

Peace Operations: the US Policy

Shackley F. Raffetto,

*Chief Judge of the Second Judicial Circuit of the State of Hawaii,
USA, CAPT, Judge Advocate Generals Corps., US Navy (Ret.)*

The US policy relating to Peace Operations is based upon domestic law, comprised of provisions of the US Constitution, laws passed by Congress, decisions of the US Federal Courts, official interpretations of US law by the Attorney General of the US, international treaties to which the US is a party and Executive Orders of the President of the US.

The US Constitution authorizes the President of the USA independent legal authority to order the deployment and participation of US military forces for the purpose of participating in military operations outside of US territory, including peace operations. The term "peace operations" is used here to include traditional "peacekeeping" based upon consent of the parties as well as "peace enforcement operations" involving the use of military force, using the US terminology, and related type operations.

Under Article II of the US Constitution the President designated as being exclusively authorized and responsible for the conduct of all diplomatic affairs of the US with foreign nations.

The US Constitution establishes the President of the US as the Commander in Chief of all US military forces. As the designated Commander in Chief of US military forces the President has the "power to dispose of troops and equipment in such a manner and on such duties as best to promote the safety of the country."

However, the President's power to deploy USA forces overseas under Constitutional authority is limited to deployments that protect US national security interests or protect US citizens abroad.

In addition, the President also has additional authority under laws passed by Congress to support peace operations.

1. The **UN Participation Act of 1945** and the **Foreign Assistance Act of 1961** are the two primary statutory enactments which provide legal authority for US support of peace operations.
2. The **UN Participation Act of 1945** specifically authorizes the President to provide support, including the commitment of up to 1,000 US military personnel worldwide, to serve as observers, guards or in any other non-combat capacity, in UN directed peace operations dedicated to the peaceful settlement of disputes, that is, Chapter VI peacekeeping operations. This statute does not authorize participation in Chapter VII peace operations.
3. The **Foreign Assistance Act** authorizes the President to furnish assistance to friendly countries as he may determine, for Peacekeeping operations and other programs carried out in pursuing of the national security interests of the US. This Act has provided legal authority for the deployment of US forces for Chapter VII operations (UNOSOM II).

The UN Charter. In addition to providing international legal authority for the conduct of peace operations, the UN Charter is a treaty ratified by the President and the Congress under the treaty clause of the US Constitution. As such, under Article VI of the Constitution, called the Supremacy Clause, the UN Charter has become part of the Federal law of the US and, therefore, in addition to providing international legal authority, it also provides domestic legal authority for US support to peace operations authorized or directed by the UN. Specifically, Article 21(5) of the UN charter calls upon all members to give the UN "every assistance" in any action it takes under the Charter. In addition, Article 25 of the Charter calls upon all member states to agree to accept and carry out the decisions of the UN Security Council.

In addition to giving the President powers over the military, the Constitution also provides powers to the Congress to counter-balance the power of the President as Commander in Chief. Only Congress can declare war. The Constitution authorizes only the Congress by the power to create, regulate and maintain military forces and to determine their size and levy taxes to pay for the military. Congress has the power to investigate the use of funds by the military. Collectively, these powers provide a strong check upon the President's powers.

During the Vietnam war a good deal of opposition to the US prosecution of the war developed in civil society in the US. At the end of the war, in 1973, the Congress attempted to further limit the power of the President to commit US military forces to any conflict without a formal Congressional declaration of war as required in the Constitution. This law is called the **War Powers Act** and it was passed over the veto of then President Nixon — requiring 2/3 vote of the Congress — which was very unusual in US society. There are many details of the War Powers Act, but basically it prohibits the President from committing US military forces to conflict overseas without either 1) specific, advance statutory authorization from Congress, 2) a national emergency created by an attack on the US or its military forces, or 3) a declaration of war by the Congress.

Even if authorized under the War Powers Act the President must terminate the use of armed forces within 60 days unless Congress specifically authorizes further action. The Act also requires the President to report and consult with the Congress about the particular use of military force both before and after deployed. If Congress does not authorize a continuation of armed conflict within the 60 days, the President must stop military operations. Finally, under Section 1544b of the War Powers Act, if Congress adopts a joint resolution of both houses directing the President to stop hostilities, he must immediately do so. Many commentators believe that this latter provision, called a "legislative veto", is probably unconstitutional as a violation of the separation of powers between the three branches of the government established in the Constitution. In practice this particular provision has simply been ignored.

Since the War Powers Act was enacted into law in 1973, every President has taken the position that the Act is an unconstitutional infringement upon the war powers of the President as provided for in the Constitution. However, since the Act is an official Act of Congress, most of the time presidents have more or less tried to comply with at least the provisions requiring notification and consultation concerning the commitment by the President of US forces overseas. Congress takes the position that the President must comply with the requirements of the Act, even when com-

mitting forces in compliance with US obligations under NATO or UN Resolutions.

Naturally, members of Congress have often been unhappy with the President's lack of compliance with the War Powers Act. At various times, in frustration, some members of Congress have brought suit in Federal Courts seeking to obtain a judicial declaration that the President is in violation of the War Powers Act. The legal challenges in the courts have never been successful. The courts, including the US Supreme Court, have consistently taken the position that this is a political controversy between two independent branches of government and therefore not appropriate to be resolved by the judiciary. And so the controversy continues.

Presidential Decision Directive 25 (PPD 25). Finally, in 1994 President Clinton ordered an inter-agency review of the US peacekeeping policies and programs in order to clarify and develop a comprehensive US policy framework suited to the realities of the post-Cold War world. There were extensive consultations with Members of Congress (recall that Congress controls the funding of the military and has investigative powers as well). It was acknowledged that peace operations can be a useful tool to help prevent and resolve conflicts before they pose direct threats to US national security. And, that peacekeeping can also serve US interests by promoting democracy, regional security, and economic growth.

The final document that resulted from this review is called **Presidential Decision Directive 25 (PDD 25)** and is in the form of a Presidential Executive Order issued in the President's capacity as Commander in Chief of US military forces. PDD 25 sets forth six major areas of reform and improvement which establish the basic policy of the US for peace operations. These can be briefly summarized as follows:

The US must make disciplined and coherent choices about which peace operations to support. This policy requires a 3 phases or levels of analysis:

The US will consider the following factors when deciding whether to vote "YES" in the UN SC or NATO, etc., for a proposed (either Chapter VI or Chapter VII) peace operatio.

- Does the UN involvement advance US interests and is there a community of interests for dealing with the problem on a multi-lateral basis?
- Is there a threat to or breach of international peace and security, defined as one or a combination of the following: international aggression, urgent humanitarian disaster coupled with violence, or sudden interruption of established democracy or gross violation of human rights along with violence or the threat of violence?
- Are there clear objectives and an understanding of whether the mission is defined as neutral peacekeeping or peace enforcement?
- Does a working cease-fire exist between the parties prior to Chapter VI missions?
- Is there a significant threat to international peace and security for Chapter VII missions?
- Are there funding mechanisms, supporting forces, and mandate to accomplish the mission?
- Are the political, humanitarian, or economic consequences unacceptable?
- Is the operation linked to clear objectives and realistic end state.

If this first phase of analysis results in a US "YES" vote for approving the operation, a second set of criteria must then be considered in order to determine whether US will commit troops to the UN operation:

- Does participation advance US interests?
- Are personnel, funds, and other resources available?
- Is US participation necessary for the success of the mission?
- Is the endstate definable?
- Is there sufficient US domestic and Congressional support for the operation?
- Are Command and Control arrangements acceptable?

Finally, one more analysis must be made if there is a significant possibility that the operation will commit US forces to combat:

Is there a clear determination to commit sufficient forces to achieve the clearly defined objective?

Do the leaders of the operation possess a clear intention to achieve the stated objectives?

Is there a commitment to reassess and continually adjust the objectives and composition of the force to meet changing security and operational requirements?

The second point of Presidential directive sets forth specific steps that are proposed for the UN to reduce the costs of UN peace operations.

Chapter VI peacekeeping operations are paid for by member obligatory contributions of member states based on a standard assessment. The US assessment at the time was 30.4 % and PDD 25 instructed that it should be reduced to 25%. In Ch VII peace enforcement operations participating states each pay for their own costs.

The third point of Presidential directive sets forth US policy regarding command and control of US forces in peace operations.

The US will relinquish only "operational control" of US forces when doing so serves the US security interests. The greater the military roll the less likely the US will give control of US forces to UN or foreign command. Any large scale participation of US forces that is likely to involve combat should ordinarily be conducted under US command and operational control or through competent regional organizations such as NATO or other coalitions. The President will never relinquish command of US forces. However, the President can in an appropriate circumstance release designated US forces to the Operational Control of a foreign commander for designated missions. When US forces are under the operational control of a UN commander, the US forces will always maintain the capability to report separately to higher US military authorities. It should be noted in this respect that this contravenes UN policy that provides once placed under UN control, soldiers will only report to and seek orders through the UN command channels. The US policy also provides that commanders of US units participating in UN operations will refer to higher US authority any orders that are illegal under US or international

law, or are outside the mandate of the mission to which the US agreed with the UN, if they are unable to resolve the matter with the UN commander. The US reserves the right to terminate participation at any time or take whatever actions are necessary to protect US forces.

The Presidential directive recommends 11 different steps to strengthen UN management of peace operations.

Document also tends to improve US Government management of US involvement in peace operations. It assigns lead agency responsibilities involving the likely use of troops in combat to the Department of Defense. The Department of State is designated lead agency to handle issues of traditional peacekeeping not involving US combat units. And, the Department of State retains responsibility for the conduct of diplomacy and instructions to embassies and to the US Mission in the UN.

Final directive seeks to increase the flow of information and consultation between the executive branch of government and Congress and acknowledges the necessity of bipartisan and Congressional support and the support of the American People for any US participation in peace operations. This portion of the policy represents a recognition by the President of the requirement of advice and consultation with Congress required under the War Powers Act referred to earlier.

Soon after becoming President, President Bush rescinded all of President Clinton's executive orders, which would include PDD 25. However, most authorities in the US believe that PDD 25 is followed and will continue to be followed by the US in making determinations of whether and to what extent the US will become involved in peace operations under the UN or otherwise.

Since President Bush took office as the President of the US, there have been dramatic events and changes in the environment of international peace and security, and US security in particular. Presently, President Bush is requesting some 97 Billion dollars in funds to carry out the US missions he has ordered in Afghanistan and Iraq. In view of this substantial current US commitment abroad it seems doubtful that the US will commit to any further substantial international peace operations in the near term,

except under exceptional circumstances, such as the recent assistance provided in Liberia. This state of affairs will increase the need for leadership and participation by regional organizations such as the CIS, NATO or perhaps the OSCE, under Chapter VIII of the UN Charter, to help moderate the international and national instabilities that the international community will continue to face in the near term.