, ratification, acceptance or approval of a treaty, accession, or other agreed means.[23] For the majority of treaties the act that signifies a state's consent to be bound by a treaty is ratification. State ratification is done by execution of an instrument of ratification by the executive, and either exchanging this instrument with the other state, or depositing it.[24]

14. A state is not bound by a treaty until the treaty enters into force for that state. Once a treaty enters into force for a particular state, that state becomes a party to the treaty.[25] When a treaty enters into force for the concerned states will be specified in the terms of the treaty, or will be as agreed by the concerned states.[26] The act which signifies a state's consent to be bound by a treaty may also be the trigger for the entry into force of the treaty for that state.[27]

SECTION 4

RESERVATIONS

15. In the case of multilateral treaties, states may choose to unilaterally modify or even decline to accept certain provisions of the treaty even though they have signed and ratified it.

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[19] In some cases, for example where a treaty is being done to supersede another, an executive negotiating mandate will not be required, although the granting of consent to be bound by the terms of the treaty will always require executive authority. It is the government of the day that determines the extent of required executive approvals, and their forms.
[20] The process for formal adoption of negotiated text will be determined in the negotiation process. Bilateral treaties will require unanimity for adoption, whereas in some cases of multilateral treaties a specified majority may adopt negotiated text: Aust, *supra* note 1 at 66.
[21] Multilateral treaties may be concluded when signature is put to the adopting documentation, or on the date on which the treaty is opened for signature: see Aust, *ibid*. at 74.
[22] Under the Vienna Convention, *supra* note 1, art. 2(1) (f), a state that has consented to be bound by a treaty's terms becomes through that act a "contracting State."
[23] *Ibid.,* art. 11. See also Aust, *supra* note 1 at 75-99.
[24] Aust, *supra* note 1 at 81.
[25] Vienna Convention, *supra* note 1, art. 2(1) (g). Also, Aust, *ibid*. at 82-83.
[26] Vienna Convention, *ibid*., art. 24(1). Also Aust, *ibid*. at 131.
[27] Aust, *ibid*. at 75 and 131.

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This is done through the process of entering a reservation.[28] Article 2(1)(d) of the *Vienna Convention on the Law of Treaties* defines reservation as "a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State." A reservation must not be incompatible with the object and purpose of the treaty. Moreover, some treaties (*e.g. The Rome Statute of the International Criminal Court*, Article 120) expressly prohibit all or some reservations. In such a case, a reservation which is contrary to such a provision will be invalid. In the case of a permissible reservation, another state may nevertheless object to the reservation, but "an objection by another contracting State to a reservation does not preclude the entry into force of the treaty as between the objecting and reserving States unless a contrary intention is definitely expressed by the objecting State." A reservation is considered to be accepted if no objection is raised.[29] Where a reservation has been accepted, it applies on the basis of reciprocity (i.e., not only can the reserving state rely upon it but so can any other party to the treaty in its relations with the reserving state).

SECTION 5

TREATY IMPLEMENTATION

16. As has been discussed above, many treaties will be the subject of domestic implementing legislation. Any state in which there is a constitutional division between the power to conclude treaties and the power to make domestic legislation will require implementing legislation to bring a treaty into force in that state.[30] As has been discussed, in Canada the bringing into force of a treaty for Canada is an executive act, whereas the generation of Canadian laws is a legislative one. In any case where a treaty done by the Canadian executive touches on areas of Canadian legislative competence, the treaty will not have effect in Canada until appropriate legislation is created.

17. Through the *Constitution Act, 1867*, Canada has divided legislative competence between its federal and provincial governments. Accordingly, the issue of which level of legislature, federal or provincial, is responsible to create laws to implement a particular treaty is answered through reference to the division of legislative powers in the *Constitution Act, 1867*.[31]

18. In practice, legislation implementing a particular treaty may do so by incorporating the text of the treaty into the implementing statute itself, or by setting out law that has the effect of implementing the treaty, or parts of it.

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[28] The subject of reservations is a complex one, and the law on the subject is not settled. Articles 19-23 of the *Vienna Convention* deal with the subject of reservations but are certainly not the last word: Aust, *ibid*. at 100. There has been much written on the legal effect of reservations and on application of Articles 19-23, and much development in the international case law. This section's purpose is to give a very brief introduction to this very complex area. For more detail on reservations *e.g.* Aust at 100-130; CED, supra note 7, ss. 315-316.

[29] For example, some Islamic countries have made reservations to the *Convention on the Rights of the Child*, saying that in case of conflict with the Shari'a, the law of the Shari'a must rule.

[30] It is important to keep clear the difference between a treaty being in force for a state (discussed above) and a treaty's terms being in force *in* that state: Aust, *supra* note 1 at 143. Some states are "monist" meaning that a treaty may become law in that state simply by entering into force for that state: Aust, *supra* note 1 at 146. Canada clearly does not use a monist approach: see CED, *supra* note 7, s. 314.

[31] Put another way, there is no such thing as treaty legislation as such for the purposes of the distribution of legislative powers; the distribution is based on classes of subjects: *Labour Conventions Case*, [1937] A.C. 326.

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CHAPTER 20

MARITIME OPERATIONS: THE LAW OF THE SEA AND RELATED DOMESTIC LEGAL AUTHORITIES

SECTION 1

INTRODUCTION

1. This chapter will address the legal basis for international and domestic naval operations and some of the issues that arise during naval operations at sea during peacetime, Security Council mandated enforcement operations and during times of armed conflict.[1] Section 2 of this chapter will introduce the reader to various international and domestic legislation that provide the basis for naval operations. Section 3 will define each maritime zone while section 4 will identify the impact that each of these zones will have on naval operations. Leadership interdiction, maritime interdiction operations and the Proliferation Security Initiative (PSI) will also be discussed. Finally, section 5 will cover the legal basis for domestic naval operations.

SECTION 2

INTERNATIONAL LAW

General

2. International law is mostly composed of treaty law and customary international law.[2] As discussed at Chapter 19, a treaty is simply any agreement between two or more states that is intended to establish obligations as a matter of international law. The *UN Charter*,[3] the *UN Convention on the Law of the Sea* (UNCLOS), the *Geneva Conventions*,[4] their *Additional Protocols*,[5] and the *Rome Statute of the International Criminal Court*[6] all establish treaty obligations. The express consent of a state is required before it is bound to comply with any treaty obligations. Customary international law, on the other hand, binds all states, without requiring their prior express consent. Customary legal principles result from the evolution of state practice and attitudes, rather than from the formal negotiation of binding agreements. The 'crystallisation' of a norm into a binding principle of customary international law requires that two threshold criteria be met: established state practice supporting the principle and a belief by states that this practice is legally required (*opinio juris sive necessitatis*).[7]

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[1] For further readings on the law of the sea see W.H. Von Heinegg, "Visit, Search, Diversion, and Capture in Naval Warfare: Part I, The Traditional Law" (1991) 29 Can. Y. Int'l L. 283; Louise Doswald-Beck, *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (Cambridge: Cambridge University Press, 1995)[San Remo Manual]; Lois E. Fielding, *Maritime Interception and U.N. Sanctions* (Maryland: Austin & Winfield Publishers, 1997); Rob Mclaughlin, "United Nations Mandated Naval Interdiction Operations in the Territorial Sea?" (2002) I.C.L.Q. 51.2; Ashley Roach, "Symposium: The Hague Peace Conferences: The Law of Naval Warfare at the Turn of Two Centuries" (2000) 94 A.J.I.L. 64.

[2] For additional information on treaty law and customary law see chapter 10 – Introduction to International Law in this manual.

[3] *Charter of the United Nations*, 26 June 1945, Can. T.S. 1945 No. 7 [UN Charter].

[4] *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 12 August 1949, 75 U.N.T.S. 31; *Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked of Armed Forces at Sea*, 12 August 1949, 75 U.N.T.S. 85; *Geneva Convention Relative to the Treatment of Prisoners of War*, 12 August 1949, 75 U.N.T.S. 135; and, *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 75 U.N.T.S. 287.

[5] *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict*, 15 August 1977, UN Doc. A/32/144; and, *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflict*, 15 August 1977, UN Doc. A/32/144.

[6] *Statute of the International Criminal Court*, UN Doc. A/CONF.183/9 (1998) [Rome Statute].

[7] See *e.g. North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. The Netherlands)*, [1969] I.C.J. Rep. 3 at 44.

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3. Generally speaking, significant treaty sources of law impacting on international naval operations are the *United Nations Convention on the Law of the Sea* (UNCLOS), the *UN Charter* and the law of armed conflict (LOAC). UNCLOS applies during peacetime and times of armed conflict and it is the most comprehensive convention pertaining to the law of the sea. The UN Charter is the legal basis upon which Security Council mandated naval operations rest. These Security Council mandated operations may or may not involve an armed conflict. As was explained in greater detail in Chapter 17, the LOAC consists of treaty law and customary international law. Key treaties include the *Geneva Conventions* and the *Additional Protocols*.[8] Customary international LOAC, as it relates to naval operations, has been captured in the San Remo Manual. The San Remo Manual, generally speaking, is a compilation of customary international law, as it exists today and is generally considered authoritative. It encapsulates international law as it applies to armed conflicts at sea.

4. Legal advisors and naval commanders should be familiar with the law as it applies to naval operations during times of peace, during Security Council mandated operations and during times of armed conflict. It is important for legal advisors and naval commanders to be able to identify the type of operation they are conducting and the law that will apply to that operation. As will be illustrated below, international and domestic law play an influential role in shaping naval operations.

United Nations Convention on the Law of the Sea

5. UNCLOS defines each maritime zone as well as the rights and obligations of states with respect to each zone. Some of the key rights and zones include internal waters, the territorial sea, innocent passage in the territorial sea, contiguous zone, international straits, transit passage, archipelagic waters, exclusive economic zone (EEZ), continental shelf and the high seas. Canada ratified UNCLOS on 6 Nov 2003 and it came into force in Canada on 7 Dec 2003. Although there is little discussion with respect to the military use of the sea per se in UNCLOS, the rights and obligations that each State has with respect to the maritime zones, as stated in UNCLOS, will have an impact on the military uses of the sea.

Charter of the United Nations

6. The Charter of the United Nations empowers the Security Council to pass Security Council Resolutions (SCR) that may authorize states to establish and enforce embargoes and sanctions. Article 41 of the UN Charter provides for the creation of embargoes and sanctions against a target state. It does not provide for their enforcement through use of force.[9]

7. A SCR created under the authority of Article 42 of the UN Charter may provide a legal basis for military enforcement measures in support of a SCR that has established embargos and sanctions. In such circumstances, depending upon the wording of the SCR, a member state may use force against other states for the purpose of enforcing the UN SCR.[10]

8. Consequently, a particular SCR may permit warships to do more than what UNCLOS would otherwise allow. An armed conflict does not need to exist for SCR to apply. As discussed below, CF naval forces have been particularly active in the last 10 years conducting maritime interdiction operations enforcing SCRs.

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[8] See B-GG-005-027/AF-002, Collection of Documents on the Law of Armed Conflict.
[9] Article 41 of the UN Charter states "The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations."
[10] Article 42 of the UN Charter states "Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations."

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Law of Armed Conflict

9. Geneva Convention II and Additional Protocol I (AP I) regulates certain aspects of naval warfare. Most aspects of naval warfare are regulated by customary international law.

San Remo Manual on International Law Applicable to Armed Conflicts at Sea

10. Customary international law is a main source of law as it applies to armed conflicts at sea. The *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* outlines both treaty law and state practice. The San Remo manual covers such areas of the law as the region of operations, basic rules and target discrimination, methods and means of warfare at sea, measures short of attack including interception, visit, search, diversion and capture, and the law as it applies to protected persons, medical transports and medical aircraft.[11]

Domestic Law

11. Domestic legislation will apply in certain circumstances to international operations but predominately it applies to operations conducted in Canadian waters, particularly those conducted in the EEZ and the contiguous zone. Naval commanders and their legal advisors must be aware of the domestic legislation that exists and its application to operations conducted in Canadian waters. Commanders need to be aware of their obligations and responsibilities under each federal statute that may apply to their day-to-day operations.

12. Canada's *Oceans Act* defines Canada's maritime zones. There are also sections on the prevention of the infringement of federal laws and the enforcement of federal laws in the contiguous zone and the application of federal laws to continental shelf installations.[12]

13. The *Fisheries Act* provides the Minister of Fisheries and Oceans with authority pursuant to section 5 of the Act to appoint persons or classes of persons as fisheries officers and to provide the appointed person or class of persons with a certificate certifying their designation.[13] This designation legally empowers the designated person with certain rights under the Act. CF officers conducting fishery patrols have been so designated.

14. The *Coastal Fisheries Protection Act* provides the Governor in Council with the authority to authorize CF commissioned officers to enforce the *Coastal Fisheries Protection Act* and to be protection officers within the meaning of the Act. CF members acting as protection officers have a number of powers and responsibilities pursuant to this Act. These powers and responsibilities will be discussed later in the chapter.[14] CF naval personnel were so designated in the so-called 'Turbot War.'

15. Section 273.6(2) of the *National Defence Act* (*NDA*) allows the Governor in Council, or the Minister of National Defence (MND) on the request of another Minister, to issue directions to the CF to assist the law enforcement agencies if the Governor in Council or the MND considers the assistance to be in the national interest and the matter cannot to effectively dealt with but for the assistance of the CF.[15] This is relevant during the various counter-drug operations the CF has participated in.

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[11] For additional comments on the San Remo Manual on International Law Applicable to Armed Conflicts at Sea see J. Ashley Roach's article "The Law of Naval Warfare at the Turn of Two Centuries," (2000) 94 A.J.I.L. 64.
[12] See the *Oceans* Act, S.C. 1996, c.31.
[13] *Fisheries Act*, R.S.C 1985, c. F-14, s. 5.
[14] *Coastal Fisheries Protection Act*, R.S.C. 1985, c. C-33.
[15] *National Defence Act,* R.S.C. 1985, c.N-5, s. 273.6.

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SECTION 3

MARITIME ZONES

16. The purpose of this section is to identify maritime zones and the key rights and obligations attached to each. UNCLOS is the main body of law that defines maritime zones. It is important that naval commanders and their legal advisors be able to identify the zone in which HMC Ships are located, as Canada's rights and obligations will vary with the zone.

Internal Waters, Ports and the Territorial Sea

17. Internal waters are those waters found on the landward side of the baseline of a state's territorial sea.[16]

18. The territorial sea is that part of the sea that extends seaward from the baseline to 12 nautical miles (nm).[17] A state has sovereignty over its landmass, internal waters and its territorial sea.[18]

The Contiguous Zone and the Exclusive Economic Zone

19. The contiguous zone is simply a zone contiguous to the territorial sea. It extends no more than 24 nm from the baseline of the coastal state. Importantly, for domestic operations, the coastal state can exercise control over this area to prevent and punish infringement of its state laws pertaining to customs, immigration, and fisheries in its territory or territorial sea.[19] Consequently, much of the CF domestic naval operations have been undertaken in these zones while assisting law enforcement authorities.

20. The exclusive economic zone (EEZ) is the area that is beyond and adjacent to the territorial sea.[20] It extends no more then 200 nm from the baseline.[21]

21. Coastal states have certain rights and duties in the EEZ:

> The coastal state has sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds.[22]

The High Seas

22. The high seas are those areas of the world's oceans that do not fall within the EEZ, territorial sea or internal waters or archipelagic waters of an archipelagic state.[23]

International Straits and Archipelagic Sea Lanes

[16] *United Nations Convention on the Law of the Sea (UNCLOS)*, 10 December 1982, [1994] 33 I.L.M. 1309, art. 8(1)[UNCLOS].
[17] *Ibid*., art. 3.
[18] *Ibid*., art. 1.
[19] *Ibid*., arts. 33 (1) & (2).
[20] *Ibid*., art. 55.
[21] *Ibid*., art. 57.
[22] *Ibid*., art. 56(1)
[23] *Ibid*., art. 86.

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23. International straits or archipelagic sea lanes are used to traverse from one part of the high seas or EEZ to another part of the high seas or EEZ. The right of transit passage through an international strait or an archipelagic sea lane does not change the legal status of the waters that form the strait.[24]

SECTION 4

INTERNATIONAL OPERATIONS

PEACETIME

24. The purpose of this section is to identify the impact each maritime zone will have on naval operations being conducted in peacetime. UNCLOS is the main body of law applicable during peacetime.

Internal Waters, Ports, Territorial Sea and Innocent Passage

25. All vessels have a right to innocent passage through a coastal state's territorial sea. Passage through the territorial sea must be for the purpose of traversing the territorial sea to reach another maritime zone. Vessels are required to pass through the territorial sea without passing through the internal waters of the coastal state. They are also not to enter or leave internal waters or stop at any port during its passage unless permitted to do so by the coastal state. According to UNCLOS,

> passage shall be continuous and expeditious. However, passage includes stopping and anchoring, but only in so far as the same are incidental to ordinary navigation or are rendered necessary by *force majeure* or distress or for the purpose of rendering assistance to person, ships or aircraft in danger or distress.[25]

The right of innocent passage belongs to warships as well as to merchant vessels (but see paragraph 27 below).

26. When foreign vessels are passing through the territorial waters of a coastal state they must refrain from doing anything that would threaten the peace and security of the coastal state. Acts that could be considered threatening to the peace and security of the coastal state include threatening to use force against the coastal state, conducting any exercise involving the use of their weapons, breaching the laws of the coastal state with respect to customs and immigration and collecting or attempting to collect information to the prejudice of the defence or security of the coastal state.[26] This is not an exhaustive list. Other activities prohibited by vessels traversing the territorial sea can be found in Article 19(2) of UNCLOS.

27. Submarines and any other underwater vessel traversing the territorial sea must do so above the surface of the water with their flag raised.[27] Aircraft may not be launched or recovered while conducting innocent passage through the territorial sea.[28]

28. Warships and certain other Government operated vessels at sea and in port have immunity from the jurisdiction of the coastal State.[29] That is, they are not subject to the enforcement jurisdiction of any state with the exception of the flag state. Laws not concerning passage through the territorial sea, for example the general criminal law of the coastal state,

[24] UNCLOS, *supra* note 16, art. 34(1).
[25] *Ibid.*, art. 18(2).
[26] *Ibid.*, art. 19(2).
[27] *Ibid.*, art. 20.
[28] *Ibid.*, art. 19(2)(e).
[29] *Ibid.*, art. 32.

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cannot be enforced against them. Warships are obliged to respect coastal state laws concerning passage through the territorial sea. When a warship does not comply with the laws and regulations of the coastal state while passing through its territorial sea and ignores a request for compliance, the coastal state may order it to leave its territorial sea immediately.[30] If the coastal state suffers any damage due to the warship's non-compliance, the flag state will bear responsibility for the damage.[31] As a result of this immunity, a local police force may not board a warship for the purposes of enforcing the coastal state's laws unless flag state consent is obtained.

International Straits and Archipelagic Sea Lanes

29. A military vessel may transit through, under or over an international strait or archipelagic sea-lane in their 'normal mode.'[32] In other words, the vessel may launch or recover aircraft and leave its radar and weapons systems on. Submarines can remain submerged.

The Contiguous Zone and Exclusive Economic Zone

30. A military vessel may operate in its 'normal mode.' It has the freedom of navigation and over flight.[33] It may launch or recover aircraft, leave its radar and weapons system on and submarines may remain submerged. Foreign vessels must, however, have due regard to the rights of the coastal state and must obey the laws of the coastal state while in the EEZ provided that the laws are not inconsistent with UNCLOS.[34]

The High Seas

31. The high seas are open to all states including landlocked states for the purposes of navigation, the laying of pipelines and other rights within UNCLOS. A state when exercising its rights on the high seas must have due regard for the rights of other states to the freedom of the high seas.[35]

32. The high sea legal regime anticipates that every ship will sail under the flag of a state (and one state only). In relation to private vessels, it is expected that flagging states exercise exclusive responsibility to regulate the conduct of these ships.[36] Warships from other states are not entitled to board the vessel, unless there are reasonable grounds to believe that that vessel is engaged in certain prohibited activities (e.g., piracy) or has no nationality (i.e., is not flagged). The rules for non-commercial governmental ships are even more limiting: any government vessel operated for non-commercial purposes has immunity from the jurisdiction of any other state while on the high seas.[37] Warships on the high seas are subject to the jurisdiction of the flag state only.[38]

ARMED CONFLICT AT SEA

33. Opposing parties to an armed conflict may be engaged at sea. The purpose of this section is to identify the impact each maritime zone has on naval operations during times of armed conflict. Customary international law is the main body of law applicable to armed conflict at sea. The law, generally speaking, has been captured in the San Remo manual. While Canada has not adopted the manual *per se* as a definitive statement of customary international law, it is

[30] *Ibid.*, art. 30.
[31] *Ibid.*, art. 31.
[32] *Ibid.*, art. 38(2).
[33] *Ibid.*, art. 58.
[34] *Ibid.*, art. 58(3).
[35] *Ibid.*, art. 87.
[36] *Ibid.*, art. 92 and 94.
[37] *Ibid.*, art. 96.
[38] *Ibid.*, art. 95.

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an important resource.[39] CF legal advisors and naval commanders were active in contributing to the manual.

Internal Waters, Ports and Territorial Sea

34. During an armed conflict at sea, operations may be conducted in the internal waters and territorial sea of the belligerents.

35. In times of armed conflict, the territorial waters of a neutral state are considered neutral waters and hostile acts by belligerents are forbidden in these waters. Neutral states are responsible for exercising control over their neutral waters to prevent belligerents from using the waters as a sanctuary or committing hostile acts. Hostile acts can include attacking persons or objects in neutral waters, the laying of mines, capturing vessels, etc.[40] If the neutral state is unable or unwilling to stop a violation of its waters by belligerents, the opposing belligerent must give notice to the neutral state that it is to take steps to terminate the violation. The belligerent is to provide the neutral state with a reasonable amount of time to terminate the violation, however:

> If the violation of the neutrality of the State by the belligerent constitutes a serious and immediate threat to the security of the opposing belligerent and the violation is not terminated, then that belligerent may, in the absence of any feasible and timely alternative, use such force as is strictly necessary to respond to the threat posed by the violation.[41]

36. A neutral state may, without jeopardizing its neutrality, permit belligerent vessels to conduct innocent passage through its territorial sea or archipelagic sea. The neutral state may also allow a belligerent vessel to replenish its supply of food, water, and fuel so as to enable the vessel to reach its own port. It may also allow repairs of that vessel in order to make it seaworthy and capable of reaching its own port. The neutral is not to repair any weapons or increase the fighting capacity of the vessel in any way.[42]

International Straits and Archipelagic Sea Lanes

37. Belligerent military vessels may pass through, under or over an international strait or archipelagic sea lane. Their passage through, under or over a strait or sea-lane does not affect the neutrality of the coastal state. Also neutral vessels may pass through, under or over an international strait and archipelagic sea lane of a belligerent coastal state. The neutral state should, however, give the belligerent notice that it intends to exercise its right of transit passage.[43]

38. Belligerent vessels passing through, under or over an international strait or archipelagic sea lane must do so without delay. They are:

> … to refrain from the threat or use of force against the territorial integrity or political independence of the neutral littoral or archipelagic State, or in any other manner inconsistent with the purposes of the Charter of the United Nations, and otherwise to refrain from any hostile actions or other activities not incident to their transit. Belligerents passing through, under or over neutral straits or waters in which the right of archipelagic sea lanes passage applies are permitted to take defensive measures consistent with their security, including launching and

[39] For general information on the law relating to the conduct of hostilities at sea, the reader should refer to B-GG-005-027/AF-021, The Law of Armed Conflict at the Operational and Tactical Level, ch. 8., which summarizes the Law of Armed Conflict (LOAC) concerning the conduct of hostilities at sea.
[40] San Remo Manual, *supra* note 1 at paras. 14-17; See also B-GG-005-027/AF-021, p. 8-2, para. 806.
[41] San Remo Manual, *supra* note 1 at para. 22; See also B-GG-005-027/AF-021, p. 8-4, para. 811.
[42] San Remo Manual, *supra* note 1 at para. 20; See also B-GG-005-027/AF-021, p. 8-3, para. 809.
[43] San Remo Manual, *supra* note 1 at paras. 23-26; See B-GG-005-027/AF-021, p. 8-4, para. 815.

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> recovery of aircraft, screen formation steaming, and acoustic and electronic surveillance. Belligerents in transit or archipelagic sea lanes passage may not, however, conduct offensive operations against enemy forces, nor use such neutral waters as a place of sanctuary nor as a base of operations.[44]

39. The mere fact that there is an armed conflict does not change the right of transit passage through an international strait or archipelagic sea lane as it relates to neutral states. The laws and regulations that neutral coastal states have adopted to regulate transit passage continue to apply in armed conflict situations.[45]

The Contiguous Zone and the Exclusive Economic Zone

40. Belligerents may lay mines in the EEZ, including the EEZ of a neutral state. If they do lay mines the belligerent must notify the neutral state of this fact. The belligerent must also ensure

> …that the size of the minefield and the type of mines used do not endanger artificial islands, installations and structures, nor interfere with access thereto, and shall avoid so far as practicable interference with the exploration or exploitation of the zone by the neutral State. Due regard shall also be given to the protection and preservation of the maritime environment.[46]

41. Belligerents shall when conducting hostilities in the EEZ have due regard to the right of neutral states to explore and exploit economic resources found within the EEZ. Belligerents shall also have due regard for the marine environment and any artificial island, structure or installation they have built in the EEZ.[47]

The High Seas

42. Belligerents when conducting hostile acts on the high seas must have due regard for the rights of neutral states to use the high sea for any purpose as set out in UNCLOS. If there are cables or pipelines on the seabed, which belong to neutral states, the belligerents must take care not to damage them.[48]

Visit and Search Operations: Leadership Interdiction Operations

43. The LOAC provides another legal basis for maritime operations, which would not necessarily be available under UNCLOS. Leadership interdiction operations (LIO) occur under the authority of LOAC and are an exercise of visit and search.

44. Naval forces may at times have to conduct visit and search operations (VSO) directed at neutral shipping to ensure that they are not carrying contraband or belligerents. Military vessels and aircraft have a right to visit and search merchant vessels outside neutral waters where there are reasonable grounds for suspecting that they are subject to capture.[49] They may be subject to capture if they are carrying contraband or belligerents. When visit and search is not possible, for example due to weather or sea conditions, diversion to port for the purpose of visit and search is acceptable.[50]

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[44] San Remo Manual, *supra* note 1 at para. 30; See B-GG-005-027/AF-021, p. 8-5, paras. 818-819.
[45] San Remo Manual, *supra* note 1 at para. 27; See also B-GG-005-027/AF-021, p. 8-4, para. 816.
[46] San Remo Manual, *supra* note 1 at para. 35; See also B-GG-005-027/AF-021, p. 8-6, para. 822.
[47] San Remo Manual, *supra* note 1 at para. 34; See also B-GG-005-027/AF-021, p. 8-6, para. 821.
[48] San Remo Manual, *supra* note 1 at paras. 36-37; See also B-GG-005-027/AF-021, p. 8-6, paras. 823-824.
[49] San Remo Manual, *supra* note 1 at para. 118.
[50] *Ibid.* at para. 121.

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45. In order to avoid VSOs, military forces may enforce reasonable control measures and certification procedures for the inspection of cargo of neutral merchant vessels. [51]

46. As a general rule, neutral merchants ships may not be attacked. However, if the naval commander believes on reasonable grounds that the vessel is carrying contraband, and after a prior warning is given, the vessel intentionally and clearly refuses to stop or resists visit, search and capture, then the vessel may be attacked.[52] Use of force would be used in accordance with LOAC principles of necessity and proportionality.

47. CF naval forces have spent a great deal of their time conducting LIOs as a part of the Campaign Against Terrorism. Numerous ships were boarded to ensure that they were not carrying contraband or belligerents. Legal advisors and naval commanders need to understand the law as it applies to visit and search since it is important part of what CF naval forces do.

Enforcement of Security Council Resolutions: Maritime Interdiction Operations

48. Over the years, CF naval forces have conducted a number of maritime interdiction operations (MIO).[53] CF maritime forces has been involved in operations off the coasts of Haiti,[54] the former Yugoslavia,[55] East Timor, the Arabian Gulf[56] and Somalia. Since MIOs are conducted with such frequency, it is important for legal advisors and naval commanders to have an understanding of the legal basis that underpin these operations.

49. The UN Charter provides the legal authority to pass Security Council resolutions (SCR) that may give states the right to establish embargoes and sanctions. As discussed in section 2, Article 41 of the UN Charter covers embargos, sanctions and their monitoring. Article 42 provides the means to enforce embargos and sanctions against states that violate the SCR establishing the embargos and sanctions in the first place.[57] SCR can apply to operations that may or may not involve an armed conflict.

50. A SCR issued under the authority of Article 41 of the UN Charter is binding on all member states including the target state. Members must adhere to the SCR with respect to obeying and self-policing the embargos and sanctions as it relates to ships flying their flag. Ships from member states are not entitled to violate the SCR and each member state must ensure that their own ships adhere to the resolution. Ships are not entitled to enforce the resolution through coercive means against other states while operating under Article 41 but may rely on any applicable domestic legislation.

51. If the Security Council considers the measures taken under Article 41 to be inadequate then the Security Council may take steps under Article 42 to compel compliance with the SCR. At that time member states may take all necessary steps to enforce compliance.[58]

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[51] *Ibid.* at para. 122.
[52] *Ibid.* at para. 67. This para also provides other conditions for which a neutral merchant vessel may be attacked.
[53] The CF has been involved in a number of international operations that have enforced UN mandates. These included the use of naval power to enforce sanctions in the Arabian Sea and Gulf Region (SCR 665 (1990); SCR 1483 (2003)) and off the Yugoslavian (SCR 787 (1992) and 820 (1993)) and Haitian coast (SCR, 875 (1993) and 917 (1994)). See generally Fielding, *supra* note 1; Von Heinegg, *supra* note 1; Mclaughlin, *supra* note 1.
[54] See SCR 815/875/917.
[55] See SCR 787/820.
[56] See SCR 665/687.
[57] See chapter 15, Enforcing UN Mandates.
[58] An example of maritime interdiction operations that began with sanctions under Article 41 and eventually moved to enforcement under Article 42 is the Iraq invasion of Kuwait in 1990. The Security Council on the 6th of August 1990 issued resolution 661. The SCR 661 provided for economic sanctions against Iraq in response to Iraq's invasion of Kuwait. The SCR purpose was to end the occupation of Kuwait by forcing, through economic sanctions, the withdrawal of Iraqi forces back to Iraq.[58] The economic sanctions under SCR 661 did not produce the desired result. As a result the Security Council issued resolution 665 on the 25th of August 1990. SCR 665 authorized maritime forces:

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52. The UN Charter provides the Security Council with the legal authority to create SCR that allow states to enter various maritime zones, such as the territorial sea, to enforce various mandates and to conduct a variety of operations using varying degrees of force, which, importantly, would not be possible under UNCLOS. For example, UNCLOS prohibits a ship from entering the territorial sea of another state unless its passage is innocent or the coastal state consents to activities beyond innocent passage. When states are operating under a SCR, a ship may enter the target state's territorial sea to enforce compliance with the SCR. Entering the territorial sea of a third party member state (i.e., a non-target state) to enforce compliance with the SCR when it appears that the third party state is either unwilling or unable to enforce the SCR, while controversial, would generally speaking, be permissible.[59]

53. Operations that may be permitted pursuant to a SCR made under Article 42 include intelligence gathering, boarding, diversion, air operations and disabling vessels. At a minimum,

> enforcement requires the authority to approach, board, demand documents, search, divert or arrest. At the extreme, if a vessel refuses to comply, this authority ultimately extends to firing across that vessel's bows or, as a last resort, disabling it with direct fire.[60]

54. In order to determine whether the CF naval force has the authority to board, search, divert, seize or perform any other maritime interdiction operation (MIO), the legal advisor must consult the SCR. For example, during Op FRICTION, CF naval forces were active in conducting MIOs in the Arabian Gulf and Sea. The authorization to use force to enforce the sanctions regime was anchored on SCRs such as SCR 665 (1991) which states in part:

> *Calls upon* those Member States co-operating with the Government of Kuwait which are deploying maritime forces to the area to use such measures commensurate to the specific circumstances as may be necessary under the authority of the Security Council to halt all inward and outward maritime shipping, in order to inspect and verify their cargoes and destinations and to ensure strict implementation of the provisions related to such shipping laid down in resolution 661 (1990).[61]

Since then numerous SCRs have been issued relating to Iraqi sanctions and embargoes.

Proliferation Security Initiative

55. The PSI is an activity whose purpose is to stop the unlawful proliferation of weapons of mass destruction (WMD). PSI participating states rely on already existing national and

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> ...to use such measures commensurate to the specific circumstances as may be necessary under the authority of the Security Council to halt all inward and outward maritime shipping, in order to inspect and verify their cargoes and destinations and to ensure strict implementation of the provisions related to such shipping laid down in resolution 661 (1990).[58]

[59] During the conflict in the Federal Republic of Yugoslavia (FRY) the UNSC passed resolution 820 (1993) that touched on this very issue. The UNSC in para 28 of the resolution "decide[d] to prohibit all commercial maritime traffic from entering the territorial sea of the Federal Republic of Yugoslavia (Serbia and Montenegro) except when authorized on a case-by-case basis by the Committee established by resolution 724 (1991) or in case of *force majeure*." (Resolution 820 (1993)). In para. 29 of the resolution, the UNSC "reaffirms the authority of States acting under paragraph 12 of resolution 787 (1992) to use such measures commensurate with the specific circumstances as may be necessary under the authority of the Security Council to enforce the present resolution and its other relevant resolutions, including in the territorial sea of the Federal Republic of Yugoslavia (Serbia and Montenegro)." See Resolution 820 (1993). Para. 28 of the resolution effectively prohibited innocent passage through the territorial sea. According to Mclaughlin, "...although there is no definitive law or practice on the issue, the argument that UN interdiction powers are exercisable in third party Territorial Seas is well-founded." See Mclaughlin, *supra* note 1 at 13.

[60] Mclaughlin, *supra* note 1.

[61] SCR 665 (Iraq).

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international law to stop or impede the transfer, shipment or sale of WMD or its related materials to state or non-state actors of proliferation concern.[62]

56. In 2004, Canada began to participate in PSI activity and to commit to the Interdiction Principles set out by the PSI. The PSI calls on states to commit to detaining, boarding and searching ships and aircraft registered to other member states committed to the PSI principles when they enter their internal waters, territorial sea, contiguous zone or national airspace. States are also called upon to board and search ships flying a flag of another state if the state is prepared to allow the interdiction. States are also called upon to require an aircraft flying through its national airspace to land if the state reasonably suspects that the aircraft has WMD cargo and is carrying the cargo to a state or non-state actor of proliferation concern.[63]

SECTION 5

DOMESTIC OPERATIONS

57. There will be times when the CF is requested to assist the civil authorities. The Government has issued a number of orders in council providing CF members with the authority and powers to enforce laws. Except as provided by these orders in council and applicable legislation, the CF does not have the legal authority to conduct domestic law enforcement operations.

Controlled Access Zone Order (Halifax, Esquimalt and Nanoose Harbours)

58. The Controlled Access Zone Order, P.C. 2002-2190, 12 December 2002, was made by the Governor General in Council on the recommendation of the Minster of National Defence for the purpose of establishing controlled access zones around Halifax, Esquimalt and Nanoose harbours.[64]

59. This order provides for the designation of a controlled access zone, types of access to a controlled access zone and compliance and enforcement of the conditions of access to a controlled access zone.[65]

60. Security guards are responsible for enforcing this order. Security guard is defined in section 1(1) of the order as: "(a) an officer or a non-commissioned member who is employed on duties relating to the enforcement of this Order; or (b) a person authorized by the Chief of the Defence Staff to enforce this Order."[66]

CF Support to RCMP Counter-Drug Operations

61. The CF and RCMP have entered into successive MOUs over the past decades, which MOUs govern the provision of CF assistance to RCMP counter-drug operation.[67] The latest of these MOUs came into force on 20 January 2005 and will remain in force until December 2006. The purpose of the MOU is to define the scope of CF assistance and the process for requesting

[62] Missile Technology Control Regime, MTCR Introduction, online: MTCR <http://www.mtcr.info/english/index.html>.
[63] *Ibid.* See also Department of National Defence, *Backgrounder: The Proliferation Security Initiative*, online: DND/CF <http://www.forces.gc.ca/site/Newsroom/view_news_e.asp?id=1329 >.
[64] Controlled Access Zone Order (Halifax, Esquimalt and Nanoose Harbours) (SI/2003-2).
[65] *Ibid.*
[66] *Ibid.*
[67] Section 273.6(2) of the *NDA* provides that the Governor-in-Council or the Minister of National Defence on the request of another Minister may issue directions to the CF to assist the law enforcement agencies if the Governor-in-Council or the Minister considers the assistance to be in the national interest and the matter cannot to effectively dealt with but for the assistance of the CF. The assistance must be more then of a minor nature or limited to a technical, logistical or administrative support. See Part III chapter 6 of this Manual, Domestic Operations: Provision of Services and Public Service.

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CF support.[68] CF personnel will act in a support role in relation to the RCMP and will only provide assistance where "there is neither the intention nor significant probability that CF personnel will be used to directly apprehend, arrest or detain suspects."[69]

62. Assistance to law enforcement is subject to the exigencies of the service and the CDS or his/her delegate will determine the strength, composition, arms and equipment of any military force tasked or dispatched in response to a specific request for assistance, as well as any subsequent changes.[70]

63. CF naval forces may be called upon to support the RCMP in their counter drug operations. The type of support provided to the RCMP generally consists of intelligence sharing and liaison, and surveillance of specific vessels and aircraft of interest by military surveillance systems or by military airplane or ships. In addition, CF naval forces may be asked to assist in interdiction operations against identified vessels and aircraft but only upon the specific request of the RCMP, and appropriate CF authorization. Other forms of assistance that are consistent with the MOU may also be provided.

Fisheries Act

64. The Minister of Fisheries and Oceans has the authority pursuant to section 5 of the *Fisheries Act* to appoint persons or classes of persons as fisheries officers and to provide the appointed person or class of persons with a certificate certifying their designation.[71] A class designation and certificate of designation was provided to officers and non-commissioned members of the CF serving in Her Majesty's Canadian ships and submarines as fishery officers. This designation applies for such time as the CF members are required to perform duties or functions under the *Fisheries Act* or the *Coastal Fisheries Protection Act*.[72]

65. There is also an MOU between the Department of Fisheries and Oceans (DFO) and the CF respecting surface ship patrols and aerial fisheries surveillance. The purpose of the MOU is:

> to define the terms and procedures for the provision of support by the Canadian Forces (CF) to the Department of Fisheries and Oceans (DFO) for the purposes of surveillance and enforcement in waters of Canadian fisheries jurisdiction and those waters where Canada has international fisheries commitments.[73]

66. The MOU defines the terms and procedures for the provision of surface ship patrols and aerial fisheries surveillance. Ship days and flying hours are allocated on an annual basis after consultation between DFO and CF officials. The MOU also deals with the cost structure pertaining to the provision of support to the DFO. Annex D to the MOU provides a matrix for an assistance request from DFO to DND.

Coastal Fisheries Protection Act

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[68] *MOU between the Canadian Forces and The Royal Canadian Mounted Police Concerning the Provisions of Assistance by the Canadian Forces in Support of the Royal Canadian Mounted Police in its Drug Law Enforcement Role*, DND ID # 1987080838, para. 3.1 [CF/RCMP MOU].
[69] *Ibid.* at para. 5.1.2.; See chapter 7 in this manual. Example: OP Board – CF Support to RCMP Counter Drug Operations. This counter drug operation took place in June 2005 where the CF provided general support to the RCMP. The CF, with the use of one of its warships, transported the RCMP to a fishing vessel believed to be smuggling drugs. The actual boarding of the vessel was undertaken by the RCMP.
[70] CF/RCMP MOU, *supra* note 69 at para. 5.2.3.
[71] *Fisheries Act*, *supra* note 13, s. 5(1) & (2).
[72] Class Designation and Certificate of Designation of Officers and Non-Commissioned Members of the Canadian Forces Serving in Her Majesty's Canadian Ships and Submarines as Fisheries Officers dated July 6, 1994.
[73] *Memorandum of Understanding Between the Department of Fisheries and Oceans and the Canadian Forces Respecting Surface Ship Patrols and Arial Fisheries Surveillance* (17 June 1994) at para. 1; See chapter 7 in this manual. Example: Turbot War between Spain and Canada on the Grand Banks in March 1995. The CF provided presence on the water during the dispute.

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67. Under the authority of section 5(2) of the *Fisheries Act,* the Deputy Minister of Fisheries has issued a certificate designating officers and non-commissioned officers of the CF 'Fishery Officers' when performing duties or functions under the *Fisheries Act* or *Coastal Fisheries Protection Acts*. In addition, the Governor in Council has authorized CF commissioned officers to enforce the *Coastal Fisheries Protection Act* and to be protection officers within the meaning of the Act.[74]

68. The *Coastal Fisheries Protection Act* provides the protection officer with the powers of inspection, arrest, seizure and forfeiture. Section 7 of the Act provides that:

> 7. A protection officer may
>
> (a) for the purpose of ensuring compliance with this Act and the regulations, board and inspect any fishing vessel found within Canadian fisheries waters or the NAFO Regulatory Area; and
>
> (b) with a warrant issued under section 7.1, search any fishing vessel found within Canadian fisheries waters or the NAFO Regulatory Area and its cargo.

69. With respect to enforcement on the high seas for unauthorized fishing in Canadian fisheries waters, s. 7.01(1) provides:

> 7.01(1) If a protection officer believes on reasonable grounds that a fishing vessel of a participating state or of a state party to a treaty or an arrangement described in paragraph 6(f) has engaged in unauthorized fishing in Canadian fisheries waters and the officer finds the vessel in an area of the sea designated under subparagraph 6(e)(ii) or f (ii), the officer may, with the consent of that state, take any enforcement action that is consistent with this Act;
>
> (2) Subsection (1) does not affect any powers the protection officer may have in the case of pursuit that began while the vessel was in Canadian fisheries waters.[75]

70. Due to the nature of these duties, when enforcing this Act, CF members, have 'peace officer' status pursuant to the definition of 'peace officer' in the *Criminal Code*. This definition includes "a person designated as a fishery officer under the *Fisheries Act* when performing any duties or functions under that Act or the *Coastal Fisheries Protection Act*," as well as members of the CF who are

> employed on duties that the Governor in Council, in regulations made under the *National Defence Act* for the purposes of [QR&O 22.01], has prescribed to be of such a kind as to necessitate that the officers and non-commissioned members performing them have the powers of peace officers.

71. Peace officer status is important when performing duties related to law enforcement. Peace officer status is time specific and exists when a member is performing law enforcement duties. It does not exist merely because the CF member is deployed in a domestic operation. Peace officer status is important because it will permit CF members to enforce the law and to use force while doing so and it will protect them from criminal and civil liability provided they are acting

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[74] P.C. 1970-1512. This authorization was made pursuant to s. 2(i)(iv) of the *Coastal Fisheries Protection Act*, s.2(f)(iv) of the *North Pacific Fisheries Convention Act*, s.2(g) (iv) of the *Northern Pacific Halibut Fisheries Convention Act*, and s.2(e)(iv) of the *Northwest Atlantic Fisheries Convention Act*. The *North Pacific Fisheries Convention Act*, the *Northern Pacific Halibut Fishery Act*, and the *Northwest Atlantic Fisheries Convention Act* have since been repealed. See chapter 7 in this manual.

[75] *Coastal Fisheries Protection Act*, *supra* note 14. See also *Coastal Fisheries Protection Regulations,* C.R.C., c. 413. Use of force is discussed in sections 19.3 to 19.5 of the regulations.

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within the scope of their duties.[76] This is important to the navy since the navy may need to use force when acting as protection officers. Peace officer status will provide them with protection from criminal and civil liability while acting in the scope of their duties.

SECTION 6

CONCLUSION

72. Over the years, CF naval forces have conducted a number of international and domestic operations. Generally speaking, international law will apply to international operations while domestic law will apply to domestic operations. However, domestic legislation will apply in certain circumstances to international operations, particularly to those conducted in the EEZ and contiguous zone.

73. This chapter has provided the reader with an introduction to important treaties, state practice and domestic legislation that apply to naval operations. Before CF naval forces can undertake any operation there has to be a legal basis for the operation. This legal basis can be found either in treaty law, customary international law or domestic law. Important treaties that provide the legal basis to conduct operations include UNCLOS for peacetime operations, the UN Charter for Security Council mandated operations, and customary international law as captured in the San Remo manual for armed conflict at sea. The *Geneva Conventions* and their *Additional Protocols* also apply during armed conflict and create a legal framework on how force may be used.

74. When conducting operations, it is also important that naval commanders and legal advisors be able to identify maritime zones as obligations will change as HMC Ships move from one zone to another or when the legal basis for the operation changes. Maritime zones identified in this chapter are internal waters, ports and territorial sea, international straits and archipelagic sea-lanes, contiguous zones, the EEZ and the high seas.

75. Conducting LIOs and MIOs is also important to CF naval forces. HMC Ships have been called upon to conduct LIOs in the Campaign Against Terrorism and MIOs to enforce SCRs relating to Iraqi sanctions and embargoes. It is important that naval commanders and their legal advisors understand the legal basis for conducting LIOs and MIOs as the authority to enforce sanctions and embargoes or to conduct VSOs will depend on the legal basis.

76. There will be times when the CF is requested to provide assistance to civilian authorities. In recognition of this, the Government has issued a number of Orders in Council and Parliament has passed legislation providing CF members with the authority and powers to enforce laws. In the absence of this domestic legislation the CF would not have the legal authority to conduct domestic law enforcement operations.

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[76] For further information on peace officer status, see chapter 9 in this manual. Example: Turbot War between Spain and Canada on the Grand Banks in March 1995. The CF provided presence on the water during the dispute.

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CHAPTER 21

THE LEGAL REGIME GOVERNING AIR OPERATIONS

SECTION 1

INTRODUCTION

1. Air law has been defined as that body of rules, both domestic and international, that govern the use of airspace.[1] The first 'air laws' were enacted in Europe in the late 1700s and were aimed at controlling the flight of balloons over population centres.[2] Driven by the incredible advances in aviation technology, particularly the advent of powered flight early in the twentieth century, air law has developed into a multi-dimensional area of the law[3] that impacts upon the conduct of CF operations both domestically and internationally.

2. This chapter will address the legal framework impacting on the conduct of air operations by the CF across the spectrum of conflict. Specifically the chapter will address the key sources of law impacting on the employment of air resources, address the meaning of state aircraft, consider the rights of state aircraft to access airspace and briefly consider the legal framework relating to the employment of air assets in both international and domestic operations.

SECTION 2

SOURCES OF LAW

3. Air law is derived from a wide variety of sources including both international treaty law and customary international law.[4] While there are numerous international treaties that impact upon air law, two treaties are of particular importance, the *1944 Convention on International Civil Aviation* (Chicago Convention),[5] and the United Nations *Convention on the Law of the Sea* (UNCLOS).[6]

4. The Chicago Convention[7] is the result of a joint British and U.S. initiative that was undertaken in 1944 to address the significant increase in commercial international aviation activity that was anticipated in the aftermath of World War II.[8] The purpose of the convention is to encourage the safe and orderly development of international air transport services.[9] Although the Convention states that it is of application only in respect to civil aircraft, it addresses a number of

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[1] Diederiks-Verschoor, *An Introduction to Air Law* (The Hague: Kluwer Law International, 1997) at 1.
[2] *Ibid*. at 2, where the author notes that in France, a police directive was issued on April 23, 1784 requiring that no balloon flight take place without prior authorization.
[3] The applicable air law is determined based on a number of different factors including location, aircraft nationality and aircraft status.
[4] For additional information on treaty law and customary law see Chapter 10 – Introduction to International Law.
[5] *Chicago Convention on International Civil Aviation (1944),* 7 December 1944, 15 U.N.T.S. 295, Can.T.S. 1944/36 (entered into force April 1947)[Chicago Convention].
[6] *United Nations Convention on the Law of the Sea (UNCLOS)*, 10 December 1982, [1994] 33 I.L.M. 1309, art. 8(1)[UNCLOS].
[7] Chicago Convention*, supra* note 5. The Chicago Convention came into force in April 1947 after being ratified by 26 states, including Canada. There are now over 188 state parties to the Treaty. It was followed by several related protocols. Civil aviation security is covered by the 1963-Tokyo Convention (on offences and other acts committed on board aircraft) and the 1971-Montreal Convention (on the suppression of unlawful acts against safety of civil aviation). The 1929 Warsaw Convention as amended, and the recent *Convention for the Unification of Certain Rules for International Carriage by Air* (entered into force November 2003) covers the compensation of passengers involved in air accidents as well as the damage, delays or loss of baggage and cargo that occurs in the course of international air transport.
[8] Michael Milde, "The Chicago Convention – Are Major Amendments Necessary or Desirable 50 Years Later?" (1994) XIX-1 Ann. Air & Sp. L. 401 at 403.
[9] Chicago Convention, *supra* note 5, Preamble.

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fundamental air law principles including the definition of national and international airspace. It also articulates the fundamental air law principle that "every State has complete and exclusive sovereignty over the airspace above its territory."[10]

5. In addition to providing a codification of public international air law, the Chicago Convention also establishes the International Civil Aviation Organization (ICAO). ICAO, with more than 180 member states,[11] is a specialized agency within the United Nations (UN), charged with promoting the development of all aspects of international civil aviation.[12]

6. UNCLOS, as discussed in Chapter 20, defines a number of different maritime zones, with states acquiring different rights and obligations depending upon the zone in which they are operating.[13] These maritime zones are also relevant in the air law context, in that they determine whether or not airspace is ultimately characterized as national airspace[14] under the exclusive jurisdiction and control of the territorial state, or international airspace[15] available for use by all and regulated by ICAO. While these zones assist in characterizing the nature of the adjacent airspace, it is important to realize that the rights and obligations of military aircraft operating within the airspace above these zones are, in some cases, significantly different from the rights and obligations of warships operating in the adjacent waters.[16]

SECTION 3

AIRCRAFT

Civil and State Aircraft

7. Article 3 of the Chicago Convention provides that the Convention is only applicable to civil aircraft and shall not be applied to state aircraft. That said, it should be noted that Article 3 and 3 *bis* do impose obligations on state aircraft relating to overflight of other state territory and safety of civilian aircraft. These rules are discussed further below. The Convention does not define civil aircraft but does state that "[a]ircraft used in military, customs and police services shall be deemed to be state aircraft."[17] This definition of the term 'state aircraft' is not exhaustive and in many respects is somewhat vague. However, the underlying principle reflected in the Chicago Convention is that public service aircraft under the exclusive use and control of the state are to be classified as state aircraft and therefore not subject to the provisions of the Convention. This view is generally accepted within the international community.[18] Aircraft belonging to the armed

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[10] *Ibid.*, art. 1. The Convention also provides guidance to states with respect to the regulation of their state aircraft (art. 3(d)); allows for the establishment of prohibited areas within a state's territory for reasons that include military necessity (art. 9); allows states, in an emergency or in the interests of public safety, to restrict or prohibit flying over the whole or any part of its territory (art. 9 - this authority was exercised by the United States in the aftermath of September 11, 2001).
[11] *Ibid.*
[12] *Ibid.,* arts. 43 and 44. This extends to include the authority, pursuant to Article 37 of the Convention, to adopt or comply with any ICAO international standards and recommended practices (SARPS). Member States are required to notify ICAO if for any reason they are unable to adopt any international standard or procedure. This obligation is linked to art. 12 which requires member states to adopt rules and regulations relating to the flight of aircraft over its territory and, to the extent possible, ensure national rules and regulations are uniform with those established under the Convention. Finally, art. 12 vests the authority in ICAO to make rules governing flight activities over the high seas.
[13] See Chapter 20, Maritime Operations: The Law Of The Sea And Related Domestic Legal Authorities, Section 3.
[14] Airspace over the land, internal waters, archipelagic waters and territorial seas of a nation.
[15] Airspace over contiguous zone, EEZ, high seas and territory not subject to the sovereignty of any nation.
[16] See the section 4 discussion below on airspace.
[17] Chicago Convention, *supra* note 5, art. 3(b).
[18] A. Meyer, *Wörterbuch des Völkerrechts*, 2nd ed., vol. III (Berlin, 1962), and, S. Sucharitkul, "Immunities of Foreign States before National Authorities" (1976-I) 149 *Recueil des Cours* 87-216, quoted by Diederiks-Verschoor, *supra* note 1 at footnote 64. For another view, see Michael Milde, *Status of Military Aircraft in International Law, Proceedings of the 1999 International Conference* at 9.37 (Singapore Ministry of Defence, 1999), where he states that "In the absence of any other guidance it is proposed that the interpretation should focus on the expressions 'used' and 'services' in Article 3(b) of the Chicago Convention…This wording… suggests that the drafters had in mind a functional approach to the determination of the status of the aircraft as civil and military: regardless of the design, technical characteristics, registration, ownership *etc.* the status of the aircraft is determined by the function it actually performs at a given time." This view is not reflected in the practice of states, which have, as noted above, adopted a control test.

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forces of a state, bearing external markings indicating the aircraft's nationality and military character, and under the control of a military crew are state aircraft.[19]

8. Civil aircraft on the other hand, are simply all aircraft that do not satisfy the requirements of state aircraft. This includes aircraft chartered by the Government of Canada to provide air transport services for the Canadian Forces. While chartered aircraft in this circumstance are being "used in military services," they do not satisfy the exclusive use and control requirements discussed above. In other words, the mere act of chartering an aircraft to support military activities does not, in and of itself, change the status of that aircraft.

Nationality of Aircraft

9. Civil aircraft have the nationality of the state in which they are registered[20] and cannot be validly registered in more than one state.[21] Aircraft engaged in international air navigation are required to display appropriate nationality and registration marks.[22] As a matter of practice, state aircraft also carry appropriate national identification marks and, as noted above, military aircraft also display markings to reflect their military character.

10. Although possessing the nationality of the state of registration, civil aircraft are subject to the laws and regulations of the state in which the aircraft is operating.[23] This includes the right of the host state to search aircraft on landing or departure and to inspect required documentation. Military and other state aircraft are immune from foreign search, inspection or taxation. Any request by foreign authorities to board or search a Canadian military aircraft should be refused and guidance sought through the chain of command.

SECTION 4

AIRSPACE

11. As noted above, airspace is classified as either being national or international in character. National airspace is under the exclusive control of individual states whereas international airspace is subject to regulation by ICAO.

National Airspace

12. States exercise compete and exclusive sovereignty over the airspace above their territory. An unauthorized entry into the national airspace of a state is a violation of that state's sovereignty and also violates Article 3 of the Chicago Convention. A state's national airspace includes:

a. The airspace above a nation's land mass. State aircraft may not enter the airspace over the land mass of any foreign state or land in any foreign state without authorization by special agreement.[24] In practice this requires military aircraft to obtain specific clearances prior to entering the airspace of a foreign state.

b. The airspace above a nation's internal waters.[25] Internal waters have the same legal status as the land mass of a state and as such, state aircraft may not enter, over fly

[19] 'Warship' is defined at art. 29 of UNCLOS. There is no similar definition of military aircraft, but the indicia of military control set out in the definition of 'warship' have been adopted in interpreting the meaning of art. 3(b) of the Chicago Convention (see Annotated Supplement 2.2.1 of the Chicago Convention).
[20] Chicago Convention, *supra* note 5, art. 17.
[21] *Ibid.*, art. 18.
[22] *Ibid.*, art. 20.
[23] *Ibid.*, arts. 12 and 13.
[24] Chicago Convention, *supra* note 5, art. 3(c).
[25] UNCLOS, *supra* note 6, art. 8.

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or land upon the internal waters of a foreign state without the prior permission of that state.

c. *The airspace above a nation's territorial sea*.[26] The territorial sea extends to a maximum distance of 12 nautical miles from the baselines of a coastal state and is part of the coastal state's sovereign territory. The airspace above the territorial sea is subject to the exclusive jurisdiction of the coastal state and as such aircraft may not enter this airspace without the prior consent of the coastal state. Unlike surface vessels, there is no right of innocent passage through the airspace over the territorial sea of a coastal state. In the course of innocent passage through the territorial sea, vessels may not launch or take on military aircraft without the consent of the coastal state.[27]

d. *The airspace above a nation's archipelagic waters*.[28] The sovereign territory of an archipelagic state extends to the state's archipelagic waters. As such, aircraft may not enter, over fly or land upon the archipelagic waters of a foreign state without the prior permission of that state. UNCLOS does make provision for archipelagic states to designate sea-lanes and air routes through archipelagic waters. Where a state has designated such routes aircraft are authorized continuous transit of the designated route without obtaining the prior consent of the archipelagic state.

13. In addition to the general prohibitions relating to unauthorized entry into the airspace of another state, the Chicago Convention also contains an article expressly prohibiting the flight of pilotless aircraft over the territory of another state.[29]

International Airspace

14. International airspace includes the airspace over the contiguous zones, exclusive economic zones (EEZ), the high seas and all territory not subject to the sovereignty of a state.[30] All states have the freedom of use of international airspace.[31]

15. ICAO establishes the rules applicable to the use of international airspace by civil aircraft.[32] While state aircraft are not subject to ICAO regulation, Article 3 of the Chicago Convention imposes the obligation upon states, when issuing regulations for their state aircraft, to have due regard for the safety and navigation of civil aircraft. In the interests of international air safety most states, including Canada, require their state aircraft, including military aircraft where the operational tasking permits to operate in accordance with ICAO Standards and Recommended Practices (SARPS) when in international airspace.[33]

Air Defence Identification Zones

16. States may establish Air Defence Identification Zones (ADIZ) in the international airspace adjacent to their territorial airspace. This is based upon the right of states to establish reasonable conditions of entry into their airspace. Accordingly, aircraft may be required to identify themselves while in international airspace as a condition of obtaining approval to enter national

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[26] *Ibid.,* arts. 3 – 26.
[27] *San Remo Manual on International Law Applicable to Armed Conflicts at Sea,* arts. 12, 30 (Cambridge: Cambridge University Press, 1995).
[28] Archipelagic waters are discussed at arts. 46-54 of UNCLOS.
[29] Chicago Convention, *supra* note 5 art. 8.
[30] Antarctica for example.
[31] This right is implicitly recognized in the Chicago Convention and expressly recognized in UNCLOS at article 2.
[32] Chicago Convention, *supra* note 5 art. 12.
[33] See B-GA-100-001/AA-000, National Defence Flying Orders, which state in Chapter 1 paragraph 4 "Military assignment permitting, aircraft in international airspace over the high seas shall comply with the SARPs of the ICAO."

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airspace.[34] This is of particular relevance to the conduct of North American Aerospace Defence (NORAD) operations and the exercise of national self defence.

International Straits

17. International straits, like archipelagic sea lanes are used to traverse from one part of the high seas or EEZ[35] to another part of the high seas or EEZ. Aircraft are authorized to transit through the airspace over an international strait in the same manner as they may transit over archipelagic waters where routes have been designated.[36]

Aircraft in Distress / Rendering of Assistance

18. In accordance with the principles of customary international law, state aircraft in distress are permitted to land on the territory of another state without the prior permission of that state. Similarly, and in accordance with the obligation of all aircraft commanders to assist those in danger of being lost at sea, an aircraft may enter the airspace over the territorial sea without permission to render immediate emergency assistance. This humanitarian obligation does not extend to include the right to conduct a search without the consent of the coastal state.

SECTION 5

INTERNATIONAL OPERATIONS

Armed Conflict

19. The law of armed conflict (LOAC) governs the conduct of air operations during armed conflict. The conduct of hostilities in the air, including air support to land and sea operations is addressed in B-GG-005-027/AF-021, The Law of Armed Conflict at the Operational and Tactical Level manual.[37]

Security Council Resolutions: Enforcement of No Fly Zones

20. CF air forces and personnel have been involved in the enforcement of UN Security Council declared no fly zones over the former Yugoslavia.[38] No fly zones have also been declared and enforced over Iraq.[39] The legal basis underpinning these operations flows from the Charter of the United Nations, which gives the United Nations Security Council the legal authority to take such action as may be necessary to restore and maintain international peace and security.[40] This action has included the declaration of no fly zones, which have the effect of excluding military air traffic except where authorized by the states acting on behalf of the UN to implement Security Council direction.

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[34] *Canadian Aviation Regulations,* art. 602.145 provides that this section applies in respect of aircraft before entering into and while operating within the ADIZ. The pilot-in-command of an aircraft whose point of departure within the ADIZ or last point of departure before entering the ADIZ has facilities for the transmission of flight plan or flight itinerary information shall, before take-off, file a flight plan or flight itinerary, indicate in the flight plan or flight itinerary the estimated time and point of ADIZ entry, and, as soon as possible after take-off, communicate by radio to an air traffic control unit, a flight service station or a community aerodrome radio station a position report of the aircraft's location, altitude, aerodrome of departure and estimated time and point of ADIZ entry. The status and interception of civil aircraft in armed conflict is also discussed in B-GJ-005-104/FP-021, Law of Armed Conflict at the Operational and Tactical Level, pp.7-4 to 7-5.
[35] An EEZ is the area of water beyond and adjacent to the territorial sea. It extends 200 nautical miles from the baseline. (UNCLOS, *supra* note 6).
[36] UNCLOS, *ibid*., arts. 37 – 44.
[37] B-GG-005-027/AF-021, ch. 7.
[38] See SCR 781 (1992).
[39] The U.S., U.K. and France declared no fly zones over parts of Iraq after the 1991 Persian Gulf War relying on UNSCR 688 (1991) for their authority to do so.
[40] UN Charter, art. 42.

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21. Any use of force in the enforcement of a no fly zone must be in accordance with the mandate provided by the UN Security Council and will be governed by authorized ROE. ROE will include established intercept procedures that are in accordance with international standards for the intercept of civil aircraft.

Intercept Operations

22. States have the right to intercept aircraft entering or flying in their national airspace, although these intercepts are closely regulated by international law.

23. Except where it is necessary to return the intercepted aircraft to its planned track, direct it beyond the boundaries of national airspace, guide it away from a prohibited, restricted or danger area or instruct it to effect a landing at a designated aerodrome, the interception of civil aircraft will be limited to determining the identity of the aircraft.[41]

24. States must refrain from resorting to the use of weapons against civil aircraft in flight and, in case of interception, the lives of persons on board and the safety of aircraft must not be endangered. However, if an intruding aircraft's intentions are unknown and cannot reasonably be ascertained by the state and the intruder disregards appropriate warnings, then steps may be taken to force the aircraft to land or, as a last resort, the aircraft may be attacked if authorized command authorities are satisfied that the aircraft presents an imminent threat or danger.[42]

25. States are also prohibited from practicing interception procedures on civil aircraft.[43]

SECTION 6

DOMESTIC OPERATIONS

26. There will be times when the CF is requested to provide assistance to civilian authorities. In recognition of this, the Government has issued a number of orders in council and Parliament has passed legislation providing CF members with the authority and powers to enforce laws. In the absence of this domestic legislation the CF would not have the legal authority to conduct domestic law enforcement operations.

Controlled Access Zone Order (Halifax, Esquimalt and Nanoose Harbours)

27. The Controlled Access Zone Order, P.C. 2002-2190, 12 December 2002, was made by the Governor General in Council on the recommendation of the Minster of National Defence (MND) for the purpose of establishing controlled access zones around Halifax, Esquimalt and Nanoose harbours.[44]

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[41] *Chicago Convention,* International Standards, Rules of the Air, Appendix 2, Interception of civil aircraft.

[42] The use of force against a civil aircraft should only occur in the most exceptional circumstances. After the shoot down of civil aircraft Korean Airlines flight 007 in 1983 by Soviet Union Air Force, the International Civil Aviation Organization adopted *Article 3* of the *Chicago Convention* which states in part that: "...every State must refrain from resorting to the use of weapons against civil aircraft in flight and that, in case of interception, the lives of persons on board and the safety of aircraft must not be endangered. This provision shall not be interpreted as modifying in any way the rights and obligations of States set forth in the Charter of the United Nations". In accordance with article 602.144 of *Canadian Aviation Regulations,* an interception signal or an instruction to land shall be given only by a peace officer, an officer of a police authority or an officer of the Canadian Forces acting within the scope of their duties. The pilot-in-command of an intercepting aircraft and the pilot-in-command of an intercepted aircraft shall comply with the rules of interception set out in the *Canada Flight Supplement* which are those express in the *Chicago Convention,* International Standards, Rules of the Air, Appendix 2, Interception of civil aircraft.

[43] *Chicago Convention,* International Standards, Rules of the Air, Appendix 2. Interception of civil aircraft.

[44] Controlled Access Zone Order (Halifax, Esquimalt and Nanoose Harbours) (SI/2003-2).

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28. This order provides for the designation of a controlled access zone, types of access to a controlled access zone and provides for compliance with, and enforcement of, the conditions of access to a controlled access zone.[45]

29. Where designated, a controlled access zone includes the airspace over the designated zone and air forces may be employed in the enforcement of the designation order.[46]

CF Support to RCMP Counter-Drug Operations

30. The CF and RCMP have entered into successive MOUs over the past decades, which MOUs govern the provision of CF assistance to RCMP counter-drug operations.[47] The latest of these MOUs came into force on 20 January 2005 and will remain in force until December 2006. The purpose of the MOU is to define the scope of CF assistance and the process for requesting CF support.[48] "CF personnel will act in a support role in relation to the RCMP, and will only provide assistance where there is neither the intention nor significant probability that CF personnel will be used to directly apprehend, arrest or detain suspects."[49]

31. Assistance to law enforcement is subject to the exigencies of the service and "the CDS or his[/her] delegate [will] determine the strength, composition, arms and equipment of any military force tasked or dispatched in response to a specific request for assistance and any subsequent changes thereto."[50]

32. CF air forces may be called upon to support the RCMP in their counter-drug operations. The type of support provided to the RCMP generally consists of surveillance of specific vessels and aircraft of interest by military surveillance systems or by military aircraft or ships. Other forms of assistance that are consistent with the MOU may also be provided.

Fisheries Act

33. There is an MOU between the Department of Fisheries and Oceans (DFO) and the CF respecting surface ship patrols and aerial fisheries surveillance which facilitates the provision of support by the CF to DFO. The authority to provide assistance derives from the *Coastal Fisheries Protection Act*. The purpose of the MOU is:

> to define the terms and procedures for the provision of support by the Canadian Forces (CF) to the Department of Fisheries and Oceans (DFO) for the purposes of surveillance and enforcement in waters of Canadian fisheries jurisdiction and those waters where Canada has international fisheries commitments.[51]

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[45] *Ibid*.
[46] *Ibid*.
[47] Section 273.6(2) of the *NDA* provides that the Governor-in-Council or the Minister of National Defence on the request of another Minister may issue directions to the CF to assist the law enforcement agencies if the Governor-in-Council or the Minister considers the assistance to be in the national interest and the matter cannot to effectively dealt with but for the assistance of the CF. The assistance must be more then of a minor nature or limited to a technical, logistical or administrative support. See Chapter 6 of this Manual, Domestic Operations: Provision of Services and Public Service.
[48] MOU between the Canadian Forces and The Royal Canadian Mounted Police Concerning the Provisions of Assistance by the Canadian Forces in Support of the Royal Canadian Mounted Police in its Drug Law Enforcement Role, DND ID # 1987080838 at para. 3.1.
[49] *Ibid*. at para. 5.1.2.; See Chapter 7 in this manual. Example: OP Board – CF Support to RCMP Counter Drug Operations. This counter drug operation took place in June 2005 where the CF provided general support to the RCMP. The CF, with the use of one of its warships, transported the RCMP to a fishing vessel believed to be smuggling drugs. The actual boarding of the vessel was undertaken by the RCMP.
[50] *Ibid*. at para. 5.2.3.
[51] Memorandum of Understanding Between the Department of Fisheries and Oceans and the Canadian Forces Respecting Surface Ship Patrols and Arial Fisheries Surveillance (17 June 1994) at para. 1.; See Dom ops Chapter on ALEA and ACP Example: Turbot War between Spain and Canada on the Grand Banks in March 1995. The CF provided presence on the water during the dispute.

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34. The MOU defines the terms and procedures for the provision of surface ship patrols and aerial fisheries surveillance. Ship days and flying hours are allocated on an annual basis after consultation between DFO and CF officials. The MOU also deals with the cost structure pertaining to the provision of support to the Department of Fisheries and Oceans (DFO). Annex D to the MOU provides a matrix for an assistance request from DFO to DND.

SECTION 7

CONCLUSION

35. Air forces play a crucial role in the conduct of CF operations across the spectrum of conflict. In recent years CF air assets have played an active role in the international forum flying combat sorties from Aviano, Italy during the Kosovo campaign, providing close air support to NATO forces in the Balkans region, providing rotary wing support to both land and sea units in a variety of operational theatres and of course providing the airlift necessary to ensure our international operations are sustained. Air forces have played an equally important role in the domestic context in order to address domestic security issues and respond to requests for CF assistance in a wide variety of circumstances.

36. An understanding of the legal framework and the legal obligations of CF commanders in the conduct of these complex and varied operations is essential to the ultimate success of the CF. Whether the issue is one of transit rights or the legality of a potential target, the law is, and will remain, an integral part of the conduct of CF air operations.

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CHAPTER 22

SPACE LAW

SECTION 1

INTRODUCTION

1. Space law can be broadly defined as the law relating to the conduct of activities, including military activities, in outer space by both governments and private individuals. International space law imposes a number of obligations on states with respect to the use of space and also requires states to regulate the activities of their nationals in space.

2. Military uses of space are not new, but reliance on space-based systems to support the conduct of operations is rapidly increasing. Historically, military forces relied on space for information collection purposes, launching remote sensing satellites to collect imagery and other data. While this data was of enormous value it was not essential to the successful conduct of military operations. This early use of space has evolved to the point where today militarily essential aspects of operations such as communications, data transfers, navigation and targeting all rely heavily on space-based systems. Denial of access to these systems would seriously impact the operational effectiveness of the modern military force.[1]

SECTION 2

THE INTERNATIONAL LEGAL FRAMEWORK

3. Human activity in outer space is relatively recent, as is the law governing the outer space environment. Four core space treaties establish the key principles underpinning the use and exploitation of outer space. These treaties are each briefly described below.[2] The core treaties apply to both military and non-military uses of space, although it is important to recognize that the application of treaty obligations during a period of armed conflict that are inconsistent with a state of belligerency are suspended as between belligerents during the conflict.[3]

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[1] This increased reliance on space exploitation in support of military operations is vividly demonstrated by the growth in the use of GPS guided weapons. None of the air to ground munitions delivered by U.S. forces during Operation Desert Storm in 1991 relied on GPS to reach their targets. During Operation Allied Force in 1999, 3% of air to ground weapons used by U.S. Forces relied on GPS to reach their targets and this number jumped to in excess of 25% during Operation Iraqi freedom. See Jeffrey Lewis, "What if Space Were Weaponized? Possible Consequences for Crisis Scenarios" (2004) at 14, online: Center for Defence Information <http://www.cdi.org/PDFs/scenarios.pdf>. These figures do not include High-Speed Anti-radiation Missile (HARM) used to target radar-equipped air defense systems.

[2] In addition to the four core treaties there is a fifth treaty, the *Agreement Governing the Activities of States on the Moon and Other Celestial Bodies,* 18 December 1979, 1363 U.N.T.S. 7 (in force 11 July 1984) [Moon Treaty]. However this treaty has been ratified by only 11 states, none of them space faring nations.

[3] The impact of a state of armed conflict on treaty obligations is open to much debate in international law. The *Vienna Convention on the Law of Treaties* only addresses the issue to the extent of stating in Article 73 that the "Convention shall not prejudge any question that may arise in regard to a treaty … from the outbreak of hostilities". L.C. Green, *The Contemporary Law of Armed Conflict,* 2nd ed. (Manchester: Manchester University Press, 2000) at 75 notes that "it is clear that Treaties of a political or trading character between belligerents will cease to operate, at least for the duration of the hostilities … If the belligerents are parties to a multi-lateral treaty, the outbreak of hostilities does not affect the continued subsistence as among the non-belligerents, nor does it affect its continuance as between each belligerent and such third states, although it may be possible for any party to argue that such circumstances have so changed as a result of the outbreak of hostilities that the treaty must cease to apply by virtue of the doctrine *rebus sic stantibus*". The Institute of International Law adopted a resolution titled *The Effects of Armed Conflict on Treaties*, in Helsinki in 1985, accessible online: Institute of International Law <http://www.idi-iil.org/idiE/navig_chon1983.html>. The resolution states that the outbreak of an armed conflict does not *ipso facto* terminate or suspend the operation of treaties in force between the belligerents, or terminate or suspend the operation of that treaty between other contracting States and the belligerents. It further provides that a State exercising its rights of individual or collective self defence in accordance with the *Charter of the United Nations* is entitled to suspend in whole or in part the operation of a treaty incompatible with the exercise of that right, and a State complying with a resolution by the Security Council of the United Nations concerning action with respect to threats to the peace, breaches of the peace or acts of aggression shall either terminate or suspend the operation of a

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4. While space law is having an ever-increasing impact upon the conduct of military operations, 'outer space' is not defined in international law, nor is there a prescribed boundary between 'airspace' and 'outer space.' The absence of any demarcation between air space and outer space is problematic to the extent that the legal regimes governing these two areas of human activity are completely different.[4] To date, however, the lack of a clearly defined boundary has not inhibited the exploration and use of outer space. As a practical matter there appears to be a general acceptance that outer space begins at an altitude of about 100 km above sea level, but this notional boundary is not subject to any agreement or practice as between states.[5]

5. In addition to the four core treaties, there are also a number of arms control agreements that impact upon military uses of space, the most important of these are also identified and briefly described in this section.

Core Treaties

6. The *Outer Space Treaty*[6] is the keystone treaty within the international space law regime. It establishes the key principles relating to the exploration and use of outer space, including freedom of use, non-appropriation, and the application of the UN Charter and international law to space activity. The treaty also prohibits the placing of nuclear weapons or other weapons of mass destruction in space, including in orbit around the earth.[7] The other core space law treaties all expand upon fundamental principles established in the *Outer Space Treaty*. Canada is a party to the *Outer Space Treaty*.

7. The *Rescue and Return Agreement*[8] expands on the obligation in Article V of the *Outer Space Treaty* that requires states to regard astronauts as the envoys of mankind. In this regard the Agreement provides for the rescue of personnel and spacecraft that end up outside the territorial boundaries of the launching state. Where personnel are rescued or objects retrieved there is an obligation to return the personnel and objects to the launching state.

8. The *Liability Convention*[9] flows from Article VII of the *Outer Space Treaty* and establishes an absolute liability regime for any damages caused by a launching state's space object on the surface of the earth or to aircraft in flight. A fault regime is established for damage caused by space objects in any other circumstance (i.e., in orbit damage caused by one space object striking another). The Convention also establishes the process for pursuing a claim under the Convention.[10]

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treaty which would be incompatible with such resolution. Finally, the resolution provides that at the end of an armed conflict and unless otherwise agreed, the operation of a treaty, which has been suspended, should be resumed as soon as possible. See chapter 19 for further discussion. Also see the opinion of the ICJ in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (2004), Advisory Opinion, P.C.I.J. (Ser. A/B) No. 131, where the ICJ discusses the issues of human rights obligations in the context of an armed conflict situation.

[4] As noted in chapter 21, states exercise complete and exclusive sovereignty over the airspace above their territory. Outer space on the other hand is free for the use of all and cannot be appropriated.

[5] The United States, one of the two major space powers, is opposed to the establishment of a boundary as it might limit its ability to take advantage of developing space technologies.

[6] *Treaty on Principles Governing Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies,* 27 January 1967, 1967 Can T.S. No. 19; 610 U.N.T.S. 205 (entered into force 10 October 1967)[Outer Space Treaty].

[7] The prohibition against placing nuclear weapons in orbit does not prohibit the passage of nuclear weapons through space so long as they do not complete a full orbit of the earth. As a result, the delivery of nuclear weapons by way of intercontinental ballistic missile (ICBM) is not prohibited by the *Outer Space Treaty*.

[8] *Agreement on the Rescue of Astronauts*, the *Return of Astronauts and the Return of Objects launched into Outer Space*, 22 April 1968, 672 U.N.T.S. 119 (entered into force 3 December 1968).

[9] *Convention on the International Liability for Damage Caused by Space Objects,* 29 March 1972, 1961 U.N.T.S. 187 (entered into force 1 September 1972)[Liability Convention].

[10] The only one formal claim under Article II (absolute liability) of the *Liability Convention* was made by Canada in 1979 as a result of the uncontrolled re-entry of the Soviet satellite, Cosmos 954, which scattered radioactive debris across a large area of Canada's north. The Canadian claim was settled for three million dollars without any acknowledgement of liability

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9. The *Registration Convention*[11] expands upon Article VIII of the *Outer Space Treaty*, and requires launching states to provide defined data to the United Nations on all objects launched into space. The data need not be provided prior to launch, the only obligation being to provide the information "as soon as practicable." States are also required to maintain their own national registry.[12]

Relevant Arms Control Agreements

10. The *Limited Test Ban Treaty*[13] prohibits nuclear weapons tests "or any other nuclear explosion"[14] in the atmosphere, in outer space, and under water. It does not ban underground testing, however the Treaty does prohibit nuclear explosions in the environment if they cause "radioactive debris to be present outside the territorial limits of the concerned state party."[15] The *Limited Test Ban Treaty* was the first treaty to regulate state activity in outer space.[16]

11. Every State Party to the Environmental Modification Convention (ENMOD Convention)[17] "undertakes not to engage in military or any other hostile use of environmental modification techniques having widespread, long-lasting or severe effects as the means of destruction, damage or injury to any other State Party." Environmental modification techniques refer to any "technique for changing -- through the deliberate manipulation of natural processes[18] -- the dynamics, composition or structure of… outer space."

SECTION 3

KEY PRINCIPLES

12. Space law is premised on a number of key principles that are relied upon in interpreting the applicable treaty law. These principles include:

a. **application of international law** - While not without controversy at the dawn of the space age, it is well accepted today that general international law is applicable in the

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by the Soviet Union. See B. Schwartz and M. Berlin, "After the Fall: An Analysis of Canadian Legal Claims for Damage Caused by Cosmos 954" (1982) 27 McGill L.J. 676.

[11] *Convention on the Registration of Objects Launched into Outer Space,* 12 November 1974, 1023 U.N.T.S (entered into force 15 September 1979)[Registration Convention].

[12] *Registration Convention,* Article II and VI. This information should include the name of the launching State or States, a designator or registration number, the date and location of launch, the general function and the basic orbital parameters (including the nodal period, inclination, apogee and the perigee) of a space object.

[13] *The Treaty Banning Nuclear Weapons Tests in the Atmosphere, in Outer Space, and Under Water,* 5 August 1963, 1964 Can T.S. No. 1; 480 U.N.T.S. 43 (entered into force 10 October 1963)[Limited Test Ban Treaty]. The Limited Test Ban Treaty was negotiated between the Soviet Union, the United Kingdom and the United States as a step towards "general and complete disarmament under strict international control." Subsequently ratified by more than 100 States, it has been described as the most successful disarmament treaty in history.

[14] The reference to "any other nuclear explosion" is intended to prohibit explosions undertaken for peaceful purposes, simply because of the difficulty of differentiating between weapons tests explosions and peaceful purposes explosions.

[15] See Nicolas Mateesco Matte, "Treaty Banning Nuclear Weapons Tests" in N.M. Matte, ed. *Space Activities and Emerging International Law* (Montreal: ICASL McGill University, 1984) 400 at 401, where it is stated that "A careful reading of [Article 1] shows that nuclear explosions are prohibited in all environments except underground tests carried out within the territorial limits of the parties to the Treaty."

[16] Christopher M. Petras, "The Debate Over the Weaponization of Space – A Military-Legal Conspectus" (2003) 28 Ann. Air & Space L. 177. A Comprehensive Test Ban Treaty was open for signature on 10 September 1996, but has yet to enter into force. See the "Comprehensive Test Ban Treaty Organization" online: Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization <http://www.ctbto.org/>.

[17] *Convention on the Prohibition of Military or any Other Hostile use of Environmental Modification Techniques*, 18 May 1977, 1108 U.N.T.S. 151 (entered into force on 17 January 1980)[ENMOD Treaty].

[18] For the ENMOD Treaty to be triggered, "deliberate manipulation of natural processes" is required, suggesting that consequential effects would not violate the Treaty. However, as noted by the ICJ in the *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, [1996] I.C.J. Rep. 2. at para. 30, "[s]tates must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives." Thus even non-deliberate manipulation (*i.e.* the creation of space debris) of the space environment must be assessed if use of force in outer space were ever to be contemplated.

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outer space environment.[19] This is reflected in the *Outer Space Treaty,* which provides that "State Parties ... shall carry on activities... in accordance with international law, including the *Charter of the United Nations*..."[20]

b. **freedom of use and exploration** - Outer space, including the moon and other celestial bodies, are free for the exploration and use of all states.[21] This principle has led to the widely accepted view that space based systems can transit over the territory of foreign states without prior authorization. In addition to being codified in the *Outer Space Treaty*, the freedom of use principle is generally accepted as a part of customary international law binding on all states.

c. **non-appropriation** - Non-appropriation is simply a necessary extension of the freedom of use principle. To allow appropriation of space (i.e., to allow states to assert sovereignty over or within the region) would lead to the exclusion of other state parties from both exploration and use.[22] This principle is generally accepted to be part of customary international law.

d. **peaceful purposes -** The term 'peaceful' is used in virtually all United Nations documents relating to the uses of outer space, including the four core Space Law Treaties. However, despite its widespread usage there is no authoritative definition of the term in any international instrument. Not surprisingly, this has resulted in a long-standing debate over what the term 'peaceful purposes' means in the context of outer space. It is the position of most western nations that military use of space is lawful so long as it does not violate Article 2(4) of the *UN Charter*, which prohibits 'the threat or use of force,' or Article IV of the *Outer Space Treaty*, which prohibits nuclear and other weapons of mass destruction in space, and demilitarizes the moon and other celestial bodies. This position recognizes the fact that many military uses can and do make a direct contribution to the maintenance of peace.[23]

SECTION 4

CANADA'S DOMESTIC LEGAL AND POLICY FRAMEWORK

DND Space Policy

13. The most recent Canadian military space policy, approved on 14 September 1998, was prepared within the context of the 1994 Defence White Paper and the 1996 renewal of the NORAD agreement between Canada and the United States. It acknowledges that the use of space is key to NORAD's ability to maintain a credible defence for North America and provides

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[19] In his book *Outer Space: The International Legal Framework*, Bin Cheng observes that "at the dawn of the space age, doubt in one form or another was often expressed, not least by various Members of the United Nations, whether international law as such was from the very beginning applicable to outer space." Cheng subsequently notes that despite these early doubts" in fact, international law knows no inherent geographical limits and extends to the activities of the subjects of international law in outer space..." See Bin Cheng, *Studies in International Space Law* (Oxford: Clarendon Press, 1997) at 70 and 385.
[20] *Outer Space Treaty*, *supra* note 6, art. III.
[21] *Ibid.,* art. I.
[22] *Ibid.*, art. II. Interestingly, and despite the arguably unambiguous wording of Article II in this regard, eight equatorial countries, all currently having either signed or ratified the Outer Space Treaty, participated in the 1976 Bogotá Declaration. The Declaration claimed the geosynchronous orbits directly over their countries. The Declaration was driven by concerns over the exclusive first come first serve approach to allocating satellite slots in this limited orbit. The signatories to the Declaration argued that, since satellites in geosynchronous orbit are in a stationary position in relation to the earth, the orbits are in fact an extension of territorial space. While the Declaration has been subject of much discussion in the international forum, no state has recognized this claim.
[23] Successful disarmament and arms control programs require a robust verification system that demonstrates that parties are in compliance. See for example Ram S. Jakhu and Riccaredo Trecroce, "International Satellite Monitoring for Disarmament and Development" (1980) Ann. Air & Space L. 509. Space based verification systems have proven to be highly effective in this regard.

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for cooperation in a number of space-related activities.[24] This policy sets out both the goals and the desired capabilities for Canada's military space program and recognizes that CF development and use of space capabilities must be carried out within the parameters of international law, including space treaties and international space agreements ratified or supported by the Government of Canada.

NORAD Agreement

14. NORAD monitors, validates and warns of attacks against North America by aircraft, missiles or space vehicles, and also provides for the defence, surveillance and control of the airspace of Canada and the United States. In the performance of this mission NORAD relies on data provided by space and land based sensing systems.

15. The NORAD Agreement has been renewed several times, most recently in 2001. Each renewal brought changes to the direction and objectives of NORAD. Today, the NORAD Agreement acknowledges that progress in strategic nuclear arms control has significantly reduced the threat from ballistic missiles or long-range manned bombers. At the same time, the Agreement takes account of the proliferation of weapons of mass destruction, the growing use of space and the increasing illegitimate uses of North American airspace for such purposes as drug smuggling. The NORAD mission contributes to the defence and security of North America in all of these areas.

16. In August 2004, in light of the growing threat involving the proliferation of ballistic missiles and weapons of mass destruction, Canada and the United States exchanged diplomatic notes to amend the NORAD Agreement in order to extend their partnership to include limited cooperation in missile defence. This amendment allows NORAD to share information with U.S. commanders running that country's missile defence system.[25]

Remote Sensing Space Systems

17. In 2004, the Government of Canada introduced the *Remote Sensing Space Systems Act*,[26] which has since received Royal Assent but was not in force at the time of writing. This new legislation is intended to ensure the protection of Canada's national interests and the interests of our allies, as the country moves from a model of state ownership and control over space based remote sensing systems to a model of private sector ownership.

18. The legislation deals with licensing, data distribution and systems control restrictions. It also provides the Minister of Foreign Affairs, the Minister of National Defence and the Minister of Public Safety and Emergency Preparedness with priority access to licensed systems in defined circumstances. In addition, both the Minister of Foreign Affairs, and the Minister of National Defence have the authority to interrupt or restrict the provision of any service from a licensed system. This authority, referred to as shutter control, will ensure imagery from licensed Canadian systems is not used to the detriment of Canada's interests, which includes both the defence of Canada and the safety of the Canadian Forces.

SECTION 5

CONCLUSION

19. Space has undoubtedly become a strategic 'centre of gravity' for many in the international community as we continue to place ever more reliance on space based systems to

[24] *Department of National Defence Space Policy,* 14 September 1998.
[25] Diplomatic Note No. JLAB-0095 from the Canadian Ambassador in Washington to the Secretary of States of the United States of America dated 5 August 2004, and the Diplomatic Note Reply from Secretary of States of the United States of America to the Canadian Ambassador in Washington, dated 5 August 2004.
[26] Bill C-25, *An Act Governing the Operation of Remote Sensing Space Systems*, 1st Sess., 38th Parl., 2004.

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support economic and governmental activity. An understanding of the legal framework, and the limitations this framework imposes on the military uses of space is becoming increasingly more important for the operational military commander.

20. This chapter has attempted to provide an overview of the relevant international treaties and highlight the key issues impacting upon the military use of space that continue to be debated in the international forum. The chapter has also identified the key domestic legislative and policy instruments that will impact on CF use of, and access to, space based systems.

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CHAPTER 23

INTELLIGENCE

SECTION 1

INTRODUCTION

1. The collection of intelligence is a practice of nations that lies at the heart of operational readiness. It is universally regarded as a fundamental element of every state's national security in both peacetime and war, and it is vital to the planning and conduct of military operations.[1]

2. Intelligence is fundamental to the conduct of any operation be it an international operation or a domestic one. Proper direction of the gathering and use of intelligence is an important responsibility of command. The lack of sufficient intelligence can impact on the planning and execution of operations. The gathering of intelligence may be, at times, sensitive, and is particularly so if information is sought with respect to Canadian citizens or within Canada. The challenge in a liberal democracy such as Canada is to ensure that national security and national defence activities remain consistent with the principles and protections set out in the *Canadian Charter of Rights and Freedoms* and the statutory rules in places like the *Access to Information Act* and the *Privacy Act*.

3. This chapter will outline the legal framework for the CF to conduct intelligence gathering. It will also address sources of intelligence and the collection of intelligence during CF international operations.

Legal Framework

4. Other than the enabling provisions of the *National Defence Act* (*NDA*) governing the activities of the Communications Security Establishment (CSE), the *NDA* does not specifically authorize or prohibit the conduct of intelligence gathering. Since there is no general purpose clause authorizing military intelligence-related activities *per se*, such activity implicitly falls within the general ambit of the national defence mandate.

5. However, reference to a defence intelligence mandate is statutorily contained in other legislation. In particular, section 16 of the *Canadian Security Intelligence Service Act* provides as follows:[2]

> 16(1) Subject to this section, the Service may, in relation to the defence of Canada or in the conduct of international affairs..., assist the Minister of National Defence..., within Canada, in the collection of information or intelligence relating to the capabilities, intentions or activities of
>
> (a) any foreign state or group of foreign states; or
>
> (b) any person other than:
>
> i. a Canadian Citizen,
> ii. a permanent resident within the meaning of subsection 2(1) of the *Immigration and Refugee Protection Act*, or
> iii. a corporation incorporated by or under an Act of Parliament or the legislature of a province.

[1] See B-GG-005-004/AF-000, CF Operations Manual, ch. 20 for an overall discussion of CF intelligence operations.
[2] *Canadian Security Intelligence Service Act*, R.S. 1985, c. C-23, s.16.

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The statement that the Canadian Security Intelligence Service (CSIS) can "assist the Minister" implies that the Minister already has an information or intelligence collection capability. In this context, the reference to the Minister would include all elements of the Defence Intelligence portfolio (DND, CF and CSE).

6. It remains that the reliance on the Crown prerogative forms the legal basis upon which most military intelligence activities takes place. The Crown prerogative is comprised of the miscellaneous powers, privileges and duties accepted under law as vested in the Crown and exercised by the Governor in Council.[3] The exercise of the Crown prerogative is shaped and implemented at the strategic level by a series of instruments including broad government-wide policy statements and executive government direction. The former include the Government Security Policy, the 1994 Defence White Paper, the 2004 National Security Policy and the Defence Section of Canada's 2005 International Policy Statement.

7. For example, the Government Security Policy establishes for each federal department an obligation to develop departmental procedures for reporting and investigating security incidents. In addition, certain departments are assigned additional responsibilities for intelligence-related functions in support of government policies. As part of the principal responsibilities assigned to the military, the Deputy Minister and the CDS are jointly responsible to provide advice to departments on military intelligence for threat and risk assessment purposes.[4]

8. While there is no one mechanism for the establishment of integrated policies and procedures, the Government of Canada does provide executive government direction on intelligence collection priorities for the security and intelligence community. An *ad hoc* Committee of Cabinet approves the priority intelligence requirements for the Government of Canada on an annual basis. The relevant parts of the Government's intelligence requirements are subsequently formulated into the Defence Intelligence Priorities. This keystone defence document serves as the basis for the issuance of subordinate direction in the form of the Commander's Critical Information Requirements (CCIRs).

International Intelligence Law

9. It is universally accepted international custom and practice that states will gather intelligence in the pursuit of their national interests and for the protection of their sovereignty. Although there is no unified body of law constraining its practice, various aspects of international civil treaties, the law of armed conflict, and customary international law touch upon and restrict certain means and platforms utilized in intelligence collection.

10. Intelligence law, an amalgamation of diverse international and domestic legal elements, is the legal framework underpinning the collection of intelligence at every level of operations. On the international stage, the deep-seated importance of intelligence to all states has dictated the freedom of its collection, except insofar as it conflicts with national sovereignty interests of a foreign state. As such, the collection of intelligence varies in accordance with the degree of infringement and the potential for conflict with foreign domestic laws.[5]

Domestic Intelligence Law

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[3] *Schrieber v. Canada,* [2001] 1 F.C. 427 (T.D.) (QL).
[4] Government of Canada, *Government Security Policy*, Appendix B, para. 4.5, online: Treasury Board of Canada Secretariat <www.tbs-sct.gc.ca/pubs_pol/gospubs/TBM_12A/gsp-psg_e.asp>.
[5] For example, while the interception of foreign radio communication signals by a military from its home soil is accepted as international custom (hence the development of encryption technologies), a peacetime military over-flight of another state's territory in order to take photographs for intelligence use is treated as a violation of the receiving state's sovereignty, and is therefore contrary to international law. While examples such as these are relatively clear-cut, the interpretation of more marginal situations lies at the heart of the practice of international intelligence law.

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11. It is an important tenet of democratic society that the military refrain from involvement with civilian functions except when authorized. The conduct of intelligence activities by DND and the CF is guided by the obligation of the Government of Canada to protect the nation's sovereignty and institutions from internal and external threats and to safeguard the rights and freedom of the citizenry, subject to such reasonable limits as prescribed by law as can be demonstrably justified in a free and democratic society. As such, the legal underpinnings of domestic intelligence lie in a complex interrelationship of constitutional law, domestic statutes and Crown prerogative that in turn govern the small but not insignificant role of military intelligence activities.

SECTION 2

INTERNATIONAL INTELLIGENCE COLLECTION

12. There is no prohibition under international law on most forms of intelligence gathering. Intelligence collection is recognized as accepted practice in peacetime and during periods of armed conflict. Although widely denied by governments for reasons of diplomacy and the fear of disclosing confidential sources, intelligence is tacitly acknowledged as important to all nations, and practiced by each. While prohibiting foreign intelligence gathering activities by treating 'spying' as a criminal act as a matter of national law, there is no international law specifically preventing the gathering of security-related information. In fact, nations have a recognized ability to collect intelligence. Nonetheless, states have an obligation not to interfere in the sovereign affairs of other states. Intelligence gathering of an active and intrusive nature could be characterized as such an interference.

13. First, under customary law, there is an implicit right to collect intelligence for the purpose of self defence. Given the pre-emptive aspects of intelligence gathering, it is reasonable for states to carry out intelligence operations in anticipation of threats to their integrity.

14. Secondly, the *1907 Hague Convention (IV)* recognizes the right of belligerents to collect intelligence during armed conflict:

> Ruses of war and the employment of measures necessary for obtaining information about the enemy and the country are considered permissible.[6]

15. Although this provision does not apply in peacetime, it provides permission for belligerents to "obtain information" on one another, and supports the notion that peacetime intelligence collection is accepted as part of customary international law.

16. International law does, however, limit the methods and platforms of collection to reflect international custom and territorial sovereignty. The fact that international law provides few proscriptions on the collection of intelligence is no reflection of the gravity that states attribute to traitorous acts. The requirements of national security and sovereignty dictate that domestic law impose the strict punishments against those who assist other states to gain access to protected information of national security interest.

17. As a general comment, international law is largely silent regarding international intelligence collection, and indeed tacitly authorizes it. Conversely, domestic law strictly prohibits any collection of information that could compromise a state's national security.

Primary Sources of Intelligence

Collection Disciplines by Source Type

[6] *Hague Convention No. IV Respecting the Laws and Customs of War on Land*, 18 October 1907, 205 Cons. T.S. 277, Annex to the Convention, art. 24 [Hague Convention No. IV]. But see the special provisions in articles 29 to 31 on spies.

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18. Intelligence sources are the means or systems used to observe, sense, and record or convey information of conditions, situations and events. The primary source types, also referred to as collection disciplines, are:

a. **ACINT - Acoustic Intelligence** "Intelligence derived from the collection and processing of acoustic phenomena".[7] This is intelligence derived from sound. Examples of ACINT sources are hydrophones, geophones, SONAR, Integrated Underwater Surveillance System (IUSS) and artillery sound ranging systems. Because of the nature of the origin of sound, ACINT is primarily concerned with movement and the intelligence that can be derived from its detection. ACINT in the CF is predominately maritime in nature, and involves the detection, tracking and possibly identification of submarine contacts by active and passive sonar of various types, including those that feed into the IUSS.

b. **HUMINT - Human intelligence** "A category of intelligence derived from information collected and provided by human sources".[8] The range of HUMINT sources are enormous. Every person, friendly, adversary or neutral is a potential source of HUMINT. HUMINT collectors are those personnel trained in the acquisition of information from human sources in response to intelligence requirements. HUMINT collectors include specially trained interrogation and HUMINT collection personnel. Collectors may also be intelligence officers, Counter-intelligence (CI) agents or Special Operations Forces (SOF) personnel when they are using human collection techniques in the course of their duties. HUMINT is of particular value in the confirmation or augmentation of IMINT and SIGINT.

c. **IMINT - Imagery Intelligence** "Intelligence derived from imagery acquired by photographic, radar, electro-optical, infra-red, thermal and multi-spectral sensors, which can be ground based, sea borne or carried by overhead platforms".[9] The adage that "a picture is worth a thousand words" is especially true in intelligence. The information conveyed by an image is clear, concise and in the main unequivocal and will often serve to support or confirm intelligence derived from other sources. The bulk of IMINT is derived from sources such as satellites, aircraft and unmanned aerial vehicles (UAVs).

d. **MASINT - Measurement and Signature Intelligence** "Scientific and technical intelligence information obtained by quantitative and qualitative analysis of data obtained from sensing instruments for the purpose of identifying any distinctive features associated with the source, emitter or sender, to facilitate the latter's measurement and identification."[10] MASINT is derived from the collection and comparison of a wide range of emissions with a database of known scientific and technical data in order to identify the equipment or source of the emissions. Such is the nature of MASINT that its collection is likely to be directed at the strategic level.

e. **OSINT - Open Source Intelligence** This is intelligence based on information collected from sources open to the public, such as the media; radio, television and newspapers, state propaganda, learned journals and technical papers, the Internet, technical manuals and books, to name but a few. Contrary to popular belief, there is considerable archival evidence to confirm that the intelligence community has always used open sources in the production of intelligence. Freedom of information

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[7] NATO Standardization Agency, *AAP-6 (2006) NATO Glossary of Terms and Definitions (English and French)* (Brussels, Belgium:NATO Publications, 2005) *s.v.* "acoustic intelligence", online: NATO <http://www.nato.int/docu/stanag/aap006/AAP-6-2006.pdf> [AAP-6 (2006)].
[8] *Ibid.*, *s.v.* "human intelligence".
[9] *Ibid.*, *s.v.* "imagery intelligence".
[10] *Ibid.*, *s.v.* "measurement and signature intelligence".

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legislation around the world has unlocked all but the most valuable of nations' secrets and the ability to reach remote information provided by systems such as the Internet has provided rapidly growing and easily accessible sources of intelligence. OSINT is most likely to be the source of basic intelligence although, with the capabilities of modern news gathering equipment, there will be occasions when "on the spot" television reporting will be used to produce current intelligence.[11]

f. **RADINT -** Radar Intelligence This is intelligence derived from the use of radar as a detection device. For example, the identifying of an object, which may or mat not be recognizable, at a specific bearing and range from the radar, or the simple detection of movement at a certain point on the ground. This is distinct from the exploitation of radar data under IMINT.

g. **SIGINT -** Signals Intelligence The generic term used to describe all intelligence derived from the Electro-Magnetic Spectrum (EMS). It is divided into:

(1) **COMINT -** Communications Intelligence "Intelligence derived from electro-magnetic communications and communications systems by those who are not the intended recipients of the information".[12] This is intelligence obtained from information gained through the interception of communications and data links. Such information may be collected in verbal form by the reception of broadcast radio messages, by the interception of point-to-point communications such as telephones and radio relay links, or as data through the interception of either broadcast or point-to-point data down links.

(2) **ELINT - Electronic Intelligence** "Intelligence derived from electro-magnetic noncommunication transmissions by those who are not the intended recipients of the information".[13] This is intelligence that is derived from the technical assessment of electro-magnetic noncommunications emissions such as those produced by radars and by missile guidance systems. It also covers lasers and infrared devices and any other equipment that produces emissions in the EMS. By comparing information about the parameters of the emission that has been intercepted with equipment signatures held in databases, valuable intelligence about the equipment and its operator can be derived.

19. There are three basic primary sources of intelligence: human, incorporating all information secured from human sources; material, comprising all documents and other recorded information; and technical, including signals, communications, electronics and imagery. Each source can serve a different purpose; for example, photo images may reveal the position of an enemy force, but enemy intentions might only be ascertained through the interception of communications. Additionally, any one of these forms of intelligence is ideally corroborated by at least one other form of intelligence before it becomes a solid basis of operational decision-making.

Human Sources

20. HUMINT comprises all information gathered and distilled from people in general. It includes such traditional sources as reconnaissance reports, undercover agents, prisoners of war, espionage, contact reports and enemy defectors. It includes intelligence derived from any individuals, whether friendly or hostile, who happen to have access to information of importance to the gathering authority.

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[11] For additional information on OSINT refer to NATO SACEUR and Open Source Solutions Inc., *NATO Open Source Intelligence Handbook*, online: Open Source Solutions <http://www.oss.net/dynamaster/file_archive/030201/ca5fb66734f540fbb4f8f6ef759b258c/NATO%20OSINT%20Handbook%20v1.2%20%2d%20Jan%202002.pdf>.
[12] AAP-6 (2006), *supra* note 7, *s.v.* "communications intelligence".
[13] *Ibid., s.v.* "electronic intelligence".

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21. International law is largely silent with respect to the collection of human intelligence, although important legal rules exist concerning the elicitation of intelligence via interrogation. The domestic law of most countries forbids the dissemination of information contrary to national security interests, however, the use of human sources of intelligence is an otherwise widely accepted international practice.

Technical Collection Platforms

22. The territorial sovereignty of states lies at the heart of international legal limitations on the various means by which technical intelligence is received. Whether or not particular means of collection is considered legal depends on the location of the platform used. As a general rule, states exercise control over their territories, coastal waters, and the air space above them. Any unauthorized positioning of a platform within the territorial limits of a foreign nation during peacetime may represent a breach of its national sovereignty.

Aircraft

23. One of the most common forms of international technical intelligence collection is military aircraft. The *Chicago Convention on International Civil Aviation* (1944) codifies the notion that every state has complete and exclusive sovereignty over the airspace above its "territory". Territory includes both the state's land areas and territorial waters.[14] The Convention also prohibits military aircraft from flying over or landing on the territory of another state without prior special agreement.[15]

24. In contrast, the *Geneva Convention on the High Seas* (1958) established the customary right of freedom of navigation in international waters, including the "freedom to fly over the high seas."[16] That freedom is limited to actions that respect the interests of other states in the exercise of their respective uses of the high seas. In summary, intelligence collected without consent during peacetime from an aircraft located within another state's airspace may be viewed as a violation of its territorial sovereignty, and thus forbidden by international law.[17]

Ships

25. The *United Nations Convention on the Law of the Sea*, (*UNCLOS*), also codifies the right of free navigation on the 'high seas,' meaning all parts of the sea that are not included in the exclusive economic zone, territorial sea or internal waters of a state.[18] By virtue of *UNCLOS*, ships are implicitly entitled to gather intelligence (such as SIGINT) in accordance with the customary right of free navigation over international waters.

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[14] *Chicago Convention on International Civil Aviation (1944)*, 7 December 1944, 15 U.N.T.S. 295, Can. T.S. 1944/36 (entered into force 4 April 1947), arts. 1-2.

[15] *Ibid.*, art 3(c).

[16] *Convention on the High Seas*, 29 April 1958, 450 U.N.T.S. 82, art. 2(4), online: Center for the International Earth Science Information Network, <http://sedac.ciesin.org/entri/texts/high.seas.1958.html>. While the treaty was signed by Canada, it was never ratified by Canada. Canada was among the many nations that considered that many parts of the treaty codified important parts of the law of the sea and in practice followed them. The subsequent 1982 *United Nations Convention on the Law of the Sea*, (*UNCLOS*), which was ratified by Canada on 7 November 2003, now covers most of the traditional law of the sea topics including the freedom of over flight on the high seas (art. 87 refers) with the partial exception of some military uses.

[17] See W. Hays Parks, "The International Law of Intelligence" in John N. Moore *et al.*, ed. *National Security Law* (Durham, North Carolina: Carolina Academic Press, 1990) at 439. For example, in 1960 an American U-2 reconnaissance plane was shot down over Soviet airspace. The UN Security Council subsequently considered the U-2 flight a violation of Soviet airspace, but did not find that its voyage represented a violation of Article 2(4) of the U.N. Charter. As it was a violation of its airspace the Soviet Union had a right to use reasonable force to defend its sovereignty. Whether the downing of the airplane was a disproportionate response, could, however, still be argued.

[18] *United Nations Convention on the Law of the Sea*, 10 December 1982, U.N.T.S. vol 1833, arts. 86-87 (entered into force 16 November 1994, accession by Canada on 17 November 1994), online: Admiralty and International Law Guide <http://www.admiraltylawguide.com/conven/unclostable.html> [UNCLOS].

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26. Although innocent passage through another state's territorial waters is permitted under international law, such passage must exclude "collecting information to the prejudice of the defence or security of the coastal State," or any activity not bearing directly on passage.[19] A state's internal waters may not be used by another state to exercise a right of innocent passage, and therefore the use of such waters is strictly precluded under international law as location for foreign naval intelligence collection.

Satellites

27. Satellites are widely used by states for the collection of technical intelligence. The legality of their use within the context of intelligence collection is governed to a large extent by the UN *Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies.*[20] This body of law is discussed in detail in Chapter 22, Space Law.

Legal Limits on Collection Platforms During Armed Conflict

28. During an armed conflict to which Canada is a party, the law of armed conflict (LOAC) will apply to intelligence gathering in belligerent territory or behind enemy lines. Generally, the LOAC places no limitations on the means, methods or targets of intelligence gathering during armed conflicts. Indeed, "employment of measures necessary for obtaining information about the enemy and the country are considered permissible".[21]

29. There are, hover, certain pre-requisites that must be met by belligerent parties if they wish to obtain protection under the LOAC while gathering intelligence. Details regarding the LOAC, including its implications on the collection of intelligence, can be found in the CF publication entitled B-GG-005-027/AF-021, The Law of Armed Conflict at the Operational and Tactical Level.

Secondary Sources of Intelligence

30. Secondary sources of intelligence are those gathered by parties other than the receiving state. In Canada, the vast majority of military foreign intelligence comes from these sources. In addition to information received from various government departments and agencies (such as Foreign Affairs, CSIS and CSE), the CF also relies heavily on open sources to augment available intelligence to assist in strategic decision-making for the Government and to formulate operational tactics. Open source information is a potentially rich vein of material, often of strategic value, that is readily available for public access. It may include, for example, print and electronic information from the news media, the Internet, government agencies or any other publicly available source. There are no legal barriers to its collection and its exploitation.

Intelligence Collection on UN Operations

31. One of the fundamental principles of the UN is respect for the territorial integrity and political independence of states.[22] The UN is also dedicated to transparency, impartiality and observance of the rule of law. Even when it is helpful or essential to fulfilling the UN's humanitarian mission in the most efficient and safe manner possible, the collection of covert

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[19] *Ibid.*, arts. 17-19.
[20] *Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies,* 27 January 1967, 720 U.N.T.S. 8843, Can T.S. 1967/19 (entered into force 10 October 1967, ratified by Canada the same date) [Outer Space Treaty].
[21] Hague Convention No. IV, *supra* note 6.
[22] *Charter of the United Nations*, 26 June 1945, Can T.S. 1945 No. 7, art. 2(4), online: United Nations <http://www.un.org/aboutun/charter/>. Article 2(4) of the UN *Charter* directs member nations to refrain from the threat or use of force against the territorial integrity or political independence of another state.

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intelligence can give rise to concerns of partiality. From a legal perspective, however, there is little preventing the UN from collecting intelligence in furtherance of its legitimate mandate.

32. Intelligence gathering may occur during both Chapter VII operations involving peace enforcement and traditional peacekeeping. All monitoring missions, such as those that were carried out in Sinai and Cyprus, involve gathering intelligence on such things as troop movements and dispositions. The monitoring is an inherent part of the mission mandate. Normally this type of mission is conducted with the permission of the host nations and thus the question of the legality of intelligence gathering does not arise.

33. Operations conducted under Chapter VII of the UN Charter normally include a Security Council authorization to use all necessary means to achieve the mission mandate. As a result, intelligence gathering is implicitly authorized should it be necessary for the success of an operation.

SECTION 3

DOMESTIC INTELLIGENCE GATHERING

Introduction

34. As a general rule, democracies avoid the use of the military in domestic operations except in cases of extreme urgency or need. Canada is no exception. The CF is not a domestic law enforcement agency. It does not have the primary responsibility or mandate to enforce the law or to act as a primary emergency response organization for the civilian authority. When domestic operations do occur, however, there is a need for intelligence, as with any operation.

35. The CF has no legal authority to engage in domestic intelligence gathering except as may be specifically required and authorized. This legal authority must either flow from statute or from the Crown prerogative. In either case, the CF must operate within the proper confines of the law.

36. This section provides an overview of the legal considerations operators must take into account regarding the collection, use and storage of intelligence when planning or conducting domestic operations. The limits placed by Canadian law on the collection of domestic intelligence are reviewed from a constitutional, statutory and common law perspective.

Legal authority for intelligence collection

Constitutional Authority

37. The constitutional authority underpinning the collection of intelligence for domestic purposes is section 91 of the *Constitution Act*[23] which states that the federal Parliament may make laws relating to “peace, order and good government” in relation to all matters not coming within the classes of objects exclusively assigned to the provinces. In addition, section 91(7) states that the federal Parliament has legislative authority with respect to matters involving the militia, military, naval service and defence. Notwithstanding the broad legislative mandate, the federal government continues to rely substantially upon the Crown prerogative in certain circumstances as the only legal basis for an array of activities in the field of intelligence gathering.

38. Parliament has exercised its authority to legislate on defence matters under section 91(7) by enacting the *NDA*. There are two provisions in the *NDA* that permit assistance to civilian law enforcement in Canada. These are section 273.6 (public service and assistance to law

[23] *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, s.91, reprinted in R.S.C. 1985, App. II, No. 5.

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enforcement) and Part VI (Aid of the Civil Power). These provisions provide the legal basis in specific circumstances for the CF to conduct domestic operations in support of civil authorities.

39. The Crown prerogative still plays an active part with respect to domestic operations. The government has, for example, exercised the Crown prerogative by creating Orders in Council which permit the deployment of the CF on domestic operations in support of civilian law enforcement authorities in a number of specific ways (e.g., *Assistance to Federal Penitentiaries* OIC (1975), *Canadian Forces Armed Assistance Directions* (CFAADs) and the *Canadian Forces Assistance to Provincial Police Force Directions* OIC (1996)).[24]

40. It must be noted, however, that while both the *NDA* and the Crown prerogative provide the legal mandate for the CF to conduct domestic operations, neither specifically authorizes the conduct of defence intelligence activities. The authority to conduct this activity, which is required in order to properly accomplish the mission, must flow from the legal mandate to conduct the defence activities and must also comply with Canadian law. In other words, there must be a nexus between the intelligence activities and the legally authorized mandates.

Canadian Charter of Rights and Freedoms

41. All legislation passed by Parliament, and indeed all action taken by federal government institutions such as the CF, is subject to the constitutionally entrenched *Canadian Charter of Rights and Freedoms* and the limitations it places on the collection of private information. Section 7 of the *Charter* states that:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

42. Furthermore, section 8 states that:

> Everyone has the right to be secure against unreasonable search or seizure.

43. The Supreme Court of Canada (SCC) has interpreted these sections as protecting individuals' reasonable expectation of privacy. In any given case, an assessment must be made as to whether, in any particular situation, an individual's right to privacy may be overridden by the government's interest in intruding upon individual privacy as a means of obtaining its legitimate goals.[25]

44. While section 8 of the *Charter* protects individuals from unjustified state intrusions, the protection of privacy is not absolute and is only accorded when there exists a reasonable expectation of privacy. The right to be free from examination by the state is subject to constitutionally permissible limits. In examining circumstances, courts strike a balance between the right to be free from surveillance and the competing societal interests of ensuring safety, security and the suppression of crime. For example, the SCC has found that the quality and precision of information obtained from Forward Looking Infra-Red (FLIR) imagery used to examine the outside of a house was insufficient to give rise to a reasonable expectation of privacy.[26]

The *Privacy Act*

[24] See chapter 7 in this manual for details of these provisions.
[25] *Hunter v. Southam Inc.* (1984), 11 D.L.R. (4th) 641 at 652 (S.C.C.)(QL).
[26] *R. v. Tessling*, [2004] S.C.J. No. 63 (QL).

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45. In addition to the constitutionally entrenched privacy protections built into the *Charter*, the federal *Privacy Act* places a limitation on the type of information that can be collected from Canadians, and the uses that can be made of that information. Section 4 of the Act states:

> No personal information shall be collected by a government institution unless it relates directly to an operating program or activity of the institution.[27]

46. The information thus gathered can then only be used for the specific purpose duly authorized. Furthermore, all information collected by the CF must be stored, used and disposed of in accordance with the provisions of the *Privacy Act*. Unless the consent of an individual is given, personal information under the control of a federal institution shall not be used except for the purposes for which it was collected, a use consistent with that purpose or a specific purpose for which an exemption is permitted by the *Privacy Act*.[28] At present there are three DND registered personal information data banks related to intelligence activities: Information Bank Security Intelligence Records,[29] Personnel Security Investigation File,[30] and Communications Security Establishment Foreign Intelligence Files.[31]

The *Criminal Code*

47. The *Criminal Code* also restricts the use of certain intrusive collection techniques. In particular, the interception of private communications without proper judicial authorization is a criminal offence. Section 184(1) of the Code states that:[32]

> Every one who, by means of any electro-magnetic, acoustic, mechanical or other device, wilfully intercepts a private communication is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.

48. Similarly, section 184.5 of the *Criminal Code* prohibits any person from intercepting radio-based telephone communications (such as cellular telephones).[33] In general, the intercept of private communications without consent to intercept, implied or explicit, of the originator of the private communication or the person intended by the originator to receive it is strictly forbidden. Before any request for CF assistance involving intercept capabilities can be considered, the requesting law enforcement agency or security agency must obtain the necessary judicial or ministerial authorizations pursuant to statute for the specified activity.

The Canadian Forces Domestic Intelligence Policy

49. The CF has no special status when it participates in domestic operations. Its activities, like the activities of any civilian law enforcement agency, must be conducted in accordance with

[27] *Privacy Act*, R.S.C. 1985, c. P-21, s. 4, online: Department of Justice Canada <http://laws.justice.gc.ca/en/s-7/text.html>.
[28] *Ibid.*, s. 7.
[29] DND/PPU 060, Information Bank Security Intelligence Records. This data bank contains information on individuals and organizations whose activities may have been suspected, on reasonable ground, of constituting a threat to the security of DND/CF personnel, information or property at home or abroad. For a detailed description of the bank see online: Treasury Board of Canada <http://www.infosource.gc.ca/inst/dnd/fed06_e.asp>.
[30] DND/PPE 834, Personnel Security Investigation File. This data bank contains personnel data such as credit check reports, criminal records, investigative reports, notations of the level of security clearance, related correspondence, reliability status in accordance with the Government Security Policy to maintain personal information held on individuals who are or have been subject to security screening procedures. For a detailed description of the bank see online: Treasury Board of Canada <http://www.infosource.gc.ca/inst/dnd/emp01_e.asp>.
[31] DND/PPU 040, Communications Security Establishment Foreign Intelligence File. This data bank contains personal information relating to sensitive aspects of Canada's international relations, security, and defence. For a detailed description of the bank see online: Treasury Board of Canada <http://www.infosource.gc.ca/inst/dnd/fed06_e.asp>.
[32] *Criminal Code*, R.S.C. 1985, c. C-46, s. 184(1).
[33] *Ibid.*, s. 184.5.

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all domestic law. CF policy ensures that intelligence-related activities are carried out in strict accordance with directives that govern the methods of collection, use, and dissemination of intelligence.

50. In the absence of specific authority, security intelligence on Canadian citizens is not collected from primary sources except when individuals willingly provide information.[34] Designated CF authorities may only conduct or participate in security intelligence activities with a clear and direct military nexus as a result of:

a. a security event or situation involving a DND employee or CF member, military property, or a foreign military member and their property on a defence establishment when the focus of efforts is solely on countering or assessing the impact of the threat to the security of DND and the CF[35]; or

b. a request or imminent request from another federal department or civil authority for military assistance when there is a threat of civil disturbance exceeding the capability of law enforcement agencies. In such circumstances, specific authorization must first be granted for collection and only information that is essential to maintain situational awareness and meet operational requirements flowing from the nature of the mission may be granted.[36]

51. Although operational level commanders are required to assess security intelligence in their areas of responsibility, the collection of domestic security intelligence rests with the Canadian Forces National Counter Intelligence Unit (CFNCIU). Only the CFNCIU and the Canadian Forces National Investigative Service (CFNIS) are authorized to liaise with civil law enforcement agencies and other civilian authorizes through the Security Intelligence Liaison Programme (SILP) for police intelligence.[37] However, CF commanders are permitted the collection of open source information available to the public at large. Open source data can include all forms of media as well as publicly available information from such organization as NGO's and government agencies, amongst many other sources.

SECTION 4

CONCLUSION

52. This chapter provided a general overview of CF intelligence collection activity. As intelligence is fundamental to the conduct of any CF operation, it is crucial for operational legal advisors and commanders to have a basic understanding of the domestic and international law related to intelligence collection. Although intelligence is vital to the success of a CF operation, intelligence collection must be conducted in accordance with the law.

53. While Canada has sufficient and competent civilian authorities to maintain national security and respond to emergencies within Canada, there will still be occasions when civilian authorities, particularly emergency response and law enforcement authorities, will request CF assistance. This will usually result in a CF domestic operation. Like any CF operation, a domestic one may require intelligence.

54. This requirement along with the CF requirement for intelligence to protect its own assets and personnel, are important but do not in themselves provide the legal authority to conduct

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[34] DAOD 8002-0, Counter-Intelligence, online: Department of National Defence <http://www.admfincs.forces.gc.ca/admfincs/subjects/daod/8002/0_e.asp-Ide>.
[35] *Ibid.*
[36] *Ibid.* See also NDHQ Instruction DCDS 02/98, Guidance for the Conduct of Domestic Operations, paras. 75-82, online: Department of National Defence (intranet only) <http://dcds.mil.ca/cosj3/ndcc/pages/sops/sopDomestic_e.asp>.
[37] DAOD 8002-3, Security Intelligence Liaison Programme, online: Department of National Defence <http://www.admfincs.forces.gc.ca/admfincs/subjects/daod/8002/3_e.asp>.

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domestic intelligence gathering. As outlined in the chapter, there are significant legal issues arising from the collection of information by the CF in Canada. The key point for operational legal advisors and commanders is to understand that the CF has no special status or right to gather intelligence in Canada.

55. The CF, like all civilian authorities, is bound by the law, especially the *Charter of Rights and Freedoms* and the *Criminal Code*, when collecting, using or storing intelligence. A commander's requirement for 'situational awareness' is not a legal authority to gather intelligence. There must be a nexus between the CF requirement for the intelligence and the legally authorized mandate of the CF to become involved in a domestic operation.

56. As the collection of intelligence in Canada is a very sensitive and complex matter, operational legal advisors and commanders must ensure all intelligence gathering, use and storage comply with the law. Failure to do so will lead to mission failure and will expose commanders and subordinates to criminal and civil liability.

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CHAPTER 24

INFORMATION OPERATIONS

SECTION 1

INTRODUCTION

1. Increasingly complex information systems are being integrated into all aspects of modern military operations. Today command, transport, logistics, intelligence and weapon systems rely heavily on computers, satellite communications and a host of electronic systems. Generally, the use of such systems by the military is described as 'information operations' (IO). When these systems are deployed, they often reach back to higher levels of command and at times interact with other governmental agencies and with the nation. The systems are not infallible, and, with ever widening use, they become vulnerable. These vulnerabilities are two sided: they create new opportunities to exploit adversaries, but they also mean that friendly forces systems must be continually protected from external manipulation. Thus there is an offensive and defensive aspect to information operations (IO).

2. This chapter highlights the nature of IO and identifies some of the related legal issues in this expanding field. A more detailed analysis of IO doctrine may be found in the CF publication, B-GG-005-004/AF-010, Canadian Forces Information Operations Manual, 1998.[1]

SECTION 2

DEFINITIONS AND OVERVIEW

3. An 'information system' is the assembly of equipment, methods and procedures, and if necessary, personnel organized so as to accomplish specific information functions.[2]

4. 'Offensive IO' includes actions taken to influence actual or potential adversarial decision makers. Affecting the opponent's use of or access to information and information systems may accomplish this task. Offensive IO can include using psychological operations (PSYOPS), deception, electronic warfare (EW), intelligence, computer network attack (CNA), physical destruction, and special information operations (SIO).

5. 'PSYOPS' or psychological operations are actions to convey selected information and indicators to foreign audiences. They are designed to influence emotions, motives, reasoning, and ultimately, the behaviour of foreign governments, organizations, groups and individuals.

6. 'Deception operations' are those measures designed to mislead the enemy by manipulation, distortion or falsification of evidence to induce the enemy to react in a manner prejudicial to that enemy's interests.

7. 'Electronic Warfare' (EW) is a form of military action, which exploits the electromagnetic spectrum. EW encompasses the interception and identification of electromagnetic emissions, the employment of electromagnetic energy, including directed energy, to reduce or prevent hostile use of the electromagnetic spectrum and actions to ensure its effective use by friendly forces. The three major subdivisions of EW are electronic warfare support measures (ESM), electronic countermeasures (ECM) and electronic protection measures (EPM). EW is an IO capability that can support offensive and defensive IO. All three subdivisions of EW contribute to the IO effort.

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[1] B-GG-005-004/AF-010, Canadian Forces Information Operations Manual, 1998. This manual is the subordinate document to B-GG-005-004/AF-000, Canadian Forces Operations Manual. See B-GG-005-004/AF-010, ch. 32. The B-GG-005-004/AF-010 provides guidance for IO operations by the CF throughout the full range of military operations.
[2] B-GG-005-004/AF-010, para. 102.

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8. 'Computer Network Attack' (CNA) is an operation to disrupt, deny, degrade or destroy information resident in information systems, or the information systems themselves.

9. 'Special Information Operations' (SIO) is IO of a sensitive nature, which, owing to its potential effect or impact, security requirements, or risk to the national security of Canada, requires a special review and approval process.[3]

10. 'Defensive IO' includes action taken to protect one's own information and ensure friendly decision makers have timely access to necessary, relevant and accurate information. Defensive IO also ensures friendly decision makers are protected from any adversary offensive efforts. Defensive IO strives to ensure the friendly decision making process is protected from all adverse effects, deliberate, inadvertent or accidental. Defensive IO is a process that integrates and coordinates policies, procedures, operations, intelligence, law and technology.

Global Aspect of Information Operations

11. There are no fixed boundaries in the information environment. Open and interconnected systems are merging into a rapidly expanding global information system infrastructure (GIS) that enfolds the Canadian National Information Infrastructure (NII). The NII includes all the systems of Canadian industry, government, academia, commercial networks and switching systems. Embedded within the NII is the Defensive Information Infrastructure (DII). At times, these three types of infrastructures cannot be distinguished from the others, as their relationship is seamless.

12. The DII is the shared or interconnected system of computers, communications, data, security and other information systems serving DND local, national and international needs. The DII connects DND and CF mission support, command and control (C2), and intelligence computers through voice, telecommunications, imagery, video and multimedia services. It also includes C2, tactical, intelligence, and commercial systems used to transmit DND and CF information.

SECTION 3

OFFENSIVE INFORMATION OPERATIONS

Legal Considerations

13. There is a wide spectrum of potential targets that IO can be directed towards. Today, it is a target rich environment. For example, an IO operation might include efforts to influence, manipulate or neutralize an adversary's key leadership, strategic communications, military infrastructure, civil infrastructure (including industry, financial and populace) along with an adversary's weapons systems. The type of IO attack could range from a mere temporary jamming of communications or dissemination of false information, to lethal manipulations of weapons electronics systems to massive interference with the infrastructure of the state.[4] The Geneva Conventions (GCs), the Hague Conventions and the Additional Protocols (APs) envisage the conduct of hostilities using kinetic means and make no explicit reference to non-kinetic techniques of warfare. Nevertheless, LOAC applies to IO.

14. In the conduct of hostilities, the means and methods of causing injury to one's adversary are not unlimited. Indeed, damage caused by the disruption of an information system, including the corruption or manipulation of stored data, may have the effect of causing serious damage and

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[3] *Ibid.*, s. 102, para 1(f).
[4] For example, causing the shutdown of a nation's electrical power grid, destruction of its stock market records, or interference with aircraft navigational systems.

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injury if critical infrastructure is paralyzed or disrupted by an IO attack. This fact calls for a consideration of the impact of harmful effects arising from such actions.

15. Indeed, Additional Protocol I (AP I) defines "attacks" as "acts of violence against the adversary, whether in the offence or in the defence."[5] Similarly, information operations, particularly when they have a consequential lethal effect or cause physical destruction, will likely be considered a use of 'force' or 'armed attack' within the meaning of the UN Charter. The complexities of determining whether an IO constitutes a use of force, along with the importance of applying the related principles of targeting and distinction between civilian objects and military objects thus underline the importance of legal review, on a case-by-case basis, for any planned IO.

Law of Armed Conflict Issues

16. IO targeting can be accomplished by application of the basic principles of the law of armed conflict (LOAC), if the situation is one of armed conflict. For example, 'military objectives' are defined as those objects "which by their nature, location, purpose, or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage."[6] Once such an objective is determined to be a military objective, then the operational planner must consider the proportionality principle, namely whether the damage to civilian objects would be excessive in relation to the concrete military advantage anticipated.[7]

17. While the use of IO may involve the use of deception and the employment of ruses, the means used may not be perfidious. Perfidy occurs whenever acts are intended to betray the confidence of an adversary to believe that he is entitled to, or obliged to accord protection under LOAC.[8] For example, the manipulation of the enemy's targeting database so that a friendly military headquarters appears as a hospital would constitute perfidy.

International Law Relating to Information Operations

18. The body of international law is not extensive in this area, nor is it particularly reflective of this rapidly growing field of cyberspace. Certain treaties have relevance in peacetime to the use and control of communications.

19. International telecommunications using wire and radio are governed in peacetime by the *International Telecommunication Convention* (ITC),[9] which in turn establishes the framework for the operation of the International Telecommunication Union (ITU) that regulates the use of the electromagnetic spectrum or international telecommunication. Under the ITU, the International Frequency Review Board (IFRB) allocates the spectrum to national authorities so as to facilitate deconfliction of the use of the radio spectrum and to prevent harmful interference. Broadcasting stations from one country are not permitted to interfere with broadcasts of other states. Military installations must also observe these non-interference requirements. While states reserve the right to cut off a private telecommunications signals transiting their territory that appear dangerous to the security of the respective state, states may not transmit false or misleading signals.[10]

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[5] *Protocol Additional to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts*, 8 June 1997, Can.T.S. 1991/2, art. 49 (Canada ratified on 20 November 1990) [AP1].
[6] *Ibid.*, art. 52, para. 2; Michael N. Schmitt and Brian T. O'Donnell, eds., *Computer Network Attack and International Law* (Germany: *Naval War College International Law Studies,* 2002) vol. 76 [Schmitt and O'Donnell].
[7] AP1, *ibid.*, art. 57, para. 2(b).
[8] AP1, *ibid.*, art. 37.
[9] *International Telecommunication Convention with General Regulations and Annexes, and Protocols*, 6 June 1982, Can.T.S. 1984/40 (Canada ratified the treaty on 10 November 1983) [ITC].
[10] *Ibid.*, arts. 19, 20, 37, 38.

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UN Charter

20. Article 41 of the UN Charter provides that the UN Security Council may call upon UN members to apply measures which "may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio and other means of communication."[11] The disruption and denial of these services under the authority of a Security Council resolution could be carried out using IO methods and means. Nonetheless, all IO activity must be considered carefully as to whether the planned activity complies with international law.[12]

SECTION 4

COMPUTER NETWORK DEFENCE

Legal Considerations

21. Defensive IO involves actions to protect Canada's information and to ensure that friendly decision makers are protected from an adversary's offensive efforts. By its nature, it is a strategy that requires the coordination of policies, procedures, operations, intelligence, law and technology. It must also comply with Canadian law and with the recognized freedoms of information that are incorporated in the Canadian democratic system. The following subsections highlight some of the domestic laws and policies applicable to the conduct of computer network defence operations in peacetime.

22. The intercept of private communications in Canada raises both *Criminal Code* and *Charter* issues. With certain limited exceptions, section 184 of the *Criminal Code* makes it unlawful to wilfully intercept private communications. Section 8 of the *Charter* prohibits any government activity that would breach an individual's reasonable expectation of privacy attaching to computer communications subject only to such reasonable limits as prescribed by law as can be demonstrably justified in a free and democratic society. For these reasons, it is important to ensure any decision to intercept computer network communications within DND/CF as a protective measure stands firmly based on lawful authority and closely controlled in its execution. Appendix A provides an overview in matrix form of many of the considerations to be examined in obtaining computer data in the course of conducting criminal investigations and military computer network defence activities.

Government Security Policy

23. The Government Security Policy (GSP) calls for each federal department and the CF to assure the continued delivery of information technology (IT) services including the establishment of baseline security controls and the maintenance of continuous service delivery monitoring.[13] Key elements of any continuous monitoring policy involve the detection of unauthorized access attempts, bypass of security controls, unauthorized probes, denial of service attacks, changes to hardware and software as well as system performance anomalies or known attack signatures. However, the GSP does not provide any specificity on authorized intrusion detection techniques beyond the adoption of a mere passive network posture.

Treasury Board Policy on Computer Monitoring

[11] *Charter of the United Nations*, 26 June 1945, Can. T.S. 1945 No. 7, art. 41 [UN Charter].
[12] Other possible international laws affecting IO include *inter alia* the *United Nations Convention on Law of the Sea* (regarding illegal radio broadcasts); the *Genocide Convention* (regarding the prohibition against hate propaganda); the *Vienna Convention on Diplomatic Relations* (regarding prohibited uses of diplomatic premises); and related SOFA agreements.
[13] Government of Canada, *Government Security Policy*, s. 10.12, online: Treasury Board of Canada Secretariat <http://www.tbs-sct.gc.ca/pubs_pol/gospubs/TBM_12A/gsp-psg_e.asp>.

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24. Treasury Board policy, entitled *Policy on the Use of Electronic Networks*,[14] does permit user monitoring of government computer systems under certain prescribed circumstances based on the principle of informed consent of governmental system users. The Policy applies to the CF and establishes a framework whereby authorized users are given sufficient notice prior to monitoring. Notice to users will explain the regular monitoring practices for the network, state that the network will be monitored only for work-related purposes, and advise that special monitoring may be permitted without notice in instances where there is reason to suspect unlawful or unacceptable activity. Institutions must also establish a statement indicating who is authorized to analyze the contents of individual files or electronic mail.

Ministerial Authorizations

25. In 2001, Bill C-36[15] introduced changes to the *NDA* that permit the Communication Security Establishment (CSE), when acting pursuant to a Ministerial authorization, to protect Government of Canada computer systems and networks. The sole purpose of such activities must be the protection from mischief, unauthorized use or interference of the system or network. The legislative change accorded the same exemptions for interceptions as those given to public service providers pursuant to section 184(2) of the *Criminal Code*, namely, the interception is necessary for the purpose of providing the service, in the course of random monitoring necessary for the purpose of mechanical or service quality control checks, or the interception is necessary to protect rights and property directly related to providing the service. All activities undertaken pursuant to a Ministerial authorization are subject to review by the Commissioner of the CSE.

Application of Bill 14 - *Criminal Code*

26. The adoption of Bill C-14[16] in 2004 introduced amendments to section 184(2) of the *Criminal Code* that provided additional exceptions from criminal liability for the intercept of private communications on a computer network. The relevant portions of the new exceptions contained in section 184(2)(e) permit interception by anyone in control of a computer network whenever the activity is reasonably necessary for two reasons:

a. managing the quality of service of the computer system as it relates to performance factors such as responsiveness and capacity of the system as well as the integrity and availability of the system and data, or

b. protecting the computer system against any act that would be an offence under subsection 342.1(1) or 430(1.1.) of the *Criminal Code*.

27. The first category establishes a service provider-like exemption that enables the interception for purposes of ensuring service performance and related matters. The more important second category of exemption involves efforts related to preventing computer crime offences. Section 342.1(1) contains the principal anti-hacking provisions of the *Criminal Code*. First introduced in 1985, the section prohibits four broad types of fraudulent conduct:

a. fraudulently obtaining any computer service;
b. using a device to intercept a function of a computer service;
c. causing a computer system to be used with intent to commit actions in sub-paragraph a) or b) or computer data mischief; and
d. using, possessing, or trafficking in computer codes or encryption codes.

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[14] Government of Canada, *Treasury Board Policy on the Use of Electronic Networks*, online: Treasury Board of Canada Secretariat <http://www.tbs-sct.gc.ca/pubs_pol/ciopubs/tb_cp/uen_e.asp>.
[15] *An Act to amend the Criminal code, the Official Secrets Act, the Canada Evidence Act, the proceeds of crime (Money Laundering) act and other Acts, and to enact measures respecting the registration of charities, in order to combat terrorism*, S.C. 2001, c. 41. (assented to on 18 December 2001).
[16] *An Act to amend the Criminal Code and other Acts*, S.C. 2004, c.12. (assented to on 22 April 2004).

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28. Section 430(1.1) of the *Criminal Code* governs mischief in relation to computer data. The section was introduced at the same time as section 342.1 in 1985. The provision applies not only to cases of intentional destruction but also to activity that renders data meaningless or ineffective. Anyone who obstructs, interferes or interrupts lawful access to data commits an offence. As such, the provision has direct application to the use or transmission of viruses, including worms, Trojan Horses, logic bombs and other similar devices causing harmful impact on the integrity of computer systems. The offence would also apply to a denial of service attack. Combined, the two offence provisions (sections 324.1 and 430(1.1)) cover all principal computer offences with the notable exception of computer port mapping which has yet to be legislated against in Canada.

29. It is important to point out that Bill C-14 introduced minimization procedures contained in section 182(2). First, the use and retention of intercepts is limited to what is essential to identify, isolate or prevent harm to computer systems. Disclosure of information drawn from interceptions is limited to that which is necessarily incidental to the exceptions permitted under s. 184(2)(e), that is to say, managing the quality of the system service as it relates to performance and ensuring the protection of the system.

Amendments to the *Financial Administration Act*

30. Bill C-14 also consequently amended section 161 of the *Financial Administration Act* (*FAA*) to expressly empower Crown employees to perform duties related to the management and protection from misuse of computer networks, including similar duties permitted under the *Criminal Code*. Nonetheless, the amendments make the relevant minister responsible not only for the reasonableness of measures taken to intercept communications within departmental computer networks but also for the establishment of measures to control and handle the use and retention of data derived from intercepts. To ensure the sufficiency of the legal framework to carry out intercepts, operational directives may be put in place to articulate clear objectives, establish authorities designated to carry out computer monitoring and create guidelines for minimization procedures.

SECTION 5

CONCLUSION

31. CF IO is a complex and quickly expanding area of operations. This, combined with the complex operational and security environment in which the CF operates, makes it vital for operational legal advisors and commanders to understand the basic terminology involved in IO and the legal issues related to IO.

32. This chapter provided an overview of the expanding nature of IO, of the types of IO conducted by the CF and, importantly, of the challenging legal issues related to IO. In many aspects, the law, both domestic and international, related to IO is challenged to keep pace with evolving IO technology. For example, it can be difficult to conceptualize the application of the LOAC (which is largely based on hostilities using kinetic weapons) to IO (which largely is based on non-kinetic systems). Similarly, in domestic operations, it can be challenging to analyze traditional concepts of intercept of communications, when the communication occurs in a computer system.

33. CF IO is, and will continue to be, an important component of CF operations. Operational legal advisors and commanders will have to remain especially vigilant in dealing with IO and associated legal issues. IO is clearly an area that could affect mission success and require a solid understanding of the technology and the legal framework.

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Canada
Matrix for Obtaining Computer Data in Criminal Investigations and Computer Network Defence

(For reference only. Consult with the Office of the Judge Advocate General for updates or factors that may change this general guidance.)

Type of Information Sought	Location of Information	Consent of Subject?	Criminal Investigation		Military Computer Network Defence/Intelligence	
			Authority	**Reference**	**Authority**	**Reference**
Subscriber information for an authorized user of a computer account	Military Server	Yes	Consent of user	*Privacy Act*, s. 7 & 8	Consent of user[1]	Log-on banners on all computers
		No	Written request of investigative body[2]	*Privacy Act*, s. 8(2)(e) *Privacy Act*, s. 8(2)(f)	Written request of investigative body[2] Treasury Board Guidelines[3]	*Privacy Act*, s. 8(2)(e) *Privacy Act*, s. 8(2)(f) *Policy on the Use of Electronic Networks*, *Appendix E – Guidelines on the Monitoring of Electronic Networks*
	Internet Service Provider (ISP) in Canada	Yes	Consent of subscriber	*Personal Information Protection and Electronic Documents Act*, Schedule 1, s. 4.3		
		No	Request of government institution[4] Request of LEA[5] General Production Order[6]	*Personal Information Protection and Electronic Documents Act*, s. 7 Telecom Decision CRTC 2002-21 *Criminal Code*, s. 487.012	Request of government institution[4] Request of LEA[5]	*Personal Information Protection and Electronic Documents Act*, s. 7 Telecom Decision CRTC 2002-21

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	Server outside Canada	Yes or No	Law of Host Nation General Production Order[6]	Various Mutual Legal Assistance Treaties[7] *Criminal Code*, s. 487.012	

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Historical transactional information about the account (no content, just data about the services accessed, sites visited, etc.)	Server within Canada	Same as above for subscriber information. There is at present no *Criminal Code* provision that specifically authorizes the collection of historical computer traffic data or permits data-preservation orders. Stored traffic data traffic would currently be accessible by means of a *Criminal Code*, s. 487(2.1) warrant or General Production Order.			For Federal Government servers Treasury Board Guidelines[3]	*Policy on the Use of Electronic Networks*, *Appendix E – Guidelines on the Monitoring of Electronic Networks*
	Server outside Canada	Yes or No	Law of Host Nation	Various Mutual Legal Assistance Treaties[7]		
Future Transactional information (pen register/trap and trace)	Server within Canada	With respect to a telephone or telephone line, warrant pursuant to *Criminal Code* s. 492.2				
	Server outside of Canada	Yes or No	Law of Host Nation	Various Mutual Legal Assistance Treaties[7]		
Contents of Stored electronic communications (that have been read)	Server within Canada	Judicial Search Warrant	*Criminal Code*, s. 487(2.1)		For Federal Government servers Treasury Board Guidelines[3]	*Policy on the Use of Electronic Networks*, *Appendix E – Guidelines on the Monitoring of Electronic Networks*
	Server outside of Canada	Yes or No	Law of Host Nation	Various Mutual Legal Assistance Treaties[7]		

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Contents of intercepted electronic communications	Military Server	Judicial Intercept Order[8]	*Criminal Code*, s. 184.2	Ministerial Authorization[9] Any Departmental IT Manager[10] For Federal Government servers— Treasury Board Guidelines[3] Judicial Intercept Order	*National Defence Act*, s. 273.65 *Financial Administration Act*, s. 161, *Policy on the Use of Electronic Networks, Appendix E – Guidelines on the Monitoring of Electronic Networks* *Canadian Security Intelligence Service Act*, s.12
	Internet Service Provider (ISP) in Canada	Judicial Intercept Order	*Criminal Code*, s. 184.2	Judicial Intercept Order	*Canadian Security Intelligence Service Act*, s.12
	Server outsider of Canada	Yes or No	Law of Host Nation	Various Mutual Legal Assistance Treaties[6]	

[1] When used, log-on banners place military computer users on notice that the use a government-own computer system constitutes consent to monitoring. For guidance on the scope and nature of systems administrators' duties, see the Treasury Board *Policy on Use of Electronic Networks*.

[2] Personal information under the control of a government institution may be disclosed to an investigative body specified in the regulations upon the written request of that body, for the purpose of enforcing any law of Canada or a province or carrying out a lawful investigation, if the request specifies the purpose and describes the information to be disclosed. Investigative bodies for purposes of s. 8(2)(e) of the *Privacy Act* include the Canadian Forces Military Police, Canadian Forces National Counter-Intelligence Unit, Canadian Security Intelligence Service and the RCMP. (For a complete listing of designated investigative bodies, see Privacy Regulations, Schedule II.) In addition, the *Privacy Act*, s. 8(2)(f) permits the disclosure of personal information under federal government control pursuant to agreements with provincial and foreign governments for the purpose of administering or enforcing any law or carrying out a lawful investigation.

[3] The Treasury Board *Policy on Use of Electronic Networks* provides guidance on the monitoring of electronic networks within the federal Government and permits the establishment of individual institutional policies. Government institutions may implement practices of monitoring electronic mail and electronic documents provided individuals are notified of the monitoring practices before they are implemented. The Policy establishes requirements to advise network users on the nature and scope of the monitoring policy to ensure that users understand the limitations on privacy during their use of the network. It envisions the monitoring of network meta-data for purposes of ensuring compliance but for purposes of verifying whether classified documents are properly secured, the Policy specifically permits authorized personnel to read subject lines of electronic mail, file names on network files servers and lists of World Wide Web sites visited by employees. Key word searches may be undertaken to identify improperly stored classified documents but monitoring personnel must use an objective method to randomly select whose electronic mail, Web visits and networks files will be monitored. A copy of the Policy is found at online: <http://www.tbs-sct.gc.ca/pubs_pol/ciopubs/TB_CP/uen2-2_e.asp>.

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[4] Permits the voluntary disclosure of "personal information" by private industry where the disclosure is made to a government institution or a part of government institution that has made a request for the information, identified its lawful authority to obtain the information and indicated that the disclosure is requested for the purpose of enforcing any law of Canada or carrying out an investigation relating to the enforcement of any such law or gathering intelligence for the purpose of enforcing any such law.

[5] Local Service Provider Identification Information (LSPID) is to be released to LEAs requesting it for any of the reasons set out below:

(i) it has reasonable grounds to suspect that the information relates to national security, the defence of Canada or the conduct of international affairs;

(ii) the disclosure is requested for the purpose of administering or enforcing any law of Canada, a province or a foreign jurisdiction, carrying out an investigation relating to the enforcement of any such law or gathering intelligence for the purpose of enforcing or administering any such law; or

(iii) it needs the information because of an emergency that threatens the life, health or security of an individual, or the LEA otherwise needs the information to fulfill its obligations to ensure the safety and security of individuals and property.

[6] Legislation to amend the *Criminal* Code was brought into force for general and specific production orders on September 15, 2004; see SI/2004-119. General production orders will likely prove to be a useful tool. Although issued in circumstances similar to those under which a search warrant would be issued, production orders have a lower threshold for their issuance that only requires the establishment of reasonable grounds to believe that an offence has been or is suspected to have been committed. In addition, as an investigative tool, they are less invasive than a search warrant since law enforcement officials would not be required to search the premises of the third party. Lastly, such orders allow for the acquisition of information held outside Canada where it is under control of a custodian in Canada.

[7] In addition to the various mutual legal assistance treaties, the Council of Europe *Convention on Cyber-Crime* is an international treaty that provides signatory states with legal tools to help in the investigation and prosecution of computer crime, including Internet-based crime, and crime involving electronic evidence. The *Convention* calls for the criminalization of certain offences relating to computers, the adoption of procedural powers in order to investigate and prosecute cyber-crime, and the promotion of international cooperation through mutual legal assistance and extradition. Although Canada is a signatory to the *Convention*, it has not yet adopted legislation to create an offence in relation to computer viruses that are not yet deployed that would be required to ratify the *Convention*.

[8] While judicial intercept orders/warrants can be obtained, Internet Service Providers often do not have the intercept capability to assist law enforcement authorities. There is currently no legislative mechanism in Canada that can be used to compel service providers to develop or deploy systems providing intercept capability, even if a legal authorization is obtained by law enforcement or national security officials to intercept the communications of a specific target.

[9] For the protection of governmental computer systems and networks, Ministerial Authorizations permit real time interception of communications by the Communications Security Establishment (CSE) in relation to any specified activity or class of activities. The use, retention and dissemination of such information is subject to minimization direction provided by the Minister of National Defence.

[10] Any employee acting on behalf of a department or Crown corporation who performs duties relating to the management or protection of computer systems may take reasonable measures for such purposes, including the intercept of private communications for protecting the computer against an act that would be an offence under *Criminal Code*, s. 342.1(1) (anti-hacking provision) or s. 430.(1.1) (computer data protection provision). For Treasury Board of Canada guidance on intrusion detection see *Interim Guidelines For The Conduct of Intrusion Detection*, online: <http://publiservice.tbs-sct.gc.ca/gos-sog/gs-sg/spins/spin_2004-03_e.asp>. Where a private communication has been intercepted lawfully but without the consent, express or implied or the originator or the intended recipient, the *Criminal Code*, s. 193(2) permits the disclosure of such information to a peace officer or prosecutor in Canada. Lastly, disclosure of such communications may be made to the Canadian Security Intelligence Service for the purpose of enabling the Service to perform its duties and functions under s. 12 of the *Canadian Security Intelligence Service Act*.

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CHAPTER 25

INTERNATIONAL AND CONTINENTAL DEFENCE ALLIANCES: NATO AND NORAD

SECTION 1

INTRODUCTION

1. Canada is a member of two important alliances created by treaty: the North Atlantic Treaty Organisation (NATO) and the North American Aerospace Defence Command (NORAD). This chapter briefly provides an overview of the key aspects of both treaties highlighting, in particular, the organization of each alliance and their role.

SECTION 2

THE NORTH ATLANTIC TREATY ORGANISATION (NATO)

The Origins of the Alliance

2. The concept of a Western Europe-based countervailing defensive alliance developed during the post World War II period as a reaction to the fear that the USSR might seek to extend its control.[1] The signature of the *Brussels Treaty* of March 1948[2] marked the determination of five Western European countries (Belgium, France, Luxembourg, the Netherlands and the United Kingdom) to develop a common defence system and to strengthen the ties between them in a manner which would enable them to resist ideological, political and military threats to their security.[3]

3. The *Brussels Treaty* countries then began negotiations with the United States and Canada with a view to creating a single North Atlantic Alliance based on security guarantees and mutual commitments between Europe and North America. The talks expanded to include Denmark, Iceland, Italy, Norway and Portugal. These negotiations culminated in the creation of the *North Atlantic Treaty*[4] in April 1949, bringing into being a common security system based on a partnership among these 12 countries.[5]

The North Atlantic Treaty

4. The preamble to the *North Atlantic Treaty* sets out that the Parties reaffirm their faith in the purposes and principles of the UN Charter, and states that "[t]hey are determined to safeguard the freedom, common heritage and civilisation of their peoples" and that "[t]hey seek to promote stability and well-being in the North Atlantic area."[6] To accomplish these goals, the Parties "are resolved to unite their efforts for collective defence and for the preservation of peace and security."[7]

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[1] North Atlantic Treaty Organisation, *NATO Handbook: The Origins of the Alliance* (2002), online: NATO Publications <http://www.nato.int/docu/handbook/2001/hb0101.htm> [NATO Handbook].
[2] *Treaty of Economic, Social and Cultural Collaboration and Collective Self Defence*, 17 March 1948, online: NATO Publications <http://www.nato.int/docu/basictxt/b480317a.htm> [*Brussels Treaty*]. The *Brussels Treaty* of 1948, revised in 1954, represented the first step in the post-war reconstruction of Western European security and brought into being the Western Union and the Brussels Treaty Organisation. It was also the first step in the process leading to the signature of the North Atlantic Treaty in 1949 and the creation of the North Atlantic Alliance. The *Brussels Treaty* is the founding document of the present day Western European Union (WEU).
[3] NATO Handbook, *supra* note 1.
[4] The *North Atlantic Treaty*, also called the *Treaty of Washington*, was signed in Washington D.C. on 4 April 1949, and came into force on 24 August 1949, after the deposition of the ratifications of all signatory states. See *North Atlantic Treaty*, 4 April 1949, online: NATO Publications <http://www.nato.int/docu/basictxt/treaty.htm> [*North Atlantic Treaty*].
[5] These twelve countries (Belgium, Canada, Denmark, France, Iceland, Italy, Luxembourg, the Netherlands, Norway, Portugal, the United Kingdom, and the United States) are referred to as the founding members of NATO.
[6] *North Atlantic Treaty*, supra note 4, Preamble.
[7] *Ibid*.

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5. Perhaps the most important Article of the *Treaty* is Article 5, which sets out the mutual self defence provision as follows: "an armed attack against one or more of (the Parties) in Europe or North America shall be considered an attack against them all."[8] In the event that such an armed attack occurs, the Parties, by the terms of the treaty, agree that each "will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area."[9]

6. The treaty expressly states that the reaction to an armed attack contemplated by Article 5 would take place as an "exercise of the right of individual or collective self defence recognized by Article 51 of the Charter of the United Nations," and that the fact of the attack and the response will be immediately reported to the UN Security Council. In the event that the Security Council has itself "taken the measures necessary to restore and maintain international peace and security," the Parties will terminate their own measures.

NATO Military combat and enforcement operations

7. Importantly on 2 October 2001, in response to the tragic events of 11 September 2001 NATO countries invoked the Article 5 collective self defence clause for the first time in the history of the organisation. On 24 October 2001, pursuant to Article 51 of the UN Charter, Canada informed the Security Council of the UN that it was exercising its right of self defence against Al Qaeda and the Taliban.[10]

NATO

8. The North Atlantic Treaty Organisation (NATO), sometimes referred to as the Alliance, is made up of all signatories to the *North Atlantic Treaty*, and has as its fundamental role to safeguard the freedom and security of its member countries by political and military means.[11]

9. NATO is considered a 'regional organization' within the meaning of Chapter VIII of the UN Charter and has historically participated in Chapter VII stabilization operations such as enforcing Security Council resolutions relating to the no-fly zone over the former Yugoslavia during the UNPROFOR mandate and later with respect to enforcing the Dayton Accord as part of the IFOR and SFOR missions. In 1999 NATO conducted an air campaign over Kosovo to stop serious violations of human rights.[12] More recently NATO has been involved with enforcing those resolutions relating to ISAF operations in Afghanistan.

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[8] *Ibid.*, art. 5. Article 5 reads:

> The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self defence recognised by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area.

Article 6 of the Treaty provides some guidance on the meaning of the term "armed attack," and reads (as it was amended in 1951):

> For the purpose of Article 5, an armed attack on one or more of the Parties is deemed to include an armed attack:
>
> on the territory of any of the Parties in Europe or North America, on the Algerian Departments of France (2), on the territory of or on the Islands under the jurisdiction of any of the Parties in the North Atlantic area north of the Tropic of Cancer;
>
> on the forces, vessels, or aircraft of any of the Parties, when in or over these territories or any other area in Europe in which occupation forces of any of the Parties were stationed on the date when the Treaty entered into force or the Mediterranean Sea or the North Atlantic area north of the Tropic of Cancer.

[9] *Ibid.*, art. 5.

[10] See Chapter 13, Law of Self Defence, in this manual.

[11] *NATO Handbook*, *supra* note 1.

[12] See Chapter 15, Enforcing UN Mandates, and Chapter 16, Other International Operations, in this manual.

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10. Since the collapse of the Soviet Union and the dissolution of the Warsaw Pact, NATO's defence focus is no longer concentrated in specific directions or geographic areas.[13] Today, the threat to security in the North Atlantic area can come from any direction, from within the region or from far beyond NATO's traditional geographical area of interest.

The Process of NATO Enlargement

11. The *North Atlantic Treaty*, at Article 10, expressly provides that other European States[14] may be invited to join the treaty. Since the creation of the *North Atlantic Treaty* and NATO there have been five rounds of enlargement, resulting in fourteen countries joining the twelve founding members and raising the NATO membership total to 26 countries. In 1952, Greece and Turkey acceded to the Treaty. The Federal Republic of Germany[15] joined the Alliance in 1955. In 1982 Spain became a member. The Czech Republic, Hungary and Poland joined in 1999. In March 2004, seven new countries formally joined the Alliance: Bulgaria, Estonia, Latvia, Lithuania, Romania, Slovakia and Slovenia.

NATO Headquarters

12. The NATO Headquarters in Brussels, Belgium, is the political headquarters of the Alliance and the permanent home of the North Atlantic Council and the Military Committee.

The North Atlantic Council

13. The North Atlantic Council (NAC), established by Article 9 of the *North Atlantic Treaty*, has effective political authority and power of decision in NATO. Each member country is represented at the NAC, normally by a representative of ambassadorial rank.[16] Decisions at the NAC are made on the basis of consensus. The Council issues declarations and communiqués explaining the Alliance's policies and decisions to the general public and to governments of countries which are not members of NATO.[17]

The NATO Secretary General

14. The Secretary General (SG) is a senior international statesperson at NATO and is nominated by the member governments. The SG's primary function is to chair the North Atlantic Council.[18]

15. The SG also acts as principal spokesperson for NATO in external relations, and helps facilitate the flow of information, and mediate disputes, between member nations.

SECTION 3

NATO MILITARY STRUCTURE[19]

The NATO Military Committee

[13] NATO's involvement in the Kosovo humanitarian intervention operation is an example of the evolution away from a strictly east-west focus to a more widely based regional interest.
[14] *North Atlantic Treaty*, supra note 4, art. 10. Accordingly, by the terms of the *Treaty*, only European states, and not other States may be invited to join NATO.
[15] In 1990, with the unification of Germany, the territory of the former German Democratic Republic came under the security protection of the Alliance as an integral part of the united country.
[16] Member nations have permanent representatives at NATO, of ambassadorial rank. It is these representatives that normally meet as the NAC to take decisions of that body. Occasionally the NAC will meet at the head of state, head of government, or minister of foreign affairs or defence level. Decisions made by the NAC are binding regardless of the makeup of the NAC at the time of decision.
[17] *NATO Handbook*, *supra* note 1.
[18] The SG also chairs the Defence Planning Committee, Nuclear Planning Group and other senior committees.
[19] *NATO Handbook*, *supra* note 1.

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16. The NATO Military Committee (MC) is a subsidiary body set up under the NAC whose purpose is to assist and advise the NAC on military matters. The MC is officially made up of the Chiefs of Defence (CHODs) of the NATO member countries,[20] known in this role as NATO Chiefs of Staff, who are normally represented in council by senior military officers in the position of Military Representative. The Chairman of the Military Committee (CMC) is elected by the committee members, and is, effectively, the highest ranking military member of NATO.[21]

Allied Command Operations

17. Allied Command Operations (ACO) is headquartered at Supreme Headquarters Allied Power Europe (SHAPE), near Mons, Belgium. ACO is commanded by Supreme Allied Commander Europe (SACEUR).[22]

18. ACO is responsible at the strategic level for all alliance operations, and has two subordinate operational standing Joint Force Commands (JFCs): one in Brunssum, Netherlands and the other in Naples, Italy. Both JFCs have the capability to conduct operations from their locations, but also have the capability to deploy land-based Combined Joint Task Forces (CJTFs) to other locations as required. ACO also has a more limited operational standing Joint Headquarters (JHQ) in Lisbon, Portugal. The JHQ has the capability to deploy a sea-based CJTF.

19. Subordinated to the Joint Force Commanders are six Joint Force Component Commands (JFCCs), and four static and two deployable Combined Air Operations Centres (CAOCs), for use in operations.

Allied Command Transformation

20. Allied Command Transformation (ACT) is headquartered at Norfolk, Virginia, U.S.A. Supreme Allied Commander Transformation (SACT) commands ACT.

21. ACT oversees the transformation of NATO’s military capabilities.

Canada - United States Regional Planning Group

22. The Canada - United States Regional Planning Group (CUSRPG)[23] is composed of military representatives of Canada and the United States. Its function is to coordinate the defence efforts of NATO in the Canada - United States (CANUS) region. There is no overall NATO commander for the region. Command arrangements therefore depend on the existing structures of the Canadian and United States armed forces and the North American Aerospace Defence Command (NORAD).

23. The Chief of the Defence Staff of Canada and the United States Chairman of the Joint Chiefs of Staff are responsible to the NATO MC for the co-ordination of NATO matters in the CANUS region.

SECTION 4

NATO PARTNERSHIPS

The Euro-Atlantic Partnership Council

[20] Iceland has no military forces and is represented in the MC at all levels by civilians at comparable levels.
[21] Canadian General Raymond Henault was elected as CMC effective 2005.
[22] *NATO Handbook*, *supra* note 1, ch. 12.
[23] *Ibid*.

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24. The Euro-Atlantic Partnership Council (EAPC)[24] was set up in 1997 to succeed the North Atlantic Cooperation Council.[25] It brings together the 26 Allies and 20 Partners,[26] usually at the ambassadorial level, for political negotiations on NATO-partner cooperation.

Partnership for Peace

25. Whereas the EAPC is the primary forum for political cooperation between NATO and partner countries, the Partnership for Peace (PFP) is geared towards defence cooperation.

26. PFP was created in 1994 and has been joined by 30 countries,[27] ten of which have become full NATO members.[28]

NATO-Russia Council

27. The NATO - Russia Council (NRC) was established in May 2002 in the wake of the 11 September 2001 terrorist attacks. The purpose of the NRC is to provide an opportunity for the NATO countries and Russia to work together as equals to pursue opportunities for joint action.

Mediterranean Dialogue and the Istanbul Cooperation Initiative

28. The Mediterranean Dialogue (MD) was launched in 1994 and provides a forum for political consultations and practical cooperation between NATO and its seven Mediterranean partners: Algeria, Egypt, Israel, Jordan, Mauritania, Morocco and Tunisia.

29. The Istanbul Cooperation Initiative (ICI) began in 2004 as a means to facilitate bilateral practical cooperation between NATO and countries of the broader Middle East.

SECTION 5

NORTH AMERICAN AEROSPACE DEFENSE COMMAND

Background

30. Established in 1958, the North American Aerospace Defence Command (NORAD)[29] is a bi-national United States and Canadian command charged with the missions of aerospace warning and aerospace control for North America.

31. Aerospace warning includes the monitoring of man-made objects in space and the detection, validation, and warning of attack against North America whether by aircraft, missiles, or

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[24] *Ibid.*
[25] The establishment of the North Atlantic Cooperation Council (NACC) in December 1991 brought together the NATO member states and nine Central and Eastern European countries in a new consultative forum. In March 1992, participation in the NACC was expanded to include all members of the Commonwealth of Independent States and by June 1992, Georgia and Albania had also become members. See *Ibid.*
[26] The members of the EAPC are thus: Albania, Armenia, Austria, Azerbaijan, Belarus, Belgium, Bulgaria, Canada, Croatia, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Kazakhstan, Kyrgyz Republic, Latvia, Lithuania, Luxembourg, Moldova, Netherlands, Norway, Poland, Portugal, Romania, Russia, Slovakia, Slovenia, Spain, Sweden, Switzerland, Tajikistan, the former Yugoslav Republic of Macedonia, Turkey, Turkmenistan, Ukraine, United Kingdom, United States, and Uzbekistan.
[27] The PFP countries are: Albania, Armenia, Austria, Azerbaijan, Belarus, Bulgaria, Croatia, Czech Republic, Estonia, Finland, Georgia, Hungary, Ireland, Kazakhstan, Kyrgyz Republic, Latvia, Lithuania, Moldova, Poland, Romania, Russia, Slovakia, Slovenia, Sweden, Switzerland, Tajikistan, Former Yugoslav Republic of Macedonia, Turkmenistan, Ukraine, and Uzbekistan.
[28] Those countries are Bulgaria, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia, and Slovenia.
[29] For information on NORAD contained in this section see *North American Aerospace Defense Command,* online: NORAD < http://www.norad.mil/about_us.htm>.

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space vehicles, utilizing mutual support arrangements with other commands and in support of the designated commands responsible for missile defence of North America.

32. Aerospace control includes providing surveillance and control of the airspace of Canada and the United States. In accordance with the NORAD Agreement,[30] the document used to establish the command, the NORAD commander in chief (CINC), and the deputy commander in chief (DCINC) cannot be of the same nationality. In case of the absence or incapacity of CINC NORAD, DCINC NORAD assumes command. It must be noted that the common usage terms are Commander NORAD (Comd NORAD) and Deputy Commander NORAD (DComd NORAD) vice CINC and DCINC. The common usage terms will be used from this point forward. By an exchange of diplomatic notes on 5 August 2004, the two governments agreed that: "NORAD's aerospace and warning mission for North America also shall include aerospace warning, as defined in NORAD's Terms of Reference, in support of the designated commands responsible for missile defence of North America." The note further states that: "This decision is independent of any discussion on possible cooperation on missile defence."

Organization

33. NORAD's surveillance and control responsibility for North American airspace is divided among three NORAD Regions, one in Canada (Canadian NORAD Region - CANR), one in the continental United States, and one in Alaska. NORAD's headquarters is located in Colorado Springs, Colorado on Peterson Air Force Base. This HQ shares its facilities and most of its personnel with the US NORTHERN Command (NORTHCOM), with many of its US personnel filling both NORAD and NORTHCOM positions. However, the NORAD J3 (Operations) and NORAD J5 (Plans) do not share personnel with the NORTHCOM J3 and J5. CF personnel are assigned to NORAD duties only.

Operations

34. To accomplish the aerospace warning mission, Comd NORAD is responsible for providing integrated tactical warning and attack assessment (ITW/AA) of an aerospace attack on North America to the governments of Canada and the United States. NORAD's aerospace control mission includes detecting and responding to any air-breathing threat to North America. To accomplish this mission, NORAD utilizes a network of ground-based radars and fighters to detect, intercept and if necessary engage any air-breathing threat to the continent. As a part of its aerospace control mission NORAD assists in the detection and monitoring of aircraft suspected of illegal drug trafficking. This information is passed to civilian law enforcement agencies to help combat the flow of illegal drugs into North America.[31]

Air Defence – Canadian Contribution

35. 1 Canadian Air Division (1 Cdn Air Div) is the military organization responsible for providing combat-ready air forces to meet Canada's commitments to the defence of North America and to maintain the sovereignty of Canadian airspace. Canadian air defence forces assigned to NORAD include Tactical Fighter Squadrons at CFB Cold Lake, Alberta, and at BFC Bagotville, Quebec. All squadrons fly the CF-18 fighter aircraft. Additionally, 21 Aircraft Control and Warning Squadron performs the surveillance and control functions.[32]

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[30] In June 2000, the governments of Canada and the United States have agreed to extend the NORAD Agreement for a five-year period. The two countries reached an accord on 16 June 2000 when US Secretary of State Madeleine Albright and Canadian Foreign Affairs Minister Lloyd Axeworthy signed an agreement in Washington, D.C., extending the current arrangement for a further five years from its current expiration date of 12 May 2001. See *North American Aerospace Defence Agreement*, 12, May 1958, Can T.S. 1958 No. 9, online: NORAD <http://www.norad.mil/about_us/NORAD_agreement.htm> [NORAD Agreement].

[31] *NORAD Newsroom,* online: NORAD <http://www.norad.mil/newsroom/recent.htm>.

[32] *Ibid*.

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Counter-Drug Mission

36. In 1989, the U.S. government decided to attack the drug problem along three lines: countering the production of illegal drugs at their source, detecting and stopping their transit into North America, and reducing distribution and use throughout the United States. The U.S. government consulted with the Canadian government on the counter-drug mission and Canada fully concurred with proposed NORAD drug interdiction efforts. In 1991, NORAD was tasked with carrying out the second line of defence, the detection and monitoring of the aerial drug smuggling threat into North America.[33]

37. In cooperation with U.S. drug law enforcement agencies and the Royal Canadian Mounted Police (RCMP), CANR monitors all air traffic approaching the coast of Canada. Any aircraft that has not filed a flight plan may be directed by Canadian NORAD assets to land and be inspected by the RCMP and Customs Canada.[34]

Canada-U.S. Defence Cooperation

38. Canada - U.S. defence cooperation is an essential component of our strategy for the defence of Canada, and a key underpinning of this cooperation is the broad ranging and multileveled partnership between the two countries providing for the defence of North America. Today there are over 80 treaty-level defence agreements and more than 250 MOUs between the two countries.[35]

39. In 1945, the Canada-U.S. Military Cooperation Committee (MCC) was formed to facilitate combined planning for the defence of North America. Its first task was to revise the wartime Canada - U.S. Defence Plan that evolved into the Basic Security Plan (BSP) that provides for the coordinated use of both countries' forces in the event of hostilities in North America. More recently the MCC was called upon to revise the terms of reference for NORAD and develop a new Canada - U.S. Basic Security Document. Today the MCC continues to act as a direct link between the respective national military staffs.

40. One of the most recent developments in Canada-U.S. defence cooperation is the establishment of a Canada-U.S. Planning Group. The *Bi-National Planning Group* (BPG) will be based at NORAD HQ in Colorado Springs.[36] The Planning Group will have a combined staff of Canadian and American personnel headed by a Canadian Lieutenant-General, but it will be independent of both NORAD & NORTHCOM. The purpose of the Planning Group is to:

a. better coordinate Canada-U.S. maritime surveillance, intelligence sharing and threat assessments; and

b. prepare contingency plans and improve the coordination of military support to civilian authorities.[37]

SECTION 6

CONCLUSION

41. This chapter provides a general overview of Canada's military participation in NATO and NORAD. It is important to understand the basic structure and function of these key alliance

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[33] *Ibid.*
[34] *Ibid.*
[35] Department of National Defence/Canadian Forces (DND/CF), *Backgrounder: Canada – United States Defence Relations*, online: DND/CF <http://www.forces.gc.ca/site/Newsroom/view_news_e.asp?id=836>.
[36] Colorado Springs is also the home of the newly created U.S. Northern Command (NORTHCOM).
[37] Canadian NORAD OUTCAN Staff, *Bi-National Planning Group (BPG)*, online: National Defence <http://www.cnos.forces.gc.ca/BPG/BPGmain_e.asp>.

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organizations. A solid understanding of the basic roles and functions of the alliances will assist in dealing with legal issues arising from CF operations conducted in support of the alliances. Legal issues arising from inter-operability matters, such as ROE development, SOFA, and command and control, will be easier to identify and resolve if operational legal advisors understand the purpose and function of the alliances.

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CHAPTER 26

STATUS OF FORCES AND SUPPORT AGREEMENTS

SECTION 1

INTRODUCTION

1. Status of Forces Agreements (SOFA) and Support Agreements[1] can significantly facilitate international operations by ensuring that the CF can operate effectively in foreign countries without being hindered by various bodies of host nation law such as those relating to customs, immigration, fiscal, civil, criminal, weapons and motor vehicles.

2. In an international operation or training scenario, two general legal issues present themselves: what is the status of deployed personnel who will be in the host nation's territory, and what support will the host nation provide to the nation deploying such personnel. The two issues are interrelated because each strikes at the heart of a fundamental dichotomy at play in all cases where the military forces of one nation are present in another. On the one hand, the "law of the flag" implies that such forces will remain under the jurisdiction of the sending nation. On the other hand, the international legal norm of territorial sovereignty means that a nation will have jurisdiction over all entities physically present in its territory. This chapter examines these legal issues in turn, and concludes with a brief discussion of key NATO documents that address these issues between NATO and Partnership for Peace (PfP) states.[2]

SECTION 2

STATUS OF FORCES

3. As a general rule, when armed forces personnel are present in the territory of a foreign state, they have the same status as tourists and are fully subject to the laws of that state. This general rule is subject to two exceptions:

   a. in some cases international law exempts visiting armed forces personnel from the application of the visited state's laws,[3] and

   b. a state may expressly or impliedly agree to exempt visiting armed forces personnel from the application of its laws.[4]

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[1] The term "agreement" is used throughout this chapter, implying that the document establishing the relevant understanding has the status of a treaty. The rights and obligations dealt with in many of the agreements here discussed could also be made the subject of a non-legally binding arrangement. The distinction between "agreement" and "arrangement" is discussed in greater detail in chapters 19 and 27. For more information on SOFAs, see Fleck, ed., *The Handbook of the Law of Visiting Forces* (Oxford: Oxford University Press, 2001).

[2] Canada has entered into numerous Agreements and Arrangements dealing with status of forces and host nation support. The *Agreement between the Parties to the North Atlantic Treaty Regarding the Status of their Forces*, 19 June 1951, is a very important example of a SOFA to which Canada is a party. Recent examples of Canadian agreements with status of forces provisions include the *Agreement between the European Union and Canada Establishing a Framework for the Participation of Canada in the European union Crisis Management Operations*, 24 November 2005, and the *Agreement on the Status of Canadian Forces in Kuwait*, 7 December 2003. An example of an Agreement containing support provisions is the *Agreement Between the Government of the French Republic and the Government of Canada Concerning Mutual Logistic Support*. An example of an arrangement-level document covering host nation support is the *Memorandum of Understanding Between the Turkish General Staff and the Department of National Defence of Canada Regarding the Provision of Host Nation Support for the Transit of Canadian Forces in Support of International Security Force*. The *Technical Arrangements between the Government of Canada and the Government of the Islamic Republic of Afghanistan* is an arrangement that deals with both status and support issues. Importantly, a written document may not be called a SOFA but may contain the same type of legally binding obligations found in a SOFA. Though rare, Defence Contract Agreements (DCAs) have contained SOFA-like provisions.

[3] Richard J. Erickson, "Status of Forces Agreements: A Sharing of Sovereign Prerogative" (1994) 37 A.F.L. Rev. 138.

[4] *Ibid*. at 139.

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4. An important element of exception (a) above (that international law may, in some circumstances, work to exempt a visiting force from host nation law) is that during a time of armed conflict, status of military personnel in enemy territory is governed by the law of armed conflict (LOAC). In times of armed conflict, military forces in enemy territory, including occupied territories, are immune from the enemy state laws.[5] Additionally, it is not uncommon for CF units to be present in a state under the authority of a Security Council Resolution (SCR).[6] At times the authorizing SCR may invoke the provisions of the UN Model Status of Force Agreement (SOFA).[7]

Status of Force Agreements

5. With respect to exception 2(b) above, express or implied agreement of a foreign state to exempt visiting forces from application of its laws is normally captured in a Status of Forces Agreement (SOFA).

6. The purpose of a SOFA is to capture an understanding whereby the host nation agrees to share its sovereign authority over those on its territory with the sending state by granting to the sending state certain rights over its personnel deployed in the host nation. It is important to remember that SOFAs merely define the status of military forces in the territory of friendly states and depending upon the wording contained in a SOFA may not themselves authorize the presence or activities of those forces.[8]

7. A SOFA may deal with a wide variety of subject matters. The breadth of a SOFA will depend on many factors including the number of personnel deployed, the complexity and planned duration of the deployment, the nature of the relationship between the host and sending nations, and the system of government in the host nation. The following matters are dealt with in almost every SOFA:

a. **Criminal Jurisdiction** - This is one of the most important status issues. Normally the SOFA will grant the sending state criminal jurisdiction over its own armed forces personnel in certain circumstances;

b. **Claims** - International deployment of armed forces often results in claims for damage caused by those armed forces. A procedure for dealing with these types of claims and provisions for dealing with the sharing of liability are common;

c. **Carrying of Arms/Use of Force** - The SOFA may permit members of the sending state's armed forces to carry arms in certain circumstances. The SOFA may also provide the sending state authority to take steps to provide for the security of its deployed armed forces and facilities;

d. **Entry/Exit Procedures** - A sovereign state has the right to specify the passport and visa requirements for persons visiting its territory. However, the issuance of passports and visas to military personnel is expensive, impractical and slow – especially in an emergency situation. Therefore, the SOFA might provide that military personnel may be exempted from certain customs requirements. For example, a SOFA may state that visiting forces can enter and exit the receiving state using military identity cards and orders;

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[5] *Ibid*.
[6] CF operations in East Timor, Bosnia, Haiti and Afghanistan were conducted, at least in part, on the basis of authority from a UN Security Council Resolution.
[7] For example, when the UN authorized the UN Stabilization Mission in Haiti (MINUSTAH) by UNSCR 1542 (2004) it noted application of the UN model status-of-force agreement (dated 9 October 1990, and done as a template for future missions) until a SOFA was done with the Haitian authorities. In the case of the UN authorized UN Mission in Sudan, the UN quickly concluded an Agreement with the Government of Sudan to govern status of the mission members.
[8] Erickson, *supra* note 3 at 139.

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e. **Duties, Taxes and Other Charges** - The SOFA might provide that the sending state is exempt from duties, taxes and other charges on goods and services imported into or acquired in the receiving state for official use. The SOFA might also exempt the personnel of the armed forces of the sending state from personal income tax and other tax based upon residency in the receiving state; and

f. **Drivers' Licences, Registration and Insurance** - The SOFA may provide that visiting armed forces personnel may operate motor vehicles using drivers' licenses issued by the sending state. The sending state's armed forces personnel might also be exempt from receiving state vehicle registration and insurance requirements.

8. Other matters addressed in a SOFA may include:

a. the requirement for visiting forces' personnel to respect the law of the receiving state;

b. wearing of uniforms;

c. privileges regarding the use of communications equipment on host nation territory;

d. civil jurisdiction;

e. procedures for arrest and service of legal documents;

f. importation and use of personal property;

g. authority to establish base commissaries, exchanges, sales and service activities, and recreational facilities;

h. health care;

i. postal services;

j. use of transportation infrastructure (e.g., exemption from toll road charges, landing and port fees, navigation and overflight charges and other similar charges);

k. use of currency and banking facilities;

l. privileges for contractor employees;

m. procedures for procuring goods from local sources;

n. utilization of local labour; and

o. application of customs rules and regulations.[9]

Equivalent Administrative and Technical Staff Status

9. The 'level' of status of visiting forces' personnel in the host nation will obviously depend on the wording of the applicable SOFA and will undoubtedly differ between SOFAs. While most SOFAs will set out status through ad hoc provisions dealing with some or all of the subject matters discussed above, a SOFA may also grant administrative and technical staff status through reference to the *Vienna Convention on Diplomatic Relations*.

[9] *Ibid*. at 147-152.

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10. Administrative and technical staff status (A & T status) under the *Vienna Convention on Diplomatic Relations* is intended to treat certain armed forces personnel as if they were part of the embassy staff.[10] It is therefore appropriate to call it "equivalent A & T status."

11. Military personnel having A & T status are granted the immunities provided for in the *Vienna Convention on Diplomatic Relations* to persons of comparable rank. The most important of these are full immunity from the criminal jurisdiction of the receiving state, and immunity from the civil jurisdiction of the receiving state to the extent that the act giving rise to the action was done in the performance of official duty.[11]

12. A & T status is an appropriate solution, provided the receiving state will grant such status, if armed forces are being deployed to foreign territory for a short period of time (e.g., a deployment of a few days for a joint military exercise or for a relief effort).

Negotiation of SOFAs Governing CF Deployments

13. CF policy is to retain criminal and disciplinary jurisdiction over deployed CF members where possible. In many cases of international operations or exercises this will require the negotiation and conclusion of a SOFA with the host nation. Ideally a SOFA will be a "status of forces agreement" rather than an equivalent arrangement so that the terms of the understanding are legally binding on the host nation. In the event that a status of forces agreement is to be concluded between Canada and another state, such an agreement will normally be negotiated by Foreign Affairs, with DND/CF playing a very significant supporting role. Such an agreement will ultimately be signed by the executive, usually the relevant ambassador, the Minister of Foreign Affairs, or the Minister of National Defence.

14. In other cases Canada will send a diplomatic note in advance of a deployment requesting the host nation confirm status arrangements.[12] Again, as these types of agreements are done by the executive and have binding force at international law, Foreign Affairs will be the lead department in the drafting of and follow up on Diplomatic Notes of this sort, with the DND/CF providing advice to ensure its requirements are met.

15. Finally, in certain cases MOUs or other arrangement-level documents will be concluded with the host country to set out status.[13] As has been touched upon, this method of obtaining special status for CF deployments is not favoured since such arrangements are not legally binding but are merely morally or politically binding. The advantage to this method is expediency: DND will typically develop and ultimately sign such arrangements, with minimal if any input from Foreign Affairs.

SECTION 3

VISITING FORCES IN CANADA

16. Once Canada has agreed to the presence in its territory of personnel of a foreign military, the issue of the status of those foreign military personnel also arises. As discussed above, personnel of a foreign military in Canadian territory will have the status of tourists and will be subject to Canadian law in the absence of additional authority.

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[10] *Ibid.* at 141-142.
[11] *Ibid.* at 141-142.
[12] Examples of this type of Diplomatic Note is that of the *Embassy of Canada to the Ministry of Foreign Affairs of the Islamic Republic of Afghanistan relating to the CF's contribution to US–led Operation Enduring Freedom*, and the *Note of the High Commission of Canada to the Ministry of Foreign Affairs of the Democratic Socialist Republic of Sri Lanka* relating to the deployment of the DART.
[13] A previously mentioned example of this type of document is the *Technical Arrangements between the Government of Canada and the Government of the Islamic Republic of Afghanistan.*

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17. However, Canada has a long history of welcoming the armed forces of its allies into its territory and has concluded many general and specific agreements and arrangements with foreign states granting special status to visiting military personnel.

History of Visiting Forces Legislation

18. The first Canadian legislation to address the status of foreign armed forces in Canada was the *Visiting Forces (British Commonwealth) Act*[14] enacted in 1933. This legislation had limited reach as it applied only to the armed forces of the British Commonwealth present in Canada.

19. The Second World War brought significant U.S. military personnel to Canada. Their status was considered of sufficient importance that a reference on this issue was made to the Supreme Court of Canada in 1943.[15] During the Second World War, the status of U.S. armed forces in Canada was governed by wartime regulations. In 1947, however, U.S. military forces were granted status comparable to British Commonwealth armed forces by the *Visiting Forces (United States of America) Act.*[16]

20. In 1949 Canada became one of the founding members of the North Atlantic Treaty Organization (NATO). In 1951 NATO members agreed on a multilateral SOFA that would apply within the territory of all member states.

21. The NATO SOFA was partly implemented in Canada by the *Visiting Forces (North Atlantic Treaty) Act*[17] enacted in 1951. This legislation was replaced by the *Visiting Forces Act*[18] (*VFA*) in 1968.

Visiting Forces Act* and *Regulations

22. The *VFA* and *Visiting Forces Regulations*[19] (*VFR*) are applicable to armed forces from a "designated state" present in Canada in connection with official duties. Such armed forces are styled "visiting forces" in the *VFA*. The *VFA* and *VFR* address matters such as:

a. disciplinary jurisdiction over visiting forces;[20]

b. waiver of primary jurisdiction over a member of visiting forces;[21]

c. procedural matters with respect to service courts of visiting forces;[22]

d. arrest of members of visiting forces;[23]

e. incarceration of members of visiting forces;[24]

f. authority of visiting forces to perform police functions;[25]

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[14] *Visiting Forces (British Commonwealth) Act,* S.C. 1932-33, c. 21, consolidated as R.S.C. 1952, c. 283.
[15] *In The Matter Of A Reference As To Whether Members Of The Military Or Naval Forces Of The United States of America Are Exempt From Criminal Proceedings In Canadian Criminal Courts*, [1943] S.C.R. 483.
[16] *Visiting Forces (United States of America) Act*, S.C. 1947, c. 47, consolidated as R.S.C. 1952, c. 285.
[17] *Visiting Forces (North Atlantic Treaty) Act,* S.C. 1951 (2nd Sess.), c. 28. While Canada's executive has the power under the Crown prerogative to conclude treaties, the fact that Canada's constitution provides for a legislative branch means that international treaties must be implemented by domestic statute before they have effect in Canada.
[18] *Visiting Forces Act,* S.C. 1967-68, c. 23, consolidated as R.S.C. 1985, c. V-2 [*VFA*].
[19] *Visiting Forces Regulations*, C.R.C, c. 1598 (1978) [*VFR*].
[20] *VFA*, *supra* note 18, ss. 5 - 7.
[21] *Ibid.,* s. 7; *VFR*, *supra* note 19, ss. 3 - 4.
[22] *VFA*, *supra* note 18, ss. 8, 13; *VFR, supra* note 19, ss. 7-8.
[23] *VFA*, *supra* note 18, s. 10; *VFR supra* note 19, s. 6.
[24] *VFA*, *supra* note 18, s. 11; *VFR, supra* note 19, s. 5.
[25] *VFA*, *supra* note 18, s. 12; *VFR, supra* note 19, s. 6.

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g. the right of visiting forces to possess explosives, ammunition and firearms;[26]

h. claims for personal injuries and property damage caused by visiting forces;[27]

i. application of the *Official Secrets Act* to visiting forces;[28]

j. exemption of visiting forces from certain forms of taxation;[29]

k. licensing and registration of service vehicles of visiting forces;[30]

l. duty-free importation of equipment, provisions, supplies and other goods for visiting forces;[31]

m. duty-free importation of private motor vehicles, furniture and personal effects belonging to members of visiting forces;[32]

n. duty-free fuel, oil and lubricants for use in service vehicles, aircraft or vessels of visiting forces;[33] and

o. attachment of visiting forces to the CF and of the CF to visiting forces.[34]

23. Under the *VFA* the executive retains the discretion to determine which countries will be designated such that the *VFA* and associated regulations have application to forces visiting from that state, and to determine the extent to which the *VFA* and regulations apply to such forces.[35] The executive will designate states by proclamation.[36]

SECTION 4

SUPPORT AGREEMENTS

General

24. Above, the issue of status of military personnel deployed internationally was reviewed. A concurrent issue concerns the support that the host nation will provide visiting forces. An understanding governing such support can be captured in a broad Mutual Support Agreement (MSA)[37] or in a more focused Host Nation Support Agreement (HNSA).[38] The two are discussed

[26] *VFA*, *supra* note 18, s. 14.
[27] *Ibid.*, ss. 15-19.
[28] *Ibid.*, ss. 20-21.
[29] *Ibid.*, s. 22.
[30] *Ibid.*, s. 23.
[31] *Ibid.*, s. 24.
[32] *Ibid.*, s. 25.
[33] *Ibid.*, s. 26.
[34] *Ibid.*, s. 27; *Visiting Forces Attachment and Serving Together Regulations*, C.R.C., c. 1597 (1978), ss. 1 - 6.
[35] *VFA*, *supra* note 18, s. 4 reads:

> The Governor in Council may by proclamation:
> a. designate any country as a designated state for the purposes of this Act [*i.e.* the *VFA*];
> b. declare the extent to which [the *VFA*] is applicable in respect of any designated state;
> c. designate civilian personnel as a civilian component of a visiting force; and
>
> revoke or amend any designation or declaration made under paragraph (a), (b) or (c).

[36] For example *Proclamation Designating Certain Countries as Designated States*, C.R.C., c. 1596 and *Proclamation Designating Certain Countries as Designated States for Purposes of the Act*, S.O.R./93-264.
[37] The previously mentioned *Agreement Between the Government of the French Republic and the Government of Canada Concerning Mutual Logistic Support* is an example of an MSA.
[38] A previously mentioned example of an arrangement-level document covering host nation support is the *Memorandum of Understanding Between the Turkish General staff and the Department of National Defence of Canada Regarding the Provision of Host Nation Support for the Transit of Canadian Forces in Support of International Security Force*.

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in turn. Given the breadth of subject matter that may be addressed by each type of Agreement, they are discussed here through reference to support agreements involving the CF.

Mutual Support Agreements (MSA)

25. The bulk of Canadian MSAs are concluded with NATO-member countries. DND has entered into reciprocal MSAs for various types of logistic support. CF MSAs include:

a. NATO Standardization Agreements (STANAGS);

(1) STANAG 3381 (to be replaced by 2034) (NATO Standard Procedures for Compensation). Actual means and methodology of payment for services and facilities are detailed in this STANAG.

(2) STANAG 3113 (Provision of Support to Visiting Personnel, Aircraft and Vehicles). Details of those materials and services provided free of charge by the host nation and those for which the sending nation will pay, are prescribed in Annex A to STANAG 3113.[39]

(3) STANAG 2135 (Procedures for Requesting and Providing Logistic Assistance). Simplified procedures for handling the standard NATO Invoice/Claim form are detailed in this STANAG.

b. CF-United States Air Force Petroleum, Oils and Lubricants Suspense Account Arrangement (CF-USAF POL Suspense Account Arrangement);[40]

c. CF-United States Navy-United States Marine Corps Fuel Exchange Agreement (CF-USN-USMC Fuel Exchange Agreement).[41]

Host Nation Support Arrangements (HNSA)

26. Host Nation Support (HNS) is an important factor in any operational or military exercise scenario. In many cases MSAs will not cover the field for a planned international operation or exercise. In such cases HNSAs might be made with participating nations.

27. Not only can HNS reduce the amount of organic support that sending nations need to deploy on operations, but such support can result in coordinated planning and provisioning resulting in overall resource efficiency.

Form of HNSAs

28. Formal HNSAs will be entered into only when the support requirements are of a continuing nature or when a formal HNSA is requested by the forces or agency providing the support.[42]

29. Short-term or ad hoc arrangements for logistic support to cover individual exercises or deployments may be made through informal means including correspondence or, occasionally, verbal arrangement.

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[39] See CFAO 223-1, Agreements with NATO Countries – Visiting Military Aircraft and Crews, for CF implementation of the provisions of STANAG 3113.
[40] See CFAO 223-1, para. 7. The associated accounting procedure is outlined in A-FN-100-002/AG-004, DND Financial Administration Manual, Chapter 53.
[41] CFAO 223-1, paras. 1, 7.
[42] CFAO 36-42, Logistic Support for Canadian Forces Outside Canada, para. 5.

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30. HNSAs will always be developed with reference to existing SOFAs or other relevant Agreements and arrangements

Authority to Enter into HNSAs

31. The Minister of National Defence (MND) has been authorized to enter into inter-government or inter-service arrangements for the provision of logistical support to the CF deployed or operating outside of Canada.[43] With this authorization the MND may conclude HNSAs with the appropriate authorities of:

a. any friendly state, for exercise purposes only; or

b. states that are parties to the North Atlantic Treaty, for any purpose other than exercises.[44]

32. Requests for authority to enter into short-term or *ad hoc* HNSAs shall be submitted to NDHQ. The request shall contain sufficient particulars to permit proper consideration including:

a. types of support and estimated cost;

b. number of personnel requiring support;

c. period of deployment; and

d. source of support.[45]

33. NDHQ may authorize the commander concerned to enter into a short-term or ad hoc HNSA on behalf of the MND. In these circumstances, the commander signs the HNSA on behalf of the MND.[46]

34. NDHQ will normally negotiate in detail a formal HNSA. A draft HNSA, agreed to by the commander and the appropriate authorities of the other state, shall be prepared with appropriate legal advice and submitted to the Senior Assistant Deputy Minister (Material) [NDHQ/Sr ADM (Mat)] for consideration and signature by or on behalf of the Minister.[47]

35. The appropriate commander will normally negotiate in detail the implementation plans for an approved HNSA.[48]

Parties to a HNSA

36. In some countries, the CF will be expected to use the services of the host nation military authorities in arranging for local contracting. This can benefit the CF; obviously, where the host nation military authorities have favourable contracting rates, it makes sense to request to use the same contract to meet the needs of the CF. Further, when goods and services are procured through host nation sources, contract claims will be dealt with by the host nation, rather than by Canada and a third party contractor.

37. For other countries, the CF will be authorized to contract directly with local private sources. This said, there are potential problems with dealing directly with trade. The CF must avoid competition for scarce resources between the CF and the civilian population. In addition,

[43] This authorization flows from Order in Council P.C. 1972-14/2307 of 21 Sept 72, and is discussed in CFAO 36-42.
[44] CFAO 36-42, paras. 1 - 4.
[45] *Ibid*., para. 7.
[46] *Ibid*., para. 7.
[47] *Ibid*., para. 8.
[48] *Ibid*., para. 9.

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and as discussed above, dealing directly with local trade means that contract conflicts will be addressed between Canada and the third party contractor, with resolution of such conflicts coming through host nation legal mechanisms.

SECTION 5

KEY NATO DOCUMENTS

38. This section provides a brief description of the key NATO documents touching on the issues discussed in this chapter.

a. **NORTH ATLANTIC TREATY -** The North Atlantic Treaty was done at Washington D.C. on 4 April 1949 and is the framework for the North Atlantic Treaty Organisation.

b. **PARIS PROTOCOL** - The Protocol on the Status of International Military Headquarters set up pursuant to the North Atlantic Treaty (known as the "Paris Protocol") was done in Paris on 28 August 1952, and defines the status of international military headquarters, and their personnel, in NATO territory. It is important to note that although Canada has signed the Paris Protocol, it has not yet ratified it.

c. **NATO STATUS OF FORCES AGREEMENT -** The Agreement between the Parties to the North Atlantic Treaty Regarding the Status of their Forces (NATO SOFA) was done in London on 19 June 1951, and defines the status of one NATO party's forces while they are deployed on another NATO party's territory. The Supplementary Agreement to the NATO SOFA, between Germany and those NATO states with forces stationed in Germany, elaborates on the basic provisions of NATO SOFA and implements arrangements suited to the German context.

d. **PfP STATUS OF FORCES AGREEMENT -** The Agreement among the States Parties to the North Atlantic Treaty and the other states participating in the Partnership for Peace Regarding the Status of their Forces (PfP SOFA) was done in Brussels on 19 June 1995, and defines the status of one PfP party's forces while they are deployed on another PfP, or NATO, party's territory.

e. **FURTHER ADDITIONAL PROTOCOL** - The Further Additional Protocol to the Agreement among the States Parties to the North Atlantic Treaty and the other states participating in the Partnership for Peace regarding the Status of their Forces was done in Brussels on 19 December 1997, and applies the provisions contained in the Paris Protocol to PfP nations.

39. There may be other relevant agreements or arrangements between NATO and other individual nations that impact forces operating in or transiting through foreign territory. It is imperative to become familiar with the various authorities that may affect an operation or exercise. Moreover, it should be remembered that not all nations have signed and/or ratified either the PfP SOFA, the Paris Protocol or the Further Additional Protocol.

SECTION 6

CONCLUSION

40. SOFAs and other types of support agreements are treaties, which create binding obligations upon states. A SOFA, if ratified prior to an international deployment into another country, can literally save significant staff time and financial expense as various administrative and legal obstacles relating to visas, customs, immigration, motor vehicle use, weapons carriage, liability under local host state domestic law are waived or negotiated. A well-crafted SOFA will

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not only facilitate operations and be of financial benefit but it will also protect CF members abroad in foreign countries from exposure to potential liability under local laws.

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CHAPTER 27

MEMORANDA OF UNDERSTANDING AND NON-LEGALLY BINDING ARRANGEMENTS[1]

SECTION 1

INTRODUCTION

1. Often the CF during domestic and international operations will enter into non-legally binding written arrangements. While not legally binding these instruments are useful for they remove ambiguities by defining arrangements in writing and create moral and political commitments to abide by the written undertaking. MOUs often facilitate operations by providing a shared understanding on matters such as personnel exchange, provision of services, transport and intelligence sharing.

2. This chapter briefly outlines the key legal and administrative directives relating to MOUs.

SECTION 2

MEMORANDA OF UNDERSTANDING

3. States and other entities enter into arrangements that are not legally binding. Such arrangements are normally referred to as memoranda of understanding (MOU) or 'arrangements.'[2]

4. In Canadian practice, MOU are sharply differentiated from treaties in legal effect. For Canada, MOU create commitments of a political and moral character but are not formally binding in, or governed by, law, either international or domestic.[3] Consequently, a conscious effort is made to ensure that MOU do not use language of legal obligation. For example, 'will' is used instead of 'shall' and 'participants' is used instead of 'parties.' The form of the instrument is also kept as simple as possible.[4] The Canadian practice is to register these instruments in a Register of Understandings and Arrangements separate from the Treaty Register.

5. The CF and the Department of National Defence (DND) frequently enter into MOU arrangements, primarily with government departments or ministries of other states, but never with the states themselves. DAOD 7014-0 defines MOU for the DND and CF as "written, approved, non-contractual, non-legally binding arrangements that may be developed at any level within the DND and/or the CF, whereby the DND and/or the CF and other participants agree to cooperate in a project, program or similar undertaking." A registry of all MOU entered into by DND/CF is kept by the National Defence MOU Coordinator (NDMOUC), who currently works within the Directorate of Law/International, office of the JAG.[5]

6. For administrative purposes, an MOU is treated as if it is legally binding.[6]

7. The term 'MOU' also applies to amendments and annexes thereto, and other related documents, such as implementing arrangements, supplementary arrangements, technical

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[1] In this chapter an "agreement" refers to document that is binding at domestic law, and an "arrangement" refers to a document that is not legally binding. This chapter deals specifically with contractual agreements, which are binding at domestic, but not international law, and MOUs, which are not legally binding.
[2] As is discussed in chapter 19, documents have in the past been titled memorandum of understanding but have, in fact, had the status of treaty. In this chapter, MOU refers to an arrangement between entities that is not legally binding.
[3] L.H. Legault "Canadian Practice in International Law during 1979 as Reflected Mainly in Public Correspondence and Statements of the Department of External Affairs" (1980) 18 Can. Y.B. Int'l L. 301 at 312-313; and W.J. Fenrick "Law and Practice", JAG Newsletter, July-December 1993 at 12 -15.
[4] Legault, *ibid*. at 312 and Fenrick, *ibid*. at 13.
[5] DAOD 7014-0, Memoranda of Understanding (MoU).
[6] *Ibid*.

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arrangements or another similar documents, whether they are stand-alone documents or based upon an existing MOU.[7]

8. MOU are restricted to arrangements with participants which are external to the DND and the CF.

9. In the context of international arrangements, the 'other participants' in an MOU may include, but may not necessarily be limited to:

a. foreign armed forces;

b. departments or ministries of foreign governments;

c. North Atlantic Treaty Organization (NATO) agencies.[8]

d. North American Aerospace Defence (NORAD) agencies;

e. Non-government organizations (NGOs); and

f. UN Agencies.

10. Because other participants in a MOU are guided by their own policies, DND and CF negotiators shall compromise, within the limits of governing policy, to achieve an arrangement satisfactory to both participants, but in particular, satisfactory to the DND and the CF.[9] Legal and financial advice shall be obtained before any MOU is approved.[10] The NDMOUC should also be consulted to determine whether a suitable arrangement already exists.[11] In any event, the status and validity of all MOU shall be reported annually to NDMOUC.[12]

11. While not exhaustive, the following are situations where MOU may be used by the DND or CF:

a. cooperative research and development;

b. information exchange;

c. international projects involving equipment acquisition or construction, it being clearly understood that an MOU is not a procurement instrument and that any procurement resulting from, or required by, the implementation of an MOU is to be accomplished in accordance with national contracting laws and regulations;

d. exchange, loan or attachment of personnel between countries;

e. secondment of personnel;

f. cooperative material support arrangements;

g. division of responsibilities concerning administrative arrangements for major projects;

h. provision of services to other departments or agencies on a cost recoverable basis; and

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[7] *Ibid*.
[8] *Ibid*.
[9] *Ibid*.
[10] DAOD 7014-0 and 7014-1, Memoranda of Understanding (MoU) Development.
[11] DAOD 7014-1.
[12] DAOD 7014-0.

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i. deployment and transport of military personnel and equipment.

12. A MOU should not generally be used for the following:

a. the commitment of DND resources to non-defence agencies governed by B-GS-055-000/AG-001, Provision of Services to Non-Defence Agencies;

b. the provision of training to foreign military forces governed by CFAO 9-68, Training of Foreign Military Forces; and

c. real estate and utility agreements or arrangements governed by C-08-005-120/AG-000, Canadian Forces Construction Engineering Manual, Chapters 36 and 50.

13. MOUs are frequently drafted by operational legal advisors and the commander's staff. MOUs are structured in a prescribed way, and as such, DAOD 7014 and its Writing Guidelines must be followed carefully when preparing an MOU. Consequently before any MOU is drafted DAOD 7014 should be consulted. Additionally, the NDMOUC and DLaw/I, for international operations, should be consulted for precedents.

14. Importantly, any CF officer who plans to sign an MOU on behalf of the CF or DND must have specific authority to do so. Consequently, DAOD 7014 must be consulted to determine whether the operational commander has the authority to enter into an MOU, or whether the commander can obtain a delegated authority to do so.

SECTION 3

CONCLUSION

15. MOUs can be an effective tool that enhances and facilitates operations by removing ambiguities and structuring relationships with other parties that are cooperating with a deployed unit in some way. Legal advisors and commanders must ensure that any MOU complies with DAOD 7014 before it becomes final.

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CHAPTER 28

RULES OF ENGAGEMENT AND TARGETING

SECTION 1

INTRODUCTION

1. This chapter will provide an overview of the operational legal framework that applies to the use of force by CF members and to discuss the process by which CF members are authorized to use force on international and domestic operations. Specific reference will be made to how the relevant legal parameters for any given operation are defined in the Rules of Engagement (ROE) and the Targeting Framework and Directive.

SECTION 2

LEGAL FRAMEWORK

General

Requirement to Control the Use of Force

2. Whether a CF operation is international or domestic, or is conducted during peacetime or armed conflict, the use of force by CF members is controlled in order to ensure discipline and to protect persons from unnecessary injury and property from unnecessary damage. International and domestic law prescribe the boundaries of force that may be used by CF members on operations. The law may also delineate the methods and means by which that force may be applied.

International Operations

3. As illustrated in Part IV "International Operations - Legal Basis," international law provides a basis for the Government of Canada's decision to deploy the CF in the exercise of the Crown prerogative. Once deployed, international and domestic law will further define the legal parameters in which force may be used. Depending upon the type of international operation one or more of the various legal regimes identified in Part V, such as The Law of Armed Conflict, International Human Rights Law, Law of the Sea, Air Law, may be relevant. Additionally CF members are at all times individually legally responsible for their actions and are subject to Canadian legislation, such as the *NDA* (primarily the *Code of Service Discipline* (*CSD*)) and *Criminal Code*.

Domestic Operations

4. The legal authority for the CF to conduct domestic operations is found in Canadian law and is elaborated in Part III. Canadian law will further define the manner in which CF members may use force during the conduct of those domestic operations. For example, section 273.6(2) of the *NDA* provides a legal authority for the conduct of domestic operations to assist civilian law enforcement authorities.[1] The legal framework defining the manner in which force may be used by members of the CF during a 273.6 (2) domestic operation is further refined in Canadian law, particularly the *Criminal Code of Canada*.[2] Depending upon the type of domestic operation, other domestic legislation may also impact on when and how force may be employed. For example, the lawful parameters of using force during a domestic operation to assist in enforcing the *Coastal Fisheries Protection Act* may be shaped by the CFPA, as well as the *NDA* and *Criminal Code* and the exercise of the Crown prerogative.

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[1] See Part III, Chapter 8 of this Manual regarding the authority to use force under Canadian law.
[2] *Criminal Code,* R.S.C. 1985, c. C-46 [*Criminal Code*].

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SECTION 3

CONTROLLING THE USE OF FORCE

General

5. Controlling the use of force by CF members is both an operational command responsibility and legal imperative. The CF has developed a framework to ensure that political direction and objectives as well as legal, diplomatic, policy and operational considerations are coherently conveyed in military orders. This is to make sure the level of force authorized for CF members contributes towards the lawful achievement of assigned missions.

6. This CF framework is found in B-GJ-005-501/FP-000, Use of Force in CF Operations Manual (*Use of Force Manual*). It provides that the CF may use force in self defence and as authorized by rules of engagement (ROE). It also includes the Targeting Framework as approved by the CDS.[3]

Self Defence

7. The *Use of Force Manual* provides that self defence is comprised of national self defence and personal self defence. The legal basis for the CF to use force in self defence is different for each category. Generally, the use of force by the CF in national self defence, whether in Canada or abroad, requires authorization from the Government of Canada. National self defence includes the defence of Canada, Canadian citizens, Canadian territory and property from hostile acts[4] or hostile intent.[5] For example, depending on the circumstances, the rescue of nationals abroad to remove Canadian citizens from a state undergoing civil unrest could be based on the exercise of national self defence.[6] Operations in Kuwait in 1991 and Afghanistan in 2001 were examples of the exercise of the collective right of self defence.

8. International and Canadian law recognize the authority to use appropriate force, up to and including deadly force[7], in personal self defence.[8] The *Use of Force Manual* recognizes this legal right and recognizes that CF members have the authority, without further written or oral direction, to use force in personal self defence to protect, against a hostile act or hostile intent, oneself, other members of the CF, and non-Canadian military personnel who are attached or seconded to a Canadian force.[9] The exercise of the use of force in personal self defence may be the subject of further military direction (e.g., types of weapons authorized or hold fire orders).

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[3] B-GJ-005-501/FP-000, Use of Force in CF Operations (Use of Force Manual), para. 201.2, online: DIN <http://www.dcds.forces.ca/jointDoc/docs/uof_e.pdf>.
[4] *Ibid.* at para. 108.3 defines "a hostile act against CF personnel, units or forces" as "an attack or other use of force against CF personnel where there is a reasonable apprehension that death or serious injury will be the likely result…. Examples of [such] hostile acts… include: firing of small arms, ordnance or [nuclear-biological-chemical] weapons at or in the vicinity of [CF] where there is a risk of death or serious injury; and conducting mine laying operations when such actions pose a risk of death or serious injury to the [CF]."
[5] *Ibid.* at para. 109.3 defines a "hostile intent against CF personnel, units or forces" as "the threat of an attack or other use of force against CF personnel where there is a reasonable apprehension that death or serious injury will be the likely result…. Examples of such hostile intent… include: weapon pointed directly at an individual; arrangement of units into battle formation; fire-control systems locked-on; weapons launcher loaded and pointed; acoustic detection of torpedo or missile-tube doors in operation; detection of data-link or sensor transmissions of a type associated with attack; and hostile electronic-countermeasures activity."
[6] The rescue of Canadian nationals aboard may also be authorized under other legal basis such as the consent of the foreign state or UN Security Council resolutions. See Chapter 13 – Law of Self Defence and Chapter 16 - Other International Operations.
[7] B-GJ-005-501/FP-000, defines "deadly force" as "That force which is intended to cause death or serious injury regardless of whether death or serious injury actually results. This is the ultimate degree of force".
[8] The right to use force in personal self defence is part of customary international law. Domestically the right to self defence is found in sections 25, 27, and 34 of the *Criminal Code, supra note* 2.
[9] B-GJ-005-501/FP-000, para. 204.2.

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SECTION 4

RULES OF ENGAGEMENT

Purpose of ROE

9. ROE are defined as orders that are intended to ensure commanders and their subordinates do not use force or other measures beyond that authorized by higher command.[10] ROE are an essential instrument of command and control for ordering and controlling the use of force during military operations. ROE are orders (i.e., lawful commands[11]) issued by a competent military authority, which define the circumstances, conditions, degree, manner and limitations within which force may be applied to achieve military objectives in furtherance of national policy.[12] ROE therefore regulate the use of force by the CF in both international and domestic operations, in peacetime, periods of tension and armed conflicts. ROE are not used to assign missions or tasks (these orders are conveyed in operations or tasking orders) nor are they used to give tactical instructions. They may be standing or mission specific ROE.[13] Mission specific ROE are tailored to meet the requirements of each operation.

ROE and the CF

10. With the exception of personal self defence, ROE provide the sole CF authority for CF members to use force. The CDS is the authority to approve ROE or changes to ROE for the CF.[14] Consequently, ROE authorized for allied, coalition and UN mandated operations shall be the subject of review and authorization by the CDS. Similarly, with the exception of personal self defence, CF members on exchange or assignment with the military force of another state, or serving in coalitions, are only authorized to use force pursuant to ROE approved by the CDS. This is to ensure that CF members use force that is compliant with Canadian legal, policy and operational requirements. Similarly other nations may issue ROE that uniquely address their own national requirements.

11. Use of force summary cards are issued in a portable format so that CF members may easily refer to them on operations.[15] Use of force summary cards or changes to the cards are approved by the Commander CEFCOM or Commander CANADA COM.[16]

Factors Influencing ROE Development

12. It is important to note that ROE are not simply a statement of the legal parameters within which force may be used. ROE are an authorization to use force within defined legal, policy, diplomatic and operational factors.[17]

13. **Legal Considerations.** Use of force by the CF shall comply with international and Canadian law and, where applicable, host nation law. The applicable legal regimes will delineate the framework within which CF planners may develop ROE for CDS approval.[18]

14. **Political and Policy Considerations.** To secure and protect national interests at home and abroad, the Government of Canada establishes policies, goals and strategic objectives. The

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[10] *Ibid.,* para. 206.3.
[11] A failure to comply with rules of engagements could be an offence under the *NDA*.
[12] B-GJ-005-501/FP-000, Glossary.
[13] For example, there are standing ROE for operations such as counter drug missions. In respect of contingency operations such as OP APOLLO in Afghanistan in 2002, mission specific ROE were authorized.
[14] B-GJ-005-501/FP-000, para. 206.2.
[15] ROE summary cards are issued for the purposes of training and re-familiarization during the course of operations. The issuance of these cards is not intended to remove the requirements for commanders at all levels to ensure proper understanding and application of the ROE.
[16] B-GJ-005-501/FP-000, para. 217.1.
[17] Lieutenant-Commander Guy R. Phillips, "Rules of Engagement: A primer" (The Army Lawyer, 1993).
[18] For example the *Convention of the Prohibition of Personnel Mines* and the *Anti Personnel Mines Act* generally prohibit the use, transport or production of anti personnel mines.

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CF, and the use of force by the CF, is one means to meet Government of Canada policies and objectives. Other methods include economic, social, cultural, diplomatic and technological instruments. The CF is an instrument of national policy and power. CF planners take into consideration Government of Canada policies and strategic objectives when developing ROE for a specified operation.[19]

15. **Diplomatic Considerations.** During international operations and, in particular, during combined[20] operations, the authority to use force reflects the collective objectives of the alliance or coalition.[21]

16. **Operational Considerations.** The use of force will also depend on current and future operational considerations (*e.g.* the use of force may be restricted in designated circumstances to avoid friendly fire incidents or the destruction of specified lines of communications).[22] Further the authority to use force set out in the ROE will often reflect the unique capability of weapon systems.

Legal Considerations - Additional Guidance

17. The level and type of force, as well as the circumstances within which force will be used, will be influenced by whether the operation is domestic or international. Domestic operations use of force parameters will be defined in part by the domestic legal authority upon which the operation is based and additionally by other possible legal authorities that may be triggered given the nature of the operation. This may involve reliance upon one or more statutes such as the *NDA*, *Criminal Code, Coastal Fisheries Protection Act*, and *Fisheries Act*.

18. International law may provide a legal basis to use reasonable and proportional force, including deadly force, in situations that do not constitute a situation of individual self defence. Authority in such circumstances may be frequently found under UN Security Council Chapter VII enforcement operations or during armed conflict. As noted, international law may also delineate the methods and means by which that force may be used. During times of armed conflict this would include customary and treaty law of armed conflict including various weapons treaties such as the *Ottawa Convention*, *The Convention on Certain Conventional Weapons*, and *The Chemical Weapons Conventions*.[23] During other international operations not amounting to an armed conflict the policy of the CF, as noted at Chapter 17 is to apply the spirit and principles of the LOAC.

19. The key rules of the LOAC are found in *The Law of Armed Conflict at the Operational and Tactical Level*. The rules of LOAC as well as the key principles of distinction, proportionality and necessity are incorporated during the process of creating ROE for international operations. This is discussed in section 9 of this chapter.

20. At times, depending upon the nature of the operation, other international legal regimes, including those discussed at Part V, may influence the ROE. This may not always be restricted to issues relating to the level and intensity of force to be used but may rather impact on the geographic parameters of the operations should regimes such as Law of the Sea, Air or Space Law be applicable.

21. Any set of ROE will, in part, be defined by the applicable domestic and/or international law. Often, more then one domestic or international legal source will be relevant. The role of the legal advisor is to identify all legal sources, which may be relevant for a particular operation, and to ensure that any ROE is legally compliant.

[19] B-GJ-005-501/FP-000, para. 210.
[20] B-GJ-005-300/FP-000, Canadian Forces Operations Manual, para. 801.1, defines a "combined operation" as "Any military operation which involves the forces of more than one nation acting together to accomplish a single mission…Allied, coalition and UN mandated operations are all considered to be combined operations."
[21] B-GJ-005-501/FP-000, para. 6(c).
[22] *Ibid.*, para. 6(d).
[23] See B-GG-005-027/AF-022, Collection of Documents on the Law of Armed Conflict; Chapter 19 of the present manual.

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ROE development

22. As a function of the exercise of command the supporting operational staff leads the ROE development process. ROE development is accomplished through an effective dialogue between the CF operational commander, the commander's staff and Joint Staff (JStaff) at NDHQ.

23. The JStaff ROE team is normally comprised of the Strategic Joint Staff ROE desk officer and representatives of the operational commander; the applicable chief of environmental staff (i.e., Navy, Army or Air) and the JAG. Representatives from ADM (Policy), and specialist officers (e.g., CF Provost Marshall, medical, etc.), are included when required.[24]

24. In order to assist the operational team (at the strategic, operational and tactical levels) and ensure that legal requirements are satisfied, CF doctrine provides that CF legal officers are involved in the ROE planning process from the onset.[25] CF legal officers provide support in a number of areas:

a. The JAG, or delegate, provides legal review and advice to the CDS with respect to ROE;

b. The Deputy Judge Advocate General/Operations (DJAG/Ops), or delegate, provides legal review and advice to the Director of Staff of the Strategic Joint Staff with respect to ROE;

c. The Legal Advisors Canada Com and CEFCOM, or staff, provide legal review and advice to the operational command headquarters staff with respect to ROE; and,

d. Unit or deployed legal officers provide advice to commanders on implementation of, and training on ROE as well as on requests for changes to CDS authorized ROE.

SECTION 5

THE CANADIAN FORCES TARGETING FRAMEWORK

General

25. The decision to authorize CF participation in domestic and in international operations rests with the Government of Canada.[26] The Minister of National Defence has the management and direction of the CF.[27] Unless the Governor in Council otherwise directs, all orders and instructions to the CF that are required to give effect to the decisions and to carry out the directions of the Government of Canada or the Minister shall be issued by or through the CDS.[28]

26. Pursuant to the legal bases upon which an international or national defence operation is authorized and conducted, as well as on Government of Canada directions, the CDS establishes military objectives for the mission and issues planning guidance, including direction on targeting, to subordinate commanders.

27. The CF Targeting Framework is a classified annex to the *Use of Force Manual*. It provides the CF with a structure to allow effective and timely decision-making relating to targeting

[24] B-GJ-005-501/FP-000, para. 211.4.
[25] *Ibid.*, para. 6 and 7(k).
[26] See Part II, Chapter 5 of this Manual for a detailed discussion regarding the exercise of the Crown prerogative in this regard.
[27] *National Defence Act,* R.S.C. 1985, c.N-5, s. 4 [*NDA*]. See Part II, Chapter 3 of this Manual for a detailed discussion regarding the role and authority of the MND.
[28] *NDA*, *ibid*., s.18(2). See Part II, Chapter 3 of this Manual for a detailed discussion regarding the role and authority of the CDS.

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both prior to and during CF participation in Canadian, coalition or alliance peace-support operations and in armed conflict.[29] This framework focuses the military strategy and operational requirements of targeting.[30] The aim of the Targeting Framework is to establish CF sanctioned decision-making processes from military strategic guidance through to the execution of the mission.[31] While the Targeting Framework is an annex to the *Use of Force Manual*, and while it is related to ROE, it is not ROE. It creates a process by which the CF validates who or what could be targeted during a CF operation. The level of force used to target a person or object is set out in the ROE.

SECTION 6

THE TARGETING DIRECTIVE

28. In order to establish CF sanctioned decision-making processes from military strategic guidance through to the execution of the mission, the CF has developed a targeting process, which is described in the CF Targeting Directive.[32]

29. The CF Targeting Directive for international operations reflects the CF views on the application of domestic and international laws, particularly the Law of Armed Conflict (LOAC) on the use of force and targeting. It is applicable to CF naval, land and air operations.

30. The LOAC contains a number of principles to ensure that military forces select and prosecute targets that are legitimate during international operations. Military commanders and planners must apply these principles. These principles guide military commanders and planners in determining what objects, areas and persons are legitimate targets.[33]

31. Not only does the CF Targeting Directive ensure LOAC is complied with but it also lays out a structured approval system for target selection and engagement and is used as a basis for the CDS to provide mission-specific direction regarding targeting for CF operations, as required. Although the Targeting Directive is related to ROE, it is not ROE. Moreover, a targeting directive does not assign missions or tasks, nor is it used to give tactical instructions. Its purpose is to validate persons or objects as legitimate targets.

32. Through the CF Targeting Directive the CDS may authorize commanders at the various levels with decision-making authority relating to targeting. Specified legal officers at the strategic, operational and tactical levels are responsible for advising those commanders responsible for decisions made within the targeting process. Generally, the 'targeting' team consists of a legal advisor, an intelligence officer and an operations officer. They all provide specialized advice to the commander who has decision-making authority for targeting. A Targeting Directive will be issued for every CF operation in which targeting is required.

SECTION 7

RELEVANT LOAC ROE AND TARGETING PRINCIPLES

33. As noted, the LOAC contains a number of principles and rules to ensure that only military objectives are engaged and that the adverse effects of hostilities on civilians and civilian objects

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[29] This formalized framework is relatively recent to the CF. Experience during the 1999 Kosovo Air Campaign indicated that there was a requirement for a formalized CF decision-making process for targeting. The CF Targeting Framework was developed following extensive consultation with key stakeholders (J3 Operations, J2 Intelligence, J5 Legal, ADM(Pol) and Environmental Chiefs of Staff) and authorized by the CDS in 2002. The CF Targeting Framework was first implemented during Op Apollo, the CF 2002-2003 participation in the Campaign Against Terrorism in Afghanistan, and is now considered during the operational planning process for all international operations.
[30] B-GJ-005-501/FP-000, Annex D para. 101.
[31] B-GJ-005-501/FP-000, para.104.
[32] B-GJ-005-501/FP-000, Annex D para. 104.
[33] The CF Targeting Directive must be used in conjunction with B-GJ-005-104/FP-021, Law of Armed Conflict at the Operational and Tactical Levels, particularly Chapter 4, Targeting.

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are minimized. In this regard a key document for legal advisors, commanders and planners is Chapter 4 - 'Targeting' of B-GJ-005-104/FP-021, The Law of Armed Conflict at the Operational and Tactical Level.[34]

34. Some of the key rules and principles applicable during armed conflict and, as a matter of policy during military operations outside armed conflict, include the following:

a. as a general rule civilians and civilian objects shall not be the object of attack;[35]

b. targets shall be limited strictly to military objectives. In so far as persons are concerned, only members of the enemy's armed forces or persons taking a direct part in hostilities are lawful targets. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage;[36]

c. in cases of doubt, a person is presumed to be a civilian until the contrary is established.[37] Similarly, there is a presumption that an object which is normally dedicated to civilian purposes is not being used to make an effective contribution to military action and thus it should not be attacked;[38]

d. in addition to the general requirement of distinguishing between military objectives and civilians and civilian objects, there are a number of specialized regimes which prohibit, or severely restrict, attacks on certain objects, such as medical facilities, cultural property and dams, dykes and nuclear generating stations;

e. planners and commanders must take all feasible precautions to verify that the target is a military objective, and not a civilian or a civilian object, and that it is not subject to any of the specialized regimes of protection discussed below;

f. planners and commanders shall refrain from launching an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated;[39] and

g. planners and commanders must take all feasible precautions in the choice of means and methods of attack to avoid, and in any event to minimize, incidental civilian loss and damage (i.e., collateral damage).[40]

The Principle of Distinction - Civilians and Civilian Objects

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[34] B-GJ-005-104/FP-021.

[35] See *Additional Protocol I to the Geneva Conventions*, 12 August 1949, U.N.T.S., arts. 51(2), 13(2), online: <http://www.unhchr.ch/html/menu3/b/91.htm> [API]; B-GJ-005-104-FP-021, para. 423.

[36] API, *ibid.*, art. 52(2); *Additional Protocol II to the Geneva Conventions*, 12 August 1949, U.N.T.S. art. 13(2) [APII]; B-GJ-005-104-FP-021, para. 406.

[37] API, *ibid.,* art. 50(1).

[38] API, *ibid.*, arts. 50 (1) and 52 (3); B-GJ-005-104-FP-021, para. 429.

[39] API, *ibid.*, art. 57(2)(a); B-GJ-005-104-FP-021,para. 417.

[40] API, *ibid.* Canada adopted the following reservation on the meaning of "Military advantage":

> It is the understanding of the Government of Canada in relation to sub-paragraph 5(b) of Article 51, paragraph 2 of Article 52, and clause 2(a)(iii) of Article 57 that the military advantage anticipated from the attack is intended to refer to the advantage anticipated from the attack considered as a whole and not isolated or particular parts of the attacks.
> Cited in B-GG-005-027/AF-022, 140.

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35. As previously discussed, as a general rule, civilians and civilian objects shall not be the object of attack. Commanders must at all times distinguish between the civilian population and combatants and between civilian objects and military objectives.[41]

36. Importantly, this rule is separate and distinct from the proportionality rule, which concerns the law of targeting relating to 'collateral damage.' For the most part, this rule is self-evident and uncomplicated. An application of the plain reading of the rule will shield the vast majority of civilians from direct attack. Most civilian objects are used for exclusive civilian purposes and like civilians are easily identified.

37. While most civilians are easily identifiable the precise scope of the definition of what is a 'civilian' is the subject of debate. The debate raises key questions such as:

a. is a person still a 'civilian' if they take a direct part in hostilities without distinguishing himself/herself from the civilian population? Often such persons are referred to as 'unlawful combatants' or 'unprivileged belligerents.'[42]

b. is a civilian contractor who performs both military and non-military functions simultaneously or at different times still a 'civilian' or an 'unlawful combatant'?[43]

Some current operational legal issues relating to the precise scope of the term 'civilian' are discussed below in section 10.

38. Civilian objects are objects that are not military objectives as defined at Article 52(2) AP1. Civilian objects shall not be made the object of attack.

39. In addition to civilians and civilian objects there are other groups of persons, such as Prisoners of War (PW), and objects, which are protected from being attacked by specialized legal regimes.[44] Such regimes exist for:

a. wounded, sick and shipwrecked members of the armed forces and the medical personnel and facilities used for treating them;[45]
b. other wounded and sick and medical facilities;[46]
c. prisoners of war;[47]

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[41] API, *supra* note 35, arts. 51,52 and 57.
[42] The term "unprivileged belligerent" refers to a person, who is not a lawful combatant, but does unlawfully take part in hostilities. Generally speaking this term will be interchangeable with "unlawful combatant". See K.W. Watkin, "Warriors without Rights? Combatants, Unprivileged Belligerents, and the Struggle over Legitimacy" (Occasional Paper Series, Humanitarian Policy and Conflict Research, Harvard University, Winter 2005).
[42] L. Turner and L.G. Norton "Civilians at the tip of the spear" (2001) 51 AFL Rev. 1 at 28; K.W. Watkin, *Combatants, Unprivileged Belligerents and Conflicts in the 21st Century* (Cambridge: International Humanitarian Law Research Institute, 2003); Marco Sassoli, *Legitimate Targets of Attack Under Humanitarian Law* (Cambridge: International Humanitarian Law Research Institute, 2003). It is important to stress that civilians are generally all persons who are not "combatants". More specifically a civilian is any person who does not belong to one of the categories of persons referred to in Article 4A(1), (2), (3) and (6) of GCIII or Article 43 or the first sentence or Article 44 (3) of AP I. An important sub-grouping of those defined as "civilians" are those described as "civilians accompanying armed forces without actually being members thereof". These civilians are protected from being intentionally targeted by virtue of their civilian status. Despite this protection from attack, they might yet become victims of collateral damage due to attacks on military objects. See Hague Regulations IV, *Respecting Laws and Customs of War on Land*, art. 13, *Geneva Convention III, Relative to the Protection of Prisoners of War*, art. 4 A (4), B-GJ-005-104-FP-021, para. 315. Civilians may become the object of attack if they directly participate in hostilities (see AP1, *supra* note 35, arts. 48,51(3) and B-GJ-005-104-FP-021, para. 312).
[44] These include prisoners of war as defined in GCIII, "hors de combat" (AP I, *supra* note 35, art. 40) and any persons who may not fall squarely within the definition of civilians but are "protected persons" as defined by *Geneva Convention IV, Relative to the Protection of Civilian Persons in Time of War*.
[45] *Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field,* 12 August 1949 and *Geneva Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea,* 12 August 1949.
[46] API, *supra* note 35, arts. 11 - 18.
[47] *Geneva Convention (III) Relative to the Treatment of Prisoners of War*, 12 August 1949.

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d. religious, cultural and historic objects, as defined at Article 53 AP 1 and in the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, 1954 and the 1999 Second Hague Protocol for the Protection of Cultural Property in the Event of Armed Conflict.[48] These cultural objects are protected from attack when their actual use remains free from military character;
e. objects indispensable to the survival of the civilian population;[49] and
f. dams, dykes and nuclear electrical generating stations, so long as these are not being used in regular, significant and direct support of military operations and an attack is the only feasible way to terminate such support.[50]

40. As a matter of general practice most of the persons and objects protected from targeting will be quite evident and the vast majority of persons and objects will not be the object of attack.

The Principle of Distinction - Military Objectives

41. As previously noted, the general rule is that "targets shall be limited to military objectives."[51]

42. However before describing parameters of a 'military objective' it is important to note that a military objective includes persons such as 'combatants,' other "persons who take part in hostilities" as well as military objects such as weapons and vehicles, and battle space such as land and sea.[52]

43. AP 1, Article 52(2) makes the distinction between objects and persons and states:

> Attacks shall be limited strictly to military objectives. In so far as objects are concerned[53], military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action, and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.

44. For targeting purposes the legal analysis involved in determining whether a potential target is a military object is carried out by what has sometimes been referred to as the "two prong test." The 'first prong' of the analysis asks:

> Whether the potential target by virtue of its nature, location, purpose or use makes an effective contribution to military action?

45. If the answer is no, then the potential target is not a military objective and must not be the target of attack.

46. If the answer is yes, the 'second prong' of the analysis asks:

> Would the total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offer a definite military advantage?

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[48] Canada recently ratified the Protocols.
[49] API *supra* note 35, art. 54.
[50] API, *ibid*., art. 56.
[51] API, *ibid*., art. 52(2).
[52] See W. Fenrick "The Law Applicable to Targeting and Proportionality After Operation Allied Force: A View From the Outside" (2000) 3 YBIHL 51. See also *The Prosecutor v. Blaskic*, ICTY Case no. IT-95-14-T, 3 March 2000; also Robertson, "The Principle of Military Objective in the Law of Armed Conflict", (1998) 72 USN War College International Law Studies 197.
[53] It is important to stress that API art. 52(2) is referring to military objectives "in so far as objects are concerned". This is sometimes overlooked by those who mistakenly assert the position that 52(2) defines military objectives as only including "objects" and not space, land or areas of sea. See K.W. Watkin "Canada/United States Military Interoperability and Humanitarian Law Issues: Land Mines, Terrorism, Military Objectives and Targeted Killing" (2005) 15:2 Duke J. Comp. & Int'l L. 301.

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47. Before the exact scope and parameters of each prong is identified it is very important at this point to note that a common error in applying the 'two prong test' occurs when 'dual use' (objects used for military purposes but otherwise would be civilian) targets are considered. Often, when dual use targets are considered by reference to the two-prong analysis, there is a mistaken tendency to incorporate the issue of proportionality into the analysis.

48. Only if a potential target passes the two-prong test and is considered a 'military objective' would any consideration of proportionality then be undertaken. Application of the proportionality test is discussed below.

The Doubt Rule

49. Importantly, in cases of doubt as to whether a person or object is protected from attack, there are certain presumptions to take into account. Thus, in the case of doubt whether a person is a civilian, that person shall be considered to be a civilian.[54] In the case of an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used. Therefore, in such cases, the person or object shall not be the object of attack unless it is shown that the person is taking a direct part in hostilities or the object is being used to make an effective contribution to military action.[55]

50. The application of the doubt rule should be able to resolve most targeting issues, which arise because of the ambiguous factual or legal nature of the person or object identified as a possible target.

Proportionality

51. As noted,

> [p]lanners shall refrain from any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.[56]

52. Treaty LOAC does not contain an express stand-alone rule on proportionality.[57] Expressly inserting the above quote was significant, because it codified in treaty form the notion that 'collateral damage' was not unlawful *per se*.

53. As has been noted, "resolution of the proportionality equation requires a determination of the relative worth of military advantage gained on one side and civilian casualties or damage to civilian objects" on the other.[58]

54. Key questions which make the application of the proportionality rule difficult to apply in practice concern:

a. what are the relative values to be assigned to the military advantage gained and the injury to civilians and/or the damage to civilian objects?;

[54] API, *supra* note 35, art. 50(1).
[55] API, *supra* note 35, arts. 50 (1), 52 (3) and B-GJ-005-104-FP-021, para. 429.
[56] API, *supra* note 35, art. 57 (2) (a) (iii).
[57] Most API articles (see *e.g.* 51(5)) touching upon proportionality are mixed with principles of discrimination and distinction. Article 57(2) (a) (iii) API, quoted above, is the clearest statement in API on proportionality and is reflective of CIL. See W. Fenrick "The Rule of Proportionality and Protocol I in Conventional Warfare", 98 Mil. L. Rev 91, and J. Gardham "Proportionality and Force in International Law" (1993) 87 AJIL 391; M. Schmitt "Bellum Americanum: The U.S. View of 21st Century War and Its Possible Implications for the Law of Armed Conflict", (1998) 19 Mich. JIL 1051. Not all writers agree that this definition is reflective of CIL. H. Parks, "Air War and the Law of War" (1990) 32 AFL Rev. 1 at 168. For a review of ICTY jurisprudence see W. Fenrick "A First Attempt to Adjudicate Conduct of Hostilities Offences," 13 (2000) Leiden J. Int'l L. 4.
[58] Taken from Fenrick "A View from the Outside", *supra* note 52.

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b. what factors are included/excluded when balancing the relative weights?;[59] and

c. what is the standard of measurement in time and space?[60]

55. Key operational law issues have focused on the concept of "concrete and direct military advantage anticipated." Specifically, the issue is whether the advantage anticipated is viewed and assessed with respect to a particular attack (tactical and operational) in and of itself or of the attack considered as a whole from the viewpoint of the overall campaign (strategic). Canada, upon signing AP1 made the following statement: "the military advantage anticipated from an attack is intended to refer to the advantage anticipated from the attack considered as a whole and not from isolated or particular parts."

56. In balancing the various factors required by the proportionality calculus, three points are important to stress. Firstly, it is a relative assessment, not a scientific equation, which produces quantifiable determinations. Secondly, from a legal perspective, it is important that the military advantage and civilian loss be clearly identified before the proportionality calculation is made. Thirdly, that a balancing of these interests is deliberately taken on a case-by-case basis.

57. As previously noted, it is only at the proportionality stage of the analysis that a determination of whether a dual use target, which has been determined to be a military objective, can be targeted.[61]

58. In making the proportionality assessment a number of issues relating to command responsibility, the standard of care, sufficiency of evidence (intelligence) arise.

Means and Methods of Warfare

59. As previously noted, "[t]he right of the Parties to the conflict to choose methods and means of warfare is not unlimited."[62] From a targeting perspective this means that weapon selection will have to be made in a way that meets the principles of distinction and proportionality.

60. Proportionality issues arise with respect to weapons selection and method of delivery. This is complicated in situations where one method of delivery will reduce risk to friendly forces but increase collateral damage. A method of delivery that reduces risk to friendly forces but increases collateral damage is permissible, so long as it would not be excessive in relation to the concrete and direct military advantage anticipated.

61. Other related issues arise when a commander must ration precision weapons or ammunition. Means and methods planning may also impact on the target selection process as it relates to weaponeering.[63] There is no international legal requirement that a commander must always use the most precise weapon system. Rather weapon selection is determined by operational factors and the principles of distinction and proportionality.

SECTION 8

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[59] Can you decrease the risk to military forces by attacking in a certain way, even though this will increase collateral damage? See A. Rogers "Zero Casualty Warfare" (2000) 82 Int'l Rev. Red Cross 165.

[60] These issues are taken from W. Fenrick *supra*, note 52 and 57. For example, must the long-term effects of destroying a power grid be assessed. In the context of the Gulf and Kosovo campaign see J. Crawford "The Law of Non-Combatant Immunity and the Targeting of National Electrical Power Systems" (1997) 21 Fletcher Forum of World Affairs 101; also F. Hampson "Means and Methods of Warfare in the Conflict in the Gulf" in P. Rowe (ed) "The Gulf War 1990-91 in International and English Law" (New York: Routledge, 1993) at 89.

[61] There is some debate over whether civilians located within a dual use target can/must be factored into the equation, see Parks *supra*, note 57 at 175. It is submitted that civilian deaths would have to be considered.

[62] AP I, *supra* note 35, art. 35(1).

[63] See A. Rogers, *supra* note 59; Infield "Precision-Guided Munitions Demonstrated Their Pinpoint Accuracy in Desert Storm; but is A Country Obligated to Use Precision Technology to Minimize Collateral Civilian Injury and Damage?" (1992) 26 Geo. Wash. L. Rev. 109, and Belts "Missiles Over Kosovo: Emergence, *Lex Lata*, of a Customary Norm Requiring the Use of Precision Munitions in Urban Areas", (2000) XLVII Nav. L. Rev.

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SPECIFIC OPERATIONAL LEGAL TARGETING ISSUES

Dual use targets

62. A potential target may be used by both the civilian population and the military. Generally, such objects appear to be civilian except they are used for military purposes. The mere fact that it has a dual use does not mean that it cannot be a military object and hence a lawful target of attack. It is necessary to carry out the two-prong analysis set out above. If the potential target, which has a dual use, is a military objective under that analysis, then its destruction is permitted provided that the proportionality test is met.

Combatants, Unlawful Combatants and Other Persons Take a Part in Hostilities

63. As noted in the previous section, civilians, protected persons, PWs, and persons 'hors de combat' shall not be the object of attack. A civilian is a person who does not directly participate in hostilities.

64. During international armed conflict 'combatants' are military objectives. For purposes of brevity, combatants are members of the armed forces of a party to the conflict and irregular soldiers who:

a. belong to an organized group;

b. where the group belongs to a party to the conflict;

c. the group is commanded by a person responsible for his subordinates;

d. the group ensures that its members have a fixed distinctive sign recognizable at a distance;

e. the group ensures that its members carry their arms openly; and

f. the group ensures that its members conduct their operations in accordance with the laws of war.[64]

65. Persons who fall into these categories are 'combatants' and at all times are military objectives regardless of whether they are, or are not, actively participating in hostilities at the time they are attacked.

66. Article 44 (3) AP 1 extends the traditional definition of combatants to include persons who, due to "situations in armed conflicts where, owing to the nature of the hostilities," cannot distinguish themselves from the civilian population. They nonetheless acquire combatant status, provided that they meet certain specified conditions relating to the carrying of arms. It must be stressed however that this provision only applies to combatants who "owing to the nature of hostilities" cannot distinguish themselves. It is debatable whether this treaty provision is reflective of customary international law.

67. Civilians who participate in hostilities but do not meet the above criteria may fall within the category of 'unprivileged belligerents' or 'unlawful combatants' and are lawful military objectives.[65] Usually, they are persons who fight but have not taken the steps to ensure they are distinguished from the civilian population (through uniforms, carrying weapons openly) or fail to conduct hostilities in accordance with the LOAC. For example, members of Al Qaeda or the Taliban may not qualify as combatants because they have not properly distinguished themselves,

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[64] Civilians are defined in AP I as any person who does not belong to one of the categories of persons referred to in Articles 4 A (1), (2), (3) or (6) of GCIII or Article 43 of AP I. See K.W. Watkin, *supra* note 42 and K.W. Watkin "Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict" 98 (2004) AJIL 1.
[65] B-GJ-005-104/FP-021, paras. 312 and 318.

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or complied with LOAC and therefore may 'forfeit' the protections of PW status.[66] Other types of unprivileged belligerents include spies and mercenaries.

68. Article 51(3) of API states that civilians are protected from hostilities "unless and for such time as they take a direct part in hostilities." Consequently, a separate and distinct issue relates to the scope of what is meant by "taking a direct part in hostilities." The breadth of this phrase has not been entirely resolved under international law.[67]

69. Persons only involved in civil defence or policing, which are not integrated into the armed forces, are not taking part in hostilities.[68]

70. Significant operational legal debate has centered around civilians accompanying or performing contracting work with military forces or performing work directly related to supporting military combat activities.[69]

Military Objectives

71. Generally, most targets are easy to identify as military and easily meet the criteria of 'military objective.' Distinction and proportionality concerns aside, a number of issues do arise however either because of the characteristics of the target or from the wording used to define 'military objective.'

Target Lists

72. Some debate exists about whether commanders can create Target Lists that identify a number of objects (e.g., barracks, radars, telephone lines, bridges etc.), which then automatically constitute 'military objectives' requiring no further review before being engaged. The debate centers around whether it is possible to determine in advance of the execution phase that a particular object can be attacked. Most militaries and the ICRC have offered lists of objects, which would clearly fall within this category.[70] The use of a non-exhaustive list of targets, so long as they continue to meet the definition of 'military objective,' does not violate LOAC.

First Prong: Does the potential target make 'an effective contribution' to military action?

73. In the vast majority of cases a straightforward application of a plain reading of the first prong rule will resolve the issue of whether a potential target makes an effective contribution to the military action. The application of the 'doubt rule' would additionally resolve the issue in many of those few cases where uncertainty remains.

74. Nonetheless, a few 'hard cases' or difficult issues may remain. Often the resolution of the hard cases is inextricably linked to legal debate and conflicting state practice on the precise definition of "nature, location, purpose or use" and "effective contribution."[71]

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[66] See Baxter "Unprivileged Belligerents" (1951) 28 Brit. Y.B. Int'l L. 323, and Kalshoven (1978) 9 N.Y.Int'l L. Rev. 107, Dinstein "The Distinction between Unlawful Combatants and War Criminals" in Dinstein (ed) "International Law at a Time of Perplexity" (Cambridge: Cambridge University Press, 1989).

[67] See K.W. Watkin, "Humans in the Cross Hairs: Targeting and Assassination in Contemporary Armed Conflict" in D. Wippman and M. Evangelista, *New Wars, New Laws? Applying the Laws of War in 21st Century Conflicts* (Andsly, New York: Transnational Publishers, 2005).

[68] See AP I, *supra* note 35, arts. 43(3) and 61.

[69] See Turner, *supra* note 42.

[70] These include target sets such as: military equipment, units, bases, C^3I facilities, electrical production facilities which power military systems, C^3 nodes, IADS, oil refining and distribution facilities, railroads, roadways, bridges if used for military purposes, etc. See U.S. Dept. of Defence, "Conduct of the Persian Gulf War: Final Report to Congress (1992); Office of the Prosecutor ICTY, "Final Report to the Prosecutor by the Committee established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia" (June 2000) at 22; H. Parks, *supra* note 57 (generally at 136-146); and W. Fenrick *supra* note 52.

[71] See Dinstein, Y., *The Conduct of Hostilities Under The Law of International Armed Conflict* (Cambridge: Cambridge University Press, 2004) at 82-92 for a useful overview of these legal terms.

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75. While a number of points of debate relating to the exact nature of the 'first prong' exist, two issues are clearly of the most practical significance: the temporal aspect of "nature, location, purpose and use" and the precise definition of "effective contribution."

76. One issue concerns whether a proposed target has to be making an effective contribution to military action by virtue of its location, purpose or use at the time the targeting decision is made or whether the proposed target only has to have the potential or possibility to make an effective contribution at some point in the future.[72] Potential targets which have no current, but merely 'possible,' 'theoretical' or 'potential' future ability to make an effective contribution to military action are outside the scope of the first prong and therefore do not constitute a military objective (e.g., a motor vehicle production facility that could be converted to the production of military vehicles). Targets which are currently making, or, based upon intelligence, are about to be used to make an effective military contribution "in the circumstances ruling at the time" would fall within the first prong. All clearly military objects (e.g., tanks, warships, barracks, military aircraft and so on) and combatants will be considered as making a 'current' effective contribution to military action. As has been noted:

> Military purpose is deduced from the established intention of a belligerent as regards future use. As pointed out by the official ICRC commentary:
>
> > The criterion of *purpose* is concerned with the intended future *use* of an object, while that of the use is concerned with its present function.[73]

77. The most controversial issue concerning the first prong relates to the scope of 'effective contribution.' In particular controversy exists whether the term only includes objects directly involved in war fighting (e.g., tanks), or directly supporting war fighting (e.g., military trucks delivering weapons to the front) versus those objects that are merely 'war sustaining' (e.g., plants that make tires for the trucks).[74]

78. This addition of 'war-sustaining' capability to the potential targets has been rejected by the San Remo Round Table of Experts, which created the *San Remo Manual on Naval Warfare*. The Round Table rejected adding to the target set list "economic targets of the enemy that indirectly but effectively support and sustain the enemy's war-fighting capability."[75] Consequently, industry and oil tankers in and of themselves would not meet the test of the first prong simply and solely for the reason that they generate revenue (or taxes) for the government that may help sustain the war fighting capability indirectly.

79. On the other hand targets which "are only indirectly related to combat action, but which nevertheless provide an effective contribution to the military part of a party's overall war-fighting capability"[76] would fall within the first prong. This would usually include logistics, which directly support war-fighting capability.

80. This approach is consistent with LOAC. Potential targets, which do not effectively contribute to war fighting capabilities, but only indirectly contribute to war sustaining capability, should not meet the requirements of the first prong. Whether a proposed 'hard case' target meets this legal test is ultimately decided, not with reference to an abstract list of possible first prong target sets, but upon intelligence which demonstrates the way in which a proposed target

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[72] See Robertson, *supra* note 52 at 209; Schmitt, *supra* note 57; see also ICRC, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 1949* (Geneva: Martinus Nijhoff Publishers, 1987) at 636; and Bothe et al *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols to the Geneva Conventions of 1949* (London: Martinus Nidjhoff Publishers, 1982) at 324.
[73] Dinstein, *supra* note 71 at 89.
[74] See Robertson, *supra* note 52 at 206; USN Commanders Handbook (1995) Chapter 7 and Department of the Air Force, International Law - The Conduct of Armed Conflict and Air Operations, AFP 110-31, Nov 19, 1976, para. 5-36(1).
[75] International Institute of Humanitarian Law, *San Remo Manual on International Law Applicable to Armed Conflict at Sea*, ed. by Donald-Beck (Cambridge: Cambridge University Press, 1995) at para. 40.12.
[76] Ibid., at para. 40.12.

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makes an effective contribution to war-fighting. The Canadian position outlined at the time of ratification of AP I is that the advantage anticipated from the attack must be considered as a whole and not from isolated or particular parts of the attack. Therefore the strategic impact on the contribution to war fighting could be considered as well as the operational and tactical impact of the destruction of the object.

81. Enemy lines of communication used for military purposes, rail yards, bridges, barges, rolling stock used for military purposes including military logistics, power generators and oil refineries which produce power used for military forces clearly fall within the first prong. Oil refineries and power generation facilities, which may produce state revenue, but are not used by a military system, would not. This determination may also be dependent upon the system of governance, as the relationship between state revenue and war fighting may be very direct in certain authoritarian regimes.

Second Prong: 'A Definite Military Advantage'

82. A potential target may make an effective contribution to military action yet not be a military objective because its destruction, capture or neutralization, in the circumstances ruling at the time, does not offer a military advantage.

83. Two key issues arise from the 'second prong' of the test. Firstly, the definition given to 'circumstances ruling at the time' and secondly, 'military advantage.'

84. With respect to 'circumstances ruling at the time,' the issue turns on what context must be applied when determining whether a military advantage exists. Canada (like a number of other countries) has noted that the perspective from which an anticipated military advantage must be assessed is "the attack considered as a whole and not from isolated or particular parts of the attack."[77]

85. It is useful to highlight at this point that 'circumstances ruling at the time' refer to circumstances made at the moment of the decision, not possible future circumstances, in the context of the campaign as a whole. Consequently, any determination of whether the second prong is met is time and situation dependant.

86. The word 'definite' was inserted into Article 52(2) of AP1 to create an objective standard and move away from the notion that a purely speculative military advantage would be sufficient. Commentators have stressed that a definite military advantage is one which is clear and distinct, not something which is merely possible.

87. Related to what is meant by military advantage, is the scope of 'effective contribution.'

88. The destruction of objects which provide an effective contribution to a party's overall war-fighting capability would provide a military advantage. Objects, which indirectly sustain the war fighting capability, and, do not produce a definite military advantage if destroyed, would not. [78]

Feasible Precautions

89. Planners and commanders are required to take all feasible steps to verify that objects to be attacked are military objectives and that the means and methods of attack are chosen with a view to avoiding or minimizing incidental injury to civilians.[79]

90. From a Canadian perspective 'feasible' is understood as "that which is practicable or practicably possible, taking into account all circumstances ruling at the time, including

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[77] Canadian Statement of Understanding issued at ratification of AP I, November 21, 1990. See B-GG-005-027/AF-022, p. 140. See also Dinstein, *supra* note 71 at 86.
[78] See Parks, *supra* note 57 at 134 - 146.
[79] See AP1, *supra* note 35, art. 57.

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humanitarian and military considerations."[80] Planners and commanders are expected to act reasonably and in good faith.[81] Furthermore, with respect to the standard of decision making, "military commanders and others responsible for planning, deciding upon or executing attacks have to reach decisions on the basis of their assessment of the information reasonably available to them at the relevant time and that such decisions cannot be judged on the basis of information which has subsequently come to light."[82] This standard is one of 'reasonableness,' not 'perfection.' Any review of a decision cannot include consideration of information not reasonably available to the decision-maker at the time the decision was taken.

Collateral Damage - Non-Violation of the Proportionality Rule

91. An attack must be cancelled or suspended if the civilian loss or damage "would be excessive in relation to the concrete and direct overall military advantage anticipated."[83]

92. From a Canadian perspective the 'military advantage anticipated' is understood "as intended to refer to the advantage anticipated from the attack considered as a whole and not from isolated or particular parts of the attack."[84]

93. As is evidenced by the wording of the language concerning feasible precautions as it relates to selecting the means and methods of attack, collateral damage is to be 'minimized' and civilian loss is not to be 'excessive.' While ideally civilian loss should be eliminated, the mere fact that collateral damage does occur does not mean that the proportionality rule has been violated. Additionally, in cases where individual criminal liability may arise from an attack, the 'intent' to conduct the attack with the knowledge that the attack would be "excessive in relation to the direct and concrete military advantage anticipated" would be required.[85]

SECTION 9

CONCLUSION

94. International and domestic law delineates the limits, the degree, and the methods and means by which force may be used. The CF has developed a framework to ensure that political direction and objectives as well as legal, diplomatic, policy and operational considerations are coherently conveyed in military orders so that the authorized use of force for CF members contributes to the achievement of assigned missions. This framework is found in the *Use of Force Manual*, which prescribes that CF members may use force in personal self defence and as authorized by ROE approved by the CDS. ROE are orders. The CF ROE doctrine emphasizes that operational staff lead the ROE development process.

95. The CF Targeting Framework provides the CF with a structure to allow effective and timely decision-making relating to targeting both prior to and during CF participation in Canadian, coalition or alliance operations and in armed conflict. The CF Targeting Framework focuses on the military strategy and operational requirements of targeting. The CF Targeting Directive outlines the targeting process for the CF. The directive reflects the CF views on the application of international and domestic laws, especially the LOAC, to targeting. The CF Targeting Directive is applicable to CF naval, land and air operations. The Targeting Framework and Directive are related to ROE, but are not ROE. The Directive is used to validate persons and objects as

[80] Canada issued the following Statement of Understanding issued at ratification, November 21, 1990: "It is the understanding of the Government of Canada that in relation to Articles 41, 56, 57, 58, 78 and 86, the word "feasible" means that which is practicable or practically possible, taking into account all circumstances ruling at the time, including humanitarian and military considerations". See B-GG-005-027/AF-022, p. 139.
[81] See Dinstein, *supra* note 71 at 26; Bothe, M. "Legal Restraints on Targeting: Protection of Civilians Population and the Changing Faces of Modern conflicts", (2001) 312 Int'l JHR 35.
[82] Canadian Statement of Understanding issued at ratification of AP I, November 21, 1990. See B-GG-005-027/AF-022, p. 139.
[83] AP1, *supra* note 35, art. 57 2. (b).
[84] Canadian Statement of Understanding, *supra* note 69.
[85] *Crimes Against Humanity and War Crimes Act,* S.C. 2000, c. 24.

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legitimate targets. The ROE will set out the level of force authorized to attack a validated target. A Targeting Directive will be issued for every CF operation in which targeting is required.

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CHAPTER 29

DETAINEES

SECTION 1

INTRODUCTION

1. During the course of CF operations, CF units and members have detained and will continue to detain individuals. Pursuant to CF doctrine, detainees are any persons who are non-consensually in the custody, care, and control of CF personnel.[1] During CF domestic operations, detainees could include a variety of persons such as civilians committing a breach of the peace during CF assistance to Canadian law enforcement authorities. During international operations detainees could include: local civilians who interfere with the mission, petty criminals, international criminals, prisoners of war (PW) or other persons who have taken part in hostilities against CF or other Allied/Coalition forces, such as unlawful combatants.[2]

2. The treatment and handling of detainees is one of the most important aspects of any mission. The standards a nation sets for the treatment of those whom it detains is often a benchmark of that nation's culture and humanity, on display for all to see. Also, for operational commanders, it is imperative to have a clear understanding of detainee issues properly to plan and successfully to execute the overall military mission. Often the success of a mission is measured by the way in which military forces deal with detainees.[3] Accordingly, the focus of this chapter is on key legal issues arising from the detention of persons during CF international operations.

SECTION 2

TYPES OF CF INTERNATIONAL OPERATIONS AND DETAINEES

3. Persons may be detained by the CF across the entire spectrum of international CF operations legally categorized from peacekeeping to armed conflict. Generally, the type of operation and the legal basis for it will define the types of persons that the CF is authorized to detain. The various legal bases for international operations have been outlined in Part IV - Legal Bases for International Operations.

Armed Conflict Operations

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[1] See CF Publications B-GJ-005-501/FP-000, Use of Force in CF Operations; BB-GG-005-027/AF-021, The Law of Armed Conflict at the Operational and Tactical Level; B-GG-005-027/AF-023, The Code of Conduct for CF Personnel; and B-GJ-005-110/FP-020, Prisoner of War Handling, Detainees and Interrogation & Tactical Questioning in International Operations.

[2] Perhaps no other Law of Armed Conflict (LOAC) concepts have been the subject of more semantic debate than those of "unlawful combatant" and "unprivileged belligerent" (see footnote 14 below.). Some may view the two terms as being legally distinct, *i.e.* "unlawful combatants" are often viewed as combatants who are authorized to fight by a legitimate party to a conflict (*i.e.* state or state-like entity) but whose conduct (usually spying while disguised as a civilian or in the uniform of the adverse party) negates their PW status upon capture while "unprivileged belligerents" are often viewed as civilians (other than a *levée en masse*) who are not lawful combatants but nevertheless participate in hostilities. The terms are used generally to describe persons who have unlawfully taken part in hostilities and, if captured, would not be legally classified as having PW status under the LOAC. The terms are nowhere found in the GCs, APs or any other Convention. The terms exist in customary international law and have been affirmed in jurisprudence, state practice and academic commentary. The CF recognizes both terms and, for the purposes of this Manual, they may be used interchangeably. For ease of reference, this Manual will generally use the term "unlawful combatants".

[3] For example, the CF mission in Somalia in 1993 was successful in many respects. However, the successes were vastly overshadowed by a single event involving a Somalia teenager detained by the CF. The teenager, Shidane Arone, was beaten to death by members of the Canadian Airborne Regiment while being detained. The incident caused outrage in Canada and around the world. It eventually contributed to the disgrace and disbandment of the Canadian Airborne Regiment.

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International Armed Conflict

4. The LOAC is the primary body of law that defines a state's obligations towards detainees during armed conflict.[4] The precise treatment accorded detainees during international armed conflicts is determined by their legal status but all detainees, whatever their status, are entitled, as a minimum, to a basic level of humane treatment.[5] Under the LOAC relating to international armed conflicts, there are two basic categories of persons: combatants and civilians.

Combatant Status

5. Lawful combatants are entitled to participate in hostilities. They have "combat immunity" which is, in effect, a license to kill, wound or capture enemy combatants and to destroy military objectives.[6] Such acts would be serious criminal offences under normal peacetime laws but during an armed conflict they are lawful. The LOAC provides a legal shield to the lawful combatant.[7] If captured by the enemy, a lawful combatant cannot be tried for participating in hostilities, for killing enemy combatants, causing the deaths of civilians (killed unintentionally during attacks on lawful targets) or for destroying enemy property. Similarly, a lawful combatant may not be tried by his/her own state or another state for committing lawful acts of combatancy.

6. Once captured, lawful combatants are entitled to prisoner-of-war (PW) status and benefit from the protection of the Third Geneva Convention (GC III), which is reflective of customary international LOAC. Article 4 of GC III delineates the conditions for PW status. In conflicts to which Additional Protocol 1 to the Geneva Conventions (AP 1) applies, those conditions have been relaxed by Art 44. However, Article 44 is not regarded as declaratory of customary law.[8] This could be important in conflicts where AP I does not apply as a matter of treaty law (such as the fighting in Afghanistan in 2002). There are two particularly important aspects of being a PW. First, the person is generally only subject to the laws, regulations and orders in effect for the armed forces of the Detaining Power. Second, the person may only be tried by the same courts and under the same procedures applicable to those armed forces.[9]

Civilian Status

7. AP I represents the first attempt to codify and define the term "civilian" under the LOAC. Article 50 of AP I indicates that a "civilian" is any person who does not belong to one of the categories of persons referred to in Article 4A (1), (2), (3) and (6) of GC III and Article 43 of AP I.[10] Essentially, this means a civilian is anyone who is not a combatant.

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[4] The *lex specialis* of LOAC applies during any armed conflict. Key provisions of the *Third Geneva Convention Relative to the Treatment of Prisoners of War* (GC III), *Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (GC IV) and *Additional Protocol I, 1977* (API) delineate the classification of persons in the conflict and the treatment which they must be accorded. *Abella v Argentina*, IACHR Report 55/97(1997), paras151-161 affirms this concept. See *Geneva Convention Relative to the Treatment of Prisoners of War* [GC III], *Geneva Convention Relative to the Protection of Civilian Persons in Time of War* [GC IV] and *Additional Protocol I* [API], 12 August 1949, U.N.T.S., online: United Nations High Commissioner for Refugees <http://www.unhchr.ch/html/menu3/b/91.htm>.

[5] API, *ibid.,* art. 75.

[6] See Inter-American Commission on Human Rights (IACHR), *Report on Terrorism and Human Rights* (Washington, D.C.: IACHR, 2002) at para 68, online: Organisation of American States <http://www.oas.org/main/main.asp?sLang=E&sLink=http://www.oas.org/consejo/default.htm>. For more on combatant immunity see also R. Goldman and B. Tittemore, *Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law* (Washington, D.C.: ASIL, 2002) online: American Society of International Law <http://www.asil.org/terrorind.htm>.

[7] Y. Dinstein, *The Conduct of Hostilities Under the Law of International Armed Conflict* (Cambridge: Cambridge University Press, 2004) at 31.

[8] See Mike Matheson, "The US Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Conventions" (1987) 2 Am U JIL & Pol 419 at 425; C. Greenwood, "Customary Law Status of the 1977 Geneva Protocols" in Delissen and Tanja, ed. *Humanitarian Law of Armed Conflict Essays in Honor of Frits Kalshoven* (The Netherlands: TMC Asser Press, 1991) at 93 -113.

[9] GC III, *supra* note 4, art. 84; A. Roberts and R. Guelff, *Documents on the Laws of War,* 3rd ed., (Oxford: Oxford University Press, 2003) at 277.

[10] Roberts and Guelff, *ibid.* at p.448.

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8. Civilians, other than those who take up arms spontaneously as combatants in a *levée en masse*, are not entitled to take part in hostilities. Civilians are to be protected under the LOAC. They are not lawful targets and not, generally, PWs. Any detention of a civilian is by exception, usually in accordance with the provisions of GC IV. The general protection of civilians against the effects of hostilities is, perhaps, the most fundamental principle of the LOAC. This is the principle of distinction. This basic concept has long been established in customary law and was codified in Article 48 of AP I. Its goal is to "ensure in every feasible manner that international armed conflicts be waged solely among the combatants of the belligerent parties."[11] However, just as it is possible to lose combatant immunity by failing to comply with the LOAC, so too can civilians lose their protection if they take a direct part in hostilities and violate the principle of distinction.

Unlawful Combatants / Unprivileged Belligerents

9. The terms "unlawful combatant" and "unprivileged belligerent"[12] are nowhere found in the GCs, APs or any other Convention. The terms exist in customary international law and have been affirmed in jurisprudence,[13] state practice[14] and academic commentary.[15] The LOAC has denied the status of lawful combatant to fighters who conduct violence for private rather than public purposes or who carry out specific unprivileged acts. Historically there have been two types of unlawful combatants/unprivileged belligerents: combatants who are authorized to fight by a legitimate party to a conflict (i.e., state or state-like entity) but whose conduct (usually spying) negates their status upon capture, and civilians (other than a *levée en masse*) who are not lawful combatants but nevertheless participate in hostilities. Generally, such persons are, upon capture, not entitled to PW status. Nevertheless, the denial of PW status does not mean that such detainees would have no right or protections under international law and the LOAC. At a minimum, they would be entitled to humane treatment under customary law.[16] While classifying detainees as unlawful combatants/unlawful belligerents and not according them PWs status when they do not comply with the requirements for that status does not breach international law this can in no way justify abuse, torture or any other form of inhumane treatment of detainees.

PW Status Determination

10. Article 5 of GC III addresses the issue of the legal status of a captured or detained person who has committed a belligerent act during an international armed conflict. It notes that a person who belongs to any of the categories under Article 4 will be treated in all respects as a

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[11] Dinstein, *supra* note 6 at p.27.

[12] See CF B-GG-005-027/AF-21, LOAC at the Operational and Tactical Level (2001) at pp.3-4 to 3-5. In this manual the term "unlawful combatant" may be used interchangeably with the term "unprivileged belligerent". See note 2 above.

[13] *Ex Parte Quirin*, 317 U.S. 1 (1942); *Public Prosecutor v. Oie Hee Koi* [1968] AC 829 and *Mohamed Ali v. Public Prosecutor* [1969] 1 AC 430; *Military Prosecutor v.Omar Mahmud Kassem and Others*, Israeli Military Court, 13 April 1969, 42 ILR (1971); *Rasul et al. v. Bush, President of the United States et al.*, No. 03–334. (28 June 2004); *Hamdi et al. v. Rumsfeld, Secretary Of Defense, et al.*, No. 03–6696 (28 June 2004); *Rumsfeld, Secretary Of Defense v. Padilla et al.*, No. 03–1027 (28 June 2004).

[14] US Department of the Army FM 27-10. *Law of Land Warfare* (1976) at paras 80-81; B-GG-005-027/AF-21, pp. 3-4 to 3-5; UK MoD, *The Manual of the LOAC*, (Oxford: Oxford University Press, 2004) at para 4.2.1; German MoD, *The Handbook of Humanitarian Law in Armed Conflicts*, ed. D. Fleck (Oxford: Oxford University Press, 1999) at para. 302.

[15] R. Baxter, "So-Called "Unprivileged Belligerency": Spies, Guerrillas and Saboteurs" (1951) 28 BYBIL 323; W. Mallison & S. Mallison, "The Juridical Status of Irregular Combatants under the International Humanitarian Law of Armed Conflict" (1977) 9 Case W Res J Int'l L 39; L.C. Green, *The Contemporary LOAC*, 2ed. (Manchester: Manchester University Press, 2000) at 102-121; Y. Dinstein, "The Distinction Between Unlawful Combatants and War Criminals" in Y. Dinstein, ed., *International Law at a Time of Perplexity* (Dordrecht: Martinus Nijhoff Publishers, 1989) at 102 - 116; Kenneth W. Watkin *Combatants, Unprivileged Belligerents and Conflicts in the 21st Century* (Cambridge: International Humanitarian Law Research Institute, 2003); K. Dörmann, "The Legal Situation of "Unlawful/Unprivileged Combatants" (2003) 849 IRRC at 73. See also footnote 2 above.

[16] Common Article 3 to the GCs and Article 75 of API delineate minimum standards of humane treatment that are considered reflective of customary law, *supra* note 4.

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PW. If there is a doubt about whether a detainee is entitled to PW status, Article 5 delineates the requirement to conduct a status determination tribunal.[17]

11. Canada enacted the *Geneva Conventions Act*[18] which approves the GCs and APs I & II and incorporates grave breaches into domestic law as offences. Pursuant to section 8 of the Act, the Minister of National Defence (MND) enacted the *Prisoner of War Status Determination Regulations, SOR/91-134*[19] which allow for the establishment of a tribunal to determine whether a detainee brought before it is entitled to PW status.

12. Neither the GCs nor the *PW Status Determination Regulations* oblige the CF to conduct status determination tribunals prior to transferring detainees to another state. For example, in a coalition context, it would be virtually impossible for operations to be conducted in accordance with the campaign plan if every member of the coalition was required to conduct a status determination tribunal prior to transferring detainees to another authority. This would significantly impair the coalition commander's ability to plan operations and deploy coalition resources because all the forces could be occupied with screening and conducting status determination tribunals. International law provides for the transfer of detainees as long as the Detaining Power is satisfied that the receiving authority is willing and able to apply the appropriate international legal standards. Generally, a "Detaining Power" will be the Power or Party which detains an individual for any period of time beyond that reasonably required between initial capture and transfer to another Power and which has the ability and resources to the maintain a long-term detention facility. Thus, if a status determination tribunal is required, it can be conducted by a Party that is willing and able to apply the appropriate international legal standards. This reflects the reality of coalition operations by only obliging one of the coalition members, usually the one with the ability and resources to deal with large scale processing of detainees, to screen detainees or, if necessary, to hold status determination tribunals.

13. Article 7 of the *PW Status Determination Regulations* describes a screening process for detainees.[20] Although this Article could be interpreted as creating a positive duty for each Commanding Officer to conduct a screening of every person detained by their respective units, such an interpretation would be too narrow and not sufficiently practicable, contextual or purposive. The *PW Status Determination Regulations* must be read in the context of the application of the GCs and in light of the realities of military operations, particularly coalition military operations.

14. The realities of military operations, especially coalition operations, require a purposive application of the Regulations. The lack of a purposive application would likely result in operations being unreasonably hampered and confusion in the chain of command. For example, during most combat operations, the initial capture of enemy forces following an engagement is often chaotic and emotionally highly charged. It is invariably not practical for the precise status of the detainee to be determined at the time of capture. The procedural requirements for conducting a status determination tribunal under the regulations are time consuming and, realistically, can only be achieved under secure circumstances.[21] It would be unreasonable and unfair for both the

[17] Article 5 states: "Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal". Roberts and Guelff, *supra* note 9 at 247.
[18] *Geneva Conventions Act,* R.S. 1985, c. G-3.
[19] Appendix 1.5 to Volume IV of the *Queen's Regulations and Orders for the Canadian Forces.*
[20] Article 7 states: "The commanding officer of a unit or other element of the Canadian Forces shall ensure that each detainee is screened as soon as is practicable after being taken into custody to determine either
(a) whether or not the detainee is entitled to prisoner-of-war status; or
(b) whether there is doubt with respect to the detainee's entitlement to prisoner-of-war status".
[21] For example, the Regulations provide for the appointment of an investigating member for the tribunal, the designation of an assisting member for the detainee, the designation of an interpreter, a hearing, minutes of proceedings, witness fees and other "trial-like" procedures. Given these procedural requirements, it would be very difficult to conduct tribunals in an unsafe, fluid and volatile environment such as often exists at the point of capture.

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Detaining Power and the detainee if the tribunal had to be conducted at the moment of apprehension by the capturing unit.

15. Regarding screening of detainees, a key point is determining what is "practicable" in an operational setting. QR&O Article 1.065 states "practicable" shall be construed as "physically possible." Similarly, the ability to hold status determination tribunals must be interpreted in light of the complexity of those tribunals including the ability to collect and disclose evidence, the preparation of minutes of proceedings, the provision of representation and the attendance of witnesses. Realistically, such tribunals can only be conducted at an established secure location. In military operations, it may well be physically impossible to establish a secure location in every place a CF unit is located in order to screen detainees or conduct status determination tribunals.

16. In a coalition operation, such as the Campaign Against Terrorism, PW status determination would practically speaking be carried out by authorities who have the ability and resources to deal with the processing of detainees. Such authorities usually assume the responsibility of establishing and maintaining coalition short and long-term detention facilities. Other coalition forces, such as the CF, would not likely be assigned the task of screening or conducting status determination tribunals. In this sense, the *PW Status Determination Regulations* would not likely apply as the CF is not required by the Coalition Commander to deal with any more than the transitory custody of detained persons. In other words, it would not necessarily be the responsibility of the CF in a coalition operation to screen, conduct status determination tribunals or establish and maintain the coalition short and long-term detention facilities.

17. Moreover, the GCs require a status determination tribunal only if there is doubt as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, are entitled to PW status. Article 5 is unclear about who must have a doubt in order for status determination tribunals to be conducted. The ICRC Commentary on this issue is minimal. However, jurisprudence[22] and state practice (i.e., creation of PW status determination tribunal under national laws) indicate that the doubt must arise with the Detaining Power. This is logical given that the GCs apply to states and it is states that are responsible for persons captured by its forces. Accordingly, if the Detaining Power has no doubt that a detained person is or is not entitled to PW status then there would be no legal requirement to conduct PW status determination tribunals.

Armed Conflict Not of an International Character

18. The majority of the LOAC deals with armed conflicts of an international character. However, some of the LOAC addresses armed conflicts not of an international character (most commonly civil wars). Common Article 3 to the GCs, 1949 and AP II, 1977 are the key legal instruments applicable to armed conflicts not of an international character. One of the significant differences in the rules applicable to non-international armed conflict is that there is no combatant status and, therefore, no entitlement to PW status. Government authority is entitled to treat its opponents in accordance with its national laws (i.e., as common criminals or traitors).

19. Despite the differences in the rules applicable to international and non-international armed conflicts, the growing number and complexity of non-international armed conflicts has blurred the legal lines of demarcation between the two. Accordingly, in light of the increasingly complex operational and security environments, there is growing recognition that many of the rules and concepts applicable in international armed conflicts should apply to non-international ones. Moreover, it is CF policy to apply the spirit and principles of the entirety of the LOAC during all its international deployments.[23] It may also be useful to consider applying the spirit and

[22] *Public Prosecutor v. Oie Hee Koi, supra* note 13 at para 855.
[23] See *supra* note 4 above.

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principles of international human rights law, particularly when the CF is involved in armed conflict not of an international character.

Non-Armed Conflict Operations

20. These operations can include a broad range of military operations that do not reach the level and intensity of armed conflict. Examples of non-armed conflict operations can include, but are not limited to, humanitarian assistance, non-combatant evacuation operations (NEO) and United Nations (UN) supported or mandated missions, such as peacekeeping and peace enforcement. The LOAC does not apply as a matter of law to such non-armed conflict operations though the CF will apply the spirit and principles during all international operations.[24] Accordingly, the key difference between detainees in armed conflict and non-armed conflict operations is that there are no categories of 'combatants,' 'unlawful combatants,' PWs, and civilian 'internees' as defined under the LOAC during non-armed conflict operations.

Categories of Detainees

21. Other than the specific categories of detainees defined under the LOAC (e.g., combatants, unlawful combatants, unprivileged belligerents, PWs, and civilian internees), there are common categories of persons detained during all international CF operations.

22. The categories of detainees during all international CF operations will be defined by the combination of the legal mandate for the mission (e.g., LOAC and United Nations Security Council Resolutions), the strategic guidance issued by the Government of Canada, the Chief of the Defence Staff's Operation Order, the Rules of Engagement and the Task Force Commander's Operation Order. Generally the main categories of persons detained (short or long term) can include, though not be limited to:

a. combatants/PWs (LOAC);
b. unlawful combatants (LOAC);
c. civilian internees (LOAC);
d. civilians in assigned residences (LOAC);
e. persons who demonstrate hostile intent or commit a hostile act against CF members or units;
f. persons who demonstrate hostile intent or commit a hostile act against Allied/Coalition members or units;
g. persons who obstruct or interfere with the mission;
h. persons who demonstrate hostile intent or commit a hostile act against mission essential force property;
i. persons who enter or attempt to enter defence controlled areas without authority; and
j. persons who commit or are suspected of committing serious crimes, including war crimes, crimes against humanity or other breaches of the LOAC and international human rights law.

Treatment of Detainees[25]

23. The treatment accorded detainees during international CF operations could be based on the determination of their legal status (e.g., combatants, unlawful combatants, civilian internees, war criminals, petty criminals and so on). However, it is CF policy[26] to treat <u>all</u> detainees, regardless of their legal status, humanely in a manner consistent with the standard of PW

[24] See chapter 17, section 6 of this manual.
[25] See B-GJ-005-110/FP-020 for more specific doctrine on the handling and treatment of detained persons during CF international operations.
[26] See B-GJ-005-501/FP-000, B-GG-005-027/AF-023, B-GJ-005-110/FP-020, *supra* note 1; and NDHQ Action Directive D1/95, Prisoners of War, Interned Civilian Protected Persons, Detainees and Interrogation Training, 23 March 1995.

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treatment as defined in GC III. This standard of care is the highest one that can be provided to a detained person.

24. The standards of treatment that PWs are entitled to are detailed in several CF publications such as the Code of Conduct for CF Personnel, The Law of Armed Conflict at the Operational and Tactical Level and Prisoner of War Handling, Detainees and Interrogation & Tactical Questioning in International Operations. This policy creates a single clear standard of humane treatment for all detainees during CF international operations. However, providing PW treatment to a detainee does not mean that, as a matter of law, the individual is entitled to PW status.

Restraints, Blindfolds, Hoods and Security

25. Restraints will only be employed for the purposes of force protection or for the protection of the detained individual. Similarly blindfolds, and in exceptional cases, hoods, may only be used for limited periods of time when it is necessary to deprive the detainee of sight for force protection or for the protection of the detained individual. The use of restraints, blindfolds, hoods or similar protection measures is by exception and only as specifically authorized in orders and Rules of Engagement issued by the Chief of the Defence Staff on a operation-by-operation basis.

26. Searches of detainees shall be conducted using CF-authorized methods and only as specifically authorized in orders and Rules of Engagement issued by the Chief of the Defence Staff. When a search is conducted it must be ensured that the dignity of the individual is respected.[27]

Interrogation and Tactical Questioning of Detainees

27. The treatment of detainees held for interrogation and tactical questioning[28] will comply with Canadian law and relevant international laws, conventions and agreements, including GC III (relative to the treatment of PW), and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984). The primary aim of interrogation and tactical questioning is the timely extraction of information and intelligence from a detainee in a humane manner, and the dissemination of that product to the relevant command in order that it may be used in the production of intelligence estimates and in decision-making.

28. Interrogation and tactical questioning (TQ) are intelligence-gathering activities, defined as follows:

a. **Interrogation**. Interrogation is the systematic questioning of a detainee to obtain information of intelligence value;

b. **Tactical Questioning**. The first questioning and screening to which a detainee is subjected to obtain information of immediate tactical value.[29]

Within the CF, the term 'interrogation' may be used to refer to intelligence gathering or criminal investigation. In this chapter, 'interrogation' is used in the intelligence gathering sense. Interrogation for the purpose of criminal investigation will not be further addressed in this chapter.

29. Successful interrogation and tactical questioning require a solid understanding of the needs of the particular intelligence operation and skill in conduct. For this reason, only specified personnel are authorized to conduct interrogation and tactical questioning, specifically:

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[27] See B-GJ-005-110/FP-020 and B-GJ-005-501/FP-000.
[28] See B-GJ-005-110/FP-020 for more specific doctrine on the questioning and tactical interrogation of detainees during CF international operations.
[29] *Ibid.* at 4-1.

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a. **Interrogation**. Only interrogators from the CF Intelligence Branch who are trained in accordance with CF standards are authorized to conduct interrogations. Scientific and technical intelligence specialists may assist in interrogations but must be similarly qualified in order to conduct interrogations on their own; and

b. **Tactical Questioning**. In a unit, only designated personnel trained to CF standards will conduct tactical questioning. [30]

Although the actual conduct of interrogation is restricted to specified personnel, all CF personnel involved in detainee handling play an important part in its success. Commanders at all levels, troops who first detain a person, and those responsible for the evacuation chain can all assist in effective interrogation by conducting proper detainee handling and ensuring that processing occurs in a timely, efficient manner.

30. Interrogation and tactical questioning are governed by the following key principles:

a. all interrogation and tactical questioning activity will fully comply with Canadian law and relevant international laws, conventions, and agreements, including the GC III, and the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984)*;

b. detainees must be humanely treated at all times;

c. detainees must at all times be protected, particularly against acts of violence or intimidation and against insults and public curiosity;

d. detainees are entitled in all circumstances to respect for their persons and their honour. Women shall be treated with all the regard due to their sex and shall in all cases benefit from treatment as favourable as that granted to men. Children who have not attained the age of 18 years shall be the object of special respect; and

e. no physical or mental torture, nor any other form of coercion, may be inflicted on detainees to secure from them information of any kind whatever. [31]

31. Generally, detainees may be questioned on any matter but are not obliged to provide any answers. Detainees who are PWs are bound to give only their surname, first names and rank, date of birth, army, regimental, personal or serial number, or failing this, equivalent information. Detainees who refuse to provide answers may not be subjected to torture, abuse or inhumane treatment.

Transfer of Detainees

32. Practically speaking, the role and structure of CF units participating in international operations are not suited to deal with any more than the transitory custody of detained persons. The clear majority of CF international operations are Allied/Coalition ones (e.g., UN mandated missions or the Campaign Against Terrorism). In the context of coalition operations, persons detained by the CF in the theatre of operations will likely be transferred either to the coalition authorities who are responsible for maintaining a detention facility, to local host nation authorities or released.

33. Generally, international law permits the transfer of detainees between states as long as the transferring state is satisfied that the accepting state is willing and able to abide by

[30] *Ibid*. at 4-1 and 4-2.
[31] *Ibid*. at 4-2.

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international obligations for the handling and humane treatment of detainees. For example, portions of the LOAC, as reflected in the provisions of GCs III & IV, provide for the transfer of captured or detained persons who have taken part in hostilities to other nations who are willing and able to apply the standards for handling and treatment of such persons.[32] In such situations it usually remains the responsibility of the Detaining Power to determine the legal status of a detainee. Importantly, the mere fact that an individual captured by the CF during an international operation may be defined as a 'detainee' under CF doctrine[33] or the *PW Status Determination Regulations*[34] does not necessarily make Canada a 'Detaining Power' under international law. A 'Detaining Power' can be either a Transferring or Accepting Power. As noted previously, a 'Detaining Power' will generally be the Power which detains an individual for any period of time beyond that reasonably required between initial capture and transfer and which has the ability and resources to the maintain a long-term detention facility. The main purpose of classifying an individual captured by the CF as a 'detainee' (as defined under CF doctrine or under the *PW Status Determination Regulations*) is that it triggers the CF policy to treat <u>all</u> detainees, regardless of their legal status or regardless of whether Canada is a 'Detaining Power,' humanely in manner consistent with the standard of PW treatment as defined in Geneva Convention (GC) III.

34. A transferring state's responsibility regarding a detainee does not end at the moment of transfer. For example, if a transferred detainee has PW status, Canada would have a residual obligation, pursuant to Article 12 GC III, to take effective measures to correct any situation upon being notified that the provisions of GC III are not being complied with in any important respect. Normally, the role of notifying a transferring state rests with the Protecting Power (often the ICRC).

35. Under customary international law, an argument can be made that a residual obligation analogous to that found at Article 12 GC III for PWs also exists for unlawful combatants or other civilian detainees (e.g., petty criminals and persons interfering with the mission) who are transferred to an accepting state. Accordingly, Canada would likely have a residual obligation to take effective measures to correct any situation upon being notified by an entity similar to a Protecting Power that an accepting state has failed, in any important way, to treat the transferred detainee humanely in a manner consistent with the standard required under international law. The ability of such an entity to engage the Canadian authorities in individual cases would depend upon its being aware of the transfer of a particular detainee by the CF.

SECTION 3

CONCLUSION

36. The legal, operational and policy issues arising from detainee handling and treatment during international operations can be varied, nuanced and complex. Resolution of such issues requires a basic understanding of the key international legal frameworks, primarily the LOAC and international human rights law. While handling and treatment of detainees can vary according to the legal status of the detainees, it must be emphasized that CF policy is to treat <u>all</u> detainees, regardless of their legal status, humanely in a manner consistent with the standard of PW treatment as defined in *Geneva Convention (GC) III*. Moreover, it is prohibited in all circumstances to torture, abuse or to treat inhumanely any detainee.

37. It is crucial to account for detainees as a key planning factor in all CF operations. If this does not occur, then CF commanders will be faced with the problem of handling detainees, possibly in large numbers, for whom little provision has been made in terms of treatment, transfer,

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[32] Article 12 of GC III states: "Prisoners of war may only be transferred by the Detaining Power to a Power which is a party to the Convention and after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the Convention". There is a similar provision for the transfer of civilian in GC IV.
[33] See B-GJ-005-501/FP-000, BB-GG-005-027/AF-021, B-GG-005-027/AF-023, B-GJ-005-110/FP-020.
[34] Article 2 of the Regulations states: "detainee" means a person in the custody of a unit or other element of the Canadian Forces who has committed a belligerent act".

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use of force, questioning, processing and logistics. If such problems occur, then the conduct of operations will likely be severely impacted and detainees may be subjected to improper treatment. This would be unacceptable for Canada, CF commanders and CF members and would likely result in mission failure. Conversely, a fully informed appreciation of detainee issues and full consideration of such issues in the operational planning process will contribute to mission success and will reaffirm the professionalism, effectiveness, honour and humanity of the CF.

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CHAPTER 30

REFUGEES, DISPLACED PERSONS AND SAFE HAVENS

SECTION 1

INTRODUCTION

1. When deployed at sea or on land the CF have frequently encountered persons who are considered ‘refugees,’ ‘internally displaced persons’ (IDPs), and ‘asylum seekers,’ often fleeing the adverse effects of an armed conflict and often requesting the assistance of the commander and CF members. Frequently, these encounters will occur during the conduct of operations and commanders will require immediate advice on what their legal responsibilities and obligations are towards them. This chapter will define the legal status of these groups of persons and what obligations rest with the CF.

SECTION 2

REFUGEES

2. The 1951 United Nations *Convention relating to the Status of Refugees* (Refugee Convention) and its 1967 *Protocol relating to the Status of Refugees* set out the specific rights of refugees and the obligations on the state in which the refugee is seeking protection.[1]

Definition of a Refugee

3. Article 1 of the *Refugee Convention* and its *Protocol* collectively define a “refugee” as:

> [a] person who owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who not having a nationality and being outside the country of his former habitual residence as a result of such event, is unable or, owing to such fear, is unwilling to return to it.[2]

4. The individual must subjectively believe that they will be subject to persecution upon return to their country of origin and this must be capable of being objectively supported by the prevailing circumstances. The fear of persecution must be based on the reasons of race, religion, nationality, membership of a particular social group or political opinion.

5. The *Refugee Convention* does not apply to an individual who is receiving protection or assistance of the UN other than from the United Nations High Commissioner for Refugees (UNHCR), to an individual who has the rights and obligations of the nationality of the host country, or to an individual who has committed a war crime, a serious non-political crime or is guilty of acts contrary to the purposes and principles of the UN.

Non-Refoulement

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[1] *Convention relating to the Status of Refugees*, 28 July 1951, U.N.T.S, online: United Nations High Commissioner for Refugees <http://www.unhchr.ch/html/menu3/b/o_c_ref.htm> [Refugee Convention]; *Protocol relating to the Status of Refugees*, 4 October 1967, U.N.T.S., online: United Nations High Commissioner for Refugees <http://www.unhchr.ch/html/menu3/b/o_p_ref.htm>.

[2] *Refugee Convention*, *ibid.*, art. 1. The *Immigration and Refugee Protection Act,* C.S. 2001, c. 27, s. 96 defines a refugee for Canada.

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6. The concept of 'non-refoulement' states that no individual should be returned to a country where they are likely to face persecution or torture. This includes the forcible removal of an individual to their country of origin without providing them with the opportunity to have their case decided through that country's legal system.

7. The non-refoulement principle contained in the *Refugee Convention* is not absolute. National security and public order have long been recognised as potential justifications for derogation to the non-refoulement principle.

SECTION 3

INTERNALLY DISPLACED PERSONS

8. IDPs are persons who are forced or compelled to flee their homes as a result of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized state border.

9. Since IDPs remain within the territorial borders of their own state they are subject to the domestic laws of that state. National authorities have the primary responsibility to provide protection and humanitarian assistance to internally displaced persons within their jurisdiction.

10. Under the law of armed conflict, IDPs form part of the civilian population and as such they are accorded all the protections as any other civilian during an armed conflict.

SECTION 4

ASYLUM

11. Asylum is the protection that a state grants on its territory, or in some other place under its control, to a person who seeks it. It can only be granted to a foreign national against the exercise of jurisdiction by another state. Once asylum has been granted a duty exists on all other states to respect the grant.

Safe Haven, Asylum Seekers and Refugees

12. A 'safe haven' is a temporary form of protection provided to civilians where the life of the person seeking protection is in imminent danger. According to international law, there is no obligation on a state to provide a safe haven to an individual seeking protection. However, once protection is provided there is an obligation on the state to treat all persons humanely without any adverse distinction based on sex, religion, race, ethnic origin or similar criteria.

13. As a safe haven is a temporary form of protection it should be removed when the immediate threat to life appears to have ceased. Persons provided with a safe haven should not be unnecessarily exposed to danger upon their release or evacuation. If possible an individual provided with a safe haven should be released to an appropriate humanitarian relief agency for assistance.

14. Other than during the exercise of the duty to rescue at sea, there is no obligation to embark civilians onto a warship. If operationally feasible, warships may take aboard persons seeking protection, continuing their planned voyage and disembarking the civilians at the next reasonable and safe opportunity.

15. Pursuant to CFAO 99-6, a CO shall not receive on board any person who is seeking safe haven for the purpose of evading criminal law or who is seeking to leave that foreign state in a manner contrary to its laws. During a disturbance or a tumult, safe haven may be given to any

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person who is in imminent danger of physical harm or loss of life or liberty.[3] However, before providing an individual with safe haven, a CO shall contact the nearest Canadian diplomatic office, consular office, or Canadian trade commissioner.

16. The principle of non-refoulement applies to rescued individuals and those to whom safe haven has been granted, and they must be taken to a safe place where they will not be subject to persecution or be in jeopardy of being returned to their country of origin to face persecution.

SECTION 5

CONCLUSION

17. During CF international operations, commanders and units may encounter refugees, displaced persons and persons seeking safe haven. Operational legal advisors and commanders must, therefore, be aware of domestic and international laws dealing with such persons.

18. Essentially, there is no obligation for a CF commander to acknowledge or grant any legal status, such as refugee status, or to grant safe haven. Commanders may provide assistance to a person in distress but any determination of the person's legal status (refugee, asylum seeker and so on) must be referred to National Defence Headquarters.

19. In today's complex operational and security environment, often described as a 'Three Block War,' the manner in which the CF treats and handles those claiming refugee status, asylum or those seeking safe haven will likely have an important impact on the successful completion of the mission. Commanders and operational legal advisors must be prepared to deal with such issues, often on short notice, and often under the scrutiny of the media.

[3] For further information on the procedures for the reception of an individual see CFAO 99-6.

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CHAPTER 31

ENVIRONMENTAL LAW

SECTION 1

INTRODUCTION

1. Environmental issues affect all CF operations whether domestic or international. While the majority of environmental legal concerns relate to domestic operations, there are some international environmental legal issues that operational legal advisors and commanders must also be aware of.

2. This chapter provides an overview of the environmental law that may be applicable during CF domestic and international operations.

SECTION 2

ENVIRONMENTAL LAW AND DOMESTIC OPERATIONS

3. Federal legislation applies to CF operational activities as well as exercises in Canada.[1] The CF and individual CF members are under a legal duty to exercise due diligence in respect of military operations and the effect these may have on the environment. The conduct of military operations must reflect established standards and regulations for environmental protection at all times. Under particular federal environmental legislation, CF members are *personally* responsible and liable for the protection of the environment while they perform their work.[2]

4. In addition to federal legislation, provincial and municipal laws and by-laws may apply. The CF should comply with the applicable provincial environmental laws when conducting domestic operations.[3]

5. In Canada, the *Export and Import of Hazardous Wastes Regulations* made pursuant to the *Canadian Environmental Protection Act, 1999* (CEPA) specify the conditions under which the export and import of hazardous wastes are allowed. Moreover, Defence Administrative and Orders Directives (DAOD) 4003-1 sets out operating principles and responsibilities for the initial selection, procurement, use, handling, storage, transport and disposal of Hazardous Materials (HAZMAT). It mandates compliance with federal laws and regulations in dealing with HAZMAT, as well as respect for provincial laws and municipal by-laws where appropriate. It also sets out

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[1] See *Canadian Environmental Protection Act 1999*, S.C. 1999, c. 33; *Canadian Environmental Assessment Act, 1992*, S.C. 1992, c. 37; *Canada Shipping Act*, R.S. 1985, c. S - 9, s. 1; *Arctic Waters Pollution Prevention Act*, R. S. 1985, c. A-12 (I" Supp.), s. 1; *Canada Water Act*, R.S.C. 1985, c. C-11; *Fisheries Act*, R.S.C. 1985, c.F-14; *Canada Wildlife*, R.S. 1985 c. W-9; *Navigable Waters Protection Act*, R.S. 1985, c. N-22; *Oceans Act*, S.C. 1996, c. 31; *Forestry Act*, R.S. 1985, c. F-30; *Great Lakes Fisheries Convention Act* , R.S. 1985, c. F-17. The DND and CF Code of Environmental Stewardship provides that both organizations shall meet or exceed the letter and spirit of all federal environmental laws and, where appropriate, be compatible with municipal, provincial, territorial, and international standards.
[2] Under the *Fisheries Act, the Canadian Environmental Protection Act 1999* and the *Canadian Environmental Assessment Act, 1992,* CF members are *personally* responsible and liable for the protection of the environment while they perform their work. If an accident causing damage to the environment occurs as a result of a member's action (or lack of action) or the direction they give (or fail to give) to their subordinates, that member will have to establish in military or civilian court that they exercised due diligence in performing their duties. Under the *National Defence Act,* members of the CF remain subject to the Canadian *Criminal Code* and any other Act of Parliament wherever they may be. CF members are to take every reasonable step to protect the environment and avoid causing any damage to it. Due diligence requires individuals to know and obey federal environmental laws and regulations; exercise caution; prepare for risks that a thoughtful and reasonable person would foresee; and respond to risks and incidents as soon as practicable. Besides requiring that an individual person takes all reasonable care, due diligence also requires warning or reporting to a superior any other person who is behaving negligently a behaviour that may cause damage to the environment.
[3] See DAOD 4003-0, Environmental Protection and Stewardship.

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requirements at the organizational and unit levels for the establishment of control and review authorities, emergency response plans, safe storage and disposal, and the provision of training to ensure that CF members are educated in the safe handling, use, storage and disposal of HAZMAT to the necessary degree. Civil legal responsibilities are specifically addressed therein.

SECTION 3

PEACETIME INTERNATIONAL ENVIRONMENTAL PROTECTION CONVENTIONS

6. The principles enacted in international environmental agreements should be respected, in times of peace and war alike.[4] Operational legal advisors and commanders should be aware of the provisions of the international environmental agreements as they may apply to the conduct of CF operations. Some of the key international agreements to which Canada is a party are described below.

The Antarctic Treaty

7. The *Antarctic Treaty*[5] expressly prohibits the use of Antarctica for military purposes, including establishing military bases or fortifications, carrying out military manoeuvres, and weapons testing. *Protocol I to the Antarctic Treaty* contains provisions regulating impact assessments, monitoring, protection and conservation of flora and fauna, waste disposal and waste management, and the prevention of marine pollution in the Antarctic region.

The Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter

8. The *London Dumping Convention*[6] imposes restrictions on the dumping or disposal of wastes from vessels, aircraft, platforms, or other man-made structures at sea. It covers all seas and all deliberate disposals of wastes, other than that incidental to the normal operation of ships.

United Nations Convention on the Law of the Sea (UNCLOS)

9. UNCLOS[7] is a comprehensive treaty dealing with maritime environmental regulation. Under UNCLOS, states are bound to prevent and control marine pollution, and they are liable for damages caused by violations of their international obligations to combat it. Part XII of UNCLOS deals specifically with the protection and preservation of the marine environment, and contains measures to prevent, reduce, and control marine pollution from all sources. In addition to imposing obligations of a general nature, Part IX specifically addresses topics related to the natural environment.[8]

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[4] Some of the environmental issues commonly encountered in all types of operations are: policies and responsibilities to protect and preserve the environment during operations; hazardous materials management; flora and fauna protection; and spill management plans.

[5] *The Antarctic Treaty*, Washington 1959. In force in Canada 04 May 1988. See also the *Antarctic Environmental Protection Act*, S.C. 2003, c. 20.

[6] *The Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter*, 30 August 1975 [*London Dumping Convention*]. Ratified by Canada on 13 November 1975. See also the *Canadian Environmental Protection Act*, 1999, Part 7, Division 3, on "Disposal at Sea", previously called "Ocean Dumping" in the 1988 CEPA.

[7] *United Nations Convention on the Law of the Sea* (UNCLOS), online: United Nations <http://www.un.org/Depts/los/convention_agreements/texts/unclos/closindx.htm>.

[8] *Ibid*. See art. 198, Requirements for notice of imminent or actual damage; art. 199, Requirements for contingency plans against pollution; art. 204, Risk monitoring and assessment provisions; art. 207, Pollution from land-based sources; art. 209, Pollution from activities in the area; art. 210, Dumping; art. 211, Pollution from vessels; art. 212, Pollution from or through the atmosphere; art. 219, Measures to avoid pollution relating to seaworthiness of vessels; and art. 221, Measures to avoid pollution relating to maritime casualties.

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10. UNCLOS is the predominant source of international maritime environmental regulation. Any specific obligations assumed by signatory states under other conventions related to protection of the marine environment should be carried out in a manner consistent with the general principles and objectives of UNCLOS.[9]

Convention on Biological Diversity and the Cartagena Protocol[10]

11. The objective of the *Convention on Biological Diversity* is to conserve biological diversity, promote the sustainable use of its components, and encourage equitable sharing of the benefits arising out of the utilization of genetic resources.[11]

12. *The Convention on Biological Diversity* places a duty on state parties to conserve biological diversity within their jurisdiction, as well as outside their jurisdiction in certain circumstances. Even though it was reaffirmed that states have sovereign rights over their own biological resources,[12] the principle of national sovereignty over domestic natural resources is subject to the rights of other states.[13] The parties have to provide for environmental impact assessment of projects that are likely to have significant adverse effects on biological diversity. State parties are to exchange information and undertake consultation with other state parties in all cases where proposed national projects are likely to have adverse effects on biological diversity in other states.[14]

13. *The Cartagena Protocol on Bio-Safety to the Convention on Biological Diversity* provides an international regulatory framework to reconcile the respective needs of trade and environmental protection in a rapidly growing global industry, the biotechnology industry.

Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal

14. *The Basel Convention*[15] is principally devoted to implementing a framework for controlling the movement of hazardous wastes across international borders.[16] Trans-boundary movements of hazardous waste or other wastes are permissible only upon prior written notification of export by the sending state to the competent authorities of the state of import and/or transit. The movement is permissible only if the state of export does not have the capability of managing or disposing of the hazardous waste in an environmentally sound manner.

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[9] *Ibid.*, art. 237.
[10] *Convention on Biological Diversity*, online: Secretariat of the Convention on Biological Diversity <http://www.biodiv.org/convention/default.shtml.htm>. Concluded in Rio de Janeiro, entered into force on 29 December 1993.
[11] *Ibid.*
[12] *Ibid.*, Preamble.
[13] *Ibid.*, art. 4.
[14] *Ibid.*, art. 14.
[15] *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal*, online: Secretariat of the Basel Convention <http://www.basel.int/text/documents.html>. Ratified by 147 parties and the European Union, as of 4 July 2001. In force in Canada as of 26 November 1992.
[16] Development of *Basel Convention* and other international agreements: in 1989, *Basel Convention was* adopted, and in 1992, it entered into force. In 1995, *Ban Amendment* prohibited exports of hazardous waste for any purposes from party members of the UE, OECD and Liechtenstein to all other parties to the Convention. For *Ban Amendment* to enter into force, it has to be ratified by 62 states present at the time of adoption. It has not yet entered into force. In 1998, the list of specific wastes characterized as hazardous or non-hazardous has been drawn. The list was adopted. In 1999, Ministerial Declaration adopted the agenda for the next decade, with a special emphasis on minimizing hazardous waste. In addition, *Protocol on Liability and Compensation* established rules on liability and compensation for damages caused by accidental spills of hazardous waste during export, import or disposal. The *Protocol* reaffirms the commitment of *Rio Declaration on Environment and Development* according to which states shall develop international and national legal instruments regarding liability and compensation for the victims of pollution and environmental damage. The need to ensure that adequate and prompt compensation is available for damage resulting from the trans-boundary movement and disposal of hazardous wastes and other wastes including illegal traffic was emphasized again.

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15. *The Basel Convention* develops criteria for environmentally sound management, involving controls from the generation of a hazardous waste to its storage, transport, treatment, reuse, recycling, recovery and final disposal.

16. States parties to the *Basel Convention* must take appropriate measures to implement and enforce its provisions. Among these, the provisions on measures to prevent and punish conduct in contravention of the *Basel Convention* are to be enforced.

17. When the CF are conducting peace support operations, in the territory of a sovereign state, CF members may not be immune from all local national environmental and other laws, unless an agreement (e.g., a Status of Forces Agreement (SOFA)) provides otherwise.[17]

SECTION 4

THE ENVIRONMENT AND THE LAW OF ARMED CONFLICT

18. LOAC impacts on the protection of environment with both its treaty law and customary law components, which will be examined in this section. In its customary law customary dimension, there is a general principle recognized by the ICJ to the effect that states must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives.[18]

Additional Protocols

19. Environmental protection is further elaborated upon, and expanded, in the *Additional Protocols. Additional Protocol I* to the *Geneva Conventions* prohibit the use of methods or means of warfare, which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment.[19] Attacks against the natural environment by way of reprisals are also prohibited.[20]

20. Attacking, destroying, removing or rendering useless certain objects for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse Party, whatever the motive, is prohibited.[21] The protected objects include agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and irrigation works. These types of objects are specifically protected against reprisals.[22] In addition, Article 56 protects works and installations containing dangerous forces (specifically dams, dykes, and nuclear generating stations) against attack. Although the aim of these provisions is to prevent the starvation of civilians and avoid losses among the civilian population resulting from the release of dangerous forces, the protection of the environment is indirectly provided for.

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[17] The agreement will usually state that the specified force should obey the laws of the host state, but that members of the force will be immune from prosecution under the host state's jurisdiction in criminal matters.

[18] *Legality of the Threat or Use of Nuclear Weapons Case*, Advisory Opinion, [1996] I.C.J. Rep. 226 at 230, online: International Court of Justice <http://www.icj-cij.org/icjwww/icases/iunan/iunanframe.htm>.

[19] *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts* (Protocol I), 8 June 1977, U.N.T.S., arts.35 and 55 [*Additional Protocol 1*].

[20] *Ibid.,* arts. 35(3) and 55. Note: While no operational definitions are provided for "widespread", "long-term" and "severe", the words "may be expected" in this prohibition imply a standard of "reasonable foreseeability" being applied in assessing liability for unintended environmental damage, as well as the requirement of "due diligence".

[21] *Ibid.*, art. 54. It should be noted that by virtue of article 54(3), the protection afforded to these objects is nullified if they are used by an adverse party: a) as sustenance solely for the members of its armed forces; or b) if not as sustenance, then in direct support of military action, so long as any actions taken against the objects may not be expected to leave the civilian population with inadequate food or water.

[22] *Ibid.*, art. 54 (4).

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21. Article 14 of *Additional Protocol II* closely mirrors Articles 54(l) and 54(2) of *Additional Protocol I* as it provides protection to objects which are indispensable to the survival of the civilian population. Here again, the protection of the environment is indirectly provided for.

The *Gas Protocol of 1925*

22. Due to the extensive use of chemical weapons during World War I an international agreement was reached in 1925. The *Gas Protocol of 1925* [23] condemned the use in war of asphyxiating, poisonous and other gasses, and of all analogous liquids, materials or devices, including bacteriological methods of warfare. Nevertheless, states parties reserved the right to retaliate should such weapons be used first against them. [24]

23. *The Gas Protocol of 1925* makes no mention of the environment or its protection *per se*. However, a prohibition on the use of gasses and bacteriological methods of warfare has the effect of protecting the environment against the deleterious effects resulting from their use.

Biological and Toxin Weapons Convention

24. The *Biological and Toxin Weapons Convention*[25] (BTWC) covers all developments in the field of microbiology and biotechnology.[26] Biological weapons were defined in the BTWC as the deliberate use of disease against humans, animals or plants. The primary purpose of the BTWC is the destruction of existing stockpiles of biological weapons and the prevention of their proliferation.[27] State parties have undertaken not to engage in military preparations for offensive biological warfare, regardless of whether they are faced with a similar threat. State parties, therefore, renounced the right to retaliation or deterrence. The BTWC also reiterates the obligation not to transfer, assist, encourage, or induce to manufacture or otherwise acquire any of the agents, toxins, weapons, or means of delivery specified therein.[28] The BTWC states that nothing in it is to be construed as derogating from the obligations contained in the *1925 Protocol*, which, therefore, continues to be in effect.[29]

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[23] *Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare,* 17 June 1925, online: Organisation for the Prohibition of Chemical Weapons <http://www.opcw.org/html/db/cwc/more/geneva_protocol.html> [*Gas Protocol of 1925*].

[24] G.S. Pearson, "The Regime to Prevent Biological Weapons: Opportunities For a Safer, Healthier, More Prosperous World" at 2, online: University of Bradford <http://www.brad.ac.uk/acad/sbtwc/other/BTWCrgime.pdf>. Some state parties entered reservations stating that the *Gas Protocol of 1925* was only binding on state parties that have signed or ratified the *Gas Protocol of 1925* or may have acceded to it. Others stipulated that the *Gas Protocol of 1925* would cease to be binding on that state party in regard to any enemy state whose armed forces fail to respect the prohibitions laid down in the *Gas Protocol of 1925*.

[25] *Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction,* 4 October 1972, online: Department of Foreign Affiars and International Trade <http://pubx.dfait-maeci.gc.ca/A_BRANCH/AES/env_commitments.nsf/0/2126e0e8d676fc9985256b6c004aeb5f?OpenDocument> [BTWC]. BTWC entered into force on 26 March 1975. As of March 2001, there are 143 states parties to the BTWC and 18 signatory states. Canada signed the BTWC on I0 April 1972 and ratified on 18 September 1972.

[26] United Nations, *The Fourth Review Conference of the States Parties to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction,* Geneva, 25 November - 6 December 1996, BWC/CONF. IV/9, 1996, online: Federation of American Scientists <http://www.fas.org/nuke/control/bwc/text/bintro.htm>.

[27] BTWC, *supra* note 26, art. I. Article I of the BTWC contains a general purpose:

> Each State Party to this Convention undertakes never in any circumstances to develop, produce, stockpile or otherwise acquire or retain:
>
> (1) Microbial or other biological agents, or toxins whatever their origin or method of production, of types and in quantities that have no justification for prophylactic, protective or other peaceful purposes;
>
> (2) Weapons, equipment or means of delivery designed to use such agents or toxins for hostile purposes or in armed conflict.

[28] *Ibid.*, art. III.

[29] See The Biological and Toxin Weapons Convention, online: The Biological and Toxin Weapons Convention Website <http://www.opbw.org/>.

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Protocol to Biological and Toxin Weapons Convention

25. The *Protocol* to the BTWC was designed to strengthen the effectiveness of the BTWC and improve its implementation.[30] Jointly, the BTWC and its *Protocol* affirm the determination to prohibit biological weapons and their use by providing for a strengthened national implementation, effective controls of the handling, use, storage and transfer of biological materials, preparedness and protective measures.[31]

Convention on the Prohibition of Military use of Environmental Modification Techniques

26. The *Environmental Modification Convention*[32] entered into force on 5 October 1978. The convention recognized that scientific and technical advances may open new possibilities with respect to the modification of the environment, and that military or any other hostile use of environmental modification techniques could have harmful effects to the welfare of humans.[33]

27. Environmental modification techniques are any technique for changing - through the deliberate manipulation of natural processes - the dynamics, composition or structure of the Earth, including its biota, lithosphere, hydrosphere and atmosphere, or outer space.[34]

28. A party to the *Environmental Modification Convention* undertakes not to engage in military or other hostile use of environmental modification techniques having widespread, long-lasting or severe effects on another state party or causing destruction, damage or injury to the latter.[35]

29. The contracting parties must refrain from assisting, encouraging or inducing any state, group of states or international organizations to engage in the aforementioned activities. Also, each state party must take measures necessary to prohibit and prevent any activity in violation of the *Environmental Modification Convention,* in a territory under its jurisdiction or control. The use of environmental modification techniques for peaceful purposes is, however, not to be hindered.[36]

30. The *Environmental Modification Convention* should not be read as prohibiting such commonplace and necessary activities as cutting down trees, bulldozing the earth, or digging as dictated by operational requirements. However, the alteration of atmospheric conditions affecting

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[30] Pearson, *supra* note 25 at 1.
[31] *Ibid.* The Protocol to the BTWC includes procedures to address non-compliance concerns. Specific measures to monitor compliance include: mandatory declarations of activities and/or facilities, visits to ensure that declarations are complete and accurate, short notice investigation, timely submissions of declarations, and consultative mechanisms to clear up ambiguities in declarations.
[32] *Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques*, 18 May 1977, U.N.T.S., online: United Nations <http://www.opcw.org/html/db/cwc/more/enmod.html>. Adopted under Resolution 31/72 of the United Nations General Assembly on December 10, 1976. On 18 May 1977 Canada signed the *Convention on the Prohibition of Military or Any Hostile Use of Environmental Modification Techniques*.
[33] *Ibid.,* Preamble.
[34] *Ibid.,* art. 2.
[35] *Ibid.*, art.1. The "Understandings", which were not incorporated into the *Environmental Modification Convention*, provide additional explanations as to, *inter alia*, the meanings of the terms "widespread", "long-lasting" and "severe" as used in Article I Environmental Modification Convention 61:

a. “Widespread" - encompassing an area on the scale of several hundred square kilometres;
b. "Long-lasting" - lasting for a period of months, or approximately a season;
c. “Severe" - involving serious or significant disruption or harm to human life, natural and economic resources or other assets.

Only one of these three criteria must be met to constitute a violation of *Environmental Modification Convention*. The Understanding also states that the interpretation of these terms is intended exclusively for the *Environmental Modification Convention* and is not intended to prejudice the interpretation of the same or similar terms if used in connection with any other international agreement. But these standards are significantly different from those in API relating to incidental environmental damage, where the terms have a different meaning and are accumulative, not alternative.
[36] *Ibid.*, art. 3.

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the environment such as affecting weather patterns, causing earthquakes and modifications to the oceans are expressly prohibited.[37]

Convention on Conventional Weapons

31. The *Convention on Conventional Weapons* (CCW)[38] was intended to remedy the situation arising in the 1970s and 1980s when it became apparent that new technologies, such as laser systems, could produce new means of suffering on the battlefield. Consequently, several Protocols were developed in order to regulate and establish international regimes applicable to conventional weapons.

32. *Protocol III* relates to environmental concerns as it contains prohibitions and restrictions on the use of incendiary weapons on forests or plant cover.[39] It is now strictly prohibited to make forests or any other kinds of plant cover the object of attack by incendiary weapons, except when such natural elements are used to cover, conceal or camouflage combatants or other military objectives, or are themselves military objectives.[40]

Chemical Weapons Convention

33. The *Chemical Weapons Convention* (CWC)[41] complements the existing prohibition on the use of chemical weapons and does not limit or detract from the obligations assumed by any state under the *1925 Protocol.*[42] The CWC contains detailed provisions on the definition of prohibited weapons. Each state party undertakes to never, under any circumstances, develop, produce, otherwise acquire, stockpile, retain or transfer, directly or indirectly, chemical weapons to anyone.[43] It also forbids the use of such weapons.[44] This obligation to never, under any circumstances, use chemical weapons applies to both international and non-international armed conflicts.[45]

34. The prohibition against the use of chemical weapons does not apply to police-type operations such as riot control. Toxic chemicals and their precursors do not qualify as chemical weapons where their use is intended for purposes not prohibited under the CWC.[46] Chemicals intended for legitimate purposes, such as agricultural use, are also not banned.

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[37] International and Operational Law Department, *Operational Law Handbook*, 1st rev. ed. at 5 - 18 (Charlottesville, Virginia: The Judge Advocate General's School, 1997).

[38] *The Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which may be deemed to be Excessively Injurious or Have Indiscriminate Effects,* 10 October 1980, U.N.T.S., online: United Nations <http://www.un.org/millennium/law/xxvi-18-19.htm> [CCW]. Also known as *the Convention on Conventional Weapons* or the *Inhumane Weapons Convention,* the CCW concluded in October 1980, and entered into force in December 1983.

[39] *Ibid.* Article 2(4) of the *CCW* states that it is prohibited to make forests or any other kinds of plant cover the object of attack by incendiary weapons except when such natural elements are used to cover, conceal or camouflage combatants or other military objectives, or are themselves military objectives. Three original *Protocols* entered into force on December 2, 1983. *Protocol IV* entered into force on July 30, 1998. Amended *Protocol* was adopted by a conference of state parties in 1996 and entered into force on Dec 3, 1998.

[40] *Ibid.*, art. 2(4).

[41] *Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction,* 13 January 1993, U.N.T.S., online: United Nations <http://www.un.org/Depts/dda/WMD/cwc/> [CWC]. The CWC entered into force on 29 April 1997, and constitutes an important achievement in disarmament law by controlling state and private behaviour. As of 29 March 2001, there were 143 state parties. Canada signed on 13 January 1993 and ratified on 26 September 1995.

[42] *Ibid.*, art. XIII.

[43] *Ibid.*, art. 1.

[44] *Ibid.*, art. 1(1).

[45] Both CWC and BTW state that each state party undertakes never under any circumstances to carry out activities stipulated therein, their applicability both in time of peace and in time of armed conflicts therefore affirmed.

[46] *Supra* note 42, art. VI (I). The purposes not prohibited under the CWC include law enforcement including domestic riot control purposes, under article II (9). The definition of the purposes not prohibited under the CWC is provided under this article.

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SECTION 5

CONCLUSION

35. Both domestically and internationally, environmental issues are gaining prominence and increasing in complexity. CF operations are effected by such issues. Accordingly, operational legal advisors and commanders must be aware of applicable Canadian and international environmental laws.

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CHAPTER 32

CONTRACTING

SECTION 1

INTRODUCTION

1. CF domestic and international operations typically require persons with the requisite authority to enter into diverse contracts in order to support the mission. Some examples of these are contracts for the supply of goods or services, leases of equipment or real property, accommodations, food, contracts for personnel services, construction contracts, rest and relaxation (R&R) and transportation contracts. These contracts may range in value from minor amounts to contracts worth millions of dollars and may involve public or non-public funds.

2. Although specific contracts vary, there are contractual principles that remain constant. Adherence to these rules and guidelines can ensure that the commander and those contracting on the commander's behalf comply with the standards that the CF and the law demand.

3. This chapter will briefly outline some of the more significant contractual issues that may arise during operations including contracting authority, relevant CF policies, legal liability, conflict of interest and receiving gifts, hospitality and other benefits.

SECTION 2

CONTRACT LAW PRINCIPLES

4. Contracts create legally binding and enforceable rights and obligations concerning the subject matter of the contract. The essence of a contract is 'agreement' between contracting parties. At common law, the requirements of a legally enforceable contract are that it involve the unconditional acceptance of an outstanding offer, that it is supported by mutual consideration, that it involves a reasonably precise set of terms, that it is entered into between two or more competent parties, that it is entered into with the intent to create legal relations, and, that it pertains to the voluntary performance of some legal act. To be legally enforceable at common law, a contract must conform to each and every one of the above six elements. 'Consideration' is usually of a financial nature, but it may also involve either a benefit being conferred or a detriment being suffered by one or both parties, and may also include mutual promises. 'Competency' refers to the ability of a contracting party to enter into an agreement. In other words, does the contracting party have the legal identity and capacity to enter into a binding agreement? In civil law jurisdictions, such as Quebec, the laws governing contract formation vary slightly from the contract principles outlined above. In either case however, it is recommended that legal review of the proposed contract be sought prior to signature.

5. Contracts may be either written or verbal. It is DND practice, however, that all contracts are to be in writing. For written contracts, the general principle is that the only terms of the contract are those that are 'express' terms, in other words, those that are written into the contract. Other terms or understandings not expressly written on the face of the contract cannot be considered when interpreting the contract.[1]

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[1] While this is the cornerstone principle, the circumstances surrounding the formation of the contract, including such matters as misrepresentations by the parties, mistakes as to the existence or identity of the subject matter of the contract, the identity of the other contracting party or the nature of the transaction by one or more of the parties, fraud, conduct of the parties, both before and after entry into the contract and a variety of other issues in contract law, may prompt a court to consider things said, done, or acted upon outside the written terms of the contract when determining the enforceability of the contract. It should also be noted that, in exceptional circumstances, in order to provide commercial efficacy to the contract, the courts may imply additional terms into the contract. Known as 'implied terms,' they may be based upon such things as the custom in the trade, prior dealings of the parties, and business efficacy. There are also terms which in

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6. Contracts create binding legal obligations and can subject the parties to possible compulsory performance of the contract terms or the payment of monetary compensation for their breach. Thus, unauthorized entry into contracts on behalf of the CF, or behaviour whereby a contract may be inferred or found to exist through one's conduct must be avoided.

SECTION 3

CF POLICIES AND PROCEDURES

General

7. The main reference materials for identifying the policies and procedures related to contracting are now located in the Defence Administrative and Orders Directives (DAOD). They are as follows:

a. DAOD 3004-0 – Contracting: dealing with general policy direction and authority to contract;

b. DAOD 3004-1 – Procedural Overview – Contracting: dealing with procedural solicitations of bids, and contracting methods;

c. DAOD 3004-2 – Service Contracts: dealing with the provision of services to DND and the CF; and

d. DAOD 3004-3 – Directed (Sole Source) Contracting: dealing with the provision of goods or services to DND and the CF through a pre-identified supplier on a justified sole-source basis.

8. Related keystone documents are:

a. Delegation of Authorities for Financial Administration for DND and the CF;[2]

b. Delegation of Authorities for Financial Administration Instrument;

c. Treasury Board Contracting Policy;[3]

d. Provision of Services Policy;[4]

e. *Financial Administration Act*[5] and *Government Contracts Regulations*; and

f. *The North American Free Trade Act* (NAFTA), the *Agreement on Internal Trade* (AIT) and the *World Trade Organization – Agreement on Government Procurement* (WTO-AGP).

9. Related documents that provide the policy and procedures for conduct of former and present CF members involved in contracting or the procurement or provision of services are:

a. DAOD 7021-0 – Conflict of Interest and Post-Employment;

Canadian jurisdictions, are deemed to be included in the contract by operation of statute, e.g., section 40 of the *Financial Administration Act*, R.S., 1985, c. F-11 and section 23 of the *Defence Production Act*, R.S., 1985, c. D-1.

[2] A-FN-100-002/AG-006, Delegation of Authorities for Financial Administration for DND and the CF.

[3] Government of Canada, *Contracting Policy*, online: Treasury Board of Canada Secretariat <http://www.tbs-sct.gc.ca/pubs_pol/dcgpubs/dcg_82_e.asp>.

[4] B-GS-055-000/AG-001, Provision of Services Policy.

[5] *Financial Administration Act*, R.S. 1985, c. F-11, online: Department of Justice <http://laws.justice.gc.ca/en/F-11/>.

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b. DAOD 7021-1 – Conflict of Interest Guidelines;

c. DAOD 7021-2 – Post Employment Guidelines; and

d. DAOD 7021-3 – Acceptance of Gifts, Hospitality and Other Benefits.

10. Under the *Department of Public Works and Government Services Act*, the Minister of Public Works and Government Services (PWGS) has the exclusive responsibility for the procurement of all goods for the federal government. Other departments, including DND, may only purchase goods to the extent and up to the values permitted by their constating legislation, or in accordance with a delegation instrument from the Minister of PWGS to the Minster of the department, or as authorized by Treasury Board. This has been summarized in the *Delegation of Authorities for Financial Administration Instrument*. Contracts for the provision of services, while not within the exclusive purview of PWGSC, are similarly circumscribed. The ability of individual CF members to contract for goods and services is further limited by internal DND policies and delegations of spending authority. Members are encouraged to familiarize themselves with these restrictions on spending authority through examination of the documents specified above.

11. Barring exceptional circumstances, it is a mandatory requirement of Canada's domestic law and international treaty obligations, as well as Treasury Board and DND policy that goods and services be procured through a competitive bid solicitation process. There are some exceptions to this, as set out in the trade agreements, Treasury Board, PWGSC and DND policies and contracting manuals, *The Delegation of Authorities for the Financial Administration for DND and the CF,* and the *Government Contracts Regulations*. They include, but are not limited to, national security concerns, pressing emergencies (where delay would be injurious to the public interest), contract values of less than $25,000[6], or where it can be demonstrated that only one firm is capable of performing the contract. In this context, it should be noted that an "emergency" refers to the occurrence of an unforeseen event, and not a circumstance in which procurement of the goods or services has become urgent due to a delay, however caused, in procuring the required goods or services.

Contracting Authority

12. Authority to enter into contracts is separate and distinct from authority to expend funds. Regardless of the availability of funds or approved budgets, managers are not allowed to enter into contracts on behalf of the Crown unless they have been granted specific authority to do so.

13. The authority to enter into contracts must be determined prior to the contract being entered into. Reference must be made to the *Delegation of Authorities for Financial Administration for the Department of National Defence and the Canadian Forces* and accompanying instrument or "matrix". Actions taken by personnel outside of their authority expose them and the CF to liability. Where persons hold themselves out as having the authority to contract (even if they don't) and the other party relies on that representation, the CF may be obligated to honour the terms of that contract, including payment for the goods and services provided, despite the fact that the CF member who authorized the contract lacked the authority to contractually bind the Crown. The consequences for the CF and the military member involved could be serious.

14. *Queen Regulations & Orders (*QR&O*)* 36.06 states the following:

[6] Treasury Board has established the limit of $25,000 as the amount below which the mandatory requirement to solicit bids may be set aside if it is not cost effective to solicit bids. This limit however is not to be construed as an automatic rationale for bypassing the competitive process.

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Authority Required To Bind The Crown By Contract

No officer or non-commissioned member shall execute or otherwise enter into any contract or agreement, written or oral, that binds or purports to bind the Crown in right of Canada, the Department or the Canadian Forces or any element thereof or that has the effect of committing or purporting to commit funds from the appropriations for the Department or create an obligation, express or implied, thereon unless authorized to do so by:

a. an act of Parliament;

b. an order of the Governor in Council or Treasury Board;

c. the express authority of a minister, given either directly or through the deputy minister, to act on his behalf; or

d. by regulations or orders issued by the Chief of the Defence Staff.

15. In matters of financial administration, delegated authority cannot be re-delegated. Furthermore, a person who does not have delegated authority may not sign on behalf of an individual who does (*i.e.* by signing over a superior's signature block).

Limits on Authority

16. There is a danger in assuming that if one is authorized to make certain commitments on behalf of the CF, one holds that authority in all circumstances. The proper course is to train oneself to consider one's authority for any transaction prior to entry into it. Restrictions on contractual authority may arise from the position occupied by the CF member, his/her delegated financial authority, the value of the proposed contract, the class of contract or types of goods, services or real property proposed to be procured, the duty of the member to report or confirm the proposed procurement or the geographical location in which the goods or services are to be procured or delivered.

SECTION 4

DELEGATION OF AUTHORITY AND CONTRACTING DURING OPERATIONS

17. As noted key documents are DAOD 3004-0 "Contracting: dealing with general policy direction and authority to contract", DAOD 3004-1 "Procedural Overview – Contracting: dealing with procedural solicitation of bids, and contracting methods", and DAOD 3004-3 "Directed (Sole Source) Contracting: dealing with the provision of goods or services to DND and the CF through a pre-identified supplier on a justified sole-source basis". Combined, these authorities identify the various types of contracts including standard articles of agreement, standing offers, local purchase orders, supply arrangements or petty cash, and define the procedures and limitations in using each type of contract.

18. Additionally, the "Delegation of Authorities for Financial Administration for the Department of National Defence (DND) and the Canadian Forces (CF)" with the accompanying "instrument" or "matrix" must be consulted in order to determine what financial limits apply in respect of expenditure and contracting authorities. This would include financial limits in respect of such items as travel/advance, hospitality, procurement initiation – goods and services, specific goods – competitive and non-competitive, goods – local procurement, services, emergency conditions, ex-gratia and liability claims and, real property transactions. Importantly, these documents specify the financial limits by reference to position titles, including Task Force Commander – CO, Deployed operations outside Canada, Formation Commander, Deployed operations outside

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Canada, and COs of deployed ships/aircraft outside Canada as well as away from Base in Canada.

19. Commanders must ensure that all contracts created during operations are done in accordance with the above noted DAODs and directives.

SECTION 5

LEGAL LIABILITY OF PERSONS IN THE CONTRACTING PROCESS

20. While portions of the *National Defence Act* (*NDA*) and the QR&Os deal with improprieties in the contracting process, there are many criminal sanctions in the *Criminal Code* relating to improper or false conduct during the negotiation, entry and performance of contracts. Without being exhaustive of all the possible offences, some of the relevant Criminal Code sections are as follows:

a. **Section 122:** Every official who, in connection with the duties of his office, commits fraud or a breach of trust is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years, whether or not the fraud or breach of trust would be an offence if it were committed in relation to a private person.[7]

b. **Section 418:**

(1) Every one who knowingly sells or delivers defective stores to Her Majesty or commits fraud in connection to the sale, lease or delivery of stores to Her Majesty or the manufacture of stores for Her Majesty is guilty of an indictable offence and is liable to imprisonment for a term not exceeding fourteen years.

(2) Every one who, being a director, an officer, an agent or an employee of an corporation that commits, by fraud, an offence under section (1),

a. knowingly takes part in the fraud, or

b. knows or has reason to believe that the fraud is being committed or is about it to be committed, and does not inform the responsible government, or a department thereof, of Her Majesty,

is guilty of an indictable offence and liable to imprisonment for a term of not exceeding fourteen years.

Conflicts of Interest

21. The conflict of interest policies set out in DAODs 7021-0 and 7022-1 must be adhered to by members of the CF at all times, even if the member ostensibly has all the necessary authority to negotiate and enter into contracts.

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[7] While it is not necessary to prove corruption, it must be shown that the accused committed an act or failed to perform an act contrary to the duty imposed upon him or her and that the result of that act or omission gave the accused some personal benefit either directly or indirectly. This benefit could be the payment of money or merely the hope of promotion or a desire to please a superior. The criminal law is not intended to punish mere technical breaches of conduct or acts or omissions of administrative fault. What the law prohibits is some act or omission done in furtherance of personal ends, the use of one's office in public service for the promotion of private ends, or to obtain directly or indirectly, some benefit. *R. v. Perreault* (1992), 75 C.C.C. (3d) 425 (Que. C.A.)(QL).

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22. These DAODs set out the policy for preventing conflicts of interest, both real and apparent, to which current and former CF members are subject. There is considerable emphasis on the post employment of senior ranking CF members in these policies. DAOD 7021-2 contains pertinent provisions for currently serving members, including obligations relating to disclosure of personal interests.

Gifts, Hospitality and other Benefits

23. Gifts, hospitality or other benefits that could influence, or be perceived to influence, the exercise of judgement concerning, and performance of, official duties and responsibilities of CF members shall be declined.

24. Acceptance, directly or indirectly, by CF members of any gifts, hospitality, or other benefits that are offered by persons, groups or organizations having dealings, or potential dealings, with the government is not permitted under DAOD 7021-3.

25. In accordance with DAOD 7021-3, a member may accept a gift, hospitality or other benefit without written approval if the benefit:

a. arises from activities associated with the performance of official duties and responsibilities, and is appropriate and reasonable in the conduct of DND and CF business;

b. is offered in circumstances that could not compromise, influence or be perceived as compromising or influencing, the performance of official duties and responsibilities (such as during periods when there is no contract bidding, no Requests for Proposal, no litigation, *etc.*);

c. does not place or cannot reasonably be perceived as placing the member or employee in a position of obligation toward the donor;

d. is within the bounds of propriety;

e. is a normal expression of courtesy or protocol;

f. is within the normal standards of hospitality;

g. is of nominal value; or

h. is of an infrequent nature.

26. Acceptance by CF members of offers of incidental gifts, hospitality, or other benefits of other than of nominal value, or of accommodation or tickets is prohibited unless approval has first been obtained. The approving authority may be the Deputy Minister, Chief of Defence Staff, a Level 1 Advisor as set out in the *Defence Plan On-Line* or a Level 2 Advisor outside of the National Capital Region.[8]

27. In exceptional circumstances, where it is impossible to decline unauthorized gifts, hospitality, or other benefits, CF members shall immediately report the matter to their CO. DND employees are required to report the matter to their supervisor.[9]

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[8] DAOD 7021-3, Acceptance of Gifts, Hospitality and Other Benefits.
[9] *Ibid.*

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SECTION 6

SPECIAL TYPES OF CONTRACTS AND ARRANGEMENTS RESEMBLING CONTRACTS

Loans

28. The loan of CF material is considered to be a contractual arrangement. Loans of equipment, for example, bring with them concerns over the return of the equipment and resulting wear and tear. Concerns over rental payments (if any), quality and quantity of material loaned and matters of liability must be considered. CFAO 36-30, Annex D describes the policy and approving authorities for most situations (the exceptions are noted therein).

Memorandum of Understanding (MOU)

29. A Memorandum of Understanding is not a contract. Rather, it refers to a signed, written record of an arrangement, between the MND and any other participant or participants, which is not considered by the participants to be legally enforceable; *i.e.*, the participants would not attempt to enforce the failure of another participant to abide by its commitments in a court of law. MOUs are used when there is a specific intent not to create a legally binding relationship, although, for administrative purposes, DND treats an MOU as being legally binding. Participants under MOUs may include departments or ministries of the federal or provincial governments, Crown corporations or agencies, foreign armed forces, departments of foreign governments or NATO agencies. Under MOUs, the participants describe arrangements or undertake commitments concerning the allocation of DND resources and, where applicable, the resources of the other participants in a project, program or undertaking.

SECTION 7

CONCLUSION

30. Domestic, and to a greater extent, international operations require an ability to contract for a wide variety of goods, services, real property and equipment.

31. In order to facilitate operations it is important for the legal advisor to ensure that all contracting occurs within the parameters set out by Departmental and Treasury Board policy, directives and QR&Os.

32. Specifically, great care must be taken to ensure that only those authorized to contract do so and that they only enter into agreements within the financial parameters delegated to them. These individuals should be aware of the various provisions that exist in relation to conflict of interest and receiving gifts, hospitality and other benefits.

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CHAPTER 33

CLAIMS BY AND AGAINST THE CROWN

SECTION 1

INTRODUCTION

1. It is not uncommon during domestic and international operations for property to be damaged or persons to be injured. Indeed, requests to be compensated for damage are a frequent occurrence, particularly during international operations. This chapter describes the claims procedures that the legal officer may be involved with during or as a result of operational missions. The distinction between domestic and international claims is discussed, as well as the procedures for third parties and CF members in respect of claims against the Crown. Policies and procedures involving Crown Servants who are not members of the CF are also identified.

2. Claims by and against the Crown may take a variety of forms. Third parties, including states, corporations and non-CF personnel may have potential claims against the Crown for damages incurred during operations. These claims may be governed by the domestic laws of Canada (or a province) if the alleged negligent incident occurred in Canada. On the other hand, claims also arise out of international CF operations and therefore may involve the laws of a foreign state, the provisions of a Status of Forces Agreement (SOFA), or claims under UN authority.

3. One of the primary tasks for the legal advisor is to identify the appropriate claims authority and the limits (often financial) imposed by that authority. The reporting system for claims must also be verified. Ensuring a proper investigation of the claim is important for the ultimate resolution of the claim. The legal officer on operations will often be involved during the investigation stage and ultimately may have responsibility to resolve the claim.

Definitions

4. The payment of claims by the CF is a highly regulated area. Consequently, it is important to define some of the key terms which impact on claims procedures and authorities. The relevant terms used in this chapter are as follows:

a. **Claim** includes a request for compensation to cover losses, expenditures or damages sustained by the Crown or a claimant, including a request that the Crown make an *ex gratia* payment.

   Claims do not include claims made pursuant to other governing instruments or policies, for example:

   - under section 11 of the *Canadian Human Rights Act* (*Equal Wages*);
   - from a contract dispute;
   - for loss and recovery of money;
   - for damage or loss to a Crown servant's effects while on relocation or travel, except in respect of the shipment of furniture and effects between locations outside Canada and the continental United States, or in an emergency evacuation; and
   - related to bodily injury while on duty.

b. ***Ex gratia* payment** means a benevolent payment made by the Crown under the authority of the Governor-in-Council to anyone, made in the public interest for loss or expenditure incurred for which there is no legal liability on the part of the Crown.

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c. **Crown** means Her Majesty in right of Canada.

d. **Crown Servant** has the same meaning as set out in the *Policy on Claims and Ex Gratia Payments* made by the Treasury Board of Canada Secretariat. DND employees and CF members are Crown servants. Persons engaged under contracts for services are not Crown servants.

e. **Department** means the Department of National Defence and includes the Defence Research Board.

f. **Minister** means the Minister of National Defence.

5. Claims responsibilities include claims prevention, claims reporting, claims investigation procedures, identification of claims resolution procedures and authority to settle and finalize a claim.

Claims Prevention Procedures

6. The most efficient means of claims resolution is to not incur the liability that gives rise to the claim in the first instance. A proactive damage prevention program involving briefings to members of the CF on how to avoid property loss may well reduce the number of claims incidents. In addition, initial claims reporting procedures will expedite the proper reporting of claims in order that they may be appropriately dealt with. International deployments call for more detailed briefings as the legal obligations are often more complex as a result of international agreements and jurisdictional issues. The Department is committed to Legal Risk Management as evidenced by the existence of a Legal Risk Management Committee composed of the Level I Managers and chaired by the Deputy Minister.

SECTION 2

SETTLEMENT AUTHORITY FOR CLAIMS

7. The following table identifies the authorities responsible for implementing the policy on Claims and *Ex Gratia* Payments of the Treasury Board Secretariat:

<table>
<tr><th>The ...</th><th>has/have authority up to</th><th>to ...</th></tr>
<tr><td>Director Claims and Civil Litigation (DCCL)</td><td>$200,000</td><td rowspan="3">• accept amounts in settlement of claims by the Crown;
• recover from a Crown servant amounts owing to the Crown; and
• pay amounts in settlement of a liability claim against the Crown.</td></tr>
<tr><td>Assistant Judge Advocates General (AJAGs)</td><td>$25,000</td></tr>
<tr><td>JAG legal officers on operations</td><td>$10,000</td></tr>
<tr><td>DCCL and AJAGs, and other JAG legal officers on operations</td><td>$2,000</td><td>• make ex gratia payments.</td></tr>
</table>

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It is important to note that under the *Claims By or Against the Crown and Ex Gratia Payments*, the Deputy MND has the authority to settle claims on the basis of legal liability and make *ex gratia* payments. Designations of this authority have been made as set out in the above table.[1]

8. This settlement authority, particularly for the legal officer on operational matters, need not be exercised. It represents the limits of the authority that officer may exercise. Any claim situation, no matter what the quantum involved, may be referred to Director, Claims & Civil Litigation for resolution when the operational legal officer considers it appropriate.

9. There are many reasons for referring matters to the Director, Claims & Civil Litigation including, but not limited to, the following reasons:

a. the matter is of a sensitive or international nature;

b. the occurrence may attract more than ordinary media attention; and

c. there is concern as to the appropriate law to apply, knowledge of the foreign law, and whether the applicable law is consistent with Canadian principles of fair compensation.[2]

10. The time for consultation with Director, Claims & Civil Litigation is before final steps have been taken either to negotiate or settle the claim or to deny the claim outright. It is anticipated, however, that the legal officer on operations will be able to resolve most claims that fall within the legal officer's authority.

11. Prompt and efficient claims resolution aids the accomplishment of the mission in a number of ways. First, the CO is able to focus on the mission rather than dealing with claimants. Second, fair and prompt resolution of CF members' claims aids in the maintenance of morale and efficiency. Finally, the reputation of the CF and Canada is enhanced with the receiving states when claims are seen to be resolved in a rapid and fair manner.

SECTION 3

ARMED CONFLICT DAMAGE CLAIMS

12. In times of conventional warfare, injuries occur and property is damaged. The principles of the Law of Armed Conflict (LOAC) apply with respect to the collateral damage caused to civilians and their property. Generally, there is no right to compensation unless, at the state level, the case is made that a serious breach of LOAC or relevant treaties has occurred. There is, at that point, some general obligation on behalf of the state for compensation but no specific provision for the payment of private claims.

13. The fact that armed conflict damages are seen in a different light is evident in many pieces of legislation. For example, the NATO Status of Forces Agreement (SOFA) has significant and somewhat complex procedures for the adjudication of claims.[3] These procedures specifically do not apply, however, for "war damage."[4] Another example is *Queen's Regulation*

[1] DAOD 7004-0, Claims By or Against the Crown and Ex gratia Payments.
[2] In the Somali case of the death of a young man caused by Canadian soldiers, the case was resolved in the sum of $15,000 US which was the equivalent of 100 camels and which was the standard Somali quantum of damages for a wrongful death. This was seen as reasonable as it was in compliance with Somali law and not repugnant to Canadian principles of compensation. Obviously a different result would have occurred if the local law had demanded some form of physical retribution toward the person who had caused the damage.
[3] See Section 5 re NATO SOFA claims procedures.
[4] NATO SOFA ART XV, paragraph 1.

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and Orders (QR&O) Chapter 21, relating to the provisions for a Summary Investigation or Board of Inquiry whenever a CF member has been injured, except for "wounds received in action."[5]

14. Unless specifically stated, then, the balance of this chapter relates to claims not involving armed conflict.

SECTION 4

THE INVESTIGATION PROCESS

General

15. Upon becoming aware of an incident that could lead to a claim during operations, the officer in command of a unit or other element shall contact the deployed legal officer or, if not available, the Director, Claims and Civil Litigation at the earliest opportunity to discuss whether an investigation is required and what level of investigation is appropriate. Before the investigation commences, the following shall be reviewed and provisions incorporated as necessary in the terms of reference of the investigation:

a. QR&O Chapter 21, Section 4, Summary Investigations and Boards of Inquiry;
b. *Policy on Claims and Ex Gratia Payments*;
c. Canadian Forces Administrative Orders (CFAO) 24-6, Investigation of Injuries or Death;
d. DAOD 7002; and
e. DAOD 7004-1.

16. Investigations for claims purposes may take place apart from any other investigation required by regulations or orders made under the *National Defence Act* (*NDA*).

17. Where a Summary Investigation (SI) or Board of Inquiry (BOI) reveals that a claim by or against the Crown may arise, the authority who ordered the SI or convened the BOI must be informed without delay.[6] The authority ordering the SI or convening the BOI is then required by regulations to order an investigation into the incident 'for claims purposes.'[7]

Legal Opinion for Claims Resolution

18. Settlement of claims by or against the Crown in excess of $10,000.00 must be approved by the Director, Claims & Civil Litigation or an AJAG (up to $25,000). For claims of $10,000.00 or less, legal officers may wish to consider seeking the opinion of the Director, Claims & Civil Litigation.[8] The legal officer is responsible for providing an opinion on any claims under $10,000 not referred to Director, Claims and Civil Litigation and the opinion shall address the issues of liability and damages. Further guidance on claims resolution may be found in the DAOD 7004 series.

SECTION 5

NATO STATUS OF FORCES AGREEMENT (SOFA) AND ITS EFFECT ON CLAIMS

[5] *Queen's Regulations and Orders* 21.46 (2) [QR&O].
[6] QR&O 21.19(1).
[7] QR&O 21.19(2) and 21.21.
[8] See *National Defence Claims Regulations*, 1970 (Appendix 1.6 to QR&O).

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19. Claims may potentially arise between NATO states while deployed on operations in the NATO area of operations or during exercise. The NATO SOFA[9] contains unique provisions concerning claims between the Contracting Parties (i.e., Canada and the other NATO countries). In some cases the damages are waived. In others, the contribution towards the payment of claims is divided between the NATO states. Some of the relevant provisions are as follows:

a. **Property Damage** - each Contracting Party will waive all of its claims against any other Contracting Party for damage caused to any military property owned by it where the damage was caused by a member or an employee of the armed services of the other Contracting Party in the execution of his duties in connection with the operation of the North Atlantic Treaty. Similarly, a waiver of all claims will be made in circumstances where damage to any military property arose from the use of any military equipment owned by the other Contracting Party, in all cases where either the military equipment causing or receiving the damage was being used in connection with the operation of the North Atlantic Treaty;

b. **Injury or Death** - each Contracting Party will waive all of its claims against any other Contracting Party for injury or death suffered by any member of its armed services while such member was engaged in the performance of his official duties;

c. **Third Party Claims** - claims may be made arising out of negligent acts or omissions of members or employees of the armed forces of a Contracting Party, if they occurred in the performance of official duty and caused damage in the territory of the receiving state to third parties, other than any of the Contracting Parties; and

d. **Enforcement of Judgments** - a member or employee of the armed forces of a Contracting Party shall not be subject to any civilian court or legal proceedings concerning the enforcement of any judgment made against him in the receiving state in any matter arising from the performance of their official duties.

The procedures for resolving such claims and others are beyond the scope of this chapter. These and other claims made pursuant to Article VIII of the NATO SOFA should be referred to the deployed legal advisor for further assistance.

20. Under the NATO Status of Forces Agreement, the receiving state deals with claims against the sending state that result from activities of the sending state in the receiving state in the same way as the receiving state deals with claims arising out of the activities of its own forces.

21. If a DND employee who is a member of the civilian component or a CF member is involved in an incident in a receiving state which may give rise to a claim against Canada as the sending state, the incident shall be immediately reported to:

a. AJAG Europe, Geilenkirchen, Germany for incidents that occur in NATO countries other than Canada or the United States (US);
b. Director, Claims and Civil Litigation for incidents in the US; and
c. the supervisor of the DND employee or the CO of the CF member for incidents in Canada.

22. In the US, the claim should be sent to the nearest US military installation. Such incidents shall be reported and investigated as prescribed by DAOD 7004-1.

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[9] NATO SOFA, Article VIII.

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NATO SOFA Respecting War Damage Claims

23. The NATO SOFA also makes specific provision for damage claims that may arise during periods of hostilities:

> **ARTICLE XV**
>
> Subject to paragraph 2 of this Article, this Agreement shall remain in force in the event of hostilities to which the North Atlantic Treaty applies, except that the provisions for settling claims in paragraphs 2 and 5 of Article VIII shall not apply to war damage, and that the provisions of the Agreement, and, in particular of Articles III and VII, shall immediately be reviewed by the Contracting Parties concerned, who may agree to such modifications as they may consider desirable regarding the application of the Agreement between them.[10]

24. Guidance for dealing with, and reporting, claims by and against the Crown arising from incidents involving activities of the CF in NATO countries can be found in DAOD 7004-1.

SECTION 6

CLAIMS BY AND AGAINST THE CROWN

Motor Vehicle Collisions – A Major Risk Activity for International Operations

25. It is not uncommon for CF members to operate, on a daily basis, military vehicles amongst foreign civilian traffic during an overseas deployment. In this regard, it is inevitable that some members may be involved in motor vehicle-related accidents where damage to personal property, injuries, fatalities or the loss of economic income to the civilian population occurs.

26. Consequently, the deployed legal officer must be mindful that driving conditions experienced by CF members on an international deployment differ markedly from those to which Canadian drivers are normally accustomed. Often, there are no traffic controls, dedicated lanes of travel or established rights of way as between vehicles and pedestrians. Vehicular and pedestrian congestion is likely to be heavy and unpredictable, especially in urban, market districts. Further, CF members often have to contend with foreign motorists operating vehicles aggressively in traffic due to an absence of civilian traffic enforcement. There are other safety hazards such as vehicles operating without lights and signals, derelict buses seriously overborne with passengers or large commercial vehicles carrying unsecured cargo. Poor lighting, extreme weather, unsafe terrain, broken road surfaces, and the constant threat of belligerents only exacerbate the situation.

27. The deployed legal officer, acting in their capacity as the contingent's claims settlement authority in theatre, may settle such claims made against the Crown up to the amount of $10,000. Where the Treasury Board policy's stated conditions for indemnification of CF members have been met, the deployed legal officer will close the claim file thereby absolving the member of any personal or financial liability in connection with the incident.

Debit and Credit Balances – Recovered Absentees

28. When an officer or non-commissioned member, who has been continuously absent without authority for more than 14 days, is recovered, any debit balance incurred on or prior to his absence shall be charged against his pay account. Any credit balance remaining in the member's pay account may be paid to the member after all public claims, if any, have been settled.[11]

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[10] NATO SOFA, Article XV.
[11] QR&O 208.09.

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Miscellaneous Entitlements and Grants

29. Compensation may be claimed under Section 1 (Compensation For Loss of or Damage to Personal Property) of CBI Chapter, 210 (Miscellaneous Entitlements and Grants) if the loss or damage to the personal property of a CF member was attributable to the service of the member and the personal property lost or damaged was necessary for the performance of military duties of the member.

30. Under the *Policy on Claims and Ex Gratia Payments*, claims for loss or damage to Crown servant effects which are reasonably related to the performance of the servant's duties are paid as a liability of the Crown or as *ex gratia*.

31. The provisions found in DAOD 7004-2 govern the submission of claims made under either of the above named policies.

32. The A-LM-007-014/AG-001, Canadian Forces Supply Manual, prescribes the conditions under which personal property may be accepted for laundering, dry cleaning and pressing services on a recoverable basis.

33. Claims by CF members arising from the use of a service laundry or dry cleaning establishment should be submitted in accordance with form DAOD 7004-2A, Declaration of Loss or Damage to Laundry and Dry Cleaning.

34. If the laundry or dry cleaning establishment is operated by a contractor, claims procedures under the contract shall be followed.

35. Compensation for loss or damage to laundry or dry cleaning shall be recommended on the basis of:

a. wear remaining in the article;
b. normal expected lifetime of the article; and
c. the responsibility of the laundry and dry cleaning establishment with relation to the stability of the fabric used in the manufacture of the article.

36. Compensation may be paid from public funds for loss or damage to personal property or baggage belonging to Crown servants and dependants, or any other person authorized to travel on military transportation facilities, if the loss or damage has occurred after acceptance by a Crown servant for shipment by military or commercial means. A request for compensation for such loss or damage shall be submitted using form DAOD 7004-2B, Declaration of Loss or Damage to Personal Property or Baggage.

37. If a member arranges shipment of unaccompanied baggage directly with a commercial carrier because of location, the Crown does not assume responsibility.

SECTION 7

OTHER RELEVANT PROVISIONS

Crown Liability and Proceedings Act

38. This *Crown Liability and Proceedings Act*[12] is the statutory authority that makes the Crown liable for torts and acts of negligence as if it were a private individual. Section 3 provides as follows:

[12] *Crown Liability And Proceedings Act*, R.S.C. 1985, c. C-50, s. 3; 2001, c. 4, s. 36.

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The Crown is liable for the damages for which, if it were a person, it would be liable

(a) in the Province of Quebec, in respect of:

(i) the damage caused by the fault of a servant of the Crown, or

(ii) the damage resulting from the act of a thing in the custody of or owned by the Crown or by the fault of the Crown as custodian or owner; and

(b) in any other province, in respect of:

(i) a tort committed by a servant of the Crown, or

(ii) a breach of duty attaching to the ownership, occupation, possession or control of property.

39. The Act provides that claims involving the Federal Crown shall be determined in Federal Court. The Crown may submit to the jurisdiction of a Superior Court of a province. However, there is a Notice of Claim provision that requires 7-day notice to be given to the Crown in such cases.

Government Employees Compensation Act

40. If a Federal government employee suffers a personal injury, either inside or outside of Canada, where an accident arising out of and in the course of his or her employment causes the injury, they will be compensated pursuant to the *Government Employees Compensation Act* (GECA)[13]. This Act would be applicable in instances where civilian Federal government employees accompany the Canadian Forces on missions.

41. By virtue of section 3, the Act specifically *does not apply* to any person who is a regular member of the CF or of the RCMP.

Treasury Board Policy on the Indemnification of and Legal Assistance for Crown Servants

42. At times, members of the CF may be involved in litigation arising from acts occurring during domestic or international operations. The *Treasury Board Policy on the Indemnification of and Legal Assistance for Crown Servants* provides for the indemnification of and legal assistance to CF members if they have:[14]

a. acted honestly;

b. acted without malice;

c. acted within the scope of their duties and employment; and

d. met reasonable departmental expectations.

43. The policy sets out an approval process for legal assistance for Crown servants primarily through the Department of Justice. There is, however, a process for the hiring of private counsel in the case of a criminal charge or where a conflict of interest exists.

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[13] *Government Employees Compensation Act*, R.S.C. 1985, Ch. G-5.
[14] Government of Canada, *Policy on the Indemnification of and Legal Assistance for Crown Servants*, online: Treasury Board of Canada Secretariat <http://www.tbs-sct.gc.ca/pubs_pol/hrpubs/TB_851/pila_e.asp>.

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Treasury Board *Policy on Claims and Ex Gratia* Payments

44. The Treasury Board *Policy on Claims and Ex Gratia* Payments[15] provides, in part:

In deciding whether to make an *ex gratia* payment, deputy heads shall consider whether there are any other reasonable means of compensation, and that:

a. claims and *ex gratia* payments are subject to consideration of federal or provincial statutes, private or public programs, contract provisions, commercial insurance or recovery from third parties;

b. this policy is not to be used to fill perceived gaps or compensate for the apparent limitations in any act, order, regulation, policy, agreement or other governing instruments; *e.g.* if a particular subject is governed by, but a payment does not appear to meet the terms of, another instrument, this policy cannot be used to expand that instrument - an exception to the governing instrument would need to be sought;

c. if there does not appear to be a governing instrument, particularly in proposed *ex gratia* cases, it is imperative that all other possible sources of compensation be reviewed; *i.e.* statutory or regulatory schemes, other Treasury Board policies, program funding, grants or contributions;

d. if, after the review, there is still no other source of funds, no liability on the part of the Crown, and no limitation or restriction imposed in existing schemes which would prohibit it, payment may be made *ex gratia*; and

e. the amount of the payment should be reduced where the acts or omissions of any person, including persons for whom a payment is being considered, contributed to the loss or expenditure incurred.

Pension Act

45. The *Pension Act*[16] provides that a CF member injured in the course of his duties must apply for a disability pension prior to making a claim for damages with respect to the same injury. If such a pension is awarded, section 9 of the *Crown Liability and Proceedings Act* bars proceedings against the Crown for that same injury. *Pension Act* claims are dealt with in detail in Chapter 36, Pensions Issues.

SECTION 8

CONCLUSION

46. Persons seeking compensation for property damage or personal injury during domestic and international operations are not uncommon. Additionally, in certain circumstances, members of the CF may be entitled to compensation. There exist a variety of authorities and processes from a wide range of statutes, regulations and directives, which may determine how a claim is to be processed. If not properly managed, claims related issues can have the potential to erode the operational effectiveness of a mission. Likewise, a well-managed claims process may enhance the degree of cooperation and support between the civilian population and the CF.

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[15] Government of Canada, *Policy on Claims and Ex gratia Payments*, online: Treasury Board of Canada Secretariat <http://www.tbs-sct.gc.ca/pubs_pol/dcgpubs/TBM_142/claiexgratpaym_e.asp>.
[16] *Pension Act*, R.S.C. 1985, Ch. P-6.

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CHAPTER 34

DISCIPLINE

SECTION 1

INTRODUCTION

1. The maintenance of discipline is particularly important to commanders during domestic and international operations. Regardless of whether CF troops are operating within or outside Canada, the *Code of Service Discipline* (*CSD*) and Canadian law continue to apply. Deployed operations often create unique legal issues relating to the authority to carry out military justice. Once units leave their home port, base or garrison, they are re-formed into new organizations and task groups, which may impact upon the powers previously held by Commanding Officers and Delegated Officers.

2. The formation of operational units and the appointment of commanders may be accomplished in a number of different ways depending on the nature of the operation. Deployed units often contain a significant numbers of individual augmentees, or formed sub-units placed under command for the duration of the mission. There is an organizational distinction between a unit at its home port, base or garrison in Canada, and that same unit deployed on operations, that requires an awareness on the part of both commanders and their legal advisors of the need to ensure that appropriate delegations and appointments are made for the new organizational entity.[1] The early establishment of a common understanding within the unit as to how discipline matters are to be handled is key to ensuring that the process of military justice on operations is flexible, portable, robust and responsive.

3. This chapter will discuss the issues relating to ensuring military justice can be carried out within a newly deployed entity and highlight some recurring legal issues encountered by deployed operational legal advisors and commanders. It must be remembered that any detailed consideration of military justice matters during deployment should be carried out with reference to B-GG-005-027/AF-011, Military Justice at the Summary Trial Level.[2]

SECTION 2

STATUS OF COMMANDING OFFICER

5. It is necessary to clearly ascertain the status of the commanding officer (CO), as the authority and ability to delegate powers varies depending on the manner by which an officer acquired CO status.

Types of Commanding Officers

6. The following officers are 'Commanding Officers' for the purposes of proceedings under the *Code of Service Discipline* (*CSD*):

a. Commanding Officer - an officer in command of a base, unit or other element of the CF (i.e., an organization provided for in a CFOO specifying that the officer in command is a CO);[3]

b. Designated Commanding Officer - an officer who, *although not in command* of a base, unit or other element of the CF, has been designated in writing[4] as a CO by or under the authority of the Chief of the Defence Staff (e.g., the Chief of Staff of a formation may be designated as a

[1] Such delegations and appointments include, but are not limited to, delegated officers for summary trials, custody review officers and charge layers.
[2] See B-GG-005-027/AF-011, Military Justice at the Summary Trial Level.
[3] Queen's Regulations and Orders 1.02(a) [QR&O].
[4] It is recommended that all memos and other documents designating COs be kept in a separate file for ease of reference and updating, as they provide the framework of the disciplinary infrastructure in most deployed operations.

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CO). COs of deployed units are often in command of the deployed unit as a 'Designated' CO, while they remain in command of the unit in garrison in Canada as a CO;[5]

c. Detachment Commander - the senior commissioned officer in charge of a detachment that is geographically separated from the remainder of the unit and under conditions that prevent the CO of the unit from effectively exercising disciplinary powers;[6]

d. Acting Commanding Officer - the next senior officer in a unit to whom command falls automatically in the absence of the CO (e.g., the Deputy Commanding Officer or Executive Officer on board a ship) or who has been identified by the CO as the Acting CO during the CO's absence;

e. Next Superior Officer to a Commanding Officer - when a CO is the accused, the officer to whom that CO is responsible in matters of discipline is considered a CO in respect of the accused (notwithstanding that the officer may otherwise be a Superior Commander or a Referral Authority);[7] and

f. Executive Officer of a Ship - where the ship's CO is still present but there is no superior commander on board or in company with the ship and the accused is a person triable by summary trial before a Superior Commander (the ship's CO then fulfills the role of Superior Commander in accordance with regulations).[8]

Acting for a Designated Commanding Officer

7. Because Designated COs are delegated specific powers by the Chief of Defence Staff (CDS), they lack the authority to pass along their powers to another officer who will be an 'Acting CO' in the designated CO's absence. Although another officer can perform many of the administrative functions of the designated CO during the CO's absence, the replacement does not have the powers of the CO under the *CSD*.

8. For the same reason, the next senior officer at the unit cannot assume Acting CO status for disciplinary purposes during the absence of a Designated CO.

9. In the case of an absent Detachment Commander, the next senior officer becomes the *de facto* Detachment Commander with all the powers provided under QR&Os, subject to any limitations imposed by the CDS or the Detachment Commander's CO.[9]

Presiding Officer Certification

10. As a condition precedent to assuming their duties, COs must be trained in the administration of the *CSD* and be certified to do so by the JAG.[10] A CO who is not certified and who does not have a CDS waiver[11] is not authorized to carry out any duties related to the administration of the *CSD* including, but not limited to, conducting summary trials.

11. A less obvious, but nevertheless important, issue is that of 'Delegated Officers' in a unit commanded by such a CO. Based on the above, it follows that a CO who is neither Presiding Officer certified nor has a CDS waiver of training, cannot delegate powers of trial and punishment and therefore cannot appoint or designate any Delegated Officers in the unit. This is because the CO described in this circumstance has no powers under the *CSD* and therefore has none to delegate.

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[5] QR&O 1.02 (b). The power to designate COs has been delegated by the CDS to officers commanding commands (OCC).
[6] QR&O 101.01(1)(a).
[7] QR&O 101.01(1)(b)(ii).
[8] QR&O 101.01(1)(b)(iii).
[9] QR&O 101.01(2).
[10] QR&O 101.09.
[11] QR&O 101.09(2).

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Delegation of Powers of Trial and Punishment

12. All the COs described in paragraph 4 above have the authority to delegate the power to try certain CF members by way of summary trial and to punish offenders who have been found guilty of offences under the *CSD*.[12] Section 163(4) of the *NDA*, which permits COs to delegate their powers, relies on the definition of CO in section 160 of the Act:

> 160. In this Division, "commanding officer," in respect of an accused person, means the commanding officer of the accused person and includes an officer who is empowered by regulations made by the Governor in Council to act as the commanding officer of the accused person.

SECTION 3

JURISDICTIONAL ISSUES

13. The question of jurisdiction is covered fully in the manual B-GG-005-027/AF-011, Military Justice at the Summary Trial Level. Jurisdictional issues are particularly important during international operations, and more specifically during leave taken by those subject to the *CSD*. CF members remain subject to the *CSD* whether regardless of whether they are on leave and no matter where they may be located. This fact must be reinforced by the chain of command to all personnel prior to and during rest and recreation (R&R). Jurisdiction for the *CSD* can also, in certain circumstances, be exercised over civilians[13] and members of other military forces.[14]

14. Furthermore, the host nation within which the unit is deployed may or may not have a Status of Forces Agreement (SOFA) or other such agreement[15] with the Canadian Government that may affect jurisdiction over criminal conduct of deployed members. Additionally, a Security Council resolution may invoke the UN Model SOFA. Certainly, many countries that deployed CF members may visit during periods of R&R do not have such agreements with Canada. Thus, CF members may find themselves subject to very serious domestic charges for their actions while on R&R, even for activities that they do not believe are illegal or problematic.[16] Moreover, many countries do not have the same robust protections for accused persons that exist under the *Canadian Charter of Rights and Freedoms*. The potential for serious problems may be reduced through the delivery of a strong education program prior to the commencement of any R&R leave period.

Legal Advice Prior to Laying of Charges

15. The requirement of members authorized to lay charges to seek legal advice prior to laying charges is provided for in QR&O 107.03.[17] Members authorized to lay charges shall obtain legal advice from a legal officer before laying a charge, except for a minor offence committed by a non-commissioned member of the rank of sergeant or below (i.e., a charge that would not give rise to a right to elect trial by court martial).[18]

SECTION 4

ELECTION TO BE TRIED BY SUMMARY TRIAL OR COURT MARTIAL

[12] *National Defence Act*, R.S.C. 1985, c. N-5, s. 163(4) and QR&O 108.10.
[13] *Ibid.,* s. 60(1)(f), (h), (i) and (j).
[14] *Ibid.,* s. 60(1)(d) .
[15] Such as the Military Technical Agreement between the Government of Afghanistan and NATO.
[16] For example, the possible punishments for public drunkenness in the United Arab Emirates includes death.
[17] See B-GG-005-027/AF-011, Chapter 8.
[18] 'Minor offences' are those offences specified at QR&O 108.17(1)(a) and (b).

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16. The election process is discussed in detail in Chapter 12 of B-GG-005-027/AF-011, Military Justice at the Summary Trial Level. Despite having been simplified through recent amendments to the *NDA*, the issue of election still requires particular attention. Offering an election to an accused is the general rule, not the exception. Delegated Officers and COs must be aware that *before they can proceed with any summary trial, an election must be offered*, except when:

a. all charges laid are for minor offences;[19] or

b. an election has previously been offered to the accused in respect of the charge(s) and the accused has chosen to be tried by summary trial.[20]

17. The process for election is no different in a deployed theatre of operations than it is in garrison in Canada. Even though defence counsel from DDCS can be reached by the accused on a 24-hour basis, the Presiding Officer should make sure that the accused has the opportunity and a telephone line to call defence counsel. When a member has elected to be tried by court martial, the legal advisor should be informed as soon as possible in order to assist the CO with the referral process, as the court martial may have to proceed in theatre during the deployment.

SECTION 5

COMMON ISSUES ARISING WITHIN THE DISCIPLINARY PROCESS

18. The following guidance is provided regarding the most commonly recurring errors made in the disciplinary process, and is especially important with respect to discipline in an operational setting.

a. Investigation. An investigation is always required before a charge is laid.[21] The investigation may only be a unit disciplinary investigation, but the reasons for believing a person has committed a service offence must be put into writing,[22] in order to:

(i) have a record of why charges were laid or not laid;

(ii) assist the charge-drafter in preparing appropriate charges; and

(iii) provide the military prosecutor with the full history of the charges from the staring point, in cases where charges are to be disposed of by court martial.

b. Charging a Reserve Force Member. When considering charges against a member of the reserves, it must be remembered that they are subject to the *CSD* only in certain specific circumstances.[23] Though not an issue during a deployment, matters occurring during pre and post deployment/reintegration periods may have jurisdictional questions that need to be addressed.

c. Does the contemplated charge require a Court Martial? Cases sometimes go to court martial automatically by virtue of the charges selected, where the matter could have more appropriately been disposed of by summary trial had other available charges been laid. Consideration is required to determine which charge(s) are the most appropriate in a given circumstance.

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[19] *Ibid*.
[20] One circumstance where offering a second election would be appropriate is where an accused, having elected summary trial before a Delegated Officer and prior to any finding being made, has his or her charges referred to the Commanding Officer for trial. Because the accused is now under a new jeopardy by virtue of the CO's greater powers of punishment, a second opportunity to elect court martial should be offered.
[21] QR&O 106.02.
[22] There is no specific format for how the written unit investigations should be prepared. In simple cases, such as an AWOL situation of a short time period, the written investigation may be very brief, but there must be something reduced to writing.
[23] *NDA, supra* note 12, s.60 and QR&O 102.01.

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d. Does the contemplated charge require an election? Cases have been received at DMP that involve elections on s. 129 *NDA* charges that could, and often should, have been charged under more appropriate non-electable charges. The addition of the s. 129 *NDA* charge (in the alternative) therefore triggers the election process. Consideration is required to determine which charge(s) are the most appropriate in a given circumstance.

e. The CO should normally not lay a charge or cause a charge to be laid. While COs are authorized to lay charges, *it is preferable they not do so* for a number of reasons:

   (i) to preserve their ability to act as a presiding officer in the case;

   (ii) to avoid any concern about influence over a delegated officer trying charges laid by his/her CO;

   (iii) so the person (the CO) exercising the discretion of whether or not to refer the charge(s) to court martial is not the same person who laid the charge.

   Vigilance must be maintained to ensure that the CO does not lose the jurisdiction to handle disciplinary matters in the deployed unit by reason of causing the charges to be laid, issuing search warrants, or by getting so involved in the process that a reasonable perception of bias arises. The remedies available to correct jurisdictional issues may be problematic when the CO is deployed in a foreign location with no other available CO in close proximity to whom a charge may be referred for summary trial or referral to court martial.

f. A Charge is laid when signed by the charge layer, not when it is served on the accused. Normally there is real effort made to resolve disciplinary matters quickly in the operational theatre such that time considerations are not an issue. Nearing the end of a tour, however, charges have sometimes been laid but not served, with the belief that the matter will be actioned once the member returns to their home unit. The laying of the charge starts the clock regarding the right to be tried within a reasonable time under the *Charter*. Besides constituting a possible violation of *Charter* rights, unexplainable and unreasonable post charge delays may violate the duty to act expeditiously pursuant to s. 162 of the *NDA*.

g. The Unit must still complete the applicable portions of the Record of Disciplinary Proceedings (RDP) when the NIS has laid a charge. Units frequently fail to complete the RDP when charges are laid by an NIS charging authority (e.g., inserting the name of assisting officer and the language election).

h. Disclosure must be made. Since even with the simplest of charges an investigation must be completed and reduced to writing, it follows that disclosure must be done in every case.[24] It is important that details of the disclosure be recorded and kept with the RDP to create a record in case the matter needs to be dealt with at a later time out of theatre.

i. Accused members must take the stand if they wish to give evidence. During a summary trial, an accused person must not be asked (and is not permitted) to give his or her 'side' of the story whenever they choose. The only way that an accused may give evidence is by providing testimony (although the accused may choose not to do so) under oath or affirmation. This allows the Presiding Officer to test the truth of the accused's evidence by asking questions of the accused. Accused are always permitted to make *representations* (closing arguments) once all witnesses have been heard whether or not they have given evidence. They may also make representations during the sentencing phase if they are found guilty. However, these representations are not factual 'evidence' (e.g., 'my car is

[24] QR&O 108.15.

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blue'), but rather 'argument' (e.g., 'you should not believe witness A because he acknowledged that it was dark and he could not tell whether it was my car').

j. Suspension of sentence at summary trials only applies to a sentence of detention.[25] There are no provisions for suspending reductions in rank, fines, confinement to ship or barracks or any of the other punishments that can be imposed at summary trial.[26]

k. A punishment commences on the date upon which it is pronounced by the service tribunal.[27] There is no authority to commence minor punishments when it is operationally more convenient. (e.g., when back in garrison). The only exceptions are in cases where:

  (i) the sentence is a suspension of detention;

  (ii) the offender is at sea or in a port with no suitable place for incarceration;[28] or

  (iii) a new punishment is imposed, by reason of substitution or commutation.[29]

l. There are no provisions for breaking up a punishment or serving a sentence intermittently. There is no way to have a member serve detention only on weekends or have a member of the reserves undergo extra work and drill for a few hours per week. However, the terms of payment of a fine are at the discretion of the service tribunal that imposes the fine.[30] For instance, a Presiding Officer may impose a fine of $500 to be paid at a rate of $100 per month. After the sentencing, the Presiding Officer may vary the term of the payment.

m. Unit Registry. The Unit Registry of Disciplinary Proceedings (URDP) is required to be maintained.[31] For deployed units that are part of a contingent operation and are thus formed specifically for that purpose, the unit is under the control of Commander CEFCOM. The unit in theatre is not the same unit as it is in Canada. The original documents placed on a URDP should stay in theatre or be transferred to HQ CEFCOM. Copies of a soldier's disciplinary record should be sent to his or her home unit. The unit should make copies of all disciplinary matters and distribute accordingly. If there are several units in theatre, a Task Force Unit Registry of Disciplinary Proceedings should be considered. As all documents must eventually be forwarded to HQ CEFCOM, the G1 of the NCE should be tasked to file and archive the documents as required.

n. Notification of Regulations, Orders and Instructions. Task Force Commanders must be aware that the requirements to issue and publish Standing Orders in accordance with QR&O 1.20 and 1.21 apply to all deployed operations. In particular, the CO must take such measures as may be necessary to ensure that the regulations, orders and instructions are drawn to the attention of and made available to those whom they may concern. This is especially true if such orders are constantly changing or the rules apply to persons who are transiting through a particular location. Previously published versions of the orders should be

[25] *NDA, supra* note 12, ss. 215-218 and QR&O 104.14.
[26] There is an option to not sentence at the date of trial that should only be used in very rare and exceptional circumstances. For example, if the CO is aware that the gravity of the charge to be tried may require the imposition of detention and the only cells available are in another location which is only accessible by aircraft, then the CO might postpone the trial or the sentencing to the date that there is a flight available to take the detainee to cells. Civilian appeal courts have held that it may be improper for the trial court to delay imposition of sentence for a collateral purpose if this may cause prejudice to the accused. 'Operational convenience' may not be sufficient, depending on the circumstances of the case.
[27] QR&O 104.02 Note. However, the comments at Note 29 also apply here.
[28] *NDA, supra* note 12, s. 204(3).
[29] *Ibid.*, s. 249.24.
[30] QR&O 104.12. It should not be confused with QR&O 208.20, which is administrative tool for the CO to recover the fine and does not give authority to a CO to modify the modality of payment ordered by the service tribunal (court martial or summary trial presided by a delegated officer).
[31] QR&O 107.14.

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maintained in order to prove determine what order applied at the date of the commission of the breach.

o. Instructions for Minor Punishments. The CO of a base, unit or element shall ensure that rules governing persons undergoing minor punishments (e.g., confinement to barracks, extra work and drill, stoppage of leave) are issued and that the rules are made known. This should be done at the beginning of a tour so that all such punishments may be dealt with on a consistent and fair basis.

SECTION 6

LEGAL REVIEW OF DISCIPLINARY RECORDS

19. By the seventh day of each month, units are to forward to their legal advisor copies of any Record of Disciplinary Proceedings (RDP), applications for referral of charges and documents indicating a decision of a review authority.[32] This requirement applies equally to deployed units involved in operations. The legal advisor is to review these documents for any errors on the face of the record and to confirm compliance with procedural requirements.[33]

20. If the operational legal advisor detects an error on the face of the record or in the procedural requirements, the legal advisor shall inform the CO and any other appropriate Review Authority and provide advice as to how the matter should be addressed. The legal advisor will advise the Review Authority with respect to his or her powers of review under QR&O 116.02 (even if no request for review has been submitted by the member under QR&O 108.45), including the Review Authority's powers to alter findings and sentence.

21. The legal advisor should ensure that the Review Authority takes the corrective action necessary under QR&O 116.03, and ensure that any alteration of finding or sentence is reflected in Part 7 of the RDP. Also, a memo from the Review Authority should be attached to the RDP indicating why the alteration took place.

22. In addition to these legal review requirements, the legal advisor is required on a monthly basis, to forward copies of the RDPs and relevant documents to MJP&R for the purpose of summary trial statistics.

SECTION 7

CONCLUSION

23. Whether deployed domestically or internationally, the *CSD* continues to apply to members of the CF. Deployed operations will often necessitate the administration of military justice, triggering the need to ensure that commanders at various levels are authorized to exercise their military justice responsibilities. While this chapter highlights some of the common military justice issues that may arise during deployments, it should be consulted in concert with B-GG-005-027/AF-011, Military Justice at the Summary Trial Level.

[32] QR&O 107.15.
[33] This may occur immediately after the conclusion of the summary trial, so long as the legal officer has verification that by end of the prescribed period, all RDPs have been forwarded for review. In turn, there is an obligation on the legal officer to forward a portion of the RDPs and the legal officer's review through the JAG chain of command on a monthly basis.

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CHAPTER 35

LIABILITY TO SERVE

SECTION 1

INTRODUCTION

1. The CF has been given a mandate by the Government of Canada to carry out lawful military operations both domestically and internationally in a wide variety of roles,[1] be they in aid of the civil power, assistance to law enforcement agencies during domestic drug interdiction, search and rescue operations, overseas peace keeping missions or the conduct of actual armed conflict combat operations, at times, under the auspices of a NATO-led or UN Security Council authorized engagement.

2. Military operations are typically complex and involve inherently dangerous work, often exposing CF members to risks such as personal injury or death. Conditions of service in the CF thus require the recruitment and retention of dedicated, highly motivated and properly trained individuals who are willing and able to perform their respective duties when called upon, often with short notice and under austere conditions. The purpose of this chapter is to examine the legal basis behind the ‘liability to serve’ principle, given that issues related to liability to serve may arise during military operations.

SECTION 2

LIABILITY TO SERVE

Duty to Serve

3. Pursuant to subsection 33(1) of the *NDA*, members of the regular force are at all times required to perform any lawful duty. The effect of this provision is compelling. It means that all regular force members can be ordered to serve anywhere in the world, including in life-threatening situations. This provision has also been relied on by both the CF and the courts in justifying the decision to release members declared medically unfit for deployment.[2]

4. The duty to serve for reserve force members is substantially more complex than it is for regular force members. Access to reserve force personnel in circumstances other than their routine peacetime training and employment is managed through three processes: active service, call out, and service with consent.

Active Service

5. Active service is described in section 31 of the *NDA*. It contemplates placing the CF on active service in only two sets of circumstances: an emergency for the defence of Canada, or in consequence of action undertaken under an instrument of collective defence. “Emergency” is defined at subsection 2(1) of the *NDA* as “an insurrection, riot, invasion, armed conflict or war, whether real or apprehended.”[3] “Active service” itself is not defined in the *NDA*, however. That said, the perceived purposes of placing the reserve force on active service is to provide a surge capability for the CF and to establish more onerous terms and conditions of service. The purpose of active service, therefore, is more closely associated with engagement in operations as opposed to peacetime training status. By Order in Council P.C. 1989-583 (dated 6 April 1989),

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[1] *National Defence Act*, R.S.C. 1985, c. N-5, s. 33(1). [*NDA*].
[2] *Canada (Attorney General) v. Robinson*, [1994] 3 F.C. 228, [1994] F.C.J. No. 737 (C.A.); *Canada (Attorney-General) v. St. Thomas,* [1993] F.C.J. No. 1015, 109 D.L.R. (4th) 671 (C.A.).
[3] *NDA*, *supra* note 1, s. 2(1).

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the Governor in Council has placed officers and non-commissioned members of the regular force on active service anywhere in and beyond Canada. This Order also placed CF officers and non-commissioned members of the reserve force on active service anywhere beyond Canada.

Call out

6. The general authority to call reservists out on service is contained in subsections 33(2), (3) and (4) of the *NDA*. Paragraphs 33(2)(a) and (b) enable the Government, through regulations and otherwise, to define and structure reserve force 'liability to serve' in light of a variety of circumstances. This authority does not apply to the Supplementary Reserve unless they are placed on active service. Pursuant to paragraph 33(2)(a), QR&O 9.04(3) prescribes that reservists may be required to train up to 15 days on Class "B" service and 60 days of Class "A" service in any given year. Pursuant to paragraph 33(2)(b), the Governor in Council may prescribe, by regulation or otherwise (i.e, an Order in Council that is not a regulation), the time and manner in which reservists may be called out on service to perform any lawful duty other than training.

7. QR&O 9.04 (Training and Duty) currently provides the only authority for a call out made pursuant to paragraph 33(2)(b) of the *NDA*. The only situation in which reservists may be called out, other than members of the supplementary reserves, is in the event of an emergency, as defined above. The Minister's authority in this respect may be devolved to designated military authorities.[4]

8. Sections 275 and 276 of the *NDA* give direction for call outs in situations specific to the provision of CF aid to a civil power. Where a riot or disturbance is taking place that is beyond the ability of civil authorities to control, reservists may be called out. However, pursuant to section 276 of the *NDA*, consent of the reservist is required. The CDS also has the authority to call out reservists under the circumstances referred to in section 278 of the *NDA*. However, consent of the member is also required.

Service With Consent

9. Section 33 of the *NDA* was amended in 1998 to remove distinctions between the liability to serve of members of the regular and reserve forces. This had the effect of incorporating the CF Total Force policy into the statute. As a result, members of both the regular and reserve forces are liable to perform any lawful duty, including those of a military nature and public service in accordance with section 273.6 of the *NDA*. While the liability to serve of members of the reserve force was changed by this amendment, it did not change the requirements for which they must consent to serve.

10. In terms of consent to serve, reservists may consent to being employed with the regular force or another subcomponent of the reserve force.[5] Consent given may be subsequently withdrawn. However, if the member is on active service, they may be compelled, pursuant to section 30 of the *NDA*, to provide continuous, full time service for as long as one year after the expiration of the period of active service.

11. In other words, reserve members may not unilaterally withdraw their consent to serve while on active service during a deployment overseas. In theatre, where certain incidents arise under the *Code of Service Discipline* as a result of alleged conduct by a reserve force member (i.e., disobedience of lawful command,[6] absence without leave[7] or desertion[8]), the in-theatre, operational chain of command, in consultation with the deployed legal advisor, may properly

[4] QR&O 9.04(4).
[5] QR&O 9.05 (Service With Consent).
[6] QR&O 103.16 (Disobedience of Lawful Command).
[7] QR&O 103.23 (Absence Without Leave).
[8] QR&O 103.21 (Desertion).

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consider disciplinary or administrative action or both, as may be appropriate given all of the prevailing circumstances.

SECTION 3

CONCLUSION

12. Service in the CF is rigorous, mentally demanding and potentially life threatening. The duty to serve for CF members in the regular force is absolute and consequently, these members must be prepared to deploy on short notice in support of sustained operations. Regarding reserve force members, the liability to serve principle is governed by three processes: the concept of active service, the ability to use call outs and the need to obtain a reserve force member's consent to serve save very exceptional circumstances. Within the context of deployed operations, neither regular force nor reserve force members on active service may unilaterally withhold the performance of a lawful military duty. Should this occur, operational commanders may be required to take disciplinary or administrative action (such as repatriation) to address the issue.

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CHAPTER 36

PENSION ISSUES

SECTION 1

INTRODUCTION

1. Both before and during a deployed operation, numerous personnel issues will invariably arise, affecting CF members and their families to differing degrees. Such issues often include pension concerns, particularly when a CF member suffers an injury, disability or death while on operations. COs, operational commanders and deployed staff officers are expected to respond to pension-related queries from subordinates and at times family members, especially where there are concerns relating to disability or survivor benefits. COs, deployed operational commanders, their staff and operational legal advisors should therefore be aware of certain critical elements that will allow them to effectively manage and inform their subordinates in these important areas.

2. In general, there are presently two different sources of retirement income specific to CF members – the *Canadian Forces Superannuation Act*[1] (*CFSA*), and the *Pension Act*[2] (*PA*). This chapter will examine these two Acts, as well as highlight proposed legislative changes that, arguably, improve eligibility and access to pension, injury, disability and survivorship benefits. The need to thoroughly investigate and properly document injury-related incidents is also discussed in light of the legislative processes currently in place to assist CF members resolve compensatory, pension-related issues commonly attributable to military service.

SECTION 2

BENEFITS UNDER THE CANADIAN FORCES SUPERANNUATION ACT

3. Prior to 2003, the last major initiative to amend the CF retirement income scheme occurred in 1960 with the *CFSA*. A number of minor reforms occurred in the intervening period until the Government eventually undertook a comprehensive legislative review of the *CFSA* in 2003.[3] These previous iterations highlighted the need for a retirement income scheme that is adaptive to changing demographics and the concurrent shift in attitudes of potential recruits.

4. Bill C-37 received Royal Assent on 7 November 2003, but is not yet in force.[4] The overall intent of this legislation is to align the retirement income arrangements available to CF members with the CF Human Resources strategy. There are four main areas of amendment. Firstly, the benefits were restructured to:

a. tie benefit eligibility to years of pensionable service rather than completion of a period of engagement in the CF;

b. provide an unreduced pension after 25 years of paid service in the CF;

c. reduce the minimum period for qualifying for a pension to two years; and

d. provide for a transfer value if vested and under age 50 and not entitled to an immediate annuity, or access to a reduced pension if age 50 or older.

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[1] *Canadian Forces Superannuation Act*, R.S.C. 1985, c. C-17. [*CFSA*].
[2] *Pension Act*, R.S.C. 1985, c. P-6 [*PA*].
[3] Director General Compensation and Benefits, *Canadian Forces Modernization Project*, online (DIN): DGCB <http://hr.ottawa-hull.mil.ca/dgcb/dpsp/engraph/cfpmp_whatsnew_e.asp> [*CF Modernization Project*].
[4] Bill C-37, *An Act to amend the Canadian Forces Superannuation Act and to make consequential amendments to other Acts*, 2nd Session, 37th Parliament, 2003, C-26, s. 17, online: Parliament of Canada <http://www.parl.gc.ca/37/2/parlbus/chambus/house/bills/government/C-37/C-37_4/90226bE.html> [Bill C-37]. Bill C-37 will come into force on a date set by the Governor in Council upon the making of regulations.

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5. Secondly, the legislation allows for certain reserve force members to be afforded the same arrangements as their regular force counterparts. This aspect complements the 1999 legislative authority to create retirement income for part-time reservists. Bill C-37 also makes provisions to increase administrative flexibility and the establishment of the necessary grandfather provisions for those already entitled to benefits under the existing pension scheme.[5]

6. The key to understanding the amendments to the *CFSA* is discerning the types of benefits to which a member may become entitled at certain points in their service. A contributor who ceases to be in the regular force is entitled to a deferred annuity if they have 2 or more years of pensionable service and are not entitled to an immediate annuity.[6] Another important element of the revised retirement benefits scheme is that a CF member who is entitled to a deferred annuity and then subsequently becomes eligible to receive a Canada Pension Plan (CPP) disability pension, ceases to be entitled to the deferred annuity and, instead, becomes entitled to an immediate annuity.[7] This change, in particular, facilitates easier and sooner access to an additional source of income for qualifying CF members, thereby improving a disabled member's quality of life.

7. The most recent amendment to the *CFSA* removed the definitions of "intermediate engagement," "retirement age" and "short engagement" from subsection 2(1) of the Act.[8] The legislation then specifically identifies who would be entitled to an immediate annuity. A member will generally be eligible for an Immediate Unreduced Annuity (IUA) upon release, if they have two or more years of pensionable service to their credit and can meet one of the following criteria:

a. they have completed not less than 25 years of paid CF service;

b. they have reached 60 years of age;

c. they have reached 55 years of age and have to their credit not less than 30 years of pensionable service;

d. they are disabled and have to their credit not less than 10 years of pensionable service; or

e. they cease to be a member of the regular force due to a reduction in the CF.

Vesting

8. Bill C-37 reduces the minimum vesting requirement in the *CFSA*. 'Vesting' refers to the right of a pension plan member to receive a benefit from the pension plan on termination of employment. This may be in the form of a cash out of the accrued benefit (transfer value), or an immediate or deferred annuity. Previously, a CF member needed 10 years to reach this point, but under Bill C-37, the pension entitlement will vest in the member after two years of contribution.

9. It is also possible for the contributor who has two or more years of pensionable service to receive 'transfer value.' The transfer value is the present value of the contributor's pension benefits. This amount may be transferred to:

a. a pension plan that is registered under the *Income Tax Act*, if it will accept the amount;

b. a retirement savings plan or fund prescribed by the regulations; or

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[5] CANFORGEN 136/03 CDS 125 071940z Nov 03, *Modernization of the Canadian Forces Superannuation Act*, para. 2, online (DIN): VCDS http://vcds.dwan.dnd.ca/vcds-exec/pubs/canforgen/2003/136-03_e.asp [*Modernization of the CFSA*].
[6] Bill C-37, *supra* note 4, s. 17.
[7] *Ibid.,* s. 21.
[8] *Ibid.,* s. 1.(1).

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c. a financial institution authorized to sell immediate or deferred life annuities,[9] for the purchase of such an annuity.

Improved Survivor Benefits

10. The new amendments have also improved survivor benefits. Under the old scheme, the survivor of a CF member with less than five years of service in the regular force would have only received the greater of a cash termination allowance or a return of contributions. The survivor of a contributor with five or more years of service would have received an annual allowance for life. The children of the survivor would receive benefits until the age of 18 or, if they were in continuous full-time attendance at school or university, until the age of 25.[10] Bill C-37 alters this arrangement, in that the two-year vesting period applies. Therefore, the survivor and dependent children of a deceased CF member would be eligible to receive allowances at an earlier stage in the member's career.[11] In addition, the prescribed definition of 'dependent children' is more flexible. For example, the Bill C-37 amendments remove the requirement for a dependent child to be in school or university on a continuous basis.

Reserve Force Pensions

11. In 1999, Bill C-78 granted the authority for the Government to make regulations concerning a Reserve Force Pension Plan. This approach precluded the need for Parliament to enact new legislation.[12] Bill C-37 provides regulation-making authority to adapt the provisions of the *CFSA* such that it applies to proscribed members of the reserve force.[13] The end result is that qualifying reserve force members will have the benefit of the *CFSA* through the new Reserve Force Pension Plan.

SECTION 3

BENEFITS UNDER THE PENSION ACT

12. In addition to retirement benefits payable under the *CFSA*,[14] it is possible for a CF member to receive a disability pension under the *Pension Act* (*PA*). These are two distinct schemes that should not be confused. Paragraph 21(2)(a) of the *PA* provides that a CF member may receive a pension when they suffer a 'disability' as the result of "an injury or disease...that arose out of, or was directly connected with such military service."[15] It is important to note that this phraseology highlights a recent amendment to the *PA*. In addition to injuries that occur in a special duty area (SDA), it is now possible for an injured service member who is injured during peacetime operations outside an SDA to receive immediate monetary benefits on successful application, rather than having to wait until after being released from the CF in order to receive these benefits.

13. Under the current *PA*, a CF member may apply in writing to the Department of Veterans Affairs (DVA) for an 'award.' An 'award' is defined as "a pension, compensation, an allowance or a bonus payable" under the *PA*.[16] The DVA adjudicators render a decision regarding the issuance of an award, and this decision may be re-assessed by a review panel.[17] An applicant can submit their request for review in writing, or may appear before the review panel in person or through a representative, in order to submit or present evidence and arguments.[18] The review

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[9] *Ibid.*, s. 22(1)(2).
[10] *CF Modernization Project.*
[11] Bill C-37, *supra* note 4, s. 25(1).
[12] *CF Modernization Project.*
[13] Bill C-37, *supra* note 4, s. 3.1.
[14] *Ibid.*, s. 16(1).
[15] *PA, supra* note 2, s. 21(2)(a).
[16] *Ibid.*, s. 3.
[17] *Ibid.*, s. 84.
[18] *Veterans Review and Appeal Board Act*, S.C. 1995, c. 18, s. 20 [*VRABA*].

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panel may reopen and reconsider its decision on its own initiative.[19] If the applicant is not satisfied with the decision of the review panel then the applicant may appeal the DVA's decision to the Veterans Review and Appeal Board (VRAB).[20]

14. The decision of the VRAB is considered final and binding,[21] although it also retains the right to reopen and reconsider decisions on its own initiative, or if the applicant has new evidence regarding matters previously adjudicated.[22]

15. At all levels of this adjudicative process, the decision-makers are reviewing the applicant's submissions regarding the link between the disability and military service. The *Veterans Review and Appeal Board Act* (*VRABA*) requires that:

> …[the] powers, duties or functions on (sic) the [VRAB] shall be liberally construed and interpreted to the end that the recognized obligation of the people and Government of Canada to those who have served their country so well and to their dependants may be fulfilled.[23]

17. There is a requirement for the VRAB to draw every reasonable inference in favour of the applicant or appellant, to accept non-contradictory evidence presented by the applicant that is credible, and to resolve any doubt in favour of the applicant.[24] Despite these prescribed advantages to the applicant or appellant, the applicant still has the responsibility of "providing credible, reasonable evidence."[25] This disposition was confirmed by the Federal Court of Appeal in *Hunt v. Canada (Minister of Veterans Affairs)*:

> …[this] evidence must be credible. The applicant must prove the civil standard that on a balance of probabilities, with the bonus of having this evidence put in the best light possible, his disease was contracted while in the service of his country. This civil standard must be read in concert with the entitling provision of section 21 of the Pension Act.[26]

The CF 98 (Report of Injuries) Form

18. The need to provide credible evidence underscores the need for units to conduct appropriate and comprehensive military investigations into incidents that may have resulted in a death, injury or disability to service personnel. Although these investigations are not absolutely determinative for the purposes of the VRAB decision-makers, they do provide evidence that ought to be considered, particularly when the injury is incurred as the result of the performance of a military duty. This highlights the need for all injured CF personnel to complete a CF 98 (Report of Injuries) in order to ensure the proper and accurate recording of relevant information.

19. Thus, the CF 98 (Report of Injuries) is an extremely important document that is utilized by DVA to adjudicate claims. Where an injury occurs to a CF member during the performance of a military duty, it is insufficient to only indicate on the CF 98 (Report of Injuries) form that an injury occurred. When determined, it should be expressly indicated on that form that such injury occurred to the member during the performance of a military duty, along with all relevant details concerning the nature of the injury and all relevant circumstances surrounding the event.

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[19] *Ibid.*, s. 23.
[20] *Ibid.*, s. 25.
[21] *Ibid.*, s. 31.
[22] *Ibid.*, s. 32(1).
[23] *Ibid.*, s. 3.
[24] *Ibid.*, s. 39.
[25] *Woo Estate v. Canada (Attorney General)*, [2002] F.C.J. No. 1690 at para. 60, 2002 FCT 1233. *Woo Estate* refers to *Hall v. Canada (Attorney General)*, [1998] F.C.J. No. 890, 152 F.T.R. 58 (T.D.).
[26] *Hunt v Canada (Minister of Veteran's Affairs)*, [1998] F.C.J. No. 377 at para. 9, 145 F.T.R. 96 (T.D.).

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20. It is important to note that the standard of proof associated with subsection 21(2) of the *PA* is not required if an applicant is applying for an award related to a disability acquired during 'special duty service.' Subsection 21(1) of the *PA* provides that where a member of the CF suffers disability resulting from an injury or disease, or an aggravation thereof, from a Special Duty Operation (SDO), they will be entitled to a pension.[27] This provision reflects a recent amendment to what was formally referred to as a Special Duty Area (SDA). Nevertheless, it is highly recommended that CF members complete a CF 98 (Report of Injuries) as a means of thoroughly documenting the incident.

Special Duty Service

21. The legal concept of an SDA under the *PA* was initiated in 1949 to recognize the hazardous service and the difficulties of establishing the facts necessary to award compensation to CF members and their families where injuries occurred in hostile conditions in foreign theatres of operations. Until recently, an SDA was the only means for a CF member serving in peacetime to secure a pension under subsection 21(1) of the *PA*.

22. Following domestic operations such as during the Oka crisis and the Quebec ice storm, Parliament amended the *PA* to include the concept of an SDO that could be designated for operations occurring inside or outside Canada. The Government has pursued a deliberate course in this regard. Since their inception, SDAs have been deliberately confined by law to areas outside Canada. Following the above noted domestic operations, this scheme was expanded to accommodate operations in Canada where a level of risk is higher than normally associated with service in peacetime. [28]

23. "Special duty service" refers to an SDA or an SDO, as defined by sections 91.2 and 91.3, respectively, of the *PA*.[29] Special duty service includes:

a. periods of training that occur specifically for the operation, regardless of the location of the training;

b. travel to and from the area of the operation, or the location of training for the operation as referred to in subparagraph a. above; and

c. duly authorized leave of absence with pay during that service, regardless of the location of the leave of absence.[30]

The above-mentioned training must have occurred on or after 11 September 2001.[31]

24. The following types of operations may be designated for the purposes of special duty service:

a. an armed conflict;

b. an operation authorized under the Charter of the United Nations, the North Atlantic Treaty, the North American Aerospace Defence Command Agreement, or any other similar treaty instrument;

c. an international or multinational military operation;

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[27] *PA, supra* note 2, at para. 21(1)(a).
[28] Bill C-31, *An Act to amend the Pension Act and the Royal Canadian Mounted Police Superannuation Act*, 2nd Session, 37th Parliament, Assented to 19th June, 2003, C-31, ss. 91.2(1)(c) and 91.3(1)(c), online: Parliament of Canada <http://www.parl.gc.ca/37/2/parlbus/chambus/house/bills/government/C-31/C-31_4/90223bE.html> [Bill C-31].
[29] *PA, supra* note 2, s. 3(1).
[30] *Ibid*.
[31] *Ibid*.

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d. an operation authorized in order to deal with a national emergency, as defined in section 3 of the *Emergencies Act*, in respect of which a declaration of emergency is made under that Act;

e. an operation authorized under section 273.6 or Part VI of the *NDA*, or other similar operation authorized by the Governor in Council;

f. an operation that, in the opinion of the MND, is a search and rescue operation;

g. an operation that, in the opinion of the MND, is a disaster relief operation;

h. an operation that, in the opinion of the MND, is a counter-terrorism operation; and

i. an operation involving a level of risk that, in the opinion of the MND, is comparable to that normally associated with an operation referred to in subparagraphs a. to e. above.[32]

25. Pursuant to subsection 91.2(1) of the *PA*, the MND may designate an SDA if the following conditions apply:

a. it is outside Canada;

b. CF members have been, or will be, deployed to the area; and

c. the MND believes deployed personnel will be exposed to elevated risk, and the operation constitutes one of the above mentioned types of operations.[33]

26. The MND may, by order, designate any operation as an SDO, effective on or after 11 September 2001, if the following conditions apply:

a. the operation is one of the types of operations identified at paragraph 24 above;

b. members of the CF have been deployed, or will be deployed, as part of that operation; and

c. the MND is of the opinion that that deployment has exposed, or may expose, those members to conditions of elevated risk.[34]

Veterans Affairs Canada Modernization – Changes to the *Pension Act*

27. The *Canadian Forces Members and Veterans Re-Establishment and Compensation Act* received Royal Assent on May 13, 2005. When this Act comes into force, it will replace the *PA* for CF members who suffer a service-related injury, disease or death after the date on which the Act becomes effective. This Act represents significant changes from the *PA*. In essence, the *PA* provided a lifetime pension benefit to, or in respect of, a member of the CF who suffered a disability or death in circumstances that were directly connected with, or arising from, their military service. This is no longer the case under the new legislation. Both the eligibility criteria and the benefit structure have been changed.

28. Under the new Act, some of the benefits may be made available to medically released members even if the disability giving rise to the release is not service-related. In addition, Veterans Affairs Canada (VAC) has instituted a 'dual award' approach. Under this approach, a member may be entitled to a lump sum disability award, to a maximum of $250,000, in order to

[32] *Ibid.*, s. 91.4(a)-(i).
[33] The *PA* defines 'conditions of elevated risk' as "a level of risk higher than that normally associated with service in peacetime." *Ibid.*, ss. 91.2(1)(c) and 91.3(1)(c).
[34] *Ibid.*, s. 91.3.

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compensate for the 'non-economic impact' of a service-related disability or death. The second element of the dual award is financial support comprising loss of earnings benefits, income support, permanent impairment allowance and a supplementary retirement benefit. Some or all of these elements may be applied to compensate for the 'economic impact' of a career ending service-related (or in some cases, unrelated), injury or disease.

29. In addition to the monetary compensation, other programs have also been instituted under the new Act to assist the member in making the transition to civilian life and regaining earning capacity. The various programs include:

a. job placement services;

b. rehabilitation services, vocational assistance and financial benefits;

c. death and detention awards; and

d. health benefits for eligible CF members.

While all members of the CF will be eligible for the lump-sum disability award, members of some sub-components of the reserve force, or on some classes of reserve service, will not be eligible for all of the programs or benefits that will be provided under the second element of the dual award approach to entitlements.

30. In the case of a disability, death or detention award, an applicant has the right to be represented by either the Veteran Affairs Canada Bureau of Pension Advocates or the Royal Canadian Legion. If a member suffers a service-related injury that may result in a disability, it would be advisable for the member to contact one of these organizations.

31. It should be noted that entitlement decisions under the new Act are made by VAC and the VRAB, and not by the CF. In order to assist released members in making their cases before VAC and potentially, the VRAB, it is important that the CF properly document the circumstances surrounding service-related injuries and diseases (e.g., by completing a CF 98 (Report of Injuries), Summary Investigation or Board of Inquiry).

Injured Military Members Compensation Act

32. As a result of Senate hearings, it was determined that the coverage for accidental dismemberment was not uniform and equitable across all ranks of the CF in respect of a service-related injury that incurred on or after 1 October 1972 and before 13 February 2003. In order to address this inequality, Parliament enacted the *Injured Military Members Compensation Act* (*IMMCA*),[35] which received Royal Assent and came into force on 19 June 2003. The *IMMCA* provides compensation to all regular force and primary reserve force members not eligible for the General Officers Insurance Plan (GOIP), the Reserve GOIP, or another insurance plan provided by the Government in respect of certain types of injuries such as dismemberment, loss of hearing or loss of speech.

Reserve Force Disability

33. Operational commanders and COs of reserve force members should also be aware of the potential entitlement to disability benefits under Compensation and Benefits Instructions, Chapter 210 (Miscellaneous Entitlements and Grants). A member of the reserve force on class A, B or C service who is injured or contracts a disease or illness due to military service, is entitled to pay and allowances until the termination of that service at their rate of pay:

a. when the injury occurred;

[35] *Injured Military Members Compensation Act,* S.C. 2003, c. 14 [*IMMCA*].

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b. while they are in hospital; or

c. while they are receiving treatment for a period determined by the MND, but not beyond their release date.[36]

If the injury or illness is not attributable to military service, or is a result of the member's misconduct, then the member may be entitled to pay until the member's period of service ends or the member is sent home.[37] Periods of treatment cannot count as training days.[38]

34. Disability compensation will continue until the member is released from the reserve force or the member "unreasonably refuses to accept prescribed medical treatment."[39] The compensation will also cease once a competent medical authority determines that the member is no longer disabled, is able to resume participating in the reserves or the occupation (military or civilian) that they held at the time the disability occurred, or is able to seek civilian employment.[40]

SECTION 4

CONCLUSION

35. Injuries frequently occur to CF members while on deployed operations. Occasionally, these injuries may lead to a CF member's permanent disability or death. It is therefore incumbent upon COs, deployed operational commanders and operational legal advisors to be aware of the two potential sources of disability, survivorship and retirement income sources that presently exist which are specific to CF members, namely the *PA* and the *CFSA*. Given that such legislation is routinely subject to legislative review and amendment, COs and deployed operational commanders are encouraged to consult with their legal advisors when dealing with disability, survivorship and retirement issues.

36. It is the CO's and deployed operational commander's responsibility to ensure that units under their command conduct appropriate and comprehensive military investigations into incidents that may have resulted in a death, injury or disability to service personnel. These investigations provide factual information that is quite likely to be relied upon by pension board decision-makers. In this regard, all documentation related to such incidents should be completed as diligently as possible and without undue delay, notwithstanding the fact that such incidents may occur during periods of high operational tempo.

[36] *Compensation and Benefits Instructions for the Canadian Forces,* 210.72(1) [CBI].
[37] *Ibid*., 210.72(2).
[38] *Ibid*., 210.72(9).
[39] *Ibid*., 210.72(6).
[40] *Ibid*., 210.72(7).

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CHAPTER 37

SERVICE ESTATES

SECTION 1

INTRODUCTION

1. Conducting military operations both domestically and abroad invariably involves exposing CF members to situations where physical risks and other mental health stressors could potentially result in CF members suffering severe personal injury or death. Given the realities concerning conditions of service in the CF while on operations, sound preparedness and planning is required on the part of operational commanders and their legal officers in order that they may be able to deal with such incidents in a timely and compassionate manner. Contingency planning in this regard is, quite arguably, conducive to maintaining morale of all deployed personnel, be they military or civilian, and, when successfully managed in theatre, will assist in maintaining leadership credibility and professionalism.

2. While the death of a CF member in theatre will necessarily involve a comprehensive response touching upon a myriad of different issues,[1] the primary purpose of this chapter is to discuss the process by which a CF member's service estate must be administered, depending on whether the member in question is deceased, reported missing or medically assessed as being of unsound mind. In this regard, should a CF member die, go missing or develop an unsound mind while deployed on operations, the CF must collect, administer and distribute the member's service estate according to each type of incident.

SECTION 2

GENERAL

3. The *National Defence Act* (*NDA*)[2] provides the CF with a description as to what constitutes a service estate. QR&O provide additional information with respect to collecting, administering and distributing the deceased's estate. As mentioned, there is also a requirement to collect and safeguard the personal belongings of a member who has been reported missing or who has been, or is expected to be, in the view of an operational commander in theatre, released from the CF with unsound mind.

4. Section 42 of the *NDA* defines a 'service estate.' This is important when determining which property belonging to the deceased member will form part of their service estate. QR&O Chapter 25 (Service Estates and Personal Belongings) provides the procedures for collecting, administering and distributing the service estate. It sets out in detail who has the authority to appoint a Director of Estates (DE), how the service estate is administered and the duties of the Committee of Adjustment (COA). It applies to members of the regular force, special force and members on Class 'B' or Class 'C' reserve service, as well as reserve force members on active service.[3]

5. DAOD 7011-1 (Responsibilities for Service Estates and Personal Belongings) covers the responsibilities of COs with respect to the personal and movable property of a deceased member, a member who has been reported missing, and a member who has been, or is expected to be released with unsound mind. It also sets out the composition, duties and responsibilities of the COA.

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[1] DDIO Instructions for International Operations.
[2] *National Defence Act*, R.S.C. 1985, c. N-5 [*NDA*].
[3] QR&O 25.015 (Application and Definitions) See also QR&O 24.15 (Entitlement to Military Funerals).

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6. The MND is responsible for appointing a DE and this individual is directly responsible to the Minister with respect to the exercise of their functions, power and duties.[4] With respect to a deceased CF member's service estate, the DE has the same rights and powers as an executor or administrator of an estate appointed by a court of competent jurisdiction.[5] The MND has appointed the Judge Advocate General (JAG) as the DE.[6]

Service Estate

7. Subsection 42(2) of the *NDA* defines a member's service estate to include:

a. service pay and allowances;

b. all other emoluments emanating from Her Majesty that, at the date of death, are due or otherwise payable;

c. personal equipment that the deceased person is, under regulations, permitted to retain;

d. personal or movable property, including cash, found on the deceased person, or on a defence establishment, or otherwise in the care or custody of the CF; and

e. in the case of an officer or non-commissioned member dying outside Canada, all other personal or movable property belonging to the deceased and situated outside Canada.

Note: Any personal equipment or personal property found in a family house, or found to be under the care, control or custody of the next of kin of the deceased member, does not form part of the deceased member's service estate.[7]

Personal Belongings

8. QR&O 25.16(1) defines 'personal belongings' as:

a. personal equipment that an officer or non-commissioned member is, under regulations, permitted to retain on release; and

b. personal or movable property, including cash, found in quarters or in the care or custody of the CF.

The CF is responsible for collecting and safeguarding a deceased member's service estate and the personal belongings of a member who has been reported missing or who has been released with unsound mind.[8] Where a member is medically assessed in theatre with unsound mind and is expected to be released upon arrival at their home unit, a similar obligation on behalf of the CF exists for collecting and safeguarding the personal belongings in theatre belonging to that member.

Committee of Adjustment

9. The COA is responsible for collecting, preparing an inventory of and safeguarding a member's service estate. The operational commander of a deceased officer or non-commissioned member is responsible for appointing the COA. The COA is to be comprised of three officers with one of the officers being the president. The president of the COA should be at the rank of Maj/LCdr or above. While the preference is to have an officer at the rank of Maj/LCdr or above act as president of a COA, officers at the rank of Capt/Lt(N) may also act as such.

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[4] QR&O 25.02 (Director Estates).
[5] QR&O 25.02(3).
[6] Ministerial Order - Designation of the Director of Estates, MCU 2000-03830 (3 Aug, 2000).
[7] QR&O 25.01(2). See also Defence Administrative Orders and Directives (DAOD) 7011-0 (Service Estates and Personal Belongings).
[8] QR&O 25.01(2).

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However, the president of a COA cannot hold a rank below that of a Capt/Lt(N). An accounting officer should be one of the three officers on the COA.[9]

10. The COA may be less than three officers, but only with the concurrence of the DE. If there is an insufficient number of officers available, then a CWO/CPO1, MWO/CPO2 or WO/PO1 can be appointed to the COA.[10]

11. Notwithstanding the above, there are times when the COA will consist only of the CO. This may occur in situations other than deployed operations and only where the following conditions are met:

a. the member dies on terminal leave;

b. a clearance certificate[11] was issued;

c. the member does not have any preferential charges on their pay account; and

d. the member left no personal or movable property at the unit or in theatre.

13. In such cases, the CO is responsible for signing a statement indicating that the four above conditions were met. The statement is to be forwarded to the DE.[12] Preferential charges include: sums due for quarters, unpaid non-public property accounts (e.g., mess dues), sums due for material and a debt balance in the member's pay account. It is the responsibility of the DE to use the service estate to satisfy preferential charges.[13] Any questions pertaining to the payment of preferential charges should be directed to the DE Office within the Office of the JAG.

14. The action to be undertaken by the COA with respect to the personal or movable property of the member is set out in DAOD 7011-1 (Responsibilities for Service Estates and Personal Belongings). The Table to this DAOD provides the COA with information concerning how to deal with various types of property. This Table should be consulted both before and while the COA begins to collect and safeguard the member's property. QR&O Chapter 25 (Service Estates and Personal Belongings) should also be consulted.

15. The COA is not responsible for satisfying claims against a service estate or a member. The service estate is not to be liquidated to satisfy any civilian creditor's claim. If there are any claims against the service estate, the civilian creditor should be advised to contact the DE. There should be no mention of the claim in the minutes of the COA.[14]

16. Once the COA has completed its work, a clearance certificate must be issued. The COA is responsible for ensuring that the appropriate clearance certificate is completed, forwarded to the appropriate accounting officer and a copy of the certificate is attached as an exhibit to the minutes.[15]

17. Preparing the minutes of proceedings is the next step in the process after completing the clearance certificate. The minutes are to be prepared in duplicate and signed by all members of the COA. The appropriate form to be used is set out in DAOD 7011-1. The original minutes, along with all of the exhibits, are to be forwarded to the DE. The duplicates (with exhibits) are to be kept on the unit file. In cases where a member is repatriated to their home unit and is expected to be released with unsound mind, two copies of the minutes are to be forwarded to the Director Military Careers Administration and Resource Management 4 (DMCARM 4).[16]

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[9] DAOD 7011-1 (Responsibilities for Service Estates and Personal Belongings).
[10] *Ibid*.
[11] A 'clearance certificate' is the document used by CF members to clear in to a unit on arrival and to clear out of a unit on departure.
[12] DAOD 7011-1 (Responsibilities for Service Estates and Personal Belongings).
[13] QR&O 25.03 (Preferential Charges Against a Service Estate).
[14] DAOD 7011-1 (Responsibilities for Service Estates and Personal Belongings).
[15] *Ibid*.
[16] *Ibid*.

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18. The minutes must be completed and forwarded to the DE within 14 days after the death of a member, the reporting of a member as being missing, or the release of a member with unsound mind. If the minutes cannot be completed and forwarded to the Director within 14 days, the COA is responsible for contacting the DE and explaining the reason for the delay. The COA is also responsible for providing the DE with the expected date by which the minutes will be forwarded.[17]

19. After forwarding the minutes of proceedings to the DE, the COA is responsible for ensuring that the member's property is disposed of properly. When dealing with the property of a deceased member or a member who has been reported missing, the DE will issue disposal instructions.[18]

20. DAOD 7011-1 sets out the actions to be taken by the COA with respect to the disposal of certain items found in a member's quarters, on the member, or under the care and control of the CF. Items include cash, public clothing, equipment or material, identification cards, identification discs and passports. It also provides instructions on how to deal with claims, advances and preferential charges.

SECTION 3

COMMANDING OFFICER'S RESPONSIBILITIES

Death of a Member

21. When a member of the CF dies while on deployment, the operational commander has a number of responsibilities with respect to the estate of the deceased member. With regards to the member's service estate, the operational commander is responsible for ensuring that all personal and movable property belonging to the deceased member is secured and safeguarded. This includes property found in quarters or under the care and control of the CF. The operational commander does not have to take any action with respect to any property found in married or civilian quarters, or property that is under the care and control of the next of kin, unless the DE decides that steps must be taken to safeguard this property.[19]

22. The operational commander is responsible for ensuring that a COA is appointed within 48 hours of the death. The operational commander should appoint an Assisting Officer (AO) to assist the next of kin. The name and telephone number of the AO should be provided to the DE.[20]

23. The operational commander is also responsible for ensuring that the Records Support Unit (URS) forwards to the DE a copy of any will or will certificate form held in custody for the deceased member or, if there is no will or will certificate form, a statement to that effect. The operational commander does not have to search for a will in a location under the control of the next of kin. If the operational commander deviates from applying DAOD 7011-1, they are required to contact the DE and report they have deviated from the DOAD.[21]

Missing Member

24. When a member is missing, the CO or operational commander must take steps to ensure the member's personal belongings are safeguarded. The CO or operational commander is responsible for ensuring that all of the personal property or movable property of the missing member found in quarters or under the control and care of the CF is safeguarded. As with the

[17] *Ibid.*
[18] *Ibid.*
[19] *Ibid.*
[20] *Ibid.*
[21] *Ibid.*

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property of a deceased member, the personal property or movable property of a missing member that is located in married or civilian quarters, or is found in the care and control of the next of kin, does not have to be collected or safeguarded by the CF unless the DE decides otherwise.[22]

25. The CO or operational commander is also responsible for ensuring that a COA is appointed within 15 days after the date the member is believed to have gone missing. This differs from the appointment of a COA for a deceased member, which must be appointed within 48 hours.[23]

26. The CO or operational commander is also responsible for ensuring that the URS forwards to the DE a copy of any will or will certificate form held in custody for the missing member, or if there is no will or will certificate form, a statement to that effect. If the CO or operational commander deviates from applying DAOD 7011-1, they must contact the DE and report this fact.[24]

27. When a member disappears and the MND, or an authority designated by the Minister, believes in their opinion that the circumstances surrounding the disappearance raises beyond a reasonable doubt the presumption that the member is dead, a presumption of death certificate may be issued. The certificate must provide the date on which the member is deemed to have died.[25]

28. If, by the end of six months from the date of a member's disappearance, the circumstances surrounding the disappearance do not provide conclusive proof that the missing member is dead, the CDS, or an authority designated by the CDS, is responsible for making further inquiries from the missing member's next of kin, CO or operational commander, or any other likely source of information. If there is no evidence that the member is still alive and the CDS believes that the circumstances surrounding the disappearance of the member raises a belief beyond a reasonable doubt that the member is dead, the CDS may issue a presumption of death certificate. The certificate will indicate the date on which the member is deemed to have died.[26]

29. The *NDA* and the QR&O do not specifically address the issue as to who will deal with the property of a missing member who is deemed to have died. However, it follows that once a member is deemed to have died and a death certificate is issued, the CO of the member's home unit will then deal with the member's personal property in accordance with the section on service estates of deceased members and not in accordance with the section pertaining to the personal belongings of members reported missing.

Member Released with Unsound Mind

30. The CO or operational commander of a member who is being released with unsound mind[27] must ensure that all of the personal property and movable property of the member found in quarters or under the care and control of the CF is collected and safeguarded. As with the

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[22] *Ibid*.
[23] *Ibid*.
[24] *Ibid*.
[25] *NDA*, *supra* note 1, s. 43; QR&O 26.20 (Certificates of Death or Presumption of Death) and QR&O 26.21 (Signing of Certificates of Death and Presumption of Death).
[26] QR&O 26.20(3)-(5).
[27] DAOD 7011-1 does not define the term 'unsound mind.' It is presumed that a member with unsound mind is released under QR&O 15.01 (Release of Officers and Non-Commissioned Members) Item 3(a) (On medical grounds, being disabled and unfit to perform duties as a member of the Service). *The Dictionary of Canadian Law* 3rd ed., as cited at *Bisoukis v. Brampton (City)* (1999), 46 O.R. (3d) 417 at para. 44, 180 D.L.R. (4th) 577 (CA), provides the following definition of a 'person of unsound mind': "A person is of unsound mind within the meaning of s. 47 [of the *Limitations Act,* R.S.O. 1990 c. L.15] when he or she, by reason of mental illness, is incapable of managing his or her affairs as a reasonable person would do in relation to the incident or event which entitles the person to bring an action." The *Black's Law Dictionary* defines 'unsound' as "not healthy...not mentally well."

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personal property of a deceased or missing member, the CO is not responsible for collecting or safeguarding any personal or movable property of the member that is located in married or civilian quarters, or is under the care and control of the next of kin, unless the DE believes that the circumstances require the property to be safeguarded.[28] A COA must be appointed within 48 hours of the member's release.[29]

31. In the case of a member released with unsound mind, or of a member in theatre who is medically assessed with unsound mind and is expected to be released, the CO or operational commander, as the case may be, is responsible for ensuring that a search is conducted for a will or will certificate held in the care and control of the CF. As with the case of a deceased member or a member reported missing, if there is no will or will certificate found, a statement to that effect must be made. The will or will certificate is not sent to the DE but, rather, to DMCARM 4.

SECTION 4

ADDITIONAL GUIDANCE

32. The main priority of operational commanders is to collect and safeguard personal property belonging to a deceased service member, a member who has been reported missing while on deployed operations, or a member who has been medically assessed with unsound mind and is expected to be released. This includes personal property found with the deceased person or subject member, personal property located in quarters, or personal property under the care and control of the CF. It does not include personal belongings in the possession, care or control of the next of kin, or located in married or civilian quarters. It does include personal belongings of the member in theatre.

33. Once the belongings are collected, an inventory should be taken to record what has been located. If any belongings are to be returned to supply, a receipt should be obtained acknowledging what property was returned. If cash is located on the member or in quarters, the cash should be handed over to an accounting officer and a receipt should be obtained. No disposal of property should take place without contacting the DE.

SECTION 5

CONCLUSION

34. Given that a CF member may die, go missing or develop an unsound mind while on an operational deployment, it is incumbent upon operational commanders and their respective legal advisors in theatre to familiarize themselves with the procedures involved in collecting, administering and distributing the member's service estate in accordance with procedures relevant to each of these circumstances. This is especially true where the nature and scope of the operational deployment is such that many incidents of this kind are expected to occur. Arguably, where such incidents are quickly and efficiently managed at the outset of a deployment, operational focus and effectiveness should be maintained.

[28] DAOD 7011-1 (Responsibilities for Service Estates and Personal Belongings).
[29] *Ibid*.

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CHAPTER 38

LEGAL ASSISTANCE TO CF MEMBERS

SECTION 1

INTRODUCTION

1. Occasionally, CF members require legal advice or assistance of a personal nature from a legal officer, either while they are on deployment or while they are conducting pre-deployment preparations. During the pre-deployment process, legal assistance may be provided to CF members in the areas of wills and power of attorney preparation, as well as other personal administrative matters having a legal component to them, through unit briefings or on an individual basis. While deployed on operations, the most common form of legal advice that is provided to a CF member comes within the context of CFAO 56-5 (Legal Assistance) or as a result of the member having been charged with one or more *Code of Service Discipline* (*CSD*) offences. The CF member in such situations will normally choose to consult a legal officer assigned to the Directorate of Defence Counsel Services (DDCS) for specific legal advice in this area.

2. Similarly, CF members in theatre may become involved in civil or criminal incidents during the course of conducting normal operations. In order to avoid potential civil claims consequences for the CF and CF members, the assistance of the deployed legal advisor is often required. Ensuring that the CF as well as CF members are properly protected in this regard is an important area for the operational commander and chain of command. This chapter will discuss the manner and extent to which legal assistance is provided in support of operational commanders while deployed, including legal assistance available to individual CF members on deployment.

SECTION 2

LEGAL ASSISTANCE BY CF LEGAL OFFICERS

3. Under the *National Defence Act* (*NDA*), the Judge Advocate General (JAG) is appointed to act as the legal advisor to the Governor General, the MND, DND and the CF on military law matters.[1] The JAG is also responsible for the "superintendence of the administration of military justice in the Canadian Forces."[2] QR&O 4.081 (Command of the Office of the Judge Advocate General) assigns legal officers to the positions established within the Office of the JAG to provide legal services to the CF and not individual CF members on personal legal matters.[3] The JAG determines the nature of these legal services and legal officers are subject only to the command of another legal officer with respect to their performance.[4] With the exception of those assigned to the Directorate of Defence Counsel Services (DDCS), legal officers have the primary duty of advising the units of the CF on military law on behalf of the JAG.

4. The provision of legal assistance to CF members on personal legal matters by legal officers is governed by CFAO 56-5 (Legal Assistance).[5] Pursuant to CFAO 56-5 (Legal Assistance), legal officers may advise CF members in relation to three issues:

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[1] *National Defence Act*, R.S.C. 1985, c. N-5, s. 9.1 [*NDA*].
[2] *Ibid.*, s. 9.2(1).
[3] *Queen's Regulations and Orders* (QR&O) 4.081(1) [QR&O].
[4] QR&O 4.081(4).
[5] Persons eligible to receive legal assistance under CFAO 56-5 (Legal Assistance) include members of the CF and members of foreign armed forces attached or seconded to the CF. If these members are serving outside Canada, their dependents are also eligible to receive legal assistance under CFAO 56-5 (Legal Assistance). Finally, personnel who are part of the civilian component of the CF outside Canada and their dependents are considered persons eligible to receive legal assistance under CFAO 56-5 (Legal Assistance), as well. See CFAO 56-5 (Legal Assistance).

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a. the CF member's legal rights and obligations;

b. the decision of whether to seek civilian legal counsel; and

c. the presentation of the member's case to their civilian lawyer.[6]

5. Lawyers are ethically required to limit their practise to matters in which they have a measure of professional experience and competence (i.e., a legal officer should not provide legal advice concerning child custody and access matters if they have no training or expertise in this area). For these reasons, legal officers providing advice under the terms of CFAO 56-5 (Legal Assistance) are normally limited in the extent to which they can provide legal advice to individual CF members, such as when it is urgent or operationally necessary, where the member's welfare and operational effectiveness are negatively impacted, or when no other civilian legal assistance is readily available.[7] Where the operational legal advisor provides legal assistance on an individual basis to CF members in theatre, all such advice is provided free to the member.

6. Except for legal officers with DDCS acting on behalf of individual CF members in respect of actions taken against them under the CSD, legal officers normally provide legal advice to the chain of command and the 'client' for all military law advice is the Crown. Solicitor-client privilege attaches to all legal advice provided to the CF and DND. Only the MND is authorized to waive solicitor-client privilege on behalf of the Crown in order for privileged information to be released to third parties.

Code of Service Discipline Matters

7. In the context of CFAO 56-5 (Legal Assistance) concerning matters related to the *CSD*, legal officers must only provide legal advice to the chain of command (i.e., an officer or NCM acting in their official capacity as representatives of the CF), unless the legal officer works for the DDCS.[8] Normally, legal officers cannot advise CF members, other than the chain of command, on civilian criminal offences, the conduct of any litigation, or any administrative matter, particularly applications for redress of grievance.[9] Military lawyers serving in the DDCS are mandated to assist CF members who are placed under arrest or in detention by military authorities, or who are being investigated or questioned, or who have been charged with an offence under the *CSD*.[10] Only in these circumstances is the individual CF member the 'client' and, accordingly, only the CF member can waive the privilege that attaches to the communications between themselves and their DDCS legal advisor.

Foreign Custody Situations

8. Operational legal advisors may properly address the CF's interests and the rights and obligations of a CF member who has been arrested. For example, they can assist the chain of command in seeking the release of members arrested by civil authorities in a theatre of operations for an alleged incident that is either connected or unconnected with their normal duties. In some circumstances, an existing Status of Forces Agreement (SOFA) may apply. In situations where a SOFA does not apply, it is in the interests of the CF to seek the immediate release of the member and for the commander to address the situation with local authorities. In these circumstances, the operational legal advisor and Canadian diplomatic representatives will often play a key role on behalf of the commander.

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[6] CFAO 56-5 (Legal Assistance) at para. 3.
[7] *Ibid*. at para. 4.
[8] QR&O 101.20 (Duties and Functions of Director of Defence Counsel Services).
[9] CFAO 56-5, para. 6.
[10] QR&O 101.20 (Duties and Functions of Director of Defence Counsel Services).

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SECTION 3

INDEMNIFICATION OF LEGAL FEES AND THE PROVISION OF LEGAL ASSISTANCE

Application of TB Policy Concerning Indemnification – Deployed Operations

9. While on deployed operations, CF members perform duties that can result in damage to public and private property and cause harm to individuals. This fact can potentially leave CF members exposed to legal liabilities as a consequence of performing their duties or employment. Accordingly, the Treasury Board of Canada Secretariat (TB) policy, *Policy on the Indemnification of and Legal Assistance for Crown Servants*, acknowledges that an employer "should indemnify its servants and protect them from certain financial costs arising from the performance of their duties."[11]

10. The TB policy provides that the Government will absolve the CF member from having to personally face potential lawsuits and legal costs over incidents that occurred while on deployment and will cover the financial expenses involved in resolving the matter in all of those cases where the CF member meets all of the requirements to obtain 'indemnification' within the policy. The TB policy ensures that deployed CF members are not personally liable for legal costs or court-imposed damage awards that may arise from incidents that occurred while performing their duties.

11. The TB policy stipulates that if a Crown servant has "acted honestly and without malice," within the parameters of their duties, and, has met reasonable departmental expectations, the Government shall:

a. indemnify a Crown servant against personal civil liability;

b. not initiate a claim against a Crown servant; and

c. provide legal assistance to a Crown servant when:

i. they must appear before, or be interviewed by, a judicial, investigative, or other inquest or inquiry;

ii. they are threatened with a lawsuit;

iii. they are to be charged with an offence; or

iv. when legal assistance is justified in other circumstances.[12]

General Limitations of the TB Policy

12. In order to qualify for indemnification or legal assistance, a CF member or DND employee must inform their operational commander via the chain of command or their employer, as the case may be, at the earliest reasonable opportunity when they become aware of the possibility of a civil claim or proceeding being personally made against them. CF members must provide a comprehensive report to the appropriate chain of command and complete the form at Appendix A (Authorization Forms) to the TB Policy that authorizes the Attorney General to defend the action.[13]

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[11] Treasury Board of Canada Secretariat (TBS), *Policy on the Indemnification of and Legal Assistance for Crown Servants* (Ottawa: TBS, 2004) at s. 2(a), online: TBS <http://www.tbs-sct.gc.ca/pubs_pol/hrpubs/TB_851/pila_e.asp> [TB Policy].
[12] *Ibid.*, s. 4 (Policy Statement).
[13] *Ibid.*, s. 7.1 (Notification).

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13. The TB has authorized the deputy heads of the various government departments to approve indemnification and the provision of legal services.[14] The DM of the Department of Justice (DoJ) has authorized the DND/CF Legal Advisor (DND/CF LA) to designate the Director of Claims and Civil Litigation (DCCL) to perform the approval function on his behalf.[15] The approval of this undertaking, however, is not automatic and the decision-maker may be required to seek legal advice regarding potential conflicts of interest or other aspects of the policy. Under certain circumstances, if the DoJ is in a position of conflict of interest (e.g., it cannot assign a DoJ lawyer to represent a CF member due to certain legal considerations involving the Crown's interests), it may be deemed appropriate for the employee or member to be represented by civilian legal counsel.

14. Where such a determination is made, private counsel cannot be retained at public expense on behalf of the CF member until DCCL has granted proper authorization. A CF member who engages the services of a civilian attorney to defend a civil claim or proceeding being made against them prior to the receipt of the proper authority from DCCL will be personally responsible for the payment of any resulting legal fees.[16]

SECTION 4

CONCLUSION

15. Legal officers, with the exception of those assigned to the DDCS, have the primary duty of advising the units of the CF on military law on behalf of the JAG. The deployed legal officer's 'client' in theatre is the Crown, as represented by the operational commander and chain of command. While the provision of personal legal assistance in theatre is limited, there are a number of things a deployed legal officer can do to assist an individual CF member. These include:

a. assisting CF members make changes to their will or power of attorney documents while in theatre;

b. assisting the chain of command with efforts to seek the release of a CF member who has been arrested and is being held by foreign civil authorities;

c. generally advising CF members of their legal rights and obligations in response to legal matters unrelated to their military service while in theatre;

d. providing assistance to CF members when deciding whether to seek civilian legal counsel in response to legal matters unrelated to their military service on deployment;

e. assisting CF members to properly present their case to a civilian lawyer, either at home or abroad; and

f. assisting CF members to resolve potential legal incidents that could conceivably result in a civil claim being filed against the Crown by a foreign national.

16. Finally, the provision of legal services and assistance can be provided in all cases when and where it is considered operationally appropriate and deemed not to be in conflict with a deployed legal officer's primary duties. When in doubt, the deployed legal advisor should consult with their chain of command to obtain additional guidance and authority. Performed effectively, the provision of legal advice and assistance to CF members by a deployed legal officer will help ensure that all CF members in theatre, including the operational commander and their command staff, remain effective, efficient and properly focused on their primary mission.

[14] *Ibid.*, s. 7.2 (Authorization).
[15] Minute from the Deputy Minister of Department of National Defence (10 June 2000).
[16] TB Policy, *supra* note 11, s. 7.3.3 (Servant's personal responsibility).

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CHAPTER 39

OPERATIONAL COMMAND

SECTION 1

INTRODUCTION

1. The CF command and control (C2) doctrine is set out primarily in Chapter 2 of CF publication B-GJ-005-300/FP-000, Canadian Forces Operations. It notes that the C2 doctrine provides "the framework within which military resources drawn from different organizations can operate together effectively to accomplish a common mission. This framework must be flexible and responsive to changing circumstances with which the CF might be faced."[1] Given that clear, effective and responsive C2 is vital in achieving operational success, it is important that operational legal advisors and commanders have a firm grasp of C2 issues.

2. Many key operational and legal issues arise from C2 matters, particularly when the CF is involved in coalition or multi-national operations. Issues such as identifying proper disciplinary authorities, issuing orders and taskings, requesting and implementing ROE, identifying decision-making authority in targeting, identifying signing authority for agreements, contracts, leases and MOUs, and controlling movement of personnel and equipment all relate to C2.

3. This chapter will provide an overview of the CF command and control structure, highlight key definitions, identify levels of command, briefly describe the new CF operational command structures and address operational command structures in the context of coalition and allied operations.

SECTION 2

COMMAND AND CONTROL OF CF OPERATIONS

4. C2 of a CF Task Force (TF) may be exercised either directly or through subordinate components, or a combination of both. C2 has its basis at NDHQ where the responsibility for establishing deployable forces is retained. In order to understand C2 arrangements, it is necessary to understand key terminology. The CF currently uses the following C2 definitions:[2]

a. **Command**. The authority vested in an individual of the armed forces for the direction, co-ordination, and control of military forces. The CDS exercises command over the CF. Commanders exercise command over their own forces at all levels, under the authority of the CDS, as do subordinate commanders over their own units. Command is further defined in terms of three levels: full, operational and tactical command.

    i. **Full Command**. The military authority and responsibility of a superior officer to issue orders to subordinates. It covers every aspect of military operations and administration and exists only within national services. The term command, as used internationally, implies a lesser degree of authority than when it is used in a purely national sense. It follows that no alliance or coalition commander has full command over the forces that are assigned to him, as nations, in assigning forces to an alliance or coalition, assign only operational command (OPCOM) or operational

[1] B-GJ-005-300/FP-000, Canadian Forces Operations Manual, p. 2-1, para. 201.
[2] *Ibid.*, p. 2-1, para. 202. Note that some of the definitions may have to be adapted or modified in light of on-going CF Transformation and the recent stand up on 1 February 2006 of Canada Command, Canadian Expeditionary Force Command, Canadian Special Operations Force Command and Canadian Operation Support Command.

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control (OPCON). The term 'full command' is equivalent to 'command' as defined in QR&Os. It applies at all levels of command, from the CDS down to the unit commander. A task force commander (TFC) cannot assume full command of units or components over which they exercise authority; rather, they are delegated OPCOM of those assets. Within the TF, subordinate commanders continue to exercise command in accordance with regulations and Environmental doctrine.

ii. **Operational Command**. The authority granted to a commander to assign missions or tasks to subordinate commanders, deploy units, reassign forces and retain or delegate OPCON or tactical control (TACON) as may be deemed necessary. It does not of itself include responsibility for administration or logistics. OPCOM may also be used to denote the forces assigned to a commander. In the CF, a commander assigned OPCOM may delegate that authority. While OPCOM allows the commander to assign separate employment to components of assigned units, it cannot be used to disrupt the basic organization of a unit to the extent that it cannot readily be given a new task or be redeployed. The commander will normally exercise OPCOM through commanders of subordinate components of a TF. OPCOM of one Environment's units by another Environmental commander may be necessary when:

(1) effective integration of effort is needed;

(2) the peculiarities of the operation dictate; or

(3) the distance from, or communication with higher authority presents unacceptable difficulties.

iii. **Tactical Command**. The authority delegated to a commander to assign tasks to forces under his command for the accomplishment of the mission assigned by higher authority. It is narrower in scope than OPCOM but includes the authority to delegate or retain TACON.

b. **Control**. That authority exercised by a commander over part of the activities of subordinate organizations, or other organizations not normally under his command, which encompasses the responsibility for implementing orders or directions. All or part of this authority may be transferred or delegated. This term is defined specifically as operational, tactical, administrative and technical control:

i. **Operational Control**. The authority delegated to a commander to direct assigned forces to accomplish specific missions or tasks which are usually limited by function, time, or location; to deploy units concerned; and to retain or assign TACON of those units. It does not include authority to assign separate employment of components of the units concerned. Neither does it, of itself, include administrative or logistic control. Units are placed under commanders' OPCON so that commanders may benefit from the immediate employment of these units in their support, without further reference to a senior authority and without the need to establish a forward agency. The commander given OPCON of a unit may not exceed the limits of its use as laid down in the applicable transfer directive without reference to the delegating authority. OPCON does not include the authority to employ a unit, or any part of it, for tasks other than the assigned task, or to disrupt its basic organization so that it cannot readily be given a new task or be redeployed. Since

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OPCON does not include responsibility for administration and logistics, that responsibility would have to be clearly specified. A commander assigned OPCON may delegate that authority.

ii. **Tactical Control**. The detailed and usually local direction and control of movements or manoeuvres necessary to accomplish missions or tasks assigned. In general, TACON is delegated only when two or more units not under the same OPCON are combined to form a cohesive tactical unit. A commander having TACON of the unit is responsible for the method used.

iii. **Administrative Control**. The direction or exercise of authority over subordinate or other organizations in respect of administrative matters such as personnel management, supply, services, and other matters not included in the operational missions of the subordinate or other organizations.

iv. **Technical Control**. The control applied to administrative or technical procedures and exercised by virtue of professional or technical jurisdiction. It parallels command channels but is restricted to control within certain specialized areas. Operational commanders may override this type of control if its application is seen to jeopardize the mission.

c. **OPCOM and OPCON**. There are important differences between these concepts. OPCOM allows commanders to reassign forces away from their own force, to specify missions and tasks, and to assign separate employment of components of assigned units. OPCON is more limited and does not include authority to reassign forces or to assign separate employment of components of units. If commanders have forces assigned for a continuing mission where they would need freedom to employ them with little or no constraint, and where delegation of OPCON to a subordinate commander may be necessary, they should be given OPCOM. However, if commanders have been given a limited mission or task, or if forces are assigned with limitations on their activities, commanders should be given OPCON. If a mission can be achieved without either authority being delegated to a commander, forces may be directed simply to act in support.

d. **Administration and Logistics**. Transfer of Authority (TOA) does not include a delegation or change of administrative or logistic responsibilities. Such delegation or change must be specifically ordered, either separately or together with the delegation of command authority. On occasion, changes to the degree of command authority may require changes to administrative or logistic responsibilities, and circumstances will arise in which administrative or logistic considerations place constraints on operations. A delegating authority must always consider the possible administrative and logistic implications of any intended operational arrangement. Some aspects of administration, logistics and technical control will not be transferred to a TFC but will be retained by the respective force generator.

5. It is also important to identify the levels of command in the CF. CF doctrine delineates three levels of command:

a. **Strategic Level of Command**. That level of command through which control of a conflict is exercised at the strategic level, overall direction is provided to military forces, advice is given to political authorities, and co-ordination is provided at the national level.

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b. **Operational Level of Command**. That level of command which employs forces to attain strategic objectives in a theatre or area of operations through the design, organization, and conduct of campaigns and major operations. At the operational level, sea, land and air activity must be conceived and conducted as one single concentrated effort. Activities at this level link strategy and tactics.

c. **Tactical Level of Command**. That level of command which directs the use of military forces in battles and engagements designed to contribute to the operational level plan.[3]

These levels of command, combined with the above-noted definitions, form the basic framework of C2 arrangements. Understanding such arrangements is fundamental when identifying operational command structures and their respective roles.

SECTION 3

OPERATIONAL COMMAND STRUCTURES

6. On 1 February 2006, the CF was reorganized to more efficiently plan and execute operations both within and outside Canada. This new operational command structure is command-centric and premised on the concept of "mission command."[4] As previously noted, the CDS exercises full command of the CF, including all units and members deployed on domestic and international operations. At the strategic level, the CDS is assisted in his command role by the Strategic Joint Staff (SJS). At the operational level, the following commands were stood up on 1 February 2006: Canada Command (domestic operations), Canada Expeditionary Force Command (international operations), Canada Special Operations Forces Command (both domestic and international operations). Canada Operational Support Command (both domestic and international operations) was also stood up to provide the required support to the new operational commands. Essentially, the new commands replace the roles and functions previously conducted by the DCDS and the DCDS Group. Each new commander will report to the CDS and will have standing and contingent Joint Task Forces (JTFs) assigned to them. The basic structure is as follows:[5]

a. **Role of Strategic Joint Staff**. The CDS's command and advisory roles impose the requirement for a Strategic Joint Staff (SJS) structure that serves these two functions. The first staff function is to provide timely and effective military analysis and decision support to the CDS in his role as the principal military advisor to the Government of Canada (GoC). The second staff function is to enable the CDS to affect strategic

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[3] *Ibid*., p. 2-6, para. 204.

[4] See B-GL-300-003/FP-000, Land Force Command, SECOND DRAFT (05 Dec 02), ch. 1 at p. 15 for the definition of "mission command." It states: Mission Command is a pragmatic and appropriate solution to the chaos and uncertainty of land combat operations. It allows for and accepts that the successful application of surprise, shock and high OPTEMPO against an enemy is best executed through rapid and timely decision-making at all levels of command in response to the unexpected or fortuitous occurrence of both threats and opportunities on the battlefield. Mission Command has three enduring tenets: the importance of understanding a superior commander's intent, a clear responsibility to fulfil that intent, and timely decision-making. The underlying requirement is the fundamental responsibility to act within the framework of the commander's intentions. Together, this requires a style of command that promotes decentralized decision-making, freedom and speed of action, and initiative. Mission Command meets this requirement and is thus key to the army's doctrine". Under the Mission Command philosophy, commanders must:
1. Give orders in a manner that ensures that subordinates understand intent, their own tasks and the context of those tasks; 2. Tell subordinates what effect they are to achieve and the reason why it needs achieving; 3. Allocate appropriate resources to carry out missions and tasks; 4. Use a minimum of control measures not to limit unnecessarily the freedom of action of his subordinates; and 5. Allow subordinates to decide within their delegated freedom of action how best to achieve their missions and tasks.

[5] See CDS Transformation SITREP 03/05, online: <http://cds.mil.ca/cft-tfc/00native/SITREP0305_e.pdf>. This new structure is set out as a "concept of operations." While there is no intent to significantly alter this structure, there may be some revisions to roles and responsibilities as the new structures begin executing their respective taskings.

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command, allowing him to plan, initiate, direct, synchronize and control operations at the strategic level.

b. **Strategic Joint Staff Structure**. The SJS will execute these twin functions in direct support of the CDS. In its first iteration, it will be focused on strategic operational issues. This staff will be led by a Director of Joint Staff (DOS) who will report directly to the CDS and who will have the responsibility and authority to issue guidance on behalf of the CDS. The staff itself will have both dedicated and matrixed positions and will be heavily weighted towards the operations (J3) and planning (J5) staff functions. This staff will be supported by a command centre, linked to the CF operational-level headquarters and selected other government departments and non-governmental agencies, that will provide full capability for the CDS to execute strategic command.

c. **Strategic Staff Interagency and Allied Responsibilities**. The SJS will support the CDS in his critical role of translating government direction into effective and responsive CF operations at the strategic, operational and tactical levels. In doing so, the SJS will establish access and information exchange with selected government departments that directly lead or support security and defence missions. Finally, the Strategic Joint Staff will ensure effective liaison with the strategic staffs of Canada's key allies.

d. **Environmental Chiefs of Staff**. The ECS command all assigned formations and units and have a direct responsibility for force generation. They play a vital role, in conjunction with the Assistant Deputy Ministers, in generating and supporting forces assigned to operational commanders and in providing the CDS with strategic advice on environmental, technical and operational matters.

e. **Operational Commanders**. The commanders of Canada Command (CanadaCOM), Canada Expeditionary Force Command (CEFCOM) and the Canada Special Operation Forces Command (CANSOFCOM) will command operations at the operational level. These three commanders are responsible to the CDS for the execution of operational missions assigned by the CDS. The responsibilities of these three commands are delineated by geography and function. The headquarters of CanadaCOM and CEFCOM are designed for force employment and have only limited forces permanently assigned. The majority of units or formations assigned under operational command to either of these two commands will be force generated by the environments or other CF force generation organizations. The identification of forces to be assigned to CanadaCOM or CEFCOM will be based on either specific mission requirements or readiness levels.

f. **CanadaCOM – Role within Canada**. Commander CanadaCOM is responsible to the CDS for the execution of all routine and contingency operations within Canada and its approaches, less those operations executed under the direct command of the CDS or NORAD. To fulfill this responsibility, Commander CanadaCOM will establish a regional joint command and control structure that operationally integrates assigned and dedicated maritime, land, air and special forces to execute assigned tasks. This regional command structure will effect regional interagency liaison with other government departments and agencies (federal, provincial and municipal) as necessary, setting conditions for a coherent response to any routine or contingency operation.

g. **CanadaCOM – Continental Role**. In addition, Commander CanadaCOM, in cooperation with US military authorities and pursuant to bilateral NORAD and NATO agreements, will be responsible for CF operations within the continental United States (specifically the 48 contiguous states and Alaska) and Mexico. Commander

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CanadaCOM will establish effective liaison with NORAD and US NORTHCOM to ensure timely and effective coordination of CF operations in the US continental area of interest with the Commander's US counterparts during routine or contingency operations. CanadaCOM's initial mandate will not include responsibility for the conduct of routine liaison, exchange or training activities executed in the continental US. Also, as required, Commander CanadaCOM will establish liaison with Mexican military authorities for effective coordination of any CF operations with them.

h. **CEFCOM**. Commander CEFCOM is responsible to the CDS for the conduct of all international operations, less continental operations. To fulfill this responsibility, Commander CEFCOM will possess the capability to establish in-theatre, national and operational-level command and support structures, ensuring the effective employment of assigned Canadian maritime, land, air and special operations forces towards the attainment of specified operational objectives – either independently or within a coalition framework. In addition, Commander CEFCOM will ensure that national command is retained throughout the duration of the employment of all Canadian forces assigned under operational command (OPCOM) or operational control (OPCON), as appropriate, to Allied commanders.

i. **CANSOFCOM**. Commander CANSOFCOM is responsible to the CDS for the timely and responsive force generation of effective joint special operations capabilities for domestic and international operations. When ordered by the CDS, Commander CANSOFCOM is also responsible for the operational command of special operations. With the exception of these CDS ordered special operations, special operations elements will normally be assigned to the Commander CanadaCOM or Commander CEFCOM for the duration of the specific missions. During these joint operations, Commander CANSOFCOM acts as Status of Forces (SOF) advisor to the respective Commander. In addition, CANSOFCOM HQ will provide staff and specialist expertise to facilitate the coordination of those operations.

7. Similarly, the Office of the JAG reorganized to ensure the continued provision of effective and responsive operational legal services to the SJS, the new commands and the new TFs. Operational legal advisors will continue to deploy with TFs both internationally and domestically. Commanders of deployed TFs will continue to receive written Terms of Reference (TORs) for their respective positions. Operational legal advisors must obtain a copy of such TORs to ensure complete understanding of the role, function and C2 relationships of the commander and the TF. Likewise, deployed operational legal advisors will receive TORs from the JAG detailing their roles, responsibilities and C2 relationship. It is important to note that deployed operational legal advisors will be responsive to the TF Commander but will, at all times, remain under the command of the JAG pursuant to QR&O 4.081.

SECTION 4

OPERATIONAL COMMAND - COALITIONS AND ALLIANCES

8. CF units and members are often deployed to and with coalition forces (e.g., Operation Enduring Freedom and the Campaign Against Terrorism) and alliance forces (e.g., NATO and NORAD). Generally, command authority over such members and units will be assigned to coalition and allied forces under operational command (OPCOM). However, the CDS will always retain full command over CF units and members when they are assigned to coalition and allied forces. This is important as it will ensure CF units and members will conduct operations in accordance with Canadian law and policy.

9. When working in a coalition or allied force operation, it is important for operational legal advisors and commanders to be aware of the command structure and terminology of the coalition or allied forces. While foreign forces may use the same terms as the CF, such as 'full command,'

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'operational command,' 'tactical control' and so on, they may have different meanings. This could have significant operational and legal consequences, particularly in areas such as ROE and assignment of taskings.

SECTION 5

CONCLUSION

10. This chapter addressed key aspects of the concept of operational command for CF operations. It highlighted the new CF operational command structure and fundamental terminology.

11. Understanding the CF operational command structure is essential for operational legal advisors and commanders. As many vital aspects of operations, such as identifying proper disciplinary authorities, issuing orders and taskings, requesting and implementing ROE, identifying decision-making authority in targeting, identifying signing authority for agreements, contracts, leases and MOUs, and controlling movement of personnel and equipment flow from the operational command structure, a lack of understanding or clarity of that structure could jeopardize mission success.

12. Conversely, a sound grasp of the operational command structure will permit commanders and legal advisors to effectively address existing and potential legal and operational problems. This will promote clarity in command and control and in identifying which lawful authorities a commander may exercise. This, in turn, will substantially increase the probability of mission success.

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CHAPTER 40

THE ROLE OF THE OPERATIONAL LEGAL ADVISOR

SECTION 1

INTRODUCTION

1. As noted in Chapter 1, the number of CF operational missions has increased by 300 per cent since 1990, when compared to the 1945 - 1989 time period.[1] With this rapid growth in operations came recognition of the impact of legal issues on the conduct of CF operations and the requirement for timely and effective legal advice.

2. Each new mission involved the provision of legal advice in a multitude of areas. Primarily, legal advice focused on identifying the legal authority for the CF to carry out the operation and the inextricably linked parameters that defined what the CF and its members could or could not do. Additional areas focused on a broad spectrum of legal issues that facilitated the operations, such as discipline, contracts, and claims.

3. Just as the nature of domestic and international operations are becoming more complex, so too are the legal issues that arise prior to, during, and following an operation. The complexities and sensitivities of most CF operations, both domestic and international, require the operational commander at all levels to have a sound understanding of the legal issues associated with such operations. The challenge for the commander is to obtain timely and accurate operational legal advice in order to ensure that the mission is successfully executed in accordance with the rule of law.[2]

4. The role of an operational legal advisor is unique in legal practice. There is no equivalent role in private practice or in government service. The role of the CF operational legal advisor is to facilitate the lawful conduct of operations by providing timely and accurate legal services and advice to commanders at the strategic, operational and tactical levels during all phases of the operation. This chapter will outline the role of a CF operational legal advisor, focusing on the responsibilities of a deployed operational legal advisor. Importantly, the issue of command and control of legal advisors will be addressed, including discussion of channels of communication.

SECTION 2

RESPONSIBLITIES OF OPERATIONAL LEGAL ADVISORS

5. The Judge Advocate General (JAG) selects all legal officers for positions within the Office of the JAG and those on deployed operations. Some legal advisors are posted to a position that is already designated as 'deployable' (e.g., a Deputy Judge Advocate (DJA) posted in support of an operational formation or unit). Others are selected in response to requests from operational commanders to have a legal officer deployed with a specific operation, including requests from coalition or alliance forces (e.g., NATO). Those legal officers selected for international operations will usually receive Terms of Reference (TORs) from the JAG confirming their selection and detailing their roles and responsibilities.

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[1] Government of Canada, "*Canada's International Policy Statement, A Role of Pride and Influence in the World*" (Defence Section), online: <http://itcan-cican.gc.ca/ips/menu-en.asp> at 8 [DPS]; Government of Canada, "*Canada's International Policy Statement, A Role of Pride and Influence in the World, Overview*" online: <http://www.dfait-maeci.gc.ca/cip-pic/IPS/IPS-Overview.pdf>, at 11 [IPS].

[2] The rule of law has been described in various ways. A useful description is found in *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 at 70: "…a sense of orderliness, of subjection to known legal rules and of executive accountability to legal authority."

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6. Operational legal advisors are expected to provide independent legal advice to the operational commander and the commander's staff. Generally, such advice during international operations will address, though not be limited to, the following:

a. legal basis for the operation;
b. international law issues (e.g., applicability of UNCLOS, the Chicago Convention on Aviation, or customary international law);
c. the law of armed conflict;
d. rules of engagement;
e. targeting;
f. use of specific weapons (e.g., prohibition on the use of anti-personnel mines and the use of riot control agents);
g. military justice and discipline;
h. administrative law issues (e.g., grievances, summary investigations, and boards of inquiry);
i. status of forces (SOFA) issues;
j. claims (with appropriate claims settlement authority);
k. contracting and procurement;
l. personnel issues, including legal aid;
m. civil-military relations; and
n. all other legal matters of particular interest to the commander and staff.

Of course this is a general overview of the areas in which legal advice may be sought and provided. All operational legal advisors should be proactive in identifying potential legal issues and responsive when advice is sought. The key is to ensure the commander is able to successfully execute the mission within the legal framework by facilitating prompt, accurate and practical legal advice.

SECTION 3

COMMAND AND CONTROL OF OPERATIONAL LEGAL ADVISORS

7. In executing the JAG mandates of providing independent legal advice to the CF in matters of military law and of superintending the military justice system as set out in sections 9 and 10 of the *NDA*, the JAG has, pursuant to the QR&O 4.081, command over all officers and non-commissioned members posted to a position established within the Office of the JAG, and whose duty it is to provide legal services to the CF. Moreover, pursuant to CFAO 4-1, all legal advisors are, regardless of where they are employed, directly responsible to the JAG through the appropriate Deputy Judge Advocate General (DJAG) for the performance of their duties and the execution of their responsibilities. Accordingly, in order to ensure the provision of effective and independent legal advice to the commander, operational legal advisors must have direct and unfettered access to the commander.

8. This statutorily mandated requirement for the provision of independent legal advice has several significant consequences. Perhaps the most notable ones are that legal advisors are legally not part of the operational chain of command and are not members of the commander's staff (i.e., not "staff" judge advocates). This issue may occasionally cause confusion or tension between commanders, their staff and legal advisors. Therefore, it is crucial for legal advisors to address this issue with commanders as soon as possible to ensure a clear shared understanding of the matter.

9. While commanders and their staffs must recognize the requirement for a legal advisor to be able to provide independent legal advice, practicalities dictate that a legal advisor will be a fully integrated member of the mission and of the commander's staff. This is a reality given that the key role of an operational legal advisor is to facilitate the commander's ability to successfully

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complete the mission in accordance the rule of law. There is no doubt that when legal advisors are deployed on missions, they are subject to orders and instructions issued by or on behalf of the commander. However, no such order or instruction shall result in any situation that would interfere substantially or conflict with the legal advisor's duties as a legal officer.

10. Another important consequence of the requirement to provide independent legal advice is that only the JAG, or a legal officer designated by the JAG, will write a performance evaluation report (PER) on a CF legal officer. Therefore, upon completion of the legal advisor's deployment, the legal advisor's superior will usually ask the commander of the operation to write a letter to the Deputy Judge Advocate General/Operations (DJAG/Ops), providing input for the PER.

SECTION 4

CHANNELS OF COMMUNICATION

11. An operational legal advisor will be responsive to the requirements of the commander and the commander's senior staff officers. Furthermore, the legal advisor will be responsible to the JAG through the appropriate senior Legal Advisor at NDHQ (usually the Director of Law/Operations (DLaw/Ops)).

12. If, in the course of executing duties as a operational legal advisor, an issue arises which cannot be resolved between the legal advisor and the commander, the legal advisor shall immediately report the matter to the JAG (via the appropriate senior operational legal advisor) using the most secure and confidential means available. No one shall interfere with the legal advisor's duty to report such incidents to the JAG.

SECTION 5

DEPLOYMENT TO COALITION AND ALLIANCE LEGAL POSITIONS

13. Today the CF frequently participates in or contributes to coalition or alliance operations. This includes the deployment of CF operational legal advisors to coalition or alliance legal billets. While there will be differences in the way in which coalitions or alliances function, the legal issues are usually the same as those arising in CF operations.

14. Accordingly, there will be little practical difference in the roles and responsibilities of CF legal advisors working in coalition or alliance legal positions. In particular, the same essential command and control and channel of communication as noted above still apply. Some modification will be required to account for the coalition and alliance context. Such modification will usually be reflected in the TORs issued by the JAG.

SECTION 6

CONCLUSION

15. It is critical that operational legal advisors and commanders understand the roles and responsibilities of the legal advisor. Given the inherent nature of providing legal advice (e.g., the existence of solicitor/client privilege) and the statutorily mandated role of the JAG, commanders and their staffs must appreciate the requirement for legal advisors to be able to provide independent legal advice. Without such independence, there is a significant risk that the legal advisor may not be able to provide the commander with prompt, accurate and balanced advice. This will increase the risk of mission failure.

17. On the other hand, operational legal advisors must appreciate the often fluid and complex nature of operations. They must understand military operations in general, along with the

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commander's intent for a specific mission. The legal advisor's role is to facilitate the commander's ability to successfully execute the mission within the boundaries of the rule of law. This can only truly be achieved if the advisor is a fully integrated member of the mission and the commander's staff. The operational legal advisor should make every effort to ensure the commander's direction is executed promptly, effectively and within the law. While there may be occasions when a legal advisor may have to advise a commander that a particular course of action or direction is unlawful, such occasions will be rare. On such occasions, commanders will likely welcome the advice, as they want to ensure that operations are conducted lawfully. However, illegality should not be confused with operational activities that may contain acceptable levels of legal risk. The legal advisor should be able to offer the commander alternative solutions that will be in compliance with the law in cases where a proposed course of conduct would be unlawful.

18. The role of an operational legal advisor is unique in legal practice. There is no equivalent role in private practice or in government service. The legal advisor is not a member of a law firm, but, rather, a member the CF Legal Branch. The legal advisor is a legal officer, not a lawyer in uniform.

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