The aim of this article is to illustrate the types of practical legal issues that arise during coalition operations and how they may be managed. These issues are drawn from my experience in relation to operations involving UK forces during the period from October 2002 to February 2005 and, in particular, to the period of combat operations that followed the invasion of Iraq in March 2003. Given that they relate in part to operations that are continuing today, my ability to disclose detail is strictly limited, but I will endeavor to provide practical examples to illustrate points where I can.

The Role of the Operational Lawyer

Among the essential functions of every coalition commander is the requirement, in the planning and execution of a mission, to identify and manage the differing military capabilities across his force. It follows, therefore, that insofar as they might impact on the scope of the military missions, the role of his operational lawyer in the planning and conduct of the mission is to identify, minimize and manage the

* Captain, Royal Navy. The views expressed in this article are those of the author and do not represent those of the Royal Navy, the United Kingdom Ministry of Defence or Her Majesty's Government.
Issues Arising from Coalition Operations: An Operational Lawyer’s Perspective

different national legal positions and to ensure that his commander is fully sighted on them. This requires a deep knowledge not only of “his own” national legal position, but also of those of each coalition partner, drawing on whether each has ratified treaties and conventions (and, if so, with what reservations and understandings), as well as an understanding of each State’s practice, opinio juris and academic writings.

With the increasingly frequent deployment of forces to multinational peace-keeping and peace-enforcement missions throughout the 1990s, legal differences between even the closest coalition partners, which had remained largely below the radar during decades dominated by Cold War planning, became increasingly visible. By the end of that decade, many lessons had been identified and were the subject of the closest examination from the general, such as our respective positions on the use of lethal force in the defense of property, to the specific, such as “What could we have done under our own laws if faced with a Srebenica?”

The invasion and occupation of Iraq by coalition forces in 2003 threw up a great many “coalition issues” but I will focus on three: first, those arising from targeting; second, those in relation to rules of engagement (ROE); and third, those arising from the capture of internees, detainees and prisoners of war. I will return to the main subjects shortly, but, using a well-known example, let me start by illustrating the sort of complex coalition issues that may arise.

Anti-personnel Landmines

An oft-cited example of coalition differences is the Ottawa Convention on landmines. Put simply, signatories to this Convention may not use anti-personnel landmines in the “victim-initiated mode,” that is, when they may be exploded by the presence, proximity or contact of a person. It does not, however, prevent either the use of other types of landmines, or indeed the use of anti-personnel landmines other than in the “victim-initiated mode.”

While this presents the land component commander of a coalition force comprised of both “Ottawa” and “non-Ottawa” States with a tactical complication, the legal issues extend beyond the “mere” tactical. If a commander, as a result of treaty obligations placed upon him by “Ottawa,” cannot authorize the use of air-dropped anti-personnel landmines to deny an enemy access to a particular facility, he may be faced with the expectation of a higher number of civilian casualties as a result of a kinetic strike. If expected civilian casualties are excessive in relation to the direct and concrete military advantage anticipated, no attack may be possible. Even if not excessive, they may, of course, be greater than those expected if landmines were used instead. There may, therefore, be a tension between treaty obligations. Indeed,
given that prohibitions under “Ottawa” extend to those who would “use, develop, produce, otherwise acquire, stockpile, retain or transfer to anyone, directly or indirectly”\textsuperscript{3} or who would “assist, encourage, induce anyone else to engage in prohibited activity”\textsuperscript{4} differing national positions within a coalition might have wider repercussions and complicate the provision of basing and the management of complex air-tasking order cycles during high-intensity warfighting.

**Legal Framework for the Conduct of Operations in Iraq from March to May 2003**

Whatever the precise legal bases adopted by coalition partners for the conduct of operations, and there were subtle differences among the coalition positions, the most important legal question at the operational and tactical levels was of the legal framework to regulate the conduct of the operation. What was clear by early 2003 was that any invasion would precipitate an armed conflict in which the operative law would be the law of armed conflict.

**Targeting**

The Gulf War of 1991 generated much legal debate over the extent to which Additional Protocol I (AP I)\textsuperscript{5} was said to codify the customary international law on the use of force in armed conflict. This may have been in part because at the time, while most of the members of the coalition against Iraq had ratified AP I, the United Kingdom and Australia had signed but not ratified, and the United States had signed but in 1987 announced that it did not intend to become a party. This, and the fact that Iraq had not even signed it, meant that AP I was therefore not applicable to those hostilities. Between 1991 and 2003 there had been only modest change to the overall position in that the United Kingdom (like Australia) had ratified AP I, whereas the United States and Iraq had not. Nevertheless, in 2003 as a matter of practice it is arguable that the definition of a military objective and the principles of distinction and proportionality, even the use of precautions in attack, as they are set out in AP I\textsuperscript{6} were generally applied by all coalition forces. Put simply, if asked whether as a matter of practice AP I differences were significant in the early part of 2003, I would have to say that on the whole they were not.

Among the reasons for this, a number are simply practical. The relatively straightforward application of customary international law as reflected in AP I during the high-intensity warfighting operations in the first half of 2003 was due in part to the scale and character of the operation. Despite its formidable military power, the 2003 invasion force was about half the size of that which had evicted Iraq from Kuwait in 1991. This relatively small force embarked upon a high-speed
land offensive on a single axis aimed at Baghdad. This had three consequences that, taken together, had a significant legal effect. First, by the time of the invasion the warfighting mission was—effectively—an agreed one. Second, the scale and character of the land maneuver had required the governments of coalition forces to delegate the authority to conduct attacks to their commanders in theater. And third, in those first six weeks or so of operations, coalition forces conducted what was, legally speaking, a most conventional international armed conflict.

The proportionality test—as it applies in targeting, and in particular to the center of gravity, which is a determination of the military advantage—is ideally suited to use by military commanders in support of their forces engaged in a conventional land campaign. That is not to say that there will not be differences, but most differences are, in my experience, successfully resolved by staff officers in theater who have an understanding of, and respect for, each others' national positions. This was greatly assisted in 2003 by the presence in deployed headquarters of UK and US officers who were able to draw upon shared experience and mutual confidence that had grown out of operations conducted together since 9/11 in relation to Afghanistan. Finally, and perhaps ironically in light of events which have ensued, it must be accepted that the initial combat operations were successful; so successful that commanders were able to apply a cautious approach without any obvious military penalty, and could have decided not to authorize attacks which, while capable of being conducted lawfully, might have had an adverse information operations impact.

I have until now focused on the issues as they relate to what might be called “deliberate targeting.” This is where the most senior military commanders in theater, supported by technologically sophisticated targeting systems and specialist staffs, including (among others) targeteers, intelligence officers, image analysts, operational analysts and, of course, legal advisers, make command decisions on the legality of airstrikes as part of a huge and sophisticated command process. Such processes are quite capable of delivering kinetic attacks by hundreds of aircraft throughout a campaign. While that process is incredibly accurate and—for its size and complexity—agile, not all air attacks can be subject to the deliberate targeting process however expedited. While the law places the heaviest burden on senior commanders to take the greatest steps to avoid or minimize the effects of an attack on civilians to the extent that it is feasible for them to do so, the reality is that the obligations upon all who plan, authorize and conduct attacks are derived from the same law. Therefore, it is perhaps a dangerous oversimplification to suggest that, except where attacks are approved as a part of a deliberate targeting process, the use of force is solely a matter for ROE.
In order to provide support to land forces engaging the enemy in a city or built-up area, the availability of immediate kinetic support to be applied with the highest possible accuracy is necessary. In 2003, in response to an “urgent operational requirement,” coalition partners acting independently produced strikingly similar direction and guidance that identified the same legal obligations, identified the respective legal responsibilities of those requiring close air support and those directly involved in providing it, and sought to ensure that within what was a tactical-level targeting process all involved were quite clear as to “who owned the bomb” so that legal obligations were discharged. Coalition forces were effectively interoperable in this respect.

**Rules of Engagement**

Having set out some of the successful features of recent coalition operations and demonstrated their interoperability, I now have to make an admission—in 2003 the coalition partners at all times operated on their own separate targeting directives and their own separate rules of engagement. It is with this in mind that I have been asked to consider the problems that flow from not having coalition ROE. Having trained as an operational lawyer in the years that followed Kosovo, I was keenly aware of the perception that coalition operations are necessarily fraught with difficulties or, in the view of some, that they may be more trouble than they are worth. The difficulties of Kosovo and other coalition operations in the 1990s have clearly had a lasting impact in military legal circles on both sides of the Atlantic and may even be behind the specific question which I have been asked to address.

There is no doubt that in each of our respective nations ROE can mean different things. They can be placed in different parts of mission directives or operational orders. They can be presented in the form of guidance or orders. They can use different language and style. However, as I have sought to suggest here, if the legal basis for the mission and the legal framework for the use of force used by coalition partners are sufficiently coherent, then the use of different ROE doctrine, formatting, style and process is entirely manageable. The key question about national ROE in the coalition context is “What exactly do they mean?”

Too often, operators, and even occasionally military lawyers, have been tempted to label differences in national law or policy as “ROE problems.” Such debate does not begin to identify the problem, only the symptom. If different ROE are rules or guidance (that distinction is not important here) that reflect a common legal authority to conduct a mission then their effects will be largely the same.
Issues Arising from Coalition Operations: An Operational Lawyer's Perspective

For more than a decade after the passing of the UN Security Council resolution to enforce the sanctions imposed after the Iraqi invasion of Kuwait maritime commanders enjoyed the use of a mandate that was perhaps unprecedented in its simplicity and robustness, and became accustomed to stopping vessels—indeed “all inward and outward maritime shipping”—in order to ensure strict implementation of the embargo imposed by Security Council Resolution 661. Once established that a vessel was proceeding to or from Iraq (not too arduous a task given the geography of the northern Arabian Gulf) there was no requirement to have either the “suspicion” or “reasonable grounds” as to its precise activity before boarding that are common requirements in peace and (in relation to neutral vessels) in armed conflict.

Post-9/11 maritime operations were not legally so straightforward. Indeed, in the context of maritime security operations, the vexing issue of masters’ consensual boardings illustrates the altogether different legal picture that exists. Among coalition partners, some (including the United Kingdom) do not believe that the master has the authority to permit boardings by foreign authorities under either the 1982 United Nations Convention on the Law of the Sea or the customary law of the sea. Others disagree and take the position that with the voluntary permission of the master not only may the vessel be boarded, but the ship’s papers and cargo may be inspected. While this and other national legal positions may be reduced by operators to a matrix of coalition ROE and a “traffic light” encapsulation of what certain States can and cannot do, this is not a ROE issue. Instead, it is the serious business of sovereign States having different views on the status of international law; views to which they are entitled and views which will not be remedied by simple request to the chain of command to modify the ROE.

The conundrum for military lawyers is to ensure that the status of ROE, and in particular the relationship between ROE and the law, is absolutely clear. This task is difficult enough within national armed forces, but within a coalition it is quite possible that national positions could range from “if the ROE permit me to act my actions are lawful” to “the ROE permit me to act within the law.” The implications of such different approaches are plain—if we are unable to identify the link between ROE and legal authority for them the cohesion of the coalition is at risk.

There has been a crucial debate in academic and military legal circles in recent years on the issue of “direct participation in hostilities.” What does it mean, however, when ROE permit a relatively junior commander to declare unidentified attackers “hostile”? Does it mean that a test for the “direct participation” has been met or is he simply determining that they are a threat against which lethal force may be used in self-defense? If it is the former, the conduct of any attack will be regulated by the law of armed conflict and the operative proportionality rule will likely
be much more permissive than that available under any national laws. If it is the former, in an armed conflict, those captured will have the right to be treated as prisoners of war. These are the legal implications which can flow from the application of ROE at the individual unit level.

A coalition commander must be vested (by his operational lawyer) with a compete understanding of what coalition forces can and cannot do, and why. He must know whether he can expect disparities to be remedied by a ROE request for additional authority to act, or whether a States' forces are already at the limits of their national legal positions. Coalition commanders must appreciate whether those national positions are policy positions (which may change) or legal positions (which may be less likely to change). Will a common ROE remedy these perceived problems? My short answer to this is no, but I can quite see how the use of common language and form might greatly assist the process of identifying, minimizing and managing different national positions.

Prisoners of War, Detainees and Internees

Given the almost immediate and widespread legal controversy that surrounded the establishment of the detention facility at the US naval base at Guantanamo Bay, Cuba, the conclusion by the three main coalition partners in March 2003 of a memorandum of understanding (MOU) for the handling and transfer of prisoners of war, internees and detainees in Iraq was a clear indication of the anticipated "conventional" international armed conflict which was to commence with the invasion. The power to capture enemy combatants in Iraq was derived from belligerent powers under the law of armed conflict and the conditions for their treatment were, the partners agreed, set out in the Third Geneva Convention. The resultant MOU was, in great part, similar to that agreed by their predecessors in 1991 and provided, in particular, for the transfer of prisoners between coalition partners.

And so if asked whether there were, during combat operations in 2003, significant coalition problems in relation to the handling of prisoners of war, internees and detainees in Iraq as a result of any different interpretation of the law of armed conflict I would have to say no. Even when the actions of a large proportion of the Iraqi military who abandoned their units and uniforms at an early stage in the war threw up unexpected challenges, the handling of issues was generally successful. This included, for example, the instigation of a novel initial screening system involving joint teams of UK and US military legal and operational officers to process large numbers of prisoners where the delay to conduct Article 5 tribunals in every case was unnecessary.
Issues Arising from Coalition Operations: An Operational Lawyer’s Perspective

Whereas the issues relating to prisoner of war camps were relatively straightforward, ongoing operations in Iraq and Afghanistan have presented complex coalition legal challenges. Under Article 78 of the Fourth Geneva Convention occupying powers may intern inhabitants of the occupied territory “for imperative reasons of security.” This power has been broadly preserved in the UN Security Council resolutions that have authorized the ongoing presence of multinational forces in Iraq since 2004. Indeed, using this power the United Kingdom has held an average of around 120 internees in the Multi-National Division South East area of responsibility, including one (Mr. Al Jeddah, a UK citizen captured in Iraq) since 2004. The United Kingdom’s ability to intern has been the subject of legal challenge in our domestic courts.

Many will be familiar with the position of the United Kingdom in relation to the death penalty, but cases in the UK domestic courts arising out of incidents in Iraq have now established that those captured and held by UK forces on operations outside armed conflict have rights under the European Convention of Human Rights (ECHR). These include not only the right not to be tortured but also a right to liberty. On this basis, the right to intern was challenged and successfully defended. A feature of UK operations since 2003 therefore has been the legal examination of the relationship between international humanitarian law and international human rights law, particularly in relation to when detainees and internees may be handed over and to whom. The United Kingdom cannot transfer internees to States who cannot guarantee that their essential human rights will be upheld. This places demands upon coalition commanders to understand, through their operational legal advisers, the respective legal responsibilities which apply to all those under their operational command. Can we guarantee that if internees are transferred to a coalition partner they will be released when their internment is no longer necessary for imperative reasons of security in Iraq or may they still be held while they are of actual or even potential intelligence value? Concerns about torture and mistreatment may get the headlines, but given the right to liberty present in the ECHR and other similar regimes, the first-order issue for coalition commanders may be to identify exactly what legal authority coalition partners and host nations believe they have to detain and when they consider they are obliged to release.

Private Military Contractors

Although much progress has been made in recent years in addressing the issues discussed above, there is an elephant in the room that will, I believe, require our careful attention, even in the maritime environment. If they have not done so already, coalition planners may in the future have to consider not only international
military forces and interagency forces and international interagency forces, but also the private military contractors who seem determined to expand into roles which may previously have been considered the preserve of the military.

Concluding Comments

I believe that coalition operations can work, and can work well. I witnessed a US-instigated coalition ROE response to a successful suicide vessel-borne improvised explosive device attack on a boarding party in the northern Arabian Gulf that took hours, not days or weeks, to plan and implement. This was possible because the operational legal advisers to the maritime commanders in the region as a matter of course had continually identified, minimized and managed their respective coalition positions. There will continue to be difficulties, but perhaps militaries and military lawyers have begun to understand better how to deal with them. If they have, all military commanders may begin to view the law as it applies across coalitions less as a constraint and more as an enabler.

Notes

1. During the Bosnian war of the 1990s, in response to the ethnic-cleansing campaign of Serb forces in eastern Bosnia, to protect Bosnian civilians who were the victims of the campaign the UN Security Council established a "safe area" in which Srebrenica and the surrounding area were to be free from any armed attack or other hostile act. S.C. Res. 819, U.N. Doc S/RES/819 (Apr. 16, 1993), available at http://daccessdds.un.org/doc/UNDOC/GEN/N93/221/90/IMG/N9322190.pdf?OpenElement. A Dutch contingent of the United Nations Protection Force was detailed to keep the peace at Srebrenica, where large numbers of civilians had taken refuge. By July 1995 the humanitarian situation in Srebrenica was dire. Then on July 9 Serbian forces entered the "safe area" and over the next 10–14 days conducted what became known as the "Srebrenica massacre," with the number of deaths estimated at eight thousand. A Dutch inquiry into the event concluded that the lightly armed Dutch force passively watched the Serbs separate the men and boys from the women and girls and load them on buses for transport to locations where they were executed. For a detailed discussion of the events at Srebrenica, see Srebrenica massacre, Wikipedia, http://en.wikipedia.org/wiki/Srebrenica_massacre (last visited Mar. 17, 2008).


3. Id., art. 1.

4. Id.


6. Id., arts. 52.2, 57.
Issues Arising from Coalition Operations: An Operational Lawyer’s Perspective

12. Id.