

The Legal Way Ahead Between War And Peace (Chapter 16)

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Abstract

This chapter is written from the perspective of the military operational lawyer in an attempt to explain where he fits in this world, from both the top-down and bottom-up perspectives in linking military operations to U.S. foreign policy. There are three issues hidden in this perspective. The first is tied to ideas about the changing nature of armed conflict. The operational lawyer currently functions most of the time in low-intensity armed conflicts like insurgencies or peacekeeping, precisely because that is the business his battlefield commander "clients" now do most of the time. So his professional world may be focused more often on civil affairs than traditional targeting law as such. The second is that his legal capacity is an advisory one (e.g., is not often devoted to running courts-martial or military commissions). And most of this advisory capacity is dedicated to planning military operations rather than their execution as such. Finally, combining advisory capacity with the point that "small wars" predominate, this version of armed conflict law is an amalgam of domestic and international law focusing currently on nontraditional questions like protection of NGO (nongovernmental organization) personnel providing humanitarian assistance, or how best to support civil authorities trying to reconstitute local courts and government in the face of targeted assassinations in the course of an insurgency. So the border seems porous between traditional military operations and something akin to law enforcement, and in any case involves a high degree of contact and often cooperation with nonmilitary bodies (i.e., foreign governments, the U.S. government interagency process, and NGOs).

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