



## A COMPLEX OPERATIONAL AND LEGAL ENVIRONMENT

For many years, the Colombian military struggled with the legal complexity of fighting a war within its own borders. For the most part, Colombian commanders operated without the benefit of embedded operational law support. In 2004, in an effort to address concerns within Colombia and the international community, the Colombian Air Force began to assign some operations-related responsibilities to designated *Asesores Jurídicos Operacionales* (Operational Legal Advisors—AJOPES).[12] In 2006, another policy was issued further delineating the functions of these attorneys and the prerequisites for service in these positions.[13]

The other branches of the Colombian military shortly followed suit, with the Navy establishing its operational law program in 2007, and the Army in 2008.[14] By 2013, the Air Force had established 18 billets for operations law attorneys at the Aerial Combat Commands, the Aerial Groups, Air Transport Command, and the Military Aviation School. In 2013, the Navy had 11 operations law attorneys assigned at the headquarters, coast guard commands, brigade commands, and the marine infantry battalions. That same year, the Army had dedicated 140 legal advisors to operations law, assigning them to both operational and tactical units.[15]

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### Providing operations law legal advisors to commanders throughout the chain of command was a giant step forward....

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Providing operations law legal advisors to commanders throughout the chain of command was a giant step forward, but it quickly became apparent that this nascent cadre of operational lawyers would require additional resources in order to achieve the desired effect on operations. Most of these AJOPES were new attorneys and newer officers, receiving little operational law training before assuming duties as legal advisors to commanders on the front lines. In 2015, with the potential of peace on the horizon, the

Colombian military asked DIILS to create a new course that would prepare the AJOPES to more effectively advise their commanders in the emerging operational environment.

## THE ASSESSMENT

In April 2015, Mr. John McLoughlin, DIILS' director for activities in Central and South America, traveled to Bogotá, Colombia, to gather information that would help develop a new course for the Colombian Ministry of Defense (MOD). To help with the assessment, Mr. McLoughlin invited Lieutenant Colonel Steve Loertscher, then the Chief of Operations Law at 12th Air Force. Lt Col Loertscher had deployed to Colombia in 2011 as the legal liaison officer for the Staff Judge Advocate of United States Southern Command (USSOUTHCOM), where he worked closely with the MOD to strengthen its military justice, operations law, and human rights programs.

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During the trip, Mr. McLoughlin and Lt Col Loertscher met with the MOD Human Rights Directorate (the Directorate), several AJOPES, senior military attorneys, and general officers to identify current challenges to providing operational law advice. The team quickly identified several difficulties. Most of the AJOPES were first-assignment attorneys who struggled to adapt to military service, understand the operational environment, and practice a specialized area of law they had never studied during their legal education. To complicate things further, these young lieutenants were often intimidated by having to instantly advise their commanders, often general officers, on issues arising in the heat of combat. AJOPES were often excluded from the early stages of operational planning, putting them in the unenviable position of advising against a course of action only after many hours had been invested in its planning. Some commanders perceived their AJOPES as obstacles rather than valued members of their staff.

Aware of these problems, the Directorate identified their desired outcomes for the course. First and foremost, they wanted the course to strengthen the relationships between commanders and their AJOPES. Second, they wanted the course to help the AJOPES apply legal principals to situations they would likely encounter in the field. Finally, they wanted the course to pave the way for missions the Colombian military might conduct after their internal conflict was resolved, which would include fighting remaining guerilla groups such as the National Liberation Army (Ejército de Liberación Nacional or ELN) and supporting law-enforcement efforts against well-funded and well-armed criminal and drug trafficking networks.

Preparing AJOPES to grapple with the legal implications of this operational transition would be critical. One of the principal duties of AJOPES during operational planning has been to advise commanders on which legal framework should apply to the operation. Since the war in Colombia is recognized as a Non-International Armed Conflict (NIAC), both the Law of Armed Conflict (LOAC) and International Human Rights Law govern Colombia's military operations against the insurgents.

For aerial operations, the legal analysis is often fairly straightforward: an offensive strike is permitted as long as the intelligence supports the conclusion that the standard LOAC principles of distinction, military necessity, proportionality, and humanity are satisfied. Since the operations are happening within Colombia's own borders, proportionality is often the biggest challenge. Under proportionality, AJOPES must be prepared to help commanders determine whether the anticipated military advantage from the strike is worth the risk of potential Colombian citizen casualties.

For land operations, AJOPES face an even greater challenge, because they must help combat units be prepared for sudden changes in the field. For example, soldiers supporting national police counter-drug units during a raid on a drug lab may suddenly find themselves in a full-on firefight with FARC or ELN fighters. This could require switching instantly from a use of force model centered on self-defense principles

to a more permissive situation during which pursuit and offensive operations could be appropriate. AJOPES would need to advise operators during planning, train soldiers on complex rules of engagement (ROE), and then be on hand to advise commanders during execution.

To be successful, the course would need to help AJOPES and commanders accomplish all of those things: no small feat for a one-week course!

## **BUILDING THE COURSE**

As Mr. McLoughlin and Lt Col Loertscher prepared to depart Colombia, they presented their proposed concept for the new course to the Directorate. Commanders would be invited to attend the course with the AJOPE from their staff. The course would consist of a one-day substantive overview of International Humanitarian Law and International Human Rights Law. This review would be followed by a practical exercise based on a factual scenario modeled after Colombia's current operational environment.

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During the exercise, the commanders and AJOPES would work together to use the Colombian version of the Joint Operational Planning Process (JOPP)[16] to develop an operational plan, which they would brief to an officer playing the role of a joint force commander. The teams would then be presented with specific situations that could arise during the execution of the plan, and would discuss their proposed legal and operational solutions. These mission execution scenarios were largely based on reports of real-life incidents collected by the Colombian Army Human Rights School, which shared them with DIILS for inclusion in the course. The next phase of the course would be a second exercise, this time based on the likely environment in Colombia after a peace deal with the FARC was in place.

The Directorate loved the concept, and asked DIILS to present the first iteration in August 2015, less than four months later. While DIILS has many off-the-shelf presentations and reference materials for teaching operations law subjects in a traditional classroom setting, much of the envisioned course would need to be built from scratch.

Mr. McLoughlin and Lieutenant Brigham Fugal, a U.S. Navy Judge Advocate (JAG) and International Operations Officer at DIILS, led the effort to build and prepare course materials. Mr. McLoughlin wrote a detailed exercise scenario about a fictionalized country modeled after Colombia's history and likely post-conflict situation. In addition to substantive presentations on the Law of Armed Conflict and International Human Rights Law, the finished product included a brief history of the fictional conflict, maps, intelligence briefings, and mission execution scenarios that would give participants an opportunity to apply legal concepts to battlefield situations. All participants in the course would receive a bound copy of the course materials to use as a reference once they returned to their units.

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#### **ASSEMBLING THE TEAM AND EXECUTING THE COURSE**

In addition to creating brand new course materials, DIILS would need to assemble a different kind of team to make the course a reality. The Colombians would be investing heavily in the course, taking not only lawyers but commanders away from their units to participate. The team would need attorneys with significant operational experience who could discuss legal concepts and share lessons learned from advising commanders. The team would need to be joint to match the anticipated audience. Finally, even though simultaneous translation would be available, Spanish-speakers with experi-

ence in Latin America would contribute cultural literacy to the effort.

DIILS executed the first course in August 2015. The team included seven U.S. JAGs: three from the U.S. Marine Corps, two from the Army, and one each from the Air Force and Navy.[17] As the Air Force member of the team, Lt Col Loertscher had a chance to watch the course he helped create become a reality. It was immediately apparent that the Colombian military intended to take full advantage of the training opportunity for its AJOPes and commanders. More than 20 commanders attended, including three general officers, each bringing their operations law advisor.

Spending several days together helped commanders appreciate how much their young legal advisors knew about operational law, and gave the AJOPes a chance to practice their craft in a low-threat environment. The end result: AJOPes were better prepared to confidently advise their commanders, and commanders were more ready to listen to their AJOPes. At the end of the course, one commander said, "I used to think that my lawyer was an obstacle I had to overcome in order to accomplish the mission. The course has helped me understand better how they can help me do my job better."

At the close of DIILS' first offering of the course, the senior Colombian Army (COLAR) participant, a two-star general, took advantage of the opportunity to give all of the COLAR AJOPes a pep talk. He praised them for their diligence and expertise, told them how important their work was, encouraged them to network with each other, and asked them to keep up the good work. By the end, he had all of the AJOPes pumped up and shouting "¡Fe en la causa!" ("Faith in the cause!"—the Colombian military's slogan at the time). It was a good sign that the course was off to a great start.

DIILS executed the course twice in 2016 and once in 2017, with Lt Col Jennifer Sanchez serving as an instructor. DIILS incorporated feedback from students to make improvements to the course during each iteration. For example, DIILS built a concept of operations briefing template to make preparing and delivering the briefings more efficient. DIILS

took advantage of the extra time gained by this efficiency, creating additional space to discuss scenarios during the execution phase of the exercises. Finally, DIILS augmented the intelligence reports for the planning exercise by adding additional potential targets and giving participants more opportunities to analyze the legal and operational possibilities of the operation.

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So far, more than 100 Colombian commanders and legal advisors from the Colombian Army, Air Force, and Navy have attended the course. Among the graduates was a Colombian Air Force captain who was recognized as a superior performer when he participated with 12 AF (AFSOUTH)/JA in USSOUTHCOM's PANAMAX[18] exercise just four months after he attended the course. In 2018, Colombia will not be the only country to have benefited from the training. This year, DIILS plans to offer the course again in Colombia and in Trinidad and Tobago, giving the project transregional significance.

### OPERATIONS LAW IN A NEW COLOMBIAN ERA

Subsequent developments in Colombia indicate that the course was delivered right on time. Between the first and second offering of the course, the Colombian government made a dramatic policy shift. In November 2015, the Colombian Government demonstrated a willingness to use military force against a group that had previously been treated solely as a drug trafficking organization. The target: the Urabeños (aka "Clan Usuga"), a criminal group consisting largely of former members of a guerilla group who left their politically-gearred organization to focus on money-making criminal enterprises.[19]

The director of the Colombian National Police said the **bombing** targeted an Urabeños camp that "could have hosted an 'amalgam' of forces from the Urabeños and rebel group the National Liberation Army (ELN)."[20]

The policy became more defined in May 2016, when Luis Carlos Villegas, the Colombian Minister of Defense, announced that Clan Usuga and two other criminal organizations would now be classified as "organized armed groups," a status that would allow authorities to use "all of the state's force, without exception" to bring the groups under control.[21] This new framework for placing groups in this status was outlined in the Ministry of Defense's "Permanent Directive No. 15," which was released on 22 April 2016.[22]



#### Download PDF Documents:

- Dirección de Derechos Humanos, Ministerio de Defensa Nacional, 2 Boletín Correo de la ODA 5 (2003), [https://www.mindefensa.gov.co/irj/go/km/docs/Mindefensa/Documentos/descargas/Asuntos\\_de\\_Interes/Derechos\\_Humanos/correo\\_oda/correo\\_oda02.pdf](https://www.mindefensa.gov.co/irj/go/km/docs/Mindefensa/Documentos/descargas/Asuntos_de_Interes/Derechos_Humanos/correo_oda/correo_oda02.pdf)
- Colombian Ministry of National Defense, Permanent Directive No. 15, [https://www.mindefensa.gov.co/irj/go/km/docs/Mindefensa/Documentos/descargas/Prensa/Documentos/dir\\_15\\_2016.pdf](https://www.mindefensa.gov.co/irj/go/km/docs/Mindefensa/Documentos/descargas/Prensa/Documentos/dir_15_2016.pdf)

In a nutshell, the Directive states the use of military force is justified against groups that: (1) engage in violence against Colombian police and military forces; (2) have a capacity to inflict a level of armed violence in excess of public disturbances and internal tension; (3) have an organized chain of command; and (4) and exert control over areas of national territory.[23] These factors were derived from a decision handed down in the International Criminal Tribunal for the Former Yugoslavia in the **case against Dusko Tadić**, who was convicted of war crimes committed during the Bosnian

conflict.[24] The directive also sets forth the process for identifying which groups qualify for this special treatment, which includes ratification of the designated groups by the Colombian National Security Council.[25]

The move foreshadowed Colombia's approach to dealing with one of its principal worries about the probable post-conflict situation: the very real possibility that criminal groups could recruit former guerilla fighters and move to fill the power vacuum that would appear after the FARC began to demobilize.

Those concerns appear to have been justified. Shortly after the peace accord was reached, both Colombian President Santos and Mr. Todd Howland, the Colombian representative for the United Nations High Commissioner for Human Rights, reported that criminal groups were already moving to [fill in spaces the FARC was leaving behind](#).[26] On 25 January 2017, Colombian Attorney General Néstor Humberto Martínez announced that the Urabeños were offering FARC dissidents \$1.8 million pesos (about \$600) to [join their ranks](#) and help them take over the FARC's abandoned drug trafficking and illegal mining operations.[27]

For Colombia's AJOPES, the policy shift will require an even more nuanced legal analysis as they advise military commanders called upon to execute operations against organized armed groups. Fortunately for AJOPES and commanders alike, the exercise scenarios created by DIILS contemplated this possibility, and provided an opportunity to consider the legal implications of the policy. In the third offering of the course, one participant marveled at the prescience of the exercise scenario. "This is exactly the situation we find ourselves in now," he said. "This is exactly what we need."

## ABOUT THE AUTHORS

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## EXPAND YOUR KNOWLEDGE:

### EXTERNAL LINKS TO ADDITIONAL RESOURCES

- **BBC:** Colombia Profile – Timeline (June 2018), <https://www.bbc.com/news/world-latin-america-19390164>
- **National Geographic:** After Five Decades of Civil War, Colombia's Healing Begins (Jan 2018), <https://www.nationalgeographic.com/magazine/2018/01/colombia-civil%20war-farc-guerrillas-peace/>
- **PBS:** FARC Drops Its Weapons, but Colombia's Deadly Conflict Goes On (Mar 2018, Video 9:22), <https://www.pbs.org/newshour/show/farc-drops-its-weapons-but-colombias-deadly-conflict-goes-on>
- **Time: Violentology:** A Manual of the Colombian Conflict (Oct 2012, Video 4:07), <https://time.com/3792184/violentology-stephen-ferry-documents-the-colombian-conflict/>

## ENDNOTES

- [1] Chris Kraul, *Half a Century of Conflict in Colombia Comes to a Close as FARC Rebels Disarm*, L.A. TIMES, 27 June 2017, <http://beta.latimes.com/world/mexico-americas/la-fg-colombia-disarmament-20170627-story.html>.
- [2] *Id.*
- [3] *The Colombian Peace Process Explained*, <http://www.telesurtv.net/english/telesuragenda/The-Colombian-Peace-Process-Explained-20141121-0047.html>.
- [4] Amy Zalman, *A Profile of the Colombia FARC Guerrilla Group* (26 April 2016), <http://terrorism.about.com/od/groupsleader1/p/FARC.htm>.
- [5] THE GLOBAL INITIATIVE AGAINST TRANSNATIONAL ORGANIZED CRIME, *THE FARC PEACE PROCESS: USHERING IN A NEW CHAPTER IN COLOMBIA'S HISTORY OF CRIME AND VIOLENCE?* (1 September 2016), <http://globalinitiative.net/wp-content/uploads/2016/09/meeting-summary-farc-peace-agreement-1-september-2016.pdf>.
- [6] *Id.* at 2.
- [7] *Id.*
- [8] *Id.*
- [9] *Id.*
- [10] Nicholas Casey, *Colombia's Congress Approves Peace Accord with FARC*, N.Y. TIMES, 30 November 2016, <https://www.nytimes.com/2016/11/30/world/americas/colombia-farc-accord-juan-manuel-santos.html>.
- [11] *Id.*
- [12] DIRECCIÓN DE DERECHOS HUMANOS, MINISTERIO DE DEFENSA NACIONAL, 2 BOLETÍN CORREO DE LA ODA 5 (2003), [https://www.mindefensa.gov.co/irj/go/km/docs/Mindefensa/Documentos/descargas/Asuntos\\_de\\_Interes/Derechos\\_Humanos/correo\\_oda/correo\\_oda02.pdf](https://www.mindefensa.gov.co/irj/go/km/docs/Mindefensa/Documentos/descargas/Asuntos_de_Interes/Derechos_Humanos/correo_oda/correo_oda02.pdf). In typical military fashion, each service has its own acronym for these operational law attorneys. "AJOPE" is used by the Colombian Army, while the Air Force uses "ASEJO" and the Navy uses "AJUROP." For simplicity's sake, "AJOPE" will be used here.
- [13] *Id.*
- [14] *Id.*
- [15] *Id.*
- [16] JOINT CHIEFS OF STAFF, JOINT PUB. 5-0, JOINT OPERATION PLANNING (11 August 2011). JOPP is a seven-step planning methodology that begins upon the receipt of a warning order (WARNORD), planning order (PLANORD) or alert order (ALERTORD), and results in an Operational Plan (OPLAN) or Operational Order (OPORD). The seven JOPP steps are: (1) Initiation, (2) Mission Analysis, (3) Course of Action (COA) Development, (4) COA Analysis/Wargaming, (5) COA Comparison, (6) COA Approval, and (7) Plan or Order Development.
- [17] The members of the first DIILS team were: Col Ian Brasure, USMC; Lt Col Patrick Knight, USMC; Lt Col Steve Loertscher, USAF; MAJ Melissa Van Buhler, US Army; MAJ Carlos Calderon, US Army; Maj Carina Cuellar, USMC; and LT Brigham Fugal, USN. Capt Ravi Kambhampaty, US Army, also participated as USSCOUTHCOM/JA's liaison officer to the US Embassy in Bogotá.
- [18] PANAMAX is an annual exercise sponsored by U.S. Southern Command that increases the ability of nations to work together and test their responsiveness in combined operations.
- [19] The guerilla group was known as the Autodefensores Unidos de Colombia (United Self Defense Forces of Colombia), which competed against the FARC for influence in the late 1990s. See Los Urabebños, <http://www.insightcrime.org/colombia-organized-crime-news/urabebnos-profile>.
- [20] David Gagne, *Aerial Bombing Possible Game Changer for Colombia BACRIM* (5 November 2015), <http://www.insightcrime.org/news-analysis/aerial-bombing-possible-gamechanger-for-colombia-bacrim>.
- [21] The other groups so designated were "Los Rastrojos" and "Los Puntillos." See Sam Tabor, *Colombia Government Reclassifies BACRIM, Paves Way for Airstrikes* (9 May 2016), <http://www.insightcrime.org/news-briefs/colombia-government-reclassifies-bacrim-airstrikes>.
- [22] COLOMBIAN MINISTRY OF NATIONAL DEFENSE, DIRECTIVA PERMANENTE 15, SETTING FORTH THE GUIDELINES OF THE NATIONAL MINISTRY OF DEFENSE FOR CHARACTERIZING AND ENGAGING ORGANIZED ARMED GROUPS (22 April 2016), [https://www.mindefensa.gov.co/irj/go/km/docs/Mindefensa/Documentos/descargas/Prensa/Documentos/dir\\_15\\_2016.pdf](https://www.mindefensa.gov.co/irj/go/km/docs/Mindefensa/Documentos/descargas/Prensa/Documentos/dir_15_2016.pdf).
- [23] *Id.*

- [24] Prosecutor v. Tadić, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int'l Crim. Trib. for the Former Yugoslavia 2 October 1995), <http://www.icty.org/x/cases/tadic/acdec/en/51002.htm>. The factors were also adopted by the Colombian Constitutional Court in a 2007 case arising from the Colombian conflict. See C.C., 25 April 2007, Sentencia C-291/07 (Colom.), <http://www.corteconstitucional.gov.co/relatoria/2007/c-291-07.htm>.
- [25] *Id.*
- [26] Mimi Yagoub, *Santos Recognizes Criminal Groups Are Moving into FARC Areas* (3 November 2016), <http://www.insightcrime.org/news-analysis/santos-recognizes-criminal-groups-are-moving-into-farc-areas>.
- [27] Tristan Clavel, *Colombia's Urabeños Recruiting Dissidents from FARC Peace Process* (26 January 2017), <http://www.insightcrime.org/news-briefs/colombia-urabenos-recruiting-dissidents-farc-peace-process>.