Operational Law Handbook

International and Operational Law Department

The Judge Advocate General's Legal Center & School, U.S. Army
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OPERATIONAL LAW HANDBOOK
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All of the faculty who have served before us
and contributed to the literature in the field of operational law.

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PREFACE

The Operational Law Handbook is a "how to" guide for Judge Advocates practicing operational law. It provides references and describes tactics and techniques for the practice of operational law. It supports the doctrinal concepts and principles of FM 3-0 and FM 27-100. The Operational Law Handbook is not a substitute for official references. Like operational law itself, the Handbook is a focused collection of diverse legal and practical information. The handbook is not intended to provide "the school solution" to a particular problem, but to help Judge Advocates recognize, analyze, and resolve the problems they will encounter in the operational context. Similarly, the Handbook is not intended to represent official U.S. policy regarding the binding application of varied sources of law, though the Handbook may reference source documents which themselves do so.

The Handbook was designed and written for Judge Advocates practicing operational law. The size and contents of the Handbook are controlled by this focus. Frequently, the authors were forced to strike a balance between the temptation to include more information and the need to retain the Handbook in its current size and configuration. Simply put, the Handbook is made for the Soldiers, Marines, Airmen, Sailors, and Coast Guardsmen of the service Judge Advocate General's Corps, who serve alongside their clients in the operational context. Accordingly, the Operational Law Handbook is compatible with current joint and combined doctrine. Unless otherwise stated, masculine pronouns apply to both men and women.

The proponent for this publication is the International and Operational Law Department, The Judge Advocate General's Legal Center and School (TJAGLCS). Send comments, suggestions, and work product from the field to TJAGLCS, International and Operational Law Department, Attention: MAJ Marie Anderson, 600 Massie Road, Charlottesville, Virginia 22903-1781. To gain more detailed information or to discuss an issue with the author of a particular chapter or appendix call MAJ Anderson at DSN 521-3373; Commercial (434) 971-3373; or email olga.anderson@hqda.army.mil.

In recent years, the Operational Law Handbook has been published in July or August, and dated for the following year. For example, the 2005 edition was first published in August 2004. Beginning with the August 2006, the date of the Handbook has been the date of actual publication. Accordingly, this 2008 Operational Law Handbook was published in July 2008.

The 2008 Operational Law Handbook is on the Internet at www.jagcnet.army.mil in both the Operational Law and CLAMO databases. The digital copies are particularly valuable research tools because they contain many hypertext links to the various treaties, statutes, DoD Directives/Instructions/Manuals, CJCS Instructions, Joint Publications, Army Regulations, and Field Manuals that are referenced in the text.

To order copies of the 2008 Operational Law Handbook, please call CLAMO at DSN 521-3339; Commercial (434) 971 3339; or email CLAMO@hqda.army.mil.

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CHAPTER 1

LEGAL BASIS FOR USE OF FORCE

I. INTRODUCTION

There are a variety of internationally-recognized legal bases for the use of force in relations between States, found in both customary and conventional law. Generally speaking, however, modern *jus ad bellum* (the law of resorting to war) is generally reflected in the United Nations (UN) Charter. The UN Charter provides two bases for the resort to force: Chapter VII enforcement actions under the auspices of the UN Security Council, and self-defense pursuant to Article 51 (which governs acts of both individual and collective self-defense).

A. Policy and Legal Considerations.

1. Before committing U.S. military force abroad, decision-makers must make a number of fundamental policy determinations. The President and the national civilian leadership must be sensitive to the legal, political, diplomatic, and economic factors inherent in a decision to further national objectives through the use of force. The legal underpinnings, both international and domestic, are the primary concern in this determination. Thus, any decision to employ force must rest upon both the existence of a viable legal basis in *international* law as well as on *domestic* legal authority (including application of the 1973 War Powers Resolution (WPR), Public Law 93-148, 50 U.S.C. §§ 1541-1548).

2. Though these issues will normally be resolved at the national political level, it is nevertheless essential that Judge Advocates (JAs) understand the basic concepts involved in a determination to use force abroad. Using the mission statement provided by higher authority, JAs must become familiar with the legal justification for the mission and, in coordination with higher headquarters, be prepared to brief all local commanders on that legal justification. This will enable commanders to better plan their missions, structure public statements, and conform the conduct of military operations to U.S. national policy. It will also assist commanders in drafting and understanding Rules of Engagement (ROE) specific to the mission, as one of the primary purposes of ROE is to ensure that any use of force is consistent with national security and policy objectives.

3. The JA must also be mindful of the fact that the success of any military mission abroad will likely depend upon the degree of domestic support demonstrated during the initial deployment and sustained operation of U.S. forces. A clear, well-conceived, effective and timely articulation of the *legal* basis for a particular mission will be essential to sustaining support at home and gaining acceptance abroad.

B. The General Prohibition Against the Use of Force.

1. The UN Charter mandates that all member States resolve their international disputes peacefully,[1] and requires that they refrain in their international relations from the *threat or use of force*.[2] An integral aspect of this proscription is the principle of non-intervention, which provides that States must refrain from interference in other State's internal affairs.[3] Put another way, nonintervention stands for the proposition that States must respect one another's *sovereignty*.

2. American policy statements have frequently affirmed this principle, and it has been made an integral part of U.S. law through the ratification of the Charters of the United Nations and the Organization of American

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[1] UN Charter, Article 2(3): "All Members shall settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered." The UN Charter is reprinted in full in various compendia, including the International and Operational Law Department's Law of War Documentary Supplement, and is also available at http://www.un.org/aboutun/charter/index.html.

[2] UN Charter, Article 2(4): "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 . . . ."

[3] UN Charter, Article 2(7): "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 or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter Vll."

States (OAS),[4] as well as other multilateral international agreements which specifically incorporate nonintervention as a basis for mutual cooperation.

II. THE LAWFUL USE OF FORCE

Despite the UN Charter's broad legal prohibitions against the use of force and other forms of intervention, specific exceptions exist that justify a State's recourse to the use of force or armed intervention. While States have made numerous claims, utilizing a wide variety of legal bases to justify a use of force, it is generally agreed that only two types of action legitimately fall within the ambit of international law: (1) actions authorized by the UN Security Council under Chapter VII of the UN Charter, and (2) actions that constitute a legitimate act of individual or collective self-defense pursuant to Article 51 of the UN Charter and/or customary international law.

A. UN Enforcement Actions (Chapter VII).

1. Chapter VII of the UN Charter, entitled "Action With Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression," gives the UN Security Council authority to determine what measures should be employed to address acts of aggression or other threats to international peace and security. The Security Council must first, in accordance with Article 39, determine the existence of a threat to the peace, a breach of the peace or an act of aggression. It then has the power under Article 41 to employ measures short of force, including a wide variety of diplomatic and economic sanctions against the target State, to compel compliance with its decisions. Should those measures prove inadequate (or should the Security Council determine that non-military measures *would* prove inadequate), the Security Council has the power to authorize member States to employ military force in accordance with Article 42. Some recent examples of UN Security Council actions to restore international peace and security include:

a. *UN Security Council Resolution (UNSCR) 678 (1990)* authorized member States cooperating with the Government of Kuwait to use "all necessary means" to enforce previous resolutions. It was passed in response to the 1990 Iraqi invasion of Kuwait, pursuant to the UN Security Council's authority under Chapter VII.

b. *UN Security Council Resolution 794 (1992)* authorized member States to use "all necessary means to establish, as soon as possible, a secure environment for humanitarian relief operations in Somalia."

c. *UN Security Council Resolution 940 (1994)* authorized member States "to form a multinational force under unified command and control and, in this framework, to use all necessary means to facilitate the departure from Haiti of the military leadership, consistent with the Governors Island Agreement, the prompt return of the legitimately elected President and the restoration of the legitimate authorities of the Government of Haiti, and to establish and maintain a secure and stable environment that will permit implementation of the Governors Island Agreement . . . ."

d. *UN Security Council Resolution 1031 (1995)* authorized member States "acting through or in cooperation with the organization [NATO] referred to in Annex 1-A of the Peace Agreement [Dayton Accords] to establish a multinational implementation force (IFOR) under unified command and control [NATO] in order to fulfill the role specified in Annex 1-A and Annex 2 of the Peace Agreement [in Kosovo];" and authorized "the Member States… to take all necessary measures to effect the implementation of and to ensure compliance with Annex 1-A of the Peace Agreement . . ."

e. *UN Security Council Resolution 1264 (1999)* authorized "the establishment of a multinational force . . . to restore peace and security in East Timor. . . " and further authorized "the States participating in the multinational force to take all necessary measures to fulfill this mandate . . ."

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[4] OAS Charter, Article 18: "No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. The foregoing principle prohibits not only armed force but also any other form of interference or attempted threat against the personality of the State or against its political, economic and cultural elements." *See also* Inter-American Treaty of Reciprocal Assistance (Rio Treaty), Art. I: ". . . Parties formally condemn war and undertake in their international relations not to resort to the threat or the use of force in any manner inconsistent with the provisions of the Charter of the United Nations or this Treaty."

f. *UN Security Council Resolution 1386 (2001)* authorized the establishment of an International Security Assistance Force (ISAF) to assist the Afghan Interim Authority. Additionally, this Resolution authorized member States participating in the ISAF to "take all necessary measures to fulfill its mandate."

g. *UN Security Council Resolution 1511 (2003)* authorized "a multinational force under unified command to take all necessary measures to contribute to the maintenance of security and stability in Iraq."

h. *UN Security Council Resolution 1529 (2004)* authorized member States participating in the Multinational Interim Force in Haiti to "take all necessary measures to fulfill its mandate." Specifically, the Multinational Interim Force was tasked with restoring peace and security in Haiti following the resignation and departure of former President Aristide.

2. OPERATION IRAQI FREEDOM.

a. In the months leading up to the U.S.-led invasion of Iraq in 2003, U.S. diplomats worked feverishly to obtain UN Security Council support for a new Resolution explicitly authorizing the use of military force. When these diplomatic efforts failed, many pundits opined that, as a result, the U.S. lacked a legitimate basis for using force against Iraq.[5] The Bush Administration countered that authority existed under previous Security Council resolutions. Looking back to November 1990, the Security Council had passed Resolution 678, which:

> Authorize[d] Member States co-operating with the government of Kuwait, unless Iraq on or before 15 January 1991 fully implements, as set forth in paragraph 1 above, the above-mentioned resolutions, 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;

b. Significantly, UNSCR 678 authorized the use of force not only to expel Iraqi forces from Kuwait (implementing Resolution 660), but also "*to restore international peace and security in the area*." In an attempt to bring this goal of peace and security in the northern Arabian Gulf region to fruition, the Security Council passed UNSCR 687, which formalized the cease-fire between coalition and Iraqi forces. As a consequence, UNSCR 687 placed certain requirements on the government of Iraq, including:

(1) Iraq shall unconditionally accept the destruction, removal, or rendering harmless, under international supervision, of: all chemical and biological weapons and all stocks of agents and all related subsystems and components and all research, development, support and manufacturing facilities related thereto; and

(2) Iraq shall unconditionally agree not to acquire or develop nuclear weapons or nuclear-weapon-usable material or any subsystems or components or any research, development, support, or manufacturing facilities related to the above.

c. The U.S. position is that UNSCR 687 never terminated the authorization to use force contained in UNSCR 678. It merely *suspended* it with a cease-fire, *conditioned upon* Iraq's acceptance of and compliance with the terms contained in the document and discussed above. While the Government of Iraq accepted the terms, it never fully complied with them. The Security Council recognized this situation in November 2002 with the adoption of UNSCR 1441, which provided in part that "Iraq has been and remains in material breach of its obligations under relevant resolutions, including Resolution 687 (1991)…." It was the position of the U.S. Government that, since Iraq remained in material breach of UNSCR 687, the cease-fire contained therein was null and void, and the authorization to use "all necessary means" to return peace and stability to the region (based on UNSCR 678) remained in effect. Under this rationale, a new Security Council resolution again authorizing "all necessary means" was politically *advisable*, yet legally *unnecessary*. However, the U.S. argument is not without its critics.[6]

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[5] *See, e.g.*, Sean D. Murphy, *Assessing the Legality of Invading Iraq*, 92 GEO. L.J. 173 (2004).

[6] *See, e.g., id.*

B. Regional Organization Enforcement Actions. Chapter VIII of the UN Charter recognizes the existence of regional arrangements among States that deal with such matters relating to the maintenance of international peace and security, as are appropriate for regional actions (Article 52). Regional organizations, such as the OAS, the Organization of African Unity and the Arab League, attempt to resolve regional disputes peacefully, prior to the issue being referred to the UN Security Council. Regional organizations do not, however, have the ability to unilaterally authorize the use of force (Article 53). Rather, the Security Council may utilize the regional organization to carry out Security Council enforcement actions. In other words, regional organizations are subject to the same limitation on the use of force as are individual States, with the same two exceptions to the general prohibition against the use of force (i.e. enforcement actions under Chapter VII, and actions in individual or collective self-defense under Article 51 of the UN Charter or customary international law).

III. SELF-DEFENSE

A. Generally.

1. The right of all nations to defend themselves was well-established in customary international law prior to adoption of the UN Charter. Article 51 of the Charter provides:

> Nothing in the present Chapter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a member of the UN until the Security Council has taken measures necessary to maintain international peace and security. . . .

2. The questions that inevitably arise in conjunction with the UN Charter's "codified" right of self-defense involve the scope of authority found therein. Does this right, as is suggested by the language of Article 51, exist only when a State is responding to an actual "armed attack," and then only until the Security Council takes *effective* action? In other words, has the customary right of self-defense been limited in some manner by adoption of the UN Charter, thus eliminating the customary concept of *anticipatory self-defense* (see below) and extinguishing a State's authority to act independently of the Security Council in the exercise of self-defense?

3. Those in the international community who advocate a restrictive approach in the interpretation of the UN Charter and in the exercise of self-defense, argue that reliance upon customary concepts of self-defense, to include anticipatory self-defense, is inconsistent with the clear language of Article 51 and counterproductive to the UN goal of peaceful resolution of disputes and protection of international order.

4. In contrast, some States, including the U.S., argue that an expansive interpretation of the UN Charter is more appropriate, contending that the customary law right of self-defense (including anticipatory self-defense) is an inherent right of a sovereign State that was not "negotiated" away under the Charter. Arguing that contemporary experience has demonstrated the inability of the Security Counsel to deal effectively with acts and threats of aggression, these States argue that, rather than artificially limiting a State's right of self-defense, it is better to conform to historically accepted criteria for the lawful use of force, including circumstances which exist outside the "four corners" of the Charter.

B. Customary International Law and the UN Charter.

1. It is well-accepted that the UN Charter provides the essential framework of authority for the use of force, effectively defining the foundations for a modern *jus ad bellum*. Inherent in its principles are the requirements for ***necessity*** (which involves considering the exhaustion or ineffectiveness of peaceful means of resolution, the nature of coercion applied by the aggressor State, objectives of each party, and the likelihood of effective community intervention), ***proportionality*** (i.e. limiting force in magnitude, scope and duration to that which is reasonably necessary to counter a threat or attack), and an element of ***timeliness*** (i.e. delay of a response to an attack or the threat of attack attenuates the immediacy of the threat and the necessity to use force in self-defense).

2. Within the bounds of both the UN Charter and customary practice, the inherent right of self-defense has primarily found expression in three recurring areas: 1) protection of *nationals* and their property located abroad; 2) protection of a nation's *political independence*; and 3) protection of a nation's *territorial integrity*. JAs must be

familiar with these foundational issues, as well as basic concepts of self-defense, as they relate to overseas deployments and operations, such as the Chairman of the Joint Chiefs of Staff (CJCS) Standing Rules of Engagement (ROE) and the response to State-sponsored terrorism.

a. *Protection of Nationals*.

(1) Customarily, a State has been afforded the right to protect its citizens abroad if their lives are placed in jeopardy and the host State is either unable or unwilling to protect them. This right is cited as the justification for non-combatant evacuation operations (NEO), discussed in greater detail in Chapter 20 of this TJAGLCS Operational Law Handbook.

(2) The protection of U.S. nationals was identified as one of the legal bases justifying initial U.S. military intervention in both Grenada and Panama. In each case, however, the United States emphasized that protection of U.S. nationals, standing alone, did not necessarily provide the legal basis for the full range of U.S. activities undertaken in those countries. Thus, while intervention for the purpose of protecting nationals is a valid and essential element in certain uses of force, it cannot serve as an independent basis for continued U.S. military presence in another country after the mission of safeguarding U.S. nationals has been accomplished.

(3) The right to use force to protect citizens abroad also extends to those situations in which a host State is an active participant in the activities posing a threat to another State's citizens (e.g. the government of Iran's participation in the hostage-taking of U.S. embassy personnel in that country in 1979-81; and Ugandan President Idi Amin's support of terrorists who kidnapped Israeli nationals and held them at the airport in Entebbe).

b. *Protection of Political Independence*. A State's political independence is a direct attribute of sovereignty, and includes the right to select a particular form of government and its officers, the right to enter into treaties, and the right to maintain diplomatic relations with the world community. The rights of sovereignty or political independence also include the freedom to engage in trade and other economic activity. Consistent with the principles of the UN Charter and customary international law, each State has the duty to respect the political independence of every other State. Accordingly, force may be used to protect a State's political independence when it is threatened and all other avenues of peaceful redress have been exhausted.

c. *Protection of Territorial Integrity*. States possess an inherent right to protect their national borders, airspace, and territorial seas. No nation has the right to violate another nation's territorial integrity, and force may be used to preserve that integrity consistent with the customary right of self-defense.

C. Collective Self-Defense.

1. To constitute a legitimate act of collective self-defense, all conditions for the exercise of an individual State's right of self-defense must be met, along with the additional requirement that assistance must be requested by the State to be defended. There is *no* recognized right of a third-party State to unilaterally intervene in internal conflicts where the issue in question is one of a group's right to self-determination and there is no request by the *de jure* government for assistance.

a. *Collective Defense Treaties and Bilateral Military Assistance Agreements*.

(1) *Collective defense treaties*, such as that of the North Atlantic Treaty Organization (NATO); the Inter-American Treaty of Reciprocal Assistance (the Rio Treaty); the Security Treaty Between Australia, New Zealand, and the United States (ANZUS); and other similar agreements <u>do not</u> provide an international legal basis for the use of U.S. force abroad, *per se*. These agreements simply establish a *commitment* among the parties to engage in "collective self-defense" as required by specified situations, and provide the framework through which such measures are to be taken. From an international law perspective, a legal basis for engaging in measures involving the use of military force abroad must still be established from other sources of international law extrinsic to these collective defense treaties (i.e. there still must be a justifiable need for collective self-defense, or UN Security Council authorization to use force).

(2) The United States has entered into *bilateral military assistance agreements* with numerous countries around the world. These are not defense agreements, and thus impose no commitment on the part of the United States to come to the defense of the other signatory State in any given situation. Moreover, such agreements, like collective defense treaties, also provide no intrinsic legal basis for the use of military force.

D. Anticipatory Self-Defense Under Customary International Law.

1. As discussed above, some States embrace an interpretation of the UN Charter that extends beyond the black letter language of Article 51, under the customary international law principle of "anticipatory self-defense." Anticipatory self-defense justifies using force in anticipation of an "imminent" armed attack. Under this concept, a State is not required to absorb the "first hit" before it can resort to the use of force in self-defense to repel an imminent attack.

2. Anticipatory self-defense finds its roots in the 1837 *Caroline* case and subsequent correspondence between then-U.S. Secretary of State Daniel Webster and his British Foreign Office counterpart Lord Ashburton. Secretary Webster posited that a State need not suffer an actual armed attack before taking defensive action, but may engage in anticipatory self-defense if the circumstances leading to the use of force are "instantaneous, overwhelming, and leaving no choice of means and no moment for deliberation." As with any form of self-defense, the principles of necessity and proportionality serve to bind the actions of the offended State.

3. Because the invocation of anticipatory self-defense is fact-specific in nature, and therefore appears to lack defined standards of application, it remains controversial in the international community. Concerns over extension of anticipatory self-defense as a pretext for reprisal or even preventive/preemptive actions (i.e. the use of force before the coalescence of an actual threat) have not been allayed by contemporary use. The United States in particular, in actions such as OPERATION ELDORADO CANYON (the 1986 strike against Libya) and the 1998 missile attack against certain terrorist elements in Sudan and Afghanistan, has increasingly employed anticipatory self-defense as the underlying rationale for use of force in response to actual or attempted acts of violence against U.S. citizens and interests.

4. It is important to note, however, that anticipatory self-defense serves as a foundational element in the CJCS Standing ROE, as embodied in the concept of "hostile intent," which makes it clear to commanders that they do not, and should not have to absorb the first hit before their right and obligation to exercise self-defense arises.

E. Preemptive Use of Force.

1. In the 2002 National Security Strategy, the U.S. Government took a step toward what many view as a significant expansion of use of force doctrine from anticipatory self-defense to preemption.[7] This position was reinforced in the 2006 National Security Strategy, which reaffirmed the doctrine of preemptive self-defense.[8]

> We must be prepared to stop rogue states and their terrorist clients before they are able to threaten or use weapons of mass destruction against the United States and our allies and friends. Our response must take full advantage of strengthened alliances, the establishment of new partnerships with former adversaries, innovation in the use of military forces, modern technologies …
>
> It has taken almost a decade for us to comprehend the true nature of this new threat. Given the goals of rogue states and terrorists, the United States can no longer solely rely on a reactive posture as we have in the past. The inability to deter a potential attacker, the immediacy of today's threats, and the magnitude of potential harm that could be caused by our adversaries' choice of weapons, do not permit that option. We cannot let our enemies strike first.[9]

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[7] The White House, *The National Security Strategy of the United States of America*, (2002).

[8] The White House, *The National Security Strategy of the United States of America*, (2006).

[9] The White House, *The National Security Strategy of the United States of America*, 14-15 (2002).

2. The reason for this change can be seen in the very nature of the terrorist threat.

> For centuries, international law recognized that nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack. Legal scholars and international jurists often conditioned the legitimacy of preemption on the existence of an imminent threat-most often a visible mobilization of armies, navies and air forces preparing to attack.
>
> We must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries. Rogue states and terrorists do not seek to attack us using conventional means. They know such attacks would fail. Instead, they rely on acts of terror and potentially, the use of weapons of mass destruction-weapons that can be easily concealed, delivered covertly, and used without warning.[10]

3. For almost two centuries, the right of anticipatory self-defense has been predicated upon knowing, with a reasonable level of certainty, the time and place of an enemy's forthcoming attack. In this age of terrorism, where warnings may not come in the guise of visible preparations, the President has determined that the United States will not wait because the risks are far too great. In that regard, the Bush Administration has provided: "The greater the threat, the greater is the risk of inaction – and the more compelling the case for taking action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack."[11]

IV. DOMESTIC LAW AND THE USE OF FORCE: THE WAR POWERS RESOLUTION

A. In addition to the requirement that a use of force have an *international* legal basis, there must also exist *domestic* legal support. In every situation involving the possible use of U.S. forces abroad, one of the first legal determinations to be made embraces the application of U.S. Constitutional principles and the 1973 War Powers Resolution.[12]

B. The Constitution divides the power to wage war between the Executive and Legislative branches of government. Under Article I, Congress holds the power to declare war; to raise and support armies; to provide and maintain a navy; and to make all laws necessary and proper for carrying out those responsibilities. Balancing that legislative empowerment, Article II vests the Executive power in the President and makes him the Commander-in-Chief of the Armed Forces. This bifurcation of the war powers created an area in which the coordinate political branches of government exercise concurrent authority over decisions relating to the use of Armed Forces overseas as an instrument of U.S. foreign policy.

C. Until 1973, a pattern of Executive initiative, Congressional acquiescence, and Judicial deference combined to give the President primacy in decisions to employ U.S. forces. In order to reverse the creeping expansion of Presidential authority and to reassert its status as a "full partner" in decisions relating to the use of U.S. forces overseas, Congress passed, over Presidential veto, the War Powers Resolution (WPR). The stated purpose of the WPR is to ensure the "collective judgment" of both the Executive and Legislative branches in order to commit to the deployment of U.S. forces by requiring consultation of and reports to Congress, in any of the following circumstances:

1. Introduction of troops into actual hostilities.

2. Introduction of troops, equipped for combat, into a foreign country.

3. Greatly enlarging the number of troops, equipped for combat, in a foreign country.

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[10] *Id*. at 15.

[11] *Id*. at 15.

[12] Public Law 93-148, 50 U.S.C. §§ 1541-1548.

D. The President is required to make such reports within 48 hours of the triggering event, detailing: the circumstances necessitating introduction or enlargement of troops; the Constitutional or legislative authority upon which he bases his action; and the estimated scope and duration of the deployment or combat action.

E. The issuance of such a report, or a demand by Congress for the President to issue such a report, triggers a sixty-day clock. If Congress does not declare war, specifically authorize the deployment/combat action, or authorize an extension of the WPR time limit during that period, the President is required to withdraw deployed forces. The President may extend the deployment for up to thirty days should he find circumstances so require, or for an indeterminate period if Congress has been unable to meet due to an attack upon the United States.

F. Because the WPR was enacted over the President's veto, one of the original purposes of the statute—establishment of a consensual, inter-branch procedure for committing our forces overseas—was undercut. In that regard, no President has either conceded the constitutionality of the WPR, or complied fully with its mandates. Although the applicability of the WPR to specific operations will not be made at the Corps or Division level, once U.S. forces are committed overseas, a deploying JA must be sensitive to the impact of the WPR on the scope of operations, particularly with respect to the time limitation placed upon deployment under independent Presidential action (i.e. the WPR's 60-90 day clock).

G. Procedures have been established which provide for CJCS review of all deployments that may implicate the WPR. The Chairman's Legal Advisor, upon reviewing a proposed force deployment, is required to provide to the DoD General Counsel his analysis of the WPR's application. If the DoD General Counsel makes a determination that the situation merits further inter-agency discussion, he or she will consult with both the State Department Legal Adviser and the Attorney General. As a result of these discussions, advice will then be provided to the President concerning the consultation and reporting requirements of the WPR.

H. In the unlikely event that a JA or his or her supported commander is presented with a question regarding the applicability of the WPR, the appropriate response should be that the operation is being conducted at the direction of the National Command Authority, and is therefore presumed to be in accordance with applicable domestic legal limitations and procedures.

NOTES

NOTES

CHAPTER 2

THE LAW OF WAR

REFERENCES

1. Hague Convention No. IV, 18 October 1907, Respecting the Laws and Customs of War on Land, T.S. 539, including the regulations thereto [hereinafter H. IV].
2. Hague Convention No. IX, 18 October 1907, Concerning Bombardment by Naval Forces in Time of War, 36 Stat. 2314 [hereinafter H. IX].
3. Geneva Convention, for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, August 12, 1949, 6 U.S.T. 3114, T.I.A.S. 3362, 75 U.N.T.S. 31 [hereinafter GWS].
4. Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members, August 12, 1949, 6 U.S.T. 3217, T.I.A.S. 3363, 75 U.S.T.S. 85 [hereinafter GWS Sea].
5. Geneva Convention, Relative to the Treatment of Prisoners of War, August 12, 1949, 6 U.S.T. 3316, T.I.A.S. 3364, 75 U.N.T.S. 135 [hereinafter GPW].
6. Geneva Convention, Relative to the Protection of Civilian Persons in Time of War, August 12, 1949, 6 U.S.T. 3516, T.I.A.S. 3365, 75 U.N.T.S. 287 [hereinafter GC].
7. The 1977 Protocols Additional to the Geneva Conventions, December 12, 1977, 16 I.L.M. 1391, DA Pam 27-1-1 [hereinafter AP I & II];* Protocol Additional to the Geneva Conventions, August 12, 2005 [hereinafter AP III].
8. Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous, or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571, 94 L.N.T.S. 65 [hereinafter 1925 Geneva Protocol].
9. Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, January 13, 1993, 32 I.L.M. 800 [hereinafter CWC].
10. 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 216 [hereinafter 1954 Cultural Property Convention].*
11. Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, April 10, 1972, 26 U.S.T. 583 [hereinafter BWC].
12. United Nations Convention on Prohibitions or Restrictions of the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, October 10, 1980, 19 I.L.M. 1523 [hereinafter UNCCW].
13. U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE (dated 18 July 1956, including change 1 dated 15 July 1976) [hereinafter FM 27-10].
14. U.S. DEP'T OF THE NAVY, NAVAL WARFARE PUBLICATION 1-14M/U.S. Marine Corps MCPW 5-2.1, THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS (July 2007) [hereinafter NWP 1-14M].
15. U.S. DEP'T OF DEFENSE, INSTR. 5000.2, OPERATION OF THE DEFENSE ACQUISITION SYSTEM (12 May 2003).
16. U.S. DEP'T OF DEFENSE, DIR. 2311.01E, DoD LAW OF WAR PROGRAM (9 May 2006) (cancelling DoDD 5100.77, DoD Law of War Program (9 December 1998)).
17. JOINT CHIEFS OF STAFF, INSTR. 5810.01B, IMPLEMENTATION OF THE DoD LAW OF WAR PROGRAM (dated 25 March 2002, current as of 28 March 2005).

*Treaties not ratified by United States.

I. INTRODUCTION

This Chapter will summarize key law of war (LOW) provisions for military personnel and commanders in the conduct of operations in both international and non-international armed conflicts. It will discuss the purposes and basic principles of the LOW, its application in armed conflict, the legal sources of the law, the conduct of hostilities, treatment of protected persons, military occupation of enemy territory, neutrality, and compliance and enforcement measures.

II. DEFINITION

The LOW is defined as "that part of international law that regulates the conduct of armed hostilities." (DoDD 2311.01E para. 3.1). It is often termed "the law of armed conflict." The LOW encompasses all international law for the conduct of hostilities binding on the United States or its individual citizens, including treaties and international agreements to which the United States is a party, and applicable customary international law. (DoDD 2311.01E para. 3.1)

III. POLICY

U.S. LOW obligations are national obligations, binding upon every Soldier, Sailor, Airman, and Marine. DoD policy is to comply with the LOW "during all armed conflicts, however such conflicts are characterized, and in all other military operations." (DoDD 2311.01E para. 41).

IV. PURPOSES AND BASIC PRINCIPLES OF THE LAW OF WAR

A. The fundamental purposes of the LOW are humanitarian and functional in nature. The humanitarian purposes include:

1. protecting both combatants and noncombatants from unnecessary suffering;
2. safeguarding persons who fall into the hands of the enemy; and
3. facilitating the restoration of peace.

B. The functional purposes include:

1. ensuring good order and discipline;
2. fighting in a disciplined manner consistent with national values; and
3. maintaining domestic and international public support.

V. THE LAW OF WAR RESTS ON FOUR BASIC PRINCIPLES:

A. Principle of Military Necessity. The principle of *military necessity* is explicitly codified in Article 23, paragraph (g) of the Annex to Hague IV, which forbids a belligerent "to destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war."

1. The principle of military necessity authorizes that use of force required to accomplish the mission. Military necessity does not authorize acts otherwise prohibited by the LOW. This principle must be applied in conjunction with other LOW principles discussed in this chapter, as well as other, more specific legal constraints set forth in LOW treaties to which the U.S. is a party.

2. *Military necessity is not a criminal defense.* As stated above, military necessity is not a defense for acts expressly prohibited by law.

a. *Protected Persons*. The LOW generally prohibits the intentional targeting of protected persons under any circumstances.

b. *Protected Places - The Rendulic Rule*. Generally, civilian objects are protected from intentional attack or destruction. However, civilian objects may lose their protections if they are being used for military purposes or if there is military necessity for their destruction or seizure. Civilian objects may, in such circumstances, become military objectives (discussed *infra*). The LOW permits destruction of these objects if military circumstances necessitate such destruction. (FM 27-10, paras. 56 & 58). The circumstances justifying destruction of objects are those of military necessity, based upon information reasonably available to the commander at the time of his decision. *See* IX Nuremberg Military Tribunals, *Trials of War Criminals Before the Nuremberg*

Military Tribunals, 1113 (1950). The Nuremberg Tribunal convicted General Lothar Rendulic of other charges, but found him "not guilty" of unlawfully destroying civilian property through employment of a "scorched earth" policy. The court found that "the conditions, as they appeared to the defendant at the time were sufficient upon which he could honestly conclude that urgent military necessity warranted the decision made." Current norms for protection (and destruction) of civilian property: civilian objects are protected from intentional attack or damage unless they have become military objectives and "unless demanded by the necessities of war." (Hague IV, art. 23(g)).

c. There may be situations where, because of incomplete intelligence or the failure of the enemy to abide by the LOW, civilian casualties occur. Example: Al Firdus Bunker. During the first Persian Gulf War (1991), U.S. military planners identified this Baghdad bunker as an Iraqi military command and control center. Barbed wire surrounded the complex, it was camouflaged, armed sentries guarded its entrance and exit points, and electronic intelligence identified its activation. Unknown to coalition planners, however, some Iraqi civilians used upper levels of the facility as nighttime sleeping quarters. The bunker was bombed, allegedly resulting in 300 civilian casualties. Was there a violation of the LOW? No, at least not by the U.S. forces (there was, however, a clear violation of the principle of distinction and discrimination (discussed *infra*) by Iraqi forces). Based upon information gathered by Coalition planners, the commander made an assessment that the target was a military objective. Although the attack may have resulted in unfortunate civilian deaths, there was no LOW violation because the attackers acted in good faith based upon the information reasonably available at the time the decision to attack was made. *See* IX Nuremberg Military Tribunals, *Trials of War Criminals Before the Nuremberg Military Tribunals*, 1113 (1950).

B. Principle of Distinction or Discrimination . This principle requires that combatants be distinguished from noncombatants, and that military objectives be distinguished from protected property or protected places. Parties to a conflict shall direct their operations only against combatants and military objectives. (AP I, art. 48).

1. AP I prohibits "indiscriminate attacks." As examples, under Article 51, paragraph 4, these are attacks that:

a. are "not directed against a specific military objective," (e.g., Iraqi SCUD missile attacks on Israeli and Saudi cities during the Persian Gulf War);

b. "employ a method or means of combat the effects of which cannot be directed at a specified military objective," (e.g., might prohibit area bombing in certain populous areas, such as a bombardment "which treats as a single military objective a number of clearly separated and distinct military objectives in a city, town, or village . . ." (AP I, art. 51, para. 5(a))); **or**

c. "employ a method or means of combat the effects of which cannot be limited as required" by the Protocol (e.g., release of dangerous forces (AP I, art. 56) or collateral damage excessive in relation to concrete and direct military advantage (AP I, art. 51, para. 5(b)); **and**

d. "consequently, in each case are of a nature to strike military objectives and civilians or civilian objects without distinction."

2. *Distinction* is the customary international law obligation of parties to a conflict to engage only in military operations the effects of which distinguish between the civilian population (or individual civilians not taking part in the hostilities), and combatant forces, directing the application of force solely against the latter. Similarly, military force may be directed only against military objectives, and not against civilian objects. Under the principle of distinction, the civilian population as such, as well as individual civilians, may not be made the object of attack. (AP I, art. 51, para. 2).

C. Principle of Proportionality. The anticipated loss of life and damage to property incidental to attacks must not be excessive in relation to the *concrete and direct* military advantage expected to be gained. (FM 27-10, para. 41, change 1). Proportionality is not a separate legal standard as such, but a way in which a military commander may assess his or her obligations as to the LOW principle of *distinction*, while avoiding actions that are indiscriminate.

1. *Incidental Injury and Collateral Damage.* Collateral damage consists of unavoidable and unintentional damage to civilian personnel and property incurred while attacking a military objective. Incidental (a/k/a collateral) damage is *not* a violation of international law. While no LOW treaty defines this concept, its inherent lawfulness is implicit in treaties referencing the concept. As stated above, Additional Protocol I, Article 51(5) describes

indiscriminate attacks as those causing "*incidental* loss of civilian life . . . excessive . . . to . . . the military advantage anticipated."

2. That being said, the term "attacking" is not well defined in the sense of the principle of proportionality, or as to the level at which such decisions are to be made. "Military advantage" is not restricted to tactical gains, but is linked to the full context of war strategy. Balancing between collateral damage to civilian objects and collateral civilian casualties may be done on a target-by-target basis, as frequently was done in the first (1991) and second (2003) Persian Gulf Wars, but also may be weighed in overall terms against campaign objectives. It may involve a variety of considerations, including security of the attacking force. See, for example, DoD Final Report to Congress, Conduct of the Persian Gulf War (April 1992), p. 611. Similarly, at the time of its ratification of Additional Protocol I, the United Kingdom declared that "'the military advantage anticipated from an attack' is intended to refer to the advantage anticipated from the attack considered as a whole and not only from isolated or particular parts of the attack."

D. Principle of Humanity or Unnecessary Suffering. A military force must minimize unnecessary suffering. "It is especially forbidden . . . to employ arms, projectiles or material calculated to cause unnecessary suffering." (Hague IV, art. 23(e)). This principle applies to the legality of weapons and ammunition as well as to the method in which weapons and ammunition are used. Military personnel may not use arms that are per se calculated to cause unnecessary suffering, sometimes referred to as superfluous injury (e.g., projectiles filled with glass, hollow point or soft-point small caliber ammunition, lances with barbed heads) or use otherwise lawful weapons in a manner calculated to cause unnecessary suffering.

1. The prohibition of *unnecessary suffering* constitutes acknowledgement that *necessary suffering* to combatants is lawful, and may include severe injury or loss of life. There is no agreed definition for unnecessary suffering. A weapon or munition would be deemed to cause unnecessary suffering only if it inevitably or in its normal use has a particular effect, and the injury caused is considered by governments as disproportionate to the military necessity for it, that is, the military advantage to be gained from its use. This balancing test cannot be conducted in isolation. A weapon's or munition's effects must be weighed in light of comparable, lawful weapons or munitions in use on the modern battlefield.

2. A weapon cannot be declared unlawful merely because it *may* cause severe suffering or injury. The appropriate determination is whether a weapon's or munition's employment for its normal or expected use would be prohibited under some or all circumstances. The correct criterion is whether the employment of a weapon for its normal or expected use inevitably would cause injury or suffering manifestly disproportionate to its military effectiveness. A State is not required to foresee or anticipate all possible uses or misuses of a weapon, for almost any weapon can be used in ways that might be prohibited.

3. See discussion of the DoD Weapons Review Program, *infra*.

VI. APPLICATION OF THE LAW OF WAR

A. The LOW applies to all cases of declared war or any other armed conflicts that arise between the United States and other nations, even if the state of war is not recognized by one of them. This threshold is codified in Common Article 2 of the Geneva Conventions. Armed conflicts such as the 1982 Falklands War, the Iran-Iraq War of the 1980s, and the first (1991) and second (2003) U.S.-led coalition wars against Iraq clearly were international armed conflicts to which the LOW applied. The Additional Protocol I to the 1949 Geneva Conventions has expanded this scope of application to include certain wars of "national liberation" for States who are parties to that convention. The United States is not a Party to AP I and does not recognize this extension of the LOW. Further, this expanded scope has not been applied since its promulgation.

1. In peace operations, such as those in Somalia, Haiti, and Bosnia, the question frequently arises whether the LOW applies. The issue is less applicability of the LOW as such but complete applicability of particular treaties. Despite the possible inapplicability of the LOW in military operations short of international armed conflict, it has been, nonetheless, the position of the United States, United Nations, and NATO that their forces would apply the LOW in these operations. (CJCSI 5810.01B) IAW DoDD 2311.01E, U.S. forces now comply with the LOW during all military operations. However, the directive itself defines the "law of war," limiting it to "international law . . . binding on the United States or its individual citizens." When facing situations that do not meet the traditional threshold of armed conflict (whether of an international or non-international character), Judge Advocates (JA) are encouraged to use the technical chain to determine how best to comply with the LOW, bearing in mind historical U.S. practice.

2. Historically, when applying the DoD policy, allowances have been made for the fact that during these operations U.S. forces often do not have the resources to comply with the LOW to the letter. It has been U.S. practice to comply with the LOW to the extent "practicable and feasible" where not directly applicable. (Memorandum of W. Hays Parks to the Judge Advocate General of the Army, 1 October 1990). The Soldier's Rules provide useful standards for the individual Soldier in the conduct of operations across the conflict spectrum. In military operations short of international armed conflict, LOW treaties provide an invaluable template for military conduct. It will be the responsibility of the military commander, with the assistance and advice of the JA, to determine those provisions that best fit the mission and situation.

VII. SOURCES OF THE LAW OF WAR.

A. The Law of The Hague (ref. (1) and (2)). These treaties regulate "methods and means" of warfare, including: prohibitions against using certain weapons such as poison; humanitarian concerns such as warning the civilian population before a bombardment; and the law of belligerent occupation (particularly with respect to property).) The rules relating to the methods and means of warfare are primarily derived from articles 22 through 41 of the Regulations Respecting the Laws and Customs of War on Land annexed to Hague Convention IV. (Hauge IV, art. 22-41).

B. Geneva Conventions of 1949 (ref. (3) - (6)). The Conventions protect "victims" of war such as wounded and sick, shipwrecked at sea, prisoners of war, and civilians.

C. 1977 Geneva Protocols (ref. (7)). Although the United States has not ratified AP I and II, most nations have ratified AP I. U.S. commanders must be aware that many allied forces are under a legal obligation to comply with the Protocols, and the United States believes some provisions of the Protocol to be customary international law (see 1986 memorandum from Hays Parks in document supplement). This difference in obligation has not proven to be a hindrance to U.S. allied or coalition operations since promulgation of AP I in 1977.

D. **Other Treaties**. The following treaties restrict specific aspects of warfare:

1. *Chemical Weapons* (ref. (8) and (9)). The Geneva Protocol of 1925 prohibits use in war of asphyxiating, poisonous, or other gases (and bacteriological weapons; see below). The United States reserved the right to respond with chemical weapons to a chemical or biological weapons attack by the enemy. This reservation became moot when the United States ratified the Chemical Weapons Convention (CWC), which prohibits production, acquisition, stockpiling, retention, and use (even in retaliation). The United States ratified the CWC on 25 April 1997 with declarations. The CWC entered into force on 29 April 1997.

2. *Cultural Property* (ref. (10)). The 1954 Hague Cultural Property Convention prohibits targeting cultural property, and sets forth conditions when cultural property may be used by a defender or attacked. Although the United States has not ratified the treaty, it regards its provisions as relevant to the targeting process: "United States policy and the conduct of operations are entirely consistent with the Convention's provisions. In large measure, the practices required by the convention to protect cultural property were based upon the practices of US military forces during World War II." (Message from the President of the United States transmitting the Hague Protocol to the 106th Congress for Advice and Consent, 6 January 1999).

3. *Biological Weapons* (ref. ((8), 11)). Biological (bacteriological) weapon use was prohibited by the 1925 Geneva Protocol. It does not prohibit development, production, and stockpiling. The 1972 Biological Weapons Convention (BWC) extended the prohibition contained in the 1925 Geneva Protocol, prohibiting development, production, stockpiling, acquisition, or retention of biological agents or toxins, weapons, equipment or means of delivery designed to use such toxins for hostile purposes or in armed conflict.

4. *Conventional Weapons* (ref. (12)). The treaty is often referred to as the UNCCW - United Nations Convention on Certain Conventional Weapons. The 1980 Conventional Weapons Treaty restricts, regulates, or prohibits the use of certain otherwise lawful conventional weapons. Protocol I prohibits any weapon whose primary effect is to injure by fragments which, when in the human body, escape detection by x-ray. Protocol II regulates use of mines, booby-traps, and other devices, while prohibiting certain types of anti-personnel mines to increase protection for the civilian population. The original Protocol II was replaced in 1996 by an Amended Mines Protocol, now Amended Protocol II. Protocol III regulates incendiary weapon use to increase protection for the civilian population. Protocol IV prohibits so-called "blinding laser weapons." Protocol V on explosive remnants of war was adopted on 28 November 2003 – the first international agreement to require the parties to an armed conflict, where feasible, to clear or assist the host nation or others in clearance of unexploded ordnance or abandoned

explosive ordnance after the cessation of active hostilities. The United States ratified the UNCCW and Protocols I and II in 1995, and Amended Mines Protocol in 1999.

E. Regulations. Implementing LOW guidance for U.S. armed forces is found in respective service manuals (FM 27-10 (Army), NWP 1-14M/FMFM 1-10 (Navy and Marine Corps), and AFPD 51-4 (Air Force).)

VIII. THE CONDUCT OF HOSTILTIES

A. Lawful Combatants and Unprivileged Belligerents

1. *Combatants*. Generally, combatants are military personnel engaging in hostilities in an armed conflict on behalf of a party to the conflict. Combatants are lawful targets unless "out of combat," that is, wounded, sick or shipwrecked and no longer resisting, or captured.

a. *Lawful Combatants*. As defined, a lawful combatant:

(1) Is entitled to carry out attacks on enemy military personnel and equipment;

(2) May be the subject of lawful attack by enemy military personnel;

(3) Bears no criminal responsibility for killing or injuring enemy military personnel or civilians taking an active part in hostilities, or for causing damage or destruction to property, provided his or her acts have been in compliance with the LOW;

(4) May be tried for breaches of the LOW;

(5) May only be punished for breaches of the LOW as a result of a fair and regular trial;

(6) If captured, must be treated humanely; and

(7) If captured, is entitled to prisoner of war status.

b. *1949 Geneva Conventions criteria* (GPW, art. 4; GWS, art. 13). Combatants include: the regular armed forces of a State Party to the conflict; militia, volunteer corps, and organized resistance movements belonging to a State Party to the conflict that are under responsible command, wear a fixed distinctive sign recognizable at a distance, carry their arms openly, and abide by the laws of war; and members of armed forces of a government not recognized by a detaining authority or occupying power. This list is a summary, but is not intended to be comprehensive or complete.

c. *Protocol I Definition*. Article 43 states that members of the armed forces of a party to the conflict, except medical personnel and chaplains, are combatants. Article 44(3) of AP I allows a belligerent to attain combatant status by carrying his arms openly during each military engagement and when visible to an adversary while deploying for an attack. Additional Protocol I thus drops the requirement for a fixed recognizable sign. The United States believes this does not reflect customary international law and diminishes the distinction between combatants and civilians, thus undercutting the effectiveness of the LOW. Other governments, such as the United Kingdom, through reservations and/or statements of understanding, have narrowly restricted or virtually eliminated application of Article 44, para. 3.

d. *Unprivileged belligerents*. Unprivileged belligerents may include spies, saboteurs, or civilians who are participating in the hostilities or who otherwise engage in unauthorized attacks or other combatant acts. Unprivileged belligerents are not entitled to prisoner of war status and may be prosecuted under the domestic law of the captor.

2. *Forbidden Conduct with Respect to Enemy Combatants and Nationals*

a. It is especially forbidden to declare that no quarter will be given or to kill or injure enemy personnel who have surrendered. (Hague IV, art. 23). It is also forbidden to kill treacherously or wound treacherously individuals belonging to the hostile nation or armed forces. (Hague IV, art. 23). Belligerents are likewise prohibited from compelling nationals of the enemy state to take part in hostilities against their own country. (Hague IV, art. 23).

b. *Assassination*. Hiring assassins, putting a price on the enemy's head, and offering rewards for an enemy "dead or alive" is prohibited. (FM 27-10, para 31; E.O. 12333). Offering rewards for information that may lead to the capture of an individual is not prohibited, and targeting military command and control is not

assassination. See W. Hays Parks, *Memorandum of Law: Executive Order 12333 and Assassination*, Army Law. Dec. 1989, at 4.

3. *Civilians and Noncombatants*. The LOW prohibits intentional attacks on civilians and non-combatants. The civilian population as such is protected from direct attack. An individual civilian is protected from direct attack unless and for such time as he or she takes part in hostilities.

a. Noncombatants include: military medical personnel, chaplains, and those out of combat, including prisoners of war and the wounded, sick, and shipwrecked.

b. Civilians who accompany the armed forces in the field in time of armed conflict are protected from direct attack unless and for such time as they take part in hostilities. Civilians who accompany the armed forces in the field may be at risk of injury or death incidental to lawful enemy attacks on military objectives.

IX. METHODS AND MEANS OF WARFARE/WEAPONS

A. "The right of belligerents to adopt means of injuring the enemy is not unlimited." (HR, art. 22.)

B. Legal Review. All U.S. weapons, weapons systems, and munitions must be reviewed by the service TJAG or DoD General Counsel for legality under the LOW. (DoDD 5000.1, AR 27-53, AFI 51-402 and SECNAVINST 5000.2c). A review occurs before the award of the engineering and manufacturing development contract and again before the award of the initial production contract. (DoDD 5000.1). Legal review of new weapons is also required under Article 36 of AP I.

C. Effect of legal review. The weapons review process of the United States entitles commanders and all other personnel to assume that any weapon or munition contained in the U.S. military inventory and issued to military personnel is lawful. If there are any doubts, questions may be directed to the International and Operational Law Division (HQDA, DAJA-IO), Office of The Judge Advocate General of the Army.

1. *Weapons may be illegal*:

a. *Per se*. Those weapons calculated to cause unnecessary suffering, determined by the "usage of states." Examples: lances with barbed heads or projectiles filled with glass. (FM 27-10, para. 34).

b. *Improper use*. Any weapon may be used unlawfully; for example, use of an M9 pistol to murder a prisoner of war. This may not be a violation of the principle of "unnecessary suffering," but would most likely violate the principles of necessity and distinction. Again, illegal use of a lawful weapon does not make the weapon unlawful.

c. *By agreement or prohibited by specific treaties*. Example: certain land mines, booby traps, and "blinding laser weapons" are prohibited by Protocols to the UNCCW. None were declared by the States Parties/drafters to cause unnecessary suffering or to be illegal as such. Anti-personnel land mines and booby traps were regulated (and, in some cases, certain types prohibited) in order to provide increased protection for the civilian population.

(1) **Small Arms Projectiles**. The 1868 Declaration of St. Petersburg prohibits exploding rounds of less than 400 grams. The United States is not a State Party to this declaration, and does not regard it as customary law. State practice since 1868 has limited this prohibition to projectiles weighing less than 400 grams specifically designed to detonate in the human body. Expanding military small arms ammunition – that is, so called 'dum-dum' projectiles, such as soft-nosed (exposed lead core) or hollow point projectiles – are prohibited by the 1899 Hague Declaration Concerning Expanding Bullets. Although the United States is not a party to this declaration, it has followed it in conventional military operations through use of full-metal jacketed ammunition. The prohibition on hollow point/soft nosed military projectiles does not prohibit full-metal jacketed projectiles that yaw or fragment, or "open tip" rifle projectiles containing a tiny aperture to increase accuracy.

(2) **Hollow point or soft point ammunition**. Hollow point or soft-point ammunition contain projectiles with either a hollow point boring into the lead core, or exposed lead core that flatten easily in the human body, often with skiving, and are designed to expand dramatically upon impact at all ranges. This ammunition is prohibited for use in international armed conflict against lawful enemy combatants by the 1899 Hague Declaration mentioned above. There are situations, however, outside of international armed conflict, where use of this ammunition is lawful because its use will significantly reduce collateral damage risk to innocent civilians and friendly force personnel, protected property (during a hostage rescue or for aircraft security), and material containing

hazardous materials. Military law enforcement personnel may be authorized to use this ammunition for law enforcement missions outside an active theater of operations. Military units or personnel are not entitled to possess or use small arms ammunition not issued to them or expressly authorized. Private acquisition of small arms ammunition for operational use is prohibited. "Matchking" ammunition (or similar rifle projectiles by other manufacturers) has an open tip, with a tiny aperture not designed to cause expansion. The projectile is designed to enhance accuracy only, and does not function like a hollow or soft point. It is lawful for use across the conflict spectrum, but may not be modified by soldiers (such as through further opening the tiny aperture to increase the possibility of expansion).

(3) **Land Mines and Booby Traps**. The United States regards land mines (anti-personnel and anti-vehicle) as lawful weapons, subject to the restrictions contained in the Amended Protocol II, UNCCW, and national policy. Military doctrine and mine inventory comply with each.

(4) **U.S. policy on anti-personnel (APL) and anti-vehicle land mines**. Per a February 2004 U.S. Presidential Memorandum, anti-personnel landmines that do not self-destruct or self-neutralize, (sometimes called "dumb" or "persistent" anti-personnel land mines) are only stockpiled for use by the United States in fulfillment of our treaty obligations to the Republic of Korea. Outside Korea, U.S. forces may no longer employ persistent APL, and between now and 2010, anti-vehicle landmines that are persistent may only be employed outside the Republic of Korea when authorized by the President. After 2010, the United States will not employ either persistent APL or persistent anti-vehicle land mines. U.S. Land Mine Policy can be found at http://www.state.gov/t/pm/wra/c11735.htm.

(5) **Incendiaries**. Napalm, flame-throwers, and thermite/thermate type weapons are incendiary weapons. Tracer ammunition and white phosphorous are not incendiary weapons. All are lawful weapons. Protocol III to the UNCCW prohibits the use of incendiaries in certain situations, primarily in concentrations of civilians. The United States has not ratified Protocol III.

(6) **Lasers**. Lasers are lawful. U.S. Policy (SECDEF Memorandum (29 Aug. 1995)) prohibits use of blinding lasers weapons specifically designed to cause permanent blindness to unenhanced vision. This policy recognizes that injury, including permanent blindness, may occur incidental to the legitimate military use of lasers (range-finding, targeting, etc.). U.S. policy became the basis for Protocol IV, UNCCW, which prohibits blinding laser weapons that meet the same definition.

(7) **Poison**. Poison has been outlawed for thousands of years, and is prohibited by treaty. (Hague IV, art. 23(a)).

(8) **Chemical weapons**. Chemical weapons are governed by the Chemical Weapons Convention.

(a) The CWC was ratified by the United States and came into force in April 1997.

(b) Summary of ***Provisions*** (twenty-four articles). Article I. Parties agree to never develop, produce, stockpile, transfer, use, or engage in military preparations to use chemical weapons. Retaliatory use (second use) is *not* allowed (this is a significant departure from 1925 Geneva Protocol). Requires destruction of chemical stockpiles. Each party agrees not to use Riot Control Agents (RCAs) as a "method of warfare." Article II. Defines chemical weapons, toxic chemical, RCA, and purposes not prohibited by the convention. Article III. Requires parties to declare stocks of chemical weapons and facilities they possess. Articles IV and V. Provies procedures for destruction and verification, including routine on-site inspections. Article VIII. Establishes the Organization for the Prohibition of Chemical Weapons (OPWC). Article IX. Establishes "challenge inspection," a short notice inspection in response to another party's allegation of non-compliance.

(c) ***Riot Control Agents*** (RCA). U.S. RCA Policy is found in Executive Order 11850. The policy applies to the use of Riot Control Agents and Herbicides; requiring presidential approval before first use in an armed conflict.

(i) *Executive Order 11850*. The order renounces first use of RCA in armed conflicts *except* in defensive military modes to save lives, such as: controlling riots in areas under direct and distinct U.S. military control, to include rioting prisoners of war; dispersing civilians where the enemy uses them to mask or screen an attack; rescue missions for downed pilots/passengers and escaping POWs in remotely isolated areas; and, in our rear echelon areas outside the zone of immediate combat, to protect convoys from civil disturbances, terrorists, and paramilitary organizations.

(ii) The CWC prohibits RCA use as a "method of warfare." "Method of warfare" is undefined. The Senate's resolution of advice and consent for ratification to the CWC (S. Exec. Res. 75 - Senate Report, S-3373 of 24 April 1997, section 2- conditions, (26) - riot control agents) required that the President must certify that the United States is not restricted by the CWC in its use of riot control agents, including the use against "combatants" in any of the following cases: when the U.S. is not a party to the conflict, in consensual (Chapter VI, UN Charter) peacekeeping operations, and in Chapter VII (UN Charter) peacekeeping operations.

(iii) The implementation section of the Senate resolution requires that the President not modify E.O. 11850. (*See* S. Exec Res. 75, section 2 (26)(b), S-3378). The President's certification document of 25 April 1997 states that "the United States is not restricted by the convention in its use of riot control agents in various peacetime and peacekeeping operations. These are situations in which the United States is not engaged in the use of force of a scope, duration, and intensity that would trigger the laws of war with respect to U.S. forces."

(iv) *Oleoresin Capsicum Pepper Spray* (OC) a/k/a Cayenne Pepper Spray. The United States classifies OC as a Riot Control Agent. (DAJA-IO, Information Paper of 15 August 1996, Use of Oleoresin Capsicum (OC) Pepper Spray and other Riot Control Agents (RCAs); DAJA-IO Memo of 20 September 1994, Subject: Request for Legal Review - Use of Oleoresin Capsicum Pepper Spray for Law Enforcement Purposes; CJCS Memo of 1 July 1994, Subject: Use of Riot Control Agents).

(d) ***Herbicides***. E.O. 11850 renounces first use in armed conflicts, except for domestic uses and to control vegetation around defensive areas.

(9) **Biological**. The 1925 Geneva Protocol prohibits bacteriological methods of warfare. The BWC (ref. 11) supplants the 1925 Geneva Protocol bacteriological weapons provisions, prohibiting the production, stockpiling, and use of biological and toxin weapons. The United States renounced all use of biological and toxin weapons.

(10) **Nuclear Weapons**. Such are not prohibited by international law. On 8 July 1996, the International Court of Justice (ICJ) issued an *advisory* opinion that "[t]here is in neither customary nor international law any comprehensive and universal prohibition of the threat or use of nuclear weapons." However, by a split vote, the ICJ also found that "[t]he threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict." The Court stated that it could not definitively conclude whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defense, in which the very survival of the state would be at stake. (35 I.L.M. 809 (1996)).

X. BOMBARDMENTS, ASSAULTS, AND PROTECTED AREAS AND PROPERTY

A. Military Objectives. Military objectives are defined in AP I as "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." (AP I. art. 52(2)).

1. State practice has identified the following general categories of military objectives:

   a. Military equipment and personnel, units and bases

   b. Command and control

   c. Economic

      (1) Power

      (2) Industry (war supporting manufacturing/export/import)

      (3) Transportation (equipment/LOC/POL)

   d. Geographic

2. Military personnel, equipment, units, and bases are always military objectives. Other objects not expressly military become military objectives when they meet the balance of the above definition.

a. *Explanation*. *Military objective* is a treaty synonym for a potential *lawful target*. The definition sets forth objective, simple criteria when military necessity may exist to consider an object a lawful target that may be seized or attacked.

b. As will be seen in the list of traditional military objectives, a military objective is not limited to military bases, forces, or equipment, but includes other objects that contribute to an opposing state's ability to wage war. It does not alter the statement contained in the Lieber Code that the LOW permits a commander to take "those measures which are indispensable for securing the ends of war" that are not expressly prohibited by the LOW. This may be accomplished through intentional attack of enemy military forces or other military objectives that enable an opposing state and its military forces to wage war.

c. The term *military target* is more limited and redundant, and should not be used. In contrast, the term *civilian target* is an oxymoron, inasmuch as a *civilian object* is an object that is not a military objective, and therefore is immune from intentional attack. *Civilian target* is inappropriate and should not be used. If military necessity exists for the seizure or destruction of a civilian object, that is, if its destruction or seizure meets the criteria set forth in the definition contained in subparagraph a., above, the object has ceased to be a civilian object and has become a military objective.

3. *Interpretation*. The definition of *military objective* contains various elements that require explanation.

a. If the objective is not enemy military forces and equipment, the second part of the definition limits the first. Both parts must apply before an object that is normally a civilian object can be considered a military objective.

b. Attacks on military objectives which may cause collateral damage to civilian objects or collateral injury to civilians not taking a direct part in the hostilities are not prohibited, provided compliance with the other principles of the LOW.

c. *Nature* refers to the type of object. Examples of enemy military objectives which by their *nature* make an effective contribution to the military action: combatants, armored fighting vehicles, weapons, fortifications, combat aircraft and helicopters, supply depots of ammunition and petroleum, military transports, command and control centers, communication stations, etc.

d. *Location* includes areas that are militarily important because they must be captured or denied an enemy, or because the enemy must be made to retreat from them. Examples of enemy military objectives which by their *location* make an effective contribution to the military action: a narrow mountain pass through which the enemy formation must pass, a bridge over which the enemy's main supply route (MSR) crosses, a key road intersection through which the enemy's reserve will pass, etc. A town, village, or city may become a military objective even if it does not contain military objectives if its seizure is necessary to protect a vital line of communications or for other legitimate military reasons.

e. *Purpose* means the future intended or possible use. Examples of enemy military objectives which by their *purpose* make an effective contribution to the military action: civilian buses or trucks which are being transported to the front to move soldiers from point A to B, a factory which is producing ball bearings for the military, etc. While the criterion of *purpose* is concerned with the intended, suspected, or possible future use of an object, the potential dual use of a civilian object, such as a civilian airport, may also make it a military objective because of its future intended or potential military use.

f. *Use* refers to how an object is presently being used. Examples of enemy military objectives which by their *use* make an effective contribution to the military action: an enemy headquarters located in a school, an enemy supply dump located in a residence, or a hotel which is used as billets for enemy troops.

4. The connection of some objects to an enemy's war fighting or war-sustaining effort may be direct, indirect, or even discrete. A decision as to classification of an object as a military objective and allocation of resources for its attack is dependent upon its value to an enemy nation's war fighting or war sustaining effort (including its ability to be converted to a more direct connection), and not solely to its overt or present connection or use.

5. The words "nature, location, and purpose or use" allow wide discretion, but are subject to qualifications stated later in the definition of "effective contribution to military action" and the offering of a "definite military advantage" through its seizure or destruction. There does not have to be a geographical connection between "effective contribution" and "military advantage." Attacks on military objectives in the enemy rear, or diversionary attacks away from the area of military operations as such the "contact zone", are lawful.

6. *Military action* is used in the ordinary sense of the words, and is not intended to encompass a limited or specific military operation.

7. The phrase "in the circumstances ruling at the time" is important. If, for example, enemy military forces have taken position in a building that otherwise would be regarded as a civilian object, such as a school, retail store, or museum, then the building has become a military objective. The circumstances ruling at the time, that is, the military use of the building, permit its attack if its attack would offer a definite military advantage. If the enemy military forces permanently abandon the building, there has been a change of circumstances that precludes its treatment as a military objective.

B. Warning Requirement (Hauge IV, art. 26). The general requirement to warn before a bombardment only applies if civilians are present. Exception: if it is an *assault* (any attack where surprise is a key element), no warning need be given. Warnings need not be specific as to time and location of the attack, but can be general and issued through broadcasts, leaflets, etc.

C. Defended Places (FM 27-10, paras. 39 & 40). As a general rule, any place the enemy chooses to defend makes it subject to attack. Defended places include: a fort or fortified place; a place occupied by a combatant force or through which a force is passing; and a city or town that is surrounded by defensive positions under circumstances where the city or town is indivisible from the defensive positions.

D. Undefended places. The attack or bombardment of towns or villages, which are undefended, is prohibited. (Hauge IV, art. 25).

1. An inhabited place may be declared an undefended place (and open for occupation) if the following criteria are met:

a. All combatants and mobile military equipment are removed;

b. No hostile use is made of fixed military installations or establishments;

c. No acts of hostilities shall be committed by the authorities or by the population; and

d. No activities in support of military operations shall be undertaken (the presence of enemy medical units, enemy sick and wounded, and enemy police forces are allowed). (FM 27-10, art. 39b).

2. While Hauge IV article 25 also includes undefended "habitations or buildings" as protected from attack, the term was used in the context of intentional bombardment. Given the definition (above) of military objective, such structures would be civilian objects and immune from intentional attack unless (a) they were being used by the enemy for military purposes, and (b) their destruction, capture, or neutralization, in the circumstances ruling at the time, would offer a definite military advantage.

3. To gain protection as an undefended place, a city or town must be open to physical occupation by ground forces of the adverse party.

E. Protected Areas. Hospital or safety zones may be established for the protection of the wounded and sick or civilians. (GWS, art. 23; GC, art. 14). Such hospital or safety zones require agreement of the Parties to the conflict. Articles 8 and 11 of the 1954 Hague Cultural Property Convention provide that certain cultural sites may be designated in an "International Register of Cultural Property under Special Protections." The Vatican has qualified for and been registered as "specially protected." Special Protection status requires strict adherence to avoidance of any military use of the property or the area in its immediate vicinity, such as the movement of military personnel or materiel, even in transit.

F. Protected Individuals and Property.

1. *Civilians*. Individual civilians, the civilian population as such, and civilian objects are protected from intentional attack. (FM 27-10, para. 246; AP I, art. 51(2)). A presumption of civilian property attaches to objects traditionally associated with civilian use (dwellings, school, etc. (AP I, art. 52(3)), as contrasted with military objectives. The presence of civilians in a military objective does not alter its status as a military objective.

2. *Protection of Medical Units and Establishments - Hospitals.* (FM 27-10, paras. 257 and 258; GWS, art. 19). Fixed or mobile medical units shall be respected and protected. They shall not be intentionally attacked. Protection shall not cease, unless they are used to commit "acts harmful to the enemy." A warning is required before attacking a hospital in which individuals are committing "acts harmful to the enemy." The hospital is given a

reasonable time to comply with the warning before an attack (AP I, art. 13). When receiving fire from a hospital, there is no duty to warn before returning fire in self-defense. Example: Richmond Hills Hospital, Grenada.

3. *Captured Medical Facilities and Supplies of the Armed Forces*. (FM 27-10, para. 234). Fixed facilities should be used for the care of the wounded and sick, but they may be used by captors for other than medical care, in cases of urgent military necessity, provided proper arrangements are made for the wounded and sick who are present. Mobile facilities - Captors may keep mobile medical facilities, provided they are reserved for care of the wounded and sick. Medical Supplies may not be destroyed.

4. *Medical Transport*. Transports of the wounded and sick or medical equipment shall not be attacked. (GWS, art. 35). Under GWS, article 36, medical aircraft are protected from direct attack only if they fly in accordance with a previous agreement between the parties as to their route, time, and altitude. Additional Protocol I contains a new regime for protection of medical aircraft (articles 24 through 31). To date, there is no State practice with respect to implementation of this regime. As the United States is not a State Party to AP I, it continues to apply the criteria for protection contained in Article 36, GWS. The Distinctive Emblem and other devices set forth in the Amended Annex I to AP I are to facilitate identification. They do not establish status as such (Amended Annex I, articles 1 and 2).

5. *Cultural Property*. Cultural property is protected from intentional attack so long as it is not being used for military purposes, or otherwise may be regarded as a military objective. The 1954 Hague Cultural Property Convention elaborates and slightly amends, but does not expand, the protections accorded cultural property found in other treaties (Hauge IV, art. 27). U.S. ratification is awaiting Senate advice and consent. Cultural property includes buildings dedicated to religion, art, and historic monuments. Misuse will subject them to attack. While the enemy has a duty to indicate the presence of such buildings with visible and distinctive signs, state adherence to the marking requirement has been limited. U.S. practice has been to rely on its intelligence collection to identify such objects in order to avoid attacking or damaging them.

G. Works and Installations Containing Dangerous Forces (AP I, art. 56, and AP II, art. 15). These rules are not United States law but should be *considered* because of the pervasive international acceptance of AP I and II. Under the Protocol, dams, dikes, and nuclear electrical generating stations shall not be attacked (even if they are military objectives) if the attack will cause the release of dangerous forces and cause "severe losses" among the civilian population. Military objectives that are nearby these potentially dangerous forces are also immune from attack if the attack may cause release of the dangerous forces (parties also have a duty to avoid locating military objectives near such locations). Works and installations containing dangerous forces may be attacked only if they provide "significant and direct support" to military operations and attack is the only feasible way to terminate the support.

H. Objects Indispensable to the Survival of the Civilian Population. Article 54 of AP I prohibits starvation as a method of warfare. It is prohibited to attack, destroy, remove, or render useless objects indispensable for survival of the civilian population, such as foodstuffs, crops, livestock, water installations, and irrigation works.

I. Protective Emblems (FM 27-10, para. 238). Objects and personnel displaying emblems are presumed to be protected under the Conventions. (GWS, art. 38).

1. *Medical and Religious Emblems*. The recognized emblems are the Red Cross, Red Crescent, and newly added Red Crystal (AP III). The Red Lion and Sun and Red Star of David were proposed as additional emblems not mentioned in the 1949 Geneva Convention, and, while not officially recognized, were protected as a matter of practice during the periods they were used.

2. *Cultural Property Emblems*. "A shield, consisting of a royal blue square, one of the angles of which forms the point of the shield and of a royal blue triangle above the square, the space on either side being taken up by a white triangle." (1954 Cultural Property Convention, art. 16 and 17).

3. *Works and Installations Containing Dangerous Forces*. Three bright orange circles, of similar size, placed on the same axis, the distance between each circle being one radius. (AP I, annex I, art. 16).

XI. Stratagems and Tactics

A. Ruses. (FM 27-10, para. 48). Injuring the enemy by legitimate deception. Examples of ruses:

1. *Land Warfare*. Creation of fictitious units by planting false information, putting up dummy installations, false radio transmissions, using a small force to simulate a large unit, feints, etc. (FM 27-10, para. 51.)

a. *1991 Gulf War*: Coalition forces, specifically XVIII Airborne Corps and VII Corps, used deception cells to create the impression that they were going to attack near the Kuwaiti boot heel, as opposed to the "left hook" strategy actually implemented. XVIII Airborne Corps set up "Forward Operating Base Weasel" near the boot heel, consisting of a phony network of camps manned by several dozen soldiers. Using portable radio equipment, cued by computers, phony radio messages were passed between fictitious headquarters. In addition, smoke generators and loudspeakers playing tape-recorded tank and truck noises were used, as were inflatable Humvees and helicopters. Rick Atkinson, *Crusade*, 331-33 (1993).

2. *Use of Enemy Property*. Enemy property may be used to deceive under the following conditions:

a. *Uniforms*. Combatants may wear enemy uniforms but cannot fight in them with the intent to deceive. An escaping prisoner of war may wear an enemy uniform or civilian clothing to affect his escape (GPW, art. 93). Military personnel captured in enemy uniform or civilian clothing risk being treated as spies (FM 27-10, para. 54, 74; NWP 1-14M, para. 12.5.3; AFP 110-31, 8-6).

b. *Colors*. The U.S. position regarding the use of enemy flags is consistent with its practice regarding uniforms, i.e., the United States interprets the "improper use" of a national flag (Hauge IV, art. 23(f)) to permit the use of national colors and insignia of the enemy as a ruse as long as they are not employed during actual combat (FM 27-10, para. 54; NWP 1-14M, para 12.5). Note the Protocol I position on this issue below.

c. *Equipment*. Forces must remove all enemy insignia in order to fight with the equipment. Captured supplies: may seize and use if state property. Private transportation, arms, and ammunition may be seized, but must be restored and compensation fixed when peace is made. (Hauge IV, art. 53).

d. *Protocol I*. AP I, Article 39(2) prohibits the use in international armed conflict of enemy flags, emblems, uniforms, or insignia while engaging in attacks or "to shield, favor, protect or impede military operations." The United States does not consider this article reflective of customary law. This article, however, expressly does not apply to naval warfare (AP I, art 39(3); NWP 1-14M, para. 12.5.1).

B. Psychological Operations. Psychological operations are lawful. In the 1991 Gulf War, U.S. PSYOP units distributed over 29 million leaflets to Iraqi forces. The themes of the leaflets were the "futility of resistance; inevitability of defeat; surrender; desertion and defection; abandonment of equipment; and blaming the war on Saddam Hussein." It was estimated that nearly 98% of all Iraqi prisoners acknowledged having seen a leaflet; 88% said they believed the message; and 70% said the leaflets affected their decision to surrender. Adolph, *PSYOP: The Gulf War Force Multiplier*, Army Magazine 16 (December 1992).

C. Treachery and Perfidy. Treachery and perfidy are prohibited under the LOW. (Hauge IV. art. 23(b)). Perfidy involves injuring the enemy by his adherence to the LOW (actions are in bad faith). Perfidy degrades the protections and mutual restraints developed in the interest of all Parties, combatants, and civilians. In practice, combatants find it difficult to respect protected persons and objects if experience causes them to believe or suspect that the adversaries are abusing their claim to protection under the LOW to gain a military advantage. (FM 27-10, para. 50).

1. *Feigning and Misuse*. Feigning is treachery that results in killing, wounding, or capture of the enemy. Misuse is an act of treachery resulting in some other advantage to the enemy. According to AP I, Article 37(1), the killing, wounding, or capture via "[a]cts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence [are perfidious, and thus prohibited acts]" as such. An act is perfidious only where the feigning of civilian status or other act is a proximate cause in the killing of enemy combatants. It was not made a Grave Breach in AP I, and the prohibition applies only in international armed conflict.

2. *Other prohibited acts include*:

a. Use of a flag of truce to gain time for retreats or reinforcements. (Hauge IV, art 23(f)).

b. Feigning incapacitation by wounds/sickness. (AP I, art. 37(1)(b)).

c. Feigning surrender or the intent to negotiate under a flag of truce. (AP I, art 37(1)(a)).

d. Misuse of the Red Cross, Red Crescent, Red Crystal and cultural property symbols. This provision is designed to reinforce/reaffirm. (Hauge IV, art. 23(f)). GWS requires that military wounded and sick, military

medical personnel (including chaplains), hospitals, medical vehicles, and in some cases, medical aircraft be respected and protected from intentional attack.

D. Espionage. (FM 27-10, para. 75; AP I, art. 46). Acting clandestinely (or on false pretenses) to obtain information for transmission back to their side. Gathering intelligence while in uniform is not espionage. Espionage is not a LOW violation; there is no protection, however, under the Geneva Conventions, for acts of espionage. If captured, a spy may be tried under the laws of the capturing nation. (*See*, UCMJ, art. 106). Reaching friendly lines immunizes the spy for past espionage activities; therefore, upon later capture as a lawful combatant, the alleged "spy" cannot be tried for past espionage.

E. Reprisals. Reprisals are conduct which otherwise would be unlawful, resorted to by one belligerent against enemy personnel or property for acts of warfare committed by the other belligerent in violation of the LOW, for the sole purpose of enforcing future compliance with the LOW. (FM 27-10, para. 497). Individual U.S. Soldiers and units do not have the authority to conduct a reprisal. That authority is retained at the national level.

F. War Trophies/Souvenirs . The LOW authorizes the confiscation of enemy military property. War trophies or souvenirs taken from enemy military property are legal under the LOW. War trophy personal retention by an individual soldier is restricted under U.S. domestic law. Confiscated enemy military property is property of the United States. The property becomes a war trophy, and capable of legal retention by an individual Soldier as a souvenir, only as authorized by higher authority. Pillage, that is, the unauthorized taking of private or personal property for personal gain or use, is expressly prohibited (Hauge IV, art. 47; GWS, art. 15; GWS(Sea), art. 18; GC, art. 33).

1. *War Trophy Policy*. 10 U.S.C. § 2579 requires that all enemy material captured or found abandoned shall be turned in to "appropriate" personnel. The law, which directs the promulgation of an implementing directive and service regulations, contemplates that members of the armed forces may request enemy items as souvenirs. The request would be reviewed by an officer who shall act on the request "consistent with military customs, traditions, and regulations." The law authorizes the retention of captured weapons as souvenirs if rendered unserviceable and approved jointly by DoD and the Bureau of Alcohol, Tobacco, and Firearms (BATF). Implementing directives have not been promulgated.

2. *Guidance*. USCENTCOM General Order Number 1 is perhaps the classic example of a war trophy order. These regulations and policies, and relevant UCMJ provisions must be made known to U.S. forces prior to combat. War trophy regulations must be emphasized early and often, for even those who are aware of the regulations may be tempted to disregard them if they see others doing so.

a. An 11 February 2004 Deputy Secretary of Defense memorandum establishes interim guidance on the collection of war souvenirs for the duration of OPERATION IRAQI FREEDOM and will remain in effect until an updated DoD Directive is implemented. This memorandum provides the following:

(1) War souvenirs shall be permitted by this interim guidance only if they are acquired and retained in accordance with the LOW obligations of the United States. Law of war violations should be prevented and, if committed by U.S. persons, promptly reported, thoroughly investigated, and, where appropriate, remedied by corrective action.

(2) All U.S. military personnel and civilians subject to this policy, operating in the Iraqi theater for operations during OIF shall turn over to officials designated by CDRUSCENTCOM, all captured, found abandoned, or otherwise acquired material, and may not, except in accordance with this interim guidance, take from the Iraqi theater of operations as a souvenir any item captured, found abandoned, or otherwise acquired.

(3) An individual who desires to retain as a war souvenir an item acquired in the Iraqi theater of operations shall request to have the item returned to them as a war souvenir at the time it is turned over to persons designated by CDRUSCENTCOM. Such a request shall be in writing, identify the item, and explain how it was acquired.

(4) War souvenir -- The guidance defines "War Souvenir" as any item of enemy public or private property utilized as war material (i.e., military accouterments) acquired in the Iraqi area of operations during OPERATION IRAQI FREEDOM and authorized to be retained by an individual pursuant to this memorandum. War souvenirs are limited to the following items: (1) helmets and head coverings; (2) uniforms and uniform items such as insignia and patches; (3) canteens, compasses, rucksacks, pouches, and load-bearing equipment; (4) flags (not otherwise prohibited by 10 USC 4714 and 7216); (5) knives or bayonets, other than those defined as weaponry

[in paragraph 3 below]; (6) military training manuals, books, and pamphlets; (7) posters, placards, and photographs; (8) currency of the former regime; or (9) other similar items that clearly pose no safety or health risk, and are not otherwise prohibited by law or regulation. Under this interim guidance, a war souvenir does not include weaponry.

(5) Acquired – A war souvenir is acquired if it is captured, found abandoned, or obtained by any other lawful means. "Abandoned" for purposes of this interim guidance means property left behind by the enemy.

(6) Weaponry – For this guidance, weaponry includes, but is not limited to: weapons; weapons systems; firearms; ammunition; cartridge casings ("brass"); explosives of any type; switchblade knives; knives with an automatic blade opener including knives in which the blade snaps forth from the grip (a) on pressing a button or lever or on releasing a catch with which the blade can be locked (spring knife), (b) by weight or by swinging motion and is locked automatically (gravity knife), or (c) by any operation, alone or in combination, of gravity or spring mechanism and can be locked; club-type hand weapons (for example, blackjacks, brass knuckles, nunchaku); and blades that are (a) particularly equipped to be collapsed, telescoped or shortened, (b) stripped beyond the normal extent required for hunting or sporting, or (c) concealed in other devices (for example, walking sticks, umbrellas, tubes). This definition applies whether an item is, in whole or in part, militarized or demilitarized, standing alone or incorporated into other items (e.g., plaques or frames).

(7) Prohibited Items – For the purposes of this interim guidance, prohibited items include weaponry and personal items belonging to enemy combatants or civilians including, but not limited to: letters, family pictures, identification cards, and "dog tags."

(8) See also MNC-I General Order #1, contained as an appendix to the Criminal Law chapter.

3. The key to a clear and workable war trophy policy is to publicize it before deployment, work it into all exercises and plans, and train with it! When drafting a war trophy policy, consider the "6 Cs":

a. COMMON SENSE—does the policy make sense?

b. CLARITY—can it be understood at the lowest level?

c. CI—is the word out through all command information means available? (Post on unit bulletin boards, post in mess facilities, put in post newspaper, put in PSA on radio, etc.).

d. CONSISTENCY—are we applying the policy across all layers and levels of command? (A policy promulgated for an entire Corps is better than diverse policies within subordinate divisions; a policy that is promulgated by the unified command and applies to all of its components is better still).

e. CUSTOMS—prepare for customs inspections, "courtesy" inspections prior to redeployment, and amnesty procedures.

f. CAUTION—Remember one of the prime purposes of a war trophy policy: to limit soldiers from exposing themselves to danger (in both Panama and the 1991 Persian Gulf War, soldiers were killed or seriously injured by exploding ordnance encountered when they were looking for souvenirs). Consider prohibitions on unauthorized "bunkering," "souvenir hunting," "climbing in or on enemy vehicles and equipment." A good maxim for areas where unexploded ordnance or booby-traps are problems: "If you didn't drop it, don't pick it up."

G. Rules of Engagement. ROE is defined as a set of directives issued by competent superior authority that delineate the circumstances and limitations under which U.S. forces will initiate and/or continue engagement with other forces. ROE are drafted in consideration of the LOW, national policy, public opinion, and military operational constraints. ROE are often more restrictive than what the LOW would allow.

XII. PROTECTED PERSONS

A. Hors de Combat. Prohibition against attacking enemy personnel who are "**out of combat**."

B. Prisoners of War. (GPW, art. 4, Hauge IV, art. 23(c) & (d)).

1. *Surrender*. Surrender may be made by any means that communicates the intent to give up. No clear-cut rule as to what constitutes surrender. However, most agree surrender constitutes a cessation of resistance and placement of one's self at the discretion of the captor. The onus is on the person or force surrendering to communicate intent to surrender. Captors must *respect* (not attack) and *protect* (care for) those who surrender – no reprisals. Civilians captured accompanying the force also receive POW status (GPW, art. 4(a)(4)).

2. *Identification and Status*. The initial combat phase will likely result in the capture of a wide array of individuals.[1] The United States applies a broad interpretation to the term "international armed conflict" set forth in Common Article 2 of the Conventions. Furthermore, DoD Directive 2311.01E, the DoD Law of War Program, states that U.S. forces will comply with the LOW regardless of how the conflict is characterized. Judge Advocates, therefore, should advise commanders that, regardless of the nature of the conflict, all enemy personnel should initially be accorded the protections of the GPW Convention (GPW), at least until their status may be determined. In that regard, recall that "status" is a legal term, while "treatment" is descriptive. When drafting or reviewing guidance to Soldiers, ensure that the guidance mandates treatment, not status. For example, a TACSOP should state that persons who have fallen into the power of U.S. Forces will be "treated as POW," not that such persons "will have the status of POW." When doubt exists as to whether captured enemy personnel warrant continued POW status, Article 5 (GPW) Tribunals must be convened. It is important that JAs be prepared for such tribunals. During the Vietnam conflict, a theater directive established procedures for the conduct of Article 5 Tribunals. The combatant commander or Army component commander may promulgate a comparable directive where appropriate.[2]

3. *Treatment*. There is a legal obligation to provide adequate food, facilities, and medical aid to all POWs. This obligation poses significant logistical problems in fast-moving tactical situations; thus, JAs must be aware of how to meet this obligation while placing a minimum burden on operational assets.[3] POWs must be protected from physical and mental harm. They must be transported from the combat zone as quickly as circumstances permit. Subject to valid security reasons, POWs must be allowed to retain possession of their personal property, protective gear, valuables, and money. These items must not be taken unless properly receipted for and recorded as required by the GPW. In no event can a POW's rank insignia, decorations, personal effects (other than weapons or other weapons that might facilitate escape), or identification cards be taken. These protections continue through all stages of captivity, including interrogation.

C. **Detainees**. Particularly in non-armed conflict situations (e.g., Somalia, Haiti, Bosnia, as discussed above), persons who commit hostile acts against U.S. forces or serious criminal acts and are captured would not be entitled to POW protection as provided by the GPW because these situations do not involve an international armed conflict to which the United States is a Party (Art. 2, GPW). These persons may be termed "detainees" instead of POWs. The GPW nonetheless provides a useful template for detainee protection and care. See DoDD 2310.01E for current terminology and application of PW/detainee concepts to the GWOT.

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[1] For example, in two days of fighting in Grenada, Army forces captured approximately 450 Cubans and 500 hostile Grenadians. Panama provided large numbers of detainees, both civilian and "PDF" (Panamanian Defense Force/police force) for the Army to sort out. The surrender of almost overwhelming numbers of Iraqi forces in Desert Storm was well publicized.

[2] No Article 5 Tribunals were conducted in Grenada or Panama, as all captured enemy personnel were repatriated as soon as possible. In the Gulf War, OPERATION DESERT STORM netted a large number of persons thought to be EPWs, who were actually displaced civilians. Subsequent interrogations determined that they had taken no hostile action against Coalition Forces. In some cases, they had surrendered to Coalition Forces to receive food and water. Tribunals were conducted to verify the status of the detainees. Upon determination that they were civilians who had taken no part in hostilities, they were transferred to detainment camps. Whether the tribunals were necessary as a matter of law is open to debate -- the civilians had not "committed a belligerent act," nor was their status "in doubt." No art 5 tribunals were held in OEF but limited numbers of art 5 tribunals were held in the opening stages of OIF. A slight variation of art 5 tribunals were held at Guantanimo Bay for detainees held pursuant to GWOT. The tribunals were called Combatant Status Review Tribunals and have been the subject of federal litigation in the D.C. circuit.

[3] The following examples are illustrative. When U.S. Forces landed in Grenada, they did not possess the food necessary to feed the large number of POWs and detainees who would come under our control. Thus, we used captured foodstuffs to feed them. Similar situations occurred in Panama. Thus, by using captured food, the U.S. met its obligation under the GPW, and the ground commanders were able to conserve valuable assets. Initially, PW facilities on Grenada, in Panama, and in the Gulf were each inadequate in their own ways. They consisted of dilapidated buildings, with no sanitation facilities or electricity, or were simply non-existent (in the desert). The ground commanders could not afford to use critically needed combat personnel (the personnel necessary to handle POWs were not initially available) to construct POW camps. Because the LOW does not require combatants to use their own assets to construct PW camps, the U.S. used captured property and POWs to construct adequate camps. (In fact, in Grenada the POWs were Cuban construction workers.). Medical assets also tend to be in high demand and short supply during combat. The LOW, however, prohibits the willful denial of needed medical assistance to POWs, and priority of treatment must be based on medical reasons. While the Capturing Party has the obligation to ensure adequate medical care for enemy wounded, the GWS Convention encourages the use of "retained persons" to treat enemy wounded. The U.S. has made use of this provision as well. As these examples indicate, the JA must be familiar with and apply the LOW in a practical manner. In doing so, he enables the commander to comply with legal requirements, without jeopardizing the mission.

D. Wounded and Sick in the Field and at Sea. (GWS, art. 12; GWS(Sea), art. 12.)

1. The first and second Geneva Conventions deal with protections for military wounded and sick, to include military shipwrecked.

a. All military wounded and sick in the hands of the enemy must be respected and protected (*See* GWS art. 13, GWS (Sea), art. 12)). "Each belligerent must treat his fallen adversaries as he would the wounded of his own army" (Pictet's Commentary, GWS, p. 137). The order of treatment is determined solely by urgent medical reasons (GWS, art.12). No adverse distinctions in treatment may be established because of gender, race, nationality, religion, political opinions, or any other similar criteria (GWS, art. 12).

b. If compelled to abandon the wounded and sick to the enemy, commanders must leave medical personnel and material to assist in their care, "as far as military considerations permit" (GWS, art. 12). At all times, and particularly after an engagement, parties are obligated to search for the wounded and sick as conditions permit (GWS, art. 15).

c. Permanent medical personnel "exclusively engaged" in medical duties (GWS, art. 24), chaplains (GWS, art. 24), personnel of national Red Cross Societies, and other recognized relief organizations (GWS, art. 26), shall not be intentionally attacked. Upon capture they are "retained personnel," not POWs; however, at a minimum they receive POW protections. They are to perform only medical or religious duties. They are to be retained as long as required to treat the health and spiritual needs of POWs. If not required, they are to be repatriated (GWS, art. 28). Personnel of aid societies of neutral countries cannot be retained, and must be returned as soon as possible.

d. Medical units and establishments may not be attacked intentionally. (GWS, art. 19). However, incidental damage to medical facilities situated near military objectives is not a violation of the LOW. Medical units and facilities lose their protection if committing "acts harmful to the enemy," and, if after a reasonable time, they fail to heed a warning to desist. No warning is required if taking fire from the medical unit or establishment; e.g., Richmond Hills Hospital, Grenada (GWS, art. 21, Pictet's Commentary on GWS, pp. 200-201).

e. Those Soldiers who have fallen by reason of sickness or wounds and who cease to fight are to be respected and protected.

f. Civilian medical care remains the primary responsibility of the civilian authorities. If a civilian is accepted into a military medical facility, care must be offered solely on the basis of medical priority (GWS, art.12).

g. Shipwrecked members of the armed forces at sea are to be respected and protected. (GWS(Sea), art. 12, NWP 1-14M, para. 11.6). Shipwrecked includes downed passengers/crews on aircraft, ships in peril, and castaways.

2. *Parachutists and paratroopers* (FM 27-10, para. 30). Descending paratroopers are presumed to be on a military mission and therefore may be targeted. Parachutists are crewmen of a disabled aircraft. They are presumed to be out of combat and may not be targeted unless it is apparent they are engaged on a hostile mission or are taking steps to resist or evade capture while descending. Parachutists "shall be given the opportunity to surrender before being made the object of attack" (AP I, art. 42).

E. Civilians.

1. *General Rule*. Civilians and civilian property may not be the object of direct (intentional) attack. Civilians are persons who are not members of the enemy's armed forces or other enumerated categories of POW. A civilian is protected from direct attack unless and for such time as he or she takes a direct part in hostilities (AP I, art. 50 and 51, para. 3). The phrase "direct part in hostilities" has not been universally defined, but is widely agreed not to include general participation or support for a nation's war effort. Commentators have suggested that functions that are of critical or high importance to a war effort constitute direct part in hostilities.

2. *Indiscriminate Attacks*. Additional Protocol I protects the civilian population from "indiscriminate" attacks. Indiscriminate attacks include those where the incidental loss of civilian life, or damage to civilian objects, would be excessive in relation to the concrete and direct military advantage anticipated. (AP I, art. 51(4).)

3. *Civilian Medical and Religious Personnel*. Civilian medical and religious personnel shall be respected and protected (AP I, art.15). They receive the benefits of the provisions of the Geneva Conventions and the Protocols concerning the protection and identification of medical personnel so long as they do not engage in acts inconsistent with their protected status.

4. *Personnel Engaged in the Protection of Cultural Property.* Article 17 of the 1954 Hague Cultural Property Convention established a duty to respect (not directly attack) persons engaged in the protection of cultural property. The regulations attached to the Convention provide for specific positions as cultural protectors and for their identification. As these individuals in all likelihood would be civilians, they are entitled to protection from intentional attack because of their civilian status.

5. *Journalists*. Protected as "civilians" provided they take no action inconsistent with their status. (AP I, art. 79). Although this provision cannot be said to have attained the status of customary law, it is one the United States has supported historically. If captured while accompanying military forces in the field, a journalist or war correspondent is entitled to POW status (GPW, art. 4(a)(4)).

XIII. MILITARY OCCUPATION

A. The Nature of Military Occupation. Territory is considered occupied when it is actually placed under the authority of the hostile armed forces. The occupation extends only to territory where such authority has been established and can effectively be exercised. (Hauge IV, art. 42). Thus, occupation is a question of fact based on the invader's ability to render the invaded government incapable of exercising public authority. Simply put, occupation must be both actual and effective. (FM 27-10, para. 352). However, military occupation (also termed belligerent occupation) is not conquest; it does not involve a transfer of sovereignty to the occupying force. Indeed, it is unlawful for a belligerent occupant to annex occupied territory or to create a new state therein while hostilities are still in progress. (See GC, art. 47). It is also forbidden to compel the inhabitants of occupied territory to swear allegiance to the hostile occupying power. (Hauge IV, art. 45). Occupation is thus provisional in nature, and is terminated if the occupying power is driven out.

B. Administration of Occupied Territory. Occupied territory is administered by military government, due to the inability of the legitimate government to exercise its functions, or the undesirability of allowing it to do so. The occupying power therefore bears a legal duty to restore and maintain public order and safety, while respecting, "unless absolutely prevented," the laws of the occupied nation. (Hauge IV, art. 43). The occupying power may allow the local authorities to exercise some or all of their normal governmental functions, subject to the paramount authority of the occupant. The source of the occupant's authority is its imposition of government by force, and the legality of its actions is determined by the LOW.[4]

1. In restoring public order and safety, the occupant is required to continue in force the normal civil and criminal laws of the occupied nation, unless they would jeopardize the security of the occupying force or create obstacles to application of the GC. (*See* GC Art. 64). However, the military and civilian personnel of the occupying power remain immune from the jurisdiction of local law enforcement.

2. Articles 46-63 of the GC establish important fundamental protections and benefits for the civilian population in occupied territory. Family honor, life, property, and religious convictions must be respected. Individual or mass forcible deportations of protected persons from the occupied territory to the territory of the occupying power or to a third state are prohibited. (GC, art. 49). The occupying power has the duty of ensuring that the population is provided with adequate food, medical supplies and treatment facilities, hygiene, and public health measures. (GC, art. 55). In addition, children are subject to special protection and care, particularly with respect to their education, food, medical care, and protection against the effects of war. (GC, art. 50).

3. The occupying power is forbidden from destroying or seizing enemy property unless such action is "imperatively demanded by the necessities of war," (Hauge IV, art. 23) or "rendered absolutely necessary by military operations." (GC, art. 53). Pillage, that is, the unauthorized taking of private or personal property for personal gain or use, is expressly prohibited (Hauge IV, art. 47; GWS, art. 15; GWS(Sea), art. 18; GC, art. 33). However, the occupying power may requisition goods and services from the local populace to sustain the needs of the occupying force "in proportion to the resources of the country, and of such a nature as not to involve the population in the obligation of taking part in operations of the war against their country." The occupying power is

[4] Use of Property. (*See* Elyce Santere, *From Confiscation to Contingency Contracting: Property Acquisition on or Near the Battlefield*, 124 Mil. L. Rev. 111 (1989). Confiscation - permanent taking without compensation; Seizure - taking with payment or return after the armed conflict; Requisition - appropriation of private property by occupying force with compensation as soon as possible; Contribution - a form of taxation under occupation law.

obliged to pay cash for such requisitions or provide a receipt and make payment as soon as possible. (Hauge IV, art. 52; FM 27-10, para. 412).

4. The occupying power may not compel protected persons to serve in its armed forces, nor may it compel them to work unless they are over eighteen years old, and then only on work that: (1) is necessary for the needs of the occupying force; (2) is necessary for public utility services; or (3) for the feeding, sheltering, clothing, transportation or health of the populace of the occupied country. The occupied country's labor laws regarding such matters as wages, hours, and compensation for occupational accidents and diseases remain applicable to the protected persons assigned to work by the occupant. (GC, art. 51).

5. The occupying power is specifically prohibited from forcing the inhabitants to take part in military operations against their own country, and this precludes requiring their services in work directly promoting the military efforts of the occupying force, such as construction of fortifications, entrenchments, and military airfields. (*See* GC, art. 51). However, the inhabitants may be employed voluntarily in such activities.

C. Security of the Occupying Force: Penal Law and Procedure

1. The occupant is authorized to demand and enforce the populace's obedience as necessary for the security of the occupying forces, the maintenance of law and order, and the proper administration of the country. The inhabitants are obliged to behave peaceably and take no part in hostilities.

2. If the occupant considers it necessary, as a matter of imperative security needs, it may assign protected persons to specific residences or internment camps. (GC, art. 78). Security detainees should not be subjected to "prolonged arbitrary detention."[5] The occupying power may also enact penal law provisions, but these may not come into force until they have been published and otherwise brought to the knowledge of the inhabitants in their own language. Penal provisions shall not have retroactive effect. (GC, art. 65).

3. The occupying power's tribunals may not impose sentences for violation of penal laws until after a regular trial. The accused person must be informed in writing in his own language of the charges against him, and is entitled to the assistance of counsel at trial, to present evidence and call witnesses, and to be assisted by an interpreter. The occupying power shall notify the protecting power of all penal proceedings it institutes in occupied territory. Sentences shall be proportionate to the offense committed. The accused, if convicted, shall have a right to appeal under the provisions of the tribunal's procedures or, if no appeal is provided for, he is entitled to petition against his conviction and sentence to the competent authority of the occupying power. (GC, arts. 72, 73).

4. Under the provisions of the GC, the occupying power may impose the death penalty on a protected person only if found guilty of espionage or serious acts of sabotage directed against the occupying power, or of intentional offenses causing the death of one or more persons, provided that such offenses were punishable by death under the law of the occupied territory in force before the occupation began. (GC, art. 68). However, the United States has reserved the right to impose the death penalty for such offenses resulting in homicide irrespective of whether such offenses were previously capital offenses under the law of the occupied state. In any case, the death penalty may not be imposed by the occupying power on any protected person who was under the age of eighteen years at the time of the offense. (GC, art. 68).

5. The occupying power must promptly notify the protecting power of any sentence of death or imprisonment for two years or more, and no death sentence may be carried out until at least six months after such notification. (GC, arts. 74, 75).

6. The occupying power is prohibited from imposing mass (collective) punishments on the populace for the offenses of individuals. That is, "[n]o general penalty, pecuniary or otherwise, shall be inflicted upon the populations on account of the acts of individuals for which they cannot be regarded as jointly and severally responsible." (Hauge, IV, art. 50; GC, art. 33).

7. In areas occupied by U.S. forces, military jurisdiction over individuals, other than members of the U.S. armed forces, may be exercised by courts of a military government. Although sometimes designated by other names, these military tribunals are actually military commissions. They preside in and for the occupied territory and thus exercise their jurisdiction on a territorial basis.

[5] In OIF, for example, the cases of security detainees are reviewed by the Combined Review and Release Board periodically and detainees may be referred to the Central Criminal Court of Iraq for prosecution. Periodic status review procedures were also adopted by multi-national forces in Haiti, Bosnia, and Kosovo.

XIV. NEUTRALITY

A. Neutrality on the part of a state not a party to an armed conflict consists in refraining from all participation in the conflict, and in preventing, tolerating, and regulating certain acts on its own part, by its nationals, and by the belligerents. In response, it is the duty of the belligerents to respect the territory and rights of neutral states. A primary source of law is Hague Convention V, Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land of 18 October 1907. The degree to which traditional "neutrality" has been modified by the Charter of the United Nations is unclear; it is generally accepted that neutrality law still provides some guidance, particularly regarding collective self-defense actions and *jus ad bellum* analysis. Historically, neutrality rights include the following:

1. The territory of the neutral state is inviolable. (Hauge V, art. 1). This prohibits any unauthorized entry into the territory of the neutral state, its territorial waters, or the airspace over such areas by troops or instrumentalities of war. Thus, belligerents are also specifically prohibited from moving troops or convoys of war munitions or supplies across the territory of a neutral state. (Hauge V, art. 2). In consequence, the efforts of the neutral to resist, even by force, attempts to violate its territory cannot be regarded as hostile acts by the offending belligerents. (Hauge V, art. 10). However, if the neutral is unable, or fails to prevent such violations of its neutrality by the troops of one belligerent, that belligerent's enemy may be justified in attacking those troops in neutral territory.

2. Belligerents are also prohibited from establishing radio communications stations in neutral territory to communicate with their armed forces, or from using such facilities previously established before the outbreak of hostilities for that purpose. (Hauge V, art. 3). However, a neutral state may permit the use of its own communications facilities to transmit messages on behalf of the belligerents, so long as such usage does not lend assistance to the forces of only one side of the conflict. Indeed, the neutral must ensure that the measure it takes in its status as a neutral state is impartial, as applied to all belligerents. (Hauge V, art. 9).

3. While a neutral state is under no obligation to allow passage of convoys or aircraft carrying the sick and wounded of belligerents through its territory or airspace, it may do so without forfeiting its neutral status. However, the neutral must exercise necessary control or restrictive measures concerning the convoys or medical aircraft, must ensure that neither personnel nor material other than that necessary for the care of the sick and wounded is carried, and must accord the belligerents impartial treatment. (Hauge V, art. 14; *see* GWS, art. 37). In particular, if the wounded and sick or prisoners of war are brought into neutral territory by their captor, they must be detained and interned by the neutral state so as to prevent them from taking part in further hostilities. (GWS, art. 37).

4. The nationals of a neutral state are also considered as neutrals. (Hauge V, art. 16). However, if such neutrals reside in occupied territory during the conflict, they are not entitled to claim different treatment, in general, from that accorded the other inhabitants; the law presumes that they will be treated under the law of nations pertaining to foreign visitors, as long as there is an open and functioning diplomatic presence of their State. (*See* GC, art. 4). They are likewise obliged to refrain from participation in hostilities, and must observe the rules of the occupying power. Moreover, such neutral residents of occupied territory may be punished by the occupying power for penal offenses to the same extent as nationals of the occupied nation.

5. A national of a neutral state forfeits his neutral status if he commits hostile acts against a belligerent, or commits acts in favor of a belligerent, such as enlisting in its armed forces. However, he is not to be more severely treated by the belligerent against whom he has abandoned his neutrality than would be a national of the enemy state for the same acts. (Hauge V, art. 17).

6. The United States has supplemented the above-described rules of international law concerning neutrality by enacting federal criminal statutes that define offenses and prescribe penalties for violations against U.S. neutrality. Some of these statutes are effective only during a war in which the United States is a declared neutral, while others are in full force and effect at all times. (*See* 18 U.S.C. 956-68; 22 U.S.C. 441-57, 461-65).

B. Impact of the United Nations Charter Regime on the Law of Neutrality

1. In the event of any threat to or breach of international peace and security, the United Nations Security Council may call for action under Articles 39 through 42 of the UN Charter. In particular, the Security Council may make recommendations, call for employment of measures short of force, or order forcible action to maintain or restore international peace and security.

2. For a nation that is a member of the UN, these provisions of the Charter, if implemented, may qualify that member nation's right to remain neutral in a particular conflict. For example, if a member nation is called on by the Security Council, pursuant to Articles 42 and 43 of the Charter, to join in collective military action against an aggressor state, that member nation loses its *right* to remain neutral. However, the member nation would actually lose its neutral status only if it complied with the Security Council mandate and took hostile action against the aggressor.

XV. COMPLIANCE WITH THE LAW OF WAR

A. The Role of Protecting Powers and the ICRC

1. *The System of Protecting Powers*. Common Articles 8 - 11 of the Geneva Conventions of 1949[6] provide for application of the Conventions in time of international armed conflict "with the cooperation and under the scrutiny of the Protecting Powers whose duty it is to safeguard the interests of the Parties to the conflict." The diplomatic institution of Protecting Powers, which developed over the centuries independent of the LOW, enables a neutral sovereign state, through its designated diplomatic representatives, to safeguard the interests of a second state in the territory of a third state. Such activities in wartime were first given formal recognition in the Geneva Prisoner of War Convention of 1929.

a. Such protecting power activities may be of value when belligerent State Parties have severed diplomatic relations. In particular, the Protecting Power attends to the humanitarian interests of those citizens of the second state who are within the territory and under the control of the third state, such as prisoners of war and civilian detainees.

b. Protecting Power activities reached their zenith during World War II, as the limited number of neutral states acting as protecting powers assumed a role as representatives not merely of particular belligerents, but rather as representatives of the humanitarian interests of the world community. Since that time, the Protecting Power role has been fulfilled by the International Committee of the Red Cross, as authorized by Article 10, GWS, GWS (Sea), and GPW, and Article 11, GC.

B. The Contributions and Role of the International Committee of the Red Cross (ICRC). Founded in 1863, the ICRC is a private, non-governmental organization of Swiss citizens that has played a seminal role in the development and implementation of the LOW relating to the protection of war victims. During World War II, the ICRC supplemented the efforts of the protecting powers, and undertook prodigious efforts on behalf of POWs. Those efforts included the establishment of a Central Prisoner of War Agency with 40 million index cards, the conduct of 11,000 visits to POW camps, and the distribution of 450,000 tons of relief items.

1. The role of the ICRC as an impartial humanitarian organization is formally recognized in common articles 9 – 11 and Articles 125, GPW, and 63, GC, of the Geneva Conventions.[7] Since World War II, the Protecting Power system has not been widely used, and the ICRC has stepped into the breach as a substitute for government Protecting Powers in international armed conflicts, subject to the consent of the Parties to the conflict.

2. With respect to non-international conflicts, Common Article 3 of the Geneva Conventions recognizes the prerogative of the ICRC or other impartial humanitarian organizations to offer its services to the parties to the conflict.

3. *Relations between U.S. Military and the ICRC*

a. Subject to essential security needs, mission requirements and other legitimate, practical limitations, the ICRC must be permitted to visit POWs and provide them certain types of relief. Typically, the United States will invite the ICRC to observe POW, civilian internee or detainee conditions as soon as circumstances permit. The invitation to the ICRC for its assistance is made by the United States Government (Department of State, in coordination with the Department of Defense), and not by the Combatant Commander. As a consequence, there is SECDEF guidance on reporting of all ICRC contacts, inspections, or meetings through operational channels.[8]

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[6] Articles 9 - 12 of the GC.

[7] Articles 10 - 12 of the GC.

[8] Memorandum, Secretary of Defense, SUBJECT: Handling of Reports from the International Committee of the Red Cross (14 July 2004).

b. Given his/her professional qualifications and specialized training in the LOW, the JA should serve as the escort and liaison officer with the ICRC.[9] This role is doctrinal, and stated in FM 71-100-2, Infantry Division Operations Tactics, Techniques, and Procedures, page 6-28. The JA can quickly identify and resolve many LOW issues before they become a problem for the commander. For those LOW matters requiring command decision, the JA is best suited to provide advice to the commander and obtain timely responses. These same skills are essential in dealing with ICRC observers. The JA can best serve as the commander's skilled advocate in discussions with the ICRC concerning the LOW.

c. Both the commander and the JA should recognize that the ICRC, as an impartial humanitarian organization, is not a political adversary, eagerly watching for and reporting LOW violations.[10] Rather, it is capable of providing assistance in a variety of ways. In recent conflicts, the ICRC assisted in making arrangements for the transportation of the remains of dead enemy combatants and for repatriating POWs and civilian detainees. By maintaining a close working relationship with ICRC representatives, the JA receives a two-fold benefit. He is assisted in identifying LOW issues before they pose problems to the command, and he has access to additional legal resources that may be used to resolve other LOW matters.

d. The ICRC is also heavily involved in MOOTW, where it may be present in conjunction with numerous other organizations and agencies. In the former Yugoslavia, Somalia, and Rwanda, for example, many international organizations are or were engaged in "humanitarian relief" activities. Among the most significant is the UN High Commissioner for Refugees (UNHCR). The list of private voluntary organizations (PVOs) and Nongovernmental organizations (NGOs) in the field is large; approximately 350 humanitarian relief agencies are registered with the U.S. Agency for International Development (USAID).

XVI. REMEDIES FOR VIOLATIONS OF THE LAW OF WAR

A. U.S. Military and Civilian Criminal Jurisdiction

1. The historic practice of the military services is to charge members of the U.S. military who commit offenses regarded as a "war crime" under existing, enumerated articles of the UCMJ. (FM 27-10, para. 507).

2. In the case of other persons subject to trial by general courts-martial for violating the laws of war (UCMJ, art. 18), the charge shall be "Violation of the Laws of War" rather than a specific UCMJ article.

3. The War Crimes Act of 1997 (18 U.S.C. § 2441) provides federal courts with jurisdiction to prosecute any person inside or outside the U.S. for war crimes where a U.S. national or member of the armed forces is involved as an accused or as a victim.

4. "War Crimes" are defined in the War Crimes Act as: (1) grave breaches as defined in the Geneva Conventions of 1949 and any Protocol thereto to which the U.S. is a party; (2) violations of Articles 23, 25, 27, 28 of the Annex to the Hague Convention IV; (3) violations of Common Article 3 of the Geneva Conventions of 1949 and any Protocol thereto to which the U.S. is a party and deals with a non-international armed conflict; (4) violations of provisions of Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps & Other devices (Protocol II as amended May, 1996) when the U.S. is a party to such Protocol and the violator willfully kills or causes serious injury to civilians.

5. U.S. policy on application of the LOW is stated in DoD Directive 2311.01E (9 May 2006): "It is DoD policy that … [m]embers of the DoD Components [including U.S. civilians and contractors assigned to or accompanying the armed forces] comply with the LOW during all armed conflicts, however such conflicts are characterized, and in all other military operations."

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[9] General Prugh (former TJAG) fulfilled the task of "interfacing" with the ICRC when he was the legal advisor to CDR, MACV in Vietnam. General Prugh relates that during the early stages of Viet Nam, OTJAG concluded that the U.S. was involved in an Art 3, not Art 2, conflict. In June '65 the situation had changed, and by Aug '65 a formal announcement was made that Art 2 now applied. Soon, ICRC delegates began to arrive, and it fell upon the judge advocates to meet with the delegates. This role continued in operations in Grenada, Panama, Somalia, Haiti, and during the Gulf War. The development of this liaison role was also apparent in Haiti, particularly in the operation of Joint Detention Facility.

[10] It is essential to understand the neutrality principle of the ICRC. One must stay at arm's length from the delegates so not to risk harming their relationships with the enemy. For example, ICRC personnel will meet with prisoners in private.

B. Command Responsibility.

1. Commanders are legally responsible for war crimes committed by their subordinates when any one of three circumstances applies:

a. The commander ordered the commission of the act;

b. The commander knew of the act, either before or during its commission, and did nothing to prevent or stop it; or

c. The commander should have known, "through reports received by him or through other means, that troops or other persons subject to his control [were] about to commit or [had] committed a war crime and he fail[ed] to take the necessary and reasonable steps to insure compliance with the LOW or to punish violators thereof." (FM 27-10, para. 501).

2. Judge Advocates must keep their commanders informed of their responsibilities concerning the investigation and prosecution of war crimes. The commander must also be aware of his potential responsibility for war crimes committed by his subordinates. CJSCI 5810.01A requires that legal advisers review all operation plans, concept plans, ROE, execute orders, deployment orders, policies, and directives to ensure compliance with the instruction, the DoD Law of War Program, "as well as domestic and international law." The CJCSI also requires integrating the reporting and investigative requirement of the DoD Law of War Program into all appropriate policies, directives, and operation and concept plans.

3. *Investigative Assets*. Several assets are available to assist commanders investigating suspected violations of the LOW. The primary responsibility for an investigation of a suspected, alleged, or possible war crime resides in the U.S. Army Criminal Investigation Command or, for other military services, CID Command's equivalent offices. For minor offenses, investigations can be conducted with organic assets and legal support, using AR 15-6 or RCM 303 commander's inquiry procedures. (Command regulations, drafted IAW DoD Directive 2311.01E, should prescribe the manner and level of unit investigation.) CID has investigative jurisdiction over suspected war crimes in two instances. The first is when the suspected offense is one of the violations of the UCMJ listed in Appendix B to AR 195-2, Criminal Investigation Activities (generally felony-level offenses). The second is when the investigation is directed by HQDA (AR 195-2, para. 3-3a(7)).

4. In addition to CID, and organic assets and legal support, a commander may have Reserve Component JAGSO teams available to assist in the investigation of war crimes committed by the enemy against U.S. forces. JAGSO teams perform JA duties related to international law, including the investigation and reporting of violations of the LOW, the preparation for trials resulting from such investigations, and the provision of legal advice concerning all operational law matters. Other available investigative assets include the military police, counterintelligence personnel, and JAs.

C. Reports. WHEN IN DOUBT, REPORT. Report a "reportable incident" by the fastest means possible, through command channels, to the responsible CINC. A "reportable incident" is a possible, suspected, or alleged violation of the LOW. The reporting requirement should be stated not only in a "27 series" regulation or legal appendix to an OPLAN or OPORD, but also in the unit TACSOP or FSOP. Normally, an OPREP-3 report established in Joint Pub 1-03.6, JRS, Event/Incident Reports, will be required. Alleged violations of the LOW, whether committed by or against U.S. or enemy personnel, are to be promptly reported, thoroughly investigated, and, where appropriate, remedied by corrective action.

D. Prevention of War Crimes. Commanders must take steps to ensure that members of their commands do not violate the LOW. The two principal means of affecting this goal are to recognize the factors which may lead to the commission of war crimes, and to train subordinate commanders and troops to standard concerning compliance with the LOW and proper responses to orders that violate the LOW.

1. Awareness of the factors that have historically led to the commission of war crimes allows the commander to take preventive action. The following is a list of some of the factors that the commander and the judge advocate should monitor in subordinate units.

a. High friendly losses.

b. High turnover rate in the chain of command.

c. Dehumanization of the enemy (derogatory names or epithets).

d. Poorly trained or inexperienced troops.

e. The lack of a clearly defined enemy.

f. Unclear orders.

g. High frustration level among the troops.

2. Clear, unambiguous orders are a responsibility of good leadership. Soldiers who receive ambiguous orders or who receive orders that clearly violate the LOW must understand how to react to such orders. Accordingly, the judge advocate must ensure that soldiers receive instruction in this area. Troops who receive unclear orders must insist on clarification. Normally, the superior issuing the unclear directive will make it clear, when queried, that it was not his intent to commit a war crime. If the superior insists that his illegal order be obeyed, however, the soldier has an affirmative legal obligation to disobey the order and report the incident to the next superior commander, military police, CID, nearest judge advocate, or local inspector general.

E. International Criminal Tribunals

Violations of the LOW, as crimes defined by international law, may also be prosecuted under the auspices of international tribunals, such as the Nuremberg, Tokyo, and Manila tribunals established by the Allies to prosecute German and Japanese war criminals after World War II. The formation of the United Nations has also resulted in the exercise of criminal jurisdiction over war crimes by the international community, with the Security Council's creation of the International Tribunal to Adjudicate War Crimes Committed in the Former Yugoslavia.

APPENDIX A

TROOP INFORMATION

I. REASONS TO COMPLY WITH THE LOW—EVEN IF THE ENEMY DOES NOT

A. Compliance ends the conflict more quickly. Mistreatment of EPWs may encourage the remaining enemy soldiers to fight harder and resist capture. During OPERATION DESERT STORM, favorable treatment of Iraqi EPWs by coalition forces helped end the war quickly because reports of such treatment likely encouraged massive surrender by other Iraqi soldiers.

B. Compliance enhances public support of our military mission; violations of the LOW seriously reduce the support that U.S. Soldiers generally receive not only from the U.S. public, but also from people in other countries (e.g., reports of misconduct in Vietnam reduced public support of the military mission).

C. Compliance encourages reciprocal conduct by enemy soldiers. Mistreatment of EPWs by our Soldiers may encourage enemy soldiers to treat captured U.S. Soldiers in the same manner.

D. Compliance not only accelerates termination of the conflict, but it also reduces the waste of our resources in combat and the costs of reconstruction after the conflict ends.

E. Compliance is required by law. LOW arises in large part from treaties that are part of our national law. Violation of the LOW is a serious crime punishable by death in some cases.

II. SOLDIER'S GENERAL RESPONSIBILITIES IN WARTIME

A. Carry out all lawful orders promptly and aggressively.

B. In rare cases when an order seems unlawful, do not carry it out right away, but do not ignore it either; instead, seek immediate clarification of that order.

1. Soldiers may be held criminally responsible for any unlawful acts that they personally commit in time of war. Since there is no "statute of limitations" on the prosecution of war crimes, Soldiers may have to defend themselves many years after the conflict ends.

2. If a Soldier is court-martialed for carrying out an unlawful order, that Soldier cannot normally defend himself by claiming he was "just following orders." As a result of attending this class and using common sense, Soldiers are expected to be able to recognize an unlawful order and take appropriate action.

C. Know:

1. The Soldier's Rules.
2. Forbidden targets, tactics, and techniques. (See related material above).
3. Rules regarding captured soldiers.
4. Rules for the protection of civilians and private property. (See related material above).
5. Obligations to prevent and report LOW violations.

III. THE SOLDIER'S RULES

A. Fight only enemy combatants.

B. Do not harm enemies who surrender — disarm them and turn them over to your superior.

C. Do not kill or torture EPW, or other detainees.

D. Collect and care for the wounded, whether friend or foe.

E. Do not attack medical personnel, facilities, or equipment.

F. Destroy no more than the mission requires.

G. Treat all civilians humanely.

H. Do not steal — respect private property and possessions.

I. Do your best to prevent violations of the law of war

J. Report all violations to your superior.

IV. RULES REGARDING CAPTURED SOLDIERS

A. Handling Surrender of Enemy Soldiers.

1. Be cautious – follow unit procedures in allowing enemy soldiers to approach your position and surrender.

2. Waiving the white flag may not mean surrender; it may simply mean that the enemy wants a brief cease-fire so they can safely meet with us. The enemy may seek such a meeting to arrange surrender, but the meeting may also be sought for other reasons (e.g., to pass a message from their commander to our headquarters or to arrange removal of wounded from the battlefield).

3. Enemy soldiers must be allowed to surrender if they wish to do so. Any order not to accept surrender is unlawful.

B. Treatment of Captured Soldiers on the Battlefield.

1. Again, follow established unit procedures for the handling of EPWs (recall the "5 Ss and T" process).

2. Recognize that Soldiers have a duty to treat EPWs humanely. The willful killing, torture, or other inhumane treatment of an EPW is a very serious LOW violation — a "grave breach." Other LOW violations are referred to as "simple breaches."

3. Note it is also forbidden to take EPWs' personal property except to safeguard it pending their release or movement elsewhere.

4. In addition, Soldiers have certain affirmative duties to protect and otherwise care for EPWs in their custody. Because this is often difficult in combat, forces must move EPWs to the rear as soon as possible.

5. Certain captured enemy personnel are not technically EPWs, but are rather referred to as "retained personnel." Such retained personnel include medical personnel and chaplains.

C. Your Rights and Responsibilities If Captured.

1. General. Note that a Soldiers' separate training on Code of Conduct, SERE, etc., provides additional information.

2. Rights as a Prisoner of War (POW). As discussed earlier, war prisoners are entitled to certain protection and other care from their captors. Such care includes food, housing, medical care, mail delivery, and retention of most of your personal property you carried when you were captured. Generally, the POW cannot waive such rights.

3. Responsibilities as a POW.

a. POWs must obey reasonable camp regulations.

b. Information: if asked, Soldier must provide four items of information (name, rank, service number, and DOB). Explain that such information is needed by the capturing country to fulfill reporting obligations under international law.

c. Work. In addition, enlisted POWs may be compelled to work provided the work does not support the enemy's war effort. Also, POW's are entitled to payment for their work. Commissioned officer POWs may volunteer to work, but may not be compelled to do so. NCO POWs may be compelled to perform supervisory work.

V. OBLIGATIONS TO PREVENT AND REPORT LOW VIOLATIONS

A. Prevention. Soldiers not only must avoid committing LOW violations; they must also attempt to prevent violations of the LOW by other U.S. Soldiers.

B. Reporting Obligation. Soldiers must promptly report any actual or suspected violations of the LOW to their superiors. If that is not feasible, Soldiers report to other appropriate military officers (e.g., IG, JA, or Chaplain). DoDD 2311.01E.

NOTES

NOTES

CHAPTER 3

HUMAN RIGHTS

REFERENCES

1. United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. GAOR, Supp. No. 51, at 197, U.N. Doc. A/RES/39/708 (1984), *reprinted in* 23 I.L.M. 1027 (1984), *modified in* 24 I.L.M. 535 (1985).
2. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171.
3. International Convention on the Elimination of All Forms of Racial Discrimination, adopted by the U.N. General Assembly Dec. 21, 1965, 660 U.N.T.S. 195.
4. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 6 U.S.T. 3516.
5. Executive Order No. 13107, Implementation of Human Rights Treaties, 63 FR 68991 (10 Dec. 1998).
6. Restatement (Third) of the Foreign Relations Law of the United States.
7. Universal Declaration of Human Rights, G.A. Res. 217 A (III), UN Doc. A/810 at 71 (1948).

I. INTRODUCTION

A. Human rights law focuses on the **life and dignity of human beings**. In contrast with most international law, international human rights law protects persons as individuals rather than as subjects of sovereign states. "Human rights, because they rest on nothing more than being human, are universal, equal, and inalienable."[1]

B. To best understand human rights law, it may be useful to think in terms of obligation versus aspiration. Human rights law exists in two forms: **treaty law** and **customary international law (CIL)**.[2] Human rights law established by treaty generally only binds the state in relation to persons under its jurisdiction; human rights law based on CIL binds all states, in all circumstances. For official U.S. personnel ("state actors" in the language of human rights law) dealing with civilians **outside the territory of the United States**, it is CIL that establishes the human rights considered fundamental, and therefore obligatory.

II. HISTORY AND DEVELOPMENT OF HUMAN RIGHTS

A. As a field of international law, human rights did not fully develop until the years following World War II. The systematic abuse and near-extermination of entire populations by states gave rise to a truly revolutionary aspect of human rights as international law. Prior to modern human rights law, how states treated their own citizens was regarded as a **purely domestic matter**. Furthermore, **individual**s had not been the object of protection of international law. Instead, international law had regulated state conduct vis-à-vis other states. International law only protected individuals as symbols of their parent states (e.g. diplomatic immunity). As sovereigns in the international system, states could expect other states not to interfere in their internal affairs. Human rights law, however, pierced the veil of sovereignty by seeking directly to **regulate how states treated their own people within their own borders**.

1. The **Nuremberg War Crimes Trials** are an example of a human rights approach to protection. The trials held former government officials legally responsible for the treatment of individual citizens within the borders of their state. The trials did not rely on domestic law, but rather on novel charges like "crimes against humanity."

2. Human rights occupied a central place in the newly formed United Nations. The **Charter of the United Nations** contains several provisions dealing directly with human rights. One of the earliest General Assembly resolutions, the **Universal Declaration of Human Rights**,[3] is perhaps the strongest international statement of human rights norms.

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[1] Jack Donnelly, *What are Human Rights?* http://usinfo.state.gov/products/pubs/hrintro/donnelly.htm (last visited Feb. 26, 2008).

[2] *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, at § 701 (2003) [hereinafter RESTATEMENT].

[3] Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., U.N. Doc. A/810 (Dec. 10, 1948).

3. Following the adoption of the **1949 Geneva Conventions**, development of the law of war (LOW) began to stall. Through the so-called Geneva Tradition, the conventions had introduced an approach to regulating armed conflict that focused on protecting and respecting individuals. By the mid-1950's, however, the LOW process stalled. The international community largely rejected the 1956 Draft Rules for Limitation of Dangers Incurred by Civilian Populations in Time of War as a fusion of the Geneva and Hague Traditions.[4] In fact, the LOW would not see a significant development in humanitarian protections until the 1977 Additional Protocols.[5]

4. At the same time, however, human rights law experienced a boom. Two of the most significant human rights treaties, the **International Covenant on Civil and Political Rights[6] (ICCPR)** and the International Covenant on Economic Social and Cultural Rights[7] were adopted and opened for signature in 1966.

B. Human Rights and Law of War - Scholars and states disagree over the interaction between human rights law and LOW. Positions range from arguments that they are entirely separate systems to a view that makes LOW a completely integrated component of human rights law.[8] In the late-1960's, the United Nations General Assembly took on the application of human rights during armed conflict.[9] Ultimately, however, the resolutions produced few useful pronouncements and many ambiguous references to humanitarian principles.

1. The traditional/United States view.[10] Traditionally, human rights law and LOW have been viewed as separate systems of protection. This classic view applies human rights law and LOW to different situations and different relationships respectively.

a. Human rights, in the traditional view, regulate the relationship between states and individuals under their jurisdiction and may, however, be inapplicable during emergencies.

b. LOW, in the traditional view, regulates wartime relations between belligerents and civilians as well as protected persons, usually not one's own citizens or nationals.

c. The traditional view notes that LOW largely predates human rights law and therefore was never intended to comprise a sub-category of human rights. This view notes that LOW includes very restrictive triggering mechanisms which limit its application to specific circumstances.[11] As such, LOW is cited as a *lex specialis* to situations of armed conflict and therefore applies in lieu of human rights law.[12]

d. The 1949 Geneva Conventions, for the most part, do not apply to a state's own nationals. Most of the Fourth Convention is restricted to "protected persons," a group characterized as civilians in the hands of their nation's enemy.[13]

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[4] Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War, r*eproduced in* DIETRICH SCHINDLER & JIŘÍ TOMAN, THE LAWS OF ARMED CONFLICT, 339 (2004).

[5] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, Jun. 8, 1977, 1125 UNTS 3 [hereinafter Protocol I].

[6] Int'l Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

[7] Int'l Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3.

[8] PROVOST, INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW (2002).

[9] G.A. Res. 2675 (1970); G. A. Res. 2444 (1968) "Respect for Human Rights in Armed Conflict"; UN GAOR 29th Sess. Supp. No. 31. Professor Schindler argues that while the UN said "human rights" in these instruments, it meant "humanitarian law." Dietrich Schindler, *Human Rights and Humanitarian Law: The Interrelationship of the Laws*, 31 AM U. L.REV. 935 (1982) [hereinafter Schindler].

[10] Michael J. Dennis, *Applying Human Rights Law and Humanitarian Law in the Extraterritorial War Against Terrorism: Too Little, Too Much, Or Just Right?: Application of Human Rights Treaties Extraterritorially to Detention of Combatants and Security Internees: Fuzzy Thinking all Around?*, 12 ILSA J. Int'l & Comp. L. 459 (2006).

[11] *See e.g.* Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 2, Aug. 12, 1949, 6 U.S.T. 3516 [hereinafter GC]. *See also*, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 ICJ REP. 226, para.25 (July 8).

[12] Christopher Greenwood, *Rights at the Frontier - Protecting the Individual in Time of War*, *in* LAW AT THE CENTRE, THE INSTITUTE OF ADVANCED LEGAL STUDIES AT FIFTY (1999); Schindler, *supra* note 12, at 397.

[13] GC, *supra* note 14, art. 4.

2. **Emerging view.** An expanding group of scholars and states has come to view the application of human rights law and LOW as overlapping. In this view, human rights law creates rights and duties beyond national borders between states and alien individuals during periods of armed conflict as well as peace.

C. Modern Challenges - As human rights are asserted on a global scale, many governments regard theme as "a system of values imposed upon them."[14] States in Asia and the Islamic world question the universality of human rights as a neo-colonialist attitude of northern states.[15]

III. FUNDAMENTAL HUMAN RIGHTS - THE OBLIGATION

A. If a specific human right falls within the category of CIL, it should be considered a "fundamental" human right. As such, it is binding on U.S. forces during all overseas operations. This is because CIL is considered part of U.S. law,[16] and human rights law operates to regulate the way state actors (in this case the U.S. armed forces) treat all humans.[17] If a "human right" is considered to have risen to the status of CIL, then it is considered binding on U.S. state actors wherever such actors deal with human beings. Unfortunately, for the military practitioner there is no definitive "source list" of those human rights considered by the United States to fall within this category of fundamental human rights. As a result, the Judge Advocate must rely on a variety of sources to answer this question.

B. Among these sources, the most informative is the **Restatement (Third) of Foreign Relations Law of the United States (2003)**.[18] According to the Restatement, the United States accepts the position that certain fundamental human rights fall within the category of CIL, and a state violates international law when, as a matter of policy, it practices, encourages, or condones any of the following:

1. Genocide,
2. Slavery,
3. Murder or causing the disappearance of individuals,
4. Torture or other cruel, inhuman, or degrading treatment or punishment,
5. Violence to life or limb,
6. Hostage taking,
7. Punishment without fair trial,
8. Prolonged arbitrary detention,
9. Failure to care for and collect the wounded and sick,
10. Systematic racial discrimination,
11. Consistent patterns of gross violations of internationally recognized human rights,

C. According to the Restatement (Third) of Foreign Relations Law of the United States, international law is violated by any state that "practices, encourages, or condones"[19] a violation of human rights considered CIL. The Restatement makes no qualification as to where the violation might occur, or against whom it may be directed. Therefore, it is the CIL status of certain human rights that renders respect for such human rights a legal obligation on the part of U.S. forces conducting operations outside the United States, and not the fact that they may be reflected in treaties ratified by the United States. Of course, this is a general rule, and Judge Advocates must look to specific

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[14] MANFRED NOWAK, INTRODUCTION TO THE INTERNATIONAL HUMAN RIGHTS REGIME 2 (2003) [hereinafter NOWAK].

[15] *See* DARREN J. O'BYRNE, HUMAN RIGHTS: AN INTRODUCTION 52-55 (2003) (discussing Marxist, Confucian, and Islamic attitudes toward concepts of universal human rights); UPENDRA BAXI, THE FUTURE OF HUMAN RIGHTS 132-35 (2002) (citing ARJUN APPADURAI, MODERNITY AT LARGE: CULTURAL DIMENSIONS OF GLOBALIZATION (1997); MIKE FEATHERSTONE, UNDOING CULTURE: GLOBALIZATION, POSTMODERNISM AND IDENTITY (1995)).

[16] *See* the *Paquete Habana The Lola*, 175 U.S. 677 (1900); *see also* RESTATEMENT, *supra* note 2 at § 111.

[17] RESTATEMENT, s*upra* note 2, at §701.

[18] *Id*. at §702.

[19] *Id.*

treaties, and any subsequent executing legislation, to determine if this general rule is inapplicable in a certain circumstance.[20] This is the U.S. position regarding perhaps the three most pervasive human rights treaties: the Covenant on Civil and Political Rights, the Covenant on Economic, Social and Cultural Rights, and the Refugee Convention and Refugee Protocol.

IV. HUMAN RIGHTS TREATIES

A. The original focus of human rights law must be re-emphasized. Understanding this original focus is essential to understand why human rights treaties, even when signed and ratified by the United States, fall within the category of "aspiration" instead of "obligation." That focus was to protect individuals from the harmful acts of **their own governments.**[21] This was the "groundbreaking" aspect of human rights law: that international law could regulate the way a government treated the residents of its own state. Human rights law was not originally intended to protect individuals from the actions of **any** government agent they encountered. This is partly explained by the fact that historically, other international law concepts provided for the protection of individuals from the cruel treatment of foreign nations.[22]

B. Major Human Rights Instruments - Until 1988 the United States had not ratified any major international human rights treaties.[23]

1. *International Covenant on Civil and Political Rights (ICCPR) (1966)* - **United States ratified** in 1992.

a. Administered by UN Human Rights Committee (HRC). Parties must submit reports in accordance with Committee guidelines for review by HRC. The HRC may question state representatives on the substance of their reports. The HRC may report to the UN Secretary General. The HRC issues General Comments to members.

b. The ICCPR addresses so-called "first generation rights." These include the most fundamental and basic rights and freedoms. **Part III** of the Covenant lists substantive rights.

c. The ICCPR is **expressly non-extraterritorial**. Article 2, clause 1 limits a Party's obligations under the Covenant to "all individuals within its territory and subject to its jurisdiction . . ." Although some commentators and human rights bodies have argued for a disjunctive reading of "and," such that the ICCPR would cover anyone simply under the control of a Party, [24] the United States interprets the extraterritoriality provision narrowly.[25]

d. First Protocol - empowers private parties to file "communications" with the UN HRC. Communications have evolved to operate as a basis for individual causes of action under the ICCPR. **United States is not a party to the First Protocol.**

e. Second Protocol - seeks to abolish death penalty. **United States not a party.**

2. *International Covenant on Economic, Social, and Cultural Rights (ICESCR) (1966)* – **United States is not a party.**

a. Does not establish a standing committee; reports went to the UN Economic and Social Council. Council later established Committee on Economic, Social, and Cultural Rights. Composed of 18 elected members. No procedure for individual complaint. Committee uses General Comments to Parties to highlight and encourage compliance.

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[20] According to the Restatement, as of 1987, there were 18 treaties falling under the category of "Protection of Persons," and therefore considered human rights treaties. This does **not** include the Universal Declaration of Human Rights, or the United Nations Charter, which are considered expressions of principles, and not binding treaties.

[21] *See* RESTATEMENT, *supra* note 2 and accompanying text.

[22] *See id.* at Part VII, Introductory Note.

[23] THOMAS BUERGENTHAL ET. AL., INTERNATIONAL HUMAN RIGHTS IN A NUTSHELL 350 (2002).

[24] Human Rights Committee, General Comment No. 31, U.N. Doc. HRI/GEN/1/Rev.6 (2004).

[25] Matthew Waxman, Head of U.S. Delegation, Principal Deputy Director of Policy Planning, Dep't of State, Opening Statement to the U.N. Human Rights Committee (July 17, 2006), http://www.state.gov/g/drl/rls/70392.htm (last visited Feb. 26, 2008) ("[I]t is the longstanding view of the United States that the Covenant by its very terms does not apply outside the territory of a State Party. . . . This has been the U.S. position for more than 55 years").

b. So-called "second generation human rights."[26] Includes right to self-determination (art. 1), right to work (art. 6), right to adequate standard of living (art 11), and right to education (art. 13).

3. *Convention on the Prevention and Punishment of the Crime of Genocide*[27] *(1948).* United States signed in 1948, transmitted to Senate in 1949, **United States ratified 1986**.

4. *Convention Against Torture and Other Cruel, Inhuman, and Degrading Treatment (1984)* **United States ratified in 1994.** Implemented by Torture Victim Protection Act of 1991.[28]

a. United Nations treaty; administered by UN Committee on Torture. Composed of 10 elected experts. Committee informed by periodic reporting system and inter-state and individual complaint procedures.

b. Article 20 empowers the Committee to conduct independent investigations but must have cooperation of the State Party subject of investigation.

5. *Convention on the Elimination of All Forms of Racial Discrimination*[29] *(1965)* United States signed in 1966. Transmitted to Senate in 1978. **United States ratified in 1994**.

a. Delay in ratification based on Southern Congressional delegation concerned over international community's view of Jim Crow laws in the South. This treaty is implemented by the Genocide Convention Implementation Act of 1987.[30]

b. Administered by United Nations Committee on the Elimination of Racial Discrimination. Eighteen members elected by parties to the Convention. Committee reviews reports and may hear inter-state or individual complaints. Note that **the interstate complaint system is not optional like that of the ICCPR,** all parties are subject to the Committee's jurisdiction. The system has not, however been used in its inter-state form.

c. Prohibits and defines racial discrimination as "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin" to "nullify[] or impair[] the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other filed of public life."[31] Parties agree to eliminate racial discrimination and apply rights set out in the Universal Declaration of Human Rights and the two Covenants.

C. The United States Treaty Process

1. Article VI of the United States Constitution establishes treaties as "the supreme Law of the Land." Consequently, treaties enjoy the same force as statutes. When treaties and statutes conflict, the later in time is law.

2. Article II, Section 2, clause 2 of the United States Constitution enumerates to the President the power to make treaties. After receiving the advice and consent of two-thirds of the Senate, the President may ratify a treaty.

3. *Reservations, Understandings and Declarations (RUDs)* – The United States policy toward human rights treaties relies heavily on RUDs. RUDs have been essential to mustering political support for ratification in the United States Senate.

a. **Reservations** modify treaty obligations with respect to relevant provisions between parties that accept; reservations do not modify provisions for other parties; if a state refuses a reservation but does not oppose entry into force between the reserving state and itself, the provision proposed for reservation does not operate between the two states.[32]

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[26] NOWAK, *supra* note 14, at 80.

[27] Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9,1948, 102 Stat. 3045, 78 UNTS 277.

[28] Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992), reprinted in 28 U.S.C. § 1350 (2000).

[29] International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195, 5 I.L.M. 352 (entered into force Jan. 4, 1969).

[30] Genocide Convention Implementation Act of 1987, 18 U.S.C. §§ 1091-93 (2000).

[31] Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 195.

[32] Vienna Convention on the Law of Treaties, .N. Doc. A/CONF.39/27 (1969), *reprinted in* 63 AM. J. INT'L L. 875 (1969), *and in* 8 I.L.M. 679 (1969).

b. **Understandings** are statements intended to clarify or explain matters incidental to the operation of the treaty. For instance, a state might elaborate on or define a term applicable to the treaty. Understandings frequently clarify the scope of application.

c. **Declarations** give notice of certain matters of policy or principle. For instance, a state might declare that it regards a treaty to be non-self-executing under its domestic law.

d. **United States practice**: When the Senate includes a reservation or understanding in its advice and consent, the President may only ratify the treaty to the extent of the ratification or understanding.

D. Application of Human Rights Treaties - Understanding how the U.S. applies human rights treaties requires an appreciation of two concepts: Non-extraterritoriality and non-self execution.

1. **Non-extraterritoriality** - It is the original scope of human rights law that is applied as a matter of **policy** by the U.S. when analyzing the scope of human rights treaties. In short, **the U.S. interprets human rights treaties to apply to persons living in the territory of the U.S., and not to any person with whom agents of our government deal in the international community**.[33] This theory of treaty interpretation is referred to as "non-extraterritoriality."[34] The result of this theory is that these international agreements do not create treaty-based obligations on U.S. forces when dealing with civilians in another country during the course of a contingency operation. This distinction between the scope of application of fundamental human rights, which have attained **CIL status**, versus the scope of application of non-core **treaty based human rights**, is a critical aspect of human rights law judge advocates must grasp.

2. **Non-self Execution -** While the non-extraterritorial interpretation of human rights treaties is the primary basis for the conclusion that these treaties do not bind U.S. forces outside the territory of the U.S., Judge Advocates must also be familiar with the concept of **treaty execution**. According to this treaty interpretation doctrine, although treaties entered into by the U.S. become part of the "supreme law of the land,"[35] some are not enforceable in U.S. courts absent subsequent legislation or executive order to "execute" the obligations created by such treaties.

a. This "self-execution" doctrine relates primarily to the ability of a litigant to secure enforcement for a treaty provision in U.S. courts.[36] However, the impact on whether a Judge Advocate should conclude that a treaty creates a binding obligation on U.S. forces is potentially profound. First, there is an argument that if a treaty is considered non-self-executing, it should not be regarded as creating such an obligation.[37] More significantly, once a

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[33] While the actual language used in the scope provisions of such treaties usually makes such treaties applicable to "all individuals subject to [a states] jurisdiction" the United States interprets such scope provisions as referring to the United States and its territories and possessions, and not any area under the functional control of United States armed forces. This is consistent with the general interpretation that such treaties do not apply outside the territory of the United States. *See* RESTATEMENT, *supra* note 2, at §322(2) and Reporters' Note 3; *see also* CLAIBORNE PELL REPORT ON THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, S. EXEC. COC. NO. 102-23 (Cost Estimate) (This Congressional Budget Office Report indicated that the Covenant was designed to guarantee rights and protections to people living within the territory of the nations that ratified it).

[34] *See* Theodore Meron, *Extraterritoriality of Human Rights Treaties*, 89 AM. J. INT'L L. 78-82 (1995). *See also* CENTER FOR LAW AND MILITARY OPERATIONS, THE JUDGE ADVOCATE GENERAL'S SCHOOL, UNITED STATES ARMY, LAW AND MILITARY OPERATIONS IN HAITI, 1994-1995--LESSONS LEARNED FOR JUDGE ADVOCATES 49 (1995) [hereinafter CLAMO HAITI REPORT] (citing human rights groups that mounted a defense for an Army captain that misinterpreted the Civil and Political Covenant to create an affirmative obligation to correct human rights violations within a Haitian Prison). Lawyers' Committee for Human Rights, Protect or Obey: The United States Army versus CPT Lawrence Rockwood 5 (1995) (reprinting an amicus brief submitted in opposition to a prosecution pretrial motion).

[35] U.S. CONST. art VI. According to the Restatement, "international agreements are law of the United States and supreme over the law of the several states." RESTATEMENT, s*upra* note 2, at §111. The Restatement Commentary states the point even more emphatically: "[T]reaties made under the authority of the United States, like the Constitution itself and the laws of the United States, are expressly declared to be 'supreme Law of the Land' by Article VI of the Constitution." *Id.* at cmt. d.

[36] *See* RESTATEMENT, *supra* note 2, at cmt h.

[37] There are several difficulties with this argument. First, it assumes that a U.S. court has declared the treaty non-self-executing, because absent such a ruling, the non-self-executing conclusion is questionable: "[I]f the Executive Branch has not requested implementing legislation and Congress has not enacted such legislation, there is a strong presumption that the treaty has been considered self-executing by the political branches, and should be considered self-executing by the courts." RESTATEMENT, *supra* note 2, at §111, Reporters Note 5. Second, it translates a doctrine of judicial enforcement into a mechanism whereby U.S. state actors conclude that a valid treaty should not be considered to impose international obligations upon those state actors, a transformation that seems to contradict the general view that failure to enact executing legislation when such legislation is needed constitutes a breach of the relevant treaty obligation. "[A] finding that a treaty is not self-executing (when a court determines there is not executing legislation) is a finding that the United States has been and continues to be in default, and should be avoided." *Id.*

treaty is executed, it is the subsequent executing legislation or executive order, and not the treaty provisions, that is given effect by U.S. courts, and therefore defines the scope of U.S. obligations under our law.[38]

b. The U.S. position regarding the human rights treaties discussed above is that "the intention of the United States determines whether an agreement is to be self-executing or should await implementing legislation."[39] Thus, the U.S. position is that its unilateral statement of intent, made through the vehicle of a declaration during the ratification process, is determinative of the intent of the parties. Accordingly, if the U.S. adds such a declaration to a treaty, the declaration determines the interpretation the U.S. will apply to determining the nature of the obligation.[40]

1. **Derogations** – Each of the major human rights treaties to which the United States is a party includes a derogations clause. Derogation refers to the legal right to suspend certain human rights treaty provisions in time of **war or in cases of national emergencies**.

a. Certain rights, however, may not be derogated from:

(1) Right to life,

(2) Prohibition on torture,

(3) Prohibition on slavery,

(4) Prohibition on *ex post* punishment,

(5) **Nor** may states adopt measures inconsistent with their obligations under international law.

V. THE INTERNATIONAL HUMAN RIGHTS SYSTEM

International human rights are developed and implemented through a layered structure of complimentary and coextensive systems. "The principle of universality does not in any way rule out regional or national differences and peculiarities."[41] As the United States participates in combined operations, Judge Advocates will find that allies may have very different conceptions of and obligations under human rights law. In addition to the global system of the United Nations, regional human rights bodies have developed in complexity and scope. Judge Advocates will benefit from an appreciation of the basic features of these systems as they relate to allies' willingness to participate and desire to shape operations.[42]

A. The Universal Declaration of Human Rights - UN General Assembly Resolution passed in December 1946. Not a treaty but many provisions reflect CIL. Adopted as "a common standard of achievement for all peoples and nations."

B. The Human Rights Committee (HRC) –

1. established by the ICCPR as a committee of independent human rights experts

2. reviews the periodic reports submitted by states party to the ICCPR.

3. may also hear "communications" from individuals in states party to the (First) Optional Protocol to the ICCPR. **United States is not a party to the First Protocol to the ICCPR.**

VI. REMEDIES FOR HUMAN RIGHTS VIOLATIONS

A. Human Rights Treaty-Based Causes of Action – U.S. courts have generally held human rights treaties to be non-self-executing and therefore not bases for causes of action in domestic courts. In *Sei Fujii v. California*,[43]

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[38] "[I]t is the implementing legislation, rather than the agreement itself, that is given effect as law in the United States." *Id.* Perhaps the best recent example of the primacy of implementing legislation over treaty text in terms of its impact on how U.S. state actors interpret our obligations under a treaty was the conclusion by the Supreme Court of the United States that the determination of refugee status for individuals fleeing Haiti was dictated not pursuant to the Refugee Protocol standing alone, but by the implementing legislation for that treaty – the Refugee Act. United States v. Haitian Centers Council, Inc. 113 S.Ct. 2549 (1993).

[39] *See* RESTATEMENT, *supra* note 2, at § 131.

[40] *See* RESTATEMENT, *supra* note 2, at § 111, cmt.

[41] NOWAK, *supra* note 14, at 2.

[42] Sei Fujii v. California, 38 Cal.2d 718, 242 P.2d 617 (1952).

[43] 38 Cal.2d, 718, 242 P.2d 617 (1952).

the California Supreme Court heard a claim that UN Charter articles 55 and 56 invalidated the California Alien Land Law. The land law had varied land owner rights according to alien status. The court struck down the law on equal protection grounds but overruled the lower court's recognition of causes of action under the UN Charter. The court stated, "The provisions in the [C]harter pledging cooperation in promoting observance of fundamental freedoms lack the mandatory quality and definiteness which would indicate an intent to create justiciable rights in private person immediately upon ratification."[44] Federal and state courts have largely followed *Sei Fujii's* lead.

B. Statutory Causes of Action – The greatest activity in domestic remedies for human rights violations has occurred through the Alien Tort Statute[45] The statute provides jurisdiction for U.S. district courts to hear "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[46]

1. In *Filartiga v. Peña-Irala*, the Second Circuit recognized a right to be free from torture actionable under the statute.[47] The court's analysis includes a detailed exploration of CIL and the level of proof required to establish an actionable provision of CIL.

2. Recently, the United States Supreme Court addressed the Alien Tort Statute in *Sosa v. Alvarez-Machain*.[48] Refining and tightening the standard for establishing torts "in violation of the law of nations," the Court characterized the statute essentially as a jurisdictional statute.[49] The Court declined to go so far as categorically requiring separate legislation to establish causes of action under the statute, however the Court set a very high burden of proof to establish actionable causes.

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[44] 242 P.2d at 621-22.

[45] 28 U.S.C. § 1350 (2004).

[46] *Id.*

[47] 630 F.2d 876 (2d Cir.1980).

[48] 542 U.S. 692 (2004)

[49] *Id.*

NOTES

NOTES

CHAPTER 4

THE LAW OF WAR ACROSS THE CONFLICT SPECTRUM

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3. U.S. DEP'T OF DEFENSE, DIR. 2311.01E, DOD LAW OF WAR PROGRAM (9 May 2006) (cancelling Dep't of Defense Directive 5100.77, DOD LAW OF WAR PROGRAM (9 December 1998)).
4. U.S. DEP'T OF DEFENSE, DIR. 3000.05, MILITARY SUPPORT FOR STABILITY, SECURITY, TRANSITION, AND RECONSTRUCTION (SSTR) OPERATIONS (28 Nov. 2005).
5. JOINT CHIEFS OF STAFF, INSTR. 5810.01C, IMPLEMENTATION OF THE DOD LAW OF WAR PROGRAM (31 January 2007, current as of 29 January 2008).
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13. U.S. DEP'T OF ARMY, FIELD MANUAL 100-8, THE ARMY IN MULTI-NATIONAL OPERATIONS (24 Nov. 1997).
14. Peacekeeping: Issues of U.S. Military Involvement, Congressional Research Service Issue Brief for Congress, updated 27 Mar. 2006 [hereinafter Peacekeeping].
15. United Nations Peacekeeping: Issues for Congress, Congressional Research Service Issue Brief for Congress, updated 1 Apr. 2005 [hereinafter United Nations Peacekeeping].
16. Report of the Panel on United Nations Peace Operations (August 2000) [hereinafter Brahimi Report]. For a condensed version and analysis, *see* William J. Durch, et al, The Brahimi Report and the Future of UN Peace Operations, The Henry L. Stimson Center (2003).
17. An Agenda For Peace: Preventive Diplomacy, Peacemaking and Peace-Keeping, Report of The Secretary-General Pursuant to the Statement Adopted by the Summit Meeting of the Security Council on 31 January 1992, 17 June 1992, and Supplement to An Agenda For Peace: Position Paper of the Secretary-General on the Occasion of the Fiftieth Anniversary of the United Nations, Report of the Secretary-General on the Work of the Organization, 3 January 1995, *available at* http://www.un.org/Docs/SG/ [hereinafter Agenda for Peace].

I. INTRODUCTION

The law of war (LOW), whether through application of treaties or customary international law (CIL), applies pursuant to the satisfaction of triggering clauses or conditions.[1] For example, the Hague Regulations apply during "war," a rather vague term that led to the adoption of Articles Two and Three common to the 1949 Geneva Conventions (applying the body of the four Conventions to international armed conflict and total or partial occupation, and applying a limited set of basic provisions to armed conflict not of an international character). However, military operations are frequently conducted in conditions not amounting to armed conflict, whether international or non-international. In such cases, what law governs the conduct of military operations?

[1] For a more detailed discussion of the application of the law of war, both pursuant to treaties and customary law, see Major John Rawcliffe, *Changes to the Department of Defense Law of War Program*, ARMY LAW. (September 2006).

II. DOCTRINAL TYPES OF OPERATIONS

Military operations are divided into three major categories: 1) Major Operations and Campaigns; 2) Crisis Response and Limited Contingency Operations; and 3) Military Engagement, Security Cooperation, and Deterrence.[2] Joint Pub 3-0 further lists the following types of operations: Arms Control, Combating Terrorism, Department of Defense (DoD) Support to Counterdrug Operations, Enforcement of Sanctions/Maritime Intercept Operations, Enforcing Exclusion Zones, Ensuring Freedom of Navigation and Overflight, Humanitarian Assistance, Military Support to Civilian Authorities, Nation Assistance/Support to Counterinsurgency, Noncombatant Evacuation Operations, Peace Operations, Protection of Shipping, Recovery Operations, Show of Force Operations, Strikes and Raids, and Support to Insurgency.

Major Operations and Campaigns will most likely involve the triggering of Common Article Two. Other types of operations, however, will likely not. Of those, Peace Operations are the most common type of operation likely to involve large numbers of military forces, including Judge Advocates (JA) and Paralegals.

III. PEACE OPERATIONS

Field Manual 3-07, Stability Operations and Support Operations, is the Army's keystone doctrinal reference on the subject of peace operations. The key concepts of peace operations are: consent, impartiality, transparency, restraint, credibility, freedom of movement, flexibility, civil-military operations, legitimacy, and perseverance.[3] These concepts affect every facet of operations and remain fluid throughout any mission. While not a doctrinal source, the Joint Task Force Commander's Handbook for Peace Operations (16 June 1997) is a widely disseminated source of lessons learned and operational issues. Chapters VI-5 of Joint Pub 3-0 contains an excellent summary of the operational considerations and principles that apply directly to Peace Operations. The principles for joint operations, in addition to the nine principles of war,[4] are restraint, perseverance, and legitimacy. The JA and Paralegal can play a significant role in establishing and maintaining these principles.

A. Definition, Generally. There is still no universally accepted definition for many of the terms connected with peace operations and related activities. For example, no single definition of "peacekeeping" is accepted by the international community as a whole. The absence of one specific definition has resulted in the term being used to describe almost any type of behavior intended to obtain what a particular nation regards as peace. There are even slight inconsistencies within U.S. doctrine and other publications that define peacekeeping and related terms.

B. Peace Operations

1. Peace Operations is a comprehensive term that covers a wide range of activities. Joint Pub. 3-0 **defines peace operations as "multiagency and multinational operations involving all instruments of national power" and encompasses** peacekeeping operations (PKO), and peace enforcement operations (PEO).

2. Whereas peace operations are authorized under both Chapters VI and VII of the United Nations Charter, the doctrinal definition excludes high end enforcement actions where the UN or UN sanctioned forces have become engaged as combatants and a military solution has now become the measure of success. An example of such is OPERATION DESERT STORM. While authorized under Chapter VII,[5] this was international armed conflict and the traditional laws of war applied.

3. These operations can occur either: a) to prevent the outbreak of hostilities, such as Task Force Able Sentry in Macedonia in 1996-98; b) after hostilities to maintain the peace such as Task Force Eagle in Bosnia beginning in 1996; or c) to provide stability in a post-occupation environment such as CJTF-7 in Iraq after 30 June 2004.

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[2] JOINT CHIEFS OF STAFF, JOINT PUB. 3-0, DOCTRINE FOR JOINT OPERATIONS (17 Sept. 2006)[hereinafter JP 3-0]. JP 3-0 is quoted or cited extensively in this outline. For brevity's sake, citations to JP 3-0 will be omitted. Military operations were previously described as "War" or "Military Operations Other Than War (MOOTW)." The term and acronym "MOOTW" was discontinued by JP 3-0, Joint Operations (17 September 2006).

[3] U.S. DEP'T OF ARMY, FIELD MANUAL 3-07, STABILITY OPERATIONS AND SUPPORT OPERATIONS para. 4-14 (20 Feb. 2003).

[4] The Nine Principles of War are: objective, offensive, mass, economy of force, maneuver, unity of command, security, surprise, and simplicity. For a detailed definition of each principle see JP 3-0 App. A.

[5] *See* S.C. Res. 678, U.N. Doc. S/RES/678 *available at* http://www.un.org/Docs/scres/1990/scres90.htm.

C. Peacekeeping

1. FM 3-07 and Joint Pub 3-07.3: Military or paramilitary operations that are undertaken with the **consent** of all major belligerents, designed to monitor and facilitate implementation of an **existing truce agreement** and support diplomatic efforts to reach a long-term political settlement.

2. Peacekeeping is conducted under the authority of Chapter VI, UN Charter, and just as the name implies, there must be a peace to keep. It is intended to maintain calm while providing time to negotiate a permanent settlement to the underlying dispute and/or assist in carrying out the terms of a negotiated settlement. Therefore, there must be some degree of stability within the area of operations. Peacekeeping efforts support diplomatic endeavors to achieve or to maintain peace in areas of potential or actual conflict and often involve ambiguous situations requiring the peacekeeping force to deal with extreme tension and violence without becoming a participant.

3. Peacekeeping requires an invitation or, at a minimum, the consent of all the parties to the conflict. Peacekeepers must remain completely impartial towards all the parties involved. Peacekeeping forces may include unarmed observers, lightly armed units, police, and civilian technicians. Typical peacekeeping operations may include: observe, record, supervise, monitor, and occupy a buffer or neutral zone, and report on the implementation of the truce and any violations thereof. Typical peacekeeping missions include:

a. Observing and reporting any alleged violation of the peace agreement.

b. Handling alleged cease-fire violations and/or alleged border incidents.

c. Conducting regular liaison visits to units within their AO.

d. Continuously checking forces within their AO and reporting any changes thereto.

e. Maintaining up-to-date information on the disposition of forces within their AO.

f. Periodically visiting forward positions; report on the disposition of forces.

g. Assisting civil authorities in supervision of elections, transfer of authority, partition of territory, & administration of civil functions.

4. Force may only be used in self-defense. Peacekeepers should not prevent violations of a truce or cease-fire agreement by the active use of force, their presence is intended to be sufficient to maintain the peace.

5. United Nations Security Council Resolution 690 (1991)[6] concerning the Western Sahara is a good example of the implementation of a peacekeeping force.

6. Brahimi Report: Peacekeeping is a 50-year plus enterprise that has evolved rapidly in the past decade from a traditional, primarily, military model of observing ceasefires and force separations after inter-state wars to one that incorporates a complex model of many elements, military and civilian, working together to build peace in the dangerous aftermath of civil wars. The Brahimi definition of peacekeeping, as well as that of many in the UN and international community, describes both traditional peacekeeping and peace enforcement operations.

D. Peace Enforcement

1. FM 3-07: The application of military force, or the threat of its use, normally pursuant to international authorization, to compel compliance with resolutions or sanctions designed to maintain or restore peace and order. *An Agenda for Peace*: Actions taken to compel a recalcitrant belligerent to comply with demands of the Security Council. Employing those **measures provided for in Chapter VII** of the Charter of the United Nations.

2. Peace enforcement is conducted under the authority of Chapter VII, UN Charter, and could include combat, armed intervention, or the physical threat of armed intervention. In contrast to peacekeeping, peace enforcement forces do not require consent of the parties to the conflict and they may not be neutral or impartial. Typical missions include:

a. Protection of humanitarian assistance.

b. Restoration and maintenance of order and stability.

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[6] *See* S.C. Res. 690 U.N. Doc. S/RES/690 *available at* http://www.un.org/Docs/scres/1991/scres91.htm.

c. Enforcement of sanctions.

d. Guarantee or denial of movement.

e. Establishment and supervision of protected zones.

f. Forcible separation of belligerents.

3. UNSCR 1031 concerning Bosnia is a good example of the Security Council using Chapter VII to enforce the peace, even when based on an agreement.[7]

E. Peacemaking

1. FM 3-07: A process of diplomacy, mediation, negotiation, or other forms of peaceful settlement that arranges ends to disputes and resolves issues that led to conflict.

2. Brahimi Report: Peacemaking addresses conflicts in progress, attempting to bring them to a halt, using the tools of diplomacy and mediation. Peacemakers may be envoys of governments, groups of states, regional organizations or the United Nations, or they may be unofficial and non-governmental groups, as was the case, for example, in the negotiations leading up to a peace accord for Mozambique. Peacemaking may even be the work of a prominent personality, working independently.

3. Peacemaking is strictly diplomacy. Confusion may still exist in this area because the former U.S. definition of peacemaking was synonymous with the definition of peace enforcement.

F. Preventive Diplomacy

1. FM 3-07 and Joint Pub. 3-07.3: Diplomatic actions taken in advance of a predictable crisis to prevent or limit violence. *An Agenda for Peace*: Action to prevent disputes from arising between parties, to prevent existing disputes from escalating into conflicts and to limit the spread of the latter when they occur.

2. Used by the UN with the deployment of a force to Macedonia, preventive diplomacy is generally of a short-term focus (although Macedonia became a long-term commitment), designed to avert an immediate crisis. It includes confidence building measures and, while it is diplomatic in theory, it could involve a show of force, preventive deployments and in some situations, demilitarized ones.

3. Whereas peacekeeping and preventive deployments have many of the characteristics (i.e. similar rules of engagement and no or very limited enforcement powers), preventive deployments usually will not have the consent of all the parties to the conflict and do not need an existing truce or peace plan.

G. Peace-Building

1. FM 3-07: Post-conflict actions, predominately diplomatic and economic, that strengthen and rebuild civil infrastructure and institutions in order to avoid a relapse into conflict.

2. Brahimi Report: Peace-building is a term of more recent origin that, as used in the present report, defines activities undertaken on the far side of conflict to reassemble the foundations of peace and provide the tools for building on those foundations something that is more than just the absence of war. Thus, peace-building includes but is not limited to: reintegrating former combatants into civilian society, strengthening the rule of law (for example, through training and restructuring of local police, and judicial and penal reform); improving respect for human rights through the monitoring, education and investigation of past and existing abuses; providing technical assistance for democratic development (including electoral assistance and support for free media); and promoting conflict solution and reconciliation techniques.

3. Peace-building activities may generate additional tasks for units earlier engaged in peacekeeping or peace enforcement. You will typically find post conflict peace-building taking place to some degree in all Peace Operations. These activities are prime candidates for causing mission creep. Judge Advocates must ensure that such activities are included in the mission and are properly funded.

H. Other Terms. The reality of modern Peace Operations is that a mission will almost never fit neatly into one doctrinal category. The JA should use the doctrinal categories only as a guide to reaching the legal issues that affect each piece of the operation. Most operations are fluid situations, made up of multifaceted and interrelated

[7] *See generally* S.C. Res. 1031, U.N. Doc. S/RES/1031 *available at* http://www.un.org/Docs/scres/1995/scres95.htm.

missions. Doctrine is currently evolving is this area, and various terms may be used to label missions and operations that do not fall neatly into one of the above definitions.

1. Second generation peacekeeping[8]
2. Protective/humanitarian engagement[9]
3. Stability Operations and/or Support Operations (SOSO or SASO)
4. Stability and Reconstruction Operations (S&RO)
5. Stability, Security, Transition, and Reconstruction (SSTR) Operations[10]
6. Stability Operations

IV. LEGAL AUTHORITY & U.S. ROLES IN PEACE OPERATIONS

A. As stated above, peacekeeping evolved essentially as a compromise out of a necessity to control conflicts without formally presenting the issue to the UN Security Council for Chapter VII action. The UN Charter does not directly provide for peacekeeping. Due to the limited authority of traditional "peacekeeping" operations (i.e., no enforcement powers), it is accepted that **Chapter VI, Pacific Settlement of Disputes**, provides the legal authority for UN peacekeeping.

B. Enforcement actions are authorized under Chapter VII of the UN Charter. The authorizing Security Council resolution will typically refer to Chapter VII in the text and authorize **"all necessary means/measures"** (allowing for the force) to accomplish the mission. Recent examples of Chapter VII operations are Somalia (both UNITAF and UNOSOM II), UNPROFOR, Haiti (the initial operation, UNMIH is Chapter VI), Bosnia (IFOR as well as SFOR) and Liberia. The UN must be acting to **maintain or restore international peace and security** before it may undertake or authorize an enforcement action. As the UN becomes more willing and able to use these Chapter VII enforcement powers to impose its will, many Third World states fear a new kind of colonialism. Although the Charter specifically precludes UN involvement in matters "essentially within the domestic jurisdiction" of states, that general legal norm "does not prejudice the application of enforcement measures under Chapter VII."[11]

C. As a permanent member of the Security Council, the U.S. has an important political role in the genesis of Peace Operations under a UN mandate. The JA serves an important function in assisting leaders in the translation of vague UN mandates into the specified and implied military tasks on the ground. The mission (and hence the authorized tasks) must be linked to authorized political objectives

D. As a corollary to normal UN authorization for an operation, international agreements provide legal authorization for some Peace Operations. The Dayton Accords and the MFO are examples of this type of Peace Operation. As a general rule of international law, states cannot procure treaties through coercion or the threat of force.[12] However, the established UN Charter mechanisms for authorizing the use of force by UN Member states define the lawful parameters. In other words, even if parties reach agreement following the use of force (or the threat thereof) or other means of inducement authorized under Chapter VII, the treaty is binding.[13]

E. Therefore: U.S. participation in Peace Operations falls into these discrete categories:

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[8] Second generation peacekeeping is a term being used within the UN as a way to characterize peacekeeping efforts designed to respond to international life in the post-cold war era. This includes difficulties being experienced by some regimes in coping with the withdrawal of super-power support, weak institutions, collapsing economies, natural disasters and ethnic strife. As new conflicts take place within nations rather than between them, the UN has become involved with civil wars, secession, partitions, ethnic clashes, tribal struggles, and in some cases, rescuing failed states. The traditional peacekeeping military tasks are being complemented by measures to strengthen institutions, encourage political participation, protect human rights, organize elections, and promote economic and social development. *United Nations Peace-keeping*, United Nations Department of Public Information DPI/1399-93527-August 1993-35M.

[9] Protective/Humanitarian engagement involves the use of military to protect "safe havens" or to effect humanitarian operations. These measures could be authorized under either Chapter VI or VII of the UN Charter. Bosnia and Somalia are possible examples.

[10] *See* U.S. DEP'T OF DEFENSE DIR. 3000.05, MILITARY SUPPORT FOR STABILITY, SECURITY, TRANSITION, AND RECONSTRUCTION (SSTR) OPERATIONS (28 Nov. 2005).

[11] U.N. Charter art. 2, para. 7.

[12] Vienna Convention on the Law of Treaties, arts. 51-53 UN Doc. A/Conf. 39/27, *reprinted in* 8 I.L.M. 679 (1969).

[13] Id. at art. 52; RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 331 cmt. d (1986).

1. Participation **in** United Nations Chapter VI Operations (UNTSO, UNMIH): This type of operation must comply with the restraints of the United Nations Participation Act (UNPA).[14] Section 7 of the UNPA (22 U.S.C. § 287d-1) allows the President to detail armed forces personnel to the United Nations to serve as observers, guards, or in any other noncombat capacity. Section 628 of the Foreign Assistance Act (22 U.S.C. § 2388) is another authority which allows the head of any agency of the U.S. government to detail, assign, or otherwise make available any officer to serve with the staff of any international organization or to render any **technical, scientific, or professional advice or service to or in cooperation with such organization.**[15] This authority cannot be exercised by direct coordination from the organization to the unit. Personnel may only be tasked following DoD approval channels. No more than 1,000 personnel worldwide may be assigned under the authority of § 7 at any one time, while § 628 is not similarly limited.

2. Participation **in support of** United Nations Peace Operations: These operations are linked to underlying United Nations authority. Examples are the assignment of personnel to serve with the UN Headquarters in New York under § 628 or the provision of DoD personnel or equipment to support International War Crimes Tribunals.

3. Operations **supporting enforcement of** UN Security Council Resolutions: These operations are generally pursuant to Chapter VII mandates, and are rooted in the President's constitutional authority as the Commander in Chief. OPERATION JOINT ENDEAVOR (Bosnia, 1995) was authorized by S.C. Res. 1031; OPERATION JOINT GUARD (Bosnia, 1996) was authorized by UNSCR 1088. The operations are subject to an almost infinite variety of permutations. For example, OPERATIONS SHARP GUARD (NATO enforcement of economic sanctions and arms embargo against the former Yugoslavia from 1993-1996) and OPERATION DENY FLIGHT (NATO enforcement of the no-fly zone over Bosnia from 1993-1995) were based on Chapter VII mandates.

V. JUDGE ADVOCATE LEGAL CONSIDERATIONS:

A. Legal Authority and Mandate

1. UNDERSTAND THE RELATIONSHIP BETWEEN THE MANDATE AND MISSION!! The first concern for the JA is to determine the type of operation (peacekeeping, enforcement, etc.), and the general concept of legal authority for the operation (if UN, Chapter VI or VII). In the context of OPERATION RESTORE HOPE (1993 humanitarian assistance mission in Somalia), one commander commented that the lawyer is the "High Priest of the mission statement." **This will define the parameters of the operation, force composition, ROE, status, governing fiscal authorities, etc.** The first place to start is to assemble the various Security Council resolutions that authorize the establishment of the peace operation and form the mandate for the Force. The mandate by nature is political and often imprecise, resulting from diplomatic negotiation and compromise. A mandate of "maintain a secure and stable environment" (as in Haiti) can often pose difficulties when defining tasks and measuring success. The mandate should describe the mission of the Force and the manner in which the Force will operate. **The CJCS Execute Order for the Operation is the primary source for defining the mission, but it will usually reflect the underlying UN mandate**. The mandate may also:

a. Include the tasks of functions to be performed.

b. Nominate the force CDR and ask for the Council's approval.

c. State the size and organization of the Force.

d. List those states that may provide contingents.

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[14] 22 U.S.C. § 287.

[15] 22 U.S.C. §§ 2389 and 2390 contain the requirements for status of personnel assigned under § 628 FAA as well as the terms governing such assignments. **Procedures.** E.O. 1213 delegates to the SECDEF, in consultation with SECSTATE, determination authority. Approval of initial detail to UN operation under this authority resides with SECDEF. The same arrangements with the UN as outlined above for Section 7 UNPA details apply here. **Reimbursements** for section 628 details are governed by section 630 of the FAA. Section 630 provides four possibilities: (1) waiver of reimbursement; (2) direct reimbursement to the service concerned with moneys flowing back to relevant accounts that are then available to expend for the same purposes; (3) advance of funds for costs associated with the detail; and (4) receipt of a credit against the U.S. fair share of the operating expenses of the international organization in lieu of direct reimbursement. Current policy is that DoD will be reimbursed the incremental costs associated with a detail of U.S. military to a UN operation under this authority (i.e., hostile fire pay; family separation allowance) and that State will credit the remainder against the U.S. peacekeeping assessment (currently paid at 27% of the overall UN PKO budget).

e. Outline proposals for the movement and maintenance of the Force, including states that might provide transport aircraft, shipping, and logistical units.

f. Set the initial time limit for the operation.

g. Set arrangements for financing the operations.

2. Aside from helping Commanders define the specified and implied tasks, the mandate outlines the parameters of the authorized mission. Thus, the mandate helps the JA and comptroller define the lawful uses of U.S. military O&M funds in accomplishing the mission. In today's complex contingencies, the UN action may often be supplemented by subsequent agreements between the parties which affect the legal rights and duties of the military forces. For example, UNSCR 1088 applied to SFOR, but referenced the General Framework Agreement for Peace (Dayton Accords) as well as the Peace Implementation Council Agreements, signed in Florence on 14 June 1996.

3. **Presidential Decision Directive (PDD) 25 (May 1994).**[16] A former Secretary of State declared that while the UN performs many important functions, "its most conspicuous role—and the primary reason for which it was established—is to help nations preserve the peace."[17] The Clinton Administration defined its policy towards supporting Peace Operations in Presidential Decision Directive 25, "The Clinton Administration's Policy on Reforming Multilateral Peace Operations (May 1994)." Presumably, this policy remains in effect for the Bush Administration unless revoked or superseded by a subsequent directive.[18] PDD-25 is a classified document; the information in this summary is based upon the unclassified public extract. The document reiterated that Multilateral Peace Operations are an important component of the U.S. national military strategy and that U.S. forces will be used in pursuit of U.S. national interests. PDD-25 promulgated six major issues of reform and improvement. Many of the same areas are the subjects of active debate, with Congress discussing methods of placing stricter controls on how the U.S. will support peace operations and how much the U.S. will pay for peace operations. The PDD-25 factors are an aid to the decision-maker. For the JA, they help define the applicable body of law, the scope of the mission statement, and the permissible degree of coalition command and control over U.S. forces. There will seldom be a single document that describes the process of applying the PDD-25 criteria. Nevertheless, the PDD-25 considerations surface in such areas as ROE, the media plan, command and control arrangements, the overall legal arguments for the legitimacy of the operation, and the extent of U.S. support for other nations to name a few. The six areas highlighted by PDD-25 follow:

a. *Making disciplined and coherent choices about which peace operations to support.* In making these decisions, a three phase analysis is conducted:

(1) The Administration will consider the following factors when deciding whether to vote for a proposed Peace Operation (either Chapter VI or VII):

(a) UN involvement advances U.S. interests and there is a community of interests for dealing with the problem on a multilateral basis (NOTE: may entail multinational chain of command and help define the scope of permissible support to other nations);

(b) There is 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 thereof (NOTE: obviously important in defining the mission, helping define the scope of lawful fiscal authority, and preventing mission creep);

(c) There are clear objectives and an understanding of whether the mission is defined as neutral peacekeeping or peace enforcement;

(d) Does a working cease-fire exist between the parties prior to Chapter VI missions?

(e) Is there a significant threat to international peace and security for Chapter VII missions?

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[16] BUREAU OF INT'L ORG. AFFAIRS, U.S. DEP'T OF STATE, PUB. No. 10161, The Clinton Administration's Policy on Reforming Multilateral Peace Operations (1994), *reprinted in* 33 I.L.M. 795 (1994). *See also* James P. Terry, *The Criteria for Intervention: An Evaluation of U.S. Military Policy in U.N. Operations*, 31 TEX. INT. L. REV. 101 (1996).

[17] Madeleine K. Albright, The UN, The U.S. and the World, 7 Dep't of State Dispatch 474 (1996).

[18] *See* Peacekeeping, Reference 14, at 3.

(f) There are sufficient forces, financing, and mandate to accomplish the mission (NOTE: helps define the funding mechanism, supporting forces, and expected contributions of combined partners);

(g) The political, humanitarian, or economic consequences are unacceptable;

(h) The operation is linked to clear objectives and a realistic end state (NOTE: helps the commander define the specified and implied tasks along with the priority of tasks).

(2) If the first phase of inquiry results in a U.S. vote for approving the operation, a second set of criteria will determine whether to commit U.S. troops to the UN operation:

(a) Participation advances U.S. interests (NOTE: helps the commander and lawyer sort out the relative priorities among competing facets of the mission, helps guide the promulgation of ROE which comply with the national interest, and helps weight the best allocation of scarce fiscal resources);

(b) Personnel, funds, and other resources are available (NOTE: may assist DoD obtain funding from other executive agencies in the interagency planning process);

(c) U.S. participation is necessary for the success of the mission;

(d) Whether the endstate is definable (NOTE: the political nature of the objective should be as clearly articulated as possible to guide the commander);

(e) Domestic and Congressional support for the operation exists; and

(f) Command and control arrangements are acceptable (NOTE: within defined legal boundaries).

(3) The last phase of the analysis applies when there is a significant possibility that the operation will commit U.S. forces to combat:

(a) There is a clear determination to commit sufficient forces to achieve the clearly defined objective;

(b) The leaders of the operation possess clear intention to achieve the stated objectives; and

(c) There is a commitment to reassess and continually adjust the objectives and composition of the force to meet changing security and operational requirements (NOTE: obviously affects the potential for mission creep and the ongoing security of U.S. forces as well as ROE modifications).

b. *Reducing U.S. costs for UN peace operations*. This is the area of greatest congressional power regarding control of military operations.[19] Funding limitations have helped to check the Security Council's ability to intervene in every conflict. In normal Chapter VI operations, member states pay obligatory contributions based on a standard assessment (currently 25% for the U.S.). In Chapter VII peace operations, participating States normally pay their own costs of participation.

c. *Policy regarding the command and control of U.S. forces.*

(1) Command and control of U.S. forces sometimes causes more debate than the questions surrounding U.S. participation. The policy reinforces the fact that U.S. authorities will relinquish only "operational control" of U.S. forces when doing so serves U.S. security interests. The greater the U.S. military role, the less likely we will give control of U.S. forces to UN or foreign command. Any large-scale participation of U.S. forces likely to involve combat should ordinarily be conducted under U.S. command and operational control or through competent regional organizations such as NATO or ad hoc coalitions. OPERATION JOINT ENDEAVOR presented an unusual twist in that the Combatant Commander was the supporting commander to a regional alliance (NATO). The command and control issues raised by OPERATION JOINT ENDEAVOR will recur if the UN authorizes regional organizations to execute future Peace Operations.

(2) PDD-25 forcefully states that the President will never relinquish command of U.S. forces. However, the President retains the authority to release designated U.S. forces to the Operational Control (OPCON)

[19] U.S. CONST. art. 1,§ 8.

of a foreign commander for designated missions. When U.S. forces are under the operational control of a UN commander they will always maintain the capability to report separately to higher U.S. military authorities. This particular provision is in direct contravention to UN policy. Under UN policy, Soldiers and units under UN control will only report to and seek orders and guidance through the UN command channels. The policy also provides that commanders of U.S. units participating in UN operations will refer to higher U.S. authorities orders that are illegal under U.S. or international law, or are outside the mandate of the mission to which the U.S. agreed with the UN, if they are unable to resolve the matter with the UN commander. As a practical matter, this means that deployed units are restricted to the mission limits prescribed in the CJCS Execute Order for the mission. The U.S. reserves the right to terminate participation at any time and/or take whatever actions necessary to protect U.S. forces.

(3) The JA must understand the precise definitions of the various degrees of command in order to help ensure that U.S. commanders do not exceed the lawful authority conveyed by the command and control arrangements of the CJCS execute order.[20] NOTE➔ NATO has its own doctrinal definitions of command relationships which are similar to the U.S. definitions. FM 100-8 summarizes the NATO doctrine as it relates to U.S. doctrinal terms.[21] The Command and Control lines between foreign commanders and U.S. forces represent legal boundaries that the lawyer should monitor.

(a) **COCOM** is the command authority over assigned forces vested only in the commanders of combatant commands by 10 U.S.C. § 164, or as directed by the President in the Unified Command Plan (UCP), and cannot be delegated or transferred. COCOM is the authority of a combatant commander to perform those functions of command over assigned forces involving organizing and employing commands and forces, assigning tasks, designating objectives, and giving authoritative direction over all aspects of military operations, joint training (or in the case of USSOCOM, training of assigned forces), and logistics necessary to accomplish the missions assigned to the command.

(b) **OPCON** is inherent in COCOM and is the authority to perform those functions of command over subordinate forces involving organizing and employing commands and forces, assigning tasks, designating objectives, and giving authoritative direction necessary to accomplish the mission. OPCON includes authoritative direction over all aspects of military operations and joint training necessary to accomplish missions assigned to the command. NATO OPCON is more limited than the U.S. doctrinal definition in that it includes only the authority to control the unit in the exact specified task for the limited time, function, and location.

(c) **TACON** is the command authority over assigned or attached forces or commands, or military capability made available for tasking that is limited to the detailed and usually local direction and control of movements or maneuvers necessary to accomplish assigned missions or tasks. TACON may be delegated to and exercised by commanders at any echelon at or below the level of combatant command. TACON is inherent in OPCON and allows the direction and control of movements or maneuvers necessary to accomplish assigned missions or tasks.

(d) **Support is a command authority**. A support relationship is established by a superior commander between subordinate commanders when one organization should aid, protect, complement, or sustain another force. Support may be exercised by commanders at any echelon at or below the level of combatant command. Several categories of support have been defined for use within a combatant command as appropriate to better characterize the support that should be given.

d. *Reforming and Improving the UN Capability to Manage Peace Operations*. The policy recommends eleven steps to strengthen UN management of peace operations.

e. *Improving the U.S. Government Management and Funding of Peace Operations*. The policy assigns responsibilities for the managing and funding of UN peace operations within the U.S. Government to DoD. DoD has the lead management and funding responsibility for those UN operations that involve U.S. combat units and those that are likely to involve combat, whether or not U.S. troops are involved. DoS will retain lead management and funding responsibility for traditional peacekeeping that does not involve U.S. combat units.

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[20] The precise definitions of the degrees of command authority are contained in Joint Pub 0-2, UNIFIED ACTION ARMED FORCES (UNAAF) (10 July 2001) and Joint Pub 3-0, DOCTRINE FOR JOINT OPERATIONS (17 September 2006).

[21] DEP'T OF ARMY, FIELD MANUAL 100-8, THE ARMY IN MULTINATIONAL OPERATIONS (24 Nov. 1997), *available at* https://akocomm.us.army.mil/usapa/doctrine/DR_pubs/dr_aa/pdf/fm100_8.pdf.

Regardless of who has the lead, DoS remains responsible for the conduct of diplomacy and instructions to embassies and our UN Mission.

f. *Creating better forms of cooperation between the Executive, the Congress, and the American public on peace operations*. This directive looks to increase the flow between the executive branch and Congress, expressing the President's belief that U.S. support for participation in UN peace operations can only succeed over the long term with the bipartisan support of Congress and the American people.

B. Chain of Command Issues

1. U.S. Commanders may never take oaths of loyalty to the UN or other organization.[22]

2. Force Protection is an inherent aspect of command that is nowhere prescribed in Title 10.

3. Limitations under PDD-25: A foreign commander cannot change a mission or deploy U.S. forces outside the area designated in the CJCS deployment order, separate units, administer discipline, or modify the internal organization of U.S. forces.

4. In a pure Chapter VI Peacekeeping Operation, command originates from the authority of the Security Council to the Secretary-General, and down to the Force Commander. The Secretary-General is responsible to the Security Council for the organization, conduct, and direction of the force, and he alone reports to the Security Council about it. The Secretary-General decides the force's tasks and is charged with keeping the Security Council fully informed of developments relating to the force. The Secretary-General appoints the force commander, who conducts the day to day operations, all policy matters are referred back to the Secretary-General. In many operations the Secretary-General may also appoint a civilian Special Representative to the Secretary General (SRSG) to coordinate policy matters and may also serve as the "Head of Mission." The relationship between the special representative and the military force commander depends on the operation, and the force commander may be subordinate to the special representative. In some cases the military force commander may be dual-hatted and also serve as the head of mission. For example, the United Nations Mission in Haiti (UNMIH), the force commander was subordinate to the SRSG, and equal in rank to the UN Administrative Officer (who controlled the funds) and the Civilian Police Commissioner.

5. In most Chapter VII enforcement operations the Security Council will authorize member states or a regional organization to conduct the enforcement operation. The authorizing Security Council Resolution provides policy direction, but military command and control remains with member states or a regional organization. For example, under the Dayton Peace Accord, sanctioned by UNSCR 1088, the Stabilization Force in Bosnia (SFOR) operated under the authority of, and subject to, the direction and political control of the North Atlantic Council.

C. Mission Creep

1. Ensure that the mission, ROE, and fiscal authority are meshed properly. Often, new or shifting guidance will require different military operations than those initially planned. This kind of mission creep comes from above; you as the JA, cannot prevent it, you just help control its impact. For instance, do the ROE need to be modified to match the changed mission (i.e., a changed or increased threat level) and are there any status or SOFA concerns? An example might be moving from peacekeeping (monitoring a cease-fire) to peace enforcement (enforcing a cease-fire).

2. Another potential issue occurs when the unit attempts to do more than what is allowed in the current mandate and mission. This usually comes from a commander wanting to do good things in his Area of Operations (AO): rebuilding structures, training local nationals, and other activities which may be good for the local population, but outside the mission. Acting outside the mission raises a myriad of concerns ranging from possible Anti-Deficiency Act violations to implicitly violating required neutrality.

D. Status of Forces/Status of Mission Agreement

1. Know the status of U.S. Forces in the AO and train them accordingly.

[22] The UN asked MG Kinzer to take such an oath of loyalty during UNMIH, and the judge advocate coordinated with CJCS to prevent the taking of a foreign oath. The same issue has surfaced in the context of NATO operations under the PFP SOFA (with the same result). *See also* 22 U.S.C. § 2387.

2. Notify the Combatant Commander and State Department before negotiating or beginning discussions with a foreign government as required by State Department Circular 175.[23]

3. Watch for varying degrees of status for supporting units on the periphery of the AO.

4. The SOFA is likely the source for determining who is responsible for paying claims.

5. The necessity for a SOFA (termed a SOMA in Chapter VI operations commanded by the UN) depends on the type of operation. Enforcement operations do not depend on, and may not have the consent of the host authorities, and therefore will not normally have a SOFA. Most other operations **should** have a SOFA/diplomatic note/or other international agreement to gain some protection for military forces from host nation jurisdiction. **AGREEMENTS SHOULD INCLUDE LANGUAGE WHICH PROTECTS CIVILIANS WHO ARE EMPLOYED BY OR ACCOMPANY U.S. FORCES.**

6. In most instances the SOFA will be a bilateral international agreement between the UN (if UN commanded) or the U.S. and the host nation(s). In UN operations the SOFA will usually be based on the Model Status of Forces Agreement. The SOFA should include the right of a contingent to exercise exclusive criminal jurisdiction over its military personnel; excusal from paying various fees, taxes, and customs levies; and the provision of installations and other required facilities to the Force by the host nation.

7. The SOFA/SOMA may also include:

a. The international status of the UN Force and its members.

b. Entry and departure permits to and from the HN.

c. Required identity documents (e.g. driver's license).

d. The right to carry arms as well as the authorized type(s) of weapons.

e. Freedom of movement in the performance of UN service.

f. Freedom of movement of individual members of the force in the HN.

g. The utilization of airports, harbors, and road networks in the HN.

h. The right to operate its own communications system across the radio spectrum.

i. Postal regulations.

j. The flying of UN and national flags.

k. Uniform regulations.

l. Permissions to operate UN vehicles without special registration.

m. General supply and maintenance matters (imports of equipment, commodities, local procurement of provisions and POL.

n. Matters of compensation (in respect of the HN's property).

8. The UN (and the U.S.) entry into a host nation may precede the negotiation and conclusion of a SOFA. Sometimes there may be an exchange of Diplomatic Notes, a verbal agreement by the host authorities to comply with the terms of the model SOFA even though not signed, or just nothing at all.

9. **TWO DEFAULT SOURCES OF LEGAL STATUS: (1) "**The Convention on the Safety of United Nations and Associated Personnel."[24] The treaty entered into force on 15 January 1999. The convention requires States to release captured personnel, to treat them in accordance with the 1949 Geneva Convention of Prisoners of War (GC IV) while in custody, and imposes criminal liability on those who attack peacekeepers or other personnel acting in support of UN authorized operations. The Convention will apply in UN operations authorized under Chapter VI or VII. The Convention will not apply in enforcement operations under Chapter VII **in which** any of the UN personnel are engaged as combatants against organized armed forces **and to which** the law of international

[23] *Available at* http://www.state.gov/s/l/treaty/c175/.

[24] *Available at* http://www.un.org/law/cod/safety.htm.

armed conflict applies. **(2)** The Convention on the Privileges and Immunities of the United Nations,[25] 1946 Article VI § 22 defines and explains the legal rights of United Nations personnel as "Experts on Mission." In particular, Experts on Mission are **NOT prisoners of war and therefore cannot lawfully be detained or have their mission interfered with by any party.**

E. Laws of War.

1. It is the UN and U.S. position that Chapter VI operations are not international armed conflict (requiring the application of the Geneva Conventions) as between the peacekeepers and any of the belligerent parties. The Geneva Conventions may of course apply between the belligerent parties. In Chapter VII operations, the applicability of the Geneva Conventions will depend on the situation. Are the UN personnel engaged as combatants against organized armed forces (e.g. Desert Storm)? If the answer is no, then the Geneva Conventions do **not** apply as between the UN Forces and the belligerent parties. In Somalia, the U.S. position was that the Geneva Conventions did not apply, as it was not international armed conflict and the U.S. was not an occupying force. However, GC IV was used to help **guide** U.S. obligations to the local nationals. In NATO enforcement of the no-fly zone and subsequent bombing campaign over Bosnia, it was the UN, NATO, and U.S. position that it was not armed conflict as between the NATO forces and the belligerents. The aircrews were in an "Expert on Mission" status and they could not be fired upon or kept prisoner. If taken into custody, they were to be immediately released. Whether the Geneva Conventions do or do apply as a matter of law, as a matter of policy the minimum humanitarian protections contained within Common Article 3 of the Geneva Conventions will apply.

2. As a matter of U.S. policy (DoDD 2311.01E), U.S. forces will comply with the LOW during all armed conflicts, however such conflicts are characterized, and in all other military operations.

3. If participating in UN operations, JAs should be aware of "the UN ROE." Secretary-General Bulletin ST/SGB/1999/13, Observance by United Nations forces of international humanitarian law, 6 August 1999. However, it is also important to note that this document was controversial when issued and includes certain LOW obligations to which the U.S. is not a party and are not reflective of CIL. This document must also be read in light of limitations on multinational ROE contained in the SROE and CJCSI 3121.01B.

F. Rules of Engagement

1. **Chapter VI missions (Peace Keeping)**: The two principal tenets are the use of force for self-defense and total impartiality. The use of deadly force is justified only under situations of extreme necessity (typically in self-defense), and as a last resort when all lesser means have failed to curtail the use of violence by the parties involved. The use of unnecessary or illegal force undermines the credibility and acceptability of a peacekeeping force to the host nations, the participants in the dispute, and within the international community. It may escalate the level of violence in the area and create a situation in which the peacekeeping force becomes part of the local problem. The use of force must be carefully controlled and restricted in its application. **Peacekeeping forces normally have no mandate to prevent violations of an agreement by the active use of force**. The passive use of force employs physical means that are not intended to harm individuals, installations, or equipment. Examples are the use of vehicles to block the passage of persons or vehicles and the removal of unauthorized persons from peacekeeping force positions. The active use of force employs means that result in physical harm to individuals, installations, or equipment. Examples are the use of batons, rifle butts, and weapons fire.

2. **Chapter VII missions (Peace Enforcement):** Peace enforcement operations on the other hand, may have varying degrees of expanded ROE and may allow for the use of force to accomplish the mission (i.e. the use of force beyond that of self-defense). In peace enforcement, active force may be allowed to accomplish all or portions of the mission. For more information, see the chapter on Rules of Engagement for tips in drafting ROE, training ROE, and sample peace operations ROE.

G. Funding Considerations

1. **FIND POSITIVE AUTHORITY FOR EACH FISCAL OBLIGATION AND APPROPRIATE FUNDS TO ALLOCATE AGAINST THE STATUTORY AUTHORITY!!** All the same rules that apply to the funding of military operations continue to apply.

[25] *Available at* http://www.un.int/usa/host_p-i.htm.

2. During a Chapter VI mission, the JA must be familiar with UN purchasing procedures and what support should be supplied by the UN or host nation. The JA should review the **Aide-Memoire/Terms of Reference.** Aide-Memoire sets out the Mission force structure and requirements in terms of manpower and equipment. It provides the terms of reimbursement from the UN to the Contingents for the provision of personnel and equipment. Exceeding the Aide-Memoire in terms of either manpower or equipment could result in the UN's refusal to reimburse for the excess. Not following proper procedure or purchasing materials that should be provided from other sources may result in the U.S. not being reimbursed by the UN. The UN Field Administration Manual will provide guidance. In general, the unit must receive a formal Letter of Assist (LOA) in order to receive reimbursement under § 7 of the UNPA. The unit can lawfully expend its own O&M funds for mission essential goods or services which the UN refuses to allow (no LOA issued). During Chapter VI or Chapter VII operations, the JA should aggressively weave lawful funding authorities with available funds in pursuit of the needs of the mission.

VI. STRUCTURE FOR ANALYSIS

These diverse operations do not always trigger the application of the traditional LOW regimes because of a lack of the legally requisite armed conflict needed to trigger such regimes.[26] This has led JAs to resort to other sources of law for the resolution of issues during operations not amounting to armed conflict. These sources start with binding CIL based human rights which must be respected by United States Forces at all times. Other sources include host nation law, conventional law, and law drawn by analogy from various applicable sources. The sources of law that can be relied on in these various types of military operations depend on the nature of the operation.

A. The process of analyzing legal issues and applying various sources of law during a military operation entails four essential steps:

1. define the nature of the issue;
2. ascertain what binding legal obligations, if any, apply;
3. identify any "gaps" remaining in the resolution of the issue after application of binding authority;
4. consider filling these "gaps" by application of non-binding sources of law as a matter of policy.[27]

B. When attempting to determine what laws apply to U.S. conduct in an area of operations, a specific knowledge of the exact nature of the operation becomes immediately necessary.[28] For example, in the operations within the Former Yugoslavia, the United States led Implementation Force (IFOR) struggled with defining the exact parameters of its mission. In a pure legal sense, the IFOR was required or authorized to implement Annex 1-A of the Dayton Accord. Yet the Accord seemed to require the following IFOR missions: (1) prevent "interference with the movement of civilian population, refugees, and displaced persons, and respond appropriately to deliberate violence to life and person," and (2) ensure that the Parties "provide a safe and secure environment for all persons in their respective jurisdictions, by maintaining civilian law enforcement agencies operating in accordance with internationally recognized standards and with respect for internationally recognized human rights and fundamental freedoms."[29]

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[26] The "trigger" for the law of war to apply is a conflict "between two or more of the High Contracting Parties [to the Geneva Conventions], even if the state of war is not recognized between them" or in "all cases of partial or total occupation of the territory of a High Contracting Party." *See* Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Article 2 *opened for signature* Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31, *reprinted in* DIETRICH SCHINDLER & JIRI TOMAN, THE LAWS OF ARMED CONFLICTS 373, 376 (3d ed. 1988).

[27] It must be remembered that the so-called "gaps," denounced by some, may be the result of intentional omission by the drafters of binding authorities.

[28] The importance of clear mandates and missions was pointed out as a "critical" lesson learned from the Somalia operations. "A clear mandate shapes not only the mission (the what) that we perform, but the way we carry it out (the how). See Kenneth Allard, Institute for National Strategic Studies- Somalia Operations: Lessons Learned (1995), at 22. Determining the authorizing source of the mission is also crucial when determining who is fiscally responsible for different aspects of the mission.

[29] *See* Dayton Accord, at Annex 1A, arts. I and VI. OPERATION RESTORE HOPE provides another example of the important relationship between the mission statement and the legal obligation owed to the civilian population. The initial mission statement for RESTORE HOPE articulated in United Nations Resolution 794 granted the United States the authority to take "all necessary means" to establish a "secure environment" in which relief efforts could be coordinated. At this point the obligation to local civilians was clear. The mission was not to assume an active role in protecting the civilians, but instead, to provide security for food and supply transfer. Once the mission was handed over to the United Nations, this mission was permitted to mutate and the obligation to civilians became less clear. The U.S. led force referred to as the

C. In reality, the IFOR, realizing the breadth of a mission with such responsibilities, did not formally acknowledge the obligation to execute either of these mission elements.[30] The result was that the forces on the ground did not have a clear picture of the mission. The lesson learned is that in the absence of well-defined mission statements, the JA must gain insight into the nature of the mission by turning to other sources of information.

D. This information might become available by answering several important questions that shed light on the United States' intent regarding any specific operation. These include: (1) what has the President (or his representative) said to the American People regarding the operation;[31] (2) if the operation is to be executed pursuant to a United Nations mandate, what does this mandate authorize; and (3) if the operation is based upon use of regional organization forces,[32] what statement or directives have been made by that organization?

E. After gaining the best possible understanding of the mission's objective, it is important to determine what bodies of law should be relied upon to respond to various issues. The JA should look to the foregoing considerations and the operational environment and determine what law establishes legally mandated obligations, and then utilize the "law by analogy." Thereafter, he should move to succeeding tiers and determine their applicability. Finally, after considering the application of the regimes found within each of the four tiers, the JA must realize that as the operation changes, the potential application of the regulation within each of the four tiers must be constantly reassessed.

VIII. SOURCES OF LAW[33]

A. Fundamental Human Rights

1. Fundamental human rights are CIL based rights, obligatory in nature, and therefore binding on the conduct of state actors at all times. These protections represent the evolution of natural or universal law recognized and commented upon by leaders and scholars for thousands of years.[34] The principle behind this body of law is that these laws are so fundamental in nature that all human beings are entitled to receive recognition and respect of them when in the hands of state actors.

2. Besides applying to all people, the most critical aspect of these rights is that they are said to be non-derogable, that is, they cannot be suspended under any circumstances. As the "minimum yardstick"[35] of protections to which all persons are entitled, this baseline tier of protections never changes. For an extensive discussion of the United States position on the scope and nature of fundamental human rights obligations, see the Human Rights Chapter of this Handbook.

B. Host Nation Law

1. After considering the type of baseline protections represented by fundamental human rights law, the military leader must be advised in regard to the other bodies of law that he should integrate into his planning and execution phases. This leads to consideration of host nation law. Because of the nature of most non-armed conflict missions, JAs must understand the technical and pragmatic significance of host nation law within the area of

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Unified Task Force (UNITAF) conducted narrowly prescribed relief operations from December 9, 1992 to May 4, 1993. On May 4, 1993, UNITAF terminated operations and responsibility for the operation was passed to the United Nations in Somalia (UNOSOM). In March and June of 1993, the United Nations passed resolutions 814 and 837, respectively. These two resolutions dramatically enlarged the scope of the United Nations Operation in Somalia (UNOSOM).

[30] *See* John Pomfret, *Perry Says NATO Will Not Serve As "Police Force" in Bosnia Mission*, WASH. POST, Jan. 4, 1996, at D-1. *See also* Office of Assistant Secretary of Defense (Public Affairs), *Operation Joint Endeavor Fact Sheet*, Dec. 7, 1995), *available at* http://www.dtic/bosnia/fs/bos-004.html (reporting that the "IFOR will not act as a police force," but noting that IFOR will have authority to detain any persons who interfere with the IFOR mission or those individuals indicted for war crimes, although they "will not track them down").

[31] Similar sources are (1) the justifications that the President or his cabinet members provide to Congress for the use of force or deployment of troops and (2) the communications made between the United States and the countries involved in the operation (to include the state where the operation is to occur).

[32] Regional organizations such as North Atlantic Treaty Organization (NATO), Organization of American States (OAS), and the Organization of African Unity (OAU).

[33] For greater detail see Major Richard M. Whitaker, *Civilian Protection Law in Military Operations: An Essay*, ARMY LAW., Nov. 1996.

[34] *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, at § 701, cmt. [hereinafter Restatement].

[35] The International Court of Justice chose this language when explaining its view of the expanded application of the type of protections afforded by article 3, common to the four Geneva Conventions. *See* Nicar. v. U.S., 1986 I.C.J. 14 (June 27), *reprinted in* 25 I.L.M. 1023, 1073.

operations. Although in theory understanding the application of host nation law during military operations is perhaps the simplest component, in practice it is perhaps the most difficult.

2. Judge Advocates must recognize the difference between understanding the technical applicability of host nation law, and the application of that law to control the conduct of U.S. forces during the course of operations. In short, the significance of this law declines in proportion to the movement of the operation toward the characterization of "conflict." Judge Advocates should understand that U.S. forces enter other nations with a legal status that exists anywhere along a notional legal spectrum. The right end of that spectrum is represented by invasion followed by occupation. The left end of the spectrum is represented by tourism.[36]

3. When the entrance can be described as invasion, the legal obligations and privileges of the invading force are based upon the list of straightforward rules found within the LOW. As the analysis moves to the left end of the spectrum and the entrance begins to look more like tourism, host nation law becomes increasingly important, and applies absolutely at the far end of the spectrum. For example, the permissive entry of the 10th Mountain Division into Haiti to execute OPERATION UPHOLD DEMOCRACY, probably represents the mid-point along the foregoing spectrum. Although the force entered with permission, it was not the welcomed guest of the de facto government. Accordingly, early decisions regarding the type of things that could be done to maintain order[37] had to be analyzed in terms of the coalition force's legal right to intervene in the matters of a sovereign state, based in part on host nation law.[38]

4. The weapons search and confiscation policy instituted during the course of OPERATION UPHOLD DEMOCRACY is a clear example of this type of deference to host nation law.[39] The coalition forces adopted an approach that demonstrated great deference for the Haitian Constitution's guarantee to each Haitian citizen the right to "armed self-defense, within the bounds of his domicile."[40]

5. It is important to note that Public International Law assumes a default setting.[41] The classical rule provides that "it is well settled that a foreign army permitted to march through a friendly country, or to be stationed in it, by permission of its government or sovereign, is exempt from the civil and criminal jurisdiction of that place."[42] However, the modern rule, is that in the absence of some type of immunity, forces that find themselves in another nation's territory must comply with that nation's law.[43] This makes the circumstances that move military forces away from this default setting of extreme importance. Historically, military commentators have stated that U.S. forces are immune from host nation laws in any one of three possible scenarios:[44]

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[36] In essence, stability operations frequently place our military forces in a law enforcement type role. Yet, they must execute this role without the immunity from local law that traditional armed conflict grants. In fact, in many cases, their authority may be analogous to the authority of United States law enforcement officers in the territory of another state. "When operating within another state's territory, it is well settled that law enforcement officers of the United States may exercise their functions only (a) with the consent of the other state ... and (b) if in compliance with the laws of the other state...." *See* RESTATEMENT, *supra* note 8, at §§ 433 and 441.

[37] United Nations Security Council Resolution 940 mandated the use of "all necessary means" to "establish a secure and stable environment." Yet even this frequently cited source of authority was balanced with host nation law. *See* CENTER FOR LAW AND MILITARY OPERATIONS, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, LAW AND MILITARY OPERATIONS IN HAITI, 1994-1995 - LESSONS LEARNED FOR JUDGE ADVOCATES 76 (1995) [hereinafter CLAMO HAITI REPORT].

[38] *Id*. at 77. Task Force lawyers advised the military leadership that since President Aristide (as well as Lieutenant General Cedras - the de facto leader) had consented to the entry, "Haitian law would seem to bear" upon coalition force treatment of Haitian civilians.

[39] *See* OPERATION UPHOLD DEMOCRACY, 10th Mountain Division, Office of the Staff Judge Advocate Multinational Force Haiti After-Action Report 7-9 (March 1995) at 108 [hereinafter 10th Mountain AAR].

[40] HAITI CONST. art. 268-1 (1987).

[41] *See* U.S. DEP'T OF ARMY, PAM. 27-161-1, LAW OF PEACE, VOL. I, para. 8-23 (1 Sept. 1979) at 11-1, [hereinafter DA PAM 27-161-1] for a good explanation of an armed forces' legal status while in a foreign nation.

[42] Coleman v. Tennessee, 97 U.S. 509, 515 (1878).

[43] Classical commentaries describe the international immunity of armed forces abroad "as recognized by all civilized nations." GERHARD VON GLAHN, LAW AMONG NATIONS 238 (1992) at 225-6 [hereinafter von Glahn]. *See also* WILLIAM W. BISHOP, JR. INTERNATIONAL LAW CASES AND MATERIALS 659-61 (3d ed. 1962) [hereinafter Bishop]. This doctrine was referred to as the Law of the Flag, meaning that the entering force took its law with its flag and claimed immunity from host nation law. Contemporary commentators, including military scholars, recognize the jurisdictional friction between an armed force that enters the territory of another state and the host state. This friction is present even where the entry occurs with the tacit approval of the host state. Accordingly, the United States and most modern powers no longer rely upon the Law of the Flag, except as to armed conflict. DA PAM 27-161-1, *supra* note 40, at 11-1.

[44] Richard M. Whitaker, *Environmental Aspects of Overseas Operations*, ARMY LAW., Apr. 1995, at 31 [hereinafter Whitaker].

a. Immunity is granted in whole or part by international agreement;

b. United States forces engage in combat with national forces; or

c. United States forces enter under the auspices of a United Nations sanctioned security enforcement mission.

6. The exception represented by the first scenario is well recognized and the least problematic form of immunity. Yet, most status of forces and stationing agreements deal with granting *members of the force* immunity from host nation criminal and civil jurisdiction. Although this type of immunity is important, it is not the variety of immunity that is the subject of this section. Our discussion revolves around the grant of immunity to the intervention (or sending) force nation itself. This form of immunity benefits the nation directly,[45] providing it with immunity from laws that protect host nation civilians. For example, under what conditions can commanders of U.S. forces, deployed to the territory of another nation, disregard the due process protections afforded by the host nation law to its own citizens?

7. Although not as common as a status of forces agreement, the United States has entered into other forms of jurisdictional arrangements. In fact the Carter-Jonassaint Agreement[46] is an example of such an agreement. The agreement demonstrated deference for the Haitian government by conditioning its acceptance upon the government's approval. It further demonstrated deference by providing that all multi-national force activities would be coordinated with the "Haitian military high command." This required a number of additional agreements, arrangements, and understandings to define the extent of host nation law application in regard to specific events and activities.

8. The exception represented by the second scenario is probably the most obvious. When engaged in traditional armed conflict with another national power, military forces care little about the domestic law of that nation. For example, during the initial phase of OPERATION IRAQI FREEDOM, the coalition invasion force did not bother to stop at Iraqi traffic lights. The domestic law of Iraq did not bind the invasion force.[47] This exception is based on the classical application of the Law of the Flag theory.

9. The Law of the Flag has two prongs. The first prong is referred to as the combat exception, is described above, and is exemplified by the lawful disregard for host nation law exercised during such military operations as OPERATION IRAQI FREEDOM. This prong is still in favor and represents the state of the law.[48] The second prong is referred to as the consent exception, described by the excerpt from the United States Supreme Court in *Coleman v. Tennessee*[49] quoted above, and is exemplified by situations that range from the consensual stationing of National Treaty Alliance Organization (NATO) forces in Germany to the permissive entry of multi-national forces in Haiti. The entire range of operations within the consent prong no longer enjoys universal recognition.[50]

10. To understand the contemporary status of the Law of the Flag's consent prong, it is helpful to look at the various types of operations that fall within its traditional range. At the far end of this range are those operations that no longer benefit from the theory's grant of immunity. For instance, in nations where military forces have entered based upon true invitations, and it is clear that the relationship between nations is both mature and normal,[51] there is no automatic immunity based upon the permissive nature of the entrance and continued presence. It is to this extent that the consent prong of the Law of the Flag theory is in disfavor. In these types of situations, the host

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[45] As opposed to the indirect benefit a sending nation gains from shielding the members of its force from host nation criminal and civil jurisdiction.

[46] The entry agreement for OPERATION UPHOLD DEMOCRACY, *reprinted in* CLAMO HAITI REPORT, at 182-83.

[47] This rule is modified to a small degree once the invasion phase ends and formal occupation begins. An occupant does have an obligation to apply the laws of the occupied territory to the extent that they do not constitute a threat to its security. *See* Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 6 U.S.T. 3516, arts. 64-78.

[48] *See* L. OPPENHEIM, INTERNATIONAL LAW, VOL. II, DISPUTES, WAR AND NEUTRALITY 520 (7th ed., H. Lauterpacht, 1955) [hereinafter Oppenheim]. "In carrying out [the administration of occupied territory], the occupant is totally independent of the constitution and the laws of the territory, since occupation is an aim of warfare and the maintenance and safety of his forces and the purpose of the war, stand in the foreground of his interests...."

[49] 97 U.S. 509, 515 (1878).

[50] *See* DA PAM 27-161-1, *supra* note 40, at 11-1.

[51] Normal in the sense that some internal problem has not necessitated the entrance of the second nation's military forces.

nation gives up the right to have its laws complied with only to the extent that it does so in an international agreement (some type of SOFA).

11. On the other end of this range are operations that enjoy, at a minimum, a healthy argument for immunity. A number of operational entrances into foreign states have been predicated upon invitations, but of a different type and quality than discussed above. This type of entrance involves an absence of complete free choice on the part of the host nation (or least the *de facto* government of the host nation). These scenarios are more reminiscent of the Law of the Flag's combat prong, as the legitimate use or threat of military force is critical to the characterization of the entrance. In these types of operations, the application of host nation law will be closely tied to the mission mandate and specific operational setting. The importance and discussion of these elements takes us to the third type of exception.

12. The third exception, although based upon the United Nations Charter, is a variation of the Law of the Flag's combat exception.[52] Operations that place a United Nations force into a hostile environment, with a mission that places it at odds with the de facto government may trigger this exception. The key to this exception is the mission mandate. If the mandate requires the force to perform mission tasks that are entirely inconsistent with compliance with host nation law then, to the extent of the inconsistency, the force would seem immunized from that law. This immunity is obvious when the intervention forces contemplate the combat use of air, sea, or land forces under the provisions of the United Nations Charter,[53] but the same immunity is available to the extent it is necessary when combat is not contemplated.[54]

13. The bottom line is that JAs should understand what events impact the immunity of their force from host nation laws. In addition, military practitioners should contact the unified or major command to determine the Department of Defense's position regarding the application of host nation law. They must be sensitive to the fact that the decisions, which impact these issues, are made at the interagency level.

C. Conventional Law

This group of protections is perhaps the most familiar to practitioners and contains the protections that are bestowed by virtue of international law conventions. This source of law may be characterized as the "hard law" that must be triggered by some event, circumstance, or status in order to bestow protection upon any particular class of persons. Examples include the LOW treaties (triggered by armed conflict), the Refugee Convention and its Protocol, weapons/arms treaties, and bi-lateral or multi-lateral treaties with the host nation. Judge Advocates must determine what conventions, if any, are triggered by the current operation. Often when treaties have not been legally "triggered," they can still provide very useful guidance when fashioning law by analogy.

D. Law By Analogy[55]

1. If the primary body of law intended to guide during military operations (the LOW) is not triggered, the JA must turn to other sources of law to craft resolutions to issues during such operations. This absence of regulation creates a vacuum that is not easily filled. As indicated earlier, fundamental human rights law serves as the foundation for some resolutions. However, because of the ill-defined nature of imperatives that come from that law, JAs need a mechanism to employ to provide the command with "specific" legal guidance in the absence of controlling "specifics."

2. The license and mandate for utilizing non-binding sources of authority to fill this legal vacuum is established by the Department of Defense's Law of War Program Directive (DoD Directive 2311.01E).[56] This

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[52] Whitaker, *supra* note 43, at n. 35.

[53] UN Charter art. 42.

[54] *See* S.C. Res. 940, U.N. Doc. S/RES/940 *available at* http://www.un.org/Docs/scres/1994/scres94.htm.; and S.C. Res. 1031, U.N. Doc. S/RES/1031 *available at* http://www.un.org/Docs/scres/1995/scres95.htm. . Resolution 940 mandated the multi-national force, led by the United States, to enter Haiti and use all necessary means to force Cedras' departure, return President Aristide to power, and to establish a secure and stable environment. The force was obligated to comply with the protective guarantees that Haitian Law provided for its citizens only to the extent that such compliance would not disrupt the accomplishment of these mission imperatives.

[55] Some might argue that due to potential changes in how U.S. forces apply the Law of War as a result of DoDD 2311.01E, that this section is duplicative and/or confusing. However, DoDD 2311.01E is new, and exactly how it will be applied in practice remains to be seen. Accordingly, it was decided to leave this section in the 2008 Operational Law Handbook. However, this chapter, and particularly this section, must be read in light of DoDD 2311.01E.

authority directs the armed forces of the United States to apply the LOW during all armed conflicts, no matter how characterized, and in all other military operations. Because of the nature of non-armed conflict operations, sources of law relied upon to resolve various issues extend beyond the LOW. These sources include, but are not limited to, tenants and principles from the LOW, United States statutory and regulatory law, and peacetime treaties. The fit is not always exact, but more often than not, a disciplined review of the international conventional and customary law or any number of bodies of domestic law will provide rules that, with moderate adjustment, serve well.

3. Among the most important rules of applying law by analogy is the enduring importance of the mission statement. Because these rules are crafted to assist the military leader in the accomplishment of his mission, their application and revision must be executed with the mission statement in mind. Judge Advocates must not permit rules, promulgated to lend order to mission accomplishment, become missions in and of themselves. There are many ways to comply with domestic, international, and moral laws, while not depriving the leader of the tools he must have to accomplish his mission.

4. The logical start point for this "law by analogy" process is the LOW. For example, when dealing with treatment of civilians, a logical starting point is the LOW treaty devoted exclusively to the protection of civilians – the fourth Geneva Convention. This treaty provides many detailed rules for the treatment of civilians during periods of occupation, rules that can be relied upon, with necessary modification, by JAs to develop treatment policies and procedures. Protocol I, with its definition of when civilians lose protected status (by taking active part in hostilities), may be useful in developing classification of "hostile" versus "non-hostile" civilians. If civilians who pose a threat to the force must be detained, it is equally logical to look to the Prisoner of War Convention as a source for analogy. Finally, with regard to procedures for ensuring no detention is considered arbitrary, the Manual for Courts-Martial is an excellent source of analogy for basic due process type procedures.

5. Obviously, the listing of sources is not exclusive. Judge Advocates should turn to any logical source of authority that resolves the issue, keeps the command in constant compliance with basic human rights obligations, and makes good common sense. These sources may often include not only the LOW and domestic law, but also non-binding human rights treaty provisions, and host nation law. The imperative is that JAs ensure that any policy-based application of non-binding authority is clearly understood by the command, and properly articulated to those questioning U.S. policies. Both JAs and those benefiting from legal advice must always remember that "law by analogy" is not binding law, and should not regard it as such.

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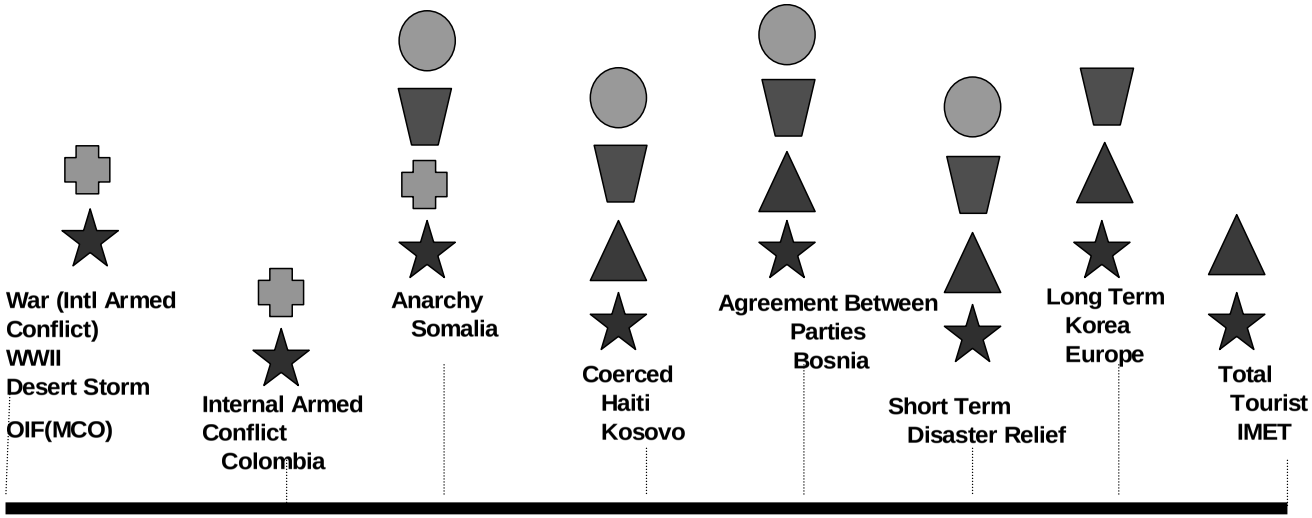
[56] DoDD 2311.01E is complimented by CJCSI 5810C which specifies reporting requirements for law of war violations and defines the law of war...



★ **Fundamental Human Rights**

✚ **Conventional Law**

▲ **Host Nation Law**

▼ **Authorizing Document**

● **Law by Analogy**

APPENDIX A

DISPLACED PERSONS

I. TREATMENT OF DISPLACED PERSONS.

A. If a displaced person qualifies for "refugee status" under U.S. interpretation of international law, the U.S. generally must provide such refugees with same treatment provided to aliens and in many instances to a nation's own nationals. The most basic of these protections is the right to be shielded from danger.

1. *Refugee Defined*. Any Person:

a. who has a well-founded fear of being persecuted for reasons of race, religion, nationality, social group, religion, or political association;

b. who is outside the nation of his nationality, and, according to United States interpretation of international law (United States v. Haitian Centers Council, Inc., 113 S. Ct. 2549 (1993)) presents him or herself at the borders of United States territory, and

c. is without the protection of his own nation, either because:

(1) that nation is unable to provide protection, or

(2) the person is unable to seek the protection, due to the well-founded fear described above.

(3) Harsh conditions, general strife, or adverse economic conditions are not considered "persecution." Individuals fleeing such conditions do not fall within the category of refugee.

B. Main Sources Of Law:

1. 1951 Convention Relating to the Status of Refugees (RC). The RC bestows refugee status/protection on pre-1951 refugees.

2. 1967 Protocol Relating to the Status of Refugees (RP). The RP bestows refugee status/protections on post-1951 refugees.

a. Adopts same language as 1951 Convention.

b. U.S. is a party (110 ratifying nations).

3. 1980 Refugee Act (8 USC §1101). Because the RP was not self-executing, this legislation was intended to conform U.S. law to the 1967 RP.

a. Applies only to displaced persons who present themselves at U.S. borders

b. This interpretation was challenged by advocates for Haitian refugees interdicted on the high seas pursuant to Executive Order. They asserted that the international principle of "non-refoulment" (non-return) applied to refugees once they crossed an international border, and not only after they entered the territory of the U.S.

c. The U.S. Supreme Court ratified the government interpretation of "non-refoulment" in *United States v. Sale*. This case held that the RP does not prohibit the practice of rejection of refugees at our borders. (This holding is inconsistent with the position of the UNHCR, which considers the RP to prohibit "refoulment" once a refugee crosses any international border).

4. Immigration and Nationality Act (8 USC §1253).

a. Prohibits Attorney General from deporting or returning aliens to countries that would pose a threat to them based upon race, religion, nationality, membership in a particular social group, or because of a particular political opinion held.

b. Does not limit U.S. authority outside of the U.S. (Foley Doctrine on Extraterritoriality of U.S. law).

5. Migration and Refugee Assistance Act of 1962 (22 § USC §2601).

a. Qualifies refugees for U.S. assistance.

b. Application conditioned upon positive contribution to the foreign policy interests of U.S.

C. Return/Expulsion Rule. These rules apply only to individuals who qualify as refugees:

1. No Return Rule (RP art. 33). Parties may not return a refugee to a territory where his life or freedom would be threatened on account of his race, religion, nationality, social group, or political opinion.

2. No Expulsion Rule (RP arts. 32 & 33). Parties may not expel a refugee in absence of proper grounds and without due process of law.

3. According to the Supreme Court, these prohibitions are triggered only after an individual crosses a U.S. border. This is the critical distinction between the U.S. and UNHCR interpretation of the RP which creates the imperative that refugees be intercepted on the high seas and detained outside the U.S.

D. Freedoms And Rights. Generally, these rights bestow (1) better treatment than aliens receive, and (2) attach upon the entry of the refugee into the territory of the party.

1. Freedom of Religion (equal to nationals).

2. Freedom to Acquire, Own, and Convey Property (equal to aliens).

3. Freedom of Association (equal to nationals).

4. Freedom of Movement (equal to aliens).

5. Access to Courts (equal to nationals).

6. Right to Employment (equal to nationals with limitations).

7. Right to Housing (equal to aliens).

8. Public Education (equal to nationals for elementary education).

9. Right to Social Security Benefits (equal to nationals).

10. Right to Expedited Naturalization.

E. Detainment (See DETAINMENT above).

1. U.S. policy relative to Cuban and Haitian Displaced Persons was to divert and detain.

2. General Principles of International Law forbid "prolonged & arbitrary" detention (detention that preserves national security is not arbitrary).

3. No statutory limit to the length of time for detention (4 years held not an abuse of discretion).

4. Basic Human Rights apply to detained or "rescued" displaced persons.

F. Political Asylum. Protection and sanctuary granted by a nation within its borders or on the seas, because of persecution or fear of persecution as a result of race, religion, nationality, social group, or political opinion.

G. Temporary Refuge. Protection given for humanitarian reasons to a national of any country under conditions of urgency in order to secure life or safety of the requester against imminent danger. NEITHER POLITICAL ASYLUM NOR TEMPORARY REFUGE IS A CUSTOMARY LAW RIGHT. A number of plaintiffs have attempted to assert the right to enjoy international temporary refuge has become an absolute right under CIL. The federal courts have routinely disagreed. Consistent with this view, Congress intentionally left this type of relief out of the 1980 Refugee Act.

1. *U.S. Policy*.

a. *Political Asylum*.

(1) The U.S. shall give foreign nationals full opportunity to have their requests considered on their merits.

(2) Those seeking asylum shall not be surrendered to a foreign jurisdiction except as directed by the Service Secretary.

(3) These rules apply whether the requester is a national of the country wherein the request was made or from a third nation.

(4) The request must be coordinated with the host nation, through the appropriate American Embassy or Consulate.

(5) This means that U.S. military personnel are never authorized to grant asylum.

b. *Temporary Refuge*. The U.S., in appropriate cases, shall grant refuge in foreign countries or on the high seas of any country. This is the most the U.S. military should ever bestow.

H. Impact Of Where Candidate Is Located.

1. *In Territories Under Exclusive U.S. Control and On High Seas*:

a. Applicants will be received in U.S. facilities or on aboard U.S. vessels.

b. Applicants will be afforded every reasonable protection.

c. Refuge will end only if directed by higher authority (i.e., the Service Secretary).

d. Military personnel may <u>not</u> grant asylum.

e. Arrangements should be made to transfer the applicant to the Immigration and Naturalization Service ASAP. Transfers don't require Service approval (local approval).

f. All requests must be forwarded in accordance with paragraph 7, AR 550-1, Procedures for Handling Requests for Political Asylum and Temporary Refuge (21 June 2004) [hereinafter AR 550-1].

g. Inquiries from foreign authorities will be met by the senior Army official present with the response that the case has been referred to higher authorities.

h. No information relative to an asylum issue will be released to public, without HQDA approval.

(1) IAW AR 550-1, immediately report all requests for political asylum/temporary refuge" to the Army Operations Center (AOC) at armywtch@hqda-aoc.army.pentagon.mil (NIPR) or armywtch@hqda.army.smil.mil (SIPR).

(2) The report will contain the information contained in AR 550-1.

(3) The report will not be delayed while gathering additional information

(4) Contact International and Operational Law Division, Army OTJAG (or service equivalent). The AOC immediately turns around and contacts the service TJAG for legal advice.

2. *In Foreign Territories*:

a. All requests for either political asylum or temporary refuge will be treated as requests for temporary refuge.

b. The senior Army officer may grant refuge if he feels the elements are met: If individual is being pursued or is in imminent danger of death or serious bodily injury.

c. If possible, applicants will be directed to apply in person at U.S. Embassy.

d. IAW AR 550-1, reporting requirements also apply.

DURING THE APPLICATION PROCESS AND REFUGE PERIOD THE REFUGEE WILL BE PROTECTED. REFUGE WILL END ONLY WHEN DIRECTED BY HIGHER AUTHORITY.

NOTES

NOTES

CHAPTER 5

RULES OF ENGAGEMENT

REFERENCE

JOINT CHIEFS OF STAFF, INSTR. 3121.01B, STANDING RULES OF ENGAGEMENT/STANDING RULES FOR THE USE OF FORCE FOR U.S. FORCES (13 June 2005).

I. INTRODUCTION

A. Rules of Engagement (ROE) are the primary tools for regulating the use of force, making them a cornerstone of the Operational Law discipline. The legal factors that provide the foundation for ROE, including customary and conventional law principles regarding the right of self-defense and the laws of war, are varied and complex. However, they do not stand alone; non-legal issues, such as political objectives and military mission limitations, also are essential to the construction and application of ROE. As a result of this multidisciplinary reach, Judge Advocates (JA) participate significantly in the preparation, dissemination and training of ROE. Although JAs play an important role, ROE ultimately are the commander's rules that must be implemented by the Soldier, Sailor, Airman, or Marine who executes the mission.

B. To ensure that ROE are versatile, understandable, easily executable, and legally and tactically sound, JAs and operators alike must understand the full breadth of policy, legal, and mission concerns that the ROE embrace, and collaborate closely in their development, training, and implementation. Judge Advocates must become familiar with mission and operational concepts, force and weapons systems capabilities and constraints, Warfighting Functions (WF), and the Military Decision Making Process (MDMP) or Joint Operations Planning and Execution System (JOPES). Operators must familiarize themselves with the international and domestic legal limitations on the use of force and the laws of armed conflict. Above all, JAs and operators must talk the same language to provide effective ROE to the fighting forces.

C. This chapter will provide an overview of basic ROE concepts. In addition, it will survey Chairman of the Joint Chiefs of Staff Instruction (CJCSI) 3121.01B, *Standing Rules of Engagement/Standing Rules for the Use of Force for U.S. Forces*, and review the JA's role in the ROE process. Finally, this chapter will provide unclassified extracts from the Standing Rules of Engagement (SROE) and specific operations in order to highlight critical issues and demonstrate effective implementation of ROE.

NOTE: This chapter is NOT intended to be a substitute for the SROE. The SROE are classified SECRET, and important concepts within it may not be reproduced here. The operational lawyer should ensure that he or she has ready access to the SROE publication. Once gaining that access, the operational lawyer should read it from cover to cover until he or she knows it. Judge Advocates play an important role in the ROE process because we are experts in ROE, but you cannot be an expert unless you read and understand the SROE.

II. OVERVIEW

A. Definition of ROE. Joint Pub 1-02, *Dictionary of Military and Associated Terms*:

> ROE are directives issued by competent military authority that delineate the circumstances and limitations under which U.S. [naval, ground, and air] forces will initiate and/or continue combat engagement with other forces encountered.

B. Purposes of ROE. As a practical matter, ROE perform three functions: (1) provide guidance from the President and Secretary of Defense (SECDEF), as well as subordinate commanders, to *deployed units* on the use of force; (2) act as a control mechanism for the transition from peacetime to combat operations (war); and (3) provide a mechanism to facilitate planning. ROE provide a framework that encompasses national policy goals, mission requirements, and the rule of law.

1. Political Purposes. ROE ensure that national policies and objectives are reflected in the actions of commanders in the field, particularly under circumstances in which communication with higher authority is not possible. For example, in reflecting national political and diplomatic purposes, ROE may restrict the engagement of certain targets, or the use of particular weapons systems, out of a desire to tilt world opinion in a particular direction,

place a positive limit on the escalation of hostilities, or not antagonize the enemy. Falling within the array of political concerns are such issues as the influence of international public opinion (particularly how it is affected by media coverage of a specific operation), the effect of host country law, and the content of status of forces agreements (SOFA) with the United States.

2. Military Purposes. ROE provide parameters within which the commander must operate to accomplish his or her assigned mission:

a. ROE provide a ceiling on operations and ensure that U.S. actions do not trigger undesired escalation, *i.e.*, forcing a potential opponent into a "self-defense" response.

b. ROE may regulate a commander's capability to influence a military action by granting or withholding the authority to use particular weapons systems, or by vesting or restricting authority to use certain types of weapons or tactics.

c. ROE may also reemphasize the scope of a mission. Units deployed overseas for training exercises may be limited to use of force only in self-defense, reinforcing the *training* rather than *combat* nature of the mission.

3. Legal Purposes. ROE provide restraints on a commander's actions, consistent with both domestic and international law, and may, under certain circumstances, impose greater restrictions than those required by the law. For many missions, particularly peace operations, the mission is stated in a document such as a UN Security Council Resolution (UNSCR), *e.g.*, UNSCR 940 in Haiti or UNSCR 1031 in Bosnia. These Security Council Resolutions also detail the scope of force authorized to accomplish the purpose stated therein. Mission limits or constraints may also be contained in mission warning or execute orders. Accordingly, commanders must be intimately familiar with the legal basis for their mission. Commanders also may issue ROE to reinforce principles of the law of war (LOW), such as prohibitions on the destruction of religious or cultural property or minimization of injury to civilians and civilian property.

III. CJCS STANDING RULES OF ENGAGEMENT

A. Overview. The new SROE went into effect on 13 June 2005, the result of a review and revision of the previous 2000 and 1994 editions. They provide implementation guidance on the inherent right of self-defense and the application of force for mission accomplishment. They are designed to provide a common template for development and implementation of ROE for the full range of operations, from peace to war.

B. Applicability. Outside U.S. territory, the SROE apply to all military operations and contingencies. Within U.S. territory, the SROE apply to air and maritime homeland defense missions. Included in the new SROE are Standing Rules for the Use of Force (SRUF), which apply to civil support missions as well as land homeland defense missions within U.S. territory and DoD personnel performing law enforcement functions at all DoD installations. The SRUF cancels CJCSI 3121.02, Rules on the Use of Force by DoD Personnel Providing Support to Law Enforcement Agencies Conducting Counterdrug Operations in the United States, and the domestic civil disturbance ROE found in Operation Garden Plot. The SRUF also supersedes DoD Directive 5210.56, Use of Deadly Force and the Carrying of Firearms by DoD Personnel Engaged in Law Enforcement and Security Duties.[1]

C. Responsibility. The SECDEF approves the SROE and, through the JCS, may issue theater, mission, or operation specific ROE. The J3 is responsible for SROE maintenance. Subordinate commanders are free to issue theater, mission, or operation ROE, but must notify the SECDEF if SECDEF-approved ROE are restricted.

D. Purpose. The purpose is twofold: (1) provide implementation guidance on the application of force for mission accomplishment, and (2) ensure the proper exercise of the inherent right of self-defense. The SROE outline the parameters of the inherent right of self-defense in Enclosure A. The rest of the document establishes rules and procedures for implementing supplemental ROE. These supplemental ROE apply only to mission accomplishment and do not limit a commander's use of force in self-defense.[2]

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[1] For further information regarding SRUF, see CJCSI 3121.01E, Enclosures L-Q, and the Domestic Operations Handbook, available at www.jagcnet.army.mil/clamo.

[2] Supplemental measures may be used to limit individual self-defense by members of their unit, when in the context of exercising the right and obligation of unit self-defense.

E. The SROE are divided as follows:

1. Enclosure A (Standing Rules of Engagement). This unclassified enclosure details the general purpose, intent, and scope of the SROE, emphasizing a commander's right and obligation to use force in self-defense. Critical principles, such as unit, individual, national, and collective self-defense, hostile act and intent, and the determination to declare forces hostile are addressed as foundational elements of all ROE. [NOTE: The unclassified portion of the SROE, including Enclosure A without its appendices, is reprinted as Appendix A to this Chapter.]

2. Key Definitions/Issues. The 2005 SROE refined the definitions section, combining the definitions of "unit" and "individual" self-defense into the more general definition of "Inherent right of self-defense" to make clear that individual self-defense is not absolute. Note, however, that if the ROE are made restrictive, the SECDEF must be notified.

a. ***Self-Defense*. The SROE do not limit a commander's inherent authority and obligation to use all necessary means available and to take all appropriate action in self-defense of the commander's unit and other U.S. forces in the vicinity.**

(1) **Inherent Right of Self-Defense**. Unit commanders always retain the inherent right and obligation to exercise unit self-defense in response to a hostile act or demonstrated hostile intent. Unless otherwise directed by a unit commander as detailed below, military members may exercise individual self-defense in response to a hostile act or demonstrated hostile intent. When individuals are assigned and acting as part of a unit, individual self-defense should be considered a subset of unit self-defense. As such, unit commanders may limit individual self-defense by members of their unit. Both unit and individual self-defense includes defense of other U.S. military forces in the vicinity.

(2) **National Self-Defense**. The act of defending the United States, U.S. forces, U.S. citizens and their property (in certain circumstances), and U.S. commercial assets from a hostile act, demonstrated hostile intent, or declared hostile force.

(3) **Collective Self-Defense**. The act of defending designated non-U.S. citizens, forces, property, and interests from a hostile act or demonstrated hostile intent. Only the PRESIDENT OR SECDEF may authorize the exercise of collective self-defense. Collective self-defense is generally implemented during combined operations.

(4) **Mission Accomplishment v. Self-Defense**. The SROE distinguish between the right and obligation of self-defense, and the use of force for the accomplishment of an assigned mission. Authority to use force in mission accomplishment may be limited in light of political, military, or legal concerns, but such limitations have NO impact on a commander's right and obligation of self-defense. Further, although commanders may limit individual self-defense,[3] commanders will always retain the inherent right and obligation to exercise unit self-defense. However, JAs must be aware that the line between action for mission accomplishment and action in self-defense is not always clear. Distinctions between mission, accomplishment, and self-defense, and between offensive and defensive operations, may vary based on the level of command, array of forces, and circumstances on the ground.

b. *Declared Hostile Force* (DHF). Any civilian, paramilitary, or military force, or terrorist that has been declared hostile by appropriate U.S. authority. Once a force is declared to be "hostile," U.S. units may engage it without observing a hostile act or demonstration of hostile intent; *i.e.*, the basis for engagement shifts from conduct to status. Once a force or individual is identified as a DHF, the force or individual may be engaged, unless surrendering or *hors de combat* due to sickness or wounds. The authority to declare a force hostile is limited, and may be found at Appendix A to Enclosure A, paragraph 3 of the SROE.

c. *Hostile Act*. An attack or other use of force against the United States, U.S. forces, or other designated persons or property. It also includes force used directly to preclude or impede the mission and/or duties of U.S. forces, including the recovery of U.S. personnel or vital U.S. government property.

[3] When assigned and acting as part of a unit, and in the context of unit self-defense. See para. III.E.2.(a).(1).

d. *Hostile Intent.* The threat of imminent use of force against the United States, U.S. forces, or other designated persons or property. It also includes the threat of force to preclude or impede the mission and/or duties of U.S. forces, including the recovery of U.S. personnel or vital U.S. government property.

e. *Imminent Use of Force.* The determination of whether the use of force against U.S. forces is imminent will be based on an assessment of all facts and circumstances known to U.S. forces at the time and may be made at any level. Imminent does not necessarily mean immediate or instantaneous.

3. Actions in Self-Defense. Upon commission of a hostile act or demonstration of hostile intent, all necessary means available and all appropriate actions may be used in self-defense. If time and circumstances permit, forces should attempt to deescalate the situation. In addition, force used in self-defense should be proportional; that is, sufficient to respond decisively. Force used may exceed that of the hostile act or hostile intent, but the nature, duration, and scope of force should not exceed what is required to respond decisively.

4. Enclosures B-H. These classified enclosures provide general guidance on specific types of operations: Maritime, Air, Land, Space, Information, and Noncombatant Evacuation Operations as well as Counterdrug Support Operations Outside U.S. Territory.

5. Enclosure I (Supplemental Measures).

a. Supplemental measures found in this enclosure enable a commander to obtain or grant those additional authorities necessary to accomplish an assigned mission. Tables of supplemental measures are divided into those actions requiring President or SECDEF approval; those that require either President or SECDEF approval or Combatant Commander approval; and those that are delegated to subordinate commanders (though the delegation may be withheld by higher authority). The current SROE recognize a fundamental difference between the supplemental measures. Measures that are reserved to the President or SECDEF or Combatant Commander are generally **permissive;** that is, the particular operation, tactic, or weapon is generally restricted, and either the President, SECDEF, or Combatant Commander implements the supplemental measure to specifically permit the particular operation, tactic, or weapon. Contrast this with the remainder of the supplemental measures, those delegated to subordinate commanders. These measures are all **restrictive** in nature; absent implementation of supplemental measures, *commanders are generally allowed to use any weapon or tactic available and to employ reasonable force to accomplish his or her mission*, without having to get permission first. Only when enacted will these supplemental measures restrict a particular operation, tactic, or weapon. Finally, note that *SUPPLEMENTAL ROE RELATE TO MISSION ACCOMPLISHMENT, NOT TO SELF-DEFENSE, AND NEVER LIMIT A COMMANDER'S INHERENT RIGHT AND OBLIGATION OF SELF-DEFENSE. However, as noted above, supplemental measures may be used to limit* ***individual*** *self-defense.*

b. Supplemental measure request and authorization formats are contained in Appendix F to Enclosure I. Consult the formats before requesting or authorizing supplemental measures.

6. Enclosure J (Rules of Engagement Process). The current, unclassified enclosure (reprinted in Appendix A to this chapter) provides guidelines for incorporating ROE development into military planning processes. It introduces the ROE Planning Cell, which may be utilized during the development process. It also names the JA as the "principal assistant" to the J3 or J5 in developing and integrating ROE into operational planning.

7. Combatant Commanders' Theater-Specific ROE. The SROE no longer provide a separate Enclosure for specific ROE submitted by Combatant Commanders for use within their Area of Responsibility (AOR). Combatant Commanders may augment the SROE as necessary by implementing supplemental measures or by submitting supplemental measures for approval, as appropriate. Theater-specific ROE documents can be found on the Combatant Command's SIPR website, often within or linked to by the SJA portion of the site. For example: CENTCOM – http://hqsweb03.centcom.smil.mil/cgi-bin/fsofiles/list_documents.asp?area=jag&pathinfo=/roe_info; PACOM – http://www2.hq.pacom.smil.mil/j0/j06/default.asp?tab=2. If you anticipate an exercise or deployment into any geographic Combatant Commander's AOR, check with the Combatant Commander's SJA for ROE guidance.

8. Enclosures L-Q (SRUF). Much like Enclosure A does for SROE, Enclosure L sets out the basic self-defense posture under the SRUF. Enclosures M-O provide classified guidance on Maritime Operations Within U.S. Territory, Land Contingency and Security-Related Operations Within U.S. Territory, and Counterdrug Support Operations Within U.S. Territory. Enclosures P and Q provide a message process for RUF, as well as RUF

references. JAs utilizing RUF are encouraged to consult the Domestic Operational Law Handbook, Chapters 11 (Rules for the Use of Force for Federal Forces) and 12 (Rules for the Use of Force in National Guard Operations). The 2006 version of the Domestic Operational Law Handbook was updated to incorporate the 2005 SRUF.

IV. MULTINATIONAL ROE

A. U.S. forces will often conduct operations or exercises in a multinational environment. When that occurs, the multinational ROE will apply **for mission accomplishment** if authorized by SECDEF order. If not so authorized, the CJCS SROE apply. Apparent inconsistencies between the right of self-defense contained in U.S. ROE and multinational force ROE will be submitted through the U.S. chain of command for resolution. While final resolution is pending, U.S. forces will continue to operate under U.S. ROE. In all cases, U.S. forces retain the inherent right and obligation to exercise unit self-defense in response to a hostile act or demonstrated hostile intent.

B. The U.S. currently has combined ROE (CROE) with a number of nations, and is continuing to work on CROE with additional nations. Some CROE may apply to all operations and others only to exercises. Functioning within multinational ROE can present specific legal challenges. Each nation's understanding of what triggers the right to self-defense is often different, and will be applied differently across the multinational force. Each nation will have different perspectives on the LOW, and will be party to different LOW obligations that will affect its ROE. And ultimately, each nation is bound by its own domestic law and policy that will significantly impact its use of force and ROE. With or without a multinational ROE, JAs must proactively coordinate with allied militaries to minimize the impact of differing ROE.

V. ROLE OF THE JUDGE ADVOCATE

A. Judge Advocates at all levels play an important role in the ROE process. The remainder of this chapter will discuss the four major tasks with which the JA will be confronted. Although presented as discrete tasks, they often are interrelated and occur simultaneously.

B. Determining the current ROE.

1. Judge Advocates in operational units will typically be tasked with briefing the ROE to the commander during the daily operational brief (at least during the first few days of the operation). In preparing this brief, the JA will want to consult the following sources:

a. *The SROE related to self-defense*. The rights and obligations of commanders to defend their units are always applicable, and bear repeating at any ROE briefing. The concepts of hostile act and hostile intent may require additional explanation.

b. As applicable, the enclosures of the SROE that deal with the type of operation (*e.g.*, Maritime, Space, or Counterdrug operations).

c. Depending on the location of an operation, the Combatant Commander's special ROE for his AOR.

d. The base-line ROE for this particular mission as provided in the OPLAN, as promulgated by separate message, or as it exists for a particular mission (for example, the OIF ROE as promulgated by Multi-National Corps – Iraq (MNC-I)). NOTE: ROE for OIF (MNC-I) can be found at http://spsan.iraq.centcom.smil.mil/C15/current%20ROE/default.aspx; ROE for OEF can be found at http://hqsweb03.centcom.smil.mil/cgi-bin/fsofiles/list_documents.asp?Area=jag&PathInfo=/roe_info/OEF-AFGHANISTAN%20Documents as well as on the CJTF-82 SIPRNet page.

e. Any additional ROE promulgated as the operation evolves or changes, or in response to requests for additional ROE. This is often a challenging area for JAs. During the first few days of an operation, the ROE may be quite fluid. Judge Advocates should ensure that any ROE message is brought to his or her immediate attention (close liaison with the JOC Chief/TOC Battle Captain is necessary here). Judge Advocates should periodically review the message traffic to ensure that no ROE messages were missed, and should maintain close contact with JAs at higher levels who will be able to advise that ROE changes were made or are on the way. Adhering to the rules for serializing ROE messages (Appendix F to Enclosure J of the SROE) will help JAs at all levels determine where the ROE stand.

2. As the operation matures and the ROE become static, the JA will probably be relieved of the daily briefing obligation. However, ROE should continue to be monitored, and notable changes should be brought to the commander's and his or her staff's attention.

C. Requesting Additional ROE.

1. The SROE provides that commanders *at any level* may request additional ROE. Commanders must look to their mission tasking and existing ROE when determining courses of action for the mission. The commander may decide that the existing ROE are unclear, too restrictive, or otherwise unsuitable for his or her particular mission. In that case, he or she may request additional ROE.

2. Although the task of drafting an ROE request message (format for which will be found in Appendix F to Enclosure I) will often be assigned to the JA, he or she cannot do it alone; there must be extensive command and staff (especially J/G/S-3) input. The concept of an "ROE Planning Cell," consisting of representatives from all sections of the command, including the JA, is recognized in Enclosure J of the SROE. Such a cell should prove ideal for the task of drafting an ROE request. The JA, who should have the best grasp of ROE in general and the SROE in particular, will still play a significant advisory role in this process.

3. Some considerations for drafting an ROE request message.

a. Base-line ROE typically are promulgated at the Combatant Commander-level and higher, and receive great thought. Be especially careful about requesting supplemental measures that require President or SECDEF approval, since these items already have received significant consideration. This is not to say that there are no circumstances for which requesting such a measure is appropriate, only that they will be relatively rare.

b. In the request message, justify why the supplemental measure is needed. As above, those at higher headquarters who have reviewed the ROE reasonably believe that they have provided the most suitable rules. It is your job to prove otherwise. For example, your unit may have a mission that earlier ROE planners could not have foreseen, and that the ROE do not quite fit. If this circumstance is clearly explained, the approval authority is more likely to approve the request.

c. Remember that the policy regarding supplemental measures is that they are generally permissive in nature (except for those reserved to the President or SECDEF or Combatant Commander). It is not necessary to request authority to use every weapon and tactic available at the unit level; higher headquarters will restrict their use by an appropriate supplemental measure if that is thought to be necessary. See the discussion in Enclosure I of the SROE for more details.

d. Maintain close contact with JAs at higher headquarters levels. Remember that ROE requests rise through the chain of command until they reach the appropriate approval authority, but that intermediate commands may disapprove the request. Your liaison may prove instrumental in having close cases approved, and in avoiding lost causes. Also, JAs at higher headquarters levels may determine that your ROE request is not needed, as existing ROE already provide the requested authority.

e. Follow the message format. Although it may seem like form over substance, a properly formatted message indicates to those reviewing it up the chain of command that your command (and you) know the SROE process and should be taken seriously.

D. Disseminating ROE to Subordinate Units.

1. The process involves taking ROE that have been provided by higher authority, adding your commander's guidance (within the power delegated to him), and broadcasting it all to subordinate units. To illustrate, CJCS/Joint Staff ROE, reflecting the guidance of the President or SECDEF, are generally addressed to the Combatant Commander and Service level. The supported Combatant Commander takes those President or SECDEF-approved measures, adds appropriate supplemental measures from the group the Combatant Commander may approve, and addresses these to his subordinate commanders, or to a subordinate JTF, as applicable. The subordinate commander/JTF commander will take the President/SECDEF- and Combatant Commander-approved ROE, add any of his own, and distribute his ROE message throughout the rest of the force. To illustrate further, suppose that a JTF commander receives the Combatant Commander's ROE, and there is no restriction on indirect, unobserved fire. The JTF commander, however, wants to restrict its use by his forces. The JTF ROE message to the field, therefore, should include the addition of the appropriate supplemental measure restricting indirect, unobserved fire. Note, however, that commanders sometimes place restrictions on the ability to modify, change, or restrict ROE at lower levels. The SROE requires notification to the SECDEF if the ROE are made more restrictive.

2. Accordingly, the drafting of ROE is applicable at each of these levels. As stated above, however, a JA cannot do it alone. The ROE Planning Cell concept is also appropriate to this task. Some applicable considerations include:

a. *Avoid strategy and doctrine*. ROE should not be used as a mechanism through which to convey strategy or doctrine. The commander should express his battlefield philosophy through the battle order and personally-communicated guidance to subordinates.

b. *Avoid restating the law of war*. ROE should not restate the LOW. Commanders may desire to emphasize an aspect of the LOW that is particularly relevant to a specific operation (*e.g.*, *see* DESERT STORM ROE regarding cultural property), but they should not include an extensive discussion of the Hague Regulations and Geneva Conventions.

c. *Avoid tactics*. Tactics and ROE are complementary, not synonymous. ROE are designed to provide boundaries and guidance on the use of force that are neither tactical control measures nor substitutes for the exercise of the commander's military judgment. Phase lines, control points, and other tactical control measures should not be contained in ROE. These measures belong in the coordinating instructions. Prescribing tactics in ROE only serves to limit flexibility.

d. *Avoid safety-related restrictions*. ROE should not deal with safety-related restrictions. Certain weapons require specific safety-related, pre-operation steps. These should not be detailed in the ROE, but may appear in the tactical or field SOP.

e. *Make ROE UNDERSTANDABLE, MEMORABLE, and APPLICABLE*. ROE are useful and effective only when understood, remembered, and readily applied under stress. They are directive in nature, and should avoid excessively qualified language. ROE must be tailored to both the unit and mission, and must be applicable to a wide range of circumstances presented in the field. Well-formulated ROE anticipate the circumstances of an operation and provide unambiguous guidance to a Soldier, Sailor, Airman, and Marine before he or she confronts a threat.

3. Promulgation of ROE. ROE are often sent via formatted messages as found at Appendix F to Enclosure J of the SROE (discussed above). Mission-specific ROE also may be promulgated at Appendix 6, Annex C, of JOPES-formatted (joint) Operational Orders, or in Paragraph 3d (Coordinating Instructions) or Annex E (Rules of Engagement) of Army operations orders (*see* FM 5-0, Army Planning and Orders Production, formerly FM 101-5, Staff Organizations and Operations).

E. Training ROE.

1. Once the mission-specific ROE are received, the question becomes: "How can I as a JA help to ensure that the troops understand the ROE and are able to apply the rules reflected in the ROE?" A JA can play a significant role in assisting in the training of individual Soldiers and the staff and leaders of the WF.

2. It is the commander, not the JA, who is responsible for training the Soldiers assigned to the unit on the ROE and on every other mission essential task. The commander normally turns to the staff principal for training, the G3 or S3, to plan and coordinate all unit training. A JA's first task may be to help the commander see the value in organized ROE training. If the commander considers ROE training to be a "battle task," that is, a task that a subordinate command must accomplish in order for the command to accomplish its mission, it is more likely that junior leaders will see the advantages of ROE training. The G3 or S3 is more likely to be willing to set aside training time for ROE training if it can be accomplished in conjunction with other unit training. The task for the JA is to help the commander and staff realize that ROE are not contained in a discrete subject, but one that pervades all military operations and is best trained in conjunction with other skill training. It is only through integrated training, where Soldiers are practicing their skills in an ROE-sensitive environment that true training on ROE issues will occur.

3. There is little U.S. Army doctrine on specifically how to train Soldiers on the SROE or on the mission-specific ROE. However, given that ROE are intended to be a control mechanism for operations in the field, there can be no substitute for individual and collective training programs. Realistic, rigorous scenario- or vignette-driven

training exercises have been much more effective than classroom instruction.[4] ROE training should be conducted by the Soldier's NCOs and officers. The Soldier will apply the ROE with his or her NCOs and officers, not with the JA. The JA should be willing to assist in drafting realistic training, and to be present when possible to observe training and answer questions regarding ROE application. If Soldiers at the squad and platoon level study and train to the ROE, they will be more likely to apply them as a team in the real world.

4. Training should begin with individual discussions between Soldiers and NCOs on a one-on-one or small group basis. Soldiers should be able to articulate the meaning of the terms "declared hostile force," "hostile act," "hostile intent," and other key ROE principles. Once each Soldier in the squad is capable of doing this, the squad should be put through an "ROE lane," or Situational Training Exercise (STX). The ROE training should not be done in a vacuum. For the greatest value, the STX lane should be centered around a task that Soldiers will perform during the mission or exercise. This involves the creation of a plausible scenario that a Soldier and his or her squad may face related to the SROE or the relevant mission-specific ROE. Soldiers move through the lane as a squad and confront role players acting out the scenario. For example, if the Soldiers are preparing to deploy on a peacekeeping mission, the STX scenario may call for them to operate a roadblock or checkpoint. A group of paramilitary role players could approach the checkpoint in a non-threatening manner. As the scenario progresses, the role players may become more agitated and eventually they may begin shooting at the peacekeepers.

5. The primary goal in STX training is to help Soldiers recognize hostile acts and hostile intent, and the appropriate level of force to apply in response. These concepts can usually best be taught by exposing Soldiers to varying degrees of threats of force. For example, in some lanes, the threat may be verbal abuse only. It may then progress to spitting, or physical attacks short of a threat to life or limb. Finally, significant threats of death or grievous bodily harm may be incorporated, such as an attack on the Soldier with a knife or club, or with a firearm. Although not specifically in the ROE, the Soldiers might be taught that an immediate threat of force likely to result in death, or grievous bodily harm (such as the loss of limb or vital organs, or broken bones) is the type of hostile intent justifying a response with deadly force. They should be taught to understand that, even where deadly force is not authorized, they may use force short of deadly force to defend themselves and property.

6. In most military operations other than war, deadly force is not authorized to protect property that is not mission-essential. However, some degree of force is authorized to protect property that is not mission-essential. A lane may be established in which a role player attempts to steal some MREs. The Soldier must understand that non-deadly force is authorized to protect the property. Moreover, if the role player suddenly threatens the Soldier with deadly force to take the non-essential property, the Soldier should be taught that deadly force would be authorized in response, not to prevent theft, but to defend him from the threat by the role player. Once they understand what actions they can take to defend themselves, members of their unit, and property, the mission-specific ROE should be consulted and trained on the issue of third party defense of others.

7. Not only should Soldiers be trained on ROE, but the staff and WF elements should be trained as well. This can be accomplished best in Field Training Exercises (FTX) and Command Post Exercises (CPX). Prior to a real-world deployment, ROE integration and synchronization should be conducted to ensure that all WF elements understand the ROE and how each system will apply the rules. The JA should ensure that the planned course of action, in terms of the application of the ROE, is consistent with the ROE.

F. Pocket Cards.

1. ROE cards are a summary or extract of **mission-specific** ROE. Developed as a clear, concise, and UNCLASSIFIED distillation of the ROE, they serve as both a training and memory tool; however, ROE CARDS ARE NOT A SUBSTITUTE FOR ACTUAL KNOWLEDGE OF THE ROE. In fact, the most effective distribution plan for the ROE card is probably as a diploma from attending ROE training. When confronted with a crisis in the field, the Soldier, Sailor, Airman, or Marine will not be able to consult his pocket card—he must depend upon principles of ROE internalized during the training process. Notwithstanding that limitation, ROE cards are a particularly useful tool when they conform to certain parameters:

a. *Maintain brevity and clarity.* Use short sentences and words found in the common vocabulary. Avoid using unusual acronyms or abbreviations. Express only one idea in each sentence, communicating the idea in

[4] A sample ROE training package is included at part of the JAG Corps' Standard Training Packages, located at https://jag.learn.army.mil. The ROE Training Package consists primarily, at this time, of a Powerpoint presentation designed to fulfill only the initial and rudimentary portions of an ROE training program. This Powerpoint presentation can and should be tailored to particular units and missions.

an active, imperative format. Although such an approach—the classic "bullet" format—may not be possible in every case, it should be used whenever feasible.

b. *Avoid qualified language*. ROE are directives, advising subordinates of the commander's desires and mission plan. They should, therefore, be as direct as any other order issued by the commander. However, while qualifying language may obscure meaning, its use is often necessary to convey the proper guidance. In such a case, the drafter should use separate sentences or subparagraphs to assure clarity of expression. At the same time, subtle differences in language or the organization of a card can convey a certain message or tone, or ensure that the tone set by the card reflects the commander's intent for the operation.

c. *Tailor the cards to the audience*. ROE cards are intended for the widest distribution possible. Ultimately, they will be put in the hands of an individual Soldier, Sailor, Airman, or Marine. Be aware of the sophistication level of the audience and draft the card accordingly. ALWAYS REMEMBER that ROE are written for commanders, their subordinates, and the individual service member charged with executing the mission on the ground. They are not an exercise in lawyering.

d. *Keep the ROE card mission-specific*. Though the commander may want to reinforce a few LOW principles in conjunction with ROE, the purpose of the card is to remind Soldiers of mission-specific issues that are not part of the regular ROE training plan, but are specific to this particular mission. For example, items which normally should be on the ROE card include: (1) any forces that are declared hostile; (2) any persons or property that should or may be protected with up to deadly force; and (3) detention issues, including circumstances authorizing detention and the procedures to follow once someone is detained. Be aware, however, that such information may be classified.

e. *Anticipate changing rules*. If the ROE change during an operation, two possible ways to disseminate the information are: (1) change the color of the card stock used to produce the new ROE card (and collect the old ones and destroy them); or (2) ensure every card produced has an "as of" date on it. Combined with an aggressive training and refresher training program, this will help ensure Soldiers are operating with the current ROE. ROE for a multi-phased operation, where the ROE are known in advance, should be published on a single card so as to minimize confusion.

NOTE: Examples of ROE cards employed in various missions—from peacekeeping to combat—are found at Appendix B of this chapter. These are not "go-bys" and cannot be "cut-and-pasted" for any given operation, but are intended to provide a frame of reference for the command/operations/JA team as they develop similar tools for specific assigned operations.

G. Escalation of Force (EOF). Currently, one of the most important topics related to ROE is the concept of Escalation of Force (EOF). EOF is not integral to the SROE,[5] and has been developed and emphasized during recent operations, most notably in Iraq. EOF can take several different forms.

1. On one level, EOF is simply the modern variant of what used to be called "graduated force measures." When possible to do so without unduly endangering U.S. lives, Soldiers should attempt to use lesser means of force.

2. Properly used, EOF measures allow Soldiers more time and better information with which to make use of force decisions. For example, the proper configuration of a Traffic Control Point will allow Soldiers to identify approaching vehicles sooner, thus providing Soldiers more time to apply warnings (visual signs, loudspeakers, barricades, tire strips, laser pointers, laser dazzlers, warning shots, etc.). An approaching vehicle's response to both the physical layout of the TCP and the Soldiers' actions can yield valuable clues as to the driver's intent, such that Soldiers can make more accurate determinations of whether hostile acts or hostile intent are present.

3. EOF concepts can be applied at TCPs as well as during convoy operations or dismounted patrols. However, the development of specific TTPs for use during convoy operations or dismounted patrols is much more challenging, as it is difficult or impossible to configure the battlespace in the manner that might be possible at a fixed, permanent TCP.

4. EOF concepts can be incorporated into the MDMP process.

5. References. The bulk of EOF development has occurred at Multi-National Corps – Iraq, and JAs should look to the MNC-I SIPRNet website for current information. In addition, the Center for Army Lessons Learned

[5] Arguably, EOF is inherent in the principle of proportionality, while similar concepts may be referenced in Enclosure D.

(CALL) website contains valuable lessons learned regarding EOF, including the Escalation of Force Handbook (07-21) (draft) and the TCP Operations Handbook (06-15). EOF scenarios are currently available for Engagement Skills Trainer 2000 (EST-2000), a video-based training system in use at many Army installations.

CHAIRMAN OF THE JOINT CHIEFS OF STAFF INSTRUCTION

J-3 CJCSI 3121.01B
DISTRIBUTION: A, C, S 13 June 2005

STANDING RULES OF ENGAGEMENT/STANDING RULES FOR THE USE OF FORCE FOR US FORCES

References: Enclosures K and Q.

1. Purpose. To provide guidance on the standing rules of engagement (SROE) and establish standing rules for the use of force (SRUF) for DOD operations worldwide. Use of force Guidance contained in this instruction supersedes that contained in DOD Directive 5210.56.

2. Cancellation. CJCSI3121.01A. 15 January 2000, CJCSI 3121.02, 31 May 2000 and CJCSI 3123.01B, 01 March 2002 are canceled.

3. Applicability.

a. The SROE (enclosures A through K) establish fundamental policies and procedures governing the actions to be taken by US commanders and their forces during all military operations and contingencies and routine Military Department functions occurring outside US territory (which includes the 50 states, the Commonwealths of Puerto Rico and Northern Marianas, US possessions, protectorates and territories) and outside US territorial seas. Routine Military Department functions include AT /FP duties, but exclude law enforcement and security duties on DOD installations, and off installation while conducting official DOD security functions, outside US territory and territorial seas. SROE also apply to air and maritime homeland defense missions conducted within US territory or territorial seas, unless otherwise directed by the Secretary of Defense (SecDef).

b. The SRUF (Enclosures L through Q) establish fundamental policies and procedures governing the actions to be taken by US commanders and their forces during all DOD civil support (e.g., military assistance to civil authorities) and routine Military Department functions (including AT / FP duties) occurring within US territory or US territorial seas. SRUF also apply to land homeland defense missions occurring within US territory and to DOD forces, civilians and contractors performing law enforcement and security duties at all DOD installations (and off-installation while conducting official DOD security functions, within or outside US territory, unless otherwise directed by the SecDef. Host nation laws and international agreements may limit US forces' means of accomplishing their law enforcement or security duties.

Note: The pagination of these extracts do not match the SROE.

4. Policy. IAW Enclosures A (SROE) and L (SRUF).

5. Definitions. Definitions are contained in Joint Pub 1-02 and the enclosures. Enclosures K and G list ROE/RUF references that provide additional specific operational guidance.

6. Responsibilities. The SecDef approves and the Chairman of the Joint Chiefs of Staff (CJCS) promulgates SROE and SRUF for US forces. The Joint Staff, Operations Directorate (J-3), is responsible for the maintenance of this instruction, in coordination with OSD.

a. Commanders at all levels are responsible for establishing ROE/RUF for mission accomplishment that comply with ROE/RUF of senior commanders, the Law of Armed Conflict, applicable international and domestic law and this instruction.

b. Standing Rules of Engagement (SROE).

(1) Self-Defense. Unit commanders always retain the inherent right and obligation to exercise unit self-defense in response to a hostile act or demonstrated hostile intent. Unless otherwise directed by a unit commander as detailed below, military members may exercise individual self-defense in response to a hostile act or demonstrated hostile intent. When individuals are assigned and acting as part of a unit, individual self-defense should be considered a subset of unit self-defense. As such, unit commanders may limit individual self-defense by members of their unit. Both unit and individual self-defense includes defense of other US Military forces in the vicinity.

(2) Mission Specific ROE.

(a) Supplemental measures allow commanders to tailor ROE for mission accomplishment during the conduct of DOD operations. There are two types of supplemental measures:

1. Those supplemental measures that specify certain actions that require SecDef approval (001-099 in Enclosure I).

2. Those supplemental measures that allow commanders to place limits on the use of force during the conduct of certain actions (100-599 in Enclosure I). Enclosure I provides ROE supplemental measures guidance.

(b) Supplemental measures may also be used by unit commanders to limit individual self-defense by members of their unit, when in the context of exercising the right and obligation of unit self-defense.

(c) Commanders at all levels may use supplemental measures to restrict SecDef-approved ROE, when appropriate. US commanders shall notify the SecDef, through the CJCS, as soon as practicable, of restrictions (at all levels) placed on Secretary of Defense-approved ROE/RUF. In time critical situations, make SecDef notification concurrently to the CJCS. When concurrent notification is not possible, notify the CJCS as soon as practicable after SecDef notification.

(3) SROE are designed to be permissive in nature. Therefore, unless a specific weapon or tactic requires Secretary of Defense or combatant commander approval, or unless a specific weapon or tactic is restricted by an approved supplemental measure, commanders may use any lawful weapon or tactic available for mission accomplishment.

c. Standing Rules for the Use of Force (SRUF).

(1) Self-Defense. Unit commanders always retain the inherent right and obligation to exercise unit self-defense in response to a hostile act or demonstrated hostile intent. Unless otherwise directed by a unit commander as detailed below, military members may exercise individual self-defense in response to a hostile act or demonstrated hostile intent. When individuals are assigned and acting as part of a unit, individual self-defense should be considered a subset of unit self-defense. As such, unit commanders may limit individual self-defense by members of their unit. Both unit and individual self-defense includes defense of other US Military forces in the vicinity.

(2) Mission Specific RUF.

(a) Commanders may submit requests to the SecDef, through the CJCS, for mission- specific RUF, as required.

(b) Commanders at all levels may restrict SecDef-approved RUF, when appropriate. US commanders shall notify the SecDef, through the CJCS, as soon as practicable, of restrictions (at all levels) placed on Secretary of Defense-approved ROE/RUF. In time critical situations, make SecDef notification concurrently to the CJCS. When concurrent notification is not possible, notify the CJCS as soon as practicable after SecDef notification.

(3) Unlike SROE, specific weapons and tactics not approved within these SRUF require SecDef approval.

7. Summary of Changes. This instruction is a comprehensive update and replacement of the existing SROE and addresses SecDef guidance, USNORTHCOM establishment and USSTRATCOM/USSPACECOM reorganization. In addition, SRUF guidance is added to allow this single instruction to provide guidance for worldwide US military operations. Existing combatant commander standing ROE/RUF guidance should be reviewed for consistency. Existing SecDef-approved mission-specific ROE/RUF remain in effect, unless otherwise noted.

8. Procedures.

a. Guidance for the use of force for self-defense and mission accomplishment is set forth in this document. Enclosure A (less appendixes) is UNCLASSIFIED and is intended to be used as a ROE coordination tool in developing combined or multi-national ROE, if necessary. Enclosure L is UNCLASSIFIED and intended to be used with US law enforcement agencies and organizations as a RUF coordination tool in developing combined RUF, if necessary.

b. Combatant commander requests for ROE supplemental measures and combatant commander requests for mission-specific RUF will be submitted to the SecDef, through the CJCS, for approval.

c. Combatant commanders will also provide the following, when applicable:

(1) Notification to the SecDef, through the CJCS, as soon as practicable, of restrictions (at all levels) placed on Secretary of Defense-approved ROE/RUF. In time critical situations, make SecDef notification concurrently to the CJCS. When concurrent notification is not possible, notify the CJCS as soon as practicable after SecDef notification.

(2) Notification of all supplemental measures, not requiring SecDef approval, to the SecDef through the CJCS, as soon as practicable.

d. Geographic combatant commanders may augment these SROE/SRUF, as necessary, through theater-specific ROE/RUF in order to reflect changing political and military policies, threats and missions specific to their respective areas of operations.

e. Ensure that operational ROE/RUF currently in effect are made available on appropriately classified command web sites.

9. Releasability. This instruction is approved for limited release. DOD components, including the combatant commands and other Federal agencies may obtain this instruction through controlled Internet access at http://www.js.smil.mil/masterfile/sjsimd/jel/Index.htm. Joint Staff activities may access or obtain copies of this instruction from the Joint Staff local area network.

10. Effective Date. This instruction is effective upon receipt for all US commanders and supersedes all other nonconforming guidance. It is to be used as the basis for all subsequent mission-specific ROE/RUF requests to SecDef and guidance promulgated by combatant commanders.

11. Document Security. This basic instruction is UNCLASSIFIED. Enclosures are classified as indicated.

//SIGNED//

RICHARD B. MYERS

Chairman of the Joint Chiefs of Staff

Enclosures:

A -- Standing Rules of Engagement for US Forces
Appendix A -- Self-Defense Policies and Procedures
B -- Maritime Operations
Appendix A -- Defense of US Nationals and their Property at Sea
Appendix B -- Recovery of US Government Property at Sea
Appendix C -- Protection and Disposition of Foreign Nationals in the Control of US Forces
C -- Air Operations
D -- Land Operations
E -- Space Operations
Appendix A -- Hostile Acts and Hostile Intent Indicators in Space Operations
F -- Information Operations
G -- Noncombatant Evacuation Operations
H -- Counterdrug Support Operations Outside US Territory
I -- Supplemental Measures
Appendix A -- General Supplemental Measures
Appendix B -- Supplemental Measures for Maritime Operations
Appendix C -- Supplemental Measures for Air Operations
Appendix D -- Supplemental Measures for Land Operations
Appendix E -- Supplemental Measures for Space Operations
Appendix F -- Message Formats and Examples
J -- Rules of Engagement Process
K -- ROE References
L -- Standing Rules for the Use of Force for US Forces
M -- Maritime Operations Within US Territory
N -- Land Contingency and Security-Related Operations Within US Territory
O -- Counterdrug Support Operations Within US Territory
P -- RUF Message Process
Q -- RUF References

ENCLOSURE A
STANDING RULES OF ENGAGEMENT FOR US FORCES

1. Purpose and Scope.

a. The purpose of the SROE is to provide implementation guidance on the application of force for mission accomplishment and the exercise of self-defense. The SROE establish fundamental policies and procedures governing the actions to be taken by US commanders during all military operations and contingencies and routine Military Department functions. This last category includes Antiterrorism/Force Protection (AT/FP) duties, but excludes law enforcement and security duties on DoD installations, and off-installation while conducting official DoD security functions, outside US territory and territorial seas. SROE also apply to air and maritime homeland defense missions conducted within US territory or territorial seas, unless otherwise directed by the SecDef.

b. Unit commanders at all levels shall ensure that individuals within their respective units understand and are trained on when and how to use force in self-defense. To provide uniform training and planning capabilities, this document is authorized for distribution to commanders at all levels and is to be used as fundamental guidance for training and directing of forces.

c. The policies and procedures in this instruction are in effect until rescinded. Supplemental measures may be used to augment these SROE.

d. US forces will comply with the Law of Armed Conflict during military operations involving armed conflict, no matter how the conflict may be characterized under international law, and will comply with the principles and spirit of the Law of Armed Conflict during all other operations.

e. US forces performing missions under direct control of heads of other USG departments or agencies (e.g., Marine Corps Embassy Security Guards and other special security forces), operate under use of force policies or ROE promulgated by those departments or agencies, when authorized by the SecDef. US forces always retain the right of self-defense.

f. US Forces Operating With Multinational Forces.

(1) US forces assigned to the operational control (OPCON) or tactical control (TACON) of a multinational force will follow the ROE of the multinational force for mission accomplishment, if authorized by SecDef order. US forces retain the right of self-defense. Apparent inconsistencies between the right of self-defense contained in US ROE and the ROE of the multinational force will be submitted through the US chain of command for resolution. While a final resolution is pending, US forces will continue to operate under US ROE.

(2) When US forces, under US OPCON or TACON, operate in conjunction with a multinational force, reasonable efforts will be made to develop common ROE. If common ROE cannot be developed, US forces will operate under US ROE. The multinational forces will be informed prior to US participation in the operation that US forces intend to operate under US ROE.

(3) US forces remain bound by international agreements to which the US is a party even though other coalition members may not be bound by them.

g. International agreements (*e.g.*, status-of-forces agreements) may never be interpreted to limit US forces' right of self-defense.

2. Policy.

a. Unit commanders always retain the inherent right and obligation to exercise unit self-defense in response to a hostile act or demonstrated hostile intent.

b. Once a force is declared hostile by appropriate authority, US forces need not observe a hostile act or demonstrated hostile intent before engaging the declared hostile force. Policy and procedures regarding the authority to declare forces hostile are provided in Appendix A to Enclosure A, paragraph 3.

c. The goal of US national security policy is to ensure the survival, safety, and vitality of our nation and to maintain a stable international environment consistent with US national interests. US national security interests guide global objectives of deterring and, if necessary, defeating armed attack or terrorist actions against the US, including US forces, and, in certain circumstances, US persons and their property, US commercial assets, persons in US custody, designated non-US military forces, and designated foreign persons and their property.

d. Combatant Commander Theater-Specific ROE.

(1) Combatant commanders may augment these SROE as necessary by implementing supplemental measures or by submitting supplemental measures requiring SecDef approval to the CJCS. The mechanism for requesting and disseminating ROE supplemental measures is contained in Enclosure I.

(2) US commanders shall notify the SecDef, through the CJCS, as soon as practicable, of restrictions (at all levels) placed on Secretary of Defense-approved ROE/RUF. In time-critical situations, make SecDef notification concurrently to the CJCS. When concurrent notification is not possible, notify the CJCS as soon as practicable after SecDef notification.

3. Definitions and Authorities.

a. Inherent Right of Self-Defense. Unit commanders always retain the inherent right and obligation to exercise unit self-defense in response to a hostile act or demonstrated hostile intent. Unless otherwise directed by a unit commander as detailed below, military members may exercise individual self-defense in response to a hostile act or demonstrated hostile intent. When individuals are assigned and acting as part of a unit, individual self-defense should be considered a subset of unit self-defense. As such, unit commanders may limit individual self-defense by members of their unit. Both unit and individual self-defense includes defense of other US military forces in the vicinity.

b. National Self-Defense. Defense of the United States, US forces, and, in certain circumstances, US persons and their property, and/or US commercial assets from a hostile act or demonstration of hostile intent. Unit commanders may exercise National Self-Defense, as authorized in Appendix A to Enclosure A, paragraph 3.

c. Collective Self-Defense. Defense of designated non-US military forces and/or designated foreign nationals and their property from a hostile act or demonstrated hostile intent. Only the President or SecDef may authorize collective self-defense.

d. Declared Hostile Force. Any civilian, paramilitary or military force or terrorist(s) that has been declared hostile by appropriate US authority. Policy and procedures regarding the authority to declare forces hostile are provided in Appendix A to Enclosure A, paragraph 3.

e. Hostile Act. An attack or other use of force against the United States, US forces or other designated persons or property. It also includes force used directly to preclude or impede the mission and/or duties of US forces, including the recovery of US personnel or vital USG property.

f. Hostile Intent. The threat of imminent use of force against the United States, US forces or other designated persons or property. It also includes the threat of force to preclude or impede the mission and/or duties of US forces, including the recovery of US personnel or vital USG property.

g. Imminent Use of Force. The determination of whether the use of force against US forces is imminent will be based on an assessment of all facts and circumstances known to US forces at the time and may be made at any level. Imminent does not necessarily mean immediate or instantaneous.

4. Procedures.

a. Principles of Self-Defense. All necessary means available and all appropriate actions may be used in self-defense. The following guidelines apply:

(1) De-escalation. When time and circumstances permit, the forces committing hostile acts or demonstrating hostile intent should be warned and given the opportunity to withdraw or cease threatening actions.

(2) Necessity. Exists when a hostile act occurs or when a force demonstrates hostile intent. When such conditions exist, use of force in self-defense is authorized while the force continues to commit hostile acts or exhibit hostile intent.

(3) Proportionality. The use of force in self-defense should be sufficient to respond decisively to hostile acts or demonstrations of hostile intent. Such use of force may exceed the means and intensity of the hostile act or hostile intent, but the nature, duration and scope of force used should not exceed what is required. The concept of proportionality in self-defense should not be confused with attempts to minimize collateral damage during offensive operations.

b. Pursuit. Self-defense includes the authority to pursue and engage forces that have committed a hostile act or demonstrated hostile intent, if those forces continue to commit hostile acts or demonstrate hostile intent.

c. Defense of US Persons and Their Property, and Designated Foreign Persons.

(1) Within a Foreign Nation's US-Recognized Territory, Airspace or Seas. The foreign nation has the principal responsibility for defending US persons and property within its territory, airspace or seas. Detailed guidance is contained in Enclosures B, C and D.

(2) Outside territorial seas. Nation of registry has the principal responsibility for protecting civilian vessels outside territorial seas. Detailed guidance is contained in Appendix A to Enclosure B (Maritime Operations).

(3) In International Airspace. Nation of registry has the principal responsibility for protecting civil aircraft in international airspace. Detailed guidance is contained in Enclosure C (Air Operations).

(4) In Space. Detailed guidance is contained in Enclosure E (Space Operations).

d. Piracy. US warships and aircraft have an obligation to repress piracy on or over international waters directed against any vessel or aircraft, whether US or foreign flagged. For ship and aircraft commanders repressing an act of piracy, the right and obligation of unit self-defense extend to the persons, vessels or aircraft assisted. Every effort should be made to obtain the consent of the coastal state prior to continuation of the pursuit if a fleeing pirate vessel or aircraft proceeds into the territorial sea, archipelagic waters or airspace of that country.

e. Operations Within or in the Vicinity of Hostile Fire or Combat Zones Not Involving the United States. US forces should not enter or remain in areas in which hostilities (not involving the United States) are innocent or occurring between foreign forces, unless directed by proper US authority.

f. Right of Assistance Entry.

(1) Ships and, under certain circumstances, aircraft have the right to enter a foreign territorial sea or archipelagic waters and corresponding airspace without the permission of the coastal state when rendering emergency assistance to those in danger or distress from perils of the sea.

(2) Right of Assistance Entry extends only to rescues where the location of those in danger is reasonably well known. It does not extend to entering the territorial sea, archipelagic waters or territorial airspace to conduct a search.

(3) For ships and aircraft rendering assistance on scene, the right and obligation of unit commanders to exercise unit self-defense extends to and includes persons, vessels or aircraft being assisted. The extension of self-defense in such circumstances does not include interference with legitimate law enforcement actions of a coastal nation. Once received on board the assisting ship or aircraft, however, persons assisted will not be surrendered to foreign authority unless directed by the SecDef.

ENCLOSURE I
SUPPLEMENTAL MEASURES

1. Purpose and Scope. Supplemental measures enable commanders to tailor ROE for specific missions. This enclosure establishes the procedures for formulation of, request for, and approval of supplemental measures. Appendices A through E to Enclosure I list supplemental measures for commanders to use when requesting and authorizing supplemental ROE measures.

2. Policy. IAW Enclosure A.

a. The goal in formulating ROE is to ensure they allow maximum flexibility for mission accomplishment while providing clear, unambiguous guidance to the forces affected. ROE must be properly crafted and commanders properly trained to avoid any hesitation when determining whether and how to use force.

b. Operational ROE supplemental measures are primarily used to define limits or grant authority for the use of force for mission accomplishment. However, unit commanders may issue supplemental measures to limit individual self-defense by members of their units. The use of force for mission accomplishment may sometimes be restricted by specific political and military goals that are often unique to the situation. Developing and implementing ROE is a dynamic process that must be flexible enough to meet changes in the operational situation. In addition to ROE, a commander must take into account the assigned mission, the current situation, the higher commander's intent and all other available guidance in determining how to use force for mission accomplishment.

c. The SROE are fundamentally permissive in that a commander may use any lawful weapon or tactic available for mission accomplishment, unless specifically restricted by approved supplemental measures or unless the weapon/tactic requires prior approval of the SecDef or a combatant commander. Thus, other commanders are authorized to employ the full range of supplemental measures set forth in measures 200 through 699 for mission accomplishment, unless specifically constrained by more restrictive measures promulgated by higher authority.

d. Although normally used to place limits on the use of force for mission accomplishment, supplemental measures may also be used specifically to authorize a certain action if clarity is required or requested.

3. Objectives. This enclosure establishes the procedures for formulation of, request for, and approval of supplemental measures. Supplemental measures are intended to:

a. Provide enough of the framework underlying the policy and military guidance to enable the commanders to appropriately address unforeseen situations when immediate decisions and reactions are required. Commanders must never forget that ROE are a tool to guide them through their decision-making process and can never substitute for their sound judgment.

b. Provide clear and tactically realistic military policy and guidance to commanders on the circumstances in which use of force can be used for mission accomplishment.

c. Enable subordinate commanders to request additional measures needed to carry out their mission.

ENCLOSURE J
RULES OF ENGAGEMENT PROCESS

1. Purpose and Scope. Developing and implementing effective ROE are critical to mission accomplishment. This enclosure provides guidelines for incorporating ROE development into the crisis action planning (CAP) and deliberate planning processes by commanders and staff at all levels. All supplemental measures not specifically requiring Presidential, SecDef or combatant commander approval (001-199) are available for use by commanders unless expressly withheld by higher authority.

2. ROE Development.

a. General Guidelines.

(1) ROE are an operational issue and must directly support the operational concept. Once assigned a mission, the commander and staff must incorporate ROE considerations into mission planning. Operations planning and ROE development are parallel and collaborative processes that require extensive integration.

(2) As missions develop and requirements emerge, it is natural to need to request supplemental measures from higher headquarters for mission accomplishment. The issues addressed throughout the planning process will form the basis for supplemental ROE requests requiring SecDef or combatant commander approval in support of a selected course of action (COA). ROE development is a continuous process that plays a critical role in every step of crisis action and deliberate planning.

(3) Due to the operational nature of ROE, the Director for Operations (J-3) and his staff are responsible for developing ROE during crisis action planning. Likewise, the Director for Strategic Plans and Policies (J-5) should play a large role in ROE development for deliberate planning.

(4) As an expert in the law of military operations and international law, the Staff Judge Advocate (SJA) plays a significant role, with the J-3 and J-5, in developing and integrating ROE into operational planning.

(5) ROE should be classified at the lowest level possible to ensure widest distribution to US forces.

b. Task Steps. The following steps can be used to assist staffs in developing and implementing ROE during planning.

(1) Mission Analysis.

(a) Review the SROE, including any current combatant commander theater-specific ROE.

(b) Review supplemental ROE measures already approved for the mission by higher headquarters, and determine the need for existing authorizations.

(c) Review higher headquarters planning documents for political, military and legal considerations that affect ROE. Consider tactical or strategic limitations on the use of force imposed by:

1. Higher headquarters in the initial planning documents.

2. U.S. law and policy.

3. International law, including the UN Charter.

4. HN law, policy and agreements.

5. For multinational or coalition operations:

a. Foreign forces ROE, NATO ROE, NORAD ROE and other RUF policies.

b. UN Security Council resolutions or other mission authority.

(d) Internal review of developed ROE by command ROE review team prior to submission for execution or approval, as appropriate.

(e) Desired End State. Assess ROE requirements throughout pre-conflict, deterrence, conflict and post -conflict phases of an operation. ROE should support achieving the desired end state.

(2) Planning Guidance.

(a) Review commander's planning guidance for considerations affecting ROE development.

(b) Ensure ROE considerations derived from commander's planning guidance are consistent with those derived from initial planning documents.

(3) Warning Orders. Incorporate instructions for developing ROE in warning orders, as required. Contact counterparts at higher, lower and adjacent headquarters, and establish the basis for concurrent planning.

(4) Course of Action (COA) Development. Determine ROE requirements to support the operational concept of each proposed COA.

(5) COA Analysis.

(a) Analyze ROE during the wargaming process. In particular, assess each COA to identify any ROE normally retained by a higher headquarters that must be delegated to subordinate commanders. Identify ROE required by decision and decisive points.

(b) Refine ROE to support synchronizing each phase of proposed COAs.

(6) COA Comparison and Selection. Consider ROE during the COA comparison process, including affects if ROE supplements are not authorized as requested.

(7) Commander's Estimate. Identify Presidential or SecDef-level ROE required to support recommended COA.

(8) Preparation of Operations Order (OPORD).

(a) Prepare and submit requests for all supplemental ROE measures IAW Enclosure A. Normally, the OPORD should not be used to request supplemental measures.

(b) Prepare the ROE appendix of the OPORD IAW CJCSM 3122.03 (JOPES Volume II: Planning Formats and Guidance). The ROE appendix may include supplemental ROE measures that are already approved.

(c) Include guidance for disseminating approved ROE that is consistent with SecDef-approved guidance. Consider:

1. Developing "plain language" ROE.

2. Creating ROE cards.

3. Issuing special instructions (SPINS).

4. Distributing ROE to multinational forces or coalitions.

5. Issuing ROE translations (for coalitions).

(9) ROE Request and Authorization Process. Commanders will request and authorize ROE, as applicable, IAW Enclosure A.

(10) ROE Control. The ROE process must anticipate changes in the operational environment and modify supplemental measures to support the assigned mission. Commanders and their staffs must continuously analyze ROE and recommend modifications to meet changing operational parameters.

(a) Ensure that only the most current ROE serial is in use throughout the force.

(b) Catalog all supplemental ROE requests and approvals for ease of reference.

(c) Monitor ROE training.

(d) Modify ROE as required. Ensure that a timely, efficient staff process exists to respond to requests for and authorizations of ROE changes.

3. Establish ROE Planning Cell. Commanders may use a ROE planning cell to assist in developing ROE. The following guidelines apply:

a. The J-3 is responsible for the ROE planning cell and, assisted by the SJA, develops supplemental ROE.

b. ROE are developed as an integrated facet of crisis action and deliberate planning and are a product of the Operations Planning Group (OPG) or Joint Planning Group (JPG), or equivalent staff mechanism.

c. An ROE planning cell can be established at any echelon to refine ROE derived from the OPG or JPG planning and to produce the most effective ROE requests and/or authorizations possible.

APPENDIX B

SAMPLE ROE CARDS

For additional examples of ROE cards from past operations, see www.jagcnet.army.mil/clamo.

Peace Enforcement: KFOR (Albania, April 1999)

TASK FORCE HAWK ROE CARD

(The contents of this card are unclassified for dissemination to Soldiers)

NOTHING IN THESE RULES PROHIBITS OUR FORCES FROM EXERCISING THEIR INHERENT RIGHT OF SELF DEFENSE.

1. **AT ALL TIMES, USE NECESSARY FORCE, UP TO AND INCLUDING DEADLY FORCE:**
   a. **In response to an immediate threat of serious bodily injury or death against yourself, other NATO Forces, or the Friendly Forces of other nations.**
   b. **To prevent the immediate theft, damage, or destruction of: firearms, ammunition, explosives or property designated as vital to national security.**

2. **AT ALL TIMES, USE FORCE LESS THAN DEADLY FORCE:**
   a. **In response to a threat less than serious bodily injury or death against yourself, other NATO Forces, or the Friendly Forces of other nations.**
   b. **To prevent the immediate theft, damage, or destruction of any NATO military property.**

3. **WHEN THE SITUATION PERMITS, USE A GRADUATED ESCALATION OF FORCE, TO INCLUDE:**
   a. **Verbal warnings to "Halt" or "ndalOHnee"**
   b. **Show your weapons.**
   c. **Show of force to include riot control formations.**
   d. **Non-lethal physical force.**
   e. **If necessary to stop an immediate threat of serious bodily harm or death, engage the threat with deliberately aimed shots until it is no longer a threat.**

4. **SOLDIERS MAY SEARCH, DISARM, AND DETAIN PERSONS AS REQUIRED TO PROTECT THE FORCE. DETAINEES WILL BE TURNED OVER TO APPROPRIATE HOST NATION AUTHORITIES ASAP.**

5. **WARNING SHOTS ARE STRICTLY PROHIBITED.**

6. **TREAT ALL EPWs WITH DIGNITY AND RESPECT. RESPECT THE CULTURAL AND RELIGIOUS BELIEFS OF ALL EPWs.**

7. **DO NOT RETAIN WAR TROPHIES OR ENEMY SOVENIRS FOR YOUR PERSONAL USE.**

8. **DO NOT ENTER ANY MOSQUE, OR OTHER ISLAMIC RELIGIOUS SITE UNLESS NECESSARY FOR MISSION ACCOMPLISHMENT AND DIRECTED BY YOUR COMMANDER.**

9. **IMMEDIATELY REPORT ANY VIOLATIONS OF THE LAW OF WAR, OR THE RULES OF ENGAGEMENT TO YOUR CHAIN OF COMMAND, MPs, CHAPLAIN, IG, OR JAG OFFICER REGARDLESS OF WHETHER FRIENDLY FORCES OR ENEMY FORCES COMMITTED THE SUSPECTED VIOLATION.**

10. **THE AMOUNT OF FORCE AND TYPE OF WEAPONS USED SHOULD NOT SURPASS THAT AMOUNT CONSIDERED NECESSARY FOR MISSION ACCOMPLISHMENT. MINIMIZE ANY COLLATERAL DAMAGE.**

KFOR RULES OF ENGAGEMENT FOR USE IN KOSOVO

SOLDIER'S CARD

To be carried at all times.

MISSION. Your mission is to assist in the implementation of and to help ensure compliance with a Military Technical Agreement (MTA) in Kosovo.

SELF-DEFENSE.

a. You have the right to use necessary and proportional force in self-defense.
b. Use only the minimum force necessary to defend yourself.

GENERAL RULES.

a. Use the minimum force necessary to accomplish your mission.
b. Hostile forces/belligerents who want to surrender will not be harmed. Disarm them and turn them over to your superiors.
c. Treat everyone, including civilians and detained hostile forces/belligerents, humanely.
d. Collect and care for the wounded, whether friend or foe.
e. Respect private property. Do not steal. Do not take "war trophies".
f. Prevent and report all suspected violations of the Law of Armed Conflict to superiors.

CHALLENGING AND WARNING SHOTS.

a. If the situation permits, issue a challenge:
   - In **English**: "NATO! STOP OR I WILL FIRE!"
   - Or in **Serbo-Croat**: "NATO! STANI ILI PUCAM!"
   - (Pronounced as: "NATO! STANI ILI PUTSAM!)
   - Or in **Albanian**: "NATO! NDAL OSE UNE DO TE QELLOJ!
   - (Pronounced as: "NATO! N'DAL OSE UNE DO TE CHILLOY!)

b. If the person fails to halt, you may be authorized by the on-scene commander or by standing orders to fire a warning shot.

FRONT SIDE

OPENING FIRE.

a. You may open fire only if you, friendly forces or persons or property under your protection are threatened with deadly force. This means:

(1) You may open fire against an individual who fires or aims his weapon at, or otherwise demonstrates an intent to imminently attack, you ,friendly forces, or Persons with Designated Special Status (PDSS) or property with designated special status under your protection.

(2) You may open fire against an individual who plants, throws, or prepares to throw, an explosive or incendiary device at, or otherwise demonstrates an intent to imminently attack you, friendly forces, PDSS or property with designated special status under your protection.

(3) You may open fire against an individual deliberately driving a vehicle at you, friendly forces, or PDSS or property with designated special status.

b. You may also fire against an individual who attempts to take possession of friendly force weapons, ammunition, or property with designated special status, and there is no way of avoiding this.

c. You may use minimum force, including opening fire, against an individual who unlawfully commits or is about to commit an act which endangers life, in circumstances where there is no other way to prevent the act.

MINIMUM FORCE.

a. If you have to open fire, you must:
- Fire only aimed shots; and
- Fire no more rounds than necessary; and
- Take all reasonable efforts not to unnecessarily destroy property; and
- Stop firing as soon as the situation permits.

b. You may not intentionally attack civilians, or property that is exclusively civilian or religious in character, except if the property is being used for military purposes or engagement is authorized by the commander.

REVERSE SIDE

Armed Conflict: DESERT STORM (Iraq, 1991)

DESERT STORM
RULES OF ENGAGEMENT

ALL ENEMY MILITARY PERSONNEL AND VEHICLES TRANSPORTING THE ENEMY OR THEIR SUPPLIES MAY BE ENGAGED SUBJECT TO THE FOLLOWING RESTRICTIONS:

A. Do not engage anyone who has surrendered, is out of battle due to sickness or wounds, is shipwrecked, or is an aircrew member descending by parachute from a disabled aircraft.

B. Avoid harming civilians unless necessary to save US lives. Do not fire into civilian populated areas or buildings which are not defended or being used for military purposes.

C. Hospitals, churches, shrines, schools, museums, national monuments, and other historical or cultural sites will not be engaged except in self defense.

D. Hospitals will be given special protection. Do not engage hospitals unless the enemy uses the hospital to commit acts harmful to US forces, and then only after giving a warning and allowing a reasonable time to expire before engaging, if the tactical situation permits.

E. Booby traps may be used to protect friendly positions or to impede the progress of enemy forces. They may not be used on civilian personal property. They will be recovered and destroyed when the military necessity for their use no longer exists.

F. Looting and the taking of war trophies are prohibited.

G. Avoid harming civilian property unless necessary to save US lives. Do not attack traditional civilian objects, such as houses, unless they are being used by the enemy for military purposes and neutralization assists in mission accomplishment.

H. Treat all civilians and their property with respect and dignity. Before using privately owned property, check to see if publicly owned property can substitute. No requisitioning of civilian property, including vehicles, without permission of a company level commander and without giving a receipt. If an ordering officer can contract the property, then do not requisition it.

I. Treat all prisoners humanely and with respect and dignity.

J. ROE Annex to the OPLAN provides more detail. Conflicts between this card and the OPLAN should be resolved in favor of the OPLAN.

REMEMBER

1. FIGHT ONLY COMBATANTS.
2. ATTACK ONLY MILITARY TARGETS.
3. SPARE CIVILIAN PERSONS AND OBJECTS.
4. RESTRICT DESTRUCTION TO WHAT YOUR MISSION REQUIRES.

CFLCC ROE CARD

1. On order, enemy military and paramilitary forces are declared hostile and may be attacked subject to the following instructions:

a. Positive Identification (PID) is required prior to engagement. PID is a reasonable certainty that the proposed target is a legitimate military target. If not PID, contact your next higher command for decision.

b. Do not engage anyone who has surrendered or is out of battle due to sickness or wounds.

c. Do not target or strike any of the following except in self defense to protect yourself, your unit, friendly forces, and designated persons or property under your control:

- Civilians
- Hospitals, mosques, churches, shrines, schools, museums, national monuments, and any other historical and cultural sites

d. Do not fire into civilian populated areas or buildings unless the enemy is using them for military purposes or if necessary for your self defense. Minimize collateral damage.

e. Do not target enemy infrastructure (public works, commercial communication facilities, dams). Lines of communication (roads, highways, tunnels, bridges, railways, and economic objectives) commercial storage facilities, pipelines, unless necessary for self defense or if ordered by your commander. If you must fire on these objects to engage a hostile force, disable and disrupt but, avoid destruction of these objects, if possible.

CFLCC ROE CARD

2. The use of force, including deadly force, is authorized to protect the following:

- Yourself, your unit, and friendly forces
- Enemy prisoners of war
- Civilians from crimes that are likely to cause death or serious bodily harm, such as murder or rape
- Designated civilians and/or property, such as personnel of the Red Cross/Crescent, UN, and US/UN supported organizations.

3. Treat all civilians and their property with respect and dignity. Do not seize civilian property, including vehicles, unless you have the permission of a company level commander and you give a receipt to the property's owner.

4. Detain civilians if they interfere with mission accomplishment or if required for self defense.

5. CENTCOM General Order No. 1A remains in effect. Looting and the taking of war trophies are prohibited.

REMEMBER

- Attack enemy forces and military targets.
- Spare civilians and civilian property, if possible.
- Conduct yourself with dignity and honor.
- Comply with the Law of War. If you see a violation, report it.

These ROE will remain in effect until your commander orders you to transition to post hostiles ROE.

AS OF 311334Z JAN 03

MNC-I ROE CARD

YOU ALWAYS HAVE THE RIGHT TO USE NECESSARY AND PROPORTIONAL FORCE TO DEFEND YOURSELF

1. **You may engage the following individuals based on their conduct:**
   - **Persons who are committing hostile acts against CF.**
   - **Persons who are exhibiting hostile intent towards CF.**

2. **Positive Identification (PID) is required prior to engagement.** PID is a reasonable certainty that the proposed target is a legitimate military target.

3. **Escalation of Force Measures (EOF).** When time and circumstances permit, EOF Measures assist CF to determine whether hostile act/intent exist in a particular situation. When you are confronted with a hostile act or demonstration of hostile intent that threatens death or serious bodily injury, you may use deadly force without proceeding through EOF measures.

4. **Warning Shots.** In general, CF may only use warning shots in situations where deadly force is authorized and in EOF situations.

5. **The use of force, including deadly force, is authorized to protect the following: (1)** yourself, your unit, and other friendly forces; **(2)** detainees; **(3)** civilians from crimes that are likely to cause death or serious bodily harm, such as murder or rape; **(4)** personnel or property **designated by the OSC** when such actions are necessary to restore order and security.

6. **You may DETAIN civilians based upon a reasonable belief that the person: (1)** is interfering with CF mission accomplishment; **(2)** is on a list of persons wanted for questioning, arrest or detention; **(3)** is or was engaged in criminal activity; or **(4)** must be detained for imperative reasons of security. **Anyone you detain MUST be protected**. You MUST fill out a detainee apprehension card for EVERY person you detain.

MNC-I ROE CARD

Law of Armed Conflict Principles:

a. Use of Force. The use of force will be necessary and proportional in order to comply with the LOAC.

b. Only Attack Legitimate Military Targets. All personnel must ensure that, prior to any engagement, non-combatants and civilian structures are distinguished from proper military targets.

c. Minimize Collateral Damage. Military operations will, in so far as possible, minimize incidental injury, loss of life, and collateral damage.

d. Do not target or strike anyone who has surrendered or is out of combat due to sickness or wounds.

e. Do not target or strike hospitals, mosques, churches, shrines, schools, museums, national monuments, and any other historical and cultural sites, civilian populated areas or buildings UNLESS the enemy is using them for military purposes or if necessary for your self-defense.

f. Do not target or strike Iraqi Infrastructure (public works, commercial communication facilities, dams), Lines of Communication (roads, highways, tunnels, bridges, railways) and Economic Objects (commercial storage facilities, pipelines) UNLESS necessary for self-defense or if ordered by your commander. If you must fire on these objects, fire to disable and disrupt rather than destroy.

g. Treat all civilians and their property with respect and dignity. Do not seize civilian property, including vehicles, unless the property presents a security threat. When possible, give a receipt to the property's owner.

- **MNC-I General Order No. 1 is in effect.** Looting and the taking of war trophies are prohibited.
- **ALL personnel MUST report any suspected violations of the Law of War committed by any US, friendly or enemy force.** Notify your chain of command, Judge Advocate, IG, Chaplain, or appropriate service-related investigative branch (e.g. CID, NCIS).

THESE ROE ARE IN EFFECT AS OF 27 MAR 07

NOTES

CHAPTER 6

INTELLIGENCE LAW AND INTERROGATION OPERATIONS

REFERENCES

1. National Security Act of 1947, 50 U.S.C. §§ 401-441d.
2. Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. §§ 1801-1863.
3. Classified Information Procedures Act of 1980, 18 U.S.C. App.
4. Congressional Oversight Act, 50 U.S.C. § 413.
5. Executive Order No. 12333, United States Intelligence Activities, 46 FR 59941 (4 Dec. 1981).
6. Intelligence Reform and Terrorism Prevention Act of 2004 (codified in scattered sections of 50 U.S.C.).
7. Detainee Treatment Act of 2005, 10 U.S.C. §801 note and 42 U.S.C. § 2000dd-1.
8. U.S. DEP'T OF DEFENSE, DIR. 2310.01E, THE DEPARTMENT OF DEFENSE DETAINEE PROGRAM (5 Sept. 2006).
9. U.S. DEP'T OF DEFENSE, DIR. 2311.01E, DOD LAW OF WAR PROGRAM (9 May 2006).
10. U.S. DEP'T OF DEFENSE, DIR. 3115.09, DOD INTELLIGENCE INTERROGATIONS, DETAINEE DEBRIEFINGS, AND TACTICAL QUESTIONING (3 Nov. 2005).
11. U.S. DEP'T OF DEFENSE, REG. 5240.1-R, PROCEDURES GOVERNING THE ACTIVITIES OF DOD INTELLIGENCE COMPONENTS THAT AFFECT UNITED STATES PERSONS (Dec. 1982).
12. U.S. DEP'T OF ARMY, REG. 381-10, U.S. ARMY INTELLIGENCE ACTIVITIES (3 May 2007).
13. U.S. DEP'T OF ARMY, FIELD MANUAL 2-22.3, HUMAN INTELLIGENCE COLLECTOR OPERATIONS (6 Sept. 2006).
14. U.S. DEP'T OF ARMY, FIELD MANUAL 3-24, COUNTERINSURGENCY (15 Dec. 2006).

I. INTRODUCTION

A. Overview. Intelligence is information and knowledge about an adversary obtained through observation, investigation, analysis, or understanding. Information superiority is essential to a commander in conducting operations and in accomplishing his mission. Intelligence collection activities, to include intelligence interrogations, have become a sophisticated and essential battlefield operating system. Intelligence collection activities involve the collection of military and military-related foreign intelligence and counterintelligence, based on intelligence collection requirements. Because intelligence is so important to the commander, operational lawyers must understand the basics of intelligence law, including how law and policy pertain to the collection of human intelligence (HUMINT), such as interrogation operations. The role of intelligence in current operations worldwide cannot be over-stressed, particularly counterinsurgency (COIN) and counter-terror (CT) operations. This need is discussed in detail in chapter 3 of FM 3-24, Counterinsurgency. In a COIN or CT environment, one of the key types of intelligence is HUMINT, and interrogation operations are central to collecting HUMINT.

B. Intelligence in General. Intelligence can be either strategic or tactical. *Strategic intelligence* is information required for the formation of policy and military plans at the national and international levels. This intelligence is normally nonperishable and is collected and analyzed for the consumer on a long-term basis. *Tactical intelligence* on the other hand is information required for the planning and conduct of tactical operations. It is usually perishable and temporary in nature. There are seven intelligence disciplines: human intelligence (HUMINT); imagery intelligence (IMINT); signals intelligence (SIGINT); measurement and signature intelligence (MASINT); open-source intelligence (OSINT); technical intelligence (TECHINT); and counterintelligence (CI).

C. Legal Basis. The statutory and policy authorities for intelligence law are listed under References above.

D. The Intelligence Community. The U.S. intelligence community is made up of 16 intelligence agencies. The Department of Defense (DoD) has eight intelligence activities: Defense Intelligence Agency (DIA); National Security Agency (NSA); National Geospatial Intelligence Agency (NGA); National Reconnaissance Office (NRO); and the intelligence commands of the Army, Navy, Air Force, and Marines. In December 2004, the Intelligence Reform and Terrorism Prevention Act separated the head of the U.S. intelligence community from the head of the Central Intelligence Agency. Today, the head of the U.S. intelligence community and principal advisor to the President on all foreign and domestic intelligence matters is the Director of National Intelligence (DNI). DoD intelligence activities include: collecting national foreign intelligence; responding to taskings from the DNI;

collecting, producing, and disseminating military and military-related foreign intelligence and counterintelligence; and protecting DoD installations, activities, and employees.

II. OPERATIONAL ISSUES

A. Scope. Aspects of intelligence law exist in all operations. It is imperative that operational lawyers consider intelligence law when planning and reviewing both operations in general and intelligence operations in particular. The joint operations planning system (JOPES) format puts the intelligence section at Annex B of the operations plan (OPLAN) / concept plan (CONPLAN). (See this Handbook's chapter on Military Decision Making Process and OPLANs, which includes the JOPES format and each annex and appendix.) Annex B is the starting point for the Judge Advocate (JA) to participate in the intelligence aspects of operational development.

B. Intelligence collection. The restrictions on collection of intelligence against U.S. persons stems from Executive Order (EO) 12333. That Order required all government agencies to implement guidance consistent with the Order. DoD has done so in DoDD 5240.1 and its accompanying regulation, DoD 5240.1-R. Each service has issued complementary guidance, though they are all based on the text of DoD 5240.1-R. AR 381-10 is the Army guidance. It is important to recognize that certain portions of DoD 5240.1-R, as well as the complimentary service guidance, apply to intelligence activities relating to non-U.S. persons.

1. DoD 5240.1-R sets forth procedures governing the collection, retention, and dissemination of information concerning U.S. persons by DoD Intelligence Components. One central requirement is information that identifies a U.S. person may be collected by a DoD intelligence component only if it is necessary to the conduct of a function assigned the collecting component. Army Regulation 381-10 further refines this requirement by mandating that a military intelligence element may only collect information concerning U.S. persons if it has the mission and authority to conduct an intelligence activity, and there is a link between the U.S. person information to be collected and the element's assigned mission and function.

2. There are two threshold questions that must be addressed. The first is determining whether information has been "collected." Information is collected when it has been received, in intelligible form (as opposed to raw data), for use by an employee of an intelligence component in the course of his or her official duties.[1] The second question is whether the information collected is about a "U.S. person." A "U.S. person" is generally defined as a U.S. citizen; permanent resident alien; a corporation incorporated in the U.S.; or an association substantially composed of U.S. citizens or permanent resident aliens. A person or organization outside the United States and aliens inside the United States shall be presumed not to be a U.S. person unless specific information to the contrary is obtained. However, if it cannot be established whether an individual in the United States is a U.S. person or alien, then the individual will be assumed to be a U.S. person. Military intelligence elements must exercise great caution in using the non-U.S. person presumptions. Any information that indicates an individual, who appears to be an alien, might either possess U.S. citizenship or be a permanent resident alien, must be resolved prior to relying on the presumption in making a collection decision.

3. **Collection**. Once it has been determined that a collection will be against a U.S. person, the analysis then turns to whether the information may be properly collected. Procedure 2 of DoD 5240.1-R governs this area. In that regard, the intelligence component must have a mission to collect the information, the information must be contained within one of thirteen categories of information presented in the Procedure, and the information must be collected by the least intrusive means.[2]

4. **Retention**. Once collected, the component should determine whether the information may be retained (Procedure 3 of DoD 5240.1-R). In short, properly collected information may be retained. If the information was incidentally collected (that is, collected without a Procedure 2 analysis), it may be retained if post-collection analysis indicates that it could have been properly collected. Information may be temporarily retained for up to ninety days solely for the purpose of determining its proper retainability.

5. **Dissemination**. Procedure 4 of DoD 5240.1-R governs dissemination of U.S. person information outside of the Army intelligence component that collected and retained it. In general, there must be a reasonable

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[1] Army Regulation 381-10 adds to this threshold question. *See* U.S. DEP'T OF ARMY, REG. 381-10, U.S. ARMY INTELLIGENCE ACTIVITIES (3 May 2007). According to AR 381-10, for information to be collected it must also be "intended for intelligence use." *Id*. However, Judge Advocates must keep in mind that when there is a conflict between DoD 5240.1-R and AR 381-10, the DoD regulation controls.

[2] Again, consider AR 381-10, *supra* note 1, para. 1-5.a., which requires Army elements to have a mission and authority outside of AR 381-10.

belief the recipient agency or organization has a need to receive such information to perform a lawful government function. However, if disseminating to another intelligence component, this determination need not be made by the disseminating military intelligence element, because the recipient component is required to do so.

C. Special Collection Techniques. DoD 5240.1-R goes on to treat special means of collecting intelligence in subsequent Procedures. These Procedures govern the permissible techniques, the permissible targets, and the appropriate official who may approve the collection. The JA confronting any of these techniques must consult the detailed provisions of DoD 5240.1-R and AR 381-10.

1. Electronic Surveillance – Procedure 5.
2. Concealed Monitoring – Procedure 6.
3. Physical Searches – Procedure 7.
4. Searches and Examinations of Mail – Procedure 8.
5. Physical Surveillance – Procedure 9.
6. Undisclosed Participation in Organizations – Procedure 10.

According to AR 381-10, paragraph 1-6(a), a legal advisor must review all activities conducted pursuant to Procedures 5-13. Both the Intelligence and Security Command (INSCOM) and the U.S. Army Intelligence Center (USAIC) offer assistance with conducting these legal reviews as well as training in special collection techniques. The OTJAG, International and Operational Law Division may also be contacted for assistance in interpretations of DoD 5240.1-R and AR 381-10 as well as questions concerning legal reviews of intelligence operations.

D. Counterintelligence. Counterintelligence is information that is gathered or activities conducted to protect against espionage and other intelligence activities, as well as international terrorism. Such intelligence activities are usually conducted in connection with foreign powers, hostile organizations, or international terrorists. Counterintelligence is concerned with identifying and counteracting threats to our national security.

1. Within the United States, the FBI has primary responsibility for conducting counterintelligence and coordinating the counterintelligence efforts of all other U.S. government agencies.[3] Coordination with the FBI will be in accordance with the "Agreement Governing the Conduct of Defense Department Counterintelligence Activities in Conjunction with the Federal Bureau of Investigation," between the Attorney General and the Secretary of Defense, April 5, 1979, as supplemented by later agreements.

2. Outside the United States, the CIA has primary responsibility for conducting counterintelligence and coordinating the counterintelligence efforts of all other U.S. government agencies.[4] Procedures for coordinating counterintelligence efforts are found in (U) Director of Central Intelligence Directive 5/1 (DCID 5/1), "Espionage and Counterintelligence Activities Abroad," December 19, 1984 (S).

3. DoD has primary responsibility for conducting military-related counterintelligence worldwide.[5] These activities are typically carried out by Service counterintelligence units. Coordination of effort with the FBI or CIA is still required in most cases.

E. Military Source Operations (MSO). MSO refer to the collection of foreign military and military-related intelligence by humans from humans. MSO is but one aspect of HUMINT. Only specially trained and qualified personnel may conduct MSO. Field Manual 2-22.3, chapter 5 discusses MSO in general. Typically, MSO operations are classified, but help is available from INSCOM, OTJAG, and USAIC.

F. Cover and Cover Support. Judge Advocates should become familiar with the basics of cover. This is particularly true for JAs serving with special mission units (SMU) or special intelligence units (SIU). Cover severs the operator from the true purpose of the operation or the fact that the operator is associated with the U.S. government. Cover operations are also typically classified, but help is available from INSCOM, OTJAG, and USAIC on classified networks.

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[3] EO 12333, ¶ 1.14(a).

[4] EO 12333, ¶ 1.8(c) and (d).

[5] EO 12333, ¶ 1.11(b).

G. Support Issues Concerning Intelligence Operations. Sound fiscal law principles apply to the support of intelligence operations. Money and property must be accounted for, and goods and services must be procured using appropriate federal acquisition regulations. Judge Advocates dealing with expenditures in support of intelligence operations should be familiar with the regulations regarding contingency funding, property accountability, secure environment contracting, and the annual intelligence appropriations acts. Intelligence Contingency Funds (ICF) are appropriated funds to be used for intelligence activities when the use of other funds is not applicable or would either jeopardize or impede the mission of the intelligence unit. Most publications concerning ICF are classified; however, AFI 14-101 is an unclassified publication that provides a basic understanding of ICF.

H. Intelligence Oversight. A critical aspect of all intelligence operations and activities is overseeing their proper execution, particularly when they relate to collection of intelligence against U.S. persons. A JA may be called upon to advise an intelligence oversight officer of an intelligence unit. Executive Order 12333, the Intelligence Oversight Act (50 U.S.C. § 413), DoD 5240.1-R, and AR 381-10 provide the proper statutory, Presidential directive, or regulatory guidance regarding intelligence oversight to include detailed requirements for reporting violations of intelligence procedures.

III. HUMAN INTELLIGENCE COLLECTOR OPERATIONS [ARMY FIELD MANUAL (FM) 2-22.3]

A. Army Field Manual (FM) 2-22.3 is a September 2006 manual that provides doctrinal guidance, techniques and procedures for interrogators[6] to support a commander's intelligence needs. Field Manual 2-22.3 was effectively incorporated into federal law through the Detainee Treatment Act of 2005 (DTA 2005). Operational JAs working with units involved in HUMINT collection, particularly interrogations, must be familiar with DTA 2005, and, at a minimum, Chapters 5 and 8, and Appendices K and M, of FM 2-22.3.

1. Interrogation. Defined by FM 2-22.3 as "the systematic effort to procure information to answer specific collection requirements by direct and indirect questioning techniques of a person who is in the custody of the forces conducting the questioning." The **ONLY** personnel who may conduct interrogations are trained and certified interrogators. There are specific courses that train and certify interrogators. These courses are run exclusively by USAIC or the Navy-Marine Corps Intelligence Training Center.

2. Tactical Interrogation at Brigade and Below. "Capture Shock" is the initial shock a detainee feels following capture. The potential for abuse of the detainee is the greatest at the initial capture and tactical questioning phase. Initial capture is also called the point of capture. Only trained personnel conduct **interrogation** at any level; other DoD personnel may only conduct "tactical questioning."

3. Tactical Questioning. According to FM 2-22.3, tactical questioning is "the expedient initial questioning for information of immediate tactical value." The DoDD 3115.09 defines it as "direct questioning by any DoD personnel of a captured or detained person to obtain time-sensitive tactical intelligence, at or near the point of capture or detention and consistent with applicable law." This is the only type of questioning that a non-trained, non-certified person may conduct with a detainee.

4. Field Manual 2-22.3 offers two tests that an interrogator should consider before submitting an interrogation plan for approval:

a. If the proposed approach technique were used by the enemy against one of your fellow Soldiers, would you believe the Soldier had been abused?

b. Could your conduct in carrying out the proposed technique violate a law or regulation? Keep in mind that even if you personally would not consider your actions to constitute abuse, the law may be more restrictive.

c. If you answer yes to either of these tests, the contemplated action should not be conducted.

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[6] In this chapter, the term interrogator is used generically, but the reader should realize that there are HUMINT collectors and interrogators. A trained and certified interrogator may conduct interrogations, but may not conduct other HUMINT collector tasks, whereas a trained and certified HUMINT collector may conduct all HUMINT collector tasks including interrogations.

B. Interrogator training provides interrogators with the basic standards for interrogations in detainee operations. This is the "THINK" model:

1. **T**reat all detainees with the same standard.

a. DoDD 2311.01E, DoD Law of War Program, 9 May 2006: DoD personnel will "comply with the Law of War during all armed conflicts, however such conflicts are characterized, and in all other military operations."

b. DoDD 2310.01E, DoD Detainee Program, 5 September 2006: "All detainees shall be treated humanely, and in accordance with U.S. Law, the Law of War, and applicable U.S. policy."

c. From an interrogator's perspective, status may matter in the following situations:

(1) Use of the separation approach technique: only authorized for unlawful enemy combatants; and

(2) Use of the incentives: may not deny the detainee anything entitled by law (there is a difference in entitlements between a civilian internee, lawful enemy combatant, an unlawful enemy combatant, and a retained person).

2. **H**umane treatment is the standard. Enclosure 4 of DoDD 2310.01E is called the detainee treatment policy. It provides the minimum standards of humane treatment for all detainees and applies to detainees from the point of capture on.

a. Adequate food, drinking water, shelter, clothing, and medical treatment;

b. Free exercise of religion, consistent with the requirements for detention;

c. All detainees will be respected as human beings. They will be protected against threats or acts of violence including rape, forced prostitution, assault, theft, public curiosity, bodily injury, and reprisals. They will not be subjected to medical or scientific experiments. They will not be subjected to sensory deprivation. This list is not exclusive.

3. **I**nterrogators interrogate.

a. Pursuant to DoDD 3115.09:

(1) Only trained and certified interrogators may interrogate;

(2) Non-interrogators and non-trained/non-certified interrogators may only ask direct questions, may not use any other approach/technique, and may not "set the conditions" for an interrogation.

b. Non-interrogators and non-trained/certified interrogators may provide passively obtained information to trained and certified interrogators for use during interrogations. For example, an MP may tell the interrogator about leaders in the facility, habits of a detainee, groups that have formed in the facility, and other information that the MP has observed during the performance of his/her duties.

4. **N**eed to report abuses.

a. Pursuant to DoDD 3115.09, all DoD personnel (including contractors) must report any "suspected or alleged violation of DoD policy, procedures, or applicable law relating to intelligence interrogations, detainee debriefings or tactical questioning, for which there is credible information."

b. FM 2-22.3 requires "all persons who have knowledge of suspected or alleged violations of the Geneva Conventions are obligated by regulation to report such matters."

c. Reports should be made to the chain of command unless the chain of command is involved, in which case the report should be made to one of the following: SJA, IG, Chaplain, or Provost Marshal.

d. Failure to report may be a UCMJ violation (either Article 92, dereliction of duty, or Article 134, misprision of a serious offense).

e. Must report violations by anyone, including but not limited to: another interrogator, interpreter, host nation personnel, coalition personnel, or a representative of another government agency (OGA).

5. **K**now the approved techniques. Only those techniques listed in Chapter 8 of FM 2-22.3 are approved and therefore lawful techniques pursuant to the Detainee Treatment Act of 2005.

a. Approach Techniques.

(1) Direct Approach. Interrogator asks direct questions, which are basic questions generally beginning with an interrogative (who, what, where, when, how, or why) and requiring a narrative answer. These questions are brief, concise, and simply worded to avoid confusion.

(2) Incentive Approach. The incentive approach is trading something that the detainee wants for information. Incentives do not include anything to which a detainee is entitled by law or policy.

(3) Emotional Love Approach. In this approach, the interrogator focuses on the anxiety felt by the detainee about the circumstances in which he finds himself, his isolation from those he loves, and his feelings of helplessness. The interrogator directs that love towards the appropriate object, focusing the detainee on what he can do to help himself, such as being able to see his family sooner, helping his comrades, helping his ethnic group, or helping his country.

(4) Emotional Hate Approach. The emotional hate approach focuses on any genuine hate, or possibly a desire for revenge, the detainee may feel.

(5) Emotional Fear-Up Approach. In the fear-up approach, the interrogator identifies a preexisting fear or creates a fear within the detainee. He then links the elimination or reduction of the fear to cooperation on the part of the detainee.

(6) Emotional Fear-Down Approach. In the fear-down approach, the interrogator mitigates existing fear in exchange for cooperation on the part of the detainee.

(7) Emotional-Pride and Ego-Up Approach. This approach exploits a detainee's low self-esteem. The detainee is flattered into providing certain information in order to gain credit and build his ego.

(8) Emotional-Pride and Ego-Down Approach. The emotional pride and ego-down approach is based on attacking the detainee's ego or self-image. The detainee, in defending his ego, reveals information to justify or rationalize his actions.

(9) Emotional-Futility. In the emotional-futility approach, the interrogator convinces the detainee that resistance to questioning is futile. This engenders a feeling of hopelessness and helplessness on the part of the detainee.

(10) We Know All. With this technique, the interrogator subtly convinces the detainee that his questioning of the detainee is perfunctory because any information that the detainee has is already known. When the detainee hesitates, refuses to answer, or provides an incorrect or incomplete reply, the interrogator provides the detailed answer himself. When the detainee begins to give accurate and complete information, the interrogator interjects pertinent questions.

(11) File and Dossier. In this approach, the interrogator prepares a dossier containing all available information concerning the detainee or his organization. The information is carefully arranged within a file to give the illusions that it contains more data than is actually there. The interrogator proceeds as in the "we know all" approach, referring to the dossier from time to time for answers. As the detainee becomes convinced that all the information that he knows is contained within the dossier, the interrogator proceeds to topics on which he has little or no information.

(12) Establish Your Identity. Using this technique, the interrogator insists the detainee has been correctly identified as an infamous individual wanted by higher authorities on serious charges, and he is not the person he purports to be. In an effort to clear himself of this allegation, the detainee makes a genuine and detailed effort to establish or substantiate his true identity.

(13) Repetition. The repetition approach is used to induce cooperation from a hostile detainee. In one variation of this approach, the interrogator listens carefully to a detainee's answer to a question, and then repeats the question and answer several times. He does this with each succeeding question until the detainee becomes so thoroughly bored with the procedure, he answers questions fully and candidly to satisfy the interrogator and gain relief from the monotony of this method.

(14) Rapid Fire Approach. In this approach, the interrogator asks a series of questions in such a manner that the detainee does not have time to answer a question completely before the next one is asked. This confuses the detainee, and he will tend to contradict himself as he has little time to formulate his answers. The interrogator then confronts the detainee with the inconsistencies causing further contradictions. More than one interrogator may be used for this approach.

(15) Silent. The silent technique may be successful when used against either a nervous or confident detainee. When employing this technique the interrogator says nothing to the detainee, but looks him squarely in the eye, preferably with a slight smile on his face. It is important not to look away from the detainee but force him to break eye contact first.

(16) Change of Scenery. Using this technique, the interrogator removes the detainee from an intimidating atmosphere such as an "interrogation" room type of setting and places him in a setting where he feels more comfortable speaking. Change of scenery is not environmental manipulation.

(17) Mutt and Jeff. This technique is also known as "Good Cop, Bad Cop." The goal of this technique is to make the detainee identify with one of the interrogators and thereby establish rapport and cooperation. Use of this technique requires two experienced interrogators who are convincing actors. The two interrogators will display opposing personalities and attitudes toward the detainee.

(a) Must be approved by first O-6 in chain of command.

(b) No violence, threats, or impermissible or unlawful physical contact.

(c) No threatening the removal of protections afforded by law.

(d) Requires regular monitoring.

(18) False Flag. The goal of this technique is to convince the detainee that individuals from a country other than the U.S. are interrogating him, and trick the detainee into cooperating with U.S. forces.

(a) Must coordinate with the SJA and C/J/G/S2X (primary staff advisor on Human Intelligence and Counterintelligence, subordinate to C/J/G/S2).

(b) Must be approved by first O-6 in chain of command.

(c) Must identify country to be used in the interrogation plan.

(d) No implied or explicit threats that non-compliance will result in harsh interrogation by non-U.S. entities.

(e) Cannot pose or portray one's self as a prohibited person (i.e. doctor, chaplain, etc.).

b. Restricted Technique.

(1) Separation. This is an approved technique, but the use is restricted by limitations outlined in Appendix M, FM 2-22.3. The purpose of separation is to deny the detainee the opportunity to communicate with other detainees in order to keep him from learning counter-resistance techniques or gathering new information to support a cover story and/or decreasing the detainee's resistance to interrogation.

(a) COCOM Commander must approve (after SJA review) the use of the separation technique in the theater.

(b) First General Officer/Flag Officer (GO/FO) in the chain of command must approve each specific use of separation.

(c) Interrogation plan should have an SJA review before submitting to the first GO/FO in the chain of command.

(d) May only be used on unlawful enemy combatants. According to FM 2-22.3, an unlawful enemy combatant is a person not entitled to combatant immunity, who engages in acts against the U.S. or its coalition partners in violation of the laws and customs of war during an armed conflict. For the purposes of the war on terrorism, the term "unlawful enemy combatant" is defined to include, but is not limited to, an individual who is was part of, or supported the Taliban, al Qaeda forces, or associated forces that are engaged in hostilities against the U.S. or its coalition partners.

(e) Applied on a case-by-case approach when the detainee may possess important intelligence and other techniques are insufficient.

(f) Only DoD interrogators trained and certified on separation may use this technique.

(g) Sensory deprivation is prohibited even for field expedient separation.7

(h) Thirty (30) day limit (12 hours if field expedient use). May be extended with SJA review and GO/FO approval.

(i) Don't confuse separation with isolation, confinement, or segregation:

(i) Separation is an interrogation technique, subject to the limitations described above.

(ii) Isolation is directed by medical personnel in response to a detainee with a contagious medical condition, such as tuberculosis or HIV. A related term is quarantine.

(iii) Confinement is punishment, generally for offenses against camp rules, directed by the camp commander following some sort of due process proceeding.

(iv) Segregation is an administrative and security provision. Segregation is part of the 5Ss and a T (search, silence, safeguard, segregate, speed to the rear, and tag) that every capturing unit uses to aid in controlling, sorting, and securing detainees at the point of capture. Military Police or guards also practice segregation in detention facilities when dealing with detainees who represent an increased security risk or who need additional oversight beyond that applied to detainees in the general population. An interrogator cannot request segregation in order to "set the conditions" for an interrogation.

C. Recent Developments.

1. **DoDD 3115.09**, Department of Defense Intelligence Interrogations, Detainee Debriefings, and Tactical Questioning, 3 November 2005. Under this directive, all captured or detained personnel must be treated humanely. The directive requires all DoD personnel to report any reportable incidents. The use of dogs as a part of an interrogation is prohibited by this directive. The Defense Intelligence Agency is responsible for establishing training and certification standards for interrogators.

2. **Detainee Treatment Act of 2005** (DTA of 2005) (part of the 2006 Department of Defense Appropriations Act, Pub. Law No. 109-163).

a. § 1002(a): No person in the custody or under the effective control of the Department of Defense or under detention in a Department of Defense facility shall be subject to any treatment or technique of interrogation not authorized by and listed in the United States Army Field Manual on Intelligence Interrogation.

b. § 1003(a): No individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment.

c. § 1005: Includes provisions for status review of detainees outside the U.S.

d. Based on enactment of the DTA of 2005, only those approach techniques contained in Chapter 8 and Appendix M of FM 2-22.3 are legal. Unlike most doctrine, this is not a recommendation for how to conduct operations, FM 2-22.3 defines the legal limits of interrogation operations.

e. The DTA of 2005 applies to all DoD personnel, both military and civilian, all the time, everywhere; and to all others conducting interrogation operations in DoD facilities.

3. **DoDD 2310.01E**, DoD Detainee Program, 5 September 2006. This directive requires that all detainees be treated humanely. All persons subject to the directive shall apply, "regardless of a detainee's legal status, at a minimum the standards articulated in Common Article 3 to the Geneva Conventions of 1949."

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[7] When physical separation is not feasible, goggles or blindfolds and earmuffs may be utilized as a field expedient method to generate a perception of separation. However, JAs must realize that use of other methods such as tape over the eyes, ears, nose, or mouth, or the use of burlap bags over a detainee's head, may be considered inhumane and pose a danger to the detainee.

APPENDIX A

REFERENCES

I. THE ATTACHED LIST OF REFERENCES IS DESIGNED TO ENABLE NEW PRACTITIONERS TO DEVELOP AN INTELLIGENCE LAW LIBRARY AT THEIR INSTALLATION.

II. NATIONAL

National Security Act of 1947, 50 U.S.C. §§ 401-441d

Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. §§ 1801-1863

EO 12333, *United States Intelligence Activities*

NSCID 5, *U.S. Clandestine Foreign Intelligence and Counterintelligence Abroad*

DCID 1/7, *Security Control on Dissemination of Intelligence Information*

DCID 5/1, *Espionage and Counterintelligence Abroad*, with 16 Feb 95 CIA/DoD Supplement

III. DOD

SecDef Memorandum of April 16, 1979, *Agreement Governing the Conduct of Defense Department Counterintelligence Activities in Conjunction with the Federal Bureau of Investigation* and the 18 Nov 96 supplement

DoDD 2000.12, *DoD Antiterrorism (AT) Program*

DoDD 2310.01E, *The Department of Defense Detainee Program*

DoDD 2311.01E, *DoD Law of War Program*

DoDD 3115.09, *DoD Intelligence Interrogations, Detainee Debriefings, and Tactical Questioning*

DoDD O-3600.1, *Information Operations (IO)*

DoDD 5105.21, *Defense Intelligence Agency*

DoDD S-5105.29, *Human Resources Intelligence (HUMINT) Activities*

DoDD 5200.27, *Acquisition of Information Concerning Persons and Organizations not Affiliated with the Department of Defense*

DoDD 5210.50, *Unauthorized Disclosure of Classified Information to the Public*

DoDD C-5230.23, *Intelligence Disclosure Policy*

DoDD 5240.01, *DoD Intelligence Activities*

DoDD 5240.1-R, *Procedures Governing the Activities of DoD Intelligence Components that Affect United States Persons*

DoDD O-5240.02, *DoD Counterintelligence (CI)*

DoDD 5525.5, *DoD Cooperation with Civilian Law Enforcement Officials*

DoDI 2310.08E, *Medical Program Support for Detainee Operations*

DoDI O-3600.02, *Information Operations (IO) Security Classification Guidance*

DoDI C-5240.08, *Counterintelligence Security Classification Guide*

DoDI 5240.4, *Reporting of Counterintelligence and Criminal Violations*

DoDI 5240.6, *Counterintelligence Awareness Briefing Program*

DoDI S-5240.9, *Support to Department of Defense Offensive Counterintelligence Operations*

DoDI 5240.10, *Counterintelligence Support to the Combatant Commands and the Defense Agencies*

DIA Regulation 60-4, *Procedures Governing DIA Intelligence Activities that Affect U.S. Persons*

IV. JOINT

CJCSI 5901.01A, *Conduct of Inspections, Investigations, and Intelligence Oversight*

JP 1-02, *Department of Defense Dictionary of Military and Associated Terms*

JP 2-0, *Doctrine for Intelligence Support to Joint Operations*

JP 2-01, *Joint and National Intelligence Support to Military Operations*

JP 2-01.3, *Joint Tactics, Techniques and Procedures for Joint Intelligence Preparation of the Battlespace*

JP 2-02, *National Intelligence Support to Joint Operations*

JP 3-05, *Doctrine for Joint Special Operations*

JP 3-05.1, *Joint Special Operations Task Force Operations*

JP 3-13, *Information Operations*

JP 3-63, *Detainee Operations (Released and then withdrawn)*

V. ARMY

AR 190-8, *Enemy Prisoners of War (under revision)*

AR 381-10, *U.S. Army Intelligence Activities*

AR 381-12, *Subversion and Espionage Directed Against the U.S. Army (SAEDA)*

AR 381-20, *The Army Counterintelligence Activities (NOFORN)*

AR 381-141, *(C) Intelligence Contingency Funds (ICF) (U)*

FM 2-22.3, *Human Intelligence Collector Operations*

FM 3-19.40, *Military Police Internment/Resettlement Operations*

FM 3-24/MCWP 3-33.5, *Counterinsurgency*

VI. NAVY

SECNAVINST 3300.2, *Combating Terrorism*

SECNAVINST 3800.8b, *Intelligence Oversight Within the Department of the Navy*

SECNAVINST S3810.5a, *Management of Foreign Intelligence, Counterintelligence and Investigative Activities within the Department of the Navy*

SECNAVINST 3820.2d, *Investigative and Counterintelligence Collection and Retention Guidelines Pertaining to the Department of the Navy*

SECNAVINST 3850.2b, *Department of the Navy Counterintelligence*

SECNAVINST S3850.3, *Support to DoD Offensive Counterintelligence Operations*

SECNAVINST 3875.1, *Counterintelligence and Awareness Briefing Program*

SECNAVINST 5500.30e, *Reporting of Counterintelligence and Criminal Violations to the Office of the SecDef Officials*

SECNAVINST 5520.3b, *Criminal and Security Investigations and Related Activities Within the Department of the Navy*

OPNAVINST 3300.53, *Navy Combating Terrorism Program*

OPNAVINST S3850.5, *Support to DoD Offensive CI Operations*

VII. MARINE CORPS

MCO 3850.1H, *Policy and Guidance for Counterintelligence Activities* with Chapter 1

MCDP 2, *Intelligence*

MCWP 2-1, *Intelligence Operations*

MCWP 2-14, *Counterintelligence*

VIII. AIR FORCE

AFI 10-245, *The Air Force Antiterrorism (AT) Standards*

AFI 14-101, *Intelligence Contingency Funds*

AFI 31-301, *Air Base Defense*

AFI 31-401, *Information Security Program Management*

AFI 71-101 (VOL I, II, and III), *Criminal Investigations, Protective Service Matters, and Counterintelligence*

AFOSII 71-104VI, *Counterintelligence and Security Services*

AFOSIMAN 71-114, *Surveillance Operations*

AFOSIMAN 71-144V4, *Antiterrorism Services*

NOTES

CHAPTER 7

INTERNATIONAL AGREEMENTS AND SOFAS

REFERENCES

1. The Case-Zablocki Act, Pub.L. 92-403, 1 U.S.C. §112b (1995).
2. Coordination, Reporting, and Publication of International Agreements, 22 C.F.R Part 181 (1 April 2005).
3. State Department Circular 175 (Volume 11, Foreign Affairs Manual, Chapter 720).
4. Status of Forces Policies and Information, 32 C.F.R. Part 151 (1 July 2005).
5. U.S. DEP'T OF DEFENSE, DIR. 5525.1, STATUS OF FORCES POLICIES AND INFORMATION (dated 7 Aug. 1979; incorporating through change 2, 2 July 1997; certified current as of 21 Nov. 2003).
6. U.S. DEP'T OF DEFENSE, DIR. 5525.03, CRIMINAL JURISDICTION OF SERVICE COURTS OF FRIENDLY FOREIGN FORCES AND SENDING STATES IN THE UNITED STATES (30 Mar. 2006).
7. U.S. DEP'T OF DEFENSE, DIR. 5530.3, INTERNATIONAL AGREEMENTS (dated 11 June 1987; incorporating change 1, 18 Feb. 1991; certified current as of 21 Nov. 2003).
8. JOINT CHIEFS OF STAFF, INSTR.2300.1C, INTERNATIONAL AGREEMENTS (15 Mar. 2006). [N.B.: SEPARATE COMBATANT COMMANDS MAY HAVE INSTRUCTIONS, *e.g.*, CINCPACINST 5711.6D].
9. U.S. DEP'T OF ARMY, REG. 27-50 STATUS OF FORCES POLICIES, PROCEDURES, AND INFORMATION (15 Dec. 1989).
10. U.S. DEP'T OF ARMY, REG. 27-51, JURISDICTION OF SERVICE COURTS OF FRIENDLY FOREIGN FORCES IN THE UNITED STATES (15 Dec. 1975).
11. U.S. DEP'T OF ARMY, REG. 550-51, INTERNATIONAL AGREEMENTS (15 Apr. 1998).
12. U.S. DEP'T OF AIR FORCE, INSTR. 51-701, NEGOTIATING, CONCLUDING, REPORTING, AND MAINTAINING INTERNATIONAL AGREEMENTS (6 May 1994) (with supplements).
13. U.S. DEP'T OF AIR FORCE, INSTR. 51-703, FOREIGN CRIMINAL JURISDICTION (6 May 1994).
14. U.S. DEP'T OF AIR FORCE, INSTR. 51-705, JURISDICTION OF SERVICE COURTS OF FRIENDLY FOREIGN FORCES IN THE UNITED STATES (31 Mar. 1994).
15. U.S. DEP'T OF NAVY, SEC'Y OF THE NAVY INSTR. 5710.25B, INTERNATIONAL AGREEMENTS (23 Dec. 2005).
16. U.S. DEP'T OF NAVY, SEC'Y OF THE NAVY INSTR. 5710.21, JURISDICTION OF SERVICE COURTS OF FRIENDLY FOREIGN FORCES IN THE UNITED STATES (13 Apr. 1997).
17. Oppenneim, International Law, Volume II (1955).
18. Lazareff, Status of Military Forces Under Current International Law (1971).
19. Snee and Pye, Status of Forces Agreements and Criminal Jurisdiction (1957).
20. Erickson, *Status of Forces Agreements: A Sharing of Sovereign Prerogative*, A.F.L. REV. (1994).
21. Supervielle, *The Legal Status of Foreign Military Personnel in the United States*, ARMY LAW. (May 1994).
22. *The Making of Executive Agreements by the United States Department of Defense*, 13 B.U. INT'L L.J. 45 (1995).
23. CLAMO, Selected After-Action Reports: Legal Operations in Grenada, Panama, Kuwait, Somalia, Haiti, Bosnia, and Kosovo.

I. INTRODUCTION

This chapter does not attempt to discuss specific international agreements that may affect military operations, since they are too numerous, and too many are classified. Instead, this discussion focuses on the role of the Judge Advocate (JA) in this area. The operational JA may be faced with the following tasks relating to international agreements and status of forces agreements (SOFA): determining the existence of an agreement, assisting in the negotiation of an agreement, and implementing or ensuring compliance with an agreement.

II. DETERMINING THE EXISTENCE OF AN AGREEMENT

A. Determining the existence of an international agreement is more challenging than one might think. Except for the most well known agreements (such as the various NATO agreements), most agreements are obscure, poorly publicized, and occasionally, classified. A JA supporting a unit that frequently deploys has to conduct an extensive search to determine whether an agreement exists, and then must try to find the text of the agreement. The sources discussed below may help.

B. The U.S. Department of State (DoS) is the repository for all international agreements to which the United States is a party.[1] DoS publishes annually a document entitled *Treaties in Force* (TIF), which contains a list of all treaties and other international agreements in force as of 1 January of that year. The most current TIF is available at the website of the Office of the Legal Advisor, Treaty Affairs, http://www.state.gov/documents/organization/24228.pdf. It is available in printed form from the Government Printing Office at http://bookstore.gpo.gov, and may be found in some of the larger Staff Judge Advocate offices and most libraries. Note, however, that TIF is merely a list of treaties and agreements, with appropriate citations.[2] TIF does not include the text of the agreements; the practitioner must locate the base document using the citation. Many agreements in TIF have no citations; either they have not yet been published in one of the treaty series (which are often years behind), or they are cited simply as "NP," indicating that they will not be published. Classified agreements are not included in the Treaties and Other International Agreements (TIAS) series. While TIF is a good place to start, it often fails to offer a complete solution.

C. There are a number of other potential sources. Within the DoS, it may be useful to contact the Country Desk responsible for the country to which the unit is set to deploy. A complete list of phone numbers for each Country Desk can be found at http://www.state.gov/documents/organization/84694.pdf. Since these desks are located in Washington, they are usually easily accessible. Somewhat less accessible, but equally knowledgeable, is the Military Group for the country. A listing for these overseas phone numbers can be found at http://www.usembassy.gov. Either the Country Desk or the Military Group should have the most current information about any agreements with "their" country.

D. Within DoD, JAs have a number of options. First, start with your operational chain of command, ending with the Combatant Commander's legal staff. Combatant Commands are responsible for maintaining a list of agreements with countries within their area of responsibility. These are often posted on command web sites, though it is more likely that they will do so on their classified (SIPRNET) site. Other options are the International and Operational Law Divisions of the Services: Army (DAJA-IO) (703) 588-0143, DSN 225; Air Force (JAO) (703) 695-9631, DSN 225; and Navy/Marine Corps (Code 10) (703) 697-9161, DSN 225.

E. The Center for Law and Military Operations (CLAMO) maintains a list of SOFAs, with text, at http://www.jagcnet.army.mil. Other agreements may be found elsewhere on the Internet, such as the United Nations website at www.un.org or the NATO website at http://www.nato.int.

III. NEGOTIATING AN INTERNATIONAL AGREEMENT

A. Although JAs may be involved in the negotiation of an international agreement, it is unlikely that they will do so without DoS representation. Accordingly, this discussion will be rather summary, but is still important for the following reasons:

1. It is essential to know what constitutes an international agreement to prevent members of the unit from inadvertently entering into one. This applies not only to the JA, but to the commander and staff as well.

2. It is important to know that this is an area governed by very detailed rules that require significant interagency coordination. It is not a process to be entered into lightly but, at the same time, it does work.

B. There are two significant concepts related to negotiating and concluding international agreements: approval and coordination.

1. *Approval*.

a. *Elements*. The elements of an international agreement are: (a) an agreement; (b) between governments (or agencies, instrumentalities or political subdivisions thereof) or international organizations; and (c) signifying intent to be bound under international law. In many respects, an international agreement is simply a contract (except there is no consideration requirement and it is governed by international law). If a document includes the elements listed above, it is an international agreement, and its title or form is of little consequence. It is also possible that an agreement may be oral. All oral agreements, however, should be reduced to writing. Similarly, the actual status or position of the signer is not as important as the representation that the signer speaks for his

[1] 1 U.S.C. § 112a.

[2] The citation may be to United States Treaties (UST) series; Treaties and Other International Agreements (TIAS) series; and/or United Nations Treaty Series (UNTS).

government. The JA should be suspicious of any document that begins "The Parties agree . . ." unless appropriate delegation of authority to negotiate and conclude has been granted.

b. *Title and Form*. An international agreement may be styled a memorandum of understanding or memorandum of agreement, exchange of letters, exchange of diplomatic notes ("Dip Notes"), technical arrangement, protocol, *note verbale, aide memoire*, etc. Forms that usually are not regarded as international agreements include contracts made under the FAR, credit arrangements, standardization agreements (STANAG), leases, procedural arrangements, and FMS letters of offer and acceptance. There are exceptions, however. A memorandum that merely sets out standard operating procedures for de-conflicting radio frequencies is not an international agreement, while a "lease" that includes status provisions would rise to the level of an international agreement. Form is not as important as substance.

c. *Authority*.

(1) **General**. An international agreement binds the U.S. in international law. The President has certain Constitutional powers in this area. Similarly, Congress has certain Constitutional powers that permit it to authorize and regulate international agreements.

(2) **Military**. Military units, under their own authority, have no such power; accordingly, any power they have is derivative of the President's executive power or from legislation created by Congress. In other words, there must be a specific grant of authority to enter into an international agreement.

(a) Most agreements with which JAs will be interested flow from implementing powers possessed by the Secretary of Defense (SECDEF). For example, 22 U.S.C. § 2770a, Exchange of Training and Reciprocal Support, provides: "the President may provide training and related support to military and civilian defense personnel of a friendly foreign country or an international organization . . . " and goes on to require an international agreement to implement the support. In Executive Order 11501, the President delegated his authority to the SECDEF. 10 U.S.C. § 2342, Cross-Servicing Agreements, is more direct, authorizing "the Secretary of Defense [to] enter into an agreement . . . " to provide logistical or similar support.

(b) In DoDD 5530.3, SECDEF delegated much of his power to enter into international agreements to the Under Secretary of Defense for Policy (USD(P)), and delegated specific powers further. Matters that are predominately the concern of a single Service are delegated to the Service Secretaries. Agreements concerning the operational command of joint forces are delegated to the Chairman, Joint Chiefs of Staff (CJCS). Additional special authorities are delegated to various defense agencies.

(c) In CJCSI 2300.01B, CJCS delegated much of his authority in this area to the Combatant Commanders. Re-delegation to subordinate commanders is permitted and will be accomplished by a Combatant Commander's regulation. Similarly, the Service Secretaries have published regulations or instructions, noted in the References section, that delegate some portion of the Secretaries' authority.

(d) The most important authority that has **not** been delegated (that is, the authority remains at the DoD level) is the authority to negotiate agreements that have policy significance. The relevant portions of DoDD 5530.3 addressing "policy significance" follow below, although it is not inclusive of all types of agreements having policy significance, and it is important to note that the term "policy significance" is interpreted broadly:

8.4. Notwithstanding delegations of authority made in section 13, below, of this Directive, all proposed international agreements having policy significance shall be approved by the OUSD(P) before any negotiation thereof, and again before they are concluded.

8.4.1. Agreements "having policy significance" include those agreements that:

8.4.1.1. Specify national disclosure, technology-sharing or work-sharing arrangements, co-production of military equipment or offset commitments as part of an agreement for international cooperation in the research, development, test, evaluation, or production of defense articles, services, or technology.

8.4.1.2. Because of their intrinsic importance or sensitivity, would directly and significantly affect foreign or defense relations between the United States and another government.

8.4.1.3. By their nature, would require approval, negotiation, or signature at the OSD or the diplomatic level.

8.4.1.4. Would create security commitments currently not assumed by the United States in existing mutual security or other defense agreements and arrangements, or which would increase U.S. obligations with respect to the defense of a foreign government or area.

(e) ***Politically Significant Agreements***. All of the directives and regulations that delegate authority contain the caveat that agreements that have political significance are not delegated. They also may contain other limitations of delegation. In general, *delegations are to be construed narrowly*. Questions about whether an authority has been delegated by a higher authority generally must be referred to that authority for resolution. This is an area where if you have to ask whether you have authority, you probably do not.

(f) ***Procedures***. The directives provide specific guidance on the procedures to be used when requesting authority to negotiate or conclude an agreement from the appropriate approval authority. Among other requirements, a legal memorandum must accompany the request; therefore, the JA will be closely involved in the process. The legal memorandum must trace the authority to enter into the agreement from the Constitution/statute through all delegations to the approval authority. All approvals must be in writing.

2. *Coordination*.

a. In addition to the approval requirements summarized above, Congress has created another level of review through the Case-Zablocki Act. 1 U.S.C. § 112b(c) (reprinted as enclosure 4 to DoDD 5530.3) provides: "Notwithstanding any other provision of law, an international agreement may not be signed or otherwise concluded on behalf of the United States without prior consultation with the Secretary of State."

b. The Secretary of State has published procedures to implement the Case-Zablocki Act in 22 C.F.R. Part 181 (reprinted as enclosure 3 to DoDD 5530.3). Part 181.4 specifically deals with the consultation requirement. It initially refers the reader to Circular 175 procedures, but those procedures are largely digested in the remainder of Part 181.4. Unfortunately, these procedures are not particularly detailed. DoDD 5530.3 is similarly unhelpful, merely assigning the responsibility to coordinate with DoS to the authority to which approval of the agreement has been delegated. Such coordination will generally be conducted at or near the Combatant Commander level.

C. Negotiation. Once the proposed agreement has been approved and coordinated, the actual negotiation with foreign authorities may begin. At this point, the process is much like negotiating any contract. The objectives of the parties, the relative strengths of their positions, and bargaining skills all play a part. Once an agreement is reached, it may not be signed until that specific approval has been given, by the same procedures discussed above, unless the initial approval was to negotiate and conclude the agreement.

D. Reporting Requirements. Once concluded, procedural requirements remain. Chief among these is the requirement to send a certified copy of the agreement to the DoS within **twenty days**. DoDD 5530.3 requires that another two copies be forwarded to the DoD General Counsel, and that copies be filed at the responsible Combatant Command headquarters. If concluding an agreement based on delegated authority, the delegating authority also must receive a copy. For example, CJCSI 2300.01B requires that a copy be forwarded to the Secretary, Joint Staff. Those concluding an agreement based on authority delegated by the Secretary of the Army must forward a copy to HQDA (DAJA-IO) (the Army requires all copies within **ten days**).

IV. IMPLEMENTING/ENSURING COMPLIANCE WITH THE AGREEMENT

A. Like any other "law," international agreements to which the United States is a party must be followed. The JA will be a principal player in this effort. Some areas, such as foreign criminal jurisdiction (FCJ), will fall within the JA's ambit in any case. Others, such as logistics agreements, will be handled by experts in other staff sections, with JA support. In areas in which we have been exercising an agreement for a long time, such as the NATO Acquisition and Cross-Servicing Agreement, the subject-matter experts, such as the logisticians, will require little legal support. Infrequently-used or newly-concluded agreements may require substantial JA involvement.

B. Common subjects of international agreements include: status of forces, logistics support, pre-positioning, cryptological support, personnel exchange programs, and defense assistance (to include security assistance programs). For the deploying JA, SOFAs are probably the most important agreements, followed by logistics support agreements, such as acquisition and cross-servicing agreements (ACSA).

1. *SOFAs*.

a. *Historically*. Scant formal international law governed the stationing of friendly forces on a host nation's territory. Most frequently, the law of the flag was applied, which basically held that since the friendly

forces were transiting a host nation's territory with their permission, it was understood that the nation whose forces were visiting retained jurisdiction over its members. After World War II, with the large increase in the number of forces stationed in friendly countries, more formal SOFAs were deemed necessary to address the many and diverse legal issues that would arise, and to clarify the legal relationships between the countries. SOFAs varied in format and length, ranging from complex multi-lateral agreements, such as the NATO SOFA and its accompanying country supplements, to very limited, smaller-scale one-page Diplomatic Notes. Topics addressed in SOFAs may cover a large variety of issues.

b. *Status/FCJ*. One of the most important deployment issues is criminal jurisdiction. The general rule of international law is that a sovereign nation has jurisdiction over all persons found within its borders. There can be no derogation of that sovereign right without the consent of the Receiving State and, in the absence of an agreement; U.S. personnel are subject to the criminal jurisdiction of the Receiving State. On the other hand, the idea of subjecting U.S. personnel to the jurisdiction of a country in whose territory they are present due solely to orders to help defend that country raises serious problems. In recognition of this, and as a result of the Senate's advice and consent to ratification of the NATO SOFA, DoD policy, as stated in DoDD 5525.1, is to maximize the exercise of jurisdiction over U.S. personnel by U.S. authorities.

c. *Exception*. An exception to the general rule of Receiving State jurisdiction is deployment for combat, wherein U.S. forces are generally subject to exclusive U.S. jurisdiction. As the exigencies of combat subside, however, the primary right to exercise criminal jurisdiction may revert to the Receiving State or come under another jurisdictional structure established in a negotiated agreement with the Receiving State.

d. *Types of Criminal Jurisdiction Arrangements*. Beyond a complete waiver of jurisdiction by the Receiving State, there are four possible types of arrangements that a deploying JA should understand: the NATO formula of Shared Jurisdiction; Administrative and Technical Status (A&T status); Visiting Forces Acts; and the prospect of deploying without an applicable SOFA.

(1) **NATO SOFA**. Article VII of the NATO SOFA provides a scheme of shared jurisdiction between the Receiving State (*i.e.*, the host nation) and the Sending State (*i.e.*, the State sending forces into the host nation). This scheme is the model for many other SOFAs, so it will be discussed in detail. All examples assume a U.S. Soldier committing an offense while stationed in Germany.

(a) ***Exclusive Jurisdiction in the Sending State***. Conduct that constitutes an offense under the law of the Sending State, but **not** the Receiving State, is tried exclusively by the Sending State. For example, dereliction of duty is an offense under the UCMJ, but not under German law, so exclusive jurisdiction rests with the United States.

(b) ***Exclusive Jurisdiction in the Receiving State***. Conduct that constitutes an offense under the law of the Receiving State, but **not** the Sending State, is tried exclusively by the Receiving State. For example, a given traffic offense may violate German law, but not U.S. law, so Germany has exclusive jurisdiction.

(c) ***Concurrent Jurisdiction***. For all conduct that constitutes an offense under the laws of both the Receiving and Sending States, there is concurrent jurisdiction, with primary jurisdiction assigned to one party:

(i) *Primary Concurrent Jurisdiction in the Sending State*. The Sending State has primary jurisdiction in two instances. First are acts in which the Sending State is the victim, or a person from the Sending State (otherwise covered by the SOFA) is the victim. This is known as *inter se* ("among themselves"). For example, if a Soldier assaults another Soldier, it violates both U.S. and German law, but primary jurisdiction rests with the United States because the victim is from the Sending State. Second are acts or omissions committed in the performance of official duty. For example, if a Soldier, while driving to another post for a meeting, hits and kills a pedestrian, he or she could be charged with some sort of homicide by both the United States and Germany. However, because the offense was committed while in the performance of official duty, the United States retains primary jurisdiction.

(ii) *Primary Concurrent Jurisdiction in the Receiving State*. In all other cases, primary jurisdiction rests with the Receiving State. However, it is possible for the Receiving State to waive its primary jurisdiction in favor of the Sending State, and they often do. The NATO SOFA provides that "sympathetic considerations" shall be given to requests to waive jurisdiction. For example, if a Soldier assaults a German national, it violates both U.S. and German law, but Germany has primary jurisdiction. Upon request, Germany may

waive its jurisdiction, in which case the Soldier may be tried by U.S. courts-martial. Supplemental agreements may provide further detail regarding these waivers of jurisdiction.

(2) **Administrative and Technical Status**. Some Receiving States may consent to granting U.S. personnel the privileges and immunities equivalent to those given the administrative and technical staff of the U.S. embassy, as defined in the Vienna Convention on Diplomatic Relations. This is often referred to as "A&T status." In many cases, the United States can obtain such status by incorporating, by reference, the privileges and immunities already granted to U.S. military personnel under another agreement, such as a defense assistance agreement that includes personnel assigned to the U.S. embassy or to a Military Assistance Advisory Group (MAAG). These agreements usually provide A&T status to the covered personnel. A&T status is rarely granted for large-scale and/or long-term deployments. The Receiving State typically recognizes the A&T status of the deploying forces through an exchange of diplomatic notes, memorandum of agreement or the like. These agreements will typically be handled by the Combatant Command headquarters and/or the U.S. Embassy or other diplomatic representative.

(3) **Visiting Forces Acts**. If the United States does not have an agreement with a host nation, some nations still extend protections to visiting forces through domestic statutes commonly called Visiting Forces Acts. Commonwealth nations are those most likely to have Visiting Forces Acts (*e.g.*, Jamaica and Belize). In general, these statutes provide a two-part test. First, Visiting Forces Acts require that the nation sending forces to the host country be listed in accordance with its domestic law. Second, the jurisdictional methodology is one of two types: a jurisdictional model similar to the NATO SOFA, or protections equivalent to A&T status. In any case, it is essential that the JA acquire a copy of the host nation's Visiting Forces Act before deploying into that country.

(4) **No Protection**. The last situation encountered by deployed units occurs when U.S. forces enter a host nation totally subject to the host nation's laws. While U.S. policy is to avoid such situations, there are some situations where a political decision is made to send U.S. forces into a country without any jurisdictional protections. In such circumstances, U.S. forces are essentially tourists. In these circumstances, if a Solider commits a crime, diplomatic resolution or liaison with the host nation military authorities may be successful in securing more favorable treatment.

(5) **Exercise of FCJ by the Receiving State**. Under any of these situations, if U.S. military personnel are subjected to FCJ, the United States must take steps to ensure that they receive a fair trial. Detailed provisions are set out in DoDD 5525.1 and implementing Service regulations.

(6) **United Nations Missions**. Personnel participating in a UN mission typically will have special protection. In some cases, the State to which the UN is deploying forces may grant those forces "expert on mission" status. This refers to Article VI of the Convention on the Privileges and Immunities of the United Nations, and grants complete criminal immunity. Alternatively, the UN may negotiate a SOFA, though in UN parlance it is called a Status of Mission Agreement (SOMA). The UN "Model" SOMA, which is to be used as a template for the actual SOMA, provides for exclusive criminal jurisdiction in the Sending State.

(7) **Article 98 Agreements and the International Criminal Court (ICC)**. After the entry into force of the Rome Statute of the ICC in July 2002, the U.S. began negotiating Article 98 Agreements with other nations. These agreements are so named after Article 98 of the ICC Statute, which states:

(a) The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.

(b) The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.[3]

(c) Article 98 Agreements are being negotiated to protect U.S. servicemembers and other U.S. nationals from being handed over to the ICC by another nation. Though it may be implausible to have Article 98 agreements signed in each country in which the U.S. military operates or exercises, Article 98-type language may be

[3] Rome Charter for the International Criminal Court, 17 July 1998, *available at* http://www.un.org/law/icc/statute/english/rome_statute(e).pdf.

integrated into a SOFA, mini-SOFA, diplomatic note, etc. in order to temporarily protect U.S. troops. Well before deployment, JAs must determine the exact status of U.S.-Host Nation relations on this issue.

(d) In addition to Article 98 Agreements, an applicable SOFA in which the United States has exclusive or primary jurisdiction for offenses committed in the course of official duties may also protect U.S. service members. For example, if the United States has a SOFA with country X that grants A&T status to Soldiers (but no Article 98 Agreement exists), this will still require the host nation to accede to U.S. jurisdiction over the offense in question. Deploying JAs should check with their technical chain of command regarding the existence of any applicable Article 98 Agreements and the impact of existing SOFAs on potential ICC jurisdictional issues.

e. *Claims and Civil Liability*. Claims for damages almost always follow deployments of U.S. forces. Absent an agreement to the contrary (or a combat claims exclusion), the United States normally is obligated to pay for damages caused by its forces. As a general rule, the desirable arrangement is for State parties to waive claims against each other. In addition, it is not uncommon for a Receiving State to agree to pay third party claims caused by U.S. forces in the performance of official duties, and release Soldiers from any form of civil liability resulting from such acts. For claims resulting from third party claims not caused in the performance of official duties, the desirable language is that the United States may, at its discretion, handle and pay such claims in accordance with U.S. laws and regulations, *i.e.*, the Foreign Claims Act[4] (FCA), but the Soldier may remain subject to the jurisdiction of host nation civil courts. This liability may, however, be mitigated based on any payments made by the United States under the FCA.

f. *Force Protection/Use of Deadly Force*. The general rule of international law is that a sovereign is responsible for the security of persons within its territory. This does not, however, relieve the U.S. commander of his or her responsibility for the safety (*i.e.*, self-defense) of the unit. As part of pre-deployment preparation, the JA should determine whether the applicable agreement includes provisions regarding force security, along with reviewing the applicable rules of engagement. While the host nation is generally responsible for the security of persons in its territory, it is common for the United States to be responsible for security internal to the areas and facilities it uses. It may also be desirable to provide for the United States with the right to take measures to protect its own personnel under certain circumstances. For example, Article III of the Korean SOFA provides that, in the event of an emergency, the U.S. armed forces shall be authorized to take such measures *in the vicinity of* its facilities and areas as may be necessary to provide for their safeguarding and control. The SOFA may also include a provision allowing military police the authority to apprehend U.S. personnel off the installation.

g. *Entry/Exit Requirements*. Passports and visas are the normal instruments for identifying nationality and verifying that presence in the Receiving State is authorized. But the issuance of passports to large numbers of military personnel is expensive and impractical, and-in an emergency-the issuance of visas is unacceptably slow. Even in peacetime, the time it takes to process visa requests has a significant impact on operational flexibility. As a result, most SOFAs provide that U.S. personnel may enter and exit the territory of the Receiving State on their military identification cards and orders, or offer other expedited procedures.

h. *Customs and Taxes*. While U.S. forces clearly should pay for goods and services requested and received, sovereigns generally do not tax other sovereigns. As a result, U.S. forces will normally be exempt from the payment of host nation customs, duties and taxes on goods and services imported to or acquired in the territory of the Receiving State for official use. Likewise, the personal items of deploying Soldiers also should be exempt from any customs or duties.

i. *Contracting*. Specific authority for U.S. forces to contract on the local economy for procurement of supplies and services not available from the host nation government should be included in the SOFA. As noted above, provisions should always be made to exempt goods and services brought to or acquired in the host country from import duties, taxes, and other fees. This provision is designed to allow for the local purchase of some or all items needed, but does not alter or obviate the need to follow other fiscal and contracting legal requirements.

j. *Vehicle Registration/Insurance/Drivers' Licenses*. The Receiving State may attempt to require U.S. vehicles be covered by third party liability insurance, and that U.S. drivers be licensed under local law. These efforts should be resisted, and provisions specifically exempting U.S. forces from these requirements should be included in the SOFA or exercise agreement.

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[4] 10 U.S.C. § 2734. Keep in mind that the payment of claims under the FCA is based not on legal liability, but on the maintenance of good foreign relations.

(1) The U.S. Government is "self-insured." That is, it bears the financial burden of risks of claims for damages, and the FCA provides specific authority for the payment of claims. As a result, negotiation of any agreement should emphasize that official vehicles need not be insured.

(2) Official vehicles may be marked for identification purposes, if necessary, but local registration should not be required by the Receiving State. In many countries, vehicle registration is expensive. SOFAs frequently provide for privately-owned vehicles to be registered with Receiving State authorities upon payment of only nominal fees to cover the actual costs of administration.

(3) A provision for U.S. personnel to drive official vehicles with official drivers' licenses expedites the conduct of official business. It is also helpful if the Receiving State will honor the U.S. drivers' licenses of U.S. personnel or, in the alternative, issue licenses on the basis of possession of a valid stateside license without requiring additional examination.

k. *Communications Support*. When U.S. forces deploy, commanders rely heavily upon communications to exercise command and control. Absent an agreement to the contrary, host nation law governs the commander's use of frequencies within the electro-magnetic spectrum. This includes not only tactical communications, but commercial radio and television airwaves. This can greatly impact operations, and should be addressed early in the planning process. While unencumbered use of the entire electro-magnetic spectrum should not be expected, use by U.S. forces must be addressed and responsibilities delineated in the SOFA. Early and close coordination between U.S. and host nation communications assets should be the norm.

2. Logistics Agreements.

a. *Pre-Positioning of Materiel*. If U.S. equipment or materiel is to be pre-positioned in a foreign country, an international agreement should contain the following provisions:

(1) Host nation *permission* for the United States to store stocks there.

(2) Unimpeded United States *access* to those stocks.

(3) *Right of removal*, without restriction on subsequent use.

(4) Adequate *security* for the stocks.

(5) The host nation must promise not to *convert* the stocks to its own use, nor to allow any third party to do so (*i.e.*, legal title remains vested in the United States).

(6) Appropriate *privileges and immunities* (status) for U.S. personnel associated with storage, maintenance, or removal of the stocks.

b. *Negotiation*. In some cases, the DoD General Counsel has allowed some leeway in negotiating pre-positioning agreements, provided that host government permission for U.S. storage in its territory and unequivocal acknowledgment of the U.S. right of removal are explicit. "Legal title" need not be addressed *per se*, if it is clear the host government has no ownership rights in the stocks—only custodial interests—and that pre-positioned stocks are solely for U.S. use. "Access" to the pre-positioned stocks need not be addressed explicitly, unless U.S. access is necessary to safeguard them. There can be no express restrictions on U.S. use. Prior "consultation" for U.S. removal of pre-positioned stocks is not favored, and prior "approval" is not acceptable. "Conversion" need not be specifically addressed, if it is clear that the pre-positioned stocks' sole purpose is to meet U.S. requirements. "Security" must be specifically addressed only when stores are at risk due to their value. "Privileges and immunities" are required only when it is necessary for U.S. personnel to spend significant amounts of time in the host country to administer, maintain, guard, or remove the stocks.

c. *Host Nation Support*. When a unit deploys overseas, some of its logistical requirements may be provided by the host nation. If so, it is desirable to have an international agreement specifying the material the host nation will provide and on what conditions, such as whether it is provided on a reimbursable basis.

d. *ACSA*. Subchapter 138 of Title 10, U.S.C. also provides authority for government-to-government ACSAs for mutual logistics support. Under 10 U.S.C. § 2342, U.S. forces and those of an eligible country[5] may

[5] Eligible countries include all NATO countries, plus non-NATO countries designated by SECDEF. Criteria for eligibility include: defense alliance with the U.S.; stationing or homeporting of U.S. Forces; pre-positioning of U.S. stocks; or hosting exercises or staging U.S. military operations. A list of ACSAs can be found on CLAMO's web site.

provide logistics support, supplies, and services on a reciprocal basis. The primary benefit of cross-servicing is that such support, supplies, and services may be reimbursed through: replacement in kind; trade of support, supplies, or services of equal value; or cash. In addition, an ACSA allows the deletion of several common contractual paragraphs required by the FAR but frequently objectionable to other sovereigns.[6] There are limits on the on the total amount of liabilities the United States may accrue under this subchapter, except during a period of active hostilities. The amount of acquisitions and cross-servicing a component may conduct each year is allocated by the cognizant Combatant Commander.[7] There are some restrictions on ACSAs. For example, they cannot be used as a substitute for normal sources of supply, or as a substitute for foreign military sales procedures. "Major end items" may not be transferred under a cross-servicing agreement. For general guidance, *see* DoD Directive 2010.9, Mutual Logistic Support Between the United States and Governments of Eligible Countries and NATO Subsidiary Bodies.

e. *Cryptologic Support*. 10 U.S.C. § 421 authorizes SECDEF to use funds appropriated for intelligence and communications purposes to pay the expenses of arrangements with foreign countries for cryptologic support. This authority has been frequently used as the basis for agreements to loan communications security (COMSEC) equipment, such as message processors or secure telephones, to allied forces. Equipment of this type raises obvious technology transfer issues, and among the key provisions of any COMSEC agreement is the assurance that the Receiving State's forces will not tamper with the equipment in an effort to retro-engineer its technology. *See* CJCSI 6510.01, *Joint and Combined Communications Security*, for guidance.

3. The United States as a Receiving State.

a. In the past, the focus of the Status of Forces was on U.S. servicemembers deployed to other countries. However, in the post-Cold War era, that is no longer exclusively the case. Foreign forces come to the U.S. for training on a routine basis. In fact, some NATO nations have units permanently stationed in the United States.[8] The status of these foreign armed forces personnel depends on what nation's soldiers are conducting training in the United States. Almost all SOFAs entered into by the United States have been non-reciprocal in nature. For example, the Korean SOFA only applies to U.S. armed forces *in* the Republic of Korea (ROK). Therefore, if ROK soldiers are present in the United States, exclusive jurisdiction would rest with the United States. On the other hand, the United States may have entered into a SOFA that is reciprocal, such as the NATO SOFA and the Partnership for Peace (PFP) SOFA. With nations party to the NATO and PFP SOFAs, the jurisdictional methodology is the same as when the United States is sending forces, only the roles are reversed.

b. There are a number of issues to be addressed in this area. The first arises based on our federal system. If the international agreement under which the foreign forces are seeking protection is a treaty, it is the supreme law of the land, and is binding on both the Federal and state jurisdictions. International agreements that are not treaties (*e.g.*, executive agreements) do not have that status. Although these are binding on the Federal government, they are not binding on the states. Therefore, a state prosecutor would be free to charge a visiting service member for a crime under state law, regardless of the provisions of the international agreement. Often, such a prosecutor will be willing to defer prosecution in the national interest, but it may be a matter for delicate negotiation, and the JA will take a leading part. Other issues arise from the foreign force imposing discipline on members of their force within the United States. Just as the United States conducts courts-martial in Germany, Germany may wish to do the same in the United States. DoDD 5525.3 and Service implementations address some of these issues.

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[6] *See* 10 U.S.C. § 2343.

[7] *See* 10 U.S.C. § 2347.

[8] For example, German Tornado Fighters are permanently assigned at Holloman Air Force Base, New Mexico. In addition, Fort Bliss, Texas is home to a substantial German Air Defense training detachment.

NOTES

CHAPTER 8

COMBATING TERRORISM

REFERENCES

A. International Agreements

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2. 1963 Tokyo Convention on Offences and Certain Other Acts Committed On Board Aircraft, 20 UST 2941, TIAS 6768, 704 UNTS 219.
3. 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft, 22 UST 1641, TIAS 7192. (Hijacking).
4. 1971 Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, 24 UST 564, TIAS 7570. (Sabotage).
5. 1971 OAS Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion That are of International Significance, 27 UST 3949, TIAS 8413.
6. 1973 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, 28 UST 1975, TIAS 8532, 1035 UNTS 167. (Protects senior government officials and diplomats).
7. 1977 European Convention on the Suppression of Terrorism.
8. 1979 Convention on the Physical Protection of Nuclear Materials, TIAS 11080.
9. 1979 International Convention Against the Taking of Hostages, TIAS 11081.
10. 1980 Vienna Convention on the Physical Protection of Nuclear Material.
11. 1987 SAARC Regional Convention on Suppression of Terrorism.
12. 1988 Protocol to the 1971 Montreal Convention for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation.
13. 1988 Rome Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, TIAS.
14. 1988 Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, TIAS.
15. 1991 Montreal Convention on the Marking of Plastic Explosives for the Purpose of Detection, S. Treaty Doc. No. 103-8.
16. 1997 International Convention for the Suppression of Terrorist Bombings.
17. 1998 Arab Convention on the Suppression of Terrorism.
18. 1999 Convention of the Organization of the Islamic Conference on Combating International Terrorism.
19. 1999 International Convention for the Suppression of Financing Terrorism.
20. 1999 OAU Convention on the Prevention and Combating of Terrorism.
21. 1999 Treaty on Cooperation Among State Members of the Commonwealth of Independent States in Combating Terrorism.
22. 2005 International Convention for the Suppression of Nuclear Terrorism.

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2. 10 U.S.C. §§ 371-382, Military Support to Law Enforcement.
3. 14 U.S.C. § 712, U.S. Coast Guard.
4. 18 U.S.C. § 1385, Posse Comitatus.
5. 18 U.S.C. § 2332a WMD.
6. 18 U.S.C. § 2332b Transnational Terrorism.
7. 18 U.S.C. § 2441 War Crimes Act.
8. 32 U.S.C. § et seq., National Guard.
9. 32 U.S.C. § 112, Drug Interdiction and Counter Drug Activities
10. 42 U.S.C. §§ 5121-5204c, Stafford Act.
11. 50 U.S.C. §§ 401-441d, National Security Act.

12. 50 U.S.C. § 413, Intelligence Oversight Act of 1980.
13. 50 U.S.C. §§ 2251-2303, Civil Defense Act.
14. 50 U.S.C. §§ 2311-2367, Weapons of Mass Destruction Act of 1996.
15. Antiterrorism and Effective Death Penalty Act of 1996, Title I, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified at scattered sections of 18 and 28 U.S.C.).
16. National Defense Authorization Act for Fiscal Year 1991, P.L. 101-510, sec. 1004, Additional Support for Counter Drug Activities.
17. National Defense Authorization Act for Fiscal Year 1997, P.L. 104-201, sec. 1031, Authority to Provide Additional Counter-Drug Activities of Mexico.
18. Authorization for Use of Military Force, 2001, P.L. 107-40, Authority for the Use of the U.S. Armed Forces Against Those Responsible for the September 11 Attacks Against the U.S.
19. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, P.L. 107-56, Authority to Deter and Punish Terrorist Acts in the U.S. and Abroad, and to Enhance Law Enforcement Investigative Tools.
20. Aviation and Transportation Security Act, 2001, P.L. 107-71.
21. Intelligence Authorization Act of Fiscal Year 2002, P.L. 107-108.
22. National Defense Authorization Act for Fiscal Year 2002, P.L. 107-107, Authority to Provide Additional Support for Activities Relating to Combating Terrorism.
23. Homeland Security Act of 2002, P.L. 107-296.
24. Military Commissions Act of 2006, P.L. 109-366.

C. Presidential Documents

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2. E.O. 12333, U.S. Intelligence Activities.
3. E.O. 12472, Emergency Telecommunications Functions.
4. E.O. 12656, Emergency Preparedness Responsibilities.
5. E.O. 13010, Critical Infrastructure Protection.
6. E.O. 13099, Naming al-Qaeda as an FTO.
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8. E.O. 13224, Freezing Assets of 27 organizations/persons linked to al-Qaeda.
9. E.O. 13228, Establishing Office of Homeland Security.
10. E.O. 13231, Critical Infrastructure Protection.
11. E.O. 13260, Homeland Security Advisory Council and Senior Advisory Committees.
12. E.O. 13286, Amendment of previous E.O.'s and other Actions in the Connection with the Transfer of Certain Functions to the Secretary of Homeland Security.
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16. PDD 39, U.S. Policy on Counterterrorism, 21 June 1995.
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3. DoD O-2000.12-P, DoD Department of Defense Antiterrorism Strategic Plan.
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5. DoDD 3020.26, Defense Continuity Program.

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7. DoDD 3025.1, Military Support to Civil Authorities.
8. DoDD 3025.12, Military Assistance for Civil Disturbances.
9. DoDD 3025.15, Military Assistance to Civil Authorities.
10. DoDD 3025.1-M, DoD Manual for Civil Emergencies.
11. DoDD 3150.8, DoD Response to Radiological Incidents.
12. DoDD O-5210.41, Security Policy for Protecting Nuclear Weapons.
13. DoDD 5210.63, Security of Nuclear Reactors and Special Nuclear Materials.
14. DoDD S-5210.81, United States Nuclear Weapons Command and Control, Safety, and Security.
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3. AR 500-3, U.S. Army Continuity of Operations (COOP) Program Policy and Planning.
4. NGR 500-1/ANGI 10-8101, Military Support to Civil Authorities.
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I. INTRODUCTION

A. On 11 September 2001, the U.S. view of the world changed. The unprecedented terrorist attacks in the United States on that day clearly demonstrated to the U.S. and the international community the depth and scope of global terrorism. The terrorist attacks in New York, Pennsylvania, and Washington, D.C. also undoubtedly demonstrated the terrorists' willingness and ability to target civilians, as well as military objects, here at home and abroad. Furthermore, the attacks unmistakably verified that the changing face of terrorism continues to evolve into organizations willing to inflict mass casualties. Historically, terrorist attacks were politically-motivated and did not typically involve mass casualties. The terrorist organizations of the 70s and 80s were mainly state-sponsored, characterized as having leftist political agendas, and avoided mass casualties. With the disintegration of the Soviet

Union and the decline of communism, there has been a major shift of terrorists' motives and tactics. Today, religious and ethnic fanaticism continues to rise. In many cases, today's terrorists view violence as a divinely-inspired act. These terrorists believe they are complying with "God's" law, and seemingly have no regard for the laws of man. Additionally, the availability of conventional weapons, the proliferation of technologies of weapons of mass destruction (WMD), and increased access to information technology provide today's terrorist organizations with the means to carry out their deadly terror campaign. Furthermore, their methods have been increasingly lethal, in the sense that they are more willing to inflict mass casualties. This lethal combination of changing motives, means and methods of today's terrorist organizations culminated with the attacks on the World Trade Center Towers and the Pentagon.

B. The 9/11 attacks clearly placed global terrorism on center-stage, both domestically and internationally. This focus on global terrorism has resulted in a close examination of how to combat it. As the world is discovering since the 9/11 attacks, combating terrorism, particularly terrorism from non-state organizations such as the al-Qaida network, does not fit neatly into any existing paradigms. U.S. involvement in the insurgency in Iraq against assorted sectarian groups, as well as the al-Qaida organization in Afghanistan and beyond, is not the traditional type of armed conflict contemplated by the drafters of existing law of war conventions. Since 9/11, many issues and questions have been raised, and many remain unresolved. The manner in which the U.S. and the international community are combating terrorism will continue to evolve. One thing is clear, however: the U.S is leading an unprecedented worldwide campaign against global terrorism, wherever it exists.

C. The international response to the 9/11 attacks was swift. In the United Nations on the day after the attacks, the General Assembly and the Security Council both passed resolutions regarding global terrorism. Additionally, on 28 September 2001, The U.N. Security Council unanimously adopted United Nations Security Council Resolution (UNSCR) 1373 under Chapter VII of the U.N. Charter. UNSCR 1373 is extremely significant in that it establishes a body of legally-binding obligations on all U.N. member states. It also defined the common core of the new international campaign to combat international terrorists, their organizations, and those who support them. Furthermore, UNSCR 1373 also called for the establishment of a Counter Terrorist Committee to ensure full implementation by all states. Other examples of international cooperation on the current war on terrorism include: 136 countries offering a diverse range of military assistance, with 17 countries having forces deployed in the Afghanistan region; 46 multilateral organizations declaring their support; and 142 countries acting to freeze terrorist assets.

D. Domestically, the U.S. has taken a broad range of steps to combat terrorism since 9/11. The President has implemented a comprehensive foreign policy against global terrorism. This policy includes putting the world on notice that any nation that harbors or supports terrorism will be regarded as a hostile regime. The administration has spearheaded the worldwide coalition against terrorism utilizing all available diplomatic, financial, law enforcement, intelligence and military means. The creation of the Department of Homeland Security (DHS) and the Homeland Security Council (HSC) were established to help protect against future terrorist attacks. In 2001, there has been a flurry of legislation passed by Congress, including the Authorization for Use of Force (AUMF) and the "PATRIOT Act." Operation Enduring Freedom (OEF) was the military manifestation of the administration's use of military force against global terrorism. As the U.S. enters the fifth year in the GWOT new organizations, both military and civilian, are being created or revamped to more effectively wage a campaign against violent Islamic extremists that routinely violate the law of war in their asymmetric fight against the U.S. and her allies.

E. The purpose of this chapter is to assist the judge advocate (JA) in understanding DoD's role in combating terrorism. OEF is an obvious example of DoD's role in combating terrorism, but DoD's function is much broader than the use of military force. Accordingly, the remainder of the chapter will focus mainly on DoD's role in supporting the U.S. effort in other areas in combating terrorism. Even before September 11, there were several studies proposing a greater role for the U.S. military in combating terrorism. The attacks on the homeland quickly moved the implementation forward. Examples include the revision of the SROE with SRUF and the bolstering of NORTHCOM to defend CONUS.

F. DoD is not the lead agency for combating terrorism. However, DoD does play a significant supporting role in several areas. In that regard, DoD is responsible for providing technical assistance or forces when requested by the President of the United States and/or the Secretary of Defense (SECDEF). Moreover, DoD is also responsible for protecting its own personnel, bases, ships, deployed forces, equipment, and installations. Every commander at every level has the inherent responsibility of planning for and defending against terrorist attacks. Similarly, every servicemember, family member, DoD civilian, contractor, and host nation laborer should be educated and alerted to

possible terrorist attacks. Judge Advocates should participate in all foreign and domestic antiterrorism plans and in the implementation of those plans. Judge Advocates assigned to units involved in counterterrorism should have a thorough understanding of the unit's plans and missions.

G. "Terrorism" is defined in Department of Defense Directive (DoDD) 2000.12 as the "calculated use of violence or threat of unlawful violence to inculcate fear and intended to coerce or to intimidate governments or societies in the pursuit of goals that are generally political, religious, or ideological." The term "combating terrorism" involves both counterterrorism and antiterrorism. One of the issues that constantly arises in discussing terrorism is defining it. While this issue has plagued the United Nations and its ability to combat terrorism as an organization, the issue is present in domestic policy as well. The Department of State uses 22 U.S.C. § 2656f(d) for its definition of terrorism.

H. Counterterrorism (CT) generally refers to offensive military operations designed to prevent, deter, and respond to terrorism. It is a highly-specialized, resource-intensive military activity. Certain national special operations forces units are prepared to execute these missions on order of the President or SECDEF. Combatant commanders maintain designated CT contingency forces when national assets are not available. These programs are sensitive, normally compartmented, and addressed in relevant National Security Directives (NSD), Presidential Decision Directives (PDD), National Security Presidential Directives (NSPD), contingency plans (CONPLAN) and other classified documents. Therefore, this subject is beyond the scope of this publication.

I. Antiterrorism (AT) consists of defensive measures to reduce the vulnerability of individuals and property to terrorist attacks. Overseas (OCONUS), AT should be an integrated and comprehensive plan within each combatant command. The AT plan is normally thought of in two primary phases: proactive and reactive. The proactive phase includes planning, resourcing, and taking preventive measures, as well as preparation, awareness, education, and training, prior to an incident. The reactive phase includes the crisis management actions in response to an attack. In the continental United States (CONUS), DoD's role is generally that of providing expert technical support in the area of consequence management.

II. JUDGE ADVOCATE INVOLVEMENT

A. As a member of the Crisis Management Team, the JA must provide essentially the same kind of legal advice to the commander of a force deployed overseas as he or she would provide in the event of a terrorist incident occurring at a CONUS installation. The unit must be prepared to defend itself, and legal questions such as what, if any, limitations exist on the use of force, and when is it appropriate to use deadly force, as well as the question of who may exercise jurisdiction over a particular incident, are issues that must be addressed prior to deployment.

B. The commander of a deployed unit, in addition to providing for force security and terrorism counteraction, must ensure that Soldiers are operating under clear, concise rules of engagement (ROE), regardless of the deployment location. Soldiers must be aware of their right to defend themselves, even while participating in a peacetime exercise. They must also be aware, however, of any restraints on the use of force. Note that according to the Chairman of the Joint Chiefs of Staff Standing Rules of Engagement (CJCS SROE) "[a]ny civilian, paramilitary or military force, or terrorist(s)" may be designated a "Declared Hostile Force."

C. Judge Advocates advising units involved in counterterrorism operations should be particularly cognizant of issues concerning: use of force/ROE; weapons selection and employment; collateral damage; defense of third parties; targeting (determination of proper targets); and terminology (*e.g.*, response, reprisal, self-defense and anticipatory self-defense).

III. FEDERAL AGENCY ROLES IN COMBATING TERRORISM

A. Overview. The primary Federal organizations dealing with terrorism management are the National Security Council (NSC), the Department of State (DoS), and the Department of Justice (DoJ). However, the creation of the DHS has significantly transformed the government in its response to terrorism as has the creation of the Director of National Intelligence (DNI).

B. The NSC. The NSC formulates U.S. policy for the President on terrorist threats that endanger U.S. interests.

C. NSC's Counterterrorism & National Preparedness Policy Coordination Committee. NSPD-1 established this committee. In that regard, NSPD-1 established the organization of the NSC under the Bush Administration. NSPD-1 abolished the previous system of interagency working groups, and replaced them with a

policy coordination committee (PCC). This committee is comprised of representatives from DoS, DoJ, DoD, CJCS, the Central Intelligence Agency (CIA), and the Federal Bureau of Investigation (FBI). The PCC has four standing subordinate groups to coordinate policy on specific areas relating to responding to terrorism. When the NSC is advised of the threat of a terrorist incident or actual event, the appropriate subordinate group will convene to formulate recommendations for the Counterterrorism and Preparedness PCC, who in turn will provide policy analysis for the Deputies Committee. The Deputies Committee then ensures that the issues brought before the Principals Committee and NSC are properly analyzed and prepared for a decision by the President.

D. DoS. DoS is the lead agency for responses to terrorism occurring OCONUS, other than incidents on U.S. flag vessels in international waters. Due to a Memorandum of Understanding between DoS and DoD, DoD has responsibility for terrorism against U.S. interests on the Arabian Peninsula. Once military force is directed, the President and SECDEF exercise control of the U.S. military force.

E. DoJ. DoJ is normally responsible for overseeing the Federal response to acts of terrorism within the U.S. The U.S. Attorney General (AG), through an appointed Deputy Attorney General, makes major policy decisions and legal judgments related to each terrorist incident as it occurs. In domestic terrorism incidents, the AG will have authorization to direct a FBI-led Domestic Emergency Support Team (DEST), which is an ad hoc collection of interagency experts. The part of the former Immigration and Naturalization Service, the Office for Domestic Preparedness, and Domestic Emergency Support Teams are now part of the new DHS.

F. FBI. The FBI has been designated the primary operational agency for the management of terrorist incidents occurring in CONUS. When a terrorist incident occurs, the lead official is generally the Special Agent in Charge (SAC) of the field office nearest the incident, and is under the supervision of the Director of the FBI. The FBI maintains liaison at each governor's office. Because of the presence of concurrent jurisdiction in many cases, the FBI cooperates with state and local law enforcement authorities on a continuing basis. In accordance with the Atomic Energy Act of 1954, the FBI is the agency responsible for investigating a threat involving the misuse of a nuclear weapon, special nuclear material, or dangerous radioactive material. For an emergency involving terrorism, or terrorist acts involving chemical or biological WMD, the FBI also has the lead. In these efforts, the FBI coordinates with the Department of Energy (DoE), DoD, the Nuclear Regulatory Commission, and the Environmental Protection Agency, as well as several states that have established nuclear, chemical, and biological and/or WMD threat emergency response plans. The FBI's National Domestic Preparedness Office has been shifted to DHS.

G. DoE. DoE has important national security responsibilities. The Office of Defense Programs maintains the safety, security, and reliability of U.S. nuclear weapons stockpiles, without underground nuclear testing. The Office of Emergency Responses is prepared to respond to any nuclear or radiological accident or incident anywhere in the world. There are seven sub-offices with the Office of Emergency Responses. DoE's Nuclear Incident Response Team, CBRN Countermeasures Programs, Environmental Measures Laboratory, and Energy Security and Assurance Program have been shifted to DHS.

H. Department of Transportation (DoT). DoT and/or the Federal Aviation Agency (FAA) are the Federal agencies responsible for responding to terrorist incidents on aircraft in flight within U.S. jurisdiction. The FAA has exclusive responsibility for the coordination of law enforcement responses in instances of air piracy. The FBI maintains procedures, in coordination with DoS and DoT, to ensure efficient resolution of terrorist hijackings. DoT, through the U.S. Coast Guard (USCG), is responsible for reducing the risk of maritime terrorist acts within the territorial seas of the Untied States. The USCG and FBI have an interagency agreement, and must cooperate when coordinating counterterrorism activities. (*See* USCG Commandant Instruction 16202.3a.) DoT's Transportation Security Administration, as well as the USCG, is now part of DHS.

I. Department of the Treasury. The Department of the Treasury is responsible for preventing unlawful traffic in firearms and explosives, and for protecting the President and other officials from terrorist attacks. The Department's U.S. Customs Service and Federal Law Enforcement Training Center have been shifted to DHS.

J. CIA. The CIA provides overall direction for and coordination of the collection of national intelligence outside the U.S. The CIA is led by the Director of the CIA, who formerly held many of the duties now held by the DNI, *see below*. The CIA mission is accomplished through collecting intelligence through human sources, correlating and evaluating intelligence related to national security, and providing dissemination of such intelligence.

K. Federal Emergency Management Agency (FEMA). In the event of a terrorist WMD attack, FEMA manages the support provided by other agencies and the coordination with state and local authorities. FEMA relies

on the Federal Response Plan to coordinate support for consequence management. FEMA has been shifted to DHS and is under the Emergency Preparedness and Response division.

L. DHS. On March 1, 2003, DHS officially came into existence. The creation of DHS is a significant transformation of the U.S. government, consolidating twenty-two disparate domestic agencies (consisting of over 170,000 employees) into one department, to protect the nation against threats to the homeland. DHS's first priority is to protect the nation against further terrorist attacks. Component agencies will analyze threats and intelligence; guard our borders and airports; protect our critical infrastructure; and coordinate our nation's response to future emergencies. Additionally, DHS is committed to protecting the rights of American citizens and enhancing public services, such as natural disaster assistance and citizenship services, by dedicating offices to these missions. The divisions within DHS coordinate a comprehensive national strategy with Federal, state, and local counterterrorism efforts to strengthen the current protections against terrorist threats and attacks in the United States. With the exception of defending against direct attack, providing direct attack deterrence, and protecting critical national defense assets, DoD's role in Homeland Security should primarily involve providing military forces in support of civilian Federal, state, and local agencies. Prior to the establishment of DHS, FEMA was generally the lead agency in Consequence Management operations. As of this publication, how DHS will impact the roles of the other agencies remains unclear.

M. DNI. Following the independent National Commission on Terrorist Attacks Upon the United States (9/11 Commission) Congress passed and the President signed the Intelligence Reform and Terrorism Prevention Act of 2004 on December 8, 2004. The Act amended the National Security Act and created the Office of the Director of National Intelligence (ODNI) led by the DNI. DNI began operations on April 22, 2005. The DNI serves as the head of the Intelligence Community. The DNI also serves as the principal advisor to the President, the National Security Council, and the Homeland Security Council for intelligence matters related to national security. The former advisory roles were previously held by the Director of the CIA. Much like DHS, ODNI missions continue to be developed as agencies formally under other executive departments now report and are tasked by ODNI directly, rather than their parent agency, such as DoD.

N. National Counterterrorism Center (NCTC). Following the 9/11 Commission Report, the President created the NCTC, formerly comprised of the Terrorism Treat Integration Center. The NCTC Director is appointed by the President and reports to the DNI. The purpose of the NCTC is to serve as the primary organization in the U.S. Government for analyzing and interpreting intelligence possessed by and acquired by the U.S. Government pertaining to terrorism and counter-terrorism, excepting purely domestic counterterrorism information.

O. DoD. U.S. Armed Forces are prepared, on order, to attack terrorists or states involved in sponsoring terrorism. DoDD 2000.12 now prescribes that the Assistant Secretary of Defense for Special Operations and Low Intensity Conflict (ASD-SO/LIC) has the lead role within DoD in countering domestic terrorist incidents where U.S. forces may be used. The Nunn-Luger Bill calls for the military to maintain at least one domestic terrorism rapid response team, which is composed of members of the Armed Forces and employees of DoD with the appropriate expertise. Active Duty, National Guard, and Reserve forces possess expertise, training, and equipment that can support responses to chemical, biological, and radiological attacks at DoD installations and civilian communities. Expert and capable technical organizations and tactical units, such as Explosive Ordinance Disposal (EOD) teams, the Marine Corps Chemical Biological Incident Response Force (CBIRF), and the Army's Technical Escort Unit (TEU), are involved in the development of response plans and procedures. These units can assist the FBI on-site in dealing with chemical and biological incidents, such as: identification of contaminants; sample collection and analysis; limited decontamination; medical diagnosis and treatment of casualties; and render-safe procedure for WMD devices.

1. The Director of Military Support (DOMS) will serve as the executive agent for all domestic consequence support. However, the AG, through the FBI, will remain responsible for coordinating:

a. The activities of all Federal agencies assisting in the resolution of the incident and in the administration of justice in the affected areas.

b. Activities with state and local agencies that are similarly engaged.

2. For the military planner in the U.S. and its territories and possessions, the relationship between DoJ and DoD requires the development of local memoranda of agreement (or understanding) between the installation, base, unit, or port, and the appropriate local FBI office. This precludes confusion in the event of an incident. Because of military turnover and reorganization, these local agreements should be reviewed and tested annually.

P. Military Authority. Upon notification of Presidential approval to use military force, the AG will advise the Director of the FBI, who will notify the SAC at the terrorist incident scene. Concurrently, the SECDEF will notify the on-scene military commander. Nothing precludes the presence of the military liaison to respond and keep the military chain of command informed. The military commander and the SAC will coordinate the transfer of operational control to the military commander. Responsibility for the tactical phase of the operation is transferred to the military authority when the SAC relinquishes command and control of the operation, and the on-site military commander accepts it. However, the SAC may revoke the military force commitment at any time before the assault phase, if the SAC determines that military intervention is no longer required and it can be accomplished without seriously endangering the safety of military personnel or others involved in the operation. When the military commander determines that the operation is complete and military personnel are no longer in danger, command and control will promptly be returned to the SAC.

IV. AUTHORITY

A. Criminal Actions. Most terrorist acts are Federal crimes, whether committed during peacetime or in military operations. Terrorists, by definition, do not meet the four requirements necessary for combatant status: wear uniforms or other distinctive insignia; carry arms openly; be under command of a person responsible for group actions; and conduct their operations in accordance with the laws of war. More importantly, terrorist activities typically do not occur during an international armed conflict and, therefore, the laws of armed conflict (which provide lawful combatant status) would not apply. Only lawful combatants can legitimately attack proper military targets. For that reason, captured terrorists are not afforded the protection from criminal prosecution attendant to prisoner of war (POW) status. However, Common Article 3 of the 1949 Geneva Conventions, which requires that noncombatants be treated in a humane manner, may apply to captured terrorists.

B. Jurisdiction. In peacetime military operations, most terrorist acts are Federal crimes. This is also true in police actions to maintain a legitimate government. However, in an internationally-recognized war or hostilities short of war (regional or global), terrorists can be tried under local criminal law or under military jurisdiction by either a court-martial or military commission. A commander's authority to enforce security measures to protect persons and property is paramount during any level of conflict. Commanders must coordinate with their legal advisers to determine the extent of their authority to combat terrorism.

V. CONSTITUTIONAL AND STATUTORY GUIDANCE

A. The fundamental restriction on the use of the military in law enforcement is contained in the Posse Comitatus Act (PCA), which is discussed at length in the Domestic Operations chapter of this Handbook. However, several of the exceptions to the PCA are relevant to DoD's contribution to the fight against terrorism. A discussion of the exceptions follows.

1. *Constitutional Exceptions*: The President, based on his inherent authority as the Commander-in-Chief, has the authority to use the military in cases of emergency and to protect Federal functions and property. Military commanders, by extension of this authority, may respond in such cases as well, pursuant to Immediate Response Authority. In the case of civil disturbances (which may result from a terrorist act), military commanders may rely on this authority, which is contained in DoDD 3025.12.

a. Generally, to cope with domestic emergencies and to protect public safety, an Emergency Rule has evolved: when the calamity or extreme emergency renders it dangerous to wait for instructions from the proper military department, a commander may take whatever action the circumstances reasonably justify. However, the commander must comply with the following:

(1) Report the military response to higher headquarters (*e.g.*, in the Army, the DOMS at HQDA, DCSOPS should be contacted).

(2) Document all facts and surrounding circumstances to meet any subsequent challenge of impropriety.

(3) Retain military response under the military chain of command.

(4) Limit military involvement to the minimum demanded by necessity.

b. Emergency situations include, but are not limited to, the following:

(1) Providing civilian or mixed civilian and military fire-fighting assistance where base fire departments have mutual aid agreements with nearby civilian communities.

(2) Providing EOD services.

(3) Using military working dog (MWD) teams in an emergency to aid in locating lost persons (humanitarian acts) or explosive devices (domestic emergencies).

2. *Statutory Exceptions*: 10 U.S.C. §§ 331-334 are the primary statutory exceptions pertinent to terrorism scenarios. A terrorist incident may well qualify as a civil disturbance. Triggering these statutes permits the active component to take on a law enforcement function, subject to the policy considerations discussed in the preceding section. In such a case, Federalization of the National Guard would not affect its functioning, since they would not be excepted from the PCA. For more information on these statutes, see the preceding section. In addition, some lesser-known statutes contain exceptions to the PCA:

a. To assist DoJ in cases of offenses against the President, Vice President, members of Congress, the Cabinet, a Supreme Court Justice, or an "internationally protected person." (18 U.S.C. §§ 351, 1116, 1751).

b. To assist DoJ in enforcing 18 U.S.C. § 831, which deals with prohibited transactions involving nuclear materials. This statute specifically authorizes the use of DoD assets to conduct arrests and searches and seizures with respect to violations of the statute in cases of "emergency," as defined by the statute.

c. To assist DoJ in enforcing 18 U.S.C. §§ 175 & 2332 during an emergency situation involving chemical or biological WMD, pursuant to 18 U.S.C. § 382. DoD support in WMD situations also appears in 50 U.S.C. §§ 2311- 2367, Weapons of Mass Destruction Act of 1996. These statutes specifically authorize the use of DoD assets, and also provide authorization for DoD to arrest, search and seize in **very limited** situations.

B. Vicarious Liability. Commanders at all echelons should be aware of the legal principle of vicarious liability in planning and implementing antiterrorist measures. This principle imposes indirect legal responsibility upon commanders for the acts of subordinates or agents. For example, willful failure on the part of the commander or a subordinate to maintain a trained and ready reaction force, as required by regulation, could be construed as an act taking the commander out of the protected position of being an employee of the Federal Government; thus making the commander subject to a civil suit by any hostages who are injured. Civil or criminal personal liability may result from subordinates' or agents' unlawful acts, negligence or failure to comply with statutory guidance. With the increasing number of civilian contract personnel on military installations and the sophistication of terrorist organizations, commanders should pay particular attention to meeting regulatory requirements and operating within the scope of their authority. The legal principle of vicarious liability, long established in the civilian community, has only recently applied to the military community. In this light, the command's legal adviser has become increasingly important to the commander in the planning, training and operational phases of the antiterrorist program.

VI. JURISDICTION AND AUTHORITY FOR HANDLING TERRORIST INCIDENTS

A. Jurisdiction Status of Federal Property. In determining whether a Federal or state law is violated, it is necessary to look not only to the substance of the offense, but also to where the offense occurred. In many cases, the location of the offense will determine whether the state or Federal government will have jurisdiction to investigate and prosecute violations. There are four categories of Federal territorial jurisdiction: exclusive, concurrent, partial and proprietary.

1. *Exclusive jurisdiction* means that the Federal government has received, by whatever method, all of the authority of the state, with no reservations made to the state except the right to serve criminal and civil process. In territory that is under the exclusive jurisdiction of the U.S., a state has no authority to investigate or prosecute violations of state law. However, the Assimilative Crimes Act, 18 U.S.C. § 13, allows the Federal government to investigate and prosecute violations of state law that occur within the special maritime and territorial jurisdiction of the United States.

2. *Concurrent jurisdiction* means that the U.S. and the state each have the right to exercise the same authority over the land, including the right to prosecute for crimes. In territory that is under the concurrent jurisdiction of the U.S. and a state, both sovereigns have the authority to investigate or prosecute violations of their respective laws. In addition, the Federal government may prosecute violations of state law under the Assimilative Crimes Act.

3. *Partial jurisdiction* refers to territory where the U.S. exercises some authority, and the state exercises some authority beyond the right to serve criminal and civil process (usually the right to tax private parties). In territory that is under the partial jurisdiction of the U.S., a state has no authority to investigate or prosecute violations of state law, unless that authority is expressly reserved. However, the Federal government may prosecute violations of state law under the Assimilate Crimes Act.

4. *Proprietary jurisdiction* means that the U.S. has acquired an interest in (or title to) property, but has no legislative jurisdiction over it. In territory that is under the proprietary jurisdiction of the U.S., the U.S. has the authority to investigate and prosecute non-territory-based Federal offenses committed on such property, such as assault on a Federal officer. This authority does not extend to investigations and prosecution of violations of state laws under the Assimilative Crimes Act and Federal Crimes Act of 1970. The state has the authority to investigate and prosecute violations of state law that occur on such territory.

B. Federal Authority. Several Federal criminal statutes apply to terrorist activities committed in the U.S. or against U.S. nationals or interests abroad. Some deal with conduct that is peculiar to terrorism, such as 18 U.S.C. § 2332 (prohibiting murder or assault of U.S. nationals overseas, when the AG certifies that the crime was intended to coerce, intimidate, or retaliate against a civilian population). Other Federal statutes proscribe conduct that is a crime for anyone, but in which a terrorist may engage to accomplish his purposes, such as 18 U.S.C. § 32 (destruction of aircraft or aircraft facilities); 18 U.S.C. § 1203 (hostage taking); and 49 U.S.C. § 46502 (aircraft piracy). The Assimilative Crimes Act, finally, will allow the Federal government to investigate and prosecute violations of state law regarding terrorist acts or threats that occur within the exclusive, concurrent or partial jurisdiction of the U.S., thereby giving the Federal government investigative and prosecutorial jurisdiction over a wide range of criminal acts. Once a violation of Federal law occurs, the investigative and law enforcement resources of the FBI and other Federal enforcement agencies become available, and prosecution for the offense may proceed through the Office of the United States Attorney.

C. Federal and State Concurrent Authority. In some cases, terrorist acts may be violations of state law as well as Federal law. In that situation, both state and Federal law enforcement authorities have power under their respective criminal codes to investigate the offense and institute criminal proceedings. If a terrorist act is a violation of both Federal and state law, then the Federal government can either act or defer to the state authorities, depending on the nature of the incident and the capabilities of local authorities. Even where the Federal government defers to state authorities, it can provide law enforcement assistance and support to local authorities on request. The prosecuting authority makes the choice between Federal or state action. However, successive prosecutions are possible even where Federal and state law proscribe essentially the same offense, without contravening the Fifth Amendment prohibition against double jeopardy. (For example, recall Federal and state prosecutions regarding the Oklahoma City Bombing.) Two relevant factors regarding law enforcement responsibility for a given incident are:

1. The capability and willingness of state or Federal authorities to act.

2. The importance of the state or Federal interest sought to be protected under the criminal statute.

VII. MILITARY INSTALLATION COMMANDER'S RESPONSIBILITIES

A. PDD-39 directs Federal agencies to ensure that the people and facilities under their jurisdiction are protected against terrorism. This applies to DoD facilities CONUS and OCONUS. In response to a Downing Assessment Task Force recommendation concerning the Khobar Towers bombing, DoD and DoS are reviewing their responsibilities to protect U.S. military and personnel assigned OCONUS.

B. Domestic Incidents. Although the FBI has primary law enforcement responsibility for terrorist incidents in the U.S. (including its possessions and territories), installation commanders are responsible for maintaining law and order on military installations. Contingency plans should address the use of security forces to isolate, contain and neutralize a terrorist incident within the capability of installation resources. In the U.S., installation commanders will provide the initial and immediate response to any incident occurring on military installations to isolate and contain the incident. The FBI will take the following steps:

1. The senior FBI official will establish liaison with the command center at the installation. If the FBI assumes jurisdiction, the FBI official will coordinate the use of FBI assets to assist in resolving the situation; *e.g.*, hostage rescue team and public affairs assets.

2. If the FBI assumes jurisdiction, the AG will assume primary responsibility for coordinating the Federal law enforcement response.

3. If the FBI declines jurisdiction, the senior military commander will take action to resolve the incident.

4. Even if the FBI assumes jurisdiction, the military commander will take immediate actions as dictated by the situation to prevent loss of life and to mitigate property damage before the FBI response force arrives.

5. In all cases, command of military elements remains within military channels.

6. Response plans with the FBI and service agencies should be exercised annually at the installation and base level to ensure the plans remain appropriate.

C. Foreign Incidents. For foreign incidents, the installation commander's responsibilities are the same as for domestic incidents, with the added requirement to notify the host nation and DoS. Notification to DoS is made at the combatant commander level. In all areas of responsibilities, existing contingency plans provide guidance to the installation commander regarding notification procedures. DoS has the primary responsibility for dealing with terrorism involving U.S. citizens abroad. The installation's response is also subject to agreements established with the host nation. Such agreements notwithstanding, the SROE (CJCS Instruction 3121.01B) make it clear that the commander always retains the inherent right and obligation of self-defense.

D. The response to an off-installation foreign incident is the sole responsibility of the host nation. U.S. military assistance, if any, depends on the applicable status of forces agreement (SOFA) or memorandum of understanding and coordination through the U.S. embassy in that country. Military forces will not be provided to host nation authorities without a directive from DoD that has been coordinated with DoS. The degree of DoS interest and the involvement of U.S. military forces depend on the incident site; the nature of the incident; the extent of foreign government involvement; and the overall threat to U.S. security.

VIII. VARIOUS ISSUES REGARDING THE CURRENT WAR ON TERRORISM

A. This portion of the chapter relates solely to some of the issues highlighted in the Global War on Terrorism (GWOT), including OEF. This section does not specifically address any past or potential future issues involving the war on terrorism.

B. Legal Basis for Military Use of Force in Afghanistan. Self Defense under the UN Charter, Article 51. Although neither UNSCR 1368 (12 Sep 01) nor UNSCR 1373 (28 Sep 01) expressly authorize the use of force against the terrorists, both resolutions recognize the United States' "inherent right of self-defense".

C. Application of the Law of Armed Conflict. As a matter of U.S. policy, DoDD 2311.01E, *DoD Law of War Program* (9 May 2006) states the U.S. armed forces comply with the law of war during all armed conflicts, however such conflicts are characterized, and in all other military operations.

D. Status of Enemy Participants in Conflict. Taliban and al-Qaida lack some or all of the four attributes specified in Article 4, GC III; thus, they are unlawful enemy combatants (*See* January 22, 2002 NSC statement of U.S. policy regarding al-Qaida and Taliban detainees).

NOTES

CHAPTER 9

INFORMATION OPERATIONS

REFERENCES

1. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56 [*hereinafter* PATRIOT Act].
2. Communication of Classified Information by Government Officer or Employee, 50 U.S.C. § 783.
3. Communications Act of 1934, 48 Stat. 1064, 47 U.S.C. §§ 151 – 614.
4. Computer Fraud and Abuse Act of 1984, 18 U.S.C. § 1030.
5. Computer Fraud and Abuse Act of 1986, 18 U.S.C. § 1030.
6. Economic Espionage Act of 1996, 18 U.S.C. §§ 1831-2.
7. Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, 100 Stat. 1848 (1986).
8. Foreign Intelligence Surveillance Act of 1978 (FISA), Pub. L. No. 95-511, 92 Stat. 1783 (1978), 50 U.S.C. §§ 1801-29.
9. Intelligence Identities Protection Act of 1982, 50 U.S.C. §§ 421-26.
10. National Security Strategy (16 Mar. 2006).
11. Executive Order No. 12684, Conforming the Central Intelligence Agency and Civil Service Retirement and Disability Systems, 54 FR 31643 (27 July 1989).
12. Executive Order No. 13010, Critical Infrastructure Protection, 61 FR 37347 (16 July 1996) (revoked in part by Executive Order 13138).
13. Executive Order No. 13231, Critical Infrastructure Protection in the Information Age, 66 FR 53063 (16 Oct. 2001).
14. Presidential Decision Directive 62, Combating Terrorism (22 May 1998).
15. Presidential Decision Directive 63, Critical Infrastructure Protection (22 May 1998).
16. Homeland Security Presidential Directive 7, Critical Infrastructure Identification, Prioritization, and Protection (17 Dec. 2003).
17. U.S. DEP'T OF DEFENSE, DIR. O-3600.01, INFORMATION OPERATIONS (IO) (14 Aug. 2006).
18. U.S. DEP'T OF DEFENSE, DIR. 5505.9, INTERCEPTION OF WIRE, ELECTRONIC, AND ORAL COMMUNICATIONS FOR LAW ENFORCEMENT (20 Apr. 1995).
19. U.S. DEP'T OF DEFENSE, DIR. 8500.1, INFORMATION ASSURANCE (24 Oct. 2002).
20. U.S. DEP'T OF DEFENSE, INSTR. 8500.2, INFORMATION ASSURANCE IMPLEMENTATION (6 Feb. 2003)
21. U.S. DEP'T OF DEFENSE, INSTR. 8523.01, COMMUNICATIONS SECURITY (COMSEC) (22 Apr. 2008).
22. DoD O-5505.9-M, Procedures for Wire, Electronic, and Oral Interceptions for Law Enforcement (May 1995) (Change 1 dated 16 February 1996).
23. U.S. DEP'T OF ARMY, REG. 380-53, INFORMATION SYSTEMS SECURITY MONITORING (29 Apr. 1998).
24. JOINT CHIEFS OF STAFF, INSTR. 3210.01B, JOINT INFORMATION OPERATIONS POLICY (5 Jan. 2007).
25. JOINT CHIEFS OF STAFF, INSTR. 3401.03A, INFORMATION ASSURANCE AND COMPUTER NETWORK DEFENSE JOINT QUARTERLY READINESS REVIEW (15 July 2003) (directive current as of 10 July 2007).
26. JOINT CHIEFS OF STAFF, INSTR. 6510.01D, INFORMATION ASSURANCE AND COMPUTER NETWORK DEFENSE (15 Aug. 2007).
27. JOINT CHIEFS OF STAFF, JOINT PUB. 2-01.2, JOINT DOCTRINE, TACTICS, TECHNIQUES, AND PROCEDURES FOR COUNTERINTELLIGENCE SUPPORT TO OPERATIONS.
28. JOINT CHIEFS OF STAFF, JOINT PUB. 3-07.2, ANTITERRORISM (14 Apr. 2006).
29. JOINT CHIEFS OF STAFF, JOINT PUB. 3-10, JOINT SECURITY OPERATIONS IN THEATER (1 Aug. 2006).
30. JOINT CHIEFS OF STAFF, JOINT PUB. 3-13, JOINT DOCTRINE FOR INFORMATION OPERATIONS (13 Feb. 2006).
31. JOINT CHIEFS OF STAFF, JOINT PUB. 3-13.1, ELECTRONIC WARFARE (25 Jan. 2007).
32. JOINT CHIEFS OF STAFF, JOINT PUB. 3-13.3, OPERATIONS SECURITY (29 June 2006).
33. JOINT CHIEFS OF STAFF, JOINT PUB. 3-13.4, MILITARY DECEPTION (13 July 2006).

34. JOINT CHIEFS OF STAFF, JOINT PUB. 3-53, JOINT DOCTRINE FOR PSYCHOLOGICAL OPERATIONS (5 Sept. 2003).
35. JOINT CHIEFS OF STAFF, JOINT PUB. 3-57, JOINT DOCTRINE FOR CIVIL-MILITARY OPERATIONS (8 Feb. 2001).
36. JOINT CHIEFS OF STAFF, JOINT PUB. 3-61, PUBLIC AFFAIRS (9 May 2005).
37. U.S. DEP'T OF ARMY, FIELD MANUAL 3-13, INFORMATION OPERATIONS: DOCTRINE, TACTICS, TECHNIQUES, AND PROCEDURES (28 Nov. 2003).
38. U.S. DEP'T OF ARMY, FIELD MANUAL 3-55.12, MULTI-SERVICE TACTICS, TECHNIQUES, AND PROCEDURES FOR JOINT COMBAT CAMERA (Mar. 2003).
39. U.S. Dep't of Defense, Office of General Counsel, An Assessment Of International Issues In Information Operations, 2d ed. (Nov. 1999).

I. INTRODUCTION

A. This entire section is derived almost entirely from the Executive Summary and Chapter II of Joint Publication 3-13, *Information Operations*.[1] According to Joint Publication (Joint Pub.) 3-13, information is a strategic resource, vital to national security, and military operations depend on information and information systems for many simultaneous and integrated activities. Information Operation (IO) are described as the integrated employment of electronic warfare (EW), computer network operations (CNO), psychological operations (PSYOP), military deception (MILDEC), and operations security (OPSEC), in concert with specified supporting and related capabilities, to influence, disrupt, corrupt, or usurp adversarial human and automated decision making while protecting our own. IO require collecting and integrating essential information while simultaneously denying the adversary and target audience essential information. IO are conducted through the integration of many core capabilities, as well as supporting and related capabilities. Core IO capabilities consist of PSYOP, MILDEC, OPSEC, EW, and CNO. Capabilities supporting IO include information assurance (IA), physical security, physical attack, counterintelligence, and combat camera. The related capabilities for IO are public affairs (PA), civil-military operations (CMO), and defense support to public diplomacy (DSPD). Department of Defense Directive (DoDD) O-3600.01 (FOUO), *Information Operations*, and Chairman of the Joint Chiefs of Staff Instruction (CJCSI) 3210.01B (SECRET), *Joint Information Operations Policy*, outline general and specific IO policy for Department of Defense (DoD) components and delineate specific responsibilities.

B. IO Core Capabilities

1. **Psychological Operations (PSYOP)** are planned operations to convey selected truthful information and indicators to foreign audiences to influence their emotions, motives, objective reasoning, and ultimately, the behavior of their governments, organizations, groups, and individuals. The purpose of PSYOP is to induce or reinforce foreign attitudes and behavior favorable to the originator's objectives. PSYOP as an IO core capability has a central role in the achievement of IO objectives in support of the Joint Force Commander.[2]

a. In creating a PSYOP plan, one must conduct research and analysis of critical information, develop themes and actions, produce the PSYOP product, and disseminate the product. In planning the dissemination of the product, one must consider the type of PSYOP product, for example: leaflets, radio broadcasts, TV broadcasts, and Internet-based products.

b. Though the vast majority of PSYOP do not raise issues of truthfulness, the 1907 Hague Convention Number IV states that ruses of war are legal so long as they do not amount to treachery or perfidy. PSYOP have played a major role in recent operations, to include Desert Shield/Desert Storm, Bosnia, Kosovo, Operation Enduring Freedom (OEF), and Operation Iraqi Freedom (OIF).

2. **Military Deception (MILDEC)** is described as being those actions executed to deliberately mislead adversary decision makers as to friendly military capabilities, intentions, and operations, thereby causing the adversary to take specific actions (or inactions) that will contribute to the accomplishment of the friendly forces' mission. MILDEC and OPSEC are complimentary activities—MILDEC seeks to encourage incorrect analysis,

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[1] JOINT CHIEFS OF STAFF, JOINT PUB. 3–13, INFORMATION OPERATIONS ix (13 Feb. 2006), *available at* http://www.dtic.mil/doctrine/jel/new_pubs/jp3_13.pdf (hereinafter JOINT PUB. 3-13).

[2] For additional discussion of PSYOP, see Joint Publication 3-53. JOINT CHIEFS OF STAFF, JOINT PUB. 3–53, JOINT DOCTRINE FOR PSYCHOLOGICAL OPERATIONS (5 Sep. 2003), *available at* http://www.dtic.mil/doctrine/jel/new_pubs/jp3_53.pdf.

causing the adversary to arrive at specific false deductions, while OPSEC seeks to deny real information to an adversary, and prevent correct deduction of friendly plans. MILDEC as an IO core capability exploits the adversary's information systems, processes, and capabilities. Military deception operations have been used throughout history, including WWII in order to divert attention from Normandy for the D-Day invasion. MILDEC must not intentionally target or mislead the U.S. public, the U.S. Congress, or the U.S. news media.[3]

a. There are three means by which a force may conduct MILDEC: physical means (i.e. dummy and decoy equipment), technical means (i.e. the emission of biological or chemical odors or nuclear particles), and administrative means (i.e. the conveyance or denial of oral, pictorial, documentary, or other physical evidence).

b. There are four different deception techniques a force may employ: feints (offensive actions to deceive the enemy about actual offensive actions), demonstrations (a show of force to cause the enemy to select an unfavorable course of action), ruses (cunning tricks to deceive the enemy for a friendly advantage), and displays (the simulation, disguising, and/or portrayal of friendly objects, units, or capabilities).

c. As with PSYOP, there is no prohibition on cover or deception operations, so long as they are not tied to an enemy's reliance on compliance with the law of war.

3. **Operations Security (OPSEC)** is a process of identifying critical information and subsequently analyzing friendly actions and other activities to: identify what friendly information is necessary for the adversary to have sufficiently accurate knowledge of friendly forces and intentions; deny adversary decision makers critical information about friendly forces and intentions; and cause adversary decision makers to misjudge the relevance of known critical friendly information because other information about friendly forces and intentions remain secure. On joint staffs, responsibilities for OPSEC are normally delegated to the J-3. OPSEC as an IO core capability, denies the adversary the information needed to correctly assess friendly capabilities and intentions. In particular, OPSEC complements MILDEC by denying an adversary information required to both assess a real plan and to disprove a deception plan.[4]

4. **Electronic Warfare (EW)** refers to any military action involving the use of electromagnetic (EM) and directed energy to control the EM spectrum or to attack the adversary. EW includes major subdivisions: electronic attack (EA), electronic protection (EP), and electronic warfare support (ES). EW as an IO core capability contributes to the success of IO by using offensive and defensive tactics and techniques in a variety of combinations to shape, disrupt, and exploit adversarial use of the EM spectrum while protecting friendly freedom of action in that spectrum.

a. **EA** involves the use of EM energy, directed energy, or antiradiation weapons to attack personnel, facilities, or equipment with the intent of degrading, neutralizing, or destroying adversary combat capability. EA is considered a form of fires.

b. **EP** involves actions taken to protect personnel, facilities, and equipment from any effects of friendly or enemy use of EM spectrum that degrade, neutralize, or destroy friendly combat capability.

c. **ES** consists of actions tasked by, or under direct control of, an operational commander to search for, intercept, identify, and locate or localize sources of intentional and unintentional radiated EM energy for the purpose of immediate threat recognition, targeting, planning, and conduct of future operations.[5]

5. **Computer Network Operations (CNO)**, along with EW, is used to attack, deceive, degrade, disrupt, deny, exploit, and defense electronic information and infrastructure. For the purpose of military operations, CNO are divided into computer network attack (CNA), computer network defense (CND), and related computer network exploitation (CNE) enabling operations. Note that due to the continued expansion of wireless networking and the integration of computers and radio frequency communications, there will be operations and capabilities that blur the line between CNO and EW and that may require case-by-case determination when EW and CNO are assigned separate release authorities. CNO as an IO core capability offers both opportunities to attack and exploit an

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[3] For additional discussion of MILDEC, see Joint Publication 3-13.4. JOINT CHIEFS OF STAFF, JOINT PUB. 3–13.4, MILITARY DECEPTION (13 July 2006), *available at* http://www.dtic.mil/doctrine/jel/new_pubs/jp3_13_4.pdf.

[4] For additional discussion of OPSEC, see Joint Publication 3-13.3. JOINT CHIEFS OF STAFF, JOINT PUB. 3–13.3, OPERATIONS SECURITY (29 June 2006), *available at* http://www.dtic.mil/doctrine/jel/new_pubs/jp3_13_3.pdf.

[5] For additional discussion of EW, see Joint Publication 3-13.1. JOINT CHIEFS OF STAFF, JOINT PUB. 3–13.1, ELECTRONIC WARFARE (25 Jan. 2007), *available at* http://www.dtic.mil/doctrine/jel/new_pubs/jp3_13_1.pdf.

adversary's computer system weaknesses and a requirement to identify and protect our own from similar attack or exploitation.

a. **CNA** consists of actions taken through the use of computer networks to disrupt, deny, degrade, or destroy information resident in computers and computer networks, or the computers and the networks themselves.

b. **CND** involves actions taken through the use of computer networks to protect, monitor, analyze, detect, and respond to unauthorized activity within DoD information systems and computer networks. CND actions not only protect DoD systems from an external adversary but also from exploitation from within, and are now a necessary function in all military operations.

c. **CNE** is enabling operations and intelligence collection capabilities conducted through the use of computer networks to gather data from target or adversary automated information systems or networks.[6]

C. IO Supporting Capabilities

1. **Information Assurance (IA)** is defined as measures that protect and defend information and information systems by ensuring their availability, integrity, authentication, confidentiality, and nonrepudiation. This includes providing for restoration of information systems by incorporating protection, detection, and reaction capabilities. IA as a supporting capability for IO protects information and information systems, thereby assuring continuous capability. IA and IO have an operational relationship in which IO are concerned with the coordination of military activities in the information environment, while IA protects the electronic and automated portions of the information environment.[7]

2. **Physical Security** is that part of security concerned with physical measures designed to safeguard personnel, to prevent unauthorized access to equipment, installations, material, and documents, and to safeguard them against espionage, sabotage, damage, and theft. Physical Security as a supporting capability for IO protects physical facilities containing information and information systems worldwide. Physical security often contributes to OPSEC, particularly in the case of MILDEC, when compromise of the MILDEC activity would compromise the real plan.[8]

3. **Physical Attack** disrupts, damages, or destroys adversary targets through destructive power. Physical attack can also be used to create or alter adversary perceptions or drive an adversary to use certain exploitable information systems. Physical attack as a supporting capability for IO can be employed as a means of attacking command and control (C2) nodes to affect enemy ability to exercise C2 and of influencing target audiences.

4. **Counterintelligence (CI)** consists of information gathered and activities conducted to protect against espionage, other intelligence activities, sabotage, or assassinations conducted by or on behalf of foreign governments or elements thereof, foreign organizations, foreign persons, or international terrorist activities. CI as a supporting capability for IO is a critical part of guarding friendly information and information systems. A robust security program that integrates IA, physical security, CI, and OPSEC with risk management procedures offers the best chance to protect friendly information and information systems from adversary actions.[9]

5. The **Combat Camera (COMCAM)** mission to provide the Office of the Secretary of Defense, the Chairman of the Joint Chiefs of Staff, the Military Departments, the combatant commands, and the Joint Task Force

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[6] For additional discussion of CNO, see Appendix A of Joint Publication 3-13. JOINT PUB. 3–13, *supra* note 1.

[7] For detailed policy guidance on IA, see DoD Directive (DoDD) 8500.1 and DoD Instruction 8500.2. U.S. DEP'T OF DEFENSE, DIR. 8500.1, INFORMATION ASSURANCE (24 Oct. 2002), *available at* http://www.dtic.mil/whs/directives/corres/pdf/d85001_102402/d85001p.pdf; U.S. DEP'T OF DEFENSE, INSTR. 8500.2, INFORMATION ASSURANCE IMPLEMENTATION (6 Feb. 2003), *available at* http://www.dtic.mil/whs/directives/corres/pdf/i85002_020603/i85002p.pdf. For Joint Policy, see Chairman of the Joint Chiefs of Staff Instruction (CJCSI) 3401.03A and CJCSI 6510.01D. JOINT CHIEFS OF STAFF, INSTR. 3401.03A, INFORMATION ASSURANCE AND COMPUTER NETWORK DEFENSE JOINT QUARTERLY READINESS REVIEW (15 July 2003) (directive current as of 10 July 2007), *available at* http://www.dtic.mil/cjcs_directives/cdata/unlimit/3401_03.pdf; JOINT CHIEFS OF STAFF, INSTR. 6510.01D, INFORMATION ASSURANCE AND COMPUTER NETWORK DEFENSE (15 June 2004), *available at* http://www.dtic.mil/cjcs_directives/cdata/unlimit/6510_01.pdf.

[8] For more discussion on physical security, see Joint Pub. 3-07.2, Joint Pub. 3-57, and Joint Pub. 3-10. JOINT CHIEFS OF STAFF, JOINT PUB. 3–07.2, ANTITERRORISM (14 Apr. 2006); JOINT CHIEFS OF STAFF, JOINT PUB. 3–57, JOINT DOCTRINE FOR CIVIL-MILITARY OPERATIONS (8 Feb. 2001), *available at* http://www.dtic.mil/doctrine/jel/new_pubs/jp3_57.pdf (hereinafter JOINT PUB. 3-13); JOINT CHIEFS OF STAFF, JOINT PUB. 3–10, JOINT SECURITY OPERATIONS IN THEATER (1 Aug. 2006), *available at* http://www.dtic.mil/doctrine/jel/new_pubs/jp3_10.pdf.

[9] For more discussion on CI, see classified Joint Pub. 2-01.2. JOINT CHIEFS OF STAFF, JOINT PUB. 2-01.2, JOINT DOCTRINE, TACTICS, TECHNIQUES, AND PROCEDURES FOR COUNTERINTELLIGENCE SUPPORT TO OPERATIONS.

with an imagery capability in support of operational and planning requirements across the range of military operations. COMCAM as a supporting capability for IO provides images for PSYOP, MILDEC, PA, and CMO use, but can also be used for battle damage assessment/measures of effectiveness analysis.[10]

D. IO Related Capabilities

1. **Public Affairs (PA)** are those public information, command information, and community relations activities directed toward both external and internal audiences with interest in DoD. PA's principal focus is to inform domestic and international audiences of joint operations to support combatant command public information needs. PA as a related capability to IO requires coordination and synchronization between PA and IO to ensure consistent themes and messages are communicated to avoid credibility losses. Credibility and truth are key elements to maintaining PA's operational capability.[11]

2. **Civil-Military Operations (CMO)** are the activities of a commander that establish, maintain, influence, or exploit relations between military forces, governmental and nongovernmental civilian organizations and authorities, and the civilian populace. CMO as a related capability to IO can be particularly effective in peacetime and pre/post-combat operations when other capabilities and actions may be constrained. Distribution of information about CMO efforts and results through PA and PSYOP can affect the perceptions of a broader audience and favorably influence key groups or individuals.[12]

3. **Defense Support to Public Diplomacy (DSPD)** consists of activities and measures taken by DoD components, not solely in the area of IO, to support and facilitate public diplomacy efforts of the U.S. government. DoD contributes to public diplomacy, which includes those overt international information activities of the U.S. government designed to promote U.S. foreign policy objectives by seeking to understand, inform, and influence foreign audiences and opinion makers and by broadening the dialogue between American citizens and institutions and their counterparts abroad.[13]

II. DEFENDING U.S. CRITICAL INFRASTRUCTURE AND INFORMATION SYSTEMS

A. "The Department of Defense is heavily dependent upon timely and accurate information and is keenly focused on information operations and information assurance. . . . Over 95% of Department of Defense telecommunications travel over commercial systems, and the interdependence of our civilian infrastructure and national security grows dramatically on a daily basis. In a few short decades, the global networking of computers via the internet will very likely be viewed as the one invention that had the greatest impact on human civilization—and perhaps the greatest challenge to our national security."[14]

B. On 15 September 1993, President Clinton established the "United States Advisory Council on the National Information Infrastructure" by **Executive Order 12864**. This Advisory Council was tasked to advise the Secretary of Commerce on a national strategy and other matters related to the development of the National Information Infrastructure (NII).

C. Recognizing the vulnerabilities created by U.S. dependence upon information technology, on 15 July 1996, President Clinton promulgated **Executive Order 13010**, establishing the "President's Commission on Critical Infrastructure Protection" (CIP). EO 13010 declared that certain "national infrastructures are so vital that their incapacity or destruction [by physical or cyber attack] would have a debilitating impact on the defense or economic security of the United States." EO 13010 listed eight categories of critical infrastructures: telecommunications; electrical power systems; gas and oil storage and transportation; banking and finance; transportation; water supply

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[10] For more discussion on COMCAM, see FM 3-55.12/Marine Corps Reference Publication 3-33.7A/Navy Tactics, Techniques, and Procedures 3-13.12/Air Force Tactics, Techniques, and Procedures (Interservice) 3-2.41. U.S. DEP'T OF ARMY, FIELD MANUAL 3-55.12, MULTI-SERVICE TACTICS, TECHNIQUES, AND PROCEDURES FOR JOINT COMBAT CAMERA (Mar. 2003), *available at* https://akocomm.us.army.mil/usapa/doctrine/DR_pubs/dr_aa/pdf/fm3_55x12.pdf.

[11] For more discussion on PA, see Joint Pub. 3-61. JOINT CHIEFS OF STAFF, JOINT PUB. 3–61, PUBLIC AFFAIRS (9 May 2005), *available at* http://www.dtic.mil/doctrine/jel/new_pubs/jp3_61.pdf.

[12] For more discussion on CMO, see Joint Pub. 3-57. JOINT PUB. 3–57, *supra* note 8.

[13] For more discussion on DSPD, see DoDD O-3600.01. U.S. DEP'T OF DEFENSE, DIR. O-3600.01, INFORMATION OPERATIONS (14 Aug. 2006).

[14] W.G. Sharp, *Critical Infrastructure Protections: A New Era of National Security*, 12 THE FEDERALIST SOC'Y INT'L AND NAT'L SECURITY L. NEWS 1, 1 (1998).

systems; emergency services (including medical, police, fire, and rescue); and continuity of government. Recognizing that many of these infrastructures are owned and operated by the private sector, the EO noted that it is essential that the government and private sector work together to develop a strategy for protecting them and assuring their continued operation.

D. To enhance U.S. ability to protect critical infrastructures, on 22 May 1998, President Clinton promulgated two Presidential Decision Directives to build the interagency framework and coordinate our critical infrastructure defense programs.

1. Presidential Decision Directive (PDD) 62, *Combating Terrorism*. **PDD 62** focuses on the growing threat of all unconventional attacks against the United States such as terrorist acts, use of weapons of mass destruction (WMD), assaults on critical infrastructures, and cyber attacks.

2. Presidential Decision Directive (PDD) 63, *Critical Infrastructure Protection*. **PDD 63** calls for immediate action and national effort between government and industry to assure continuity and viability of our critical infrastructures. PDD 63 makes it U.S. policy to take all necessary measures to swiftly eliminate any significant vulnerability to physical or information attacks on critical U.S. infrastructures, particularly our information systems.

E. On 22 October 2001, President Bush issued **Executive Order 13231** – Critical Infrastructure Protection in the Information Age. In the EO, President Bush states: "It is the policy of the United States to protect against disruption of the operation of information systems for critical infrastructure and thereby help to protect the people, economy, essential human and government services, and national security of the United States and to ensure that any disruptions that occur are infrequent, of minimal duration, and manageable, and cause the least damage possible." To help accomplish this, the EO establishes the President's Critical Infrastructure Protection Board.

F. On 14 February 2003, the President released the **National Strategy to Secure Cyberspace** and the **National Strategy for the Physical Protection of Critical Infrastructures and Key Assets**. The National Strategy to Secure Cyberspace designates the Department of Homeland Security as the lead agency for the protection of cyberspace. The objectives of the strategy are to "[p]revent attacks against our critical infrastructures; [r]educe our national vulnerabilities to cyber attack; and [m]inimize the damage and recovery time from cyber attacks that do occur." The DoD is responsible for the cyber security of the defense industrial base. The National Strategy for the Physical Protection of Critical Infrastructures and Key Assets on the other hand, focused on the protection of critical infrastructures and key assets against physical attack.

G. On February 28, 2003, the President directed that the Department of Homeland Security develop a comprehensive plan for managing incidents of national significance. In compliance with **Homeland Security Presidential Directive 5**, the Department of Homeland Security implemented the **National Response Plan (NRP)** in December 2004. The NRP contains a cyber incident annex assigning responsibilities for a response to and recovery from a cyber attack of national significance. According to the NRP, the DoD may exercise computer security and computer network defense activities in military operations to defend the homeland. Additionally, the DoD "can take action to deter or defend against cyber attacks which pose an imminent threat to national security, as authorized by applicable law and policy." The annex does not clarify what constitutes an imminent threat to national security.

H. On 17 December 2003, President Bush issued **Homeland Security Presidential Directive 7** – Critical Infrastructure Identification, Prioritization, and Protection. This directive tasks federal departments with the responsibility to "identify, prioritize, and coordinate the protection of critical infrastructure and key resources in order to prevent, deter, and mitigate the effects of deliberate efforts to destroy, incapacitate, or exploit them. Federal departments and agencies will work with State and local governments and the private sector to accomplish this objective." The Secretary of the Department of Homeland Security (DHS) is tasked with coordinating the "overall national effort to enhance the protection of the critical infrastructure and key resources of the United States."

I. In compliance with HSPD 7, the Department of Homeland Security developed the **National Infrastructure Protection Plan (NIPP)**. The NIPP laid out in detail the Department's effort to coordinate and plan for the protection of critical infrastructure to include cyberspace. The NIPP assigns the DoD with the responsibility to quickly attribute the perpetrator of a cyber attack. In addition, the NIPP sets specific objectives to include the establishment of a National Cyberspace Security Response System.

J. These authorities place emphasis on the protection of IO systems tied to critical national infrastructure, including those associated with national security. They also task each agency with responsibility to protect its own systems. However, DHS is the overall coordinator and Department of Justice (DOJ) has the lead in investigation and prosecution of any attacks on those critical IO systems.

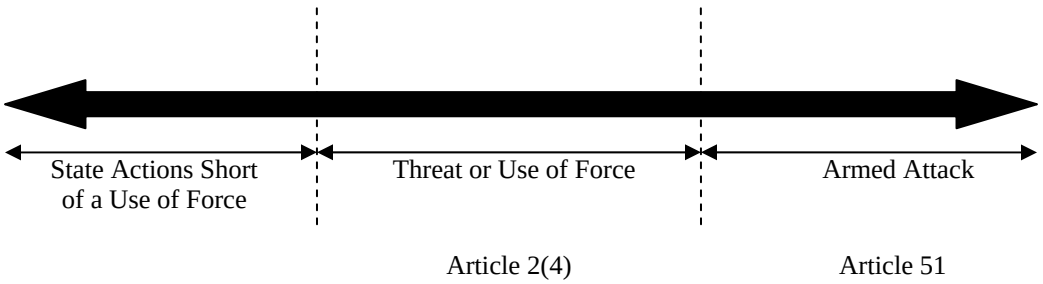
III. INTERNATIONAL LEGAL CONSIDERATIONS IN IO

A. IO is governed by both pre-hostilities law, or *jus ad bellum*, and the law of war, or *jus in bello*, once hostilities have begun.

B. IO and *Jus ad Bellum*. The primary *jus ad bellum* document is the UN Charter, and the ultimate question, based on UN Charter Articles 2(4), 39, and 51, is whether a particular application of IO equates to a "use of force" or "armed attack."[15]

1. To determine the legality of any pre-hostilities action under the UN Charter, it is necessary to determine where that action would fit along the spectrum of force: below the threshold of a use of force under Article 2(4), a use of force under Article 2(4) but shy of an armed attack under Article 51, or an armed attack under Article 51 giving the victim state the right to respond in self-defense.

Spectrum of Interstate Relations[16]



[16]

2. While the phrase use of force is commonly understood to include a kinetic military attack of one state against the territory, property, or citizens of another state, i.e., an armed attack, some state activities that fall short of an armed attack may also cross the threshold of the Article 2(4) use of force. For example, some states and scholars consider the use of economic or political force as a use of force prohibited by Article 2(4).[17] "The Article 2(4) prohibition on the use of force also covers physical force of a non-military nature committed by any state agency."[18] Although this economic or political force may cross the use of force threshold, it will not cross the Article 51 armed attack threshold.

3. Some aspects of IO that cross the use of force threshold under Article 2(4) may go one step further and become an armed attack triggering a state's right to Article 51 self-defense (unlike the economic or political force mentioned above). "The dilemma lies in the fact that CNA [and IO in general] spans the spectrum of consequentiality. Its effects freely range from mere inconvenience (e.g., shutting down an academic network temporarily) to physical destruction (e.g., as in creating a hammering phenomenon in oil pipelines so as to cause them to burst) to death (e.g., shutting down power to a hospital with no back-up generators)."[19]

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[15] *See* THOMAS C. WINGFIELD, THE LAW OF INFORMATION CONFLICT pt. II (2000).

[16] *See id.* at 128.

[17] *See* THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 118-19 (Bruno Simma ed., 2002). This is the minority view; the prevailing view and the view of the U.S. is that the prohibition on the use of force in Article 2(4) does not extend to economic and political force. *See id.* Some scholars suggest that Article 2(4) prohibits physical force of a non-military nature, such as "the cross-frontier expulsion of populations, the diversion of a river by an up-stream State, the release of large quantities of water down a valley, and the spreading of fire across a frontier." *Id.*

[18] Sharp, *supra* note 14, at 101.

[19] Michael N. Schmitt, *Computer Network Attack and the Use of Force in International Law: Thoughts on a Normative Framework*, 37 COLUM. J. TRANSNAT'L L 885, 912 (1999).

4. Determining when an IO amounts to a use of force, or an armed attack is difficult at best. However, if the deliberate actions of one belligerent cause injury, death, damage, and destruction to the military forces, citizens, and property of another belligerent, those actions are likely to be judged by applying traditional *jus in bello* principles. DoD Office of the General Counsel adopts a results test. In their "Assessment," they conclude: "If a coordinated computer network attack shuts down a nation's air traffic control system along with its banking and financial systems and public utilities, and opens the floodgates of several dams resulting in general flooding that causes widespread civilian deaths and property damage, it may well be that no one would challenge the victim nation if it concluded that it was a victim of an armed attack, or of the equivalent to an armed attack."[20] While this is helpful in the event of a catastrophic CNA, it does not provide much guidance for a CNA, or other forms of IO, that affect only one of the systems mentioned.

5. Michael Schmitt, Stockton Chair at the Naval War College, offers **seven factors** that one may use to determine whether an IO amounts to a use of force under the UN Charter.[21] According to Professor Schmitt, the best approach to analyze an IO *jus ad bellum* issue is to apply a consequence based analysis rather than an instrument based analysis using the following factors:

a. ***Severity***: Armed attacks threaten physical injury or destruction of property to a much greater degree than other forms of coercion. Physical well-being usually occupies the apex of the human hierarchy of need.

b. ***Immediacy***: The negative consequences of armed coercion, or threat thereof, usually occur with great immediacy, while those of other forms of coercion develop more slowly. Thus, the opportunity for the target state or the international community to seek peaceful accommodation is hampered in the former case.

c. ***Directness***: The consequences of armed coercion are more directly tied to the *actus reus* than in other forms of coercion, which often depend on numerous contributory factors to operate. Thus, the prohibition on force precludes negative consequences with greater certainty.

d. ***Invasiveness***: In armed coercion, the act causing the harm usually crosses into the target state, whereas in economic warfare the acts generally occur beyond the target's borders. As a result, even though armed and economic acts may have roughly similar consequences, the former represents a greater intrusion on the rights of the target state and, therefore, is more likely to disrupt international stability.

e. ***Measurability***: While the consequences of armed coercion are usually easy to ascertain (e.g., a certain level of destruction), the actual negative consequences of other forms of coercion are harder to measure. This fact renders the appropriateness of community condemnation, and the degree of vehemence contained therein, less suspect in the case of armed force.

f. ***Presumptive Legitimacy***: In most cases, whether under domestic or international law, the application of violence is deemed illegitimate absent some specific exception such as self-defense. The cognitive approach is prohibitory. By contrast, most other forms of coercion - again in the domestic and international sphere - are presumptively lawful, absent a prohibition to the contrary. The cognitive approach is permissive. Thus, the consequences of armed coercion are presumptively impermissible, whereas those of other coercive acts are not (as a very generalized rule).

g. ***Responsibility***: The extent to which the State is responsible for the attack.

6. Armed attack is not defined in the UN Charter. The closest the UN came was when the General Assembly defined armed aggression. As part of this definition, the General Assembly Resolution listed acts of aggression that amount to an armed attack.[22] Professor Schmitt attempts to provide an approach for determining whether an IO amounts to an armed attack. "First, a cyber attack [or an IO in general] is an armed attack justifying a forceful response in self-defense if it causes physical damage or human injury or is part of a larger operation that constitutes an armed attack. Second, self-defense is justified when a cyber attack [or an IO in general] is an irrevocable step in an imminent (near-term) and unavoidable attack (preparing the battlefield). Finally, a State may

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[20] U.S. DEP'T OF DEFENSE, OFFICE OF THE GENERAL COUNSEL, AN ASSESSMENT OF LEGAL ISSUES IN INFORMATION OPERATIONS 16 (2d ed. 1999) [hereinafter DoD OGC].

[21] Michael N. Schmitt, *The Sixteenth Waldemar A. Solf Lecture in International Law*, 176 MIL. L. REV. 364, 417 (2003); Schmitt, *supra* note 19, at 914-15.

[22] *See id.* at 111.

react defensively during the last possible window of opportunity available to effectively counter an armed attack when no reasonable doubt exists that the attack is forthcoming."[23]

7. Thomas Wingfield provides one approach to determine whether an IO amounts to an armed attack, when he argues that "an armed attack may occur when a use of force or an activity not traditionally considered an armed attack is used in such a way that it becomes tantamount in effect to an armed attack."[24] He suggests three factors to consider when looking at whether an activity is **tantamount** to an armed attack: scope, duration, and intensity.

8. **IO on the Offense**. Any offensive IO prior to hostilities must comply with the UN Charter. While the principles are similar with any aspect of IO, the areas of EW and CNO are probably the most likely to create significant legal issues.

a. How these principles of international law will be applied to EA and CNA by the international community is unclear. Much will depend on how nations and international institutions react to the particular circumstances in which the issues are raised for the first time. It seems likely that the international community will be more interested in the **consequences** of an EA or a CNA than in the means used. An EA or a CNA can cause significant property and economic damage, as well as human fatalities. For instance, a state could use a CNA to cause: "(1) flooding by opening the flood gates of a dam; (2) train wrecks by switching tracks for oncoming trains; (3) plane crashes by shutting down or manipulating air traffic control systems; (4) large chemical explosions and fires by readjusting the mix of volatile chemicals at an industrial complex; (5) a run on banks or a massive economic crisis by crashing stock exchanges; and any number of other examples that are limited only by the imagination of the actors. . . . The effect can be the same, if not more severe, as if the destruction was caused by conventional kinetic means of warfare."[25]

b. Though there is little state practice to help determine how the international community will view offensive IO, "it seems likely that the international community will be more interested in the consequences of a computer network attack [or other means of IO] than in its mechanism."[26] This means that the method of IO is less important than the effects of a particular IO when establishing the legality of an action.

9. **IO on the Defense**. As with offensive IO, legal issues with regard to defensive IO are most likely to occur in the areas of EW and CNO. Because equipment necessary for CNA is readily available and inexpensive, and access to many computer systems can be obtained through the Internet, CNO poses a particularly important defensive challenge. As a result, many U.S. military and non-military information systems are subject to CNA anywhere and anytime. The actor may be a foreign state, an agent of a foreign state, an agent of a non-governmental entity or group, or an individual acting for purely private purposes. The phrase use of force also applies to all agencies and agents of a state government, such as the organized military, militia, security forces, police forces, intelligence personnel, or mercenaries. When determining lawful actions in response to an EA or a CNA, attribution, characterization, and the doctrine of neutrals should guide any U.S. military response.

a. **Attribution** of attack is very important in determining an appropriate response. However, identification of an EA or a CNA originator has often been a difficult problem. This is especially true for a CNA when the intruder has used a number of intermediate relay points, when he has used an anonymous bulletin board whose function is to strip away all information about the origin of messages it relays, or when he has used a device that generates false origin information. Locating an originating computer does not entirely resolve attribution problems, since a computer may have been used by an unauthorized user, or by an authorized user for an unauthorized purpose.[27]

b. **Characterization** of the intent and motive underlying an attack may also be very difficult, though equally important when determining an appropriate response. However, factors such as persistence, sophistication

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[23] Schmitt, *supra* note 21, at 420.

[24] WINGFIELD, *supra* note 15, at 113.

[25] *See* Sharp, *supra* note 14, at 101-02.

[26] DOD OGC, *supra* note 20, at 16.

[27] *Id* at 19.

of methods used, targeting of especially sensitive systems, and actual damage done may persuasively indicate both the intruder's intentions and the dangers to the system in a manner that would justify an action in defense.[28]

c. **Neutrality**. As a general rule, all acts of hostility in neutral territory, including neutral lands, waters, and airspace, are prohibited. A belligerent nation has a right to demand that a neutral nation prevent belligerents from using its information systems in a manner that violates the nation's neutrality. If the neutral nation is unable or unwilling to do so, other belligerent(s) may have a limited right of self-defense to take necessary and proportionate action against the neutral nation (e.g., jamming) to prevent such use by the enemy.

(1) A limited exception exists for communications relay systems. Articles 8 and 9 of 1907 Hague Convention Respecting Rights and Duties of Neutral Powers and Persons in Case of War on Land (to which the U.S. is a party) provides that "A neutral Power is not called upon to forbid or restrict the use on behalf of belligerents of telegraph or telephone cables or of wireless telegraph apparatus belonging to it or to Companies or private individuals," so long as such facilities are provided equally to both belligerents.

(2) **International consortia** (an association or institution for engaging in a joint venture) present special problems. Where an international communications system is developed by a military alliance, such as NATO, few neutrality issues are likely to arise. Other international consortia provide satellite communications and weather data used for both civilian and military purposes. The membership of these consortia virtually guarantees that not all members of a consortium will be allies in future conflicts. Consortia such as INTELSAT, INMARSAT, ARABSAT, EUTELSAT, and EUMETSAT have attempted to deal with this possibility by limiting system uses during armed conflict. However, INMARSAT nations have determined that the communications relay provision permits use by UN Security Council authorized forces, even while engaged in armed conflict.

d. If an EA or a CNA results in widespread civilian deaths and property damage, it may well be that the international community would not challenge the victim nation if it concluded that it was the victim of an armed attack, or an equivalent of an armed attack.[29] Even if the systems attacked were unclassified military logistics systems, an attack upon such systems might seriously threaten a nation's security.

e. If a particular EA or CNA were considered an armed attack or its equivalent, it would seem to follow that the victim nation would be entitled to respond in self-defense by EA, CNA or by conventional military means. For example, a state might respond in self-defense to disable the equipment and personnel used to mount the offending attack.

f. In some circumstances, it may be impossible or inappropriate to attack the specific means used where, for example, the personnel and equipment cannot reliably be identified, an attack would not be effective, or an effective attack might result in disproportionate collateral damage. In such cases, any legitimate military target could be attacked, as long as the purpose of the attack is to dissuade the enemy from further attacks or to degrade the enemy's ability to undertake them (i.e., not in "retaliation" or reprisal).[30]

g. It seems beyond doubt that any unauthorized intrusion into a nation's computer systems would justify that nation in taking self-help action to expel the intruder and to secure the system against reentry. Though the issue has yet to be addressed in the international community, unauthorized electronic intrusion may be regarded as a violation of the victim's sovereignty, or even as equivalent to a physical trespass into that nation's territory. Such intrusions create vulnerability, since the intruder had access to information and may have corrupted data or degraded the system.

h. As a minimum, a victim nation of an unauthorized computer intrusion has the right to protest such actions if it can reliably characterize the act as intentional and attribute it to agents of another nation.

i. It is far from clear the extent to which the world community will regard an EA or a CNA as armed attacks or uses of force, and how the doctrine of self-defense will be applied to either. The most likely result is an acceptance that a nation subjected to a state-sponsored EA or CNA can lawfully respond in kind, and that in some circumstances it may be justified in using conventional military means in self-defense. Unless nations decide to

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[28] *Id*.

[29] *Id* at 16.

[30] *Id*. at 17.

negotiate a treaty addressing EA and/or CNA, international law in this area will develop through the actions of nations and through the positions that nations adopt publicly as events unfold.

C. IO and *Jus in Bello*.

1. While some have termed IO, and particularly CNO, as a revolution in military affairs,[31] use of various forms of IO generally require the same legal analysis as any other method or means of warfare.

2. However, IO pose an interesting dilemma; they run the gamut from mere inconvenience to actual death and destruction in the physical realm. This wide disparity in effects from IO creates a threshold issue that one must examine before applying the *jus in bello* principles.[32] Does the IO cause injury, death, damage, or destruction? If so, one must apply *jus in bello* principles; if not, the principles need not be applied to the IO.

3. Applying *jus in bello* principles to IO.

a. **Military Necessity/Military Objective**.

(1) Article 14 of the Lieber Code defines military necessity as "those measures which are indispensable for securing the ends of war, and which are lawful according to the modern laws and usages of war." Once a commander determines he or she has a military necessity to take a certain action or strike a certain target, then he or she must determine that the target is a valid military objective. The current definition of a military objective is found in Additional Protocol (AP) I to the Geneva Conventions, Article 52(2): "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."

(2) The U.S. defines "definite military advantage" very broadly to include "economic targets of the enemy that indirectly but effectively support and sustain the enemy's warfighting capability."[33] This broad definition is important in IO because most financial institutions rely heavily on information technology and under this expansive definition, these economics institutions may become targets for IO.[34] For example, a nation's stock market will generally rely heavily upon information technology like computer systems.

(3) There are specifically protected objects that a force may not target in spite of the fact that they may be military objectives. For example, one may by unable to conduct an IO against a food storage or distribution center.[35]

b. **Distinction/Discrimination**.

(1) AP I, Article 48 sets out the rule: "[p]arties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives." AP I further defines "indiscriminate attacks" under Article 51(4) as those attacks that:

(a) are "not directed against a specific military objective" (e.g., SCUD missiles during Desert Storm);

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[31] Michael N. Schmitt, *Wired Warfare: Computer Network Attack and Jus in Bello*, 846 INT'L REVIEW OF THE RED CROSS 365, 365 (2002), *available at* http://www.icrc.org/Web/eng/siteeng0.nsf/iwpList501/E4E4A03DE3BE1211C1256BF900332F62.

[32] *Id.* at 381.

[33] U.S. NAVAL WAR COLLEGE, ANNOTATED SUPPLEMENT TO THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS 8-3 (1997). The U.S. considers this customary international law. Letter from J. Fred Buzhardt, General Counsel, Department of Defense, to Edward Kennedy, Senator, U.S. Congress (Sep. 22, 1972), *quoted in* Arthur W. Rovine, *Contemporary Practice of the United States Relating to International Law*, 67 AM. J. INT'L L. 118, 123 (1973). *But see* CLAUDE PILLOUD ET AL., COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 636 (Yves Sandoz et al. eds., 1987) [hereinafter COMMENTARY] (stating that "it is not legitimate to launch an attack which only offers potential or indeterminate advantages").

[34] Schmitt, *supra* note 31, at 381.

[35] *See id.* at 385-86. Article 54(2), AP I, prohibits attacks on "objects indispensable to the survival of the civilian population, such as food-stuffs." The U.S. believes that starvation of civilians shall not be used as a method of warfare, however the U.S. does not subscribe to the belief that starvation of the military would be prohibited. *See* Michael Matheson, Deputy Legal Advisor, U.S. Dep't of State, Address at the Sixth Annual American Red Cross-Washington College of Law Conference on International, Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions (1987) *in* 2 AM. U.J. INT'L L. & POLICY 419 (1987).

(b) "employ a method or means of combat the effects of which cannot be directed at a specified military objective" (e.g., area bombing);

(c) "employ a method or means of combat the effects of which cannot be limited as required" (use of bacteriological weapons); and

(d) "consequently, in each case are of a nature to strike military objectives and civilians or civilian objects without distinction."

(2) AP I, Article 51(2) requires that "[t]he civilian population as such, as well as individual civilians shall not be the object of attack." And as for civilian objects, AP I, Article 52 requires they "not be the object of attack."

(3) According to the commentary to AP I, "[t]he immunity afforded individual civilians is subject to an overriding condition, namely, on their abstaining from all hostile acts. Hostile acts should be understood to be acts which by their nature and purpose are intended to cause actual harm to the personnel and equipment of the armed forces."[36] According to AP I, Article 51(3), civilians enjoy the protection against targeting "unless and for such time as they take a ***direct part*** in hostilities." The Commentary to AP I, Article 51(3) explains "direct part" as "acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces."[37] According to U.S. policy, a civilian "entering the theater of operations in support or operation of sensitive, high value equipment, such as a weapon system, may be at risk of intentional attack because of the importance of his or her duties."[38] This is the U.S. direct part test.

(4) Government agencies other than the U.S. military have the ability to conduct IO. However, if a civilian takes direct part (defined differently by AP I and the U.S.) in an IO, that civilian becomes an unlawful enemy combatant and loses the protections afforded to civilians under Geneva Convention IV.

(5) Dual-use objects pose another dilemma. A dual-use object is one that is used for both military purposes and civilian purposes. If the object does serve or may serve a military purpose, it may be a valid military target in spite of the civilian purpose. However, the civilian purpose will weigh heavily in the proportionality analysis that must be done for a dual-use target.

(6) Indiscriminate attacks are prohibited by Article 51(4), AP I. This could become an issue for a CNA. For instance, if the CNA will release a virus, chances are the spread of that virus cannot be controlled and will become an indiscriminate attack prohibited by Article 51(4).[39] Keep in mind the threshold question: this only applies to a CNA, in this case a virus, that may cause injury, death, damage, or destruction.

(7) A means or method of warfare that is not directed at a specific military objective violates Article 51(4) as well. For instance, a CNA that can be directed at a specific military objective, but is not and rather affects civilian objects as well would be prohibited.[40] Again one must keep in mind the threshold question.

c. **Proportionality**.

(1) The test to determine if an attack is proportional is found in AP I, Article 51(5)(b): "[a]n 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" violates the principle of proportionality. Note: this principle is only applicable when an attack has the possibility of affecting civilians. If the target is purely military with no known civilian personnel or property in jeopardy, no proportionality analysis need be conducted.

(2) One difficulty in applying the proportionality principle to an IO is determining the proper valuation system for the balancing test.[41] For instance, how does one value an IO that shuts off basic services such as electricity, water, and/or natural gas?

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[36] PILLOUD ET AL., COMMENTARY, *supra* note 33, at 618.

[37] *Id.* at 619.

[38] Memorandum of Law, W. Hays Parks, Office of the Judge Advocate General, U.S. Army, subject: Law of War Status of Civilians Accompanying Military Forces in the Field (May 6, 1999).

[39] *See* Schmitt, *supra* note 31, at 389; DOD OGC, *supra* note 20, at 8-9.

[40] *See* Schmitt, *supra* note 31, at 390.

(3) Another very difficult issue for IO relates to the knock-on effects from an operation. Knock-on effects are "those effects not directly and immediately caused by the attack, but nevertheless the product thereof."[42] These knock-on effects are much harder to calculate for IO than kinetic operations and must be considered in the proportionality analysis. For example, an IO that shuts down an electrical grid may have the intended effect of degrading the command and control of the military, but may also have the effect of shutting down electricity for civilian facilities with follow-on effects such as: unsanitary water and therefore death of civilians and the spread of disease because the water purification facilities and sewer systems don't work; death of civilians because the life support systems at emergency medical facilities fail; or death of civilians because traffic accident increase due to a failure of traffic signals.

d. **Unnecessary Suffering**.

(1) Hague Regulation, Article 22 states that the right of belligerents to adopt means of injuring the enemy is not unlimited. Furthermore, Article 23(e) states that "it is especially forbidden . . . to employ arms, projectiles or material calculated to cause unnecessary suffering."

(2) One must not dismiss the possibility that an IO could cause unnecessary suffering. For example, photosensitivity to rapid flashes of light or alternating patterns of colors may cause seizures in certain people.[43] A photosensitive seizure can be the result of viewing a television broadcast or a computer monitor image. An IO that has the intended effect of causing photosensitive seizures may be viewed as illegal because it causes unnecessary suffering.

e. **Treachery or Perfidy**. Article 37 of Protocol I to the Geneva Conventions prohibits belligerents from killing, injuring, or capturing an adversary by perfidy. The essence of this offense lies in acts designed to gain advantage by falsely convincing the adversary that applicable rules of international law prevent engaging the target when in fact they do not. The use of enemy codes and signals is a time-honored means of tactical deception. However, misuse of distress signals or of signals exclusively reserved for the use of medical aircraft would be perfidious. The use of deception measures to thwart precision guided munitions would be allowed, while falsely convincing the enemy not to attack a military target by electronic evidence that it was a hospital would be perfidious. "Morphing" techniques, while not a violation of the law of war generally, if used to create an image of the enemy's chief of state falsely informing troops that an armistice or cease-fire agreement exists would be considered perfidy and constitutes a war crime.[44]

D. Communications Law and IO[45]

1. **International Communications Law**. International communications law consists primarily of a number of bilateral and multilateral communications treaties. The International Telecommunications Convention of 1982 (ITC) (the Nairobi Convention) is the most significant. The ITC is the latest of a series of multilateral agreements that establish the International Telecommunication Union (ITU) (a specialized agency of the UN). These agreements invest the ITU with the authority to formulate telegraph and telephone regulations, which become binding legal obligations upon formal acceptance by ITU member nations. They also establish mutual legal obligations among parties, several of which are directly relevant to IO.

a. **ITC Article 35** provides that all radio "stations, whatever their purpose, must be established and operated in such a manner as not to cause harmful interference to the radio services or communications of other Members or of recognized private operating agencies, which carry on radio service, and which operate in accordance with the provisions of the Radio Regulations."

b. **Annex 2 to the ITC** defines "harmful interference" as "interference which endangers the functioning of a radio navigation service or of other safety services or seriously degrades, obstructs or repeatedly interrupts a radio communication service operating in accordance with the Radio Regulations." This provision

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[41] *See id.* at 392.

[42] *Id.* at 392.

[43] Epilepsy Foundation, Photosensitivity and Seizures, http://www.epilepsyfoundation.org/answerplace/Medical/seizures/precipitants/photosensitivity.cfm?renderforprint=1& (last visited 30 Nov. 2006).

[44] *See* DoD OGC, *supra* note 20, at 8-9.

[45] *See generally id.* at 30-32.

would appear to restrict IO techniques that involve the use of radio broadcasting, for example, jamming or "spoofing" of a radio navigation service.

c. However, **ITC Article 38** provides a specific exemption for military transmissions: "members retain their entire freedom with regard to military radio installations of their army, naval and air forces." Article 38 further provides: "Nevertheless, these installations must, so far as possible, observe . . . the measures to be taken to prevent harmful interference, and the provisions of the Administrative Regulations concerning the types of emission and the frequencies to be used, according to the nature of the service performed by such installations." This provision indicates that military installations do not have carte blanche to interfere with civilian communications, but the phrase "so far as possible," read together with the specific exemption for military radio installations, provides considerable room for military forces' IO.

d. The ITC permits member nations to interfere with international communications in certain circumstances. Article 19 allows members to "stop the transmission of any private telegram which may appear dangerous to the security of the State or contrary to their laws, to public order or to decency, provided that they immediately notify the office of origin of the stoppage of any such telegram or part thereof, except when such notification may appear dangerous to the security of the state." Article 19 also permits members to "cut off any private telecommunications which may appear dangerous to the security of the State or contrary to its laws, to public order or to decency."

e. Article 20 reserves the right of members "to suspend the international telecommunications service for an indefinite time, either generally or only for certain relations and/or certain kinds of correspondence, outgoing, incoming or in transit, provided that it immediately notifies such action to each of the other members through the medium of the Secretary-General."

f. It seems clear that ITC provisions apply primarily in peacetime. The treaty does not specifically state whether it applies during armed conflict. Ample precedent exists, however, in which nations have demonstrated conclusively that they regard international communications conventions as suspended between belligerents engaged in armed conflicts.

2. **Domestic Communications Law**. ITC obligates each member nation to suppress acts by individuals or groups within its territory that interfere with the communications of other members. In the U.S., **47 U.S.C. § 502** implements this treaty obligation. It provides: "Any person who willfully and knowingly violates any rule, regulation, restriction, or condition . . . made or imposed by any international radio or wire communications treaty or convention, or regulation annexed thereto, to which the United States is or may hereafter become a party, shall, in addition to any other penalties provided by law, be punished, upon conviction thereof, by a fine of not more than $500 for each and every day during which such offense occurs."

3. Department of Justice, Office of Legal Counsel, issued a written opinion providing in effect that 47 U.S.C. § 502 does not apply to actions of the U.S. military executing instructions of the President acting within his constitutional powers to conduct foreign policy and to serve as Commander-in-Chief.

4. **Assessment**. Neither international nor domestic communications law presents any significant barrier to U.S. military IO. International Communications law contains no direct and specific prohibition against the conduct of IO by military forces, even in peacetime. Established state practice evidences that nations regard telecommunications treaties as suspended among belligerents during international armed conflict. Domestic communications laws do not prohibit properly authorized military IO.

IV. FOREIGN DOMESTIC LAW AND CNO[46]

A. Foreign domestic laws, like U.S. criminal statutes addressing computer-related offenses, space activities, communications, and the protection of classified information, may have important implications for U.S. forces' conduct of IO. The state of domestic laws dealing with high-tech misconduct varies enormously from country to country.

B. The state of a nation's domestic criminal law directly impacts the assistance that the nation's public officials can provide in suppressing certain behavior by persons operating in its territory. The state of the nation's domestic

[46] *See generally id.* at 39-42.

criminal law may also have a significant effect on U.S. IO conducted in the nation's territory or involving communications through the nation's communications systems.

C. U.S. forces must determine whether local laws prohibit contemplated IO activities. These prohibitions are important because individuals who order or execute prohibited activities might be subject to prosecution in a host nation criminal court, and commanders might feel obligated on a policy basis to refrain from issuing such an order. U.S. military members who order or execute acts in the course of their official duties overseas, that are a crime under host nation law, may be subject to prosecution in that nation's criminal courts.

V. LAW ENFORCEMENT ASPECTS OF IO

As mentioned above, DoD has the responsibility to take necessary steps to protect its own information systems. When DoD's information systems are compromised, the Defense Criminal Investigative Service Computer Crimes Program (which is part of the Department of Defense Office of Inspector General) has the lead in investigating those responsible. Department of Justice would have the lead for the prosecution. There are several domestic statutory provisions that provide the basis for criminal prosecution in such cases.

A. Electronic Communications Privacy Act of 1986 (ECPA).[47] ECPA was enacted as 18 U.S.C. §§ 2510-2521, §§ 2701-11, §§ 3121-27, § 1367, § 3117. The ECPA made numerous amendments to provisions of the Communications Act of 1934. § 107 of the Act specifically limits its statutory application to law enforcement functions. "Nothing contained … constitutes authority for the conduct of any intelligence activity."

1. ECPA makes it unlawful for "any person" to "intentionally intercept, use, or disclose or endeavor to intercept, use, or disclose any wire, oral, or electronic communication." 18 U.S.C. § 2511. 18 U.S.C. § 2703(c) states that with a subpoena the government can obtain the name, address, local and long distance telephone billing records, telephone number or other subscriber information. The government entity receiving such information is not required to provide notice to the consumer. 18 U.S.C. § 2703(d) allows a court to issue an order for disclosure if the government offers specific and articulable facts that there are reasonable grounds to believe that the contents of an electronic communication or the records within the service provider's database or other information sought are relevant and material to an ongoing criminal investigation. The service provider may move to quash or modify the order, if the request is unusually voluminous or would cause an undue burden on the carrier. Section 209 of the USA PATRIOT Act now authorizes the seizure of stored voice communications under 18 U.S.C. § 2703 with a warrant.[48] Section 211 of the USA PATRIOT Act also clarifies that the ECPA and "trap and trace" rules govern cable companies' records for telephone and Internet services.[49]

2. There are nine Statutory Exceptions (of which three are central to IO) to the ECPA prohibitions: (1) a System Administrator may "intercept, disclose, or use . . . communication in the normal course of his employment while engaged in any activity which is a necessary incident to the rendition of his service or to the protection of the rights or property of the provider of that service,"18 U.S.C. § 2511(2)(a)(i); (2) it is not unlawful "where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception," 18 U.S.C. § 2511(2)(c); and (3) it is not unlawful pursuant to a court order directing such assistance signed by the authorizing judge or a certification in writing by a person designated in 18 U.S.C. § 2518(7) or the Attorney General that no court order is required by law and that all statutory requirements have been met, 18 U.S.C. § 2511(2)(a)(ii).

B. 18 U.S.C. § 2709 deals with counterintelligence access to telephone tolls and transactional records. The Director of the FBI or his designee in a position not lower than Deputy Assistant Director has authority to require a wire or electronic communication service provider to produce subscriber information and toll billing records information or electronic communication transactional records.

The FBI must certify that the information sought is relevant to an authorized foreign counterintelligence investigation and that there are specific and articulable grounds to believe that the person or entity to whom the information pertains is a foreign power or an agent of a foreign power as defined in the Foreign Intelligence Surveillance Act, 50 U.S.C. § 1801.

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[47] Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, 100 Stat. 1848 (codified as amended in scattered sections of 18 U.S.C.).

[48] Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, tit. II, § 209(2), Pub. L. No. 107-56, 115 Stat. 272 (codified as amended at 18 U.S.C. § 2703 (Supp. II 2002)).

[49] 47 U.S.C. § 551.

C. 18 U.S.C. § 1029 prohibits a wide range of offenses dealing fraud activity in connection with access devices. The statute prohibits the following: producing, using, or trafficking in counterfeit access devices knowingly and with intent to defraud, 18 U.S.C. § 1029(a)(1); trafficking in or using one or more unauthorized access devices during a one year period (which can include unauthorized use of passwords), 18 U.S.C. § 1029 (a)(2); possessing 15 or more unauthorized or counterfeit access devices, 18 U.S.C. § 1029 (a)(3); or a variety of other offenses dealing with the unlawful procurement of telecommunications services. Offenses are punishable by either 10 or 15 years confinement with fines.

The term "access device" means any card, plate, account number, electronic serial number, personal identification number, or other means of account access that can be used to obtain money, goods, services, or to initiate a transfer of funds. 18 U.S.C. § 1029(e)(1). The term "unauthorized access device" means any access device that is lost, stolen, expired, revoked, canceled, or obtained with intent to defraud. 1998 amendments broadened coverage to include all telecommunications service as defined in section 3 of title I of the Communications Act of 1934.[50] Section 377 of the USA PATRIOT Act provides for extraterritorial jurisdiction for certain "access device" offenses under 18 U.S.C. § 1029 such as stolen computer passwords, credit card account numbers, or other counterfeit or unauthorized devices.[51]

D. Computer Fraud and Abuse Act of 1984[52] and **Computer Fraud and Abuse Act of 1986**.[53] The Act contains eleven specified crimes: 6 felony offenses and 5 misdemeanor offenses, including:

1. Computer Espionage, 18 U.S.C. § 1030(a)(1): knowing access, or exceeding authorized access, to obtain information and to willfully communicate, deliver, or transmit to any person not authorized to receive it with reason to believe that the information could be used to the injury of the United States.

2. Financial Records, 18 U.S.C. § 1030(a)(2): intentional access without authorization, or exceeding authorized access, to information from any department of the United States, computer records of financial institutions, or information from a protected computer involved in interstate or foreign communication.

3. Government Computers, 18 U.S.C. § 1030(a)(3): intentional access to any nonpublic computer exclusively for the use of the United States or affecting the United States' use of the system.

4. Intent to Defraud, 18 U.S.C. § 1030(a)(4): knowingly and with intent to defraud accessing a protected computer.

5. Unlawful Computer Trespassers, 18 U.S.C. § 1030(a)(5): knowingly causing the transmission of a program, information code, or command and, as a result of such conduct, intentionally causing damage to a protected computer.

6. Password Trafficking, 18 U.S.C. § 1030(a)(6): knowingly and with intent to defraud trafficking (as defined in 18 U.S.C. § 1029) in any password or similar information in any government computer, or in a computer that affects interstate commerce.

7. Extortion, 18 U.S.C. § 1030(a)(7): knowingly and with intent to defraud transmitting any communication containing a threat to cause damage to a protected computer. Section 202 of the USA PATRIOT Act added any felony violation of the Computer Fraud and Abuse Act to a list of offenses that support a voice wiretap order.[54]

E. Gathering, Transmitting, or Losing Defense Information, 18 U.S.C. § 793. The information need not be classified to constitute a violation of this statute if the information is not generally accessible to the public.[55] The accused must have had an intent or reason to believe that the information "is to be used" to the injury of the United States. 18 U.S.C. § 794 deals with Gathering or Delivering Defense Information to Aid a Foreign Government. 18

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[50] Communications Act of 1934, tit. I, § 3, Pub. L. No. 73-415, 48 Stat. 1064 (codified as amended at 47 U.S.C. § 153 (2002)).

[51] 18 U.S.C. § 1029.

[52] Computer Fraud and Abuse Act of 1984, Pub. L. 98-473, 98 Stat. 1837 (codified as amended at 18 U.S.C. § 1030 (2002)).

[53] Computer Fraud and Abuse Act of 1986, sec. 2, Pub. L. 99-474, 100 Stat. 1213 (codified as amended at 18 U.S.C. § 1030 (2002)).

[54] 18 U.S.C. § 2516(1)(c).

[55] United States v. Allen, 31 M.J. 572 (N.M.C.M.R. 1990), *aff'd*, 33 M.J. 309 (C.M.A. 1991), *cert. denied*, 503 U.S. 936 (1992).

U.S.C. § 798 concerns Disclosure of Classified Information which is "for reasons of national security, specifically designated by a United States Government Agency for limited or restricted dissemination or distribution."

F. The Economic Espionage Act of 1996.[56] 18 U.S.C. § 1831 prohibits knowing theft, appropriation, duplication, communication, receipt, purchase, or possession of a trade secret intending or knowing that it will benefit any foreign government, instrumentality, or agent. 18 U.S.C. § 1832 prohibits theft of trade secrets without requiring the intent to benefit a foreign government, instrumentality, or agent.

G. Intelligence Identities Protection Act of 1982 (codified at 50 U.S.C. §§ 421-26).[57] Whoever, having or having had authorized access to classified information that identifies a covert agent, intentionally discloses any information identifying such covert agent to any individual not authorized to receive classified information, knowing that the information disclosed so identifies such covert agent and that the United States is taking affirmative measures to conceal such covert agent's intelligence relationship to the United States, shall be fined not more than $50,000 or imprisoned not more than ten years, or both.

Whoever, in the course of a pattern of activities intended to identify and expose covert agents and with reason to believe that such activities would impair or impede the foreign intelligence activities of the United States, discloses any information that identifies an individual as a covert agent to any individual not authorized to receive classified information, knowing that the information disclosed so identifies such individual and that the United States is taking affirmative measures to conceal such individual's classified intelligence relationship to the United States, shall be fined not more than $15,000 or imprisoned not more than three years, or both.

H. Interception of Wire, Oral, and Electronic Communications. Within DoD, the relevant guidance is contained in DoDD 5505.9, Interception of Wire, Electronic, and Oral Communications for Law Enforcement Purposes (20 Apr. 1995), and DoD 0-5505.9-M, Procedures for Wire, Electronic, and Oral Interceptions for Law Enforcement Purposes (May 1995).

I. The Foreign Intelligence Surveillance Act of 1978 (FISA).[58] FISA revolves around the core definition of **FOREIGN INTELLIGENCE INFORMATION**, which is information that relates to the ability of the U.S. to protect against the following: attack or hostile act of a foreign power or agent; sabotage or international terrorism; clandestine intelligence activities by an intelligence network or service of a foreign power or by an agent; or information on foreign power or foreign territory relative and necessary to the national defense and security of the U.S. or the foreign affairs of the U.S.

FISA is the statutory mechanism for obtaining two major categories of information related to defensive IO: (1) Acquisition of a "nonpublic communication" by electronic means[59] without the consent of a person who is a party to an electronic communication or, in the case of a non-electronic communication, without the consent of a person who is visibly present at the place of the communication; and (2) Physical searches seeking to obtain foreign intelligence information. Section 214 of the USA PATRIOT Act eliminates the requirement of showing specific and articulable facts to believe the targeted line is being used by an agent of a foreign power, or in communication with such an agent to get a FISA pen register, trap and trace authorization.[60] Section 218 changes the requirement that obtaining foreign intelligence was "the" purpose of the search to now being "a significant purpose" of the search.[61]

J. USA PATRIOT Act of 2001.[62] In addition to those specific provision mentioned above, the USA PATRIOT Act also makes the following changes to pre-existing laws:

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[56] The Economic Espionage Act of 1996, tit. I, § 101, Pub. L. No. 104-294, 110 Stat. 3488 (codified as amended at 18 U.S.C. §§ 1831-39 (2002)).

[57] The Intelligence Identities Protection Act of 1982, tit. VI, § 601, Pub. L. No. 97-200, 96 Stat. 122 (codified as amended at 50 U.S.C. §§ 421-26 (2002)).

[58] Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (1978) (codified as amended at 50 U.S.C. §§ 1801-29). *See also* 18 U.S.C. § 2232 regarding prohibitions on warning an individual of surveillance authorized under the Foreign Intelligence Surveillance Act.

[59] Such means include wiretaps of phones, teleprinter, facsimile, computers, computer modems, radio intercepts, and microwave eavesdropping.

[60] 50 U.S.C. § 1842.

[61] §§ 1804(a)(7)(B), 1823(a)(7)(B).

[62] Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified in scattered sections).

1. § 203b allows investigative or law enforcement officers to disclose foreign intelligence information without a court order to any other Federal law enforcement, intelligence, protective, immigration, national defense, or national security official to assist in official duties.

2. § 210 updates and expands records available by subpoena to add the means and source of payment, credit card or bank account number, records of session times and durations, and any temporarily assigned network address.

3. § 216 applies to any non-content information – "dialing, routing, addressing, and signaling information" if the information is relevant to ongoing criminal investigation. It also allows for nationwide federal pen/trap orders.

4. § 217 allows victims of computer attacks to authorize persons "acting under color of law" (law enforcement or counter-intelligence) to monitor trespassers on their computer systems.

5. § 219 allows judges, in domestic or international terrorism cases, to issue search warrants in any district in which acts may have occurred, for property or persons within or outside the district.

6. § 220 allows single jurisdiction search warrants for e-mail.

K. Communications Security (COMSEC) monitoring. This is a clearly defined, bright line exception to the general limitations on content monitoring. Section 107(b)(1) of the Electronic Communications Privacy Act specifically allows activities intended to "intercept encrypted or other official communications of United States executive branch entities or United States Government contractors for communications security purposes." NSA is the proponent under National Telecommunications and Information Systems Security Directive (NTISS) Directive No. 600, Communications Security Monitoring (10 Apr. 1990). COMSEC is one of the tools available to fulfill the DoD mandate to accredit automated information systems and ensure compliance with security requirements.[63] According to DoD Directive 8500.1, it is DoD policy to monitor information systems "in order to detect, isolate, and react to intrusions, disruption of service, or other incidents."

1. Implemented within the Army by AR 380-53, Information Systems Security Monitoring will be conducted only in support of security objectives.[64] Information Systems Security Monitoring will not be performed to support law enforcement or criminal or counterintelligence investigations. The results of Information Systems Security Monitoring shall not be used to produce foreign intelligence or counterintelligence, as defined in Executive Order 12333.

2. There are certain prerequisites for Information Systems Security Monitoring.

a. **NOTIFICATION**: Users of official DoD telecommunications will be given notice that: (1) Passing classified information over nonsecure DoD telecommunications systems, other than protected distribution systems or automated information systems accredited for classified processing is prohibited; (2) Official DoD telecommunications systems are subject to Information Systems Security Monitoring at all times, and (3) Use of official DoD telecommunications systems constitutes consent by the user to Information Systems Security Monitoring at any time.

b. **CERTIFICATION**: The Office of the General Counsel has certified the adequacy of the notification procedures in effect, and the OGC and TJAG have given favorable legal review of any proposed Information Systems Security Monitoring that is not based on a MACOM request. AR 380-53, paragraph 2-4 contains a specific list of information required prior to certification.

c. **AUTHORIZATION**: The Deputy Chief of Staff for Intelligence has authorized Information Systems Security Monitoring to be conducted within the MACOM involved.

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[63] *See generally* U.S. DEP'T OF DEFENSE, INST. 8523.01, COMMUNICATIONS SECURITY (COMSEC) (22 Apr. 2008).

[64] U.S. DEP'T OF ARMY, ARMY REGULATION 380-53, INFORMATION SYSTEMS SECURITY MONITORING (29 Apr. 1998), *available at* http://www.apd.army.mil/pdffiles/r380_53.pdf.

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CHAPTER 10

NONCOMBATANT EVACUATION OPERATIONS (NEO)

REFERENCES

1. JOINT CHIEFS OF STAFF, JOINT PUB. 3-68, NONCOMBATANT EVACUATION OPERATIONS (22 Jan. 2007).
2. U.S. DEP'T OF DEFENSE DIR. 3025.14, PROTECTION AND EVACUATION OF U.S. CITIZENS AND DESIGNATED ALIENS IN DANGER AREAS ABROAD (dated 5 Nov. 1990, incorporating through change 2, 13 July 1992; current as of 8 Dec. 2003).
3. U.S. DEP'T OF DEFENSE DIR. 2000.11, PROCEDURES FOR HANDLING REQUESTS FOR POLITICAL ASYLUM AND TEMPORARY REFUGE (dated 3 Mar. 1972, incorporating change 1, 17 May 1973).
4. Executive Order No. 12656, Assignment of Emergency Preparedness Responsibilities, 53 FR 47491, 3 CFR 585 ('88 Compilation), sections 502 and 1301 (18 Nov. 1988).
5. JOINT CHIEFS OF STAFF INSTR. 3121.01B, STANDING RULES OF ENGAGEMENT/STANDING RULES FOR THE USE OF FORCE (SROE/SRUF) FOR U.S. FORCES (13 June 2005) (portions of this document are classified SECRET).
6. Executive Order No. 11850, Renunciation of Certain Uses in War of Chemical Herbicides and Riot Control Agents, 40 FR 16187, 3 CFR 980 ('71-75 Compilation) (8 Apr. 1975, reprinted in FM 27-10 at C.1 p. 2 (56)).
7. Vienna Convention on Diplomatic Relations, open for signature Apr. 8, 1961, 23 U.S.T. 3227, T.I.A.S. 7502, 500 U.N.T.S. 95.
8. U.S. DEP'T OF DEFENSE DIR. 5515.8, SINGLE-SERVICE ASSIGNMENT OF RESPONSIBILITY FOR PROCESSING OF CLAIMS, (9 June 1990) (CANCELLED).
9. 31 U.S.C. § 1535, Agency Agreements.
10. JAGINST 5800.7D, Manual of the Judge Advocate General, Sec. 1013, 15 Mar. 2004.
11. Steven Day, *Legal Considerations in NEOs*, 40 NAVAL L. REV. 45, 1992.
12. Memorandum of Agreement between the DoS and DoD on the Protection and Evacuation of U.S. Citizens and Nationals and Designated Other Persons From Threatened Areas Overseas.
13. U.S. DEP'T OF ARMY, REG. 550-1, PROCESSING REQUESTS FOR POLITICAL ASYLUM AND TEMPORARY REFUGE (21 June 2004).
14. U.S. DEP'T OF ARMY, FIELD MANUAL 3-05.104, ARMY SPECIAL OPERATIONS FORCES NONCOMBATANT EVACUATION OPERATIONS (2 Feb. 2004).
15. U.S. DEP'T OF ARMY, FIELD 3-07, STABILITY OPERATIONS AND SUPPORT OPERATIONS (20 Feb. 2003).
16. U.S. DEP'T OF DEFENSE DIR. 2311.01E, DEPT OF DEFENSE LAW OF WAR PROGRAM (9 May 2006).

I. NATURE AND CHARACTERISTICS OF NEO

A. NEO are operations directed by the Department of State (DoS), the Department of Defense (DoD), or other appropriate authority whereby noncombatants are evacuated from areas of danger overseas to safe havens or to the U.S. Recent examples include:

1. Lebanon: 14,000 American Citizens (AMCITS), July 2006
2. Liberia (Assured Response): 2200 civilians, April-June 1996.
3. Central African Republic (Quick Response): 448 civilians, April 1996.
4. Albania (Silver Wake): 900 civilians, March 1997.
5. Sierra Leone (Nobel Obelisk): 2610 civilians, May-June 1997.

B. There have been many smaller NEOs in the last ten years such as OPERATION SHEPHERD SENTRY in the Central African Republic in October 2002 and OPERATION SHINING EXPRESS in Liberia in June/July 2003. The nature of operations as well as the diplomatic concerns over even calling an operation officially a NEO has caused confusion in the last five years. Even the Lebanon evacuation was not officially deemed a NEO, but an

authorized departure in some DoS communiqués. Regardless of the official name, the concept of rapidly inserting U.S. forces to evacuate AMCITS and other third country nationals (TCN) remains an area that Judge Advocates (JA) need to be aware of.

II. COMMAND AND CONTROL

A. Executive Order (EO) 12656 assigns primary responsibility for safety of U.S. citizens abroad to the Secretary of State.

1. DoS establishes and chairs the "Washington Liaison Group" (WLG) to oversee NEO.

a. WLG membership consists of representatives from various government agencies, including DoS, DoD, Central Intelligence Agency (CIA), Defense Intelligence Agency (DIA), Department of Homeland Security (DHS) and Department of Health and Human Services (DHHS).

b. The WLG ensures national-level coordination of government agencies in effecting a NEO.

c. The WLG also serves as coordinator with Regional Liaison Groups (RLG).

2. The Chief of Diplomatic Mission, or principal officer of the DoS, **is the lead official in the threat area** responsible for the evacuation of all U.S. noncombatants.

a. The Chief of Mission will give order for the evacuation of civilian noncombatants, except for Defense Attaché System personnel and DIA personnel.

b. The evacuation order of military personnel is given by the Combatant Commander but, in reality, the call is made by the Chief of Mission.

c. The Chief of Mission is responsible for drafting an evacuation plan (this is usually done by the Regional Security Officer (RSO)).

3. The Secretary of Defense (SECDEF) plays a **supporting role** in planning for the protection, evacuation, and repatriation of U.S. citizens in threat areas.

a. Within DoD, the responsibility for NEO is assigned under DoD Directive 3025.14.

b. DoD assigns members from service components and Joint Staff to WLG.

c. Department of the Army (DA) is the executive agent for the repatriation of civilians following the evacuation. This is accomplished through establishment of a Joint Reception Center/Repatriation Processing Center.

4. Combatant Commanders are responsible for the following:

a. Preparing and maintaining plans for the evacuation of noncombatants from their respective area of operations (AO).

b. Accomplishing NEO planning through liaison and cooperation with the Chiefs of Mission in the AO.

c. Assisting in preparing local evacuation plan.

5. Rules of Engagement (ROE) guidance for NEO is found in Enclosure G of Combined Joint Chiefs of Staff (CJCS) Standing Rules of Engagement (SROE).

B. Amendment to EO 12656.

1. An amendment to EO 12656 and a new Memorandum of Agreement (MOA) between DoD and DoS address the relative roles and responsibilities of the two departments in NEO. DoS retains ultimate responsibility for NEO.

2. On 9 February 1998, the President amended EO 12656 to state that DoD is "responsible for the deployment and use of military forces for the protection of U.S. citizens and nationals and in connection therewith, designated other persons or categories of persons, in support of their evacuation from threatened areas overseas." EO 12656 states that the amendment was made in order to "reflect the appropriate allocation of funding responsibilities" for NEO. EO 12656 refers to "procedures to be developed jointly by the Secretary of Defense and

the Secretary of State" order to implement the amendment. DoS and DoD subsequently signed a memorandum of understanding that addresses those procedures.

3. On 14 July 98, DoS and DoD entered into an MOA concerning their "respective roles and responsibilities regarding the protection and evacuation of U.S. citizens and nationals and designated other persons from threatened areas overseas."

a. DoS retains ultimate responsibility for NEO, except that DoD has responsibility for NEO from the U.S. Naval Base at Guantanamo Bay, Cuba (Sections C.2. and C.3.b.).

b. DoD prepares and implements plans for the protection and evacuation of DoD noncombatants worldwide. In appropriate circumstances, SECDEF may authorize the evacuation of DoD noncombatants after consultation with the SECSTATE (Section C.3.c.).

c. "Once the decision has been made to use military personnel and equipment to assist in the implementation of emergency evacuation plans, the military commander is solely responsible for conducting the operations. However, except to the extent delays in communication would make it impossible to do so, the military commander shall conduct those operations in coordination with and under policies established by the Principal U.S. Diplomatic or Consular Representative" (Section E.2.).

d. The MOA includes a "Checklist for Increased Interagency Coordination in Crisis/Evacuation Situations" and a DoS/DoD Cost Responsibility Matrix with Definitions. Under the matrix, DoS is responsible for "Evacuation Related Costs" and DoD is responsible for "Protection Related Costs."

III. LEGAL ISSUES INVOLVED IN NEO

A. International Law. NEO fall into three categories: permissive (where the host country or controlling factions allow the departure of U.S. personnel); non-permissive (where the host country will not permit U.S. personnel to leave); and uncertain (where the intent of the host country toward the departure of U.S. personnel is uncertain). The non-permissive and uncertain categories raise the majority of legal issues because "use of force" becomes a factor.

B. Use of Force. Because non-permissive NEOs intrude into the territorial sovereignty of a nation, a legal basis is required. As a general rule, international law prohibits the threat or use of force against the territorial integrity or political independence of any state. While there is no international consensus on the legal basis to use armed forces for the purpose of NEOs, the most common bases are cited below:

1. Custom and Practice of Nations (pre-UN Charter) clearly allowed NEO. In that regard, a nation could intervene to protect its citizens located in other nations when those nations would not or could not protect them.

2. UN Charter.

a. *Article 2(4)*: Under this Article, a nation may not threaten or use force "against the territorial integrity or political independence of any state . . . ." One view (a minority view) holds that NEO are of such a limited duration and purpose that they do not rise to the level of force contemplated by Article 2(4).

b. *Article 51*: The U.S. position is that Article 51's "inherent right of individual or collective self-defense" includes the customary pre-charter practice of intervention to protect citizens. There is no international consensus on this position.

C. Sovereignty Issues. Planners need to know the territorial extent of the countries in the AO. Absent consent, U.S. forces should respect countries' territorial boundaries when planning NEO ingress and egress routes.

1. Extent of Territorial Seas and Airspace. The Law of the Sea allows claims of up to 12 nautical miles. The Chicago Convention limits state aircraft to international airspace or to domestic airspace with consent. There is a right of innocent passage through the territorial seas. Innocent passage poses no threat to territorial integrity. Air space, however, is inviolable. There is no right of innocent passage for aircraft. Only "transit passage" allows over-flight over international straits. See Chapter 23 of this Handbook for more information. Note that airspace and territorial sea boundaries are not a consideration for the target nation of a non-permissive NEO.

2. Rights and Duties of Neutral States. Neighboring states may have concerns that permitting over-flight or staging areas may cause them to lose their "neutrality" with the target state. To the extent that the concept of neutrality still exists in international law, such action may jeopardize relations between the two countries.

Establishing "safe havens," however, does not violate neutrality concepts. A safe haven is a stopover point where evacuees are initially taken when removed from danger. They are then taken to their ultimate destination.

D. Status of Personnel. In NEO, commanders will face a multitude of legal issues regarding the personnel encountered on the ground.

1. Captured Combatants. Treatment (not status) derives from Articles 2, 3 and 4 of the Third Geneva Convention. U.S. policy is to treat all captured personnel as prisoners of war while in our custody, but to leave them in the host nation upon departure.

2. Civilians Seeking Refuge: Temporary Refuge v. Asylum.

a. *U.S. policy*: DoD Directive 2000.11 and AR 550-1 set out procedures for Asylum/Temporary Refuge. U.S. commanders may not grant political asylum to foreign nationals. U.S. Citizenship and Immigration Services, DHS is the lead agency for granting asylum requests. U.S. commanders may, however, offer temporary refuge in emergencies.

b. *General policy*: If the applicant makes a request at a unit or installation located **within** the territorial jurisdiction of a foreign country (to include territorial waters), then:

(1) Asylum may **not** be granted, but the request is forwarded via immediate message to the Assistant Secretary of Defense (ASD) for International Security Affairs (ISA), and the applicant is referred to the appropriate diplomatic mission. The best practice is to immediately forward the issue to the DoS representative at the embassy in the country being evacuated.

(2) Temporary refuge will be granted (if the requester is in imminent danger) and ASD (ISA) will be informed. The applicant will **not** be surrendered without Service Secretary approval.

c. If the applicant makes a request at a unit, installation or vessel in **U.S. territorial waters** or **on the high seas**, then the applicant is "received" and the request for asylum is forwarded to DHS. Do not surrender the applicant to a foreign power without higher headquarters approval (Service Secretary level).

3. **Status of U.S. Embassy Premises and the Grant of Diplomatic Asylum**.

a. Usually a NEO will involve actions at the U.S. embassy or consulate. Therefore, it is important to understand the special status of embassy property and the status of persons who request asylum on that property.

b. The status of the premises may depend on whether the mission is an embassy or a consul; whether the U.S. owns the property or leases it; and whether the host country is a signatory to the Vienna Convention on Diplomatic Relations. If the mission is an embassy owned by the U.S. and in a foreign country that is a signatory, the premises are inviolable. Even if these conditions are not met, the premises are usually inviolable anyway due to reciprocal agreements with host nations under the Foreign Missions Act. Diplomatic missions are in a foreign country only at the invitation of that country. Most likely, that nation will have a mission in the U.S., and thus enjoy a reciprocal relation of inviolability (Information from the DoS Legal Counsel's Office).

4. **The Vienna Convention on Diplomatic Relations, April 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95**. Article 22 states that "The premises of the [diplomatic] mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of mission. . . . the mission shall be immune from search, requisition, attachment or execution."

5. **The Foreign Missions Act (Pub. Law 88-885, State Department Basic Authorities Act of 1956 Title II, Sections 201-213)**. This legislation establishes procedures for reciprocal agreements to provide for the inviolability of diplomatic missions.

6. **Diplomatic Asylum**. The grant of political asylum on embassy premises has been "circumscribed little by little, and many states have abandoned the practice, normally by issuing instructions to their diplomatic agents." Today, the extensive practice of the grant of diplomatic asylum appears to be restricted to missions in the Latin America republics (Gerhard von Glahn, *Law Among Nations*, 6th ed., 309).

7. **DoDD 2000.11**. Paragraph IV(B)(2)(a)(2) states that persons who request political asylum in territories under foreign jurisdiction "will be advised to apply in person at the nearest American Embassy or Consulate, subject to the internal procedures published by the Chief of Missions." Requests for political asylum will be governed by

the appropriate instructions applicable to the diplomatic mission. Once again, seek out DoS personnel at the embassy in question.

E. Law of War Considerations.

1. **Targeting – Rule of Thumb**: follow the targeting guidance of the Hague Regulations, Geneva Conventions, and applicable articles of the 1977 Protocols regardless of whether NEO is "international armed conflict." Under DoDD 2311.01E, U.S. Armed Forces will comply with the law of war "during all armed conflicts … and in all other operations." Use of Force guidance for NEO is found in Enclosure G of the CJCS SROE (CJCSI 3121.01B).

2. **Riot Control Agents (RCA)**. EO 11850 allows the use of RCA in non-armed conflict and defensive situations, to include "rescue of hostages." But the Chemical Weapons Convention prohibits the use of RCA as a "method of warfare." Whether the use of RCA in NEO is a "method of warfare" may depend on the circumstances of the NEO. However, under EO 11850, Presidential approval is always required prior to RCA use, and this approval may be delegated through the Combatant Commander. Authorization to use RCA would normally be requested as a supplemental ROE under Enclosure J to the CJCS SROE.

3. **Drafting ROE**. Coordinate Combatant Command forces' ROE with the ROE of the Marine Security Guards (who work for DoS), Host Nation Security, and Embassy Security. As always, ensure that the inherent right of self-defense is addressed adequately.

F. Search Issues.

1. **Search of evacuee's luggage and person**. Baggage will be kept to a minimum, and civilians will not be allowed to retain weapons. In accordance with the Vienna Convention on Diplomatic Relations, the person and personal luggage of diplomatic personnel are inviolable if the Diplomat is accredited to the U.S. (which would be rare in NEO). Even if they were accredited, luggage may be inspected if "serious grounds" exist to suspect that luggage is misused. An "accredited" diplomatic bag retains absolute inviolability.

2. **However, force protection is paramount**. If a commander has a concern regarding the safety of aircraft, vessels, ground transportation, or evacuation force personnel due to the nature of the personnel being evacuated, he or she may order a search of their person and belongings as a condition to evacuation. Diplomatic status is not a guarantee to use U.S. transportation. If a diplomat refuses to be searched (to include their diplomatic bag), the commander may refuse transportation. If this becomes an issue during NEO, immediately contact senior DoS personnel on-scene to assist. Always consider the actual nature of the problem, i.e. would a diplomat want to endanger himself on his own flight or is he bringing contraband that while problematic is not dangerous to the crew or aircraft.

IV. PLANNING CONSIDERATIONS

Due to their very nature, NEOs are rapidly developing operations that rely on as much pre-planning as possible. At a minimum, NEO planners should look to Joint Pub 3-68 and it's annexes to begin planning and request products to assist in mission development. Early connectivity with higher headquarters is also necessary for ROE requests. Like all ROE requests that begin an operation of this magnitude, it will be subject to much scrutiny and therefore needs to begin early to ensure it has time to complete the decision loop and return back to the unit that must execute the mission. Other early coordination with HQs such as service components at COCOMs and TRANSCOM will assist planners in spotting issues with legal and operational concerns.

NOTES

CHAPTER 11

SEA, AIR, AND SPACE LAW

REFERENCES

1. United Nations Convention on the Law of the Sea (UNCLOS III) (1982).
2. Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea Of 10 December 1982 (28 July 1994), A/RES/48/263 (33 ILM 1309).
3. Convention on the Territorial Sea and the Contiguous Zone (1958).
4. Convention on the Continental Shelf (1958).
5. Convention on the High Seas (1958).
6. Convention on Fishing and Conservation of the Living Resources of the High Seas (1958).
7. Convention on International Civil Aviation (Chicago Convention) (1944).
8. The Antarctic Treaty (1959).
9. Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space Including the Moon and Other Celestial Bodies (Outer Space Treaty) (1967).
10. Agreement on the Rescue of Astronauts, the Return of Astronauts, and the Return of Objects Launched Into Outer Space (Rescue Agreement) (1968).
11. Convention on the International Liability for Damage Caused By Space Objects (Liability Convention) (1972).
12. Convention on Registration of Objects Launched Into Outer Space (Registration Convention) (1974).
13. Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (Moon Treaty) (1979).
14. Convention on Offences and Certain Other Acts Committed on Board Aircraft (Tokyo Convention) (1963).
15. Convention for the Suppression of Unlawful Seizure of Aircraft (Hague Convention) (1970).
16. Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Montreal Convention) (1971).
17. U.S. DEP'T OF DEFENSE, MANUAL 2005.1-M, MARITIME CLAIMS REFERENCE MANUAL (June 2005) (available at http://www.dtic.mil/whs/directives/corres/html/20051m.htm).
18. U.S. DEP'T OF DEFENSE, GUIDE 4500.54-G, FOREIGN CLEARANCE GUIDE (regularly updated) (available at https://www.fcg.pentagon.mil/fcg.cfm).
19. NWP 1-14M, Annotated Supplement to the Commander's Handbook on the Law of Naval Operations (2007) (available at http://www.dsca.mil/diils/library/US%20Navy%20Marine%20Coast%20Guard%20Operational%20Law%20Manual%20for%20Lawyers.pdf).
20. JOINT CHIEFS OF STAFF, INSTR. 2410.01B, GUIDANCE FOR THE EXERCISE OF THE RIGHT-OF-ASSISTANCE ENTRY (1 May 2001) (*available at* http://www.dtic.mil/cjcs_directives/cdata/unlimit/2410_01.pdf).
21. Churchill & Lowe, The law of the sea (3d ed. 1999).

I. INTRODUCTION

A. Unlike many other topics of instruction in international and operational law, which primarily address questions of "What" is permitted or prohibited, or "How" to legally obtain a certain result, this topic often addresses the question of "Where." In other words, *what* an individual or State may do depends on *where* the action is to take place (i.e. land, sea, air, or space).

B. This chapter will first discuss the various legal divisions of the land, sea, air, and outer space. Next, it will turn to the navigational regimes within each of those divisions. Finally, it will present the competencies of the coastal State over navigators within the divisions.

C. There are many sources of law which impact on Air, Sea, and Space Law, but three are particularly noteworthy:

1. *1982 United Nations Convention on the Law of the Sea (UNCLOS III).*

a. Opened for signature on December 10, 1982, UNCLOS III entered into force on November 16, 1994 (with 60 State ratifications).[1] Previous conventions on the law of the sea had been concluded, but none were as comprehensive as UNCLOS III. UNCLOS I (1958) was a series of four conventions (Territorial Sea/Contiguous Zone; High Seas; Continental Shelf; and Fisheries/Conservation). The 1958 Conventions' major defect was their failure to define the breadth of the territorial sea.[2] UNCLOS II (1960) attempted to resolve this issue, but "failed, by only one vote, to adopt a compromise formula providing for a six-mile territorial sea plus a six-mile fishery zone."[3] UNCLOS III, which was negotiated over a period of nine years,[4] created a structure for the governance and protection of the seas, including the airspace above and the seabed and subsoil below. In particular, it provided a framework for the allocation of *reciprocal rights and responsibilities* between States—including jurisdiction, as well as navigational rights and duties—that carefully balances the interests of coastal States in controlling activities off their own coasts with the interests of all States in protecting the freedom to use ocean spaces without undue interference (aka "freedom of the seas").[5] The resources of the deep sea bed below the high seas are declared to be the common heritage of mankind.[6] The high seas are reserved for peaceful uses.[7]

b. On July 9, 1982, the United States announced that it would not sign the Convention, objecting to provisions related to deep seabed mining[8] (Part XI of the Convention).[9] In a March 10, 1983 Presidential Policy Statement, the United States reaffirmed that it would not ratify UNCLOS III because of the deep seabed mining provisions.[10] Nevertheless, the United States considers the navigational articles to be generally reflective of customary international law, and therefore binding upon all nations.[11] In 1994, the UN General Assembly proposed amendments to the mining provisions.[12] On October 7, 1994, President Clinton submitted the Convention, as amended, to the Senate for its advice and consent.[13] On February 25, 2004, the Senate Foreign Relations Committee voted to send the treaty to the full Senate with a favorable recommendation for ratification. To date, no action has been taken by the full Senate on UNCLOS III.[14]

2. *1944 Convention on International Civil Aviation (Chicago Convention).* This 1944 Convention was intended to encourage the safe and orderly development of the then-rapidly growing civil aviation industry. It does not apply to State (i.e. military, police or customs) aircraft. While recognizing the absolute sovereignty of the State within its national airspace, the Convention provided some additional freedom of movement for aircraft flying over and refueling within the national territory. The Convention also attempted to regulate various aspects of aircraft

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[1] As of 20 May 2008, 155 States have ratified UNCLOS III (http://www.un.org/Depts/los/reference_files/status2008.pdf). *See also* NWP 1-14M, Annotated Supplement to the Commander's Handbook on the Law of Naval Operations 1-71 to 1-73 (1997) [hereinafter NWP 1-14M] (available at http://www.dsca.mil/diils/library/US%20Navy%20Marine%20Coast%20Guard%20Operational%20Law%20Manual%20for%20Lawyers.pdf).

[2] The four 1958 law of the sea conventions (UNCLOS I) are the only law of the sea treaties to which the United States is presently a State party. NWP 1-14M, *supra* note 1, at 1-74 to 1-76. The breadth of the territorial sea under customary international law was 3 Nautical Miles (NM). Churchill & Lowe, The law of the sea 78 (3d ed. 1999) [hereinafter Churchill & Lowe].

[3] Churchill & Lowe, *supra* note 3, at 15.

[4] NWP 1-14M, *supra* note 1, at 1-1.

[5] UNCLOS III, Article 87. *See also* Churchill & Lowe, *supra* note 3, at 205-08.

[6] UNCLOS III, Pmbl. para. 6 and Article 136.

[7] *Id.* at Articles 88 and 301. *See also* Churchill & Lowe, *supra* note 3, at 208, 421-30.

[8] Since it is not a party to UNCLOS III, the United States maintains that it may mine the deep sea-bed without being bound by any limitations contained in UNCLOS III. NWP 1-14M, *supra* note 1, at 1-25 to 1-26, 1-39.

[9] *See generally id.* at 1-30, 1-38.

[10] *Id.* at 1-1 to 1-2, 1-38 to 1-39, 1-65 to 1-67.

[11] *Id.* at 1-25, 2-59, 2-63.

[12] *Id.* at 1-2.

[13] *Id.* at 1-2, 1-29 to 1-30. In doing so, President Clinton noted that "[s]ince the late 1960s, the basic U.S. strategy has been to conclude a comprehensive treaty on the law of the sea that will be respected by all countries. Each succeeding U.S. Administration has recognized this as the cornerstone of U.S. oceans policy." *Id.* at 1-29.

[14] Accession to UNCLOS III is supported by President Bush. *See, e.g.* http://www.state.gov/g/oes/rls/rm/2003/25572.htm.

operations and procedures. This is a continuing responsibility of the International Civil Aviation Organization (ICAO), which was created by the Convention.

3. *1967 Outer Space Treaty*. This treaty limited State sovereignty over outer space. Outer space was declared to be the common heritage of mankind. This treaty prevented certain military operations in outer space and upon celestial bodies, including the placing in orbit of any nuclear weapons or other weapons of mass destruction, and the installation of such weapons on celestial bodies. Outer space was otherwise to be reserved for peaceful uses.[15] It is argued by the United States and a majority of other nations, that the phrase "peaceful purposes" does not exclude the use or emplacement of weapons in outer space (other than WMD) as long as such use is in compliance with the *jus ad bellum* principles of the UN Charter. Current U.S. space policy reflects this view that the U.S. will take an aggressive stance against nations, groups, or individuals who would threaten the numerous space assets the U.S. currently relies upon for military operations and national security. Various other international conventions, such as the Moon, Registration, and Liability Treaties, expand upon provisions found in the Outer Space Treaty.

II. LEGAL DIVISIONS

A. The Earth's surface, sub-surface and atmosphere is broadly divided into National and International areas.[16]

B. National Areas.

1. *Land Territory*. This includes all territory within recognized borders. Although most borders are internationally recognized, there are still some border areas in dispute.

2. *Internal Waters*. These are all waters landward of the baseline,[17] over which the coastal State "exercise[s] the same jurisdiction and control … as they do over their land territory."[18] The baseline is an artificial line generally corresponding to the low-water mark along the coast.[19] The coastal State has the responsibility for determining and publishing its baselines. The legitimacy of these baselines is determined by international acceptance or rejection of the claims. UNCLOS III recognizes several exceptions to the general rule:

a. *Straight Baselines*. A coastal State may draw straight baselines when its coastline has fringing islands or is deeply indented (*e.g.*, Norway with its fjords).[20] The lines drawn by the coastal State must follow the general direction of the coast. Straight baselines should not be employed to expand the coastal State's national areas. Straight baselines are also drawn across the mouths of rivers[21] and across the furthest extent of river deltas or other unstable coastline features.[22] Straight baselines are overused,[23] and the United States strictly interprets the few instances when straight baselines may be properly drawn.[24]

b. *Bays*. Depending on the shape, size, and historical usage, the coastal State may draw a baseline across the mouth of a bay, making the bay internal waters. The bay must be a "well-marked indentation," and "more than a mere curvature" in the coastline.[25] A *juridical bay* (*i.e.*, one legally defined by UNCLOS III) must have a water area greater than that of a semi-circle whose diameter is the length of the line drawn across its mouth (headland to headland), and the closure lines may not exceed 24 NM.[26] *Historic bays* (i.e. bodies of water with closures of greater than 24 NM but which historically have been treated as bays) may be claimed as internal waters

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[15] NWP 1-14M, *supra* note 1, at 2-38.

[16] *See* schematic *infra*; NWP 1-14M, *supra* note 1, at 1-69 to 1-70.

[17] UNCLOS III, Article 8; NWP 1-14M, *supra* note 1, at 1-14.

[18] NWP 1-14M, *supra* note 1, at 2-6.

[19] UNCLOS III, Article 5; NWP 1-14M, *supra* note 1, at 1-4, 1-46. The "low-water line" is inherently ambiguous, and may correspond to "the mean low-water spring tide, the lowest astronomical tide or some other low-water line." Churchill & Lowe, *supra* note 3, at 33 n.4.

[20] UNCLOS III, Article 7(1); NWP 1-14M, *supra* note 1, at 1-5.

[21] UNCLOS III, Article 9; NWP 1-14M, *supra* note 1, at 1-12.

[22] UNCLOS III, Article 7(2); Churchill & Lowe, *supra* note 3, at 37-38.

[23] Churchill & Lowe, *supra* note 3, at 38-40; NWP 1-14M, *supra* note 1, at 1-77 to 1-79.

[24] NWP 1-14M, *supra* note 1, at 1-6.

[25] *Id.* at 1-8, 1-47.

[26] UNCLOS III, Article 10; NWP 1-14M, *supra* note 1, at 1-8 to 1-11; Churchill & Lowe, *supra* note 3, at 41-43.

when the following criteria are met: the claim of sovereignty is an open, effective, continuous and long term exercise of authority, coupled with acquiescence (as opposed to mere absence of opposition) by foreign States.[27] The United States does not recognize any claims to historic bay status,[28] such as Libya's claim to the Gulf of Sidra[29] (closure line in excess of 300 NM) or Canada's claim to Hudson Bay (closure line in excess of 50 NM).[30]

c. *Archipelagic Baselines*. UNCLOS III allows archipelagic States (i.e. those consisting solely of groups of islands,[31] such as Indonesia[32]) to draw baselines around their outermost islands, subject to certain restrictions.[33] The waters within are given special status as archipelagic waters, which are more akin to territorial waters than to internal waters.

d. *Maritime Claims Reference Manual*. This DoD publication[34] sets out in detail the maritime claims of all States, including specific points of latitude and longitude, and the U.S. position with regard to those maritime claims.

3. *Territorial Sea*. This is the zone lying immediately seaward of the baseline.[35] States must actively claim a territorial sea, to include its breadth (i.e. it does not exist until claimed by the coastal State). The maximum breadth is 12 NM.[36] Most States, including the United States, have claimed the full 12 NM. Some States have claimed less than 12 NM, and some have made excessive claims of more than 12 NM.[37]

4. *Off-Shore Elevations*.

a. *Low-tide Elevations*. These are "naturally formed area[s] of land which [are] surrounded by and above water at low tide but submerged at high tide."[38] Low-tide elevations do not generate any maritime zones. However, if they are located within the territorial sea, they may be used to extend out the baseline,[39] which is used for measuring the territorial sea and other zones. Straight baselines may also be drawn out to the low-tide elevation if "a lighthouse or similar installation, which is permanently above sea level" is erected.[40]

b. *Rocks*. These are naturally formed areas of land which are surrounded by and always above water (i.e. even at high-tide). A rock is similar to an island, except that the former is not capable of sustaining human habitation or economic life.[41] Rocks are entitled to a territorial sea and a contiguous zone (*see infra*), but not to an exclusive economic zone (EEZ—*see infra*) or a continental shelf,[42] which may have serious economic consequences. For example, Chinese, Malaysian, Filipino, Taiwanese and Vietnamese soldiers occupy 45 of the smaller Spratly Islands in the South China Sea, in order to prove not only ownership, but that what otherwise appear to be "rocks"

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[27] UNCLOS III, Article 10(6); NWP 1-14M, *supra* note 1, at 1-11; Churchill & Lowe, *supra* note 3, at 43-45.

[28] NWP 1-14M, *supra* note 1, at 1-80.

[29] *Id.* at 2-70, 2-82; Churchill & Lowe, *supra* note 3, at 45.

[30] NWP 1-14M, *supra* note 1, at 1-11 to 1-12 n.23.

[31] *Id.* at 1-17 to 1-18, 1-85 to 1-88.

[32] Seventeen States have claimed archipelagic status, including the Bahamas, Indonesia, Jamaica, and the Philippines. Churchill & Lowe, *supra* note 3, at 121-22.

[33] UNCLOS III, Article 47; NWP 1-14M, *supra* note 1, at 1-17 to 1-18; Churchill & Lowe, *supra* note 3, at 123-25.

[34] DoD 2005.1-M, available at http://www.dtic.mil/whs/directives/corres/html/20051m.htm.

[35] UNCLOS III, Article 2; NWP 1-14M, *supra* note 1, at 1-14 to 1-15, 1-62.

[36] UNCLOS III, Article 3; NWP 1-14M, *supra* note 1, at 1-15.

[37] NWP 1-14M, *supra* note 1, at 1-81 to 1-84. See the DoD Maritime Claims Reference Manual for claims of specific States, or the annotated supplement to NWP 1-14M for a synopsis of State claims.

[38] *Id.* at 1-54.

[39] UNCLOS III, Article 13; NWP 1-14M, *supra* note 1, at 1-15 to 1-16.

[40] UNCLOS III, Article 7(4); NWP 1-14M, *supra* note 1, at 1-6 to 1-8.

[41] NWP 1-14M, *supra* note 1, at 1-15 to 1-16.

[42] The continental shelf is the seabed and subsoil, which may extend beyond the 200 NM EEZ, but generally not more than 350 NM from the baseline, over which the coastal State exercises sovereignty for exploration and exploitation of natural resources. UNCLOS III, Articles 76 and 77; NWP 1-14M, *supra* note 1, at 1-22 to 1-23, 1-27.

are actually capable of sustaining life, and therefore qualify as islands, each with its own 200 NM EEZs (which may contain extensive fishing and petroleum resources—*see infra*).

c. *Islands.* These are naturally formed areas of land which are surrounded by and always above water (i.e. even at high-tide), and are capable of sustaining human habitation and economic life. Islands are entitled to all types of maritime zones (i.e. territorial sea, contiguous zone (*see infra*), EEZ (*see infra*), and a continental shelf).[43]

5. *National Airspace*. This area includes all airspace over the land territory, internal waters and territorial sea.[44]

C. International Areas.

1. *Contiguous Zone*. This zone is immediately seaward of the territorial sea and extends no more than 24 NM from the baseline.[45] *See infra* for a discussion of the coastal State's competency in the contiguous zone.

2. *Exclusive Economic Zone (EEZ).* This zone is immediately seaward of the territorial sea and extends no more than 200 NM from the baseline.[46] *See infra* for a discussion of the coastal State's competency in the EEZ.

3. *High Seas*. This zone includes all areas beyond the exclusive economic zone (EEZ).[47]

4. *International Airspace*. This area includes all airspace beyond the furthest extent of the territorial sea.[48]

5. *Outer Space*. The Outer Space Treaty and subsequent treaties do not define the point where national airspace ends and outer space begins, nor has there been any international consensus on the line of delimitation.[49] Some of the suggested delimitations include the upper limit of aerodynamic lift (approximately 80 km); the lowest satellite orbit (approximately 90 km); and the end of measurable air resistance (approximately 200 km).

6. *Antarctica*. The Antarctic Treaty of 1959 applies to the area south of 60º South Latitude, reserving that area for peaceful purposes only. Specifically, "any measures of a military nature, such as the establishment of military bases and fortifications, the carrying out of military maneuvers, as well as the testing of any type of weapon," is prohibited.[50] However, the Treaty does not prejudice the exercise of rights on the high seas within that area.[51] "Antarctica has no territorial sea or territorial airspace."[52]

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[43] NWP 1-14M, *supra* note 1, at 1-15 to 1-16.

[44] UNCLOS III, Article 2; NWP 1-14M, *supra* note 1, at 1-18, 1-24, 2-28 to 2-29.

[45] UNCLOS III, Article 33; NWP 1-14M, *supra* note 1, at 1-89; Churchill & Lowe, *supra* note 3, at 132-39.

[46] UNCLOS III, Articles 55, 57; Churchill & Lowe, *supra* note 3, at 160-79.

[47] UNCLOS III, Article 86; NWP 1-14M, *supra* note 1, at 1-21.

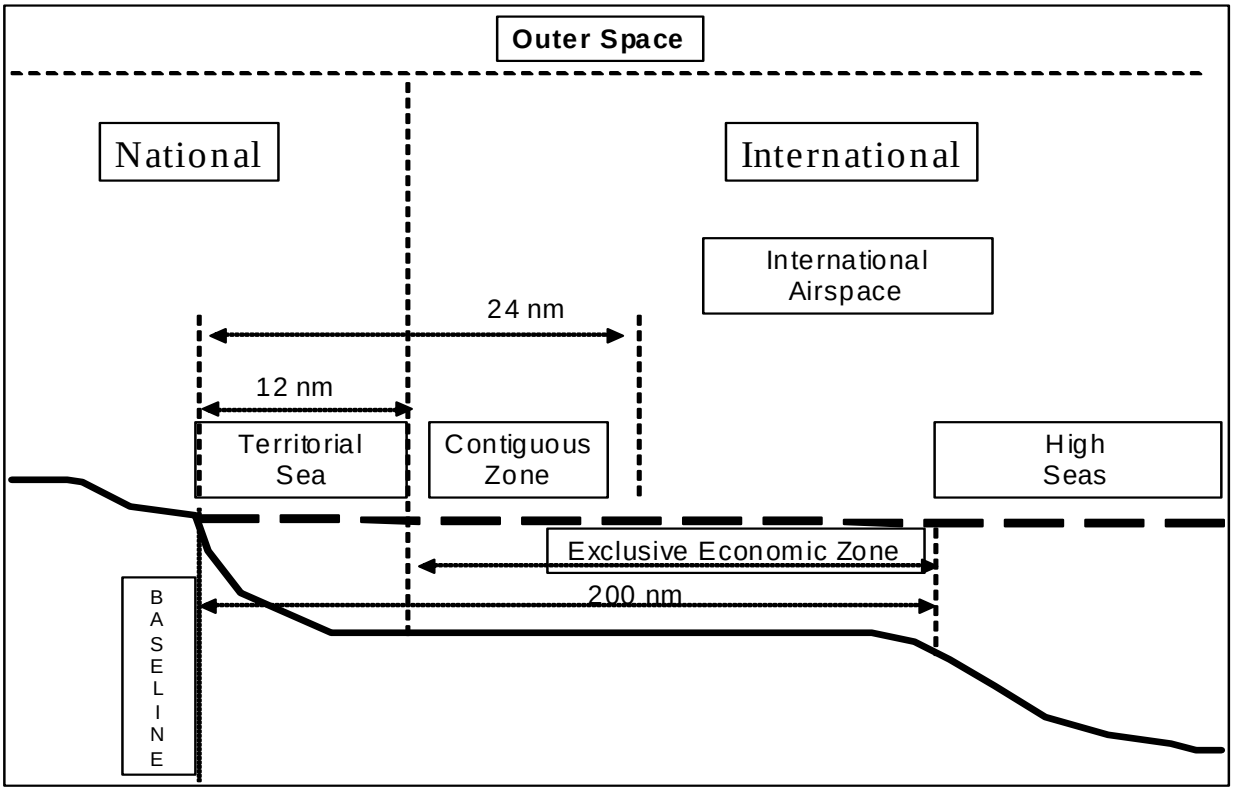
[48] NWP 1-14M, *supra* note 1, at 1-24, 2-29 to 2-30.

[49] *Id.* at 1-24, 2-38.

[50] *Id.* at 2-25.

[51] *Id.*

[52] *Id.*



III. NAVIGATIONAL REGIMES

A. Having presented the various legal divisions, it is now necessary to discuss the navigational regimes within those zones. The freedom of navigation within any zone is inversely proportional to the powers that may be exercised by the coastal State (see the discussion *infra* on State Competencies). Where a State's powers are at their greatest ebb (*e.g.*, land territory, internal waters), the navigational regime is most restrictive. Where a State's powers are at their lowest ebb (*e.g.*, high seas, international airspace), the navigational regime is most permissive.

B. National Areas.

1. With limited exception, States exercise full sovereignty within their national areas.[53] Therefore, the navigational regime is "consent of the State."[54] Although the State's consent may be granted based on individual requests, it may also be manifested generally in international agreements such as:

a. *Status of Forces Agreements*. These agreements typically grant reciprocal rights, without the need for securing individual consent, to members of each State party. Such rights may include the right-of-entry and travel within the State.

b. *Friendship, Commerce and Navigation (FCN) Treaties.* These treaties typically grant reciprocal rights to the commercial shipping lines of each State party to call at ports of the other party.

c. *Chicago Convention*. State parties to the Chicago Convention have granted limited consent to civil aircraft of other State parties to enter and land within their territory.[55] The Chicago Convention "does *not* apply to military aircraft … other than to require that they operate with 'due regard for the safety of navigation of civil aircraft.'"[56]

2. The DoD Foreign Clearance Guide[57] sets out the entry and clearance requirements for both aircraft and personnel, and overflight rights where applicable, for every State.

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[53] *Id.* at 2-6 to 2-7.

[54] *Id.* at 1-14, 1-24, 2-6 to 2-7. The only exceptions are when entry into internal waters is "rendered necessary by *force majeure* or by distress."

[55] *Id.* at 2-30.

[56] *Id. See also* Chicago Convention, Article 3(d).

[57] DoD 4500.54-G, available at https://www.fcg.pentagon.mil/fcg.cfm.

3. *Exceptions in the Territorial Sea*. Although the territorial sea is considered a national area, the need for greater freedom of navigation than consent of the coastal State has convinced the international community to recognize the four exceptions specified below. Note that these exceptions do not apply to *internal* waters, for which consent of the State remains the navigational regime.

a. *Innocent Passage*. Innocent passage refers to a vessel's right to *continuous* and *expeditious* transit through a coastal State's territorial sea for the purpose of traversing the seas (without entering a State's internal waters, such as a port).[58] Stopping and anchoring are permitted when incident to ordinary navigation or made necessary by *force majeure* (*e.g.*, mechanical casualty, bad weather or other distress).[59] "Passage is *innocent* so long as it is not prejudicial to the peace, good, order, or security of the coastal nation."[60] There is no provision in international law that would permit a coastal State to require prior notification or authorization in order to exercise the right of innocent passage.[61] Moreover, UNCLOS III contains **no** requirement that passage through a State's territorial sea be *necessary* in order for it to be innocent; it does, however enunciate a list of twelve activities deemed **not** to be innocent, including any threat or use of force, any weapons exercise or practice, any intelligence collection or act of propaganda, the launching or recovery of aircraft or any military device (e.g. landing craft), any willful act of serious pollution, any fishing, research or survey activities, any intentional interference with communications systems, or "any other activity not having a direct bearing on passage."[62]

(1) The United States takes the position that UNCLOS III's list of prohibitions on innocent passage is exhaustive and intended to eliminate subjective determinations of innocent passage. If a vessel is not engaged in the above listed activities, its passage is deemed innocent according to the U.S. view.

(2) The U.S. view is that innocent passage extends to all shipping, and is not limited by cargoes, armament or type of propulsion (e.g. nuclear). Note that UNCLOS III prohibits coastal State laws from having the practical effect of denying innocent passage.

(3) Innocent Passage does **not** apply to aircraft (i.e. the airspace above the territorial sea is considered "national airspace," which aircraft can generally only enter with the consent of the coastal State, e.g. in accordance with the Chicago Convention).[63]

(4) A submarine in innocent passage must transit on the surface, showing its flag.[64]

(5) *Challenges to Innocent Passage*.

(a) Merchant ships must be informed of the basis for the challenge and provided an opportunity to clarify intentions or to correct the conduct at issue. Where no corrective action is taken by the vessel, the coastal State may require it to leave or may, in limited circumstances, arrest the vessel.

(b) A warship/State vessel must be challenged and informed of the violation that is the basis for the challenge. Where no corrective action is taken, the coastal State may require the vessel to leave its territorial sea and may use necessary force to enforce the ejection.[65]

(6) *Suspension of Innocent Passage*. A coastal State may temporarily suspend innocent passage if such an act is essential for the protection of security. Such a suspension must be: (1) non-discriminatory; (2) temporary; (3) applied to a specified geographic area; and (4) imposed only after due publication/notification.[66]

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[58] UNCLOS III, Article 18; NWP 1-14M, *supra* note 1, at 2-7 to 2-9.

[59] UNCLOS III, Article 18(3); NWP 1-14M, *supra* note 1, at 2-7, 3-3.

[60] NWP 1-14M, *supra* note 1, at 2-7.

[61] *Id.* at 1-26. Nevertheless, many States seek to require either prior notification or authorization, particularly for warships, before engaging in innocent passage through their territorial sea. *See generally id.* at 2-83; DoD 2005.1-M, Maritime Claims Reference Manual (June 2005) (*available at* http://www.dtic.mil/whs/directives/corres/html/20051m.htm).

[62] UNCLOS III, Article 19(2). *See also* NWP 1-14M, *supra* note 1, at 2-8; Churchill & Lowe, *supra* note 3, at 84-87.

[63] NWP 1-14M, *supra* note 1, at 2-7, 2-9, 2-28.

[64] UNCLOS III, Article 20; NWP 1-14M, *supra* note 1, at 2-11; Churchill & Lowe, *supra* note 3, at 88-92.

[65] UNCLOS III, Article 30. *See also* NWP 1-14M, *supra* note 1, at 2-9, 2-11; Churchill & Lowe, *supra* note 3, at 99.

[66] UNCLOS III, Article 25(3); NWP 1-14M, *supra* note 1, at 2-9 to 2-10; Churchill & Lowe, *supra* note 3, at 87-88. Note that the temporary suspension of innocent passage is different from the establishment of security zones, which are not recognized either by international law or by

b. *Right-of-Assistance Entry*. Based on the long-standing obligation of mariners to aid those in distress from perils of the sea, the right-of-assistance entry gives limited permission to enter into the territorial sea to render assistance to "those in danger of being lost at sea."[67] The location of the persons in danger must be reasonably well-known—the right does not permit a search.[68] Aircraft may be used to render assistance, though this right is not as well-recognized as that for ships rendering assistance.[69]

c. *Transit Passage*. Transit passage applies to passage through *International Straits*,[70] which are defined as: (1) routes between the high seas or exclusive economic zone (EEZ) and another part of the high seas or exclusive economic zone;[71] (2) overlapped by the territorial sea of one or more coastal States;[72] (3) with no high seas or exclusive economic zone route of similar convenience;[73] (4) natural, not constructed (*i.e.*, not the Suez Canal); and (5) must actually be used for international navigation. The U.S. position is that the strait must only be *susceptible* to use, and not necessarily *actually* be used for international navigation. Transit passage is unimpeded, continuous and expeditious passage through the strait.[74] The navigational regime is "normal mode[] of continuous and expeditious transit."[75] In the normal mode of transit, ships may launch and recover aircraft if that is normally done during their navigation (e.g. for force protection purposes), and submarines may transit submerged.[76] Unlike innocent passage, aircraft may also exercise transit passage (i.e. aircraft may fly in the airspace above international straits without consent of the coastal States).[77] Transit passage may **not** be suspended by the coastal States during peacetime.[78] The U.S. view is that unlike Archipelagic Sea Lanes Passage (*see infra*), the right of transit passage exists from coastline to coastline of the strait, and of the approaches to the strait.[79]

(1) Straits regulated by long-standing international conventions remain governed by the terms of their respective treaty (e.g. the Bosphurus and Dardanelles Straits are governed by the Montreux Convention of 20 July 1936, and the Straits of Magellan are governed by article V of the Boundary Treaty between Argentina and Chile) rather than by the regime of transit passage.[80]

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the United States. NWP 1-14M, *supra* note 1, at 1-21 to 1-22, 1-90, 2-22 to 2-23. However "[c]oastal nations may establish safety zones to protect artificial islands, installations, and structures located in their internal waters, archipelagic waters, territorial seas, and exclusive economic zones, and on their continental shelves." *Id.* at 1-24. Safety zones were established in the immediate vicinity of the two Iraqi oil platforms in the northern Arabian Gulf to protect against terrorist attacks. States may also "declare a temporary warning area in international waters and airspace to advise other nations of the conduct of activities that, although lawful, are hazardous to navigation and/or overflight. The U.S. and other nations routinely declare such areas for missile testing, gunnery exercises, space vehicle recovery operations, and other purposes entailing some danger to other lawful uses of the high seas by others." *Id.* at 2-22.

[67] *Id.* at 2-12. *See also id.* at 2-48 to 2-58, 3-1 to 3-2.

[68] *Id.* at 2-12.

[69] *See* CJCSI 2410.01B for further guidance on the exercise of the right-of-assistance entry, available at http://www.dtic.mil/cjcs_directives/cdata/unlimit/2410_01.pdf.

[70] *See generally id.* at 2-71 to 2-76 for large-scale charts of popular international straits.

[71] UNCLOS III, Article 37.

[72] For example, Japan only claims a territorial sea of 3 nm in some areas in order to leave a "high seas corridor," rather than creating an international strait through which transit passage may theoretically occur "coastline to coastline." NWP 1-14M, *supra* note 1, at 2-12 to 2-15, 2-17.

[73] UNCLOS III, Article 36; Churchill & Lowe, *supra* note 3, at 105.

[74] UNCLOS III, Article 38. *See* Churchill & Lowe, *supra* note 3, at 110-13 for three arguments that transit passage is a matter of customary international law.

[75] UNCLOS III, Article 39(1)(c); Churchill & Lowe, *supra* note 3, at 109.

[76] NWP 1-14M, *supra* note 1, at 2-15.

[77] *Id.* at 1-24, 2-29.

[78] UNCLOS III, Article 44; NWP 1-14M, *supra* note 1, at 2-15. *See also* The Corfu Channel Case, International Court of Justice 1947 (*available at* http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=cd&case=1&code=cc&p3=4); Churchill & Lowe, *supra* note 3, at 103-04.

[79] NWP 1-14M, *supra* note 1, at 2-12 to 2-15, 2-59 to 2-60, 2-62, 2-65, 2-66, 2-67.

[80] UNCLOS III, Article 35(c); NWP 1-14M, *supra* note 1, at 2-13, 2-61, 2-63, 2-85; Churchill & Lowe, *supra* note 3, at 114-15.

d. *Archipelagic Sea Lanes Passage (ASLP).*

(1) Archipelagic Sea Lanes Passage (ASLP) is the exercise of the rights of navigation and overflight, in the normal mode of navigation, solely for the purpose of continuous, expeditious and unobstructed transit between one part of the high seas/exclusive economic zone and another part of the high seas/exclusive economic zone *through archipelagic waters*.[81] ASLP "is substantially identical to the right of transit passage through international straits."[82]

(2) Qualified archipelagic States may designate Archipelagic Sea Lanes (ASL) for the purpose of establishing the ASLP regime within their Archipelagic Waters. States must designate *all normal passage routes used as routes for international navigation or overflight through or over archipelagic waters*,[83] and the designation must be referred to the International Maritime Organization (IMO) for review and adoption. In the absence of designation, the right of ASLP may be exercised through all routes normally used for international navigation.[84] Once ASLs are designated, transiting ships and aircraft[85] may not deviate more than 25 NM from the ASL axis, and must stand off the coastline no less than 10% of the distance between the nearest points of land on the islands bordering the ASL (unlike transit passage, which arguably exists coastline to coastline—*see supra*).[86] Upon ASL designation, the regime of innocent passage applies to Archipelagic Waters outside ASL.[87] ASLP is non-suspendable;[88] however, if ASLs are designated, innocent passage outside the lanes—but within Archipelagic Waters—may be suspended in accordance with UNCLOS III (*see supra* discussion of Suspension of Innocent Passage).

C. International Areas. In all international areas, the navigational regime is "due regard for the rights of other nations and the safe conduct and operation of other ships and aircraft."[89] Although reserved for peaceful purposes,[90] military operations are permissible in international areas. The U.S. position is that military operations which are consistent with the provisions of the United Nations Charter are "peaceful."[91]

IV. STATE COMPETENCIES

A. General. The general rule is that the Flag State exercises full and complete jurisdiction over ships and vessels that fly its flag. The United States has defined the "special maritime and territorial jurisdiction" of the United States as including registered vessels, U.S. aircraft and U.S. space craft.[92] Various Federal criminal statutes are specifically made applicable to acts within this special jurisdiction. The power of a State over **non-Flag** vessels and aircraft depends upon the zone in which the craft is navigating (discussed *infra*), and whether the craft is considered State or civil.

1. *State Craft*. State ships include warships[93] and ships owned or operated by a State and used only for government non-commercial service. State aircraft are those used in military, customs and police services.[94] State vessels enjoy complete sovereign immunity (*see infra*).[95]

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[81] UNCLOS III, Article 53; NWP 1-14M, *supra* note 1, at 2-17 to 2-18; Churchill & Lowe, *supra* note 3, at 127.

[82] NWP 1-14M, *supra* note 1, at 2-17.

[83] *Id.* at 1-18. "If the archipelagic nation does not designate such [normal passage routes as] sea lanes, the right of archipelagic sea lanes passage may nonetheless be exercised by all nations through routes normally used for international navigation and overflight." *Id. See also* UNCLOS III, Article 53(12); Churchill & Lowe, *supra* note 3, at 128.

[84] UNCLOS III, Article 53(12); NWP 1-14M, *supra* note 1, at 1-28; Churchill & Lowe, *supra* note 3, at 128.

[85] NWP 1-14M, *supra* note 1, at 1-24, 2-29.

[86] I*d.* at 2-18 to 2-19.

[87] *Id.* at 2-18.

[88] *Id.*

[89] *Id.* at 2-21. *See also* UNCLOS III, Articles 58 and 87.

[90] UNCLOS III, Articles 88 and 301. *See also* Churchill & Lowe, *supra* note 3, at 208, 421-30.

[91] *See, e.g.*, NWP 1-14M, *supra* note 1, at 2-38 & n.114.

[92] 18 U.S.C. § 7 (2007).

[93] "For the purposes of this Convention, "warship" means a ship belonging to the armed forces of a State bearing the external marks distinguishing such ships of its nationality, under the command of an officer duly commissioned by the government of the State and whose name

2. *Civil Craft*. These are any craft other than State craft. States must set conditions for the granting of nationality to ships and aircraft. Craft may be registered to only one State at a time.

B. National Areas.

1. *Land Territory and Internal Waters*. Within these areas, the State exercises complete sovereignty, subject to limited concessions based on international agreements (*e.g.*, SOFAs).

2. *Territorial Sea*. As noted above, the navigational regime in the territorial sea permits greater navigational freedom than that available within the land territory or inland waters of the coastal State. Therefore, the State competency within the territorial sea is somewhat less than full sovereignty.

a. *Innocent Passage*.

(1) *Civil Craft*. The State's power is limited to:

(a) safety of navigation, conservation of resources, control of pollution and prevention of infringements of the customs, fiscal, immigration or sanitary laws;

(b) criminal enforcement, but only when the alleged criminal act occurred within internal waters, or the act occurred while in innocent passage through the territorial sea and it affects the coastal State;[96]

(c) civil process, but the coastal State may not stop ships in innocent passage to serve process, and may not arrest ships unless the ship is leaving internal waters, lying in territorial sea (*i.e.*, not in passage), or incurs a liability while in innocent passage (*e.g.*, pollution).[97]

(2) *State Craft*. State vessels enjoy complete sovereign immunity.[98] However, the Flag State bears liability for any costs that arise from a State vessel's violation of any of the laws that would otherwise be applicable to civil vessels.[99] The coastal State's only power over State vessels not complying with its rules is to require them to leave the territorial sea immediately,[100] arguably by using "any force necessary to compel them to do so."[101]

b. *Transit Passage and Archipelagic Sea Lane Passage*.

(1) *Civil Craft*. The coastal State retains almost no State competencies over civil craft in transit passage or ASL passage, other than the competencies applicable within the contiguous zone and exclusive economic zone (EEZ—*see infra*). These include customs, fiscal, immigration and sanitary laws, and prohibitions on exploitation of resources (e.g. fishing). Additionally, the coastal State may propose a traffic separation scheme, but it must be approved by the International Maritime Organization (IMO).[102]

(2) *State Craft*. State vessels enjoy complete sovereign immunity. The Flag State bears liability for any costs that arise from a State vessel's violation of any of the laws that would otherwise be applicable to civil vessels.

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appears in the appropriate service list or its equivalent, and manned by a crew which is under regular armed forces discipline." Article 29, UNCLOS III; NWP 1-14M, *supra* note 1, at 2-1.

[94] Chicago Convention, Article 3.

[95] UNCLOS III, Article 30; NWP 1-14M, *supra* note 1, at 2-1.

[96] UNCLOS III, Article 27; Churchill & Lowe, *supra* note 3, at 98, 268.

[97] UNCLOS III, Article 28; Churchill & Lowe, *supra* note 3, at 98, 461.

[98] UNCLOS III, Article 30; NWP 1-14M, *supra* note 1, at 2-1. For an interesting 1994 Naval message on the sovereign immunity policy, including examples of situations raising the issue of sovereign immunity, *see id.* at 2-43 to 2-46.

[99] UNCLOS III, Article 31; Churchill & Lowe, *supra* note 3, at 99.

[100] UNCLOS III, Article 30; NWP 1-14M, *supra* note 1, at 1-18 to 1-19, 2-2.

[101] Churchill & Lowe, *supra* note 3, at 99.

[102] *See generally* http://www.imo.org/.

C. International Areas.

1. *Contiguous Zone*. The contiguous zone was created by UNCLOS III solely to allow the coastal State to prevent and punish infringement of its customs, fiscal, immigration and sanitary laws "*within its territory or territorial sea*."[103] Thus, the contiguous zone serves as a buffer to prevent or punish violations of coastal State law that occurred *on land, within internal waters, or within the territorial sea*, and arguably not for purported violations *within the contiguous zone itself* (unless the deleterious effects extend to the territorial sea). Thus, a vessel polluting while engaged in innocent passage in the territorial sea could be stopped and arrested in the contiguous zone. However, all nations continue to enjoy the right to exercise the traditional high seas freedoms of navigation and overflight in the contiguous zone.

2. *Exclusive Economic Zone*. Within this area, the coastal State exercises sovereign rights for managing all natural resources.[104] Coastal State consent is required for marine scientific research (with no exception for State vessels), but such consent should normally be given.[105] "However, in the EEZ all nations enjoy the right to exercise the traditional high seas freedoms of navigation and overflight … and of all other traditional high seas uses by ships and aircraft which are not resource related."[106]

3. *High Seas.*

a. *Civil Craft*. On the high seas, the general rule is Flag State jurisdiction only.[107] Non-Flag States have almost no competencies over civil craft on the high seas, with the following exceptions:

(1) *Ships engaged in the slave trade*.[108] Every State is required to take measures to suppress the slave trade by its flagged vessels. If any other State stops a slave vessel, the slaves are automatically freed.

(2) *Ships or aircraft engaged in piracy*.[109] Any State may seize, arrest and prosecute pirates. Piracy remains a problem in many areas of the world, particularly in confined waters.[110]

(3) *Ship or installation (aircraft not mentioned), engaged in unauthorized broadcasting*.[111] Any State which receives such broadcasts, or is otherwise subject to radio interference, may seize and arrest the vessel and persons on board.

(4) *Right of visit*.[112] The right of visit, which is similar to an automobile traffic stop to check license and registration, may only be conducted by State ships and aircraft. There must be a reasonable suspicion that: (1) the ship visited is engaged in slave trade,[113] piracy,[114] or unauthorized broadcasting;[115] (2) the ship is either

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[103] UNCLOS III, Article 33(1)(a) and (b); NWP 1-14M, *supra* note 1, at 1-18 to 1-19, 1-48; Churchill & Lowe, *supra* note 3, at 132-39. [Note that the NWP 1-14M's assertion that "[t]he U.S. claims a contiguous zone extending 12 nautical miles from the baselines used to measure the territorial sea" is no longer correct. Presidential Proclamation No. 7219 of Aug 2, 1999 extended the U.S. contiguous zone out to 24 NM from the baseline. DoD 2005.1-M, Maritime Claims Reference Manual (June 2005) (*available at* http://www.dtic.mil/whs/directives/corres/html/20051m.htm).]

[104] UNCLOS III, Article 56; NWP 1-14M, *supra* note 1, at 1-19 to 1-21; Churchill & Lowe, *supra* note 3, at 166-69.

[105] UNCLOS III, Article 246; Churchill & Lowe, *supra* note 3, at 405-12.

[106] NWP 1-14M, *supra* note 1, at 1-20. *See also* UNCLOS III, Article 58(1); NWP 1-14M, *supra* note 1, at 1-26, 1-39; Churchill & Lowe, *supra* note 3, at 170-74.

[107] UNCLOS III, Article 92; Churchill & Lowe, *supra* note 3, at 461. *See also* UNCLOS III, Article 217; Churchill & Lowe, *supra* note 3, at 348.

[108] UNCLOS III, Article 99.

[109] *Id.* at Articles 101-107.

[110] Pirate attacks have recently decreased in the Strait of Malacca, through which forty percent of the world's trade is shipped. "Watchdog hails improved security in Malacca Strait; Increased patrols and other measures have cut number of pirate attacks," The Straits Times, January 23, 2007 (*available at* http://app.mfa.gov.sg/pr/read_content.asp?View,6339,).

[111] UNCLOS III, Article 109.

[112] *Id.* at Article 110.

[113] NWP 1-14M, *supra* note 1, at 3-13.

[114] *Id.* at 3-9 to 3-13.

[115] *Id.* at 3-13 to 3-14.

stateless (i.e. without nationality, under the premise that a ship that belongs to no State belongs to all States) or quasi-stateless (e.g. flying under more than one flag);[116] or (3) the ship, although flying a foreign flag, actually is of the same nationality of the visiting State ship or aircraft.[117] The visiting State ship may ask to see the visited ship's documents. If the documents raise the level of suspicion of illicit activity, this may serve as the basis for a further search of the vessel.

(5) *Hot Pursuit*.[118] Like the right of visit, hot pursuit may be conducted only by State ships and aircraft. A craft suspected of committing a prohibited act may be pursued and captured upon the high seas. The pursued ship must have violated a law or regulation of the coastal State in any area in which those laws or regulations are effective. For example, the ship must have violated a customs rule within the territorial sea, or a fishing regulation within the exclusive economic zone (EEZ). The pursuit must commence in the area where the violation was committed, and must be continuous. Pursuit must end once the ship enters the territorial sea of another State, including its own.

(6) *Terrorism*. Over the past 30 years, nations have attempted to combat the problem of criminal interference with aircraft, specifically hijacking. To deter hijackers, these legal strategies must be supported by strengthened airport security, commitment to prosecute terrorists, and sanctions against States that harbor terrorists. Hijacking is usually not an act of piracy as defined under UNCLOS III. Nations have entered into multilateral agreements to define the offense of hijacking and to deter hijacking as a method of terrorism. These conventions include the Tokyo Convention, Hague Convention and Montreal Convention.

b. *State Craft*. State vessels are absolutely immune on the high seas.[119]

Legal Division	Navigational Regime	State Competency
Land Territory	Consent of coastal State	Full sovereignty
Internal Waters	Consent of coastal State	Full sovereignty
Territorial Sea	Innocent Passage (ships only)	Limited navigational, criminal, and civil
International Straits	Transit Passage (normal mode of transit)	Fiscal, customs, immigration, and sanitary
Archipelagic Sea Lanes	Archipelagic Sea Lanes Passage	Fiscal, customs, immigration, and sanitary
Contiguous Zone	Due Regard for the rights of others	Fiscal, customs, immigration, and sanitary
Exclusive Economic Zone (EEZ)	Due Regard for the rights of others	Natural resources
High Seas	Due Regard for the rights of others	Almost none, other than over vessels of Flag State

[116] *Id.* at 3-25.

[117] *Id.* at 3-8.

[118] UNCLOS III, Article 111; NWP 1-14M, *supra* note 1, at 3-21 to 3-23.

[119] UNCLOS III, Article 95.

NOTES

NOTES

CHAPTER 12

DETAINEE OPERATIONS

REFERENCES

1. Geneva Convention (III) Relative to the Treatment of Prisoners of War of August 12, 1949.
2. Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War of August 12, 1949.
3. Detainee Treatment Act of 2005, found in Department of Defense Appropriations Act of 2006 (H.R. 2863, Title X) Dec 30, 2005.
4. U.S. DEP'T OF ARMY, ARMY REG. 190-8, ENEMY PRISONERS OF WAR, RETAINED PERSONNEL, CIVILIAN INTERNEES AND OTHER DETAINEES (1 Oct. 97) (also published as a multi service regulation as MCO 3461.1, OPNAVINST 3461.6, AFJI 31-304).
5. U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE (July 1956).
6. U.S. DEP'T OF DEFENSE, DIR. 2310.01E, DOD DETAINEE PROGRAM (5 Sept. 2006).
7. Maj. Gen. Antonio Taguba, Article 15-6 Investigation of the 800th Military Police Brigade, Feb. 2004.
8. Former Secretary of Defense James Schlesinger, Final Report on the Independent Panel to Review DOD Detention Operations, Aug. 2004.
9. Maj. Gen. George Fay, Article 15-6 Investigation of the Abu Ghraib Prison and the 205th Military Intelligence Brigade, August 25, 2004.
10. Lt. Gen. Anthony Jones. Article 15-6 Investigation of the Abu Ghraib Prison and the 205th Military Intelligence Brigade, August 25, 2004.
11. Dep't of the Army, the Inspector General Detainee Operations Inspection, July 21, 2004.
12. Review of Dep't of Defense Detention Operations and Detainee Interrogation Techniques. (Church Report)
13. Memorandum for Secretaries of the Military Departments, et al, Subject: Application of Common Article 3 of the Geneva Conventions to the Treatment of Detainees in the Department of Defense.
14. U.S. DEP'T OF DEFENSE, DIR. 2311.01E, DOD LAW OF WAR PROGRAM (9 May 2005).
15. U.S. DEP'T OF THE ARMY, FIELD MANUAL 2-22.3. HUMAN INTELLIGENCE COLLECTOR OPERATIONS (6 Sept. 2006).
16. Military Commission Act of 2006; Public Law 109-366- Oct 17, 2006.
17. U.S. DEP'T OF DEFENSE, INSTR. 2310.081E MEDICAL PROGRAM SUPPORT FOR DETAINEE OPERATIONS (6 June 2006).
18. JOINT CHIEFS OF STAFF, JOINT PUB. 3-63, DETENTION OPERATIONS (6 Feb. 2008).
19. Jennifer Elsea, Treatment of "Battlefield Detainees" in the War on Terrorism, Congressional Research Service Report, (27 Mar. 06) available at http://www.usembassy.at/en/download/pdf/battlefield_det.pdf.
20. U.S. DEP'T OF THE ARMY, FIELD MANUAL 3-19.40, INTERNMENT AND RESETTLEMENT OPERATIONS (4 Sept. 2007).

I. FRAMEWORK

A. Throughout the 20th century, American forces have engaged their adversaries in numerous conflicts across the entire spectrum of conflict. From the Banana Wars of the middle 1920s to World War II and Operation Desert Storm, American forces have captured personnel and treated them as criminals, insurgents, and prisoners of war (POW). Following the attacks of September 11, 2001, American forces continued to engage in conflicts that led to the detention of individuals.

B. The United States has been at the forefront of legally defining and treating its enemies since the inception of the Lieber Code in 1863.[1] The Hague Conventions of 1907 provided the first international attempt to codify treatment of captured individuals.[2] The first substantive treatment of captured personnel, however, was codified in

[1] Instructions for the Government of Armies of the United States in the Field, General Orders No. 100, (Apr. 24, 1863), reprinted in The Laws of Armed Conflicts 3 (Dietrich Schindler & Jiri Tomas eds., 3d ed., 1988) [hereinafter Lieber Code].

[2] *See* Hague Convention IV Respecting Laws & Customs of War on Land, Oct. 18, 1907, art. 4-20, 36 Stat. 2227 [hereinafter Hague IV].

the 1929 Geneva Conventions Relative to Prisoners of War.[3] Following World War II the international community came together to improve the 1929 POW conventions to address significant shortcomings that arose during World War II. The 1949 Geneva Conventions became the preeminent international standard for treatment of POWs.[4]

1. The full body of customary international law as well as the Geneva Conventions of 1949 is triggered when an international armed conflict arises between two high contracting parties to the convention.[5] Referred to as Common Article 2 conflicts, international armed conflict occurs during declared war or de facto conflicts between two contracting states. The easiest example to describe a recent international armed conflict is Desert Storm in which the United States and its coalition partners fought Iraq for control of Kuwait.

2. Partial or total occupation of the territory of a high contracting party also triggers the full body of customary international law as well as the Geneva Conventions of 1949.[6]

C. The United States has also participated in various internal armed conflicts.[7] These conflicts are traditionally known as civil wars. They do not involve two belligerent states fighting each other. Rather they involve one nation fighting indigenous forces and may involve another state assisting the current government's attempt to retain its sovereignty. These internal conflicts have significantly less internationally based protections for its combatants than are provided by international law to combatants in international armed conflicts; the primary protections afforded to those involved in internal armed conflict derive from domestic law.[8] The protections afforded from Common Article 3 of the Geneva Conventions do provide a minimal amount of protections for combatants involved in internal armed conficts.[9] These protections are generally accepted as so basic to fundamental human rights that their universality is rarely questioned. American assistance to Columbia in its fight against the Revolutionary Armed Forces of Colombia (Fuerzas Armadas Revolucionarios de Colombia) (FARC) is an example of American forces in an internal armed conflict.

1. Within the framework of the GWOT, are examples of both international and internal armed conflicts.

a. The United States characterized military operations conducted against the Taliban in Afghanistan during Operation Enduring Freedom (OEF) as international armed conflict, even though there was some question as to whether the Taliban constituted a government of that nation or was more appropriately characterized as one of a number of warring factions in a failed state. The United States also characterized military operations against the armed forces of Iraq in Operation Iraqi Freedom (OIF) as an international armed conflict. The United States Government's position as of October 2005 is that neither of these international armed conflicts have officially terminated. Moreover, the U.S. / Coalition presence is also based on our status as an invitee to the country as reflected in the United Nations Security Council Resolution (UNSCR) 1546 and UNSCR 1790. It such a case, these provide authority to act IAW the UNSCR and in reliance on the host nation invitation/request for assistance. There has been no formal termination of either conflict, and large numbers of U.S. military personnel continue to conduct combat operations in both countries. Additionally, U.S. forces have been continuously engaged in armed conflict with various opposition groups to include remnants of the Taliban in Afghanistan and former Iraqi armed forces, and Saddam loyalists in Iraq. In both nations, foreign fighters and other armed groups opposed to the new governments continue to engage U.S. forces. Issues related to operations conducted against such groups are addressed on a case by case basis reflecting the distinct nature of these conflicts from the broader international armed conflicts surrounding them.

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[3] Convention Relative to the Treatment of Prisoners of War, July 27, 1929, 47 Stat. 2021, 2 Bevans 932.

[4] *See* Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC III], Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC IV].

[5] GC III, *supra* note 4, art. 2. Additionally, cases of either partial or total occupation trigger the full body and protections of the Geneva Conventions. *Id.*

[6] *Id.*

[7] *See id*. art. 3.

[8] Although the United States does not recognize the applicability of Human Rights law in the International Armed Conflicts (IAC) because the United States view the law of war as the *lex specialis* of these conflicts, the United States and increasingly all States, recognize that domestic protections for those involved in Internal Armed Conflicts are based on Human Rights law.

[9] *Id.*

b. Other coalition partners, nations, international organizations, and commentators have asserted that while U.S. forces were engaged in international armed conflict initially in Afghanistan and Iraq, U.S. forces are now engaged in internal armed conflicts in support of the nascent Afghani and Iraqi governments as they strive to defeat opposition groups. No matter how the conflicts are characterized, there is little dispute that both situations qualify as armed conflicts. For purpose of U.S. legal advisors, this requires analysis of applicable policy related to the conduct of military operations by U.S. forces — specifically DOD policy related to compliance with the law of war is established in DOD Directive 2311.01E.[10] The clear policy mandate of that directive is that the armed forces of the United States will comply with the law of war applicable to international armed conflict during all armed conflicts, however such conflicts are characterized, and in all other military operations.[11] The Army doctrine for specific treatment of detainees and the internment or resettlement of civilians is contained in AR 190-8 and FM 3-19.40 – both of which are drafted with Geneva Conventions III and IV as the standard. These standards of treatment are the default standards for detainee operations, unless directed otherwise by competent authority (usually the Combatant Commander or higher).

c. The main take away for the legal advisors involved in detainee operations in today's operational environment is that there will likely be some uncertainty related to the nature of armed conflicts. Even when the nature of the conflict seems relatively apparent, each conflict will likely include new policy changes. With respect to detainee issues, it is essential to emphasize the basic mandate to treat all detainees humanely; to treat captured personnel consistently with the GC III until a more precise determination is made regarding status; and to raise specific issues on a case by case basis when resort to the policy mandate is insufficient to provide effective guidance to the operational decision-makers.

II. LEGALLY DEFINED PERSONS

A. This Section will examine three constructs used in detainee operations: Department of Defense Directive 2310.01E, Geneva Convention III, Relative to the Treatment of Prisoners of War (GC III), and the Military Commissions Act of 2006. Absent the specific triggers of both the right type of conflict and right type of person, practicing JAs should look to the DoD Directive first for definitions applicable to detention operations.

1. Departmentt of Defense Directive 2310.01E. The following definitions are found in DoDD 2310.01E, Department of Defense Detainee Program.

a. *Detainee*.[12] Any person captured, detained, held, or otherwise under the control of DoD personnel (military, civilian, or contractor employee). It does not include persons being held primarily for law enforcement purposes, except where the United States is the Occupying Power. It includes any person held during operations other that war. This is the default term to use when discussing persons who are in custody of U.S. Forces. A POW may be termed a detainee initially by U.S. forces if there is doubt as to his status. If he is later declared a POW by competent authority he should be called an EPW.[13] It is good practice to have capturing forces refer to persons in their custody as detainees if there is doubt as to their status. A detainee may also include the following categories:

b. *Enemy Combatant*.[14] In general, a person engaged in hostilities against the United States or its coalition partners during armed conflict. The term "enemy combatant" includes both "lawful enemy combatants" and "unlawful enemy combatants."

(1) *Lawful Enemy Combatant.*[15] Lawful enemy combatants, who are entitled to protections under the Geneva Conventions, include members of the regular armed forces of a State party to the conflict; militia, volunteer corps, and organized resistance movements belonging to a State party to the conflict, which are under responsible command, wear a fixed distinctive sign recognizable at a distance, carry their arms openly, and abide by

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[10] U.S. DEP'T OF DEFENSE, DIR. 2311.01E, DOD LAW OF WAR PROGRAM, (9 May 2005) [hereinafter DOD DIR. 2311.01E].

[11] *Id*. para. 4.1.

[12] U.S. DEP'T OF DEFENSE, DIR. 2310.01E, THE DEPARTMENT OF DEFENSE DETAINEE PROGRAM, para. E2.1. (5 Sept. 2006) [hereinafter DOD DIR. 2310.01E].

[13] *See* GC III, *supra* note 4, art. 5.

[14] DOD DIR. 2310.01E, *supra* note 10, para. E.2.1.1.

[15] *Id.* para. E.2.1.1.1.

the law of war; and members of regular armed forces who profess allegiance to a government or an authority not recognized by the detaining power.[16]

(2) *Unlawful Enemy Combatant*.[17] Unlawful enemy combatants are persons not entitled to combatant immunity, who engage in acts against the United States or its coalition partners in violation or the laws and customs of war during an armed conflict. For purposes of the war on terrorism, the term Unlawful Enemy Combatant is defined to include, but is not limited to, an individual who is or was part of or supporting Taliban or al Qaeda forces or associated forces that are engaged in hostilities against the United States or its coalition partners.

c. *Enemy Prisoner of War*.[18] Individuals under the custody and/or control of the Department of Defense according to GC III, Articles 4 and 5.

d. *Retained Person*.[19] Individuals under the custody and/or control of the Department of Defense according to GC III, Article 33.

e. *Civilian Internee*.[20] Individuals under the custody and/or control of the Department of Defense according to GC IV, Article 4.[21]

2. The following are defined persons that can be found in Geneva Conventions III (GC III) and IV (GC IV).

a. *Prisoner of War (POW)*. A detained person as defined in Article 4 of GC III. Traditionally these are members of the armed forces of a party or militias forming a part of an armed force who comply with criteria set out in Article 4(a)(2) of GC III. The term Enemy Prisoner of War (EPW) is also used by U.S. forces.[22] There is no legal difference between POWs and EPWs. As a practice EPW refers to POWs that Americans capture in international armed conflict. POW is the term for US service members captured by our enemy. POW is also the international name of choice for armed forces captured on the battlefield.

b. *Protected Person*. A person protected under GC IV is any person who at a given moment and in any manner whatsoever finds himself in case of conflict or occupation, in the hands of a Party to the conflict or Occupying Power, of which he is not a national.[23] Furthermore, if an individual falls into one of the following four categories, they are excluded from the protections given to a "protected person" under the GC IV: a) nationals of a State not bound by the GC; b) nationals of a neutral State with normal diplomatic relations with the Detaining Power; c) nationals of a co-belligerent State with normal diplomatic relations with the Detaining Power; or d) individuals covered by another Geneva Convention.[24]

c. *Detainee*. This term is not specifically defined in the Geneva Conventions.[25] However, this term is used in some articles discussing the due process rights of civilians being held by an Occupying Power.

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[16] This language mirrors the requirements found in article 4(a)(2) of the Third Geneva Convention (GC III). *See* GC III, *supra* note 4, art. 4. Therefore, in cases where additional guidance may be required, look to the law surrounding the development of GC III, article 4. This definition of lawful enemy combatant is narrower than the definition of enemy prisoner of war. The definition of lawful enemy combatant is limited to GC III, art. 4(a)(1) & (2); whereas, the definition of enemy prisoner of war includes all six categories of potential prisoner of war found in GC III, art. 4(a)(1)-(6). GC III, *supra* note 4, art. 4.

[17] DOD DIR. 2310.01E, *supra* note 10, para. E.2.1.1.2.

[18] *Id.* para. E.2.1.2.

[19] *Id.* para. E.2.1.3.

[20] *Id.* para. E.2.1.4.

[21] These individuals qualify as "protected persons" under the Fourth Geneva Convention (GC IV). *See* GC IV, *supra* note 4, art. 4. Protected persons are entitled to various protections in Part II and Part III of GC IV. *Id.* Refer to the GC IV outline for additional details.

[22] DOD DIR. 2310.01E, *supra* note 10, para. E2.1.2.

[23] GC IV, *supra* note 4, art. 4.

[24] *Id.* In practice, few individuals would fall outside the protected person status since virtually all nations today consider themselves bound by the Conventions and any individual meeting the criteria of exclusion b and c should already receive some level of protection based upon the bilateral relationship between their State and the detaining powers. Thus, in current operations in OIF and OEF almost all persons would be "protected person" in some way.

[25] GC IV, *supra* note 4, art. 76.

d. *Civilian Internee*. A civilian internee is a civilian who is interned during international armed conflict or occupation for imperative reasons of security or for committing an offense against the detaining power.[26]

3. Further guidance has been promulgated in the Military Commissions Act of 2006 (MCA).[27] Recent court decisions found that "detainees could not be tried as "unlawful enemy combatants" under the MCA if the individual was designated only an "enemy combatant" by Combatant Status Review Tribunals (CSRT) rather than an "unlawful enemy combatant."[28] The definition of unlawful enemy combatant in the MCA, however, is slightly different from that found in the DODD 2310.01EIn the Act, the following definitions apply:

a. *Lawful Enemy Combatant*. The term "lawful enemy combatant" means a person who is—

(1) A member of the regular forces of a State party engaged in hostilities against the United States;[29]

(2) A member of a militia, volunteer corps, or organized resistance movement belonging to a State party engaged in such hostilities, which are under responsible command, wear a fixed distinctive sign recognizable at a distance, carry their arms openly, and abide by the law of war;[30] or

(3) A member of a regular armed force who professes allegiance to a government engaged in such hostilities but not recognized by the United States.[31]

b. *Unlawful Enemy Combatant*. The term "unlawful enemy combatant" means—

(1) a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces);[32] or

(2) a person who, before, on, or after the date of the MCA, has been determined to be an unlawful enemy combatant by a CSRT or another competent tribunal established under the authority of the President or the Secretary of Defense.[33]

4. Other terms for Detainees. The following names have been used to describe persons detained by U.S. forces in the GWOT. Some of the terms have no legal background while others are used to describe persons who did not appear to fit neatly into the recognized framework of the Geneva Conventions. The key for JAs is to ensure that servicemembers treat all detainees humanely. Judge Advocates can look to Common Article 3 as a minimum yardstick for human treatment. Since the adoption of various definitions in DoD Directive 2310.01E, JAs should work to categorizing detainees in accordance with the DoD Detainee Program or Geneva Conventions at the lowest possible level.

a. Unlawful Combatant / Belligerent

b. Person of Interest / Person Under US Control (PUC)

c. Terrorist

d. Security Detainee

e. Unprivileged Belligerent

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[26] *See generally*, GC IV, *supra* note 4, art. 79-135 (discussing the protections afforded to civilian internees).

[27] Military Commissions Act of 2006, 10 U.S.C. § 948a et seq. (2000). Note that the MCA likely has a narrow application to cases arising from detainees held at Guantanamo Bay.

[28] Michael Sung, *Pentagon seeking reconsideration of Guantanamo dismissals, available at* http://jurist.law.pitt.edu/paperchase/2007/06/pentagon-seeking-reconsideration-of.php. The Military Commissions Act of 2006 and its definition of "unlawful enemy combatant" did not exist when these initial individuals were classified.

[29] 10 U.S.C. § 948a(2)(A).

[30] 10 U.S.C. § 948a(2)(B).

[31] 10 U.S.C. § 948a(2)(C).

[32] 10 U.S.C. § 948a(1)(A)(i).

[33] 10 U.S.C. § 948a(1)(A)(ii).

III. DETAINEE OPERATIONS IN GWOT

A. Operation Enduring Freedom (OEF)[34]

1. Following the attacks on the United States on September 11, 2001, the United States prepared a myriad of potential responses against the attackers. Once Al-Qaida was identified as the entity responsible for the attack, the United States attacked the Al-Qaida leadership and their Taliban allies in Afghanistan. In a Presidential Order dated 13 Nov 2001, the President of the United States authorized the Secretary of Defense (SECDEF) to detain individual subjects captured by American forces.[35] The order listed the basic protections that the individuals would receive,

a. Humane treatment without distinction based on race, color, religion, gender, birth, wealth or similar criteria;[36]

b. Adequate food, drinking water, shelter, clothing, and medical treatment;[37]

c. Free exercise of religion consistent with requirements for detention;[38] and

d. In accordance with other such conditions as the SECDEF may proscribe.[39]

2. The protections afforded captured individuals were not as broad as those found in Common Article 3 of the Geneva Conventions and were subject to criticism from domestic and international commentators.

3. On July 7, 2006, the Deputy Secretary of Defense issued new guidance to DoD in regards to individuals detained in the GWOT.[40] Following the U.S. Supreme Court's decision in *Hamdan v. Rumsfeld*,[41] the official DoD position is that Common Article 3 of the 1949 Geneva Conventions applies as a matter of law to the conflict with Al-Qaida.[42] The status of Al-Qaida, as an organization, has not changed. They remain a non party to Geneva Conventions and therefore do not qualify for protection under the full body of the Geneva Conventions and customary international law.

B. Prelude to Guantanamo (G'TMO)

1. American and allied forces captured thousands of Taliban and Al-Qaida fighters during OEF.[43] Among the captured were American citizens as well as nationals from numerous countries as diverse as Australia and Saudi Arabia. Afghan nationals were also captured along with the foreign fighters. This led to the first distinction based on nationalities and rationale for the treatment given to these detainees.

2. Initial guidance for American forces was to TREAT the detainees in accordance with GC III but not to grant the STATUS of POW to the detained personnel. As the detainees were being transferred to G'TMO the policy guidance became public.

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[34] For a full discussion of the historical treatment of both Al Qaida and the Taliban during the Global War on Terror see Congressional Research Service Report, *Treatment of "Battlefield Detainees" in the War on Terrorism*, Jennifer Elsea, updated 27 March 06 at http://www.usembassy.at/en/download/pdf/battlefield_det.pdf

[35] 66 Fed. Reg. 57833, 57834.

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] Memorandum, Deputy Secretary of Defense, to Secretaries of the Military Departments, subject: Application of Common Article 3 of the Geneva Conventions to the Treatment of Detainees in the Department of Defense (7 July 2006) *available at* http://www.defenselink.mil/news/Aug2006/d20060814comm3.pdf (last visited July 31, 2007) [hereinafter England Memorandum].

[41] Hamdan v. Rumsfeld, 344 F.Supp.2d 152, 162 (D.D.C. 2004), *rev'd* 413 F.3d 33 (D.C. Cir. 2005), *rev'd* 548 U.S. 126 (2006).

[42] DoD Dir. 2310.01E, *supra* note 10, para. 4.2.

[43] Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 98 Am. J. Int'l L. 820 (2004).

C. Treatment vs. Status

1. On January 19, 2002, the SECDEF transmitted to DoD the official USG position on the status of Taliban and Al-Qaida individuals under US control.[44] This policy was backed by a memorandum from the Department of Justice Office of Legal Council to Counsel to the President, Alberto Gonzales and General Counsel to DoD, William Haynes. The memo laid out the legal rationale for the denial of POW status for Taliban and Al-Qaida detainees.

2. The advice provided to the President and subsequently passed to DoD was formally mandated by Presidential memorandum dated February 7, 2002 and publicized by a press conference on the same day. The presidential memorandum did not take as expansive view of Afghanistan as a failed state but it did end up with the same conclusions relative to Al-Qaida and the Taliban.[45] Al-Qaida is a transnational criminal organization; therefore, its members are not protected by the Geneva Conventions. The Taliban are not protected by the Geneva Conventions because they failed to meet the criteria of GC III, art. 4(a)(2).[46]

a. The Taliban practice of not adhering to these criteria may be the object of some question regarding one or two of the provisions but there is little to no question that they did not adhere to all four which is the requirement for militia members to rate POW status.

b. The other subject of disagreement is whether the Taliban even have to adhere to the criteria since they were the legitimate armed force of Afghanistan and should be accorded status based on GC III art. 4(a)(1), which can be argued as well, grants status based on membership in the armed service of a high contracting party.

3. Of particular note to those working with allies is Additional Protocol I (AP I). Neither, the United States nor Afghanistan is a party to AP I. However, several of our allies, to include Great Britain, did ratify AP I. AP I recognizes a much less onerous standard for individuals to qualify for POW status. Under AP I, anyone who openly carries their arms in the attack and follows the law of war can qualify for POW status.[47]

4. Following the US Supreme Court's decision in Hamdan v. Rumsfeld the official position to Al-Qaida has changed. The new DoD policy is that Common Article 3 of the 1949 GCs applies to the conflict with Al-Qaida as a matter of law. This position was initially promulgated in the 7 July 2006 memorandum from Deputy Secretary of Defense England.[48] It is now found in DoD Directive 2310.01E.[49] All DoD personnel, as well as all orders, policy, directives, execute orders, and doctrine will adhere to the CA3 standards.

D. Interrogation Methods

1. In August 2002, the Department of Justice Office of Legal Council (OLC) wrote an opinion on the legality of torture in light of the 1994 Torture Statute (18 U.S.C. §§ 2340-2340a).[50] The opinion when released was highly controversial and remains so today. It asserted that interrogation methods that did not cause death or severe pain would not run afoul of domestic law.[51] The opinion rested strongly on the ability of the President to authorize

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[44] Memorandum, Secretary of Defense, to Chairman of the Joint Chiefs of Staff, subject: Status of Taliban and Al Qaida (19 Jan. 2002) *available at* http://news.findlaw.com/hdocs/docs/dod/62204index.html.

[45] Presidential Memorandum, *supra* note 32.

[46] For militia, volunteer groups, or organized resistance movements to qualify as lawful combatants, they must meet the following criteria identified in Article 4(a)(2) of Geneva Convention III: 1) be under responsible command; 2) wear a fixed distinctive sign recognizable from a distance; 3) carry their arms openly; and 4) abide by the laws of war.

[47] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 44, June 8, 1977, 1125 UNTS 3 [hereinafter AP I]. While the United States has not ratified Geneva Protocol I, the United States remains bound by those provisions considered customary international law (CIL) assuming that the trigger for Common Article 2 is met. However, the United States does not view articles 44 or 45 of Geneva Protocol I to be CIL. Michael Matheson, *Session One: The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U.J. INT'L L. & POLICY 419 (1987).

[48] England Memorandum, *supra* note 38, para. 2.

[49] DOD DIR. 2310.01E, *supra* note 10, para. 4.2.

[50] Memorandum, Office of Legal Council, to Alberto R. Gonzalez, Counsel to the President, subject: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340a (1 Aug. 2002) *available at* http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.08.01.pdf.

[51] *Id.* at 4.

extreme measures commensurate with his powers as Commander in Chief.[52] Additionally interrogation methods that were violative of the Torture Statute were justifiable as self defense or necessity thereby voiding criminal liability. The August 2002 legal opinion was rescinded on December 31, 2004 by the Department of Justice, Office of Legal Council and a new opinion was published that reiterated the USG position that torture was violative of U.S. law.[53]

2. G'TMO and SOUTHCOM requested legal guidance on authorized interrogation measures they felt necessary to use on extremely resistant detainees.[54] In response to these requests, in December 2002, SECDEF promulgated measures more severe than FM 34-52 (which was the interrogation manual in effect at that time). These measures could only be used after being given specific approval from the appropriate level of command.[55]

3. In response to serious concerns of DoD uniformed JAs and Dept. of Navy General Counsel, SECDEF rescinded his December 2002 directive and returned interrogation techniques to those mirroring FM 34-52 (now FM 2-22.3). SECDEF also tasked DoD to form a working group to formulate guidance on interrogations that would comport with existing legal obligations.[56]

4. The DoD working group forwarded their recommendations to SECDEF in April 2003 which were transmitted to G'TMO with implementation guidance that the measures were only for G'TMO detainees.[57]

5. On December 30, 2005, President Bush signed the Department of Defense Appropriations Act of 2006 that included the "Detainee Treatment Act of 2005."[58]

a. Section 1002 directly relates to the treatment of detainees under DoD custody or effective control. No detainee in custody shall be subject to any treatment not authorized by the Army Field Manual on Intelligence Interrogation. The FM was recently re-released as FM 2-22.3.

b. Section 1003 states that no individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman or degrading treatment or punishment.[59] Note this section goes beyond DoD to the entire USG. This should be of special emphasis to JAs when dealing with agencies and personnel outside of DoD.

6. The Detainee Treatment Act along with numerous DoD publications recently published or revised will be the guidance for commanders and JAs as we continue to prosecute the GWOT.

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[52] *Id.* at 31.

[53] Memorandum, Acting Assistant Attorney General, to Deputy Attorney General, subject: Legal Standards Applicable Under 18 U.S.C. §§ 2340-2340A (Dec. 30, 2004) *available at* http://www.usdoj.gov/olc/18usc23402340a2.htm (last visited Aug. 1, 2007).

[54] Memorandum, Commander United States Southern Command, to Chairman of the Joint Chiefs of Staff, subject: Counter-Resistance Techniques (25 Oct. 2002) *available at* http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.12.02.pdf (last visited Aug. 1, 2007).

[55] Decision, Secretary of Defense, to Chairman of the Joint Chiefs of Staff, subject: Counter-Resistance Techniques (2 Dec. 2002) *available at* http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.12.02.pdf (last visited Aug. 1, 2007).

[56] Memorandum, Secretary of Defense, to General Counsel of the Department of Defense, subject: Detainee Interrogations (Jan. 15, 2003) http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/03.01.15b.pdf (last visited Aug. 1, 2007).

[57] Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations (Apr. 4, 2003) *available at* http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/03.04.04.pdf (last visited Aug. 1, 2007).

[58] Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2680 (also commonly referred to as the McCain Amendment); Detainee Treatment Act of 2005, Pub. L. No. 109-148. This law was passed twice, with identical language, in both the 2005 National Defense Appropriations Act and the National Defense Authorization Act. For purposes of this outline, all references will be to the Detainee Treatment Act will be as published in Public Law 109-148.

[59] "[C]ruel, inhuman, or degrading treatment or punishment means the cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States, as defined in the United States Reservations, Declarations and Understandings to the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment done at New York, December 10, 1984." *Id.* § 1003(d).

IV. DETAINEE OPERATIONS IN OIF

A. American forces with their coalition allies began combat operations against Iraq in March 2003.[60] The USG announced that the entire body of the law of war including the Geneva Conventions would apply to American forces during OIF.

B. Immediately after combat operations began, American and allied coalition Soldiers captured Iraqi soldiers who were dressed in civilian clothes. Allied forces also were engaged by Saddam Fedayeen[61] forces wearing civilian clothes. The majority of Iraqi forces captured in the opening days of the war were taken to Camp Bucca in southeastern Iraq. Some of these individuals qualified for protection under GC III as POWs. However, other individuals who were detained were civilians who took a direct part in hostilities or posed a threat to security, but who would not qualify as a POW under GC III, art. 4.

C. President Bush declared an end to major combat activities on May 1, 2003.[62] This ostensibly began the occupation of Iraq by American and allied forces. The American occupation ended on June 28, 2004 with the transfer of sovereignty to the interim Iraqi government.[63] During major combat operations as well as during the occupation, individual detainees, who meet the criteria of GC III, art. 4, could have qualified as a POW.

1. Recall that during a period of occupation the Geneva Conventions remain applicable law.[64] Forces may capture EPWs during an occupation as was the case with Saddam Hussein who was captured in December 2003. Hussein was an EPW at the time of his capture but he was also an unindicted war criminal who was facing prosecution by the Iraqi government.

2. During the summer of 2003, there was a rise of an insurgency, especially in Sunni dominated central Iraq. The state of occupation potentially triggered the full body and protections of GC IV.[65] However, some of the foreign fighters who came into Iraq after May 1, 2003 likely did not qualify for protections of GC IV because they would not be "protected persons" under the definition in Article 4, as they are nationals of a States Party to the Convention not at war with Iraq.[66] Specific protections to afford these individuals needed to be considered on a case by case basis. All other security internees are; however, afforded GC IV treatment per Coalition Provisional Authority Memorandum 3, subject to derogations necessary for "imperative reasons of security," under Article 5 of GC IV and FM 27-10 paragraph 248.

3. The position of the USG in October 2006 is that the United States is still engaged in international armed conflict in Iraq. This position is debated among international lawyers as noted previously. The key remains to treat all detainees humanely and in accordance with DoD policies, to include CA3 at a minimum.

V. ABU GHRAIB AND THE INVESTIGATIONS

A. During the October/November 2003 timeframe, numerous members of the 800th Military Police (MP) Brigade and 205th Military Intelligence (MI) Brigade took part in abuses that were subsequently reported to the world in 2004. The aftermath of the abuses as Abu Ghraib will resonate for years to come.

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[60] George W. Bush, President, President Bush Addresses the Nation (Mar. 19, 2003) *available at* http://www.whitehouse.gov/news/releases/2003/03/20030319-17.html (last visited Aug. 1, 2003).

[61] The paramilitary Fedayeen Saddam (Saddam's `Men of Sacrifice') was founded by Saddam's son Uday in 1995. Saddam's Martyrs "Men of Sacrifice" *Fedayeen* Saddam, http://www.globalsecurity.org/intell/world/iraq/fedayeen.htm (last visited Aug. 6, 2007). The Fedayeen, with a total strength reportedly between 18,000 and 40,000 troops, was composed of young soldiers recruited from regions loyal to Saddam. *Id.* The unit reported directly to the Presidential Palace, rather than through the army command, and was responsible for patrol and anti-smuggling duties. *Id.* Though at times improperly termed an "elite" unit, the Fedayeen was a politically reliable force that could be counted on to support Saddam against domestic opponents. *Id.*

[62] George W. Bush, President, President Bush Announces Major Combat Operations in Iraq Have Ended, Remarks by the President from the USS Abraham Lincoln At Sea Off the Coast of San Diego, California, (May 1, 2003) *available at* http://www.whitehouse.gov/news/releases/2003/05/20030501-15.html (last visited Aug. 1, 2007).

[63] S. C. Res. 1546, ¶ 1, U.N. Doc. S/RES/1546 (June 8, 2004).

[64] GC IV, *supra* note 4, art. 2.

[65] *See id.* art. 4.

[66] *See id.*

1. The events of the personnel at Abu Ghraib led to many investigations into the practices of the units involved as well as reviews of Department of the Army policy on detention operations in Iraq as well as Afghanistan and G'TMO. The following are the most applicable to detention operations:

2. Major General Taguba AR 15-6.[67] This investigation was initiated in January 2004 well before the release of the photos that sparked a media frenzy. This investigation focused on the 800th MP Brigade and found that among other problems, the MPs were not adequately trained for their mission and that no clear guidance on chain of command existed at Abu Ghraib.

3. Major General Fay/ Lieutenant General Jones AR 15-6.[68] The investigation was initiated in the spring of 2004 and focused on the activities of the 205th MI Brigade. Among major problems listed were confusion concerning authorized interrogation techniques, a failure of leadership, and the presence of Other Governmental Agencies (OGAs) that did not have the same rules or procedures as DoD personnel.

4. Department of the Army Inspector General (DAIG) Report on Detainee Operations.[69] The Inspector General of the Army completed an assessment of detainee doctrine in the United States Army. He found that the doctrine in place was basically sound and the brunt of the responsibility for abuses fell on the leadership of the units in question. The report did acknowledge that MP and MI doctrine needed to be revised to accommodate the presence of both units in detainee operations.

5. Schlesinger Report.[70] Former Secretary of Defense James Schlesinger headed an investigation team that reviewed the overall tenor of detention operations in the DoD. The investigation is a compilation of the above mentioned reports as well as several others. It highlighted that no one decision at any level led to the abuses of detainees. It generally shared in the conclusions of leadership failure at the tactical level as well as confusion as to the proper conduct of interrogations.

6. Church Report.[71] The most recent report released by DoD was the Final Report on Detainee Operations and Detainee Interrogation Techniques, chaired by Vice Admiral A.T. Church III. Among the main conclusions were: 1) One-third of detainee abuses occur at the point of capture (this reinforces the necessity of training all personnel in detainee handling); 2) There was a failure to react to early warning signs of abuse (this is a concept that military leaders must constantly guard against apathy and constantly monitor their units that are dealing with detainees); 3) There was a breakdown in fundamental good order and discipline in the units that had confirmed cases of abuse (this highlights the need for initial and refresher training for detainee operations).

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[67] Major General Antonio M. Taguba, Article 15-6 Investigation of the 800th Military Police Brigade (commonly referred to as the Taguba Report) (3 Mar. 2004).

[68] Major General George R. Fay, Army Regulation 15-6 Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade, (23 Aug. 2004) *available at* http://fl1.findlaw.com/news.findlaw.com/hdocs/docs/dod/fay82504rpt.pdf (last visited Aug. 1, 2007); Lieutenant General Anthony R. Jones, Army Regulation 15-6 Investigation of the Abu Ghraib Prison and 205th Military Intelligence Brigade (23 Aug. 2004) *available at* http://fl1.findlaw.com/news.findlaw.com/hdocs/docs/dod/fay82504rpt.pdf (last visited Aug. 1, 2007).

[69] Department of the Army The Inspector General, Detainee Operations Inspection, (commonly referred to as the DAIG Investigation) *available at* http://www4.army.mil/ocpa/reports/ArmyIGDetaineeAbuse/DAIG%20Detainee%20Operations%20Inspection%20Report.pdf (last visited Aug. 1, 2007).

[70] Honorable James Schlesinger, Final Report of the Independent Panel to Review Detainee DoD Operations (commonly referred to as the Schlesinger Report) (24 Aug. 2004) *available at* http://www.defenselink.mil/news/Aug2004/d20040824finalreport.pdf (last visited Aug. 1, 2007).

[71] Vice Admiral A.T. Church III, Review of Department of Defense Detention Operations and Detention Interrogation Techniques (7 Mar. 2005) (commonly referred to as the "Church Report") http://www.aclu.org/images/torture/asset_upload_file625_26068.pdf (last visited Aug. 1, 2007).

APPENDIX A: PRACTICAL CONSIDERATION OF DETAINEE OPERATIONS IN OIF

1. There is now a system in place "for the capture, evidence collection, processing, questioning, tracking, internment, prosecution, and subsequent release of captured individuals" detained in Iraq.[72] While some of the specific details and procedures remain classified, the basic requirements for compiling a detainee packet for a security internee will be discussed below.

2. The authority to detain individuals in Iraq stems from United Nations Security Counsel Resolution (UNSCR) 1546.[73] Internment is authorized "where this is necessary for imperative reasons of security."[74] This is the legal standard used by the Brigade Judge Advocate and Division Detainee Operations Officer who determines if there are reasonable grounds to support continued detention.

3. To ensure that an individual is properly detained, the unit must complete the correct administrative paperwork, provide evidence linking the defendant to the crime, and provide evidence linking the detainee to the witnesses.[75] Evidence linking the defendant to the crime includes photographs, sworn statements, diagrams, (PSD) and physical evidence.[76] The better the evidence collected at the site and consolidated as part of the initial packet, the more likely that the individual will remain detained if he poses an imperative threat to security (as demonstrated by intelligence) and successfully prosecuted for his criminal activities against military forces.

a. Photographs. Units should use photographs to connect the individual being detained to the basis for detention. These photographs can be and frequently are presented to judges at the Central Criminal Court of Iraq (CCCI).[77] Therefore, the more photographs that the unit takes on the objective, the better the potential case has for prosecution.[78]

(1) Individuals from the unit should take photographs of all potentially relevant evidence such as weapons, ammunition, money, detonators, etc.[79] Taking photographs helps maintain the integrity of the evidence. "In documenting your evidence at the site, you have not only shown the evidence exists, but what it looked like when you found it and where it was when you found it."[80] Therefore, take photographs before the evidence is moved.[81] Attempt to capture photographs covering 360 degrees around the site.[82]

(2) It is important to have one photograph where the individual detainee is visible next to the evidence.[83] However, if this photograph is not taken at the time of the operation, do not stage this type of photograph later. For security purposes, the detainee can be photographed while wearing zip ties. However, the detainee should not be blindfolded in the photograph since the blindfold will hinder the judge's ability to identify the detainee. U.S. forces should not be visible in the photographs.

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[72] CENTER FOR MILITARY LAW AND OPERATIONS, THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER & SCHOOL, U.S. ARMY, FORGED IN THE FIRE, LEGAL LESSONS LEARNED DURING MILITARY OPERATION 1994-2006 33 (Sept. 2006).

[73] S. C. Res. 1546, attached letter from Colin L. Powell, U.N. Doc. S/RES/1546 (June 8, 2004). The authority to detain individuals found in UNSCR 1546 was renewed by UNSCR 1637 in 2005 and UNSCR 1723 in 2006.

[74] *Id.*

[75] PowerPoint Presentation, Detainee Operations, Joint Readiness Training Center (2006) [hereinafter JRTC PowerPoint].

[76] TASK FORCE 134, MULTI-NATIONAL FORCE – IRAQ, SOLDIER'S INVESTIGATION GUIDE AND CRIME TIP MANUAL 3 (2006) [hereinafter TF 134 GUIDE].

[77] Although the CCCI original worked out of the Green Zone, it now has ten panels throughout Iraq located in Baghdad, Kut, Hillah, Baquba, Tikrit, Najaf, Karbala, Basrah. JRTC PowerPoint, *supra* note 73, at slide 12.

[78] Although most units have digital cameras, for those units who are likely to detain individuals, this provides justification for the acquisition of digital cameras.

[79] TF 134 GUIDE, *supra* note 74, at 4.

[80] PowerPoint Presentation, The All Army Evidence Awareness Training Support Package (3 Aug. 2007) (information contained in the notes section of slide 22) [hereinafter Evidence PowerPoint Presentation].

[81] *Id.* If time permits, take multiple photographs of the evidence. *Id.* One set should contain a measuring device to give the judge perspective. *Id.* If possible, take photographs from a ninety degree angle (from overhead) to capture the most accurate dimension. *Id.*

[82] *Id.*

[83] TF 134 GUIDE, *supra* note 74, at 4.

(3) Furthermore, the photographs should include any notable landmarks or reference points which may be helpful to put the scene into context for the judge.[84] A series of photographs of the site, building, or area will help establish the view so that the judge can formulate an idea of what the site looked like to Soldiers on the day of the operation.[85] It is important to mark the photographs with a date time stamp.[86] On a practical note, consider having the Brigade Commander make it a requirement for subordinate units to submit all photographs on two CDs as part of the detainee packet. One CD will be forwarded with the packet to the next level of detention (either the Division Detainee Collection Point or the Theater Internment Facility (TIF)). The second CD should be stored by either the Brigade Human Intelligence Officer (S2X) or the legal office.

b. Statements. At least two, preferably three, Soldiers who were at the scene must write a detailed account of why the individual is being detained.[87] Each sworn statement should cover the who, what, when, where, why and how of the detention.[88] These statements provide much of the information used to conduct the initial magistrate's review. Under the UNSCR, the packet must support a finding that detention is necessary for imperative reasons of security. By standard operating procedure (SOP), the United States applies a reasonable basis standard during this review. However, JAs should also consider the fact that the information contained in the initial packet is likely to be the same information used to support a higher legal standard applied by the court. Since it is unlikely that the unit will uncover a significant amount of additional information before the trial, it is important to collect as much information in the initial sworn statements as possible to support the court's standard. Remember, that it is the content of the statement that is key. Therefore, even if the Soldiers do not have a DA Form 2823 (Sworn Statement) available at the point of capture, they should record the information on any piece of paper and transfer the information to a DA Form 2823 as soon as the security situation permits. In the event there is insufficient **unclassified** evidence to prosecute a detainee before the Central Criminal Court of Iraq, units may still attempt to justify continued detention using classified evidence. To this end, it is imperative for the detaining unit to ensure such intelligence is provided with the packet to enable reviewers who do not recommend CCCI processing to recommend, instead, continued detention for imperative reasons of security.

(1) Who: Clearly identify the detainee by name and capture tag number. If multiple individuals are detained in the same operation, list all individuals who are detained together. It is important to link potential co-defendants together in both the sworn statement and one the apprehension form.[89] Furthermore, the statement should also identify other members of the unit who were present for the operation by full name and rank.[90]

(2) What: Explain what happened and the events leading up to the detainee's capture.[91] This description should include what the overall mission of the unit was that day, such as, patrol, convoy, or raid. Furthermore, this explanation should include what the unit found in terms of contraband, if anything.

(3) When: Record the date and time of the incident.[92] Include the time and location of all significant events that occurred during the mission. For example, if the unit took small arms fire before detaining the individual include the time and location for both the small arms fire and the detention.

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[84] *Id.*

[85] Evidence PowerPoint Presentation, *supra* note 78, slide 22.

[86] TF 134 GUIDE, *supra* note 74, at 4.

[87] *See* U.S. DEP'T OF ARMY, FIELD MANUAL 3-90.6, THE BRIGADE COMBAT TEAM Table G-1(4 Aug. 2006). Documenting the reason for detention is part of a common task trained to all Soldiers. Writing a sworn statement is part of the Tag requirement from the 5Ss and T (Silence, Segregate, Safeguard, Speed to a Safe Area / Rear and Tag) training for detainees at the point of capture. *Id.* This is not a task imposed by the prosecutors.

[88] *Id.*

[89] If one of the potential co-defendants is released and others are forwarded to the theater internment facility (TIF), annotate the reason for the release in the files of all remaining co-defendants. Do not allow the detainees to "blame the crime on the guy who was released" when they are tried before the Central Criminal Court of Iraq.

[90] TF 134 GUIDE, *supra* note 74, at 4. Ideally, you should list at least five Soldiers who were actual witnesses to the detention. *Id.* Remember that the individuals prosecuting this case are likely not assigned to your unit. The prosecutors are likely assigned to another service. The case may not go to trial for six to twelve months. Add as much contact information as possible to help make future witness production easier.

[91] TF 134 GUIDE, *supra* note 74, at 5.

(4) Where: The statement should include both a grid location and physical description of where the individual was detained. While other members of the military can related to the grid location, local judges are better able to relate to a physical description that refers to local landmarks. Therefore, the where section of the statement should identify the nearest town, street name (local not the Main Supply Route (MSR) name given by US forces), mosque, or other notable landmark.[93]

(5) Why: Explain what the events and / or unclassified information that led the unit to the search or to the detention. Furthermore, annotate whether or not the detainee made a confession or admission at the point of capture.[94]

(6) How: Explain how the unit accomplished the mission and how the items or detainees were found.

(7) Classification: Attempt to ensure that the content of each statement is unclassified. While the detainee packet itself may contain information from classified target folders, intelligence debriefings, or other classified information, the statements should contain only information that is releasable to the Iraqi government without further redaction or reclassification.

c. Diagrams. Diagrams or sketches are essential to put the operation into context for the judge. The diagram relates the location of either the physical evidence seized by US forces to the location of the detainee in the house, on the street, or in the field. The diagram, or sketch, "is the quickest and easiest way to document and exhibit the layout of a site."[95] Ideally, Soldiers should complete the diagram "before the evidence is collected and it should be used to reaffirm the location of evidence, and the location of your site."[96] The diagram should also correspond to the photographs taken at the site.[97] The diagram can help relate the location of landmarks or other significant points of interest to where the evidence was found. Make sure that the diagram has a key or legend, as required. Ensure that distances are properly marked. Estimates of sizes and distances are acceptable if taking exact measurements is not feasible.

4. The contents of the detainee packet supplement the physical evidence taken from the objective. The unit may and should seize items that connect the detainee to the basis for detention.[98] Examples of evidence seized by U.S. forces could include the following: weapons, scopes, ammunition, cell phones, pagers, documents, computers, thumb drives, fake identification documents, passports, bomb making material (such as wiring, circuit boards, blasting caps, plastic explosives, artillery rounds, copper, batteries, car alarms, garage door openers, and timers.[99]

a. Evidence Handling: Attempt to maintain evidence consistent with chain of custody requirements for evidence presented in U.S. courts. While the evidence may not be presented before the judge, the chain of custody is still important from an operational, intelligence and legal perspective.

b. It is important to document all property seizures with either a DD Form 2745 (Enemy Prisoner of War [EPW] Capture Tag) or DA Form 4137 (Evidence Property/Custody Document).[100] Make sure that the

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[92] *Id.* The time date group should be consistent with the information presented on the apprehension form. If there is any inconsistency between the date time group in the sworn statement and that in the apprehension form, then the Combined Review and Release Board will use the information on the apprehension form. Interview with Lieutenant Commander David D. Furry, Student 55th Judge Advocate Officer Advanced Course, in Charlottesville, VA (Nov. 16, 2006) (discussing his previous assignment with Task Force 134 working on the Combined Review and Release Board).

[93] TF 134 GUIDE, *supra* note 74, at 5.

[94] *Id.* Furthermore, the statement should refer to whether or not the detainee signed the evidence inventory form.

[95] Evidence PowerPoint Presentation, *supra* note 78, slide 23.

[96] *Id.*

[97] Clearly label the diagram so that the link to various photographs is as clear as possible.

[98] The general rule regarding property is that "it is especially forbidden to destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war." Hague IV, *supra* note 2, art. 23(g). Any property seized by members of the United States armed forces is property of the United States and not property of the individual conducting the seizure. U.S. DEP'T OF ARMY, FIELD MANUAL 27-10 THE LAW OF LAND WARFARE para. 396 (18 July 1956) [hereinafter FM 27-10].

[99] PowerPoint Presentation, The All Army Evidence Awareness Training Support Package (3 Aug. 2007).

[100] *See* FM 27-10, *supra* note 96, para 409. The information contained on the DA Form 4137 may be used to support or refute future claims by detainees. Therefore, the content should be as thorough and accurate as possible.

documentation clearly ties the item to one individual if multiple individuals are detained during the same operation. If neither the DD Form 2745 nor the DA Form 4137 is available on the objective, capture the content of the information to be transferred to the proper form later in a more secure location.

c. Note that only a Commander can order the seizure of funds. If the unit seizes any money, account for each piece of currency by amount. Furthermore, United States currency must be accounted for by serial number. Thus, a key element of unit level planning is also obtaining a safe to ensure the evidence custodian has a means to secure cash and other high value items. Such funds may be turned over to finance, but all evidence custodians should be trained and maintain records of such transactions just as would a Class A agent or armorer from the arms room to protect themselves.

5. Minimum Mandatory Forms Required for a Detainee Packet

a. Multi-National Forces Iraq Apprehension Form

b. DA Form 2823 (Sworn Statement) (times two)

c. DA Form 4137 (Evidence Property / Custody Document)

d. DD Form 2708 Receipt for Inmate or Detained Person

e. Evidence Inventory Form (unnumbered, bi-lingual, published by Task Force 134)

6. Top Ten Detainee Packet Deficiencies.[101]

a. Statements with insufficient detail.

b. X-spray results as the sole piece of evidence.

c. Detaining groups without investigating the culpability of each member of the group (this results in insufficient evidentiary packets and without Evidence to prosecute, detainees must be released)

d. Enemy propaganda as the sole piece of evidence.

e. Detaining small time crooks (extra weapons, curfew violator) (These individuals do not meet the criteria for continued detention absent other evidence. There dentition cannot be considered necessary for imperative reasons of security in most cases and their crimes should be handled by the Iraqi system).

f. Identical statements provided by multiple witnesses.

g. Detainee engaged in suspicious activity (lying to or fleeing from CF).

h. Only evidence supporting detention is guilt by association (phone activity with known bad guys)

i. Lack of photos or diagrams.

j. Failure to corroborate times with events.

7. Role of the JAG may include the following:

a. Review the initial packet for completeness and conduct a magistrate's review.

b. Ensure accuracy of the forms submitted in the packet and assist the unit in identifying relevant evidence or information that could support continued detention.

c. Be the counselor who is willing to advise the Commander when the evidence does not support continued detention.

d. Be prepared to answer requests for assistance from higher headquarters prosecuting the detainee before the Central Criminal Court of Iraq.

e. Provide an advocacy memorandum for select detainees being processed for early release.

f. Participate in regular inspections of detention facilities.

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[101] 4th Infantry Division (OIF 05-07) After Action Review, 11-12 (1 Feb. 2007) (covering lessons learned by the Office of the Staff Judge Advocate).

g. Help prepare unit witnesses to testify before the CCCI and help the CCCI prosecutors locate the best witnesses to the incident.

8. Reviews of the File

a. Each detainee packet will undergo a number of legal reviews to provide the detainee due process. These reviews occur at the following command levels:

(1) Brigade: A member of the brigade legal team will conduct an initial legal review within the first 72 hours to 7 days.

(2) Division: If the Brigade nominates the individual for continued detention at the Theater Interment Facility (TIF), the division legal office will conduct a review.

(3) Theater Internment Facility (TIF): During the initial in-processing of the detainee at the TIF, a JA assigned to Task Force 134 will conduct a magistrate's review to determine whether the individual should be recommended for expedited release, prosecution by the CCCI, or further detention and review by the Multinational Forces Review Committee (MNFRC).

(4) Multi-National Forces Review Committee (MNFRC): The detainee has the opportunity to appeal, in person, the magistrate's recommendation of continued detention. The MNFRC can recommend release, continued detention with or without reintegration training. The MNFRC consists of three US officers. While the procedures are similar to an Article 5 tribunal, the purpose is to determine if further detention is warranted rather than to determine status. This committee will see classified information about the detainee.

(5) Combined Review and Release Board (CRRB): The CRRB is a board composed of both local nationals and United States military officers. The detainee's file should be presented to this board within six months of the detainee arriving at the TIF. This committee WILL NOT see classified information about the detainee, and if there is insufficient evidence to detain, may well recommend release. This decision goes to the Chief of Detention Operations for final decision who WILL see any classified information before rendering his or her decision

(6) Joint Detainee Review Committee (JDRC): The JDRC is also a board composed of both local nationals and United States military officers. Generally, the file of any individual detained for more than eighteen months will be considered by the JDRC. Any recommendation by the JDRC for continued detention beyond eighteen months must be approved by the Prime Minister of Iraq and the Commander, Multi-National Forces-Iraq.

b. This process has evolved over time to increase the due process afforded to each individual detainee. This process may continue to evolve and JAs should look for updates or changes as posted in theater specific SOPs.

c. In order to understand the decision made regarding detainees from a specific area of operations (AOR), Brigade Judge Advocates (BJA) should identify and meet the JA assigned to TF 134 who works the initial review, CCCI, CRRB, and JDRC for their specific AOR. This will enable the BJA to potential learn of trends either for detention or release that directly impact their command.

APPENDIX B: DETAINEE OPERATIONS AT THE POINT OF CAPTURE ("THE FIVE S's AND T")

Search	Search each detainee for weapons, items of intelligence value, and items that would make escape easier or compromise US security interests. Confiscate these items. Prepare a receipt when taking property DA Form 4137 (Evidence/Property Custody Document). ***Note.*** When possible, conduct same gender searches. When not possible, perform mixed gender searches in a respectful manner. Leaders must carefully supervise Soldiers to prevent allegations of sexual misconduct. Detainees may keep the following items found in a search: Protective clothing and equipment that cannot be used as a weapon (such as helmets, protective masks and clothing) for use during evacuation from the combat zone. Retained property, once cleared by military intelligence personnel or other authority may consist of, identification (ID) cards or tags, personal property having no intelligence value and no potential value to others (such as photos, mementos, etc.), clothing, mess equipment (except knives and forks), badges of rank and nationality, decorations, religious literature, and jewelry. (Personal items, such as diaries, letters, and family pictures may be taken by MI teams for review, but are later returned to the proper owner). ***Note.*** Initially all property is taken into custody. Confiscate currency only on the order of a commissioned officer (AR 190-8) and provide a receipt and establish a chain of custody using DA Form 4137 or any other field expedient substitute.
Silence	Silence the detainees by directing them not to talk. Muffle may be employed if necessary (ensure detainee can breathe after application).
Segregate	Segregate detainees based on perceived status and positions of authority. Segregate leaders from the remainder for the population. Segregate hostile elements such as religious, political, or ethnic groups hostile to one another. For their protection, segregate minor and female detainees from adult male detainees whenever possible.
Safeguard	Safeguard the detainees. Ensure detainees are provided adequate food, potable water, clothing, shelter, and medical attention. Ensure detainees are not exposed to unnecessary danger and are protected (afforded the same protective measures as the capturing force) while awaiting evacuation. Do not use coercion to obtain information from the captives. Provide medical care to wounded and/or sick detainees equal in quality to that provided to US forces. Report acts or allegations of abuse through command channels, to the supporting judge advocate, and to the US Army Criminal Investigation Command.
Speed to Safe Area / Rear	Evacuate detainees from the battlefield as quickly as possible, ideally to a DCP or detainee holding area where MPs take custody of the detainees. Transfer custody of all captured documents and other property to the US forces assuming responsibility for the detainees.
Tag	Use DD Form 2745 (Enemy Prisoner of War [EPW] Capture Tag). Include the following information: (1) Date and time of the capture (2) Location of the capture (grid coordinates) (3) capturing unit (4) circumstances of capture. Indicate specifically why the person has been detained. Use additional documentation when necessary and feasible to elaborate on the details of capture: Documentation should answer five Ws – who, what, where, why, and witnesses. Use a form, such as a DA Form 2823 (Sworn Statement) or an appropriate field expedient, to document this information. List all documents and items of significance found on the detainee. Attach Part A, DD Form 2745, to the detainee's clothing with wire, string, or another type of durable material. Instruct the captive not to remove or alter the tag. Maintain a written record of the date, time, location, and personal data related to the detention. Attach a separate identification tag to confiscated property that clearly links the property with the detainee from whom it was seized.[102]

[102] U.S. DEP'T OF ARMY, FIELD MANUAL 3-90.6, THE BRIGADE COMBAT TEAM Table G-1(4 Aug. 2006).

NOTES

NOTES

CHAPTER 13

DOMESTIC OPERATIONS

REFERENCES

1. Posse Comitatus Act, 18 U.S.C. § 1385 (2000)
2. Military Support for Civilian Law Enforcement Agencies, 10 U.S.C. §§ 371-382
3. Insurrection Statutes, 10 U.S.C. §§ 331-334
4. Stafford Act, 42 U.S.C. § 5121, et seq., as amended
5. Defense Against Weapons of Mass Destruction Act of 1996, P.L. 104-201
6. Drug Interdiction and Counter-Drug Activities, 32 U.S.C. § 112
7. Response to Threats of Terrorist Use of Weapons of Mass Destruction, 50 U.S.C. § 2311
8. Duties Relating to Defense Against Weapons of Mass Destruction, 10 U.S.C. § 12310(c)
9. National Defense Authorization Act for Fiscal Year 1997, P.L. 104-201, Section 1031, as amended, Authority to Provide Additional Support for Counter-Drug Activities of Mexico
10. National Defense Authorization Act for Fiscal Year 1998, P.L. 105-85, Section 1033, Authority to provide Additional Support for Counter-Drug Activities of Peru and Colombia
11. National Security Strategy for Homeland Security, Office of Homeland Security, October 2007
12. National Defense Authorization Act for Fiscal Year 1998, P.L. 105-85, Section 1033, Authority to provide Additional Support for Counter-Drug Activities of Peru and Colombia
13. Homeland Security Act of 2002, Pub. L. No. 107-296 (2002).
14. National Response Framework, January 2008
15. USNORTHCOM, CONPLAN 2502
16. U.S. DEP'T OF DEFENSE, DIR. 3025.15, MILITARY ASSISTANCE TO CIVIL AUTHORITIES (18 Feb. 1997)
17. U.S. DEP'T OF DEFENSE, DIR. 5525.5, DOD COOPERATION WITH CIVILIAN LAW ENFORCEMENT (15 Jan. 1986; change one, 20 Dec. 1989)
18. U.S. DEP'T OF DEFENSE, DIR. 5210.56, USE OF DEADLY FORCE AND THE CARRYING OF FIREARMS BY DOD PERSONNEL ENGAGED IN LAW ENFORCEMENT AND SECURITY DUTIES (1 Nov. 2001; change one, Jan. 24, 2002)
19. U.S. DEP'T OF DEFENSE, INSTR. 5525.10, USING MILITARY WORKING DOG TEAMS TO SUPPORT LAW ENFORCEMENT AGENCIES IN COUNTERDRUG MISSIONS (17 Sept. 1990)
20. U.S. DEP'T OF DEFENSE, DIR. 3025.12, MILITARY ASSISTANCE FOR CIVIL DISTURBANCE (MACDIS) (4 Feb. 1994)
21. U.S. DEP'T OF DEFENSE, DIR. 3025.1, MILITARY SUPPORT TO CIVIL AUTHORITIES (MSCA) (15 Jan. 1993)
22. U.S. DEP'T OF DEFENSE, DIR. 3025.1M, MANUAL FOR CIVIL EMERGENCIES (June 1994)
23. U.S. DEP'T OF DEFENSE, INSTR. 6055.06, DOD FIRE AND EMERGENCY SERVICES (F&ES) PROGRAM (21 Dec. 2006)
24. JOINT CHIEFS OF STAFF, INSTR. 3710.01A, DOD COUNTERDRUG SUPPORT (30 Mar. 2004)
25. U.S. DEP'T OF ARMY, REG. 190-14, CARRYING OF FIREARMS AND USE OF FORCE FOR LAW ENFORCEMENT AND SECURITY DUTIES (12 Mar. 1993)
26. U.S. DEP'T OF ARMY, REG. 700-131, LOAN AND LEASE OF ARMY MATERIAl (23 Aug. 2004)
27. U.S. DEP'T OF ARMY, FIELD MANUAL 3-07, STABILITY OPERATIONS AND SUPPORT OPERATIONS (Feb. 2003)
28. U.S. DEP'T OF ARMY, FIELD MANUAL 100-19, DOMESTIC SUPPORT OPERATIONS (July 1993)
29. U.S. NATIONAL GUARD BUREAU, REG. 500-1/ANGI 10-8101, MILITARY SUPPORT TO CIVIL AUTHORITIES (1 Feb. 1996)
30. U.S. NATIONAL GUARD BUREAU, REG. 500-2/ANGI 10-801, NATIONAL GUARD COUNTERDRUG SUPPORT (31 Mar. 2000)
31. U.S. DEP'T OF NAVY, SECNAV INSTR. 5820.7B, COOPERATION WITH CIVILIAN LAW ENFORCEMENT OFFICIALS (28 Mar. 1998)
32. U.S. DEP'T OF NAVY, OPNAV INSTR. 3440.1C, NAVY CIVIL EMERGENCY MANAGEMENT PROGRAM (10 Mar. 1995)
33. U.S. DEP'T OF AIR FORCE, INSTR. 10-801, AIR FORCE ASSISTANCE TO CIVILIAN LAW ENFORCEMENT AGENCIES (15 Apr.1994)
34. U.S. DEP'T OF AIR FORCE, INSTR. 10-802, MILITARY SUPPORT TO CIVIL AUTHORITIES (19 Apr. 2002)

I. OVERVIEW

The military's mission is to fight and win the nation's wars. Prior to September 11, 2001, military involvement in domestic operations was almost exclusively in the area of civil support operations. Today, the military's mission includes Homeland Security. For the Department of Defense (DoD), the concept of Homeland Security consists of two major components: homeland defense and Civil Support.

II. HOMELAND DEFENSE AND CIVIL SUPPORT

"Homeland security (HLS)" is defined in The National Strategy for Homeland Security (October 2007) (*available at* http://www.whitehouse.gov/infocus/homeland/nshs/2007/index.html*)* as "a concerted national effort to prevent terrorist attacks within the United States, reduce America's vulnerability to terrorism, and minimize the damage and recover from attacks that do occur." This definition is consistent with the definition provided in the first National Strategy for Homeland Security, published in July 2002. Then-Army Secretary Thomas E. White testified before Congress that the DoD homeland security mission breaks down into two functions: Homeland Defense and Civil Support. (*available at* http://www.defenselink.mil/news/Oct2001/n10262001_200110262.html).

A. DoD defines Homeland Defense (HD) as the "protection of U.S. sovereignty, territory, domestic population, and critical defense infrastructure against external threats and aggression, or other threats as directed by the President." It is generally considered to consist of war-fighting missions led by the DoD. Examples include combat air patrols and maritime defense operations.

B. DoD defines Civil Support (CS) as support to civil authorities for domestic emergencies and other designated activities. Examples include disaster response, counterdrug support, and support to civilian law enforcement.

III. POSSE COMITATUS ACT (PCA).

A. To advise commanders properly, especially in the area of CS, Judge Advocates (JA) must understand the limitations created by the PCA, and as importantly, the constitutional and statutory exceptions to the PCA. The PCA states:

> *Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both.* 18 U.S.C. § 1385.

B. History

1. *Posse comitatus* po.si komitei.tAs, -tius , [med. (Anglo) L., force of the county: see prec. and county.] 'The force of the county'; the body of men above the age of fifteen in a county (exclusive of peers, clergymen, and infirm persons), whom the sheriff may summon or 'raise' to repress a riot or for other purposes; also, a body of men actually so raised and commanded by the sheriff. Oxford English Dictionary Online.

2. In the U.S., the military was used extensively as a posse comitatus to enforce various laws as diverse as the Fugitive Slave Law and Reconstruction-era laws. Throughout time, the authority level necessary for local law enforcement to call on the military as a posse comitatus devolved down to the lowest level. For several reasons (e.g., the Army's increasingly vocal objection to "commandeering of its troops;" Southerners' complaints that the Northern-based Federal military was unfairly enforcing laws against them; and compromises made as a result of the most recent presidential election), Congress sought to terminate the prevalent use of Federal Soldiers in civilian law enforcement roles. Accordingly, Congress passed the PCA in 1878 as a rider to an Army appropriations act, limiting the circumstances under which the Army could be used as a posse comitatus to "execute the laws."

C. To Whom the PCA Applies

1. Active duty personnel in the Army and Air Force.

a. Most courts interpreting the Posse Comitatus Act have refused to extend its terms to the Navy and Marine Corps (United States v. Yunis, 924 F.2d 1086 (D.C. Cir. 1991); United States v. Roberts, 779 F.2d 565 (9th Cir. 1986), cert. denied, 479 U.S. 839 (1986); United States v. Mendoza-Cecelia, 736 F.2d. 1467 (11th Cir. 1992); United States v. Acosta-Cartegena, 128 F. Supp. 2d 69 (D.P.R. 2000)).

b. In 10 U.S.C. § 375, Congress directed SecDef to promulgate regulations forbidding direct participation "by a member of the Army, Navy, Air Force, or Marine Corps in a search, seizure, arrest, or other similar activity." SECDEF has done so in DoDD 5525.5. Therefore, the proscription has been extended by regulation to the Navy and Marine Corps (DoDD 5525.5). SECDEF and SECNAV may grant exceptions on a case-by-case basis (DoDD 5525.5, Encl. 4, SECNAVINST 5820.7b, para. 9c.).

2. Reservists on active duty, active duty for training, or inactive duty for training.

3. National Guard personnel in Federal service (i.e., Title 10 status).

4. Civilian employees of DoD when under the direct command and control of a military officer (DoDD 5525.5, para. E4.2.3; AR 500-51, para. 3-2; SECNAVINST 5820.7B, para. 9b(3)).

D. To Whom the PCA does NOT Apply

1. A member of a military service when **off duty** and acting in a **private capacity**. A member is not acting in a private capacity when assistance to law enforcement officials is rendered under the direction or control of DoD authorities (DoDD 5525.5, Encl. 4; AR 500-51 para. 3.2; SECNAVINST 5820.7B, para. 9b(4); AFI 10-801).

2. A member of the National Guard when not in Federal Service (i.e., while serving under state control in Title 32 or State Active Duty status).

3. A member of a Reserve Component when not on active duty, active duty for training, or inactive duty for training.

4. Members of the Coast Guard (14 U.S.C. § 2) (Jackson v. Alaska, 572 P.2d 87 (Alaska 1977)).

5. Members who are not a "part of the Army or Air Force." In a 1970 Department of Justice opinion, then-Assistant Attorney General William Rehnquist addressed the assignment of Army personnel to the Department of Transportation (DoT) to act as U.S. Marshals. He determined that this was not a violation of the PCA since: (a) a statute (49 U.S.C. § 1657) expressly authorized the detailing of military members to DoT; (b) under the statute, the assigned members were not charged against statutory limits on grade or end strength; and (c) the members were not subject to direct or indirect command of their military department of any officer thereof. He determined, therefore, that they were DoT employees for the duration of the detail. Therefore, they were not "part of the Army or Air Force" (Memorandum for Benjamin Forman, Assistant General Counsel, Department of Defense, from William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, Re: Legality of deputizing military personnel assigned to the Department of Transportation (Sept. 30, 1970) ("Transportation Opinion")).

E. To What the PCA Applies.

1. When determining what actions are covered by the PCA (i.e., what constitutes "execut[ing] the law" under the statute), you must consider both directive and case law, as they are not identical. In fact, case law prohibits a much broader range of activities as "execut[ing] the law." Some of these issues have been addressed in various service Judge Advocate General opinions, but some instances simply will require you to apply the court tests described.

a. *Directive/Regulation* (DoDD 5525).

(1) Prohibits direct law enforcement assistance, including:

(a) Interdiction of a vehicle, vessel, aircraft, or other similar activity.

(b) Search or seizure.

(c) Arrest, apprehension, stop and frisk, or similar activity.

(d) Use of military personnel for surveillance or pursuit of individuals, or as undercover agents, informants, investigators, or interrogators (DoDD 5525.5, para. E4.1.3).

b. *Case Law.*

(1) *Analytical framework.* There are three separate tests that courts apply to determine whether the use of military personnel has violated the PCA (United States v. Kahn, 35 F.3d 426 (9th Cir. 1994); United States v. Hitchcock, 103 F.Supp. 2d 1226 (D. Haw. 1999)).

(a) FIRST TEST: whether the action of the military personnel was "active" or "passive" (United States v. Red Feather, 392 F. Supp. 916, 921 (W.D.S.D 1975); United States v. Yunis, 681 F. Supp. 891, 892 (D.D.C. 1988); United States v. Rasheed, 802 F. Supp. 312 (D. Haw. 1992)).

(b) SECOND TEST: whether use of the armed forces pervaded the activities of civilian law enforcement officials (United States v. Hartley, 678 F.2d 961, 978 (11th Cir. 1982) cert. den. 459 U.S. 1170 (1983); United States v. Hartley, 796 F.2d 112 (5th Cir. 1986); United States v. Bacon, 851 F.2d 1312 (11th Cir. 1988); Hayes v. Hawes, 921 F.2d 100 (7th Cir. 1990)).

(c) THIRD TEST: whether the military personnel subjected citizens to the exercise of military power that was:

- Regulatory (a power that controls or directs);

- Proscriptive (a power that prohibits or condemns); or

- Compulsory (a power that exerts some coercive force) (United States v. McArthur, 419 F. Supp. 186 (D.N.D. 1975); United States v. Casper, 541 F.2d 1274 (8th Cir. 1976), cert. denied, 30 U.S. 970 (1977); United States v. Yunis, 681 F. Supp. 891, 895-6 (D.D.C. 1988); United States v. Kahn, 35 F.3d 426 (9th Cir. 1994)).

2. *Military Purpose Activities* (DoDD 5525.5, para. E4.1.2.1). The PCA does NOT apply to actions furthering a military or foreign affairs function of the Untied States. This is sometimes known as the "Military Purpose Doctrine." The primary purpose must be to further a military interest, and civilians may receive an incidental benefit. Such military purposes include:

a. Investigations and other actions related to enforcement of the UCMJ (United States v. Thompson, 33 M.J. 218 (CMA 1991), cert. denied. 502 U.S. 1074 (1992) (E4.1.2.1.1)).

b. Investigations and other actions that are likely to result in administrative proceedings by DoD, regardless of whether there is a related civil or criminal proceeding (E4.1.2.1.2).

c. Investigations and other actions related to the commander's inherent authority to maintain law and order on a military installation or facility (Harker v. State, 663 P.2d 932 (Alaska 1983); Anchorage v. King, 754 P.2d 283 (Alaska Ct. App. 1988); Eggleston v. Department of Revenue, 895 P.2d 1169 (Colo. App 1995)). Civilians may be detained for an on-base violation long enough to determine whether the civilian authorities are interested in assuming the prosecution (Applewhite v. United States, 995 F.2d 997 (10th Cir. 1993), cert. denied, 510 U.S. 1190 (1994) (E4.1.2.1.3)).

d. Protection of classified military information or equipment (E4.1.2.1.4).

e. Protection of DoD personnel, DoD equipment, and official guests of the DoD (United States v. Chon, 210 F.3d 990 (9th Cir. 2000), cert. denied, 531 U.S. 910 (2000) (NCIS investigation of civilians undertaken for independent purpose of recovering military equipment was permissible) (E4.1.2.1.5)).

f. Other actions undertaken primarily for a military or foreign affairs purpose (E4.1.2.1.6).

F. Where the PCA Applies – Extraterritorial Effect of the PCA

1. A 1989 Department of Justice Office of Legal Counsel opinion concluded that the PCA does not have extraterritorial application (Memorandum, Office Legal Counsel for General Brent Scowcroft, 3 Nov. 1989). This opinion also states that the restrictions of 10 U.S.C. §§ 371 - 381 (specifically, 10 U.S.C. § 375), were also not intended to have extraterritorial effect.

2. Some courts have also adopted the view that the PCA imposes no restriction on use of U.S. Armed Forces abroad, noting that Congress intended to preclude military intervention in **domestic affairs** (United States v. Cotton, 471 F.2d 744 (9th Cir. 1973); Chandler v. United States, 171 F.2d 921 (1st Cir. 1948), cert. denied, 336 U.S. 918 (1949); D'Aquino v. United States, 192 F.2d 338 (9th Cir. 1951), cert. denied, 343 U.S. 935 (1952); United States v. Marcos, No. SSSS 87 Cr. 598, 1990 U.S. Dist. LEXIS 2049 (S.D.N.Y. Feb. 28, 1990)). (Note: both Chandler and D'Aquino involved law enforcement in an area of military occupation.) But see United States v. Kahn, 35 F.3d 426, 431 n. 6 (9th Cir. 1994) (In a case involving the applicability of the PCA to Navy activities in support of maritime interdiction of a drug-smuggling ship, the government maintained the PCA had no

extraterritorial effect. While the court stated that issue had not been definitively resolved, it did state that 10 U.S.C. §§ 371-381 did "impose limits on the use of American armed forces abroad.").

3. Note, however, that DoD policy, as contained in DoDD 5525.5 (which incorporates the restrictions of 10 U.S.C. § 375), applies to all U.S. forces wherever they may be. Two weeks after the promulgation of the DoJ memo, Secretary Cheney amended the Directive to read that, in the case of compelling and extraordinary circumstances, SECDEF may consider exceptions to the prohibition against direct military assistance with regard to military actions outside the territorial jurisdiction of the United States (DoDD 5525.5, para. 8.2).

G. The Effects of Violating the PCA

1. *Criminal Sanctions.* Two years imprisonment, fine, or both. Note that, to date, no direct action has been brought for violations of the PCA. The issue of the PCA has arisen instead as a "collateral" issue, whether as a defense to a charge by a criminal defendant (see Padilla v. Bush, 233 F. Supp. 2d 564 (S.D.N.Y. 2002); United States v. Red Feather, 392 F. Supp. 916 (W.D.S.D. 1975)), or in support of an argument for exclusion of evidence. Perhaps the question of more interest to the military member is what effect violations of the PCA would have on a state criminal case brought against a military member. For example, if a military member shot and killed a U.S. civilian in the course of an HLS mission, and if the state charged the servicemember with murder and determined that the servicemember was "execut[ing] the law" (i.e., searching or seizing an individual) in violation of the PCA, would he therefore be acting outside the scope of his authority, and lose protection from state prosecution.

a. *Inability to Convict Offenders.*

(1) Exclusionary rule. In general, courts have **not** applied the exclusionary rule to cases in which the PCA was violated, using the following rationales:

(a) The PCA is itself a criminal statute, so there is no need to use the deterrent of the exclusionary rule. However, since there have been no prosecutions under the PCA, its deterrent effect is questionable (State v. Pattioay, 896 P.2d 911 (Hawaii 1995); Colorado v. Tyler, 854 P.2d 1366 (Colo. Ct. App. 1993), rev'd on other grounds, 874 P.2d 1037 (Colo. 1994); Taylor v. State, 645 P.2d 522 (Okla. 1982)).

(b) The PCA is designed to protect the rights of all civilians, not the personal rights of the defendant (United States v. Walden, 490 F.2d 372 (4th Cir. 1974), cert. denied 416 U.S. 983 (1974)).

(c) Violations of the PCA are neither widespread nor repeated, so the remedy of the exclusionary rule is not needed. Court will apply the exclusionary rule when the need to deter future violations is demonstrated (United States v. Roberts, 779 F.2d 565 (9th Cir. 1986), cert. denied 479 U.S. 839 (1986); United States v. Wolffs, 594 F.2d 77 (5th Cir. 1979); United States v. Thompson, 30 M.J. 570 (A.F.C.M.R. 1990)).

(d) Failure to prove an element of offense. Where the offense requires that law enforcement officials act lawfully, violation of the PCA would negate that element (United States v. Banks, 383 F. Supp. 368 (1974)).

(e) Dismissal of charges. Not likely to be considered an appropriate remedy (United States v. Rasheed, 802 F. Supp 312 (D. Haw. 1992); United States v. Hitchcock, 103 F. Supp 2d. 1226 (D. Haw. 1999)).

2. *Civil Liability.*

a. PCA violation as a private cause of action? No. PCA is a criminal statute; Congress did not intend to create a private cause of action (Robinson v. Overseas Military Sales Corp., 21 F. 3d 502, 511 (2nd Cir. 1994) citing Lamont v. Haig, 539 F. Supp. 552 (W.D.S.D. 1982)).

b. PCA violation as a constitutional tort ("Bivens suit")? An evolving area (Applewhite v. United States Air Force, 995 F.2d. 997 (10th Cir. 1993), cert. denied, 510 U.S. 1190 (1994) (finding PCA not violated, and conduct of military personnel did not otherwise violate 4th or 5th Amendment rights); Bissonette v. Haig, 800 F.2d 812 (8th Cir. 1986), aff'd, 485 U.S. 264 (1988) (finding a private right of action under the 4th Amendment)).

c. Federal Tort Claims Act. Military personnel acting in violation of the PCA may not be found to be acting "within the scope of their employment," and therefore may be subject to individual personal liability (Wrynn v. U.S., 200 F. Supp. 457 (E.D.N.Y. 1961)).

IV. CIVIL SUPPORT

A. The DEPSECDEF memo titled, "Implementation Guidance Regarding the Office of the Assistant Secretary of Defense for Homeland Defense" (Appendix A) (now the Assistant Secretary of Homeland Defense and Americas' Security Affairs (ASD (HD&ASA)) directs the ASD (HD&ASA) to "update and streamline" DoDDs 3025.15, 3025.1 and 3025.12, and "other related issuances." There is no specific deadline for these changes. Therefore, before relying on the below information, you MUST check to ensure you have the most current version of the directive you are using.

B. It is DoD's policy that DoD shall cooperate with and provide military assistance to civil authorities as directed by and consistent with applicable law, Presidential Directives, Executive Orders, and DoDD 3025.15. Assistance is generally one of **support**; the civilian authorities retain **primary** responsibility.

C. DoDD 3025.15.

1. This directive establishes DoD's policy and assigns responsibilities for providing military assistance to civil authorities. The directive governs all DoD military assistance provided to civil authorities within the fifty States, District of Columbia, Puerto Rico, and U.S. possessions and territories, including:

a. Sensitive support requests under DoDD S-5210.36.

b. Civil disturbances under DoDD 3025.12.

c. Protection of key assets under DoDD 5160.54.

d. DoD responses to civil emergencies under DoDD 3025.1.

e. Acts or threats of terrorism under DoDD 2000.12.

f. Requests for aid to civil law enforcement authorities (LEA) under DoDD 5525.5.

2. DoDD 3025.15 provides criteria against which all requests for support shall be evaluated. The directive addresses them to approval authorities, but commanders at all levels should use them in providing a recommendation up the chain of command.

a. *Legality*: compliance with the law.

b. *Lethality*: potential use of lethal force by or against DoD forces.

c. *Risk*: safety of DoD forces.

d. *Cost*: who pays, impact on DoD budget.

e. *Appropriateness*: whether the requested mission is in the interest of DoD to conduct.

f. *Readiness*: impact on DoD's ability to perform its primary mission.

3. *Approval Authority*. DoDD 3025.15 changes the approval authority, in certain cases, from that set forth in older directives, but the older directives have not been changed and are otherwise applicable. For this reason, this directive should always be the first one consulted.

4. Although the directive states that the "Secretary of the Army is the approval authority for emergency support in response to natural or man-made disasters," this responsibility has been transferred to the Joint Director of Military Support (JDOMS) (Appendix B).

5. SECDEF is the approval authority for:

a. Civil disturbances (DoDD 3025.15, para. 4.4).

b. Responses to acts of terrorism (DoDD 3025.15, para. 4.4).

c. Support that will result in a planned event with the potential for confrontation with specifically-identified individuals or groups, or which will result in the use of lethal force (DoDD 3025.15, para. 4.4).

d. Loan of equipment, facilities or personnel to law enforcement (DoDD 3025.15, para. 4.7.2).

6. Requests shall be made and approved IAW DoDD 5525.5, but at a level no lower than a Flag or General Officer, or equivalent civilian, with the following exceptions:

a. SECDEF is approval authority for any requests for potentially lethal support.

b. SECDEF is approval authority for all assistance with the potential for confrontation between DoD personnel and civilian individuals or groups.

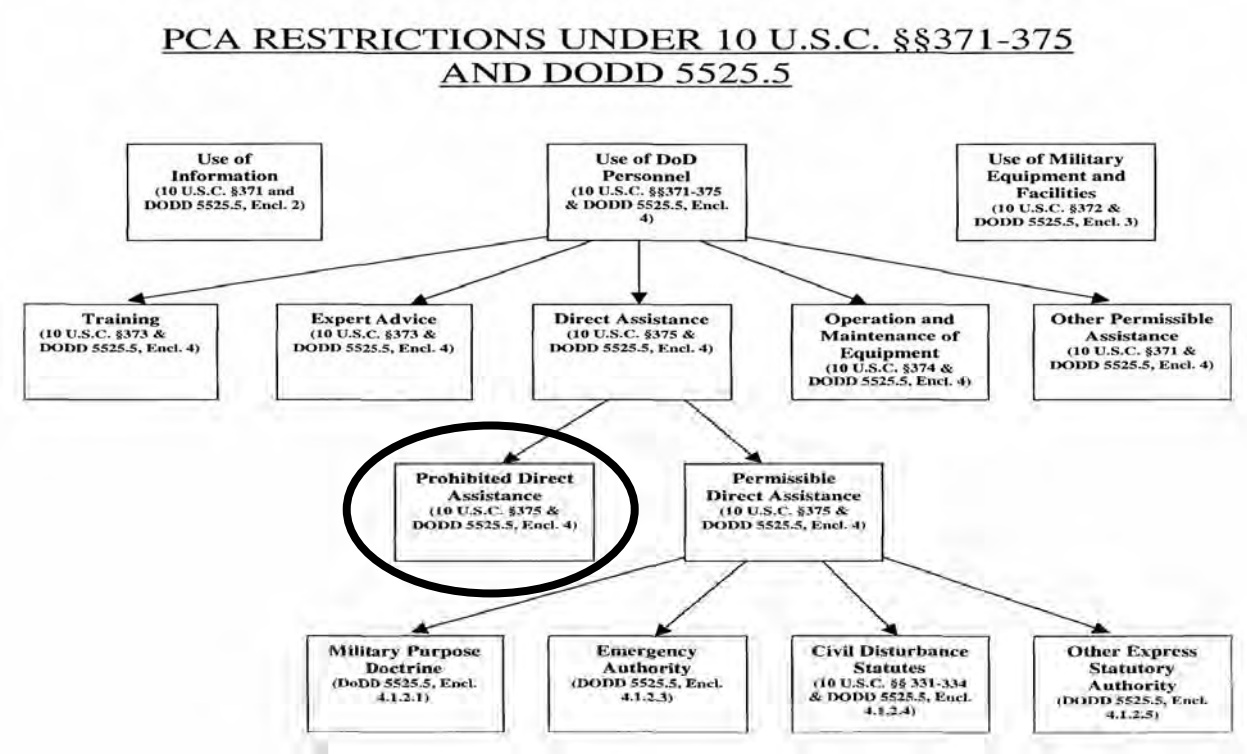
7. *Support for Civil Disasters*. Follow DoDD 3025.1 and Appendices A and B.

8. When Combatant Command assigned forces are to be used, there must be coordination with the CJCS. CJCS will determine whether there is a significant issue requiring SECDEF approval, after coordination with the affected Combatant Command (DoDD 3025.15, para. 4.5).

9. Immediate response authority (DoDD 3025.1, paragraph 4.5) in the local commander is not affected. This is discussed in greater detail below.

V. SUPPORT TO CIVILIAN LAW ENFORCEMENT

A. When providing support to civilian law enforcement, there is always a concern that such actions may run afoul of the PCA. The following chart illustrates the permissible and non-permissible activities (Prohibited Direct Assistance-circled block):



B. Although the activities discussed below can be considered law enforcement-type activities, they do not violate the PCA since the military personnel do not provide direct assistance. In addition, many of them are statutorily directed, and therefore could be considered an "exception" to the PCA.

C. This section is broken down into three functional areas of support: loan of equipment and facilities; expert advice and training; and sharing information. Material otherwise not covered in one of these three areas can be found in DoDD 5525.5.

1. *Loan of Equipment and Facilities*.

a. *Key References*.

(1) **Law**. 10 U.S.C. §§ 372 and 374.

(2) **DoD**. DoDDs 5525.5 and 3025.15.

b. With proper approval, DoD activities may make equipment (including associated supplies and spare parts), base facilities, or research facilities available to Federal, state, or local law enforcement officials for law enforcement purposes.

c. There must be no adverse impact on national security or military preparedness.

d. *Approval authority*.

(1) SECDEF is the approval authority for requests for assistance with the potential for confrontation between DoD personnel and civilian individual groups, as well as any requests for potentially lethal support, including loans of:

(a) Arms.

(b) Combat and tactical vehicles, vessels, or aircraft.

(c) Ammunition. (DoDD 3025.15, paras. 4.7.2.1. and 4.7.2.3.)

(2) Requests for loans of equipment, facilities, or personnel made by law enforcement agencies, including the Coast Guard when not acting as part of the Navy, shall be made and approved in accordance with DoDD 5525.5, but at a level no lower than a flag or general officer, or equivalent civilian, with the exceptions discussed in the following authorities:

(a) AR 700-131.

(b) SECNAVINST 5820.7B, para. 8.

(c) AFI 10-801, Attachment 4.

2. *Expert Advice and Training*.

a. *Key References*.

(1) **Law**. 10 U.S.C. §§ 373, 375, 377; and 50 U.S.C. §§ 2312, 2315.

(2) **DoD**. DoDD 5525.5, Enclosure 4. and DoDI 5525.10.

b. Military personnel may be used to **train** civilian law enforcement personnel in the use of equipment that we provide. Large scale or elaborate training programs are prohibited, as is regular or direct involvement of military personnel in activities that are fundamentally civilian law enforcement operations.

(1) Note that the DEPSECDEF has provided policy guidance in this area, which limits the types of training U.S. forces may provide. The policy is based on prudent concerns that advanced training could be misapplied or misused by civilian law enforcement agencies, resulting in death or injury to non-hostile persons. The memo permits basic military training, such as basic marksmanship; patrolling; medical/combat lifesaver; mission planning; and survival skills. It prohibits what it terms "advance military training," which is defined as "high intensity training which focuses on the tactics, techniques, and procedures (TTP) required to apprehend, arrest, detain, search for, or seize a criminal suspect when the potential for a violent confrontation exists." Examples of such training include: sniper training; military operations in urban terrain (MOUT); advanced MOUT; and close quarter battle/close quarter combat (CQB/CQC) training. (*See* Appendix C.)

(2) A single general exception exists to provide this advanced training at the U.S. Army Military Police School. In addition, Commander, United States Special Operations Command (USSOCOM) may approve this training, on an exceptional basis, by special operations forces personnel. (*See* Appendix C.)

c. Military personnel may also be called upon to provide **expert advice** to civilian law enforcement personnel. However, regular or direct involvement in activities that are fundamentally civilian law enforcement operations is prohibited.

(1) A specific example of this type of support (advice) is military working dog team (MWDT) support to civilian law enforcement. The military working dog (MWD) has been analogized to equipment, and its

handler provides expert advice. (*See* DoDI 5525.10, Using Military Working Dog Teams to Support Law Enforcement Agencies in Counterdrug Missions, 17 Sept. 1990; Military Working Dog Program, AFI 31-202.)

(a) Pursuant to 10 U.S.C. § 372, the Secretary of Defense may make available equipment to any Federal, state or local LEAs for law enforcement purposes. So, upon request, an MWD (viewed by the DoD as a piece of equipment) may be loaned to law enforcement officials. Moreover, MWD handlers may be made available to assist and advise law enforcement personnel in the use of the MWD under 10 U.S.C. § 373. If a MWD is loaned to an LEA, its military handlers will be provided to work with the particular MWD. An MWD is always loaned with its handler since they work as a team. Under compelling and exceptional circumstances, requests for exceptions may be submitted, through channels, to the DoD Drug Coordinator. (DoDDI 5525.10, para. 4.2.1.)

(b) In all cases, MWDT support may be provided only under circumstances that preclude any confrontation between MWDTs and civilian subjects of search.

d. *Weapons of Mass Destruction (WMD)*. Congress has directed DoD to provide certain expert advice to Federal, state and local agencies with regard to WMD. This training is non-reimbursable because Congress has appropriated specific funds for these purposes.

(1) **50 U.S.C. § 2312**. Training in emergency response to the use or threat of use of WMD.

(2) **50 U.S.C. § 2315**. Program of testing and improving the response of civil agencies to biological and chemical emergencies. Department of Energy runs the program for responses to nuclear emergencies.

3. *Sharing Information*.

a. *Key References*.

(1) **Law**. 10 U.S.C. § 371.

(2) **DoD**. DoDD 5525.5, Enclosure 2.

(3) **Services**.

(a) AR 500-51, Chapter 2, Section 1.

(b) SECNAVINST 5820.7B, para. 7.

(c) AFI 10-801, Chapter 4.

b. Military Departments and Defense Agencies are encouraged to provide to Federal, state, or local civilian law enforcement officials any information collected during the **normal course of military operations** that may be relevant to a violation of any Federal or state law within the jurisdiction of such officials. (DoDD 5525.5, para. E2.1)

c. Collection must be compatible with military training and planning. To the maximum extent practicable, the needs of civilian law enforcement officials **shall** be taken into account in planning and execution of military training and operations. (10 U.S.C. § 371(b))

d. However, the planning and/or creation of missions or training for the primary purpose of aiding civilian law enforcement officials is prohibited. (DoDD 5525.5, para. E2.1.4.)

VI. CIVIL DISTURBANCES

A. Key References.

1. **Law**.

a. *Constitution*. Article 4, Section 4: "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened), against domestic Violence."

b. *10 U.S.C. §§ 331-335*.

2. **DoD.**

a. DoDD 3025.12.

b. U.S. Dep't of Defense, Garden Plot.

c. USJFCOM Functional Plan 2502-98, Military Assistance for Civil Disturbances (25 June 2001).

B. The primary responsibility for protecting life and property and maintaining law and order in the civilian community is vested in the state and local government (DoDD 3025.12, para. 4.1.3). Involvement of military forces will only be appropriate in extraordinary circumstances. Use of the military under these authorities to conduct law enforcement activities is a specific exception to the PCA. The probable order of employment of forces in response to a certain situation will be:

1. Local and state police.

2. National Guard in their state status.

3. Federal civil law enforcement officials.

4. Federal military troops (to include National Guard called to active Federal service).

C. The insurrection statutes permit the President to use the armed forces, subject to the following circumstances:

1. An insurrection within a state. The legislature or governor must request assistance from the President (10 U.S.C. § 331).

2. A rebellion making it impracticable to enforce the laws of the United States (i.e., Federal law) by the ordinary course of judicial proceedings (10 U.S.C. § 332).

3. To suppress, in any State, any insurrection, domestic violence, unlawful combination or conspiracy, if it

a. Hinders execution of State and U.S. law protecting Constitutional rights and State is unable, fails, or refuses to protect those rights (state is considered to have denied equal protection under the Constitution)

b. Opposes or obstructs execution of U.S. law or justice (10 U.S.C. § 333).

4. If the President considers it necessary to use the armed forces, he must (shall) first issue a proclamation directing the insurgents to disperse and retire peacefully (10 U.S.C. § 334).

D. The Federal Response

1. Responsibility for the management of the Federal response to civil disturbances rests with the Attorney General of the United States.

2. As discussed above, if the President decides to respond to the situation, he must first issue a proclamation to the insurgents, prepared by the Attorney General, directing them to disperse within a limited time. At the end of that time period, the President may issue an execute order directing the use of armed forces.

3. The Attorney General appoints a Senior Civilian Representative of the Attorney General (SCRAG) as his action agent.

E. The DoD Response

1. SECDEF has reserved to himself the authority to approve support in response to civil disturbances (DoDD 3025.15, para. 4.4).

2. Although the civilian authorities have the primary responsibility for response to civil disturbances, military forces shall remain under military command and control at all times (DoDD 30125.12, para. 4.2.5).

3. GARDEN PLOT is the standing Operation Plan for response to civil disturbance. It is a comprehensive plan. Detailed RUF/ROE is found in Appendices 1 and 8 to Annex C of this plan.

F. Emergency Employment of Military Forces (DoDD 30125.12, para. 4.2.2).

1. Military forces shall not be used for civil disturbances unless specifically directed by the President, pursuant to 10 U.S.C. §§ 331-334, except in the following circumstances:

a. To prevent the loss of life or wanton destruction of property, or to restore governmental functioning and public order. The "emergency authority" applies when sudden and unexpected civil disturbances occur, and the duly-constituted authority local authorities are unable to control the situation and circumstances preclude obtaining prior Presidential authorization (DoDD 30125.12, para. 4.2.2.1).

b. When duly-constituted state or local authorities are unable or decline to provide adequate protection for Federal property or fundamental Federal functions, Federal action is authorized, as necessary, to protect the Federal property and functions (DoDD 30125.12, para. 4.2.2.2).

2. Note that this is limited authority.

3. *Other Considerations*. Although employment under these authorities permits direct enforcement of the law by military forces, the military's role in law enforcement should be minimized as much a possible. Our role is to support the civilian authorities, not replace them.

VII.VII. DISASTER AND EMERGENCY RELIEF

A. Key References**.**

1. **Law**. Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. § 5121, et seq., as amended.

2. **DoD**. DoDD 3025.1.

3. **DHS**. The National Response Framework.

B. The Stafford Act is not a statutory exception to the PCA; therefore, all missions performed during a disaster relief response must comply with the restrictions of the PCA.

C. Stafford Act. The overarching purpose of the Act is to provide an orderly and continuing means of assistance by the Federal government to state and local governments in carrying out their responsibilities to alleviate suffering and damage resulting from disaster. The Act provides four means by which the Federal government may become involved in the relief effort:

1. President may declare the area a major disaster (42 U.S.C. § 5170).

a. "Major disaster" means any natural catastrophe (including any hurricane; tornado; storm; high water; wind-driven water; tidal wave; tsunami; earthquake; volcanic eruption; landslide; mudslide; snowstorm; or drought) or, regardless of cause, any fire, flood, or explosion, in any part of the United States, which, in the determination of the President, causes damage of sufficient severity and magnitude to warrant major disaster assistance under this chapter to supplement the efforts and available resources of states, local governments, and disaster relief organizations in alleviating the damage, loss, hardship, or suffering caused thereby (42 U.S.C. § 5121).

b. Requires a request for the declaration from the governor.

c. State must have executed its own emergency plan and require supplemental help.

d. State certifies that it will comply with cost sharing provisions under this Act.

2. President may declare the area an emergency (42 U.S.C. § 5191).

a. "Emergency" means any occasion or instance for which, in the determination of the President, Federal assistance is needed to supplement state and local efforts and capabilities to save lives and to protect property and public health and safety, or to lessen or avert the threat of a catastrophe in any part of the United States (42 U.S.C. § 5122).

b. Same criteria as for a major disaster, except also requires that governor define the type and amount of Federal aid required. Total Federal assistance may not exceed $5 million.

c. Operationally, no significant distinction between an emergency and a major disaster.

3. President's 10-day Emergency Authority. President may send in DoD assets on an emergency basis to "preserve life and property" (42 U.S.C. § 5170b(c)).

a. "During the immediate aftermath of an incident which may ultimately qualify for assistance under this subchapter or subchapter IV-A of this chapter, the Governor of the State in which such incident occurred may request the President to direct the Secretary of Defense to utilize the resources of the Department of Defense for the purpose of performing on public and private lands any emergency work which is made necessary by such incident and which is essential for the preservation of life and property. If the President determines that such work is essential for the preservation of life and property, the President shall grant such request to the extent the President determines practicable. Such emergency work may only be carried out for a period not to exceed 10 days" (42 U.S.C. § 5170b(c)).

b. Done before any Presidential declaration, but still requires a governor's request.

c. Lasts only **ten** days.

d. Used to clear debris and wreckage and to temporarily restore essential public facilities and services. Very limited authority.

4. President may send in Federal assets where an emergency occurs in an area over which the Federal government exercises **primary** responsibility by virtue of the Constitution or Federal statute (42 U.S.C. § 5191(b)).

a. Does not require a governor's request, although the statute directs consultation with the governor, if practicable.

b. Results in a Presidential declaration of an emergency regarding a situation for which the primary responsibility for a response rests with the United States.

c. President Clinton exercised this authority on April 19, 1995 in the case of the bombing of the Murrah Federal Building in Oklahoma City, OK.

5. Types of support authorized under the Stafford Act.

a. Personnel, equipment, supplies, facilities, and managerial, technical, and advisory services in support of relief authorized under the Act (42 U.S.C. §§ 5170a(1) and 5192(a)).

b. Distribution of medicine, food, and other consumable supplies, and emergency assistance (42 U.S.C. §§ 5140a(4) and 5192(a)(7)).

c. Utilizing, lending or donating Federal equipment, supplies, facilities, personnel, and other resources to state and local governments (42 U.S.C. §§ 5170b(a)(1) and 5192(b)).

d. Performing on public or private lands or waters any work or services essential to saving lives and protecting and preserving property, public health, and safety, including:

(1) Debris removal.

(2) Search and rescue; emergency medical care; emergency mass care; emergency shelter; and provision of food, water, medicine and other essential needs, including movement of supplies and persons.

(3) Clearance of roads and construction of temporary bridges necessary to the performance of emergency tasks and essential community services.

(4) Provision of temporary facilities for schools and other essential community services.

(5) Demolition of unsafe structures that endanger the public.

(6) Warning of further risks and hazards.

(7) Dissemination of public information and assistance regarding health and safety measures.

(8) Provision of technical advice to state and local governments regarding disaster management and control.

(9) Reduction of immediate threats to life, property, and public health and safety (42 U.S.C. § 5170b(a)(3)).

D. The Federal Response

1. The Federal Emergency Management Agency (FEMA), which is part of DHS, directs and coordinates the Federal response on behalf of the President.

2. In HSPD-5, the President directed the development of a National Response Plan (to supersede the Federal Response Plan) to align federal coordinating structures, capabilities, and resources into a unified, all-disciplined, and all-hazards approach to domestic incident management. The DHS published the National Response Plan (NRP) in December, 2004 and updated the NRP on May 25, 2006. The NRP was superseded by the National Response Framework.

3. The National Response Framework (NRF) (73 Fed. Reg. 4887-4888 (Jan. 22, 2008), effective March 22, 2008, supersedes the NRP and "is now more in keeping with its intended purpose, specifically, simplifying the language, presentation and content; clarifying its national focus; articulating the five principles of response doctrine; and methodically describing the who, what and how of emergency preparedness and response." The NRF is a guide to how the nation conducts all-hazards response. It is built upon scalable, flexible, and adaptable coordinating structures to align key roles and responsibilities across the Nation, linking all levels of government, nongovernmental organizations and the private sector. It is intended to capture specific authorities and best practices for managing incidents that range from the serious but purely local, to large-scale terrorist attacks or catastrophic natural disasters.

a. The NRF consists of the following components:

(1) The core document describes the doctrine that guides our national response, roles and responsibilities, response actions, response organizations, and planning requirements to achieve an effective national response to any incident that occurs.

(2) The Emergency Support Function (ESF) Annexes group Federal resources and capabilities into functional areas that are most frequently needed in a national response (e.g., Transportation, Firefighting, Mass Care).

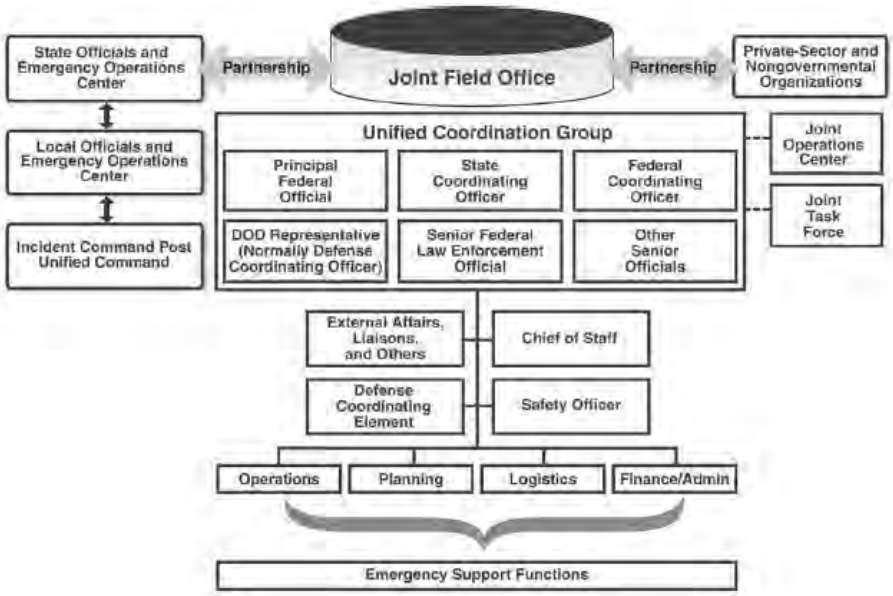
(3) The Support Annexes describe essential supporting aspects that are common to all incidents (e.g., Financial Management, Volunteer and Donations Management, Private-Sector coordination).

(4) The Incident Annexes address the unique aspects of how to respond to a seven broad incident categories (e.g., Biological, Nuclear/Radiological, Cyber, Mass Evacuation).

(5) The Partner Guides provide ready references describing the key roles and actions for local, tribal, State, Federal and private-sector response partners.

b. The NRF applies a functional approach that groups the capabilities of federal departments and agencies and the American Red Cross into Emergency Support Funtions (ESFs) to provide the planning, support, resources, program implementation, and emergency services that are most likely to be needed during actual or potential incidents where coordinated federal response is required. The NRF contains 15 ESFs for which certain federal agencies are either the coordinator, a primary agency, or a support agency or serve in two or all of the capacities. The DoD/U.S. Army Corps of Engineers is the Coordinator and a Primary Agency for ESF #3 (Public Works and Engineering), and DoD is a Primary Agency for ESF #9 (Search and Rescue). DoD serves as a support agency for all 15 ESFs.

c. Joint Field Office (JFO). The JFO is the primary Federal incident management field structure. It is a temporary Federal facility that provides a central location for the coordination of Federal, State, tribal, and local government and private-sector and nongovernmental organizations with primary responsibility for response and recovery.



(1) The Principal Federal Official (PFO). By law and Presidential directive, the Secretary of Homeland Security is the PFO responsible for coordination of all domestic incidents requiring multiagency federal response. The Secretary may elect to designate a single individual to serve as his or her primary representative who serves as the PFO in the field.

(2) The Federal Coordinating Officer (FCO). For Stafford Act incidents, upon the recommendation of the FEMA administrator and the Secretary of Homeland Security, the President appoints an FCO. The FCO is a senior FEMA official trained, certified, and well experienced in emergency management, and specifically appointed to coordinate Federal support in the response to and recovery from emergencies and major disasters.

(3) Defense Coordinating Officer (DCO). The DCO is the DoD's single point of contact at the JFO. DoD has appointed ten DCOs and assigned one to each FEMA region. The DCO coordinates requests for DSCA with the exception of requests for U.S. Army Corps of Engineers support, National Guard forces operating in State Active Duty or Title 32 status (i.e. in a State, not Federal status), or, in some circumstances, DoD forces in support of the FBI. Specific responsibilities of the DCO (subject to modification based on the situation) include processing requirements for military support, forwarding mission assignments to the appropriate military organizations through DoD-designated channels, and assigning military liaisons, as appropriate, to activated ESFs.

E. The DoD Response

1. *Regulation*. DoDD 3025.1, Military Support to Civil Authorities (MSCA), governs all planning and response by DoD components for civil defense or other assistance to civil authorities, with the exception of military support to law enforcement operations under DoDD 3025.12, Military Assistance for Civil Disturbance (MACDIS) and contingency war plans (DoDD 3025.1, para 4.2).

2. *MSCA Policy*. MSCA shall include, but is not limited to, support similar to that described for "Immediate Response" (DoDD 3025.1, para. 5.4) in either civil emergencies or attacks, or during any period of peace, war or transition to war. It shall include response to civil defense agencies, but shall not include military assistance for civilian law enforcement operations (DoDD 3025.1, para. 4.4.1).

3. **NOTE**: The Secretary of the Army is no longer the DoD Executive Agent for disaster relief operations. The duties and authorities associated with that assignment have been delegated to the ASD(HD(&ASA))(See Appendix B). The ASD(HD&ASA) is responsible for policy oversight (legality, cost, lethality, appropriateness, risk, readiness impact), supervises HD activities, and serves as the liaison between DoD and lead federal agencies (LFAs).

4. The JDOMS is the ASD(HD&ASA)'s action agent. The JDOMS designates the Supported Combatant Commander (COCOM), and serves as the focal point for that COCOM and the National Guard, while coordinating and monitoring the DoD effort through the DCO. The JDOMS also deconflicts the mission(s) with worldwide demands and keeps the SECDEF and CJCS informed of ongoing mission(s) status.

5. Supported COCOMs. The U.S. Northern Command (USNORTHCOM) area of responsibility (AOR) includes air, land, and sea approaches and encompasses the continental United States, Alaska, Canada, Mexico, and the surrounding water out to approximately 500 nautical miles, the Gulf of Mexico and the Straits of Florida. The U.S. Pacific Command (USPACOM) AOR includes Hawaii and U.S. territories and possessions in the Pacific. The U.S. Southern Command (USSOUTHCOM) AOR includes Puerto Rico and the U.S. Virgin Islands.

6. Immediate Response Authority (DoDD 3025.1, para 4.5).

a. "Imminently serious conditions resulting from any civil emergency or attack may require immediate action by military commanders, or by responsible officials of other DoD Agencies, to save lives, prevent human suffering, or mitigate great property damage. When such conditions exist and time does not permit prior approval from higher headquarters, local military commanders and responsible officials of other DoD Components are authorized by this Directive, subject to any supplemental direction that may be provided by their DoD Component, to take necessary action to respond to requests of civil authorities. All such necessary action is referred to in this Directive as Immediate Response" (para 4.5.1).

b. Types of support authorized include (see para 4.5.4. for full list):

(1) Rescue, evacuation, and emergency treatment of casualties; maintenance or restoration of emergency medical capabilities; and safeguarding the public health.

(2) Emergency restoration of essential public services (such as fire-fighting, water, communication, transportation, power and fuel).

(3) Emergency removal of debris and explosive ordnance.

(4) Recovery and disposal of the dead.

c. This type of support is provided on a cost-reimbursable basis, but assistance should not be denied because the requester is unable or unwilling to commit to reimbursement (para 4.5.2).

d. NOTE: This is a very limited authority, and should only be invoked in bona fide emergencies. Contemporaneous coordination with higher headquarters should always occur in these scenarios, and in any other case potentially involving this type of assistance to civil authorities. See APPENDIX E.

7. Disaster Support Involving Law Enforcement Activities.

a. The Stafford Act is not an exception to the PCA. Therefore, any support that involves direct involvement in the enforcement of the civil law must undergo the PCA analysis discussed above. Typical areas of concern include:

(1) Directing traffic.

(2) Guarding supply depots.

(3) Patrolling.

b. National Guard personnel acting in their Title 32 (state) status should be the force of choice in these areas.

c. Law enforcement duties that involve military functions may be permissible (e.g., guarding a military supply depot).

VIII. DUAL STATUS COMMAND AUTHORITIES

A. *National Guard Officer Dual Status (or Dual Hat).* Typically, National Guard personnel may only serve in one of three statuses (State, Federal, Civilian) at a time. Specific statutory authority at 32 U.S.C. § 325, however, provides limited authority for a National Guard officer to serve simultaneously in both State and Federal statuses. The dual status commander is authorized to concurrently command both federal (Title 10) and state (Title 32, State

Active Duty) forces. This dual status requires the authority of the President (currently delegated to the SecDef) and the consent of the officer's governor to serve in both duty statuses.

1. The National Guard dual status command authority was used in recent National Special Security Events (NSSEs). An NSSE is a highly visible, well-attended event that if attacked by terrorists would have significant impact on our country because of physical and psychological damage. Examples include the G8 Summit, and the Republican and Democratic National Conventions of 2004.

2. The dual status commander receives orders from both superior and separate federal and state chains of command. These two distinct, separate chains of command flow through different sovereigns that recognize and respect the dual status commander's duty to exercise these two separate authorities in a mutually exclusive manner. As such, the dual status commander typically establishes his or her own subordinate federal and state chains of command.

B. *Active Component Dual Status*. Pursuant to 32 U.S.C. § 315, the Secretaries of the Army or Air Force may detail regular officers to duty with the National Guard, and with the permission of the President, the detailed officer may accept a commission in the National Guard without vacating his or her regular appointment. The state or territory would have to commission the officer in its National Guard for him or her to command its National Guard forces serving in a state status (Title 32 or State Active Duty). State law will dictate the requirements and procedures for such appointment and would typically require the Governor's consent.

IX. COUNTERDRUG SUPPORT

A. Key References.

1. **Law**.

a. 10 U.S.C. § 124.

b. 32 U.S.C. § 112.

c. Section 1004, FY91 NDAA.

d. Section 1031, FY97 NDAA.

e. Section 1033, FY98 NDAA.

f. Public Law 107-107, Section 1021 (extends support for counterdrug activities through 2006).

2. **DoD**.

a. Drug Enforcement Policy and Support (DEP&S) Policy of 26 January 1995.

b. CJCSI 3710.01A, 30 March 2004.

c. NGR 500-2/ANGI 10-801.

B. General.

1. Counterdrug support operations have become an important activity within DoD. All such DoD support is coordinated through the Office of the Defense Coordinator for Drug Enforcement Policy and Support (DEP&S), which is located within the Office of the Assistant Secretary of Defense for Special Operations and Low Intensity Conflict (ASD (SO/LIC)).

2. What separates counterdrug support from most other areas of support is that it is non-reimbursable. For FY03, Congress appropriated nearly $850 million for DoD counterdrug support. DEP&S channels that money to the providers of counterdrug support.

C. Detection and Monitoring (D&M).

1. Pursuant to 10 U.S.C. § 124, DoD is the lead Federal agency for D&M of aerial and maritime transit of illegal drugs into the United States. Accordingly, D&M is a DoD mission.

2. Although it is a DoD mission, D&M is to be carried out in support of Federal, state, and local law enforcement authorities.

3. Note that the statute does not extend to D&M missions covering land transit (e.g., the Mexican border).

4. Interception of vessels or aircraft is permissible outside the land area of the United States to identify and direct the vessel or aircraft to a location designated by the supported civilian authorities.

5. D&M missions involve airborne (AWACs, aerostats), seaborne (primarily USN vessels), and land-based radar (to include Remote Other The Horizon Radar (ROTHR)) sites.

6. This mission is not covered by CJCSI 3710.01A (CJCSI 3710.01A, para 2.a).

D. National Guard (NG).

1. Pursuant to 32 U.S.C. § 112, SECDEF may make Federal funding available for NG drug interdiction and counterdrug activities, to include pay, allowances, travel expenses, and operations and maintenance expenses.

2. The state must prepare a drug interdiction and counterdrug activities plan. DEP&S reviews each state's implementation plan and disburses funds.

3. It is important to note that although the NG is performing counterdrug support operations using Federal funds and under Federal guidance, it remains a state militia force and is not to be considered a Federal force for purposes of the PCA.

4. Although the NG is not subject to the restrictions of the PCA while not in Federal status, the NGB has imposed a number of policy restrictions on counterdrug operations. See NGR 500-2 for more information.

E. Additional Support to Counterdrug Agencies.

1. General. In addition to the authorities contained in 10 U.S.C. §§ 371-377 (discussed above), Congress has given DoD additional authorities to support Federal, state, local, and foreign entities that have counterdrug responsibilities. Congress has not chosen to codify these authorities, however, so it is necessary to refer to the public laws instead. Many of them are reproduced in the notes following 10 U.S.C. § 374 in the annotated codes.

2. Section 1004 (see Appendix D).

a. Section 1004 is the primary authority for counterdrug operations. The statute permits broad support to the following law enforcement agencies that have counterdrug responsibilities:

(1) Federal, state, and local.

(2) Foreign, when requested by a Federal counterdrug agency (typically, the Drug Enforcement Agency or member of the State Department Country Team that has counterdrug responsibilities within the country).

b. Types of support (see CJCSI 3710.01A, para. 3):

(1) Equipment maintenance.

(2) Transportation of personnel (U.S. & foreign), equipment and supplies CONUS/OCONUS.

(3) Establishment of bases of operations CONUS/OCONUS.

(4) Counterdrug-related training of law enforcement personnel, including associated support and training expenses.

(5) Detection and monitoring of air, sea and surface traffic outside the United States, and within 25 miles of the border if the detection occurred outside the United States.

(6) Engineer support (e.g., construction of roads, fences and lights) along U.S. border.

(7) Linguist and intelligence analyst services.

(8) Aerial and ground reconnaissance.

(9) Establishment of command, control, communication and computer networks for improved integration of law enforcement, active military and NG activities.

3. These authorities are not exceptions to the PCA. Any support provided must comply with the restrictions of the PCA. Additionally, any domestic training provided must comply with the Deputy Secretary of Defense policy on advanced training.

4. Approval Authorities (CJCSI 3710.01A).

a. Non-Operational Support.

(1) This type of support does not involve the active participation of DoD personnel, and includes the provision of equipment only; the use of facilities; and formal schoolhouse training. This type of support is requested and approved in accordance with DoDD 5525.5 and implementing service regulations, discussed above.

b. Operational Support.

(1) SECDEF is the approval authority. The approval will typically be reflected in a CJCS-issued deployment order.

(2) SECDEF has delegated approval authority for certain missions to Geographic Combatant Commanders (GCC), with the ability for further delegation, but no lower than a flag officer. The delegation from SECDEF depends on the type of support provided, the number of personnel provided, and the length of the mission. See CJCSI 3710.01A. Example: for certain missions along the southwest border, the delegation runs from SECDEF to NORTHCOM to Joint Task Force North (JTF-N).

c. Requests for DoD support must meet the following criteria:

(1) Have a clear counterdrug connection.

(2) Originate with Federal, state or local agency having counterdrug responsibilities.

(3) Be for support that DoD is authorized to provide.

(4) Clearly assist with counterdrug activities of agency.

(5) Be consistent with DoD support of the National Drug Control Strategy.

(6) With regard to operational support, must have military training value to the supporting unit or be consistent with the DoD policy (CJCSI 3710.01A, para 8b.(4)(a-f)).

5. Other Statutes.

a. Section 1206, FY 90 NDAA. Congress directed the armed forces, to the maximum extent practicable, to conduct training exercises in declared drug interdiction areas.

b. Section 1031, FY 97 NDAA. Congress authorized, and provided additional funding specifically for, enhanced support to Mexico. The support involves the transfer of certain non-lethal specialized equipment such as communication, radar, navigation and photo equipment.

c. Section 1033, FY 97 NDAA. Congress authorized, and provided additional funding specifically for, enhanced support to Colombia and Peru. The additional support is similar that provided to Mexico under Section 1031, but also includes boats suitable for riverine operations.

X. MISCELLANEOUS SUPPORT

A. Sensitive support - DoDDS-5210.36.

B. Law Enforcement Detachments (LEDET).

1. Law. 10 U.S.C. § 379.

2. U.S. Coast Guard personnel shall be assigned to naval vessels operating in drug interdiction areas. Such personnel have law enforcement powers, and are known as LEDETs.

3. When approaching a contact of interest, tactical control (TACON) of the vessel shifts to the Coast Guard. As a “constructive” Coast Guard vessel, the ship and its crew are permitted to participate in direct law enforcement. However, to the maximum extent possible, law enforcement duties should be left to Coast Guard personnel. Military members should offer necessary support.

C. Emergencies Involving Chemical or Biological Weapons.

1. The Secretary of Defense, upon request of the Attorney General, may provide assistance in support of Department of Justice activities during an emergency situation involving a biological or chemical weapon of mass destruction. 10 U.S.C. § 382.

a. Department of Defense rapid response team. The SECDEF shall develop and maintain at least one domestic terrorism rapid response team composed of members of the Armed Forces and employees of the DoD who are capable of aiding Federal, State, and local officials in the detection, neutralization, containment, dismantlement, and disposal of weapons of mass destruction containing chemical, biological, radiological, nuclear, and high-yield explosives (CBRNE). 50 U.S.C.S. § 2314(a) (LEXIS 2006). The U.S. Marine Corps Chemical Biological Incident Response Force (CBIRF), therefore, has the mission to, when directed, forward-deploy and /or respond to a credible threat of a CBRNE incident in order to assist local, state, or federal agencies and Unified Combat Commanders in the conduct of consequence management operations. CBIRF accomplishes this mission by providing capabilities for agent detection and identification; casualty search, rescue, and personnel decontamination; and emergency medical care and stabilization of contaminated personnel.

b. National Guard Weapons of Mass Destruction Civil Support Teams (WMD-CSTs). 10 U.S.C. § 12310(c). Each team consists of twenty-two highly skilled, full-time Army and Air National Guard members who are state controlled, federally resourced, trained, and exercised, and employs federally approved response doctrine. In 2002, Congress required the establishment of fifty-five teams, providing at least one team is established in each state (two in California) and territory (U.S. Virgin Islands, Puerto Rico, Guam) and Washington, D.C. All teams are scheduled to be certified by September 2007. Their missions primarily fall under the command and control of state or territory officials; however, if the teams are federalized, they fall under the command and control of Joint Task Force, Civil Support (JTF-CS).

D. Miscellaneous Exceptions. DoDD 5525.5, para. E4.1.2.5 contains a list of statutes that provide express authorization for the use of military forces to enforce the civil law. Among them are:

1. Protection of the President, Vice President and other dignitaries.

2. Assistance in the case of crimes against members of Congress or foreign officials, or involving nuclear materials.

APPENDIX A

DEPUTY SECRETARY OF DEFENSE
101 DEFENSE PENTAGON
WASHINGTON, DC 20301-1010

MAR 25 2003

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS
CHAIRMAN OF THE JOINT CHIEFS OF STAFF
UNDER SECRETARIES OF DEFENSE
ASSISTANT SECRETARIES OF DEFENSE
GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
INSPECTOR GENERAL OF THE DEPARTMENT OF DEFENSE
DIRECTOR, OPERATIONAL TEST AND EVALUATION
ASSISTANTS TO THE SECRETARY OF DEFENSE
DIRECTOR, ADMINISTRATION AND MANAGEMENT
DIRECTOR, FORCE TRANSFORMATION
DIRECTOR, NET ASSESSMENT
DIRECTOR, PROGRAM ANALYSIS AND EVALUATION
DIRECTORS OF THE DEFENSE AGENCIES
DIRECTORS OF THE DOD FIELD ACTIVITIES

SUBJECT: Implementation Guidance Regarding the Office of the Assistant Secretary of Defense for Homeland Defense

The Honorable Paul McHale has been appointed as the first Assistant Secretary of Defense for Homeland Defense (ASD(HD)). His principal duty is the overall supervision of the homeland defense activities of the Department under the authority, direction and control of the Under Secretary of Defense for Policy (USD(P)) and, as appropriate, in coordination with the Chairman of the Joint Chiefs of Staff (CJCS). As such, he will averse HD activities, develop policies, conduct analyses, provide advice, and make recommendations on HD, support to civil authorities, emergency preparedness and domestic crisis management matters within the Department.

Specifically, the ASD(HD) will assist the Secretary in providing policy direction on HD matters through the CJCS to United States Northern Command and other Combatant Commands, as applicable, to guide the development and execution of their plans and activities. To focus the planning and execution of DoD activities and the use of resources in preventing or responding to crises, the ASD(HD) will serve as the DoD Domestic Crisis Manager. To address the complexities of the interagency environment, the ASD(HD) will represent the Department on all HD related matters with designated Lead Federal Agencies, the Executive Office of the President, the Department of Homeland Security, other Executive Departments and Federal Agencies, and state and local entities, as appropriate.

Accordingly, the interim DoD Executive Agent for Homeland Security assignment to the Secretary of the Army (SecArmy), as described in Deputy Secretary of Defense Memorandum, "Homeland Security Executive Agent," October 2, 2001, is hereby terminated. To streamline and consolidate our support to civil authorities and related activities, the DoD Executive Agent assignments for Military Support to Civil Authorities, as described in DoD Directive 3025.1, and Military Assistance for Civil Disturbances, as described in DoD Directive 3025.12, are also terminated. The duties and authorities associated with these DoD Executive agent assignments are delegated to the ASD(HD) effective today. Also effective today, the delegation of authority to oversee the management and coordination of DoD support to international and national special events, including, without limitation, events covered under 10 U.S.C. 2564, is transferred from the SecArmy to the ASD(HD).

Effective no later than May 16, 2003, the following additional transfers and transitions of delegated authority, personnel, and associated resources, as shown, are directed to focus and align the Department with regard to homeland defense.

- From the Army to the Office of ASD(HD): transfer the functions and associated resources of the Offices of the Special Assistant for Military Support -- Civilian (3), Military (2), Total (5).

- From the Army to the CJCS: transition of the functions and associated resources of the Office of the Director of Military Support (DOMS) related to support to civilian authorities and special events -- Civilian (8), Military (12), Total (20). The ASD(HD) will exercise policy oversight of the DOMS on behalf of the Secretary.

- From the USD for Personnel and Readiness to the Office of the ASD(HD): the functions and associated resources related to Military Assistance to Civil Authorities -- Civilian (2), Military (5), Total (7).

- From the ASD for Special Operations and Low Intensity Conflict to the Office of the ASD(HD): the functions and associated resources related to Territorial Security -- Civilian (7), Military (6), Total (13).

The Director of Administration and Management, in coordination with the USD(P), the USD(Comptroller), the General Counsel of the Department of Defense, and other cognizant official will take the actions necessary to implement this direction. The attachment provides additional guidance to implement these and other actions.

/s/Paul Wolfowitz

Attachment:
As stated

Additional Implementation Guidance Regarding the Office of the Assistant Secretary of Defense for Homeland Defense (ASD(HD))

1. The ASD(HD), through the Under Secretary of Defense for Policy (USD)(P), shall:

1.1. Prepare transition plans, within 30 days, to effect all directed transfers and transitions as soon as possible, but no later than May 16, 2003. Coordinate the plans, as appropriate, with the Secretary of the Army, the Chairman of the Joint Chiefs of Staff (CJCS), the Under Secretary of Defense for Personnel and Readiness, the Under Secretary of Defense (Comptroller)(USD)(C), the General Counsel of the Department of Defense (GC, DoD), and the Director of Administration and Management (DA&M).

1.2. Prepare a memorandum for my approval, within 30 days, defining the domestic crisis management structure within OSD. Coordinate the memorandum with the CJCS, the under Secretaries of Defense, the Assistant Secretary of Defense for Command, Control, Communications and Intelligence (or successor organizations), the GC, DoD, and the DA&M.

1.3. Prepare a memorandum for my approval, within 30 days, defining the relationship between the ASD(HD) and the U.S. Northern Command, and other Combatant Commands as applicable. Coordinate the memorandum with the CJCS, the GC, DoD and DA&M.

1.4. Update and streamline DoD Directive 2000.15, "Support to Special Events", DoD Directive 3025.1, "military Support to Civil Authorities (MSCA)", DoD Directive 3025.12, "Military Assistance for Civil Disturbances (MACDIS)", DoD Directive 3025.15, "Military Assistance to Civil Authorities," and other related issuances, to implement this memorandum and any other required changes resulting from the establishment of the Office of the ASD(HD). Coordinate the directive in accordance with DoD 5025.1-M, "DoD Directive Systems Procedures."

2. The DA&M shall:

2.1. Develop and coordinate a chartering DoD Directive for the ASD(HD), within 45 days, for my approval, to incorporate the appropriate provisions of the memorandum. The DoD Directive shall define the relationship between the ASD(HD) and the ASD for Special Operations and Low Intensity Conflict regarding the matters of counterterrorism, antiterrorism, force protection, consequence management and counternarcotics. The DoD Directive shall also define the relationship between the ASD(HD) and the ASD for International Security Affairs (ASD(ISA)) regarding matters involving Mexico and the island nations of the Caribbean. And, the DoD Directive shall define the relationship between ASD(HD) and the ASD(ISA) regarding matters involving Canada and other NATO nations as they pertain to direct defense of the homeland.

2.2. Once the ASD(HD) chartering DoD Directive is approved, update DoD Directive 5111.1, "Under Secretary of Defense for Policy (USD(P))," DoD Directive 5111.10, "Assistant Secretary of Defense for Special Operations and Low Intensity Conflict (ASD(SO/LIC))" and other chartering DoD Directives, as required, to implement this memorandum.

2.3. Implement other administrative, financial, personnel, information technology, and support actions necessary to establish the Office of the ASD(HD).

3. The USD(C), the USD(P), and the Director, Program Analysis and evaluation shall promulgate updated planning, programming, and budgeting system (PPBS) guidance documents, beginning with the current PPBS cycle, that reflect these organizational, functional, and personnel realignments and requirements, and that include separate guidance for DoD homeland defense matters.

APPENDIX B

Originator: JOINT STAFF WASHINGTON DC//JDOMS//

SUBJECT: **TRANSFER OF THE ARMY DIRECTOR OF MILITARY SUPPORT TO THE JOINT STAFF**

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ZNR UUUUU
R 141916Z MAY 03
FM JOINT STAFF WASHINGTON DC//JDOMS//

BT
UNCLAS
MSGID/GENADMIN/JDOMS//
SUBJ/TRANSFER OF THE ARMY DIRECTOR OF MILITARY SUPPORT MISSION TO THE JOINT STAFF//
REF/A/DOD DIRECTIVE 3025.1/DTD 15 JAN 93/-/NOTAL//
REF/B/DOD DIRECTIVE 3025.1-M/DTD 2 JUN 94/-/NOTAL//
REF/C/DOD DIRECTIVE 3025.15/DTD 18 FEB 97/-/NOTAL//
REF/D/DOD DIRECTIVE 3025.12/DTD 4 FEB 94/-/NOTAL//
REF/E/DEPUTY SECRETARY OF DEFENSE IMPLEMENTATION MEMORANDUM/DTD 25 MAR 03/-/NOTAL//
RUEKJCS8003 UNCLAS
AMPN/REFS A-C DESIGNATE THE SECRETARY OF THE ARMY AS THE DOD EXECUTIVE AGENT FOR MILITARY SUPPORT TO CIVIL AUTHORITIES (MSCA) AND OUTLINE PROCEDURES FOR REQUESTING AND PROVIDING MSCA. REF D DESIGNATES THE SECRETARY OF THE ARMY AS THE DOD EXECUTIVE AGENT FOR MILITARY ASSISTANCE FOR CIVIL DISTURBANCES (MACDIS) AND OUTLINE PROCEDURES FOR REQUESTING AND PROVIDING MACDIS. REF E TRANSFERS THE EXECUTIVE AGENT AUTHORITY FOR MSCA AND MACDIS FROM THE SECRETARY OF THE ARMY TO THE ASSISTANT SECRETARY OF DEFENSE FOR HOMELAND DEFENSE AND DIRECTS THE TRANSFER OF THE FUNCTIONS OF THE DIRECTOR OF MILITARY SUPPORT (DOMS) FROM THE DEPARTMENT OF THE ARMY TO THE JOINT STAFF.//
RMKS/1. EFFECTIVE 161600Z MAY 03, THE ACTION AGENCY FOR MSCA AND MACDIS IS TRANSFERRED FROM THE DEPARTMENT OF THE ARMY DIRECTOR OF MILITARY SUPPORT (DOMS) TO THE JOINT STAFF PER REF E. CURRENT DOMS FUNCTIONS WILL BE ASSUMED BY A NEW DIVISION, JDOMS, WITHIN THE JOINT STAFF, J-3 DIRECTORATE.
2. THE TRANSFER OF THE ACTION AGENCY FOR DOMESTIC MILITARY SUPPORT FOLLOWS THE RECENT TRANSFER OF EXECUTIVE AGENCY FOR MSCA AND MACDIS FROM THE SECRETARY OF THE ARMY TO THE ASSISTANT SECRETARY OF DEFENSE FOR HOMELAND DEFENSE.
3. JDOMS IS LOCATED IN THE PENTAGON, WASHINGTON DC, ROOM 1E1008.
4. CONTACT NUMBERS.
A. PHONE: 703-697-9400, DSN 227-9400.
B. FAX: 703-697-3147, DSN 227-3147.
C. AFTER HOURS DUTY PHONE: DDO IN THE NATIONAL MILITARY COMMAND CENTER, 703-693-8196, DSN 223-8196.
5. NETWORK CONNECTIONS
A. NIPRNET EMAIL: JDOMS@JS.PENTAGON.MIL
B. SIPRNET EMAIL: JDOMS@JS.PENTAGON.SMIL.MIL
6. THE JOINT STAFF POINT OF CONTACT IS CDR FRANK MORNEAU, J-3, JOD HLS, TEL: 703-697-9444 OR 9400, DSN 697-9444 OR 9400.//
BT

APPENDIX C

THE DEPUTY SECRETARY OF DEFENSE
WASHINGTON D.C. 20301-1000

29 JUN 1996

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS
CHAIRMAN OF THE JOINT CHIEFS OF STAFF
UNDER SECRETARIES OF DEFENSE
COMMANDERS-IN-CHIEF OF THE UNIFIED COMBATANT COMMANDS
ASSISTANT SECRETARIES OF DEFENSE
GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
INSPECTOR GENERAL OF THE DEPARTMENT OF DEFENSE
DIRECTOR OF ADMINISTRATION AND MANAGEMENT
CHIEF, NATIONAL GUARD BUREAU

SUBJECT: DoD Training Support to U.S. Civilian Law Enforcement Agencies

This directive-type memorandum provides the DoD policy for providing advanced military training to U.S. civilian law enforcement agencies.

It is DoD policy that no advanced military training will be provided to U.S. civilian law enforcement agency (CLEA) personnel, except as noted below. "Advanced military training," in the context of this policy, is defined as high intensity training which focuses on the tactics, techniques, and procedures (TTPs) required to apprehend, arrest, detain, search for, or seize a criminal suspect when the potential for a violent confrontation exists. "Advanced military training" includes advanced marksmanship (including sniper training), military operations in urban terrain (MOUT), advanced MOUT, close quarters battle/close quarters combat (CQB/CQC), and similar specialized training. It does not include basic military skills such as basic marksmanship, patrolling, mission planning, medical, and survival skills.

As a single general exception to this policy, the U.S. Army Military Police School is authorized to continue training CLEA personnel in the Counterdrug Special Reaction Team Course, the Counterdrug Tactical Police Operations Course, and the Counterdrug Marksman/Observer Course. Additionally, on an exceptional basis, the Commander-in-Chief, U.S. Special Operations Command (USCINCSOC) may approve such training by special operations forces. In such cases, USCINCSOC will inform the Executive Secretary to the Secretary of Defense of the training support provided. Similarly, the U.S. Army MP School will continue to report training performed in accordance with existing procedures.

Those portions of applicable DoD directives and instructions relating only to the procedures for coordination and approval of CLEA requests for DoD support are not affected by this memorandum. Those portions of such directives that address the substance of training that may be provided to CLEAs will be revised to reflect this change in policy within 90 days.

The Under Secretary of Defense for Policy will notify civilian law enforcement agencies through appropriate means of this change in policy

/s/ JOHN P. WHITE

APPENDIX D

NATIONAL DEFENSE AUTHORIZATION ACT FOR FY2002

107 P.L. 107; 115 Stat. 1012; 2001 Enacted S. 1438; 107 Enacted S. 1438

Sec. 1021. EXTENSION AND RESTATEMENT OF AUTHORITY TO PROVIDE DEPARTMENT OF DEFENSE SUPPORT FOR COUNTER-DRUG ACTIVITIES OF OTHER GOVERNMENTAL AGENCIES.

Section 1004 of the National Defense Authorization Act for Fiscal Year 1991 (Public Law 101-510; 10 U.S.C. 374 note) is amended to read as follows:

Sec. 1004. ADDITIONAL SUPPORT FOR COUNTER-DRUG ACTIVITIES.

(a) Support to Other Agencies.--During fiscal years 2002 through 2006, the Secretary of Defense may provide support for the counter-drug activities of any other department or agency of the Federal Government or of any State, local, or foreign law enforcement agency for any of the purposes set forth in subsection (b) if such support is requested—

(1) by the official who has responsibility for the counter-drug activities of the department or agency of the Federal Government, in the case of support for other departments or agencies of the Federal Government;

(2) by the appropriate official of a State or local government, in the case of support for State or local law enforcement agencies; or

(3) by an appropriate official of a department or agency of the Federal Government that has counter-drug responsibilities, in the case of support for foreign law enforcement agencies.

(b) Types of Support.--The purposes for which the Secretary of Defense may provide support under subsection (a) are the following:

(1) The maintenance and repair of equipment that has been made available to any department or agency of the Federal Government or to any State or local government by the Department of Defense for the purposes of—

(A) preserving the potential future utility of such equipment for the Department of Defense; and

(B) upgrading such equipment to ensure compatibility of that equipment with other equipment used by the Department of Defense.

(2) The maintenance, repair, or upgrading of equipment (including computer software), other than equipment referred to in paragraph (1) for the purpose of—

(A) ensuring that the equipment being maintained or repaired is compatible with equipment used by the Department of Defense; and

(B) upgrading such equipment to ensure the compatibility of that equipment with equipment used by the Department of Defense.

(3) The transportation of personnel of the United States and foreign countries (including per diem expenses associated with such transportation), and the transportation of supplies and equipment, for the purpose of facilitating counter-drug activities within or outside the United States.

(4) The establishment (including an unspecified minor military construction project) and operation of bases of operations or training facilities for the purpose of facilitating counter-drug activities of the Department of Defense or any Federal, State, or local law enforcement agency within or outside the United States or counter-drug activities of a foreign law enforcement agency outside the United States.

(5) Counter-drug related training of law enforcement personnel of the Federal Government, of State and local governments, and of foreign countries, including associated support expenses for trainees and the provision of materials necessary to carry out such training.

(6) The detection, monitoring, and communication of the movement of—

(A) air and sea traffic within 25 miles of and outside the geographic boundaries of the United States; and

(B) surface traffic outside the geographic boundary of the United States and within the United States not to exceed 25 miles of the boundary if the initial detection occurred outside of the boundary.

(7) Construction of roads and fences and installation of lighting to block drug smuggling corridors across international boundaries of the United States.

(8) Establishment of command, control, communications, and computer networks for improved integration of law enforcement, active military, and National Guard activities.

(9) The provision of linguist and intelligence analysis services.

(10) Aerial and ground reconnaissance.

(c) Limitation on Counter-Drug Requirements.--The Secretary of Defense may not limit the requirements for which support may be provided under subsection (a) only to critical, emergent, or unanticipated requirements.

(d) Contract Authority.--In carrying out subsection (a), the Secretary of Defense may acquire services or equipment by contract for support provided under that subsection if the Department of Defense would normally acquire such services or equipment by contract for the purpose of conducting a similar activity for the Department of Defense.

(e) Limited Waiver of Prohibition.--Notwithstanding section 376 of title 10, United States Code, the Secretary of Defense may provide support pursuant to subsection (a) in any case in which the Secretary determines that the provision of such support would adversely affect the military preparedness of the United States in the short term if the Secretary determines that the importance of providing such support outweighs such short-term adverse effect.

(f) Conduct of Training or Operation To Aid Civilian Agencies.--In providing support pursuant to subsection (a), the Secretary of Defense may plan and execute otherwise valid military training or operations (including training exercises undertaken pursuant to section 1206(a) of the National Defense Authorization Act for Fiscal Years 1990 and 1991 (Public Law 101-189; 103 Stat. 1564)) for the purpose of aiding civilian law enforcement agencies.

(g) Relationship to Other Laws. —

(1) The authority provided in this section for the support of counter-drug activities by the Department of Defense is in addition to, and except as provided in paragraph (2), not subject to the requirements of chapter 18 of title 10, United States Code.

(2) Support under this section shall be subject to the provisions of section 375 and, except as provided in subsection (e), section 376 of title 10, United States Code.

(h) Congressional Notification of Facilities Projects. —

(1) When a decision is made to carry out a military construction project described in paragraph (2), the Secretary of Defense shall submit to the congressional defense committees written notice of the decision, including the justification for the project and the estimated cost of the project. The project may be commenced only after the end of the 21-day period beginning on the date on which the written notice is received by Congress.

(2) Paragraph (1) applies to an unspecified minor military construction project that—

(A) is intended for the modification or repair of a Department of Defense facility for the purpose set forth in subsection (b)(4); and

(B) has an estimated cost of more than $ 500,000.

APPENDIX E

DEPUTY SECRETARY OF DEFENSE
1010 DEFENSE PENTAGON
WASHINGTON, DC 20301-1010

APR 25 2005

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS
CHAIRMAN OF THE JOINT CHIEFS OF STAFF
UNDER SECRETARIES OF DEFENSE
COMMANDERS OF THE COMBATANT COMMANDS
GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
DIRECTOR, ADMINISTRATION AND MANAGEMENT
DIRECTORS OF THE DEFENSE AGENCIES
DIRECTORS OF THE DOD FIELD ACTIVITIES

SUBJECT: Reporting "Immediate Response" Requests from Civil Authorities

Military commanders and responsible officials of DoD components and agencies are authorized, when time does not permit prior approval from higher headquarters and subject to supplemental direction, to take immediate actions in response to requests from domestic civil authorities in order to save lives, prevent human suffering, or mitigate great property damage. Such actions are referred to as "immediate response."

Recently, the Secretary of Defense, Chairman of the Joint Chiefs of Staff and the combatant commanders have not received timely notice of immediate response activities undertaken in accordance with DoD directives. Accordingly, the notification policy contained in this memorandum is effective immediately.

As soon as practical, the military commander, or responsible official of a DoD component or agency rendering such assistance, shall report the request, the nature of the response, and any other pertinent information through the chain of command to the National Military Command Center (NMCC). Each level in the chain of command will make expeditious notification to the next higher authority. Notification should reach the NMCC within a few hours of the decision to provide immediate response. The NMCC will notify the Joint Staff through the Deputy Director for Operations and the Secretary of Defense, Deputy Secretary of Defense, Assistant Secretary of Defense (Homeland Defense) and Executive Secretary through OSD Cables.

This interim policy clarifies the notification guidance contained in DoD Directives 3025.1, "Military Support to Civil Authorities (MSCA)," January 15, 1993 and 3025.15, "Military Assistance to Civil Authorities," February 18, 1997. This interim policy guidance will remain in effect until its incorporation into appropriate directives by the Assistant Secretary of Defense (Homeland Defense).

Paul Wolfowitz

OSD 05892-05

NOTES

CHAPTER 14

RESERVE COMPONENT SOLDIERS AND OPERATIONS

I. TYPES OF OPERATIONALLY DEPLOYED RESERVE COMPONENT SOLDIERS

A. Overview. The Army's Reserve Components (RC) consist of the U.S. Army Reserve (USAR) and the Army National Guard of the United States (ARNGUS).[1] USAR units are combat service or combat service support type units, whereas ARNGUS units are typically combat or combat support type units.

B. USAR. The USAR consists of Soldiers assigned to units, and various individual Soldiers not assigned to units. Typically, USAR units and Soldiers serve under the U.S. Army Reserve Command (USARC), a part of U.S. Army Forces Command (FORSCOM). Most of the individuals who are not assigned to units belong to a manpower pool known as the Individual Ready Reserve (IRR).[2]

C. ARNGUS. The ARNGUS is the RC consisting of federally recognized units and organizations of the Army National Guard (ARNG) and members of the ARNG who are also Reserves of the Army.[3] Members of the ARNGUS/ARNG serve in a "dual status" in that they may serve as members of the ARNGUS under the command of the President, or as members of their individual state's ARNG under the command of their governor.[4]

1. Federal (ARNGUS) Status. Soldiers serve in their ARNGUS (RC) status when in federal (Title 10, U.S. Code) status. In this federal status, ARNGUS Soldiers are commanded and controlled by a federal chain of command, are subject to the UCMJ, and are typically subject to Army regulations applying to the active component. Judge Advocates (JA) should look to the "applicability" paragraph of a regulation in determining whether the regulation applies to Soldiers serving in an ARNGUS status. By regulation, National Guard Soldiers serving outside the United States must serve in their ARNGUS, Title 10 status.[5]

2. State (ARNG) status. Unless ordered into service in a federal ARNGUS status, ARNG Soldiers serve under a state chain of command, with the governor as commander-in-chief. Soldiers serving in this ARNG status can generally serve in either a Title 32, U.S. Code, status or State Active Duty (SAD) status. The distinction between state and federal status often assumes critical legal importance. The UCMJ does not apply to Soldiers on duty in either a Title 32 or SAD status.[6] Instead, state law provides for military justice.[7] The Federal *Posse Comitatus Act*[8] does not apply to National Guard Soldiers in a Title 32 or SAD status. Thus, they may legally participate in law enforcement activities if authorized by State law.

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[1] *See* 10 U.S.C. § 3062(c)(1)(2000). The other RCs are the Air National Guard of the United States, the Air Force Reserve, the Navy Reserve, the Marine Corps Reserve and the Coast Guard Reserve. *Id*. § 10101.

[2] Like the Selected Reserve, the IRR is a part of the broader Ready Reserve. *See* 10 U.S.C. § 10144. Although individuals who belong to the IRR "are available for mobilization in time of war or national emergency," they should not be confused with those who serve as drilling individual mobilization augmentees (DIMAs). As a technical matter, DIMAs belong to the Selected Reserve. AR 140-10, *supra* note 3, at para. 2-4a(2). *See also* U.S. DEP'T OF ARMY, REG. 140-145, ARMY RESERVE: INDIVIDUAL MOBILIZATION AUGMENTATION (IMA) PROGRAM (23 Nov. 1994).

[3] 10 U.S.C. § 10105 (2000).

[4] *See* Lieutenant Colonel Steven B. Rich, *The National Guard, Drug Interdiction and Counterdrug Activities, and Posse Comitatus: The Meaning and Implications of "In Federal Service,"* ARMY LAW., June 1994 at 35, 35-40 (detailed discussion of the various types of status for National Guardsmen).

[5] U.S. DEP'T OF ARMY, REG. 350-9, OVERSEAS DEPLOYMENT TRAINING, para. 4-2a (8 Nov. 2004). See also U.S. DEP'T OF ARMY, NATIONAL GUARD REG. (AR) 350-1, NATIONAL GUARD TRAINING table 1-1 (3 June 1991) ("All overseas deployment training (ODT) is Title 10.").

[6] The UCMJ is specific on this point indicating that it is applicable to "members of the Army National Guard of the United States or the Air National Guard of the United States only when in Federal service." UCMJ, art. 2(a)(3) (2008). *See also* U.S. DEP'T OF ARMY, REG. 135-200, ACTIVE DUTY FOR MISSIONS, PROJECTS, AND TRAINING FOR RESERVE COMPONENT SOLDIERS para. 1-11g(9) (30 June 1999); U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE para. 21-2b (16 Nov. 2005).

[7] *See, e.g.*, COLO. REV. STAT. §§ 28-3.1-101 to -607 (2005); CONN. GEN. STAT. §§ 27-145 to -274 (LEXIS 2006); Miss. Code Ann. § 33-13-1 to -627 (2006); TEX. GOV'T CODE §§ 432.001 to 432.048 (LEXIS 2005).

[8] 18 U.S.C. § 1385 (2000).

a. Title 32 status. Often considered a hybrid status, Title 32 status is federally funded; however, state authorities maintain command and control of its ARNG soldiers serving in Title 32 status. ARNG soldiers serving in Title 32 status are regulated by various, but not all, Army regulations. Judge Advocates should look to the "applicability" paragraph of the regulation in determining whether the regulation applies to Soldiers serving in an ARNG status.

(1) Training status. ARNG soldiers serving in a Title 32 are generally, and historically, in a "training" status. ARNG soldiers typically attend drill periods and annual training in this "training" status as they train for their federal mission if federalized in their ARNGUS status.[9]

(2) Operational status. Limited and specific statutory authorities also exist for ARNG personnel to conduct operational missions in a Title 32 status. Examples include Drug Interdiction and Counterdrug (CD) Missions,[10] Weapons of Mass Destruction Civil Support Teams (WMD CSTs),[11] Homeland Defense Activities,[12] and recent authority to support operations or missions undertaken by the member's unit at the request of the President or Secretary of Defense.[13]

b. State Active Duty (SAD) Status. National Guard Soldiers serving in their home state (or other state pursuant to the Emergency Management Assistance Compact (EMAC))[14] in such roles as disaster relief or control of civil disturbances typically serve in a SAD status.[15] Service in this status is completely governed by State law and regulations, is state funded and commanded and controlled by state authorities. In this status, ARNG members serve in a pure "militia" status.

II. STATUTORY AUTHORITY TO ORDER THE USAR AND ARNGUS TO ACTIVE DUTY TO TRAIN OR PERFORM OPERATIONS

A. Reserve and National Guard Soldiers and units may be ordered to perform annual training under statutory authority, and may be mobilized to participate in operations under several different statutory authorities.[16] The list below summarizes some of the more important ones.

1. **Annual Training**. Members of the USAR serve fourteen days of annual, active duty training and forty-eight periods of inactive duty training (IDT), which consists of twenty-four days of IDT per year.[17] Members of the National Guard, however, perform fifteen days of annual training and forty-eight periods of IDT per year, typically in a Title 32 status.[18] If training is conducted OCONUS, ARNG members serve in their ARNGUS, Title 10 status.[19]

2. **15 Days Without Consent**. Service secretaries may bring members of the RC to active duty for not more than fifteen days per year without the member's consent.[20] This type of secretarial authority is useful for training and processing in advance or anticipation of a longer mobilization period. It is distinct from those authorities that require performance of duty during weekend drills and a two week period of annual training.[21]

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[9] 32 U.S.C. § 502(a)(2000).

[10] 32 U.S.C. § 112 (2000).

[11] 10 U.S.C. § 12310(c) (LEXIS 2007).

[12] 32 U.S.C. § 901, *et seq.* (LEXIS 2007).

[13] 32 U.S.C. § 502(f)(2)(A) (LEXIS 2007).

[14] *See* Emergency Management Assistance Compact, Pub. L. No. 104-321, 110 Stat, 3877 (1996)

[15] *See, e.g.*, N.Y. MIL. LAW § 6 (LEXIS 2005); GA. CODE ANN. § 38-2-6 (LEXIS 2005); W. VA. CODE § 15-1D-1 (LEXIS 2006).

[16] For an alternative discussion of the mobilization continuum, *see* U.S. FORCES COMMAND, REG. 500-3-1, FORSCOM MOBILIZATION AND DEPLOYMENT PLANNING SYSTEM (FORMDEPS): VOLUME I, FORSCOM MOBILIZATION PLAN, para. 3 (15 Apr. 1998).

[17] 10 U.S.C. § 10147 (2006) (USAR drill and annual training provision).

[18] 32 U.S.C. § 502(a)(2000).

[19] U.S. DEP'T OF ARMY, REG. 350-9, OVERSEAS DEPLOYMENT TRAINING para. 4-2a (8 Nov. 2004); *see also* U.S. DEP'T OF ARMY, NATIONAL GUARD REG. (AR) 350-1, NATIONAL GUARD TRAINING table 1-1 (3 Jun. 1991) ("All overseas deployment training (ODT) is Title 10.").

[20] 10 U.S.C. § 12301(b)(LEXIS 2006). Members of the National Guard can only be brought to active duty under this authority with the consent of their governor. *Id.*

[21] *Id.*

3. **With Consent**. RC members may be ordered to active duty at any time with their consent. There is no limit to the duration of this duty aside from normal mandatory retirement dates and the expiration of enlistment contracts. Other than budgetary constraints, there is no cap on the number of reservists who may be on active duty.[22]

4. **Selective Mobilization**. This authority exists for peacetime domestic mobilization to suppress insurrection, enforce Federal authority, or prevent interference with state or Federal law.[23]

5. **Presidential Reserve Call-Up (PRC)**. Up to 200,000 reservists from the Selected Reserve and IRR may be involuntarily called to active duty for up to 365 days, for purposes related to external threats to U.S. security.[24] Soldiers may not be retained under this authority for more than 365 days, including time spent on active duty prior to and after deployment. The statute allows for the activation of units or individual Soldiers not assigned to a unit. Sometimes, special units (referred to as "derivative UICs") may be created to mobilize individual or groups of unit members without mobilizing entire units. These derivative units can be comprised of particular skill sets needed in theater.

6. Partial Mobilization. Upon presidential proclamation of a national emergency, up to one million Reserve Soldiers may be involuntarily called to duty for not more than twenty-four consecutive months.[25]

7. **Full Mobilization**. Under public law or Congressional resolution, all reservists may be involuntarily ordered to active duty for the duration of the war or emergency, plus six months.[26]

B. Determining when a Soldier's active duty service terminates can be critically important. Some types of duty end by operation of law. For example, no authority exists to extend a 365-day PRC. Therefore, the command must either complete actions pertaining to such a Soldier or initiate the Soldier's continuation under other authority. Similarly, a unit present on a 15-day annual training tour cannot be retained involuntarily, even if its continued presence is essential to the success of a mission.

C. Continuation of duty beyond the limits of the authorization to active duty is one matter. It is another for a Soldier to be continued on active duty pursuant to some other authorization. Servicemembers ordered to active duty under a PRC, for instance, may be ordered to perform a consecutive period of active duty pursuant to a partial mobilization. Similarly, those ordered to duty under a partial mobilization may be ordered to a further twenty-four consecutive month period of active duty. Individuals may also volunteer to extend their activation.[27] This latter option not only works to extend the period, but can also work to avoid the strength limitations in the event the mobilization calls for more personnel than authorized.

III. ADVERSE ACTIONS AGAINST DEPLOYED RC SOLDIERS

A. Overview. Mobilized RC Soldiers in Federal service have rights and obligations comparable to Active Army Soldiers. However, the JA advising commanders of these Soldiers and units must take care to avoid some RC-specific problem areas.

B. Authority to take UCMJ action. Two points loom large when assessing the implications of UCMJ action against RC Soldiers. They are (1) jurisdiction over the RC Soldier at the time of the offense and (2) jurisdiction over the RC Soldier at the time of the UCMJ action.

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[22] 10 U.S.C. § 12301(d). National Guard Soldiers activated under this authority come to active duty with their governor's consent. Those who have volunteered to serve through the active guard reserve (AGR) program with the USAR are on active duty pursuant to this authority. Congress does establish an upper limit on the number of AGR Soldiers who may be on duty at any time. *See, e.g.*, Department of Defense Authorization Act, 2006, Pub. L. No. 109-163, § 412, 119 Stat. 3136 (2006). *See also*, U.S. DEP'T OF ARMY, REG. 135-18, THE ACTIVE GUARD RESERVE (AGR) PROGRAM (1 Nov. 2004).

[23] *See* 10 U.S.C. §§ 331-333.

[24] 10 U.S.C. § 12304, as amended (LEXIS 2007). No more than 30,000 may come from the IRR. *Id.*

[25] 10 U.S.C. § 12302(a)(2000).

[26] *Id.* § 12301(a).

[27] *Id.* at para. 4.1.1. *See also* 10 U.S.C. § 12301(d).

1. **Status at the time of the offense**. In order to be subject to UCMJ liability, a Soldier has to be in a Federal[28] duty status at the time of commission of the offense. Proving this can sometimes present problems. For example, consider the case where a Soldier submits a urine sample shortly after beginning a tour of active duty. It may show ingestion of an illegal drug, but the command will need to prove that the Soldier was in an active duty status at the time of drug ingestion.[29]

2. **Status at the time of the action**. In order to take UCMJ action against a RC Soldier, the Soldier must be in an active duty status. This makes it critically important that the command know when the Soldier's active duty concludes. An RC Soldier may be retained on active duty for court-martial if action with a view toward court-martial is taken prior to the normal end of the Soldier's period of active duty. An Active Army General Court-Martial Convening Authority (GCMCA) can also order an RC Soldier back to active duty for court-martial or Article 15 punishment under this authority.[30]

3. **Assignment or attachment**. In addition to determining duty status, these situations also call for a careful review of the RC Soldier's orders. If a Soldier is *assigned* to a command, there should be no problem. However, if the orders specify that a Soldier is *attached* to a command, counsel must ensure that the terms of the attachment vest UCMJ jurisdiction in the command. If they do not, the attachment command may contact the assigning command to request any necessary amendments.

4. **Witness**. The authority to retain or call back a Soldier to active duty for court-martial does not apply to witnesses. In cases where RC Soldiers will be needed as witnesses after their release from active duty, the command may contact the Reserve Soldier's chain of command to secure the witness' presence under other authority.

5. **State jurisdiction over UCMJ violations**. Many State Codes of Military Justice lose jurisdiction over its National Guard Soldiers when serving in or mobilized into Title 10 (ARNGUS) status.[31] Consequently, when the Soldier is demobilized and returns to his ARNG status, the State is unable to prosecute the Soldier under its State Code of Military Justice for crimes committed when in Title 10 status. If the Federal authorities wish the Court-Martial the soldier, he must be recalled to active duty. Otherwise, the State is likely only authorized to pursue administrative action against the Soldier.

C. Administrative Actions. Administrative actions against a deployed RC Soldier pose fewer jurisdictional issues than UCMJ actions, but must still be approached carefully.

1. Unlike UCMJ jurisdictional requirements, a Soldier need not be in a duty status when committing misconduct subject to administrative action. However, the command must have authority to take the action. Here again, the RC Soldier's orders require careful examination. Assigned RC Soldiers generally fall under the command's administrative authority like any other Soldier, but attachment orders may reserve authority for administrative actions to the Soldier's reserve chain of command.

2. Generally, Active Army regulations will apply to mobilized RC Soldiers. For example, an administrative separation action against a mobilized Soldier would proceed under AR 635-200[32] rather than AR 135-178.[33] Practical considerations are also a factor. It is imperative to check the applicable regulation carefully and determine its impact when a RC Soldier is involved. Often, the duration of a Soldier's remaining active duty may be important. For example, what if a Soldier has only a week of active duty left? The Active Army command may lack sufficient time to complete a separation. Because a court-martial is not contemplated, there is no authority to extend the Soldier on active duty. The better alternative may be to ensure the documentation is forwarded to the

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[28] The UCMJ is inapplicable to members of the National Guard serving in State Active Duty status or Title 32 status. UCMJ, art. 2(a)(3) (2008). *See also* U.S. DEP'T OF ARMY, REG. 135-200, ACTIVE DUTY FOR MISSIONS, PROJECTS, AND TRAINING FOR RESERVE COMPONENT SOLDIERS, para. 1-11g(9) (30 June 1999); U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE para. 21-2b (16 Nov. 2005).

[29] *See, e.g.*, United States v. Chodara, 29 M.J. 943 (ACMR, 1990).

[30] *See generally*, U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE chapter 21 (16 Nov. 2005).

[31] *See, e.g.*, W. Va. Code § 15-1-3 (2006) ("This [code] applies to all members of the state military forces who are not in federal service.")

[32] U.S DEP'T OF ARMY, REG. 635-200, ACTIVE DUTY ENLISTED ADMINISTRATIVE SEPARATIONS (6 Jun. 2005).

[33] U.S. DEP'T OF ARMY, REG. 135-178, ENLISTED ADMINISTRATIVE SEPARATIONS (29 Jul. 2005).

Soldier's RC chain of command for appropriate action. With other actions, the Active Army chain of command processes the action to completion even after the RC Soldier departs.[34]

IV. JUDGE ADVOCATES IN THE RESERVE COMPONENTS[35]

A. This chapter has outlined some key terminology relevant to the RC. It has also discussed some of the important authorities for and issues related to the mobilization of RC Soldiers. Assistance with those matters and the fuller spectrum of RC legal issues is available from JAs who serve in the RC.

B. JAs are "embedded" as command JAs in some brigades and other brigade-level units in the USAR and ARNG. Legal Service Organizations (LSO) and Mobilization Support Organizations (MSO) are USAR units, comprised solely of JAs and paralegal specialists. Within the USAR, JAs also serve in garrison support units, division headquarters, at certain higher echelon commands, such as a theater support command or a theater signal command, and at the regional readiness command headquarters. They are also found at the fifty-four state and territorial Joint Force Headquarters and at divisions in the National Guard.

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[34] *See, e.g.*, U.S. DEP'T OF ARMY, REG. 600-37, UNFAVORABLE INFORMATION para. 3-4d (19 Dec. 1986) (providing for the completion of the memorandum of reprimand process following the departure of a Soldier from the command).

[35] For a further discussion of the roles of ARNG/ARNGUS and USAR JAs and their organizations, *see* U.S DEP'T OF ARMY, FIELD MANUAL 27-100, LEGAL SUPPORT TO OPERATIONS para. 2.1.5 and para. 2.1.6 (1 Mar. 2000). *See also* U.S. DEP'T OF ARMY, REG. 27-1, JUDGE ADVOCATE LEGAL SERVICES chp. 11 (30 Sep. 1996).

NOTES

CHAPTER 15

EMERGENCY ESSENTIAL CIVILIANS SUPPORTING MILITARY OPERATIONS

REFERENCES

1. Criteria for Designating Emergency Essential Employees, 10 U.S.C. § 1580.
2. Anthrax Notification Requirements, 10 U.S.C. § 1580a.
3. U.S. DEP'T OF DEFENSE, DIR. 1404.10, EMERGENCY-ESSENTIAL (E-E) DOD U.S. CITIZEN CIVILIAN EMPLOYEES (dated 10 Apr. 1992, certified current as of 1 December 2003).
4. U.S. DEP'T OF DEFENSE, DIR. 1400.31, DOD CIVILIAN WORK FORCE CONTINGENCY AND EMERGENCY PLANNING AND EXECUTION (28 Apr. 1995).
5. U.S. DEP'T OF DEFENSE INSTR. 1400.32, DOD CIVILIAN WORK FORCE CONTINGENCY AND EMERGENCY PLANNING GUIDELINES AND PROCEDURES (24 Apr. 1995).
6. U.S. DEP'T OF DEFENSE, INSTR. 1000.13, IDENTIFICATION CARDS FOR MEMBERS OF THE UNIFORMED SERVICES, THEIR DEPENDENTS, AND OTHER ELIGIBLE INDIVIDUALS (5 Dec. 1997).
7. U.S. DEP'T OF DEFENSE, INSTR. 5525.11, CRIMINAL JURISDICTION OVER CIVILIANS EMPLOYED BY OR ACCOMPANYING THE ARMED FORCES OUTSIDE THE UNITED STATES, CERTAIN SERVICE MEMBERS, AND FORMER SERVICE MEMBERS (3 Mar. 2005).
8. U.S. U.S. DEP'T OF ARMY, REG. 690-11, USE AND MANAGEMENT OF CIVILIAN PERSONNEL IN SUPPORT OF MILITARY CONTINGENCY OPERATIONS (26 May 2004).
9. U.S. DEP'T OF AIR FORCE, INSTR. 36-3026(I) (AR 600-8-14), IDENTIFICATION CARDS FOR MEMBERS OF THE UNIFORMED SERVICES, THEIR ELIGIBLE FAMILY MEMBERS, AND OTHER ELIGIBLE PERSONNEL (20 Dec. 2002) (Joint Instruction Adopted by Order of the Secretaries of the Air Force, Army, Navy, Marine Corps and Coast Guard).
10. U.S. DEP'T OF ARMY, PAM. 690-47, DA CIVILIAN EMPLOYEE DEPLOYMENT GUIDE (1 Nov. 1995).
11. Civilian Personnel Management Guide for Management Officials During Contingencies and Emergencies (March 2003), *available at* http://www.cpms.osd.mil/civ_prep/ManagementGuide.pdf.
12. Army Civilian Personnel Online (CPOL) "Civilian Deployment/Mobilization" guidance, *available at* http://cpol.army.mil/library/mobil/civ-mobil.html.
13. Department of State Office of Allowances (Foreign Post Differential and Danger Pay Allowance), *available at* http://www.state.gov/m/a/als.
14. Limitation on Premium Pay, 5 U.S.C. § 5547 (2000).
15. Federal Employees' Compensation Act (FECA), 5 U.S.C. § 8101 (2000).
16. Hours of Duty, 5 C.F.R. § 610.
17. Military Extraterritorial Jurisdiction Act (MEJA) of 2000, 18 U.S.C. §3261 (*See also* Chapter 7 of this Handbook).

I. INTRODUCTION

A. Throughout our history, civilians have accompanied the force during operations. Recent operations highlight civilian employees' importance to the military mission. Civilian employees perform a number of jobs formerly held by Soldiers, in areas as diverse as recreation specialists and intelligence analysts. Civilian employees' importance is reflected in the following Department of Defense (DoD) Directive:

> The DoD civilian workforce shall be prepared to respond rapidly, efficiently, and effectively to meet mission requirements for all contingencies and emergencies."[1]

B. An understanding of the process for designating, training, and directing the efforts of emergency-essential (EE) civilians while deployed is essential for Judge Advocates (JA) advising commanders.

[1] DEP'T OF DEFENSE DIR. 1400.31, DOD CIVILIAN WORK FORCE CONTINGENCY AND EMERGENCY PLANNING AND EXECUTION para. 4 (28 Apr. 1995)

II. DESIGNATING EMERGENCY-ESSENTIAL POSITIONS

A. An EE employee is one in a position that is located overseas or that would be transferred overseas during a crisis situation, or that requires the employee to deploy or to perform temporary duty assignments overseas during a crisis in support of a military operation. EE civilians are *not* contractor employees. EE civilian positions must be limited to those required to ensure the success of combat operations or to support combat-essential systems subsequent to mobilization, an evacuation order, or some other type of military crisis. EE positions cannot be converted to military positions because they require uninterrupted performance to provide immediate and continuing support for combat operations and/or support maintenance and repair of combat-essential systems. EE designations should be regularly reviewed and updated as part of each installation's operations plan. Management officials have the authority to designate additional positions as EE during a contingency or emergency, when such positions are deemed critical to accomplishment of the military mission.

B. The specific crisis situation duties, responsibilities, and physical requirements of each EE position must be identified and documented to ensure that EE employees know what is expected. Documentation can include annotation of EE duties in the existing peacetime position descriptions, a brief statement of crisis situation duties attached to position descriptions if materially different than peacetime duties, or separate EE position descriptions.

C. Employees assigned to pre-identified EE positions must sign a Department of Defense (DD) Form 2365, "DoDD Civilian Employee Overseas Emergency-Essential Position Agreement" as a condition of employment. The agreement specifies that the employee must continue to perform the duties and requirements of the EE position in the event of a crisis situation or war. It further documents that incumbents of EE positions accept certain conditions of employment arising out of crisis situations wherein EE employees shall be sent on temporary duty, relocate to duty stations in overseas areas, or continue to work in overseas areas after the evacuation of other U.S. citizen employees who are not EE. If a person with military recall status (*e.g.*, Ready Reserve, Standby Reserve, or other military recall status) is selected for an EE position, his or her non-availability for military mobilization will be reported promptly to the appropriate military personnel center so that he or she may be removed from military recall status. Any employee selected for an EE position who cannot be exempted from recall to active duty will not be appointed to an EE position.

D. Employees in positions located overseas that are identified as EE after the outbreak of a military crisis will be asked to execute an EE agreement (DD Form 2365). If the employee declines, the employee will continue to perform the functions of the position if no other qualified employee or military member is reasonably available. The employee will be entitled to the benefits and protections of an EE employee, but will be reassigned out of the position and assigned to a non-EE position as soon as reasonably practicable under the circumstances.

E. An employee in the U.S. who occupies a position that is identified as EE after a crisis develops or contingency mission begins will be asked to execute the DD Form 2365 and participate in contingency operations during the crisis. If the incumbent declines to sign the agreement or perform in the newly-designated EE position, the employing activity will seek another employee to volunteer to fill the position. If a volunteer is available, the incumbent will be detailed or transferred to a non-EE position, if one is available, at the same grade for which he or she is qualified. If a volunteer is not found, and the incumbent declines to sign the agreement but possesses the skills and expertise that, in management's view, renders it necessary that he or she perform in the EE position without an EE agreement, the employee may be involuntarily assigned the EE duties at the location where needed, and directed to perform the duties at that location on a temporary basis.

F. The EE position designation is included in the position description of each EE-identified position. Example:

> This position is emergency-essential. In the event of a crisis situation, the incumbent, or designated alternate, must continue to perform the EE duties until relieved by proper authority. The incumbent, or designated alternate, may be required to take part in readiness exercises. This position cannot be vacated during a national emergency or mobilization without seriously impairing the capability of the organization to function effectively; therefore, the position is designated "key," which requires the incumbent, or designated alternate, to be screened from military recall status.

G. The FY 2001 National Defense Authorization Act amended Title 10, U.S. Code, to require that EE civilians be notified of anthrax immunization requirements. The most recent guidance on the Anthrax Vaccine Immunization Program can be found at http://www.anthrax.mil. The notification requirement applies to both current and new EE

employees. The notice must be written, and the employee must sign to acknowledge receipt. File a copy of the notice and acknowledgement with the signed DD Form 2365. A sample notice follows:

> This is to notify you that your position has been designated as emergency essential. You may be required, as a condition of employment, to take the series of anthrax vaccine immunizations, to include annual boosters. This may also include other immunizations that may in the future be required for this position, or for a position you may fill as an emergency-essential alternate. Failure to take the immunizations may lead to your removal from this position or separation from Federal service. [Acknowledgement: This is to acknowledge that I have read and fully understand the potential impact of the above statement. (*employee signature and date)*].

H. Notice of the anthrax vaccine requirements must also be included in all vacancy announcements for EE positions. The notice may mirror that provided above.

I. Personnel selected for, or occupying, EE and alternate positions will meet the medical fitness and physical requirements of the job, as determined by the combatant or major command commander. Any special medical fitness requirements must be job-related and/or theater-specific.

III. DEPLOYMENT PREPARATIONS

A. Identification. Issue Geneva Convention Identity Cards to EE employees, or employees occupying positions determined to be EE. Emergency essential employees shall also be issued passports, visas, country clearances, and any required security clearances.

B. Documentation. Civilian employees must fill out DD Form 93, "Record of Emergency Data." Components will establish procedures for storing and accessing civilian DD Forms 93. Civilian casualty notification and assistance should be the same as, or parallel to, that provided to military personnel.

C. Clothing and Equipment Issue. All deploying Department of the Army (DA) civilians are expected to wear the appropriate military uniform, as determined and directed by the theater commander. Department of the Army Pamphlet 690-47 and AR 670-1 contain more details on the issuance and wear of military uniforms and equipment. Maintenance and accountability of military uniforms and equipment is the employee's responsibility. Personal clothing and care items are also the responsibility of the individual. Civilian employees should bring work clothing required by their particular job.

D. Training Requirements. Headquarters, Department of the Army (HQDA) mandated training includes the following: first aid and other Soldier field survival tasks; hands-on Mission Oriented Protective Posture (all levels); Geneva Convention (Relative to the Treatment of Prisoners of War); and an explanation of entitlements, and the circumstances under which the entitlements are authorized. Training requirements are the responsibility of the employee's home installation. Civilian EE employees shall be provided the same specialized training as military members (including training on the use of protective gear) on a periodic basis and prior to any deployment. Emergency essential civilians should also be trained in their responsibilities as members of the force, including standards of conduct, cultural awareness, prisoner of war coping skills, law of war, and the Uniform Code of Military Justice. EE employees will be encouraged, but not required, to participate in physical fitness and conditioning activities in accordance with AR 600-63.

E. Medical and Dental Care. Prior to deployment, provisions shall be made for EE employee medical care in the theater of operations. As part of pre-deployment preparations, EE employees shall receive the same immunizations as military personnel in theater. EE employees may be ordered to submit to required immunizations for service in the theater, and may be subjected to discipline for failing to submit. EE employees shall be tested for human immunodeficiency virus HIV before deployment, if the country of deployment requires it. According to DA policy (Department of the Army Chief of Staff/Office of the Judge Advocate General decision), when a requirement exists for mandatory HIV screening, and an individual tests positive, the individual can be deployed in support of a contingency operation if the host country is notified and the EE employee is able to perform assigned duties. EE employees shall receive medical and dental examinations and, if warranted, psychological evaluations to ensure fitness for duty in the theater. They shall carry with them a minimum of a ninety day supply of any medication they require. During a contingency, returning EE civilians shall receive cost-free military physical examinations within thirty days if the medical community decides it is warranted, or if it is required for military personnel.

F. Casualty, Mortuary, and Family Care. All EE employees who permanently change stations or are on temporary duty (TDY) outside the United States shall have panarex or deoxyribonucleic acid (DNA) samples taken for identification purposes. Dental x-rays may be substituted when the ability to take panarex or DNA samples is not available. EE employees may also be issued "dog tags" for identification purposes.

1. EE civilians who are in or deploying to a theater of operations, and who have dependents, are encouraged to make Family Care Plans. As a condition of employment, single parents or families in which both parents are EE civilians are responsible for ensuring that an adequate family care plan is in place at all times (DoDD 1404.10).

2. EE civilians are entitled to casualty services, to include tracking under the military casualty system, next-of-kin notification by Casualty Area Command, military escort of remains, and a U.S. flag and casket provided at Government expense.

G. Legal Assistance. Legal assistance, including wills and any necessary powers of attorney relating to deployments, is available to EE civilians notified of deployment, as well as their families, and will be available throughout the deployment. It is limited to deployment-related matters as determined by the on-site supervising attorney. DoD civilian employees who are serving with the Armed Forces of the United States in a foreign country (and their family members who accompany them) are eligible to receive legal assistance (without limitation) (*see* AR 27-3, para. 2-5a(6)(b)).

H. Weapons Certification and Training. Under certain conditions, and subject to weapons familiarization training in the proper use and safe handling of firearms, EE employees may be issued a personal military weapon for personal self-defense. Acceptance of a personal weapon is voluntary. Authority to carry a weapon for personal self-defense is contingent upon the approval and guidance of the Combatant Commander. Only Government-issued weapons/ammunition are authorized. Civilians may not be assigned to guard duty or perimeter defense or to engage in offensive combat operations.

I. Continental United States (CONUS) Replacement Center (CRC). All CONUS-based DA civilians (EEs, volunteers, and replacements) will process through a designated CRC prior to deployment.

IV. COMMAND AND CONTROL DURING DEPLOYMENTS

A. During deployments, EE civilians are under the direct command and control of the on-site supervisory chain, which will perform the normal supervisory functions, such as performance evaluations, task assignments and instructions, and disciplinary actions.

B. On-site commanders may impose special rules, policies, directives, and orders based on mission necessity, safety, and unit cohesion. These restrictions need only be considered reasonable to be enforceable.

V. COMMON ISSUES DURING DEPLOYMENTS

A. Accountability. The Army has developed an automated civilian tracking system called Civilian Tracking System (CIVTRACKS) to account for civilian employees supporting unclassified military contingencies and mobilization exercises. CIVTRACKS is a web-based tracking system designed to allow input of tracking data from any location with Internet access; its use is required. It is the employee's responsibility to input his/her data into CIVTRACKS, and data should be entered each time there is a change in duty location while deployed, to include the initial move from home station. The employee's home station is responsible for providing the employee a deployment card with user identification and password for access to CIVTRACKS (https://cpolrhp.belvoir.army.mil/civtracks/default.asp).

B. Tour of Duty. The administrative workweek constitutes the regularly-scheduled hours for which an EE civilian must receive basic and premium pay. Under some conditions, hours worked beyond the administrative workweek may be considered to be irregular and occasional, and compensatory time may be authorized in lieu of overtime/premium pay. The in-theater commander or his/her representative has the authority for establishing and changing EE tours of duty. The in-theater commander will establish the duration of the change.

C. Overtime. EE civilians whose basic rates of pay do not exceed that of a general schedule (GS) 10, step 1 will be paid at a rate of one and one-half times their basic hourly pay rate for each hour of work authorized and approved over the normal eight hour day or forty hour week. For employees paid at the rate of GS-10, step 1 or higher, their overtime pay used to be limited to one and one-half times the hourly pay rate for a GS-10, step 1. This meant that higher-ranking employees often earned less than their usual wage while working overtime. The 2004

Defense Authorization Act changed this: employees whose rate exceeds that of a GS-10, step 1 will now be paid at the rate of one and one-half times the basic hourly rate of a GS-10, step 1 or the employees' basic rate of pay, whichever is *greater*. Ideally, overtime will be approved in advance of deployment. If overtime is not approved in advance, the EE employee's travel orders should have the following statement in the remarks column: "Overtime authorized at TDY site as required by the Field Commander. Time and attendance reports should be sent to (name and address)." Field commanders should then submit to the EE employee's home installation a DA Form 5172-R, or local authorization form (with a copy of the travel orders), documenting the actual premium hours worked by each EE employee for each day of the pay period as soon as possible after the premium hours are worked.

D. On-Call Employees. Emergencies or administrative requirements that might occur outside the established work hours may make it necessary to have employees "on-call." On-site commanders may designate employees to be available for such a call during off-duty times. Designation will follow these guidelines: (1) a definite possibility that the designated employee's services might be required; (2) required on-call duties will be brought to the attention of all employees concerned; (3) if more than one employee could be used for on-call service, the designation should be made on a rotating basis; and (4) the designation of employees to be "on-call" or in an "alert" posture will not, in itself, serve as a basis for additional compensation (*i.e.*, overtime or compensatory time). If an employee is called in, the employee must be compensated for a minimum of two hours.

E. Leave Accumulation. Any annual leave in excess of the maximum permissible carry-over is automatically forfeited at the end of the leave year. Annual leave that was forfeited during a combat or crisis situation determined by appropriate authority to constitute an exigency of the public business may be temporarily restored. However, the employee must file for carry-over. Normally, the employee has up to two years to use restored annual leave.

F. Pay and allowances during deployments. Civilian employees receive the same pay and allowances to which they were entitled prior to deploying, and to which they would become entitled thereafter (*e.g.*, within-grade increases). There is no tax exclusion for civilian employees similar to the combat tax exclusion for military members. By law, the pay of a GS employee normally cannot exceed that of a GS-15, step 10 in a biweekly pay period, except that in a deployment situation this maximum salary limitation (basic plus overtime pay) is measured on an annual basis. As part of the 2006 Defense Authorization Act, Congress raised the total pay cap for civilian employees supporting overseas military operations under U.S. Central Command to $212,100 for calendar year 2007. Danger Pay Allowance (DPA) and Foreign Post Differential (FPD), both discussed below, are not subject to the pay cap. The pay cap does not apply to wage grade (WG) employees.

G. FPD. Employees assigned to work in foreign areas where the environmental conditions either differ substantially from CONUS conditions or warrant added compensation as a recruiting and retention incentive, are eligible for FPD after being stationed in the area in excess of forty-one days. FPD is exempt from the pay cap and is paid as a percentage of the basic pay rate, not to exceed 25% of basic pay. The Department of State (DoS) determines which areas are entitled to receive FPD, the FPD rate for the area, and the length of time the rate is in effect. Different areas in the same country can have different rates.

H. DPA. Civilian employees serving at or assigned to foreign areas designated for danger pay by the Secretary of State (SECSTATE) because of civil insurrection, civil war, terrorism, or wartime conditions which threaten physical harm or imminent danger to the health or well being of a majority of employees stationed or detailed to that area, will receive DPA. The allowance will be a percentage of the employee's basic compensation at the rates of 15, 20, or 25 percent, as determined by the SECSTATE. This allowance is in addition to any FPD prescribed for the area, but in lieu of any special incentive differential authorized the post prior to its designation as a DPA area. For employees already in the area, DPA starts on the date of the area's designation for DPA. For employees later assigned or detailed to the area, DPA starts upon their arrival in the area. For employees returning to the post after a temporary absence, it starts on the date of return. DPA will terminate with the close of business on the date the Secretary of State removes the danger pay designation for the area, or on the day the employee leaves the post, for any reason, for an area not designated for DPA. DPA paid to Federal civilian employees should not be confused with Imminent Danger Pay (IDP) paid to the military. IDP is triggered by different circumstances, and is not controlled by the SECSTATE.

I. Life Insurance. Federal civilian employees are eligible for coverage under the Federal Employees Group Life Insurance (FEGLI) program. Death benefits (under basic and all forms of optional coverage) are payable regardless of cause of death. Civilians who are deployed with the military to combat support roles during times of crises are not "in actual combat" and are entitled to accidental death and dismemberment benefits under FEGLI in the event of death. Similarly, civilians carrying firearms for personal protection are not "in actual combat."

J. Discipline. For information regarding MEJA, see the chapter on "Contractors Accompanying the Force" in this handbook.

VI. CONTRACTOR EMPLOYEES

For contractor issues during deployment, the chapter entitled "Contractors Accompanying the Force."

NOTES

NOTES

CHAPTER 16

CONTINGENCY CONTRACTOR PERSONNEL (CCP)

REFERENCES

1. U.S. DEP'T OF DEFENSE, DEFENSE FEDERAL ACQUISITION REG. SUPP. 225.74, (July, 2007) (Defense Contractors Outside the United States, with its accompanying clause at 252.225-7040, Contractor Personnel Authorized to Accompany U.S. Armed Forces Deployed Outside the United States; Department of Defense Procedures, Guidance and Information (DFARS PGI) Subpart 225.74, Defense Contractors Outside the United States).
2. U.S. DEP'T OF DEFENSE, INSTR. 3020.41, CONTRACTOR PERSONNEL AUTHORIZED TO ACCOMPANY U.S. ARMED FORCES, 3 Oct. 2005.
3. U.S. DEP'T OF DEFENSE, INSTR. 5525.11, CRIMINAL JURISDICTION OVER CIVILIANS EMPLOYED BY OR ACCOMPANYING THE ARMED FORCES OUTSIDE THE UNITED STATES, CERTAIN SERVICE MEMBERS, AND FORMER SERVICE MEMBERS, 3 March 2005.
4. Army Contractors Accompanying the Force (CAF) (AKA Contractors on the Battlefield) Guidebook, Procurement and Industrial Base Policy Office under the Deputy Assistant Secretary of the Army (Policy and Procurement), September 2003, available at http://www.afsc.army.mil/gc/files/CAF%20Guidebook.doc (hereinafter, CAF Guidebook).
5. Army Field Support Command (AFSC) Contractors on the Battlefield webpage. http://www.afsc.army.mil/gc/battle2.asp (contains links to CCP related Army Regulations; Field Manuals; Joint Publications; DOD Directives, Instructions and Regulations; DA Pamphlets & Policy Memos; the LOGCAP contract and amendments; and, Status of Forces Agreements).
6. Contingency Contracting/Contractors on the Battlefield, *available at* https://www.alt.army.mil/portal/page/portal/oasaalt/SAAL-ZP-Contingency-Contracting (contains links to materials relevant to contingency contracting; deployments; CCP; suggested contracting clauses; contingency contracting articles; etc.).
7. Defense Acquisition Deskbook, Supplement on Contractor Support in Theater of Operations, 28 Mar. 2001 *available at* (http://www.dscp.dla.mil/contract/doc/contractor.doc.
8. U.S. DEP'T OF ARMY, REG. 715-9, CONTRACTORS ACCOMPANYING THE FORCE, 29 Oct. 1999; U.S. DEP'T OF ARMY REG. 700-137, LOGISTICS CIVIL AUGMENTATION PROGRAM (LOGCAP), (16 Dec. 1985).
9. See Section IX below for additional references.

I. INTRODUCTION

DOD uses contractors to provide U.S. forces that are deployed overseas with a wide variety of services because of force limitations and a lack of needed skills. The types of services contractors provide to deployed forces include communication services, interpreters, base operations services, weapons systems maintenance, gate and perimeter security, intelligence analysis, and oversight over other contractors. The military uses contractors to support deployed forces for several reasons. One reason is that in some deployed areas, such as Bosnia and Kosovo, the executive Branch has limited the number of U.S. military personnel who can be deployed in those countries at any one time. When these limits, known as force caps, are in place, contractors replace soldiers so that the soldiers will be available to undertake activities with the potential for combat. A second reason that DOD uses contractors is because either the required skills are not available in the military or are only available in limited numbers and need to be available to deploy for other contingencies . . . . Finally, DOD uses contractors to conserve scarce skills to ensure that they will be available for future deployments.[1]

[1] Military Operations: Contractors Provide Vital Services to Deployed Forces But Are Not Adequately Addressed in DOD Plans, GAO-03-695, page 2.

II. DEFINITIONS

A. Contingency Contractor Personnel (CCP). Defense contractors and employees of defense contractors and their subcontractors at all tiers under DOD contracts, including U.S. citizens, U.S. legal aliens, third country national (TCN) and host nation (HN) personnel, who are authorized to accompany the U.S. Armed Forces under such contracts. This includes employees of external support, systems support, and theater support contractors. Such personnel are provided with an appropriate identification card under the Geneva Conventions.[2]

B. Contractors Deploying with the Force (CDF). This is a significant sub-category of CCP subject to special deployment, redeployment, and accountability requirements and responsibilities. Employees of system support and external support contractors, and associated subcontractors at all tiers, who are specifically authorized in their contract to deploy through a deployment center or process and provide support to U.S. military forces in contingency operations or in other military operations. CDF do not include TCN or local national personnel hired in theater using local procurement (e.g., day laborers).[3]

C. Defense Contractor. Any individual, firm, corporation, partnership, association, or other legal non-Federal entity that enters into a contract directly with the DOD to furnish services, supplies, or construction. In most instances, foreign governments, representatives of foreign governments, or foreign corporations wholly owned by foreign governments that have entered into contracts with DOD are not Defense contractors.[4]

D. Essential Contractor Services. A service provided by a firm or individual under contract to the DOD to support vital systems in support of military missions considered of utmost importance to the U.S. mobilization and wartime mission. The services, which shall be designated in the contract, are essential because the DOD components may not have military or DOD civilians to perform these services immediately or the effectiveness of defense systems or operations may be seriously impaired, and interruption is unacceptable when those services are not immediately available. Most support under external support and systems support contracts falls into this category as well as some support under theater support contracts.[5]

E. Joint Reception Center (JRC). The center established in the operational area (as directed by the joint force commander), with responsibility for the reception, accountability, training, and processing, of military and civilian individual augmentees upon their arrival in the operational area. It is also the center where augmentees will normally be out-processed through upon departure from the operational area.[6]

F. Local Procurement. This is the process of obtaining personnel, services, supplies, and equipment from local or indigenous sources.[7]

G. DFARS clause 252.225-7040, *Contractor personnel Authorized to Accompany U.S. Armed Forces Deployed Outside the United States*, applies when contractor personnel are authorized to accompany U.S. Armed Forces deployed outside the United States in contingency operations, humanitarian or peacekeeping operations, other military operations, or military exercises designated by the combatant commander.[8]

1. Contingency Operation. A military operation that the Secretary of Defense designates as an operation in which members of the armed forces are or may become involved in military actions, operations, or hostilities against an enemy of the U.S. or against an opposing military force. Or, alternatively, a military operation that results in the call or order to, or retention on, active duty of members of the uniformed services.[9]

2. Other Military Operations. A range of military force responses that can be projected to accomplish assigned tasks. These include, e.g.: civic action, humanitarian assistance, civil affairs, military presence,

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[2] U.S. DEP'T OF DEFENSE, INSTR. 3020.41, CONTRACTOR PERSONNEL AUTHORIZED TO ACCOMPANY U.S. ARMED FORCES, para. E2.1.3 (3 Oct. 2005) [hereinafter DODI 3020.41].

[3] *Id*. para. E2.1.4. Cf. definition of "external support contractors."

[4] *Id*. para. E2.1.5.

[5] *Id*. para. E2.1.6.

[6] *Id*. para. E2.1.10.

[7] *Id*. para. E2.1.11.

[8] DFARS 252.225-7040(b)(1).

[9] 10 U.S.C. § 101(a)(13).

psychological operations, quarantines, blockades, raids, intervention, and support for law enforcement authorities to counter international criminal activities or suppress domestic rebellion.[10]

H. Types of Contracts involving CCP. CCP contracts can be grouped into three categories. Each category may trigger different sets of rules and may also indicate where the contracting officer is located.

1. External Support.

a. External Support Contract. Contracts awarded by a supporting headquarters outside the contingency operation area that provide support for deployed operational forces. These contracts are usually prearranged, but may be awarded or modified during the mission based on the commanders' needs. Examples include the Army Logistics Civil Augmentation Program (LOGCAP), the Air Force Contract Augmentation Program, the Navy Construction Capabilities Contract, Civil Reserve Air Fleet contracts, and war reserve materiel contracts. Support under external support contracts is often designated as "essential contractor services" under the contract.[11]

b. External Support Contractors. Contract personnel under external support contracts who are hired predominantly from outside the operational area to support deployed operational forces. External support contractors include TCN personnel and local national personnel who are hired under a subcontract relationship of a prime external support contract; while these TCN and local national subcontractor personnel may not deploy through a deployment center or process, they are considered CDF for joint contractor database purposes and the prime external support contractor shall ensure their applicable personnel data is reflected in the joint contractor database. *See also* systems support contractors; theater support contractors.[12]

2. Systems Support.

a. Systems Support Contract. Contracts awarded by Military Department program managers or by Component Commands outside the contingency operation area to support deployed operational forces. They provide essential support to specific systems throughout the system's life cycle (including spare parts and maintenance for key weapons systems, command and control infrastructure, and communications systems) across the range of military operations. Support under systems support contracts is often designated as "essential contractor services" under the contract.[13]

b. Systems Support Contractors. Contract personnel under systems support contracts, normally with high levels of technical expertise, hired to support specific military systems. *See also* external support contractors; theater support contractors.[14]

3. Theater Support

a. Theater Support Contract. Contracts awarded within the contingency operation area to support deployed operational forces. Military contracting personnel with the deployed force, working under the contracting authority of the theater, component, or joint forces command contracting chief, normally award and administer these contracts. Theater support contracts provide goods, services, and minor construction, usually from the local vendor base, to meet the immediate needs of operational commanders. Most of these contracts do not provide essential contractor services; however, there are exceptions such as fuel and transportation support.[15]

b. Theater Support Contractors. Contract personnel under theater support contracts that are hired in, and operating in, a specific operational area. *See also* external support contractors; systems support contractors.[16]

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[10] DFARS 252.225-7040(a).

[11] DODI 3020.41, *supra* note 1, para. E2.1.7.

[12] *Id.* para. E2.1.8.

[13] *Id.* para .E.2.1.15.

[14] *Id.* para. E.2.1.16.

[15] *Id.* para. E2.1.17.

[16] *Id.* para. E2.1.18.

III. LEGAL STATUS

A. International Law. Contractors may support military operations as "civilians accompanying the force." Contractors must be designated as such by the military force they are accompanying and must be provided an appropriate identification (ID) card under the Geneva Convention.[17]

1. If captured during armed conflict, CCP are entitled to POW status.

2. CCP may support operations through indirect participation, such as by providing communications support, transporting munitions and other supplies, performing maintenance on military equipment, and other logistic services.[18] CCP who "engage in hostilities" risk being treated as combatants (and thus being targeted, etc.). Further, they risk being treated as "unprivileged belligerents" (and thus as war criminals).[19]

3. Arming of CCP, and CCP performance of security services, are addressed below in Section VI.

4. Each service to be performed by CCP in contingency operations SHALL BE reviewed, on a CASE-BY-CASE basis, in consultation with the servicing legal office to ensure compliance with applicable law and regulation.

B. HN and TCN Laws. Subject to international agreements, CCP are subject to HN law and the law of their home country (TCN law).

1. Status of Forces Agreements (SOFAs). SOFAs are international agreements between two or more governments that provide various privileges, immunities and responsibilities and enumerate the rights and responsibilities of individual members of the deployed force. The United States does not have SOFA arrangements with every country and some SOFAs do not adequately cover all contingencies. As such, it is possible that CCP and Soldiers will be treated differently by a local government. CAF Guidebook, Topic 15.

a. CCP status will depend upon the specific provisions of the SOFA, if any, that are applicable between the U.S. and the country of deployment at the time of deployment.

b. CCP may or may not be subject to criminal and/or civil jurisdiction of the host country to which they are deploying.[20]

c. If an international agreement (e.g., SOFA) does not address CCP status, the contractor may be unable to perform because their employees may not be able to enter the country or the contractor could be treated as a foreign corporation subject to local laws and taxation policies.[21]

d. The North Atlantic Treaty Organization (NATO) SOFA is generally accepted as the model for bilateral and multilateral SOFAs between the U.S. Government and host nations around the world.

e. The NATO SOFA covers three general classes of sending state personnel: 1) Members of the "force," i.e., members of the armed forces of the sending state; 2) Members of the "civilian component," i.e., civilian employees of the sending state; 3) "Dependents," i.e., the spouse or child of a member of the force or civilian component that is dependent upon them for support.

f. Under the generally accepted view of the NATO SOFA, contractor employees are not considered members of the civilian component. Accordingly, special technical arrangements or international agreements generally must be concluded to afford contractor employees the rights and privileges associated with SOFA status.

g. If there is no functioning government with which the Department of State can negotiate a SOFA, contract planners must comply with the policy and instructions of the combatant commander when organizing the use of contractors in that country.

h. If there is any contradiction between a SOFA and an employer's contract, the terms of the SOFA will take precedence.

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[17] *Id.* para. 6.1.1.

[18] U.S. DEP'T OF ARMY REG. 715-9, CONTRACTORS ACCOMPANYING THE FORCE, para. 3-3(d) (29 Oct. 1999) [hereinafter AR 715-9].

[19] Rebecca Rafferty Vernon, *Battlefield Contractors: Facing the Tough Issues*, 33 PUB. CONT. L.J. 369, 404-21 (2004).

[20] *Id.* para. 3-1(g).

[21] *Id.*

i. The following websites may help determine if the U.S. has a SOFA agreement with a particular country: http://www.jagcnet.army.mil (CLAMO section); https://aflsa.jag.af.mil/INTERNATIONAL (site requires FLITE registration and password); http://www.state.gov (this webpage also contains country studies, a quick way to learn about a country to which personnel are deploying).

2. CCP remain subject to the laws of their home country. Application of U.S. law is discussed below in Section VII.

C. Iraq: Coalition Provisional Authority (CPA), Coalition Contractors, Subcontractors and Their Employees.

1. Criminal, Civil and Administrative Jurisdiction. Contractor and sub-contractor Coalition personnel, who do not normally reside in Iraq, are subject to the exclusive jurisdiction of their Parent State for actions taken pursuant to contract terms. These CCP are not subject to Iraqi criminal jurisdiction. Coalition Provisional Authority Order Number 17, § 4 (available at http://www.cpa-iraq.org/regulations). Although the CPA was dissolved in June 2004 with the transfer of governing authority to the Iraqis, several orders, including CPA Order 17, continue to operate as the law of Iraq unless and until they are rescinded or superseded.

2. Licensing; Registration of Employees; Business and Corporate Laws; Acts Performed in an Official Capacity; and, Acts Not Performed in an Official Capacity. Coalition contractors, their subcontractors and all of their employees, who do not normally reside in Iraq, are not subject to Iraqi jurisdiction in matters relating to the terms and conditions of their contract in relation to the Coalition Provisional Authority. Coalition Provisional Authority Order Number 17, § 16 (available at http://www.cpa-iraq.org/regulations).

3. Claims against Contractors in Iraq. Claims for property loss, property damage, personal injury, personal illness and death against any persons employed by the CPA shall be submitted to and dealt with by the Parent State. Coalition Provisional Authority Order Number 17, § 18. (available at http://www.cpa-iraq.org/regulations).

IV. ADMINISTRATIVE ACCOUNTABILITY AND PROCESSING

A. General. Combatant Commanders are responsible, with assistance from their Component Commanders, for overall contractor visibility within their AOR. Accountability requirements apply to CDF; accountability of other CCP is left to lower command levels. In practice, accountability of both CDF and all other CCP requires the work and coordination of all levels of command.

B. Joint Contractor Database. The Under Secretary of Defense (Personnel and Readiness) (USD(P&R)) in coordination with the Under Secretary of Defense (Acquisition, Technology, and Logistics) (USD (ATL)) shall designate or develop a joint web-based database as the central repository of CDF personnel and contract capability information for all external support and systems support contracts.

1. The database shall provide by-name accountability of all CDF.

2. The database shall contain or link to minimum contract information, such as contract number; contractor, contracting office, and sponsoring military unit contact information, and a summary of services or capability to be provided under the contract.

3. Military Departments shall ensure that the joint database is designated, and its use required, in all external support and systems support contracts where CDF have the potential to support contingency operations or other military operations.

4. The Synchronized Predeployment and Operational Tracker (SPOT) was designated as the database to serve as the central repository for information on all CDF personnel and contract capability as required by DODI 3020.41. Queries about SPOT should be addressed to the SPOT group at SPOT@mail1.monmouth.army.mil. A SPOT Guidebook is also available upon request from this address.

5. CIVTRACKS was the previous system used for accountability of civilian personnel, and may still be encountered. CIVTRACKS is also a web-based tracking system that allows commanders to track and maintain accountability of civilians (e.g., contractor employees, government civilians, Red Cross, etc.) in a theater of operations. CIVTRACKS requires each individual to enter, via the internet, their name, duty location, telephone number, status, etc. into the computer program. CIVTRACKS may be modified in the future to enable civilians to input their data with a passage of their Common Access Card (CAC) through a computer scanner. Memorandum from the DA, Deputy Chief of Staff, G-1, 31 May 2002. CAF Guidebook, Topic 17.

C. Contractor Responsibilities.

1. Accountability. External support and systems support contractors shall input employee data and maintain by-name accountability of CDF in the joint database specified in the contract. These contractors are responsible for knowing the general location of their employees and shall keep the database updated.

2. Personnel Requirements.

a. Medical. Contractors are responsible for providing medically and physically qualified CCP. Any CDF deemed unsuitable to deploy during the deployment process, due to medical or dental reasons, will not be authorized to deploy with the military force. The SECDEF may direct mandatory immunizations for CDF.[22] Contracts must stipulate that CDF must provide medical, dental and DNA reference specimens, and make available medical and dental records.

b. Contracting officers may authorize contractor-performed deployment processing. Contracting officers shall coordinate with and obtain approval from the military departments for contractor-performed processing.[23]

D. CONUS Replacement Centers (CRCs) and Individual Deployment Sites (IDS). All CDF shall report to the deployment center designated in the contract before deploying to a contingency operation.[24] Actions at the deployment center include:

1. Validate accountability information in the joint database; verify: security background checks completed, possession of required vehicle licenses, passports, visas, next of kin/emergency data card;

2. Issue/validate proper ID card;

3. Issue applicable government-furnished equipment;

4. Provide medical/dental screenings and required immunizations. Screening will include HIV testing, pre- and post-deployment evaluations, dental screenings, and TB skin test. A military physician will determine if the contract employee is qualified for deployment to the AO and will consider factors such as age, medical condition, job description, medications, and requirement for follow-up care.[25]

5. Validate/complete required training (e.g., law of war, detainee treatment, Geneva Conventions, General Orders, standards of conduct, force protection, nuclear/biological/chemical, etc);

6. All CDF shall receive deployment processing certification (annotated in the letter of authorization (LOA) or separate certification letter) and shall bring this certification to the JRC and carry it with them at all times;

7. Waivers. For less than 30-day deployments, the Combatant Commander may waive some of the formal deployment processing requirements, including processing through a deployment center. Non-waivable requirements include possession of proper ID card, proper accountability, medical requirements (unless prior approval of qualified medical personnel). CDF with waivers shall carry the waiver with them at all times.[26]

E. Joint Replacement Center (JRC). CDF shall process through a JRC upon arrival at the deployed location. The JRC will validate personnel accountability, ensure theater-specific requirements are met, and brief CDF on theater-specific policies and procedures.[27]

F. Army sponsored. All U.S. Army sponsored contractor employees in the AO shall be designated to a military unit to maintain oversight and accountability.[28]

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[22] *See* U.S. DEP'T OF DEFENSE INSTR. 6205.4. IMMUNIZATION OF OTHER THAN U.S. FORCES (OTUSF) FOR BIOLOGICAL WARFARE DEFENSE (14 Apr. 2000).

[23] DODI 3020.41, *supra* note 1, para. 6.2.7.11.

[24] *Id.* para 6.2.7.1.; DFARS 252.225-7040(f).

[25] U.S. DEP'T OF ARMY, FIELD MANUAL 3-100.21, CONTRACTORS ON THE BATTLEFIELD para. 3-39; *See also* DFARS 252.225-7040(f).

[26] DODI 3020.41, *supra* note 1, para. 6.2.7.2.

[27] *Id*. para. 6.3.1; DFARS 252.225-7040(f).

[28] AR 715-9, *supra* note 18, para. 2-1(a).

V. LOGISTICS SUPPORT

A. Policy. Generally, contractors are responsible for providing for their own logistical support and logistical support for their employees. Logistical support shall be provided by the DOD **ONLY** when the commander or contracting officer determines the provision of such support is needed to ensure continuation of essential contractor services and adequate support cannot be obtained by the contractor from other sources.[29] The contracting office is required to verify the logistical and operational support that will be available for CCP. DoD Procedures, Guidance and Information (DFARS PGI) Subpart 225.74.

B. Letter of Authorization (LOA).[30]

1. An LOA shall be issued by a contracting officer or designee for all CDF, and will be required for processing through a deployment center, travel to/from/within the AOR, and will detail the privileges and government support to which each contractor employee is entitled.[31]

2. The LOA shall provide, at a minimum, the contract number, emergency contact information for the contracting officer, emergency contact information for the contractor POC, and contact information for the sponsoring in-theater supported unit.

3. All CDF shall carry the LOA with them at all times. The LOA shall identify the CDF by-name.

4. The LOA shall state the intended length of assignment in the AOR, and identify the government facilities, equipment, and privileges the CDF is entitled to use.

C. Individual Protective Equipment. Generally, contractors are responsible for providing all life, mission, and administrative support to its employees. If the government determines it is in its interests to provide protective equipment, the level of support must be stated in the contract. The contract should designate where/when the equipment will be provided, where/when it is to be returned, and whether it is being provided on a reimbursable basis.[32] The decision of contractor personnel to wear any issued protective equipment is voluntary; however, the Combatant Commander, subordinate JFC and/or ARFOR Commander may require contractor employees to be prepared to wear Chemical, Biological, and Radiological Element (CBRE) and High-Yield Explosive defensive equipment. CAF Guidebook, Topic 6.

D. Clothing. Generally, commanders SHALL NOT issue military clothing to CCP, nor allow CCP to wear military or military look-alike uniforms.[33] Individual CCP are ordinarily responsible to provide their own clothing. Combatant commanders may authorize certain CCP to wear military uniforms for operational reasons. This authorization shall be in writing and be carried at all times by subject CCP. Care must be taken to ensure CCP are distinguishable from military personnel.[34]

E. Government Furnished Equipment (may include protective equipment, clothing, or other equipment necessary for contract performance).

1. The contract must specify that the contractor is responsible for storage, maintenance, accountability, and performance of routine inspection of Government furnished property. The contract must also specify contractor responsibilities for training and must specify the procedures for accountability of Government furnished property.[35]

2. Contractor employees will be responsible for maintaining all issued items and must return them to the issuer upon redeployment.[36] In the event that issued clothing and/or equipment is lost or damaged due to negligence,

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[29] DODI 3020.41, *supra* note 1, para. 4.3; DFARS 225.7402-3; AR 715-9, *supra* note 18, para. 3-1(i).

[30] DODI 3020.41, *supra* note 1, para. 6.2.7.4.

[31] DFARS PGI 225.7402-3 provides a sample LOA.

[32] DODI 3020.41, *supra* note 1, para. 6.2.7.6.

[33] AR 715-9, *supra* note 18, para. 3-3(e).

[34] DODI 3020.41, *supra* note 1, para. 6.2.7.7.

[35] U.S. DEP'T OF ARMY, REG. 700-137 LOGISTICS CIVIL AUGMENTATION PROGRAM (LOGCAP) (16 Dec. 85) [hereinafter AR 700-137]; AR 715-9, *supra* note 18, para. 3-1(j); CAF Guidebook, Topic 6

[36] DFARS 252.225-7040(i).

a report of survey will be initiated IAW AR 735-5, Chapters 13 and 14. According to the findings of the Survey Officer, the government may require reimbursement from the contractor.[37]

F. Legal Assistance. Generally, CCP are NOT entitled to military legal assistance with personal legal affairs, either in theater or at the deployment center. Any authorization should be contained within the LOA, which should be carried by the CCP and be presented to the legal office to show entitlement.[38]

1. Contractual Obligation. The specific terms of the contract must be reviewed to verify if the government is obligated to provide legal service.[39] SJAs should recommend eliminating legal assistance contractual obligations whenever such contracts are reviewed or renegotiated.[40]

2. If contractually obligated to provide legal assistance, the following limitations apply:

a. If the legal assistance is to be provided overseas, it must be in accordance with applicable international agreements or approved by the host nation government in some way.[41]

b. Legal assistance is limited to ministerial service (for example notarial services), legal counseling (to include the review and discussion of legal correspondence and documents), and legal document preparation (limited to powers of attorney and advanced medical directives) and help on retaining civilian lawyers.[42]

c. NOTE: Contract employee status is irrelevant if the person is an authorized recipient of legal assistance services, e.g., Retiree or Family Member otherwise authorized legal assistance services.

G. ID Cards.

1. CCP will receive one or more of the following three distinct forms of identification:

a. Common Access Card (CAC). Required for access to facilities and use of privileges afforded to military, government civilians and/or military dependents. CDF are issued CACs. CAF Guidebook, Topic 4.

b. DD Form 489 (Geneva Conventions Identity Card for Persons who Accompany the Armed Forces). Identifies one's status as a contractor employee accompanying the U.S. Armed Forces. Must be carried at all times when in the theater of operations. Pursuant to the Geneva Convention Relative to the Treatment of Prisoners of War, Article 4(4), if captured, contractors accompanying the force are entitled to prisoner of war status. CAF Guidebook, Topic 4. (See discussion of Status, *supra*).

c. Personal identification tags. The identification tags will include the following information: full name, social security number, blood type and religious preference. These tags should be worn at all times when in the theater of operations. CAF Guidebook, Topic 4.

2. In addition, other identification cards, badges, etc., may be issued depending upon the operation. For example, when U.S. forces participate in United Nations (U.N.) or multinational peace-keeping operations, contractor employees may be required to carry items of identification that verify their relationship to the U.N. or multinational force.

3. If the contractor processes CDF for deployment, it is the responsibility of the contractor to ensure CDF receive required identification prior to deployment.

H. Medical and Dental Care. Generally, DOD may provide resuscitative care, stabilization, hospitalization at level III Military Treatment Facilities (MTF), and assistance with patient movement in emergencies where loss of life, limb, or eyesight could occur.[43]

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[37] AR 700-137 *supra* note 35; CAF Guidebook, Topic 6.

[38] DODI 3020.41, *supra* note 1, para. 6.2.7.10; U.S. DEP'T OF ARMY, REG. 27-3 THE ARMY LEGAL ASSISTANCE PROGRAM para. 2-5a(7) (21 Feb. 96) [hereinafter AR 27-3].

[39] AR 27-3, *supra* note 38, para. 2-5(a)(7).

[40] *Id.* para. 2-5a(7).

[41] *Id.* para. 2-5.

[42] *Id.* para. 2-5.

[43] DODI 3020.41, *supra* note 1, para. 6.3.8; DFARS 252.225-7040(c)(2).

1. All costs associated with treatment and transportation are reimbursable to the government.

2. Resuscitative care. The aggressive management of life and limb-threatening injuries. Examples of emergencies include refills of prescription/life-dependent drugs, broken bones, and broken teeth.

3. Primary Care. Primary medical or dental care is NOT authorized and will not be provided unless specifically authorized under the terms of the contract and the corresponding LOA.

4. Long term care. Long term care will not be provided.

I. Evacuation, Next of Kin (NOK) Notification, Personnel Recovery, Mortuary Affairs.

1. Evacuation. The government will provide assistance, to the extent available, to U.S. and TCN CCP if the Combatant Commander orders a mandatory evacuation.[44]

2. NOK Notification. The contractor is responsible for notification of the employee-designated NOK in the event an employee dies, requires evacuation due to an injury, or is isolated, missing, detained, captured, or abducted.[45]

3. The government will assist, in accordance with DODD 2310.2, Personnel Recovery, in the case of isolated, missing, detained, captured, or abducted CCP.[46]

4. Mortuary Affairs. Mortuary affairs will be handled in accordance with DODD 1300.22, Mortuary Affairs Policy.[47]

J. Vehicle and Equipment Operation. Deployed contractor employees may be required or asked to operate U.S. military, government owned or leased equipment such as generators and vehicles. Contractor personnel may also be required to obtain a local license for the deployment country, e.g. German driver's license.[48]

1. Contractor-owned/leased vehicles shall meet all requirements established by the combatant commander and be maintained in a safe operating condition.[49]

2. While operating a military owned or leased vehicle, a contractor employee is still subject to the local laws and regulations of the country, area, city, and/or camp in which he/she is deployed. Traffic accidents or violations usually will be handled in accordance with the local laws, the Status of Forces Agreement, and/or combatant commander guidance.

3. If a contractor employee does not enjoy special status under the Status of Forces Agreement, then he/she may be subject to criminal and/or civil liabilities. Therefore, the employee or contractor may be held liable for damages resulting from negligent or unsafe operation of government, military vehicles and equipment.

K. MWR Support. CCP may be eligible to use some or all MWR facilities and activities subject to the installation or Combatant Commander's discretion and the terms of the contract.[50] U.S. citizen contractor employees may be eligible for use of Army and Air Force Exchange Service (AAFES) facilities for health and comfort items. Use of these facilities will be based on the installation or Combatant Commander's discretion, the terms of the contract with the government, and the terms of the applicable Status of Forces Agreement.[51]

L. Military Postal Service (MPS). U.S. citizen contractor employees, and any accompanying dependents, are entitled to use the MPS only where there is no U.S. Postal Service available and the contract between the U.S.

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[44] DFARS 252.225-7040(m).

[45] DFARS 252.225-7040(n).

[46] DFARS 252.225-7040(n).

[47] DFARS 252.225-7040(o).

[48] DFARS 252.225-7040(k); CAF Guidebook, Topic 8.

[49] CAF Guidebook, Topic 8.

[50] U.S. DEP'T OF ARMY, REG. 215-1 MILITARY MORALE, WELFARE, AND RECREATION PROGRAMS AND NONAPPROPRIATED FUND INSTRUMENTALITIES ch. 6 (31 July 2007).

[51] U.S. DEP'T OF ARMY, REG. 60-20, ARMY AND AIR FORCE EXCHANGE SERVICE OPERATING POLICIES ch. 2 (15 Dec. 1992).

Government and contractor does not preclude the contractor's employees from using the MPS. Contract clauses authorizing a contractor employee to use the MPS must be reviewed and approved by the MPS agency.

M. American Red Cross (ARC) Services. ARC services such as emergency family communications and guidance for bereavement airfare are available to CDF in the area of operations.

N. Family Readiness Groups (FRG). CDF personnel are encouraged to form their own FRGs or may coordinate with supported unit leaders to determine whether to involve their family with the FRG group of the military unit to which they are attached.

O. Religious Support. CDF are entitled to receive Army chaplain religious support. The Army can restrict the right to the free exercise of religion by CDF. The location and nature of the conflict will determine these parameters.[52]

P. Hostage Aid. When the Secretary of State declares that U.S. citizens or resident aliens are in a "captive status" as a result of "hostile action" against the U.S. government, CDF personnel and his/her dependents become entitled to a wide range of benefits. Potential benefits include: continuation of full pay and benefits, select remedies under the Servicemembers' Civil Relief Act, physical and mental health care treatment, education benefits to spouses or dependents of unmarried captives, and death benefits. Eligible persons must petition the Secretary of State to receive benefits. Responsibility for pursuing these benefits rests with the contractor employee, the employee's family members, or the contractor.

VI. SECURITY, WEAPONS, AND USE OF FORCE

A. Security. It is DOD policy to develop a plan for protection of CCP in locations where there is not sufficient or legitimate civil authority and the commander decides it is in the interests of the government to provide security because the contractor cannot obtain effective security services, such services are unavailable at a reasonable cost, or threat conditions necessitate security through military means.[53]

1. The contracting officer shall include the level of protection to be provided to CCP in the contract.

2. In appropriate cases, the Combatant Commander may provide security through military means, commensurate with the level of security provided to DOD civilians.

3. All CCP shall comply with applicable Combatant Commander and local commander force protection policies.[54]

B. CCP Arming for Self-Defense.[55]

1. In accordance with applicable U.S., HN, and international law, and relevant international agreements, on a CASE-BY-CASE basis, the Combatant Commander (or general officer designee) may authorize CCP arming for INDIVIDUAL self-defense.

2. Acceptance of weapons by CCP must be voluntary and permitted by the contractor and the contract.

3. The government must furnish or ensure weapons training and briefings on the rules for the use of force.

4. The contractor must ensure that employees are not prohibited under U.S. law to possess firearms (e.g., Lautenberg Amendment, 18 U.S.C. § 922(d)(9)).

5. Unless immune from HN jurisdiction, CCP shall be advised that the inappropriate use of force may subject them to U.S. or HN prosecution and civil liability.

6. All applications for arming CCP shall be reviewed on a case-by-case basis by the Staff Judge Advocate to the Combatant Commander.

C. Security Services. If consistent with applicable U.S., HN, and international law, and international agreements and DODI 3020.41, a defense contractor may be authorized to provide security services for OTHER

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[52] AR 715-9, *supra* note 18, para. 2-1(b).

[53] DODI 3020.41, *supra* note 1, para. 4.4; DFARS 252.225-7040(c).

[54] DODI 3020.41, *supra* note 1, para. 6.3.4.

[55] *Id.* para. 6.3.4.1 & 6.3.4.2.

THAN UNIQUELY MILITARY FUNCTIONS. Contracts for security services shall be used cautiously in contingency operations where major combat operations are ongoing or imminent.[56]

1. Whether a particular use of contract security personnel to protect military assets is permissible is dependent on the facts and requires legal analysis considering the nature of the operation, the type of conflict, and a case-by-case determination.[57]

2. Requests for permission to arm CCP to provide security services shall be reviewed by the Staff Judge Advocate to the Combatant Commander. The request will then be approved or denied by the Combatant Commander, or a specifically identified designee no lower than general officer.[58]

3. If major combat operations are ongoing or imminent, contract security services will NOT be used to guard U.S. or coalition military supply routes, military facilities, military personnel, or military property except as specifically authorized by the Combatant Commander (non-delegable).[59]

4. Requests for permission to arm CCP to provide security services shall include:[60]

a. A description of where such contract security personnel will operate, the anticipated threat, and what non-military property, or non-military personnel such personnel are intended to protect, if any;

b. A description of how the movement of contractor security personnel will be coordinated through areas of increased risk or planned or ongoing military operations including how the contractor security personnel will be rapidly identified by members of the Armed Forces;

c. A communication plan to include a description of how relevant threat information will be shared between contractor security personnel and U.S. military forces, including how appropriate assistance will be provided to contractor security personnel who become engages in hostile situations;

d. Documentation of individual training covering weapons familiarization, rules for the use of deadly force, limits on the use of force including whether defense of others is consistent with HN law, the distinction between the rules of engagement applicable to military forces and the prescribed rules for the use of deadly force that control the use of weapons by civilians, and the Law of Armed Conflict;

e. DD Form 2760, "Qualification to Possess Firearms and Ammunitions," certifying the individual is not prohibited under U.S. law from possessing a weapon or ammunition due to conviction in any court of a crime of domestic violence whether a felony or misdemeanor;

f. Written acknowledgement by the defense contractor and individual contractor security personnel, after investigation of background and qualifications of contractor security personnel and organizations, certifying such personnel are not prohibited under U.S. law to possess firearms; and

g. Written acknowledgement by the defense contractor and individual contractor security personnel that: potential civil and criminal liability exists under U.S. and HN law for the use of weapons; proof of authorization to be armed must be carried; CCP may possess ONLY U.S. Government-issued and/or approved weapons and ammunition for which they have been qualified; contract security personnel were briefed and understand limitations on the use of force; and authorization to possess weapons and ammunition may be revoked for non-compliance with established rules for the use of force.

5. Upon approval of the request, the Combatant Commander will issue written authorization to the defense contractor identifying who is authorized to be armed and the limits on the use of force.

VII. COMMAND, CONTROL AND DISCIPLINE

A. General. Command and control, including direction, supervision, and discipline, of CCP is significantly different than that of military personnel or even government civilian employees.

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[56] *Id.* para. 6.3.5.

[57] *Id.* para. 6.3.5.

[58] *Id.* para. 6.3.5.1.

[59] *Id.* para. 6.3.5.2.

[60] *Id.* para. 6.5.3.3

1. The contract is the principal legal basis for the relationship between DOD and the contractor. The contract shall specify the terms and conditions under which the contractor is to perform.[61]

2. Functions and duties that are inherently governmental are barred from private sector performance.[62] Additionally, the contracting officer is statutorily required to make certain determinations before entering into a contract for the performance of each function closely associated with inherently governmental functions.[63]

3. CCP are not under the direct supervision of military personnel in the chain of command.[64] CCP shall not be supervised or directed by military or government civilian personnel.[65]

4. The Contracting Officer is the designated liaison for implementing contractor performance requirements. The contracting officer is the only government official with the authority to increase, decrease or materially alter a contract scope of work or statement of objectives.[66] Only the designated contracting officer's representative (COR) shall communicate the Army's requirements to the contractor and prioritize the contractor's activities consistent with the contract.[67]

5. CCP personnel cannot command, supervise, or control military or government civilian personnel.[68]

B. Orders and Policies.

1. The general rule is that CCP are subject to the terms of the contract under which they are performing, and CCP are responsible for their performance to the contractor – their employer. Commanders have no direct contractual relationship with CCP or defense contractors.[69]

2. All contracts involving CCP should include provisions requiring CCP to comply with: U.S. and HN laws; applicable international agreements; applicable U.S. regulations, directives, instructions, policies, and procedures; orders, directives, and instructions issued by the combatant commander relating to force protection, security, health, safety, or relations and interaction with local nationals.[70]

3. Commanders and legal advisers must be aware that interaction with CCP may lead to unauthorized commitments and possible Anti-Deficiency Act (ADA) violations. While contracting officers are the only government officials authorized to change contracts, actions by other government officials, including commanders, CORs, etc, may bind the government under alternative theories of recovery.

4. Contract changes (direction to CCP) in emergency situations.

a. DFARS. The DFARS maintains the general rule that only contracting officers may change a contract, even in emergency situations. The DFARS clause does expand the scope of the standard Changes Clause, by allowing, in addition to changes otherwise authorized, that the contracting officer may, at any time, make changes to Government-furnished facilities, equipment, material, services, or site.[71]

b. DODI. The Instruction states that the ranking military commander may, in emergency situations (e.g., enemy or terrorist actions or natural disaster), direct CCP to take lawful action as long as those actions do not require them to assume inherently governmental responsibilities.[72]

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[61] *Id.* para. 6.1.4.

[62] *Id.* para. 6.1.5.

[63] 10 U.S.C. § 2383.

[64] AR 715-9, *supra* note 18, para. 3-2(f).

[65] *Id*. para. 3-3(b).

[66] *Id.* para. 3-2(e). *See also* FAR Part 42; AR 700-137, *supra* note 35.

[67] AR 715-9, *supra* note 18, paras. 3-2(f), 3-3(b).

[68] *Id.* para. 3-3(a); AR 700-137, *supra* note 35. *See also* FAR 37.104, prohibition on personal services contracts.

[69] DODI 3020.41, *supra* note 1, para. 6.3.3.

[70] DFARS 252.225-7040(d); AR 715-9, *supra* note 18, para. 3-2(h); DODI 3020.41, *supra* note 1, para. 6.3.3.

[71] DFARS 252.225-7040(p).

[72] DODI 3020.41, *supra* note 1, para. 6.3.3.

C. Discipline. The contractor is responsible for disciplining CCP; commanders have LIMITED authority to take disciplinary action against CCP.[73]

1. Commander's Options.

a. Revoke or suspend security access or impose restriction from installations or facilities.

b. Request that the contracting officer direct removal of the individual.

2. Contracting Officer Options. The contracting officer may direct the contractor, at its own expense, to remove and replace any CCP who jeopardize or interfere with mission accomplishment or who fail to comply with or violate applicable requirements of the contract. The contractor shall have on file a plan showing how the contractor would replace CCP who are so removed.[74]

3. Specific jurisdiction for criminal misconduct is subject to the application of international agreements. Application of HN and TCN law is discussed above in Section IV.

4. Military Extraterritorial Jurisdiction Act of 2000, as amended by § 1088 of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005 (MEJA).[75]

a. Background. Since the 1950s, the military has been prohibited from prosecuting by courts-martial civilians accompanying the Armed Forces overseas in peacetime who commit criminal offenses. Many Federal criminal statutes lack extraterritorial application, including those penalizing rape, robbery, burglary, and child sexual abuse. In addition, many foreign countries decline to prosecute crimes committed within their nation, particularly those involving U.S. property or another U.S. person as a victim. Furthermore, military members who commit crimes while overseas, but whose crimes are not discovered or fully investigated prior to their discharge from the Armed Forces are no longer subject to court-martial jurisdiction. The result is jurisdictional gaps where crimes go unpunished.[76]

b. Solution. The MEJA closes the jurisdictional gaps by extending Federal criminal jurisdiction to civilians overseas and former military members.[77]

c. Covered Conduct:[78]

(1) Conduct committed outside the United States, that

(2) Would be a crime under U.S. law if committed within U.S. special maritime and territorial jurisdiction, that is

(3) Punishable by imprisonment for more than one year.

d. Covered persons include:[79]

(1) Members of the Armed Forces who, by Federal indictment or information, are charged with committing an offense with one or more defendants, at least one of whom is not subject to the UCMJ;

(2) Members of a Reserve component who commit an offense when they are not on active duty or inactive duty for training;

(3) Former members of the Armed Forces who were subject to the UCMJ at the time the alleged offense was committed, but are not longer subject to the UCMJ;

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[73] *Id.* para. 6.3.3.

[74] DFARS 252.225-7040(h).

[75] 18 U.S.C. §§ 3261-3267.

[76] U.S. DEP'T OF DEFENSE INSTR. 5525.11, CRIMINAL JURISDICTION OVER CIVILIANS EMPLOYED BY OR ACCOMPANYING THE ARMED FORCES OUTSIDE THE UNITED STATES, CERTAIN SERVICE MEMBERS, AND FORMER SERVICE MEMBERS, 3 Mar. 2005 (implementing the Military Extraterritorial Jurisdiction Act of 2000, 18 U.S.C. §3261).

[77] *Id.* para. 2.5.

[78] *Id.* para. 6.1.1

[79] *Id.* paras. 6.1.2-6.1.9

(4) Civilians employed by the Armed Forces outside the United States, who are not a national of or resident in the HN, who commit an offense while outside the United States in connection with such employment. Such civilian employees include:

(a) Persons employed by DOD, including NAFIs;

(b) Persons employed as a DOD contractor, including subcontractors at any tier;

(c) Employees of a DOD contractor, including subcontractors at any tier;

(d) Civilian employees, contractors (including subcontractors at any tier), and civilian employees of a contractor (including subcontractors at any tier) of any other Federal agency, or any provisional authority, to the extent such employment relates to supporting the mission of the DOD overseas.

(5) Civilians accompanying the Armed Forces:

(a) Dependents of anyone covered above if:

(b) The dependent resides with the person, allegedly committed the offense while outside the United States, and is not a national of or ordinarily resident in the HN. Command sponsorship is not required for the MEJA to apply.

(6) MEJA does not apply to persons whose presence outside the United States at the time the offense is committed is solely that of a tourist, student, or is otherwise not accompanying the Armed Forces.

(7) Foreign Criminal Jurisdiction. If a foreign government, in accordance with jurisdiction recognized by the U.S., has prosecuted or is prosecuting the person, the U.S. will not prosecute the person for the same offense, absent approval by the Attorney General or Deputy Attorney General.

(8) TCNs who might meet the requirements above for MEJA jurisdiction may have a nexus to the United States that is so tenuous that it places into question whether the Act should be applied. DOS should be notified of any potential investigation or arrest of a TCN.

e. DODD 5525.11 contains detailed guidance regarding the procedures required for MEJA use, including investigation, arrest, detention, representation, initial proceedings, and removal of persons to the United States or other countries. Further, much authority is delegated to Combatant Commanders, so local policies must be researched and followed.

5. Uniform Code of Military Justice (UCMJ).

a. Retired military members who are also CCP are subject to the UCMJ. Art. 2(a)(4), UCMJ. DA policy provides that retired Soldiers subject to the UCMJ will not be tried for any offense by any courts-martial unless extraordinary circumstances are present. Prior to referral of courts-martial charges against retired Soldiers, approval will be obtained from Criminal Law Division, ATTN: DAJA–CL, Office of The Judge Advocate General, HQDA.[80]

b. Under the law for at least the past 30 years, contractors were only subject to the UCMJ in a congressionally declared war. During that time, there was never UCMJ jurisdiction over contractor personnel because there were no congressionally declared wars.

c. Congress amended the UCMJ in the John Warner National Defense Authorization Act for Fiscal Year 2007 (2007 NDAA). In section 552 of the 2007 NDAA, Congress changed Article 2(a)(10), addressing UCMJ jurisdiction over civilians accompanying the Armed Forces, from "time of war" to "time of declared war or contingency operation." This change now subjects contractors and other civilians accompanying the Armed Forces to the UCMJ in OIF/OEF.

d. It is not clear whether this congressional attempt at expanding UCMJ jurisdiction over civilians in less-than congressionally declared war is constitutional. Prior congressional attempts at expanding UCMJ jurisdiction have been rejected by the Courts as unconstitutional.

[80] U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE para. 5-2b(3) (16 Nov. 2005).

e. The Secretary of Defense published guidance on the exercise of this expanded UCMJ jurisdiction in March 2008. Office of the Secretary of Defense memorandum, Subject: UCMJ Jurisdiction Over DoD Civilian Employees, DoD Contractor Personnel, and Other Persons Serving With or Accompanying the Armed Forces Overseas During Declared War and in Contingency Operations, dated March 10, 2008. This guidance requires, among other things, that the Department of Justice be notified and afforded an opportunity to pursue U.S. federal criminal prosecution under the MEJA or other federal laws before disciplinary action pursuant to the UCMJ authority is initiated.

VIII. OTHER CCP ISSUES

A. Living Conditions.

1. Generally, when provided by the government, CCP living conditions, privileges, and limitations will be equivalent to those of the units supported unless the contract with the Government specifically mandates or prohibits certain living conditions.

2. Tours of Duty. CCP tours of duty are established by the contractor and the terms and conditions of the contract between the contractor and the government. Emergency-based on-call requirements, if any, will be included as special terms and conditions of the contract.

3. Hours of Work. Contractors must comply with local laws, regulations, and labor union agreements governing work hours.[81] Federal labor laws that govern work hours and minimum rates of pay do not apply to overseas locations. FAR 22.103.1 allows for longer workweeks if such a workweek is established by local custom, tradition, or law. SOFAs or other status agreements may impact work hours issues.

B. Life and Health Insurance.

1. Unless the contract states otherwise, the Army is not statutorily obligated to provide health and/or life insurance to a contractor employee. Policies that cover war time deployments are usually available from commercial insurers.

2. Contractors and their employees bear the responsibility to ascertain how a deployment may affect their life and health insurance policies and to remedy whatever shortcomings a deployment may cause.

C. Workers' Compensation-Type Benefits:

1. Several programs are available to ensure "workers comp" type insurance cover contractor employees while deployed and working on government contracts.[82] Pursuing any of the following benefits is up to the contractor employee or the contractor.[83]

2. Defense Base Act (DBA) 42 U.S.C. 1651 *et seq.*; FAR 28.305 and 52.228-3; DFARS 228.305, 228.370(a), and 252.228-7000.

a. Requires contractors to obtain workers compensation insurance coverage or to self-insure with respect to injury or death incurred in the scope of employment for "public work" contracts or subcontracts performed outside the United States.[84]

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[81] DFARS 252.222-7002.

[82] See generally, FAR 28.305 and AR 715-9.

[83] CAF Guidebook, Topic 11.

[84] AR 715-9, *supra* note 18. *See*, Royal Indem. Co. v. Puerto Rico Cement Co., 142 F.2d 237, 239 (1st Cir. 1944), cert. denied, 323 U.S. 756 (1944) (holding that a construction employee working on a military base in Puerto Rico was covered by the DBA because the purpose of the DBA was to extend the benefits of the Longshore and Harbor Worker's Compensation Act to areas overseas and to obtain insurance at reasonable rates); Berven v. Fluor Co., 171 F. Supp. 89 (S.D.N.Y. 1959) (explaining the statute covers individuals employed at any military, air, or naval base or contracts for the purpose of engaging in a public work); *See also*, University of Rochester v. Hartman, 618 F.2d 170, 173 (2d Cir. 1980) (holding that a service contract lacking a nexus with overseas construction project or work connected with national defense does not constitute "public work" within the meaning of 42 U.S.C. § 1651(a)(4)); O'Keeffe v. Pan American World Airways Inc., 338 F.2d 319 (5th Cir. 1964), cert. denied, 380 U.S. 951 (1965) (holding that the frolic and detour rule for scope of employment analysis must be applied more broadly in the context of DBA claims because the statute was intended to avoid harsh results); Republic Aviation Co. v. Lowe, 164 F.2d 18 (2d Cir. 1947), cert. denied, 333 U.S. 845 (1948).

b. FAR Clause 52.228-3, Workers' Compensation Insurance (Defense Base Act), is required in all DoD service contracts performed, entirely or in part, outside the U.S and in all supply contracts that require the performance of employee services overseas.[85]

3. Longshoreman and Harbor Worker's Compensation Act (LHWCA) 33 U.S.C. §§ 901-950, DA Pamphlet 715-16, paragraphs 10-5c to 10-5d. Applicable by operation of the DBA. The LHWCA provides compensation for partial or total disability, personal injuries, necessary medical services/supplies, death benefits, loss of pay and burial expenses for covered persons. Statute does not focus on fault.[86]

4. War Hazards Compensation Act (WHCA) 42 U.S.C. §§ 1701-17, FAR 52.228-4, DFARS 228.370(a). The WHCA provides that any contractor employee who is killed in a "war risk hazard" will be compensated in some respects as if the CDF were a full time government civilian employee. WHCA benefits apply regardless of whether the injury or death is related to the employee's scope of employment.[87]

D. Pay. CCP pay and benefits are governed by the CCP employment contract with the contractor. The U.S. Government is not a party to this employee-employer relationship. CCP are not entitled to collect any special pay, cash benefits or other financial incentives directly from the U.S. Government.

E. Veteran's Benefits. Service performed by CCP is NOT active duty or service under 38 U.S.C. 106.[88] DoD policy is that contractors operating under this clause shall not be attached to the armed forces in a way similar to the Women's Air Forces Service Pilots of World War II. Contractors today are not being called upon to obligate themselves in the service of the country in the same way as the Women's Air Forces Service Pilots or any of the other groups listed in 38 U.S.C. 106. [89]

F. Continued Performance During a Crisis.

1. During non-mandatory evacuation times, Contractors shall maintain personnel on location sufficient to meet contractual obligations.[90]

2. DODI 3020.37, Continuation of Essential DOD Contractor Services During a Crisis (6 Nov. 1990) (administrative reissuance incorporating Change 1, 26 Jan. 1996). The Instruction requires contractors to use all means available to continue to provide services deemed essential by DOD. The DODI is guidance for commanders; it does not bind contractors in any way.[91]

3. There is no "desertion" offense for contractor personnel. Commanders should plan for interruptions in services if the contractor appears to be unable to continue support.

IX. ADDITIONAL REFERENCES

A. Geneva Conventions of 1949 and Additional Protocol of 1977.

B. 18 U.S.C. § 922(d), Unlawful Acts (providing firearms to certain persons).

C. 22 U.S.C. § 3261 *et seq.*, Responsibility of the Secretary of State (for U.S. citizens abroad).

D. AR 700-4 (Logistics Assistance).

E. AR 570-9 (Host Nation Support).

F. AR 12-1 (International Logistics).

G. FM 3-100.21 – Contractors Accompanying the Force.

H. FM-100-10-2 – Contracting Support on the Battlefield.

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[85] Office of the Under Secretary of Defense Memo, 8 December 2003.

[86] CAF Guidebook, Topic 11.

[87] CAF Guidebook, Topic 11.

[88] DFARS 252.225-7040(b)(4).

[89] 73 Fed. Reg. 62 (March 31, 2008).

[90] DFARS 252.225-7040(m).

[91] See also, CAF Guidebook, Topic 13.

I. DA PAM 27-1-1 (Geneva Convention Protocols).

J. DA PAM 690-80 (Use of Local Civvies in Hostilities).

K. DA PAM 715-16 (Contractor Deployment Guide).

L. DA Policy Memo, 12 Dec 97, Contractors on the Battlefield.

M. ASA(ALT) Memo, 26 Jan 02, (Contractor Systems Support During Contingency Operations).

N. DODI 4161.2 (Government Property in Possession of Contractors).

O. DODI 1300.23 (Isolated Training for DOD Civilian and Contractors).

P. DODI 1000.1 (Geneva Convention ID Cards).

Q. DODI 1100.22 (Guidance for Determining Workforce Mix,).

R. DODI 3020.37 (Continuation of Essential DOD Contractor Services Crisis).

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T. DODD 3025.1 (Non-combatant Evacuation Operations).

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W. AMC Pamphlet, 715-18. AMC Contracts and Contracting Supporting Military Operations. 16 June 1999.

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CHAPTER 17

FISCAL LAW

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7. JOINT CHIEFS OF STAFF, INSTR. 7401.01A, COMBATANT COMMANDER INITIATIVE FUND (15 Aug. 2003).
8. *The Honorable Michael B. Donley,* B-234326.15, 24 Dec. 1991 (unpublished).
9. U.S. DEP'T OF DEFENSE, DIR. 2205.2, HUMANITARIAN AND CIVIC ASSISTANCE PROVIDED IN CONJUNCTION WITH MILITARY OPERATIONS (6 Oct. 1994).
10. U.S. DEP'T OF DEFENSE, INSTR. 2205.3, IMPLEMENTING PROCEDURES FOR THE HUMANITARIAN AND CIVIC ASSISTANCE PROGRAM (27 Jan. 1995).
11. 10 U.S.C. § 166a, Combatant Commanders' Initiative Funds.
12. 10 U.S.C. § 401, Overseas, Humanitarian, Disaster, and Civic Aid (OHDACA), and Humanitarian and Civic Assistance (HCA).
13. 10 U.S.C. § 402, Transportation of Humanitarian Relief Supplies to Foreign Countries.
14. 10 U.S.C. § 404, Foreign Disaster Assistance.
15. 10 U.S.C. § 1050, Latin American (LATAM) Cooperation.
16. 10 U.S.C. § 1051, Bilateral Regional Cooperation Programs.
17. 10 U.S.C. § 2010, Combined Exercises.
18. 10 U.S.C. § 2011, Special Operations Training.
19. 10 U.S.C. § 2341-50, Acquisition and Cross Servicing Agreements.
20. 10 U.S.C. § 2557, Excess Non-Lethal Supplies.
21. 10 U.S.C. § 2561, Humanitarian Assistance (HA).
22. 10 U.S.C. § 2804, Contingency Construction
23. 22 U.S.C. § 2318 & 2348, Presidential Drawdowns.
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25. 22 U.S.C. § 2761, Foreign Military Sales (FMS) Program.
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I. INTRODUCTION

A. Fiscal Law and the Deployed JA: Fiscal law touches everything we do, whether in garrison or in contingency operations. Behind every operation, or even daily requirements, an expenditure of funds is required to pay for the goods or services or pay the salary of those performing the duties. Your ability to scrutinize the fiscal aspects of the mission will assist the unit meeting the commander's intent and keep the unit within the boundaries of the law. The U.S. Constitution grants the President the authority to be Commander in Chief of the Armed Services. The same document retains the power to authorize funds to a separate body, Congress. The founders also made clear that no money be spent without a specific appropriation (See Art. I, §9, cl. 7, U.S. Constitution). That is the law! While commanders recognize the importance of having funds to accomplish their mission, they often times do not appreciate the underlying law that requires affirmative authority to spend the money in the manner the commander intends. It is your mission to make sure commands use the funds for the purpose they are given.

If there was ever any doubt about commanders' recognition of the strategic effect that money can have on an operation, the recent experiences in Iraq and Afghanistan provide clear evidence that commanders appreciate how funds can, and do, shape their overall success (for example, the MNC-I CJ8 "Money As A Weapons System – MAAWS" SOP indicates that commanders understand the combat multiplier that fiscal law can provide to their units). Due to the requirement for affirmative authority in order to expend funds, the question you must ask and you must train commanders and staff to ask is, "show me where in the statutes it says I can do this."

Because Congress provides appropriations for military programs, and military departments in turn allocate funds to commands, commanders may wonder why legal advisors scrutinize the fiscal aspects of mission execution so closely, even though expenditures or tasks are not prohibited specifically. Similarly, JTF staff members managing a peacekeeping operation may not appreciate readily the subtle differences between operational necessity and "mission creep," nation building and humanitarian and civic assistance, and construction, maintenance, and repair. Deployed judge advocates (JA) often find themselves immersed in such issues. When this occurs, they must find affirmative fiscal authority for a course of action, suggest alternative means for accomplishing a task, or counsel against the proposed use of appropriated funds, personnel, or assets. To aid legal advisors in this endeavor, this chapter affords a basic, quick reference to common authorities. Because fiscal matters are so highly legislated,

regulated, audited and disputed, however, it is not a substitute for thorough research and sound application of the law to specific facts. One possible source for an example of previous application of the law to specific facts is the compilation of AARs that CLAMO has put together on various past operations.

B. Constitutional Framework: Under the Constitution, Congress raises revenue and appropriates funds for Federal agency operations and programs. *See* U.S. Const., Art. I, § 8. Courts interpret this constitutional authority to mean that Executive Branch officials, *e.g.*, commanders and staff members, must find affirmative authority for the obligation and expenditure of appropriated funds.[1] *See, e.g.*, *U.S. v. MacCollom*, 426 U.S. 317, at 321 (1976) ("The established rule is that the expenditure of public funds is proper only when authorized by Congress, not that public funds may be expended unless prohibited by Congress.") Likewise, in many cases, Congress has limited the ability of the Executive to obligate and expend funds through annual authorization or appropriations acts or in permanent legislation.

C. Legislative Framework: The principles of Federal appropriations law permeate all Federal activity, both within the United States, as well as overseas. Thus, there are no "contingency" exceptions to the fiscal principles discussed throughout this chapter. However, Congress has provided DoD with special appropriations and/or authorizations for use during contingency operations. Fiscal issues arise frequently during contingency operations. Failure to understand the fiscal nuances and the special appropriations and/or authorizations during contingency operations may lead to the improper expenditure of funds and administrative and/or criminal sanctions against those responsible for funding violations. Moreover, early and continuous JA involvement in mission planning and execution is essential. JAs who participate actively and have situational awareness will have a clearer view of the command's activities and an understanding of what type of appropriated funds, if any, are available for a particular need. JAs should consider several sources that define fund obligation and expenditure authority: (1) Title 10, U.S. Code; (2) Title 22, U.S. Code; (3) Title 31, U.S. Code; (4) DoD authorization acts; (5) DoD appropriations acts; (6) supplemental appropriations acts; (7) agency regulations; and (8) Comptroller General decisions. Without a clear statement of positive legal authority, the legal advisor should be prepared to articulate a rationale for an expenditure which is "necessary and incident" to an existing authority.

D. Roadmap for this Chapter. This Chapter is divided into 14 sections. Sections I through V provide an overview of Basic Fiscal Controls – Purpose, Time, and Amount/Antideficiency Act. Section VI explores military construction appropriations, authorizations, and regulatory policies (including special authorities for contingency operations). Section VII provides the fiscal law legislative framework that regulates the Funding of US Military Operations (FUSMO). The focus of FUSMO is the funding of Foreign Assistance operations (i.e., operations whose primary purpose is to assist foreign governments, militaries, and populations). Section VIII analyzes the Department of State appropriations and/or authorizations to fund Foreign Assistance, with a focus on those authorities that DoD commonly executes on behalf of DoS via an interagency acquisition. Section IX details DoD's appropriations and/or authorizations to fund Foreign Assistance operations, to include the Commander's Emergency Response Program (CERP). Section X explains and analyzes the primary role of the Defense Reutilization and Marketing Service (DRMS) in providing excess DoD equipment to foreign governments, security forces, and populations. Section XI provides a summary chart of the 2008 Department of Defense Appropriations Act (DODAA) provisions. Section XII provides a summary chart of the 2008 National Defense Authorization Act provisions likely to affect JAs during deployments and contingency operations. Section XIII notes the requirement that DoD notify Congress before transferring any defense articles or services to another nation or international organization. Section XIV provides some concluding thoughts for JAs.

II. BASIC FISCAL CONTROLS[2]

A. Congress imposes fiscal controls through three basic mechanisms, each implemented by one or more statutes. The U.S. Comptroller General, who heads the Government Accountability Office (GAO), audits executive agency accounts regularly, and scrutinizes compliance with the fund control statutes and regulations. The three basic fiscal controls are as follows:

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[1] An obligation arises when the government incurs a legal liability to pay for its requirements, *e.g.*, supplies, services, or construction. For example, a contract award normally triggers a fiscal obligation. Commands also incur obligations when they obtain goods and services from other U.S. agencies or a host nation. An expenditure is an outlay of funds to satisfy a legal obligation. Both obligations and expenditures are critical fiscal events.

[2] For a more in-depth review of fiscal law issues, *See*, CONTRACT & FISCAL L. DEP'T, THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER AND SCHOOL, U.S. ARMY, FISCAL LAW COURSE DESKBOOK, current edition, *available at* http://www.jagcnet.army.mil/tjagsa.

1. Obligations and expenditures must be for a proper **purpose**;

2. Obligations must occur within the **time** limits applicable to the appropriation (*e.g.*, operation and maintenance (O&M) funds are available for obligation for one fiscal year); and

3. Obligations must be within the **amounts** authorized by Congress.

III. THE PURPOSE STATUTE—GENERALLY

A. Although each fiscal control is key, the "purpose" control is most likely to become an issue during military operations. The Purpose Statute provides that "[a]ppropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law." *See* 31 U.S.C. § 1301(a). Thus, expenditures must be authorized by law (permanent legislation or annual appropriations act) or be reasonably related to the purpose of an appropriation. In determining whether expenditures conform to the purpose of an appropriation, JAs should apply the GAO's Necessary Expense Doctrine, which allows for the use of an appropriation if:

1. An expenditure fits an appropriation (or permanent statutory provision), *or* is for a purpose that is necessary and incident to the general purpose of an appropriation;

2. The expenditure is not prohibited by law; and

3. The expenditure is not provided for otherwise, *i.e.*, it does not fall within the scope of another, more specific, appropriation.

B. Augmentation of Appropriations and Miscellaneous Receipts.

1. AUGMENTATION OF APPROPRIATIONS: A corollary to the Purpose control is the prohibition against augmentation. *See, Nonreimbursable Transfer of Admin. Law Judges*, B-221585, 65 Comp. Gen. 635 (1986); *cf.* 31 U.S.C. § 1532 (prohibiting transfers from one appropriation to another except as authorized by law). Appropriated funds designated for a general purpose may not be used for another purpose for which Congress has appropriated other funds. *Secretary of the Navy*, B-13468, 20 Comp. Gen. 272 (1940). If two funds are equally available for a given purpose, an agency may elect to use either, but once the election is made, the agency must continue to charge the same fund. *See, Funding for Army Repair Projects*, B-272191, Nov. 4, 1997. The election is binding even after the chosen appropriation is exhausted. *Honorable Clarence Cannon*, B-139510, May 13, 1959 (unpub.) (Rivers and Harbors Appropriation exhausted; Shipbuilding and Conversion, Navy, unavailable to dredge channel to shipyard.)

2. MISCELLANEOUS RECEIPTS STATUTE: If an agency retains funds from a source outside the normal fund distribution process, an augmentation has occurred and the Miscellaneous Receipts Statute is violated. *See* 31 U.S.C. § 3302(b); s*ee also, Interest Earned on Unauthorized Loans of Fed. Grant Funds*, B-246502, 71 Comp. Gen. 387 (1992). When the retained funds are expended, this generally violates the constitutional requirement for an appropriation. *See, Use of Appropriated Funds by Air Force to Provide Support for Child Care Centers for Children of Civilian Employees*, B-222989, 67 Comp. Gen. 443 (1988); *Bureau of Alcohol, Tobacco, and Firearms--Augmentation of Appropriations--Replacement of Autos by Negligent Third Parties*, B-226004, 67 Comp. Gen. 510 (1988).

3. EXCEPTIONS. There are, however, statutory exceptions to the augmentation prohibition.

a. There are *interagency acquisition* authorities that allow augmentation or retention of funds from other sources. *See, e.g.*, Economy Act, 31 U.S.C. § 1535; Foreign Assistance Act (FAA), 22 U.S.C. § 2344, 2360, 2392 (permitting foreign assistance accounts to be transferred and merged); Emergency Presidential drawdown authority. The Economy Act authorizes a Federal agency to order supplies or services from another agency. For these transactions, the requesting agency must reimburse the performing agency fully for the direct and indirect costs of providing the goods and services. *See, Washington Nat'l Airport; Fed. Aviation Admin.*, B-136318, 57 Comp. Gen. 674 (1978) (depreciation and interest); *Obligation of Funds Under Mil. Interdepartmental Purchase Requests*, B-196404, 59 Comp. Gen. 563 (1980); s*ee also*, DoD 7000.14-R, vol. 11A, ch. 1, para. 010201.J. (waiving overhead for transactions within DoD). Consult agency regulations for order approval requirements. *See, e.g.*, Federal Acquisition Regulation Subpart 17.5; Defense Federal Acquisition Regulation Subpart 217.5; Army Federal Acquisition Regulation Supplement Subpart 17.5.

b. Congress also has authorized certain expenditures for military support to civil law enforcement agencies (CLEA) in counterdrug operations. *See* the Domestic Operations chapter for a more complete review. Support to CLEAs is reimbursable *unless* it occurs during normal training and results in DoD receiving a benefit

substantially equivalent to that which otherwise would be obtained from routine training or operations. *See* 10 U.S.C. § 377. Another statutory provision authorizes *operations or training* to be conducted for the sole purpose of providing CLEAs with specific categories of support. *See* §1004 of the 1991 Defense Authorization Act, codified at 10 U.S.C. § 374. In 10 U.S.C. § 124, Congress assigned DoD the operational mission of detecting and monitoring international drug traffic (a traditional CLEA function). By authorizing DoD support to CLEAs at essentially no cost, Congress has authorized augmentation of CLEA appropriations.

C. Purpose Statute Violations.

1. VIOLATIONS OF THE PURPOSE STATUTE: As noted at the beginning of this chapter, the Purpose Statute provides that "[a]ppropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law." *See* 31 U.S.C. § 1301(a). Thus, if the command uses funds for an improper purpose, it must adjust the accounts by deobligating the funds used erroneously and seek the proper appropriation.

2. CORRECTING VIOLATONS OF THE PURPOSE STATUTE: For example, if the command constructs an $850,000 (funded costs) building with O&M funds, it has violated the Purpose Statute. (Remember, O&M is normally proper only for projects with funded costs up to $750,000). To correct this violation, the command must deobligate the O&M funds and substitute (obligate) Unspecified Minor Military Construction (UMMC) funds, which are available for projects between $750,000 and $1.5 million. This account adjustment is typically an internal adjustment of the agency's accounting records and does not normally require a recovery of the actual payment disbursed to the contractor or other payee. While this is a matter of adjusting agency accounts, the command must report a potential Anti-Deficiency Act (ADA) violation unless proper funds (UMMC) were available: (1) at the time of the original obligation (*e.g.*, contract award), (2) at the time the adjustment is made, and (3) continuously at all times in-between. *See* discussion of the ADA, below. The same analysis applies if the command uses O&M funds to purchase what are considered to be investment items, *e.g.*, equipment or systems that are either centrally managed or cost $250,000 or more. Finally, if a command uses funds for a purpose for which there is no appropriation, this is an uncorrectable Purpose Statute violation, and officials must report a potential ADA violation.

IV. AVAILABILITY OF FUNDS AS TO TIME

A. Overview: The "Time" control includes two major elements:

1. Appropriations have a definite life span; and

2. Appropriations normally must be used for the needs that arise during their period of availability.

B. Period of availability. Most appropriations are available for a finite period. For example, O&M funds (the appropriation most prevalent in an operational setting) are available for one year; Procurement appropriations are available for three years; and Construction funds have a five-year period of availability. If funds are not *obligated* during their period of availability, they expire and are unavailable for new obligations (*e.g.*, new contracts or changes outside the scope of an existing contract). Expired funds may be used, however, to adjust existing obligations (*e.g.*, to pay for a price increase following an in-scope change to an existing contract).

C. The "bona fide needs rule." This rule provides that funds are available only to satisfy requirements that arise during their period of availability, and will affect which fiscal year appropriation you will use to acquire supplies and services. *See* 31 U.S.C. § 1502(a).

1. SUPPLIES. The bona fide need for supplies normally exists when the government actually will be able to use the items. Thus, a command would use a currently available appropriation for office supplies needed and purchased in the current fiscal year. Conversely, commands may not use current year funds for office supplies that are not needed until the next fiscal year. Year-end spending for supplies that will be delivered within a reasonable time after the new fiscal year begins is proper, however, as long as a *current need* is documented. Note that there are lead-time and stock-level exceptions to the general rule governing purchases of supplies. The lead-time exception allows the purchase of supplies with current funds at the end of a fiscal year even though the time period required for manufacturing or delivery of the supplies may extend over into the next fiscal year. The stock-level exception allows agencies to purchase sufficient supplies to maintain adequate and normal stock levels even though some supply inventory may be used in the subsequent fiscal year. *See* Defense Finance and Accounting Service Reg.--Indianapolis 37-1 [DFAS-IN 37-1], Chapter 8; or DoD Financial Management Regulation 7000.14-R, vol. 3, para. 080303. In any event, "stockpiling" items is prohibited. *See, Mr. H.V. Higley*, B-134277, Dec. 18, 1957 (unpub.).

2. SERVICES. Normally, *severable* services are bona fide needs of the period in which they are performed. Grounds maintenance, custodial services, and vehicle/equipment maintenance are examples of severable services because of the recurring "day-to-day" need. Use current year funds for recurring services performed in the current fiscal year. As an exception, however, 10 U.S.C. § 2410a permits DoD agencies to obligate funds current at the time of award for a severable services contract (or other agreement) with a period of performance that does not exceed one year. Even if some services will be performed in the subsequent fiscal year, current fiscal year funds can be used to fund the full year of severable services. Conversely, *nonseverable* services are bona fide needs of the year in which a contract (or other agreement) is executed. Nonseverable services are those that contemplate a single undertaking, *e.g.*, studies, reports, overhaul of an engine, painting a building, etc. Fund the entire undertaking with appropriations current when the contract (or agreement) is executed, even if performance extends into a subsequent fiscal year. *See* DFAS-IN 37-1, ch. 8.

V. AVAILABILITY OF APPROPRIATIONS AS TO AMOUNT

A. The Anti-Deficiency Act (31 U.S.C. §§ 1341(a), 1342, & 1517(a)). The Anti-Deficiency Act prohibits any government officer or employee from:

1. Making or authorizing an expenditure or obligation *in advance of* or *in excess of* an appropriation. (31 U.S.C. § 1341)

2. Making or authorizing an expenditure or incurring an obligation *in excess of* an apportionment or *in excess of* a formal subdivision of funds. (31 U.S.C. § 1517).

3. Accepting voluntary services, unless authorized by law. (31 U.S.C. § 1342)

B. Informal and Formal Subdivisions: Commanders must ensure that fund obligations and expenditures do not exceed amounts provided by higher headquarters. Although over-obligation of an installation O&M account normally does not trigger a reportable ADA violation, an over-obligation locally *may* lead to a breach of a formal O&M subdivision at the Major Command level. *See* 31 U.S.C. § 1514(a) (requiring agencies to subdivide and control appropriations by establishing administrative subdivisions); 31 U.S.C. 1517; DoD Financial Management Regulation, vol. 14l DFAS-IN 37-1, ch. 4. Similarly, as described in the Purpose section, above, over-obligation of a statutory limit, *e.g.*, the $750,000 O&M threshold for construction, may lead to an ADA violation.

C. Requirements when an ADA is suspected: Commanders must investigate suspected violations to establish responsibility and discipline violators. Regulations require "flash reporting" of possible ADA violations. DoD 7000.14-R, Financial Management Regulation, vol. 14, chs. 3-7; DFAS-IN 37-1, ch. 4, para. 040204. If a violation is confirmed, the command must identify the cause of the violation and the senior responsible individual. Investigators file reports through finance channels to the office of the Assistant Secretary of the Army, Financial Management & Comptroller (ASA (FM&C)). Further reporting through OSD and the President to Congress also is required if ASA (FM&C) concurs with a finding of violation. By regulation, commanders must impose administrative sanctions on responsible individuals. Criminal action also may be taken if a violation was knowing and willful, 31 U.S.C. §1349, §1350. Lawyers, commanders, contracting officers, and resource managers all have been found to be responsible for violations. Common problems that have triggered ADA violations include the following:

1. Without statutory authority, obligating (*e.g.*, awarding a contract) current year funds for the bona fide needs of a subsequent fiscal year. This may occur when activities stockpile supply items in excess of those required to maintain normal inventory levels.

2. Exceeding a statutory limit (*e.g.*, funding a construction project in excess of $750,000 with O&M; acquiring investment items with O&M funds).

3. Obligating funds for purposes prohibited by annual or permanent legislation.

4. Obligating funds for a purpose for which Congress has not appropriated funds, e.g., personal expenses where there is no regulatory or case law support for the purchase.

VI. MILITARY CONSTRUCTION (MILCON) -- A SPECIAL PROBLEM AREA

A. Introduction. Military Construction represents a special area of concern for commands. Misinterpretation and misapplication of the rules is one of the leading causes of Anti-Deficiency Act violations. These violations consume massive amounts of manhours (investigations etc.) and can have professional ramifications on the officers

involved. Great care should be taken to properly define the scope of the project. Most commands would prefer to use O&M funds for any and all construction projects, though the ability to use these funds is extremely limited. To add to the dilemmas, deployed commands normally receive only O&M-type funds. In this context, the O&M may be from humanitarian or foreign disaster assistance appropriation, but is used as a generic O&M fund would be, *i.e.*, to conduct the specified operation.

B. Definitions. What you call a project often times determines what type of funds may be used on the project. Congress appropriates funds for military construction projects and, based upon the cost of the project, may or may not specifically authorize projects. Other types of work, such as maintenance and repair, are not construction, and therefore military construction funds are not required to perform maintenance and repair.

1. "MILITARY CONSTRUCTION" includes any construction, development, conversion, or extension carried out with respect to a military installation ***whether to satisfy temporary or permanent requirements***. It includes "all military construction work…necessary to produce a complete and usable facility or a complete and usable improvement to an existing facility…." 10 U.S.C. § 2801. The definition of a military installation is very broad and includes foreign real estate under the operational control of the U.S. military. "Military Construction Project" includes all work "necessary to produce a complete and usable facility or a complete and usable improvement to an existing facility." *See, The Honorable Michael B. Donley*, B-234326.15, Dec. 24, 1991 (unpub.) (Prohibiting project splitting to avoid statutory thresholds). As defined further in AR 420-1, para. 4-17, construction includes the following:

a. The erection, installation, or assembly of a *new* facility;

b. The addition, expansion, extension, alteration, functional conversion, or replacement of an *existing facility*;

c. The *relocation* of a facility from one site to another;

d. *Installed equipment* (e.g., built-in furniture, cabinets, shelving, venetian blinds, screens, elevators, telephones, fire alarms, heating and air conditioning equipment, waste disposals, dishwashers, and theater seats); and

e. Related real property requirements, including land acquisitions, site preparation, excavation, filling, landscaping, and other land improvements.

2. "MILITARY CONSTRUCTION PROJECT" includes all work necessary to produce a "complete and usable facility, or a complete and usable improvement to an existing facility." 10 U.S.C. § 2801(b). Splitting projects into separate parts so as to stay under the $750,000 O&M threshold is strictly prohibited. *See* AR 420-1, para. 2-15a(2), DA Pam 420-11, Glossary, sec. II; AFI 32-1021, para 4.2; OPNAVINST 11010.20F, para. 6.2.1.

3. MAINTENANCE is "work required to preserve or maintain a facility in such condition that it may be used effectively for its designated purpose." AR 420-1, Glossary, sec. II (12 Feb 2008). It includes work required to prevent damage and sustain components (e.g., replacing disposable filters; painting; caulking; refastening loose siding; and sealing bituminous pavements). *See* DA Pam 420-11, para. 1-6a.

4. REPAIR means the restoration of a real property facility to such conditions that it may be used effectively for its designated functional purpose or; Correction of deficiencies in failed or failing components of existing facilities or systems to meet current Army standards and codes where such work, for reasons of economy, should be done concurrently with restoration of failed or failing components; or a utility system or component may be considered "failing" if it is energy inefficient or technologically obsolete. AR 420-1, Glossary, sec. II.

5. RELOCATABLE BUILDINGS - An arrangement of components and systems designed to be transported over public roads with a minimum of assembly upon arrival and a minimum of disassembly for relocation. A relocatable building is designed to be moved and reassembled without major damage to floor, roof, walls, or other significant structural modification. DA Memo – Delegation of Authority (8 Feb 2008). AR 420-1, para. 6-14 further defines relocatables as personal property used as a structure that would have a building category code if it was real property, designed to be readily moved, erected, disassembled, stored, reused, and met the 20 percent rule. In accordance with Dept of the Army guidance published on February 10, 2008, the costs for disassembly, repackaging, any exterior refinishing (e.g. brick façade etc …) and any interior work (e.g. electrical systems, fire suppression systems, walls or ceiling, etc.) including labor applied to the building after site delivery to make the relocatable building useable, and non-recoverable building components, including foundations, may not exceed 20 percent of the purchase price of the relocatable building. HQDA, DAIM-ZA Interim Policy Memo (10 Feb 2008).

6. FUNDED COSTS. Costs which are charged to the appropriation designated to pay for a project. AR 420-1, Glossary. They are the "out-of-pocket" expenses of a project, such as contract costs, TDY costs, materials, etc. It does not include the salaries of military personnel, equipment depreciation, and similar "sunk" costs. The cost of fuel used to operate equipment is a funded cost. Segregable maintenance and repair costs are not funded costs. *See* DA Pam 420-11, Glossary. Only *funded costs* count against the $750,000 O&M threshold.

C. Funds for Construction. This year, there were significant changes to funding for construction and construction related areas. As of the FY08 NDAA there is a new threshold for Unspecified Minor Military Construction (UMMC) and new requirements for the Contingency Construction Authority (CCA). Also, there are new directives for Relocatable Buildings and clarifications on what to include in the funded costs. The charts on the next pages summarize many of these changes.

Construction Fiscal Law Basics

Amount	Type Funds	Approval
>$2 Mil*	**MILCON**	**Congress**
$750K-$2 Mil**	**Unspec Minor MILCON (UMMC)**	**(Under or Dep) Sec Level**
Under $750K*	**O&M**	**Commander**

Thresholds is $1.5 million if project is intended solely to correct a deficiency that threatens life, health, or safety.

**** Limit is $3 million if project is intended solely to correct a deficiency that threatens life, health, or safety.**

Generally, funding for construction is appropriated for the specific projects under the Military Construction Appropriation. However, there are some exceptions. 10 U.S.C. § 2805(c) authorizes the use of O&M funds for unspecified minor military construction up to $750,000 per project. The statute increases this threshold to $1.5 million if the project is "solely to correct a deficiency that threatens life, health, or safety." *See also* AR 420-1, para. 2-12d. Military Construction projects between $750,000 and $2 million may use Unspecified Minor Military Construction funds. AR 420-1, Appendix D-1 a. The threshold for UMMC is increased to $3 million if the project is "solely to correct a deficiency that threatens life, health, or safety." Congress increased the threshold to $2 million with the FY 2008 NDAA, but it did not increase the threshold to correct deficiencies that threaten life, health, or safety. Military Construction projects above $2 million must be funded with Military Construction Funds.

> [Note: While the statute allows for the increase in the threshold to $1.5 million for life, health, or safety, there is no statutory guidance as to what constitutes "a deficiency that threatens life, health, or safety." Further, DoD and Army Regulations do not assist in defining this criteria. At least one Army MACOM has issued limited guidance. *See* Appendix B: Memorandum, Deputy Chief of Staff for Personnel and Installation Management, AFEN-ENO, Subject: Funding and Approval Authority, 6 March 2000. The Air Force requires prior approval of SAF/MII and Congressional notification for projects solely to correct a life, health, or safety deficiency that exceed $500,000. AFI 32-1032, para 5.1.2.1.]

DoD also must notify Congress if commanders intend to undertake construction (temporary or permanent) during any exercise, and the cost of the construction is expected to exceed $100,000. *See* Military Construction Appropriation Act, 2004, Pub. L. No. 108-132, 117 Stat. 1374, (2003) § 113.

Commanders also must use UMMC funds for all permanent construction during CJCS-coordinated or directed OCONUS exercises. *See* 10 U.S.C. § 2805(c)(2). The authority for exercise-related construction is limited to no more than $5 million per military department per fiscal year. *See* 10 U.S.C. § 2805(c)(2). This limitation does not affect funding of minor and truly temporary structures such as tent platforms, field latrines, shelters, and range

targets that are removed completely once the exercise is completed. Units may use O&M funds for these temporary requirements. Again, however, congressional notification is required for any construction in excess of $100,000. *See* Military Construction Appropriation Act, 2000, Pub. L. No. 106-52, § 113, 113 Stat. 264 (1999).

D. Methodology for analyzing construction funding issues:

1. Define the scope of the project (i.e., what is the complete and usable facility?);
2. Classify the work as construction, repair, or maintenance;
3. Determine the funded cost of the project;
4. Select the proper appropriation (O&M $\leq$$750,000, UMMC $\leq$ $2 mil, MILCON > $2 mil); and
5. Verify the identity of the proper approval authority.

E. Construction Using O&M Funds During Combat or Declared Contingency Operations. As stated in the introduction, there is no "deployment exception to Fiscal Law, whether in construction funding or other types of funding. However, Congress has provided special funding authorities for contingency operations. The following additional authorities are available to DoD to fund combat and contingency related construction projects. Of the authorities listed below, only the Contingency Construction Authority is frequently used. The remainder of the authorities are rarely used because their requirements include Congressional notification, and in the case of 10 U.S.C. § 2808 and 10 U.S.C. § 2803, the reprogramming of unobligated military construction funds, which are normally limited in amount.

1. CONTINGENCY CONSTRUCTION AUTHORITY (CCA). Within the last several years significant changes have taken place in the funding of combat- and contingency-related construction. Section 2808 of the Military Construction Authorization Act for FY 2004 (Pub. L. No. 108-136, 117 Stat. 1723 (2003)) authorized what is now known as "Contingency Construction Authority." To compensate for the loss of authority provided under the February 2000 SAGC (Ethics & Fiscal) (also known as the Reres Doctrine) and the February 2003 USD(C) policy memoranda, section 1901 of the FY 03 Emergency Supplemental provided authority to transfer up to $150 million of O&M funds to the account established for contingency construction under 10 U.S.C. § 2804. The Military Construction Authorization Act for FY 2004 authority has been granted annually by Congress, though there were significant changes to the procedures instituted in the FY2008 NDAA.

Section 2801 of the FY 08 NDAA extended the original authority of Section 2808 of the FY04 Military Construction Authorization Act not to exceed $200,000 for one year (through FY 2008). Now, however, BEFORE using this authority, Congress must be notified and the unit must wait 10 days (or 7 days if the notice is delivered to Congress electronically).

The Deputy Secretary of Defense issued implementing guidance for Section 2808 of the FY 2004 Defense Authorization Act on 1 April 2004, which still applies. See Memorandum, Deputy Secretary of State, Subject: Use of Operation and Maintenance Appropriations for Construction During Fiscal Year 2004 (1 April 2004). Military Departments or Defense Agencies are to submit candidate construction projects exceeding $750,000 to the Under Secretary of Defense (Comptroller). The request will include a description and the estimated cost of the project, as well as a certification by the Secretary of the Military Department or Director of the Defense Agency that the project meets the conditions stated in Section 2808 of the FY 04 Defense Authorization Act. The Under Secretary of Defense (Comptroller) will review the candidate projects in coordination with the Under Secretary of Defense (Acquisition, Technology, and Logistics), and the Under Secretary of Defense (Comptroller) will notify the Military Department or Defense Agency when to proceed with the construction project.

2. PROJECTS RESULTING FROM A DECLARATION OF WAR OR NATIONAL EMERGENCY**.** Upon a presidential declaration of war or national emergency, 10 U.S.C. § 2808 permits the Secretary of Defense (SECDEF) to undertake construction projects not otherwise authorized by law that are necessary to support the armed forces. These projects are funded with unobligated military construction and family housing appropriations, and the SECDEF must notify the appropriate committees of Congress of (a) the decision to use this authority; and (b) the estimated costs of the construction project. On 16 November 2001 President Bush invoked this authority in support of the Global War on Terrorism. *See* Executive Order 13235, Nov. 16, 2001, 66 Fed. Reg. 58343.

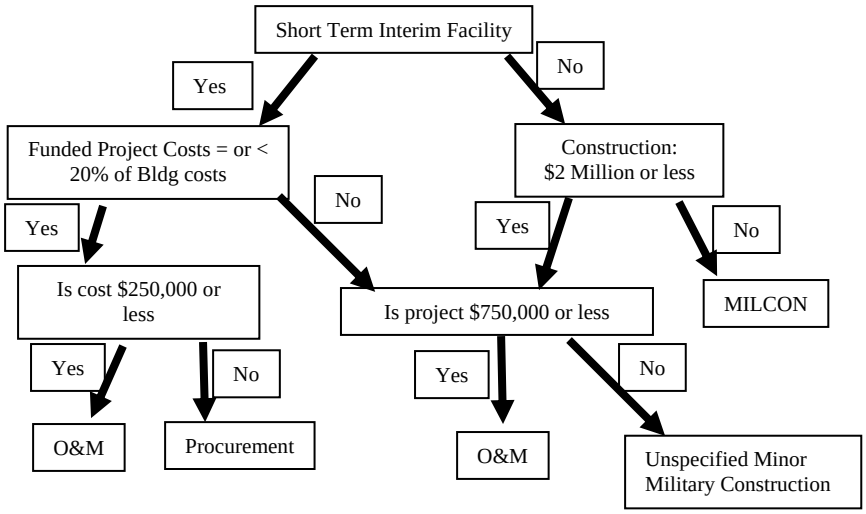
a. Emergency Construction, 10 U.S.C. § 2803. Limitations: (a) a determination by the Service Secretary concerned that the project is vital to national defense; (b) a 21-day congressional notice and wait period;

(c) a $45 million cap per fiscal year; and (d) a requirement that the funds come from reprogrammed, unobligated military construction appropriations.

b. Contingency Construction, 10 U.S.C. § 2804. Limitations similar to those under 10 U.S.C. § 2803 apply; however, Congress specifically appropriates funds for this authority. In 2003, Congress dramatically increased the amount of funding potentially available to DoD under this authority. *See* Emergency Wartime Supplemental Appropriations for the Fiscal Year 2003, Pub. L. No. 108-11, 117 Stat. 587 (2003). Section 1901 of the supplemental appropriation authorized the SECDEF to transfer up to $150 million of funds appropriated in the supplemental appropriation for the purpose of carrying out military construction projects not otherwise authorized by law. The conference report accompanying the supplemental appropriation directed that projects that previously had been funded under the authority of the DoD Deputy General Counsel (Fiscal) 27 February 2003 memorandum, must be funded pursuant to 10 U.S.C. § 2804 in the future. However, because the 2004 and 2005 Defense Authorization Acts authorized DoD to spend up to $200 million per fiscal year on such construction projects, DoD's authority to fund projects pursuant to 10 U.S.C. § 2804 was later significantly reduced. *See* Pub. L. 108-767, 118 Stat. 1811, Section 2404(a)(4) (limiting funding under this authority to $10 million for fiscal year 2005).

F. Recurring Construction Funding Issues – Relocatable Buildings and LOGCAP

1. RELOCATABLE BUILDINGS. Department of the Army issued new guidance regarding Relocatable Buildings and the delegation authority in February 2008. *See* DAIM-ZO Memo, Interim Policy for Relocatable Buildings (10 February 08), Delegation of Authority – Relocatable Buildings Memorandum, Office of the Assistant Secretary of the Army Installations and Environment (8 February 2008). Depending on the purpose of the relocatable, it may be construction or procurement. The flow diagram below shows the analysis for selecting the proper funds for the use of relocatable buildings.



As a general rule, a "relocatable building" must be funded as a construction project IF the estimated funded and unfunded costs for average building disassembly, repackaging (including normal repair and refurbishment of components, but not transportation), and nonrecoverable building components, including typical foundations, exceed 20% of the acquisition cost of the relocatable building itself. (DoDI 4165.56 dtd Apr '88, para. 3.2.1). The Army recently clarified the 20% rule in its Interim Policy published in February 2008. The policy states "[t]he costs for disassembly, repackaging, any exterior refinishing (e.g. brick façade, etc …) and any interior work (e.g. electrical systems, fire suppression systems, walls, or ceilings, etc.) including labor applied to the building after site delivery to make the relocatable building usable, and non-recoverable building components, including foundations, may not exceed 20% of the purchase price of the relocatable building. (Foundations include blocking, footing, bearing plates, ring walls, and concrete slabs. When concrete slabs are used as relocatable building foundations or floors, the entire cost of the slab will be included in the foundation cost)." Under the interim policy, relocatable buildings may be used for no more than 6 years.

2. LOGCAP. The rules concerning construction ordered under the Logistics Civil Augmentation Program (LOGCAP) are the same as if the unit was funding the construction contract through normal contracting procedures. For years, units ordered things through the LOGCAP service contract via a task order and, because the LOGCAP

contract was funded with O&M funds, assumed O&M funds were appropriate for all contracted items under the contract. In March 2006, the DoD OGC clarified the fiscal rules concerning the LOGCAP contract, stating "there are no special fiscal rules when using LOGCAP." Thus, if the task order's terms calls for construction, then the rules concerning construction funding apply. (See generally Appendix C: DOD OGC, LOGCAP Funding Opinion, dtd 7 Mar. 2006).

VII. THE LEGISLATIVE FRAMEWORK REGULATING THE FUNDING OF UNITED STATES MILITARY OPERATIONS (FUSMO).

A. Fiscal Legislative Controls: There is NO "deployment exception" to the Fiscal Law Framework! Therefore, the same fiscal limitations regulating the obligation and expenditure of funds apply to FUSMO (See supra, Purpose, Time, and Amount/ADA, Fiscal Law Deskbook, chapters 2-4). The focus of FUSMO is how to fund operations whose primary purpose is to benefit foreign militaries, foreign governments, and foreign populations. Generally these operations are Foreign Assistance, and are normally funded by the Department of State (DoS). Congress does provide DoD, however, special appropriations and/or authorizations to fund Foreign Assistance. Of the three general limitations - Purpose, Time, and Amount/ADA, the Purpose Statute is the fiscal control that is generally the primary focus for the fiscal law practitioner in a military operational setting and FUSMO.

1. 31 U.S.C. § 1301(a). Provides that appropriations shall be applied only to the objects for which the appropriations were made, except as otherwise provided by law.

2. NECESSARY EXPENSE DOCTRINE (THREE-PART PURPOSE TEST). In 1984, in response to a request for an opinion by Congressman Bill Alexander, the Government Accountability Office's (GAO) Comptroller General addressed numerous funding issues related to the Ahuas Tara military exercises conducted in Honduras.[3] In this case, the Comptroller General reviewed the use of DoD O&M funds to fully fund the Foreign Assistance activities of the DoD during the Ahuas Tara military exercises. Accordingly, the Comptroller General reiterated the three prongs of the Necessary Expense Doctrine, used to determine whether an appropriation is legally available for an expenditure:

a. The expenditure must be reasonably related to the purposes for which the appropriation was made. In other words, the expenditure of an appropriation must be for a particular statutory purpose, or necessary and incident, to the proper execution of the general purpose of the appropriation.

b. The expenditure must not be prohibited by law.

c. The expenditure must not fall specifically within the scope of some other category of appropriations. This last requirement applies even if the more appropriate funding source is exhausted and therefore unavailable.

3. OPERATIONS & MAINTENANCE (O&M) RECURRING ISSUES. To understand whether O&M funds may be used for Foreign Assistance, it is important to understand the primary purpose of O&M appropriations. The primary purpose of O&M is "[f]or expenses, not otherwise provided for, necessary for the operation and maintenance of the [Army, Air Force or Navy] as authorized by law…."

a. *"For expenses"* – Expenses are non-durable end items that are not expected to last more than one year. Therefore, O&M may generally not be used for capital investments (i.e., durable goods whose expected usable life exceeds one year), or centrally-managed items. Capital investments and centrally-managed items are generally funded with Procurement appropriations.

(1) Congress provided the DoD with the authority to use O&M funds for capital investments whose cost is $250,000 or less. *See* Section 8031 of the FY07 DoD Appropriations Act (DODAA), stating that O&M may be used "to purchase items which have an investment unit item cost of not more than $250,000…;" *See also* Purpose Outline, Chapter 2, "Investment-Expense" Threshold.

(2) All DoD elements will use O&M funds for capital investments whose cost is $250,000 or less. (*See* Financial Management Regulation (FMR) Vol 2A, paragraph 010201 on the "expense – investment threshold."

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[3] CONTRACT & FISCAL L. DEP'T, THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER AND SCHOOL, U.S. ARMY, FISCAL LAW COURSE DESKBOOK, current edition, Chapter 12: FUSMO, Appendix A: The Honorable Bill Alexander, B-213137, 63 Comp. Gen. 422 (1984), *available at* http://www.jagcnet.army.mil/tjagsa.

See also Purpose Outline, Chapter 2, "Investment-Expense" Threshold). As a result, DoD funds all expense items, and capital investment items that exceed $250,000 and are "not otherwise provided for," with O&M appropriations. An example of a capital investment item that would be purchased with O&M funds would be a desk or a computer system, as long as these investment items do not exceed $250,000 in price.

b. *"not otherwise provided for"* – O&M is not for Weapons, Ammunition or Vehicles, since these are investment items. Additionally, Congress appropriates funds separately for each military department for weapons, ammunition, and vehicles. For example, vehicles are purchased with Procurement, Army Other Funds (OPA): "For construction, procurement, production, and modification of vehicles, including tactical, support, and non-tracked combat vehicles; the purchase of passenger motor vehicles for replacement only...." Therefore, O&M may not be used to procure these types of "investment" items (even if the cost is $250,000 or less), since more specific appropriations exist for the purchase of Weapons, Ammunition, and Vehicles (i.e., the various Procurement appropriations).

c. *"necessary for the operation"* – Military Construction (MILCON) presents a special problem area. 10 USC § 2805(c)(1), a "codified" or "permanent" authorization (see infra, VI.C.), authorizes the use of O&M funds, as opposed to UMMC or MILCON funds, for a military construction project costing not more than $750,000 (or $1.5M for a project intended solely to correct a life, health, safety deficiency). Absent this authorization, DoD units would fund all construction projects that cost $750,000 or less with UMMC or MILCON funds. There are, however, some statutory exceptions to the general limitation on the use of O&M funds for construction projects that exceed $750,000:

(1) *Contingency Construction Authority (CCA):* Authorizes the SECDEF to obligate up to $200 million of the DoD O&M appropriation "to carry out a construction project outside the United States that the Secretary determines…:"

(a) "[I]s necessary to meet urgent military operational requirements of a temporary nature involving the use of the Armed Forces in support of a declaration of war, the declaration by the President of a national emergency under section 201 of the National Emergencies Act (50 U.S.C. 1621), or a contingency operation."

(b) "[I]s not carried out at a military installation where the United States is reasonably expected to have a long-term presence."

(c) "The United States has no intention of using the construction after the operational requirements have been satisfied," and;

(d) "The level of construction is the minimum necessary to meet the temporary operational requirements."

(e) Prior to using CCA authority for each project, the SECDEF must waive and approve the use of O&M in excess of MILCON thresholds. *See* Division B of the National Defense Authorization Act (NDAA) for 2004, Section 2808(a), as amended by Section 2810, of the NDAA for 2005, Section 2809 of the NDAA for 2006, Section 2802 of the NDAA for 2007, and Section 2801 of the 2008 NDAA.[4]

(f) CCA authorization also requires Congressional advance notification to the House and Senate Armed Services and Appropriations Committees of every CCA project seven or ten days prior to the award of the contract for the contingency construction (seven days if the notification is by electronic format and ten days if it is not in electronic format).[5]

(g) The notification requirement is very important, as Congress included a provision that if DoD failed to provide the required notices, the Contingency Construction Authority ceases to exist by operation of law. This occurred in FY07 (prior to Congress re-authorizing the CCA with additional notice requirements in FY08). Due to DoD's failure to notify Congress by 18 September 2007 of a CCA project approved on 11 September 2007,

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[4] CONTRACT & FISCAL L. DEP'T, THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER AND SCHOOL, U.S. ARMY, FISCAL LAW COURSE DESKBOOK, current edition, Chapter 12: FUSMO, Appendix B: Contingency Construction Authority Statutory Language Yearly Updates, *available at* http://www.jagcnet.army.mil/tjagsa.

[5] National Defense Authorization Act for 2008, Pub. L. No. 110-181, § 2801 (Jan. 28, 2008), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_public_laws&docid=f:publ181.110.pdf.

CCA authority ceased to exist on 19 September 2007. Congress did not re-authorize CCA until the enactment of the 2008 National Defense Authorization Act (2008 NDAA) on 28 January 2008.

(2) *Logistics Civil Augmentation Program (LOGCAP)* – Another recurring issue related to the use of O&M for construction projects is the use of LOGCAP to issue task orders for construction projects. LOGCAP is a multi-year contingency indefinite delivery-indefinite quantity (ID/IQ) contract originally designed for the provision of contractor services to the U.S. Army, but it also allows the Army to contract for the provision of goods and construction in wartime and other contingency operations. Contractors perform the procured services to support U.S. Army units in support of the operational missions. Use of contractors in a theater of operations allows the release of military units for other missions or to fill support shortfalls. This program provides the Army with additional means to adequately support the current and programmed forces. The Army recently awarded the 4th iteration of the LOGCAP contract, LOGCAP IV, in 2007.

(a) When OEF and OIF began, the Army used LOGCAP to contract for services, goods, and construction. The Army, however, initially paid for all LOGCAP ID/IQ task orders, including construction, with O&M funds. The Army's rationale for doing this was that the goods and construction were really a LOGCAP service allowed under the LOGCAP ID/IQ (e.g., The Army needs food service for its Soldiers – if the contractor needs to construct a Dining Facility to provide those services, that is their decision; it is still a service to us, which is expended within the current fiscal year, so the Army can use O&M funds to reimburse the contractor for constructing the facility, since what the Army really procured were dining facility "services"). This rationale is no longer legally valid!

(b) O&M is no longer the "exclusive" source of funding for LOGCAP. All LOGCAP projects should be financed with the proper purpose funds, depending on what the Army is procuring. The fact that the command is making a procurement via LOGCAP does not affect the normal fiscal analysis. For example, if the Army wants food services, and the contractor will need to construct a Dining Facility with a cost exceeding $2 million, specified MILCON funds should be used to finance the construction of the facility. The actual cost of providing the meals, however, is an expense of current operations and should be funded with O&M funds.[6]

B. Appropriations vs. Authorizations. Under the U.S. Constitution, no funds may be drawn from the U.S. Treasury for any purpose, absent a congressional appropriation. There is no constitutional requirement to pass an authorization act in order to draw funds from the U.S. Treasury. In layman's terms, the appropriation draws the "pot of money" from the U.S. Treasury, while an authorization may provide additional purposes for which that "pot of money" may be used.

1. OVERVIEW: Congress has enacted laws that require it to enact an authorization act prior to enacting an appropriation act. Technically, the authorization act sets the maximum amounts that may be appropriated for a specific program. These laws, however, are unenforceable upon Congress, since an earlier Congress cannot bind a later Congress via statute.

a. Historically, the authorization acts passed in the respective congressional committees (e.g., House and Senate Armed Services Committees) set the maximum funding levels and purposes that the appropriations committees (e.g., House and Senate Appropriations Committees) could appropriate funds for in the appropriations acts. For example, 10 U.S.C. § 114(a) states that "No funds may be appropriated for any fiscal year" for certain purposes, including procurement, military construction, and/or research, development, test and evaluation "unless funds therefore have been specifically authorized by law."

b. The congressionally enacted requirement to enact an authorization act prior to an appropriation act, however, is unenforceable upon Congress. Based on generally accepted principles of statutory hierarchy, an earlier congressional law cannot bind a later Congress. In this case, a previous Congress passed a statute that requires a future Congress to pass an authorization act prior to the passage of an appropriations act. A future Congress can certainly change that law. By passing an appropriations act prior to the respective authorization act, Congress has, in effect, changed the law to not require the enactment of the authorization act prior to the enactment of the appropriations act. This has occurred on numerous occasions, including most recently in fiscal year (FY) 2008.

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[6] CONTRACT & FISCAL L. DEP'T, THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER AND SCHOOL, U.S. ARMY, FISCAL LAW COURSE DESKBOOK, current edition, Chapter 12: FUSMO, Appendix C: DOD OGC, LOGCAP Funding Opinion, dtd 7 March 2006, *available at* http://www.jagcnet.army.mil/tjagsa.

c. Historically, an authorization act provision would not expand the scope of availability of a particular appropriation beyond what was permitted by the terms utilized in the appropriation act. An authorization act, however, could decrease the scope of availability of an appropriation by placing further restrictions on the use of those funds.[7]

d. This tradition, however, is also unenforceable upon Congress. The sole constitutional requirement to allow a federal agency to obligate and expend funds from the U.S. Treasury is that "[n]o money shall be drawn from the Treasury, but in Consequence of Appropriations made by law . . . ." (U.S. Const. Art. I, § 9, cl. 7. emphasis added). As a result, when Congress draws funds from the Treasury due to the enactment of an appropriation act, it has met its constitutional requirement. It is not a constitutional violation for Congress to enact additional authorizations, or purpose(s), for the respective funds drawn from the Treasury, in legislation other than the appropriation act itself (i.e., an authorization act).

e. Recently, Congress has used the yearly National Defense Authorization Act (NDAA) as a vehicle to provide additional authorizations for the funds that are appropriated in the yearly DoD Appropriations Act (DODAA). Many of these additional authorizations exceed the basic purpose of the appropriation which these additional authorizations are linked to. For example, the Commander's Emergency Response Program (CERP) authorizes the use of O&M funds, generally available for the annual expenses of service members and units, for the "urgent humanitarian and reconstruction needs" of the Iraqi and Afghan civilian populations. The CERP authorization clearly exceeds the basic purpose of the O&M appropriation, but remains legally viable.

2. APPROPRIATIONS AND AUTHORIZATION STATUTES: Traditionally, Congress appropriated funds and authorized additional purposes for those funds in three annual public laws:

a. Department of Defense Appropriations Act (DODAA): Appropriated funds for the yearly expenses and investment activities of DoD, not including the funding of contingency operations. These activities are colloquially referred to as "baseline operations," funded with "baseline funds."

b. Veteran's Affairs and Military Construction Appropriation Act (VA/MILCONAA): Div. A (MILCON) appropriated Unspecified Minor Military Construction (UMMC) and Specified Military Construction (MILCON) funds for DoD. Veteran's Affairs (VA) Administration is now its own agency.

c. NDAA: provides maximum amounts that the DODAA may appropriate, and additional authorizations (purposes) for which the appropriated funds drawn by the DODAA may be used.

d. Congressional Committees: The congressional appropriations committees (House and Senate Appropriations Committees, respectively) draft the federal appropriations acts for consideration and passage by Congress. The congressional authorizations committees (House and Senate Armed Services Committees, respectively) draft the DoD authorization acts for consideration and passage by Congress.

(1) Generally, Congress appropriates DoD funds via the DODAA and the MILCONAA, and provides authorizations via the NDAA.

(2) On certain occasions, however, Congress will provide additional appropriations in the NDAA, and additional authorizations in one of the DoD appropriations acts. This often occurs because DoD requests a high priority authorization or appropriation provision that may be politically controversial in one congressional committee, but not another. If DoD is unsure whether the high priority appropriation or authorization will survive the respective committee compromises, they may request the provision in both the appropriations committees and the Armed Services committees. On rare occasions, the same appropriation and/or authorization provision will appear in multiple appropriations and/or authorization acts.

3. APPROPRIATIONS FOR CONTINGENCY OPERATIONS: The President has made the policy decision to request funds for the GWOT via separate appropriations acts, other than the DODAA or the VA/MILCONAA (this policy has been the traditional presidential practice of the modern presidency since WWII):

a. GWOT Operations are normally funded through "Wartime Supplemental" appropriations acts.

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[7] *See generally*, Principles of Fed. Appropriations Law, vol. I, ch. 2, 2-51 to 2-52, GAO-040261SP (3d ed. 2004).

b. If DoD expends the appropriated funds enacted by Congress prior to the end of the fiscal year, Congress may provide additional funds with additional appropriations. These additional appropriations are generally referred to as "Emergency Supplemental" appropriations acts.

4. 2008 DoD APPROPRIATIONS AND AUTHORIZATIONS ACTS AS OF 28 MAY 2008:

a. 2008 DoD Appropriations Act (DODAA): signed by the President on 13 November 2007, the 2008 DODAA appropriated "baseline" funds for DoD non-GWOT related operations.[8] Until the DODAA's enactment, DoD was operating under Continuing Resolutions, or temporary appropriations acts. Section XII *infra*, provides a summary chart of the appropriations contained in the 2008 DODAA.

b. 2008 Consolidated Appropriations Act (CAA): signed by the President on 26 December 2007, the CAA appropriated funds for all U.S. federal agencies in one act. The CAA is divided into 13 different divisions, each of which appropriates funds for the traditional appropriations acts.[9]

(1) MILCONAA: Division I, Title I contains the DoD MILCON appropriations for FY2008. Title II contains the VA appropriations.[10]

(2) GWOT Funds: Division L of the 2008 CAA, also named the Emergency Supplemental Appropriations Act for Defense, 2008, contains $70 billion in appropriations for DoD to prosecute the GWOT.[11]

c. 2008 National Defense Authorization Act (NDAA): On 28 December 2007, the President vetoed Congress' first attempt at enacting the 2008 NDAA. After resolving the disagreement with Congress, the President enacted the 2008 NDAA on 28 January 2008.[12]

C. "Codified" (or "Permanent") vs. "Uncodified" (or "Temporary") Authorizations. "Codified" (or "permanent") means that Congress inserts a respective authorization into the actual U.S. Code (e.g., Title 10 for DoD and Title 22 for DoS). In contrast, "uncodified" (or "temporary") authorizations are not inserted into the U.S. Code (although it remains an enacted Public Law).

1. "CODIFIED" (OR "PERMANENT") APPROPRIATIONS AND AUTHORIZATIONS: These authorizations are inserted into the appropriate Title of the U.S. Code (e.g., Title 10 for DoD). The significance of this event is that Congress need not "re-authorize" the authorization on a yearly basis. They are presumed to be authorized until Congress modifies or eliminates the authorization in a later statute.

2. "UNCODIFIED" (OR "TEMPORARY") APPROPRIATIONS AND AUTHORIZATIONS: These appropriations and authorizations are not inserted into the U.S. Code. As a result, they automatically cease to exist once the period of availability is complete, unless Congress subsequently re-authorizes the provision in later legislation.

3. GENERALLY, GWOT AND CONTINGENCY FUNDS ARE "UNCODIFIED": Most of the GWOT funds are "uncodified," implying that Congress intends to cease appropriations for specific GWOT theaters of operation (e.g., OEF and OIF) when those operations are completed.

D. The Fiscal Law Framework and FUSMO. As Section VII, *supra*, indicates, Congress has created a broad and detailed fiscal law framework whose complexity directly impacts FUSMO. The Fiscal Law Framework creates some basic rules in the field of Funding US Military Operations. Generally, DoD may only obligate appropriated O&M and Procurement funds when the primary purpose is to directly benefit the U.S. military. When the primary purpose of the expenditure is to assist foreign nations, their military/security services, or their foreign populations, apply the framework below.

1. FUSMO GENERAL RULE: The general rule in FUSMO is that the Department of State (DoS), and not DoD, funds Foreign Assistance to foreign nations and their populations. Section VIII, *infra*, discusses the Title 22

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[8] Department of Defense Appropriations Act for 2008, Pub. L. No. 110-116 (Nov. 13, 2007), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_bills&docid=f:h3222enr.txt.pdf.

[9] Consolidated Appropriations Act for 2008, Pub. L. No. 110-161, (Dec. 26, 2008), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_bills&docid=f:h2764enr.txt.pdf.

[10] *Id*. at Div. I.

[11] *Id*. at Div. L.

[12] National Defense Authorization Act for 2008, Pub. L. No. 110-181, § 2801 (Jan. 28, 2008), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_public_laws&docid=f:publ181.110.pdf.

DoS funds available for FUSMO. Foreign Assistance includes Security Assistance to a foreign military or government, Development Assistance for major infrastructure projects, and Humanitarian Assistance directly to a foreign population.

2. TWO EXCEPTIONS: There are two exceptions to the FUSMO general rule.

a. Interoperability, Safety, and Familiarization Training: DoD may fund the training (as opposed to goods and services) of foreign militaries with O&M only when the purpose of the training is to enhance the Interoperability, Familiarization, and Safety Training, and not Security Assistance Training. This exception applies only to training.[13]

b. Congressional Appropriation and/or Authorization to conduct Foreign Assistance*:* DoD may fund Foreign Assistance operations if Congress has provided a specific appropriation and/or authorization to execute the mission. Section VIII, *infra*, discusses the most frequently used appropriations and authorizations that Congress has enacted for DoD to execute FUSMO. Section IX, *infra*, also explores The Honorable Bill Alexander GAO Opinion, which provides the Interoperability, Safety, and Familiarization Training exception to the general rule that DoS funds Foreign Assistance.

VIII. DEPARTMENT OF STATE AUTHORIZATIONS AND APPROPRIATIONS

A. Introduction. The United States military has engaged in operations and activities that benefit foreign nations for many decades. The authorities and funding sources for these operations and activities have evolved into a complex set of statutes, annual appropriations, regulations, directives, messages, and policy statements. The key issue for the practitioner is determining whether DoS authorizations and/or appropriations (under Title 22 of the U.S. Code, and the annual Foreign Assistance Act), or DoD authorizations and/or appropriations (under Title 10 of the U.S. Code, and the annual DoD appropriations and authorizations) should be used to accomplish a particular objective. If there are non DoD appropriations and/or authorizations that may be used to fund a Foreign Assistance mission, then DoD may still be able to execute the mission, but with DoS funds (as long as DoS approves their use).

1. FUSMO GENERAL RULE. The general rule in Funding U.S. Military Operations (FUSMO) is that the Department of State (DoS) has the primary responsibility, authority, and funding to conduct Foreign Assistance on behalf of the USG. Foreign assistance encompasses any and all assistance to a foreign nation, including Security Assistance (assistance to the internal police forces and military forces of the foreign nation), Development Assistance (assistance to the foreign government in projects that will assist the development of the foreign economy or their political institutions), and Humanitarian Assistance (direct assistance to the population of a foreign nation). The legal authority for the DoS to conduct Foreign Assistance is found in the Foreign Assistance Act of 1961, 22 U.S.C. §2151.

2. HUMAN RIGHTS AND SECURITY ASSISTANCE. The "Leahy Amendment," first enacted in the 1997 Foreign Operations Appropriation Act (FOAA is the annual DoS Appropriations Act), prohibits the USG from providing funds to the security forces of a foreign country if the DoS has credible evidence that the foreign country or its agents have committed gross violations of human rights, unless the Secretary of State determines and reports that the government of such country is taking effective measures to bring the responsible members of the security forces unit to justice. This language is also found in yearly DoD Appropriations Act prohibiting the DoD from funding any training program involving a unit of the security forces of a foreign country if the DoS has credible information that the unit has committed a gross violation of human rights, unless all necessary corrective steps have been taken. See DoD Appropriations Act for 2007, §8069.

B. Legal Framework for Foreign Assistance.

1. THE FOREIGN ASSISTANCE ACT.

a. The Foreign Assistance Act of 1961 (FAA)[14] The FAA constituted landmark legislation providing a key blueprint for a grand strategy of engagement with friendly nations. Congress codified the 1961 FAA in Title 22 of the U.S. Code. The FAA intended to support friendly foreign nations against communism on twin pillars:

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[13] *See* CONTRACT & FISCAL L. DEP'T, THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER AND SCHOOL, U.S. ARMY, FISCAL LAW COURSE DESKBOOK, current edition, Chapter 12: FUSMO, Appendix A: The Honorable Bill Alexander, B-213137, 63 Comp. Gen. 422 (1984), *available at* http://www.jagcnet.army.mil/tjagsa.

[14] 22 U.S.C. §§ 2151 et seq.

(1) Provide supplies, training, and equipment to friendly foreign militaries; and

(2) Provide education, nutrition, agriculture, family planning, health care, environment, and other programs designed to alleviate the root causes of internal political unrest and poverty faced by foreign populations.

(3) The first pillar is commonly referred to as "security assistance" and is embodied in Subchapter II of the FAA. The second pillar is generally known as "development assistance" and it is found in Subchapter I of the FAA.

b. The FAA charged DoS with the responsibility to provide policy guidance and supervision for the programs created by the FAA. Each year Congress appropriates a specific amount of money to be used by agencies subordinate to the DoS to execute the FAA programs.[15]

c. As noted earlier, the FAA has two principal parts. Subchapter I provides for foreign assistance to developing nations; and Subchapter II provides for military or security assistance. The FAA treats these two aspects of U.S. government support to other countries very differently. The treatment is different because Congress is wary of allowing the U.S. to be an arms merchant to the world, but supports collective security. *See* 22 U.S.C. § 2301. The purposes served by the provision of defenses articles and services under Part II of the FAA are essentially the same as those described for the Arms Export Control Act (*see* 22 U.S.C. § 2751), but under the FAA, the recipient is more likely to receive the defense articles or services free of charge.

d. Congress imposes fewer restraints on non-military support (foreign assistance) to developing countries. The primary purposes for providing foreign assistance under Subchapter I of the FAA are to alleviate poverty; promote self-sustaining economic growth; encourage civil and economic rights; and integrate developing countries into an open and equitable international economic system. *See* 22 U.S.C. §§ 2151, 2151-1. In addition to these broadly-defined purposes, the FAA contains numerous other specific authorizations for providing aid and assistance to foreign countries. *See* 22 U.S.C. §§ 2292-2292q (disaster relief); 22 U.S.C. § 2293 (development assistance for Sub-Saharan Africa).

e. Even though Congress charged DoS with the primary responsibility for the FAA programs, the U.S. military plays a very important and substantial supporting role in the execution of the FAA's first pillar, Security Assistance. The small DoD boxes attached to the primary Security Assistance programs in the above diagram represent this relationship. The U.S. military provides most of the training, education, supplies, and equipment to friendly foreign militaries under Security Assistance authority. DoS retains ultimate strategic policy responsibility and funding authority for the program, but the "subcontractor" that actually performs the work is often the U.S. military. It should be noted that Congress requires by statute that DoS conduct human rights vetting of any foreign recipient of any kind of military training. *See e.g.* Sec. 8069, DoD Appropriations Act for FY 2006, Pub. L. No. 109-148 (2005).

f. With regard to the second pillar of the FAA, Development Assistance, USAID, the Office for Foreign Disaster Assistance (OFDA) within DoS, and embassies often call on the U.S. military to assist with disaster relief and other humanitarian activities. Again, the legal authority to conduct these programs emanates from the FAA, the funding flows from DoS's annual Foreign Operations Appropriations, and the policy supervision also rests on DoS. However, as represented by the above diagram, the U.S. military plays a relatively small role in DoS Development Assistance programs.

2. DoD AGENCIES THAT PARTICIPATE IN EXECUTING DoS FOREIGN ASSISTANCE:

a. Defense Security Cooperation Agency (DSCA). DSCA was created by DoD Directive 5105.65 as a separate defense agency under the direction, authority and control of the Assistant Secretary of Defense (International Security Affairs). Among other duties, DSCA is responsible for administering and supervising DoD security assistance planning and programs.

b. DEFENSE INSTITUTE OF SECURITY ASSISTANCE MANAGEMENT (DISAM). DISAM is a schoolhouse operating under the guidance and direction of the Director, DSCA. According to DoD Directive 2140.5, the mission of DISAM is as follows: "The DISAM shall be a centralized DoD activity for the education and training of authorized U.S. and foreign personnel engaged in security assistance activities." In addition to resident courses,

[15] Annual Foreign Operations Appropriations Acts, *available at* http://thomas.loc.gov/.

DISAM prepares a valuable publication entitled "The Management of Security Assistance," and the periodical "DISAM Journal." DISAM is located at Wright-Patterson AFB, Ohio.

c. THE MILITARY DEPARTMENTS.

(1) *Secretaries of the Military Departments.* Advise the SECDEF on all Security Assistance matters related to their Departments. Functions include conducting training and acquiring defense articles.

(2) *Department of the Army.* Consolidates its plans and policy functions under the Deputy Undersecretary of the Army (International Affairs). Operational aspects are assigned to Army Materiel Command. The executive agent is the U.S. Army Security Assistance Command, Security Assistance Training Field Activity (SATFA) and Security Assistance Training Management Office (SATMO). These offices coordinate with force providers to provide mobile training teams (MTT) to conduct the requested training commonly referred to as a "train and equip" mission.

(3) *Department of the Navy.* The principal organization is the Navy International Programs Office (Navy IPO). Detailed management occurs at the systems commands located in the Washington, D.C. area and the Naval Education and Training Security Assistance Field Activity in Pensacola, Florida.

(4) *Department of the Air Force.* Office of the Secretary of the Air Force, Deputy Under Secretary for International Affairs (SAF/IA) performs central management and oversight functions. The Air Force Security Assistance Center oversees applicable FMS cases, while the Air Force Security Assistance Training Group (part of the Air Education Training Group) manages training cases.

(5) *Security Assistance Organizations (SAO).* The term encompasses all DoD elements located in a foreign country with assigned responsibilities for carrying out security assistance management functions. It includes military missions, military groups, offices of defense cooperation, liaison groups, and designated defense attaché personnel. The primary functions of the SAO are logistics management, fiscal management, and contract administration of country security assistance programs. The Chief of the SAO answers to the Ambassador, the Commander of the Unified Command (who is the senior rater for efficiency and performance reports), and the Director, DSCA. The SAO should not be confused with the Defense Attachés who report to the Defense Intelligence Agency.

3. DOD SUPPORT TO DOS FOREIGN ASSISTANCE PROGRAMS THROUGH INTERAGENCY FUNDING

a. The overall tension in the FAA between achieving national security through mutual military security, and achieving it by encouraging democratic traditions and open markets, is also reflected in the interagency transaction authorities of the act. *Compare* 22 U.S.C. § 2392(c) *with* 22 U.S.C. § 2392(d) (discussed below). DoD support of the military assistance goals of the FAA is generally accomplished on a full cost recovery basis; DoD support of the foreign assistance and humanitarian assistance goals of the FAA is accomplished on a flexible cost recovery basis.

b. By authorizing flexibility in the amount of funds recovered for some DoD assistance under the FAA, Congress permits some contribution from one agency's appropriations to another agency's appropriations. That is, an authorized augmentation of accounts occurs whenever Congress authorizes recovery of less than the full cost of goods or services provided.

c. DoS reimbursements for DoD or other agencies' efforts under the FAA are governed by 22 U.S.C. § 2392(d). Except under emergency Presidential drawdown authority (22 U.S.C. § 2318), reimbursement to any government agency supporting DoS objectives under "subchapter II of this chapter" (Part II of the FAA (military or security assistance)) is computed as follows:

[a]n amount *equal to the value* [as defined in the act] of the defense articles or of the defense services [salaries of military personnel excepted], or other assistance furnished, *plus expenses arising from or incident to operations* under [Part II] [salaries of military personnel and certain other costs excepted].

d. This reimbursement standard is essentially the "full reimbursement" standard of the Economy Act. Pursuant to FAA § 632 (22 U.S.C. § 2392) DoS may provide funds to other executive departments to assist DoS in accomplishing its assigned missions (usually implemented through "632 Agreements" between DoD and DoS). Procedures for determining the value of articles and services provided as security assistance under the Arms Export Control Act and the FAA are described in the Security Assistance Management Manual (DoD Manual 5105.38-M) and the references therein.

e. In addition to the above, Congress has authorized another form of DoD contribution to the DoS's counterdrug activities by providing that when DoD furnishes services in support of this program, it is reimbursed only for its "additional costs" in providing the services (*i.e.*, its costs over and above its normal operating costs), not its full costs.

f. The flexible standard of reimbursement under the FAA mentioned above for efforts under Part I of the FAA is described in 22 U.S.C. § 2392(c). This standard is applicable when any other Federal agency supports DoS foreign assistance (*not* military or security assistance) objectives for developing countries under the FAA.

> [A]ny commodity, service, or facility procured . . . to carry out subchapter I of this chapter [Part I] [foreign assistance] . . . shall be (reimbursed) at replacement cost, or, if required by law, at actual cost, or, in the case of services procured from the DoD to carry out part VIII of subchapter I of this chapter [International Narcotics Control, 22 U.S.C. § 2291(a)-2291(h)], the amount of the additional costs incurred by the DoD in providing such services, or at any other price authorized by law and agreed to by the owning or disposing agency.

g. Note the specific reference to DoD services in support of DoS counterdrug activities. "Additional costs incurred" is the lowest acceptable interagency reimbursement standard. If Congress wishes to authorize more DoD contribution (that is, less reimbursement to DoD appropriations), Congress authorizes the actual expenditure of DoD funds for or on the behalf of other agencies. *See* Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, §§ 1001-11, 104 Stat. 1485, 1628-34 (1990) [codified at 10 U.S.C. § 374 note] (providing general authority for DoD to engage in counterdrug operations); *see also* section 1022 of the Defense Authorization Act for FY 07, Pub. L. No. 109-364, which extends DoD's counterdrug authority through 30 September 2008.

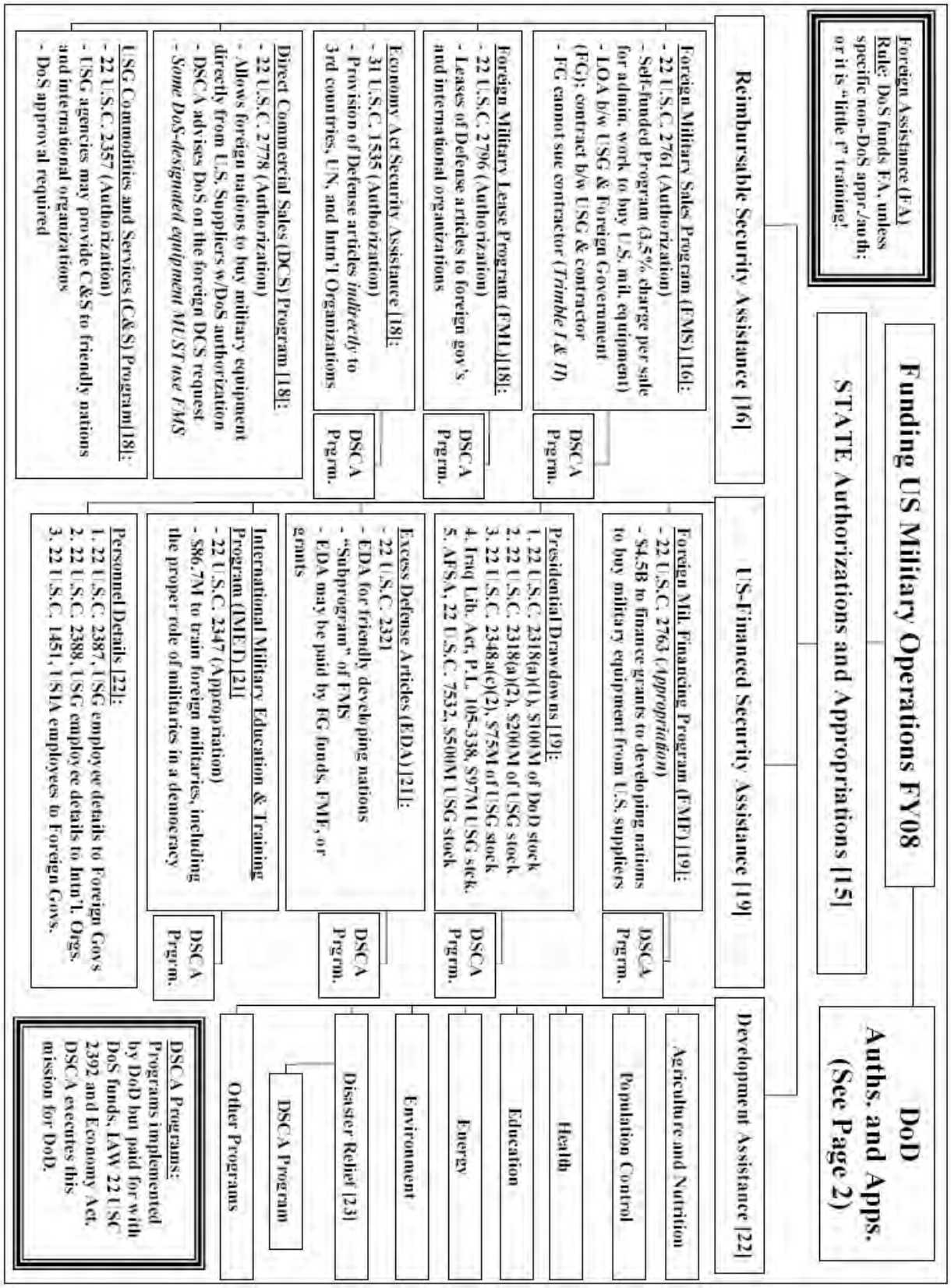
h. The DoD reimbursement standards for 22 U.S.C. § 2392(c) are implemented by DoD 7000.14-R, vol. 11A (Reimbursable Operations, Policies and Procedures), ch. 1 (General), ch. 7 (International Narcotics Control Program). When DoD provides services in support of DoS counterdrug activities, the regulation permits "no cost" recovery when the services are incidental to DoD missions requirements. The regulation also authorizes pro rata and other cost sharing arrangements. *See* DoD 7000.14-R, vol. 11A, ch. 7.

4. PRESIDENTIAL DECISION DIRECTIVE 25 – REIMBURSABLE SUPPORT VS. NON-REIMBURSABLE SUPPORT: On 6 May 1994, President Bill Clinton signed PDD 25, which remains in effect today. PDD 25 set the U.S. policy for all USG agencies (including DoD) with regards to the financing of combined exercises and operations with foreign nations. USG agencies should seek reimbursement for their activities in combined exercises and operations prior to accessing non-reimbursable Congressional appropriations to fund those activities. PDD 25 affects all USG funding policy decisions, including both DoS and DoD. *See* Presidential Decision Directive 25, Section IV.B., http://www.fas.org/irp/offdocs/pdd25.htm.

a. As previously discussed, Foreign Assistance can take two forms – Security Assistance to a foreign nation's military/security forces, and Development/Humanitarian Assistance. Although DoD's role in Development/Humanitarian Assistance has traditionally been small, DoD plays a primary role in executing Security Assistance on behalf of the DoS. When DoD executes Security Assistance programs on behalf of the DoS, the DoS generally reimburses DoD for all its costs. When the DoS approves the use of a reimbursable authorization and/or appropriation, the benefitting foreign nation reimburses DoS for all its costs (including the costs that DoD charges DoS to provide the requested assistance).

b. PDD 25 provides a policy overlay to Security Assistance provided by DoS or DoD on behalf of DoS. Before obligating and expending appropriated funds from non-reimbursable appropriations and/or authorizations, the DoS and the DoD should seek to use its reimbursable authorizations during Foreign Assistance operations. For the practitioner's ease, the DoS FUSMO Flowchart on the next page highlights the main DoS appropriations and/or authorizations that are traditionally executed by DoD on behalf of DoS. The DoS appropriations and/or authorizations are divided into three categories – Reimbursable Security Assistance, Non-Reimbursable (US-Financed) Security Assistance, and Development Assistance (in which DoD traditionally has a small or no role, except for Disaster Relief).

5. FUSMO FLOWCHART (DOS), FY08:



C. Reimbursable DoS Security Assistance Programs.

1. FOREIGN MILITARY SALES (FMS) PROGRAM - 22 U.S.C. § 2761. Foreign countries and the US may enter standard FMS contracts with DoD for the sale of defense articles, services, and training from existing stocks or new procurements at no cost to the U.S. government.

a. FMS is a "Revolving Fund," with the intent of being self-funded. DoS charges a 3.5% administrative fee to the foreign purchasing nation for each "case" (sale), to reimburse the U.S. for administrative costs. The administrative fee allows DoS to generate the funds necessary to reimburse the DoD MILPER account via an Economy Act transaction.

b. FMS cases can be used for support to multilateral operations, logistics support during a military exercise, training, purchase of equipment, weapons, and ammunition. The military equipment, weapons, ammunition, and logistics services, supplies, and other support must conform with the restrictions of the DoS International Traffic in Arms Regulations (ITARs).

c. The FMS program, like many of the DoS Security Assistance programs, is operated by DoD on behalf of DoS via the Defense Security Cooperation Agency (DSCA). DoS reimburses DoD for the use of military personnel by reimbursing the DoD Military Personnel (MILPER) appropriation in the DODAA via an Economy Act transaction.

d. DSCA-designated Significant Military Equipment (SME) may only be purchased via the FMS, and may not be purchased via the Direct Commercial Sales (DCS) program.

e. In conjunction with both FMS cases and Direct Commercial Sales (DCS), the U.S. may provide foreign nations loans and/or grants via the DoS Foreign Military Financing Program, a separate authorization for which Congress provides yearly appropriations.

f. To enter into an FMS case for the purchase of military equipment, DSCA (on behalf of the USG) and the foreign nation enter into a Letter of Agreement (LOA). The LOA outlines the items that the foreign nation will purchase via FMS. DSCA may provide the items from existing stock, or it may enter into a new contract with a defense contractor to produce the item. The foreign nation, however, does not have any third party beneficiary rights against the contractor, and has no cause of action against the contractor for any disputes that may arise between the contractor and the receiving foreign nation.[16]

2. FOREIGN MILITARY LEASE PROGRAM- AECA §§ 61-62, 22 U.S.C. § 2796-2796A. Authorizes leases of Defense articles to foreign countries or international organizations. The leases generally occur on a reimbursable basis. The U.S. may, however, provide foreign nations loans and/or grants via the DoS Foreign Military Financing Program.

3. ECONOMY ACT SECURITY ASSISTANCE, 31 U.S.C. § 1535. Authorizes the provision of defense articles and services indirectly to third countries, the UN, and international organizations on a reimbursable basis for another federal agency (e.g., Department of State).

4. USG COMMODITIES AND SERVICES (C&S) PROGRAM, 22 U.S.C. §. 2357. USG agencies may provide C&S to friendly nations and international organizations. DoS approval is required.

5. DIRECT COMMERCIAL SALES (DCS) PROGRAM, 22 U.S.C. § 2778. Authorizes eligible governments to purchase defense articles or services directly from defense contractors. A DoS review and DoS-issued "license" is required before the contractor may provide the products to the foreign nation. DoD is not involved in the management of the sale from the contractor to the foreign nation.

D. U.S.-Financed DoS Security Assistance.

1. FOREIGN MILITARY FINANCING (FMF) PROGRAM, 22 U.S.C. § 2763. Congressionally approved grants or loans $4.8 billion to finance grants to developing nations to buy equipment, services, or training from U.S. suppliers through the FMS/.FML or DCS programs.

2. PRESIDENTIAL DRAWDOWNS. Presidential Drawdowns are directives by the President of the United States (POTUS) for DoD to access its current stock of equipment and services, and to provide the identified

[16] Secretary of State for Defense v. Trimble Navigation Limited, 484 F.3d 700 (4th Cir. 2007).

equipment to a foreign country, their military or security services, or the foreign civilian population. The items need not be "surplus" or "excess."

a. Foreign Assistance Act (FAA) § 506(a)(1), 22 U.S.C. § 2318(a)(1) - Authorizes the President to direct the drawdown of defense articles and services having an aggregate value of up to $100,000,000 in any fiscal year for unforeseen military emergencies requiring immediate military assistance to a foreign country or international organization. Requires presidential determination (PD) and prior congressional notification (CN).[17]

b. FAA § 506(a)(2), 22 U.S.C. § 2318(a)(2) - Authorizes the President to direct the drawdown of articles and services having an aggregate value of up to $200,000,000 from any agency of the U.S. in any fiscal year for other emergencies including (among other things) counterdrug activities, disaster relief, non-proliferation, anti-terrorism, and migrant and refugee assistance, antiterrorism, and non-proliferation assistance. (The Security Assistance Act of 2000 increased the amount from $150M to $200M and added antiterrorism and non-proliferation to the permissible uses of this authority.) Of that amount, not more than $75M may come from DoD resources; not more than $75M may be provided for counternarcotics; and not more than $15M to Vietnam, Cambodia and Laos for POW accounting. Drawdowns supporting counternarcotics and refugee or migration assistance require PD 15-day prior CN.[18]

c. FAA § 552(c)(2), 22 U.S.C. § 2348a(c)(2) - Authorizes the President to direct the drawdown of up to $25,000,000 in any fiscal year of commodities and services from any federal agency for unforeseen emergencies related to peacekeeping operations and other programs in the interest of national security. Requires PD and prior CN.

d. Iraq Liberation Act of 1998, P.L. No. 105-338, 112 Stat. 3178 (Oct. 31, 1998*)* – Authorizes the President to direct the drawdown of defense articles from the stocks of DoD, defense services of DoD, and military education and training for Iraqi democratic opposition organizations. This assistance may not exceed $97 million and requires fifteen days notice to Congress. President Bush subsequently directed $92 million in drawdown assistance in 2002. See, Presidential Determination No. 03-06, 67 Fed. Reg. 78,123 (Dec. 23, 2002). Unique to drawdowns, Congress subsequently appropriated $63.5M reimbursement for IFSA drawdown support. *See* Sec. 1309 of the FY03 Emergency Wartime Supplemental Appropriation.

e. Afghanistan Freedom Support Act of 2002, P.L. No. 107-327, 116 Stat. 2797 (Dec. 4, 2002, codified at 22 USC §7532 – Authorizes the President to direct the drawdown of up to $300 million of defense articles, defense services, and military education and training for the Government of Afghanistan, eligible foreign countries, and eligible international organizations. This authority is carried out under section 506 (22 USC §2318(a)(1)) of the Foreign Assistance Act. The assistance may also be provided by contract. Section 9008 of the FY05 Defense Appropriations Act Pub. L. No. 108-287 (2004) increased this Afghan drawdown authority to $550 million. Oddly enough lightning has struck the same point twice. Congress provided $165M reimbursement for the AFSA Drawdown. *See* Sec. 1307 of the FY03 Emergency Wartime Supplemental Appropriation.

3. EXCESS DEFENSE ARTICLES (EDA). EDA is a "subprogram" of FMS. "Excess" Defense articles no longer needed by the DoD may be made available to 3rd Countries for sale (sometimes financed with FMF), or on a grant basis. Prior to sale, FMS/EDA has the authority to depreciate the value of the item. EDA are priced on the basis of their condition, with pricing ranging from 5 to 50 percent of the items' original value. "Excess" items are no longer required by DoD, even though that type of item may still be regularly used by DoD units. (See Security Assistance Management Manual (SAMM)). EDA may be purchased by foreign nations, and they may be purchased by foreign nations with funds loaned or granted by the United States under the DoS FMF program (See Foreign Military Financing, supra VII.C.1.). FMS receives EDA from the Defense Reutilization and Marketing Service (DRMS). Only countries that are justified in the annual Congressional Presentation Document (CPD) by the DoS or separately justified in the FOAA during a fiscal year are eligible to receive EDA. EDA must be drawn from existing stocks. Congress requires fifteen days notice prior to issuance of a letter of offer if the USG sells EDA. However, most EDA is transferred on a grant basis. No DoD procurement funds may be expended in connection with an EDA transfer. The transfer of these items must not adversely impact U.S. military readiness.

a. FAA § 516, 22 U.S.C. § 2321(j). This statute authorizes both lethal and non-lethal EDA (including Coast Guard equipment) support to any country for which receipt was justified in the annual Congressional

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[17] Defense and Security Assistance Improvements Act, Pub. L. 104-164 (1996) (increase from $75M to $100M).

[18] *See id*; *see also* Security Assistance Act, Pub. L. 106-280, 114 Stat. 850 (2000).

Presentation Document (CPD). It continues to accord priority of delivery to NATO, non-NATO Southern-flank allies, and the Philippines, as well as continuing the 7:10 EDA grant split between Greece & Turkey. *See* Defense and Security Assistance Improvements Act, Pub. L. 104-164 (1996) (consolidation of EDA authorities into §516 and repeal of §§ 518-520); Security Assistance Act of 1999, Pub. L. 106-113, § 1211(b) (1999).

b. Transportation: No-cost space available transportation of EDA is authorized for countries receiving less than $10M FMF or IMET in any fiscal year, as long as DoS makes the determination that it is in the national interest of the United States to pay for the transportation.

4. INTERNATIONAL MILITARY EDUCATION & TRAINING (IMET). U.S.-funded program to fund the military training of foreign soldiers at U.S. military schools.

a. FAA §§ 541-545 (22 U.S.C. §§ 2347-2347(d). Security assistance program to provide training to foreign militaries, including the proper role of the military in civilian-led democratic governments and human rights.

b. *See also*, Section 1222 of FY07 NDAA, which deletes the IMET program from the sanctions of the American Servicemembers' Protection Act.

5. PERSONNEL DETAILS.

a. FAA § 627, 22 U.S.C. § 2387. When the President determines it furthers the FAA's purposes, statute permits a federal agency head to detail officers or employees to foreign governments or foreign government agencies, where the detail does not entail an oath of allegiance to or compensation from the foreign countries. Details may be with or without reimbursement. FAA § 630, 22 U.S.C. § 2390.

b. FAA § 628, 22 U.S.C. § 2388. When the President determines it furthers the FAA's purposes, statute permits federal agency heads to detail, assign, or otherwise make their officers and employees available to serve with international organizations, or serve as members of the international staff of such organizations, or to render any technical, scientific, or professional advice or service to the organizations. May be authorized with or without reimbursement. FAA § 630, 22 U.S.C. § 2390.

c. 22 U.S.C. § 1451. Authorizes the Director, United States Information Agency, to assign U.S. employees to provide scientific, technical, or professional advice to other countries. Details may be on reimbursable or nonreimbursable basis. Does not authorize details related to the organization, training, operation, development, or combat equipment of a country's armed forces.

E. Development Assistance.

1. OVERVIEW: DoS and USAID finance a number of development assistance programs, including: Agriculture and Nutrition, Population Control, Health, Education, Energy, and Environment Improvement. Most of these projects are financed with direct grants or loans from DoS or USAID to the developing country. These are large-scale projects and normally do not involve DoD.

2. FOREIGN DISASTER RELIEF (NOT THE SAME AS FOREIGN DISASTER ASSISTANCE). Statutory authority for the President to grant disaster relief aid for natural or manmade disasters is found in the Foreign Assistance Act, 22 U.S.C. § 492. Primary implementing tool for this program is USAID. USAID may request DoD assistance and must reimburse DoD for its costs via an Economy Act transaction.

3. MILITARY ROLE. The military's role in the provision of development assistance through the FAA is relatively limited when compared to its role in the provision of security assistance. Nevertheless, from time to time, agencies charged with the primary responsibility to carry out activities under this authority, call upon the U.S. military to render assistance. An example of participation by the U.S. military would be action taken in response to a request for disaster assistance from the **Office for Foreign Disaster Assistance (OFDA)**. OFDA often asks the U.S. military for help in responding to natural and man-made disasters overseas. Key point: generally, costs incurred by the U.S. military pursuant to performing missions requested by other Federal agencies under the FAA, Development Assistance provisions, must be reimbursed to the military pursuant to FAA § 632 or pursuant to an order under the Economy Act.

4. Foreign Disaster Relief In Support of OFDA.

a. The United States has a long and distinguished history of aiding other nations suffering from natural or manmade disasters. In fact, the very first appropriation to assist a foreign government was for disaster relief.[19] The current statutory authority continuing this tradition is located in the Foreign Assistance Act.[20] For foreign disaster assistance, Congress granted the President fiscal authority to furnish relief aid to any country "on such terms and conditions as he may determine."[21] The President's primary implementing tool in carrying out this mandate is USAID.

b. The USAID is the primary response agency for the U.S. government to any international disaster.[22] Given this fact, DoD traditionally has possessed limited authority to engage in disaster assistance support. In the realm of Foreign Disaster Assistance, the primary source of funds should be the International Disaster Assistance Funds.[23] The Administrator of the USAID controls these funds because the President has designated that person as the Special Coordinator for International Disaster Assistance.[24] In addition, the President has designated USAID as the lead agency in coordinating the U.S. response for foreign disaster.[25] Normally these funds support NGO and PVO efforts in the disaster area. However, certain disasters can overwhelm NGO and PVO capabilities, or the military possesses unique skills and equipment to accomplish the needed assistance. In these situations, DoS, through OFDA, may ask for DoD assistance. Funding in these cases comes from the International Disaster Assistance fund controlled by OFDA. DoD is supposed to receive full reimbursement from OFDA when they make such a request. DoD access to these funds to perform Disaster Assistance missions occurs pursuant to § 632 FAA.

F. Accessing the DoS Appropriations and Authorizations. For the deployed unit, properly coordinating for access to the DoS appropriations and authorizations becomes critical. In a non-deployed environment, a DoD unit would normally coordinate with the Defense Security and Cooperation Agency (DSCA) and follow the procedures of the Security Assistance Management Manual (SAMM).

1. Due to the dramatically increased Operational Tempo (OPTEMPO), the deployed unit normally requires the appropriate funds much more quickly than in a non-deployed situation. As a result, the unit should coordinate with the deployed DoS Political Advisor (POLAD) located at the Combined Joint Task Force (CJTF), or division, level. The unit may also coordinate with the DoS Foreign Officers located at the local Provincial Reconstruction Teams (PRTs) and/or the "Embedded" Provincial Reconstruction Teams (ePRTs).

2. The DoD legal advisor should be aware of the cultural, structural, and procedural differences between DoD and DoS, and plan accordingly.[26] DoD has the cultural and structural capability to plan for operations far in advance via the Military Decision-Making Process (MDMP). DoS generally has neither the structural capability nor the organizational culture that would allow it to plan for operations as far in advance as DoD. These structural differences between DoD and DoS will need to be overcome by the deployed unit.

G. Conclusion. The general rule for FUSMO is that the DoS (and not DoD) funds foreign assistance. Section III, supra, discussed the most frequently used DoS appropriations and authorizations impacting DoD FUSMO. Section IV, infra, will discuss the DoD appropriations and authorizations for FUSMO that Congress has enacted for DoD to fund Security Assistance outside of DoS appropriations and authorizations. All of the DoD appropriations

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[19] This appropriation was for $50,000 to aid Venezuelan earthquake victims in 1812. Over 25,000 people died in that tragedy. Act of 8 May 1812, 12th Cong., 1st Sess., ch. 79, 2 Stat. 730.

[20] FAA § 492 (10 U.S.C. § 2292) (International Disaster Assistance). The President may furnish foreign disaster assistance under such terms and conditions determined appropriate pursuant to the FAA §§ 491-496 (22 U.S.C. §§ 2292-2292q). *See, e.g.,* Foreign Operations Appropriations Act for FY 03, Pub. L. 108-7, (2003) ($230M appropriated to DoS for international disaster assistance under this authority).

[21] 22 U.S.C. § 2292(b).

[22] E.O. 12966, 60 F.R. 36949 (July 14, 1995).

[23] FAA §§ 491 - 495K, 22 U.S.C. §§ 2292 - 2292q.

[24] *See* FAA § 493, 22 U.S.C. § 2292b and E.O. 12966, Sec. 3, 60 F.R. 36949 (July 14, 1995). *See also* E.O. 12163, section 1-102(a)(1), 44 F.R. 56673 (Sept. 29, 1979), *reprinted as amended in* 22 U.S.C.A. § 2381 (West Supp. 1996).

[25] *See generally,* E.O. 12966, 60 F.R. 36949 (July 14, 1995).

[26] *See* Hansen, Rosemary, "Defense is from Mars, State is from Venus: Improving Communications and Promoting National Security," U.S. Army War College Strategy Research Project (1998).

and authorizations discussed in Section IV, infra, fall within the statutory exception to the general rule that DoS funds Foreign Assistance.

IX. DEPARTMENT OF DEFENSE APPROPRIATIONS AND AUTHORIZATIONS

A. Introduction. The general rule in FUSMO is that DoS has the primary responsibility, authority, and funding to conduct Foreign Assistance on behalf of the USG. The legal authority for the DoS security assistance and development assistance mission is found in the Foreign Assistance Act of 1961, 22 U.S.C. §2151.

1. TWO EXCEPTIONS: There are two exceptions to the general rule that foreign assistance is funded with DoS authorizations and appropriations. The first exception is based on historical Government Accountability Office (GAO) opinions which allow for the use of O&M to train foreign forces, as long as the purpose of the training is Interoperability, Safety, and Familiarization of the foreign element with U.S. forces. The second group of exceptions occur when Congress enacts a DoD appropriation and/or authorization to conduct foreign assistance (logistics support, training, and/or humanitarian assistance):

a. Exception 1 - Security Assistance Training ("Big T training") vs. Interoperability Training ("Little t training"): Security Assistance Training is funded with DoS authorizations and appropriations. Interoperability training is generally funded with DoD O&M funds.

(1) If the primary purpose of the training of foreign forces is to improve the operational readiness of the foreign forces, then this is Security Assistance Training ("Big T") and should be funded with DoS authorizations and appropriations. On the other hand, if the primary purpose of the training of foreign forces is for interoperability, safety, and/or familiarization, then this is Interoperability Training ("Little t") and is NOT security assistance training. See Appendix A: The Honorable Bill Alexander GAO Opinion (1986).

(2) In most circumstances, the training effect of DoD in providing the training, along with the factual support for the stated DoD intent, will guide the advising attorney in determining whether a training event is Security Assistance Training or Interoperability, Safety, and Familiarization Training. In classifying the type of training of foreign troops by DoD (Security Assistance vs. Interoperability), the advising attorney should consider such factors as the cost of the training, the current level of training of the foreign troops before the training vs. the expected level of training of the foreign troops after the training is complete, and the amount of time and resources that DoD will need to expend to provide the training. As these factors increase, it becomes more likely that the training envisioned is Security Assistance training, as opposed to Interoperability Training.

(3) For example, in a month-long Combined Airborne Parachute Exercise with other countries, whose participating troops are all airborne qualified in their own countries, a 2-hour block of instruction on C-130 entry and egress safety procedures would be Interoperability Training ("Little t" training), since the primary purpose is safety and interoperability of the foreign troops. Additionally, it is a short duration (2 hours) training event, the cost is not significant, and their level of training is not significantly enhanced (since the foreign troops are already airborne qualified). Therefore, this would likely be classified as Interoperability, Safety, and Familiarization Training, and DoD may fund this training with its own O&M funds.

(4) On the other hand, training foreign troops on airborne operations, including the provision of DoD trainers for a month-long airborne school to qualify all the individual foreign troops in airborne jumps, would likely be classified as Security Assistance Training ("Big T" training). In this case, the duration of the training is long (one month), the cost is likely significant, and most importantly, the level of training of the foreign troops is significantly increased. As a result, the primary purpose of the training is not the Interoperability, Familiarization, and Safety of the foreign troops, and this training should be classified as Security Assistance training.

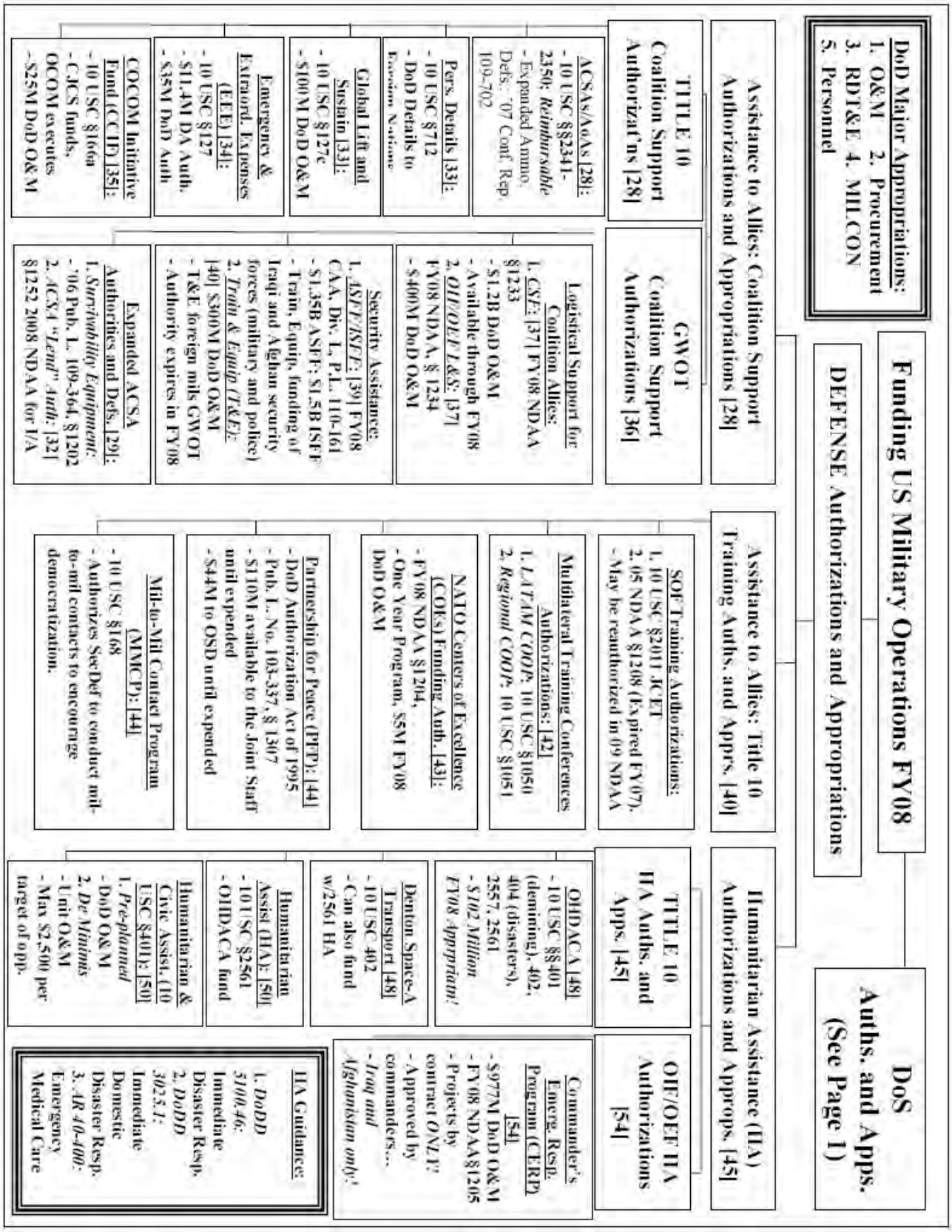
b. Exception 2 - Statutory Appropriation or Authorization*:* Congress may appropriate funds, or authorize the use of funds, for DoD to provide Foreign Assistance outside of Title 22 DoS appropriations and authorizations. The remainder of this section discusses the DoD statutory authorizations and appropriations to conduct Foreign Assistance.

2. GROUPING THE STATUTORY APPROPRIATIONS AND AUTHORIZATIONS: Generally, DoD foreign security assistance authorizations and appropriations may be grouped into three categories: Assistance to Allies, Training Authorizations, and Humanitarian Assistance authorizations and appropriations. Within these three categories, we can separate the codified appropriations and authorizations inserted into Title 10 (and are presumably relatively "permanent"), from the uncodified, or "temporary" authorizations and appropriations.

a. These congressional appropriations and/or authorizations allow the DoD to conduct missions that would traditionally be classified as Foreign Assistance. Absent these congressional appropriations and/or authorizations, DoD would not be able to execute these Foreign Assistance operations.

b. The FUSMO Flowchart (DoD) FY08 on the next page highlights some of the most exercised DoD appropriations and/or authorizations to conduct Foreign Assistance. It is not an exclusive list – there are additional appropriations and/or authorizations for DoD to conduct Foreign Assistance in Title 10 and the yearly DoD Appropriations and Authorization Acts. The appropriations and/or authorizations discussed, however, are the most commonly used during contingency operations.

3. FUSMO FLOWCHART (DOD), FY08.



B. DoD Assistance to Allies: Title 10 Coalition Support Authorizations and Appropriations. The following authorizations are codified in Title 10 (see supra, Section II. C. for a discussion of "codified" statutes). As a result, these authorizations are permanently authorized until Congress enacts changes to Title 10 of the U.S. Code.

1. ACQUISITION & CROSS-SERVICING AGREEMENTS (ACSA) - 10 U.S.C. §§ 2341-2350: ACSAs are bilateral agreements for the reimbursable mutual exchange of Logistics Supplies, Services, and Support (LSSS) (See DoD Directive 2010.9, 28 Apr 2003; Chairman of the Joint Chiefs of Staff, Instruction (CJCSI) 2120.01, 27 April 2004). The ACSA authorization allows DoD (as opposed to DoS) to enter into mutual logistics support agreements with the defense departments of foreign nations. The ACSA authorizes DoD to acquire logistic support, without resort to commercial contracting procedures (i.e., DoD does not need to follow the competition in contracting requirements of the Federal Acquisition Regulation) and to transfer limited support outside of Title 22 the Arms Export Control Act (AECA). Under the ACSA statutes, after consulting with the State Department, DoD (i.e. the affected Combatant Commander) may enter into agreements with NATO countries, NATO subsidiary bodies, other eligible countries, the UN, and international regional organizations of which the U.S. is a member for the reciprocal provision of LSSS.

a. Two different ACSA Authorities/methods exist:

(1) Acquisition and Cross-Servicing Agreements (ACSAs) – 10 U.S.C. §2342 (full ACSA authority) allows the DoD to both purchase LSSS from the foreign military department, as well as to provide LSSS, on a reimbursable basis, to the foreign military department.

(2) Acquisition Only Authority (AoAs) – 10 U.S.C. §2341 provides limited authority allowing DoD to acquire LSSS for our deployed forces use from that host country if it has a defense alliance with the U.S., allows stationing of U.S. Forces, prepositioning of U.S. materiel, or allows U.S. military exercises or operations in the country. No specific formal agreement is required. The DoD, however, may NOT provide LSSS to the foreign nation if it has not entered into an approved ACSA with that foreign nation.

b. LSSS definition 10 U.S.C. §2350 – Congress defines LSSS as: food, billeting, transportation, POL, clothing, communication services, medical services, ammunition (generally limited to small arms ammunition like 5.56mm rifle rounds), base operations support, storage services, use of facilities, training services, spare parts and components, repair and maintenance services, calibration services, and port services. Prohibited items are those designated as significant military equipment on the U.S. Munitions List promulgated under the AECA.

(1) Special equipment transfer authority – In Section 1202 of the FY07 NDAA, Pub.L. 109-364, (Oct 17, 2006), Congress granted SECDEF specific authority to transfer via ACSA personnel survivability equipment to coalition forces in Iraq and Afghanistan. On 19 January 2007, the DEPSECDEF delegated this authority to CDRUSCENTCOM. Authority expires 30 September 2008.

(2) Ammunition definition expanded - The FY07 NDAA Conference Report (Joint Conference Report 109-702), provides an updated and expanded definition of ammunition which may be transferred by ACSA through 30 September 2008. Generally, the types of ammunition that may be transferred under an ACSA are small arms ammunition, flares, etc. *See* CJCS Instruction 2010.01, Appendix A, Enclosure A, Table A-A-1, Examples of Support Permitted Under ACSA, http://www.dtic.mil/cjcs_directives/cdata/unlimit/2120_01.pdf.

c. ACSA Transaction Approval Authority: The approval authority for ACSA transactions is delegated from the SECDEF to "ACSA Warranted Officers" within the Combatant Commands. The ACSA Warranted Officers receive a warrant, or authorization, to approve the transactions. Prior to executing any ACSA transaction, an ACSA Warranted Officer must approve the reimbursable transaction.

d. ACSA Reimbursement: Acquisitions and transfers executed under an ACSA may be reimbursed under three methods: Payment-In-Kind (PIK), Replacement-In-Kind (RIK), or Equal Value Exchange (EVE). *See* DoDD 2010.9: Acquisition and Cross-Servicing Agreements, http://www.dtic.mil/whs/directives/corres/pdf/201009p.pdf. See also, CJCS Instr'ctn 2010.01: Acquisition and Cross-Servicing Agreements, http://www.dtic.mil/cjcs_directives/cdata/unlimit/2120_01.pdf.

(1) Payment-In-Kind (PIK): This reimbursement option requires that the receiving defense department reimburse the providing defense department the full value of the LSSS in currency. For example, if the DoD provides $10,000 worth of tents to a foreign defense department, they reimburse us with $10,000 in currency. IAW the DoD FMR, the reimbursement must occur within 90 days of the initial provision of the LSSS.

(2) Replacement-In Kind (RIK): This reimbursement option requires that the receiving defense department reimburse the providing defense department by providing the same type of LSSS. For example, if the DoD provides 10 tents to a foreign defense department, the foreign defense department provides the exact same type of tents to the DoD in return. This often occurs when a foreign nation has the LSSS required in their inventory, but does not have the logistical capability to deliver the LSSS to their own troops in a contingency operation. In that situation, DoD may provide the LSSS to the foreign troops in the contingency location, and the foreign government provides the same type of LSSS to the DoD at another location. IAW the DoD FMR, the reimbursement must occur within one year of the initial provision of the LSSS.

(3) Equal Value Exchange (EVE): This reimbursement option requires that the receiving defense department reimburse the providing defense department by providing LSSS that has the same value as the LSSS initially provided. For example, the DoD may provide $10,000 in tents to the foreign nation via the ACSA, and the foreign nation may provide $10,000 worth of fuel as reimbursement. IAW the DoD FMR, the reimbursement must occur within one year of the initial provision of the LSSS.

e. ACSAs and Presidential Decision Directive (PDD) 25:

(1) Presidential Decision Directive (PDD) 25: On 6 May 1994, President Bill Clinton signed PDD 25, which remains in effect today. PDD 25 set the U.S. policy for all USG agencies (including DoD) with regards to the financing of combined exercises and operations with foreign nations. USG agencies should seek reimbursement for their activities in combined exercises and operations prior to accessing Congressional appropriations to fund those activities.[27]

(2) ACSA/AoA authority is the only congressional authorization for DoD to receive direct reimbursement from foreign nations (through their defense ministries) for the costs of DoD-provided support in combined exercises and operations. As such, prior to accessing DoD appropriations to finance a foreign nation's LSSS in a combined exercise or operation, units should determine whether the foreign nation defense ministry has an ACSA/AoA with DoD, and if so, whether the foreign nation has the capability to reimburse DoD under the existing ACSA for any LSSS support that DoD provides.

(3) The fact that a foreign nation defense ministry has an ACSA in place with DoD does not create a requirement that all transactions with that foreign nation be reimbursable. The size and scope of the support should be considered in relation to that nation's capability to reimburse the U.S. for the required LSSS. Generally, developing nations with little reimbursement capability will not be required to reimburse the U.S. for LSSS (assuming that there is a U.S. financed appropriation or authorization available to fund the requested LSSS). On the other hand, developed nations should normally reimburse the U.S. for any LSSS via an ACSA.

f. Temporary Authority to Lend LSSS to Iraq and Afghanistan under an existing ACSA: Section 1252 of the 2008 NDAA authorized the DoD to lend military equipment, on a non-reimbursable basis, to the military departments of Iraq and/or Afghanistan. This temporary authorization is available to the DoD until 30 September 2009 (FY09). *See* Sec. 1252, 2008 NDAA, Pub. L. No. 110-161. Currently, there is an approved ACSA with Afghanistan, but an ACSA with Iraq has not been completed.

2. PERSONNEL DETAILS: 10 USC § 712. Authorizes the President to detail members of the armed forces to assist in military matters in any foreign nation of North, Central, or South America; the Republics of Haiti, and Santo Domingo; or -- during a war or a declared national emergency -- in any other country. Personnel Details may be on a reimbursable or non-reimbursable basis.

3. GLOBAL LIFT AND SUSTAIN: 10 USC §127C. In Section 1201 of FY07 NDAA, Congress codified this drawdown-like authority to use up to $100 million of DoD O&M per fiscal year to provide logistic supplies, services, and support (LSSS), including air-lift and sea-lift support, to partner nation forces worldwide in support of the GWOT. The approval authority for Global Lift and Sustain remains at the SECDEF level. Other limitations include:

a. Prior to the use of this authority, the Secretary of State must concur with its use.

b. May only be used for a combined operation with US forces in support of GWOT: This authority may not be used for training exercises, and the combined operation must be a GWOT-support operation.

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[27] *See* Presidential Decision Directive 25, http://www.fas.org/irp/offdocs/pdd25.htm.

c. May not be used in Iraq and Afghanistan: The Necessary Expense Doctrine pre-empts the use of Global Lift and Sustain authority in Iraq and Afghanistan, since Iraq/Afghanistan Lift and Sustain is the more specific authorization. (See infra, Section IV.C.2., Iraq/Afghanistan Lift and Sustain Authorization).

4. EMERGENCY & EXTRAORDINARY EXPENSES ("EEE," OR "TRIPLE E") - 10 U.S.C. § 127.

a. General. The SECDEF, the Inspector General (TIG), and the secretaries of the military departments may receive EEE funds for use of any type of emergency or expenditure which cannot be anticipated or classified. The SECDEF, TIG, and the secretaries of the military departments may obligate the funds appropriated for such purposes as they deem proper; such determination is final and conclusive upon the accounting officers of the U.S. The SECDEF, TIG, and the secretaries of the military departments may delegate (and redelegate) the authority to obligate EEE funds.

b. Congressional Notification. DoD Authorization Act for FY 1996 revised § 127 to require that SECDEF provide the congressional defense and appropriations committees 15 days advance notice before expending or obligating funds in excess of $1 million, and five days advance notice for expenditures or obligations between $500,000 and $1 million. Pub. L. No. 104-106, § 915, 110 Stat. 413 (1996).

c. The 2008 DODAA authorized the following amounts for EEE:[28]

(1) SECDEF: Authorization for the SECDEF to obligate up to $35.82M in DoD O&M for EEE purposes.

(2) Secretary of the Army: Authorization of $11.42M for Secretary of the Army EEE.

(3) Secretary of the Navy: Authorization of $6.22M for Secretary of the Navy EEE.

(4) Secretary of the Air Force: Authorization of $7.66M for Secretary of the Air Force EEE.

5. COMBATANT COMMANDER INITIATIVE FUNDS (CCIF)

a. 10 U.S.C. § 166a. See DoD Appropriations Act for FY 2005, Pub. L. 108-287 (2004) ($25M for CCIF in FY 2005 in Defense-wide O&M); see also Chairman of the Joint Chiefs of Staff Instruction (CJCSI) 7401.01A, "Combatant Commander Initiatives Fund," 15 Aug 2003. This Instruction provides additional guidance on CCIF and a format for compiling CCIF packages for CJCS review and decision.

b. Purpose. CJCS may provide to Combatant Commanders (and NORAD) sums appropriated for the following activities – (1) Force training (2) Contingencies (3) Selected operations (4) Command and control (4) Joint exercises (including the participating expenses of foreign countries) (5) Humanitarian and Civil Assistance (6) Military education and training to military and related civilian personnel of foreign countries (including transportation, translation, and administrative expenses) (6) Personnel expenses of defense personnel for bilateral or regional cooperation programs (7) Force protection. Section 902 of the FY07 NDAA also codified "civic assistance, to include urgent and unanticipated humanitarian relief and reconstruction assistance" as a proper purpose for the use of CCIF.

c. Relationship to Other Funding. Any amount provided as CCIF for an authorized activity are "in addition to amounts otherwise available for that activity during the fiscal year."

d. Limits. 10 U.S.C. § 166a(e) Of funds made available for CCIF, no more than $10 million may be used to buy end items with a cost greater than $15,000; no more than $10 million may be used to pay the expenses of foreign countries participating in joint exercises; no more than $5 million may be used for education and training to military and related civilian personnel of foreign countries; and no funds may be used for any activity for which Congress has denied authorization.

6. EMERGENCY CONTINGENCY OPERATIONS FUNDING AUTHORITY. This authority, under 10 U.S.C. § 127a (amended by DoD Authorization Act for FY 1996, Pub. L. No. 104-106, § 1003 (1996)), applies to certain "emergency" contingency operations for which Congress has not appropriated funds. The intent of the statute is to provide standing authority to fund DoD contingency operations which DoD has not had the opportunity to request funding for. The statute authorizes SECDEF to transfer up to $200 million in any fiscal year to reimburse accounts

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[28] Department of Defense Appropriations Act for 2008, Pub. L. No. 110-116 (Nov. 13, 2007), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_bills&docid=f:h3222enr.txt.pdf; *see also* Section XII *infra (*providing a summary chart of the 2008 DODAA provisions).

used to fund operations for incremental expenses incurred for designated emergency contingency operations. This transfer authority funding is regulated by volume 12, chapter 23 of the DoD Financial Management Regulation, DoD 7000.14-R. Due to provisions requiring both Congressional notification and GAO compliance reviews, this authority is rarely used.

a. This authority applies to deployments, other than for training, and humanitarian assistance, disaster relief, or support to law enforcement operations (including immigration control) for which:

(1) Funds have not been provided;

(2) Operations are expected to exceed $50 million; or

(3) The incremental costs of which, when added to other operations currently ongoing, are expected to result in a cumulative incremental cost in excess of **$100 million.**

b. This authority does *not* apply to operations with incremental costs not expected to exceed $10 million. The authority provides for the waiver of Working Capital Fund (WCF) reimbursements. Units participating in applicable operations receiving services from WCF activities may not be required to reimburse for the incremental costs incurred in providing such services. This statute restricts SECDEF's authority to reimburse WCF activities from O&M accounts. (In addition, if any activity director determines that absorbing these costs could cause an ADA violation, reimbursement is required.)

C. DoD GWOT Coalition Support Authorizations. These uncodified, or "temporary" appropriations and authorizations consist primarily of logistical support for coalition allies. The general rule for foreign military training is that security assistance training of foreign militaries is authorized under Title 22 and funded by DoS from the annual Foreign Operations, Export Financing and Related Programs Appropriations Act (FOAA). Exceptions to this rule occur when there are specific statutory authorizations (Title 10) or when the training is incident to US military training. The general rule for foreign police training is that no funds shall be used to provide training or advice to police, prisons, or other law enforcement forces for any foreign government. Exceptions include Iraq Security Forces Fund (ISFF)/Afghanistan Security Force Fund (ASFF), assistance for sanctions monitoring and enforcement, and assistance for reconstitution of civilian police authority and capability in post-conflict restoration.

1 COALITION SUPPORT FUND (CSF) - Emergency Supplemental Appropriations Act for Defense and for Reconstruction of Iraq and Afghanistan, 2004, Pub. L. No. 108-106 (2003), § 1310 (hereinafter FY04 ESAA). Authorized $1,150,000,000 of Defense-Wide O&M to remain available until expended to reimburse Pakistan, Jordan, and other key cooperating nations for logistical and military support provided to U.S. military operations in connection with military action in Iraq and the global war on terrorism. Public Law No. 109-234, Making emergency supplemental appropriations for the fiscal year ending September 30, 2006, added to that amount by $740M, and the base FY07 Defense Appropriations Act added another $900M, all to remain available until expended. There are no "Time" restrictions on the use of the CSF.

a. Requirements: This authority requires the Secretary of State concurrence, 15 day prior notification to Congress, and quarterly reports to Congress.

b. The 2008 CAA authorized an additional $300,000,000 from DoD O&M, to remain available until expended, for the Coalition Support Fund.[29]

c. Section 1233 of the 2008 NDAA authorized the use of an additional $1.2 Billion from DoD O&M, to remain available through 30 September 2008, for the Coalition Support Fund.[30]

2. IRAQ/AFGHANISTAN LIFT AND SUSTAIN: Section 1106 of the FY04 ESAA authorized Defense Wide O&M Funded Support to Coalition Partners. Defense O&M may be used to provide supplies, services, transportation, including airlift and sealift, and other logistical support to coalition forces supporting military and stability ops in Iraq.

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[29] Consolidated Appropriations Act for 2008, Pub. L. No. 110-161, Div. L. (Dec. 26, 2008), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_bills&docid=f:h2764enr.txt.pdf.

[30] National Defense Authorization Act for 2008, Pub. L. No. 110-181, § 1233 (Jan. 28, 2008), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_public_laws&docid=f:publ181.110.pdf.

a. Section 9009 of the FY05 Defense Appropriations Act, Pub. L. No. 108-287 (2004): Continued this "Lift & Sustain Authority," and also included authorization to support coalition force operations in Afghanistan. Sections 9009 of the FY06 Defense Appropriations Act and 9008 of the FY07 Defense Appropriations Act reauthorized the Iraq/Afghanistan Lift and Sustain Authority.

b. Section 607 of the 2008 Consolidated Appropriations Act, Div. L (Emergency Supplemental Appropriations Act for Defense, 2008: Re-authorized OIF/OEF Lift and Sustain activities until 30 September 2008, to be funded by DoD O&M.

c. Section 1234 of the 2008 NDAA: Limited the amount of DoD O&M that the SECDEF may obligate for Iraq/Afghanistan Lift and Sustain to $400 Million. Prior to the 2008 NDAA, there were no limitations on the amounts that the SECDEF could obligate for I/A Lift and Sustain.

d. Note: Iraq/Afghanistan Lift and Sustain authority is for exactly the same purpose as the Global Lift and Sustain authority (*See supra*, Section IX. B. 3., Global Lift and Sustain). The second prong of the Necessary Expense Doctrine ("not otherwise provided for") dictates that DoD use the more specific authorization. As a result, DoD must use the Iraq/Afghanistan Lift and Sustain authority in Iraq and Afghanistan, and may not use the Global Lift and Sustain authority in Iraq and Afghanistan.

3. IRAQ SECURITY FORCES FUND (ISFF) / AFGHANISTAN SECURITY FORCES FUND (ASFF) - The ISFF and ASFF "shall be available to the SECDEF, notwithstanding any other provision of law, for the purpose of allowing the Commander [Combined Forces Command-Afghanistan for ASFF and Multi-National Security Transition Command-Iraq for ISFF], or the Secretary's designee, to provide assistance, with the concurrence of the Secretary of State, to the security forces of [Afghanistan for ASFF, Iraq for ISFF] including the provision of equipment, supplies, services, training, facility and infrastructure repair, renovation, and construction, and funding . . . ." Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief Act, 2005, Pub. L. 109-13 (May 11, 2005) created the Afghanistan Security Forces Fund (ASFF) ($1.285 billion) and the Iraq Security Forces Fund (ISFF) ($5.7 billion), to remain available for new obligations until Sept. 30, 2006. The period of availability of ISFF and ASFF is two years.

a. Public Law No: 109-234, Making emergency supplemental appropriations for the fiscal year ending September 30, 2006, added to those amounts by $1.9B for ASFF and $3.0B for the ISFF (those new amounts being available until 30 Sep 2007).

b. The FY07 Defense Appropriations Act appropriated funds for the ISFF in the amount of $1.7 billion and the ASFF in the amount of $1.5 billion, to be available for obligation until 30 September 2008. Pub. L. 109-289 (Sept. 29, 2006).

c. The 2008 Consolidated Appropriations Act, Div. L (Emergency Supplemental Appropriations Act for Defense, 2008), appropriated $1.35B for the ASFF and $1.5B for the ISFF, to be available for obligation until 30 September 2009.[31]

4. "Train and Equip" Authority (2006 NDAA § 1206): Section 1206 of the FY06 NDAA, as amended by Section 1206 of the FY07 NDAA, provides DoD with the authority to "build the capacity" of foreign military forces in support of GWOT. This breakthrough authority is similar to the now-defunct "train and equip" authority for DoD, but it also has serious limitations (most importantly that it has not yet been delegated below the SECDEF level of approval).

a. §1206 "Train and Equip" (T&E) authority allows DoD to build the capacity of a foreign country's national military forces in order for that country to—

(1) conduct counterterrorist operations; or

(2) to participate in or support military and stability operations in which the United States Armed Forces are a participant.

[31] Consolidated Appropriations Act for 2008, Pub. L. No. 110-161, Div. L. (Dec. 26, 2008), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_bills&docid=f:h2764enr.txt.pdf.

b. Authorizes the SECDEF to approve the use of $300 million in DoD O&M (Drawdown-like authority). This authority is available for military forces and not security/police forces. It is also not available in nations where DoS assistance is prohibited by other laws.

c. Requires concurrence of the Secretary of State and 15 day prior Congressional notification. This three year pilot program is available for new obligations until 30 September 2008.

D. DoD Assistance to Allies: Title 10 Training Authorizations and Appropriations. In determining if we are training foreign forces primarily for their benefit, Congress defines "training" very broadly: "[T]raining includes formal or informal instruction of foreign students in the United States or overseas by officers or employees of the United States, contract technicians, or contractors (including instruction at civilian institutions), or by correspondence courses, technical, educational, or information publications and media of all kinds, training aid, orientation, training exercise, and military advice to foreign military units and forces." AECA § 47(5) (22 U.S.C. § 2794(5). The FAA § 644 (22 U.S.C. § 2403) contains a substantially similar definition, though "training exercises" is omitted. The default setting for training with foreign forces is that it is Security Assistance that must be completed by FMS or IMET or other DoS authority. Although the following authorizations provide DoD with the appropriations and/or authorizations to conduct Security Assistance training that would normally be conducted by the Department of State, most of these DoD Security Assistance training authorizations may require a program to be forwarded for approval to the SECDEF, and may also require Secretary of State concurrence, and/or prior notification to Congress.

1. SPECIAL OPERATIONS FORCES (SOF) TRAINING.

a. 10 U.S.C. § 2011. SOF Training as Joint Combined Exchange Training (JCET).

(1) Scope. The Commander of SOCOM and the commander of any other combatant command may pay any of the following expenses relating to the training of SOF of the combatant command: (1) expenses of training the SOF assigned to the command in conjunction with training with the armed forces and other security forces of a friendly foreign country; (2) expenses of deploying SOF for the training; and (3) incremental expenses incurred by the friendly developing foreign country incurred as the result of the training.

(2) Definitions. SOF includes civil affairs and psychological operations forces. Incremental Expenses include the reasonable and proper cost of goods and services consumed by a developing country as a direct result of the country's participation in a bilateral or multilateral exercise, including rations, fuel, training, ammunition, and transportation. The term does not include pay, allowances, and other normal costs of the country's personnel.

b. 2006 NDAA § 1206. Although not limited to SOF, Section 1206 of the FY06 NDAA, as amended by Section 1206 of the FY07 NDAA, provides DoD with the authority to "build the capacity" of foreign military forces in support of GWOT. Authorizes the SECDEF to approve the use of $300 million in DoD O&M (Drawdown-like authority). This authority is available for military forces and not security/police forces. It is also not available in nations where DoS assistance is prohibited by other laws.

2. MULTILATERAL CONFERENCES, SEMINARS, & MEETINGS.

a. The Need for Express Authority. 31 U.S.C. § 1345: "Except as specifically provided by law, an appropriation may not be used for travel, transportation, and subsistence expenses for a meeting." 62 Comp. Gen. 531 (1983): "[T]here is a statutory prohibition against paying the travel, transportation, and subsistence expenses of non-Government attendees at a meeting. . . . By using the word 'specifically' Congress indicated that authority to pay travel and lodging expenses of non-Government employees should not be inferred but rather that there should be a definite indication in the enactment that the payment of such expenses was contemplated." See also B-251921 (April 14, 1993); 55 Comp. Gen. 750 (1976).

b. General Authorities. U.S. Civilian Employees & Military Personnel. See, e.g., 5 U.S.C. §§ 4109-4110; 31 U.S.C. § 1345(1); 37 U.S.C. § 412. Individuals Performing Direct Services for the Government. GAO, I Principals of Federal Appropriations Law 4-44 to 4-51 (3d ed. 2004); see also B-242880 (March 27, 1991); 8 Comp. Gen. 465 (1929); Joint Travel Regulations ¶ C.6000.3.

c. Military Cooperative Authorities for Conferences, Meetings, and Threat Reduction

(1) Latin American Cooperation (LATAM COOP) - 10 U.S.C. § 1050. Authorizes the service secretaries to fund the travel, subsistence, and special compensation of officers and students of Latin American countries and other expenses the secretaries consider necessary for Latin American cooperation.

(2) Bilateral or Regional Cooperation Programs - 10 U.S.C. § 1051. (Travel Expenses): The SECDEF may authorize the payment of travel, subsistence, and similar personal expenses of defense personnel of developing countries "to and within the area of responsibility in which the bilateral or regional conference…is located…," if the SECDEF deems attendance in U.S. national security interest. Other Expenses. The SECDEF may pay such other expenses in connection with the conference, seminar, or meeting, as he considers in the national interest. Additional Funding Authority. The authority to pay expenses under section 1051 is in addition to the authority under LATAM COOP, 10 U.S.C. § 1050. See DoD Authorization Act for FY 97, Pub. L. 104-201 §1065 (1996) (10 U.S.C. § 113 note) for Marshall Center Participants.

(3) Asia-Pacific Center for Security Studies. The SECDEF may waive reimbursement of the cost of conferences, seminars, courses of instruction, or similar educational activities of APC for foreign military officers and civilian officials if in US national security interest. See § 8081 of the DoD Appropriations Act for FY 2002, Pub. L. 107-117 (2001). See § 1306 of the FY 95 NDAA for similar authority to waive costs for participation of personnel from Partnership-For-Peace and EAPC countries in activities of the George C. Marshall European Center for Security Studies.

(4) Cooperative Threat Reduction (CTR) with States of the Former Soviet Union (FSU). This legislation funds various programs to dismantle the FSU's arsenal of weapons of mass destruction; Congress appropriated $372,128,000 million for the CTR program in FY07. These are multi-year funds available until 30 September 2009.

3. MULTINATIONAL MILITARY CENTERS OF EXCELLENCE (MCOE). In Section 1205 of the FY07 NDAA, Congress provided authority, with specific limitations, to support NATO Centers of Excellence (COEs). The authority was a one-year pilot program authority given at DoD request.

a. In FY07, from DoD O&M appropriations, the SECDEF may authorize and fund up to $3,000,000 in costs (not including the salaries of the participating DoD personnel) to allow for the participation of DoD military and civilian personnel in NATO COE's and any major non-NATO ally COE's. See John Warner National Defense Authorization Act for 2007, http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_public_laws&docid=f:publ364.109.pdf.

b. Secretary of State concurrence is required, and the SECDEF must submit a report to the House and Senate Armed Services Committees on the use of this authority NLT 31 October 2007.

c. Section 1204 of the 2008 NDAA extended this MCOE authorization through FY08, with the authority to obligate up to $5,000,000 from DoD O&M for the program purposes. (See 2008 NDAA, Sec. 1234, Pub. L. No. 110-181).

4. PARTNERSHIP FOR PEACE (PFP) - DoD Authorization Act for FY 1995, Pub. L. No. 103-337, § 1307, 108 Stat. 2893 (1994) (See also H.R. Conf. Rep. No. 747, 103d Cong., 2d Sess. 63 (1994); S. Rep. No. 321, 103d Cong., 2d Sess. 42 (1994).) $30 million appropriated in FY95 for the Joint Staff to "use existing authorities to the greatest extent possible" to provide assistance to and cooperate with PFP countries. $40 million in FY96 and another $40 million in FY97. $44 million appropriated in FY98, but to OSD, not the Joint Staff.

5. MILITARY-TO-MILITARY CONTACT PROGRAM - 10 U.S.C. § 168.

a. Authorizes the SECDEF to conduct military-to-military contacts and comparable activities that are designed to encourage democratic orientation of defense establishments and military forces of other countries.

b. A list of eight authorized activities allowed to be funded is contained in 10 U.S.C. § 168 (c). These activities are to be funded by Traditional Command Authority (TCA) funds provided to the Combatant Commanders and the Chairman of the Joint Chiefs of Staff, upon request or the Head of a DoD Component.

6. BILATERAL & MULTILATERAL EXERCISE PROGRAMS. Developing Countries Combined Exercise Program (DCCEP) - 10 U.S.C. § 2010.

a. Scope. After consulting with the Secretary of State, the SECDEF may pay the incremental expenses of a developing country incurred by the country's participation in a bilateral or multilateral exercise, if --

(1) the exercise is undertaken primarily to enhance U.S. security interests; and

(2) SECDEF determines the participation of the participating country is necessary to achieve the "fundamental objectives of the exercise and those objectives cannot be achieved unless the U.S. pays the incremental expenses . . . ."

b. Definition of Incremental Expenses. "Incremental expenses" are reasonable and proper costs of goods and services consumed by a developing country as a direct result of the country's participation in exercises, including rations, fuel, training, ammunition, and transportation. The term does not include pay, allowances, and other normal costs of the country's personnel.

E. Title 10 Humanitarian Assistance (HA) Authorizations and Appropriations.

1. INTRODUCTION TO DOD HUMANITARIAN ASSISTANCE.

a. The Honorable Bill Alexander, B-213137, 63 Comp. Gen. 422 (1984): "[I]t is our conclusion that DoD's use of O&M funds to finance civic/humanitarian activities during combined exercises in Honduras, in the absence of an interagency order or agreement under the Economy Act, was an improper use of funds, in violation of 31 U.S.C. § 1301(a)." Generally, Humanitarian Assistance is "ordinarily carried out through health, education, and development programs under the Foreign Assistance Act of 1961, 22 U.S.C. § 2151 et seq." *See*, The Honorable Bill Alexander, B-213137, 63 Comp. Gen. 422 (June 22, 1984).

b. Policy and Program Guidance – On a recurring basis, the Office of the Assistant Secretary of Defense for Special Operations and Low-Intensity Conflict (SO/LIC) and the Defense Security Cooperation Agency (DSCA) issues a joint message entitled: Policy and Program Guidance for Overseas Humanitarian, Disaster, and Civic Aid (OHDACA) Activities and Humanitarian and Civic Assistance (HCA). The most recent guidance was issued by the SO/LIC in 2005.

(1) The FY05 guidance clearly set out separate HCA guidance that primarily reiterates the 10 U.S.C. § 401 requirements and distinguishes it from other humanitarian assistance activities. Additionally, the FY05 guidance provides a supplemental checklist (in addition to the general checklist) for HCA project submissions to the DoD. Generally, the supplemental checklist contains items necessary for compliance with 10 U.S.C. § 401 including that the project is provided in conjunction with military operation/exercise, it promotes specific operational readiness skills of U.S. military forces participating in project, that labor will be performed by U.S. military forces, and that the project falls into one of the [10 USC §401 HCA activities].

(2) The general checklist within the FY05 guidance provided points that have to be addressed for all OHDACA funded and O&M funded HCA projects. Selected general checklist requirements include whether the project supports the Global War on Terror (GWOT) objectives, contributes to DoD coalition building, strengthens the host nation's security and stability, enhances DoD's image and "ability to shape the regional security environment," and whether appropriate partnering with host nation militaries is accomplished to further goals of interoperability and coalition-building. In addition to the HCA supplemental checklist, the FY05 guidance included supplemental checklists for humanitarian assistance (HA) under 10 U.S.C. § 2561, foreign disaster relief under 10 U.S.C. § 404, and humanitarian mine action under 10 U.S.C. § 401.

(3) The FY05 guidance strongly emphasized military participation requirements as follows: "Participation of U.S. military forces: All HA projects … should maximize visible U.S. military participation to ensure that the projects are effective security cooperation tools. Active DoD participation improves the prospects for developing channels of influence and access, potentially provides operational readiness benefits, and generates unique training opportunities. DoD's role must not be reduced to simply providing resources or writing checks."

2. IMMEDIATE RESPONSE AUTHORITY

a. Immediate Foreign Disaster Relief: DoD Directive 5100.46 outlines various responsibilities for DoD components in undertaking foreign disaster relief operations in response to a Department of State request. However, paragraph 4.3 provides that the Directive does not prevent "a military commander at the immediate scene

of a foreign disaster from undertaking prompt relief operations when time is of the essence and when humanitarian considerations make it advisable to do so." See DoD Directive 5100.46, Foreign Disaster Relief (Dec. 4, 1975).

b. Immediate Response Authority for Domestic Emergencies: DoD Directive 3025.1 outlines various responsibilities for DoD components in undertaking domestic disasters or emergencies in accordance with the Stafford Act, 42 USC §5121. Similar to the foreign disaster immediate response authority, "[i]mminently serious conditions resulting from any civil emergency or attack may require immediate action by military commanders, or by responsible officials of other DoD Agencies, to save lives, prevent human suffering, or mitigate great property damage. When such conditions exist and time does not permit prior approval from higher headquarters, local military commanders and responsible officials of other DoD Components are authorized by [DoD Directive 3025.1], …to take necessary action to respond to requests of civil authorities. All such necessary action is referred to … as 'Immediate Response.'" See DoD Directive 3025.1, Military Support to Civil Authorities (MSCA) (Jan. 15, 1993). See also AR 500-60, OPNAVINST 3440.16C, and MCO 3440.7A.

c. Emergency Medical Care: AR 40-400 authorizes the commander to provide medical care to any person in an emergency "to prevent undue suffering or loss of life." AR 40-400, Patient Administration, ¶3-55 (12 Mar 2001).

3. OVERSEAS, HUMANITARIAN, DISASTER, AND CIVIC AID (OHDACA) – The primary purpose of the OHDACA appropriation is for DoD to conduct worldwide demining operations, and to provide assistance to the victims of mines worldwide. The 2008 DODAA appropriated $102.78 million for Overseas Humanitarian, Disaster, and Civic Aid (OHDACA) programs of the Department of Defense under §401 [Humanitarian Demining section]. The 2008 OHDACA appropriation is available for new obligations for a period of three years, until 30 September 2010. (See 2008 DODAA, Pub. L. 110-116, http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_bills&docid=f:h3222enr.txt.pdf; see also Appendix A: DoD Appropriations Legislation, The Army Lawyer: Contracts and Fiscal Law Year in Review, January 2008, providing a summary of the 2008 DODAA provisions, and a 2008 DODAA Summary Chart).

4. ADDITIONAL HUMANITARIAN ASSISTANCE AUTHORIZATIONS FOR OHDACA APPROPRIATION: In addition to the OHDACA demining primary purpose, Congress authorized the use of the OHDACA appropriation for additional humanitarian purposes. These additional authorizations are contained in §§402, 404, 2557, and 2561 of Title 10.

a. Transportation of Humanitarian Relief Supplies for NGOs – 10 U.S.C. § 402.

(1) Scope of Authority. SECDEF may transport to any country, without charge, supplies furnished by NGOs intended for humanitarian assistance. Transport permitted only on a space-available basis. Supplies may be distributed by U.S. agencies, foreign governments, international organizations, or non-profit relief organizations.

(2) *Preconditions*. Before transporting supplies, SECDEF must determine --

(a) the transportation of the supplies is consistent with U.S. foreign policy;

(b) the supplies to be transported are suitable for humanitarian purposes and are in usable condition;

(c) a legitimate humanitarian need exists for the supplies by the people for whom the supplies are intended;

(d) the supplies will, in fact, be used for humanitarian purposes; and

(e) adequate arrangements have been made for the distribution of the supplies in the destination country.

(3) Limits. Supplies transported may not be distributed (directly or indirectly) to any individual, group, or organization engaged in military or paramilitary activities.

b. Foreign Disaster Assistance - 10 U.S.C. § 404. The President may direct the SECDEF to provide disaster assistance outside the U.S., to respond to manmade or natural disasters when necessary to prevent the loss of life. Amounts appropriated to DoD for Overseas Humanitarian, Disaster, and Civic Aid (OHDACA) are available for organizing general policies and programs for disaster relief programs.

(1) Delegation of Authority. The President delegated to the SECDEF the authority to provide disaster relief, with the Secretary of State's concurrence. In emergencies when there is insufficient time to seek the concurrence of the Secretary of State, the SECDEF may authorize the disaster relief and begin execution, provided the SECDEF seeks Secretary of State concurrence as soon as practicable thereafter. See Executive Order 12966, 60 Fed. Reg. 36949 (July 14, 1995).

(2) Types of Assistance. Transportation, supplies, services, and equipment. Notice to Congress. Within 48 hours of commencing relief activities, President must transmit a report to Congress. All costs related to these disaster relief operations are funded from the OHDACA appropriation.

c. Excess Nonlethal Supplies for Humanitarian Relief – 10 U.S.C. § 2557. The SECDEF may make available for humanitarian relief purposes any DoD nonlethal excess supplies. Excess supplies furnished under this authority are transferred to DoS, which is responsible for distributing the supplies. "Nonlethal excess supplies" means property that is excess under DoD regulations and is not a weapon, ammunition, or other equipment or material designed to inflict serious bodily harm or death. Excess property is that property which is in the Defense Reutilization and Marketing Office (DRMO) channels. If the required property is in the excess property inventory, it is transferred to USAID, as agent for the DoS, for distribution to the target nation. This statute does not contain the authority to transport the items, though it may be provided under authority of 10 U.S.C. § 2561, below.

d. Humanitarian Assistance – 10 U.S.C. § 2561.

(1) Scope of Authority. To the extent provided in authorization acts, funds appropriated to DoD for humanitarian assistance shall be used for providing transportation of humanitarian relief and other humanitarian purposes worldwide.

(2) Funds. Funded from OHDACA appropriations, which usually remain available for two years.

(3) General: This authority is often used to transport U.S. Government donated goods to a country in need. (10 U.S.C. § 402 applies when relief supplies are supplied by non-governmental and private voluntary organizations, see below.) "Other humanitarian purposes worldwide" is not defined in the statute. Generally, if the contemplated activity falls within the parameters of HCA under 10 U.S.C. § 401, then the more specific HCA authority should be used (*See* HCA authority below). 10 U.S.C. § 2561 primarily allows more flexibility in emergency situations such as disasters (natural or man-made), and it allows contracts if necessary for mission execution. HCA generally requires pre-planned activities and must promote operational readiness skills of the U.S. participants. Section 2561 does not require the promotion of operational readiness skills of the U.S. military participants. Also, unlike HCA, which must be conducted in conjunction with an exercise or on-going military operation, humanitarian assistance (HA) can be conducted as a stand-alone project. Section 312 of the FY04 National Defense Authorization Act amends 10 U.S.C. § 2561 to allow SECDEF to use this authority to transport supplies intended for use to respond to, or mitigate the effects of, an event or condition that threatens serious harm to the environment (such as an oil spill) if other sources of transportation are not readily available. The SECDEF may require reimbursement for the costs incurred by DoD to transport such supplies. Judge Advocates must obtain and review for implementation purposes the DoD message on current guidance for Humanitarian Assistance Activities. Each fiscal year the Office of the Assistant Secretary of Defense for Special Operations and Low-Intensity Conflict (SO/LIC) and the Defense Security Cooperation Agency (DSCA) issue a joint message providing policy guidance for humanitarian assistance activities. See Message, R251658Z Feb 2004, SECDEF, subject: Policy and Program Guidance for FY05 Overseas Humanitarian, Disaster, and Civic Aid (OHDACA) Activities and Humanitarian and Civic Assistance (HCA).

5. HUMANITARIAN & CIVIC ASSISTANCE (HCA) - 10 U.S.C. § 401 [Humanitarian and Civic Assistance Section]. See also DOD Dir. 2205.2, 6 Oct. 1994; DOD Instr. 2205.3, 27 Jan. 1995. HCA is found in the same Title 10 section as OHDACA, but it is an authorization that is funded from DoD O&M, instead of the OHDACA appropriation. There are two types of HCA authorized under 10 U.S.C. § 401: (1) Pre-Planned ("Budgeted") HCA, and (2) De minimis HCA.

a. Pre-Planned (or "Budgeted") HCA:

(1) Scope of Authority. Secretary concerned may carry out HCA in conjunction with authorized military operations of the armed forces in a country if the Secretary determines the activities will: (1) promote the security interests of the U.S. and the country where the activities will be carried out; and (2) the specific operational readiness skills of the servicemembers who will participate in the activities.

(2) Definition. Pre-Planned HCA under 10 USC §401 means

(a) medical, dental, veterinary care in rural or underserved areas;

(b) construction of rudimentary surface transportation systems;

(c) well drilling and construction of rudimentary sanitation facilities;

(d) rudimentary construction and repair of public facilities; and

(e) detection and clearance of landmines, including education, training, and technical assistance.

(3) Limits. (1) May not duplicate other forms of U.S. economic assistance, (2) May not be provided (directly or indirectly) to any individual, group, or organization engaged in military or paramilitary activities, (3) SECSTATE must specifically approve assistance, (4) Must be paid out of funds budgeted for HCA as part of the service O&M appropriations, (5) U.S. personnel may not engage in the physical detection, lifting, or destroying of landmines (except concurrent with U.S. military operation), or provide such assistance as part of a military operation not involving U.S. forces, and (6) Expenses funded as HCA shall include the costs of consumable materials, supplies, and services reasonably necessary to provide the HCA. They shall not include costs associated with the military operation (e.g. transportation, personnel expenses, POL) that likely would have been incurred whether or not the HCA was provided. DoD Directive 2205.2, "Humanitarian and Civic Assistance (HCA) Provided in Conjunction with Military Operations" 6 October 1994, para. D.9.

(4) For FY07, the DoD sought express language in 10 U.S.C. § 401 to authorize certain types of communications and information technology assistance. The Congress did not add language or provide such potentially far-reaching authority, but in the Joint Explanatory note to the Conference Report to the FY07 NDAA, noted: "The conferees acknowledge that restoring basic information and communications capacity is a fundamental element of humanitarian and civic assistance…Accordingly, the conferees note that rudimentary construction and repair of public facilities, under Section 401(e)(4) of Title 10 United States Code, includes information and communications technology as necessary to provide basic information and communication services."

b. De minimis HCA. 10 U.S.C. § 401(c)(4) and DoD Dir. 2205.2, para. E1.1.1.

(1) Provides authority for commanders to react to HCA "targets of opportunity" during the course of a military operation. Such activities must be modest in scope and involve only "minimal expenditures for incidental costs." IAW DoDD 2205.2, the maximum amount that may be expended on each command-approved target of opportunity is $2,500.

(2) All material and supply costs incurred in executing a de minimis HCA action are funded from the unit's O&M account because the unit uses its resources currently on-hand.

(3) Rule of Thumb: A few Soldiers, a few dollars, for a few hours. Combatant commanders or theater commanders may further restrict the approval of de minimis HCA in their AORs.

(4) Examples:

(a) A unit's doctor's examination of villagers for a few hours, with the administration of several shots and the issuance of some medicine, but not the deployment of a medical team for the purposes of providing mass inoculations to the local populace.

(b) The opening of an access road through the trees and underbrush for several hundred yards, but not the asphalting of a roadway.

(5) Funding. De minimis HCA is funded from the unit's O&M account and also uses available personnel resources and other equipment/supplies that are available.

6. HCA VS. OHDACA FROM A FUNDING PERSPECTIVE: 10 U.S.C. §401 "Pre-planned" or "budgeted" HCA is funded from DoD O&M. 10 U.S.C. §401 de minimus HCA is funded from the unit's O&M account. All the other Humanitarian Assistance authorizations are funded from the OHDACA appropriation.

7. §§ 2561 "HA," 401 "PRE-PLANNED HCA" AND THE ELECTION DOCTRINE: If the assistance fits § 401 in every respect, and satisfies all the requirements for the use of § 401 HCA, then the unit should use § 401 HCA. If the assistance does not satisfy the requirements for the use of § 401 HCA, but still has a humanitarian purpose, then the unit should use the § 2561 HA authorization.

8. EXERCISE-RELATED CONSTRUCTION (ERC) DISTINGUISHED. 10 U.S.C. § 2805(A)(2).

a. Construction that is necessary for use by U.S. military forces (e.g. base camp construction, a bridge to the base camp, or other construction necessary for operations) during a Joint Chiefs of Staff directed exercise are funded with military construction (MILCON) appropriations and not through 10 USC § 401 HCA funding or other humanitarian assistance appropriations. 10 USC § 2805 also forbids funding ERC under $750,000 as O&M funded construction.

b. "[F]unds from this account may only support construction activities necessary for the conduct of U.S. military exercises. The account is not a foreign assistance program." S. Rep. 355, 102d Cong., 2d Sess. 10 (1992) (emphasis added).

c. Bottom Line: If the primary purpose of the construction is for the benefit and use of U.S. servicemembers, then the unit should fund the construction based on a construction funding analysis, even if the local population may receive an incidental benefit from the construction. On the other hand, if the primary purpose of the construction is for the benefit and use of the population, then the unit should fund the construction with a DoD or DoS humanitarian assistance authorization or appropriation.

F. DoD GWOT Humanitarian Assistance (HA) Authorizations and Appropriations.

1. COMMANDER'S EMERGENCY RESPONSE PROGRAM (CERP). The primary purpose of CERP is "[to enable] military commanders in Iraq [and Afghanistan] to respond to urgent humanitarian relief and reconstruction requirements within their areas of responsibility by carrying out programs that will immediately assist the Iraqi [and Afghan] people."

a. CERP was originally funded with seized Iraqi assets (See CJTF-7 FRAGO 89). The Coalitional Provisional Authority (CPA) accounted for the seized Iraqi funds, and administered and distributed the funds to U.S. Commanders in Iraq for "reconstruction assistance" to the Iraqi people. The CPA initially defined reconstruction assistance as the "building, repair, reconstruction, and reestablishment of the social and material infrastructure in Iraq." See, Coalition Provisional Authority FRAGO 89. The CPA initially provided approximately $78.6M for over 11,000 Projects. Examples of reconstruction assistance noted in FRAGO 89 included financial management improvements, restoration of the rule of law and governance initiatives, day laborers for civic cleaning projects, and purchase or repair of civic support vehicles.

b. CERP Appropriated Funding . Sec. 9007, FY05 Defense Appropriations Act (Pub. L. 208-287) provided $300,000,000 of appropriated funds for CERP, an increase from Section 1110, FY04 Emergency Supplemental Appropriations Act, which provided $180,000,000 of appropriated funds. The FY04 Emergency Supplemental dictated that the program's purpose was, "notwithstanding any other provision of law … [to enable] military commanders in Iraq [and Afghanistan] to respond to urgent humanitarian relief and reconstruction requirements within their areas of responsibility by carrying out programs that will immediately assist the Iraqi [and Afghan] people."

(1) In Section 1202, Ronald W. Reagan National Defense Authorization Act for FY05, (Pub. L. 108-375), Congress included "waiver authority." The language in the Authorization Act states that, "[f]or purposes of the exercise of the authority provided by this section or any other provision of law making funding available for the Commanders' Emergency Response Program...the Secretary may waive any provision of law not contained in this section that would (but for the waiver) prohibit, restrict, limit, or otherwise constrain the exercise of that authority."

(a) The SECDEF waived the Competition in Contracting Act requirements for CERP funded projects. As a result, CERP-funded projects need not follow the competition requirements of the Federal Acquisition Regulation (FAR).

(b) The SECDEF also waived the Foreign Claims Act (FCA). As a result, CERP may fund condolence payments and battle damage claims that are normally barred by the FCA.

(2) Division J, Section 102, Title I, Consolidated Appropriations Act, FY05 (Pub. L. 108-447), amended the FY05 Appropriations Act and increased the amount available for CERP to $500,000,000. The Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief for Fiscal Year 2005 (Pub. L. 109-13) increased the amount available for CERP from $500,000,000 to $854,000,000.

(3) Section 9007 of the FY06 DoD Appropriations Act authorized the use of up to $500,000,000 of DoD O&M for CERP. These funds "may not be used to provide goods, services, or funds to national armies, national guard forces, border security forces, civil defense forces, infrastructure protection forces, highway patrol units, police, special police, or intelligence or other security forces." Section 9006 of the FY07 DoD Appropriations Act similarly authorized up to $500,000,000 of DoD O&M for CERP.

(4) The 2008 CAA re-authorized the use of up to $500 million from DoD O&M for the CERP. See 2008 CAA, Div. L, Pub. L. 110-161, http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_bills&docid=f:h2764enr.txt.pdf.

(5) The 2008 NDAA authorized the use of up to $977,441,000 from DoD O&M, in each of FY08 and FY09, for the CERP (See Section 1205, 2008 NDAA, Pub. L. No. 110-181).

c. DoD Guidance for CERP – See Appendix D: Memorandum, Tina W. Jonas, Under Secretary of Defense Comptroller, to Secretaries of the Military Departments, et al, subject: Commander's Emergency Response Program (CERP) Guidance (9 May 2007). The guidance primarily assigns administration responsibilities, defines proper CERP projects, and specifies accountability procedures. This guidance is mandatory reading for anyone intending to use CERP funds.

(1) Battle Damage Claims - CERP appropriated funds may be used to repair property damage to that results from U.S., coalition, or supporting military operations that are not otherwise compensable under the Foreign Claims Act.

(2) "Solatia-Like" or "condolence" payments – CERP appropriated funds may be used for condolence payments to individual civilians for the death or physical injury resulting from U.S., coalition, or supporting military operations that are not compensable under the Foreign Claims Act. Condolence payments may also include payments ("martyr payments") to surviving spouse or kin of defense or police personnel killed as a result of U.S., coalition, or supporting military operations.

(3) Reward/microrewards and Weapons Buy-Back Programs – CERP appropriated funds *may not* be used to pay rewards or fund any type of weapon buy-back program. Title 10, USC §127b, provides the authority for the Rewards Program.

2. REWARDS PROGRAM. 10 U.S.C. §127B. Allows the military to pay monetary rewards to foreign individuals for providing USG personnel with information or nonlethal assistance that is beneficial to:

a. An operation or activity of the armed forces conducted outside the U.S. against international terrorism; or

b. Force protection of the armed forces.

c. Although NOT a weapons buy-back program (DoD currently has no program for a buy-back program), rewards can be paid for information leading to the recovery of enemy weapons.

d. MNC-I has steadily increased the amount that lower echelon commanders are able to pay out. Company commanders have seen their paying authority increase from $20/payment and $100/month to $500/payment and $1000/month (with the possibility of increasing this amount to $10,000/month with BCT commander approval and Division-level coordination). See MNC-I Rewards SOP in Appendix 3 to Annex B of MNC-I OPORD 07-01, 9 July 2007.

e. Congress recently increased the maximum reward pay-out authority of subordinate commanders (delegated to BCT commanders by MNC-I) from $2,500/payment to $10,000/payment in the 2007 National Defense Authorization Act, Pub. L. 109-276, 22 June 2006.

f. The maximum amount of any award may not exceed $200,000. The authority of the SECDEF may be delegated only: 1) to the Deputy Secretary of Defense and an Under Secretary of Defense, without further redelegation; and 2) to a combatant commander, but only for a reward in an amount or with a value not to exceed $50,000. The combatant commander who has been delegated this authority may further delegate that authority, but only for a reward in an amount or with a value not in excess of $2,500. Persons not eligible to receive such a reward under this authority are: (1) a citizen of the United States; (2) an officer or employee of the United States; or (3) an employee of a contractor of the United States.

G. Conclusion.

1. Between the DoS and DoD appropriations and authorizations discussed in Sections III and IV, infra, Congress has provided the funds necessary for DoD to fund the vast majority of contingency operations. The key for the legal practitioner is to identify the proper appropriation and/or authorization that would allow DoD to legally fund the mission. Once the proper fund(s) are identified and the unit makes the policy decision to access an appropriation or authorization to fund a mission, the legal practitioner should assist the unit in requesting, and receiving, the identified funds from the proper approval levels.

2. On some occasions, however, the deployed unit may desire access to U.S. government property that was previously purchased for one purpose with the appropriate funds (e.g., Procurement), but is no longer needed for that original purpose. If the unit wants to provide that government property to a foreign military, can they legally do so?

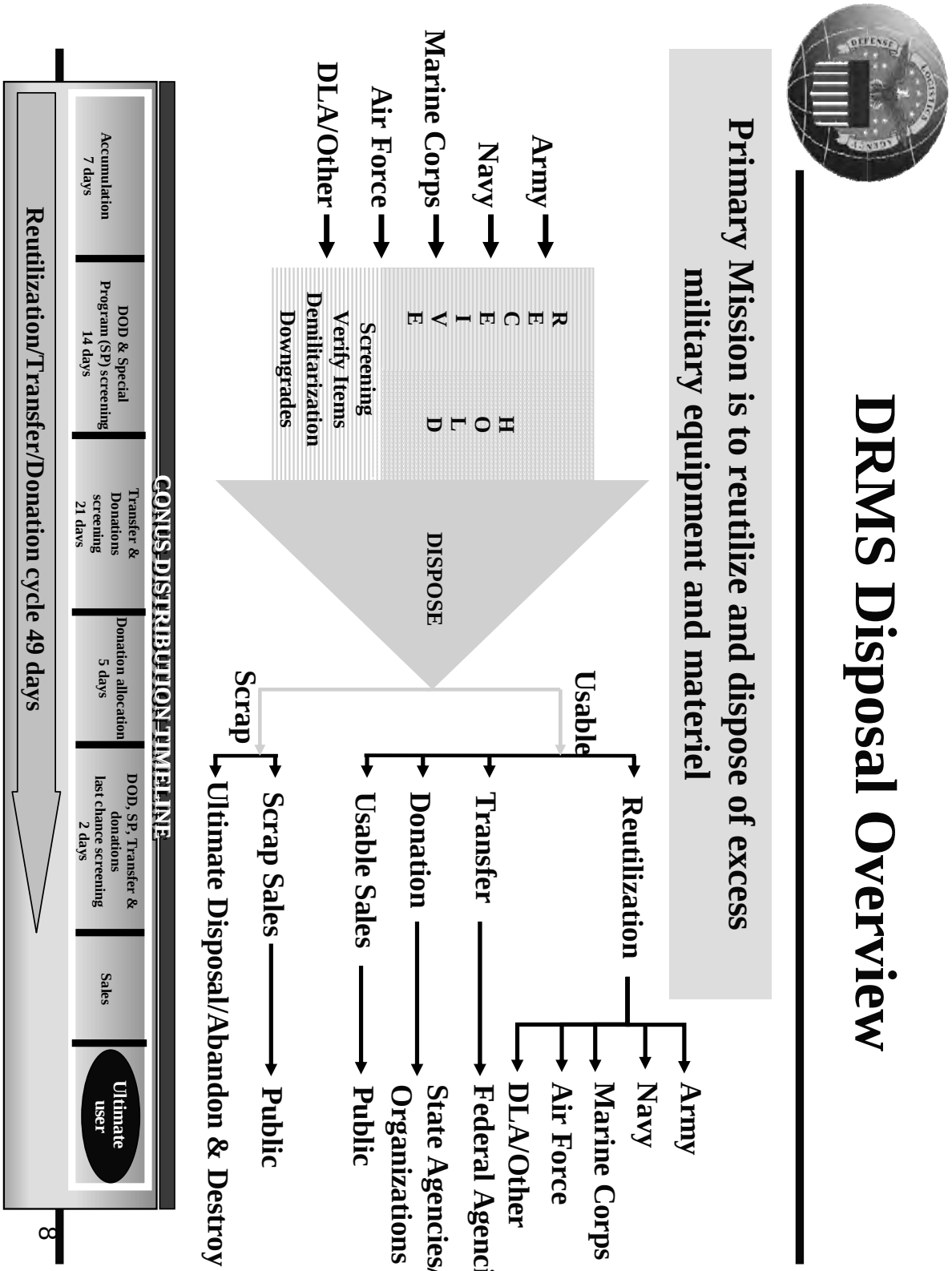
3. It is legally possible, but it will necessarily involve the Defense Reutilization and Marketing Service (DRMS), since DRMS is the only DoD component with the authority to dispose of DoD property. See infra, Section V.

X. DEFENSE REUTILIZATION AND MARKETING SERVICE (DRMS) AND THE DISPOSAL OF DoD PROPERTY

A. Introduction. The Defense Reutilization and Marketing Service (DRMS) is the *only* DoD element with statutory authority to dispose of durable (investment item) DoD property (including all military equipment) purchased with appropriated funds. Disposal of DoD property in any manner must follow DRMS disposal procedures. *See* DRMS Instruction (DRMS-I) 4160.14. It is critical for JA's to understand the DRMS process when considering whether a U.S. military unit may provide DoD property to a foreign military, a foreign government, or a foreign population. The provision of any DoD property to foreign entities will always involve DRMS.

1. Disposal of DoD government property outside of DRMS-authorized channels may lead to potential ADA violations, as well as criminal and/or regulatory violations. DRMS has the authority to use business judgment in determining the most appropriate and economical manner of disposal. The disposal procedure that DRMS chooses for a specific piece of government property, however, must conform to all DoD and U.S. government (USG) statutory and regulatory restrictions (e.g., although DRMS may "abandon" some types of government property, DRMS may not "abandon" a nuclear warhead, because this would violate statutory and regulatory procedures for the disposal of such items). DRMS co-locates its subordinate Defense Reutilization and Marketing Offices (DRMOs) with DoD units world-wide, usually at the post/installation level or the CJTF (Division) level in contingency environments.

2. DRMS DISPOSAL OVERVIEW FLOWCHART:



B. Relevant DRMS Statutory and Regulatory Terms:

1. "Surplus": Federal government property that is no longer required, or in use, by any federal government agency.

2. "Excess": Federal government property that is no longer required by the federal agency that initially procured the property, but is required by other federal agencies.

3. "Disposal": The reutilization, transfer, donation, sale, abandonment, or destruction of excess and surplus federal government property.

4. "Reutilize": Occurs when an element of a federal agency receives ownership of, and reuses, federal government property that was initially procured by another element of the same federal agency.

5. "Transfer": Occurs when a federal agency receives ownership of federal government property that was initially procured by another federal agency.

6. "Donate": When federal government property is surplus, DRMS may donate the property to authorized state governments/agencies, or to a small group of congressionally-designated private organizations.

7. "Usable Sales": Federal government property that is sold to the general public (usually via auctions) for full use in the manner originally intended when procured.

8. "Scrap Sales": Federal government property that is sold to the general public (usually via auctions) for use of its components.

9. "Abandon": Federal government property that has no private or public value may be abandoned by DRMS.

10. "Destroy": Federal government property that may not be sold or abandoned must be destroyed by DRMS.

C. DRMS Statutory Authority to Dispose of DoD equipment: DRMS derives its statutory authority from a delegation of disposal authority to DRMS by the General Services Administration (GSA). DRMS is a subordinate element to the Defense Logistics Agency (DLA).

1. 40 U.S.C. § 101: authorizes the GSA to dispose of federal government property (both real and personal property).

2. 40 U.S.C. § 121(d): authorizes the GSA to delegate disposal authority to the head of another agency.

3. DRMS Disposal Authority: In 1972, DRMS was created as a subordinate element to DLA. That year, GSA delegated the authority to dispose of DoD equipment to DRMS via DoD and DLA. Prior to the creation of DRMS, disposal authority of DoD property resided at DLA.

D. DRMS Disposal Process: Generally, DRMS has the authority to dispose of DoD property through reutilization, transfer, donation, usable sales, scrap sales, abandonment, and destruction, in order of disposal priority. Once DRMS advertises the government property to be disposed of, multiple government entities may have a need for the property. Therefore, DRMS assigns the following four priorities to government elements requesting DRMS-owned property (See DRMS-I 4160.14):

1. Priority 1: Reutilization: DoD property that is turned in to DRMS and is requisitioned by another DoD component.

a. After DoD property is turned in to DRMS and is ready for reuse, for the first 14 day window, the DRMS property may be requisitioned only by DoD components and "Special Programs."

b. "Special Programs": Designated non-DoD USG programs that also receive Priority 1 status and rights. Special Programs include: Foreign Military Sales (DoS), Computers for Schools (Dep. Of Ed.), and Equipment for Law Enforcement (FBI, ICE, DHS).

2. Priority 2: Transfer: DoD property that is turned in to DRMS and is not needed within DoD, but is needed by another USG agency.

a. After the first 14-day window with no Priority 1 requisition requests, the property enters a 21-day window in which non-DoD USG agencies may requisition the property.

b. During the 21-day Priority 2 window, the property may be requisitioned only by Priority 2 USG components.

3. Priority 3: Donation: DoD property that is turned in to DRMS and is not needed by any USG agency.

a. After the Priority 2 requisition window closes with no USG requisition requests, the property enters the Priority 3 five-day window where DRMS may donate the property to approved state governments and organizations.

b. Priority 1-3 "Final Screening": If no approved state government agencies and organizations wish to receive donation of the property, then the property receives a 2-day final screening and "last chance" requisition window for Priority 1-3 components, agencies, and approved governments and organizations.

4. Priority 4: Sales: DoD property that is turned in to DRMS and is not needed by any USG agency nor may be donated to approved state agencies and organizations may now be sold to the general public. Normally, these sales occur via public auctions.

a. All DoD property with military capabilities must be demilitarized prior to sale to the general public. If an item cannot be demilitarized, it cannot be sold and must be destroyed.

b. DoD property that has been demilitarized may be sold as either "usable sales" or "scrap sales." Usable sales occur when an item, although demilitarized, may still be used by the general public for the originally intended purpose of the item. For example, a WWII Jeep that is in a significantly usable state of operation may be a usable sale. Scrap sales, on the other hand, occur when the item is sold simply for the scrap value of the materials with which it was created.

5. Abandonment or Destruction: DoD property that is turned in to DRMS and cannot be disposed of by any other method may be abandoned or destroyed. Additionally, DoD military equipment that cannot be demilitarized may not be sold or abandoned, and must be destroyed.

6. General DRMS Guidelines applicable to all DRMS disposal procedures:

a. Components, agencies, state government agencies, approved organizations, and private individuals may generally requisition or purchase DRMS property on an "as is/where is" basis. See DRMS-I 4160.14.

b. Receiving agencies, organizations, and/or public individuals that requisition or purchase DRMS equipment must pay for all costs related to Packaging, Crating, Handling, and Transportation (PCH&T) of the DRMS property from the DRMS local office where the equipment was originally turned in to the receiver's location. PCH&T costs include the costs of inspection of the items by other USG agencies whenever the items re-enter the United States from their OCONUS locations.

E. Conclusion: Contact DRMS immediately if you are considering the disposal of DoD property. The Defense Reutilization and Marketing Service (DRMS) is the only DoD element with statutory authority to dispose of durable (investment item) DoD property (including military equipment) purchased with appropriated funds. Disposal of DoD government property outside of DRMS-authorized channels may lead to potential ADA violations, as well as criminal and/or regulatory violations.

XI. Department of Defense Appropriations Act, FY2008

On 13 November 2007, President George W. Bush enacted the 2008 DODAA.[32] Initially, Congress appropriated funds for the following activities in the 2008 DODAA: $105.29 billion for Military Personnel (MILPER) in Title I,[33] $140.09 billion for Operations and Maintenance (O&M) in Title II,[34] $98.20 billion for Procurement activities in

[32] Department of Defense Appropriations Act for 2008, Pub. L. No. 110-116, (Nov. 13, 2007), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_bills&docid=f:h3222enr.txt.pdf.

[33] *See* Department of Defense Appropriations Act for 2008, Pub. L. No. 110-116, Div. A, tit. 1 (Nov. 13, 2007).

[34] *See* Department of Defense Appropriations Act for 2008, Pub. L. No. 110-116, Div. A, tit. 2 (Nov. 13, 2007).

Title III,[35] $77.27 billion for Research, Development, Test, and Evaluation (RDT&E) in Title IV,[36] $2.70 billion for Working Capital Funds (WCF), also referred to as Revolving Funds, in Title V,[37] $26.31 billion for Other DOD Programs in Title VI,[38] $988 million for Related Agencies in Title VII,[39] and $12.22 billion for the General Provisions in Title VIII.[40]

In Title VIII Congress also ordered two sets of reductions in the initially appropriated amounts of Titles II, III, IV, and V.[41] In Section 8097 of the 2008 DODAA, Congress ordered a reduction of $506.9 million against the amounts initially appropriated for Titles II, III, and IV activities, as a result of "contractor efficiencies."[42] Congress stated that "[t]he Secretary of Defense shall allocate this reduction proportionately to each budget activity, activity group, subactivity group, and each program, project and activity within each applicable appropriation account."[43] In addition to the Section 8097 reductions, in Section 8104 Congress ordered that Titles II, III, IV, and V be reduced by $470 million, $506 million, $367 million, and $10 million, respectively.[44] Congress stated that the reductions were attributable to "savings from revised economic assumptions," and ordered proportional distribution within each title.[45] To determine the final appropriated funds for DoD activities, the initial amounts that Congress appropriated to Titles II, III, IV, and V must be adjusted downward to reflect the Section 8097 and Section 8104 reductions.[46] The chart on the next page provides the initial and final appropriated amounts (after reductions). The final amounts appropriated for Titles II – V activities are: $139.39 billion for O&M in Title II, $97.54 billion for Procurement in Title III, $76.78 billion for RDT&E in Title IV, and $2.69 billion for WCF in Title V.[47]

2008 DoD Appropriations Act (DODAA)

Title I: Military Personnel (MilPer)

APPR. NAME	INITIAL AMOUNT	HR 3222 Pg. #	AVAIL THRU DATE	FINAL AMOUNT
Army MilPer	$31,535,016,000	2	30-Sep-2008	$31,535,016,000
Navy MilPer	$23,318,476,000	2	30-Sep-2008	$23,318,476,000
Marine MilPer	$10,280,180,000	2	30-Sep-2008	$10,280,180,000
Air Force (AF) MilPer	$24,194,914,000	2	30-Sep-2008	$24,194,914,000
Army Reserve MilPer	$3,684,610,000	2	30-Sep-2008	$3,684,610,000
Navy Reserve MilPer	$1,790,136,000	3	30-Sep-2008	$1,790,136,000
Marines Reserve MilPer	$583,108,000	3	30-Sep-2008	$583,108,000
AF Reserve MilPer	$1,363,779,000	3	30-Sep-2008	$1,363,779,000
Army National Guard (NG)	$5,924,699,000	3	30-Sep-2008	$5,924,699,000
AF NG	$2,617,319,000	4	30-Sep-2008	$2,617,319,000

[35] *See* Department of Defense Appropriations Act for 2008, Pub. L. No. 110-116, Div. A, tit. 3 (Nov. 13, 2007).

[36] *See* Department of Defense Appropriations Act for 2008, Pub. L. No. 110-116, Div. A, tit. 4 (Nov. 13, 2007).

[37] *See* Department of Defense Appropriations Act for 2008, Pub. L. No. 110-116, Div. A, tit. 5 (Nov. 13, 2007).

[38] *See* Department of Defense Appropriations Act for 2008, Pub. L. No. 110-116, Div. A, tit. 6 (Nov. 13, 2007).

[39] *See* Department of Defense Appropriations Act for 2008, Pub. L. No. 110-116, Div. A, tit. 7 (Nov. 13, 2007).

[40] *See* Department of Defense Appropriations Act for 2008, Pub. L. No. 110-116, Div. A, tit. 8 (Nov. 13, 2007).

[41] *Id.*

[42] *See* Department of Defense Appropriations Act for 2008, Pub. L. No. 110-116, Div. A, tit. 8 § 8097 (Nov. 13, 2007).

[43] *Id.*

[44] *See* Department of Defense Appropriations Act for 2008, Pub. L. No. 110-116, Div. A, tit. 8 § 8104 (Nov. 13, 2007).

[45] *Id.*

[46] *See* Department of Defense Appropriations Act for 2008, Pub. L. No. 110-116, Div. A, tit. 8 § 8097 (Nov. 13, 2007); s*ee also* Department of Defense Appropriations Act for 2008, Pub. L. No. 110-116, Div. A, tit. 8 § 8104 (Nov. 13, 2007).

[47] *Id.*

Initial Title I (MilPer):	$105,292,237,000	**Total FINALTitle I:**	$105,292,237,000

Title II: Operations and Maintenance (O&M)

APPR. NAME	INITIAL AMOUNT	HR 3222 Pg. #	AVAIL THRU DATE	FINAL AMOUNT
Army Emer.&Ext.Exp. (EEE)	$11,478,000	4	30-Sep-2008	$11,421,053.48
Army O&M	$27,361,574,000	4	30-Sep-2008	$27,225,823,321.17
Navy/Marine EEE	$6,257,000	4	30-Sep-2008	$6,225,956.76
Navy O&M	$33,087,650,000	4	30-Sep-2008	$32,923,490,184.18
Marines O&M	$4,792,211,000	4	30-Sep-2008	$4,768,435,105.52
AF EEE	$7,699,000	4	30-Sep-2008	$7,660,802.47
AF O&M	$32,176,162,000	4	30-Sep-2008	$32,016,524,406.29
DOD O&M	$22,693,617,000	5	30-Sep-2008	$22,581,025,746.56
Army Reserve O&M	$2,510,022,000	6	30-Sep-2008	$2,497,568,871.74
Navy Reserve O&M	$1,148,083,000	6	30-Sep-2008	$1,142,386,944.41
Marines Reserve O&M	$208,637,000	6	30-Sep-2008	$207,601,876.28
AF Reserve O&M	$2,815,417,000	6	30-Sep-2008	$2,801,448,696.53
Army NG O&M (+Sec. 8086)	$5,765,848,000	6	30-Sep-2008	$5,737,241,539.71
Air National Guard O&M	$5,468,710,000	7	30-Sep-2008	$5,441,577,748.95
CAAF	$11,971,000	7	30-Sep-2008	$11,911,607.53
Army Envrnmntl. Restrtn.	$439,879,000	7	Various (Transfer Auth.)	$437,696,600.96
Navy Envrnmntl. Restrtn.	$300,591,000	7	Various (Transfer Auth.)	$299,099,659.18
AF Envrnmntl. Restrtn.	$458,428,000	8	Various (Transfer Auth.)	$456,153,572.65
DOD Envrnmntl. Restrtn.	$12,751,000	8	Various (Transfer Auth.)	$12,687,737.67
Former DoD Base ER (Army)	$280,249,000	8	Various (Transfer Auth.)	$278,858,583.21
OHDACA (DOD)	$103,300,000	9	30-Sep-2010	$102,787,491.29
CCCP Threat Reduction	$428,048,000	9	30-Sep-2010	$425,924,298.84

Total Initial Title II (O&M):	$140,088,582,000	**Total FINAL Title II:**	$139,393,551,805.38

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Title III: Procurement (Proc.)

APPR. NAME	INITIAL AMOUNT	HR 3222 Pg. #	AVAIL THRU DATE	FINAL AMOUNT
Army Aircraft	$4,185,778,000	9	30-Sep-2010	$4,157,486,293.86
Army Missile	$1,911,979,000	10	30-Sep-2010	$1,899,055,919.03
Army Weapons and Tracks	$3,021,889,000	10	30-Sep-2010	$3,001,464,028.69
Army Ammo	$2,223,176,000	10	30-Sep-2010	$2,208,149,536.08
Army Other	$11,428,027,000	10	30-Sep-2010	$11,350,784,876.41
Navy Aircraft	$12,464,284,000	11	30-Sep-2010	$12,380,037,807.27
Navy Weapons	$3,113,987,000	11	30-Sep-2010	$3,092,939,537.59
Navy/Marine Ammo	$1,064,432,000	11	30-Sep-2010	$1,057,237,495.81
Navy Ships	$13,597,960,000	12	30-Sep-2012	$13,506,051,282.34
Navy Other	$5,317,570,000	12	30-Sep-2010	$5,281,628,502.91
Marines Proc. - ALL	$2,326,619,000	13	30-Sep-2010	$2,310,893,364.04

AF Aircraft	$12,021,900,000	13	30-Sep-2010	$11,940,643,884.17
AF Missiles	$4,985,459,000	13	30-Sep-2010	$4,951,762,243.75
AF Ammo	$754,117,000	13	30-Sep-2010	$749,019,917.32
AF Other	$15,440,594,000	14	30-Sep-2010	$15,336,230,904.77
DoD Proc. - ALL	$3,269,035,000	14	30-Sep-2010	$3,246,939,566.95
NG & Reserve Proc. - ALL	$980,000,000	14	30-Sep-2010	$973,376,172.36
DoD Production Act	$94,792,000	14	30-Sep-2010	$94,151,300.13
Total INITIAL Title III:	$98,201,598,000		**Total FINAL Title III:**	$97,537,852,633.50

Title IV: Research, Development, Test, and Evaluation (RDT&E)

APPR. NAME	INITIAL AMOUNT	HR 3222 Pg. #	AVAIL THRU DATE	FINAL AMOUNT
Army RDT&E	$12,126,591,000	15	30-Sep-2009	$12,049,516,443.56
Navy RDT&E	$17,918,522,000	15	30-Sep-2009	$17,804,634,912.10
AF RDT&E	$26,255,471,000	15	30-Sep-2009	$26,088,595,677.71
DoD RDT&E	$20,790,634,000	15	30-Sep-2009	$20,658,492,255.17
DoD Op. Testing & Eval	$180,264,000	15	30-Sep-2009	$179,118,272.58
Total INITIALTitle IV:	$77,271,482,000		**Total FINAL Title IV:**	$76,780,357,561.13

Title V: Revolving Funds/Working Capital Funds (WCF)

APPR. NAME	INITIAL AMOUNT	HR 3222 Pg. #	AVAIL THRU DATE	FINAL AMOUNT
DoD WCF	$1,352,746,000	16	Until Expended	$1,347,739,241.64
Sealift (Merchant Marines)	$1,349,094,000	16	Until Expended	$1,344,100,758.36
Total INITIAL Title V:	$2,701,840,000		**Total FINAL Title IV:**	$2,691,840,000.00

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Title VI: Other DoD Programs (Other)

APPR. NAME	INITIAL AMOUNT	HR 3222 Pg. #	AVAIL THRU DATE	FINAL AMOUNT
DoD Health Program	$23,458,692,000	16	Various	$23,458,692,000
DoD Chem Weapons Dest.	$1,512,724,000	17	Various	$1,512,724,000
DoD Counter-Drug Ops	$984,779,000	17	Transfer Auth.	$984,779,000
Joint IED Defeat Program	$120,000,000	17	Transfer Auth.	$120,000,000
Office of IG	$239,995,000	18	Various	$239,995,000
Total Initial Title VI (Other):	$26,316,190,000		**Total Initial Title VI:**	$26,316,190,000

Title VII: Related Agencies

APPR. NAME	INITIAL AMOUNT	HR 3222 Pg. #	AVAIL THRU DATE	FINAL AMOUNT
CIA Retirement Fund	$262,500,000	18	30 Sep 08 (Sec. 8035)	$262,500,000

Intell Community Mgmt	$725,526,000	18	Various	$725,526,000
Total INITIALTitle VII:	$988,026,000		**Total FINALTitle VII:**	$988,026,000

Title VIII: General Provisions Additions

APPR. NAME	INITIAL AMOUNT	HR 3222 Pg. #	AVAIL THRU DATE	NOTES
Sec. 8020 - Indian Fin. Act	$15,000,000	24	30-Sep-2008	
Sec. 8023 - Kuwait Reimb.	$350,000,000	25	30-Sep-2008	
Sec. 8077 - Fischer House	$10,000,000	38	Until Expended	
Sec. 8086 - AR NG O&M	$0	40	30-Sep-2008	$990,000 added Title II
Sec. 8087 - Public Schools	$5,500,000	40	Until Expended	
Sec. 8089 - Various Grants	$62,700,000	41	30-Sep-2008	
Sec. 8112 - AF Tankers	$150,000,000	45	Various (Transfer)	
Sec. 8121 - MRAPs	$11,630,000,000	47	Various (Transfer)	
Total Title VIII (Additions):	$12,223,200,000		**Total Title VIII (Addns):**	$12,223,200,000
Initial Amounts 2008 DODAA	$463,083,155,000			

Title VIII: General Provisions REDUCTIONS

APPR. NAME	INITIAL AMOUNT	HR 3222 Pg. #	How allocated?
Sec. 8097	($506,900,000)	43	Proportionally to and within Titles II, III, and IV
Sec. 8104	($470,000,000)	44	Proportionally within Title II (O&M)
Sec. 8104	($506,000,000)	44	Proportionally within Title III (Procurement)
Sec. 8104	($367,000,000)	44	Proportionally within Title IV (RDT&E)
Sec. 8104	($10,000,000)	44	Proportionally within Title V (Revolve/WCF)
Total Title VIII Reduce:	($1,859,900,000)		
2008 DoD Appr. Act FINAL Amount Appropriated:			**$461,223,255,000.00**

2008 DoD Appropriations Act

I. Proportional Calculations of Section 8097 Reductions (2008 Initial Appropriation is $463,083,155,000)

Title II Initial Amount:	$140,088,582,000	**2008 Appr. Act Title II Proportion:**	44.3934099%
Title III Initial Amount:	$98,201,598,000	**2008 Appr. Act Title III Proportion:**	31.1196225%
Title IV Initial Amount:	$77,271,482,000	**2008 Appr. Act Title IV Proportion:**	24.4869676%
Title V Initial Amount:	$2,701,840,000	**TITLE V NO Sec. 8097 Reduction.**	

2008 Appr. Act Title II After Section 8097 Reduction:	$139,863,551,805.38
2008 Appr. Act Title III After Section 8097 Reduction:	$98,043,852,633.50
2008 Appr. Act Title IV After Section 8097 Reduction:	$77,147,357,561.13

II. 2008 Appr. Act Titles II, III, IV, and V Final Amounts after Sec. 8104 Reductions (with 8097 Reduction)

2008 Appr. Act Title II after Sec. 8104 Reduction:	$139,393,551,805.38
2008 Appr. Act Title III after Sec. 8104 Reduction:	$97,537,852,633.50
2008 Appr. Act Title IV after Sec. 8104 Reduction:	$76,780,357,561.13
2008 Appr. Act Title V after Sec. 8104 Reduction:	$2,691,840,000

III. Proportional Calculations of Titles II - V; (Final amounts after Reductions)/(Initial Amounts Appropriated)

Title II Proportion of: (Final Reduced Amount)/(Initial Amounts Appropriated) -	99.5038638%
Title III Proportion of: (Final Reduced Amount)/(Initial Amounts Appropriated) -	99.3240992%
Title IV Proportion of: (Final Reduced Amount)/(Initial Amounts Appropriated) -	99.3644170%
Title V Proportion of: (Final Reduced Amount)/(Initial Amounts Appropriated) -	99.6298819%

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XII. NATIONAL DEFENSE AUTHORIZATION ACT, FY2008

On 28 January 2008, President George W. Bush enacted the National Defense Authorization Act (NDAA) for 2008.[48] The chart on the next page summarizes many of the provisions and authorities that have the greatest impact on Contingency Operations funding and FUSMO.

		2008 NDAA Summary Chart
Section	**Title**	**Summary**
Sec 132	Clarification of Limitation on Retirement of U-2 Aircraft.	Continues to require SD certification that the U-2 "no longer contribute(s) to mitigating any gaps in intelligence, surveillance and reconnaissance capabilities identified in the 2006" QDR. (Presumably valid until the Global Hawk can assume this mission.)
Sec 222	Study on future roles and missions of the Missile Defense Agency	The SECDEF shall enter into an agreement with one of the Federally Funded Research and Development Centers under which the Center shall carry out an independent study to examine, and make recommendations with respect to, the long-term structure, roles, and missions of the Missile Defense Agency
Sec 226	Limitation on availability of funds for procurement, construction, and deployment of missile defenses in Europe	Limits funding for the procurement, construction, and deployment of missile defenses in Europe until the countries where the missile defense components will be deployed (Czech Republic and Poland) have given final approval to agreements with the United States about the deployment of those components in their countries.
Sec 372	Authority for DoD to provide support for certain sporting events	Amends 10 USC §2564. Authorizes SECDEF to support USOC sporting events through Paralympic Military Program or any other USOC-sanctioned national or international paralympic event when held in the United States so long as at

[48] National Defense Authorization Act for 2008, Pub. L. No. 110-181 (Jan. 28, 2008), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_public_laws&docid=f:publ181.110.pdf.

		least 10 percent of participants are or were members of US armed forces.
Sec 401-406	Title IV – Military Personnel Authorizations	Included the strength growth for the Army and Marine Corps; and increased grade authorizations for Army (O4) and Navy (O4-O6s), and E9s.
Sec 526	NDU Master's Degree Program	Amends 10 USC § 2163 to authorize the NDU-P to award a master's degree in Strategic Security Studies to graduates of the School of National Security Executive Education
Sec 543	Modification of authorities on senior members of the JAG Corps	TJAGs of USA, USAF, and USN would serve in grade of lieutenant general/vice admiral. Authorizes LC to be one-star brigadier general, rear admiral (lower half). Requires SECDEF to develop plan linking missions and requirements of GO/FOs to statutory limits, current assignments, promotion, and joint officer development.
Sec 551	Temporary enhancement of carryover accumulated leave for members of the armed forces	Increases for all service members the number of days accumulated leave they may carry over from one fiscal year to the next from 60 to 75 days. Increases by one year the length of time available to use leave accumulated under the special leave accrual provisions of 10 USC §701(f). Amends 37 USC §501(b) to allow enlisted members who have accumulated more than 120 days of leave under §701(f) a one-time opportunity to sell back up to 30 days of leave in excess of 120 days. Authority expires 31 Dec 10.
Sec 810	Clarification of limited acquisition authority for Special Operations Command	Amends 10 USC §167(e)(4) by codifying the position of acquisition executive for SOCOM and delineates the authorities and responsibilities of that position on behalf of SOCOM.
Sec 825	Provision of authority to maintain equipment to Unified Combatant Command for Joint Warfighting	Amends 10 USC §167a to allow SECDEF to give the combatant commander with the joint warfighting mission the authority to maintain equipment, in addition to develop and acquire that equipment. Authority expires after 30 Sep 10.
Sec 847	Requirements for senior DoD officials seeking employment with defense contractors	Requires contractors that receive DoD contracts in excess of $10M to report to DoD annually certain former DoD employees who receive compensation from the contractor within two years after leaving DoD service. Also requires certain DoD officials to obtain written opinion (30-day letter) from ethics counselor before accepting compensation.
Sec 848	Report on contractor ethics programs of major defense contractors	Requires Comptroller General to report to HASC and SASC on the internal ethics programs of major defense contractors.
Sec 861	MOU on matters relating to contracting	Requires SECDEF and USAID to enter into MOU regarding matters relating to contracts in Iraq and Afghanistan
Sec 862	Contractors performing private security functions in areas of combat operations	Requires SECDEF to prescribe regulations on the selection, training, equipping, and conduct of personnel performing private security functions in an area of combat operations (or potential combat operations), and to ensure that contractors and subcontractors of ALL federal agencies are subject to such directives and regulations issued by the combatant commander.
Sec 911	Space Protection Strategy	The SECDEF, in conjunction with the Director of National Intelligence, shall develop a strategy, to be known as the Space Protection Strategy, for the development and fielding by the United States of the capabilities that are necessary to ensure freedom of action in space for the United States.
Sec 941	Requirement for Quadrennial Roles and Missions Review	"(b) Independent Military Assessment of Roles and Missions.—(1) In each year in which the SECDEF is required to conduct a comprehensive assessment pursuant to subsection (a), the Chairman of the Joint Chiefs of Staff shall prepare and submit to the Secretary the Chairman's assessment of the roles and missions of the armed forces and the assignment of functions to the armed forces……..

Sec 942	JROC additional duties related to core mission areas	Amends 10 USC §181 to revise the mission of the JROC and address participation of certain senior civilian leaders.
Sec 952	Interagency Policy Coordination	Requires SECDEF to submit a plan for improving DoD contributions to Interagency Coordination, and to appoint a senior official (suggests USDP) to serve as advisor on these issues.
Sec 958	Report on Foreign Language Proficiency.	Requires SECDEF, with each Secretary of the Military Department, to report on the foreign language proficiency of DoD personnel.
Sec 1021	Extension of authority for joint task forces to provide support to law enforcement agencies conducting counter-terrorism	Amends §1022(b) of the FY04 NDAA to allow joint task forces to continue supporting law enforcement agencies conducting counter-terrorism activities through FY08.
Sec 1033	Improved authority to provide rewards for assistance in combating terrorism	Amends 10 USC §127b to increase size of reward payments and provides new authority to pay rewards for information provided to allied forces participating in a combined operation with the armed forces. Extends the authority through 30 Sep 09.
Sec 1049	Study on the National Security Interagency System	Provides $3M for SECDEF to enter into an agreement to conduct the study with an independent non-profit, non-partisan organization
Sec 1068	Repeal of section 1076 of PL 109-364 relating to use of Armed Forces in major public emergencies	Repeals §1076 of FY07 NDAA and revives the provisions of 10 USC §§333 and 12304(c). Repeals 10 USC §2567 relating to providing supplies, services, and equipment when the President exercised authority under the FY07 changes (now repealed) to 10 USC §333. [Restores Insurrection Act as written prior to FY07 NDAA].
Sec 1201	Military to military contacts	Amends 10 USC §168(c) permit personnel exchange programs with foreign governments to be non-reciprocal if SECDEF determines in the national interest
Sec 1202	Authority for support of military operations to combat terrorism	Extends §1208 of FY05 NDAA through FY10.
Sec 1203	Medical care and TDY expenses for liaison officers	Amends 10 USC §1051a to allow SECDEF to pay the civilian medical and mission-related TDY expenses of liaison officers from developing countries who are assigned to combatant command, subordinate command, or component command in connection with a military operation.
Sec 1204	Extension and expansion of DoD authority to participate in multinational centers of excellence	Extends authority for centers of excellence approved and accredited by NATO through FY08 and increases monetary cap for FY08 from $3M to $5M. Conference report urges" DoD to provide additional information on costs and locations if the centers of excellence authority were expanded beyond NATO.
Sec 1205	Reauthorization of CERP	Authorizes CERP up to $977,441,000 in Iraq and Afghanistan during FY08 and FY09. Conference report expresses concern that OSD Comptroller issued revised CERP guidance, dated 9 May 2007, without complying with congressional notification requirements. Conference report questions DoD's characterization in the revised CERP guidance of martyr payments as a subset of condolence payments and directs DoD to provide a report on this subject NLT 60 days after FY08 NDAA is enacted.
Sec 1206	Authority to build the capacity of the Pakistan Frontier Corps	Authorizes SECDEF, with SecState concurrence, to use up to $75M during FY08 for the Pakistan Frontier Corps. Authorized assistance may include equipment, supplies, and training.
Sec 1207	Authority to Equip and Train Foreign Personnel	(a) In General.—Chapter 20 of title 10, United States Code, is amended by adding at the end the following new section:

	to assist in accounting for Missing USG Personnel	"§ 408. Equipment and training of foreign personnel to assist in Department of Defense accounting for missing United States Government personnel "(a) In General.—The SECDEF may provide assistance to any foreign nation to assist the Department of Defense with recovery of and accounting for missing United States Government personnel.
Sec 1209	Report on DoD Foreign Assistance-Related Activities	Requires DoD to report, on a country by country basis, on all activities conducted under Section 1206, 1207, 1208, CN authorities, loans of Significant Military Equipment, CT Fellowship, OHDACA, and activities executed on behalf of other agencies.
Sec 1210	Extension and enhancement of authority for security and stabilization assistance	Extends authority under §1207 of FY06 NDAA through 30 Sep 08. This provision allows SECDEF to provide SecState services, defense articles, or funding to support DoS programs for reconstruction, security, or stabilization assistance. Keeps the funding limitation to $100M during
Sec 1211	GAO Assessment of the Global Peace Operations Initiative	Not later than June 1, 2008, the Comptroller General of the United States shall submit to the congressional defense committees, the Committee on Foreign Relations of the Senate, and the Committee on Foreign Affairs of the House of Representatives a report assessing the Global Peace Operations Initiative.
Sec 1212.	American Service Members Protection Act of 2002.	Repeals the limitations on providing military assistance under §2007 of the American Servicemembers' Protection Act of 2002 (22 U.S.C. 7426). .
Sec 1225	Report on support from Iran for Attacks against Coalition Forces in Iraq	NLT 30 days after enactment and every 60 days thereafter, CDR MNF-I and US Ambassador to Iraq in coordination with DNI shall jointly submit report.
Sec 1252	Extension and expansion of temporary authority to use ACSA to lend military equipment	Extends through 30 Sep 09 the authority provided under §1202 of the FY07 NDAA. This authority allows SECDEF to use acquisition and cross-servicing agreements to loan significant military equipment for personnel protection and survivability to foreign military forces participating in combined operations with the United States as part of peacekeeping operations under the UN Charter or another international agreement.
Sec 1264	Report on application of UCMJ to civilians accompanying armed forces during a declared war or contingency operations	Requires SECDEF to report to SASC and HASC on the status of applying the UCMJ to civilians accompanying the force not later than 60 days after the FY08 NDAA is enacted.
Sec 1267	Report on Threats to the United States from Ungoverned Areas	NLT 120 days after enactment SD/SS in coordination with DNI shall submit the report. D/NCTC, director as a national intelligence center, or the head of any department agency, or element of the IC shall not later than 15 days after a request make available assessments, reports, estimates, legal opinions or other information to committees.
Sec 1811 Sec 1811	Appointment, grade, and duties of Chief of the National Guard Bureau	Amends 10 USC §10502 to require that the Chief of the National Guard Bureau serve in the grade of general. Designates the Chief of the National Guard Bureau to serve as a principal military advisor to SECDEF, through the Chairman of the Joint Chiefs of Staff, on matters involving non-federalized National Guard forces and other matters determined by SECDEF. The Chief of the National Guard Bureau would also serve as the principal military advisor to the Secretary and Chief of Staff of the Army and Air Force on the National Guard, Army National Guard of the United States, and Air National Guard of the US

Sec 1812	Establishment of the National Guard Bureau as a joint activity of the Department of Defense	Amends 10 USC §10501 to establish the National Guard Bureau as a joint activity of DoD. Amends 10 USC §1011 to require that manpower requirements be determined IAW regulations issued by SECDEF, in consultation with the CJCS.
Sec 1813	Enhancement of functions of the National Guard Bureau	Amends 10 USC §10503 to expand National Guard Bureau charter to include assisting SECDEF with facilitating/coordinating with other federal agencies, the adjutant generals, NORTHCOM, and JFCOM on the use of National Guard personnel and resources in the conduct of missions under Title 32 or in support of State missions. Requires the SECDEF, in consultation with SecArmy and SecAF to develop the charter of the National Guard Bureau.
Sec 1824	High level positions authorized or required to be held by reserve component general or flag officers	Amends 10 USC §526(b)(2) to increase from 10 to 15 the number of GO/FO positions on the staffs of the combatant commands that may be held by reserve component officers. Amends 10 USC §164(e) to require that at least one deputy commander of NORTHCOM be a National Guard officer who is eligible for promotion to 0-9 unless a National Guard officer is serving as the commander of NORTHCOM.
Sec 2801	Use of operation and maintenance funds for construction projects outside the United States	Amends §2808 of the FY04 NDAA to extend through FY08 the authority for SECDEF to use O&M funds to carry out construction projects to satisfy operational requirements. Caps the authority to $200M.
Sec 2803	Increase in threshold for unspecified minor military construction	Amends 10 USC §2805(a)(1) by raising the threshold cost of an unspecified minor military project from $1.5M to $2M.

XIII. CONGRESSIONAL NOTIFICATION AND HUMAN RIGHTS VETTING REQUIREMENTS

A. Section 8059 Notification – Limitation on Transfer of Defense Articles and Services. Continuing similar requirements from prior years' appropriations acts, Congress requires DoD to notify the Congressional appropriations, defense, and international relations committees 15 days *before* transferring to another nation or international organization any defense articles or services (other than intelligence services) in conjunction with (1) peace operations under chapters VI or VII of the UN charter or (2) any other international peacekeeping, peace-enforcement, or humanitarian assistance operation. *See* DoD Appropriations Act for FY 06, Pub. L. No. 109-148 § 8059 (2005). The notice required includes the following: a description of the articles or services to be transferred; the value of the articles or services; and, with respect to a proposed transfer of supplies and equipment, a statement of whether the inventory requirements of all elements of the armed forces (including the Reserve Components) for the types of articles and supplies to be transferred have been met; and whether the items to be provided will have to be replaced, and how the President proposes to pay for such replacement. Initially, this notification requirement was enacted through Section 8117 of the DoD Appropriations Act for FY 1996, Pub. L. No. 104-61 (1995). Leading up to the original House DoD Appropriations Bill (H.R. 2126) enactment, the House Appropriations Committee expressed concern about the *diversion of DoD resources to non-traditional operations*, such as Haiti, Guantanamo, Rwanda and the former Yugoslavia. The Committee stated that Congress must be kept fully aware of the use and involvement of defense assets in "essentially non-defense activities in support of foreign policy." H.R. Rep. No. 208, 104th Cong., 1st Sess. 12 (1995). In "acquiescing" in the Appropriations Act, the President expressed concern about section 8117 and pledged to interpret it consistent with constitutional authority to conduct foreign relations and as Commander in Chief. Statement by the President (Nov. 30, 1995).

B. Section 8069 Prohibition on Funding for Training of Foreign Units that Commit Gross Violations of Human Rights – Human Rights Vetting. DoD Appropriations Act for FY 2006, Pub. L. No. 109-148, § 8069. Continuing similar prohibitions from prior years' appropriations Acts, Congress prohibited any funding for support of any training program involving a unit of the security forces of a foreign country if the [SECDEF] has received credible information from the [DoS] that the unit has committed a gross violation of human rights, unless all necessary corrective steps have been taken.

XIV. CONCLUSION

A. Active Participation: Congress limits the authority of DoD and other executive agencies to use appropriated funds. The principal fiscal controls imposed by statute, regulation, and case law are Purpose, Time and Amount. These controls apply both to CONUS activity and OCONUS operations and exercises. The Comptroller General, service audit agencies, and inspectors general monitor compliance with rules governing the obligation and expenditure of appropriated funds. Commanders and staff rely heavily on JAs for fiscal advice. Active participation by JAs in mission planning and execution, as well as responsive and well-reasoned legal advice, will help ensure that commands use appropriated funds properly. Those found responsible for funding violations will face adverse personnel actions and possibly criminal sanctions.

B. Necessity for the JA to Get It Right.

1. Military commanders and staffs often plan for complex, multi-faceted, joint and combined operations, exercises, and activities overseas. Not only do foreign allies participate in these activities, but other U.S. government agencies, international non-governmental organizations, and U.S. Guard and Reserve components do as well. Not surprisingly, these operations, exercises, and activities are conducted under the bright light of the U.S. and international press, and thus precise and probing questions concerning the legal authority for the activity are certain to surface. Congress will often have an interest in the location, participants, scope, and duration of the activity. Few operations the U.S. military conducts overseas escape Congressional interest. Thus, it is imperative that the commander and his or her staff be fully aware of the legal basis for the conduct of the operation, exercise, or activity that benefits a foreign nation.

2. Judge Advocates bear the primary responsibility for ensuring that all players involved, and especially the U.S. commander and his or her staff, understand and appreciate the significance of having a proper legal basis for the activity. This fundamental understanding will shape all aspects of the activity, especially a determination of where the money will come from to pay for the activity. Misunderstandings concerning the source and limits of legal authority and the execution of activities may lead to a great deal of wasted time and effort to correct the error, and embarrassment for the command in the eyes of the press and the Congress. At worst, such misunderstandings may lead to violations of the ADA, and possible reprimands or criminal sanctions for the responsible commanders and officials.

C. How the JA Can Get It Right—Early JA Involvement.

1. Judge Advocates must be part of the planning team from the inception of the concept, through all planning meetings, and through execution of the operation or activity. It is too late for the JA to review the operations plan the week, or even the month, before the scheduled event. Funding, manpower, logistics, transportation, and diplomatic decisions have long been made, and actions based on those decisions have already been executed weeks in advance of the activity.

2. In short, the JA must understand the statutory, regulatory, and policy framework that applies to military operations and activities that benefit foreign nations. More importantly, the JA must ensure that the commander understands what that legal authority is and what limits apply to the legal authority. The JA must then ensure that the commander complies with such authorities.

NOTES

NOTES

CHAPTER 18

DEPLOYMENT CONTRACTING AND BATTLEFIELD ACQUISITION

REFERENCES

1. U.S. DEP'T OF DEFENSE, DEFENSE FEDERAL ACQUISITION REG. (DFARS), AND SERVICE SUPPLEMENTS.
2. U.S. DEP'T OF ARMY, ARMY FEDERAL ACQUISITION REGULATION MANUAL No. 2 (Contingency Contracting), NOV 1997.
3. Air Force FAR Supplement, Appendix CC – Contingency Operational Contracting Support Program (COCSP), 15 June 2006.
4. NAVSUP Instruction 4230.37A, 9 April 1996.
5. U.S. MARINE CORPS, ORDER P4200.15G. APPENDIX B: MARINE CORPS PURCHASING PROCEDURES MANUAL.
6. JOINT CHIEFS OF STAFF, JOINT PUB. 1-06, JOINT TACTICS, TECHNIQUES, AND PROCEDURES FOR FINANCIAL MANAGEMENT DURING JOINT OPERATIONS, 22 Dec. 1999.
7. JOINT CHIEFS OF STAFF, JOINT PUB. 4-0, DOCTRINE FOR LOGISTICS SUPPORT OF JOINT OPERATIONS, (6 Apr. 2000) (Chapter V, Contractors in Theater).
8. JOINT CHIEFS OF STAFF, JOINT PUB. 4-07, JOINT TACTICS, TECHNIQUES, AND PROCEDURES FOR COMMON-USER LOGISTICS DURING JOINT OPERATIONS (11 June 2001).
9. JOINT CHIEFS OF STAFF, JOINT PUB. 4-08, JOINT DOCTRINE FOR LOGISTIC SUPPORT TO MULTINATIONAL OPERATIONS (25 Sep. 2002).
10. U.S. DEP'T OF THE ARMY, REG. 700-137, LOGISTICS CIVIL AUGMENTATION PROGRAM (LOGCAP) (16 Dec. 1985).
11. U.S. DEP'T OF THE ARMY, REG. 715-9, ARMY CONTRACTORS ON THE BATTLEFIELD (29 Oct. 1999).
12. U.S. DEP'T OF THE ARMY, PAM. 690-80, USE AND ADMINISTRATION OF LOCAL CIVILIANS IN FOREIGN AREAS DURING HOSTILITIES (12 Feb. 1971) (joint publication also known as /NAVSO P-1910/AFM 40-8/MCO P12910.1).
13. U.S. DEP'T OF THE ARMY, PAM. 700-31, COMMANDER'S HANDBOOK FOR PEACEKEEPING OPERATIONS (A Logistics Perspective) (1 July 1994).
14. U.S. DEP'T OF THE ARMY, PAM. 700-15, LOGISTICS SUPPORT OF UNITED NATIONS PEACEKEEPING FORCES (1 May 1986).
15. U.S. DEP'T OF THE ARMY, PAM. 715-16, CONTRACTOR DEPLOYMENT GUIDE (27 Feb. 1998).
16. U.S. DEP'T OF ARMY, FIELD MANUAL 3-100.21, CONTRACTORS ON THE BATTLEFIELD (Jan. 2003).
17. U.S. DEP'T OF ARMY, FIELD MANUAL 100-10-2, CONTRACTING SUPPORT ON THE BATTLEFIELD (4 Aug. 1999).
18. U.S. ARMY MAT'L COMMAND, PAM. 700-30, LOGISTICS CIVIL AUGMENTATION PROGRAM (LOGCAP) (31 Jan. 2000).
19. U.S. ARMY MAT'L COMMAND, PAM. 715-18, AMC CONTRACTS AND CONTRACTORS SUPPORTING MILITARY OPERATIONS (June 2000).
20. AMC LOGCAP Battle Book, 31 January 2000.
21. AMC LOGCAP Homepage: http://www.amc.army.mil/LOGCAP/
22. USAF Contingency Contracting Web site: http://www.safaq.hq.af.mil/contracting/contingency/

I. INTRODUCTION[1]

A. Operations Enduring Freedom (OEF) and Iraqi Freedom (OIF) re-emphasized the role of contingency contracting as a force multiplier for deployed forces. Deployment contracting leverages assets and reduces dependence on CONUS-based logistics, reduces the time between identification of needs and the delivery of supplies or performance of services, and provides alternative sources for supplies and services. Using local sources

[1] For a complete overview of contracting, see CONTRACT & FISCAL L. DEP'T, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, CONTRACT ATTORNEYS COURSE DESKBOOK. The current version of the deskbook is available on either the Electronic Judge Advocate Warfighter System (e-J.A.W.S.) Resouce Digital Library (https://www.jagcnet.army.mil/laawsxxi/cds.nsf) or on the TJAGLCS homepage (http://www.jagcnet.army.mil/TJAGLCS) under the link "TJAGLCS Publications."

during a deployment relieves our limited air and sea lift assets for other higher-priority needs, and depending on the particular mission, can provide other collateral benefits such as strengthening the local economy and establishing relationships with the community.

B. In various contingency operations after action reports (AAR), Judge Advocates (JA) and commanders expressed the need for a better understanding and experience with government contract law. These AARs emphasized LOGCAP contract support, real estate leases, base camp construction contracting, and other logistical support services.[2] At a minimum, deployed JAs at any command level should provide proactive advice on the need for proper contracting authority through a warranted contracting officer (KO).

C. Doctrine covering legal support to operations doctrine[3] provides that the JA's "contract law responsibilities include furnishing legal advice and assistance to procurement officials during all phases of the contracting process."[4] Specifically, FM 27-100 calls for JAs to provide "legal advice to the command concerning battlefield acquisition, contingency contracting, Logistics Civil Augmentation Program (LOGCAP), Acquisition and Cross-Servicing Agreements (ACSAs), . . . and overseas real estate and construction." To provide contract law support in operations, JAs with contract law experience or training should be assigned to division and corps level main and rear command posts or to the command level that will have the assigned contingency contracting element headquarters. Depending on mission requirements, command structure, and the dollar value and/or complexity of contracting actions, contract law support may be required at various command levels including brigade or battalion.[5]

D. Applicable Law During a Deployment. Contracting during a deployment involves two main bodies of law: international law, and U.S. contract and fiscal law. Attorneys must understand the authorities and limitations imposed by these two bodies of law.

1. International Law.

a. The Law of War—Combat. The Law of War applies during combat operations and imposes limitations, for example, on the use of prisoners of war (POW) for labor.

b. The Law of War—Occupation. The Law of War also applies during occupation, and may also be followed as a guide when no other laws clearly apply, such as in Somalia during OPERATION RESTORE HOPE.

c. International Agreements. A variety of international agreements, such as treaties and status of forces agreements (SOFA) may apply. These agreements can have substantial impact on contingency contracting by, for example, limiting the ability of foreign corporations from operating inside the local nation, placing limits and tariffs on imports, and governing the criminal and taxation jurisdiction over contractors and their personnel.

2. U.S. Contract and Fiscal Law.

a. Armed Services Procurement Act of 1947, as amended. 10 U.S.C. §§ 2301-31.

b. Federal Acquisition Regulation (FAR) and Agency Supplements. FAR Part 25 and DFARS Part 225 govern foreign acquisitions. New FAR Part 18 provides a listing of the various FAR provisions allowing expedient and relaxed procedures that may be useful in a contingency situation. Also, the agency supplement manuals listed in the reference section of this chapter provide a basic guide to contingency contracting and a general overview of government acquisition.

c. Fiscal Law. Title 31, U.S. Code; DoD Financial Management Reg (DoD 7000.14-R); DFAS-IN 37-1; DFAS Manual 37-100-XX (XX= current FY).

d. Executive Orders and Declarations.

E. Wartime Funding. Congressional declarations of war and similar resolutions may result in subsequent legislation authorizing the President and heads of military departments to expend appropriated funds to prosecute the war as they see fit. However, recent military operations (Bosnia, Haiti, Somalia, Desert Shield/Desert Storm,

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[2] *See generally* various lessons learned publications from the Center for Legal and Military Operations (CLAMO), The Judge Advocate General's Legal Center and School, Charlottesville, Virginia.

[3] U.S. DEP'T OF ARMY, FIELD MANUAL 27-100, LEGAL SUPPORT TO OPERATIONS (1 Mar. 2000).

[4] *Id.* at para. 3.6.

[5] *Id.*

Panama, Grenada, OEF/OIF) were not declared "wars" and thus the standard rules and laws, and those passed addressing the specific military operation, have applied.

F. Wartime Contract Law. During a national emergency declared by Congress or the President and for six months after the termination thereof, the President and his delegees may initiate or amend contracts notwithstanding any other provision of law whenever it is deemed necessary to facilitate the national defense. (Pub. L. No. 85-804, *codified a*t 50 U.S.C. § 1431-1435; Executive Order 10789 (14 Nov. 1958); FAR Part 50; DFARS Part 250; AFARS Part 5150). These powers are broad, but the statute and implementing regulations contain a number of limitations. For example, these powers do not include waiving the requirement for full and open competition, and the authority to obligate funds in excess of $50,000 may not be delegated lower than the Army Secretariat. Because of the limitations, this authority is rarely used. Although these are broad powers, Congress still must provide the money to pay for obligations incurred under this authority.

II. PREPARATION FOR DEPLOYMENT CONTRACTING

A. General Considerations. Recent operations have demonstrated the need to begin planning early for contracting during a deployment.

1. Identify and ensure training of necessary contracting personnel. Units must develop plans for contracting personnel/teams to deploy with the organization. Units must realize that assets for contracting normally will come from their organic resources. Some of these individuals are identified and discussed below. Judge Advocates should take the lead in pushing deployment contracting preparation. The contracting element generally consists of contracting officers (KOs), field ordering officers (FOOs), legal and other support personnel.

2. Judge Advocates must review any existing CONPLANS or OPLANS, paying particular attention to the acquisition and/or contracting appendices. Push for contracting assets to be among the first to deploy in the order of march. Determine whether any Reserve contracting assets will be available, and the procedures and authority to request such contracting support. An acquisition review board should be established in any major deployment.[6] In a joint setting, these boards are referred to as Joint Acquisition Review Boards or JARBs.

3. Establish contact with overseas and higher level points of contact. If the deployment is not the first deployment to the area, establish early contact with counterparts already in theater accomplishing contracting actions. Regardless of the existence of any prior deployment to the area, establish contact with higher headquarters contracting activities.

4. Review theater policies and procedures. The Unified Command, Joint Task Force, MACOM, or Combatant Command controlling the deployment will set policy and procedure affecting contracting plans. Coordinate with the controlling headquarters to receive these policies and procedures for review and to determine any pre-deployment requirements that must be met.

B. Deployment Contracting Personnel. Contracting authority runs from the Secretary of Defense to the Heads of Contracting Activities (HCA). The HCA appoints a principal assistant responsible for contracting (PARC). The PARC warrants KOs at various levels and with varying levels of authority. The chief of a contracting office, a KO, may appoint field ordering officers (FOOs) to conduct relatively low dollar value purchases. FOOs are authorized to obligate the government to pay for goods or services in accordance with their appointment letters, but FOOs do not normally handle money. Finance soldiers, known as Class A agents or paying agents, handle money and pay merchants for purchases made by the FOOs.

1. Head of Contracting Activity (HCA). A General Officer or equivalent senior civilian grade who provides overall contracting guidance. The HCA, acting under appointment by the Assistant Secretary of the Army (Acquisition, Logistics, and Technology), serves as the approving authority for contracting as stipulated in regulatory contracting guidance. DoD Contracting Activities are listed in the DFARS, and include Forces Command, U.S. Army Europe, U.S. Army Pacific, and other major commands. Currently for Iraq and Afghanistan, the commanding general of the Joint Contracting Command – Iraq/Afghanistan (JCC-I/A) is also the HCA. FM 100-10-2.

[6] Ensure that the G-4/J-4 for the operation reviews and approves requirements, to avoid purchases better filled through the supply system. AFARS Manual No. 2, para. 2-3.

2. Principal Assistant Responsible for Contracting (PARC). A special staff officer, appointed by the HCA, who serves as the senior Army contracting advisor responsible for planning and managing all Army contracting functions for the MACOM or theater. All Army contracting authority in a theater flows from the HCA to the PARC. PARCs appoint KOs by issuing an SF1042 (warrant) that specifies the limits of the individual KO's authority to obligate the U.S. Government. FM 100-10-2.

3. Theater Warfighting PARC (also referred to as warfighting PARCs). The Army PARC and senior contracting official supporting the Army Component headquarters of a Unified or Specified Command. All Army contracting authority in a theater flows from the HCA through the PARC to individual KOs. All Army contingency contracting personnel operate under the operational control (OPCON) of the cognizant warfighting PARC when operating within that PARC's theater, or a mission area of responsibility (AOR) within that theater. The warfighting PARC's functional control of all Army contracting in their theater requires all contracting personnel from any Army agency or supporting command to coordinate their activities with that PARC, usually through the Combatant Commander's acquisition review board (ARB), and to follow the PARC's contracting support plan (CSP) when procuring goods or services within the theater. The warfighting PARC publishes as CSP as part of every theater OPLAN or CONPLAN. When the Combatant Commander designates the Army as the Executive Agent for contracting, the warfighting PARC integrates the operations of contingency contracting personnel from all Services by means of the CSP. FM 100-10-2.

4. **Contracting Officer (KO).** Only contracting officers and their authorized representatives (e.g., FOOs) may obligate government funds. Contracting Officers award, administer, and terminate contracts, and make determinations and findings permitted by statute and regulation. FAR 1.602-1. Division-level units will have at least one KO, although contracting assets may be centralized during larger contingency operations (e.g., Joint Contracting Command - Iraq/Afghanistan (JCC-IA)). A KO specializing in deployment contracting is referred to as a contingency contracting officer (CKO). CKOs fill a full-time billet and may be commissioned/warrant officers or noncommissioned officers. CKOs are trained to operate in austere environments and work with contractors that may have limited knowledge of U.S. Government contracting practices.

5. Contracting Officer's Representative (COR) or Contracting Officer's Technical Representative (COTR). CORs, alternatively referred to as COTRs, operate as the KO's eyes and ears regarding contract performance, and provide the key link between the command and the KO regarding the command's needs. CORs are organic members of the unit and are appointed to be a COR as an additional duty. CORs are necessary because KOs are normally not able to personally monitor contract performance. In some cases, contracts will already be in place before the unit deploys, and the KO for the contract is in CONUS. CORs are appointed by KOs, and the limits of their responsibilities are detailed in the letter of appointment. CORs do NOT exercise any contract authority and cannot take any actions that will change the contract or the government's liabilities under the contract. Their role is to monitor performance of the contract and to communicate with the contracting officer regarding the performance. Any issues with the contractor must still be resolved by the KO. The COR's appointment letter typically authorize the COR to perform inspections and to perform acceptance by the government of supplies/services receive.

6. Field Ordering Officer (FOO). The chief of the contracting office may appoint FOOs. (AFARS 5101.602-2-90). FOOs are usually not part of the contracting element, but are typically commissioned officers, warrant officers, or noncommissioned officers of the forward units. FOOs may make purchases over the counter with SF44s, may be authorized to make calls under Blanket Purchase Agreements (BPAs) established by KOs, and may be authorized to use imprest funds, subject to limitations in their appointment letters. AFARS 5101.603-1-90. FOOs may also be government purchase card holders. (AFARS 5113.2). Typical limitations are restrictions on the types of items that may be purchased and on per purchase dollar amounts. A sample appointment letter is found at (AFARS 5153.9002).

7. Paying Agents. Finance specialists hold money. When FOOs or KOs make purchases using SF44s, the merchant can present the form to the paying agent for payment. Alternatively, and most likely a necessity in an immature theater, the paying agent will accompany the FOO or KO. Once the FOO/KO completes the transactions, the paying agent will pay the merchant. Predeployment coordination with finance to determine who the paying agents are and where they will be located will aid the deployed contracting process. Paying agents may not be FOOs.

C. Pre-Deployment Funding Arrangements.

1. Certified Funding. A deployable unit should coordinate to have funds certified as available in bulk to support deployment purchases. The finance officer should provide a bulk funded DA Form 3953, Purchase Request and Commitment (PR&C), to any deploying unit.

2. Imprest Funds. Consider establishing an imprest fund in advance of deployment notification.[7] (FAR 13.305; DFARS 213.305; DoD Reg. 7000.14-R, vol. 5, paras. 020901 to 020908). An imprest fund operates like a petty cash fund; it is replenished as payments are made from it. Installation commanders may establish funds up to $10,000. The fund should include local currency if available before deployment. FAR 25.1002 requires that off-shore procurements be made with local currency, unless the contracting officer determines the use of local currency inappropriate (e.g., if a SOFA exists and it allows use of U.S. dollars). Imprest fund cashiers should receive training in their duties, liabilities, and the operation of an imprest fund prior to deployment. Authorized individuals make purchases and provide the receipts to the fund cashier.

III. CONTRACTING DURING A DEPLOYMENT

A. This section discusses various contracting methods used to acquire supplies and services. It begins with a general discussion of seeking competition, and discusses specific alternatives to acquiring supplies and services pursuant to a new contract to meet the needs of a deploying force.

B. Competition Requirements. The Competition in Contracting Act (CICA), 10 U.S.C. § 2304, requires the government to seek competition for its requirements. *See also* FAR Part 6 and Far 2.101. In general, the government must seek full and open competition by providing all responsible sources an opportunity to compete. No automatic exception is available for contracting operations during deployments.

1. For contracts awarded and performed within CONUS, the statutory requirement for full and open competition for purchases over the simplified acquisition threshold creates a 45-day minimum procurement administrative lead time (PALT), which results from a requirement to publish notice of the proposed acquisition 15 days before issuance of the solicitation (by synopsis of the contract action in the Government-wide Point of Entry (GPE)) at FedBizOpps.gov, followed by a requirement to provide a minimum of 30 days for offerors to submit bids or proposals. Three additional time periods extend the minimum 45-day PALT: 1) time needed for the unit to define the requirement and prepare the solicitation; 2) time needed for the contracting office to evaluate offers and award the contract; and 3) time needed after contract award for delivery of supplies or performance of services.

2. There are seven statutory exceptions that permit contracting without full and open competition, which are set forth in 10 U.S.C. § 2304(c) and FAR Subpart 6.3:

a. Only one responsible source and no other supplies or services will satisfy agency requirements. (FAR 6.302-1). The contracting officer may award a contract without full and open competition if the required supplies or services can only be provided by one or a limited number of sources. For example, it may be necessary to award to a particular source where that source has exclusive control of necessary raw materials or patent rights. FAR 6.302-1 provides additional examples of circumstances where use of this exception may be appropriate. This exception allows the KO to limit the competition to those sources that can meet the Government's need.

b. Unusual and compelling urgency. (FAR 6.302-2). This exception applies where the need for the supplies or services is of such an unusual or compelling urgency that delay in awarding the contract would result in serious injury to the government. Use of this exception enables the contracting officer to limit the procurement to the only firm(s) he reasonably believes can properly satisfy the requirement in the limited time available.[8] Because

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[7] Effective 1 October 1996, use of imprest funds by DoD activities in CONUS is no longer authorized. Effective 1 October 1997, use of imprest funds is not authorized OCONUS. However, the use of imprest funds is authorized for use in a contingency operations. *See* message, Under Secretary of Defense (Comptroller), Subject: Elimination of Imprest Funds (28 March 1996). See also, DoD 7000.14-R, vol. 5, ch.2, para. 0208.

[8] This exception can be particularly applicable to meet urgent critical needs relating to human safety and which affects military operations. For example, it was recently used to procure sandbags in support of Operation Iraqi Freedom (Total Industrial & Packaging Corporation, B-295434, 2005 U.S. Comp. Gen. Proc. Dec. ¶ 38 (Feb. 22, 2005)) and to procure automatic fire suppression systems for U.S. Marine Corps's light armored vehicles (Meggitt Safety Systems, Inc., B-297378, B-297378.2, 2006 U.S. Comp. Gen. LEXIS 27 (Jan. 12, 2006)). However, this exception cannot be used where the urgency was created by the agency's lack of advanced planning. 10 U.S.C. § 2304(f)(5). *See, e.g.*, WorldWide Language Resources, Inc.; SOS International Ltd., B-296984; B-296984.2; B-296984.3; B-296984.4; B-296993; B-296993.2; B-296993.3; B-296993.4., 2005 U.S. Comp. Gen. Proc. Dec. ¶ 206 (Nov. 14, 2005) (protest of December, 2004 award of sole-source contract for bilingual-bicultural advisor/subject matter experts in support of Multinational Forces-Iraq sustained where the urgency – the immediate need for the

of the urgency, the contracting officer is permitted to award the contract even before the written "Justification and Approval" (see paragraph 3 below) is completed. Similarly, the urgency requiring use of this exception can allow the contracting officer to dispense with the 15-day publication requirement. (FAR 5.202(a)(2)).

c. Industrial mobilization, engineering, developmental, or research capability; or expert services for litigation. (FAR 6.302-3). This exception is used primarily when it is necessary to keep vital facilities or suppliers in business, to prevent insufficient availability of critical supplies or skills in the event of a national emergency.

d. International agreement. (FAR 6.302-4). This exception is used where supplies or services will be used in another country, and the terms of a SOFA or other international agreement or treaty with that country specify or limit the sources. This exception also applies when the acquisition is for a foreign country who will reimburse the acquisition costs (e.g., pursuant to a foreign military sales agreement) and that country directs that the product be obtained from a particular source.

e. Authorized or required by statute. (FAR 6.302-5). Full and open competition is not required if a statute expressly authorizes or requires the agency to procure the supplies or services from a specified source, or if the need is for a brand name commercial item for authorized resale.

f. National security. (FAR 6.302-6). This exception applies if disclosure of the government's needs would compromise national security. Mere classification of specifications generally is not sufficient to restrict the competition, but it may require potential contractors to possess or qualify for appropriate security clearances. (FAR 6.302-6).

g. Public interest. (FAR 6.302-7). Full and open competition is not required if the agency head determines that it is not in the public interest for the particular acquisition. Though broadly written, this exception is rarely used because only the head of the agency can invoke it – it requires a written determination by the Secretary of Defense. (DFARS 206.302-7).

3. Use of these exceptions to full and open competition requires a "Justification and Approval" (J&A). (FAR 6.303). For the contents and format of a J&A, refer to AFARS 5106.303, 5153.9004, and 5153.9005. The approving authority is responsible for the J&A, but attorney involvement and assistance is critical to successful defense of the decision to avoid full and open competition. Limiting competition in any way invites protests of the procurement which may interrupt the procurement process. Approval levels for justifications are at FAR 6.304:

a. Actions under $500,000: the contracting officer.

b. Actions from $500,000 to $10 million: the competition advocate (FAR 6.501).

c. Actions from $10 million to $50 million: the HCA or designee.

d. Actions above $50 million: the agency acquisition executive. For the Army, this is the Assistant Secretary of the Army for Acquisition, Logistics, and Technology (ASA(ALT)).

4. The requirement for "full and open" competition does not apply to simplified acquisitions. However, even with simplified acquisitions there are still some competition requirements for procurements in excess of the micropurchase threshold, including publication requirements. *See* paragraph E (Acquisition Method – Simplified Acquisition Procedures) below for a detailed description of simplified acquisitions.

C. Acquisition Method – Sealed Bidding: award is based only on price and price-related factors, and is made to the lowest, responsive, responsible bidder. (*See*, FAR Part 14).

1. Sealed bidding procedures must be used if the four conditions enumerated in the Competition in Contracting Act exist. (10 U.S.C. § 2304(a)(2)(A); *see also, Racal Filter Technologies, Inc.*, B-240579, Dec. 4, 1990, 70 Comp. Gen. 127, 90-2 CPD ¶ 453). These four conditions, commonly known as the "Racal factors," are:

a. Time permits the solicitation, submission, and evaluation of sealed bids;

b. Award will be made only on the basis of price and price-related factors;

c. It is not necessary to conduct discussions with responding sources about their bids; and

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services prior to the January 2005 elections in Iraq – was the direct result of unreasonable actions and acquisition planning by the government 2-3 months earlier).

d. There is a reasonable expectation of receiving more than one sealed bid.

2. Use of sealed bidding results in little discretion in the selection of a source. Bids are solicited using Invitations for Bids (IFB) under procedures that do not allow for pre-bid discussions with potential sources. A clear description/understanding of the requirement is needed to avoid having to conduct discussions. Sealed bidding requires more sophisticated contractors because minor errors in preparing a bid can make the bid nonresponsive and prevent the government from accepting the offer. Only fixed-price type contracts are awarded using these procedures. Sealed bidding procedures are rarely used during active military operations in foreign countries because it is usually necessary to conduct discussions with responding offerors to ensure their understanding of, and capability to meet, U.S. requirements.

D. Acquisition Method - Negotiations (Competitive Proposals):

1. With this acquisition method, award is based on stated evaluation criteria, one of which must be cost, and is made to the responsible offeror whose proposal offers the "best value" to the government. The contracting officer informs potential offerors up front whether best value will be based upon an offeror submitting the "lowest cost, technically acceptable" solution to the government's requirement, or whether best value will be determined on a "cost-technical tradeoff" basis, which allows the government to accept a higher-priced offer if the perceived benefits of the higher-priced proposal outweigh the additional cost. The basis for award (low-cost, technically-acceptable *or* cost-technical tradeoff), and a description of all factors and major subfactors that the contracting officer will consider in making this determination, must be stated in the solicitation. (*See*, FAR Part 15).

2. Negotiations are used when the use of sealed bids is not appropriate. (10 U.S.C. § 2304(a)(2)(B)). Negotiations permit greater discretion in the selection of a source, and allow consideration of non-price factors in the evaluation of offers, such as technical capabilities of the offerors, past performance history, etc. Offers are solicited by use of a Request for Proposals (RFP). Proposals are submitted by offerors and are evaluated in the manner stated in the solicitation. Consistent with the solicitation, the contracting officer may establish a competitive range comprised of the most highly-rated proposals and conduct discussions with those offerors, after which those offerors submit revised proposals for evaluation. Award is made to the offeror whose proposal represents the best value to the government. Negotiations permit the use of any contract type.

E. Acquisition Method - Simplified Acquisition Procedures: procedures for the acquisition of supplies, non-personal services, and construction in amounts less than the simplified acquisition threshold. (*See*, FAR Part 13).

1. Normal Thresholds. Simplified acquisition procedures may be used for procurements up to the "simplified acquisition threshold" (SAT), which is normally $100,000. Simplified acquisition procedures may also be used to purchase commercial items up to an amount well above the SAT – the commercial items test program threshold is normally $5,500,000. The "micro-purchase threshold," below which purchases may be made without competition, is normally $3,000.

2. Thresholds for Contingency Operations. On October 28, 2004, Section 822 of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, amended 41 U.S.C. § 428a (Special Emergency Procurement Authority) to increase each of these thresholds for procurements in support of a contingency operation as defined in 10 U.S.C. § 101(a)(13), or to facilitate defense against or recovery from NBC or radiological attack. Presently, in a contingency operation, the thresholds are as follows:

a. Simplified acquisition threshold (SAT). For purchases supporting a contingency operation but made (or awarded and performed) inside the United States, the SAT is $250,000. For purchases supporting a contingency operation made (or awarded and performed) outside the United States, the SAT is $1,000,000. (41 U.S.C. § 428a(b)(2); FAR 2.101).

b. Micro-purchase threshold. For purchases supporting a contingency operation, but made (or awarded and performed) inside the United States, the micro-purchase threshold is $15,000. For purchases supporting a contingency operation made (or awarded and performed) outside the United States, the micro-purchase threshold is $25,000. (41 U.S.C. § 428a(b)(1); FAR 2.101).

c. Commercial items. For purchases supporting a contingency operation, simplified acquisition procedures may be used to purchase commercial item supplies and services up to $11,000,000. (41 U.S.C. § 428a(c); FAR 13.500(e)).

3. About 95% of the contracting activity conducted in a deployment setting will be simplified acquisitions. The following are various methods of making or paying for these simplified purchases. Most of these purchases can be solicited orally, except for construction projects exceeding $2,000 and complex requirements. The types of simplified acquisition procedures likely to be used during a deployment are:

a. Government Purchase Card Purchases. (FAR 13.301; DFARS 213.301; AFARS Subpart 5113.2).

b. Purchase Orders. (FAR Subpart 13.302; DFARS Subpart 213.302; AFARS Subpart 5113.302 and 5113.306 (for use of the SF 44)).

c. Blanket Purchase Agreements (BPA). (FAR Subpart 13.303; DFARS Subpart 213.303; AFARS Subpart 5113.303).

d. Imprest Fund Purchases (and accommodation checks/convenience checks). (FAR 13.305; DFARS Subpart 213.305; DOD 7000.14-R, vol. 5, ch. 2, paras. 0209 and 0210).

4. Government-wide Purchase Card (GPC). Authorized GPC holders may use the card to purchase goods and services up to the micro-purchase threshold. In a contingency operation, KOs may use the card for purchases up to the SAT. (DFARS 213.301(3)). Overseas, even if not in a designated contingency operation, authorized GPC holders may make purchases up to $25,000 for commercial items/services for use outside the United States, but not for work to be performed by workers recruited within the United States. (DFARS 213.301(2)). The GPC can also be used as a payment instrument for orders made against Federal Supply Schedule contracts, calls made against a Blanket Purchase Agreement (BPA), and orders placed against Indefinite Delivery/Indefinite Quantity (IDIQ) contracts that contain a provision authorizing payment by purchase card. (FAR 13.301(c); AFARS 5113.202(c)). Funds must be available to cover the purchases. Special training for cardholders is required. (AFARS Subpart 5113.270[sic](c)). Issuance of these cards to deploying units must be coordinated prior to deployment, because there is insufficient time to request and receive the cards once the unit receives notice of deployment. Coordination must also be made with the Head of Contracting Activity responsible for the deployed area to ensure local procedures are followed and proper funding is accomplished.

5. Purchase Orders. A purchase order is an offer to buy supplies or services, including construction. Purchase orders usually are issued only after requesting quotations from potential sources. Issuance of an order does not create a binding contract. Instead, a contract is formed when the contractor accepts the offer either in writing or by performance. In operational settings, purchase orders may be written using three different forms.

a. DD Form 1155 or SF 1449. These are multi-purpose forms which can be used as a purchase order, blanket purchase agreement, receiving/inspection report, property voucher, or public voucher. They contain some contract clauses, but users must incorporate all other applicable clauses. (FAR 13.307; DFARS 213.307; and AFARS Manual No. 2, Appendix J. *See* clause matrix in FAR Part 52). When used as a purchase order, the KO may make purchases up to the simplified acquisition threshold. Only KOs are authorized to use these forms.

b. Standard Form (SF) 44. *See* Appendix A. This is a pocket-sized form intended for over-the-counter or on-the-spot purchases. Clauses are not incorporated. Use this form for "cash and carry" type purchases. FOOs and KOs may use this form. Reserve unit commanders may use the SF 44 for purchases not exceeding the micro-purchase threshold when a Federal Mobilization Order requires unit movement to a Mobilization Station or site, or where procurement support is not readily available from a supporting installation. (FAR 13.306; DFARS 213.306; AFARS 5113.306). Conditions for use:

(1) As limited by KO's warrant or FOO's appointment letter;

(2) Away from the contracting activity;

(3) Goods or services are immediately available;

(4) One delivery, one payment.

c. FOOs may use SF 44s for purchases up to the micro-purchase threshold for supplies or services, except that purchases up to the simplified acquisition threshold may be made for aviation fuel or oil. A KO may make purchases up to the simplified acquisition threshold. (*See* DFARS 213.306(a)(1)(B)).

6. Blanket Purchase Agreements (BPA). (FAR Subpart 13.303; DFARS 213.303-5; and AFARS 5113.303). A BPA is a simplified method of filling anticipated repetitive needs for supplies or services essentially by establishing "charge account" relationships with qualified sources of supply. They are not contracts, but merely

advance agreements for future contractual undertakings. BPAs set prices, establish delivery terms, and provide other clauses so that a new contract is not required for each purchase. The government is not bound to use a particular supplier as it would be under a requirements contract. The KO negotiates firm-fixed-prices for items covered by the BPA, or attaches to the BPA a catalog with pertinent descriptions/prices.

a. BPAs are prepared and issued on DD Form 1155 or SF 1449 and must contain certain terms/conditions. (FAR 13.303-3):

(1) Description of agreement.

(2) Extent of obligation.

(3) Pricing.

(4) Purchase limitations.

(5) Notice of individuals authorized to purchase under the BPA and dollar limitation by title of position or name.

(6) Delivery ticket requirements.

(7) Invoicing requirements.

b. KOs may authorize FOOs and other individuals to place calls (orders) under BPAs. (FAR 13.303, AFARS 5113.303-2). Existence of a BPA does not *per se* justify sole-source procurements. (FAR 13.303-5(c)). Consider establishing BPAs with multiple sources. If insufficient BPAs exist, solicit additional quotations for some purchases and make awards through separate purchase orders.

7. Imprest Fund. (*See* FAR 13.305; DFARS 213.305; DoD Reg. 7000.14-R, Financial Mgmt. Reg.. vol. 5, Disbursing Policies and Procedures, paras. 020901 to 020908). An imprest fund is a cash fund of a fixed amount established by an advance of funds from a finance or disbursing officer to a duly appointed cashier. The cashier disburses funds as needed to pay for certain simplified acquisitions. Funds are advanced without charge to an appropriation, but purchases are made with notation on the receipts returned to the imprest fund cashier of the appropriation which will be used to reimburse the imprest fund for the amount of the purchase. The maximum amount in a fund at any time is $10,000, but can be increased to $100,000 during a contingency operation. (DoD 7000.14-R, vol. 5, ch. 2, para. 020903). During an overseas contingency operation as defined in 10 U.S.C. 101(a)(13) or a humanitarian or peacekeeping operation as defined in 10 U.S.C. 2302(8), imprest funds may be used for transactions at or below the micro-purchase threshold. (DFARS 213.305-3).

a. FOOs and KOs may use the imprest fund procedures. Imprest fund cashiers, however, cannot be FOOs and cannot make purchases using imprest funds. (DoD 7000.14-R, vol. 5, ch. 2, para. 020905).

b. Each purchase using imprest funds must be based on an authorized purchase requisition. If materials or services are deemed acceptable by the receiving activity, the receiver annotates the supplier's sales document and passes it to the imprest fund cashier for payment. Alternatively, the imprest fund cashier may advance cash to an authorized individual to pick up and pay for the material at the vendor's location. (*See* DoD 7000.14-R, vol. 5, ch. 2, para. 020906.B).

8. Accommodation Checks/Convenience Checks. (*See* DoD 7000.14-R, vol. 5, ch. 2, para. 0210). Commands involved in a deployment may use accommodation checks and/or GPC convenience checks in the same manner as they are used during routine operations. Checks should only be used when Electronic Funds Transfer or the use of the government purchase card is not possible. Government purchase card convenience checks may not be issued for purchases exceeding the mirco purchase threshold. (*See* DoD 7000.14-R, vol. 5, ch. 2, para. 021001.E.1).

9. Simplified Acquisition Competition Requirements. The requirement for full and open competition does not apply to simplified acquisitions. However, for simplified acquisitions *above* the micro-purchase threshold, there is still a requirement to obtain competition "to the maximum extent practicable," which ordinarily means soliciting at least 3 quotes from sources within the local trade area. (FAR 13.104(b)). For purchases *at or below* the micro-purchase threshold, there is no competition requirement at all, and obtaining just one oral quotation will suffice so long as the price is fair and reasonable. (FAR 13.202(a)(2)). Additional simplified acquisition competition considerations:

a. Micro-purchases. While there is no competition requirement, micro-purchases shall be distributed equitably among qualified sources to the extent practicable. (FAR 13.202(a)(1)). If practicable, solicit a quotation from other than the previous supplier before placing a repeat order. Oral solicitations should be used as much as possible, but a written solicitation must be used for construction requirements over $2,000. (FAR 13.106-1(d)).

b. Simplified acquisitions above the micro-purchase threshold. Because there is still a requirement to promote competition "to the maximum extent practicable," KOs may not sole-source a requirement above the micro-purchase threshold unless the need to do so is justified in writing and approved at the appropriated level. (FAR 13.501). Soliciting at least three sources is a good rule of thumb to promote competition to the maximum extent practicable. Whenever practicable, request quotes from two sources not included in the previous solicitation. (FAR 13.104(b)). You normally should also solicit the incumbent contractor. (*J. Sledge Janitorial Serv.*, B-241843, Feb. 27, 1991, 91-1 CPD ¶ 225).

c. Requirements aggregating more than the SAT or the micro-purchase threshold may not be broken down into several purchases merely to avoid procedures that apply to purchases exceeding those thresholds. (FAR 13.003(c)).

d. Publication (Notice) Requirements. Normally, contracting officers are required to publish a synopsis of proposed contract actions over $25,000 on the Government-wide point of entry (GPE) at FedBizOpps.gov. (15 U.S.C. § 637(e); 41 U.S.C. § 416(a)(1); FAR 5.101(a)(1) and FAR 5.203). For actions estimated to be between $10,000 and $25,000, public posting (displaying notice in a public place) of the proposed contract action for ten days is normally required. (15 U.S.C. § 637(e); 41 U.S.C. § 416(a)(1)(B); FAR 5.101(a)(2)). None of these notice requirements exist if the disclosure of the agency's needs would compromise national security. (15 U.S.C. § 637(g)(1)(B); 41 U.S.C. § 416(c)(1)(B); FAR 5.101(a)(2)(ii) and FAR 5.202(a)(1)). Disclosure of most needs in a deployment would not compromise national security. Still, the requirement to publish notice in FedBizOpps.gov is often not required in deployment contracting because there are other exemptions listed at FAR 5.202 that will often apply. For example, publication is not required for contracts that will be made and performed outside the United States, and for which only local sources will be solicited. (FAR 5.202(a)(12)). Accordingly, notice of proposed contract actions overseas is accomplished primarily through public posting at the local equivalent of a Chamber of Commerce, bulletin boards outside the deployed contracting office, or other locations readily accessible by the local vendor community. (*See* FAR 5.101(a)(2) & (b) and AFARS Manual No. 2, para. 4-3.e).

10. Commercial Items Acquisitions, FAR Part 12. Much of our deployment contracting involves purchases of commercial items. The KO may use any simplified acquisition method to acquire commercial items, or may use one of the other two acquisition methods (sealed bidding or negotiations). All three acquisition methods are streamlined with procuring commercial items. FAR Part 12 sets out a series of special simplified rules, to include a special form, simplified clauses, and streamlined procedures that may be used in acquiring commercial items up to $5,500,000 ($11,000,000 in a contingency operation). However, any contract for commercial items must be firm-fixed-price or fixed-price with economic price adjustment. (FAR 12.207).

F. Use of Existing Contracts to Satisfy Requirements. Existing ordering agreements, indefinite delivery contracts, and requirements contracts may be available to meet recurring requirements, such as fuel and subsistence items. Investigate existence of such contracts with contracting offices of units and activities with continuing missions in the deployment region. For example, the Navy had an existing contract for the provision of shore services to its ships in the port of Mombasa, Kenya, which was used in lieu of new contracts to provide services to air crews operating out of Mombasa during Operation Provide Relief. Some of these standing contracts are highlighted below.

1. LOGCAP. The U.S. Army Material Command (AMC) has a cost-type contract known as LOGCAP (Logistics Civil Augmentation Program), which provides for comprehensive logistics and construction support to a deployed force anywhere in the world. By using this contract to provide logistics support to a deployed force, a commander can perform a military mission with a much smaller force than might otherwise be necessary, and without developing and awarding an entirely new contract to obtain required support. (*See* AR 700-137).

2. LOGCAP is primarily designed for use where no treaties exist but can be used CONUS[9] as well as OCONUS. LOGCAP is designed to develop support for an arriving force in an austere environment to provide for basic needs such as water, sewage, electricity, etc. LOGCAP may also provide services such as force sustainment,

[9] OPERATION PROVIDE REFUGE, the housing of Kosovar Refugees at Fort Dix, NJ, May-July 1999, was supported by LOGCAP.

construction, and other general logistics support. The LOGCAP contract (and other resources) can be found at http://www.aschq.army.mil/gc/battle2.asp. The LOGCAP homepage is http://www.amc.army.mil/LOGCAP/.

3. LOGCAP is an expensive contracting tool and should be used judiciously with command oversight of requirements submitted to the LOGCAP contractor. The high costs associated with the LOGCAP contract have resulted in close scrutiny by Congress. In one report, the GAO noted that commanders were unaware of the cost ramifications for what they were doing. In Bosnia, unit commanders wanted to accelerate the base camp construction and required the contractor to fly in the plywood from the U.S. because there were insufficient supplies on the local markets. The commanders thought they would pay about $14 per sheet the plywood; instead the cost was about $86 per sheet. LOGCAP is a cost-reimbursement contract and the unit must pay transportation costs in addition to the basic supply cost. (*See* Comp. Gen. B-272659, GAO/NSIAD-97-63 Contingency Operations, Feb. 11, 1997).

4. Another option may be the Air Force Contract Augmentation Program (AFCAP). Similar to LOGCAP, AFCAP is primarily a civil engineering support contract. AFCAP can also provide limited services. AFCAP is a contract force multiplier to augment Civil Engineer and Services capabilities to support worldwide contingency planning and deployment operations principally in military operations other than war. AFCAP may also be used in base recovery operations as a result of natural disasters, accidents, or terrorist attacks. The AFCAP has been used to support a number of contingencies and was used to aid recovery efforts after Hurricane Georges struck Keesler AFB in 1998. The AFCAP homepage is: http://www.afcap.com.

5. The U.S. Navy's Contingency Construction Capabilities (CONCAP) program is similar to AFCAP. CONCAP is a Navy construction contracting program designed to provide a responsive contracting vehicle and a large civilian contractor ready to respond to contingencies or natural disasters anywhere in the world. CONCAP has been used in domestic support operations to aid recovery efforts in the wakes of Hurricanes Bertha and Fran in 1996, and Hurricanes Bonnie and Georges in 1998.

G. Alternative Methods for Fulfilling Requirements. New and existing contracts are not the only methods for meeting the needs of deployed military forces. The military supply system is the most common source of supplies and services. Cross-servicing agreements and host-nation support agreements exist with NATO, Korea, and other major U.S. allies. Similarly, under the Economy Act and other authorities, other government agencies may fill requirements for deployed forces, either from in-house resources or by contract. Finally, service secretaries retain substantial residual powers under Public Law 85-804 that may be used to meet critical requirements that cannot be fulfilled using normal contracting procedures.

1. Host nation support and cross-servicing agreements are also means of fulfilling the needs of deployed U.S. forces and are addressed in 10 U.S.C. § 2341-50; DoD Dir. 2010.9; and AR 12-1. These authorities permit acquisitions and transfers of specific categories of logistical support to take advantage of existing stocks in the supply systems of the U.S. and allied nations. Transactions may be accomplished notwithstanding certain other statutory rules related to acquisition and arms export controls. However, except during periods of active hostilities, reimbursable transactions (i.e., those where repayment in kind is not possible) are limited to a total of $150M (credit) / $200M (liability) per year for NATO and $75M (credit) / $60M (liability) per year for non-NATO allies. The usefulness of these arrangements may be limited when the host nation has not invited U.S. intervention, or when the U.S. deploys forces unilaterally.

2. Interagency Acquisitions. The Economy Act (31 U.S.C. § 1535) and several other statutes that authorize interagency transactions provide another alternative means of fulfilling requirements. An executive agency may transfer funds to another agency, and order goods and services to be provided from existing stocks or by contract. For example, the Air Force could have construction performed by the Army Corps of Engineers, and the Army might have Dep't of Energy facilities fabricate special devices for the Army. The use and procedural requirements of the Economy Act and the other authorities can be found in the *Interagency Acquisitions* chapter of the US Army Judge Advocate General's School's *Contract Attorneys Course Deskbook*. CONTRACT & FISCAL L. DEP'T, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, CONTRACT ATTORNEYS COURSE DESKBOOK. The current version of this deskbook is *available at* http://www.jagcnet.army.mil/TJAGLCS, under the link "TJAGLCS Publications." (*See also* FAR Subpart 17.5; DFARS 217.5; DFAS-IN 37-1).

3. Extraordinary contractual actions under Pubic Law 85-804 (50 U.S.C. § 1431-1435; FAR Part 50) may be taken under the broad residual authority of the SECARMY to initiate extraordinary contractual actions to facilitate national defense. Requiring activities may request that the Secretary use this authority. There are some

limitations on use of these powers. (FAR 50.203(a)). Procedures for requesting use of these powers are found in FAR Subpart 50.4, DFARS Subpart 250.4, and AFARS Subpart 5150.1. Congress still must appropriate funds needed to pay obligations incurred under this authority.

H. Leases of Real Property. The Army is authorized to lease foreign real estate for military purposes. (10 U.S.C. § 2675). Authority to lease is delegated on an individual lease basis. (AR 405-10, para. 3-3b). Billeting services are acquired by contract, not lease. True leases normally are accomplished by the Army Corps of Engineers using Contingency Real Estate Support Teams (CREST).

IV. INTERNATIONAL LAW CONSIDERATIONS IN THE ACQUISITION OF SUPPLIES AND SERVICES DURING MILITARY OPERATIONS

A. We cannot rely only on the principles of international law for the acquisition of supplies and services to support military operations. Limitations under international law make it imperative that we normally acquire supplies and services using U.S. acquisition laws. Nevertheless, battlefield acquisition techniques (confiscation, seizure, and requisition) may prove a valuable means of supporting some of the needs of a deployed force when active combat or actual occupation of hostile territory occurs.

B. U.S. Rights and Obligations Under International Law Relating to Battlefield Procurement of Goods.

1. The law of land warfare regulates the taking and use of property by military forces. The rights and obligations of military forces vary depending on the ownership of the property, the type of property, and whether the taking occurs on the battlefield or under military occupation. Certain categories of property are completely protected from military action (e.g., historic monuments, museums, and scientific, artistic, and cultural institutions).

2. *Acquisition of Enemy Property in Combat.*

a. **Confiscation** is the permanent taking or destruction of enemy *public* property found on the battlefield. (Hauge IV, art. 23(g) and 53; FM 27-10 paras. 59, 393-424). When required by military necessity, confiscated property becomes the property of the capturing state. The concept of state ownership includes the requirement to preserve property. Confiscation is a taking without compensation to the owner. Thus, a commander may acquire the supplies of an enemy armed force and its government. Public buildings may also be used for military purposes. When military necessity requires it, if ownership is not known, a commander may treat the property as public property until ownership is determined.

b. **Seizure** is the temporary taking of private or state property. When the use of private real property on the battlefield is required by military necessity, military forces may temporarily use it without compensation. (Use of private real property is discouraged; try to use public real property [firehouses or abandoned palaces make excellent CPs]. Anything other than a transient use of private real property will require a lease [typically retroactive] concluded by the Corps of Engineers.) Private personal property, if taken, must be returned when no longer required, or else the user must compensate the owner. (Hauge IV, art. 53; FM 27-10, para. 406-10). Examples of property which might be seized include arms and ammunition in contractor factories; radio, TV, and other communication equipment and facilities; construction equipment; privately owned vehicles, aircraft, ships, etc.

c. To the maximum extent possible, avoid seizing private property. Use enemy public (government or military) property instead. If private property must be seized, give a receipt for the property, if possible, and record the condition of the property and the circumstances of seizure. Units should produce duplicate forms for this purpose, not only to document the seizure, but to notify operators and logisticians of the availability of the property. An example of such a form is reproduced at the end of this Chapter at Appendix B. Units likely to seize property (typically airborne and light units with few organic vehicles) should train on seizure, recordation, and reporting procedures. Vehicle seizure procedures should be in the TACSOP of such units. Marking of seized vehicles (with spray paint or marker panels) should be addressed in the TACSOP to minimize the likelihood of fratricide.

3. Acquisition of Enemy Property in Occupied Territories.

a. An occupation is the control of territory by an invading army. (Hauge IV, art. 42; FM 27-10, para. 351). Public personal property that has some military use may be confiscated without compensation. (FM 27-10, para. 403). The occupying military force may use public real property, if it has some military use or is necessary to prosecute the war. (FM 27-10, para. 401). However, no ownership rights transfer.

b. Private property capable of direct military use may be seized and used in the war effort. Users must compensate the owner at the end of the war. (FM 27-10, para. 403).

c. DoD makes a distinction between those instances in which a contractual obligation has arisen and those in which the private owner must initiate a non-contractual claim for compensation. 25 Jan. 90 memo from Deputy General Counsel (Acquisition) to ASA (RDA) (two categories of claims set forth). The first category involves products or services acquired as result of express or implied in fact contract. The second category which gives rise to potential compensation claims arises when a government representative unilaterally takes possession of the property. In both cases, an owner may have extraordinary relief available (Pub. L. 85-804). In no case, however, is relief under Pub. L. 85-804, or under any other contractual remedy, available to pay for combat damage.

d. **Requisition** is the taking of private or state property or services needed to support the occupying military force. Unlike seizure, requisition can only occur upon the order of the local commander. Users must compensate the owner as soon as possible. (FM 27-10, para. 417). The command may levy the occupied populace to support its force, i.e., pay for the requisition. Requisition is the right of the occupying force to buy from an unwilling populace. Requisitions apply to both personal and real property. It also includes services.

e. **Article 2 Threshold**. If a host nation government invites U.S. forces into its territory, the territory is not occupied, and U.S. forces have no right to take property (because the Law of War and the property rules therein have not been triggered). The Host Nation may agree to provide for some of the needs of U.S. forces that cannot be met by contracting. Examples: (1) Saudi Arabia in Operation DESERT SHIELD/STORM (1990-91), (2) Haiti in Operation UPHOLD DEMOCRACY (1994-95), and (3) Bosnia-Herzegovina, in Operation JOINT ENDEAVOR (1995-96).

C. U.S. Rights and Obligations Under International Law Relating to Battlefield Procurement of Services. The law of war also regulates use of prisoners of war (POW) and the local populace as a source of services for military forces. POWs and civilians may not be compelled to perform services of a military character or purpose.

1. *Use of POWs as Source for Services in Time of War.* POWs may be used as a source of labor; however, the work that POWs may perform is very limited. (GPW, art. 49; FM 27-10, para. 125-33). POWs may not be used as a source of labor for work of a military character or purpose. (GPW, art. 49; FM 27-10, para. 126). The regulation governing POW labor is AR 190-8, which requires a legal review (with copy to OTJAG) of proposed POW labor in case of doubt concerning whether the labor is authorized under the law of war. Note that POWs may be used to construct and support (food preparation, e.g.) POW camps.

2. *Use of Civilian Persons as Source for Services in Time of War.*

a. Civilian persons may not be compelled to work unless they are over 18, and then only on work necessary either for the needs of the army of occupation, for public utility services, or for the feeding, sheltering, clothing, transportation, or health of the population of the occupied country. (GC art. 51; FM 27-10, para. 418-24). Civilians considered protected persons may not be compelled to take part in military operations against their own country. (GC, art. 51; FM 27-10, para. 418).

b. The prohibition against forced labor in military operations precludes requisitioning the services of civilian persons upon work directly promoting the ends of war, such as construction of fortifications, entrenchments, or military airfields; or transportation of supplies/ammunition in the Area of Operations. There is no prohibition against their being employed voluntarily and paid for this work. (FM 27-10, para. 420).

3. *Practical Considerations on Use of International Law Principles for Acquisition of Supplies and Services.* The uncertainty of these principles (confiscation, seizure, and requisition) as a reliable source for the acquisition of supplies and services make them a less-preferred means of fulfilling the requirements of U.S. forces than traditional contracting methods. However, these principles do provide an expedient complement to other acquisition techniques that should not be overlooked in appropriate circumstances. Before using these acquisition techniques, however, consider the impact that takings of private property or forced labor inevitably have on the populace. Consider also the difficulty in accurately computing compensation owed if accurate records do not exist (units must set up a system for recording takings of private property in SOPs if battlefield acquisitions are anticipated).

V. POLICING THE CONTRACTING BATTLEFIELD

A. The Grenada and Panama operations spawned a large number of irregular or unauthorized procurements and other actions with procedural defects. Similar problems were also encountered in OPERATION ENDURING FREEDOM (primarily Afghanistan and surrounding area) and OPERATION IRAQI FREEDOM. As these areas of

operations matured, U.S. forces faced the problem of correcting errors made in acquisitions supporting combat units. Generally, resolution involved ratification, extraordinary contractual actions, and GAO claims procedures.

B. Ratification of Contracts Executed by Unauthorized Government Personnel. Only warranted KOs can legally bind the government in contract. However, sometimes other government officials purport to bind the government. This may occur, for example, when a commander directs a contractor to take actions. An "unauthorized commitment" is an agreement that is not binding on the government solely because it was made by someone who did not have authority to bind the government. (FAR 1.602-3).

1. Because the person making the unauthorized commitment had no authority to bind the government, the government has no obligation to pay the unauthorized commitment. However, someone with actual authority to bind the government may choose to subsequently ratify the unauthorized commitment. To get the vendor paid, the unit should obtain from the local contracting office the appropriate form with which to request ratification, typically entitled Request for Approval of Unauthorized Commitment. The person making the unauthorized commitment completes the first few parts of the Request, providing the details of the unauthorized commitment. The Request is forwarded up the chain of command for concurrence and to explain the remedial and disciplinary actions taken in response to the unauthorized commitment, then further forwarded to the contracting office for further processing.

2. Based upon the dollar amount of the unauthorized commitment, the following officials have the authority to ratify the unauthorized commitment (*See* FAR 1.602-3; AFARS 5101.602-3):

a. Up to $10,000 - Chief of Contracting Office

b. $10,000 - $100,000 – Principal Assistant Responsible for Contracting (PARC)

c. Over $100,000 – Head of Contracting Activity (HCA)

3. The above officials may ratify only when:

a. The government has received the goods or services;

b. The ratifying official has authority to obligate the U.S. now, and could have obligated the U.S. at the time of the unauthorized commitment;

c. The resulting contract would otherwise be proper (a proper contract type, a contract not prohibited by law, etc.), and adequate funds are available, were available at the time of the unauthorized commitment, and have been available continuously since that time;

d. The price is fair and reasonable.

C. Extraordinary Contractual Actions. If ratification is not appropriate, e.g., where no agreement was reached with the supplier, the taking may be compensated as an informal commitment. (FAR 50.302-3). Alternatively, the supplier may be compensated using service secretary residual powers. (FAR Subpart 50.4).

1. Requests to formalize informal commitments must be based on a request for payment made within 6 months of furnishing the goods or services, *and* it must have been impracticable to have used normal contracting procedures at the time of the commitment. (FAR 50.203(d)).

2. These procedures have been used to reimburse owners of property taken during the Korean War (AFCAB 188, 2 ECR § 16 (1966)); in the Dominican Republic (Elias Then, Dept. of Army Memorandum, 4 Aug. 1966); in Jaragua S.A., ACAB No. 1087, 10 Apr. 1968; and in Panama (Anthony Gamboa, Dep't of Army Memorandum, Jan. 1990).

D. Government Accountability Office (GAO) Claims. GAO claims procedures provide another method of settling claims[10] for which the legal authority or procedures are uncertain. The GAO has broad authority to settle claims against the U.S. (*See* 31 U.S.C. § 3702(a); Claim of Hai Tha Trung, B-215118, 64 Comp. Gen. 155 (1984)). The procedures are set forth in 4 C.F.R. Part 30, and in Title 4, GAO Policies and Procedures Manual for the Guidance of Federal Agencies. (*See also* DFAS-IN 37-1, para 090902).

[10] Quantum meruit (unjust enrichment) claims no longer go to the GAO. These claims are adjudicated before DOHA (Defense Office of Hearings and Appeals). Quantum meruit claims should be submitted to the KO and then forwarded through channels with an administrative record/file to DOHA.

1. Voluntary Creditors. Generally, government employees who make payments from private funds on behalf of the U.S. may not be reimbursed. (*See* 31 U.S.C. § 1342; Voluntary Payments—Gov't Reimbursement Liability, B-115761, 33 Comp. Gen. 20 (1953)). A limited exception to this rule may apply in cases of urgent, unforeseen emergencies. Reimbursement of Personal Expenditures by Military Member for Authorized Purchases, B-195002, May 27, 1980, 80-2 CPD ¶ 242. Circumstances authorizing reimbursement include protection of government property, Meals—Furnishing—General Rule, B-177900, 53 Comp. Gen. 71 (1973), and unforeseen impediments to completion of an urgent agency mission, Reimbursement of Personal Expenditures by Military Member for Authorized Purchases, B-195002, May 27, 1980, 80-2 CPD ¶ 242.

2. GAO claims procedures may be used to reimburse employees who have made payments which may fit within the above exceptions to the general rule. The case at 64 Comp. Gen. 155 involved a claim by a Vietnamese man that the GAO determined to be cognizable, but which was barred by a statute of limitations. The case at 33 Comp. Gen. 20 involved a person who submitted a voucher for $13.50, $9.00 of which was denied. A supervisor reimbursed that person the $9.00 out of his own pocket, and claimed that money by letter to GAO (GAO denied recovery because supervisor volunteered payment, and proper way was for person himself to file directly with GAO for $9.00). The case at 53 Comp. Gen. 71 involved a claim for the cost of providing food service to Federal Protective Services Officers; the GAO found it reimbursable on an emergency basis because the officers had to be on call to protect a federal building occupied by protesters. If the GAO believes that a meritorious claim cannot be paid because an appropriation is not available for its payment, GAO reports to Congress. (31 U.S.C. § 3702(d)). This report may form the basis for congressional private relief legislation.

E. Other Prohibitions. In addition to all the above, several general prohibitions in government contracting are more commonly encountered during contingency operations. Judge Advocates at all levels must be vigilant against these practices.

1. **Inherently Governmental Functions**. Contracts shall not be used for the performance of inherently governmental functions. (FAR 7.503(a)). The following are examples of inherently governmental functions. The list is not all inclusive. (FAR 7.503(c)).

a. Direct conduct of criminal investigations, control of prosecutions and performance of adjudicatory functions.

b. Command of military forces, especially the leadership of military personnel, or direction or control of other government employees.

c. Actions which bind the government, for example contract, policy, regulation, etc.

d. Actions that significantly affect the life, liberty or property interests of private persons.

e. Exercising ultimate control over government property or money.

2. Personal Services. Personal services *may not* be obtained by contract absent statutory authority. (FAR 37.104(b)). A personal services contract is one that, by its express terms or as administered, makes the contractor personnel appear to be, in effect, Government employees. (FAR 2.101).

a. A personal services contract is characterized by the employer-employee relationship it creates between the government and the contractor's personnel. This relationship may be created either by the contract terms or by the manner of contract performance. The key question is always: will the government exercise relatively continuous supervision and control over the contractor personnel performing the contract? (FAR 37.104).

b. The government is normally required to obtain its employees by direct hire under competitive appointment or other procedures required by civil service laws. Obtaining personal services by contract, rather than by direct hire, circumvents those laws unless Congress has specifically authorized acquisition of the services by contract. (FAR 37.104).

c. The following non-inclusive list of factors should be considered when determining whether a contract is for personal services: performance on site, principal tools and equipment furnished by the government, comparable services are performed by civil service personnel, need for the service can reasonably be expected to last beyond one year, and the inherent nature of the service reasonably requires government supervision and control. (FAR 37.104).

d. Statutory Authority. Statutory does exist for personal service contracts in a number of circumstances. One circumstance that most JAs have experienced is that of expert witnesses for courts-martial. Title 5, Section 3109 of United States Code allows agencies to acquire expert or consultant services on a temporary or intermittent basis. More applicable to contingency operations, Section 129b(d) of Title 10 allows the DoD to enter into personal services contracts outside the United States or in support of DoD intelligence or special operations missions. This authority is limited by regulation requiring the Head of Contracting Activity to approve such contracts. (DFARS 237.104(b)(iii)).

VI. CONCLUSION

Planning is critical to the success of contracting operations in an operational setting. Identification and proper training of contracting personnel before deployment is essential. In addition to understanding the basic contracting rules that will apply during U.S. military operations, JAs and contracting personnel also must know basic fiscal law principles (*See* Fiscal Law chapter of this handbook). Unauthorized commitments are easier to avoid than to correct through ratifications. Avoid them by putting contracting capability where it is needed on the battlefield. When they do occur, ensure that unauthorized commitments are detected and reported early while they are easier to correct.

APPENDIX A

SF 44

INSTRUCTIONS FOR THE USE OF THE SF 44:

Instructions are located on the inside cover of the form booklet.

1. Filling out the Form.

a. All copies of the form must be legible. To insure legibility, indelible pencil or ball-point pen should be used. SELLER'S NAME AND ADDRESS MUST BE PRINTED.

b. Items ordered will be individually listed. General descriptions such as "hardware" are not acceptable. Show discount terms.

c. Enter project reference or other identifying description in the space captioned "PURPOSE." Also, enter proper accounting information, if known.

2. Distributing Copies.

a. **Copy No. 1 (Seller's Invoice)**- Give to seller for use as the invoice or as an attachment to his commercial invoice.

b. **Copy No. 2 (Seller's Copy of the Order)**- Give to seller for use as a record of the order.

c. **Copy No. 3 (Receiving Report-Accounting Copy)**-

(1) On over-the-counter transactions where the delivery has been made, complete receiving report section and forward this copy to the proper administrative office.

(2) On other than over-the-counter transactions, forward this copy to location specified for delivery. (Upon delivery, receiving report section is to be completed and this copy then forwarded to the proper administrative office.

d. **Copy No. 4 (Memorandum Copy)**- Retain in the book, unless otherwise instructed.

3. When Paying Cash at Time of Purchase.

a. Enter the amount of cash paid and obtain seller's signature in the space provided in the seller section of Copy No. 1. If seller prefers to provide a commercial cash receipt, attach it to Copy No. 1 and check the "paid in cash" block at the bottom of the form.

b. Distribution of copies when payment is by cash is the same as described above, except that Copy No. 1 is retained by Government representative when cash payment is made. Copy No. 1 is used thereafter in accordance with agency instruction pertaining to handling receipts for cash payments.

SF 44

TOP HALF

U.S. GOVERNMENT

PURCHASE ORDER—INVOICE—VOUCHER

DATE OF ORDER | ORDER NO.

PRINT NAME AND ADDRESS OF SELLER *(Number, Street, City, and State)* ★

P
A
Y
E
E

FURNISH SUPPLIES OR SERVICES TO *(Name and address)* ★

SUPPLIES OR SERVICES	QUANTITY	UNIT PRICE	AMOUNT

AGENCY NAME AND BILLING ADDRESS ★

TOTAL

DISCOUNT TERMS

_____ % _____ DAYS

DATE INVOICE RECEIVED

P
A
Y
O
R

ORDERED BY *(Signature and title)*

SF 44

BOTTOM HALF

ORDERED BY *(Signature and title)*

PURPOSE AND ACCOUNTING DATA

PURCHASER— *To sign below for over-the-counter delivery of items*

RECEIVED BY

TITLE | DATE

SELLER— *Please read instructions on Copy 2*

☐ PAYMENT RECEIVED $ _____ | ☐ PAYMENT REQUESTED $ _____

NO FURTHER INVOICE NEED BE SUBMITTED

SELLER | DATE

BY _____
(Signature)

I certify that this account is correct and proper for payment in the amount of

$ _____

_____
(Authorized certifying officer)

DIFFERENCES

ACCOUNT VERIFIED:
CORRECT FOR

BY _____

PAID BY ☐ CASH

OR _____
(Check No.)

DATE PAID

VOUCHER NO.

* PLEASE INCLUDE **ZIP CODE**

1. SELLER'S INVOICE
(See Instructions on Copy 2)

STANDARD FORM 44a (Rev. 10-83)
PRESCRIBED BY GSA,
FAR (48 CFR) 53.213(c)

APPENDIX B

PROPERTY CONTROL RECORD BOOK

FOR USE IN DOCUMENTING THE SEIZURE OF PROPERTY ACQUIRED BY MILITARY NECESSITY

THESE ARE CONTROLLED, SERIAL-NUMBERED DOCUMENTS. USE STRICTLY IN ACCORDANCE WITH INSTRUCTIONS ON INSIDE COVER. COPIES 1 (WHITE) 2 (BLUE) AND 3 (PINK) SHALL BE DISTRIBUTED WHEN USED; COPY 4 (GREEN) SHALL REMAIN ATTACHED TO THIS BOOK AT ALL TIMES.

INSTRUCTIONS TO COMMANDERS

1. Treat civilians and their property with dignity and respect. Obey the law of war and respect the lives and property of the local population.

2. If required by military necessity, you are authorized to seize property in combat. **COMBAT OPERATIONS DO NOT GIVE YOU LICENSE TO LOOT**. Seizing private or public property for personal use or mere convenience is unlawful.

3. Use this Property Control Record to document seizure of property on the battlefield by U.S. Armed Forces. Fill out the forms completely, legibly, and accurately. Describe the property in as much detail as possible. Get photographs if you can!

4. After you have completed this form, give Copy 1 (white) to the property owner, if available. Forward Copy 2 (blue) to your battalion S-4. Copy 3 (pink) stays with the property that was seized and Copy 4 (green) remains attached to this book. Fill in the Seizure Record inside the back cover.

5. Direct questions about use of this form to the nearest Judge Advocate.

Acquisition Log

Number	Owner's Name	Date

A French Version

RECEIPT

This is a receipt for your property that has been used or taken by the Armed Forces of the United States of America. The unit commander determined that this property was essential to ensure the success of the mission or to protect the safety of the soldiers of his command. This receipt may be used to redeem your property or document any claim.

I acknowledge receipt of this document.

Name_____

Address_____

Ceci est une recette pour votre propriete qui etait utilisee' ou prise par l'Armee des 'Etats-Unis. Le commandant a determine' que cette propriete' a e'te' ne'cessaire a'assurer le suce's de la mission ou a' proteger la se'curite' des soldats de son commandement. Cette re'ception peut etre utilise pour la remboursement pour votre propie'te' Ou pour documenter quel que re'clamation

J'accuse re'ception du document.

Nom:_____

Adres:_____

DOCUMENT NO. 000221
PROPERTY CONTROL BOOK

COUNTRY _____

GRID _____ DATE _____

1. Owner's name _____

2. Owner's Address _____

3. Reason for military necessity _____
_____
_____

4. Description of property _____
_____

5. Condition of property _____

6. Remarks _____
_____
_____

Signature _____

Printed name _____

Rank _____ SSN _____

Unit _____

An Arabic Version used during Operation Iraqi Freedom

ايصال/RECEIPT

هذا هو ايصال بممتلكك التي صادرتها او استعملتها القوات المسلحة للولايات المتحدة. قرر قائد الوحدة أن هذه الامتعة كانت ضرورية للتأكد من أنه نجح في مهمته او لحماية جنوده. يمكنك تستعمل هذا الايصال لاعادة الحصول على امتعتك او لتسجيل اي طلب للتعويض. انا اعترف باستلامي هذه الوثيقة:

سم:_____

عنوان:_____

This is a receipt for your property that has been used or taken by the Armed Forces of the United States of America. The unit commander determined that this property was essential to ensure the success of the mission or to protect the safety of the soldiers of his command. This receipt may be used to redeem your property or document any claim. I acknowledge receipt of this document:

Name:_____

Address:_____

COUNTRY_____

GRID_____ DATE_____

1. Owner's name/اسم المالك_____

2. Owner's address/عنوان المالك_____

3. Reason for military necessity_____

4. Description of property_____

5. Condition of property_____

6. Remarks_____

Signature_____

Printed Name_____

Rank_____ SSN_____

Unit_____ FORM-0208-01

NOTES

NOTES

CHAPTER 19

FOREIGN AND DEPLOYMENT CLAIMS

REFERENCES

1. U.S. DEP'T OF ARMY, REG. 27-20, CLAIMS (8 Feb. 2008).
2. U.S. DEP'T OF ARMY, REG. 27-40, LITIGATION (19 Sept. 1994).
3. U.S. DEP'T OF ARMY, PAM. 27-162, CLAIMS (21 Mar. 2008).
4. USARCS Federal Tort Claims Handbook (November 2003 Web Edition).
5. JAGCNet Claims Forum.
6. JAGINST 5890.1, Administrative Processing and Consideration of Claims on Behalf of and Against the United States (17 Jan. 1991).
7. JAGINST 5800.7E, Manual of the Judge Advocate General (JAGMAN), Chapter 8 (20 June 2007).
8. U.S. DEP'T OF AIR FORCE, INSTR. 51-501, TORT CLAIMS (15 Dec. 2005).
9. U.S. DEP'T OF AIR FORCE, INSTR. 51-502, Personnel and Government Recovery Claims (1 Mar. 1997).
10. U.S. DEP'T OF DEFENSE, INSTR. 5515.08, ASSIGNMENT OF CLAIMS RESPONSIBILITY (11 Nov. 2006).
11. U.S. DEP'T OF DEFENSE, DIR. 5515.8, Single-SERVICE ASSIGNMENT OF RESPONSIBILITY FOR PROCESSING OF CLAIMS (9 June 1990). (CANCELLED)

I. INTRODUCTION

A. Most deployments, mobilizations, disaster relief operations, or routine field exercises involve the movement of large amounts of equipment and personnel. Careful planning and execution can reduce the amount of property damage or loss and personal injuries that occur during such operations. Some damage, loss and injuries are unavoidable; however, and claims will definitely result.

B. Claimants will include local residents, host nation governments, allied forces, and even U.S. service members. To ensure friendly relations with the local population and maintain the morale of our own troops, deploying Judge Advocates (JA) must be prepared to thoroughly investigate, impartially adjudicate, and promptly settle all meritorious claims.

II. SINGLE SERVICE RESPONSIBILITY

A. Department of Defense Instruction (DoDI) 5515.08, Assignment of Claims Responsibility (11 Nov. 2006)[1] assigns to each service exclusive geographical responsibility for settling tort claims against and on behalf of all of the Department of Defense (DoD). However, this Instruction can be amended by the DoD General Counsel. When processing tort claims, JAs must use the rules and regulations of the service that has single service responsibility for the country in which the claim arose.

B. The current single service responsibility assignments are listed in Appendix A. Before deploying, JAs should check with the U.S. Army Claims Service (USARCS) for the most current single service list. For JAs deploying to an area where single service responsibility has not yet been established, it may be appropriate to seek an interim assignment of responsibility from the responsible Unified or Specified Commander. This is accomplished through the command claims service responsible for the area of operations.

III. POTENTIAL CLAIMS

A. The statutes and regulations that provide relief for damages resulting from deployments often overlap. To determine the proper claims statutes and regulations to apply, always take into account the status of the claimant, as well as the location and type of incident that gave rise to the claim.

B. Although JAs may encounter some of the same types of claims while deployed as seen at their home station, most deployment claims operations will differ in several respects from those conducted in garrison. Additionally, not all "claims" for payment (for example, claims arising out of a contract) are cognizable under the military claims system.

[1] This instruction cancels DoDD 5515.8, Single-Service Assignment of Responsibility for Processing of Claims (9 June 1990).

IV. TYPES OF CLAIMS APPLICABLE DURING A DEPLOYMENT

A. Claims Cognizable Under the Federal Tort Claims Act (FTCA).[2] The FTCA provides a limited waiver of sovereign immunity for the negligent or wrongful acts or omissions of government employees acting within the scope of employment. In other words, a person who is harmed by the tortuous conduct of one of our service members or employees may file a claim. If the FTCA claim is not settled satisfactorily, the claimant may sue in Federal court. The FTCA is an exclusive remedy when applicable. However, the FTCA does not apply to tortuous conduct occurring outside the United States (OCONUS). Therefore you will not use the FTCA in most deployments, unless the deployment is within the United States (for example, U.S. based disaster relief operations).[3]

B. Claims Cognizable Under the Personnel Claims Act (PCA).[4] The PCA applies worldwide. It is limited to claims for loss, damage, or destruction of personal property of military personnel and DoD civilian employees that occur incident to service. Valid PCA claims commonly arising in deployment situations include: loss of equipment and personal items during transportation; certain losses while in garrison quarters; losses suffered in an emergency evacuation; losses due to terrorism directed against the United States; and the loss of clothing and articles worn while performing military duties. No claim may be approved under the PCA when the claimant's negligence caused the loss. Prompt payment of service members' and civilians' PCA claims is essential to maintenance of positive morale in the unit. Unit claims officers (UCO) must be prepared to comply fully with small claims procedures immediately upon arrival at the deployment or exercise site.[5]

C. Claims Cognizable Under the Military Claims Act (MCA).[6] The MCA also applies worldwide, however the claimant must be a U.S. resident in order to recover. CONUS tort claims must first be considered under the FTCA. Overseas, the MCA will apply only when the claim cannot be paid under the PCA or the Foreign Claims Act (FCA) (discussed below). These limitations generally restrict application of the MCA overseas to claims made by family members accompanying the force or by contractors and reporters during a deployment. There are two bases of liability under the MCA. The first requires damage or injury caused by an "act or omission determined to be negligent, wrongful, or otherwise involving fault of military personnel . . . acting within the scope of their employment." The second permits a form of absolute liability for damage or injury caused by "noncombat activities." "Noncombat activities" are defined as an activity "essentially military in nature, having little parallel in civilian pursuits . . . ."[7] Examples include maneuver damage caused by the administrative movement of troops and equipment to and from military operations and exercises, and military training.

D. Claims Cognizable Under the Foreign Claims Act (FCA).[8] The FCA is the most widely-used claims statute in foreign deployments. Since the FCA applies only overseas and, therefore, is not used routinely by CONUS-based claims offices, JAs and UCOs must familiarize themselves with its provisions and compile as much supporting information (*e.g.*, country law summaries) as possible before deployment. Under the FCA, meritorious claims for property losses, injury or death caused by service members or the civilian component of the U.S. forces may be settled "[t]o promote and maintain friendly relations" with the receiving state. Claims that result from "noncombat activities" or negligent or wrongful acts or omissions are also compensable.[9] Categories of claims that may not be allowed include: losses from combat; contractual matters; domestic obligations; and claims that either are not in the best interest of the U.S. to pay, or are contrary to public policy.[10]

1. Similar to the MCA, claims under the FCA may be based on either the negligent or wrongful acts or omissions of U.S. military personnel, or on the noncombat activities of U.S. forces. Unlike the MCA, however,

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[2] 28 U.S.C. §§ 2671 – 2680.

[3] For more information on disaster relief operations, *see* Noncombat Deployment Operations, *infra.*

[4] 31 U.S.C. § 3721.

[5] Under the small claims procedures set forth in AR 27-20, paras. 11-10 and 2-14, personnel claims that can be paid for $5,000 or less should be settled or paid within one working day of receipt. Although the claims officer cannot ensure payment of these claims, early coordination with the finance and accounting office and the designated Class A agent will also speed up the payment process.

[6] 10 U.S.C. § 2733.

[7] AR 27-20, Glossary, sec. II.

[8] 10 U.S.C. § 2734.

[9] AR 27-20, para. 10-3.

[10] AR 27-20, para. 10-4.

there generally is no scope of employment requirement. The only actors required to be "in scope" for the U.S. to have liability are host nation local nationals who work for the United States. The FCA allows payment of claims filed by inhabitants of foreign countries for personal injury, death, or property loss or damage caused by U.S. military personnel outside of the United States. "Inhabitants" includes receiving state and other non-U.S. nationals, and all levels of receiving state government. These are proper claimants.[11] Enemy or "unfriendly" nationals or governments, insurers and subrogees, U.S. inhabitants, and U.S. military and civilian component personnel, if in the receiving state incident to service, are improper claimants.[12]

2. FCA claims should be presented in writing to U.S. or other authorized officials within two years of accrual. Oral claims may be accepted, but they must later be reduced to writing.[13] All claims, oral or written, should state the time, place and nature of the incident; the nature and extent of damage, loss or injury; and the amount claimed. A claim must be stated in the local currency or the currency of the country of which the claimant was an inhabitant at the time of loss.[14]

3. FCA claims are investigated and adjudicated by foreign claims commissions (FCC). FCCs may have one or three members. They are usually comprised of JA claims officers, although other commissioned officers often serve as single-member commissions as well. At least two members of three-member FCCs must be JAs or claims attorneys. Regardless of their composition, proper authority must appoint FCCs.[15] The Commander of USARCS, TJAG, and DJAG are the only appointing authorities for FCCs in Afghanistan and Iraq. These appointments should take place before deployment, if possible. All legal offices subject to mobilization or deployment should identify FCC members and alternates as a part of their predeployment planning. FCCs should request permission to join the FCC restricted forum on JAGCNET, where there are invaluable training tools and guidance.

4. In adjudicating claims under the FCA, the FCC applies the law of the country in which the claim arose to determine both liability and damages. This includes the local law or custom pertaining to contributory or comparative negligence and joint tortfeasors. Payments for punitive damages, court costs, filing costs, attorneys' fees and bailment are not allowed under the FCA. Before deploying, JAs should become familiar with the application of foreign law, and should attempt to compile local law summaries for all countries in which the unit is likely to conduct operations.[16] After deployment, claims personnel may contract local attorneys for assistance, or obtain information on local law and custom from the U.S. Consulate or Embassy located in-country.[17]

5. Once the FCC issues its final decision and the claimant signs the settlement form, the FCC then certifies the claim to the local Defense Finance and Accounting Office for payment in local currency. If an FCC intends to "deny a claim, award less than the amount claimed, or recommend an award less than claimed but in excess of its authority," it must notify the claimant. This notice will give the claimant an opportunity to submit additional information for consideration before a final decision is made. When the FCC proposes an award to a claimant, it also forwards a settlement agreement that the claimant may either sign or return with a request for reconsideration.

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[11] AR 27-20, para. 10-2*a*.

[12] AR 27-20, paras. 10-4*h* and *i*.

[13] AR 27-20, para. 2-5.

[14] AR 27-20, para. 10-9*b*.

[15] In the Army, normally the USARCS Commander appoints FCCs. USARCS has developed an "off-the shelf" appointment package and can assist in the speedy appointment of FCCs. Unless otherwise limited in an appointment letter, a one-member FCC who is either a JA or a claims attorney may pay or deny claims up to $15,000. Line-officer commissioners may pay claims up to $5,000, although they have no denial authority. A three-member FCC may deny claims of any amount, and settle claims up to $50,000. Two members of a three-member FCC constitute a quorum, and decision is by majority vote. USARCS is the settlement authority for claims in excess of $50,000. The Secretary of the Army or his designee will approve payments in excess of $100,000. All payments must be in full satisfaction of the claim against the United States, and all appropriate contributions from joint tortfeasors, applicable insurance, or Article 139, UCMJ proceedings must be deducted before payment. Advance payments may be authorized in certain cases. *See* AR 27-20, paras. 10-5 to 10-9.

[16] Before deploying, Army JAs responsible for unit claims management should contact the Chief of Claims in the SJA office of the Unified Command responsible for that particular country and the USARCS Tort Claims Division, Foreign Torts Branch, Fort Meade, Maryland 20755-5360 (Commercial 301-677-7009/DSN 923-7009) for further information and guidance.

[17] Although the Army claims regulation does not specifically set out conflict of law provisions, general principles applicable to tort claims are set out in AR 27-20, para. 3-5. These principles may be used in situations where local law and custom are inapplicable because of policy reasons, or where there is a gap in local law coverage.

E. Claims Cognizable Under International Agreements (SOFA Claims).[18]

1. As a general rule, the FCA will not apply in foreign countries where the U.S. has an agreement that "provides for the settlement or adjudication and cost sharing of claims against the United States arising out of the acts or omissions of a member or civilian employee of an armed force of the United States."[19] For example, if a unit deploys to Korea, Japan, or any NATO or Partnership for Peace country, claims matters will be managed by a command claims service under provisions outlined in the applicable status of forces agreement (SOFA).[20]

2. Deployment to a SOFA country places additional pre-deployment responsibilities on JAs. First, knowledge of the claims provisions contained in the applicable SOFA is mandatory. Second, JAs must be aware of receiving state procedures for the settlement of claims. The SJA element of the deploying unit "may legitimately expect and plan for technical assistance from the servicing command claims service and should coordinate with that service prior to deployment."

F. Claims Cognizable Under the Public Vessels Act (PVA) and Suits in Admiralty Act (SAA). The PVA and SAA provide broad waivers of sovereign immunity for property damage and personal injury claims arising from maritime torts caused by an agent or employee of the government, or by a vessel or other property in the service of the government. Such claims typically arise from the negligent maintenance or operation of government vessels or aircraft. Claims may also take the form of demands for compensation for towage and salvage services, including contract salvage, rendered to a government vessel or to other property owned by the government.[21]

1. Both the PVA and SAA contain two-year statutes of limitations, which run from the date of the event upon which a claim is based. No administrative claim is required under the PVA and SAA. However, when a claim arises under the Admiralty Jurisdiction Extension Act, 46 U.S.C. app. § 740, a claim is required. Unlike FTCA claims, no particular form is needed to assert an admiralty tort claim. However, a claimant will bear the burden of providing evidence from which government liability and the full measure of damages can be determined with a reasonable degree of certainty. Filing a claim does not toll the two-year limitations period. If an admiralty tort claim is denied, a claimant's only recourse is to file suit in Federal district court within the two-year limitations period.

2. Unlike the FTCA, waiver of immunity under the PVA and SAA includes admiralty tort claims arising in international waters or in the territorial waters of a foreign country. While the PVA and SAA contain no express exceptions to their broad waivers, as does the FTCA, most Federal courts have incorporated, by implication, the discretionary function exception into the PVA/SAA.

G. Applicability of International Agreements to Admiralty Claims. Admiralty claims may or may not fall under the applicable SOFA. All personal injury or death claims arising from the operation of a U.S. government vessel or the actions of government personnel in a host country's territorial waters are adjudicated by the host country under the SOFA's claims provisions. However, property damage claims arising from the navigation or operation of a ship usually fall outside the terms of the SOFA.

1. In some instances, supplementary agreements may further modify the provisions of a SOFA. In Japan, for example, certain small fishing vessel and net damage claims were brought within the scope of SOFA adjudication by the 1960 Note Verbale to the SOFA, even for damage caused by a U.S. warship.

2. Separately, government-to-government admiralty claims for damage are waived by parties to a SOFA under the so-called "knock for knock" provisions. Even when you suspect that a knock-for-knock agreement may apply, it is still important to investigate and document all admiralty incidents and to contact your claims branch for guidance.

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[18] 10 U.S.C. § 2734a (commonly referred to as the International Agreement Claims Act).

[19] *Id*.

[20] *See* the USARCS Website, https://www.jagcnet.army.mil, click on the USARCS link on the left of the screen. A list of U.S. sending state and single-services offices can be found on the website under "Claims Resources," then "VI, Tables Listing Claims Offices Worldwide."

[21] Specific guidance on each service's settlement authority and claims processing procedures is set forth at: 10 U.S.C. § 7622 and 32 C.F.R. § 752.1-752-5 (Navy); 14 U.S.C. § 646 and 33 C.F.R. Part 25 (Coast Guard); 10 U.S.C. § 4802-4806 and 33 C.F.R. § 536.44-536.45 (Army); 10 U.S.C. § 9802 and 32 C.F.R. Part 842 (Air Force).

H. Claims Cognizable Under UN or NATO Claims Procedures. In special circumstances, U.S. personnel may be assigned to a UN or NATO headquarters unit and may cause damage or injury to a third party. In such cases, special UN or NATO claims procedures may apply, and the UN or NATO may actually pay the claim. If faced with such a situation, JAs should contact their command claims service for guidance.

I. Solatia Payments.[22] If a unit deploys to the Far East, or other parts of the world where payments in sympathy or recognition of loss are common, JAs should explore the possibility of making solatia payments to accident victims. Solatia payments are **not** claims payments. They are payments in money or in-kind to a victim or to a victim's family as an expression of sympathy or condolence. These payments are immediate and, generally, nominal. The individual or unit involved in the damage has no **legal** obligation to pay; compensation is simply offered as an expression of sympathy in accordance with local custom. Solatia payments are **not** paid from claims funds but, rather, from unit operation and maintenance (O&M) budgets. Prompt payment of solatia ensures the goodwill of local national populations, thus allowing the U.S. to maintain positive relations with the host nation. Solatia payments should not be made without prior coordination with the highest levels of command for the deployment area. On 26 November 2004, the DoD General Counsel issued an opinion that solatia is a custom in Iraq and Afghanistan.[23] Before deploying to one of these theatres, JAs should read the DoD GC's memo, which can be found in the FCC forum on JAGCNET. If solatia becomes an issue, contact USARCS for guidance. Also, this handbook's fiscal law chapter for a discussion of the Commanders' Emergency Response Program, which some units are using as solatia-like condolence payments.

J. Article 139 Claims.[24] UCMJ Article 139 authorizes collection of damages directly from a servicemember's pay for willful damage to or wrongful taking of property by military personnel acting outside the scope of their employment. During deployments, Article 139 claims are handled just as they are at the installation. The processing of these claims overseas, however, presents unique logistical challenges. Special Court-Martial Convening Authorities (SPCMCA), who function as appointing and final action authorities for Article 139 claims, may be geographically separated from the investigating officer and the reviewing claims JA. Every unit must prepare for these challenges and contingencies during pre-deployment planning.

K. Real Estate Claims. Corps of Engineers Real Property Teams (CREST) will settle the majority of claims arising from the use of real estate. These claims are based upon contract principles and are paid from O&M funds, not claims expenditure allowances.

1. Coordination and regular communication between the JA and the engineers after deployment is essential. Judge Advocates should also be aware that not all claims for damage/use of real estate are based on contract. Some are based on tort law and may be considered as claims under the FCA or MCA, such as claims for damage/use of real estate for a period of thirty days or less. If the claim is for a period of thirty-one days or more, it is normally considered a real estate claim.[25]

2. During lengthy deployments, rapid turnover of real estate officers is common. In OPERATION JOINT ENDEAVOR/GUARD/FORGE in Bosnia and Herzegovina, for instance, the Corps of Engineers rotated civilian real estate officers into the area of operations on sixty-day tours. To define responsibilities between the Engineer Real Property Team and the claims office concerning real estate in Bosnia and Herzegovina, the U.S. Army Europe (USAREUR) Judge Advocate and the USAREUR Director of Real Estate signed technical implementing guidance to the OPORD. This guidance provides overall policies and procedures to be used in processing of claims for the use of real property for which there is no lease during the operation.[26]

L. Claims Involving Non-appropriated Fund Instrumentalities (NAFI). Frequently, FCCs will receive claims involving NAFIs. Although FCCs may adjudicate such claims, the FCC will not actually pay the claimant unless the damage was "caused" by the U.S. Forces or a DoD appropriated fund employee. Therefore, the FCC should coordinate with the local manager of the NAFI prior to investigating the claim. Some NAFI managers have

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[22] *See, e.g.*, AR 27-20, paras. 10-10 and 13-13; DA PAM 27-162, paras. 10-10 and 13-13.

[23] Memorandum, Deputy General Counsel (International Affairs), Department of Defense to Chairman, Joint Chiefs of Staff, subject: Solatia (26 Nov. 2004).

[24] 10 U.S.C. § 939. *See generally*, AR 27-20 ch. 9; DA PAM 27-162 ch. 9.

[25] AR 27-20, para. 2-15m.

[26] For an example of implementing guidance for real property claims, *see* Appendix D, Enclosure 4, *infra*.

independent authority to settle small claims. For example, Army and Air Force Exchange Service store managers have authority to settle claims up to $2,500. If the NAFI has the authority, it may settle the claim. If not, the FCC will investigate and adjudicate the claim, as it would for any other FCA claim. However, instead of making payment, the FCC will forward the adjudicated claim to the NAFI for payment.

M. Affirmative Claims. An affirmative claim is a claim asserted by the United States against a tortfeasor or a tortfeasor's insurance company. If claims personnel believe the possibility exists for an affirmative claim, and they can identify a party against whom the claim can be asserted, this should be reported to the responsible claims service. In countries where the Department of the Army has single-service claims responsibility, the responsible claims service may appoint a recovery JA to assert and collect payment. Recovery JAs should keep in mind that, after assertion, they may not have the authority to terminate or settle the claim for less than the full amount. This authority may rest with the responsible claims service or higher depending on the amount of the claim. In addition, claims against foreign governmental entities have to be coordinated with USARCS and approved by TJAG.

V. PRE-DEPLOYMENT PLANNING

A. General Considerations. Many factors must be considered during pre-deployment planning. All personnel involved in the claims mission must be properly trained. Principal players must be properly appointed. International agreements with the host nation, compilations of local law, and/or other references that will impact on the claims operation, must be located. These agreements, and the application of local law to determine liability and damages under certain claims statutes, can give rise to unique ethical and conceptual challenges. All of these aspects of the claims operation must be considered.[27]

B. Training. The initial step in any successful claims operation is the establishment of education and prevention programs. The primary aspect of these programs is training. Claims JAs must ensure that all parties to the claims operation are properly trained, not only on legal requirements, but also on required military skills for potential deployed environments (*e.g.*, weapons training, vehicle licensing, combat lifesaver training, etc.). This should be an ongoing part of the daily mission, whether or not deployment is contemplated. Claims JAs, attorneys, and legal NCOs and specialists must know the procedures for serving as FCCs and Foreign Claims NCOICs, and for operating Special Claims Processing Offices. FCCs should review the training support packages in the FCC forum on JAGCNET. Claims personnel must also brief service members and UCOs on how to avoid property damage, property loss, and personal injuries. These briefings should also address procedures for documenting and reporting preexisting damage. Finally, claims personnel should ensure that Unit Claims Officers (UCO) and Maneuver Damage Claims Officers (MDCO) know and understand the proper procedures for investigating claims, compiling evidence, and completing reports and forms. Claims avoidance, reporting, and investigation procedures must be addressed long before the unit begins actual operations.

C. Appointment Orders. Principal players in deployment claims operations include UCOs, MDCOs and FCCs. Ordinarily, prior to any deployment, each company- or battalion-sized unit appoints a UCO and, depending upon the equipment and mission of the unit, an MDCO. These individuals document and investigate every incident that may result in a claim either against or on behalf of the United States. UCOs and MDCOs coordinate their investigations with either servicing JAs or FCCs. Recognition and documentation of possible claims, and initial contact with claimants, often rests with UCOs and MDCOs. They are, therefore, very important assets to the claims operation.

VI. NONCOMBAT DEPLOYMENT OPERATIONS

A. The operation of deployment claims offices varies depending upon the type and location of the mission. Flexibility, therefore, is essential. An overseas location may present language barriers and logistical challenges, such as where to locate claims offices and how to coordinate the investigation, adjudication, and payment phases of the claims process. Nevertheless, some aspects of the operations, such as the need for a cooperative environment and consistent procedures for payment and processing, remain constant.

B. Disaster Relief and CONUS Deployment Claims. Generally, when we think of deployments, we think of overseas operations in preparation for combat, peace enforcement, or peacekeeping operations. However, these are not our only deployment operations. Consider the aftermath of Hurricanes Andrew and Katrina. The military is called to react to these types of disasters both within and outside of the United States. These operations place a great

[27] *See also* Appendices C and D to this chapter.

demand on claims personnel.[28] Claims offices must have operational claims disaster plans to execute claims contingencies when called upon to compensate persons harmed by military activities that cause the disasters, as well as military disaster relief activities that cause further harm. Additionally, the Army is DoD's executive agent for tort claims arising from chemical disasters under the purview of the Chemical and Biological Defense Command, and has other significant responsibilities for the resolution of tort, maneuver damage and personnel claims arising from such disasters.

C. Logistical Support. Proper logistical planning and coordination is essential to effective deployment claims operations. During most deployments, claims processing is a complex, full-time job requiring dedication of substantial personnel and equipment assets. Claims investigators will have to travel frequently to visit areas where damages, losses, and injuries are alleged to have occurred. Depending on the security and force protection orders in effect during a given operation, claims personnel may have to deal with a variety of issues and planning factors that are not directly related to the adjudication and payment of claims. For example, claims personnel in OPERATION IRAQI FREEDOM were subject to force protection rules that prohibited them from leaving their base camps except in four-vehicle convoys with crew-served weapons. Unfortunately, many Brigade Legal Teams did not have the vehicles or weapons (*e.g.*, crew-served weapons) necessary to comply with applicable force protection orders, so extensive coordination with supported units and other staff sections was critical.

1. Claimant forms and correspondence naturally must be in the native language of the claimants to be effective. Therefore, FCCs must request a translator for initial drafting of claim forms and settlement/rejection letters. In addition, FCCs must coordinate for translator support during claims processing hours. Because translation services are in high demand during a deployment, the FCC must coordinate this support immediately upon arrival in theater.

2. Every unit's claims deployment plan must address three areas: claims investigation; payment of claims; and the projected location of the claims office. The initial steps in an effective deployment claims operation are the establishment of a central location for the receipt of claims, and publication of this location to the local population. During the early stages of a deployment, this may mean simply erecting a tent. As the operation progresses, however, it is wise to establish a more substantial and permanent facility, if possible. The G5 and Public Affairs Offices can publish the claims office's location and hours of operation. The local embassy and civil affairs personnel, if available, may also be helpful in disseminating information on the claims operation.

3. Transportation assets will be limited in any deployment. However, JAs and other claims investigators must be able to travel to claims sites. This requires the exclusive use of some type of vehicle(s). Claims personnel should be licensed and trained on how to properly operate and maintain dedicated vehicles. If claims offices are unable to procure sufficient vehicles to support their operations, they may also seek assistance in investigating claims from embassy and civil affairs personnel, as well as UCOs. Local national insurance adjusters may serve as additional sources of information and assistance in the investigation and adjudication of claims.

4. After claims personnel have adjudicated a claim, they must be able to pay it. Payment requires the presence of a Class A agent and a sufficient amount of local currency. Do not assume that finance offices will supply you with Class A agents. You may have to train unit or legal personnel to be certified to act in this capacity. Likewise, you should not assume that the Finance Office certification process is an easy one. After action reports from Iraq have related that Claims personnel received their FCC appointments and were designated as pay agents well before leaving home station. However, claims operations were still significantly delayed because after arrival into theater, the local finance offices had its own lengthy procedures for certifying pay agents. Security is always a concern. In Somalia, claimants often walked away from the claims office only to be robbed or shot to death within minutes. Still another issue is the "type" of money used to fund the operation. The money used to pay for claims filed under the FCA comes from the claims expenditure allowance. Not only must claims be paid from claims funds, they must be charged to the proper fund cite, which is tied to the payment authority for the claim (MCA, PCA, FCA, etc.). These issues must be resolved during pre-deployment planning through extensive coordination with unit comptroller personnel and higher level claims offices with claims appropriations.

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[28] In November 1998, USARCS published a Disaster Claims Handbook designed to be a stand-alone guide for use in providing claims services during a disaster. This handbook consolidates the provisions from AR 27-20, DA Pam. 27-162, and other publications that are relevant to disaster claims. It also contains additional materials and forms necessary to provide disaster claims relief, including a model disaster claims plan and suggested annexes. This handbook will be updated periodically and is available on the JAGCNet. *See* DISASTER CLAIMS HANDBOOK, U.S. Army Claims Service, November 1998, on JAGCNet for more information on disaster claims operations.

VII. COMBAT CLAIMS

A. Effect of International Agreements. Provisions in international agreements between the U.S. and host nation governments regarding claims processing and adjudication generally do not affect combat claims. Most bilateral Military Assistance Agreements to which the U.S. is a party have no claims provisions. If there is a SOFA or other agreement that addresses claims issues, it may be suspended in time of armed conflict.[29] The agreement may also exclude claims arising from "war damage." However, one option the JA should investigate is preparing an agreement under which the host nation assumes responsibility for paying all claims that result from any combat activity.[30]

B. Noncombat Claims Arising on Conventional Combat Deployments. A basic principle embodied in U.S. claims statutes is that damage resulting directly from combat activities[31] is not compensable. For example, claims resulting either from "action by an enemy" or "directly or indirectly from an act of the armed forces of the United States in combat" are not payable under the FCA.[32] Claims personnel must, however, distinguish between combat-related claims and noncombat claims that arise in a combat setting. Claims unrelated to combat activities will arise under the FCA, the MCA,[33] and the PCA.[34] Solatia[35] payments are not barred by the combat activities rule, and will commonly be based on injury or death resulting from combat activities. Real estate claims and claims under UCMJ Article 139[36] also arise in combat deployments. The JA must be prepared to process all of these claims, and a Class A agent must be present to pay claims in the local currency for FCA claims, and in U.S. dollars for PCA and MCA claims.

C. Combat Claims Arising on Conventional Combat Deployments. The combat-related claims exclusion often directly interferes with the principal goal of low intensity conflict/foreign internal defense: obtaining and maintaining the support of the local populace. Our recent combat deployments offer insight into how we can maintain the support of the local population while observing the legal restrictions on combat-related damages. Each of our substantial combat scenarios over the last thirty years has been unique. Three major deployments—Vietnam, Grenada, and Panama—provide historical precedent of the various methodologies used to deal with combat claims.

1. In Vietnam, the South Vietnamese government agreed to pay all claims generated by military units of the Republic of Vietnam, the United States, and the Free World forces.[37]

2. After OPERATION URGENT FURY in Grenada in 1983, the U.S. Department of State initiated a program to pay for combat-related death, injury, and property damage as an exception to the restrictions imposed by the combat activities exclusion.[38]

3. Following OPERATION JUST CAUSE (OJC) in Panama, the United States provided funds to the government of Panama both to stimulate the Panamanian economy and to help Panama recover from the effects of

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[29] For example, NATO SOFA Art. XV provides that, in the event of hostilities, a party may suspend the SOFA by giving 60 days notice.

[30] For example, South Vietnam had responsibility for processing and paying all combat claims generated by U.S. and "Free World forces."

[31] Combat activities are defined as "[a]ctivities resulting directly or indirectly from action by the enemy, or by the U.S. Armed Forces engaged in, or in immediate preparation for, impending armed conflict." AR 27-20,Glossary, sec. II,.

[32] 10 U.S.C. § 2734.

[33] 10 U.S.C. § 2733.

[34] 31 U.S.C. § 3721 (which provides compensation to service members for property losses due to enemy action).

[35] *See* notes 22 and 22 and accompanying text.

[36] 10 U.S.C. § 939.

[37] Dep't of the Army, Vietnam Studies, Law of War: Vietnam 1964-1073, Prugh, George S., Major General; Wash. D.C. 1975.

[38] At the conclusion of combat in Grenada, it quickly became apparent that the U.S. could not refuse to pay for combat-related damage if it wanted to maintain the support of the Grenadian citizens. With claims statutes providing no means to make such payments, the Department of State entered a Participating Agency Servicing Agreement between the U.S. Agency for Internal Development (USAID) and the USARCS that allowed for payment of combat claims. This agreement established a nonstatutory, gratuitous payment program outside of the combat activities exclusion using USAID funds. USARCS provided personnel to staff FCCs to process requests, investigate and recommend payment or denial of claims.

OJC. These funds were used for emergency needs, economic recovery, and development assistance. The U.S. also provided Panama with credit guarantees, trade benefits, and other economic assistance programs.[39]

D. Requisitions under the Law of War. The impact of lawful requisitions of private property on the battlefield is an often overlooked area of deployment claims. Under the law of war, a Soldier may requisition any type of property whenever there is a valid military necessity.[40] Although public property may be "seized" as the need arises in combat, the appropriation of private property for such purposes may result in allowable claims for damage or destruction of the property. The combat exclusion may obviate many such claims, but the U.S. may still be liable for damage or destruction of the property if it was bailed to the U.S. under either an express or implied agreement.[41] To ensure proper documentation of requisition claims, the servicing JA must implement a procedure to document and describe all requisitioned items. A system using bilingual property receipts distributed down to the UCOs might prove effective, for example.

APPENDICES

A. Single Service Claims Responsibility Assignments

B. Unit Claims Officer Deployment Guide

C. Deployment Claims Office Operation Outline

D. Sample Deployment Claims SOP

[39] This was done in Panama to support the Endara government and help to establish its legitimacy. Our mission was to support the legitimate government, not to act in place of it. The U.S. and Panama agreed to a Letter of Instruction (LOI) that established the procedures to be followed, listed categories of claims deemed not compensable, and set monetary limits for claims under the FCA that were not barred by the combat claims exclusion. These commissions proceeded to adjudicate and recommend payment on the combat-related claims, essentially using the same procedures already established for the payment of claims under the FCA and incorporating the special requirement of the LOI. $1.8 million of USAID money was made available: $200,000 to support the claims office and personnel, and the remainder to pay claims.

[40] A common example is the taking of private vehicles for tactical transportation. U.S. forces took vehicles in OPERATIONS URGENT FURY, JUST CAUSE, DESERT STORM, and OPERATION IRAQI FREEDOM. Other lawful examples would be the taking of food to feed service members who cannot be resupplied because of the tactical situation, or the billeting of service members in private dwellings if other suitable shelter is not available.

[41] AR 27-20, para. 10-3*c*(2).

APPENDIX A

SINGLE SERVICE CLAIMS RESPONSIBILITY ASSIGNMENTS

Afghanistan	Army
Albania	Army
Australia	Air Force
Austria	Army
Azores	Air Force
Bahrain	Navy
Belarus	Army
Belgium	Army
Bosnia-Herzegovina	Army
Bulgaria	Army
Canada	Air Force
Croatia	Army
Cyprus	Air Force
Czech Republic	Army
Denmark	Air Force
Djibouti	Navy
Egypt	Air Force
El Salvador	Army
Eritrea	Army
Estonia	Army
Ethiopia	Army
France	Air Force
Germany	Army
Greece	Navy
Greenland (Denmark)	Air Force
Grenada	Army
Haiti	Army
Honduras	Army
Hungary	Army
Iceland	Navy
India	Air Force
Iran	Army
Iraq	Army
Israel	Navy
Italy	Navy
Japan	Air Force
Jordan	Air Force
Kazakhstan	Air Force
Kenya	Army
Korea	Army
Kuwait	Army
Kyrgyzstan	Army
Latvia	Army
Lithuania	Army
Luxembourg	Air Force
Macedonia	Army
Marshall Islands	Army
Moldova	Army
Montenegro	Army
Morocco	Air Force
Nepal	Air Force
Netherlands	Army
Norway	Air Force
Oman	Air Force
Pakistan	Air Force
Poland	Army
Portugal	Navy
Qatar	Air Force
Romania	Army
Rwanda Refugee Crisis Area (except Kenya)	Army
Saudi Arabia	Air Force
Serbia	Army
Seychelles	Army
Slovak Republic/Slovakia	Army
Slovenia	Army
Somalia	Army
Spain	Navy
Sudan	Army
Switzerland	Army
Tajikistan	Air Force
Tunisia	Air Force
Turkey	Air Force
Turkmenistan	Air Force
Ukraine	Army
United Arab Emirates	Navy
United Kingdom	Air Force
Uzbekistan	Air Force
Vietnam (war era claims)	Navy
Yemen	Army
Yugoslavia	Army

International Agreement Claims Arising in the United States: Army

Claims Generated by United States Central Command in countries not assigned: Army

Claims Generated by United States Special Operations Command in countries not assigned: Air Force

Executive Agencies:

- Agent Orange	Air Force
- Gulf War Illness	Air Force

APPENDIX B

UNIT CLAIMS OFFICER DEPLOYMENT GUIDE

I. PURPOSE. To provide information regarding the use of Unit Claims Officers (UCO) to investigate and document claims incidents on behalf of Foreign Claims Commissions (FCC) during deployments.

II. INTRODUCTION. Any deployment of U.S. forces into a foreign country (a "receiving state") may cause damage to the personnel and property of either the U.S. or the receiving state and its inhabitants. Willful misconduct or negligent acts and omissions on the part of U.S. or receiving state personnel can cause these damages. Ordinarily, prior to deployment, each company- or battalion-sized unit appoints a UCO to investigate and document every incident that may result in a claim either against or on behalf of the United States.

III. INVESTIGATION REQUIREMENT

A. Prompt and thorough investigations will be conducted on all potential and actual claims against or in favor of the government. Information must be collected and recorded, whether favorable or adverse. The object of the investigation is to gather, with the least possible delay, the best possible evidence without accumulating excessive evidence concerning any particular fact.

B. Occasions upon which immediate investigations are required include when: non-governmental property is lost or damaged by a government employee; an actual claim is filed; a receiving state national is killed by the act or omission of a government employee; or when a competent authority so directs.

IV. APPOINTMENT PROCEDURES. Commanders appoint commissioned officers, warrant officers, noncommissioned officers or qualified civilian employees as UCOs as an additional duty. The appointment orders (Enclosure 1) should instruct the UCO to coordinate with a designated Judge Advocate or attorney who services the UCO's unit. UCOs must seek guidance from the servicing judge advocate at the beginning and before the conclusion of the investigation whenever the claim is, or may be, more than $2,500. Copies of UCO appointment orders should be forwarded to the appropriate command claims service or servicing claims activity.

V. UCO RESPONSIBILITIES

A. **Pre-deployment Prevention Program**. UCOs should coordinate with the servicing judge advocate to advise unit personnel of particular aspects of the pending deployment or the receiving state that could cause particular claims problems. Depending upon the mission and the unit, UCOs should also coordinate with the designated Maneuver Damage Control Officers (MDCOs) to ensure investigative efforts are not duplicated.

B. **Conduct of Investigations**. UCOs will conduct immediate investigations, the duration and scope of which will depend upon the circumstances of the claims incident itself. UCOs will often be required to coordinate their investigations with criminal or safety investigations, which have priority for access to incident sites and witnesses. The reports of such investigations can be extremely useful to UCOs in the completion of their own investigations. In certain cases, UCOs themselves may be doing the bulk of investigation, and are required to safeguard all evidence that may be used in subsequent litigation. To that end, UCOs should interview all possible witnesses and reduce their statements to writing, and secure police reports, statements to insurance companies, hospital records, and even newspaper accounts. It is not necessary that the statements are sworn; claims adjudications are administrative matters in which decisions are based upon a preponderance of the evidence. UCOs must consult with the servicing judge advocate before disposing of any evidence.

C. **Claims Reports**.

1. Form of the Report. In claims incidents that have, or may have, a potential value in excess of $2,500, UCOs complete DA Form 1208 and attach all available evidence for review by the responsible FCC or Affirmative Claims Authority. Insignificant or simple claims with an actual or potential value of less than $2,500 may require

only a cover memorandum explaining the attachments, if any, and the UCO's findings. The servicing judge advocate can provide guidance as to which form is better. In certain cases, such as when an AR 15-6 investigation is conducted, the claims report may be submitted on DA Form 1574 (Report of Proceedings).

2. Content of the Report. The factual circumstances surrounding the claims incident must be detailed in the claim report, regardless of the format actually used. In vehicular accidents, for example, the questions found at Enclosure 2 can be used to develop a sufficient factual basis by even an unschooled investigator. UCOs should never make findings or recommendations as to liability or the dollar value of personal injuries in the claims report. These determinations should be left to the responsible judge advocate, but the UCO may note any additional comments in a separate document to accompany the claims report. Specific instructions on how to complete the claims report (DA Form 1208) are at Enclosure 3.

ENCLOSURES

1. Unit Claims Officer Appointment Order
2. Investigator's Interview Checklist for Vehicle Accidents
3. Instructions for Completing DA Form 1208 (Report of Claims Officer)

Enclosure 1 - Unit Claims Officer Appointment Order

DEPARTMENT OF THE ARMY
HEADQUARTERS AND HEADQUARTERS COMPANY
99TH ARMORED DIVISION
UNIT 10000, APO AE 09000

ABCD-EF-HHC 1 September 2008

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Duty Appointment

1. Effective 12 September 2000, 1LT Joe Jones, Unit Mailing Address, DSN phone number, DEROS is assigned the following duty:

UNIT CLAIMS OFFICER

2. Authority: AR 27-20, para 2-3(a)(1).

3. Purpose: As indicated in the applicable directives.

4. Period: 12 September 2008 until officially released or relieved from appointment of assignment.

5. Special Instructions: This memorandum supersedes all previous appointments to this assignment. Unit claims officer will coordinate all claims investigation activities with MAJ Brown, OIC of the Bad Drecksfeld Legal Service Center.

FRED E. SMITH
CPT, AR
COMMANDING

1. **Personnel Information.**
   a. Full name.
   b. Birth date.
   c. Social security number.
   d. Unit.
   e. Home address.
   f. Permanent home address.
   g. Expiration term of service (ETS) date (ask about plans for reenlistment).
   h. Date eligible for return from overseas (DEROS) (ask about extension).
   i. Pending reassignment orders, reporting date at new installation. Get a copy of the orders and find out about the Soldier's plans.

2. **Driving experience**.
   a. When did the driver start to drive?
   b. When did the driver first obtain a driver's license?
   c. Types of driver's licenses and dates (get copies).
   d. Driver training courses, dates of instruction.
   e. Types of vehicles operated in the past for pleasure or business; add specifics on experience and training.
   f. If the driver has been awarded a wheeled vehicle military occupational specialty, find out specifics of training and experience.
   g. Accident record.
   h. Enforcement record.

3. **Vehicle involved in the accident**.
   a. How familiar was the operator with the vehicle (was it the operator's assigned vehicle or the first time the operator ever drove it)?
   b. PMCS (preventive maintenance, checks and services).
      (1) Was PMCS pulled?
      (2) Who pulled it?
      (3) Where is the PMCS checklist for that day?
      (4) If necessary, have the driver show you how PMCS was performed.
      (5) Find out who else assisted with, witnessed, or checked PMCS.
   c. Was there any problem with the vehicle (especially if the PMCS checklist is not available or does not list a defect)?
   d. Did the vehicle develop a problem after the trip started? Was this a problem that had happened before? What action was taken once the problem was recognized?

4. **The trip**.
   a. What were the driver's normal assigned duties?
   b. Was the trip part of these duties?
   c. Had the driver driven the route before or was the driver unfamiliar with the route?
      (1) How many times did the driver drive the route?
      (2) If unfamiliar with the route, what directions did the driver get or what maps were provided?
   d. Who authorized the trip?
   e. Why was the trip authorized?
   f. How long did the driver expect the trip to take?
   g. Before the driver set out on the trip, how much sleep did he or she have the night before and what did the driver do before starting? Was the driver tired or alert? This is the point to ask about alcohol and drugs (see questions in paragraph 8).
   h. Who else was in the vehicle (get full personal information)?
      (1) Why were they in the vehicle?
      (2) What did they do during the trip?
   i. Have the driver take you through the trip from start point/time to destination and then to return. Ask the driver to describe the trip as planned and then as it actually happened.
      (1) Get a map and ask the driver to show you the route on the map.

(2) If the route is not the most direct route, ask the driver to explain any deviation and to include any reasons for the deviation.
(3) Indicate any interruptions or rest stops. Determine the reason for each stop, what happened during the stop, and the duration of the stop.

5. **The accident**.
   a. If possible, visit the accident scene with the driver.
   b. If relevant (and possible), drive the route with the driver.
   c. Have the driver describe the sequence of events up to, during and after the accident.
      (1) When did the driver see the other vehicle?
      (2) What was the driver's speed at the time of the accident?
      (3) What evasive or other actions did the driver take?
      (4) Did the other driver see our vehicle?
   d. If the driver completed an accident report, ask the driver to review it and explain any omissions or errors.

6. **Injuries**.
   a. Was our driver injured?
   b. Names of other injured parties (compare with accident reports).

7. **Witnesses**.
   a. Names of any witnesses known to the driver.
   b. What did the witnesses supposedly see?
   c. Any oral statements by witnesses the driver recalls?

8. **Alcohol/Drugs**.
   a. Find out if the driver is a drinker.
   b. If the driver does drink, when was alcohol last consumed before the accident?
      (1) How much alcohol?
      (2) Types of drinks?
      (3) Was the alcohol taken with a meal?
   c. Drug use? Get specific if you suspect it.
   d. Was the driver taking medication?
      (1) Name of drug.
      (2) Get bottle if a prescription medication.
      (3) Why was the driver taking medication?
      (4) Did it affect his or her driving?
      (5) Get specifics on amount taken, when, and whether the driver had used it before.

9. **Diagrams**.
   Show the driver other accident diagrams if available and ask if they are accurate. If not, have the driver explain why.

10. **Insurance**.
    a. Consider the following insurance sources:
       (1) Automobile insurance
          (a) Injured party's own (even if injured party's vehicle was not involved).
          (b) Owner of automobile.
          (c) Driver of automobile.
       (2) Homeowner's insurance.
       (3) Property insurance.
    b. Always ask for the following information about an insurer:
       (1) Full name of company.
       (2) Address/Telephone number of insurer.
       (3) Name of adjuster/representative.
       (4) Amount of claim, date filed, and date of payment.

Enclosure 3 - Instructions for Completing DA Form 1208 (Report of Claims Officer)

PROCEDURES

DA Form 1208 (Report of Claims Officer) does not have to be typed, but it must be legible. Information on the form must be clear to claims personnel and receiving state authorities who may have to read and translate it. Unit claims officers (UCO) will complete DA Form 1208 as follows:

General Information.

Date of Report. Self-explanatory.

Headquarters. Enter designation and APO address of unit involved in the incident.

Location. Enter unit location.

1. **Accident or Incident**. Enter date, hour and place of incident in appropriate blocks.

2. **Claimants**. When available, enter claimant's name and address. If not available, leave empty, but complete the rest of the form. Claimants may file with receiving state authorities instead of UCOs or FCCs. In those instances, this report will provide the relevant information about U.S. involvement.

3. **Property and Personnel Involved**.

Government Property. Identify U.S. vehicles involved with vehicle type, bumper markings, and license plate number. Describe the condition of the military vehicle before and after the incident. If the foreign national is at fault (partially or in full) this information will aid in an affirmative claim against that person for damaging U.S. property or injuring U.S. personnel, or at least reduce U.S. liability. If available, attach photographs of damaged property.

Private Property. Provide all available information. Do not delay, however, trying to get information that is not reasonably available or information that the servicing judge advocate can get from other sources. When possible, interview claimants or foreign national(s) involved. Provide a description of the property before and after the incident. If a vehicle is involved, include the model, and license number. If available, attach photographs of damaged property.

U.S. Government Personnel. Enter name, rank or grade, position, social security number, current assignment, DEROS (if overseas), ETS date, and telephone number of U.S. personnel involved.

Civilian and Foreign Nationals. Enter names, nationalities, addresses and telephone numbers of non-U.S. Forces persons involved.

4. **Scope of Employment**. Leave blank, the servicing judge advocate or FCC will determine this.

5. **Damage to Property**. Fully describe the damage to government and private property involved. Estimate repair costs.

6. **Persons Injured or Killed**. List U.S. Forces and private persons injured or killed. If personnel were hospitalized, indicate where, how long, and transfers to other facilities. Do not delay the investigation if this information is not readily available.

7. **Witnesses**. List names, addresses, and telephone numbers of witnesses not included in block 3.

8. **Police Investigation and Trial**. Try to obtain local police reports. If authorities are reluctant to release the information, do not delay the investigation.

9. **Findings**. Fully describe the incident. Reference to police reports and witness statements (*e.g*. "See attached" statements) is not enough. The UCO must make independent findings of fact taking into account personal observation and all evidence obtained.

10. **Exhibits**. List all exhibits and attach them to the report.

11. **Recommendations**.

It is Recommended That. Leave this block blank.

Reasons for Recommendations. Leave this block blank.

UCOs will send their recommendations on a separate sheet of paper. This is because local (receiving state) law often determines payment of claims. Claimants who are not satisfied with their settlements may go to court. DA Form 1208 may be made available to the claimant and to the local court for use in the proceedings. Because UCOs are not expected to know local laws, their recommendations about whether or how much to pay on a claim may be erroneous. If they are included on DA Form 1208, they may prejudice the United States' position in court.

Claims Officer. The UCO will include his or her name, and sign and date the forms in the appropriate blocks.

12. **Action of Commanding Officer or Staff Judge Advocate**. Leave this block blank.

Forward the completed form along with all exhibits and attachments and your recommendations to the servicing claims office or FCC.

APPENDIX C

DEPLOYMENT CLAIMS OFFICE OPERATION OUTLINE

I. PURPOSE. To outline the planning factors necessary to consider during the pre-deployment and deployment/stationing phases of a deployment of U.S. forces into a foreign country (a "receiving state") in order to operate an effective foreign claims activity.

II. OVERVIEW: THE AR 27-20 SCHEME. AR 27-20, Legal Services -- Claims (8 February 2008), envisions the following general scheme for deployment claims operations:

A. Unit Claims Officers (UCO) and Maneuver Damage Control Officers (MDCO) are appointed by unit commanders and trained by unit or claims judge advocates or Foreign Claims Commissioners.

B. During the course of deployments, UCOs and MDCOs investigate claims incidents and forward potential claims files, both against and on the behalf of the U.S., to servicing judge advocates. DA Forms 1208 (Report of Claims Officer) are completed and forwarded as well, when appropriate.

C. Unit judge advocates forward potential claims files and completed DA Forms 1208 to the appropriate Foreign Claims Commission (FCC) for further processing and entry into the potential claims database.

D. Potential claims files are transferred to the active claims files system and assigned a claims file number when a claimant actually files a claim.

E. FCCs investigate actual claims, in cooperation with the UCOs, and adjudicate them. Claimants are notified of the FCC's decisions, and approved claims are processed for payment.

F. Special Claims Processing Offices (SCPO) handle the claims of members of the force or civilian component for damages to personal property.

III. PRE-DEPLOYMENT PLANNING AND TRAINING

A. Ensure that all units have UCOs, and MDCOs if necessary, appointed on orders.

B. Coordinate the training of UCOs and MDCOs in proper investigative techniques and completing accident report forms with MP personnel.

C. Coordinate the training of UCOs in compiling potential claims files and completing DA Forms 1208 with unit or claims judge advocates.

D. Train an NCO to serve as a Foreign Claims NCOIC. Foreign Claims NCOICs maintain the potential claims files and database, the actual claims files and database, and fiscal accountability. Foreign Claims NCOICs also coordinate the activities of the UCOs and MDCOs.

E. Determine force protection requirements in area of operations. Claims personnel should be licensed to drive available military vehicles, to use required weapons (including crew-served weapons), and to be combat lifesavers whenever possible.

F. To service a division-sized unit, train three judge advocates to serve as Foreign Claims Commissioners. Each can serve as a one-member commission to handle claims up to $15,000 for their respective brigades. Together, the three can serve as a three-member commission, which can handle claims up to $50,000 for the division, if necessary.

G. Secure a supply of the forms listed in appendix D for possible use by the FCC.

H. Train one judge advocate and one NCO to staff an SCPO.

IV. DEPLOYMENT PLANNING

A. **U.S. Army Claims Service (USARCS)**. Immediately upon being informed of a possible deployment, contact the Chief, Foreign Torts Branch, USARCS, Ft. Meade, MD, for current claims information and technical guidance. USARCS has the authority to constitute and appoint FCCs, and to issue fund cites to pay foreign claims. This authority may be delegated to a command claims service or to a Staff Judge Advocate, as necessary.

B. **Planning Factors**. The exact structure and operation of a deployment claims activity depends upon several factors:

1. Type and duration of deployment. Is the operation an evacuation of noncombatants from a hostile area, or will the unit be deployed to the area for a significant period of time?

2. Area to which U.S. forces will be deployed. Logistically, how close is the area to installations where U.S. forces maintain a permanent or significant presence? How isolated will the unit be?

3. Existence of stationing agreements or MOUs governing the presence of U.S. forces. Stationing agreements, like the NATO Status of Forces Agreement (SOFA), may preempt the ordinary application of U.S. foreign claims statutes and regulations. What legal status will members of the force or civilian component have in the area?

4. Single Service Responsibility (SSR). Department of Defense (DoD) Directive 5515.8 (1990) assigns SSR for claims for certain countries to particular service components. The U.S. Army, for example, is assigned Germany. Does another service component already have SSR for the area to which the unit will deploy?

5. Predominate Service Component. If SSR is not already assigned, which service will be the predominate service component, if any, in the deployment? Under DoD Directive 5515.8, the appropriate unified or specified commander may make an interim designation of SSR. In the absence of such designation, each service component will have Individual Service Responsibility (ISR) for its own claims.

V. DEPLOYMENT/STATIONING PHASE. Once the unit has begun deploying into the receiving state, the following factors need to be considered in conducting a deployment claims activity:

A. **Coordination with receiving state authorities**. It is very important to inform host nation authorities of the way in which the deployment claims activity will work. They have an interest in seeing that claims resulting from damages to their citizens and property are properly handled. If a NATO SOFA-style stationing agreement exists, for example, this interest may have significant status as a matter of international law.

B. **Coordination with Civil Military Affairs personnel**. The CMA activities can provide invaluable help in liaison with both local officials and the local population itself, as well as providing information about the local culture and customs that may have an impact on the adjudication of claims.

C. **Claims activity publicity**. Whether by means of the mass media or even by Soldiers handing out pamphlets to local nationals, the local population must be given basic information about claims procedures. This will expedite the processing of claims in general, and will help resolve meritorious claims before they become a public relations problem. Coordination with PAO and the SJA must occur before claims information is publicized. U.S. State Department officials may also wish to be consulted.

D. **Claims intake procedures**. The deployment claims activity must establish an intake procedure for foreign claims. This may be something as simple as setting aside two days a week for the receipt of claims and dissemination of claims status information to claimants. Particular forms may have to be devised to expedite and simplify the intake process.

E. **Translation capabilities**. Translators should be secured as quickly as possible to help the deployment claims activity. Translators help in the investigation of claims, the translation of intake forms and claimants' submissions, and the translation of correspondence.

F. **Local legal advice**. As interpreted by AR 27-20, local law most often determines liability and the measure of damages under the Foreign Claims Act. A local attorney is often necessary to explain local law, particularly in areas without a Western-style legal system.

G. **Security**. Physical security of the deployment claims activity includes such measures as not making the Foreign Claims Commissioner a Class A agent, and ensuring that crowd control measures are in effect on intake days. Security also includes fiscal security--checking the adjudication of claims to ensure that local organized crime elements are not trying to manipulate the claims system.

H. **Coordination with Military Intelligence personnel**. As was demonstrated in Grenada, claims offices can become very fertile ground for intelligence gathering. Military Intelligence personnel can likewise provide important information for claims investigations.

I. **Coordination with UCOs and MDCOs**. To make the claims activity run smoothly and efficiently, UCOs and MDCOs should be conducting most of the investigation of claims at their level. Because they are just on additional duty orders, and not legally trained, they must often be closely supervised to ensure that claims investigations are done properly.

J. **Coordination with Military Police personnel**. As trained investigators, MPs can provide invaluable assistance to UCOs, both in the course of actual investigations and in the compiling of reports after claims incidents. The Deployment Claims NCOIC should receive copies of the blotter on a daily basis and collect information related to potential claims against the United States.

K. **Coordination with Local Finance Offices**. Ensure that Class A agents are trained and available for claims missions. Also ensure that local currency will be available to pay claims.

L. **Coordination with Non-Governmental Organizations (NGOs) and Other Governmental Organizations (OGOs)**. Depending upon the area into which the unit deploys, it could find various international and charitable organizations already operating there. Likewise, other agencies of the U.S. government may also be operating in the area. The operation of these NGOs and OGOs may have a direct impact on a deployment claims activity. For example, many of these organizations might pay for claims (in cash or in-kind) that the FCCs cannot under the applicable statutes and regulations.

M. **Coordination with USARCS or command claims services**. Frequent coordination with USARCS or with the responsible command claims service is necessary both to ensure that funds are available to pay claims, and to maintain claims accountability. Both services also provide continuing technical oversight and logistical support.

APPENDIX D

SAMPLE DEPLOYMENT CLAIMS SOP

I. INTRODUCTION. This SOP is based upon that used by USACSEUR to handle claims under its Foreign Claims Commissions (FCCs). The actual SOP used in a deployment situation by an FCC will vary with the mission and the circumstances of the deployment.

II. UNIT CLAIMS OFFICER (UCO)/MANEUVER DAMAGE CONTROL OFFICER (MDCO) COORDINATION

A. Receive claims investigation packets from UCOs/MDCOs, including completed DA Forms 1208, Report of Claims Officer, and Maneuver/Convoy Maneuver Damage Report Forms. DA Forms 1208 need not be typed, but must be used for all but the simplest cases.

B. Register potential claims in potential claims log, both against and on behalf of the United States. On a monthly basis, forward information regarding potential claims on behalf of the U.S. to the United States Army Claims Service (USARCS) or the responsible command claims service.

C. Make a potential claims file with the investigation packets or whatever information is available.

D. Direct UCOs/MDCOs to make whatever further investigation is appropriate, or conduct further investigation yourself. In particular, seek military police reports, local police reports, trial results or relevant counseling statements, hospital logs, and even local newspaper accounts.

III. LOGGING IN CLAIMS

A. Make a notation in the potential claims database that the claim actually was received.

B. Pull the potential file and insert its materials into the new case file (on the right hand side and in reverse chronological order).

C. Staple a new chronology sheet (Enclosure 1) onto the left side of the folder.

D. Fill in the claimant's name and the amount claimed, in both local currency and converted to dollars using the exchange rate on the day the claim was filed and the day of the incident. The official exchange rate, or "peg rate," is available from the servicing finance office.

E. Annotate the claim in the actual claims log using the next available claims number. Use DA Form 1667, Claims Journal. The file number should be written on the left hand corner of the file folder using the FY; the assigned commission number; the type of claim (use "T" for in-scope tort, "N" for non-scope tort or "M" for maneuver damage); and the next available claim number. For example: 96-E99-T001.

IV. NEW CLAIM PAPERWORK

A. If an attorney represents the claimant, make sure a power of attorney (POA) is in the file, under the chronology sheet. In some deployed areas, POAs from local national claimants may not be possible, but ensure that you have sufficient documentation to verify representation. In such cases, any payment should be made directly to the claimant.

B. Prepare a certificate indicating whether the claim is in-scope or non-scope (Enclosure 2), if required by claims regime under which you are operating. A certificate is required as to the type of claim in areas where the NATO SOFA or a NATO SOFA analog applies.

C. Ensure that either SF 95 (Claim for Damage, Injury or Death) or a bilingual form patterned after USACSEUR Form 100 is properly filled out. A dual language form must note as a minimum: the time, place and nature of the incident; the nature and extent of the loss; and the amount of compensation claimed.

D. Determine whether claim is filed within the two-year statute of limitations.

E. If the tortfeasor will pay voluntarily, write "P" on the right front corner of the file.

F. If UCMJ Article 139 is to be used, write "139" on the right hand corner of the file.

G. Maintain a 30-day suspense for correspondence with claimants. Annotate correspondence on chronology sheet.

V. ADJUDICATION REVIEW

A. If the claimed amount is over your authorized payment threshold, send the completed file with any comments or recommendations up to next higher claims authority.

B. If the claimed amount is within your authority, determine the applicable claims laws and regulations, including whether you have Individual Service Responsibility (ISR) or Single Service Responsibility (SSR) for the claim under DoD Directive 5515.8.

C. Review the substantiation of causation and damages. Consult USACSEUR policy guidelines, local law and USARCS, or the responsible command claims service, if there are further questions.

D. Prepare a decision either in data sheet form (Enclosure 5) if the settlement is under $2,500, or as a seven-paragraph memorandum for denials and approvals over $2,500 (Enclosure 6).

E. For claims under $2,500, use DA Form 1668, Small Claims Certificate.

F. In cases involving non-scope misconduct by a Soldier, send either the decision memo or the data sheet to the Soldier's commander with a request for the commander to counsel the Soldier accordingly. If the Soldier chooses to voluntarily pay, document the payment on DD Form 1131, Cash Collection Voucher, and send the voucher and payment to finance using DA Form 200, Transmittal Record.

G. If the tortfeasor will not pay voluntarily, advise the commander of the possibility of UCMJ Article 139 procedures.

H. Prepare a letter to the claimant or representative in English, with a courtesy copy in the local (or third) language informing the claimant of your decision. In cases where payment will be approved, have the claimant sign the appropriate release form, DA Form 1666, Claims Settlement Agreement. In cases where claims will be denied, claimants should be so notified and given the opportunity to submit additional matters for consideration before a final decision is made.

VI. PAYMENT

A. Use SF 1034, Public Voucher, to pay the claimant. Attach DA Form 1666 (Claims Settlement Form), DA Form 1668 (Small Claims Certificate), and either the data sheet or seven-paragraph memo to the voucher, as appropriate. Send all materials to finance under DA Form 200. Also include a copy of the POA, if necessary.

B. Depending on the situation, coordinate with USARCS or a command claims service before payment to review any questions, obtain a fund cite and ensure that funds are available.

C. Coordinate with Finance to ensure that local currency is available to pay the claimant. The Foreign Claims Commissioner should arrange for a Class A agent (generally, not the Commissioner) to disburse the cash.

D. Forward a brief monthly claims report noting claims received, adjudicated and paid to USARCS or the responsible command claims service. Also include amounts paid, fund cites used, exchange rates and any other relevant information. Send all completed claims files for review and storage by USARCS or the responsible command claims service.

VII. REPORTING CLAIMS AND CLAIMS LOG

A. It is important to report the settlement of claims to the responsible claims service for a number of reasons, the foremost of which is to keep track of expenditures. Currently, deployed units are required to use the on-line database to enter their claims information. However, where there is no Internet connectivity, rely on traditional reporting methods. At a minimum, claims reports should be submitted monthly and include the following information:

1. FCA Claims:

   a. Current month.

      (1) Amount paid.

      (2) Number filed/paid/denied/transferred.

   b. Total Claims Received (during operation).

   c. Total Claims Pending Action.

   d. Total Claims Paid.

   e. Total Claims Denied.

   f. Total Claims Transferred.

   g. Total Amount Claimed in Local Currency and U.S. Dollars.

   h. Total Amount Paid in Local Currency and U.S. Dollars.

2. NATO/PFP SOFA Claims:

   a. Total Claims Received.

   b. Total Pending Action.

   c. Total Scoped.

   d. Total Claims Denied.

   e. Total Claims Transferred.

   f. Total Amount Claimed in Local Currency and U.S. Dollars.

   g. Total Amount Paid in Local Currency and U.S. Dollars.

   h. Total *Ex Gratia* claims, amount paid, and amount claimed.

B. It is also important that claims be logged. This became extremely important during Operation Joint Endeavor/Guard/Forge because of the amount of claims activity and duration of the operation. When there is a large

number of claims being adjudicated by a number of different FCCs and the FCCs subsequently change, there is high probability of losing track of claims without a standardized logging system. The responsible claims service will determine the format for logging claims. See Enclosure 8 for a sample log using Microsoft Excel during Operation Joint Endeavor/Guard/Forge. This format is available in electronic form at USARCS.

ENCLOSURES

1. Claims Chronology Sheet
2. Sample Scope Certificate
3. Request for Ex Gratia Award
4. Example Implementing Guidance for Real Property Claims
5. Foreign Claims Commission Data Sheet
6. Foreign Claims Commission Memorandum of Opinion
7. Partial Claims Settlement Agreement
8. Foreign Claims Commission Claims Log

CLAIMS CHRONOLOGY SHEET

CLAIMANT'S NAME: _____ FILE # _____

AMOUNT CLAIMED: $_____ AT:_____

DATE OF INCIDENT: _____

DATE CLAIM FILED: _____

DATE RECEIVED		SUSPENSE DATE

DEPARTMENT OF THE ARMY
U.S. ARMY CLAIMS SERVICE, EUROPE
Unit 30010, APO AE 09166-5346

AEAJ-CD-FC 15 November 2008

MEMORANDUM FOR BAD DRECKSFELD DCO

SUBJECT: Scope Certificate

_____ The act(s) or omission(s) of the member(s) or employee(s) of the U.S. forces or its civilian component was (were) done in the performance of official duty.

_____ Use of the vehicle of the U.S. forces was unauthorized.

_____ A Foreign Claims Commission will adjudicate this non-scope type of claim on receipt of your report.

_____ U.S. forces were not involved in this incident.

FOR THE CHIEF:

JOE D. SNUFFY
CPT, JA
Foreign Claims Commissioner

UNITED STATES ARMY

REQUEST FOR *EX GRATIA* AWARD

THIS FORM MUST BE FULLY COMPLETED AND SUBMITTED IN TRIPLICATE

APPLICANT Name and address:

_____
(Name in full)

_____
(Street) (City) (Zip code)

REQUESTED AMOUNT Property damage: $_____ Personal injury: $_____

Total amount claimed: $_____

INCIDENT Date: _____ Hour: _____

Place: _____

Give a detailed description of the incident. Identify all persons and property involved. Attach all supporting evidence.

_____

_____

PROPERTY DAMAGE
State name and address of owner, if other than claimant. Describe and substantiate the age and condition of the damaged property. Describe necessary repair and substantiate all costs.

_____

_____

_____

Are you entitled to recover Value-Added Tax ? Yes ( )No( )

List all insurance applicable to damaged property.

Name of Insurer _____ Policy number: _____

Dates of coverage: _____ Deductible amount: $ _____

Auto comprehensive: _____

PERSONAL INJURY -
State name and address of injured persons. Describe and substantiate nature and extent of injury and required medical treatment.

_____

_____

Specify any other source of recovery, e.g. health insurance, social insurance, workmen's compensation fund, employer, Victim Compensation Act. State nature and amount of compensation.

_____

_____

_____

WITNESSES
State names and addresses of known witnesses.

_____

_____

CERTIFICATION
I understand that the United States Government is not liable for the aforementioned damages and that any ex gratia award which may be offered is done so as a voluntary gesture of goodwill. I certify that my statements above are complete and correct to the best of my knowledge and belief and that each requested item is entirely and exclusively related to the aforementioned incident. Finally, I certify that I have not received nor am I eligible to receive any compensation or payment for those damages from any third party. I understand that any nondisclosure or fraudulent statement on my part may result in denial of my request or in reduction of any award. If an award is offered and if I accept that award, I agree that such acceptance will be in full satisfaction and final settlement of all my claims arising from that incident and that I shall have no further claim against the tortfeasor or any third party.

_____	_____	_____
Place	Date	Signature of Applicant

This guidance is based upon that used by during Operation Joint Guard/Forge to handle real property claims. The actual guidance issued in a deployment situation will vary with the mission and the circumstances of the deployment.

Technical Guidance – In Support of Operation _____:

Processing of Claims (Demands for Payment) for Rent (the Use of Real Property) for Which There is No Lease

I. REFERENCES

A. OPORD.

B. Any Previous Technical Implementing Guidance for Termination and Restoration Settlements for Properties Leased in Support of the Operation.

C. Army Regulation 27-20.

II. GENERAL

A. In general, claims are requests for compensation, normally written demands for payment, made against the United States. All claims against U.S. Forces must be received and accepted for processing by the servicing Claims Office of the servicing Staff Judge Advocate Office. The Claims Office will review each claim to determine if it includes a demand for rent.

B. Claims offices will handle claims that do not include a demand for rent of the property through the normal claims process. When the claims office receives a claim for rent (use of real property for more than 30 consecutive days) or both rent and damages to that property, the Claims Office will verify: (1) that the claimant owns the property; (2) that the U.S. Forces currently or previously occupied the property; and (3) the duration of the period during which the property was occupied by U.S. Forces.

C. If the U.S. Forces currently occupy the property or previously occupied the property for more than 30 days, the demand will be transferred to the Real Estate Contracting Officer to negotiate a lease to include a settlement in lieu of restoration for any damages from occupancy. If the Real Estate Contracting Office is unable to negotiate a reasonable lease or settlement in lieu of restoration, the claim will be transferred back to the claims office for settlement or denial through the normal claims process.

III. DETAILED IMPLEMENTING GUIDANCE

A. All real property claims must be received and accepted for processing by the servicing Claims Office or the servicing Staff Judge Advocate office. The servicing Claims Office will log all claims and assign a claim number to each claim.

B. The Claims Office will screen all claims to identify those that demand rent (use of real property) or both rent and damages to the property. A demand for rent is defined as a monetary demand for the use of real property for a continuous period of more than 30 days. A demand will not ordinarily be considered a claim for rent if it is for intermittent and/or temporary use of the property (never used by U.S. Force for more than 30 continuous days). Claims for the use of land for intermittent and or temporary use may be considered as torts.

C. When the Claims Office receives a demand of both rent and damages to that property, the Claims Office will verify the claimant's ownership of the property and that U.S. Forces currently occupy or occupied the property and

D. If the claimant owns the property and U.S. Forces currently occupy the property:

1. The claim will be transferred to the local Real Estate Contracting Officer, and the Claims Office will annotate in the log that the demand was transferred to Real Estate. At this point, the claim is no longer treated as a claim, but as a request for a lease.

2. The Real Estate Contracting Officer will verify that there is no conflicting claim of ownership or contract covering the property, and will thereafter negotiate a lease covering the entire period of anticipated occupancy. The lease may provide for a one-time payment for any period of past occupancy, and periodic or one-time payment for the remainder of the anticipated use. The Real Estate Contracting Officer will attempt to include in any negotiated lease a waiver of any future claim for restoration.

E. If the U.S Forces do not currently occupy the property, then the Claims Office will verify:

1. That the U.S. Forces actually occupied this real property and for what period; and

2. That the claimant is the owner of the property.

3. If both are established, the demand will be transferred to the local Real Estate Contracting Office, which will attempt to negotiate a lease covering the period of occupancy. The Claims Office will annotate in the log that the claim was transferred to the Real Estate Office.

4. Real Estate Contracting Officers will use their best efforts to negotiate a lease providing for a one-time payment covering both the fair market rent for the period of actual occupancy, and a settlement in lieu of any restoration for damages asserted and caused by the U.S. Forces. Real Estate Contracting Officers will notify the Claims Office when a lease is successfully negotiated so that the claim log can be annotated.

F. If the Real Estate Contracting Officer is unable to negotiate a reasonable lease/settlement for property currently or previously occupied, the claim will be transferred back to the Claims Office for settlement or denial through the normal claims process. The normal claims procedure should only be used as a last resort to settle or pay claims for rent or both rent and damage to property that cannot be resolved reasonably by the Real Estate Contracting Officer.

G. If the Claims Office settles a real property claim while a lease is pending, it will forward a copy of all investigative information and settlement documents to the appropriate Real Estate office to ensure that the claimant is not compensated twice for the same damage at the conclusion of the lease.

FOREIGN CLAIMS COMMISSION DATA SHEET

1. FCC #: _____ 2. FCC#: _____ 3. DATE REQUEST FILED: _____

4. NAME AND ADDRESS OF CLAIMANT:

_____

_____

5. NAME AND ADDRESS OF REPRESENTATIVE:

_____

_____

6. DATE AND PLACE OF INCIDENT:_____

7. AMOUNT REQUESTED: _____ 8. EQUIVALENT IN U.S. CURRENCY:_____

9. FACTS: _____

_____

_____

_____

10. LIABILITY: The request is/is not cognizable and considered meritorious.

11. VOLUNTARY RESTITUTION: A request for voluntary restitution has/has not been sent out.

12. QUANTUM: Amount requested: _____ Amount approved: _____

_____

13. ACTION: _____

14. ADJUDICATOR'S SIGNATURE/DATE: _____

15. AMOUNT ALLOWED: _____

16. EQUIVALENT IN U.S. CURRENCY: _____

17. COMMISSIONER'S SIGNATURE/DATE: _____

U.S. FOREIGN CLAIMS COMMISSION MEMORANDUM OF OPINION

1. Identifying Data.

a. Claimant:

b. Attorney:

c. Date and place of incident:

d. Amount of claim / date request filed / date request received from DCO:

e. Brief description of claim:

f. Co-cases:

2. Jurisdiction. This request is presented for consideration under the provisions of the Foreign Claims Act, 10 U.S.C. § 2734, as implemented by Chapter 10, AR 27-20. This claim was filed in a timely manner.

3. Facts. There is/is no record that any disciplinary action was taken against the Soldier. A request for voluntary restitution has not yet been sent out.

4. Legal Analysis. The claim is / is not cognizable and meritorious.

5. Damages.

a. Repair costs.

Amount requested: _____ Amount approved: _____

b. Consequential expenses.

Amount requested: _____ Amount approved: _____

These costs cannot be favorably considered since they are considered to have arisen in connection with filing the request.

6. Proposed Settlement or Action.

7. Recommendation.

The request should be compensated in the amount of _____.

8. Document and Witness List.

JOSEPH J. JONES
CPT, JA
Foreign Claims Commissioner

PARTIAL CLAIMS SETTLEMENT AGREEMENT

FILE NUMBER: _____ DATE: _____

DATE OF INCIDENT: _____ PLACE OF INCIDENT:_____

_____

Brief description of claim/incident:

_____

_____

_____

_____

_____

I (we), the claimant(s) and beneficiaries, hereby agree to accept the sum of _____ as a partial settlement for my claim against the United States Government.

Printed Name of Claimant(s) Signature of Claimant(s)

_____ _____

_____ _____

Date: _____ Address of Claimant(s)

_____

_____

TRANSLATOR: Since the claimant does not read English, I hereby certify that I read the document to the claimant before he/she signed the settlement agreement.

_____
Translator

Enclosure 8 - FCC Claims Log

CLAIM #	NAME	AREA	DATE INCIDENT	DATE FILED	AMT CLMD	AMT SETTLED	DATE PAID	REMARKS	STATUS
96-E9I-T002	"Stocar"	Bosnjaci	Dec-95-Jan-96	10-Jan-96	DM 159,383.00	DM 61,000.00	31-Oct-96	2/3 FA camped on land	**Transferred to MAJ Prescott @ USACSE**
96-E9I-T013	Mato Kovac	Gradiste	1-Jan-96	2-Apr-96	Kn 20,799.00			Camp Harmon(see #35)	
96-E9I-T016	Pero Palijan	Gradiste	1-Jan-96	10-Jan-96				Camp Harmon (see #39)	
96-E9I-T019	"Duro Dakovic"	Slavonski Brod	13-Jan-96	13-Jan-96	DM 3,350.00	Kn1,000.00	11-Jul-97	Barge Cable & anchor	**Paid $160.84**
96-E9I-T035	Josip Filipovic	Gradiste	1-Jan-96	2-Apr-96	Kn 20,799.00			Camp Harmon(see #13)	
96-E9I-T036	Martin Zivkovic	Gradiste	1-Jan-96	23-Jan-96				Camp Harmon	
96-E9I-T039	Josip Colak	Gradiste	1-Jan-96	10-Jan-96				Camp Harmon(see #16)	
96-E9I-T086	Izet Tursunovic	Gunja	6-Mar-96					48 Savska	**Brought Fwd from 96 log**
96-E9I-T127	Bono Bozic		26-Dec-95	8-May-96	DM 1,360.00			Crds for 1stBde,1st AD CA	**Denied 23-Dec-96**
96-E9I-T136	Luka Lucic	Gunja	6-Mar-96		Kn 2,000.00			6a Krleze-Property Damage	**Denied 10-Oct-96**
96-E9J-T140	"Hrvatske Ceste"	Croatia	12/95-4/96	12-Jul-96	Kn 51,633,949.00			Road Damage 30-Oct-96	**Transferred to MAJ Prescott @USACSE**
96-E9J-T141	"Feliks"	Slavonski Brod	20-Dec-95	12-Jul-96	Kn 463,590.00	Kn 116,000.00	27-Apr-97	Contract Dispute-Gravel	**Paid Kn by MAJ Prescott116,000.00**
96-E9J-T142	Roza Korac	Garesnica	12-Apr-96	12-Jul-96	Kn 2,406.00			Bridge Damage-Driveway	**Denied 10-Oct-96**
96-E9J-T145	"Electra"	Slavonski Brod	9-Apr-96	13-Jul-96	Kn 7,604.00			Traffic light pole	**Denied 10-Oct-96**
96-E9J-T153	Zeljko Kapular	Lipovljani	26-Jan-96	22-Jul-96	Kn 78,890.00	Kn 32,500.00	9-Dec-96	Vehicle Accident	**Paid $5,977.67**
96-E9J-T160	"Hrvatske Ceste"	Croatia	3-Jan-96	31-Jul-96	Kn 6,525.60	DM 925.50	28-Nov-96	IFOR hit median rail	**Paid $638.28**
96-E9J-T165	Josip Kendel	Terelino	29-Mar-96	28-Aug-96	DM 460.00	Kn 1,575.00	24-Oct-96	Vehicle Accident	**Paid $290.11**
96-E9J-T166	Nedeljko Marjanovic	Sibinj	22-Jun-96	28-Aug-96	DM 2,550.00	KN 8,925.00	17-Oct-96	Vehicle Accident	**Paid $1,628.55**
96-E9J-T167	"Ferimport"	Slavonski Brod	Jul-Aug 96	1-Sep-96	DM 9,500.00	See T037	See T037	Maneuver Damage	**See TO37**
96-E9J-T168	Ivan Stefanic	Zupanja	12-Jan-96	4-Sep-96				5 Ton hit VW Golf	**Withdrawn 24-Sep-96**
96-E9J-T169	Mirko Dominkovic	Zupanja	4-Sep-96	4-Sep-96		Kn 2,070.00	17-Oct-96	HEMMT hit VW Golf	**Paid $377.74**
96-E9J-T170	"Ferimport"	Slavonski Brod	Jul-Aug 96	5-Sep-96	DM10,050.00	See T037	See T037	Maneuver Damage	**See TO37**
96-E9J-T171	Pero Blazevic	Split	7-Jan-96	7-Sep-96	Kn 5,588.06			Vehicle Acc. IFOR &1989 Yugo	**Denied 10-Oct-96**
96-E9J-T172	Anda Miljic	Srpski Brod	May-Jun 96	10-Sep-96	DM 3,500.00	DM 300.00	16-Nov-96	Detonation damage & injury	**Paid $204.08**
96-E9J-T173	Vaso Mandalic	Srpski Brod	May-Jun 96	10-Sep-96	DM 3,500.00	DM 300.00	16-Nov-96	Detonation damage & injury	**Paid $204.08**
96-E9J-T176	Zvonko Vukojevic	Slavonski Brod	12-Aug-96	11-Sep-96	DM 2,000.00	KN 1,750.00	17-Oct-96	Equip. fell fro.trk-damg fence&clu	**Paid $319.34**
96-E9J-T177	Zoran Subota	Zagreb	15-Jan-96	3-Sep-96	Kn3,419.13	KN 2,000.00	17-Oct-96	CUCV hit Audi	**Paid $364.96**
96-E9J-T178	Narcisa Cosic	Dakovo	22-Aug-96	16-Sep-96	Kn 10,156.72	KN10,160.00	17-Oct-96	IFOR hit Ford Escort	**Paid $1,854.01**
97-E9J-T001	Adriana Curic	Slavonski Brod	30-Jul-96	1-Oct-96	Kn2,840.00			Veh. Acc. Trk.trailer w/Zastava	**Denied 9-Oct-96**

NOTES

NOTES

CHAPTER 20

ENVIRONMENTAL LAW IN OPERATIONS

REFERENCES

1. Executive Order 12114, Environmental Effects Abroad of Major Federal Actions, 44 Fed. Reg. 1957 (1979).
2. U.S. DEP'T OF DEFENSE, DIR. 6050.7, ENVIRONMENTAL EFFECTS ABROAD OF MAJOR DEPARTMENT OF DEFENSE ACTIONS (31 March 1979; certified 5 March 2004).
3. U.S. DEP'T OF DEFENSE, INSTR. 4715.5, MANAGEMENT OF ENVIRONMENTAL COMPLIANCE AT OVERSEAS INSTALLATIONS (22 Apr. 1996).
4. U.S. DEP'T OF DEFENSE, INSTR. 4715.8, ENVIRONMENTAL REMEDIATION FOR DOD ACTIVITIES OVERSEAS (2 Feb. 1998).
5. JOINT CHIEFS OF STAFF, JOINT PUB. 3-34, JOINT ENGINEER OPERATIONS (12 Feb. 2007).
6. JOINT CHIEFS OF STAFF, STAFF MANUAL 3122.03C, JOINT OPERATION PLANNING AND EXECUTION SYSTEM VOL. II: (PLANNING FORMATS AND GUIDANCE) (17 Aug. 2007).
7. U.S. DEP'T OF ARMY, REG. 200-1, ENVIRONMENTAL PROTECTION AND ENHANCEMENT (13 Dec. 2007).
8. U.S. DEP'T OF ARMY, FIELD MANUAL 3-100.4, ENVIRONMENTAL CONSIDERATIONS IN MILITARY OPERATIONS (15 June 2000; Change 1, 11 May 2001).
9. Technical Manual (TM) 3-34.489, The Soldier and the Environment (26 Oct. 2001).
10. U.S. DEP'T OF AIR FORCE, INSTR. 32-7006, ENVIRONMENTAL PROGRAMS IN FOREIGN COUNTRIES (29 Apr.1994).
11. U.S. DEP'T OF NAVY, SEC'Y OF THE NAVY INSTR. 5090.1C, ENVIRONMENTAL READINESS PROGRAM MANUAL (30 Oct. 2007).
12. U.S. MARINE CORPS, ORDER P5090.2A, ENVIRONMENTAL COMPLIANCE AND PROTECTION MANUAL (10 July 1998).

I. INTRODUCTION

A. "While complete protection of the environment will not always be possible due to its competition with other risks that the commander must assess, planning must carefully and continuously address the full range of environmental considerations in joint operations."[1] Protecting the environment is a major international, U.S., and Department of Defense (DoD) concern. The international community is increasingly vigilant in its oversight of the environmental consequences of military operations. Judge Advocates (JAs) must ensure that leaders are aware of both the rules and the importance of environmental compliance and protection. "The goal of compliance is to minimize potential adverse impacts on human health and the environment while maximizing readiness and operational effectiveness."[2] Failure to take adequate account of environmental considerations can jeopardize Soldiers' health and welfare; impede current and future operations; generate domestic and international criticism; waste operational funds to fines and penalties; produce costly litigation; limit future uses of land and resources; and result in personal liability for leaders and Soldiers. This chapter addresses environmental considerations during overseas military operations. It does not address domestic military operations for which domestic environmental laws apply. This chapter also does not address management of fixed installations overseas.[3]

B. The staff engineer generally takes the lead in planning and executing environmental operations. Every theater of operation will have a designated Environmental Executive Agent (EEA), or in the absence of an EEA, the combatant commander will serve as the DoD executive agent. The EEA acts as the regulatory authority for DoD operations in the overseas area and is responsible for publishing, interpreting, revalidating, and updating the Final Governing Standards (FGS). Identification of the EEA and establishment of a communication link to the EEA is a key element to environmental operations. Doctrine in this area has developed faster than the underlying law and policy. Field Manual 3-

[1] U.S. DEP'T OF DEFENSE, JOINT PUB. 3-34, JOINT ENGINEER OPERATIONS, app. D-1 (12 Feb. 2007) [hereinafter JOINT PUB. 3-34].

[2] *Id.*

[3] *See* U.S. DEP'T OF DEFENSE, INSTR. 4715.5, MANAGEMENT OF ENVIRONMENTAL COMPLIANCE AT OVERSEAS INSTALLATIONS, para. 2.1.4 (22 Apr. 1996) [hereinafter DoDI 4715.5].

100.4 and Joint Pub. 3-34 are critical to planning military operations. A valuable resource is the Defense Environmental Network and Information Exchange (DENIX) at www.denix.osd.mil.[4]

C. Judge Advocates must be aware of the significant role contractors play in environmental matters. Contractors will likely perform many of the environmental missions during an operation, whether under a Logistics Civilian Augmentation Program (LOGCAP) contract or another contract. Involve contract and fiscal law experts early. During the contracting process, JAs must carefully determine whether the various environmental standards and authorities apply to the particular operation. DoDI 4715.5 and the Overseas Environmental Baseline Guideline Document (OEBGD) do not apply during hostilities and contingency operations. If Annex L of the operations plan (OPLAN) or operations order (OPORD) incorporates only limited elements of the OEBGD, then full OEBGD compliance should not be required in support contracts.[5]

II. JUDGE ADVOCATE RESPONSIBILITIES

A. Judge Advocates must advise the commander and staff on environmental legal matters to include:

1. Applicable and appropriate environmental laws, regulations, treaties, international conventions, and laws of armed conflict;

2. Interpretation of the existing Status of Forces Agreement (SOFA), if any, and identify additional requirements as necessary to support a new or supplementary SOFA;

3. Completion of environmental assessment requirements and environmental baseline surveys (EBS), and processing claims involving environmental damage;

4. Preservation of historic and cultural sites, and sensitive natural areas, and

5. Legal requirements of transiting hazardous wastes for use and disposal.[6]

B. Judge Advocates will assist commanders in ensuring compliance, as far as practicable within the confines of mission accomplishment, with all applicable environmental laws and authorities as outlined in the OPLAN and OPORD, specifically, Annex L (Environmental Considerations). Judge Advocates are responsible for legal support in the development of Annex L, and must ensure consideration of appropriate and applicable domestic environmental laws, relevant country-specific FGS, the OEBGD, relevant international agreements, other operational directives, and any other environmental requirements that apply to the operation.[7] During execution, JAs must know how to analyze environmental issues and be able to provide appropriate and credible solutions to commanders. Judge Advocates also must be prepared to advise and train supported commanders and units regarding environmental aspects of overseas operations along the entire operational spectrum.

III. Environmental Planning Resources

A. As a general rule, domestic environmental statutes have no extraterritorial application during overseas operations.[8] A notable example of a domestic statute with extraterritorial application is the Marine Mammal Protection

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[4] The "international" subject area within the DoD section of DENIX contains many of the references cited in this chapter. Judge advocates must obtain a user identification and password for full access to DoD-restricted databases and should do so in advance of deployment.

[5] Telephone interview Jennifer Leonard, United States Army, Assistant Chief of Staff for Installation Management, Office of the Director of Environmental Programs (21 Mar. 2007) [hereinafter Leonard Interview] (Ms. Leonard coordinates Army overseas environmental compliance at HQDA).

[6] JOINT PUB. 3-34, *supra* note 1, at app. D-4.

[7] *Id.* at app. D-1.

[8] For a statute to have extraterritorial application, there must be language within the statute that makes "a clear expression of Congress' intent for extraterritorial application." E.E.O.C. v. Arabian American Oil Co., 499 U.S. 244 (1991). With one exception, courts have consistently refused to apply the National Environmental Protection Act (NEPA) outside of the United States. In that one case, Environmental Defense Fund v. Massey, 986 F.2d 528 (D.C. Cir. 1993), the court held that NEPA applies to the National Science Foundation's decision to burn food wastes in Antarctica. This finding was based upon the absence of a sovereign within Antarctica, the United States exercised a good deal of legislative control over Antarctica, and because the Agency decision-making occurred within the United States. In NEPA Coalition of Japan v. Defense Department, 837 F. Supp. 466 (D.D.C. 1993), the court refused to make an extraterritorial application of NEPA. The court cited as its reasoning: the strong presumption against extraterritorial application, possible adverse affect upon existing treaties, and the adverse effect upon U.S. foreign policy. *Id.*

For instance, the Endangered Species Act (ESA) and NEPA are generally considered not to have extraterritorial application; however, NEPA applies to major U.S. federal actions outside of the country that have significant environmental impacts inside the United States. *See generally*, 16 U.S.C. §§ 1531-1544 (2000) (the U.S. Supreme Court reversed the one case where the ESA had been found to have extraterritorial application. The Court's

Act (MMPA).[9] Although the strict requirements of domestic statutes generally do not apply to most overseas operations, U.S. executive branch policy is often couched as a requirement to adhere to "U.S. environmental requirements, if feasible."[10] As discussed below, this does not mean that a waiver is required for operations that cannot comply with domestic laws. When applying environmental law to U.S. military operations, it is useful to distinguish the laws and regulations that impose planning requirements either prior to or in conjunction with military operations, and other authorities that may impose substantive restrictions on operations (e.g., disposal of waste by discharging it into the air or water, burying it in the ground, or transporting it across international boundaries for eventual disposal). The following resources address these two applications.

B. *Executive Order (EO) No. 12114*.[11] EO 12114 creates "NEPA-like" rules for overseas operations by requiring environmental impact analysis of major federal actions affecting the environment outside of the United States.. A particularly important exemption is for "actions taken by or pursuant to the direction of the President or Cabinet officer when the national security or interest is involved or when the action occurs in the course of an armed conflict."[12] This exemption covers current joint operations in Iraq and Afghanistan. EO 12114 is implemented by Department of Defense Directive (DoDD) 6050.7.

C. *DoDD 6050.7*.[13] This directive implements EO 12114 and provides definitions, the review process, and document requirements for environmental analysis. Each service implements the directive as follows: Army, 32 C.F.R. Part 651, *Environmental Analysis of Army Actions*; Air Force, AFI 32-7006, *Environmental Program in Foreign Countries*, Chapter 4; Navy, OPNAVINST 5090.1C; and Marine Corps, MCO P5090.2A.

D. *DoDI 4715.5*.[14] This instruction establishes environmental compliance standards for protecting human health at installations in other countries, as well as provides for the designation of the EEAs. While it does not apply to off-installation operations and training, it may be useful in identifying environmental standards for planning purposes.

E. *CJCSM 3122.03C*.[15] Joint doctrine establishes how an OPLAN and OPORD for joint operations address environmental considerations. Annex L will contain all relevant environmental considerations as reviewed and designated. Upon deployment, Annex L should provide a primary source for all environmental requirements.

F. *Joint Pub. 3-34*.[16] This publication elaborates on the roles and responsibilities of commanders, JAs, and others in the process of drafting Annex L. Combatant commanders and subordinate joint force commanders should demonstrate

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rationale, however, was not based upon any of the substantive environmental issues involved, but on lack of standing. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 112 S. Ct. 2130 (1992). Most scholars, however, believe the result would have been the same had the Court reached the extraterritoriality question.); 42 U.S.C. §§ 4321-4370 (2000) (NEPA does not serve to prohibit actions; instead, it creates a documentation requirement that ensures that Agency decision-makers consider the environmental impact of Federal actions. The required documents are usually referred to as either environmental assessments (EA) or environmental impact statements (EIS). The production of these documents can cause substantial delays in a planned Federal action. The location of the impact, and not the action, determines NEPA applicability.).

[9] 16 U.S.C. § 1362-1421h (1972) (amended 2007). Arguably, use of Mid-Frequency Active Sonar by the U.S. Navy at sea violated the MMPA. Congress amended the MMPA in the 2004 National Defense Authorization Act to allow the Secretary of Defense to exempt "military readiness activities" after consultation with the Secretary of Commerce or the Secretary of the Interior. To date, the Secretary of Defense has invoked this exemption twice, with the current exemption extending until January 2009. Memorandum, Gordon England, Deputy Secretary of Defense, to Donald C. Winter, Secretary of the Navy, Subject: National Defense Exemption from Requirements of the Marine Mammal Protection Act for Certain DoD Military Readiness Activities That Employ Mid-Frequency Active Sonar or Improved Extended Echo Ranging Sonobuoys (23 Jan. 2007).

[10] U.S. ARMY LEGAL SERVICES AGENCY, THE DESERT STORM ASSESSMENT TEAM'S REPORT TO THE JUDGE ADVOCATE GENERAL OF THE ARMY, Environmental Law 3 & Issue 143 (22 Apr. 1992) [hereinafter DSAT] (some JAs during Operation Desert Storm received confusing guidance to apply U.S.-like environmental protections to their activities, when feasible. This guidance was not based upon the requirements of either NEPA or Executive Order (EO) No. 12114. Every U.S. activity within Southwest Asia (taken pursuant to Operations Desert Shield/Storm) was exempted under EO 12114 (*see* discussion *infra* for an explanation of exempted status under EO 12114)).

Because of this perceived general policy, during Operations Desert Shield/Storm many judge advocates became confused as to the need for an "emergency waiver." In fact, several of the Desert Storm Assessment Team Report (DSAT) assumptions are inaccurate because of confusion about the need to apply NEPA to operations in Southwest Asia because no such waiver was needed. *See id.*

[11] Exec. Order No. 12114, 44 Fed. Reg. 1957 (1979) *reprinted at* 42 U.S.C. § 4321, at 515 (1982) [hereinafter EO 12114].

[12] *Id* at para. 2-5(a)(iii); *see also* U.S. DEP'T OF DEFENSE, DIR. 6050.7, ENVIRONMENTAL EFFECTS ABROAD OF MAJOR DEPARTMENT OF DEFENSE ACTIONS, para. E2.3.3.1.3. (31 Mar. 1979) [hereinafter DoDD 6050.7].

[13] DoDD 6050.7, *supra* note 12.

[14] DoDI 4715.5, *supra* note 3.

[15] CHAIRMAN, JOINT CHIEFS OF STAFF MANUAL 3122.03C, JOINT OPERATION PLANNING AND EXECUTION SYSTEM VOL. II: (PLANNING FORMATS AND GUIDANCE) (17 Aug. 2007).

"proactive environmental leadership during all phases of joint operations across the range of military operations."[17] They should also ensure that environmental considerations are an integral part of the planning and decision-making process.[18] The combatant command and subordinate joint force engineer have a primary role in drafting and executing Annex L. Other principals with environmental responsibilities include the staff judge advocate, public affairs officer, surgeon, civil affairs officer, chemical officer, ordnance, and J-4. Commanders may establish a Joint Environmental Management Board to bring together leaders and staff with expertise to ensure unity of effort in environmental matters.

IV. ENVIRONMENTAL PLANNING PROCESS

A. Operation Planning.

1. General Considerations. Judge Advocates must recognize that EO 12114 mandates *some degree* of environmental stewardship by U.S. forces in regard to its operations outside of the United States or its territories. Judge Advocates should add this short document to their operational law library and refer to it during the operational planning phase. In addition, JAs should turn to the more specific documents that implement the Order: DoDD 6050.7 and 32 C.F.R. Part 651.

a. When executing a mission within a foreign state, the military leader should first consider three general rules that dictate the interpretation and compliance with all other rules:

(1) Based upon operational realities and necessities, take all reasonable steps to act as a good environmental steward;

(2) Respect treaty obligations and the sovereignty of other nations; at a minimum, restraint must be exercised in applying U.S. laws within foreign nations unless Congress has expressly provided otherwise; and

(3) Any acts contemplated by officials within the DoD that require "communications with foreign governments concerning environmental agreements and other formal arrangements with foreign governments" must be coordinated with the Department of State (DoS).[19]

2. Required Analysis and Actions. Instead of promulgating additional and possibly more onerous requirements, the Army's regulation at 32 C.F.R. Part 651, Subpart H, generally restates the requirements of DoDD 6050.7. Similar to EO 12114, DoDD 6050.7 is organized around four types of environmental events:

a. Major federal actions that do significant harm to the global commons;[20]

b. Major federal actions that significantly harm the environment of a foreign nation that is not involved in the action;[21]

c. Major federal actions that are significantly harmful to a foreign nation's environment affecting: (1) a product, or involve a physical project that produces a principal product, emission, or effluent, that is prohibited or strictly regulated by Federal law in the United States because its toxic effects to the environment create a serious public health risk; or (2) a physical project that is prohibited or strictly regulated in the United States by federal law to protect the environment against radioactive substances,[22] and

d. Major federal actions outside the United States that significantly harm natural or ecological resources of global importance designated by the President or Secretary of State.[23]

3. Judge Advocates must consider whether the proposed operation might generate any one of the four environmental events listed above. If the answer is yes, then the military leader should either seek an exemption or direct

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[16] JOINT PUB. 3-34, *supra* note 1.

[17] *Id.* at app. D-1.

[18] *Id.* at app. D-10.

[19] DoDD 6050.7, *supra* note 12, at para. 4.4. Judge advocates who work environmental law issues should open a line of communication with a point of contact (POC) in the Department of State early in the process.

[20] *Id.* at para. E1.1.

[21] *Id.* at para. E2.2.1.1

[22] *Id*. at para. E2.2.1.2.

[23] *Id*. at para E2.2.1.3.

the production of either a bilateral or multilateral environmental study (ES), or a concise environmental review (ER) of the specific issues involved (which would include an environmental assessment, summary environmental analysis, or other appropriate documents).[24]

4. The Participating Nation Exception. As a JA proceeds through the regulatory flowchart of required analysis and actions, the most important and frequently-encountered problem is the "participating nation" determination.[25] This is because most overseas contingency operations do not generate the first, third, or fourth types of environmental events listed above. Accordingly, a premium is placed upon the interpretation of the second type of environmental event (i.e., major federal actions that significantly harm the environment of a foreign nation that is not involved in the action).

a. What is a participating nation? The threshold issue appears to be whether or not the host nation is participating in the operation. If the nation is participating, then no study or review is technically required.[26] Out of four relatively recent contingency operations (Somalia; Haiti; Guantanamo Bay, Cuba; and Bosnia), the United States relied upon the so called "participating nation exception" in Haiti and Bosnia. In Somalia and Guantanamo Bay, because neither Somalia nor Cuba participated with U.S. forces in either OPERATION RESTORE HOPE or OPERATION SEA SIGNAL, the United States could not utilize the participating nation exception. Accordingly, the United States had a choice of accepting the formal obligation to conduct either an ES or an ER, or seek an exemption. In both cases, the United States sought and received an exemption.[27]

b. How does the JA and operational planner distinguish between participating and non-participating nations? The foreign nation's involvement may be signaled by either direct or indirect involvement with the United States, or by involvement through a third nation or international organization.[28]

(1) The foregoing regulatory guidance is helpful, but the nuance and uncertain nature of contingency operations require additional discussion on this point. One technique for discerning participating nation status is to consider the nature of the entrance into the host nation.

(2) There are generally three ways that military forces enter a foreign nation: forced entry, semi-permissive entry, or permissive entry. A permissive entry typically involves a participating (cooperating) nation. Conversely, U.S. forces that execute a forced entry would rarely deal with a participating nation. The analysis required for these two types of entries is fairly straightforward.

(3) The semi-permissive entry presents a much more complex question. In this case, the JA must look to the actual conduct of the host nation. If the host nation has signed a stationing or SOFA, or has in a less formal way agreed to the terms of the U.S. deployment within the host nation's borders, the host nation is probably participating with the United States (at a minimum, in an indirect manner). If the host nation expressly agrees to the entry and to cooperate

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[24] *Id.* at para. E2.4.1.

[25] *Id*. at para. E2.2.2.

[26] *Id.*

[27] *See* Memorandum, Lieutenant General Walter Kross, Director, Joint Staff, to The Under Secretary of Defense for Acquisition and Technology, Subject: Exemption from Environmental Review (17 Oct. 1994) [hereinafter Kross Memorandum]. Regarding OPERATION SEA SIGNAL, General Kross forwarded the CINCUSACOM request for exemption. The request was based on a disciplined review of the operation's probable environmental impact, a short rendition of the facts, and a brief legal analysis and conclusion. *See also* CENTER FOR LAW AND MILITARY OPERATIONS, THE JUDGE ADVOCATE GENERAL'S SCHOOL, UNITED STATES ARMY, AFTER ACTION REPORT, UNITED STATES ARMY LEGAL LESSONS LEARNED, OPERATION RESTORE HOPE, 5 DECEMBER 1992 - 5 MAY 1993, 23 (30 Mar. 1995) [hereinafter RESTORE HOPE AAR]. It is important to note that in both operations, even though U.S. forces received an exemption from the review and documentation requirement, the United States still prepared an environmental audit, and U.S. forces applied well-established environmental protection standards to events likely to degrade the host nation's environment.

Lieutenant Colonel Richard B. Jackson, having served as a legal advisor with the United States Atlantic Command Staff Judge Advocate's Office during both OPERATION UPHOLD DEMOCRACY and OPERATION SEA SIGNAL, notes that Cuba never did anything, by act or omission that could be construed as cooperating or participating in OPERATION SEA SIGNAL. On the other hand, the entrance of U.S. forces into Haiti was based upon an invitation that was reduced to writing and signed by the Haitian head of state, President Emile Jonassaint, on 18 September 1994. In fact, this agreement, signed by former President Jimmy Carter and President Jonassaint and referred to as the Carter-Jonassaint Agreement, expressly stated that Haitian authorities would "work in close cooperation with the U.S. Military Mission." Interview, Lieutenant Colonel Richard B. Jackson, Chair, International and Operational Law Department, The Judge Advocate General's School, United States Army, Charlottesville, Virginia (20 Mar. 1997). *See also* CENTER FOR LAW AND MILITARY OPERATIONS, THE JUDGE ADVOCATE GENERAL'S SCHOOL, UNITED STATES ARMY, LAW AND MILITARY OPERATIONS IN HAITI, 1994 - 1995 – LESSONS LEARNED FOR JUDGE ADVOCATES App. C (1995) [hereinafter the CLAMO HAITI REPORT].

[28] DoDD 6050.7, *supra* note 12, at para. E2.2.1.1.

with the U.S. military forces, the case for concluding that the nation is participating is even stronger.[29] Finally, if the host nation agrees to work with the United States on conducting a bilateral environmental review, the case is stronger still.[30]

c. There is no requirement for a SOFA or other international agreement between the host nation and U.S. forces to document participating nation status. Participation and cooperation, however evidenced, are the only elements required under EO 12114 and its implementing directive. Judge Advocates should look to the most logical and obvious places for evidence of such participation. In recent operations, the United States and its host nation partners documented the requisite participation within such agreements.

d. The decision to assume participating nation status is made at the combatant command level.[31] In addition, once this election is made, the second decision as to what type of environmental audit[32] to perform is also made at the same level.[33] In the cases of OPERATIONS UPHOLD DEMOCRACY and JOINT ENDEAVOR, the tandem effort of the respective J4-Engineer Section and the Office of the Staff Judge Advocate (OSJA) prepared the complete action.[34] It was also these members of the staff that disseminated the environmental guidelines and standards adopted in the OPLAN.

e. Exemptions. If the facts in a particular operation are similar to those in either OPERATIONS JOINT ENDEAVOR or UPHOLD DEMOCRACY, then JAs would, under most circumstances, find that the host nation is a participating nation, and no further action would be required under regulations that implement EO 12114. If an exemption applies and is granted by the proper authority, then the EO requires no further action (meaning no formal documented review or study is required under DoDD 6050.7).[35]

(1) OPERATIONS RESTORE HOPE and SEA SIGNAL provide recent examples of exempted operations. In OPERATION SEA SIGNAL JAs quickly determined that Cuba could not be considered as a participating nation. Consequently, they considered the array of exemptions provided in DoDD 6050.7 and forwarded an exemption request based upon national security concerns.[36]

(2) The exemptions are broad and would likely provide exempted status to most foreseeable overseas military operations. Consequently, these operations would enjoy exemption from the "NEPA-like" documented review requirements of EO 12114.

(3) Unlike the participating nation exception, some exemptions require that the military leader take an affirmative step to gain a variance from the formal documentation requirements.[37] In the case of OPERATION SEA SIGNAL, the Commander, U.S. Atlantic Command forwarded a written request for exempted status for the construction and operation of temporary camps at Naval Station Guantanamo Bay, Cuba. The request was forwarded through

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[29] *See* Memorandum, Major Mike A. Moore, United States Atlantic Command, J4 - Engineer, to Lieutenant Colonel Richard B. Jackson, Subject: Environmental Concerns of MNF (24 Jan. 1995) [hereinafter Moore Memorandum] (explaining EO 12114 did not apply to OPERATION UPHOLD DEMOCRACY because Haiti was a participating nation, and going on to explain that U.S. forces should coordinate with Haitian authorities to conduct a bilateral environmental audit).

[30] *Id*. at para. 4.

[31] *See* DoDD 6050.7, *supra* note 12, at para. 5.4.

[32] *See* Moore Memorandum, *supra* note 29. The word "audit" was adopted in lieu of the words "review" or "study" to make clear that policy drives the environmental assessment, and not the formal documented review or study requirement of EO 12114 or DoDD 6050.7.

[33] Telephone interview Lieutenant Colonel Mike A. Moore, United States Atlantic Command, J4 - Engineer (Mar. 27, 1997) [hereinafter Moore Interview] (Lieutenant Colonel Moore, the same officer referred to earlier as Major Mike A. Moore, served as the action officer tasked with determining what legal responsibilities the Command owed the environment during OPERATION SEA SIGNAL and UPDHOLD DEMOCRACY. He was also tasked with ensuring that an environmental audit was performed for OPERATION UPHOLD DEMOCRACY. Based upon his almost daily coordination with JAs in the Command's legal office, he and the Command's Staff Judge Advocate recommended that the Commander-in-Chief adopt the participating nation status and conduct a thorough environmental audit. Lieutenant Colonel Moore noted that the authority to make the decision rested at the unified command level. He also stated that several of the exemptions within EO 12114 were pre-delegated down to United States Atlantic Command).

[34] *Id*.

[35] DoDD 6050.7, *supra* note 12, at para. E2.3.3.

[36] *See* Memorandum, Paul G. Kaminski, Under Secretary of Defense (Acquisition and Technology), to Director, Joint Staff, Subject: Exemption from Environmental Review Requirements for Cuban Migrant Holding Camps at Guantanamo, Cuba (OPERATION SEA SIGNAL Phase V) (5 Dec. 1994).

[37] *See e.g.* DoDD 6050.7, *supra* note 12, at para. E2.3.3.2.1. Under the participating nation exception, the combatant commander may simply approve the OPLAN that integrates the exception into its environmental consideration appendix. *Id.*

appropriate legal channels and the Joint Staff (through the Chairman's Legal Advisor's Office) to the Under Secretary of Defense (Acquisition and Technology) for approval. The Undersecretary approved the request, citing the importance of OPERATION SEA SIGNAL to national security.[38] The entire written action was only three pages long.[39] The action is shorter than most actions that involve the environment because it may be drafted and forwarded with little prior review of environmental impact. In fact, the JA involved in the process (the probable drafters of the action) need only know that the proposed operation is:

(a) A major federal action;

(b) That will likely cause significant harm to the host nation's environment;

(c) Where the host nation is not participating; and

(d) One of the ten exemptions is applicable.[40]

(4) Once the exemption is approved, then the exempted status should be integrated into the OPLAN. If this event occurs after the OPLAN is approved, the exempted status should be added as a fragmentary order (FRAGO) to provide supplemental guidance to the environmental consideration section of the OPLAN.

5. DoDI 4715.5 does not apply to the operations of U.S. military vessels and aircraft, or to off-installation operations and training.[41] However, it does apply to support functions (e.g. management or disposal of off-loaded waste or material).

6. Laws of Host Nations.

a. U.S. forces are immune from host nation laws where:

(1) Immunity is granted by agreement;

(2) U.S. forces engage in combat with national forces;[42] or

(3) U.S. forces enter under the auspices of an UN-sanctioned security enforcement mission.[43]

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[38] *See* Kross Memorandum, *supra* note 27. The decision memorandum integrated into the final action informed the Under Secretary of Defense (Acquisition and Technology), the approval authority, that the CINCUSACOM had determined that Cuba was not a participating nation, and that a significant impact on the host nation environment was likely. The author of the memorandum, therefore, requested that the approval authority grant an exemption based upon the national security interests involved in the operation. *Id.*

[39] *Id.* The memorandum action provided: (1) the "general rule," as required by EO 12114 and DoDD 6050.7; (2) the explanation of why the operation did not fall within either of the two exceptions (either an action that does not cause a significant environmental impact or involve a host nation that is a "participating" nation); and (3) the four courses of action. The courses of action were provided as follows:

(1) Determine that the migrant camp operation has no significant impact;

(2) Seek application of the national security interest or security exemption;

(3) Seek application of the disaster and emergency relief operation exemption; or

(4) Prepare a "NEPA-like" environmental review.

The action then provided discussion regarding each of the four options. The action explained that the first option "is without merit" because the "migrant camp will clearly have an adverse impact on the environment." It found merit with each of the exemptions, but concluded that approval of an exemption alone might later subject DoD to criticism on the ground that it actively avoided its environmental stewardship responsibility. The last option was rejected as setting an inappropriate and unsound precedent of admitting legal responsibilities not actually required by the law. *Id.* It should be noted that some of the exemptions (like the exemption for "[a]ctions taken by or pursuant to the direction of the President or a cabinet officer in the course of armed conflict"(DoDD 6050.7, para. E2.3.3.1.3)) are considered general exemptions not requiring written determinations like the one required for OPERATION SEA SIGNAL under the National Security Exemption (DoDD 6050.7, para. E2.3.3.1.4).

[40] DoDD 6050.7, *supra* note 12, at para. E2.3.3.

[41] DoDI 4715.5, *supra* note 3, at para. 2.1.4 ([o]ff-installation operations include hostilities, contingency operations, and multi-national force activities not under full control of the United States; excepted operations shall be conducted in accordance with applicable international agreements, DoD guidance, and environmental annexes).

[42] *See* WILLIAM W. BISHOP, JR., INTERNATIONAL LAW CASES AND MATERIALS 659-661 (3d ed. 1962) (this exception is based upon a classical application of the Law of the Flag theory. This term is sometimes referred to as "extraterritoriality," and stands for the proposition that a foreign military force that enters a nation either through force or by consent is immune from the laws of the receiving nation. The second prong of this theory (the implied waiver of jurisdiction by consenting to the entrance of a foreign force) has fallen into disfavor.).

b. The question of immunity is unresolved where U.S. forces enter in a noncombatant role, and not to enforce peace or end cross-border aggression. In OPERATION RESTORE DEMOCRACY, U.S. forces entered Haiti as part of a multinational force to protect human rights and restore democracy. There are three arguments as to why host nation environmental law should not have applied:

(1) Consent to enter by a legitimate (recognized) government included an implied grant of immunity;

(2) Law of the Flag applied (as it did during OPERATION PROVIDE COMFORT), and

(3) The operation was sanctioned by the United Nations as a Chapter VII enforcement action (even though peace enforcement in this context does not provide an exact fit).

c. Judge Advocates should:

(1) Contact the combatant command to determine DoD's position relative to whether any host nation law applies;

(2) Request copies of relevant treaties or international agreements from higher headquarters or the combatant command legal advisor, and

(3) Seek information relative to any plan to contact foreign governments to discuss environmental agreements or issues. The Army must consult with the DoS before engaging in "formal" communications regarding the environment.[44]

7. Joint doctrine provides several environmental factors and elements to consider when planning and conducting joint operations. Key factors include, but are not limited to:

a. Legal requirements and constraints;

b. Cultural, historic, and religious factors;

c. Environmentally sensitive ecosystems to include endangered or threatened species and marine mammals;

d. Environmental health risks to the force;

e. Environmental terrorism;

f. Targeting considerations to avoid damage to cultural, historic, or religious sites;

g. Site selection for base camps and other facilities;

h. Camp closure and site remediation;

i. Management of hazardous materials and oil products and disposal of hazardous waste (e.g. pesticides);

j. Spill prevention, containment, and response;

k. Transportation, storage, and disposal of medical and infectious waste;

l. Water certification and wastewater management;

m. Pollution prevention and recycling efforts to reduce waste generation and logistic efforts;

n. Remediation of contaminated areas.

o. Sensitive site exploitation and associated liabilities of operations (claims);

p. Construction operations;

q. Noise abatement, and

r. Air emissions (e.g. burning).[45]

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[43] *Id.* This theory is a variation of the combat exception. Operations that place a United Nations force into a hostile environment, with a mission that places it at odds with the *de facto* government, trigger this exception. This is another of the very few examples where the Law of the Flag version of sovereign immunity survives. *Id.*

[44] DoDD 6050.7, *supra* note 12, at para. 4.4.

[45] JOINT PUB. 3-34, *supra* note 1, at D-11.

B. Judge Advocates can use this framework to assist military leaders in the construction of an environmental compliance standard. In many operations, a checklist similar to the framework set out above was used to construct an environmental compliance model that took into account each element or item on the checklist. For example, during OPERATION JOINT ENDEAVOR, JAs worked in conjunction with the civil engineering support elements and medical personnel to establish concise standards for the protection of host nation water sources and the management of waste.[46] This aspect of host nation environmental protection was executed and monitored by a team comprised of JAs, medical specialists, and representatives from the engineer community.[47]

C. In addition, JAs must also integrate a directive for documentation of initial environmental conditions into the OPLAN. This was done in OPERATION JOINT ENDEAVOR and, pursuant to this directive, unit commanders took photographs and made notes regarding the status of land that came under their unit's control.[48] As a result of this excellent planning and execution, U.S. forces were protected against dozens of fraudulent claims filed by local nationals.[49]

D. The Basel Convention. A particularly vexing problem for overseas operations is the transportation of hazardous waste across international boundaries. The Basel Convention of 1989, which the United States has signed but not ratified, imposes strict rules on signatory countries with respect to the movement of hazardous waste across international boundaries.[50] This presented problems for operations in both Bosnia and Kosovo, particularly with respect to Germany and Macedonia. The lead agency for DoD with respect to the Basel Convention is the Defense Logistics Agency (DLA). Should an operation involve potential Basel Convention issues, contact DLA.

E. United States policy is always to conduct a good faith environmental audit to reduce potential adverse consequences to the host nation's environment.[51] The practical result of the U.S. policy is that U.S. forces require "adherence to U.S. domestic law standards for environmental actions where such procedures do not interfere with mission accomplishment."[52] Accordingly, from the planning phase to the execution phase, the environment is an important aspect of all U.S. operations. Early involvement by JAs is essential to ensure that all appropriate environmental reviews have been completed either prior to the entry of U.S. forces, or as soon thereafter as is possible. Additionally, JAs at all levels of command must be cognizant of an operation's environmental dimension so that they can ensure that the doctrinally-required consideration is integrated into OPLANs and OPORDs, training events, and civil-military operations.

F. The JA's job is not complete once the OPLAN is drafted and approved. He or she also must be heavily involved in the execution phase. Leaders, having read the general guidance contained within the OPLAN, will seek the JA's assistance in the onerous task of translating this guidance into action.[53] The JA must ensure that this translation takes a

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[46] Although identified in the planning process, management and disposal of waste involved a significant expenditure of task force manpower and fiscal assets. Early identification of environmental issues and continued monitoring in conjunction with other members of the staff is critical. *See* HEADQUARTERS, UNITED STATES, EUROPEAN COMMAND, OFFICE OF THE LEGAL ADVISOR, INTERIM REPORT OF LEGAL LESSONS LEARNED: WORKING GROUP REPORT, 3 (18 Apr. 1996).

[47] *See id.* This obligation was written into the operation plan under the heading "[p]otable water." The central theme of this objective was to protect host nation water sources from contamination by "suitable placement and construction of wells and surface treatment systems, and siting and maintenance of septic systems and site treatment units." *Id.*

[48] *Id.*

[49] Memorandum, Captain David G. Balmer, Foreign Claims Judge Advocate, 1st Armored Division (Task Force Eagle), to Major Richard M. Whitaker, Professor, International and Operational law, The Judge Advocate General's School, Subject: Suggested Improvements for Chapter 10 of Operational Law Handbook (4 Dec. 1996) (stating that the number of claims alleging environmental damage was "fairly high, and very difficult to adjudicate in the absence of photographs taken prior to the occupation of the area by U.S. forces," and that such pictures repeatedly "saved the day when fraudulent claims were presented by local nationals").

[50] Basel Convention on the Control of Transboundary Movements of Hazardous Waste and Their Disposal, Mar. 22, 1989, 28 I.L.M. 657.

[51] JOINT PUB. 3-34, *supra* note 1, at D-1.

[52] *See* RESTORE HOPE AAR, *supra* note 27, at 23. During OPERATION RESTORE HOPE in Somalia, the multi-national force (under U.S. leadership) determined that the actions of U.S. forces in that operation were exempted from EO 12114 formal review or study requirements, but the force adhered to U.S. domestic law to the greatest extent possible (defined as the extent to which such adherence did not frustrate operational success). *Id.*

[53] Interview, Lieutenant Colonel George B. Thompson, Jr., Chief, International and Operational Law Division, Office of the Judge Advocate, Headquarters, United States Army, Europe and Seventh Army, in Willingen, Germany (4 Feb. 1997) (Lieutenant Colonel Thompson points out that a number of Judge Advocates "have their hands full working the day-to-day environmental piece." He stated that one such judge advocate was then-Major Sharon Riley, Officer-in-Charge of the 1st Infantry Division's Schweinfurt Branch Office. Major Riley spent a good portion of her time in Bosnia-Herzegovina helping commanders determine acceptable environmental standards by balancing operational considerations and realities with DoD's general environmental standards); *see also* Leonard Interview, *supra* note 5 (effective training of in-theater personnel regarding non-applicability of domestic laws, and self-enforcement by the joint chain of command is critical. Such training would have prevented instances of in-theater personnel calling the U.S. Environmental Protection Agency "Clean Air Hotline" from within Iraq to complain of alleged violations. EPA had no authority on the matter and did not know what to do with the complaint. The issue did not reach in-theater engineering assets for a number of weeks.).

form that those charged with its execution can easily understand.[54] Judge Advocates may also assist with the closures of temporary facilities such as a forward operating base as described in Legal Lessons Learned from Afghanistan and Iraq: Volume II.[55]

V. TRADITIONAL LAW OF WAR (LOW) APPLICATION

A. Customary Law. Although the environment was not visibly considered during the evolution of customary international law or during the negotiation of the pre-1970s LOW treaties, the basic LOW principles discussed in this Handbook apply to limit the destruction of the environment during warfare. For example, the customary LOW balancing of military necessity, proportionality and avoidance of superfluous injury and destruction apply to provide a threshold level of protection for the environment.

B. Conventional Law. A number of the well-known LOW treaties impact environmental operations.

1. *Hague Convention No. IV (Hague IV).*[56] Hague IV and the regulations attached to it represent the first time that environmental principles were codified into treaty law. Hague IV restated the customary principle that methods of warfare are not unlimited (serving as the baseline statement for environmental war principles).[57] Hague IV environmental protections enjoy the widest spectrum of application of any of the LOW conventions. They apply to all property, wherever located, and by whomever owned.

a. Article 23(e) forbids the use or release of force calculated to cause unnecessary suffering or destruction.[58] Judge Advocates should analyze the application of these principles to environmental issues in the same manner they would address the possible destruction or suffering associated with any other weapon use or targeting decision.

b. Hague IV also prohibits destruction or damage of property in the absence of military necessity.[59] When performing the analysis required for the foregoing test, the JA should pay particular attention to the geographical extent (i.e., how widespread the damage will be), longevity, and severity of the damage upon the target area's environment.

2. *The 1925 Gas Protocol*.[60] The Gas Protocol bans the use of "asphyxiating, poisonous, or other gases, and all analogous liquids, materials, and devices . . . ." during war.[61] This treaty is important because many chemicals (especially herbicides) are extremely persistent, cause devastating damage to the environment, and even demonstrate the ability to multiply their destructive force by working their way up the food chain. During the ratification of the Gas Protocol, the United States reserved its right to use both herbicides and riot control agents (RCA).[62]

3. *The 1993 Chemical Weapons Convention (CWC).*[63] The CWC complements the Gas Protocol. EO 11850[64] specifies U.S. policy relative to the use of chemicals, herbicides, and RCA, and sets out several clear rules regarding the

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[54] The translation will usually require more than a single articulation. Some degree of Soldier training, for example, must occur to ensure that Soldiers understand the basic rules. This articulation of the standards is typically very basic. A more sophisticated articulation is made for subordinate commanders and engineering personnel who execute the environmental compliance mission. *See id*.

[55] CENTER FOR LAW & MILITARY OPERATIONS, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, LEGAL LESSONS LEARNED FROM AFGHANISTAN AND IRAQ: VOLUME II, FULL SPECTRUM OPERATIONS 2 (MAY 2003 - 30 JUNE 2004), 177-79.

[56] Hague Convention No. IV, Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 205 Consol. T.S. 277, including the regulations thereto [hereinafter Hague IV].

[57] *Id*. at art. 22.

[58] *Id.* at art. 23e.

[59] *Id*. at art. 23g. Most nations and scholars agree that Iraq's release of oil into the Persian Gulf while retreating from Kuwait during Operation Desert Storm violated this principle. Iraq failed to satisfy the traditional balancing test between military necessity, proportionality, and unnecessary suffering/destruction.

[60] The 1925 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous, or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571, T.I.A.S. No. 8061 [hereinafter Gas Protocol].

[61] *Id.*

[62] *Id.* (the U.S. position is that neither agent meets the definition of a chemical under the treaty's provisions).

[63] Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Jan. 13, 1993, 32 I.L.M. 800 [hereinafter CWC] (where the CWC is more rigorous than the Gas Protocol, the provision of the CWC should be followed). *Id.* at Preamble.

[64] Exec. Order No. 11850, 40 Fed. Reg. 16187 (1975), *reprinted in* FM 27-10, at C1-C2 [hereinafter EO 11850].

CWC.[65] As a general rule, the U.S. renounces the use of both herbicides and RCA against combatants, which also may not be used "in war" in the absence of national command authority (NCA) authorization.[66] In regard to herbicides, the EO sets out the two uses that are expressly permitted, even without NCA authorization: domestic use and control of vegetation within and around the "immediate defensive perimeters" of U.S. installations.[67]

4. *1980 Conventional Weapons Convention (COWC).*[68] Only Optional Protocol II has environmental significance because it places restrictions on the use of mines, booby traps, and other devices. The significance of this treaty lies in the fundamental right to a safe human environment; the COWC bans the indiscriminate use of these devices. Indiscriminate use is defined as use that:

a. Is not directed against a military objective;

b. Employs a method or means of delivery that cannot be directed at a specific military objective; or

c. May be expected to cause incidental loss of civilian life or injury to civilian objects (including the environment), which would be excessive in relation to the concrete and direct military advantage to be gained.[69]

5. *The Fourth Geneva Convention (GC IV).*[70] The GC IV is a powerful environmental convention, but it does not have the wide application enjoyed by Hague IV. The most important provision, Article 53, protects only the environment of an occupied territory by prohibiting the destruction or damage of property (including the environment) in the absence of "absolute military necessity."[71] Article 147 provides the enforcement mechanism; under its provisions, "extensive" damage or destruction of property, not justified by military necessity, is a "grave breach" of the conventions.[72] All other violations that do not rise to this level are lesser breaches (sometimes referred to as "simple breaches"). The distinction between these two types of breaches is important. A grave breach requires parties to the conventions to search out, and then either prosecute or extradite, persons suspected of committing a grave breach.[73] A simple breach only requires parties to take measures necessary for the suppression of the type of conduct that caused the breach.[74] U.S. policy requires the prompt reporting and investigation of all alleged war crimes (including environmental violations), as well as taking appropriate corrective action as a remedy when necessary.[75] These obligations make Soldiers vulnerable to adverse actions if they are not well-trained relative to their responsibilities under environmental operational provisions.

6. *The Environmental Modification Convention (ENMOD).*[76] Unlike all the other environmental LOW treaties, which ban the effect of various weapon systems upon the environment, ENMOD bans the manipulation or use of the environment itself as a weapon. Any use or manipulation of the environment that is widespread, long-lasting or severe violates ENMOD (single element requirement).[77] Another distinction between the ENMOD Convention and other treaties is that the ENMOD only prohibits environmental modifications that cause damage to another party to ENMOD.[78]

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[65] *Id.* For a full discussion of EO 11850, see Chapter 2 of this Handbook.

[66] *Id.* (These restrictions do not apply relative to uses that are not methods of warfare).

[67] EO 11850, *supra* note 64 (the depth of an "immediate defensive area" will be controlled by the type of terrain, foreseeable tactics of enemy forces, and weapons routinely used in the area).

[68] Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Excessively Injurious or Have Indiscriminate Effects, Oct. 10, 1980, 19 I.L.M. 1525 [hereinafter COWC].

[69] *Id.*

[70] The Geneva Convention relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GCIV].

[71] *Id.* at art. 53.

[72] *Id.* at art. 147.

[73] *Id*. at art. 146, cl. 2.

[74] *Id*. at art. 146, cl. 3.

[75] U.S. DEP'T OF DEFENSE, DIR. 2311.01E, DOD LAW OF WAR PROGRAM, para. 4.4 (9 May 2006).

[76] The Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, May 18, 1977, 31 U.S.T. 333. 1108 U.N.T.S. 151 [hereinafter ENMOD Convention].

[77] *Id.* (for a discussion of the meaning of these three elements see the discussion in the next section or similar elements found in Articles 35 and 55 of the 1977 Protocol I Additional to the Geneva Conventions of 1949).

[78] *Id.* at art. I.

a. The application of ENMOD is limited, as it only bans efforts to manipulate the environment with extremely advanced technology. The simple diversion of a river, destruction of a dam, or even the release of millions of barrels of oil do not constitute "manipulation" as contemplated under the provisions of the ENMOD. Instead, the technology must alter the "natural processes, dynamics, composition or structure of the earth . . ."[79] Examples of this type of manipulation are: (a) alteration of atmospheric conditions to alter weather patterns; (b) earthquake modification; and (c) ocean current modification (tidal waves etc.).

b. The drafters incorporated the distinction between high versus low technological modification into the ENMOD Convention to prevent the unrealistic extension of ENMOD. For example, if the ENMOD Convention reached low technological activities, then actions such as cutting down trees to build a defensive position or an airfield, diverting water to create a barrier, or bulldozing earth might all be considered activities that violate ENMOD. Judge Advocates should understand that none of these activities, or similar low technological activities, is controlled by ENMOD.

c. ENMOD does not regulate the use of chemicals to destroy water supplies or poison the atmosphere.[80] As before, this is the application of a relatively low technology, which ENMOD does not reach.[81] Although the relevance of ENMOD appears to be minimal given the current state of military technology, JAs should become familiar with the basic tenets of the ENMOD. This degree of expertise is important because some nations argue for a more pervasive application of this treaty. Judge Advocates serving as part of a multinational force must be ready to provide advice relative to ENMOD, even if this advice amounts only to an explanation as to why ENMOD has no application, despite the position of other coalition states.[82]

7. *The 1977 Protocols Additional to the Geneva Conventions (AP I & AP II).*[83] The United States has not yet ratified AP I; accordingly, the United States is ostensibly bound by only the provisions within AP I that reflect customary international law. To some extent, AP I, Articles 35, 54, 55, and 56 (the environmental protection provisions within AP I), merely restate Hague IV and GC IV environmental protections. To that extent, these provisions are enforceable. However, the main focus of AP I protections go far beyond the previous baseline protections. AP I is much more specific relative to the declaration of these environmental protections. In fact, AP I is the first LOW treaty that specifically provides protections for the environment by name.

a. The primary difference between AP I and the protections found with the Hague IV or GC IV is that once the degree of damage to the environment reaches a certain level, AP I does not employ the traditional balancing of military necessity against the quantum of expected destruction. Instead, it establishes this level as an absolute ceiling of permissible destruction. Any act that exceeds that ceiling, despite the importance of the military mission or objective, is a violation of the LOW.

b. This absolute standard is laid out in Articles 35 and 55 as any "method of warfare which is intended, or may be expected, to cause widespread, long-term and severe damage to the environment." The individual meanings of the terms "widespread," "long-term" and "severe" damage have been debated at length. The ceiling is only reached when all three elements are satisfied (unlike the single-element requirement of ENMOD).

c. Most experts and the Commentary to AP I state that "long-term" should be measured in decades (twenty to thirty years). Although the other two terms remain largely subject to interpretation, a number of credible interpretations have been forwarded.[84] Within AP I, the term "widespread" probably means several hundred square

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[79] *Id.* at art. II.

[80] *Id.* However, these types of activities would violate Hague IV and the Gas Protocol.

[81] Environmental Modification Treaty: Hearings Before the Committee on Foreign Relations, U.S. Senate, 95th Cong., 2nd Sess. 83 (1978) (Environmental Assessment) [hereinafter Senate Hearings].

[82] AUSTRALIAN DEFENCE FORCE PUBLICATION 37, THE LAW OF ARMED CONFLICT 4-5 to 4-6 (1994) [hereinafter ADFP 37] (ADFP 37 states that the ENMOD Convention prohibits "any means or method of attack which is likely to cause widespread, long-term or severe damage to the natural environment." This arguably gross overstatement of the actual limitations placed upon a commander by ENMOD ignores the "high technology" requirement, and serves as an example of the type of misinformation that requires judge advocates to be conversant in treaties like the ENMOD Convention.).

[83] Protocol I Additional to the Geneva Conventions, Dec. 12, 1977, 16 I.L.M. 1391, 1125 U.N.T.S. 3 [hereinafter GP I].

[84] Claude Pilloud, International Committee of the Red Cross, Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 Aug. 1949, at 410 to 420 (Yves Sandoz ed., 1987) [hereinafter Sandoz].

kilometers, as it does in ENMOD.[85] "Severe" can be explained by Article 55's reference to any act that "prejudices the health or survival of the population."[86] Because the general protection found in Articles 35 and 55 require the presence of all three of these elements, the threshold is set very high.[87] For instance, there is little doubt that the majority of carnage caused during World Wars I and II (with the possible exception of the two nuclear devices exploded over Japan) would not have met this threshold requirement.[88]

d. Specific AP I protections include Article 55's absolute ban on reprisals against the environment; Article 54's absolute prohibition on the destruction of agricultural areas and other areas that are indispensable to the survival of the civilian population; and Article 56's absolute ban on targeting works on installations containing dangerous forces (dams, dikes, nuclear plants, etc.), if such targeting would result in substantial harm to civilian persons or property.[89]

e. Although the foregoing protections are typically described as "absolute," the protections do not apply in a number of circumstances. For instance, agricultural areas or other food production centers used solely to supply the enemy fighting force are not protected.[90] A knowing violation of Article 56 is a grave breach. Additionally, with respect to the three-element threshold set out in Articles 35 and 55, the standard is so high that a violation of these provisions may also be a grave breach, because the amount of damage required would seem to satisfy the "extensive" damage test set out by GC IV, Article 147.[91]

VI. PEACETIME ENVIRONMENTAL LAW (PEL)

A. In cases not covered by the specific provisions of the LOW, civilians and combatants remain under the protection and authority of principles of international law derived from established principles of humanity, and from the dictates of public conscience. This includes protections established by treaties and customary law that protect the environment during periods of peace (if not abrogated by a condition of armed conflict).[92]

B. In the aftermath of OPERATION DESERT STORM, the international community generally accepted the application of the Martens Clause as a useful contributor to the protection of the environment in times of armed conflict.[93]

VII. CONCLUSION

A. As the forgoing discussion indicates, the reality of the need to integrate environmental planning and stewardship into all phases of overseas operations cannot be ignored. A number of other initiatives are now under way to incorporate an increased awareness of the environment into both the planning and execution phases of all military operations and activities. The Army Judge Advocate General's Corps' own keystone doctrinal source for legal operations recognizes that environmental law considerations should play a role in the planning and execution of operations.[94]

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[85] *Id*. at 417. Sandoz cites to the Report of the Conference of the Committee on Disarmament, Vol. I, United Nations General Assembly, 31st Sess., Supp. No. 27 (A/31/27), p. 91, wherein the intent of the drafters of the ENMOD Convention relative to each of the three elements is set out as follows: (1) widespread: encompassing an area on the scale of several hundred kilometers; (2) long-lasting: lasting for a period of several months, or approximately one season; and (3) severe: involving serious or significant disruption or harm to human life, natural economic resources or other assets.

[86] *Id*. at 417. The Article 55 language has roughly the same meaning as the meaning of "severe" within the ENMOD Convention.

[87] Some experts have argued, however, that this seemingly high threshold might not be as high as many assert. The "may be expected" language of Articles 35 and 55 appears to open the door to an allegation of war crimes any time damage to the environment is substantial and receives ample media coverage. The proponents of this complaint allege that this wording is far too vague and places unworkable and impractical requirements upon the commander. G. Roberts, *The New Rules for Waging War: The Case Against Ratification of Additional Protocol I*, 26 VA. J. INT'L L. 109, 146-47 (1985).

[88] *See* Sandoz, *supra* note 84, at 417.

[89] The specific protections afforded by Articles 54, 55, and 56 should be applied in conjunction with Article 57's "precautionary measures" requirement. For example, prior to initiating an artillery barrage, the commander must do everything "feasible" to ensure that no objects subject to special protections are within the destructive range of the exploding projectiles (dams, dikes, nuclear power plants, drinking water installations, etc.).

[90] However, if the food center is shared by both enemy military and enemy civilian population (a likely situation), then Article 54 permits no attack that "may be expected to leave the civilian population with such inadequate food or water as to cause starvation or force its movement."

[91] Report of the Secretary-General on the Protection of the Environment in Times of Armed Conflict, U.N. GAOR, 6th Comm., 48th Sess., Agenda Item 144, at 17, U.N. Doc. A/48/269 (29 July 1993) [hereinafter Secretary-General's Report] (the experts who compiled the Secretary General's report felt that the GP I should be changed to make this point clear, that a violation of either Article 35 or Article 55, at a minimum, is a grave breach).

[92] *See* Hague IV, *supra* note 56, at Preamble (this provision, commonly referred to as the Martens Clause, makes peacetime law applicable to fill in gaps in the LOW where protection is needed to protect a certain person, place, or thing).

[93] *See* Secretary-General's Report, *supra* note 91, at 15.

[94] U.S. DEP'T OF ARMY, FIELD MANUAL 27-100, LEGAL SUPPORT TO OPERATIONS, para. 3.6 (1 Mar. 2000).

B. Judge Advocates, as they have traditionally done, must continue to stay aware of changes in both doctrine and law in this area. In the end, their advice must be based upon a complete understanding of the law, the client's mission, and common sense.

SUMMARIES OF SOME OF THE MAJOR DOMESTIC (U.S.) ENVIRONMENTAL LAWS

ANTARCTIC PROTECTION ACT - 16 U.S.C. §§ 2461-2466. This major legislation prohibits prospecting, exploration and development of Antarctic mineral resources by persons under U.S. jurisdiction.

CLEAN AIR ACT - 42 U.S.C. §§ 7401 et seq. This legislation is broken down into six subchapters, each of which outlines a particular strategy to control air pollution. Subchapter I: Control of Criteria and Hazardous Pollutants from Stationary Sources; and Enforcement of the Act; Subchapter II: Mobile Source Control; Subchapter III: Administrative Provisions; Subchapter IV: Acid Rain Control; Subchapter V: Operating Permits; and Subchapter VI: Protection of Stratospheric Ozone.

DEEPWATER PORT ACT - 33 U.S.C. §§ 1501 et seq. (INTERNATIONAL APPLICATION THROUGH 33 U.S.C. § 1510). This legislation regulates construction, ownership and operation of deepwater ports beyond the territorial limits of the U.S., thereby protecting indigenous marine life and the coastal environment.

ENDANGERED SPECIES ACT OF 1973 - 16 U.S.C. §§ 1531 et seq. The purpose of this act is to protect threatened and endangered fish, wildlife, and plant species, as well as the "critical habitat" of such species.

FEDERAL WATER POLLUTION CONTROL ACT (CLEAN WATER ACT) - 33 U.S.C. §§ 1251-1376. This act controls domestic water pollution in the U.S. (primarily through the use of the National Pollution Discharge Elimination System (NPDES)) and also regulates wetlands.

FOREIGN ASSISTANCE ACT - 22 U.S.C. §§ 2151p-2152d. This subsection of the Foreign Assistance legislation requires environmental accounting procedures for projects that fall under the act and significantly affect the global commons or environment of any foreign country.

FOREIGN CLAIMS ACT - 10 U.S.C. §§ 2734-2736. This major legislation prescribes the standards, procedures and amounts payable for claims arising out of noncombat activities of the U.S. Armed Forces outside the U.S..

MARINE PROTECTION, RESEARCH AND SANCTUARIES ACT - 16 U.S.C. §§ 1431-1445, 33 U.S.C. §§ 1401-1445. This major Federal legislation sets out the procedures for designation of marine sanctuaries and the enforcement procedures for their protection. It also addresses the circumstance where this legislation applies to non-U.S. citizens.

MARINE MAMMAL PROTECTION ACT - 16 U.S.C. §§ 1361-1421h. This legislation establishes a moratorium on the taking and importation of marine mammals and marine mammal products, during which time no permit may be issued for the taking of any marine mammals nor may marine mammal products be imported into the U.S. without a permit.

MIGRATORY BIRD TREATY ACT - 16 U.S.C. §§ 703-712. This legislation makes it illegal to "take" migratory birds, their eggs, nests, or feathers. Take includes hunting, killing, pursuing, wounding, possessing, and transporting.

NATIONAL ENVIRONMENTAL POLICY ACT (NEPA) - 42 U.S.C. §§ 4321-4345. Pursuant to this act, environmental impacts must be considered before conducting any major Federal action significantly affecting the quality of the human environment.

NATIONAL HISTORIC PRESERVATION ACT - 16 U.S.C. §§ 470 et seq. This act provides for the nomination, identification (through listing on the National Register) and protection of historical and cultural properties of significance. Specific procedures are established for compliance, including rules for consulting the World Heritage List or equivalent national register prior to approval of any OCONUS undertaking.

OCEAN DUMPING ACT - 33 U.S.C. §§ 1401-1445, 16 U.S.C. 1431–1447f, and 33 U.S.C. 2801–2805. This legislation regulates the dumping into ocean waters of any material that would adversely affect human health, welfare or amenities, or the marine environment or its economic potential.

OIL POLLUTION ACT - 33 U.S.C. §§ 2701 et seq. This act implements the provisions of the International Convention for the Prevention of the Pollution of the Sea by Oil, 1954, and amends the Federal Water Pollution Control Act. Specifically, it implements the 1969 and 1971 amendment to the International Convention.

PRE-COLUMBIAN MONUMENTS, TITLE II - REGULATION OF IMPORTATION OF PRE-COLUMBIAN MONUMENTAL OR ARCHITECTURAL SCULPTURE OR MURALS – 19 U.S.C. §§ 2091-2095. This public law prohibits the importation into the U.S. of pre-Columbian monumental or architectural sculptures or murals that are the

product of the pre-Columbian Indian culture of Mexico, Central America, South America, or the Caribbean Islands without a certificate from the country of origin certifying that the exportation was not in violation of law.

ACT TO PREVENT POLLUTION FROM SHIPS - 33 U.S.C. §§ 1901-1912. This act provides the enabling legislation that implements the protocol of 1978 relating to the International Convention for the Prevention of Pollution from Ships, 1973. The protocol is specifically designed to decrease the potential for accidental oil spills and eliminate operational oil discharges from ships at sea and in coastal waters. It contains many new requirements concerning the design, construction, operation, inspection, and certification of new and existing ships. Specifically, it requires the installation of oil-water separating equipment and oil content monitors in nearly all ships, and prohibits the discharge of oil at sea.

RESOURCE CONSERVATION AND RECOVERY ACT (RCRA) - 42 U.S.C. §§ 6901 et seq. This act (§ 6938) prohibits the export of hazardous waste without the consent of the receiving country and notification to the appropriate U.S. authorities.

DEPARTMENT OF DEFENSE DIRECTIVES/INSTRUCTIONS

DoDD 6050.7, Environmental Effects Abroad of Major Department of Defense Actions (March 31, 1979, certified 5 March 2004).

DoDI 4715.5, Management of Environmental Compliance at Overseas Installations (22 April 1996).

DoDI 4715.8, Environmental Remediation for DoD Activities Overseas (2 February 1998).

ARMY REGULATIONS

AR 27-20, Claims (8 February 2008), Chapter 10 – Claims Cognizable Under the Foreign Claims Act (FCA) (1 July 2003). (a) This chapter implements the FCA within the Army and authorizes the administrative settlement of claims of inhabitants of a foreign country, or a foreign country or a political subdivision thereof; against the U.S.; for personal injury, or death or property damages caused outside the U.S., its territories, commonwealths, or possessions; by military personnel or civilian employees of the DA; or claims which arise incident to noncombat activities of the Army.
(b) Claims resulting from the activities, or caused by personnel of another military department, service, or agency of the U.S. may also be settled by Army foreign claims commissions when authorized by this chapter. (c) Claims arising from acts or omissions of employees of nonappropriated fund activities may also be settled by Army foreign claims commissions pursuant to this chapter, otherwise applicable, but are payable from nonappropriated funds (chap. 12).
NOTE: Internationally, countries are divided up among the services for claims settlement authority; thus, the Army may not be the claims settlement authority in the area of operations. The claims regulation to be followed is the service-specific claims regulation for the responsible service. *See generally*, Chapter 8, Claims, *supra*.

AR 200-1, Environmental Protection and Enhancement (13 December 2007). Regulates compliance with environmental standards set out in host nation law or Status of Forces Agreements (SOFA) and supplies regulatory standards for OCONUS commanders at locations where there is an absence of host nation law or SOFA requirements.

NAVY REGULATIONS

OPNAVINST 5090.1C, Environmental Readiness Program Manual (30 October 2007). Contains guidance to deployed commanders concerning the management of hazardous materials, the disposal of hazardous waste and ocean dumping. It also contains the Navy's implementing guidance for Executive Order 12114 and DODD 6050.7, and sets out the factors that require environmental review for OCONUS actions.

MARINE CORPS ORDERS

MCO P5090.2A, Environmental Compliance and Protection Manual (10 July 1998). This codification of Marine Corps environmental policies and rules instructs the deployed commander to adhere to SOFA guidance and host nation laws that establish and implement host nation pollution standards.

AIR FORCE INSTRUCTIONS

AFI 32-7006, Environmental Program in Foreign Countries (29 April 1994).

AFI 32-7061, The Environmental Impact Analysis Process (EIAP) (12 March 2003). Now published as 32 CFR 989, this regulation is the Air Force's implementing guidance for Executive Order 12114 and DODD 6050.7. It sets out service activities that require environmental documentation and the type of documentation required. For overseas EIAP, *see* subpart 989.37.

NOTES

CHAPTER 21

ADMINISTRATIVE LAW IN OPERATIONS

REFERENCES

I. Gifts.

1. 10 U.S.C. § 2601, General Gift Funds (6 Jan. 2006).
2. 10 U.S.C. § 2608, Acceptance of Contributions for Defense Programs, Projects, and Activities (8 May 2007).
3. 5 U.S.C. § 7342, Receipt and Disposition of Foreign Gifts and Decorations (20 Dec. 2006).
4. U.S. DEP'T OF DEFENSE, DIR. 1005.13, GIFTS AND DECORATIONS FROM FOREIGN GOVERNMENTS (19 Feb. 2002, incorporating change 1, 6 Dec. 2002).
5. U.S. DEP'T OF DEFENSE, REG. 7000.14-R, FINANCIAL MANAGEMENT REGULATION, Vol. 12, Ch. 3 (Jan. 2002).
6. U.S. DEP'T OF ARMY, REG. 1-100, GIFTS AND DONATIONS (15 Nov. 1983).
7. U.S. DEP'T OF ARMY, REG. 1-101, GIFTS FOR DISTRIBUTION TO INDIVIDUALS (1 May 1981).
8. U.S. DEP'T OF ARMY, REG. 215-1, MORALE, WELFARE AND RECREATION ACTIVITIES AND NON-APPROPRIATED FUND INSTRUMENTALITIES (31 July 2007).
8. U.S. DEP'T OF ARMY, REG. 600-8-22, Military Awards, Chapter 9 (11 December 2006).
9. U.S. DEP'T OF AIR FORCE, INSTR. 51-601, GIFTS TO THE DEPARTMENT OF THE AIR FORCE (26 Nov. 2003).
10. U.S. DEP'T OF AIR FORCE, INSTR. 51-901, GIFTS FROM FOREIGN GOVERNMENTS (16 Feb. 2005).
11. U.S. DEP'T OF AIR FORCE, INSTR. 34-201, USE OF NONAPPROPRIATED FUNDS (NAFs) (17 June 2002).
12. U.S. DEP'T OF NAVY, SEC'Y OF THE NAVY INSTR. 4001.2H, ACCEPTANCE OF GIFTS (1 Dec. 2006).
13. U.S. DEP'T OF NAVY, SEC'Y OF THE NAVY INSTR. 1650.1H, NAVY AND MARINE CORPS AWARDS MANUAL (22 Aug. 2006).

II. Morale, Welfare, and Recreation (MWR)

1. U.S. DEP'T OF DEFENSE, INSTR. 1015.10, PROGRAMS FOR MILITARY MORALE, WELFARE, AND RECREATION (dated 3 Nov. 1995, incorporating change 1, 31 Oct. 1996).
2. U.S. DEP'T OF ARMY, REG. 215-1, MORALE, WELFARE AND RECREATION ACTIVITIES AND NON-APPROPRIATED FUND INSTRUMENTALITIES (31 July 2007).
3. U.S. DEP'T OF ARMY, REG. 700-135, SOLDIER SUPPORT IN THE FIELD (31 Dec. 2002).
4. U.S. DEP'T OF NAVY, SEC'Y OF THE NAVY INSTR. 1700.12A, Operation of Morale, Welfare and Recreation (MWR) Activities (15 July 2005).
5. U.S. DEP'T OF AIR FORCE, INSTR. 34-262, AIR FORCE COMMUNITY SERVICE PROGRAMS AND USE ELIGIBILITY (27 June 2002).
6. U.S. MARINE CORPS, ORDER P1700.27B, MARINE CORPS COMMUNITY SERVICES POLICY MANUAL (9 Mar. 2007).

III. Command Investigations

1. U.S. DEP'T OF DEFENSE, INSTR. 6055.7, ACCIDENT INVESTIGATION, REPORTING, AND RECORD KEEPING (3 Oct. 2000, incorporating Change 1, 24 Apr. 2008).
2. Memorandum of Understanding Among the U.S. Army, Air Force, and Naval Safety Centers, Headquarters, Marine Corps (Safety Division), and the U.S. Coast Guard Health and Safety Directorate for Safety Investigation and Reporting of Joint Service Mishaps (10 Apr. 2006).
3. U.S. DEP'T OF DEFENSE, INSTR. 2310.5, ACCOUNTING FOR MISSING PERSONS (31 Jan. 2000).
4. U.S. DEP'T OF DEFENSE, INSTR. 2310.4, REPATRIATION OF PRISONERS OF WAR (POW), HOSTAGES, PEACETIME GOVERNMENT DETAINEES AND OTHER MISSING OR ISOLATED PERSONNEL (21 Nov. 2000).
5. U.S. DEP'T OF DEFENSE, INSTR. 1300.06, CONSCIENTIOUS OBJECTORS (5 May 2007).
6. U.S. DEP'T OF ARMY, REG. 15-6, PROCEDURE FOR INVESTIGATING OFFICERS AND BOARDS OF OFFICERS (2 Oct. 2006).
7. U.S. DEP'T OF ARMY, REG. 385-10, THE ARMY SAFETY PROGRAM (23 Aug. 2007).
8. U.S. DEP'T OF ARMY, REG. 600-34, FATAL TRAINING/OPERATIONAL ACCIDENT PRESENTATIONS TO THE NEXT OF KIN (2 Jan. 2003).
9. U.S. DEP'T OF ARMY, REG. 600-8-1, ARMY CASUALTY PROGRAM (30 Apr. 2007).
10. U.S. DEP'T OF ARMY, REG. 600-8-4, LINE OF DUTY POLICY, PROCEDURES, AND INVESTIGATIONS (15 Apr. 2004).

11. U.S. DEP'T OF ARMY, REG. 600-43, CONSCIENTIOUS OBJECTION (21 Aug. 2006).
12. U.S. DEP'T OF ARMY, REG. 735-5, POLICIES AND PROCEDURES FOR PROPERTY ACCOUNTABILITY (28 Feb. 2005).
13. U.S. DEP'T OF ARMY, REG. 380-5, DEPARTMENT OF THE ARMY INFORMATION SECURITY PROGRAM (25 Sept. 2000).
14. U.S. DEP'T OF AIR FORCE, INSTR. 51-503, AEROSPACE ACCIDENT INVESTIGATIONS (16 July 2004).
15. U.S. DEP'T OF AIR FORCE, INSTR. 91-204, SAFETY INVESTIGATIONS AND REPORTS (14 Feb. 2006).
16. U.S. DEP'T OF AIR FORCE, INSTR. 31-401, INFORMATION SECURITY PROGRAM MANAGEMENT (1 Nov. 2005).
17. U.S. DEP'T OF AIR FORCE, INSTR. 36-2910, LINE OF DUTY (MISCONDUCT) DETERMINATION (4 Oct. 2002).
18. U.S. DEP'T OF AIR FORCE, MANUAL 23-220, REPORTS OF SURVEY FOR AIR FORCE PROPERTY (1 July 1996).
19. U.S. DEP'T OF AIR FORCE, INSTR. 36-3204, PROCEDURES FOR APPLYING AS A CONSCIENTIOUS OBJECTOR (15 July 1994).
20. The Air Force Commander-Directed Investigation Guide (7 July 2006).
21. U.S. DEP'T OF NAVY, SEC'Y OF THE NAVY INSTR. 3750.6-R, NAVAL AVIATION SAFETY PROGRAM (dated 1 Mar. 2001, incorporating change 2, 11 Aug. 2003).
22. U.S. DEP'T OF NAVY, SEC'Y OF THE NAVY INSTR. 5100.19D, AFLOAT, NAVY OCCUPATIONAL SAFETY AND HEALTH (NAVOSH) PROGRAM MANUAL FOR FORCES AFLOAT W/CH 1 (30 Aug. 2001).
23. U.S. DEP'T OF NAVY, SEC'Y OF THE NAVY INSTR. 5100.23G, ASHORE, NAVY OCCUPATIONAL SAFETY AND HEALTH (NAVOSH) PROGRAM MANUAL (30 Dec. 2005).
24. U.S. MARINE CORPS, ORDER P5102.1B, NAVY AND MARINE CORPS MISHAP AND SAFETY INVESTIGATION REPORTING AND RECORD KEEPING MANUAL (7 Jan. 2005).
E25 JAGINST 5800.7D, Manual of the Judge Advocate General (JAGMAN),Chapter 2 (20 June 2007).

IV. Freedom of Information Act (FOIA)

1. U.S. DEP'T OF DEFENSE, DIR. 5400.7, DOD FREEDOM OF INFORMATION ACT PROGRAM (2 Jan. 2008)
2. U.S. DEP'T OF DEFENSE, REG. 5400.7-R, DOD FREEDOM OF INFORMATION ACT PROGRAM (4 Sept. 1998) (includes 1996 amendments to the Freedom of Information Act).
2. U.S. DEP'T OF ARMY, REG. 25-55, THE DEPARTMENT OF THE ARMY FREEDOM OF INFORMATION ACT PROGRAM (1 Nov. 1997) (does not include 1996 amendments to the Freedom of Information Act).
3. U.S. DEP'T OF DEFENSE, REG. 5400.7/Air Force Supplement, DoD Freedom of Information Act Program (24 June 2002).
4. Navy/Marines: Secretary of the Navy Instruction 5720.42F, Department of the Navy Freedom of Information Act Program (6 January 1999); Marine Corps Order 5720.63, Publication in the Federal Register, Indexing, and Public Inspection of Marine Corps Directives (22 August 1983) (W/CH1 2 August 1991)

V. Financial Liability Investigations

1. U.S. DEP'T OF ARMY, REG. 600-4, REMISSION OR CANCELLATION OF INDEBTEDNESS (7 Dec. 2007).
2. U.S. DEP'T OF ARMY, REG. 735-5, POLICIES AND PROCEDURES FOR PROPERTY ACCOUNTABILITY (28 Feb. 2005).
3. U.S. DEP'T OF ARMY, PAM. 735-5, FINANCIAL LIABILITY OFFICER'S GUIDE (9 Apr. 2007).
4. U.S. DEP'T OF AIR FORCE, MANUAL 23-220, REPORTS OF SURVEY OF AIR FORCE PROPERTY (1 July 1996).
5. U.S. DEP'T OF NAVY, SEC'Y OF THE NAVY INSTR. 5500.4G, REPORTING OF MISSING, LOST, STOLEN, OR RECOVERED (MLSR) GOVERNMENT PROPERTY (24 June 1993); CNATRAINST 5500.1C, REPORTING OF MISSING, LOST, STOLEN, OR RECOVERED GOVERNMENT PROPERTY (18 Dec. 1996).
6. U.S. MARINE CORPS, ORDER 4340.1A, REPORTING OF MISSING, LOST, STOLEN, OR RECOVERED (MLSR) GOVERNMENT PROPERTY (8 Aug. 1994).

I. GIFTS

A. Sources and Recipients of Gifts. To analyze the legality of a gift to a DoD organization or a DoD employee, it is important to consider the source of the gift and the intended recipient.

1. *Gifts to DoD and the Army*.

a. Gifts to the Services are governed by statute and implementing regulations. The two primary gift statutes that authorize the Army to accept gifts are 10 U.S.C. §§ 2601 & 2608. For the Army, AR 1-100 implements § 2601 and allows acceptance of gifts to be used for a school, hospital, library, museum or cemetery, or other similar institution. A local commander can accept unconditional gifts valued up to $1,000. Conditional gifts or gifts valued over $1,000 may be accepted only by the Secretary of the Army. POC is Ms. Natalie Abt, Chief, Property Management Branch, OAA,

Director of Logistics-Washington (703) 602-2293. Also, AR 1-101 addresses gifts given to the Army for distribution to individuals. This regulation requires the donor to pay transportation costs and prohibits Army endorsement of the donor. The Air Force does not limit § 2601 to institutions similar to those listed in the statute, and has more detailed delegations of gift acceptance authority than the Army. *See* AFI 51-601, Gifts to Dep't of the Air Force. *See also* SECNAVINST 4001.2H, Acceptance of Gifts.

b. 10 U.S.C. § 2608 is the broadest gift acceptance authority for the Army. It was passed shortly after OPERATION DESERT SHIELD/DESERT STORM, and applies to all of DoD. The Army has not implemented it by regulation. DoD has implemented this section in the Financial Management Regulation, DoD 7000.14-R, Volume 12, Chapter 3. The statute allows DoD to accept money or property from any person, and services from a foreign government or international organization, for use in any DoD program. DoD has delegated authority to accept gifts of property to Service Secretaries. All gifts of money must be processed through the DoD Comptroller. Additionally, all gifts of money must be deposited in the Defense Cooperation Account and cannot be expended until re-appropriated by Congress. The Air Force has implemented this statute in AFI 51-601, Gifts to Dep't of the Air Force, Chapter 4.

c. In the Army, commanders have much more local gift acceptance authority if the command accepts the gift for its Non-Appropriated Fund Instrumentalities (NAFI). AR 215-1, para. 13-14, authorizes MWR Directors to accept gifts to MWR up to $15,000; garrison commanders up to $50,000; IMCOM regional directors up to $100,000; and, United States Army Family and Morale, Welfare, and Recreation Command (USAFMWRC) up to $250,000. Military personnel may not solicit gifts for the NAFI, but may make the NAFI's needs known in response to inquiries from prospective donors. (*See also* AFI 34-201; and SECNAVINST 4001.2H).

2. *Gifts to Individuals*.

a. The Joint Ethics Regulation (JER), DoD 5500.7-R, Chapter 2, generally governs acceptance of gifts to individuals in their personal capacities. The JER may not be supplemented. (The JER and The Judge Advocate General's Legal Center and School's Ethics Counselor's Deskbook may be found in the Standards of Conduct Office (SOCO) Database on JAGCNet, as well as the DoD SOCO website: http://www.defenselink.mil/dodgc/defense_ethics/).

b. The primary issue regarding gifts to individuals is determining who is the gift-giver (and who is paying for the gift). Different rules apply depending upon whether the gift is from a foreign government, from an outside source (outside the Federal Government), or from fellow Soldiers or DoD/DA civilians (*i.e.*, between Federal employees). To avoid any problems in this area, ask your appointed Ethics Counselor for advice either before receipt or shortly after receipt of the gift.

3. *Gifts to Individuals From Foreign Governments*.

a. There is a general Constitutional prohibition against any Federal employee receiving any gift from a foreign government or its representatives. A gift from a foreign government includes a gift from the national, state or local governmental entity. Article 1, section 9 prohibits a Federal employee from accepting any "present or emolument" from a foreign government unless authorized by Congress. Congress has authorized, in 5 U.S.C. § 7342, the acceptance of gifts of "minimal value." Minimal value changes every three years, as determined by the Consumer Price Index. Currently, minimal value is $335.

b. The rules allow a Federal employee to personally accept a gift given from a foreign governmental representative if the gift is worth $335 or less. Each level of the foreign government (separate sovereigns) has a $305 limit. The value of the gift is based upon the fair market value of the gift in U.S. Dollars in the United States. Fair market value can be determined through like items sold at AAFES, from the Claims Office, or formal appraisals (which may be funded by the command). These rules apply to foreign gifts received in foreign countries or in the U.S. **To determine what is a "gift," look to 5 U.S.C. § 7342, and the DoD Directive on foreign gifts, DoDD 1005.13, and do not look to the gift definitions contained in the Standards of Conduct rules found in the JER.** For the Army's rules on acceptance of foreign awards and decorations, see AR 600-8-22, Chapter 9; Air Force rules are at AFI 51-901; Navy/USMC, see SECNAVINST 1650.1G, Chapter 7.

c. If the gift is valued at more than $335, then the employee must forward a report through the chain of command to HRC (for Army personnel). POC is Ms. Natalie Abt, Chief, Property Management Branch, OAA, Director of Logistics-Washington (703) 602-2293, the same POC as for Gifts to the Army (see above). (AF POC is AFPC/DPPPRS, 550 C. St. West, Suite 12, (Attn: Ms. Garsford), Randolph AFB, 78150-4714; for Navy and USMC, report to and deposit gifts in accordance with SECNAVINST 1650.1H, Chapter 7).

d. Gifts of more than $335 become U.S. Government property. The employee can forward the gift with the report to HRC, which will likely pass the gift on to the General Services Administration for sale at a public auction. The employee can also forward the report without the gift and ask that the gift, now Government property which should be entered on the property books, be retained on permanent display at the employee's agency. If the employee wishes personally to retain a gift worth more than $335, the employee may purchase the gift before it is auctioned off.

e. It is never inappropriate to accept a gift from a foreign government, even one valued at more than $335, when refusal could embarrass the U.S. or could adversely affect foreign relations. In such cases, the employee should accept the gift on behalf of the U.S. and then report the gift to HRC, as discussed above.

f. There are several other variations of the rule. For multiple gifts given at a presentation ceremony, the employee may accept gifts with an aggregate value is $335 or less. The gift(s) which, in the aggregate, exceed the $335 limit may not be kept. Gifts given to the spouse of a Federal employee by a foreign official are considered to be gifts to the employee, and gifts given by the spouse of a foreign official are considered to be gifts from the foreign official. Gifts which are paid for by a foreign government are foreign gifts; gifts which are paid for from a foreign individual's personal funds are not foreign gifts. For example, if the foreign employee is giving the Federal employee the gift as an act of personal friendship and the foreign employee is personally bearing the cost of the gift, then the foreign gift rules do not apply. In this case, the rules regarding gifts from outside sources or gifts between employees may apply.

4. *Gifts to Individuals From an Outside Source*.

a. Government employees may not solicit or accept a gift: (1) from a prohibited source (someone who has an interest in the performance of official Army missions); or (2) because of the employee's official position.

b. The test to determine if a gift is given because of the employee's "official position" is whether the gift would have been given if the employee had not held the status, authority or duties of his particular position. The broad prohibitions are subject to the following:

(1) First, the term "gift" does not include modest items of food and refreshments that are not offered as part of a meal. For example, coffee and donuts are not gifts. The following are also not considered gifts: greeting cards; plaques; trophies; prizes in contests open to the public; commercial discounts open to all; anything paid for by the Government; anything for which fair market value is paid; and other similar items.

(2) Second, several exceptions allow acceptance of otherwise prohibited gifts. The most common exception allows acceptance of unsolicited gifts valued at $20 or less per source, per occasion. The cumulative value from any single source may not exceed $50 during the year. Other exceptions that allow acceptance of gifts, include: gifts based upon an outside relationship (*e.g.*, family); certain broadly-available discounts and awards; free attendance at certain widely-attended gatherings; and gifts of food or entertainment in foreign areas. The last exception allows an employee to accept food, refreshments, or entertainment while in a foreign area when offered at a meal or a meeting when: (1) the value does not exceed the Department of State per diem rate (in U.S. dollars) for the locale; (2) foreign officials are in attendance; (3) attendance at the meal or meeting is part of the official duties of the employee and will further a U.S. mission; and (4) the gift is paid for by a person other than a foreign government.

(3) Third, if the above analysis allows acceptance, employees must nonetheless refuse gifts if accepting would undermine Government integrity, *e.g.*, gifts accepted on too frequent a basis. Employees may never use their official position to solicit a gift and may never accept any gift in exchange for official action (illegal *quid pro quo*).

c. Change 6 to the JER, dated 23 March 2006, allows service members, who have sustained injuries or illness while serving in designated combat zones, and their family members to accept unsolicited gifts from non-Federal entities (does not include gifts from foreign governments and their agents). The following limitations apply: the gifts cannot have been given in return for influencing performance of an official act; the gift(s) cannot have been solicited or coerced; and the gifts cannot have been accepted in violation of any other statute, including 18 U.S.C. 201(b) (bribes) and 209 ("dual compensation"). For gifts with an aggregate market value in excess of "minimal value" (currently $335) per source per occasion, or with an aggregate market value exceeding $1000 received from any one source in a calendar year, an agency ethics official must make a written determination that the gift(s) is/are not offered in a manner that specifically discriminates among Soldiers or family members merely on the basis of type of official responsibility or of favoring those of higher rank or rate of pay; the donor does not have interests that may be affected substantially by the performance or non-performance of the Soldier or family member's official duties; and acceptance would not cause a reasonable person with knowledge of the relevant facts to question the integrity of DoD's programs or operations. For more information, see JER 3-400 to 3-500. This exception is retroactive to September 11, 2001.

5. *Gifts to Individuals from Other Federal Employees.*

a. There are general prohibitions on gifts between Federal employees. An employee shall not: (1) give a gift or solicit a contribution for an official superior, or (2) accept a gift from a lower-paid employee, unless the donor and recipient are personal friends who are not in a superior-subordinate relationship.

b. There are two exceptions to the general prohibition: (1) gifts on special infrequent occasions (*e.g.*, marriage, PCS, retirement, etc.), and (2) gifts on an occasional basis (*e.g.*, birthdays and holidays).

(1) **Special Infrequent Occasions**. Gifts are generally limited to $300 in value per gift per donating group. No member of one donating group may be a member of another donating group. Employees may not solicit more than $10 from another employee. All donations must be voluntary and employees must be free to give less than the amount requested, or nothing at all. Gifts may exceed the $300 cap only in unusual occasions. In certain occasions where the superior-subordinate relationship is terminated (*e.g.*, retirement, resignation, transfer outside of the chain of command), gifts may exceed $300 per donating group only if they are appropriate to the occasion and uniquely linked to the departing employee's position or tour of duty, and commemorate the same. DA SOCO advises that "appropriate to the occasion" should generally be $300.

(2) **Occasional Basis**. This exception includes meals at an employee's home and customary gifts brought to the home (*e.g.*, flowers). Also included are gifts valued at $10 or less given on appropriate occasions, such as birthdays, Christmas, etc. No collection of money from other employees is permissible under this exception.

B. Handling Improper Gifts to Individuals. If a gift has been improperly accepted, the employee may pay the donor its market value or return the gift. With approval, perishable items may be donated to charity, shared within the office, or destroyed. See your Ethics Counselor as necessary.

II. MWR OPERATIONS

A. General.

1. MWR activities during mobilization, contingency and wartime operations are "necessary to maintain physical fitness and to alleviate combat stress by temporarily diverting Soldier's focus from combat situations" (AR 215-1, para. 9-1).

2. This section focuses on command and staff responsibilities to provide MWR support, types of activities and the resources available to accomplish them.

B. Responsibilities.

1. For the Army, USAFMWRC is the key policy-making organization for all MWR operations. In deployed environments, the theater Army DCSPER and Corps G1 are the primary coordinating bodies with USAFMWRC for MWR programs.

2. Unit commanders are responsible for designating a unit athletic and recreation (A&R) officer or NCO. The A&R officer/NCO assists the commander in acquiring, assembling and shipping their own initial 30-day supply of A&R and library book kits (obtained from installation MWR libraries), as well as operating athletic activities, recreation, programs, unit lounges and AAFES Imprest Fund Activities (AIFA).

C. Training.

1. Commanders may designate Soldiers to execute MWR operations. Civilian MWR specialists may also be available to assist. These specialists train the Unit A&R officers/NCOs.

2. Training covers recreation programming, operation of unit lounges, unit fund management, and establishment/maintenance of corps/division/brigade packages and unit A&R kits.

D. Kits and Other Supplies.

1. MWR A&R kit equipment tailored to unit needs is procured and maintained locally.

2. Items that can be deployed with the unit to support unit self-directed recreation activities include, but are not limited to: music listening equipment; cards; board games; and balls and athletic equipment available through normal Army supply channels. USAFMWRC also provides unit kits for extended operations.

E. Funding.

1. MWR support is mission-funded during war and other conditions (*e.g.*, mobilization/contingency operations). (*See* AR 215-1, para. 9-1).

2. All MWR kits are authorized appropriated fund (APF) expenditures (AR 215-1, para. 9-4). All categories of MWR activities shall be mission-funded with APFs. *See* AR 215-1, para. 9-6.

F. Authorized MWR Activities in Contingency and Combat Operations.

1. *USO/Armed Forces Professional Entertainment Office (AFPEO).* Unit Commanders may request, through the corps commander, civilian entertainment. Requests are forwarded to the AFPEO.

2. *Military Clubs*. Existing theater military clubs continue operations if conditions warrant. New clubs may be established in secure areas (*e.g.*, rest areas and R&R areas) after a NAFI is established. Services should include food, beverages (alcohol if theater commander approves), entertainment and other recreation, and check cashing and currency conversion.

3. *Unit Lounges*. Theater commanders may authorize "unit lounges," which are recreation centers that provide food and beverages, as well as activities normally offered in clubs. SOPs provided by the installation are used in the absence of theater guidelines.

4. *Rest Centers (in secure areas), pursuant to AR 215-1, para. 9-5*.

a. *General*. Rest centers in theater or corps areas, established by commanders, give Soldiers a short respite from combat or combat support duties. Rotation, including transportation, is normally less than one week. Soldiers have as many services as the commander can logistically secure/support. Assets to establish/operate a rest area come from unit resources.

b. *DoD Rest and Recuperation (R&R) Centers*. Established based on theater needs. Theater commanders may designate resorts and other suitable facilities located at a reasonable distance from combat areas, outside the theater of operation, as R&R destination sites. After obtaining DoD approval, the theater executes the program.

c. *Armed Forces Recreation Centers (AFRC).* AFRCs both within and outside the theater of operation may be designated R&R centers.

5. *Army Recreation Machine Program (ARMP), or "Slot machines*." May continue service within authorized theaters of operation if resources are available. If civilian employees are evacuated from the area, local commanders may assume operations for machines and operations, once a modified ARMP SOP is provided by USAFMWRC.

6. *Tactical Field Exchanges (TFE).* TFEs are established to provide AAFES-type merchandise (class VI). Initial establishment of TFEs is normally accomplished by military personnel; AAFES is responsible for training military personnel to operate the facilities. Once the theater is stabilized, or mission, enemy, terrain, troops, time, civilians (METT-TC) allows, AAFES civilian personnel may be brought into the theater. AIFAs are military-operated retail activities, usually operated in small or remote sites, when regular direct operation exchanges cannot be provided. Commanders may establish AAFES AIFA with borrowed military labor, if resources allow. Commanders must select and train unit personnel to operate AIFAs. AAFES issues the unit an initial fund to purchase a beginning inventory. Site commanders can request establishment of an AIFA from the general manager of the AAFES geographical area. *See* FM 12-6. TFEs are managed by a TFE officer (TFEO), who is a commissioned, warrant or non-commissioned officer. (*See* AR 700-135, Para. 2-5).

7. *American Red Cross (ARC).* All requests for ARC personnel to accompany U.S. forces into a theater of operations during war or operations other than war (OOTW) must be forwarded to USAFMWRC. USAFMWRC is responsible for coordinating and securing support for ARC personnel to support military operations, and managing and monitoring military support to ARC, including funding travel. Once in the theater of operations, ARC support is coordinated through the theater G1.

G. Redeployment/Demobilization.

1. *General*. Upon redeployment/demobilization, NAF accounts will be closed, NAFIs disestablished as necessary, and MWR equipment accounted for. MWR equipment issued to units in theater will revert to the theater MWR.

2. *Funds*. Unit funds revert to the theater NAFI upon unit redeployment. Theater NAFI funds revert to USAFMWRC or remain in theater if there is an established and continuing installation MWR fund.

H. Lessons Learned. As required, after-action MWR reports are forwarded to Commander, USAFMWRC, ATTN: CFSC-SP (Lessons Learned), 4700 King Street, Alexandria, VA 22302-4419.

III. COMMAND INVESTIGATIONS

A. Introduction.

1. All the Services have specific procedures for various types of administrative investigations. In the absence of more specific regulatory guidance, the Army uses AR 15-6, Procedure for Investigating Officers and Boards of Officers. AR 15-6 contains the basic rules for Army regulatory boards. If an investigation is appointed under a specific regulation, that regulation will control the proceedings. Often, that specific regulation will have a provision that makes AR 15-6 applicable to the proceedings. Consequently, you may have to look to both the specific regulation involved and to AR 15-6 for the proper board procedures. If the two regulations conflict on a particular point, the provisions of the specific regulation authorizing the board will override the provisions of AR 15-6.

2. Some of the more likely types of investigations that Army judge advocates (JA) may encounter during deployments include: accident investigations, which may require both a Safety Accident Investigation and a Legal Accident Investigation under AR 385-10 and AR 600-34 (if death results, a family brief may be triggered under AR 600-34); Hostile death Investigations required by AR 600-8-1; Line of Duty Investigations under AR 600-8-4; Conscientious Objector Investigations under AR 600-43; and Boards of Inquiry for missing persons under AR 600-8-1.

3. The Air Force has no single regulation or instruction governing non-IG investigations. Some types of investigations may be specifically authorized by instruction (*e.g.*, AFI 36-3208, Administrative Separation of Airmen). In any event, the ability to initiate a command-directed investigation flows from the commander's inherent authority.

4. In the Navy and Marine Corps, the main reference for administrative investigations is JAGINST 5800.7C, The Manual of the Judge Advocate General, also known as the "JAGMAN." It divides administrative investigations into more specific types than does AR 15-6, to include litigation report investigations, courts and boards of inquiry, and command investigations.

5. Investigations in all services follow similar basic concepts. In the joint environment, the goal is to prepare an investigation that meets the substantive standards of all the Services involved. Detailed analysis of Air Force and Navy Investigation requirements is beyond the scope of this chapter. Reference to those Services' policies is for clarification only. Legal advisors should turn to the appropriate Service authorities for detailed guidance.

6. There is currently no joint publication governing investigations. In the event an investigation is required in a joint environment, judge advocates should determine which Service's regulation is most applicable and then an investigation under that regulation should be conducted. When determining which Service's regulation is most applicable consider the possible uses of the investigation, whether a particular Service requires a certain investigation, which Service has the most at stake in the outcome of the investigation, any local or command guidance regarding joint investigations, and other matters that would contribute to an informed decision. Since investigations in all services follow similar basic concepts and will result in a thorough investigation if conducted properly, the regulation ultimately used is not as important as is choosing and following a particular authorized regulation. Under no circumstances should regulations be combined and a "hybrid" investigation created. Pick a regulation and follow it! The Services are shown great deference in regards to administrative matters as long as regulations are followed correctly.

B. Command Investigations, Generally.

1. *Function and Purpose*. The primary purpose of an investigation or board of officers is to look into and report on the matters that the appointing authority has designated for inquiry. The report will include findings of fact and recommendations. Often, when criminal misconduct is suspected, it may be more appropriate to conduct an R.C.M. 303 preliminary inquiry or to have either the Military Police (MP), Criminal Investigation Division (CID), or other appropriate law enforcement authorities conduct the investigation.

2. *Methods*. An administrative fact-finding procedure under AR 15-6 may be designated an investigation or a board of officers. The proceedings may be informal or formal. Proceedings that involve a single officer using the informal procedures are designated investigations. Proceedings that involve more than one Investigating Officer (IO) using formal or informal procedures or a single investigating officer using formal procedures are designated boards of

officers. The Navy term for informal investigations is "command investigation" (CI). The Air Force term is "Command Directed Investigations" (CDI).

3. *Uses*. No Service requires as a blanket rule that an investigation be conducted before taking adverse administrative action. But, if inquiry is made under AR 15-6 or other general investigative authority, the findings and recommendations may be used in any administrative action against an individual. An adverse administrative action does not include actions taken pursuant to the Uniform Code of Military Justice (UCMJ) or the Manual for Courts-Martial (MCM).

4. *Types of Investigations*. The appointing authority must determine, based on the seriousness and complexity of the issues and the purpose of the inquiry, whether to designate an investigation or a board of officers to conduct the inquiry.

a. *Investigation*. Conducted by a single IO using informal procedures. An investigation designated under AR 15-6 can be used to investigate almost any matter.

b. *Board of Officers*. When more than one fact-finder is appointed, whether formal or informal procedures are used, they will be designated a board of officers. Multiple fact-finders using informal procedures may be appropriate for investigations into large-scale events or investigations where there are a large number of witnesses and other evidence to collect and consider. A single fact-finder will also be designated a board when formal procedures are to be used.

c. *Informal Procedures*. An informal investigation or board may use whatever method it finds most efficient and effective for acquiring information. For example, the board may divide witnesses, issues or evidentiary aspects of the inquiry among its members for individual investigation and development, holding no collective meeting until ready to review all of the information collected. Evidence may be taken telephonically, by mail, or in whatever way the board deems appropriate. A respondent shall not be designated when informal procedures are used, and no one is entitled to the rights of a respondent. Before beginning an informal investigation, an IO reviews all written materials provided by the appointing authority and consults with a servicing staff judge advocate (SJA) or command judge advocate (CJA) to obtain appropriate legal guidance. Some of the most important services a JA can perform include assisting the IO in developing an investigative plan and providing advice during the conduct of the investigation, often regarding such matters as what the evidence establishes, what areas might be fruitful to pursue, and the necessity for rights warnings.

d. *Formal Procedures*. This type of board meets in full session to take evidence. Definite rules of procedure will govern the proceedings. Depending on the subject matter under investigation, these procedural rules are found in AR 15-6 (Chapter 5), the specific regulation governing the investigation, or both. The Air Force presents guidance for formal investigations in AFI 51-602, Boards of Officers. The Navy's guidance appears in JAGINST 5830.1, Procedures Applicable to Courts of Inquiry and Administrative Fact-Finding Bodies that Require a Hearing.

5. *Due Process*. When a respondent is designated, a hearing must be held. A respondent may be designated when the appointing authority desires to provide (or other regulations require) a hearing for a person with a direct interest in the proceeding. Important benefits inure to a respondent, such as the right to be present at board sessions, representation by counsel, and the opportunity to present witnesses and cross-examine Government witnesses. The mere fact that an adverse finding may be made or adverse action recommended against a person, however, does not mean that he or she should be designated a respondent. If a respondent is designated, formal procedures must be used. For example, a board of officers considering an enlisted Soldier for separation under AR 635-200 must use formal procedures. Due to the considerable administrative burden of using formal procedures, they are rarely used unless required by other regulations. Proper conduct of formal investigations depends on the purpose of the investigation, and is beyond the scope of this chapter.

C. Friendly Fire.

1. DoDI 6055.7 requires that for all incidents falling within the definition of Friendly Fire, the Combatant Commander will convene a legal investigation (an AR 15-6 investigation in the Army, a command investigation in the Navy, or a command directed investigation in the Air Force) to determine the facts of the incident and guide further actions. In practice, Combatant Commanders typically delegate this authority to the GCMCA of the unit involved. Regardless of who appoints the investigation, however, the Combatant Commander must approve all friendly fire investigations.

2. Friendly fire is defined in DoDI 6055.7 as a circumstance in which members of a U.S. or friendly military force are mistakenly or accidentally **killed or injured** in action by U.S. or friendly forces actively engaged with an enemy or who are directing fire at a hostile force or what is thought to be a hostile force.

3. In addition to the legal investigation commanders may also convene a safety investigation *as required*. Currently, the Army is the only service that requires a safety investigation for all friendly fire incidents.

4. In May 2007, the Army Vice Chief of Staff published detailed guidance regarding the reporting and investigation requirements for all incidents of friendly fire. Units must follow these procedures for all friendly fire incidents, whether resulting in death or injury, as soon as personnel on the ground *suspect* that a friendly fire incident has occurred.

a. The unit must provide immediate telephonic notice through the Casualty Assistance Center to the Army Casualty and Mortuary Affairs Operation Center (CMAOC). For time sensitive assistance contact the CMAOC Operations Center at 1-800-626-3317 COMM: (703) 325-7990. DSN: 221-7990. OCONUS dial country code 001 or OCONUS DSN code (312).

b. Generate an initial casualty report IAW AR 600-8-1, approved by a field grade officer, through command channels to the Combatant Commander.

c. Initiate an AR 15-6 investigation (Appointed by GCMCA; approved by Combatant Commander).

d. Contact the Combat Readiness Center (COMM: (334) 255-9493 / 9585, DSN: 558) and initiate safety investigation based upon CRC guidance.

e. Contact the local Criminal Investigation Division. They will provide forensics assistance to the AR 15-6 Officer or conduct investigation if criminal action or negligence is suspected or substantiated.

f. Submit supplemental casualty report when there is a substantial change to the initial report (i.e., when inflicting force is discovered).

g. Once approved by the Combatant Commander, submit the AR 15-6 proceedings to the CMAOC.

h. Continue coordination with the CMAOC to provide an AR 600-34 family presentation for fatality cases.

D. Authority to Appoint an Investigation.

1. *Formal*. After consultation with the servicing JA or legal advisor, the following individuals may appoint a formal board of officers in the Army:

a. Any General Court-Martial Convening Authority (GCMCA) or Special Court-Martial Convening Authority (SPCMCA), including those who exercise that authority for administrative purposes only.

b. Any General Officer.

c. Any commander or principal staff officer in the grade of colonel or above at the installation, activity or unit level.

d. Any State Adjutant General.

e. A Department of the Army civilian supervisor permanently assigned to a position graded as a GS/GM-14 or above and who is assigned as the head of an Army agency or activity or as a division or department chief.

f. In the Air Force, the appointment authority for boards of officers varies with the regulatory authority for convening the board. In the Navy, an officer in command may convene a board. The GCMCA takes charge in case of a "major incident."

2. *Informal*. Informal investigations or boards may be appointed by:

a. Any officer authorized to appoint a formal board or investigation.

b. A commander at any level. In the Air Force, the commander must be on "G" series orders granting UCMJ authority over the command. In the Navy, a commanding officer or an officer in charge may convene a CI.

c. In the Army, a principal staff officer or supervisor in the grade of major or above.

3. *Selection of Members*.

a. In the Army, if the appointing authority is a General Officer, he or she may delegate the selection of board members to members of his or her staff.

b. However, in investigations under AR 15-6, only a GCMCA may appoint an investigation or board for incidents resulting in property damage of $1 million or more, the loss/destruction of an Army aircraft or missile, or an injury/illness resulting in or likely to result in death or permanent total disability.

c. For investigations of a death or deaths involving a deployed force(s), from what is believed to be hostile fire, the GCMCA may delegate, in writing, appointing/approval authority to a subordinate commander exercising special court-martial convening authority. If evidence is discovered, however, during the investigation that indicates that the death(s) may have been the result of fratricide/friendly fire, the investigating officer will immediately suspend the investigation and inform the appointing authority and legal advisor. At this time the general court-martial convening authority will appoint a new investigation into the fratricide/friendly fire incident. Any evidence from the hostile fire investigation may be provided to the investigating officer or board conducting the fratricide/friendly fire investigation. The general court-martial convening authority may also appoint the same investigating officer if the investigating officer is still best qualified to perform the duty.

E. Choosing the AR 15-6 IO.

1. The AR 15-6 IO must be the best qualified by reason of age, education, training, experience, length of service and temperament. In the Army, the IO must be a commissioned or warrant officer, or a civilian GS-13 or above, senior to any likely subjects of the investigation. In the Naval services, most CIs are conducted by a commissioned officer. However, a warrant officer, senior enlisted person, or civilian employee may be used when the convening authority deems it appropriate. The Air Force specifies no minimum grade for CDI investigators.

2. Both the Army and the Air Force require the IO to consult with a JA for guidance before beginning an informal investigation. The Naval services only require such consultation when the investigation is intended as a litigation report, or when directed by the appointing authority. This consultation offers a good opportunity to provide a written investigative guide to the IO. The Army AR 15-6 Informal Investigating Officer's Guide is included here as an appendix. The Naval Justice School has a similar publication, JAGMAN Investigations Handbook. The Air Force publishes the Air Force Commander-Directed Investigations Guide.

F. Methods of Appointment.

1. Informal Army investigations and boards may be appointed either orally or in writing. Air Force CDIs and Navy CIs must be appointed in writing. Formal boards must be appointed in writing but, when necessary, may be appointed orally and later confirmed in writing. Whether oral or written, the appointment should specify clearly the purpose and scope of the investigation or board, and the nature of the findings and recommendations required. The appointing memorandum should specify the governing regulation and provide any special instructions.

2. If the board or investigation is appointed in writing, the appointing authority should use a Memorandum of Appointment. Note that the Memorandum of Appointment must include certain information: the specific regulation or directive under which the board is appointed; the purpose of the board; the scope of the board's investigatory power; and the nature of the findings and recommendations required. The scope of the board's power is very important because a board has no power beyond that vested in it by the appointing authority. A deficiency in the memorandum may nullify the proceedings for lack of jurisdiction. If this occurs, consult AR 15-6, para. 2-3c. It may be possible for the appointing authority to ratify the board's action.

3. The Memorandum of Appointment also names the parties to the board and designates their roles in the board proceeding. If the board were appointed specifically to investigate one or more known respondents, the respondent(s) also would be named in the Memorandum of Appointment.

G. Conducting the Informal Investigation.

1. The IO, with the assistance of the JA advisor, must formulate an investigation plan that takes into account both legal concerns and tactical effectiveness. Each investigation will be different, but the following factors should be considered:

a. Purpose of the investigation. Need to carefully consider the guidance of the Memorandum of Appointment with regard to purpose and timeline.

b. Facts known.

c. Potential witnesses.

d. Securing physical and documentary evidence.

e. Possible criminal implications (including need for Article 31, UCMJ warnings).

f. Civilian witness considerations (*e.g.*, securing non-military witness information and giving appropriate rights to collective bargaining unit members).

g. Regulations and statutes involved.

h. Order of witness interviews.

i. Chronology.

2. Continued meetings between the IO and the legal advisor will allow for proper adjustments to the investigative plan as the investigation progresses, as well as proper ongoing coordination with the appointing authority.

H. Findings and Recommendations.

1. *Report Structure*. Army informal investigations normally begin with DA Form 1574, which provides a "fill in the box" guide to procedures followed during the investigation. Navy CI and Air Force CDI reports begin with narrative information from the IO.

a. Navy CI reports of investigation begin with a preliminary statement. It tells how all reasonably available evidence was collected or is forthcoming; whether each directive of the convening authority has been met; what, if any, difficulties were encountered; and any other information necessary for a complete understanding of the case.

b. Air Force CDI reports of investigation begin with a discussion of the authority and scope of the investigation. They continue with an introduction providing background, a description of the allegations, and a "bottom line up front" conclusion regarding whether or not the allegations were substantiated.

2. The report of investigation contains two final products: the findings and the recommendations.

a. *Findings*. A finding is a clear, concise statement of fact readily deduced from evidence in the record. Findings may include negative findings (*i.e.*, that an event did not occur). Findings should refer to specific supporting evidence with citations to the record of investigation. Findings must be supported by a preponderance of the evidence. The IO may consider factors such as demeanor, imputed knowledge, and ability to recall. Finally, findings must also address the issues raised in the appointment memorandum.

b. *Recommendations*. Recommendations must be consistent with the findings, and must thus be supported by the record of investigation. Air Force CDIs and Navy CIs will not contain recommendations unless specifically requested by the convening authority.

I. Legal Review.

1. AR 15-6 requires legal review of Army investigations if: adverse administrative action may result; the report will be relied upon by higher headquarters; death or serious bodily injury resulted; or any case involving serious or complex matters. The Air Force requires legal review of CDIs that are not simply "diagnostic" to ensure compliance with applicable regulations and law. The Navy neither requires nor precludes legal review. As a practical matter, most investigations should receive a legal review whether required by regulation or not.

2. There is no prohibition against the advisor to the investigating officer also conducting the legal review. However, it is recommended that a different attorney conduct the legal review for complex or high profile investigations. In the Army, the legal review focuses on: whether the proceedings complied with legal requirements; what affects any errors would have; whether sufficient evidence supports the findings; and whether the recommendations are consistent with the findings.

J. Appointing Authority Action.

1. After reviewing the report of investigation, the appointing authority has three options.

a. approve the report as is;

b. return the report for additional investigation, either with the same IO or a new one; or

c. substitute findings and recommendations.

2. The record must support any substituted findings and recommendations. Unless otherwise provided in other regulations, the appointing authority is not bound by the IO's findings or recommendations. The appointing authority may also consider information outside the report of investigation in making personnel, disciplinary or other decisions.

K. Maintaining and Releasing the Investigation.

1. The release authority for AR 15-6 investigations is the appointing authority. No part of a report should be released (unless specifically authorized by law or regulation such as a valid Freedom of Information Act (FOIA) request) without the approval of the appointing authority.

2. Investigations must be retained by the approving authority for five years, and then destroyed or shipped for permanent storage IAW the Army Records Information Management System (ARMIS) and Record Retention Schedule – Army (RRS-A) (See www.armis.army.mil. & AR 25-400-2, The Army Records Information Management System (ARMIS), 18 March 2003).

IV. FREEDOM OF INFORMATION ACT (FOIA) (5 USC §552)

A. Deployed units should anticipate requests under the FOIA for records they maintain. The FOIA is a release statute. As such, it is presumed that if a proper FOIA request is received the requested records will be released.

B. Unit judge advocates must be prepared to respond to FOIA requests in a timely manner. The FOIA requires DoD to respond to FOIA requests within twenty working days of receipt of a proper request. This requires units to gather, analyze, and redact requested investigations rather quickly. Judge advocates must have general knowledge regarding the FOIA and the appropriate regulations.

C. Records requested must ordinarily be released unless they are exempted or excluded from release by one of ten exemptions or three exclusions. Even though government agencies have the discretion to release information exempted from release, current DoD policy discourages discretionary releases. Under this policy, therefore, units must normally withhold information from release if a FOIA exemption applies.

D. A principle concept of the FOIA is the rule of segregability. If a FOIA request is received and a responsive record found, units must segregate (redact) exempted information from non-exempt information and release non-exempt information. Units simply withhold release – they do not deny a request. Within DoD the authority to deny a FOIA request rests solely with designated initial denial authorities. While units are responsible for addressing the initial FOIA request and even releasing information that is not exempt, redacted information must be forwarded to an appropriate initial denial authority for final decision.

E. The most common FOIA request received by deployed units are requests for investigations. Below are the most frequently relied upon FOIA exemptions applicable to investigations (NOT an exhaustive list).

1. Exemption 1: Classified Information. This exemption permits the withholding of records that are *substantively and procedurally* properly classified IAW Executive Order 12958, as Amended, (Classified National Security Information, 68 Fed. Reg. 15,315 (Mar. 28, 2003). Documents whose classification decision was made more than two years prior to the FOIA request must receive a classification review to determine whether the document is still properly classified. Executive Order 12958, as Amended, only authorizes Top Secret, Secret, and Confidential security classifications. All other security markings are insufficient to protect a document from release utilizing Exemption 1, unless a subsequent classification review properly classifies the document as Top secret, Secret, or Confidential. Post request classification is authorized as long as the criteria of EO 12958, as Amended, is followed.

2. Exemption 2: Internal Personnel Rules and Practices. This exemption permits the withholding of records that deal with both, trivial internal matters in which there is little or no public interest (Low-2: smoking policy, physical training schedules, etc.) and significant internal matters the release of which will allow the requester to circumvent an agency regulation or frustrate an agency function or mission (High-2: blueprint of agency buildings where contents or infrastructure could be harmed by public disclosure, unit SOPs that reveal how the unit responds to an ambush, installation security plans). High-2 has become an increasingly important tool used to protect unclassified but sensitive information.

3. Exemption 3: Other Federal Withholding Statutes. This exemption permits the withholding of information that Congress exempted from disclosure via a federal statute. In order for a federal statute to qualify as an Exemption 3 statute, the statute must either require that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or establish particular criteria for withholding or refer to particular types of matters to be withheld. For example, 10 U.S.C. §130b, allows withholding of information on personnel of overseas, sensitive, or routinely

deployable units. This statute establishes particular criteria for withholding (information on personnel of overseas, sensitive, or routinely deployable units). NOTE: While the language of 10 U.S.C. §130b suggests there is discretion on whether to withhold or release this information, it is DoD policy that personal information about service members are not released [See Exemption 6 below]. This requires the redaction of personal information about DoD personnel, to include names, from most investigations. [Do not redact the name of the requester if included in the investigation].

4. Exemption 5: Privileged Memoranda & Internal Agency Communications. This exemption permits the withholding of records that are inter-agency or intra-agency memorandums or letters which would not be available by law to a party in litigation with the agency. Exemption 5 incorporates most common law discovery privileges. Legal advice and investigation legal reviews should be routinely withheld under exemption 5 utilizing the attorney-client privilege and/or the attorney work-product privilege. Recommendations not approved by the approval authority should be withheld under the deliberative process privilege. Once approved however, recommendations become final agency decisions, no longer qualifying for protection under the deliberative process privilege.

5. Exemption 6: Protection of Personal Privacy. This exemption permits the withholding of personal information about an individual the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. When determining whether withholding is appropriate, the individuals' privacy interest in the information must be balanced with the public's interest in disclosure. Since 9/11 members of DoD, both civilian and military, have a heightened privacy interest in their personal information that most often outweighs the public's interest in disclosure. As such, most personal information about members of DoD should be redacted from records before they are released. IAW DoD policy, "release of information on DoD personnel will be limited to the names, official titles, organizations, and telephone numbers for personnel only at the office director level or above, provided a determination is made that disclosure does not raise security or privacy concerns" (Memorandum, Office of the Secretary of Defense, Subject: Withholding of Information that Personally Identifies DoD Personnel, 1 September 2005). As a matter of practice, personal information about enlisted personnel and officers below the rank of brigadier general should not be released IAW the DoD policy.

6. Exemption 7: Law Enforcement Records. This exemption permits the withholding of records or information *compiled for law enforcement purposes* if the disclosure could reasonably be expected to result in any of six specified harms. The two most common harms cited involving the release of an investigation is that release "could reasonably be expected to interfere with enforcement proceedings" or "release could reasonably be expected to constitute an unwarranted invasion of personal privacy." Use of Exemption 7 is limited to investigations that involve the enforcement of a statute or regulation (law enforcement) and lasts only so long as the potential harm exists. For example, the first harm mentioned above could be cited to prevent the release of an unfinished investigation or during the pendency of a resultant adverse administrative action but could not be used once that adverse administrative action has been completed.

V. FINANCIAL LIABILITY INVESTIGATIONS

A. Introduction.

1. Financial Liability Investigations, formerly known as Reports of Survey, serve multiple purposes. They document circumstances surrounding loss or damage to government property; serve as a voucher for adjusting property records; and document a charge of financial liability, or provide for relief of financial liability. Imposition of liability is a purely administrative process that is designed to promote a high degree of care for Army property through deterrence.

2. ***It is not a punitive program***. Commanders should consider other administrative, nonjudicial or judicial sanctions if damage or loss of property involves acts of misconduct.

3. The investigation is completed on DD Form 200 and guided by DA Form 7531, Checklist and Tracking Document for Financial Liability Investigations of Property Loss.

B. Alternatives to Financial Liability Investigations.

1. Statement of Charges/Cash Collection Voucher (consolidated on DD Form 362) when liability is admitted and the charge does not exceed one month's base pay.

2. Cash sales of hand tools and organizational clothing and individual equipment.

3. Unit-level commanders may adjust losses of durable hand tools up to $100 per incident, if no negligence or misconduct is involved.

4. Abandonment orders may be used in combat, large-scale field exercises simulating combat, military advisor activities, or to meet other military requirements.

5. If the commander determines that no negligence was involved in the damage to the property, no financial liability investigation is required as long as the approving authority concurs.

C. The Financial Liability Investigation System.

1. *Initiating a Financial Liability Investigation.*

a. Active Army commanders will initiate the investigation within 15 calendar days of discovering the loss or damage.

b. Mandatory financial liability investigations:

(1) When an individual refuses to admit liability by signing a statement of charges, cash collection voucher or other accountability document, and negligence or misconduct is suspected.

(2) Anytime a higher authority or other DA regulations directs a financial liability investigation.

(3) Whenever a sensitive item is lost or destroyed.

(4) When property is lost by an outgoing accountable officer, unless voluntary reimbursement is made for the full value of the loss.

(5) When the amount of loss or damage exceeds an individual's monthly base pay, even if liability is admitted.

(6) When damage to government quarters or furnishings exceeds one month's base pay.

(7) When the loss involves certain bulk petroleum products.

c. Joint Financial Liability Investigations.

(1) Absent a loan agreement stating otherwise, the regulation of the Service that owns the property (property is located on that service's property account) is the appropriate regulation to apply.

(2) The Army and Air Force have a reciprocal agreement outlined in paragraph 14-36 of AR 735-5 that explains the process for processing financial liability investigations that find Air Force personnel liable for the loss, damage, or destruction of Army property. Upon completion of the investigation, it should be forwarded to the appropriate Air Force approval authority for final action and possible collection.

(3) For all other situations where non-Army personnel are found to be liable for the loss, damage, or destruction of Army property, the procedures of AR 735-5, paragraph 14-35 should be followed. Upon completion of the investigation, the respondent will be formally notified and requested to make payment in full. If after 60 days, the respondent fails to pay, the investigation should be sent to the respondent's servicing finance office for processing.

(4) Financial liability investigations that find contractors liable should be processed IAW the applicable contract.

2. *Processing Times*.

a. In the Active Army, financial liability investigations will normally be processed within 75 days.

b. Financial liability investigations in the National Guard will normally be processed within 150 days; in the U.S. Army Reserves, 240 days.

3. *Approving Authority*.

a. Per HQDA message dated 6 June 2006, the approval authority for losses under $100,000 is the first 06 or GS-15 in the rating chain. For losses of $100,000 or greater, or losses involving a sensitive item, the approval authority is the first GO or SES civilian in the rating chain. The approving authority does not have to be a court-martial convening authority.

b. If negligence is clearly established from the facts and circumstances known at the time the loss, damage or destruction is discovered, the approving authority may recommend liability without appointing an IO. The approving

authority is then responsible for ensuring that the charges are properly computed and that the individual against whom liability is recommended is properly notified and given an opportunity to respond.

4. *Appointing Authority*. The appointing authority is an officer or civilian employee designated by the approving authority with responsibility for appointing financial liability investigation investigating officers. The approving authority may designate, in writing, a Lieutenant Colonel (05) (or major in a lieutenant colonel billet) or DOD civilian employee in the grade of GS-13 (or a GS-12 in a GS-13 billet) or above as an appointing authority.

5. *Financial Liability Officer (IO).*

a. The IO will be senior to the person subject to possible financial liability, "except when impractical due to military exigencies."

b. The IO can be an Army commissioned officer; warrant officer; or noncommissioned officer in the rank of Sergeant First Class or higher; a civilian employee GS-07 or above; a commissioned officer of another service; or a Wage Leader (WL) or Wage Supervisor (WS) employee. In joint activities, DoD commissioned or warrant officers, or noncommissioned officers in the grade of E-7 or above, qualify for appointment as IOs. (*See* AR 600-8-14, Table 8-1, for the grade equivalency between military personnel and civilian employees).

c. The investigation is the IO's primary duty.

d. The IO must get an appropriate briefing before beginning the investigation. This briefing does not have to be from a JA but can be from another appropriate official.

D. Legal Considerations for Imposing Liability. Individuals may be held financially liable for the loss, damage, or destruction of Government property if they were negligent or have committed willful misconduct, and their negligence or willful misconduct is the proximate cause of that LDD.

1. *Responsibility for property*. The type of responsibility a person has for property determines the obligations incurred by that person for the property

a. *Command responsibility*.

(1) The commander has an obligation to ensure proper use, care, custody and safekeeping of government property within his or her command.

(2) Command responsibility is inherent in command and cannot be delegated. It is evidenced by assignment to command at *any* level.

b. *Direct responsibility*.

(1) An obligation of a person to ensure the proper use, care, custody and safekeeping of all government property for which the person is receipted.

(2) Direct responsibility is closely related to supervisory responsibility, which is discussed below.

c. *Personal responsibility:* the obligation of an individual for the proper use, care and safekeeping of government property in his possession, with or without a receipt.

d. *Supervisory responsibility*.

(1) The obligation of a supervisor for the proper use, care and safekeeping of government property issued to, or used by, subordinates. It is inherent in all supervisory positions and is not contingent upon signed receipts or responsibility statements.

(2) If supervisory responsibility is involved, consider the following additional factors:

(a) The nature and complexity of the activity and how that affected the ability to maintain close supervision.

(b) The adequacy of supervisory measures used to monitor the activity of subordinates.

(c) The extent supervisory duties were hampered by other duties or the lack of qualified assistants.

e. *Custodial responsibility*.

(1) The obligation of an individual to exercise reasonable and prudent actions in properly caring for and ensuring proper custody and safekeeping of property in storage awaiting issue or turn-in.

(2) When unable to enforce security, they must report the problem to their immediate supervisor.

2. Negligence or Culpability. **Before a person can be held liable, the facts must show that he or she, through negligence or willful misconduct, violated a particular duty involving the care of the property.**

a. *Simple negligence*: the failure to act as a reasonably prudent person would have acted under similar circumstances. A reasonably prudent person is an average person, not a perfect person. Consider also the person's age, experience, and special qualifications; the type of responsibility involved; the type and nature of the property (more complex or sensitive property normally requires a greater degree of care).

b. *Gross negligence*: an extreme departure from the course of action expected of a reasonably prudent person, all circumstances being considered, and accompanied by a reckless, deliberate or wanton disregard for the foreseeable consequences of the act.

c. *Willful misconduct*: any intentional or unlawful act.

3. Proximate cause: the cause which, in a natural and continuous sequence, unbroken by a new cause, produces the loss or damage, and without which the loss or damage would not have occurred. It is the primary moving cause, or the predominating cause, from which the injury follows as a natural, direct and immediate consequence, and without which the injury would not have occurred.

4. Loss. Before a person may be held liable, the facts must show that a loss to the Government occurred. There are two types of losses that can result in financial liability.

a. *Actual loss*. Physical loss, damage or destruction of the property.

b. *Loss of accountability*. Due to the circumstances of the loss, it is impossible to determine if there has been actual physical loss, damage or destruction because it is impossible to account for the property.

E. Determining the Amount of Loss.

1. If possible, determine the actual cost of repair or actual value at the time of the loss. The preferred method is a qualified technician's two-step appraisal of fair market value. The first step involves a determination of the item's condition. The second step is to determine the commercial value of the item, given its condition.

2. If other means of valuation are not possible, consider depreciation. Compute the charge according to AR 735-5, Appendix B.

F. Limits on Financial Liability.

1. The general rule is that an individual will not be charged more than one month's base pay.

a. Charge is based upon the Soldier's base pay at the time of the loss.

b. For ARNG and USAR personnel, base pay is the amount they would receive if they were on active duty.

c. As exceptions to the general rule, there are times when personnel are liable for the full amount of the loss.

(1) Any person is liable for the full loss to the Government (less depreciation) when they lose, damage or destroy personal arms or equipment.

(2) Any person is liable for the full loss of public funds.

(3) Accountable officers will be held liable for the full amount of the loss.

(4) Any person assigned government quarters is liable for the full amount of the loss to the quarters, furnishings or equipment as a result of specific finding of gross negligence or willful misconduct of the responsible individual, his guests, dependents, or pets.

2. *Involuntary Withholding of Current Pay*.

a. Members of the Armed Forces may have charges involuntarily withheld. (*See* 37 U.S.C. §1007).

b. Involuntary withholding for civilian employees. (*See* 5 U.S.C. § 5512, DOD FMR Volume 8, DFAS-IN 37-1).

c. No involuntary withholding for the loss of NATO property. (*See* DAJA-AL 1978/2184).

G. Rights of Individual for Whom Financial Liability is Recommended.

1. The financial liability investigation form (DD Form 200) contains a limited rights notice; however, to adequately inform an individual of his or her rights, *see* AR 735-5, para 13-42 and Figures 13-14 and 13-17.

2. If financial liability is recommended, the IO must take the following actions:

a. Give the person an opportunity to examine the report of investigation.

b. Ensure that the person is aware of rights.

c. Fully consider and attach any statement the individual desires to submit.

d. Carefully consider any new or added evidence and note that the added evidence has been considered.

e. Explain the consequences of a finding of gross negligence for an investigation involving government quarters, furnishings and equipment.

H. Duties of the Approving Authority.

1. If the IO recommends liability, a JA must review the adequacy of the evidence and the propriety of the findings and recommendations before the approving authority takes action.

2. The approving authority is not bound by the IO's or JA's recommendations.

3. If the approving authority decides to assess financial liability contrary to the recommendations of the IO or JA, that decision and its rationale must be in writing.

4. If considering new evidence, the approving authority must notify the individual and provide an opportunity to rebut.

5. Ensure that the individual was advised of his or her rights.

6. May approve or assess a lesser amount of financial liability than the actual amount of the loss in appropriate cases.

7. Initiate collection action by sending documentation to the servicing finance office.

8. The approving authority may request that a charge be prorated beyond two months.

I. Relief from Financial Liability Investigations.

1. *Appeals*.

a. The appeal authority is the next higher commander above the approving authority (*see* AR 735-5, para. 13-52, for delegation authority).

b. The respondent has thirty days to appeal unless he or she shows good cause for an extension.

c. The appeal is submitted to the approving authority for reconsideration before action by the appeal authority.

d. If the approving authority denies reconsideration, the following actions are required:

(1) Prepare a memorandum giving the basis for denying the requested relief.

(2) The approving authority must personally sign the denial.

(3) Forward the action to the appeal authority within fifteen days.

e. Action by the appeal authority is final.

2. *Re-opening Financial Liability Investigations*.

a. Authority to reopen rests with the approval authority.

b. Not an appeal, but may occur as part of an appeal. Re-opening is proper when:

(1) A response is submitted to the IO from the person charged subsequent to the approving authority having assessed liability.

(2) A subordinate headquarters recommends reopening based upon new evidence.

(3) The property is recovered.

(4) The approving authority becomes aware that an injustice has been perpetrated against the government or an individual.

3. *Remission of Indebtedness (See AR 735-5; AR 600-4)*.

a. Enlisted Soldiers only.

b. Only to avoid extreme hardship.

c. Only unpaid portions can be remitted. Suspend collection action long enough for the Soldier to submit his request for remission of the debt.

4. Army Board for the Correction of Military Records (ABCMR) (*See* AR 15-185).

5. Civilian employees may avail themselves of grievance/arbitration procedures (*See* paragraph 13-45).

J. SJA Review.

1. *For the Approving Authority*: adequacy of evidence and propriety of findings and recommendations.

2. *For the Appeal Authority*: evidence is adequate and findings are proper.

3. *Caveat*: the same attorney cannot perform both legal reviews (*See* paragraph 13-52b(1)).

4. CONCLUSION: Commanders must ensure that the financial liability investigation process is fair and uniform in its treatment of agency members. Liability of individuals responsible for property (whether based on command, supervisory, direct or personal responsibility) should be fully considered. Legal advisors should get involved early in the process to help commanders and IOs focus their investigations, and to ensure that individual rights are addressed before imposition of liability.

VI. CONSCIENTIOUS OBJECTORS

A. Introduction.

1. Definition. Members of the Armed Forces who have "a firm, fixed and sincere objection to participation in war in any form or the bearing of arms, by reason of religious training and belief" may apply for Conscientious Objector (CO) status. Supreme Court decisions have expanded "religious training and belief" to include any moral or ethical belief system held with the strength of conventional religious convictions.

2. Classification.

a. *Class 1-0*: A service member who, by reason of conscientious objection, sincerely objects to participation of any kind in war in any form.

b. *Class 1-A-0*: A service member who, by reason of conscientious objection, sincerely objects to participation as a combatant in war in any form, but whose convictions permit military service in a noncombatant status.

3. What is NOT a category of CO status:

a. Objection based on a CO claim that existed, but was not presented, prior to notice of induction, enlistment or appointment (however, claims arising out of experiences before entering military service, that did not become fixed until after entry, will be considered).

b. Objection based solely upon policy, pragmatism or expediency.

c. Objection to a certain war.

d. Objection based upon insincere beliefs.

e. Objection based solely on a claim already denied by the Selective Service System.

B. Burden of Proof and Standards.

1. The applicant for CO status must prove by "*clear and convincing*" evidence that:

a. the basis of the claim satisfies the definition and criteria for CO; and

b. the claimant's belief is honest, sincere and deeply held.

2. An applicant for CO status must choose either 1-0 (war in any form) or 1-A-0 (noncombatant). An applicant choosing 1-0 will not be granted 1-A-0 as a consolation.

3. The unit will not use the CO process to eliminate those who do not qualify as CO's. Nor will the unit use the CO process in lieu of adverse administrative separation procedures for unsatisfactory performance, substandard duty or misconduct.

C. Application Procedures.

1. Form. Military personnel seeking either a discharge (1-0) or noncombatant duties (1-A-0) must submit an application on a DA Form 4187 (Personnel Action) to their immediate commander. The individual will include all of the personal information required by Appendix B, AR 600-43.

2. Suspense.

a. *Active Duty Suspense*: Active Army units will process the application and forward it to HQDA within 90 days from the date submitted.

b. *Reserve Component Suspense*: Reserve Army units will process the application and forward it HQDA within 180 days from the date submitted.

3. Immediate Commander Responsibilities.

a. Counsel Soldier.

b. Coordinate interview with Chaplain.

c. Coordinate interview with psychiatrist or medical officer.

d. Forward completed interviews, application and recommendation to SPCMCA.

4. SPCMCA Responsibilities.

a. Appoint IO in the grade of O-3 or higher.

b. Ensure IO conducts a proper investigation.

5. IO Responsibilities.

a. Conduct a hearing at which the applicant may appear and present evidence.

b. Prepare a written report, and forward it to the GCMCA.

6. GCMCA Responsibilities.

a. Army GCMCAs may approve 1-A-0 status. Once approved, the servicemember is eligible only for deployment to areas where duties normally do not involve handling weapons.

b. Additionally, Army GCMCAs must forward to HQDA any applications for 1-0 status and any applications for 1-A-0 status upon which he or she recommends disapproval. Approval authorities for other services vary.

D. Use, Assignment, and Training of CO Applicants.

1. Persons who have submitted a CO application will be retained in their units and assigned duties providing minimum practicable conflict with their asserted beliefs, pending a final decision on their application.

2. An Active Army Soldier who receives **individual** orders for reassignment, or who has departed the unit in compliance with **individual** reassignment orders, may not apply for CO status until arriving at the new duty station. This

policy does not apply to Soldiers who are TDY en route for a period in excess of 8 weeks. These Soldiers may apply at their TDY duty station.

3. On the other hand, an Active Army Soldier who is assigned or attached to a unit that has **unit** reassignment order instructions (*i.e.*, the unit is deploying) may submit an application for CO status. The unit must process the application as operational and mission requirements permit. The Soldier must continue to prepare for deployment, and will deploy with the unit unless his or her application has been approved. If the Soldier's application has been forwarded to the DA Conscientious Objector Review Board (DACORB), the GCMCA **may** excuse the Soldier from deployment. Contact the DACORB and determine the status of the application before the GCMCA excuses the Soldier (DACORB: DSN 221-8671 / 8672 or commercial (703) 325-8672).

4. In the case of RC Soldiers not on active duty, the submission of an application after publication of orders to report for AD or ADT will not serve as a basis to delay reporting (*see* AR 600-43, para. 2-10). If the Soldier applies for CO status before AD or ADT orders are issued, and the Soldier's application cannot be processed before the Soldier's reporting date, the Soldier must comply with the orders (the application must, however, be sent to the proper Active Army GCMCA for processing). Members of the IRR may submit CO applications at their mobilization stations. Submission will not preclude further assignment or deployment during processing of the application.

VII. FAMILY PRESENTATIONS

A. Congressional Requirement.

1. Pub. L. 102-484, div. A, title X, § 1072, Oct. 23, 1992, 106 Stat. 2508 (10 U.S.C. § 113, note).

2. Requires the Service Secretaries to ensure that fatality reports and records pertaining to members of the Armed Forces who die in the line of duty are made available to family members.

3. Within a reasonable period of time after the family members are notified of the death, but not more than 30 days after the date of notification, the Secretary must:

a. in any case under investigation, inform the family members of the names of the agencies conducting the investigation and of the existence of any reports by such agencies that have been or will be issued; and

b. furnish, if the family members desire, a copy of any completed investigative report to the extent such reports may be furnished consistent with the Privacy Act and the Freedom of Information Act.

B. Army Implementation.

1. AR 600-34, Fatal Training/Operational Accident Presentations to the Next of Kin (2 January 2003).

2. Key Definitions.

a. *Fatal training accidents* include those accidents associated with non-combat military exercises or training activities that are designed to develop a Soldier's physical ability or to maintain or increase individual/collective combat and/or peacekeeping skills.

b. *Fatal operational accidents* are those deaths associated with active duty military exercises or activities occurring in a designated war zone or toward designated missions related to current war operations or Military Operations Other Than War, contributing directly or indirectly to the death.

c. *Primary Next of Kin (PNOK).* The legal next of kin. That person of any age most closely related to the individual according to the line of succession. Seniority, as determined by age, will control when the persons are of equal relationship.

d. *Family member*:

(1) Spouse.

(2) Unmarried child of a sponsor, including an adopted child, step child, foster child or ward, who either: (a) has not passed his or her 21st birthday; (b) is incapable of self-support because of a mental or physical incapacity that existed before that birthday and is (or was at the time of the member's or former member's death) in fact dependent on the sponsor for over one-half of his or her support; or (c) has not passed his or her 23rd birthday, is enrolled in a full-time course of study in an institution of higher learning and is in fact dependent on the sponsor for over one-half of his or her support.

(3) A parent or parent-in-law of a sponsor who is in fact dependent on the sponsor for one-half of his or her support and residing in the sponsor's household.

3. *Presentations Required for*:

a. All fatal training/operational accidents investigated under AR 15-6, AR 385-10 and AR 600-34.

b. Special interest cases or cases in which there is probable high public interest, as determined by The Adjutant General (TAG).

c. All suspected cases of friendly fire.

d. In general, fatal accidents that are hostile, but do not occur as a result of engagement with the enemy.

(1) "Hostile deaths" are defined as a death caused by terrorist activity or "in action."

(2) "In action" characterizes death as having been the direct result of hostile action, sustained in combat or related thereto, or sustained going to or returning from a combat mission, provided that the occurrence was directly related to hostile action.

C. Preparing the Presentation to the PNOK.

1. Once the investigation is complete, the Adjutant General contacts the collateral investigation appointing/approval authority to coordinate appointment of the briefer who is "most often the deceased Soldier's colonel or brigade level commander."

2. Within 24-hours of completion of the investigation, the CAO must inform the PNOK that the Army is prepared to discuss the results of the investigation with the family. Presentations are offered to adult PNOK (18 years of age or older); for PNOK under 18, the adult custodian must decide the PNOK's ability to receive a face-to-face briefing.

3. Briefing Team.

a. At a minimum, the briefing team must consist of the briefer (O6 or higher), the family's CAO and a chaplain from the mishap unit.

b. The briefer must consider including the SJA/legal advisor or PAO representative when it is apparent that a family has invited (or may invite) the local media, or if a family legal representative will attend the presentation.

(1) The CAO must work with the PNOK to obtain a list of people the PNOK intends to invite to the presentation to enable the presentation team to determine the family's intent to invite media or legal representation.

(2) **NOTE**: The Army is prohibited from putting conditions or limitations upon those whom the family wishes to invite to the presentation.

(3) The briefer must also consider including an interpreter if the PNOK or other attending family members do not understand English.

D. Conducting the Family Presentation.

1. The briefer's primary responsibility is to meet personally with the PNOK and deliver a thorough, open explanation of the releasable facts and circumstances surrounding the accident. At a minimum, the briefer must provide the following:

a. An explanation of the unit's mission, highlighting the Soldier's significant contributions to the mission and the Army.

b. An accurate account of the facts and circumstances leading up to the accident; the sequence of events that caused the accident; and a very clear explanation of primary and contributing factors causing the accident, as determined by the collateral investigation.

c. Actions taken at the unit level to correct any deficiencies.

2. The most favored choice for the presentation is the PNOK's home.

3. Style of Presentation.

a. *Dialogue with no notes, but with maps and diagrams of training areas*. This works best for a briefer who is intimately familiar with the accident and investigation.

b. *Bullet briefing charts*. These work well as they tend to help the briefer stay focused. Charts must be reviewed and approved in advance by the SJA.

c. *Simple notes and an executive summary*. Written materials must be reviewed and approved by the SJA, and copies should be left with the PNOK, if requested.

4. If a family presentation must proceed with a legal representative present, but without Army legal advice, the briefer must inform the PNOK that the presentation is strictly intended to provide information to the family. If the attorney has a list of questions for the family to ask, the briefer must offer to take the questions back to the servicing SJA to obtain complete answers. The SJA may then follow up directly with the PNOK.

F. Completion of Family Presentation. Within two weeks of the presentation, the briefer must submit an AAR through the appointing authority and MACOM to TAG.

G. SJA Requirements.

1. The SJA is required to review the presentation to ensure that it contains no admission of liability; no waiver of any defense; no offer of compensation; or any other statement that might jeopardize the Army's litigation posture. This may include a review of briefing charts, notes and executive summaries.

2. The SJA or legal advisor must provide a non-redacted copy of the collateral investigation report to CMAOC.

3. The regulation is not intended to provide the PNOK with information not otherwise releasable under the Privacy Act or the Freedom of Information Act.

a. The SJA must redact the collateral investigation report and prepare the required number of copies. At a minimum, the briefer, each team member and each PNOK will be given a redacted copy.

b. The SJA also must prepare a letter to accompany the redacted version of the report delivered to the family explaining, in general terms, the reasons for the redactions.

H. Release of the Legal Accident Investigation. The legal accident investigation will be released in the following order:

1. PNOK and other family members designated by the PNOK.

2. Members of Congress, upon request.

3. Members of the public and media.

I. Navy and Marine Corps, JAGMAN, paras. 0233 & 0234. Generally requires the Casualty Assistance Calls Officer to deliver the report of investigation to the next of kin, unless there is a reason for another individual to be assigned (*e.g.*, technical subject-matter, personal friendship, etc.).

J. Air Force, AFI 51-503, CH 9 (16 JULY 2004).

1. Results of Accident Investigation Boards (AIB) must be briefed to the next of kin of deceased persons and seriously injured personnel.

2. Usually, the board president serves as the briefing officer. The briefing serves to:

a. Personally express the condolences of the Department of the Air Force.

b. Personally deliver a copy of the AIB report.

c. Provide a basic briefing on the investigation results, including the cause or factors contributing to the accident, and to answer questions.

VIII. MISSING PERSONS LEGISLATION AND REGULATIONS

A. Introduction.

1. The Missing Persons Act.

a. Congress first enacted the Missing Persons Act in 1942 (current version codified at 37 U.S.C. §§ 551-59 and 5 U.S.C. §§ 5561-69).

b. The Missing Persons Act provided for payment of pay and allowances to missing service members, and it was not intended to be a law to account for missing persons.

2. DoD Personnel Missing as a Result of Hostile Action.

a. DoDI 2310.5, Accounting for Missing Persons (31 January 2000).

b. DoDI 1300.18, Military Personnel Casualty Matters, Policies, and Procedures (18 December 2000).

c. In 1996, Congress passed The Missing Service Personnel Act of 1995. This law calls for DoD to *account* for persons missing as a result of hostile action (current version codified at 10 U.S.C. §§ 1501-1513).

d. Among other provisions, the Missing Service Personnel Act and subsequent DoD instruction provide certain family members with due process rights.

3. It is important to keep in mind that the two laws, although similar and related in certain ways, actually operate toward two different goals. The Missing Persons Act is the basis for continued pay and allowances when an individual is missing. The Missing Service Personnel Act requires that they be accounted for.

4. The remainder of this section discusses the implementation of the Missing Service Personnel Act. Commanders and deployed JAs will need to be familiar with the initial processing requirements. However, legal assistance attorneys and other JAs may receive questions concerning some of the other aspects of the process. Legal assistance attorneys, for example, may field inquiries concerning the subsequent and further board proceedings from family members. This section is a summary of the requirements.

B. Definitions.

1. Applicability. The statutory provisions on accounting for personnel missing as a result of hostile action apply to the following:

a. Members of the Armed Forces on active duty, or in the Reserve Component performing official duties:

(1) who become involuntarily absent as a result of a hostile action or under circumstances suggesting that the involuntary absence is a result of a hostile action; and

(2) whose status is undetermined or who is unaccounted for.

b. Any other person who is a citizen of the U.S. and a civilian officer or employee of DoD or an employee of a DoD contractor, as determined by the Undersecretary of Defense for Policy:

(1) who serves in direct support of, or accompanies, the Armed Forces in the field under orders and becomes involuntarily absent as a result of a hostile action or under circumstances suggesting that the involuntary absence is a result of a hostile action; and

(2) whose status is undetermined or who is unaccounted for.

2. Hostile Action. Acts of an opposing force, or friendly action in response thereto, resulting in the involuntary absence of persons described in subparagraph A, above, while engaged in an operational environment, or while going to or returning therefrom. For example, a friendly aircraft lost enroute to a target as a result of a mechanical malfunction, not the result of enemy fire, would be deemed to have been lost as a result of hostile action.

3. Missing Status. The status of a missing person who is determined to be absent in any of the following categories:

a. *Missing*. Defined as a person who is not present at his or her duty location due to apparent involuntary reasons, and whose location is unknown.

b. *Missing in Action*. Defined as the involuntary absence of a person whose location is unknown; and

(1) the absence is a result of a hostile action; or

(2) the absence is under circumstances suggesting it is a result of a hostile action.

c. *Interned in a Foreign Country*. A person is interned if he or she is definitely known to have been taken into custody of a nonbelligerent foreign power as the result of, and for reasons arising out of, any armed conflict in which the Armed Forces of the U.S. are engaged.

d. *Captured*. A person is captured if he or she has been seized as the result of action of an unfriendly military or paramilitary force in a foreign country.

e. *Beleaguered*. A person is beleaguered if he or she is a member of an organized element that has been surrounded by a hostile force to prevent escape of its members.

f. *Besieged*. A person is besieged if he or she is a member of an organized element that has been surrounded by a hostile force for the purpose of compelling it to surrender.

g. *Detained in a Foreign Country Against That Person's Will*. A person is detained if he or she is prevented from proceeding or is restrained in custody for alleged violation of international law or other reason claimed by the Government or group under which the person is being held.

4. Missing Person. A missing person is a person who is in a missing status.

5. Accounted For. With respect to a person in a missing status:

a. the person is returned to U.S. control alive;

b. the person's remains are recovered and, if not identifiable through visual means, are identified as those of the missing person by a practitioner of an appropriate forensic science; or

c. credible evidence exists to support another determination of the person's status (such as when a person's remains have been destroyed and are, thus, unrecoverable).

C. Initial Report of Missing Persons.

1. Initial Duty Status (DoDI 1300.18).

a. When a commander suspects that a person may be missing, DoD requires that the Services place the person in an interim status called "Duty Status-Whereabouts Unknown" (DUSTWUN). This is usually done within 24 hours of the person's whereabouts becoming unknown.

b. This status is used when the commander suspects that a person's absence is involuntary, but insufficient evidence prevents deciding the status of a person. This category serves to avoid placing a person in a missing status prematurely.

c. DUSTWUN status is useful during armed conflict when hostilities prevent an immediate capability to determine the service member's true status, or search and rescue efforts are ongoing to determine the servicemember's true status.

d. DUSTWUN is a temporary status only (not a missing category), and must be followed by a report/message revoking the initial casualty report of DUSTWUN in accordance with Service policy.

e. If it is determined that a member is absent as a result of hostile action, the commander may only recommend a missing status. Only the Service Secretary (or his delegee) may make the determination of actual status. In such cases, DUSTWUN designation continues until the Secretary concerned determines the status.

2. Preliminary Assessment (10 U.S.C. § 1502; DoDI 2310.5, Encl. 3).

a. When an immediate commander (defined as a commander of a unit, facility or area to which a person is assigned) receives information showing that the whereabouts and status of a person covered by the Act are uncertain and that the absence may be involuntary, the commander must make a preliminary assessment of the circumstances.

b. If the circumstances of the involuntary absence are questionable (*e.g.*, it is unclear whether the absence resulted from hostile action), the commander must submit a preliminary assessment and recommendation. If the commander concludes that the person is missing, the commander must:

(1) recommend that the person be placed in a missing status; and

(2) transmit a report containing the recommendation to the Secretary concerned no later than ten days after receiving the information. The Service Secretary may extend this time limit for an additional ten days on a case-by-case basis, but only on a showing of good cause.

c. The report is generally made on DD Form 2812, "Commander's Preliminary Assessment and Recommendation Regarding Missing Person." This form is not always required. For instance, if evidence is obtained through news coverage or diplomatic channels, that evidence may be sufficient to enable a commander to make a preliminary assessment regarding the person's whereabouts, status, and whether the absence of the person is involuntary.

d. If recommending that a person be placed in a missing status, the commander must transmit an advisory copy of the preliminary assessment and recommendation to the Theater Component Commander having jurisdiction over the missing person.

D. Casualty Notification and Assistance.

1. The desires of the military member, expressed in the record of emergency data concerning whom not to notify, should be honored unless, in the judgment of the commander, official notification by the Military Service should be made.

2. Initial notification for personnel in a DUSTWUN or Missing Category.

a. Initial notification is generally made in person by a service member:

(1) to PNOK; and

(2) if the casualty occurred as a result of hostile action or terrorist activity, also to parents who are the secondary NOK.

b. All facts and circumstances known at the time of the initial notification must be provided to the NOK.

3. Follow-on Notification and Casualty Assistance.

a. For those service members who are determined to be deceased or missing, a casualty assistance representative must be appointed. This representative is required to contact the NOK within twenty-four hours of the initial notification to set up a time to meet with the NOK.

b. PNOK of those in a DUSTWUN status must be kept informed of the progress in determining the servicemember's actual status. Casualty assistance is not provided unless the member's actual status is determined to be deceased or missing.

E. Initial Boards of Inquiry (10 U.S.C. § 1503, DoDI 2310.5, Encl. 4).

1. Receipt by Service Secretary of a commander's preliminary assessment recommending a person be placed in a missing status.

2. Secretary must review the preliminary assessment and, not later than ten calendar days after receipt, appoint a board to conduct an inquiry into the whereabouts and status of the person.

3. An initial board of inquiry is not always required. For example, if the evidence regarding a covered person is received through news coverage or discovered through diplomatic channels, it may be sufficient to enable the Secretary to make a status determination. Receipt of additional evidence, such as cessation of hostilities without the return of the person, could require the Secretary to appoint an initial board.

4. The Secretary may appoint a single board to inquire into the whereabouts and status of two or more persons where it appears that their absence is factually related.

5. Composition of the Board.

a. The board must consist of at least one person who has experience with, and understanding of, military operations or activities similar to the operation or activity in which the person disappeared. The person must be:

(1) a military officer, in the case of an inquiry regarding a servicemember;

(2) a civilian, in the case of an inquiry regarding a DoD civilian employee or a DoD contractor; or

(3) at least one military officer and a civilian, in the case of an inquiry regarding one or more servicemembers and one or more civilian DoD employees or DoD contractors. The ratio of service members to civilians should be roughly proportional to the ratio of number of servicemembers and civilians subject to the board of inquiry.

b. *Security Clearance*. A member may be appointed to the board only if he or she has a sufficient security clearance to afford access to all information relating to the whereabouts and status of the person(s) covered by the board of inquiry.

c. *Legal Advisor*.

(1) The Secretary must assign a JA to the board, or appoint an attorney who has expertise in the law relating to missing persons, the determination of death of such persons, and the rights of family members and dependents of such persons.

(2) Duties of the legal advisor include advising the board on questions of law or procedure pertaining to the board; instructing the board on governing statutes and directives; and monitoring (observing) the deliberations of the board.

6. Duties of the Board. The board's duties include:

a. Collecting, developing and investigating all facts and evidence relating to disappearance or whereabouts and status of the person.

b. Collecting appropriate documentation of the facts and evidence covered by the board's investigation.

c. Analyzing facts and evidence; making findings that are supported by a preponderance of the evidence based on that analysis; and drawing conclusions as to the current whereabouts and status of the person.

d. Recommending to the Service Secretary that:

(1) the person be placed in a missing status;

(2) the person be declared deserted, absent without leave, or dead; or

(3) the person is accounted for, such as when credible evidence exists to support a determination that a person's remains have been destroyed and are unrecoverable.

7. Board Proceedings. The board must:

a. Collect, record and safeguard all facts, documents, statements, photographs, tapes, messages, maps, sketches, reports and other information relating to the whereabouts and status of the person(s).

b. Gather information relating to actions taken to find the person(s).

c. Arrive at its findings and recommendations by majority vote and ensure that its findings are supported by a preponderance of the evidence.

d. Maintain a record of its proceedings.

e. Close the proceedings to the public, including the PNOK, other immediate family members, and any previously designated person of the missing person (*i.e.*, a person designated by the missing person to receive information on the whereabouts and status of the missing person).

8. Counsel for Missing Person. Each person named in the inquiry is entitled to counsel. If the absence or missing status of two or more persons may be factually related, one counsel may represent all such persons, unless a conflict results.

a. The missing person's counsel represents the interests of the missing person, and not those of any member of the person's family or other interested parties.

b. To be appointed counsel, a person must:

(1) be a JA;

(2) be a graduate of an accredited law school or a member of the bar of a Federal court or the highest court of a State; or

(3) if other than a JA, be a member of the bar of a Federal court or of the highest court of a State.

c. The person must also:

(1) Be certified as competent to perform his or her duties by The Judge Advocate General of the Service for which he or she is a member or, if a civilian, the Secretary concerned who appointed the board.

(2) Have a security clearance that affords counsel access to all information relating to the whereabouts and status of the person.

(3) Have expertise in the law relating to missing persons, the determination of the death of such persons, and the rights of family members and dependents.

d. *Access*. The missing person's counsel:

(1) Must have access to all facts and evidence the board considers.

(2) Observe all official activities of the board during the proceedings.

(3) Monitor (observe) the board deliberations.

e. A missing person's counsel must also assist the board in ensuring that all appropriate information about the case is collected, logged, filed and safeguarded. The NOK and previously-designated person have the right to submit information to the missing person's counsel.

f. *Independent Review*. The missing person's counsel must conduct an independent review of the board's report. This review is made an official part of the board's record and accompanies the report to the Secretary for final decision.

9. Board Report.

a. The board must submit a report within thirty calendar days of its appointment using DD Form 2811, Report of Proceedings by Initial/Subsequent Board of Inquiry or Further Review Board, to prepare its report.

b. The report must include:

(1) A discussion of the facts and evidence the board considered and the recommendation with respect to each person the report covers.

(2) Disclosure of whether the board reviewed classified documents and information or used them otherwise in forming its recommendation.

(3) The missing person's counsel's independent review of the board's report.

c. An initial board of inquiry may not recommend that a person be declared dead unless:

(1) credible evidence exists to suggest that the person is dead;

(2) the U.S. possesses no credible evidence that suggests that the person is alive; and

(3) representatives of the U.S.:

(a) have completely searched the area where the person was last seen (unless, after making a good faith effort to obtain access to the area, the representatives are not granted access); and

(b) have examined the records of the Government or entity having control over the area where the person was last seen (unless, after making a good faith effort to obtain access to the records, the representatives are not granted access).

d. If the board recommends that a missing person be declared dead, the board must include in their report:

(1) a detailed description of the location where the death occurred;

(2) a statement of the date on which the death occurred;

(3) a description of the location of the body, if recovered; and

(4) if the body was recovered and is not identifiable through visual means, a certification by a forensic pathologist that the body is that of the missing person.

10. Disclosure of Report. The report may not be made public, except to PNOK, other members of the immediate family, and any other previously designated person, until one year after the date on which the report is submitted. Classified portions may not be made available to the public or the NOK.

11. Secretary Determination.

a. The Secretary must review the report within 30 calendar days of receipt and determine whether the report is complete and free of error. If incomplete, the Secretary may return the report to the board for further action.

b. If the Secretary determines the report is complete and free of administrative error, he or she will determine the status of the missing person(s), including whether the person(s) shall be declared:

(1) missing;

(2) deserted;

(3) absent without leave; or

(4) dead.

12. Report to Family Members and Other Interested Persons. No later than 30 calendar days after the date the Secretary determines status, the Secretary must provide the PNOK, immediate family, and other previously designated person:

a. an unclassified summary of the unit commander's preliminary assessment and recommendation and the board report (including the names of the members);

b. notice that the U.S. will conduct a subsequent inquiry into the whereabouts and status of the missing person(s) upon the earlier of:

(1) on or about one year after the date of the first official notice of the disappearance; or

(2) information becomes available that may result in a change in status.

c. *Extensions*. The Secretary may grant extensions of the times periods, but only on a case-by-case basis for good cause, and only for a period not in excess of the period for which the extension is granted.

F. Subsequent Boards of Inquiry (10 U.S.C. § 1504, DoDI 2310.5, Encl. 5). If, during the year following the date of the transmission of a commander's initial report, credible information becomes available that may result in a change of the person's status, the Secretary must appoint a subsequent board of inquiry to inquire into the information. Also, in the absence of such information, the Secretary must appoint a subsequent board of inquiry to inquire into the whereabouts and status of a missing person on or about one year after the date of the transmission of a commander's initial report on the person.

G. Further Review Boards (10 U.S.C. § 1505, DoDI 2310.5, Encl. 6). When the Director, Defense Prisoner of War/Missing in Action Office (DPMO) receives information from a U.S. intelligence agency or other Federal Government element relating to a missing person, the Director must ensure that the information is added to the missing person's case resolution file; and make appropriate notifications IAW the regulation. The Director, with the advice of the missing person's counsel, must decide whether the information is significant enough to require a review by a further review board.

H. Release of Information (DoDI 2310.5, Encl. 7).

1. The Secretary must, upon request, release the contents of a missing person's case resolution file to the PNOK, other immediate family members, and any other previously designated person.

2. Classified information, debriefing reports, or information protected by the Privacy Act or by other applicable laws and regulations may be made available, for official use only, to personnel within the DoD possessing the appropriate security clearance and having a valid need to know.

ARMY REGULATION 15-6
INVESTIGATION GUIDE
FOR
INFORMAL INVESTIGATIONS

May 2008

INTRODUCTION

1. PURPOSE:

a. This guide is intended to assist investigating officers, who have been appointed under the provisions of Army Regulation (AR) 15-6, in conducting timely, thorough, and legally sufficient investigations. It is designed specifically for informal investigations, but some provisions are also applicable to formal investigations. It may also be used by legal advisors responsible for advising investigating officers. A brief checklist is included at the end of the guide as an enclosure. The checklist is designed as a quick reference to be consulted during each stage of the investigation. The questions in the checklist will ensure that the investigating officer has covered all the basic elements necessary for a sound investigation.

b. Investigating officers are encouraged to use this guide for general guidance regarding informal investigations. Investigating officers should consult their legal advisor for detailed guidance and assistance.

c. This guide is based upon the 2 October 2006 version of AR 15-6.

2. DUTIES OF AN INVESTIGATING OFFICER: The primary duties of an investigating officer are:

a. to ascertain and consider the evidence on all sides of an issue,

b. to be thorough and impartial,

c. to make findings and recommendations warranted by the facts and comply with the instructions of the appointing authority, and

d. to report the findings and recommendations to the appointing authority.

3. AUTHORITY:

a. AR 15-6 sets forth procedures for the conduct of informal and formal investigations. Only informal investigations will be discussed here. Informal investigations are those that most often have a single investigating officer who conducts interviews and collects evidence. In contrast, formal investigations normally involve due process hearings for a designated respondent. Formal procedures are required whenever a respondent is specifically designated by the appointing authority.

b. Informal procedures are not intended to provide a hearing for persons who may have an interest in the subject of the investigation. Since no respondents are designated in informal procedures, no one is entitled to the rights of a respondent, such as notice of the proceedings, an opportunity to participate, representation by counsel, or the right to call and cross-examine witnesses. The investigating officer may, however, make any relevant findings or recommendations concerning individuals, even where those findings or recommendations are adverse to the individual or individuals concerned. If the appropriate authority decides to take action against an individual based upon an AR 15-6 investigation, that individual will be afforded certain due process rights before adverse action is taken.

c. AR 15-6 is used as the basis for many investigations requiring the detailed gathering and analyzing of facts, and the making of recommendations based on those facts. AR 15-6 procedures may be used on their own, such as in an investigation to determine facts and circumstances, or the procedures may be incorporated by reference into directives governing specific types of investigations, such as financial liability investigations and line of duty investigations. If such directives contain guidance that is more specific than that set forth in AR 15-6, the more specific guidance will control. For example, AR 15-6 does not contain time limits for completion of investigations; however, if another directive that incorporates AR 15-6 procedures contain time limits, that requirement will apply.

d. Only commissioned officers, warrant officers, or DA civilian employees paid under the General Schedule, Level 13 (GS 13), or above may be investigating officers. The investigating officer must also be senior to any person that is part of the investigation if the investigation may require the investigating officer to make adverse findings or recommendations against that person. Since the results of any investigation may have a significant impact on policies, procedures, or careers of government personnel, the appointing authority should select the best qualified person for the duty based on their **education, training, experience, length of service, and temperament**. If during the investigation, the investigating officer begins to suspect that adverse findings will be made against someone senior to the investigating officer, the investigating officer must contact the legal advisor immediately.

PRELIMINARY MATTERS

1. Appointing authority.

a. Under AR 15-6, the following persons may appoint investigating officers for informal investigations: any general court-martial convening authority, including those who have such authority for administrative purposes only; any general officer; a commander at any level; a principal staff officer or supervisor in the grade of major or above; any state adjutant general; and a DA civilian supervisor paid under the Executive Schedule, SES, or GS/GM 14 or above, provided the supervisor is the head of an agency or activity or the chief of a division or department.

b. Only a general court-martial convening authority may appoint an investigation for incidents resulting in property damage of $1M or more; loss or destruction of Army aircraft or missile; injury or illness likely to result in death or permanent total disability; death of one or more persons; or death of one or more persons by fratricide/friendly fire. If the investigating officer is conducting an investigation that involves one of these situations, and the investigation was not appointed by a general court-martial convening authority, the investigating officer must contact the legal advisor immediately. Errors in appointing authority nullify the investigation unless later ratified by an appropriate appointing authority.

c. For investigations of a death or deaths involving a deployed force(s), from what is believed to be hostile fire, the general court-martial convening authority may delegate, in writing, appointing/approval authority to a subordinate commander exercising special court-martial convening authority. If appointing/approval authority has been delegated and evidence is discovered during the investigation that indicates that the death(s) may have been the result of fratricide/friendly fire, the investigating officer **will immediately suspend the investigation and inform the appointing authority and legal advisor**. At this time the general court-martial convening authority will appoint a new investigation into the fratricide/friendly fire incident. Any evidence from the hostile fire investigation may be provided to the investigating officer or board conducting the fratricide/friendly fire investigation. The general court-martial convening authority may also appoint the same investigating officer if the investigating officer is still best qualified to perform the duty.

2. Appointment procedures. Informal investigation appointments may be made orally or in writing. If written, the appointment orders are usually issued as a memorandum signed by the appointing authority or by a subordinate with the appropriate authority line. Whether oral or written, the appointment should specify clearly the purpose and scope of the investigation and the nature of the findings and recommendations required. If the orders are unclear, the investigating officer should seek clarification. The primary purpose of an investigation is to report on matters that the appointing authority has designated for inquiry. The appointment orders may also contain specific guidance from the appointing authority, which, even though not required by AR 15-6, nevertheless must be followed. For example, AR 15-6 does not require that witness statements be sworn for informal investigations; however, if the appointing authority requires this, all witness statements must be sworn.

3. Obtaining assistance. The servicing Judge Advocate office can provide assistance to an investigating officer at the beginning of and at any time during the investigation. Investigating officers should always seek legal advice as soon as possible after they are informed of this duty and as often as needed while conducting the investigation. In serious or complex investigations for which a legal review is mandatory, this requirement should be included in the appointment letter. Early coordination with the legal advisor will allow problems to be resolved before they are identified in the mandatory legal review. The legal advisor can assist an investigating officer in framing the issues, identifying the information required, planning the investigation, and interpreting and analyzing the information obtained. The attorney's role, however, is to provide legal advice and assistance, not to conduct the investigation or substitute his or her judgment for that of the investigating officer. NOTE: Complex and sensitive cases include those involving a death or serious bodily injury, those in which findings and recommendations may result in adverse administrative action, and those that will be relied upon in actions by higher headquarters.

4. Administrative matters. As soon as the investigating officer receives appointing orders, he or she should begin a chronology showing the date, time, and a short description of everything done in connection with the investigation. The chronology should begin with the date orders are received, whether verbal or written. Investigating officers should also record the reason for any unusual delays in processing the case, such as the absence of witnesses due to a field training exercise. The chronology should be part of the final case file.

5. Concurrent investigations. An informal investigation may be conducted before, concurrently with, or after an investigation into the same or related matters by another command or agency. Appointing authorities and investigating officers must ensure that investigations do not hinder or interfere with criminal investigations or investigations directed by higher headquarters. In cases of concurrent investigations, investigating officers should coordinate with the other command or agency and other investigating officers to avoid duplication of investigative effort wherever possible. Information from other investigations may be incorporated into the AR 15-6 investigation and considered by the investigating officer but available information may be limited (i.e., safety investigations under AR 385-10). Likewise, a 15-6 investigating officer may be asked to share information with a concurrent investigation. The legal advisor should be consulted for guidance. Also, an investigating officer should immediately coordinate with the legal advisor if he or she discovers evidence of serious criminal misconduct. Criminal investigations by MPI or CID may take precedence.

CONDUCTING THE INVESTIGATION

1. Developing an investigative plan.

a. The investigating officer's primary duty is to gather evidence, and make findings of fact and appropriate recommendations to the appointing authority. Before obtaining information, however, the investigating officer should develop an investigative plan that consists of (1) an understanding of the facts required to reach a conclusion, and (2) a strategy for obtaining evidence. This should include a list of potential witnesses and a plan for when each witness will be interviewed. The order in which witnesses are interviewed may be important. An effective, efficient method is to interview principal witnesses last. This best prepares the investigating officer to ask all relevant questions and minimizes the need to re-interview these critical witnesses. As the investigation proceeds, it may be necessary to review and modify the investigative plan.

b. The investigating officer should begin the investigation by identifying the information already available, and determining what additional information will be required before findings and recommendations may be made to the appointing authority. An important part of this is establishing the appropriate standards, rules, or procedures that govern the circumstances under investigation. The legal advisor or other functional expert can assist the investigating officer in determining the information that will be required.

2. Obtaining documentary and physical evidence.

a. The investigating officer may need to collect documentary and physical evidence such as applicable regulations, existing witness statements, accident or police reports, and photographs. This information can save valuable time and effort. Accordingly, the investigating officer should obtain this information at the beginning of the investigation. In some cases, the information will not be readily available, so the request should be made early so the investigating officer may continue to work on other aspects of the investigation while the request is being processed. The investigating officer should, if possible and appropriate, personally inspect the location of the events being investigated and take photographs, if they will assist the appointing authority.

b. Investigating officers are limited to what physical evidence (i.e., photos, clothing, vehicles, house) they may examine (potentially a search) or take custody of (potentially a seizure) for purpose of their investigation. The investigating officer must first attempt to obtain the rightful owner's permission to examine or take custody of privately owned items. The investigating officer's authority to search and seize privately owned property is limited by the US Constitution and Army regulation. Deliberately circumventing these limits may impact the investigation. **Consult with your legal advisor if you need to examine or take custody of privately owned property.**

c. A recurring problem that must be avoided is lack of documentation in investigations with findings of no fault, no loss, or no wrongdoing. It is just as important to back these findings up with documentary evidence as it is to document adverse findings. All too frequently an investigating officer who makes a finding of no fault, no loss, or no wrongdoing, closes the investigation with little or no documentation. This is incorrect. The report of investigation must include sufficient documentation to convince the appointing authority and others who may review the investigation that the finding of no fault, no loss, or no wrongdoing is supported by the evidence.

3. Obtaining witness testimony.

a. In most cases, witness testimony will be required. Clearly, the best interviews occur face-to-face; but, if necessary, interviews may be conducted by telephone or mail. Because of the preference for face-to-face interviews, telephone and mail interviews should be used only in unusual circumstances. Information obtained telephonically should be documented in a memorandum for record.

b. DA Form 2823.

(1) Statements should be taken on DA Form 2823. Although there is a box for the witness's social security number on the November 2006 version of DA 2823, there is no valid reason to require that information in an overwhelming majority of situations. If a situation arises where a social security number is relevant and material to the investigation and thus must be collected, the information obtained must be properly safeguarded. Also, home addresses and phone numbers should not be recorded on the DA Form 2823 unless absolutely necessary.

(2) Legible handwritten statements and/or questions and answers are ordinarily

sufficient. If the witness testimony involves technical terms that are not generally known outside the witness's field of expertise, the witness should be asked to define the terms the first time they are used.

c. Although AR 15-6 does not require that statements be sworn for informal investigations, the appointing authority, or other applicable regulation, may require sworn statements, or the investigating officer may, at his or her own discretion, ask for sworn statements, even where not specifically required. Under Article 136, UCMJ, military officers are authorized to administer the oath required to provide a sworn statement; 5 U.S.C. 303 provides this authority for civilian employees. (Statements taken out of the presence of the investigating officer may be sworn before an official authorized to administer oaths at the witness's location.)

d. Military personnel and Federal civilian employees. Commanders and supervisors have the authority to order military personnel and to direct Federal employees to appear and testify. Some civilian employees are members of unions, and may be subject to collective bargaining agreements that may impose conditions or limits on interviews of collective bargaining unit members. Prior to interviewing civilian employees, the Investigating Officer should discuss potential limitations with the legal advisor.

e. Non-military affiliated civilians. Investigating officers do not have the authority to subpoena witnesses. Civilian witnesses who are not Federal employees may agree to appear, however, and, if necessary, be issued invitational travel orders. This authority should be used only if the information cannot be otherwise obtained (via telephone, Email, etc.) and only after coordinating with the legal advisor or appointing authority.

4. Rights Advisement.

a. All soldiers suspected of criminal misconduct must first be advised of their rights.

DA Form 3881 should be used to record that the witness understands his or her rights and elects to waive those rights and make a statement or elects to invoke those rights and remain silent. It may be necessary to provide the rights warning at the outset of the interview. In some cases, however, an investigating officer will become aware of the witness's involvement in criminal activity only after the interview has started and incriminating evidence is uncovered. In such case, rights warnings must be provided as soon as the investigating officer suspects that a witness may have been involved in criminal activity. If a witness elects to assert his or her rights and requests an attorney, all questioning must cease immediately. Questioning may only resume in the presence of the witness's attorney, if the witness consents to being interviewed. The investigating officer should consult with the legal advisor whenever a witness invokes the right to remain silent.

b. Note that these rights apply only to information that might be used to incriminate the witness. They cannot be invoked to avoid questioning on matters that do not involve violations of criminal law. Finally, these rights may be asserted only by the individual who would be accused of the crime. The rights cannot be asserted to avoid incriminating other individuals. The following example highlights this distinction.

c. Example: A witness who is suspected of stealing government property must be advised of his or her rights prior to being interviewed. However, if a witness merely is being interviewed concerning lost or destroyed government property in connection with a financial liability investigation, a rights warning would not be necessary unless evidence is developed that leads the investigating officer to believe the individual has committed a criminal offense. If it is clear that

the witness did not steal the property but has information about who did, the witness may not assert rights on behalf of the other individual.

5. Scheduling witness interviews. The investigating officer will need to determine which witnesses should be interviewed and in what order. Often, information provided by one witness can raise issues that should be discussed with another. Organizing the witness interviews will save time and effort that would otherwise be spent "backtracking" to re-interview prior witnesses concerning information provided by subsequent witnesses. While re-interviewing may be unavoidable in some circumstances, it should be kept to a minimum. The following suggests an approach to organizing witness interviews; it is not mandatory.

a. When planning who to interview, identify the people who are likely to provide the best information. When conducting the interviews, start with witnesses that will provide all relevant background information and frame the issues. This will allow the interviews of principal witnesses to be as complete as possible, avoiding the "backtracking" described above.

b. Concentrate on those witnesses who would have the most direct knowledge about the events in question. Without unnecessarily disclosing the evidence obtained, attempt to seek information that would support or refute information already obtained from others. In closing an interview, it is appropriate to ask if the witness knows of any other persons who might have useful information or any other information the witness believes may be relevant and material to the inquiry.

c. Any information that is relevant and material should be collected regardless of the source; however, investigating officers should collect the best information available from the most direct source.

d. It may be necessary or advisable to interview experts having specialized understanding of the subject matter of the investigation.

e. At some point, there will be no more witnesses available with relevant and material information. It is not necessary to interview every member of a unit, for example, if only a few people have information relevant to the inquiry. Also, all relevant witnesses do not need to be interviewed if the facts are clearly established and not in dispute. However, the investigating officer must be careful not to prematurely terminate an investigation because a few witnesses give consistent testimony.

6. Conducting witness interviews. Before conducting witness interviews, investigating officers may consult Inspector General officials or law enforcement personnel such as Military Police officers or Criminal Investigation Division agents for guidance on interview techniques. The following suggestions may be helpful:

a. Prepare for the interview. While there is no need to develop scripts for the witness interviews, investigating officers may wish to review the information required and prepare a list of questions or key issues to be covered. This will prevent the investigating officer from missing issues and will maximize the use of the officer's and witness's time. Generally, it is helpful to begin with open-ended questions such as "Can you tell me what happened?" After a general outline of events is developed, follow up with narrow, probing questions, such as "Did you see SGT X leave the bar before or after SGT Y?" Weaknesses or inconsistencies in testimony can generally be better explored once the general sequence of events has been provided.

b. Ensure the witness's privacy. Investigating officers should conduct the interview in a place that will be free from interruptions and will permit the witness to speak candidly without fear of being overheard. Witnesses should not be subjected to improper questions, unnecessarily harsh and insulting treatment, or unnecessary inquiry into private affairs.

c. Focus on relevant and material information. Unless precluded for some reason, the investigating officer should begin the interview by telling the witness about the subject matter of the investigation. Generally, any evidence that is relevant and material to the investigation is permissible. The investigating officer should not permit the witness to get off track on other issues, no matter how important the subject may be to the witness. Information should be relevant and material to the matter being investigated. Relevancy depends on the circumstances in each case. Compare the following examples:

(1) Example 1: In an investigation of a loss of government property, the witness's opinions concerning the company commander's leadership style normally would not be relevant.

(2) Example 2: In an investigation of alleged sexual harassment in the unit, information on the commander's leadership style might be relevant.

(3) Example 3: In an investigation of allegations that a commander has abused command authority, the witness's observation of the commander's leadership style would be highly relevant.

d. Let the witness testify in his or her own words. Investigating officers must avoid coaching the witness or suggesting the existence or non-existence of material facts. After the testimony is completed, the investigating officer should assist the witness in preparing a written statement that includes all relevant information, and presents the testimony in a clear and logical fashion. Written testimony also should reflect the witness's own words and be natural. Stilted "police blotter" language is not helpful and detracts from the substance of the testimony. A tape recorder may be used, but the witness should be advised of its use. Additionally, the tape should be safeguarded, even after the investigation is completed.

e. Protect the interview process. In appropriate cases, an investigating officer may direct witnesses not to discuss their statement or testimony with other witnesses or with persons who have no official interest in the proceedings until the investigation is complete. This precaution is recommended to eliminate possible influence on testimony of witnesses still to be heard. Witnesses, however, are not precluded from discussing matters with counsel.

7. Rules of Evidence: Because an AR 15-6 investigation is an administrative and not a judicial action, the rules of evidence normally used in court proceedings do not apply. Therefore, the evidence that may be used is limited by only a few rules.

a. The information must be relevant and material to the matter or matters under investigation. Information not meeting this standard must not be included in the investigation.

b. Information obtained in violation of an individual's Article 31, UCMJ, or 5th Amendment rights may be used in administrative proceedings unless obtained by unlawful coercion or inducement likely to affect the truthfulness of the statement.

c. Evidence of the results, taking, or refusal of a polygraph examination will not be considered without the consent of the person involved in such test.

d. Privileged communications between husband and wife, priest and penitent, attorney and client may not be considered, and present or former inspector general personnel will not be required to disclose the contents of inspector general reports, investigations, inspections, action requests, or other memoranda without appropriate approval.

e. "Off-the-record" statements will not be considered for their substance but can be relied upon to help find additional evidence.

f. An involuntary statement by a member of the Armed Forces regarding the origin, incurrence, or aggravation of a disease or injury may not be admitted.

The investigating officer should consult the legal advisor if he or she has any questions concerning the applicability of any of these rules.

8. Standard of Proof. Since an investigation is not a criminal proceeding, there is no requirement that facts and findings be proven beyond a reasonable doubt. Instead, unless another specific directive states otherwise, AR 15-6 provides that findings must be supported by "a greater weight of evidence than supports a contrary conclusion." That is, findings should be based on evidence which, after considering all evidence presented, points to a particular conclusion as being more credible and probable than any other conclusion. This is also known as the preponderance of the evidence.

CONCLUDING THE INVESTIGATION

1. Preparing Findings and Recommendations. After all the evidence is collected, the investigating officer must review it and make findings. The investigating officer should consider the evidence thoroughly and impartially, and make findings of fact and recommendations that are supported by the facts and comply with the instructions of the appointing authority.

a. Facts: To the extent possible, the investigating officer should fix dates, places, persons, and events, definitely and accurately. The investigating officer should be able to answer questions such as: What occurred? When did it occur? How did it occur? Why did it occur? Who was involved, and to what extent? .

b. Findings: A finding is a clear and concise statement that can be deduced from the evidence in the record. In developing findings, investigating officers are permitted to rely on the facts and any reasonable inferences that may be drawn from those facts. In stating findings, investigating officers should refer to the exhibit or exhibits relied upon in making each finding. Findings (including findings of no fault, no loss, or no wrongdoing) must be supported by the documented evidence that will become part of the report. Exhibits should be numbered in the order they are discussed in the findings.

c. Recommendations: Recommendations should take the form of proposed courses of action consistent with the findings, such as disciplinary action, imposition of financial liability, or corrective action. Recommendations must be supported by the facts and consistent with the findings. Each recommendation should cite the specific findings that support the recommendation.

d. Facts, findings, and recommendations may be provided in a separate memorandum attached to the DA 1574. In that event, the DA 1574 should be appropriately annotated to accurately identify the memorandum.

2. Preparing the Submission to the Appointing Authority. After developing the findings and recommendations, the investigating officer should complete DA Form 1574 and assemble the packet.

a. All administrative documents, such as the memorandum of appointment, rights warning statements, Privacy Act statements, and chronology, will be marked as enclosures.

b. Every item of evidence offered or received by the investigating officer (with index) will be marked as exhibits.

c. Care should be taken to organize the investigation in a logical, coherent, useful manner.

3. LEGAL REVIEW:

a. AR 15-6 does not require that all informal investigations receive a legal review. The appointing authority, however, must get a legal review of all cases involving serious or complex matters, such as where the incident being investigated has resulted in death or serious bodily injury, or where the findings and recommendations may result in adverse administrative action, or will be relied on in actions by higher headquarters. Nonetheless, appointing authorities are encouraged to obtain legal review of all investigations. Other specific directives may also require a legal review. Generally, the legal review will determine:

(1) whether the investigation complies with requirements in the appointing order and other legal requirements,

(2) the effects of any errors in the investigation,

(3) whether the findings (including findings of no fault, no loss, or no wrongdoing) and recommendations are supported by sufficient evidence, and

(4) whether the recommendations are consistent with the findings.

b. If a legal review is requested or required, it is required before the appointing authority approves the findings and recommendations. After receiving a completed AR 15-6 investigation, the appointing authority may approve, disapprove, or modify the findings and recommendations, or may direct further action, such as the taking of additional evidence, or making additional findings.

CHECKLIST FOR INVESTIGATING OFFICERS

1. Preliminary Matters:

a. Has an appropriate level appointing authority appointed a proper investigating officer based on seniority, availability, experience, and expertise?

b. Does the appointment memorandum clearly state the purpose and scope of the investigation, the points of contact for assistance (if appropriate), and the nature of the findings and recommendations required?

c. Has the initial legal briefing been accomplished?

2. Investigative Plan.

a. Does the investigative plan outline the background information that must be gathered, identify the witnesses who must be interviewed, and order the interviews in the most effective manner?

b. Does the plan identify witnesses no longer in the command and address alternative ways of interviewing them?

c. Does the plan identify information not immediately available and outline steps to quickly obtain the information?

3. Conducting the Investigation.

a. Is the chronology being maintained in sufficient detail to identify causes for unusual delays?

b. Is the information collected (witness statements, MFR's of phone conversations, photographs, etc.) being retained and organized?

c. Is routine coordination with the legal advisor being accomplished?

d. Is all evidence relevant and material to an issue being investigated?

4. Preparing Findings and Recommendations.

a. Is the evidence assembled in a logical, coherent, and useful fashion?

b. Are the findings (including findings of no fault, no loss, or no wrongdoing) supported by the evidence? Does each finding cite the exhibits that support it?

c. Are the recommendations supported by the findings?

d. Are the findings and recommendations responsive to the tasking in the appointment memorandum?

e. Did the investigation address all the issues (including systemic breakdowns; failures in supervision, oversight, or leadership; program weaknesses; accountability for errors; and other relevant areas of inquiry) raised directly or indirectly by the appointment?

5. Final Action.

a. Was an appropriate legal review conducted?

b. Is the investigation being turned in on time?

NOTES

CHAPTER 22

LEGAL ASSISTANCE IN OPERATIONS

REFERENCES

1. U.S. DEP'T OF ARMY, REG. 27-3, THE ARMY LEGAL ASSISTANCE PROGRAM (21 Feb. 1996).
2. U.S. DEP'T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS (1 May 1992).
3. U.S. DEP'T OF ARMY, REG. 600-8-101, PERSONNEL PROCESSING (IN-OUT-, SOLDIER READINESS MOBILIZATION, AND DEPLOYMENT PROCESSING) (18 July 2003).
4. U.S. DEP'T OF ARMY, PAM. 600-8-101, PERSONNEL PROCESSING (IN-OUT-, SOLDIER READINESS MOBILIZATION, AND DEPLOYMENT PROCESSING) (28 May 2003).
5. U.S. DEP'T OF AIR FORCE, INSTR. 51-504, LEGAL ASSISTANCE, NOTARY, AND PREVENTIVE LAW PROGRAMS (27 Oct. 2003).
6. JAGINST 5801.2, Navy-Marine Corps Legal Assistance Program (11 Apr. 1997).
7. COMDTINST 5801.4E, Legal Assistance Program (26 Oct. 2005).
8. U.S. DEP'T OF ARMY, FIELD MANUAL 27-100, LEGAL SUPPORT TO OPERATIONS (1 Mar. 2000) (under revision as of the date of this Handbook's publication, but set for publication as FM 1-04 Legal Support to the Operational Army)
9. Center for Law and Military Operations (CLAMO), Forged In Fire: Lessons Learned During Military Operations (1994–2006), Chapter VI, Legal Assistance (2006).

I. INTRODUCTION

A. A Soldier's combat efficiency can be affected by legal problems that detract from his or her ability to concentrate on the military mission at hand. One objective of the Army Legal Assistance Program is to enhance combat efficiency by assisting Soldiers with their personal legal issues. If left unchecked, these difficulties can reduce efficiency and even result in disciplinary action.

B. From an operational standpoint, servicing Judge Advocates (JAs) must ensure that Soldiers' personal legal affairs are in order prior to deployment. Once deployed, JAs assist Soldiers in resolving their problems quickly and efficiently. The broad nature of the legal assistance mission makes it impossible to summarize all of the laws and resources a practitioner may need during a deployment. This chapter outlines certain situations, identifies resources and highlights some recurring substantive issues that may arise during deployment

II. PREPARATION FOR EXERCISES, MOBILIZATION, AND DEPLOYMENT

A. Legal assistance problems that blossom during deployment can often reduced with aggressive predeployment preventive law efforts.

B. The Office of the Staff Judge Advocate (OSJA) and Brigade Judge Advocate (BJA) must ensure Soldiers' legal affairs are reviewed and updated at least annually, and more frequently as expected deployments near. Judge Advocates should look for opportunities to raise awareness of frequently encountered issues to deploying Soldiers. Prior to deployment, both the Soldier and the Soldier's family must be prepared. For the Soldier, this preparation is an ongoing effort that should begin upon arrival at the unit and end only upon transfer.

III. SOLDIER READINESS PROGRAM (SRP)

A. AR 600-8-101 establishes the SRP.[1] It mandates that Soldiers of the Active Army (AA), the Army National Guard (ARNG), and those who serve with units in the United States Army Reserves (USAR) undergo a comprehensive SRP annually and within thirty days of a deployment.

1. Ten functional areas comprise the SRP: deployment validation; personnel; finance; legal; logistics; training; security; medical; dental; and vision. Accordingly, the legal portion of the SRP is part of a broader assessment of a Soldier's readiness and availability for deployment.

[1] *See* U.S. DEP'T OF ARMY, REG. 600-8-101, PERSONNEL PROCESSING (IN-, OUT-, SOLDIER READINESS, MOBILIZATION, AND DEPLOYMENT PROCESSING) (18 July 2003).

2. DA Form 7425 serves as a checklist and the focal point for the SRP.[2] JAs must ensure the most current edition of the DA From 7425 is being used by the SRP, as previous editions created the foundation for a violation of client confidence with the Lautenberg Amendment check.

B. The SRP requires Soldiers receive counseling about wills and powers of attorney (POA) at a minimum.[3] DA Form 7425 requires a determination of whether or not the Soldier has a domestic violence investigation pending. This latter requirement is important to the command because servicemembers with "a qualifying crime of domestic violence are non-deployable for missions that require possession of firearms or ammunition."[4] Legal Assistance Attorneys (LAAs) may counsel individual servicemembers with domestic violence matters, however, LAAs must be aware of the potential for creating a confidentiality issue under AR 27-26.[5] At the SRP, DA Form 7425 requires the G1 to confirm whether there is a domestic violence issue. If there is a problem, personnel from that section report it to the command and should send the Soldier to the LAA for help. Finally, in the area of training, the SRP requires a check on whether Soldiers have received certain briefings. Depending on the nature of the deployment and the unit, these briefings could cover the UCMJ, the Geneva Conventions, the law of land warfare, the Servicemembers Civil Relief Act (SCRA), and the Uniformed Services Employment and Reemployment Rights Act (USERRA). An SRP standardized training packet has been published and is available on JAGCNet.

IV. OSJA, BCT, AND LAO PREPARATION AND PLANNING FOR THE SRP AND DEPLOYMENT

A. In broad terms, effective legal support for deployment depends on the following factors:

1. Familiarity with the general legal support needed during mobilization and deployment, so that legal services at the BCT or OSJA, are organized.

2. Knowledge of the requirements in each substantive area of the law (including tax law) so that all legal personnel are properly trained and proper references and forms are available.

3. Opportunities to participate in predeployment exercises to test deployment plans and training.

4. Effective utilization of RC legal personnel wherever feasible.

5. Establishment of good working relationships with key Corps, Division, and installation personnel.

B. LAOs and BCT JAs should aggressively sponsor preventive law programs to educate Soldiers and their families before deployment occurs. At a minimum, topics covered should include:

1. *Eligibility for legal assistance*.

2. *SGLI designations*.

a. Ensure proper designation and coordination with will and other estate planning documents.

b. If the servicemember is making a testamentary trust the beneficiary of SGLI proceeds, then ensure that the SGLI form correctly reads that the SGLI beneficiary is the trustee to fund a trust established "for the benefit of my child(ren) under my will."

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[2] Similar to DA Form 5123. U.S. Dep't of Army, DA Form 5123, In- and Out-Processing Records Checklist (June 2003). Like the DA Form 7425, DA Form 5123 can be an indicator of the Soldier's individual readiness posture. *See* U.S. DEP'T OF ARMY, REG. 600-8-101 , ARMY CASUALTY PRORGRAM (30 Apr. 2007).

[3] The instructions for DA Form 7425 on this point are as follows:

> All deployees will be encouraged to attend the Premobilization Legal Briefing and take care of all their legal needs at Home Station. This includes the need for a will (wills if married), power(s) of attorney and other legal issues. If required, deployees will be afforded the opportunity to obtain legal advice regarding all legal issues. Certification will be made by a judge advocate or other qualified personnel who are supervised by a judge advocate (paralegal or NCO/Specialist . . . .

U.S. Dep't of Army, DA Form 7425, Readiness and Deployment Checklist at Instruction Section V, Item 1 (Jan. 2006).

[4] *Id*. at Sec. II, Item 22.

[5] U.S. DEP'T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS (1 May 1992).

3. *Wills for both spouses*.

a. Educate clients on the need for comprehensive estate planning. Provide them information about other ancillary documents they may need, such as living wills, health care POAs, durable POAs, and mortuary planning.

b. Educate clients on the need and the best way to provide for minor children using such means as testamentary trusts, UGMA/UTMA, and guardianships.

c. Provide information to clients regarding possible estate tax savings provisions that may be used in their estate plan, such as credit shelter and other trusts, and gifting property.

4. *POAs*.

a. Due to possibly long durations of deployments, servicemembers should anticipate the likelihood that a POA might expire prior to their return and be briefed on the availability of obtaining POA services in theater.

b. Although valid without raised seals, a raised notary seal often promotes broader acceptance of the POA by businesses.

c. No business or other entity is required to accept a POA. Soldiers should confirm with businesses at which the POAs might be used whether the businesses will accept a POA issued by the military, or whether the business requires the use of a POA that the business, itself, has created. Some business may require a special, or limited, POA.

5. *SCRA*.

a. Soldiers should be briefed on the SCRA's provisions governing a Soldier's ability—or inability—to change court dates now or while deployed.

b. Soldiers should be briefed on the SCRA's applicability to lease terminations.

6. *Family law issues*.

a. Soldiers must understand that a Family Care Plan (FCP) that proposes to place the servicemember's child with some person other than the other biological parent of that child (unless the child remains with the child's new adoptive parent) may be subject to challenge in court. Soldiers should be briefed on prophylactic measures that may help head off later challenges to a FCP by a non-military parent. Some measures may include the desirability of obtaining written consent from the other biological parent, or a court order, in the event the Soldier plans to place the child in the custody of a third party, non-biological, and non-adoptive parent.

b. Servicemembers must understand that their support obligations under applicable service Family Support regulations are not relieved by deployment; they must plan for the continued support of family members during the period of deployment.

c. Soldiers must understand that the SCRA will afford little relief, in the form of continuances or delays, in family law actions in which the well-being of a child (e.g., child support or custody) is at issue.

d. Soldiers sometimes seek to be married by proxy while deployed. Four states (Colorado, Montana, Texas, and solely for servicemembers abroad, California) allow marriages by proxy or by VTC. Montana permits double proxy marriages.

7. *Consumer law issues*.

a. Be aware of and inform Soldiers of the current consumer scams in the local area, and warn them that dependents may be targeted by unscrupulous businesses during the deployment.

b. Single Soldiers should forward mail to a trusted family member or friend to look for bills and collection notices.

c. Advise Soldiers not to purchase high-priced items during deployments, which they could not afford at home station.

8. *Tax issues*.

a. Provide information to Soldiers regarding whether the area is designated a QHDA or CZ for income tax purposes. Soldiers who are deployed in a QHDA or CZ are eligible for tax relief.

b. Provide information to Soldiers regarding extensions of time to file taxes and other delays of tax actions. Soldiers have 180 days upon return from deployment, plus however many days the Soldier was deployed during the filing season, to file the tax return.

9. *Reemployment rights issues (USAR and ARNG).*

D. BCT JAs and Chiefs of Legal Assistance should ensure that their offices have an SRP SOP. To tailor the SOP, BCT JAs and Chiefs of Legal Assistance need to be familiar with the installation/unit SRP SOP or operations plan and should coordinate, in advance, with other staff elements. A key issue will be to ensure that the installation/unit plans to conduct the SRP in a suitable location; that is, a location conducive to the delivery of competent and confidential legal services. Some issues to address in the SOP might include:

1. Establishing the simultaneous administration of the SRP site and the LAO.

2. Designating the teams of attorneys and paralegal specialists who will staff the SRP site.

3. Designating the teams of attorneys and paralegal specialists who will staff the LAO during the SRP.

4. Anticipating whether and how to reschedule LAO hours of operation.

5. Anticipating whether it will be necessary to suspend the delivery of certain routine legal assistance services during the SRP.

6. Considering whether RC JAs and paralegal specialists are available for rotations at the SRP site.[6]

7. Considering whether RC JAs and paralegal specialists are available for rotations at the LAO.

V. DEPLOYMENT

A. Legal Assistance occurs during deployment. Brigade Judge Advocates must plan ahead for the delivery of this service. They must determine in advance what resources will be available in theater, what the supported unit will provide, and what appropriated or contingency funds will be available.

B. The nature of combat causes legal assistance services to become more pronounced. Legal issues take on significant immediate importance to the client, the command, and the servicing attorney. The provision of legal assistance during combat deployments may occur anywhere within the theater, and JAs should expect to respond to inquiries from Soldiers in-country. All deployed attorneys should anticipate being requested to provide assistance to Soldiers.

C. Deployed JAs should expect to:

1. Handle the same legal assistance problems seen in garrison.

2. Establish liaison with communication, transportation, and aviation elements for contact and courier service with JAs in the rear detachment (the installation from which the deployment took place) and for service throughout the theater.

3. Establish liaison with the U.S. Consulate at the deployment location for overseas marriage and adoption coordination, and the implementation of emergency leave procedures.

4. Establish a client tracking system, perhaps in coordination with the rear detachment.

5. Find a dedicated area to work, with a phone and unclassified internet access. Try to locate an area that allows for confidential discussion.

6. Answer questions regarding marriage to, or adoption of, foreign nationals.

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[6] Before and during large operations, local civilian attorneys may contact SJAs offering to volunteer in the LAO or at SRPs. SJAs in the grade of Lieutenant Colonel or higher may accept voluntary legal services. The services accepted must be within the scope of the Army Legal Assistance Program, and the volunteer attorneys must be licensed in the jurisdiction where they provide the legal assistance services. *See* Memorandum, Office of the Judge Advocate General, U.S. Army, Legal Assistance Policy Division, subject: Acceptance of Voluntary Service (29 Apr. 2003).

7. Handle a high volume of family law issues, including the need to obtain CONUS civilian counsel for clients.

8. Help servicemembers apply for citizenship.

9. Establish a plan to handle client conflicts during the deployment.

10. Coordinate travel to other locations to provide legal assistance support throughout the area of operations (AO).

11. Determine which civilian contractors in the AO are eligible to receive legal assistance by reviewing the applicable DoD contracts.

12. Coordinate for legal assistance coverage when potential conflicts of interest arise within the office providing legal assistance.

D. Deployed JAs should plan on delivering tax assistance in theater. Although family members can file tax returns at the home station with POAs, JAs in theater will probably need to produce an information paper addressing basic tax issues, including a discussion of filing extensions. Both JAs and paralegals should obtain tax training before deployment. They will also want to consider opening a tax center.

VI. RECURRING SUBSTANTIVE DEPLOYMENT LEGAL ASSISTANCE ISSUES

A. Family Care Plans (FCP).[7]

1. Army Regulation 600-20 requires single parent Soldiers and dual military couples with minor children to implement a FCP to provide for the care of their family members when military duties prevent the Soldier from doing so.[8] Plans must be made to ensure dependent family members are properly and adequately cared for when the Soldier is deployed, on TDY or otherwise not available due to military requirements. Commanders have the responsibility to ensure Soldiers complete FCPs.

2. Significant problems have arisen when the caretaker designated in the FCP is not the other biological parent of the minor children. A biological parent has, absent other considerations, superior custodial rights over others the Soldier-parent may wish to designate in a FCP. There have been several cases where a non-custodial biological parent has sought to exercise parental rights while the Soldier is deployed. Soldiers have unsuccessfully attempted to defend against such lawsuits by invoking the SCRA. Several states have passed laws protecting a Soldier-parent's custodial rights when a deployment disrupts them.

3. Family care plans are not effective in preventing judicial scrutiny of the servicemember's proposed custodial arrangement. If deploying Soldiers wish to place their children in the custody of someone other than the other biological or the adoptive parent of the child, this should be accomplished by executing an agreement that is judicially reviewed for appropriateness, or by securing a court order to that effect. Recognizing these problems and resolving them before deployment is critical to success with this issue.

B. Immigration.

1. Waivers of age and residency requirements are available for non-U.S. citizens who served honorably during WWI, WWII, the Korean War, Vietnam, and Operations Desert Shield/Desert Storm, and who wish to apply for citizenship.[9]

a. An executive order extends this benefit to servicemembers on active duty for any period since 11 September 2001.[10]

b. No fees will be charged to military members for naturalization. Assistance with the naturalization process will be available in overseas locations.

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[7] *See* U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY (1 Feb. 2006).

[8] *Id*. para. 5-5.

[9] 8 U.S.C. § 1440 (2000); *see also* 8 C.F.R. § 329 (2008).

[10] Exec. Order No. 13,269, 3 C.F.R. 241 (2008).

2. To begin the naturalization process, N-400, N-426 and G-325b immigration forms need to be completed, fingerprints and photos must be obtained, and the packet must be mailed to the Nebraska Service Center.[11] Deployed military members are eligible for expedited overseas processing after they receive the I-797 Notice of Action from the Nebraska Service Center.

3. It is also possible for non-citizen personnel to receive citizenship posthumously.[12]

C. Casualty Assistance.

1. Casualties may occur on deployment and at home station. When casualties occur, the SJA elements, both on the exercise/deployment and with the rear detachment, must assist the Soldier's next of kin, the command, and the Casualty Assistance Officer (CAO).

2. Among the many issues that attend the death of a Soldier are: reporting the casualty; notifying the next of kin; appointing an CAO and providing legal advice to that officer; disposing of the remains, including a possible autopsy; advising the next of kin concerning their legal rights and benefits; appointing a summary court officer; and conducting a line of duty investigation. Accordingly, pre-deployment preparation is essential.

a. Familiarity with the Army's casualty regulation, AR 600-8-1,[13] is vital.

b. Judge Advocates will become involved in helping the next of kin of Soldiers missing in action or taken prisoner. The DoD pay manual[14] permits the Secretary of the Department concerned to initiate or increase an allotment on behalf of family members if circumstances so warrant.

c. Prior to deployment, Soldiers should be encouraged to review closely their DD Form 93 (Record of Emergency Data), which designates beneficiaries of pay and allowances; might designate the Death Gratuity beneficiary (Block 9a; if no spouse or children); and designates the Person Authorized to Direct Disposition (PADD) of remains (Block 13, Continuation/Remarks block).

D. SCRA.[15]

1. *Overview*. The SCRA provides a number of substantive benefits and procedural protections to members of the Armed Forces on active duty. Some of these benefits and protections are extremely important during exercises, deployments, and times of mobilization. LAAs must familiarize themselves with the following SCRA issues, at a minimum, and be prepared to assist servicemembers in resolving those issues.

2. *Interest rate reduction*.[16]

a. Soldiers who are mobilized from the RC, and those who join the Army from civilian life, may reduce the interest on liabilities incurred prior to activation or entry in the armed forces to six percent.

b. Creditors may obtain relief in certain circumstances.

3. *Rental property protections*.

a. *Eviction*.[17]

(1) Soldiers and dependents may not be evicted from rented housing except pursuant to a court order.

(2) This protection is available when the amount of rent does not exceed $2,534.32 per month.[18]

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[11] *See* United States Citizenship and Immigrations Services, Naturalization Information for Military Personnel, *available at* http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=92f596981298d010VgnVCM10000048f3d6a1RCRD&vgnextchannel=0a9ab58f71e14110VgnVCM1000004718190aRCRD (last visited May 28, 2008).

[12] 8 U.S.C. § 1440.

[13] U.S. DEP'T OF ARMY, REG. 600-8-1, ARMY CASUALTY PROGRAM (30 Apr. 2007).

[14] U.S. DEP'T OF DEFENSE REG, 7000.14-R, DEPARTMENT OF DEFENSE FINANCIAL MANAGEMENT REGULATIONS, VOLUME 7A, MILITARY PAY POLICY AND PROCEDURES – ACTIVE DUTY AND RESERVE PAY para. 40304 (Feb. 2002).

[15] Pub. L. No. 108-189, 117 Stat. 2835 (2003) (codified at 50 U.S.C. App. §§ 501–596 (LexisNexis 2008).

[16] 50 U.S.C. app. § 527.

[17] *Id*. app. § 531.

(3) When a Soldier's military service affects his or her ability to pay rent, and the Soldier applies for a stay, the court must stay the eviction proceedings for a period of 90 days.

b. *Lease termination*.[19]

(1) The SCRA allows Soldiers to terminate their "residential, professional, business, [and] agricultural" leases when they undergo a permanent change of station.

(2) Soldiers also may terminate their leases when they enter active military service and when they are deployed "for a period of not less than 90 days."

4. *Automobile leases*.[20]

a. Soldiers may terminate their automobile leases when they are transferred outside the continental United States (OCONUS) or from OCONUS states and territories back to CONUS.

b. Soldiers also may terminate their automobile leases when they "deploy with a military unit for a period of not less than 180 days."

5. *Stays of proceedings*.[21]

a. Soldiers may seek to have litigation before civil judicial and administrative proceedings stayed when their military service materially affects their ability to participate in the litigation.

b. The stay may be granted on the court's own motion, and shall be granted for a period of 90 days upon a motion by the Soldier.

c. The application for the stay must include a letter from the Soldier establishing that the current military service materially affects the Soldier's ability to participate in the litigation. The Soldier must also provide a date when he or she will be able to appear in court.

d. The application must also include a statement from the Soldier's commander stating that the Soldier's military service precludes attendance, and that leave is currently not authorized for the Soldier.

E. USERRA.

1. USERRA[22] protects the rights of Guardsmen and Reservists to return to their civilian employment following periods of military service.[23] Obviously, this legislation provides major benefits to RC Soldiers. Judge Advocates should be at least generally acquainted with its major tenets.

2. To take advantage of the law, the servicemember must provide his or her employer with notice of the pending absence.[24] Periods of absence, per employer, must not exceed five years,[25] and the service must be characterized as "honorable" or "under honorable conditions."[26] The servicemember must report back "not later than the beginning of the first full regularly-scheduled work period on the first full calendar day following the completion of the period of service and the expiration of eight hours after a period allowing for the safe

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[18] This amount is subject to annual adjustment. *Id*. app. § 531(a).

[19] *Id*. app. § 535.

[20] *Id*.

[21] *Id*. § 522.

[22] Pub. L. No. 103-353, 108 Stat. 3149 (1994), codified as amended at 38 U.S.C.S. §§ 4301–4334 (LexisNexis 2008).

[23] In fact, the Act's protections are much broader, and the law works as any anti-discriminatory legislation. As the law states, it "prohibit[s] discrimination against persons because of their service in the uniformed services." 38 U.S.C. § 4301(a)(3) (2000). In a more complete sense, the law tells employers that "[a] person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation." *Id*. § 4311(a).

[24] *Id*. § 4312(a)(1).

[25] *Id*. § 4312(a)(2). There are a number of exceptions to the five-year provision. In fact, most types of service, such as regularly-scheduled drills, mobilizations under the Presidential call-up and the partial mobilization, qualify and do not count toward the five-year cap.

[26] *Id.* § 4304.

transportation of the person from the place of that service to the person's residence."[27] If the absence is for longer periods, the servicemember must make an application for reemployment within specified times.[28]

3. Although there are a number of protections, the law provides that employers must promptly reinstate their returning servicemembers to the same, or like, position that they left, and with accrued seniority.[29] They also must attempt to qualify the servicemember for the return to the position, if such re-qualification is necessary as a result of the person's absence for military service.[30]

4. Servicemembers who experience difficulties with employers may find that the volunteer services of local ombudsmen from the National Committee for Employer Support of the Guard and Reserve (ESGR) will prove useful.[31] While those with more serious problems may file suit with a private attorney, assistance also is available through the Secretary of Labor.[32]

5. Although there is more to USERRA than this brief explanation can cover,[33] one important aspect to keep in mind is that LAAs must be cautious when providing assistance on such matters. In that regard, the Department of Labor and Department of Justice may not wish to undertake a servicemember's representation if that servicemember has been previously represented by counsel. Notwithstanding the limits of the Legal Assistance Program, a client could encounter problems later when seeking in-court representation from the Departments of Labor or Justice.[34] However, giving briefings to groups of Soldiers regarding USERRA, referring clients to the Department of Labor's Veterans' Employment and Training Service (VETS) or the ESGR, and following up with VETS should not present a problem for a servicemember who later decides to seek in-court representation.[35]

6. The Department of Labor publishing implementing regulations went into effect on 18 January 2006. These regulations will hopefully eliminate many problems encountered by citizen Soldiers.[36]

VII. CONCLUSION

A. Legal Assistance is an essential JA mission. It becomes critical during exercises, deployments, and combat operations. This chapter has examined some of the issues relevant to the successful delivery of this important service.

B. As a final matter, check lists for supplies and other resources follow.

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[27] *Id*. § 4312(e)(1)(A)(i).

[28] *See id*. § 4312(e)(1)(C), (D).

[29] *Id*. § 4313(a).

[30] *Id*.

[31] Information from the ESGR on USERRA and its own programs is available at http://www.esgr.org.

[32] *See* 38 U.S.C. § 4322(a); *see also id*. § 4321 (providing for preliminary assistance from the Department of Labor through its Veterans' Employment and Training Service). Federal employees receive an assessment and assistance through the Office of Special Counsel. *Id*. § 4324.

[33] For more detailed discussions, see Ryan Wedlund, *Citizen Soldiers Fighting Terrorism: Reservists' Reemployment Rights*, 30 WM. MITCHELL L. REV. 797 (2004); Anthony H. Green, *Reemployment Rights Under the Uniformed Services Employment and Reemployment Rights Act (USERRA)*, 37 IND. L. REV. 213 (2003); Lieutenant Colonel H. Craig Manson, *The Uniformed Services Employment and Reemployment Rights Act of 1994*, 47 A.F. L. REV. 55 (1999).

[34] *See* U.S. DEP'T OF ARMY, REG. 27-3, THE ARMY LEGAL ASSISTANCE PROGRAM para. 3-5e(2)(a) (21 Feb. 1996).

[35] *Id*. para. 3-5e(2)(b).

[36] *See* Regulations Under the Uniformed Services Employment and Reemployment Rights Act of 1994, 20 C.F.R. Pt. 1002 (Dec. 19, 2005).

CHECKLISTS

Table 1: Sample Ready Box

Item	***Quantity***	***O/H***
Notebook computer/printer	4	
DL Wills		
QuickScribe program		
Client Information System (CIS) program		
TaxWise Program		
Printer toner cartridges	5	
Manual typewriter/ribbons/correction tape	1	
Client Interview Cards	200	
Electrical extension cords	6	
Will Cover Sheets	200	
Envelopes, 4” x 9 ½” (DA)	150	
Envelopes, 4” x 9 ½” (plain)	150	
Markers, red	10	
Masking tape, rolls	5	
Scotch Tape, rolls	5	
Paper, Printer (Ream)	12	
Paper, tablets	14	
Pens, boxes	5	
Regulations & References if on-line resources are unavailable		
Seals (authority of 10 U.S.C. § 1044a)*	2	
Signs (Legal Assistance)	2	
Staple removers	2	
Stapler w/extra staples	4	
3 inch Binders	20	
3 hole punch	1	
Will Interview Worksheets	150	
Cell phone for the LAO to use to help clients	1	

* 10 U.S.C. § 1044a only requires the signature of an authorized military notary as evidence of the notarization. Though no seal is required, it does help to ensure acceptance of military-prepared legal documents by organizations and persons outside the military.

Table 2: Deployment Legal Assistance References

Regulation	***Title***
AR 27-3	The Army Legal Assistance Program (21 Feb. 96)
AR 27-55	Notarial Services (17 Nov. 03)
AR 600-8-1	Army Casualty Programs (7 Apr. 07)
AR 600-8-101	Personnel Processing (In- and Out- and Mobilization Processing) (18 July 03)
AR 600-15	Indebtedness of Military Personnel (14 Mar. 86); DoD Dir. 1344.9 (Indebtedness of Military Personnel) (27 Oct. 94)
AR 600-20	Army Command Policy (18 Mar. 08)
AR 608-99	Family Support, Child Custody, and Paternity (29 Oct. 03)

Table 3: TJAGLCS Publications on the JAGCNet & CD ROM

Publication	***Title***
JA 260	Servicemembers Civil Relief Act
JA 274	Uniformed Services Former Spouses' Protection Act Guide
JA 275	Tax Assistance Program Management Guide

NOTES

NOTES

CHAPTER 23

CRIMINAL LAW IN OPERATIONS

REFERENCES

1. MANUAL FOR COURTS-MARTIAL (2008).
2. U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE, 16 Nov. 2005.
3. U.S. DEP'T OF AIR FORCE, INSTR. 51-201, ADMINISTRATION OF MILITARY JUSTICE, 26 Nov. 2003.
4. U.S. DEP'T OF AIR FORCE, INSTR. 51-202, NONJUDICIAL PUNISHMENT, 7 Nov. 2003.
5. JAGINST 5800.7D, Manual of the Judge Advocate General (JAGMAN), 15 Mar. 2004.
6. U.S. DEP'T OF ARMY, REG.15-6, PROCEDURES FOR INVESTIGATING OFFICERS AND BOARDS OF OFFICERS, 2 Oct. 2006.
7. U.S. DEP'T OF ARMY, REG. 220-5, DESIGNATION, CLASSIFICATION, AND CHANGE IN STATUS OF UNITS, 15 Apr. 2003.
8. U.S. DEP'T OF ARMY, REG. 635–200, ACTIVE DUTY ENLISTED ADMINISTRATIVE SEPARATIONS, 6 June 2005.
9. JOINT CHIEFS OF STAFF, JOINT PUB. 1-02, DOD DICTIONARY OF MILITARY AND ASSOCIATED TERMS, 12 Mar. 2001 (As amended through 04 March 2008).
10. U.S. DEP'T OF ARMY, FIELD MANUAL 27-100, LEGAL SUPPORT TO OPERATIONS, 1 Mar. 2000.
11. U.S. DEP'T OF DEFENSE, INSTR. 5525.11, CRIMINAL JURISDICTION OVER CIVILIANS EMPLOYED BY OR ACCOMPANYING THE ARMED FORCES OUTSIDE THE UNITED STATES, CERTAIN SERVICE MEMBERS, AND FORMER SERVICE MEMBERS, 3 Mar. 2005 (implementing the Military Extraterritorial Jurisdiction Act of 2000, 18 U.S.C. §3261).
12. Crimes & Defenses Deskbook, JA 337, Apr. 2008, available at https://www.jagcnet.army.mil/JAGCNETINTERNET/HOMEPAGES/AC/TJAGSAWEB.NSF/TJAGLCSPublications.
13. Preparing For Deployment, A Handbook for the Chief of Military Justice, Office of the Judge Advocate General, Criminal Law Division, 20 June 2007, available on JAGCNET in the Military Justice Core Functional Area [hereinafter Deploying Justice Handbook].

I. INTRODUCTION

Recent events confirm that processing military justice actions in a deployed setting remains a difficult, critical task. Judge Advocates (JA) must ensure efficient and expeditious processing of military justice actions to include courts–martial, non–judicial punishment (NJP), and administrative separations. This obligation exists throughout the spectrum of operations. While supporting deployed units – whether during training exercises, emergency relief operations, peacekeeping operations, or war – JAs must simultaneously maintain efficiency forward and rear, processing military justice actions in accordance with the Uniform Code of Military Justice (UCMJ), the Manual for Courts–Martial (MCM), and Service Regulations. Although legal considerations may differ depending on the mission, court-martial and NJP procedures remain largely unchanged in a deployed setting. Judge Advocates should beware the "field due process" myth that leads some commanders to believe the rules are different in a deployed environment.

II. MILITARY JUSTICE CONSIDERATIONS DURING DEPLOYMENT

A. Jurisdictional Alignment.

Command and control relationships are becoming increasingly complex. Brigade combat teams may deploy in whole or in part; supported by slice elements and personnel, who may be supplied by sister units, sister services, or civilian contractors. This situation makes it imperative that JAs think long and hard about designating and aligning the convening authority structure for both the deployment theater and home station.[1]

[1] The most important concept for the Judge Advocate to grasp is that under the UCMJ, to qualify as a convening authority (CA), an officer must be in command. A unit may only have one commander at a time. If a commander is not present for duty (e.g., TDY, leave, hospitalization, etc.), an acting commander must be appointed in accordance with service regulations. A unit may not have a commander in command of the bulk of the unit, and another commander in command of another portion. Simply put, rear detachment OICs are not commanders, unless that rear detachment has been designated an actual unit (e.g., a provisional unit) under service regulations.

The convening authority (CA) has three broad options available with regard to handling military justice actions. The CA may exercise his military justice authority over all units from the deployed location. Alternatively, the CA may remain in the rear and exercise his military justice authority from that location. Finally, the CA may elect to place deployed or stay-behind units under the administrative control of separate convening authorities.[2]

If the CA deploys and elects to leave all or some CA authority with another CA in the rear, or vice versa, coordination must be made (see paragraphs a and b below). Although many CONUS Army installations have a residual General Courts-Martial (GCM) authority already designated in the Installation Commander pursuant to Department of the Army General Order, when this authority is not present, Army JAs should coordinate with The Office of The Judge Advocate General, Criminal Law (OTJAG) ((703) 588-6776) for Secretarial designation of a new General Courts-Martial Convening Authority (GCMCA). Non-Army JAs should consult their service regulations and technical chains of command for similar guidance. Cases should be transferred to the new convening authorities when necessary. (*See* Deploying Justice Handbook).

NOTE: The term "jurisdiction" is being used to describe venue (which commander should act as a convening authority in a given case), not to describe a court-martial's legal authority to render a binding verdict and sentence. Under the UCMJ, any CA may refer any case to trial.[3] However, as a matter of policy, JAs should ensure the CA with administrative control (ADCON)[4] over the accused servicemember exercises primary UCMJ authority. Absent clear command guidance, ADCON can be an elusive concept. For the Army, AR 27-10, para. 3-8, lists specific language that should be included in attachment orders to indicate a Soldier is attached to a unit for the purpose of Article 15.[5]

1. *Ensuring **units** are assigned/attached to the appropriate organization for administration of military justice.* Initially, unit commanders at all levels must determine which units, or portions of units, will deploy or remain in the rear. For example, a deploying company may deploy with a previously unrelated battalion. This may create the need for orders attaching the company to the deploying battalion. It may also be necessary to create provisional units (p-units)[6] to support the deployment. This is because non-deploying Soldiers may either be

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[2] As defined in Articles 22, 23, and 24, UCMJ.

[3] *See* RCM 601(b) *discussion* and U.S. v. Egan, 53 M.J. 570 (Army Ct. Crim. App. 2000), for an example of a case where an Air Force commander referred a Soldier's case to trial by a special court-martial convened within a joint command (EUCOM) after the Soldier's Army chain of command decided not to refer the case to trial.

[4] Administrative control (ADCON) as opposed to operational control (OPCON) is defined in JP 1-02 and FM 27-100 as follows:

> JP 1-02 — Direction or exercise of authority over subordinate or other organizations in respect to administration and support, including organization of Service forces, control of resources and equipment, personnel management, unit logistics, individual and unit training, readiness, mobilization, demobilization, discipline, and other matters not included in the operational missions of the subordinate or other organizations.
>
> FM 27-100 — Administrative Control (ADCON) is the direction or exercise of authority necessary to fulfill military department statutory responsibilities for administration and support. ADCON may be delegated to and exercised by service commanders at any echelon at or below the service component command. The secretaries of military departments are responsible for the administration and support of their forces assigned or attached to unified commands. The secretaries fulfill this responsibility by exercising ADCON through the service component commander of the unified command. ADCON is subject to the command authority of the combatant commander.

[5] AR 27-10, para. 3-8.a.(4) states: "If orders of directives include such terms as 'attached for administration of military justice,' or simply 'attached for administration,' the individual so attached will be considered to be of the command, of the commander, of the unit of attachment for the purpose of Article 15." Note however, the regulatory authority to impose NJP under AR 27-10 differs from the statutory authority to act as a CA under the UCMJ. A rear detachment OIC could impose NJP by virtue of having "primary command authority" as described in para 3-7.a.(1). The same officer would need to be a commander of a unit (to include p-units) in order to act as a CA under Articles 22, 23, or 24, UCMJ. See *supra* note 3.

[6] Provisional units (p-units) are temporary units (not to exceed 2 years) composed of personnel detached from their unit of assignment and created under authority of AR 220-5, 15 Apr. 03. Provisional units are often used to create a UCMJ structure or fill the gaps in UCMJ authority or convening authority. They help to ensure that commanders at all levels are available to process UCMJ and administrative actions. Commanders decide whether or not p-units will be "organized," and if so, to what unit they will be attached. This should be done in consultation with the S1 and the Judge Advocate. When a unit deploys, it normally leaves behind individuals or portions of the unit. Those elements can either be attached to another preexisting unit remaining in the rear or a p-unit can be created at the commander's discretion. Provisional units can be created at any level, to include company, battalion, and brigade. Deploying elements may also need to provisionalize depending upon whether a portion of the unit is deploying and / or whether the commander of the original unit is deploying as the commander of that unit; that is, the commander "takes his flag" to the deployed setting.

The S1/PSC is normally the staff element responsible for executing the commander's intent by processing the documents that "organize" and "attach" p-units. Judge Advocates must assist in this process to ensure a UCMJ command structure exists, and that this structure continues

attached to previously unrelated units or to p-units during the period of deployment. If the commander decides to create a rear detachment, staffed by non-deploying Soldiers, the rear detachment will be integrated into a new or existing chain of command. For the rear detachment OIC "commander" to command and acquire CA status under the UCMJ, the rear detachment must be a unit IAW service regulations (*e.g.*, create a provisional unit IAW AR 220-5).

2. *Ensuring* ***individuals*** *are assigned/attached to the appropriate organization for administration of military justice (ADCON).* All Soldiers, whether deploying or not, should be assigned or attached to a unit that can dispose of criminal and administrative actions that may arise during the deployment period. The unit adjutant should initiate a request for orders to attach non-deploying Soldiers to a unit remaining at the post, camp, or station. Commanders must identify non-deployable Soldiers within the unit.

Trial counsel (TCs) should monitor the status of those Soldiers within their jurisdiction who may be non-deployable for legal reasons. Judicial action by military or civil authorities, while generally making a Soldier non-deployable for exercises, may not bar deployment for actual combat operations. The unit adjutant should initiate procedures to obtain the release of Soldiers in confinement whom the commander requests be made available for deployment. Trial Counsels should also advise commanders of those Soldiers who are not themselves the subject of legal action, but who are required to participate in legal proceedings (such as witnesses or court or board members). The Commander, usually after coordination with the TC, decides whether these Soldiers will deploy.[7]

3. *Continuously ensure orders assigning units and personnel clearly indicate which commanders have nonjudicial punishment and court-martial authority*. This is an ongoing process, as new Soldiers (and possibly members from other services) will be incoming to the command. This requires coordination with the appropriate G1/S1 personnel staff elements. For units, it is useful to keep track of the tactical task organization (usually stated upfront in mission orders) IOT keep track of which subordinate units are operating under the control of which parent units. Although the jurisdictional alignment for UCMJ actions may not directly track the tactical task organization, it provides a good starting point.

4. *Selection of court-martial panel, if necessary, in the deployment theater and rear detachment.* Supervisory Judge Advocates must plan for new panel selection for both the rear garrison and the deployed setting. Brigade Judge Advocates may also consider establishing special court-martial panels in theater to provide an expeditious forum for resolution of NJP refusals and other low-level misconduct. Judge Advocates should also familiarize themselves with a legally sound selection process and deploy with prepared panel selection advice.

5. *Guidance for disposing of pending cases upon deployment.* Judge Advocates must consider whether to take pending actions to the deployed setting or leave them in garrison. (See OTJAG information paper at the end of this chapter.) For courts-martial, this will largely be a function of the seriousness of the offense and whether the witnesses are primarily civilian or military. Serious criminal offenses or cases with primarily civilian witnesses often remain in the rear. Similarly, Soldiers pending administrative separation normally should remain in garrison pending separation. NJP actions normally go forward with the deploying force.

B. Preparation of personnel and equipment for deployment.

1. *Deploying Personnel*. Successful management of military justice actions during a deployment requires planning and training of key personnel. The size of the deployment will often dictate who deploys from a legal

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the sensible flow of UCMJ actions. Provisional units must have a commander on orders. Such commanders must be commissioned officers (including commissioned warrant officers). They have normal UCMJ authority. Check local military justice supplements to identify modifications or reservations of authority in this regard.

Judge Advocates must monitor the PSC publication of orders that "organize" and then "attach" p-units to other units. This process is typically initiated by the commander submitting a request for orders to "organize" a p-unit, and then a second RFO to "attach" the unit to a "parent" unit. Often, given the volume of units deployed and p-units organized and the delay in publication of orders, it is sometimes more efficient to publish a regulation or General Order which sets out the jurisdictional scheme for both forward and rear area elements. This ensures all commanders and units, especially newly attached units, are aware of their "food chain."

Note: The FORSCOM CG has retained the authority to approve the organization of p-units within FORSCOM. Therefore all requests for the establishment of p-units within FORSCOM should be sent to the FORSCOM Commanding General, ATTN: AFOP-PLF.

[7] In the Army, personnel status is tracked using a Unit Status Report (USR). *See* U.S. DEP'T OF ARMY, REG. 220-1, UNIT STATUS REPORTING (19 Dec. 2006). Preparation of the USR at Battalion and Brigade is typically an additional duty for a fortunate junior officer. In practice, this means the USR officer may be prone to declaring any Soldier remotely connected with "JAG" as "nondeployable for legal" reasons. Judge Advocates should get directly involved in preparation of the USR to the extent necessary to prevent overcounting of "nondeployable for legal" Soldiers.

office. Deployed settings present difficult supervisory challenges, primarily caused by increased distances between JAs, communication and transportation limitations, and "imported" counsel (JAs crossing over from legal assistance, administrative law, operational law, or claims) who may be inexperienced with common military justice actions. Supervisors must therefore attempt to identify and train potentially deployable JAs before deployment to ensure they are knowledgeable about investigations, NJP procedures, court-martial procedures, and administrative separations.

2. *Non-deploying personnel*. A military justice supervisor in the rear detachment should prepare for military justice challenges in the rear because of fewer resources available. Also the supervisor should expect that rear detachment commanders have little to no experience in military justice actions and will need training and guidance, particularly in areas such as unlawful command influence. Rear detachment military justice supervisors must plan for and prepare legal briefings for all new OICs/commanders in the rear detachment and additional training as necessary.

3. *Identification/marshaling resources to conduct operations*. Resources, to include electricity, phone lines, internet, e-mail, and fax capability, are ordinarily limited in deployed settings. Judge Advocates must deploy with relevant regulations and legal forms in electronic format[8] and hard copy. Computers may help to eliminate the need for some hard copy resources. However, given the potential unreliability of computers in the harsh environment of a deployment, JAs must plan for the worst. Past Army deployments have demonstrated the need to deploy with a hardbound set of essential publications, including the Manual for Courts-Martial, AR 27-10 (with any relevant supplements), the Military Judges' Benchbook, AR 15-6, AR 635–200, a Military Rules of Evidence (MRE) hornbook, a Military Evidentiary Foundations book, and the Basic Course Criminal Law Deskbook.[9]

C. Consider the need for or existence of a General Order for the operation.[10]

1. *Draft a general order for the operation.* Based upon mission requirements and command guidance, military justice supervisors and TC must draft the general order (GO) for the operation and have it ready for publication as soon as possible. Before attempting to draft a GO, JAs must determine if their higher headquarters already published a mission or theater specific GO. See examples at the end of this chapter (GOs for operations in Desert Shield, Haiti, and Allied Force).

2. *Publish a general order for the operation.* The GO must be published and disseminated to all Soldiers prior to deployment. Violations of a properly published GO may be punished under Article 92, UCMJ. Although the government need not prove knowledge of a lawful GO as an element of the offense, the contents of the GO should be aggressively briefed to all deploying Soldiers.

3. *Conducting mission training / predeployment briefings.* Judge Advocates must be thoroughly familiar with the GO for the operation and must provide extensive briefings prior to deployment. As with ROE training, supervisory JAs must ensure all members of the command understand the commander's intent. Refresher training on the GO (and ROE) upon arrival in theater, and at regular intervals throughout the deployment, are critical tasks.

D. Coordinate/ensure the availability of services and resources, to include:

1. *Trial defense and judiciary services.* Deployment support from trial defense and judiciary services must be coordinated at this time. Judge Advocates should discuss the logistical requirements associated with TDS and military judges and ensure commanders understand they may be asked for assistance in this area.

2. *Confinement Facility*. With the exception of the Vietnam War, Army forces have typically not maintained confinement facilities in theater for U.S. personnel. Although jails run by U.S. or U.N. forces may exist for local nationals, they are not intended, and generally should not be used, for holding U.S. military personnel. When pretrial confinement is necessary, the Soldier is normally shipped to the rear (Mannheim, Germany or

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[8] E.g. Electronic Judge Advcocate Warfighting System (eJAWS), a comprehensive DVD / CD-ROM set.

[9] Many of these resources can be accessed on the JAGCNet (http://www.jagcnet.army.mil/).

[10] A general order (GO) is the commander's tool to promote mission accomplishment and protect deployed forces. Much like the Rules of Engagement (ROE), GOs are a flexible way for the command to centrally plan, but decentrally execute the commander's intent. One of the earliest general orders was given at Bunker Hill, "Do not fire until you see the whites of their eyes." Modern general orders include prohibitions on the use of privately owned weapons, alcohol, or entry into local religious or cultural buildings.

CONUS). In light of OEF/OIF, a confinement facility has been established at Camp Arifjan in Kuwait, for Soldiers tried in theater.

3. *Urinalysis Testing*. Based upon mission requirements and command guidance, JAs should ensure units have the ability to conduct urinalysis testing in theater. Inevitably, contraband finds its way to the deployed setting. At a minimum, the commander should have the option to conduct a urinalysis. Coordination should be made with unit ADCOs, the Installation Biochemical Testing Coordinator and the relevant stateside lab prior to deployment.

4. *Dogs*. Judge Advocates should also consider the advisability of requesting canine support, to include drug and explosive detection capable dogs. Dogs are valuable in a drug support role; however, JAs should be aware that they may be fully tasked for force protection missions during deployment.

E. Redeployment / Demobilization Considerations.

During redeployment/demobilization, the military justice supervisor must ensure the following is accomplished: 1) return to the original convening authority structure; 2) units and personnel are assigned/attached back to appropriate organizations for administration of military justice; 3) designations of home station convening authorities are revoked; 4) individual cases are transferred to the appropriate CA for referral or initial action;[11] and 5) the general order for the operation is rescinded.

II. JOINT OPERATIONS

A. Courts-Martial. Commanders may refer court-martial cases on personnel of other services assigned or attached to their units, however they must take care to follow the service regulations of the accused.[12] For example, in *United States v. Egan*,[13] an Air Force commander (a SPCMCA) referred a Soldier's case to trial by a special court-martial. The TC was Air Force, the DCs were Army and Air Force and the military judge was Army. On appeal, the Army Court of Criminal Appeals reviewed the case. Due to the lack of specific language in EUCOM regulations, the Army court held that the Air Force CA was unable to approve a bad conduct discharge, because he did not forward the case to a GCMCA for referral as required by the version of AR 27–10 in effect at that time, even though Air Force SPCMCAs had the authority to refer BCD special cases to trial in cases involving accused airmen.

B. Nonjudicial Punishment. Commanders may impose NJP on personnel of other services assigned or attached to their units; however, commanders must do so IAW the accused servicemember's service regulation.[14] Another option in a joint command is to designate a service representative to administer NJP to members of their service.

III. MILITARY EXTRATERRITORIAL JURISDICTION ACT OF 2000. 18 U.S.C. §3261.

The Military Extraterritorial Jurisdiction Act of 2000[15] (MEJA), as implemented by DoD Instruction 5525.11,[16] expands Federal (not military) jurisdiction to cover certain members of and persons employed by or accompanying the Armed Forces. MEJA jurisdiction applies to offenses committed outside the United States that, if committed within the special maritime and territorial jurisdiction of the United States, are punishable by imprisonment for more than one year. For a brief summary, see Appendix D at the end of this chapter and chapter 7.

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[11] *See* United States v. Newlove, 59 M.J. 540 (Army Ct. Crim. App. 2003)

[12] *See* UCMJ art. 17 (2000) and R.C.M. 201(e).

[13] 53 M.J. 570 (Army Ct. Crim. App. 2000).

[14] JOINT CHIEFS OF STAFF, JOINT PUB. 1, DOCTRINE FOR THE ARMED FORCES OF THE UNITED STATES, para. 14c (14 May 2007). Service regulations provide service-specific procedures for non-judicial punishment (AFI 51-202, para 2, 2.2.1; Navy and Marine JAGMAN 0106d; Coast Guard MJM, Art 1-A-3(c); AR 27-10, para 3-8c). JAs must note certain differences in procedures. For AF personnel, a joint commander may only impose NJP on AF personnel if the offense "arises from a joint origin or has joint forces implications." Other service procedures must also be followed. For example, the AF provides 72 hours to consult with counsel. The Navy/Marine burden of proof is a preponderance of the evidence. Also, appeals typically proceed through the servicemember's parent service. Coordination, therefore, must be made with the servicing Judge Advocate. This list of procedural differences is not exhaustive. JAs should consider consultation with other service JAs to understand the impact of NJP on other service personnel.

[15] Codified at 18 U.S.C. §§ 3261-67.

[16] DoD Instruction 5525.11, Criminal Jurisdiction Over Civilians Employed By or Accompanying the Armed Forces Outside the United States, Certain Service Members, and Former Service Members, 3 March 2005. (*www.dtic.mil/whs/directives/corres/html/552511.htm)*

IV. CRIMINAL LAW ISSUES DURING COMBAT OPERATIONS

This section addresses criminal law problems associated with combat and, specifically, wartime-related offenses.

A. Time of War, MCM. The MCM defines "time of war" as "a period of war declared by Congress or the factual determination by the President that the existence of hostilities warrants a finding that time of war exists." (R.C.M. 103(19)). The definition applies **only** to the following portions of the MCM (It does **not apply** to statute of limitations and/or jurisdiction over civilians):

1. Offenses that can only occur during time of war: Improper use of a countersign (UCMJ art. 101), Misconduct as a prisoner (UCMJ art. 105), and Spying (UCMJ art. 106).

2. Offenses that may be punished by the death penalty only in time of war: Desertion (UCMJ art. 85),[17] Assaulting or Willfully Disobeying a Superior Commissioned Officer (UCMJ art. 90), and Misbehavior of Sentinel or Lookout (UCMJ art. 113).

3. Aggravating Factor for some offenses: Homicide and rape are both capital offenses in time of war (as well as at other times) (*See* RCM 1004(c)(6)). The maximum penalty that may be imposed by court-martial is increased in time of war for drug offenses, malingering, and loitering/wrongfully sitting on post by sentinel/lookout. The maximum period of confinement *may* be suspended in time of war for solicitation to desert, mutiny, misbehavior before the enemy, or sedition.

B. Time of War, Nonjudicial Punishment. A commander in the grade of major/lieutenant commander or above may reduce enlisted members above the pay grade E-4 *two* grades in time of war *if* the Service Secretary has determined that circumstances require the removal of peacetime limits on the commander's reduction authority. (*See* MCM, pt. V, para. 5b(2)(B)(iv)).

C. Time of War, Jurisdiction & Statutes of Limitation. Jurisdictional rules and statutes of limitation may both be affected by a determination that a time of war exists. As stated previously, "time of war" is defined differently for jurisdiction and statutes of limitations purposes than it is for aggravating factors for a capital case, the punitive articles, and nonjudicial punishment.

1. *Jurisdiction*. UCMJ art. 2(a)(10) provided that in time of war, persons "serving with or accompanying an armed force in the field" may be subject to trial by court-martial. Article 2(a)(10) was amended by the 2007 National Defense Authorization Act to read "in time of declared war or contingency operation." The amendment of "war" to "declared war" simply brought the code in line with established caselaw. In the case *U.S. v. Averette*, 41 C.M.R. 363 (1970), the Court of Military Appeals (CMA) held that for purposes of providing jurisdiction over persons accompanying the armed forces in the field in time of war, the words "in time of war" mean a war formally declared by Congress. However, the addition of the term "contingency operation" has much broader potential application, since the term "contingency operation" is itself defined in 10 U.S.C. sec. 101(a)(13) to include operations declared by the Secretary of Defense (SECDEF) and a series of other conditions, many of which are currently met by operations in support of OPERATION ENDURING FREEDOM and OPERATION IRAQI FREEDOM. Although a straightforward reading of the Amended UCMJ Article 2(a)(10) indicates many civilians accompanying the force overseas may now be subject to the UCMJ, there is little guidance on actually using the amended provision.[18] Before attempting any action against a civilian under the UCMJ, JAs would be well advised to contact OTJAG or their service equivalent. NOTE: The Military Extraterritorial Jurisdiction Act of 2000,[19] as implemented by DoD Instruction 5525.11,[20] expands federal (not military) jurisdiction to cover certain civilians accompanying the Armed Forces overseas in peacetime. (*See* Section III above).

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[17] The last execution for desertion occurred during World War II. See Slovik, E. Theater of Operations CMCO No. 5555.

[18] DoD guidance on military jurisdiction over civilians is contained in a memo included in the appendix to this Chapter, Memorandum, Secretary of Defense, to Secretaries of the Military Departments, Chairman of the Joint Chiefs of Staff, Under Secretaries of Defense, Commanders of the Combatant Commands, subject: UCMJ Jurisdiction Over DoD Civilian Employees, DoD Contractor Personnel, and Other Persons Serving With or Accompanying the Armed Forces Overseas During Declared War and in Contingency Operations (10 Mar 2008).

[19] Codified at 18 U.S.C. §§ 3261-67.

[20] DoD Instruction 5525.11, Criminal Jurisdiction Over Civilians Employed By or Accompanying the Armed Forces Outside the United States, Certain Service Members, and Former Service Members, 3 March 2005. (*www.dtic.mil/whs/directives/corres/html/552511.htm)*

2. *Statutes of Limitation*. UCMJ art. 43 extends the statute of limitations for certain offenses committed in time of war.[21]

a. There are no statutes of limitation for the crimes of Desertion, Absence Without Leave, Aiding the Enemy, Mutiny, Murder, or Rape in time of war, and persons accused of these crimes may be tried and punished anytime. (UCMJ art. 43(a)).

b. The President or Service Secretary may certify particular offenses that should not go to trial during a time of war if prosecution would be inimical to national security or detrimental to the war effort; statute of limitations may be extended to six months after the end of hostilities. (UCMJ art. 43(c)).

c. The statute of limitations is also suspended for three years after the end of hostilities for offenses involving fraud, real property, and contracts with the United States.[22]

In determining whether "time of war" exists for statute of limitations purposes, CMA held that the conflict in Vietnam, though not formally declared a war by Congress, was a "time of war."[23] Military courts have articulated factors it will look to in making such an analysis, to include whether there are armed hostilities against an organized enemy[24] and whether legislation, executive orders, or proclamations concerning the hostilities are indicative of a time of war.[25]

Military courts have also rejected the notion that there is a geographical component to the "time of war" in the sense that absence from the combat zone at the time of an offense does not prevent the offense from occurring in "time of war."[26] For example, in a case in which an accused absented himself without leave from Fort Lewis, Washington, during the Korean conflict, CMA held that the Korean conflict was a war within the meaning of UCMJ, art. 43(a) and that the accused's geographical location at the time of the offense was irrelevant. "In either instance, the Armed Forces are deprived of a necessary—perhaps vitally necessary—combat replacement."[27]

V. WARTIME OFFENSES

Certain violations of the UCMJ penalize conduct unique to a combat environment. As described above, several offenses may occur only in time of war or have increased punishments in time of war. The following crimes need not occur in time of war to be criminal, but they have elements that may occur only in a wartime situation:

A. Misbehavior Before the Enemy (UCMJ, art. 99).

B. Wrongful Destruction of Private Property **(**UCMJ, art. 109).

C. Wrongful Taking of Private Property (UCMJ, art. 121).

D. Mutiny or Sedition (UCMJ art. 94).

E. Subordinate Compelling Surrender (UCMJ art. 100).

F. Improper Use of Countersign (UCMJ art. 101).

G. Forcing a Safeguard (UCMJ art. 102).

H. Aiding the Enemy (UCMJ art. 104).

I. Spying (UCMJ art. 106).

J. Misbehavior of a Sentinel (UCMJ art. 113).

K. Malingering (UCMJ art. 115).

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[21] CMA held that Vietnam was a time of war for statute of limitations purposes. U.S. v. Anderson, 38 C.M.R. 386 (1968).

[22] UCMJ art. 43(f). The date hostilities end is proclaimed by the President or established by a joint resolution in Congress.

[23] U.S. v. Anderson, 38 C.M.R. 386 (1968).

[24] U.S. v. Shell, 23 C.M.R. 110 (1957).

[25] U.S. v. Bancroft, 11 CMR 3 (1963).

[26] U.S. v. Averette, 41 C.M.R. 363 (1970).

[27] U.S. v. Ayers, 15 C.M.R., at 227 (1954).

L. Offenses by a Sentinel (UCMJ art. 134).

M. Straggling (UCMJ art. 134).

Understand that these offenses may attract both political and media attention when charged. This warning is not provided either to encourage or to discourage charging these offenses, but to alert the practitioner that a strategy for prosecuting one of these offenses must necessarily address political and media concerns. For a thorough treatment of the issues associated with prosecuting these offenses, see the Crimes & Defenses Deskbook, JA 337.

APPENDICES

A. OTJAG Information Paper: Rules Governing Transfer of Court–Martial Cases upon Deployment

B. Sample Request for GCMCA Designation

C. Sample General Orders Number 1

D. MEJA DA Message and OTAG Information Paper

PREPARING FOR DEPLOYMENT

A Handbook For The Chief Of Military Justice

Office of The Judge Advocate General
Criminal Law Division
20 June 2007

DEPARTMENT OF THE ARMY
OFFICE OF THE JUDGE ADVOCATE GENERAL
CRIMINAL LAW DIVISION
1777 N. KENT STREET
ROSSLYN, VA 22209-2194

REPLY TO
ATTENTION OF:

DAJA-CL

20 June 2007

MEMORANDUM FOR Staff Judge Advocates

SUBJECT: Preparing for Deployment – Establishing Convening Authorities

1. Enclosed is a "How To" for deploying units who intend to create provisional units, transfer cases to different GCMCAs, and establish new jurisdictional schemes. To complete this document, we surveyed the field, searched for references, and received input from the trial judiciary. We found that although OSJAs are getting the job done, there is no definitive, published resource to assist deploying units.

2. We have attempted to provide a step by step set of instructions, samples, and applicable references that will help the Chief of Military Justice to understand the process and avoid the pitfalls. If your office has any experience you would like to share, we would appreciate any information that you can add to make this a better product. Additionally, we encourage supplements by Army Commands and local installations.

3. If you have any questions or concerns, please contact MAJ Alison Martin at (703) 588-6755 DSN 425, or email alison.martin@us.army.mil.

Enclosure
as

FLORA D. DARPINO
COL, JA
Chief, Criminal Law Division

Preparing for Deployment – Establishing Convening Authorities[1]

Section I - References.

1. Manual for Courts-Martial (2005)
   a. Articles 6, 22, 23, 24, 25, 60
   b. RCM 103(6) and (17), 401, 502, 504, 601, 604, 1106, 1107

2. Regulations/Joint Publications
   a. AR 27-10, Military Justice, 16 November 2005
   b. AR 220-5, Designation, Classification, and Change in Status of Units, 15 April 2003
   a. AR 600-20, Army Command Policy, 7 June 2006
   c. AR 600-8-105, Military Orders, 28 October 2005
   d. AR 635-200, Active Duty Enlisted Separations, 6 June 2005
   e. JP 1-02, DoD Dictionary of Military and Associated Terms, 12 April 2001, as Amended Through 1 March 2007

3. Case Law
   a. U.S. v. Newlove, 59 M.J. 540, 541 (A.C.C.A. 2003)
   b. U.S. v. Barry, 57 M.J. 799, 802 (A.C.C.A. 2002)
   c. U.S. v. Gavitt, 37 M.J. 761 (A.C.M.R. 1993)
   d. U.S. v. Gates, 21 M.J. 722 (A.C.M.R. 1985)
   e. U.S. v. Hardy, 4 M.J. 20 (C.M.A. 1977)

4. Law Review Articles/Information Papers/Other Sources
   a. Major Mark Holzer, *Purple Haze: Military Justice in Support of Joint Operations*, Army Lawyer, July 2002
   b. OPLAW Handbook
   c. OTJAG IP - Transfer of Court-Martial Cases upon Deployment (**Enclosure 1**)
   d. III Corps IP - Provisional Units and the Uniform Code of Military Justice (**Enclosure 2**)
   e. FORSCOM Withholding Memorandum, 10 July 2003 (**Enclosure 3**)
   f. FORSCOM Delegation Memorandum, 11 January 2007 (**Enclosure 3**)
   g. Samples (**Enclosure 4, Tabs A – I**).

Section II - Outline of Requirements.

Step 1. Identify Available Sources of General Court-Martial Convening Authority
   a. Existing Authority Under Article 22, UCMJ
   b. Methods to Determine Available Sources of UCMJ Authority
   c. Creating New Authority Through the Use of Provisional Units

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[1] This product was prepared by The Office of the Judge Advocate General, Criminal Law Division. This is a compilation of various documents prepared by several different installations during recent deployments. OTJAG – Criminal Law would like to expressly thank LTC Christian Gifford and MAJ Beth Kubala for allowing the reproduction of many of their original thoughts, ideas, and products.

Step 2. Determine Optimal Convening Authority During Deployment
a. Convening Authority Deploys and Retains Jurisdiction Over All Soldiers
b. Convening Authority Remains at Home Station
c. Convening Authority Deploys and Attaches Soldiers at Home Station to a Different Convening Authority

Step 3. Establish a Jurisdictional Scheme for the Rear Provisional Unit
a. Designate a Rear Convening Authority
b. Develop a Jurisdictional Scheme
c. Designate a SJA for the Rear Convening Authority
d. Build the Rear Provisional Unit

Step 4. Select a New Court-Martial Panel and Administrative Separation Board
a. Select a New Panel
b. Publish New Convening Orders
c. Select a New Standing Administrative Separation Board

Step 5. Transfer Pending Courts-Martial Cases
a. Determine Which Cases Must be Transferred to a New Convening Authority
b. Prepare Documents to Request Transfer
c. Use of Documentation

Step 6. Actions on Redeployment
a. Effective End Date of Provisional Units
b. Determine Status of Current Cases

Section III - Detailed Description of Requirements.

Step 1. Identify Available Sources of General Court-Martial Convening Authority

a. Existing Authority Under Article 22, UCMJ. Article 22 lists who may convene general courts-martial. Most Army units will rely on either Article 22(a)(5) or Article 22(a)(8). Under Article 22(a)(5), a commander of an Army Corps, a division, or a separate brigade may convene courts-martial. Article 22(a)(8) is usually referred to as secretarial authority and provides the Secretary of each service the authority to designate any other commanding officer as a general courts-martial convening authority. The Chief of Military Justice should verify which source of authority the convening authority currently relies on and whether other sources of authority may also apply. Most CONUS installations have been designated by the Secretary of the Army as GCMCAs. At the same time, a Corps or Division Commander located at the CONUS installation may rely on their inherent authority as the unit commander, rather than the installation commander, in order to convene courts-martial.

b. Methods to Determine Available Sources of UCMJ Authority. There are several ways to determine the convening authority and it is possible that the unit has more than one GCMCA option available.

(1) First, check the order cited on the courts-martial convening orders. For a copy of the orders, the United States Army Publishing Directorate provides a list of all Department of the Army General Orders (DAGO). The website is http://www.usapa.army.mil. If you cannot locate your jurisdiction's DAGO on the website, OTJAG-Criminal Law Division maintains a comprehensive orders book for all Army GCMCAs.

(2) Next, review the modification table of organization and equipment (MTOE) and the table of distribution and allowances (TDA). Most of the large CONUS installations have separate positions for the unit commanders and the installation commanders. At Fort Lewis, for example, the DAGO 10, dated 1981, designated the Commander, Fort Lewis, as a GCMCA. DAGO 27 designates the Commander, I Corps and Fort Lewis, as a GCMCA. The Commander, I Corps, also exercises his inherent authority as a Corps Commander and can convene general courts-martial pursuant to Article 22(a)(5).

(3) Finally, the Chief of Military Justice should review the deployment order. The commander may be authorized to convene courts-martial based on secretarial designation of the deployed command position. For example, when the Commander of XVIII Airborne Corps deployed to Afghanistan in 2002, the Secretary of the Army designated the commander of the Army Task force element of CJTF-180 to be a GCMCA.

c. Creating New Authority Through the Use of Provisional Units. Since most commands will leave behind pending courts-martial cases and administrative separations, it is critical that rear commanders have the proper authority to exercise military justice. Therefore, your unit may need to establish provisional units. A unit is only authorized one commander, so in order for the rear unit to have military justice authority, the unit must be a provisional unit properly designated in accordance with AR 220-5, paragraph 2-5a. The Chief of Military Justice should work with counterparts in G-1 and G-3/5/7 (Force Structure) in order to ensure that the rear unit has an activated unit identification code (UIC) and is reported to the Center of Military History (DAMH–FPO). Under the provisions of AR 220-5, paragraph 2-5a, the commander of an Army field command may establish provisional units.[2] See Enclosure 2. Joint Publication 1-02, 12 April 2001, as Amended Through 1 March 2007, defines **field army** as an "Administrative and tactical organization composed of a headquarters, certain organic Army troops, service support troops, a variable number of corps, and a variable number of divisions. See also **Army corps.**"[3] The GCMCA also has the authority to determine whether a command is separate and detached, and can serve as either a SPCMCA or a SCMCA, pursuant to RCM 504(b)(2). AR 27-10, paragraph 5-2a(2), also recognizes the authority of the GCMCA to designate provisional units under AR 220-5. See Enclosure 4, Tabs G and H.

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[2] For units assigned to FORSCOM, the FORSCOM commander has withheld authority to create provisional units. *See* FORSCOM Withholding Memorandum and Delegation Memorandum (Enclosure 3).

[3] Although AR 310-25 has been superseded by JP 1-02, it provides useful information in determining how to define field command. In accordance with AR 310-25, "Army field commands" consist of "[a]ll Department of the Army exclusive of that part defined as Headquarters, Department of the Army. Army field commands include all field headquarters, forces, [r]eserve components, installations, activities, and functions under the control or supervision of the Secretary of the Army."

Step 2. Determine Optimal Convening Authority During Deployment. There are usually three different options that a convening authority has for addressing military justice actions during a deployment.

a. Convening Authority Deploys and Retains Jurisdiction Over All Soldiers. Although this course of action may be appropriate for short deployments and where the convening authority returns to home station regularly to meet with key staff and review documents, this option is too cumbersome in the current environment where units are typically deploying for 12-15 months.

b. Convening Authority Remains at Home Station. In some cases, smaller units will deploy from the installation while the convening authority remains at home station. The deploying units will be attached to other headquarters in the deployed location. Judge Advocates should review the deployment orders to help determine the military justice authority and to assist in the preparation of the new jurisdictional scheme for troops remaining at home station and those deploying.

c. Convening Authority Deploys and Attaches Soldiers at Home Station to a Different Convening Authority. This option is the most common for lengthy deployments involving the bulk of troops from a particular installation. It allows the commanders to focus on the combat mission, and provides clear UCMJ authority for units remaining at home station. The remaining checklist will focus on the required steps for this course of action. Some specific examples include:

(1) Leaving the Flag Behind. When XVIII Corps deployed to Afghanistan and serve as the HQ for JTF-180, the Deputy Commander of XVIII Airborne Corps and Fort Bragg, assumed command of the Corps and Fort Bragg. Meanwhile, the Corps Commander, LTG McNeill, assumed command of JTF-180. Therefore, the Deputy Commander became a successor in command, and many of the problems associated with transferring cases were avoided.

(2) Taking the Flag Forward and Designating a Rear Provisional Unit. When 10th Mountain Division deployed to Afghanistan, the Division Commander took the flag forward and asked the Secretary of the Army to designate the Commander, 10th Mountain Division and Fort Drum (Rear)(Provisional) as a GCMCA.

(3) Splitting the Flag. When the 3rd Infantry Division deployed, the installation commander served as the GCMCA for the Soldiers remaining at home station using the installation flag and the Division commander took the Division flag forward. More explicitly, 3ID normally convenes cases under the authority of Commander, 3ID and Fort Stewart. When 3ID deployed, the Division Commander took his GCMCA authority forward pursuant to Article 22(a)(5). The installation commander assumed command of Fort Stewart, and relied on the convening authority provided by secretarial designation pursuant to Article (a)(8) and DAGO 10, dated 9 April 1981.

Step 3. Establish a Jurisdictional Scheme for the Rear Provisional Unit.

a. Designate a Rear Convening Authority. Once a command decides to attach those Soldiers remaining at home station to a different convening authority, the next decision is who will serve as that convening authority. There are two main options. The first course of action is to utilize an existing convening authority at home station that will not be part of the deployment that you have identified in Step 1. The second option relies on the installation command itself. For example, if the Commander of 101st Airborne Division (Air Assault) deploys and takes his convening authority under Article 22(a)(5) as a division commander forward, the convening authority of the commander of Fort Campbell (the installation) still remains intact under the secretarial designation under Article 22(a)(8). The Commander, Fort Campbell assumes military justice authority for Soldiers remaining behind at home station.[4] However, the rear convening authority may not be a combination of the divisional and installation authority, such as 101st Airborne Division (Air Assault) and Fort Campbell.

b. Develop a Jurisdictional Scheme. The Office of the Staff Judge Advocate should work with the staff and the command to develop a jurisdictional scheme that best supports good order and discipline and mirrors the existing structure as closely as possible. See Enclosure 4, Tabs B,C, and D. However, commands should limit the number of rear units to ease the administration of military justice. Normally, Soldiers should be aligned with a convening authority who exercises administrative control (ADCON) over the Soldiers. G-1 should create orders that capture the jurisdictional structure and attach Soldiers as needed for ADCON and purposes of UCMJ. See Enclosure 4, Tabs G and H.

c. Designate an SJA for the Rear Convening Authority. Article 6(b) provides that convening authorities must communicate with their SJAs on matters pertaining to the administration of military justice. Article 60(d) and RCM 1106(a) require the convening authority to obtain a recommendation from the assigned SJA or legal officer prior to taking initial action in most courts-martial cases.[5] The TJAG specifically designates all SJAs, and the SJA must be attached, assigned, or detailed for duty as an SJA in that general courts-martial jurisdiction. Therefore, if the entire OSJA deploys with the command, TJAG must approve a designation of an alternate SJA or appoint an SJA from an activated LSO team to advise the rear convening authority.

d. Build the Rear Provisional Unit. Once the command has decided on a GCMCA and assigned a responsible SJA, the next step is to work with the staff to assemble the rear provisional unit. First, organize and delineate all rear provisional units by applying the jurisdictional scheme and publishing unit rear provisional orders.[6] Once the command has

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[4] If a different general officer will assume duties of the regularly assigned commander, AR 600-20, requires coordination with the appropriate ACOM and the General Officer Management Office. *See* AR 600-20, paras. 2-5f. and 2-8d.

[5] Required for all general courts-martial or any special courts-martial case that includes a bad-conduct discharge or confinement for one year. *See* Article 60(d), R.C.M. 1106(a); *see also* U.S. v. Barry, 57 M.J. 799, 802 (A.C.C.A. 2002); U.S. v. Gavitt, 37 M.J. 761, 763 (A.C.M.R. 1993).

[6] Per AR 220-5, para. 2-5, provisional units will be organized for limited periods, not to exceed 2 years. In order to facilitate rapidly changing deployment and redeployment timelines, recommend that provisional unit orders be effective for a period not to exceed 2 years or until a fixed event, whichever is sooner. The triggering mechanism is often the return of the original unit commander to home station. However, since units tend to start block leave soon

chosen rear provisional unit commanders, they must next publish assumption of command orders for each command.[7] Finally, attach all remaining Soldiers to the rear provisional units in accordance with the jurisdictional structure. See Enclosure 4, Tabs C, G, and H. In order to be successful, the Chief of Military Justice will need to work closely with members of the staff, specifically G-1 and G-3/5/7 (Force Structure), to ensure that the provisional units have activated UICs and that the unit orders are properly published.[8]

Step 4. Select a New Court-Martial Panel and Administrative Separation Board.

a. Select a New Panel if Applicable. If the command chooses to create a new GCMCA or if the jurisdictional structure provides for the attachment of Soldiers to another, existing GCMCA, the convening authority is not a successor in command IAW RCM 601(b). Therefore, the convening authority will have to select his own panel, rather than adopting the panel of the previous GCMCA. The Chief of Military Justice should keep in mind that in the event of a large deployment, the number of remaining personnel eligible for service on the panel will likely be much smaller than normal and the average rank of those remaining behind tends to be lower. Regardless of the personnel available to serve as panel members, convening authorities should strictly adhere to the requirements of Article 25 and RCM 502, but may have to use different selection processes. For example, the commander may have to select one panel instead of two or three, or rely on alpha rosters and record briefs rather than the nominative process to narrow the field of potential panel members. The Chief of Military Justice must carefully monitor the timeline to ensure that the rear convening authority has assumed command prior to selecting a new panel.

b. Publish New Convening Orders. Once the GCMCA has selected a new panel, the next step is to publish the convening orders for each GCM and SPCM as soon as practicable. After the orders are published, the convening authority can begin referring cases to courts-martial.

c. Select a New Standing Administrative Separation Board. Once a new rear GCMCA has been established, orders have been published, and Soldiers have been re-assigned in accordance with the jurisdictional scheme, the new convening authority should select a new standing administrative separation board from the population of personnel remaining at home station.

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after redeployment, chiefs of justice should consider an alternate terminating event, such as, "60 days after redeployment of the unit commander." This will also allow the home station OSJA to complete cases or prepare cases to be re-transferred back to the original unit.

[7] It is not necessary to create a provisional unit for each level of command, and provisional units are usually limited to the battalion level or brigade level. There is no required rank for provisional commanders, but leaders should usually be of a rank that will allow them to execute other administrative actions, for example administrative separations.

[8] Please note that FORSCOM units must have permission from FORSCOM to create provisional units. This is a lengthy process, and should be initiated at least 120 days in advance of deployment. *See* FORSCOM Withholding Memorandum and Delegation Memorandum at Enclosure 3 and samples provided at Enclosure 4, Tab A.

Step 5. Transfer Pending Courts-Martial Cases.

a. Determine Which Cases Must be Transferred to a New Convening Authority. If possible, commands should work to resolve cases prior to deployment, or delay referring cases pending the designation of the GCMCA and the subsequent new panel selection. However, if operational realities and complexities of a case do not allow for this, the command has two main options. First, they can choose to take the case forward with the existing GCMCA. Although not favored in most situations, this course of action may be suitable for cases where all of the witnesses are deploying and cannot be returned to home station in the foreseeable future to testify in motions and in the case in chief. The second option is the more common and typically involves leaving the accused and the case at home station. Deploying commanders should understand that once a case is transferred, the receiving GCMCA will decide the disposition of the case, and could even choose to withdraw and dismiss the charges entirely.[9] Deploying commanders should also understand that some of their Soldiers may have to return to home station to act as witnesses in the courts-martial. Finally, deploying trial counsels should leave behind an organized case folder including a detailed prosecution memorandum identifying key witnesses and evidence to assist the home station trial counsel in pursuing the case.

b. Prepare Documents to Request Transfer. The OTJAG Information Paper on Transferring Court-Martial cases provides detailed information and sample templates for the losing command to request transfer of cases, both pre and post trial, to the new convening authority (Enclosure 1). The other samples provided at Enclosure 4, Tabs E and F use a similar method, but list all cases for transfer on one memorandum, rather than providing different documents for each case. Regardless of the method, the losing commander should withdraw any referred cases pursuant to RCM 604. The losing commander should then request that the gaining Commander accept the cases. The documents should make the transfer transparent for the SJA remaining at home station, as well as for the appellate courts. The documents should clearly delineate between preferred and post-trial cases. Once a case is referred, ordinarily it cannot be transferred to another GCMCA. However, in certain situations, the charges may be withdrawn and transferred to another GCMCA.[10] The documents should also include a brief discussion of the reasons and timing of the transfer, as well as the authority upon which it is based. Transfer of cases should be completed no later than 30 days prior to deployment of the unit to facilitate case administration.

c. Use of Documentation. Finally, the Chief of Military Justice should collect all pertinent documents, to include the provisional unit orders, the jurisdictional scheme, and the transfer of cases, and compile one packet of information. This packet should be provided to the defense, and must be included in each record of trial affected by the transfer, regardless of what stage of the proceeding the transfer is made. Consistent with *United States v. Hardy*, in cases where charges were actually withdrawn and re-referred, trial counsels should include the reasons for

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[9] Unlawful Command Influence continues to be a problem with deploying units. Therefore, trial counsels and brigade judge advocates should warn deploying commanders that once cases are transferred to rear provisional units, they may not attempt to influence the military justice decisions of rear provisional unit commanders in any way.

[10] See OTJAG IP – Rules Governing Transfer of Court-Martial Cases upon Deployment; *see also* RCM 601, 604. Consistent with U.S. v. Hardy, 4 M.J. 20 (C.M.A. 1977), the memorandum should include the convening authority's reasons for the re-referral on the record.

withdrawal and re-referral of cases on the record, and ask that the document packet be inserted in the record of trial (Enclosure 1). In cases where the transfer was especially complicated, SJAs should consider adding a brief discussion of the history of the case and the reasons for the transfer in the SJAR.[11] The Chief of Military Justice should take care to ensure that all indicia of the new convening authority are consistent throughout all pre and post trial documents. For example, the letterhead and the office symbol should be changed to reflect the new GCMCA.

Step 6. Actions on Redeployment

a. Effective End Date of Provisional Units. The provisional unit orders should clearly delineate the effective end date of the provisional unit. As previously noted, in addition to the 2 year limitation, the Chief of Military Justice should consider adding another triggering event that provides some definitive action that terminates the provisional unit, but still allows the redeploying unit some flexibility. If a triggering event is not used, then the Chief of Military Justice will have to ensure there is documentation to terminate the provisional unit. As with the start up phase of the provisional unit, during the termination period, all indicia of the unit change should be consistent. Therefore, the letterhead, UIC, office symbol, and charge sheets should accurately reflect that cases are being initiated by the redeploying unit.

b. Determine Status of Current Cases. The Chief of Justice must determine which cases initiated by the rear provisional unit will not be completed when the main unit redeploys to home station. The SJA will then have to make a recommendation to the command as to what action to take with regard to the outstanding cases. If the rear GCMCA has continuing convening authority, then the redeploying command has to the option to leave cases in progress with that authority until action.[12] If the rear GCMCA will dissolve or be reabsorbed into the redeploying command, then cases will have to be transferred to that command using the same steps used at the time of the original deployment.[13] See Enclosure 4, Tab I. It is very important that the documentation packet that chronicles the history of the case, as well as the provisional unit orders that provide the respective authority of each GCMCA and their SJAs, be added to each record of trial.

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[11] For a detailed review of some of the pitfalls associated with transferring cases between the rear provisional GCMCA and the division commander, *see generally* U.S. v. Barry, 57 M.J. 799 (A.C.C.A. 2002); U.S. v. Newlove, 59 M.J. 540 (A.C.C.A. 2003).

[12] In situations where the GCMCA has both inherent authority as a Division or Corps Commander and secretarial authority as the installation commander, the returning GCMCA may be a successor in command and be able to assume authority for a case that was convened by the installation commander during the deployment. For example, if the Commander of 3ID redeploys to Fort Stewart and a case that was convened by the Commander, Fort Stewart is still ongoing, he may be deemed a successor in command. However, he would have to assume GCMCA authority for that case in his capacity as the Commander of Fort Stewart and not in his capacity as the Commander of 3ID and Fort Stewart.

[13] *See generally* U.S. v. Barry, 57 M.J. 799 (A.C.C.A. 2002); U.S. v. Newlove, 59 M.J. 540 (A.C.C.A. 2003), for some complications arising out of the 10th Mountain redeployment to Fort Drum; *see also* Enclosure 4, Tab I for sample documenting the transfer of cases upon redeployment.

Enclosure 1

INFORMATION PAPER

DAJA-CL
20 June 2007

SUBJECT: Rules Governing Transfer of Court-Martial Cases upon Deployment

1. Purpose: To inform judge advocates in the field regarding the transfer of pending courts-martial to another commander exercising GCMCA upon deployment of the parent unit.

2. Conclusion: Court-martial cases may be transferred to another commander exercising GCMCA when the parent unit deploys in support of military contingency operations. Different legal considerations apply depending on the stage of the court-martial proceedings being transferred. These legal considerations must be weighed in evaluating whether transfer of the case is possible or practical.

3. General Discussion on the Three Stages of Proceedings.

a. Pre-Referral Stage of Proceedings. In pre-referral cases, a convening authority who receives a case by transfer from another convening authority can simply refer the preferred charges and specifications to a court-martial he selects. When the receiving convening authority is a commander of a provisional unit, he may not adopt any court-martial panels selected by the commander of the parent unit; rather, he should select his own panel. The provisional commander is not a successor in command under R.C.M. 601(b) because there is no predecessor in command for the provisional unit.

b. After Referral.

(1) Ordinarily once a case has been referred, the fact that that the convening authority has deployed does not deprive the court-martial of jurisdiction to try the accused. The accused could be tried at the home station after deployment of the parent unit or at the deployed location. Several issues may arise, though, that could affect the proceedings:

(a) Typically, the command will try the accused at home station due to the location of witnesses and other administrative issues. Members and substitute members originally detailed to the CM may no longer be available at the home station in sufficient numbers, due to the deployment, to meet the requirements of R.C.M. 501. Members would then have to be returned for the trial or new members would have to be detailed.

(b) There are several post-referral trial issues that require the approval of "the" convening authority such as pre-trial agreements[1] and the employment of expert witnesses.[2] These requests would have to be forwarded to the parent unit commander for his disposition.

(2) If deployment, or imminent deployment, make it impossible or impracticable to continue the accused's court-martial as referred, it may be possible to withdraw and transfer the case to a different court-martial convening authority that exercises court-martial convening

[1] R.C.M. 705
[2] R.C.M. 703(d)

authority over the accused at the home station. In this situation, the deploying court-martial convening authority withdraws the already referred charges under R.C.M. 604 and transfers them by agreement to the new commander under R.C.M. 601(b) and its discussion. The new convening authority may, in his discretion, promptly re-refer them to a new court-martial panel he has previously selected.

c. After Trial - Cases Pending Action. R.C.M. 1107 allows the parent unit commander to transfer these cases to another commander for action if it would be impracticable for him to take action. The discussion to R.C.M. 1107 specifically addresses the deployment situation as one in which it would be impracticable for the original convening authority to take action. The deploying unit should request that the rear command take action, and the rear command should accept those cases and document the transfer in a memorandum.

4. How to Withdraw Cases and Re-refer with a New Convening Authority.

a. Withdrawal Generally. Under R.C.M. 604, the convening authority may withdraw charges or specifications from a court-martial for any reason at any time before findings are announced. Re-referral of the charges to another court-martial, though, is more complicated. The reasons for the withdrawal and re-referral should be put on the record.[3] As discussed below, the ability to re-refer is dependent on the stage the proceedings were at when the charges or specifications were withdrawn and the convening authority's underlying reasons for the withdrawal.

b. Withdrawal and Re-referral.

(1) Before arraignment the convening authority can withdraw and re-refer a case to another court-martial unless the withdrawal was arbitrary or unfair to the accused, or was for an improper reason.[4] Some of the proper, and improper, reasons for withdrawal and referral are listed in the discussion to R.C.M. 604(b). One of the proper reasons listed is the routine duty rotation of the personnel constituting the court-martial. The loss of court-martial personnel due to an operational deployment closely parallels this reason and may provide the basis for a pre-arraignment withdrawal and re-referral. The Koke case, discussed below, provides additional support for this. Even though that case involved a withdrawal and re-referral after arraignment, the operational exigency factor discussed therein would also provide very strong support in a pre-arraignment case.

(2) After arraignment it becomes more difficult to withdraw and re-refer a case from court-martial, particularly if the court has been assembled and evidence taken on the merits.

(a) Before the taking of evidence. After arraignment but before the taking of evidence on the general issue of guilt, it is possible to withdraw and re-refer charges and specifications, if good cause is shown based upon the factors outlined in the discussion to R.C.M. 604 or

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[3] U.S. v. Hardy, 4 M.J. 20 (C.M.A. 1977). Although, U.S. v. Blaylock, 15 M.J. 190 (C.M.A. 1983) and the discussion to R.C.M. 604 could be read to require putting the convening authority's reasons on the record only if the re-referral is more onerous to the accused, the Hardy decision clearly requires it for all cases. It is recommended that *Hardy* guidance be followed for withdrawals and re-referrals under the circumstances discussed in this Information Paper.
[4] R.C.M. 604 and its discussion.

contained in prior court precedent. Of particular note, U.S. v. Koke[5] distilled several factors from prior court decisions that are important indicia of whether a withdrawal after arraignment is for a proper reason. One of those factors, operational exigency, is mentioned twice but never defined. Several other decisions have mentioned operational exigency in the context of deciding different issues of law.[6] A very strong argument can be made that a deployment in support of potential combat operations is an operational exigency. Withdrawal of charges and specifications after arraignment, but before the taking of evidence, may be permissible under R.C.M. 604 as a response to operational exigencies resulting from the deployment of the parent unit. However, when a deployment date is known well in advance, it might be more difficult to rely on this provision.

(b) After the taking of evidence. After withdrawal and the taking of evidence on the general issue of guilt, withdrawal and re-referral may only be done if the withdrawal was necessitated by urgent and unforeseen military necessity.[7] This provision is based upon *Wade v. Hunter*[8]; *Legal and Legislative Basis, Manual for Courts-Martial, United States, 1951* at 64. In that case the accused's court-martial for rape was taking place in the European theatre of operations during WWII. His unit was actually engaged in combat operations against the enemy. In the two weeks between when the incident occurred and the accused was tried, his unit had advanced 22 miles. After both the prosecution and defense had rested and the court closed to deliberate, the members requested to hear several additional witnesses. The court-martial was continued until a later date. During this delay the convening authority withdrew the case and, citing the tactical situation, transferred it the unit now occupying the town in which the incident occurred and where the witnesses were located. The case was re-referred and tried again. The Supreme Court found that the accused's Fifth Amendment double jeopardy rights were not violated. The tactical situation of a rapidly advancing army justified the withdrawal and re-referral in this case. Absent facts closely paralleling those in *Wade*, withdrawal and re-referral after taking evidence on the general issue of guilt should be avoided.

5. Formats for Transfer of Cases

a. Enclosure 1 contains a sample document that may be tailored for transfer of a case tried but pending action.

b. Enclosure 2 contains a sample document that may be tailored for withdrawal and transfer of a case where charges have been referred. If evidence on the general issue of guilt has been taken, withdrawal and re-referral should not be attempted except in the most unusual case where the facts are akin to those discussed in *Wade v. Hunter*.

PREPARED BY: MAJ Alison Martin (703) 588-6755
APPROVED BY: COL Flora D. Darpino

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[5] 32 M.J. 876 (N.M.C.R. 1991); *affirmed* 34 M.J. 313 (C.M.A. 1992).
[6] *See, e.g.*, U.S. v. Scott, 25 C.M.R. 636, 640 (A.B.R. 1958).
[7] R.C.M. 604(b).
[8] 336 U.S. 684; 69 S.Ct. 834; 93 L.Ed. 974 (1949).

DEPARTMENT OF THE ARMY
Insert Letterhead

REPLY TO
ATTENTION OF:

Insert OFFICE SYMBOL _____20XX

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Withdrawal from Court-Martial and Transfer of U.S. v. (*insert Name, Last four of SSN, and Unit*)

1. Pursuant to General Order Number (*insert number or originating GCMCA*), dated _____20XX, I am the General Court Martial Convening Authority for the (*insert GCMCA designation*). On or about _____20XX, the (*insert originating GCMCA unit*) will deploy. Due to operational exigencies arising out of this deployment, and the disruptions they will foresee ably cause in the trial by court-martial of the case of (U.S. v (*insert name*), referred by me on _____20XX to (general/special) court-martial by (General/Special Court-Martial Convening Order Number (*insert number*), I direct the charges and specifications in this case be withdrawn from court-martial pursuant to R.C.M. 604 in the interests of justice. The accused (has/has not) been arraigned.

2. *(Note: If after arraignment but before the taking of evidence, insert the specific operational exigencies involved in parent unit's deployment. Recommend this memorandum and the supporting facts be entered into the record.)* The charges and specifications are not dismissed.

3. I hereby request the transfer this case to the Commander, (*insert name of new GCMCA*) for disposition as deemed appropriate.

signature block of originating GCMCA

Pursuant to the provisions of R.C.M. 604, I hereby accept the transfer of (U.S. v (*insert name*).

signature block of new GCMCA

DISTRIBUTION:
SJA, Originating GCMCA
SJA, New GCMCA
Accused
Each ROT

DEPARTMENT OF THE ARMY
LETTERHEAD

REPLY TO
ATTENTION OF:

Insert OFFICE SYMBOL _____20XX

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Transfer of U.S. v. *insert Name, Last Four of SSN, Unit* for Initial Action

1. Pursuant to General Order Number (*insert number or originating GCMCA*), dated (*insert date*), I am the General Court Martial Convening Authority for the (*insert GCMCA designation*). On or about the (insert originating GCMCA unit) will deploy in support of Operation Iraqi Freedom XX. Due to operational exigencies arising out of this deployment, and the disruptions they will foreseeably cause in the post-trial processing of the case of (U.S. v (*insert name*), referred by me on _____20XX to (general/special) court-martial by (General/Special Court-Martial Convening Order Number (*insert number*), and in which trial ended on _____20XX, it is impracticable for me to take initial action in this case.

2. Under the provisions of R.C.M. 1107, I hereby request that this case be transferred to the Commander of (*insert new GCMCA designation*).

signature block of originating GCMCA

Under the provisions of R.C.M. 1107, I hereby accept the case of (U.S. v (*insert name)* for post-trial processing.

signature block of new GCMCA

DISTRIBUTION:
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SJA, New GCMCA
Accused
Each ROT

Enclosure 2

INFORMATION PAPER

AFZF-JA-MJ
29 October 2002

SUBJECT: Provisional Units and the Uniform Code of Military Justice

1. Purpose. To provide information regarding the authority of a commander of a provisional unit to take judicial and non-judicial punishment action pursuant to the Uniform Code of Military Justice (UCMJ).

2. References.

a. Title 10, United States Code, Section 822.

b. Manual for Courts-Martial (MCM).

c. Army Regulation (AR) 27-10, *Military Justice*.

3. Discussion.

a. *General Court-Martial Convening Authority (GCMCA)*. Article 22[1] of the UCMJ and Rule for Courts-Martial (RCM) 504(b)(1)[2] delineate who may serve as a GCMCA. In general, Article 22 establishes GCMCA for individuals serving in a specific position (*e.g.*, commander of an Army corps) or if the Secretary of the Army (SA) designates an individual/position as a GCMCA. Army policy implementing Article 22 is in AR 27-10. Review of AR 27-10, paragraph 5-2,[3] reflects that the SA has not designated any positions, other than those cited in Article 22 of the UCMJ, as having general court-martial convening authority.

b. *Special Court-Martial Convening Authority (SPCMCA)*.

(1) SPCMCA. Article 23[1] of the UCMJ and RCM 504(b)(2) delineate who may serve as a SPCMCA. Consistent with Article 22 and RCM 504(b)(1), Article 23 and RCM 504(b)(2)[2] focus on specific positions and individuals "empowered" by the SA to serve as a SPCMCA (Article 23(a)(6)). AR 27-10, paragraph 5-2a(2),[3] provides that "[c]ommanders exercising GCM authority may establish deployment contingency plans that, when ordered into execution, designate provisional units under AR 220-5, whose commanders are determined by the GCM authority to be empowered under Article 23(a)(6) to convene SPCM [special courts-martial]."

(2) Provisional Units. AR 220-5, paragraph 2-5,[4] sets forth guidance regarding the organization and designation of provisional units. Under the provisions of AR 220-5, paragraph 2-5a, the commander of an Army field command[5] may establish provisional units. Limitations on provisional units include:

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[1] Tab N.
[2] Tab O.
[3] Tab P.
[4] Tab Q.
[5] Per AR 310-25, the term "Army field commands" consists of "[a]ll Department of the Army exclusive of that part defined as Headquarters, Department of the Army. Army field commands include all field headquarters, forces, [r]eserve components, installations, activities, and functions under the control or supervision of the Secretary of the Army."

organizational duration may not exceed two years; units providing personnel for the provisional unit may not receive replacement sources as a result of the vacancies created by attaching their soldiers to the provisional unit; and the promotion, reduction, or reassignment of an individual attached to a provisional unit remain the responsibility of the commander of the unit to which the individual is permanently assigned.

c. *Summary Court-Martial Convening Authority (SCMCA).* Article 24[1] of the UCMJ and RCM 1302[6] set forth who may serve as a SCMCA. Similar to the authorities for GCMCA and SPCMCA, Article 24 and RCM 1302 identify specific positions and individuals "empowered" by the SA to serve as a SPCMCA (Article 23(a)(6)). Article 24 and RCM 1302 provide that a GCMCA or SPCMCA may convene a summary court-martial. RCM 1302 lists additional positions wherein the occupant may serve as a SCMCA.

d. *Non-Judicial Punishment.* Per AR 27-10, paragraph 3-7a(4),[7] as a general proposition, commanders of provisional units possess the authority to impose non-judicial punishment authorized under the UCMJ.

e. *Application and Overview.*

(1) GCMCA. Based on the information in paragraph 3a above, if the 4th Infantry Division (4ID) or the 1st Cavalry Division (1CD) seeks to have an individual serve as a GCMCA who is not occupying one of the positions listed in Article 22, they would have to seek that authority through the Criminal Law Division, Office of The Judge Advocate General. *See* AR 27-10, paragraph 5-2a(1).

(2) SPCMCA. Based on the information in paragraph 3b above, the commanding generals of the 4ID and the 1CD could, subject to compliance with AR 220-5, generate a contingency plan that would allow for the designation of commanders of provisional units as special courts-martial convening authorities. Although Article 23, RCM 504(b)(2), and AR 27-10 do not state that an individual serving as a provisional commander must be a certain grade, from a policy perspective it is prudent to ensure that the individual chosen possesses the grade to execute other adverse administrative actions (*e.g.*, involuntary administrative separations), the intent and purpose of AR 600-20 is satisfied, and possesses the maturity, experience, and knowledge required to fairly adjudicate misconduct.

(3) SCMCA. Subject to compliance with AR 220-5 and proper establishment of the commander of a provisional unit as a SPCMCA, that individual could also serve as the SCMCA.

MAJ Gifford/287-3658

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[6] Tab R.
[7] Tab S.

Enclosure 3

DEPARTMENT OF THE ARMY
HEADQUARTERS UNITED STATES ARMY FORCES COMMAND
1777 HARDEE AVENUE SW
FORT MCPHERSON GA 30330-1062

REPLY TO
ATTENTION OF

AFOP-PLF

JUL 10 2003

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Approval Authority for Provisional Organizations

1. This is to clarify the approval authority for provisional organizations. The Forces Command (FORSCOM) Commanding General retains the authority to approve the organization of provisional units. Conditions for establishing a provisional unit are described in Army Regulation 220-5, paragraph 2-5.

2. Requests for the establishment of provisional organizations should be sent to the FORSCOM Commanding General, ATTN: AFOP-PLF.

3. For additional information, contact Ms. Lareen Peeples, DSN 367-6455.

FOR THE COMMANDER:

JULIAN H. BURNS, JR.
Major General, USA
Chief of Staff

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COMMANDER
FIRST UNITED STATES ARMY
THIRD UNITED STATES ARMY
FIFTH UNITED STATES ARMY
I CORPS AND FORT LEWIS
III CORPS AND FORT HOOD
XVIII AIRBORNE CORPS AND FORT BRAGG
NATIONAL TRAINING CENTER AND FORT IRWIN
JOINT READINESS TRAINING CENTER AND FORT POLK
US ARMY RESERVE COMMAND
US ARMY SOUTH
32D ARMY AIR AND MISSILE DEFENSE COMMAND

DEPARTMENT OF THE ARMY
HEADQUARTERS UNITED STATES ARMY FORCES COMMAND
1777 HARDEE AVENUE SW
FORT MCPHERSON GA 30330-1062

REPLY TO
ATTENTION OF

JAN 1 1 2007

AFCG-JA

MEMORANDUM FOR MG Thomas Miller, Deputy Chief of Staff, G-3/5/7, US Army Forces Command, 1777 Hardee Avenue, SW, Fort McPherson, GA 30330-1062

SUBJECT: Delegation of Authority – Provisional Unit Request Approval

1. Under the provisions of Army Regulation (AR) 220-5, paragraph 2-5, I delegate to you the authority to exercise approval authority over provisional unit requests.

2. This delegation is personal to you and you may not re-delegate it. It will remain in effect until I change command, I terminate it in writing, or your position changes. It is without prejudice to my own authority under AR 220-5.

3. Direct all inquiries to COL Karl Goetzke, Staff Judge Advocate, US Army Forces Command, 404-464-6200.

CHARLES C. CAMPBELL
General, USA
Commanding

Enclosure 4

TABLE OF CONTENTS
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TAB A

DEPARTMENT OF THE ARMY
Letterhead

REPLY TO
ATTENTION OF:

OFFICE SYMBOL _____ 20XX

MEMORANDUM FOR Commander, United States Army Forces Command, Fort McPherson, GA

SUBJECT: Request for the Establishment of a ____Corps (Rear)(Provisional) and Commander Designation

1. Purpose. To request the establishment of a ____Corps (Rear)(Provisional) and designation of the senior commander within ____ Corps as its commander.

2. Background.

a. Current Command Structure for __ Corps & Fort _____. Currently I serve as the Commander for ___ Corps and Fort _____ (enclosure 1). The position of Commander, ___ Corps, is an MTO&E position (enclosure 2) and the position of Commander, Fort _____, is a TDA position (enclosure 3).

b. Impact of Operation Iraqi Freedom XX (OIFXX). On or about _____ 20XX, I will depart Fort _____ to serve as the Deputy Commander, Coalition Joint Task Force-7 [CJTF-XX], Baghdad, Iraq. Because I will need to rely on my authority as the Commander, ___ Corps, to administer discipline while serving as the Deputy Commander, CJTF-XX, I cannot leave command of ___ Corps with the senior general officer within ___ Corps that remains in CONUS.

c. The DCG, ___ Corps, Will Serve as the Commander, Fort _____, Without Contravening Law or Regulation. Major General Smith, Deputy Commanding General, ___ Corps, will serve as the Commander, Fort _____, during my OIFXX absence. As the Commander, Fort _____, MG Smith will be able to dispose of those actions that I normally act upon in my capacity as Commander, Fort _____.

3. Discussion. As discussed below, the establishment of a ___ Corps (Rear) (Provisional) is necessary for the continued effective command and control within ___ Corps.

a. Necessity for a ___ Corps (Rear) (Provisional). Within ___ Corps, there will be a limited number of actions that by law must be acted upon by a corps commander (or higher) or do not relate specifically to Fort _____, thereby exceeding MG Smith's authority as the Commander, Fort _____. As a result of retaining my command authority while deployed to Iraq, such actions would need to be forwarded to me in Iraq for decision. Because such a construct would likely create logistical burdens and result in inefficiency, I believe establishment of the provisional unit is required in order to ensure actions comply with law and regulation, while preserving the ability to handle matters by a commander within CONUS.

OFFICE SYMBOL
SUBJECT: Request for the Establishment of a ____ Corps (Rear) (Provisional) and Commander Designation

b. Designation of Commander, ___ Corps (Rear) (Provisional). Subject to the establishment of a ___ Corps (Rear) (Provisional), I request that DA appoint the senior officer within ___ Corps as the Commander, ___ Corps (Rear) (Provisional). If such request were granted, Major General Doe, Commander, 7th Infantry Division and Fort Carson, would be appointed as the Commander, ___ Corps (Rear) (Provisional).

4. If you have any questions or concerns, please contact MAJ Chief of Justice at 123-456-7890.

3 Enclosures
1. Assumption of Command
2. Fort ____ TDA excerpt
3. Fort ____ MTOE excerpt

IMA CORPS COMMANDER
Lieutenant General, USA
Commanding

2

TAB B

DEPARTMENT OF THE ARMY
Letterhead

REPLY TO
ATTENTION OF:

OFFICE SYMBOL _____ 20XX

MEMORANDUM FOR Commander, United States Army Forces Command, Fort McPherson, GA

SUBJECT: Notification of Command Structure at ___ Corps and Fort _____ During Operation Iraqi Freedom XX

1. Purpose. To advise you of the prospective command structure for _____ and Fort _____during the period I am deployed to Iraq in support of Operation Iraqi Freedom XX(OIFXX). Specifically, this memorandum explains the rationale for having Brigadier General [BG] Smith, Deputy Commanding General, ___ Corps, serve as the Commander, Fort _____, during my deployment in support of OIFXX.

2. Background.

a. Assumption of Dual Role. On ____ July 20XX (enclosure 1), I assumed command of __ Corps& Fort _____. The position of Commander, Fort _____, is a TDA position (enclosure 2) and the position of Commander, ___ Corps, is a MTO&E position (enclosure 3). Based on informal discussions with the Department of Army General Officer Management Office and Resource Management personnel at Fort _____, the two billets have historically been filled by the same individual.

b. Service as a General Court-Martial Convening Authority. Based on my service as Commander, ___ Corps, Article 22(a)(5) of the Uniform Code of Military Justice (UCMJ) empowers me to be a GCMCA. In addition, Department of Army General Order 3, dated 19 January 1981 [hereinafter DA GO 3, 1981], empowers me to be a GCMCA pursuant to my position as Commander, __ Corps& Fort ____, and as Commander, Fort _____ (enclosure 4). Currently, I convene courts-martial for __ Corps units using the GCMCA authority vested in me as the Commander, __ Corps & Fort _____.[1]

c. Impact of OIFXX on General Court-Martial Convening Authority at Fort _____. On or about 15 January 20XX, I will depart Fort _____ to serve as the Deputy Commander, Coalition Joint Task Force-XX [CJTF-XX], Baghdad, Iraq. During the period I serve as the Deputy Commander, CJTF-XX, a need will exist to exercise GCMCA authority over __ Corps units in Iraq (and those attached or assigned to ___ Corps). Because I will not be able to use the GCMCA authority of the Commander, CJTF-XX, while serving as the Deputy Commander, CJTF-XX, I will be required to use the GCMCA authority vested in me as the Commander, __ Corps. In addition, because I occupy all the positions that establish GCMCA authority for __

[1] On __ March 20XX, the _____ Division began departing Fort _____ in support of OIFXX. As a result, the undersigned currently exercises GCMCA authority over the _____ Division (Rear) (Provisional), in addition to serving as the GCMCA for __ Corps units.

Corps and Fort ____, my retention of such authority will result in the complete absence of a GCMCA for those __ Corps units and personnel who remain at Fort _____ during OIFXX.[2]

3. Discussion. As set forth in the discussion below, BG Smith's assumption of command as the Commander, Fort _____, does not contravene law or regulation and is necessary for the continued effective command, control, and administration of justice at Fort _____.

a. Requirement for a GCMCA at Fort _____. Approximately 85% of the units that comprise the __ Corps military justice caseload will remain at (or return to) Fort _____ during OIFXX, therefore the need for a local GCMCA is great. Although having a remote GCMCA is feasible in theory, it is impractical from both a work efficiency and command and control perspective.

b. BG Smith Can Serve as the GCMCA for Fort _____ Without Contravening Law or Regulation. The position of Commander, Fort _____, and Commander, ___ Corps, are distinct positions. Accordingly, although historically only one individual has simultaneously served in both positions, the ability exists to bifurcate the duties and allow a separate individual to serve in each position. As a result, BG Smith can serve as the Commander, Fort _____, during my absence without affecting my role as Commander, ___ Corps. In turn, because DA GO 3, 1981 recognizes the Commander, Fort _____, as a distinct GCMCA, BG Smith would serve as the GCMCA for __ Corps units and personnel who remain at Fort _____ (or return to Fort _____) during my OIFXX absence.

c. Establishment of a ___ Corps (Rear) (Provisional). As the Commander, Fort _____, BG Smith will be able to dispose of many of the actions that I normally act upon. There is likely to be a limited number of actions, however, that by law must be acted upon by a corps commander (or higher) or do not relate specifically to Fort _____. Such actions would thereby exceeding BG Smith's authority as the Commander, Fort _____. As a result, with regard to those limited number of actions, a need would still exist either to have actions forwarded to me in Iraq or establish a __ Corps (Rear) (Provisional) whose commander could act upon the actions. To ensure the efficient and effective command and control of __ Corps during my absence, I am forwarding to you by separate memorandum a request to establish a __ Corps (Rear) (Provisional). I believe establishment of the provisional unit is required in order to ensure actions comply with law and regulation, while preserving the ability to handle matters by a commander within CONUS. The memorandum requests that DA appoint the senior officer within __ Corps as the Commander, __ Corps (Rear) (Provisional). If such request were granted, Major General Jones, Commander, _____ Division and Fort Carson, would be appointed as the Commander, ___ Corps (Rear) (Provisional).

[2] The Commander, _____ Division, will depart Fort _____ in approximately ___April 20XX in support of OIFXX and therefore not be able to assume GCMCA responsibility for ___ Corps.

OFFICE SYMBOL
SUBJECT: Notification of Command Structure at ___ Corps and Fort _____ During Operation Iraqi Freedom XX

4. If you have any questions or concerns, please contact COL SJA at 123-456-7890.

4 Enclosures
1. Assumption of Command
2. Fort ____ TDA excerpt
3. Fort ____ MTOE excerpt
4. DA GO 3

IMA CORPS COMMANDER
Lieutenant General, USA
Commanding

3

TAB C

DEPARTMENT OF THE ARMY
Letterhead

REPLY TO
ATTENTION OF:

OFFICE SYMBOL _____20XX

MEMORANDUM FOR See Distribution

SUBJECT: Establishment of Provisional Units and Jurisdictional Scheme ___ Corps Units and Personnel Remaining at Fort _____ During Operational Iraqi Freedom XX

1. Purpose. To establish provisional units and the jurisdictional scheme for ___ Corps units which remain at Fort _____ during the current period of contingency operations. My actions are intended to ensure the command, control, and administration of justice during Operation Iraqi Freedom XX.

2. Authority.

a. Article 22, Uniform Code of Military Justice (UCMJ)
b. Army Regulation 27-10, paragraph 5-2a(2)

3. Specific Findings. I have determined that those provisional units established within this memorandum, and bearing the special court-martial convening authority ("SPCMCA") designation, are separate and detached commands for the purpose of Articles 23(3) and (6) of the Uniform Code of Military Justice (UCMJ).

4. Jurisdictional Structure. The structure below reflects an ascending jurisdictional scheme. For example, each of the cited SPCMCA falls within the purview of the cited GCMCA. In turn, each of the units cited within each SPCMCA unit fall within the purview of that specific SPCMCA.

a. Commander, Fort _____ - General Court-Martial Convening Authority.

b. United States Army Garrison – Special Court-Martial Convening Authority.

(1) Headquarters Command Battalion (Rear) (Provisional) – Summary Court-Martial Convening Authority

(2) Headquarters and Headquarters Company, United States Army Garrison

c. 1st Medical Brigade – Special Court-Martial Convening Authority

(1) 21st Combat Support Hospital – Summary Court-Martial Convening Authority
All companies assigned or attached to the 21st CSH which remain at Fort _____ with

their regularly assigned commander.

(2) 61st Area Support Medical Battalion - Summary Court-Martial Convening Authority

All companies assigned or attached to the 61st ASMB which remain at Fort _____ with their regularly assigned commander.

d. __ Infantry Division (Rear)(Provisional) - Special Court-Martial Convening Authority

(1) 1st BCT (Rear)(Provisional) – Summary Court-Martial Convening Authority

(2) 2nd BCT (Rear)(Provisional) – Summary Court-Martial Convening Authority

(3) 3rd BCT (Rear)(Provisional) – Summary Court-Martial Convening Authority

(4) Support Brigade (Rear)(Provisional) – Summary Court-Martial Convening Authority

5. Savings Clause. Those personnel who remain at Fort Hood, and are not otherwise accounted for in any of the units cited in paragraph 4 above, shall be attached to Headquarters and Headquarters Company, United States Army Garrison, for the purpose of UCMJ and adverse administrative actions.

6. Effect of Re-Deploying Units.

a. Upon re-deployment of a unit, for whom a provisional unit has been established within this memorandum, the commander of the parent unit shall request that the Commander, Fort Hood, authorize the inactivation of the provisional unit. Such approval is required, per this memorandum, in order to inactivate the unit and re-establish the parent unit as the superior UCMJ authority.

b. Upon re-deployment of a unit, which has had subordinate units re-aligned under another unit during the parent unit's absence, the commander of the parent unit shall coordinate with ___ Corps G1 to restore the subordinate units to their pre-OIF8 UCMJ organizational structure.

c. The SPCMCA is responsible for ensuring the proper generation and publication of those orders, required by Army Regulation 600-8-105, for the re-alignment of units or inactivation of a provisional unit. The SPCMCA shall ensure the ___ Corps G1 and ___ Corps Office of the Staff Judge Advocate (Chief, Criminal Law Division) receive a copy of any such order.

OFFICE SYMBOL

SUBJECT: SUBJECT: Establishment of Provisional Units and Jurisdictional Scheme ___ . Corps Units and Personnel Remaining at Fort _____ During Operational Iraqi Freedom XX

7. Effective Date for Provisional Units and Orders Requirements.

a. The effective establishment date for those provisional units identified in this memorandum, which have not yet already been established by separate memorandum, shall be the date on which the regularly assigned commander deploys.

b. The S-1 of each SPCMCA is responsible for ensuring the generation and publication of those orders necessary to lawfully appoint the commanders of provisional units and/or re-align units.

c. The G1, ___ Corps and Fort _____, provide notice to Headquarters, Department of Army (DAMH-HSO), regarding the creation of the provisional units, as required by AR 220-5, paragraph, 2-5a.

8. Explanation of Terms. As used in this memorandum, the term military justice includes, but is not limited to: courts-martial, non-judicial punishments action, administrative separations, memoranda of reprimand and admonition, and administrative reduction actions.

9. If you have any questions or concerns, please contact COL SJA at 123-456-7890.

Enclosures
as

IMA CORPS COMMANDER
Lieutenant General, USA
Commanding

Distribution: A

3

TAB D

DEPARTMENT OF THE ARMY
Letterhead

REPLY TO
ATTENTION OF:

OFFICE SYMBOL _____20XX

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: General Court-Martial Convening Authority and Jurisdictional Scheme for Select Army Units in Iraq in Support of Operation Iraqi Freedom XX

1. Purpose. To identify those units in Iraq for which the Commanding General, __ Corps, will serve as the General Courts-Martial Convening Authority (GCMCA) and the jurisdictional scheme for those units. My actions are intended to ensure the proper command, control, and administration of justice in Iraq during Operation Iraqi Freedom XX.

2. Authority.

a. Articles 22, 23 Uniform Code of Military Justice (UCMJ)

b. R.C.M. 504 (Manual for Courts-Martial 2005)

3. Jurisdictional Structure. The Commanding General, __ Corps, shall serve as the GCMCA for the units set forth below (and in the attached appendices). The court-martial convening authority for the commanders of the units delineated in this memorandum are also set forth.

a. ___ Medical Brigade – Special Court-Martial Convening Authority (SPCMCA).
- See Appendix A for those units for which the Commander, ___Medical Brigade, will serve as the SPCMCA

b. ___ Corps Artillery -SPCMCA.
- See Appendix B for those units for which the Commander, ___Corps Artillery, will serve as the SPCMCA

c. ___ Signal Brigade SPCMCA.
- See Appendix C for those units for which the Commander, ___Signal Brigade, will serve as the SPCMCA

d. ___ Corps Support Command –SPCMCA.
- See Appendix D for those units for which the Commander, ___Corps Support Command, will serve as the SPCMCA

e. ___ Military Police Brigade – SPCMCA
- See Appendix E for those units for which the Commander, ___Military Police

Brigade, will serve as the SPCMCA

f. ___ Armor Brigade – SPCMCA
- See Appendix F for those units for which the Commander, ___Armor Brigade, will serve as the SPCMCA

g. ___ Aviation Brigade – SPCMCA
- See Appendix G for those units for which the Commander, ___Aviation Brigade, will serve as the SPCMCA

h. ___ Engineer Brigade – SPCMCA
- See Appendix H for those units for which the Commander, ___Engineer Brigade, will serve as the SPCMCA

i. ___ Military Intelligence Brigade –SPCMCA
- See Appendix I for those units for which the Commander, ___Military Intelligence Brigade, will serve as the SPCMCA

4. Savings Clause.

a. Those Army units and personnel not assigned to units operating within Iraq, who are not otherwise accounted for in any of the units cited in paragraph 3 above (or the appendices), and are not accounted for in the jurisdictional memoranda for other major commands operating within Iraq shall be attached to Headquarters and Headquarters Company (HHC), __ Corps (and, commonly use that unit's UCMJ chain), for the purpose of UCMJ and adverse administrative actions.

b. Units affected by paragraph 4a above, who seek to administer a UCMJ chain independent of HHC, __ Corps, shall seek written approval from the Staff Judge Advocate, __ Corps. Although paragraph 4a does not limit a commander's authority to administer non-judicial punishment, paragraph 4a serves to limit the special and summary courts-martial convening authorities that a commander might otherwise have pursuant to Articles 23 and 24 of the UCMJ. As a result, commanders affected by paragraph 4a who seek to have courts-martial convening authority must satisfy the written authorization requirement delineated in this paragraph prior to exercising courts-martial convening authority.

5. Explanation of Terms.

a. As used in this memorandum, the term military justice includes, but is not limited to: courts-martial, non-judicial punishments action, administrative separations, memoranda of

reprimand and admonition, and administrative reduction actions.

b. As used in the appendices, the acronym "SCMCA" refers to summary court-martial convening authority.

6. COL SJA at 123-456-7890 is the POC for this memorandum.

Enclosures
as

IMA CORPS COMMANDER
Lieutenant General, USA
Commanding

Distribution: A

TAB E

DEPARTMENT OF THE ARMY
Letterhead

REPLY TO
ATTENTION OF:

OFFICE SYMBOL _____20XX

MEMORANDUM FOR Commander, Fort _____, Fort _____, ___ 12345-6789

SUBJECT: Formal Recognition of the Fort _____ General Court-Martial Jurisdiction and Transfer of Select ___ Corps & Fort _____ Cases

1. Purpose. To request you take the actions delineated below to ensure the command, control, and general administration of military justice at Fort _____ during Operation Iraqi Freedom (OIF).

2. Authority. Rules for Courts-Martial, 401, 604, 1107, Manual for Courts-Martial (MCM 2005)

3. Exercise of General Court-Martial Convening Authority (GCMCA). In your capacity as the Commander, Fort _____, request you serve as the GCMCA for those units listed in enclosure 1 and those units and personnel who are at Fort _____ and who would otherwise fall under the general court-martial authority of the GCMCA, ___ Corps & Fort _____. In my capacity as Commander, ___ Corps, I will serve as the GCMCA for units and personnel in Iraq who would otherwise fall under the GCMCA, ___ Corps & Fort _____.

4. Transfer of Preferred Cases.

a. Based on my extended absence in support of OIF, and the foreseeable disruptions that absence will cause on the administration of justice of current cases, I hereby request transfer of the following **preferred** cases under the provisions of Rule for Courts-Martial (RCM) 401 (c), for disposition as appropriate:

(1) U.S. v. John Doe, SSN, Unit.

(2) U.S. v. Jane Doe, SSN, Unit.

b. In addition, request you accept the transfer of any case preferred between the date of this memorandum and your acceptance of my request.

5. Transfer of Post-Trial Cases.

a. Based on my extended absence in support of OIF, and the foreseeable disruptions that absence will cause on the administration of justice of current cases, I hereby request transfer of the following current **post-trial cases** under the provisions of Rule for Courts-Martial (RCM) 11 07(a), for action as appropriate:

(1) U.S. v. Ima Soldier, SSN, Unit.

(2) U.S. v. Youra Soldier, SSN, Unit.

b. I have retained responsibility for the referred cases listed below. I referred the cases in my capacity as Commander, ___ Corps and Fort ____. In the event the cases listed below result in a requirement for post-trial processing, request transfer of each case for post-trial processing, under the provisions of RCM 1107(a), for action as appropriate:

(1) U.S. v. Bill Smith, SSN, Unit.

(2) U.S. v. Bob Jones, SSN, Unit.

6. If you have any questions or concerns, please contact MAJ Chief of Justice at 123-456-7890.

Enclosure
Fort ___ Jurisdiction Memo, date

IMA CORPS COMMANDER
Lieutenant General, USA
Commanding

TAB F

DEPARTMENT OF THE ARMY
Letterhead

REPLY TO
ATTENTION OF:

OFFICE SYMBOL _____20XX

MEMORANDUM FOR Commander, ___ Corps, Baghdad, Iraq

SUBJECT: Formal Recognition of the Fort _____ General Court-Martial Jurisdiction and Acceptance of __ Corps & Fort _____ Cases

1. Purpose. To document my acceptance of your request to serve as the general court-martial convening authority (GCMCA) for select __ Corps and Fort _____ units/activities/personnel and accept the transfer of select __ Corps & Fort _____ cases.

2. Decision. Based your request, I specifically:

a. Accept for disposition as appropriate, those pretrial cases cited in the _____ 20XX memorandum (hereinafter "___ Corps CG Transfer Memo.").

b. Accept the transfer of any case preferred on or between _____ 20XX and the date of this memorandum. I specifically recognize the case of U.S. v. _____, SSN, Unit.

c. Accept, for processing and post-trial action as appropriate, those post-trial cases and potential post-trial cases cited in the __ Corps CG Transfer Memo.

d. Accept service as the GCMCA for those units listed in enclosure 1 of the __ Corps CG Transfer Memo and those units and personnel who are at Fort _____ and who would otherwise fall under the general court-martial authority of the GCMCA, ___ Corps & Fort _____.

3. Findings.

a. Department of Army General Order 3, dated 19 January 1981, empowers me to be a GCMCA pursuant to my position as Commander, Fort ____.

b. On or about _____ 20XX, many units and most of the headquarters personnel from __ Corps began deploying from Fort _____ to the CENTCOM area of operations in support of OPERATION IRAQI FREEDOM. The deployment will affect the general court-martial convening authority of the Commander, __ Corps, and numerous special and summary courts-martial convening authorities, and administrative and legal support personnel. Due to operational exigencies and the foreseeable disruptions caused by those exigencies, I find it in the interests of justice to take these actions.

OFFICE SYMBOL
SUBJECT: Formal Recognition of the Fort _____ General Court-Martial Jurisdiction and Transfer of Select ___ Corps & Fort _____ Cases

4. If you have any questions or concerns, please contact MAJ Chief of Justice at 123-456-7890.

Enclosure
as

IMA COMMANDER
Brigadier General, USA
Commanding

2

TAB G

DEPARTMENT OF THE ARMY
Letterhead

REPLY TO
ATTENTION OF:

OFFICE SYMBOL DATE

MEMORANDUM FOR Commander, ___ Personnel Group, Fort _____, __ 12345-6789

SUBJECT: Establishment of ___ Brigade Provisional Units

1. Based on current contingency operations and pursuant to Army Regulation 220-5, paragraph 2-5a, I approve:

a. The immediate establishment of the ___ Personnel Services Battalion (Rear) (Provisional).

b. The immediate establishment of a Headquarters and Headquarters Detachment (HHD) (Rear) (Provisional), __Personnel Group.

2. I direct the following actions:

a. The G1, ____Corps and Fort _____, provide notice to Headquarters, Department of Army (DAMH-HSO), regarding the creation of the __ Personnel Services Battalion (Rear) (Provisional), as required by AR 220-5, paragraph, 2-5a.

b. The G1, ___ Corps and Fort _____, generate and publish the necessary orders to lawfully realign the __ Personnel Services Battalion (Rear) (Provisional), HHD (Rear) (Provisional), and various separate companies.

c. The G1, ___Corps and Fort _____, and the S1, ___ Personnel Group, generate and publish the necessary orders as appropriate, to lawfully appoint the commanders of the provisional units.

d. The S1, ___ Personnel Group, generate and publish the necessary orders to lawfully attach non-deployed soldiers to the HHD (Rear) (Provisional).

3. If you have any questions or concerns, please contact MAJ Chief of Justice at 123-456-7890.

IMA CORPS COMMANDER
Lieutenant General, USA
Commanding

DEPARTMENT OF THE ARMY
Letterhead

REPLY TO
ATTENTION OF:

OFFICE SYMBOL _____20XX

MEMORANDUM FOR Commander, ___ Corps, and Fort ____, Fort _____, __ 12345-6789

SUBJECT: SJA Advice - Establishment of ___ Brigade Provisional Units

1. Purpose. To obtain your decision on a request by the Commander, _____ Brigade (Bde), to establish provisional units within that command for the purpose of command, control, and the administration of justice during the current period of contingency operations.

2. Discussion.

a. Need to Create Provisional Units.

(1) Due to current operations, units within the _____Bde will deploy outside the continental United States. Of particular concern at this time is the _____Battalion. Once deployed, commanders for deploying units and most of the assigned soldiers will no longer be located at Fort _____. The deploying units will have soldiers who do not deploy ("non-deployed"), thereby remaining at Fort _____. Absent official action to properly defer the command authority of the non-deployed soldiers, such authority remains with the deployed commander. Disciplinary actions under the Uniform Code of Military Justice ("UCMJ") and adverse administrative actions would have to be forwarded to the deployed commander for disposition.

(2) In addition to the non-deployed soldiers, the _____Bde has several separate companies who are assigned to the _____Battalion for the purpose of punitive and adverse administrative matters. Based on current operations, the separate companies have been reassigned to the _____Bde for punitive and adverse administrative purposes to allow the _____Battalion commander to focus on deployment readiness. As a result, currently there is no battalion level commander for the separate companies and the _____Bde commander is having to fill that role. Creation of a provisional battalion level unit will facilitate having the separate companies assigned to that battalion level command, thereby relieving the _____Bde commander of those duties.

b. Authority to Create Provisional Units. As a general court-martial convening authority you are authorized to establish and designate provisional units within your command pursuant to Army Regulation (AR) 220-5, paragraph 2-5a. Upon creation of a provisional command, AR 27-10, paragraph 5-2a (2), authorizes you to designate the commander of a provisional unit as a special courts-martial convening authority. You are further authorized to establish provisional units that would be subordinate to the provisional SPCMCA.

c. Powers of Provisional Commanders. Provisional unit commanders have the authority

granted under the Manual for Courts.-Martial and Army Regulation 27-10, commensurate with their unit and command designation.

d. Actions Requested. The Commander, _____Bde, requests you direct the following actions:

(1) Establishment of a Provisional Battalion. Pursuant to AR 220-5, paragraph 2-5a, immediately establish and designate a provisional battalion level unit, the _____Battalion (Rear) (Provisional).

(2) Establishment of Provisional Companies / Detachments. Pursuant to AR 220-5, paragraph 2-5a, establish and designate a Headquarters and Headquarters Detachment (Rear) (Provisional), to consolidate the administration of justice and adverse administrative actions within the _____Battalion and the _____Battalion (Rear) (Provisional). Soldiers within the _____Battalion, who remain at Fort _____ after their regularly assigned company deploys, will be attached to the HHD (Rear) (Provisional) upon deployment of their regularly assigned company level commander. Consistent with AR 27-10, paragraph 3-7a(4), commanders of provisional company level commands possess authority to administer military justice, as established by law and regulation, absent withdrawal of such authority by a superior.

e. Limitations on Provisional Units. The existence of a provisional unit may not exceed two years. Units providing personnel for the provisional unit may not receive 'replacement sources as a result of the vacancies created by attaching their soldiers to a provisional unit.

3. Recommendations. I recommend you:

a. Authorize the establishment of the _____Battalion (Rear) (Provisional) and direct its activation upon deployment of the regularly assigned _____Battalion Commander

b. Authorize the immediate establishment of an HHD (Rear) (Provisional).

c. Direct the G1, __ Corps and Fort _____, provide notice to Headquarters, Department of Army (DAMH-HSO), regarding the creation of the _____Battalion (Rear) (Provisional), as required by AR 220-5, paragraph, 2-5a.

d. Direct the G1, __ Corps and Fort _____, generate and publish the necessary orders to lawfully realign the _____Battalion (Rear) (Provisional), HSC (Rear) (Provisional), and the various separate companies.

e. Direct the G1, __ Corps and Fort _____, and the S1, _____Bde, generate and publish the necessary orders, as appropriate, to lawfully appoint the commanders of the provisional units.

OFFICE SYMBOL
SUBJECT: SJA Advice - Establishment of ___ Brigade Provisional Units

f. The S1, _____Bde, generate and publish the necessary orders to lawfully attach non-deployed soldiers to the HSC (Rear) (Provisional).

g. A memo to accomplish these actions is enclosed.

4. POC is the undersigned at 123-456-7890.

3 Enclosures
1. AR 220-5 excerpt
2. AR 27-10 excerpt
3. Establishment of Provisional Units

IMA SJA
Colonel, JA
Staff Judge Advocate

TAB H

DEPARTMENT OF THE ARMY
LETTERHEAD

OFFICE SYMBOL _____20XX

___ Corps and Fort _____, (WABCD) Fort _____, ___ 12345-6789

Following organization/unit action directed.

Action: Organize provisional units designated as __ Corps (Rear)(Provisional)(WABCD) Fort _____, ___ 12345-6789

Assigned to: _____ Corps and Fort _____

Attached to: _____ Corps (Rear)(Provisional) Fort _____

Mission: To provide command, control, and administration of justice over the ___ Corps units and personnel who do not deploy in support of Operation Iraqi Freedom and fall within the general court-martial jurisdiction of the Commander, ___ Corps and the Commander, Fort _____ . Effective date of organization: 15 July XXXX Organization terminates: TBD
Military structure strength: Not applicable
Military authorized strength: Not applicable
Civilian structure strength: Not applicable
Civilian authorized strength: Not applicable
Accounting classification: Not applicable
Authority: AR 220-5; AR 27-10, Memoranda dated _____, SUBJECT: Request for the Establishment of a ___ Corps (Rear Provisional) and SUBJECT: Notification of Command Structure at ___ Corps & Fort _____ During Operation Iraqi Freedom, which notifies FORSCOM that the Commander, Fort _____ will serve as the general court-martial convening authority for ___ Corps units and personnel who remain at Fort _____ during Operation Iraqi Freedom.
Additional Instructions: Effective the organization date, Commander, Fort _____ assumes UCMJ authority as set forth in Memoranda dated _____, SUBJECT: Notification of Command Structure at Fort _____ During Operation Iraqi Freedom, SUBJECT: Request for the Establishment of a ___ Corps (Rear) (Provisional) and Commander Designation, and SUBJECT: General Court-Martial Convening Authority and Jurisdictional Scheme for Select Army Units in Iraq in Support of Operation Iraqi Freedom XX. Effective the organization date, Commander, Fort _____ assumes peacetime award approval authority according to AR 600-8-22 for Fort _____ units and personnel who do not deploy in support of Operation Iraqi Freedom XX. The Commander, ___ Corps (Rear) (provisional) assumes peacetime award approval authority according to AR 600-8-22 for ___ Corps units outside of Fort _____ and personnel who do not deploy in support of Operation Iraqi Freedom XX.
Format: 740

BY COMMAND OF LTG _____:

Colonel, GS
ACofS. G-1/AG

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I-AEAGC-FMD-DE; I-AEAGC-FMD-I(UICIO); I-AEAGC-IO-TO; I-AEAGD-ROA;
1 - AEAGD-BP; 1 - AEAGD-SD; 1 - AEAGF-C; 1 - AEAGF-M; 1 - AEAGS-MH; 1 AEAIM-SM-EB; 2 - AEAJA-X; 1 - AEAPM-PL); 1 - Cdr, ___ Corps , 5 - Cdr, 1 st PERSCOM (1- AEUPE-EPMO-R; I-AEUPE-OPMD; 1- AEUPE-PIMD-SIDPERS; I-AEUPE-PODOPSD; 1 - AEUPE-CS-OPS), Unit 29058, APO AE 09081-9058; 19 - Cdr, V Corps (5- AETVGFM; 5 - AETV -AGM; 5 - AETV - GSF; 2 - AETV -CSH; 2 - AEUPE-PSB-HA (SIDPERS), 1 AETV - THN, 1 - AETV -THO, 1- AETV - THR, I-AETV - THQ, 1 - AETV - THT, 1 - AETV - THNA, 1 - AETV - THN-A (Rear) (Provisional)

DEPARTMENT OF THE ARMY
LETTERHEAD

OFFICE SYMBOL ____20XX

___ Corps and Fort _____, (WABCD) Fort _____, ___ 12345-6789

Following organization/unit action directed.

Action: Organize provisional units designated as __ Corps (Rear)(Provisional)(WABCD) Fort ____, ___ 12345-6789

Assigned to: ____ Corps and Fort ____

Attached to: ____ Corps (Rear)(Provisional) Fort ____

Mission: To provide command, control, and administration of justice over the units and personnel for the units set forth below.

a. __d Medical Brigade (-)
b. __Corps Artillery (-)
c. __rd Signal Brigade (-)
d. __th Corps, Support Command (-)
e. __th Military Police (MP) Brigade (-)
f. __st Armor Brigade (-)
g. __th Military Police (MP) Brigade (-)
h. __d Corps Support Group (-)
i. __th Aviation Group (-)
j. __rd Engineer Group (-)
k. __th Engineer Brigade (-)
1 __th Military Intelligence Brigade (-)
m. __rd Corps Support Group (-)

Effective date of organization: 15 July XXXX Organization terminates: TBD
Military structure strength: Not applicable
Military authorized strength: Not applicable
Civilian structure strength: Not applicable
Civilian authorized strength: Not applicable
Accounting classification: Not applicable
Authority: AR 220-5; AR 27-10, Memoranda dated _____ SUBJECT: Request for the Establishment of a ___ Corps (Rear Provisional) and SUBJECT: Notification of Command Structure at ___ Corps & Fort _____ During Operation Iraqi Freedom, which notifies FORSCOM that the Commander, Fort _____ will serve as the general court-martial convening authority for ___ Corps units and personnel who remain at Fort _____ during Operation Iraqi Freedom XX.
Additional Instructions: Additional Instructions: Commander, __Corps assumes authority for UCMJ and adverse administrative actions over the units set forth in Memorandum dated 19

December 20XX, SUBJECT: General Court-Martial Convening Authority (GCMCA) and Jurisdictional Scheme for Select Army Units in Iraq in Support of Operation Iraqi Freedom XX, upon arrival of those units or personnel in the CENTCOM area of operations. Commander, __ Corps, assumes wartime award approval authority according to AR 600-8-22 for units listed in the mission statement above that deploy in support of Operation Iraqi Freedom XX.
Format: 740

BY COMMAND OF LTG _____:

Colonel, GS
ACofS. G-1/AG

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TAB I

DEPARTMENT OF THE ARMY
Letterhead

REPLY TO
ATTENTION OF:

OFFICE SYMBOL _____20XX

MEMORANDUM FOR Commander, ___Infantry Division, Fort _____, ___ 12345-6789

SUBJECT: Transfer of Select ___ Infantry Division Court-Martial Cases

1. Purpose. To request you accept the cases of *US v. Private First Class Smith* and *US v. Specialist Jones* for disposition, as appropriate.

2. Basis for Request.

a. On ___ March 20XX, you requested that the Commander, ___ Corps & Fort _____, serve as the general court-martial convening authority (GCMCA) for the ___ Infantry Division (Rear) (Provisional) (__ID (R)(P)) and the attachment of the __ID (R)(P) to ___ Corps for the purpose of UCMJ or adverse administrative actions. You requested the attachment based on the deployment of the ___ Infantry Division in support of Operation Iraqi Freedom XX. The Commander, ___ Corps & Fort _____, approved your request on _____ 20XX.

b. On _____20XX, the Commander, ___ Corps, requested the Commander, Fort _____, serve as the GCMCA for, and accept responsibility of the Fort _____ court-martial jurisdiction. Included in that jurisdiction was the ___ ID (R)(P). The Commander, Fort _____, approved that request on _____20XX.

c. On _____20XX, court-martial charges were preferred against Private First Class _____, 123rd Cavalry Regiment (Rear) (Provisional) [(R)(P)], ___ Brigade (R)(P), __ID (M)(R)(P)] (enclosure 1) and Specialist _____ (123rd Aviation Support Battalion (R) (P), Division Support Command (R) (P), __ID (M)(R)(P)) (enclosure 2).

d. On _____20XX, the Headquarters, __ID , formally returned to Fort _____the Commander, __ID , has resumed exercising general court-martial convening authority over all ___ID Soldiers at Fort ___.

3. Recommendation. Based on the facts delineated in paragraph above, request you accept the cases of *US v. Private First Class* _____ *and US v. Specialist* _____position, as appropriate.

4. MAJ Chief of Justice, __ Corps (Rear)(Provisional), is the POC for this memorandum.

Enclosures
1. PFC Smith, DD Form 458
2. SPC Jones, DD Form 458

IMA REAR COMMANDER
Brigadier General, USA
Commanding

APPENDIX B

UNITED STATES CENTRAL COMMAND
OFFICE OF THE COMMANDER
7115 SOUTH BOUNDARY BOULEVARD
MACDILL AIR FORCE BASE, FLORIDA 33621-5101

MAR 13 2006

CCJA

GENERAL ORDER NUMBER 1B (GO-1B)*

TITLE: Prohibited Activities for U.S. Department of Defense Personnel Present within the United States Central Command (USCENTCOM) Area of Responsibility (AOR).

PURPOSE: To identify and regulate conduct that is prejudicial to the maintenance of good order and discipline of forces in the USCENTCOM AOR.

AUTHORITY: Title 10, United States Code, Section 164(c) and the Uniform Code of Military Justice (UCMJ), Title 10, United States Code, Sections 801-940.

APPLICABILITY: This General Order is applicable to all United States military personnel, and to all civilians, including contingency contractor personnel (as defined in DOD Instruction 3020.41, dated October 3, 2005), serving with, employed by, or accompanying the Armed Forces of the United States, while present in the USCENTCOM AOR *except for* personnel assigned to: Defense Attaché Offices; United States Marine Corps Security Detachments; sensitive intelligence and counterintelligence activities that are conducted under the direction and control of the Chief of Mission/Chief of Station; or other United States Government agencies and departments.

1. **STATEMENT OF MILITARY PURPOSE AND NECESSITY:** Current operations and deployments place United States Armed Forces within USCENTCOM AOR countries whose local laws and customs may prohibit or restrict various activities which are generally permissible in western societies. Adhering to restrictions upon such activities is essential to preserving U.S./host nation relations and ensuring the success of combined operations between U.S. and friendly forces. In addition, the high operational tempo combined with often-hazardous duty faced by U.S. forces in the region make it prudent to restrict certain activities in order to maintain good order and discipline and ensure optimum force readiness.

* This General Order supersedes General Order Number 1A, dated 19 December 2000 (See Paragraph 7)

CCJA

GENERAL ORDER NUMBER 1B (GO-1B)

2. **PROHIBITED ACTIVITIES:**

a. Purchase, possession, use, or sale of privately owned firearms, ammunition, explosives, or the introduction of these items into the USCENTCOM AOR.

b. Entrance into a Mosque or other site of Islamic religious significance by non-Moslems unless directed to do so by military authorities, required by military necessity, or as part of an official tour conducted with the approval of military authorities and the host nation. This provision may be made more restrictive by Commanders when the local security situation warrants.

c. Introduction, purchase, possession, sale, transfer, manufacture or consumption of any alcoholic beverage within the countries of Kuwait, Saudi Arabia, Afghanistan, Pakistan, and Iraq. In all other countries of the USCENTCOM AOR, U.S. military and civilian personnel will conform to their respective component restrictions on alcohol, and maintain appropriate deportment by respecting host-nation laws and customs. In order to maintain good order and discipline and ensure optimum readiness, in all locations where alcohol is not prohibited by this General Order, Commanders and unit chiefs are directed to exercise discretion and good judgment in promulgating and enforcing appropriate guidelines and restrictions. Guidelines should recognize that in some countries although alcohol consumption may be legal within certain facilities such as hotels, personnel, upon any consumption, may be presumed to be under the influence upon leaving the facility or upon operating a motor vehicle (e.g., Qatar, UAE),. Alcohol consumption guidelines and restrictions should be regularly reviewed to ensure that they are commensurate with current or foreseen operations, threats and host country actions.

d. Introduction, purchase, possession, use, sale, transfer, manufacture, or consumption of any controlled substances. Prescription drugs must be accompanied by the original prescription label which identifies the prescribing medical facility or authority.

PROHIBITED ACTIVITIES (Continued)

e. Introduction, purchase, possession, transfer, sale, creation, or display of any pornographic or sexually explicit photograph, video tapes or CDs, movie, drawing, book, magazine, or similar representation. The prohibitions contained in this subparagraph shall not apply to AFRTS broadcasts and commercial videotapes distributed and/or displayed through AAFES or MWR outlets located within the USCENTCOM AOR. This prohibition also shall not apply within the areas exclusively under the jurisdiction of the United States, such as aboard United States Government vessels and aircraft, which shall remain subject to service rules.

f. Photographing or filming detainees or human casualties, as well as the possession, distribution, transfer, or posting, whether electronically or physically, of visual images depicting detainees or human casualties, except as required for official duties. "Human Casualties" are defined as dead, wounded or injured human beings, to include separated body parts, organs and biological material, resulting from either combat or non-combat activities. This prohibition does not apply to the possession of such visual images acquired from open media sources (e.g., magazines and newspapers), nor is the distribution of these unaltered images, subject to copyright markings or notices. Additionally, possession and distribution of open media source images is not prohibited if required for official duties. Finally, with their express consent, the photographing and possession of images of wounded personnel while within medical facilities and during periods of recovery is also not prohibited.

g. Gambling of any kind, including sports pools, lotteries and raffles, unless permitted by host-nation laws and applicable service component regulations.

h. Removing, possessing, selling, defacing or destroying archeological artifacts or national treasures. (See also 2.m.(3) below).

i. Selling, bartering or exchanging any currency other than at the official host-nation exchange rate.

PROHIBITED ACTIVITIES (Continued)

j. Adopting as pets or mascots, caring for, or feeding any type of domestic or wild animal.

k. Proselytizing of any religion, faith or practice.

l. Taking or retaining of public or private property of an enemy or former enemy, except as granted by applicable USCENTCOM waivers and as noted below:

(1) Individual War Souvenirs may only be acquired if specifically authorized by USCENTCOM. Absent such express authorization, no weapon, munitions, or military article of equipment obtained or acquired by any means other than official issue may be retained for personal use or shipped out of the USCENTCOM AOR for personal retention.

(2) Private or public property may be seized during exercises or operations only on order of the Commander, when based on military necessity.

(a) Private property will be collected, processed, secured and stored for later return to the lawful owner. The wrongful taking of private property, even temporarily, is a violation of Article 121, Uniform Code of Military Justice.

(b) Public property lawfully seized by U.S. Armed Forces is the property of the United States. The wrongful retention of such property is a violation of Article 108, Uniform Code of Military Justice. Unit retention of historical artifacts must be specifically approved by USCENTCOM.

(3) This prohibition on acquiring the property of an enemy or former enemy applies to enemy war materiel even if such materiel could be lawfully purchased through commercial or private means. Such items can only be acquired as Individual War Souvenirs and then only to the extent specifically authorized. This prohibition does not preclude the lawful acquisition of other items as tourist souvenirs if such items can be legally imported into the United States.

CCJA

GENERAL ORDER NUMBER 1B (GO-1B)

3. **PUNITIVE ORDER:** Paragraph 2 of this General Order is punitive. Persons subject to the UCMJ may be punished thereunder. Civilians serving with, employed by, or accompanying the Armed Forces of the United States in the USCENTCOM AOR may face criminal prosecution or adverse administrative action for violation of this General Order. In the case of contingency contractors, DOD Instruction 3020.41, dated October 3, 2005, provides guidance on administrative actions.

4. **INDIVIDUAL DUTY:** All persons to whom this General Order is applicable are charged with the individual responsibility to know and understand the prohibitions contained herein. All such persons are further charged with the responsibility to become familiar with and respect the laws, regulations, and customs of their host nation insofar as they do not interfere with the execution of their official duties. Acts of disrespect or violations of host nation laws, regulations and customs may be punished under applicable criminal statutes and administrative regulations.

5. **UNIT COMMANDER RESPONSIBILITY:** Commanders, Security Assistance Office Chiefs, and military and civilian supervisors are charged with ensuring that ALL PERSONNEL are briefed on the prohibitions and requirements of this General Order. Commanders may further restrict their forces as they deem necessary.

6. **CONFISCATION OF OFFENDING ARTICLES:** Items determined to violate this General Order may be considered contraband by command or law enforcement authorities if found in the USCENTCOM AOR. Before destruction of contraband, Commanders or law enforcement personnel will coordinate with their servicing judge advocate. Military customs and other pre-clearance officials will enforce this General Order in their inspections of personnel prior to departure from the AOR and return to CONUS.

7. **EFFECTIVE DATE:** This General Order is effective immediately. GO-1A, dated 19 Dec 00, as amended on 30 Nov 01 and 9 Aug 03, and all waivers granted pursuant to GO-1A, are hereby rescinded and superseded. USCENTCOM Policy Memo

CCJA

GENERAL ORDER NUMBER 1B (GO-1B)

Prohibiting Photographing or Filming Detainees or Human Casualties or Possessing, Distributing, or Posting Visual Images Depicting Human Casualties, dated 21 Oct 2005, is hereby rescinded and superseded.

8. **EXPIRATION:** This General Order will expire when rescinded by the Commander, USCENTCOM, or higher authority.

9. **WAIVER AUTHORITY:** Authority to waive or modify the prohibitions of Paragraph 2 of this General Order is hereby delegated to the Deputy Commander, USCENTCOM and to the Chief of Staff, USCENTCOM. No further delegation is authorized.

JOHN P. ABIZAID
General, USA

DISTRIBUTION:
A

APPENDIX C -- DESERT SHIELD GENERAL ORDER NO. 1

OPER/DESERT SHIELD/MSGID/ORDER/USCINCCENT

SUBJECT: DESERT SHIELD GENERAL ORDER

ACTIVITIES FOR U.S. PERSONNEL SERVING IN CENTRAL COMMAND

1. This message transmits USCINCENT Desert Shield General Order No. 1. It is applicable to all U.S. military personnel and to us persons serving with or accompanying the Armed Forces in the USCENTCOM AOR deployed or acting in support of Operation Desert Shield. Commanders are directed to readdress this order to their units and ensure widest dissemination to the lowest levels of command.

2. Statement of military purpose and necessity. Operation Desert Shield places U.S. Armed Forces into USCENTCOM AOR countries where Islamic Law and Arabic customs prohibit or restrict certain activities that are generally permissible in Western societies. Restrictions upon these activities are essential to preserving U.S. - host nation relations and the combined operations of U.S. and friendly forces. Commanders and supervisors are expected to exercise discretion and good judgment in enforcing this General Order.

3. THE FOLLOWING ACTIVITIES ARE PROHIBITED!

a. Taking of war trophies.

b. Purchase, possession, use or sale of privately owned firearms, ammunition, explosives, or the introduction of these items into the USCENTCOM AOR.

c. Entrance into a mosque or other site of Islamic religious significance by non-Moslems unless directed to do so by military authorities or by military necessity.

d. Introduction, possession, use, sale, transfer, manufacture or consumption of any alcoholic beverage.

e. Introduction, possession, transfer, sale, creation or display of any pornographic photograph, videotape, movie, drawing, book or magazine or similar representations. For purposes of this order, “pornographic” means any medium that displays human genitalia, uncovered women’s breasts, or any human sexual act. It is intended to include not only “obscene items,” but items of “art” which display human genitalia, uncovered women’s breast or any human sexual act.

f. The introduction, possession, transfer, sale, creation or display of any sexually explicit photograph, videotape, movie, drawing, book or magazine. For purposes of this order, “sexually explicit” means any medium displaying the human anatomy in any unclothed or semi-clothed manner and which displays portions of the human torso (i.e., the area below the neck, above the knees and inside the shoulder). By way of example, but not limitation, are body building magazines, swim-suit editions of periodicals, lingerie or underwear advertisement, and catalogues, as well as visual mediums which infer but do not directly show human genitalia, women’s breasts, or human sexual acts.

g. Gambling of any kind, including sports pools, lotteries and raffles.

h. Removing, possessing, selling, defacing, destroying archeological artifacts, or national treasures.

i. Selling, bartering or exchanging any currency other than at the official host-nation exchange rate.

4. This order is punitive. Persons subject to the Uniform Code of Military Justice may be punished under Art. 92, UCMJ for violating a lawful general order. Civilians accompanying the armed forces of the U.S. may face adverse administrative action.

5. All persons subject to this order are charged with the individual duty to become familiar with and respect the laws, regulations, and customs of their host nation insofar as they do not interfere with the execution of their official duties. Individual acts of insensitivity or flagrant violations of host nation laws, regulations and customs may be punished as a dereliction of duty under Art. 92, UCMJ. Civilians accompanying the Armed Forces may face adverse administrative action.

6. Unit commanders and supervisors are charged to ensure all, repeat all, personnel are briefed on the prohibition of these activities.

7. Items that violate this General Order may be considered contraband and may be confiscated. Before destruction of contraband, commanders or law enforcement personnel should coordinate with their servicing Staff Judge Advocate.

8. This General Order will expire upon the completion of Operation Desert Shield unless rescinded, waived or modified.

9. Because tolerance varies for some of these activities across the AOR, authority to waive or modify the prohibitions of this order relative to alcoholic beverages, sexually explicit materials and gambling is delegated to the designated commanding officers (DCO) for the respective host nation AOR countries. (See Appendix A to CENTCOM Reg. 27-2; i.e., Saudi Arabia, Egypt and Oman rests with COMUSCENTAF; Bahrain and UAE rests with COMUSNAVCENT). Staff Judge Advocates for the designated commanding officers are to coordinate all waivers with the USCENTCOM Staff Judge Advocate.

JTF 190 (HAITI) GENERAL ORDER NO.1

1. TITLE: Prohibited activities of Joint Task Force 190 (JTF 190) personnel serving in the joint operations area (JOA).

2. PURPOSE: To prohibit conduct that is to the prejudice of good order and discipline of JTF 190, is of a nature likely to bring discredit upon JTF 190, is harmful to the health and welfare of members of JTF 190, or is essential to preserve U.S. and host nation relations.

3. APPLICABILITY: This general order is applicable to all U.S. military personnel assigned or attached to JTF 190, and all U.S. civilian personnel serving with, employed by, or accompanying forces assigned or attached to JTF 190.

4. AUTHORITY: The Uniform Code of Military Justice (UCMJ), Title 10, United States Code, section 801 *et. Seq*.

5. PROHIBITED ACTIVITIES:

a. Purchase, possession, use, or sale of privately-owned firearms, ammunition, or explosives, or the introduction of these items into the JOA.

b. Entrance into Haitian churches, temples, or structures conducting religious worship, or to other sites of religious significance, unless directed by a superior authority or required by military necessity.

c. Introduction, purchase, possession, use, sale, transfer, manufacture, or consumption of any alcoholic beverage without the approval of a commander in the grade of 06 or above.

d. Introduction, purchase, possession, use, sale, transfer, manufacture, or consumption of any controlled substance as defined by Article 112a, UCMJ, and Schedules I through V of the Controlled Substance Act of 1970, 21 USC Section 812.

e. Gambling of any kind, including sports pools, lotteries, and raffles.

f. Removing, possessing, selling, defacing, or destroying archeological artifacts or national treasures.

g. Selling, bartering, or exchanging currency other than at the official exchange rate, if any.

h. Taking or retention of individual souvenirs or trophies

(1) Explanation of prohibition:

(a) Private property may be seized during combat operations only on order of a commander based on military necessity. The wrongful taking of private property, even temporarily, violates Article 121, UCMJ.

(b) Public property captured by U.S. personnel is the property of the U.S.. Wrongful retention of such property by an individual violates Article 108, UCMJ.

(c) No weapon, munition, or military article of equipment captured or acquired by any means other than official issue may be retained for personal use or shipped out of the JOA for personal retention or control.

i. Selling, reselling, loaning, or otherwise transferring rationed or controlled items or relief supplies outside official relief channels.

j. Throwing at civilians any food items, including candy or Meals Ready to Eat (MREs), or any beverage, including water, from moving vehicles.

k. Do not engage in any sexual conduct or contact with any member of the Haitian populace.

l. Adopting as pets or mascots, caring for, or feeding any type of domestic animal (e.g., dogs or cats) or any type of wild animal. These animals may be infected with a variety of diseases that can be transmitted from animals to humans, and can harbor organisms capable of transmitting diseases to humans (including rabies) that have a high potential for adversely affecting the health of the command.

m. Eating food or drinking beverages grown or produced, prepared or served by local Haitian vendors, restaurants, or facilities. Only food and beverages approved by the Commander, JTF 190, or his designee, may be consumed by JTF 190 personnel.

6. FURTHER RESTRICTIONS: Providing food items directly to or feeding civilian refugees. Odd items may be donated to Humanitarian Relief Organizations (HROs) engaged in humanitarian relief efforts after appropriate medical inspection and release approval by an 05 commander. This provision does not prohibit the distribution of small items, such as pieces of candy, to civilian refugees when such distribution is approved by the individual's supervising NCO or officer and is under conditions that are safe both for the recipients and the military personnel involved. (See paragraph 5j above).

7. PUNITIVE ORDER: Paragraph 5 of this General Order is punitive in nature. Persons subject to the UCMJ may be court-martialed or receive adverse administrative action, or both, for violations of this General Order. Likewise, civilians serving with, employed by, or accompanying JTF 190 may face criminal prosecution or adverse administrative action for violation of this General Order.

8. INDIVIDUAL DUTY: All persons subject to this General Order are charged with the duty to become familiar with this General Order and local laws and customs. The JTF 190 mission places U.S. Armed Forces and civilian personnel into a country whose laws and customs prohibit or restrict certain activities which are generally permissible in the United States. All personnel shall avoid action, whether or not specifically prohibited by this General Order, which might result in or reasonably be expected to create the appearance of a violation of this General Order or local law or customs.

9. UNIT COMMANDER RESPONSIBILITIES: Commanders and civilian supervisors are charged with ensuring that all personnel are briefed on the prohibitions and requirements of this General Order. Commanders and supervisors are expected to exercise good judgment in reinforcing this General Order.

10. CONFISCATION OF CONTRABAND: Items which are determined to violate this General Order and or constitute contraband may be confiscated. Commanders, supervisors, military customs inspectors, and other officials will enforce this General Order in their inspections of personnel and equipment prior to and during deployment to the JOA and upon deployment from the JOA. Before destruction of contraband, commanders or law enforcement personnel will coordinate with their Staff Judge Advocate.

11. EFFECTIVE DATE: This General Order is effective upon the date of the assumption of command of Joint Task Force 190 and the MNE by the undersigned.

12. EXPIRATION: This General Order will expire when rescinded by the Commander, JTF 190, or higher authority.

13. WAIVER REQUESTS: Requests to waive prohibitions of this General Order must be coordinated with the JTF 190 Staff Judge Advocate.

ALLIED FORCE/ALLIED HARBOR (Balkans) General Order No. 1

General Order 1 in Support of Allied Force and Humanitarian Efforts in the Balkans

(Taken from USCINCEUR VAIHINGEN GE msg 122330 APR 99)

This is a lawful general order approved, issued, and published by USCINCEUR

1. Title: Prohibited Activities For U.S. Personnel Deployed In The Region Of The Former Yugoslavia In Support Of Allied Force And Humanitarian Efforts In The Balkans.

2. Authority: Title 10 United States Code section 164(c)(1)(f) and the Uniform Code of Military Justice (UCMJ)(Title 10 United States Code sections 801-940).

3. Applicability: This general order is applicable to all U.S. military and civilian personnel serving with or accompanying the armed forces of the United States deployed in support of NATO Operation ALLIED FORCE or NATO Humanitarian Operation ALLIED HARBOR, deployed to the land, territorial seas and airspace of Albania and the nations which formerly comprised the nation of Yugoslavia, to include Croatia, Bosnia-Herzegovina, Macedonia, Serbia and Montenegro. This general order does not cover individuals assigned or attached to SFOR. With regard to military members this general order is punitive. With regard to civilian personnel it may serve as the basis for adverse administrative action in case of violation of its provisions.

4. Statement of Military Purpose and Necessity: Restrictions upon certain activities are essential to maintain the security, health and welfare of U.S. forces; to prevent conduct prejudicial to good order and discipline or of a nature to bring discredit upon the U.S. forces; and to improve U.S. relations within the region. These restrictions are essential to preserve U.S. relations with host nations and other friendly forces. Furthermore, current operations place U.S. armed forces in countries where local law and customs prohibit or restrict certain activities. This general order to ensure good order and discipline are maintained and host nation laws are respected to the maximum extent consistent with mission accomplishment.

5. Prohibited Activities:

5a. Taking, possessing, or shipping captured, found or purchased weapons without legal authority or for personal use. "Without legal authority" means an act or activity undertaken by U.S. personnel that is not done at the direction of a commander or as a result of military necessity during the performance of military duties.

5b. Introduction, possession, use, sale, transfer, manufacture, or consumption of any alcoholic beverage or controlled substance. Individuals are authorized to consume alcoholic beverages, e.g., toasts, whenever refusal to do so would offend most nation military or civilian officials,

5c. Possessing, touching, using, or knowingly approaching without legal authority any unexploded munitions or ordnance, of any kind or description whatsoever.

5d. Purchase, possession, use, sale, or introduction of privately owned firearms, ammunition, and explosives.

5e. Gambling of any kind, including betting on sports, lotteries and raffles.

5f. Selling, bartering, or exchanging any currency other than at the official host nation exchange rate.

5g. Entrance into a religious shrine or mosque unless approved by or directed by military authorities or compelled by military necessity.

5h. Removing, possessing, selling, transferring, defacing, or destroying archeological artifacts or national treasures.

5i. Participating in any form of political activity of the host nation, unless directed to do so as part of the mission.

5j. Taking or retaining public or private property as souvenirs of the operation. Legitimately purchased souvenirs, other than weapons, munitions, or items prohibited by customs regulations are authorized.

6. Punitive Order: To reiterate, this order is punitive. Persons subject to the Uniform Code of Military Justice who violate this order may be punished under Article 92, UCMJ, for violating a lawful general order. Civilians accompanying the U.S. armed forces may face adverse administrative actions for violations.

7. Individual Duty: Persons subject to this general order are charged with the individual duty to become familiar with and to respect, the laws, regulations, and customs of the host nation insofar as they do not interfere with the execution of their official duties. Individual acts of disrespect or flagrant violations of host nation laws, regulations, and customs may be punished as a violation of the UCMJ for military members and may lead to adverse administrative action against civilians who violate its provisions. Commanders should remind servicemembers of their responsibilities under the code of conduct and the provisions of the international law of armed conflict.

8. Unit Commander Responsibility: Unit commanders and supervisors are to ensure that all personnel are briefed on the contents of this general order.

9. Contraband: Items determined to violate this general order may be considered contraband and may be confiscated. Before destruction of contraband, commanders, or law enforcement personnel should coordinate with their servicing staff judge advocate.

10. Effective Date: This general order is effective immediately. An amnesty period of 72 hours is granted, from the effective date of this general order, for personnel to surrender or dispose of items that violate this general order. Individuals or commanders may arrange for safekeeping of personal firearms with their unit military law enforcement activity. There is no amnesty period for alcoholic beverages.

11. Expiration: This general order will expire upon the completion of operations unless it is rescinded, waived or modified.

12. Waiver Authority: Mission requirements may permit and host nation tolerance may allow for the consumption of alcohol in certain portions of the area of operations. Therefore, authority to waive or modify the prohibitions of this order relative only to alcoholic beverages is delegated to Joint Task Force Commanders. When waiver or modification is granted, commanders who grant such waivers will notify DCINC USEUCOM immediately. Requests for waiver of other provisions beyond their authority will be directed to DCINC USEUCOM.

13. Staff judge advocates for the waiver authorities will provide the USEUCOM judge advocate with copies of all waivers granted to this order.

14. When commanders inform subordinates of the provisions of this general order, they will also inform them that I am personally very proud of their courage, professionalism and dedication to duty under very difficult circumstances. Make no mistake about it, the tasks we are undertaking are difficult and will call for personal sacrifice. Nevertheless, I know that when our servicemembers are called upon to make personal sacrifices as representatives of their country they always perform selflessly and brilliantly. I cannot over-emphasize the trust, faith and confidence I have in them. They will get the mission done with skill and expertise out of a sense of duty and patriotism. What they are doing they are doing for America. I know that when participants look back on their role in this worthy endeavor, whether it he fighting for their country or helping to feed and care for the dispossessed in this strife-torn part of the world, that it will be with pride. They will know that their sacrifice made a difference in the lives of those in need.

HEADQUARTERS
MULTI-NATIONAL CORPS – IRAQ
BAGHDAD, IRAQ
APO AE 09342

REPLY TO
ATTENTION:

FICI-CG

16 DEC 2006

GENERAL ORDER NUMBER 1 (GO-1)

TITLE: Prohibited Activities for U.S Department of Defense Personnel Assigned to the Multi-National Corps – Iraq (MNC-I) or Present Within the MNC-I Area of Responsibility (AOR).

PURPOSE: To identify conduct that is prejudicial to the maintenance of good order and discipline of all forces assigned to the MNC-I or present within the MNC-I AOR.

AUTHORITY: United States Central Command (USCENTCOM), General Order 1B (GO-1B), dated 13 March 2006.

APPLICABILITY: This General Order is applicable to all United States military personnel, and to civilians serving with, employed by, or accompanying the Armed Forces of the United States, while assigned to the MNC-I or while present in the MNC-I AOR, except for personnel expressly excluded under USCENTCOM GO-1B. This General Order also applies to all United States military personnel, and to civilians serving with, employed by, or accompanying the Armed Forces of the United States, while under the operational control of the Commander, MNC-I and present for duty in Kuwait or Iraq. Such duty includes but is not limited to pre-deployment site surveys, leader's recons, and advanced party deployments. This General Order is not applicable to any personnel located outside the USCENTCOM AOR.

1. STATEMENT OF MILITARY PURPOSE AND NECESSITY: Current operations and deployments place United States Armed Forces into areas where local laws and customs prohibit or restrict certain activities that are generally permissible in western societies. Restrictions upon these activities are essential to fostering US/host nation relations and combined operations of U.S. and friendly forces. In addition, the high operational tempo combined with the hazardous duty faced by MNC-I Soldiers and other U.S. forces in the MNC-I AOR makes it necessary to restrict certain activities in order to maintain good order and discipline and ensure optimal readiness.

2. PROHIBITED ACTIVITIES: In accordance with and in addition to USCENTCOM GO–1B, the following activities are prohibited:

a. Purchase, possession, use, or sale of privately owned firearms, ammunition, explosives, or the introduction of these items into the USCENTCOM AOR.

b. Entrance into a Mosque or other site of Islamic religious significance by non-Moslems unless directed to do so by military authorities, required by military necessity, or as part of an official tour conducted with the approval of military authorities and the host nation. This provision may be made more restrictive by Commanders when the local security situation warrants.

c. Introduction, purchase, possession, sale, transfer, manufacture or consumption of any alcoholic beverage within the MNC-I AOR. This restriction also prohibits the introduction, possession, sale, transfer, manufacture or consumption of any alcoholic beverage by military personnel or civilians serving with, employed by, or accompanying the Armed Forces of the United States, while assigned to or under

the operational control of the Commander, MNC-I and present for duty in Kuwait or Iraq. This prohibition does not apply to personal hygiene items (like mouthwash) commercially available for sale by AAFES in the MNC-I AOR, nor does it apply to the use of alcohol for authorized religious ceremonies.

d. Introduction, purchase, possession, use, sale, transfer, manufacture, or consumption of any controlled substances, to include unprescribed prescription medicine, or drug paraphernalia. Prescription medicine must be accompanied by the original prescription label which identifies the prescribing medical facility or authority. Prescription medicine includes substances for which U.S. state or federal law requires a valid prescription for dispensing.

e. Introduction, purchase, possession, transfer, sale, creation, or display of any pornographic or sexually explicit photograph, videotape , CD/DVD, movie, drawing, book, magazine, or similar representation. The prohibitions contained in this subparagraph shall not apply to AFRTS broadcasts or commercial magazines, CD/DVD or videotapes distributed and/or displayed through AAFES or MWR outlets located within the MNC-I AOR. This prohibition also shall not apply within the areas exclusively under the jurisdiction of the United States, such as aboard United States Government vessels and aircraft, which shall remain subject to service rules.

f. Photographing or filming detainees or human casualties, as well as the possession, distribution, transfer, or posting, whether electronically or physically, of visual images depicting detainees or human casualties, except as required for official duties, such as unit casualty reporting and/or investigations. "Human Casualties" are defined as dead, wounded or injured human beings, to include separated body parts, organs and biological material, resulting from either combat or non-combat activities. This prohibition does not apply to the possession of such visual images acquired from open media sources (e.g., magazines and newspapers), nor is the distribution of these unaltered images, subject to copyright markings or notices. Additionally, possession and distribution of open media source images is not prohibited if required for official duties. Finally, with their express consent, the photographing and possession of images of wounded personnel while within medical facilities and during periods of recovery is also not prohibited.

g. Gambling of any kind, including sports pools, lotteries and raffles, unless permitted by host-nation laws and applicable service component regulations.

h. Removing, possessing, selling, defacing or destroying archeological artifacts or national treasures.

i. Selling, bartering or exchanging any currency other than at the official host-nation exchange rate.

j. Adopting as pets or mascots, caring for, or feeding any type of domestic or wild animal.

k. Proselytizing of any religion, faith or practice.

l. Taking or retaining of public or private property of an enemy or former enemy, except as granted by applicable USCENTCOM waivers and as noted below:

(1) Individual War Souvenirs may only be acquired if specifically authorized by USCENTCOM. Absent such express authorization, no weapon, munitions, or military article of equipment obtained or acquired by any means other than official issue may be retained for personal use or shipped out of the MNC-I AOR for personal retention.

(2) Private or public property may be seized during exercises or operations only on order of the Commander, MNC-I, or his designated representative, when based on military necessity and in accordance with the rules of engagement.

(a) Private property will be collected, processed, secured and stored for later return to the lawful owner. The wrongful taking of private property, even temporarily, is a violation of Article 121, Uniform Code of Military Justice.

(b) Public property lawfully seized by U.S. Armed Forces is the property of the United States. The wrongful retention of such property is a violation of Article 108, Uniform Code of Military Justice. Unit retention of historical artifacts must be specifically approved by USCENTCOM.

(3) This prohibition on acquiring the property of an enemy or former enemy applies to enemy war materiel even if such materiel could be lawfully purchased through commercial or private means. Such items can only be acquired as Individual War Souvenirs and then only to the extent specifically authorized. This prohibition does not preclude the lawful acquisition of other items as tourist souvenirs if such items can be legally imported into the United States.

(4) This prohibition does not preclude the lawful acquisition of souvenirs that can be legally imported into the United States. The following items have been approved as authorized souvenirs: helmets and head coverings; bayonets; uniforms and uniform items such as insignia and patches; canteens, compasses, rucksacks, pouches, and load bearing equipment; flags; military training manuals, books, and pamphlets; posters, placards, and photographs; or other items that clearly pose no safety or health risk, and are not otherwise prohibited by law or regulation. All acquired items are subject to the war souvenir retention process and must be approved by the appropriate reviewing officer. IAW MNC-I Frago 076 (09 Jan 05), each company commander or person in the rank of LTC/O5 or above is designated as a reviewing officer.

m. Taking or retaining any found or seized currency for personal use. Such currency will be identified, collected, recorded, secured, and stored until it can be delivered to the appropriate authority.

n. Possession, operation, purchase, use, sale or introduction into the MNC-I AOR of any motor vehicle not owned or leased by the U.S. government or any company or agency engaged in contracting with the U.S. government.

o. Sexual contact with foreign and local nationals who are not members of coalition forces.

p. Cohabitation of males and females except for lawfully married spouses. Married spouses will be allowed to cohabitate provided adequate accommodations are available.

3. PUNITIVE ORDER: Paragraph 2 of this General Order is punitive. Persons subject to the UCMJ may be punished thereunder. Civilians serving with, employed by, or accompanying the Armed Forces of the United States in the USCENTCOM AOR may face criminal prosecution or adverse administrative action for violation of this General Order. In the case of contingency contractors, DOD Instruction 3020.41, dated October 3, 2005, provides guidance on administrative actions.

4. INDIVIDUAL DUTY: All persons to whom this General Order is applicable are charged with the individual responsibility to know and understand the prohibitions contained herein. All such persons are further charged with the responsibility to become familiar with and respect the laws, regulations, and customs of their host nation insofar as they do not interfere with the execution of their official

duties. Acts of disrespect or violations of host nation laws, regulations and customs may be punished under applicable criminal statutes and administrative regulations.

5. UNIT COMMANDER RESPONSIBILITY: Commanders, Security Assistance Office Chiefs, and military and civilian supervisors are charged with ensuring that ALL PERSONNEL are briefed on the prohibitions and requirements of this General Order. Commanders may further restrict their forces as they deem necessary.

6. CONFISCATION OF OFFENDING ARTICLES: Items determined to violate this General Order may be considered contraband by command or law enforcement authorities if found in the USCENTCOM AOR. Before destruction of contraband, Commanders or law enforcement personnel will coordinate with their servicing judge advocate. Military customs and other pre-clearance officials will enforce this General Order in their inspections of personnel prior to departure from the AOR and return to CONUS.

7. EFFECTIVE DATE: This General Order is effective immediately. GO-1, dated 15 October 2005, and all waivers granted pursuant to GO-1, are hereby rescinded and superseded.

RAYMOND T. ODIERNO
Lieutenant General, USA
Commanding

DISTRIBUTION: A

APPENDIX D – DA MSG RE: MEJA

TMEB: AAAAMI TOR: 3/13/2005 7:07:52 PM

Prec: P
DTG: 131741Z May 05

From: DOD, ARMY, ORGANIZATIONS, ARMY OPERATIONS CENTER, AOC CAT OPSMATCH G3 DAMO AOC(MC)
Subj: ALARACT FOREIGN NATIONALS EMPLOYED BY OR ACCOMPANYING ARMY FORCES OCONUS MAY BE SUBJECT TO U.S. CRIMINAL JURISDICTION

UNCLASSIFIED//FOR OFFICIAL USE ONLY.
RELEASE ON BEHALF OF THE JUDGE ADVOCATE GENERAL OF THE ARMY

REF/A/DOC/DODI 5525.11/03MAR05
AMPN/REF A IS A DOD INSTRUCTION CONCERNING CRIMINAL JURISDICTION OVER CIVILIANS EMPLOYED BY OR ACCOMPANYING THE ARMED FORCES OUTSIDE THE UNITED STATES, CERTAIN SERVICE MEMBERS AND FORMER SERVICE MEMBERS.
REF/B/DOC/18 USC 3261-3267
AMPN/REF B IS CHAPTER 212, SECTIONS 3261-3267 OF TITLE 18, U.S. CODE, THE MILITARY EXTRATERRITORIAL JURISDICTION ACT (MEJA), AS AMENDED.

NARR/REF A IMPLEMENTS POLICIES AND PROCEDURES AND ASSIGNS RESPONSIBILITIES UNDER REF B AND IS APPLICABLE TO ALL COMMANDS. IMMEDIATE COMPLIANCE IS REQUIRED. REFS A AND B ADDRESS CRIMINAL JURISDICTION AS APPLIED TO CERTAIN CIVILIANS EMPLOYED BY DOD, EMPLOYED BY OTHER FEDERAL AGENCIES OR ANY PROVISIONAL AUTHORITY TO THE EXTENT THEIR EMPLOYMENT IS SUPPORTING THE MISSION OF DOD, OR ACCOMPANYING U.S. ARMED FORCES OUTSIDE THE U.S., CERTAIN MEMBERS OF THE ARMED FORCES, AND CERTAIN FORMER MEMBERS OF THE ARMED FORCES.

REMARKS/1. PENDING PROMULGATION OF ANY DA IMPLEMENTING REGULATIONS AND ANY COMBATANT COMMAND INSTRUCTIONS, THIS MESSAGE:

A. PROVIDES INTERIM GUIDANCE TO ALL ARMY ACTIVITIES ON THE IMMEDIATE NOTIFICATION REQUIREMENTS OF REF A.

B. DIRECTS THAT ARMY STAFF JUDGE ADVOCATES (SJA) AND/OR LEGAL ADVISORS OUTSIDE THE U.S. PROVIDE ELECTRONIC NOTICE THRU TECHNICAL CHANNELS TO THE JUDGE ADVOCATE GENERAL (TJAG) OF THE ARMY OF ANY PENDING CASE UPON INITIAL COORDINATION WITH HIGHER HEADQUARTERS, THE APPLICABLE COMBATANT COMMAND, DOD GENERAL COUNSEL, OR DOJ FOR POTENTIAL CRIMINAL PROSECUTION IAW REF B. SUCH NOTICE IS FOR INFORMATIONAL PURPOSES ONLY AND DOES NOT SUPPLANT OTHER NOTICE AND REPORTING REQUIREMENTS ESTABLISHED BY REF A.

2. NOTICE REQUIREMENTS TO FOREIGN NATIONALS:

A. WITHIN 60 DAYS OF THE ISSUANCE OF THIS MESSAGE, ALL ARMY ACTIVITIES SHALL NOTIFY PERSONS CURRENTLY EMPLOYED BY OR ACCOMPANYING ARMY FORCES OUTSIDE THE U.S. WHO ARE NOT NATIONALS OF THE U.S. (EXCEPT THOSE THAT ARE NATIONALS OR ORDINARILY RESIDENT IN THE HOST NATION) THAT THEY ARE POTENTIALLY SUBJECT TO THE CRIMINAL JURISDICTION OF THE U.S.

B. WITHIN 60 DAYS OF THE ISSUANCE OF THIS MESSAGE, ALL ARMY CONTRACTING ACTIVITIES SHALL NOTIFY CONTRACTORS AND CONTRACTOR

EMPLOYEES EMPLOYED BY OR ACCOMPANYING ARMY FORCES OUTSIDE THE U.S. WHO ARE NOT NATIONALS OF THE U.S. (EXCEPT THOSE THAT ARE NATIONALS OR ORDINARILY RESIDENT IN THE HOST NATION) THAT THEY ARE POTENTIALLY SUBJECT TO THE CRIMINAL JURISDICTION OF THE U.S.

C. NOTICE TO FOREIGN NATIONALS IS MANDATED BY CONGRESS IN REF B AND DOD IN REF A, BUT FAILURE TO PROVIDE NOTICE IAW THIS MESSAGE SHALL NOT DEFEAT THE JURISDICTION OF A U.S. COURT OR PROVIDE A DEFENSE IN ANY JUDICIAL PROCEEDING ARISING UNDER REF B.

5. POC FOR THIS MESSAGE IS LTC EDWARD K. LAWSON, INTERNATIONAL LAW ATTORNEY, HQDA, OFFICE OF THE JUDGE ADVOCATE GENERAL, INTERNATIONAL AND OPERATIONAL LAW DIVISION, AT COMM (703) 588-0132, DSN (312) 425-0132, OR VIA E-MAIL AT EDWARD.LAWSON@HQDA.ARMY.MIL.

4. EXPIRATION DATE CANNOT BE DETERMINED

TO Addressees

(OR1) TAYZ3, PTSC, ALARACTRA

(DN1) DOD, ARMY, ORGANIZATIONS, DA PENTAGON TELECOMMUNICATIONS(UC), ALA AUTHORITY(UC)

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Originator-DN - DOD, ARMY, ORGANIZATIONS, ARMY OPERATIONS CENTER, AOC CAT C

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Signers-DN - DoD, ARMY, Organizations, ARMY OPERATIONS CENTER, AOC CAT OPSWATC

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Classification: UNCLASSIFIED

INFORMATION PAPER

DAJA-CL
24 May 2005

SUBJECT: Military Extraterritorial Jurisdiction Act (MEJA).

1. **Purpose**. To provide background information on the Military Extraterritorial Jurisdiction Act (MEJA).

2. **Discussion**.

a. 18 U.S.C. §§ 3261 et seq. (MEJA) provides for Federal jurisdiction over crimes committed outside the United States. The jurisdiction only applies to offenses that, if committed within the special maritime and territorial jurisdiction of the United States, are punishable by imprisonment for more than 1 year. This jurisdiction covers members of and persons employed by or accompanying the Armed Forces.

3. **Discussion**.

a. 18 U.S.C. §§ 3261 et seq. (MEJA) provides for Federal jurisdiction over crimes committed outside the United States. The jurisdiction only applies to offenses that, if committed within the special maritime and territorial jurisdiction of the United States, are punishable by imprisonment for more than 1 year. This jurisdiction covers members of and persons employed by or accompanying the Armed Forces.

b. The act provides two significant limitations: 1) no prosecution may be commenced if a foreign government with jurisdiction recognized by the United States has prosecuted or is prosecuting the individual, except upon the approval of the Attorney General or Deputy Attorney General; 2) no person amenable to jurisdiction under the Uniform Code of Military Justice (UCMJ) may be prosecuted unless he or she ceases to be subject to the UCMJ or is charged with one or more other defendants, at least one of whom is not subject to the UCMJ. The act allows the Secretary of Defense to authorize law enforcement personnel to arrest suspected offenders. It also provides procedures for removal to the United States and pretrial detention of offenders.

c. On 3 Mar 05, the Deputy Secretary of Defense approved and signed DoD Instruction 5525.11, "Criminal Jurisdiction Over Civilians Employed By or Accompanying the Armed Forces Outside the United States, Certain Service Members, and Former Service Members" implementing MEJA (www.dtic.mil/whs/directives/corres/pdf/i552511 030305/ i552511p.pdf; Attached to this message as an Adobe file). Under the DODI, Combatant Commanders and Designated Commanding Officers (as defined in DODI 5525.11, DODD5525.1, and AR 27-50, Table C-1) have the primary responsibility for implementation of the MEJA. In the near future, Combatant Commanders should publish theater specific guidance on procedures. In addition, AR 27-10, AR 27-50, AR 690-11 and DA Pam 690-47 will be amended to provide service-specific guidance. Also attached to this message as an Adobe file is a recent DA message concerning the MEJA .

d. Under the DODI, Army Staff Judge Advocates have certain responsibilities. Army Staff Judge Advocates for Designated Commanding Officers are responsible for reviewing and forwarding Criminal Investigative Reports that may result in prosecutions to the Combatant Commander, for delivery to the Domestic Security Section, Criminal Division, Department of Justice (DSS/DOJ) and designated US Attorney representative (see DODI 5525.11, para.6.2.2.1). DCO SJAs must also furnish the DSS/DOJ and the designated US Attorney representative, an affidavit from the criminal investigator setting forth the probable cause basis for believing a violation of the Act has occurred, and the person identified in the affidavit who committed the violation.
e. If initial proceedings under the MEJA are required, Army SJAs to the DCO must arrange the proceedings and provide a military representative to assist the designated US Attorney's office representative in presenting the information for the Federal Magistrate Judge's review. The military representative will also provide any administrative assistance required by the Federal Magistrate at the location outside the US where initial proceedings are conducted (see DODI 5525.11, para.6.4.10).

f. The DODI requires that video teleconferencing or similar means should be available to conduct initial proceedings under the MEJA at the overseas location. SJAs assigned to overseas commands should be prepared, upon direction of the DCO SJA, to coordinate video teleconferencing or other communications at their locations for initial proceedings conducted pursuant to MEJA.

g. SJAs at overseas commands will also compile a list of civilian counsel, licensed to practice law in the US, available to provide representation at initial proceedings, (see DODI 5525.11 para 6.3.1.2.). AR 27-10 will be amended to provide guidance to the Army Trial Defense Service to provide qualified military counsel in those cases where a Federal Magistrate has determined a civilian is qualified for free representation at an initial proceeding.

Prepared By: COL Child /703-588-6746
Approved by: BG Wright, OTJAG-MLO

SECRETARY OF DEFENSE
1000 DEFENSE PENTAGON
WASHINGTON, DC 20301-1000

MAR 10 2008

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS
CHAIRMAN OF THE JOINT CHIEFS OF STAFF
UNDER SECRETARIES OF DEFENSE
COMMANDERS OF THE COMBATANT COMMANDS

SUBJECT: UCMJ Jurisdiction Over DoD Civilian Employees, DoD Contractor Personnel, and Other Persons Serving With or Accompanying the Armed Forces Overseas During Declared War and in Contingency Operations

References:
(a) Section 552 of the John Warner National Defense Authorization Act for Fiscal Year 2007 (Public Law 109-364, October 17, 2006)
(b) Uniform Code of Military Justice (Chapter 47 of title 10, United States Code)
(c) Manual for Courts-Martial, United States (Executive Order 12473, July 13, 1984, as amended)
(d) Military Extraterritorial Jurisdiction Act (MEJA), Chapter 212 of title 18, United States Code
(e) Department of Defense Instruction 5525.11, "Criminal Jurisdiction Over Civilians Employed By or Accompanying the Armed Forces Outside the United States, Certain Service Members, and Former Service Members," March 3, 2005

Military operations in support of the Global War on Terrorism (GWOT) increasingly require U.S. military forces to operate alongside DoD civilian employees and DoD contractor personnel who serve with or accompany our armed forces as integral parts of that unified effort. This memorandum provides additional guidance to commanders on the exercise of their UCMJ authority during contingency operations, including those supporting the GWOT.

Commanders retain authority to respond to an incident, restore safety and order, investigate, apprehend suspected offenders, and otherwise address the immediate needs of the situation. Commanders possess significant authority to act whenever criminal activity may relate to or affect the commander's responsibilities, including situations in

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which the alleged offender's precise identity or actual affiliation is to that point undetermined. Attachment 1, "Command Law Enforcement Authority," summarizes the broad scope of this command authority. I expect commanders and their law enforcement authorities to act accordingly.

On October 17, 2006, the Uniform Code of Military Justice (UCMJ) was amended to extend UCMJ jurisdiction over persons serving with or accompanying U.S. armed forces in the field in times of declared war or a contingency operation (references (a) and (b)). Since then, commanders have had available this additional UCMJ disciplinary authority.

The unique nature of this extended UCMJ jurisdiction over civilians requires sound management over when, where, and by whom such jurisdiction is exercised. There is a particular need for clarity regarding the legal framework that should govern a command response to any illegal activities by Department of Defense civilian employees and DoD contractor personnel overseas with our Armed Forces. Accordingly, pursuant to my authority under Article 22, UCMJ (reference (b)), and Rules for Courts-Martial 401 and 601 of the Manual for Courts-Martial (reference (c)), the requirements of Attachment 2, "Article 2(a)(10), UCMJ, Authority Over Persons Serving With or Accompanying the Armed Forces," apply to all disciplinary actions under this UCMJ amendment.

When offenses alleged to have been committed by civilians violate U.S. federal criminal laws, the Department shall notify responsible Department of Justice (DoJ) authorities, and afford DoJ the opportunity to pursue its prosecution of the case in federal district court (references (d) and (e)). To expedite that process, the notification requirements and procedures of attachment 3 shall apply in all cases.

While the DoJ notification and decision process is pending, commanders and military criminal investigators should continue to address the alleged crime. Commanders should ensure that any preliminary military justice procedures that would be required in support of the exercise of UCMJ jurisdiction over civilians continue to be accomplished during the concurrent DoJ notification process. Commanders should be prepared to act, as appropriate, should possible U.S. federal criminal jurisdiction prove to be unavailable to address the alleged criminal behavior.

DoD regulations and other guidance, the regulations and other guidance of the Secretaries of the Military Departments (including the U.S. Coast Guard when it is operating as a Service in the Navy), publications and other guidance of the Joint Chiefs of Staff, and, by agreement, regulations and other guidance of the Department of

Homeland Security for the U.S. Coast Guard, when it is not operating as a Service in the Navy, shall incorporate the guidance provided by this memorandum and its attachments. The General Counsel of the Department of Defense is authorized to issue additional guidance implementing this memorandum.

Attachments:
As Stated.

Copy to:

Secretary of State
Attorney General of the United States
Secretary of Homeland Security
General Counsel of the Department of Defense
Assistant Secretary of Defense (Legislative Affairs)
Assistant Secretary of Defense (Public Affairs)
Assistant Secretary of Defense (NII)
DOD Inspector General

Command Law Enforcement Authority

The following summarizes some of the commander's authority and the military law enforcement authority available when a crime is committed within that commander's geographic area of responsibility outside the United States.

1. Commanders have authority to cause an inquiry or investigation to be conducted of any crime allegedly committed by persons subject to Uniform Code of Military Justice (UCMJ) jurisdiction, as well as a person subject to Military Extraterritorial Jurisdiction Act (MEJA) jurisdiction until such time as civilian law enforcement officials have assumed sole investigative responsibility. (References: Rule for Courts-Martial 303, Manual for Courts-Martial; DoD Instruction 5525.11; DoD Instruction 5525.07).

2. Military law enforcement officers and military criminal investigators are authorized to apprehend persons subject to UCMJ jurisdiction, and arrest and temporarily detain persons subject to MEJA jurisdiction, when there is probable cause that an offense has been committed and that the person committed it. (References: Rules for Courts-Martial 301-305, Manual for Courts-Martial; 10 U.S.C. §§ 807-814, 1585a, 4027, 7480, 9027; 18 U.S.C. § 3262; Paragraph 6.2, DoD Instruction 5525.11; DoD Instruction 5525.07).

3. All commissioned, warrant, petty, and noncommissioned officers on active duty may apprehend offenders subject to UCMJ jurisdiction. (References: 10 U.S.C. § 807; Rule for Courts-Martial 302, Manual for Courts-Martial).

4. Any person authorized to make an apprehension may use such force and means as are reasonable under the circumstances to accomplish the apprehension. (References: 10 U.S.C. § 807; Rule for Courts-Martial 302, Manual for Courts-Martial).

5. Federal law enforcement officials have independent authority to apprehend persons, whether or not subject to trial by court-martial, to the extent their authority is permitted by applicable statutes and other law. (References: 10 U.S.C. § 807; Rule for Courts-Martial 302, Manual for Courts-Martial; DOD Instruction 5525.07).

Attachment 1

Article 2(a)(10), UCMJ, Authority
Over Persons Serving With or Accompanying the Armed Forces

1. Within the Department of Defense, only the Secretary of Defense shall possess authority to exercise court-martial convening authority and impose nonjudicial punishment over persons subject to Article 2(a)(10), Uniform Code of Military Justice (UCMJ), jurisdiction with respect to:

a. Offenses committed within the "United States", meaning the several States of the United States, the District of Columbia, and the commonwealths, territories, and possessions of the United States;

b. Persons who were not at all times during the alleged misconduct located outside the "United States", as defined above; and

c. Persons who are, at the time court-martial charges are initiated (preferred) or notice of Article 15, UCMJ proceedings is given, located within the "United States", as defined above.

2. Subject to the above, the commanders of geographic combatant commands, and only those commanders assigned or attached to the combatant command who possess general court-martial convening authority, may exercise court-martial convening authority and impose nonjudicial punishment over persons subject to Article 2(a)(10), UCMJ, jurisdiction with respect to offenses committed outside the "United States," as defined above. The commander of the combatant command may further withhold such authority within the combatant command.

3. Authority to initiate (prefer) court-martial charges and nonjudicial punishment is withheld until the required notification requirements established in attachment 3 are accomplished for Article 2(a)(10), UCMJ, cases. Law enforcement, criminal investigations, and other military justice procedures that precede the initiation (preferral) of court-martial charges should continue, as applicable, during this notification process.

4. Authority to initiate (prefer) court-martial charges and nonjudicial punishment over an offense pursuant to this UCMJ authority is withheld whenever the Department of Justice (DoJ) provides notice to the Department of Defense that it intends to pursue U.S. federal criminal prosecution for what is substantially the same offense or a related offense, and such withholding shall remain in effect while DoJ is pursuing its federal prosecution of the case, and until such prosecution is completed or terminated prior to its completion.

Attachment 2

Article 2(a)(10), UCMJ, Notification Requirements and Procedures

Because of the unique nature of this Uniform Code of Military Justice (UCMJ) jurisdiction over civilians, it is important that the exercise of this jurisdiction be based on military necessity to support an effective fighting force and be called for by circumstances that meet the interests of justice, such as:

- When U.S. federal criminal jurisdiction otherwise does not apply or federal prosecution is not pursued, and/or

- When the person's conduct is adverse to a significant military interest of the United States (e.g., alleged misconduct that may jeopardize good order and discipline or discredit the armed forces and thereby have a potential adverse effect on military operations).

Nevertheless, before initiating a disciplinary action pursuant to this UCMJ authority, commanders shall comply with the following notification procedures to determine whether U.S. federal criminal jurisdiction under the Military Extraterritorial Jurisdiction Act (MEJA) or other federal laws applies and will be pursued:

1. The notification procedures and information requirements of DoD Instruction 5525.11 shall be followed in all cases intended to be pursued under Article 2(a)(10), UCMJ, jurisdiction, to include providing all reasonably available information regarding the investigation and the location of the alleged offender's last known residence in the United States.

2. Commanders who are not general court-martial convening authorities (GCMCA) have had their UCMJ authority withheld by attachment 2. As such, those commanders shall, before initiating any disposition action under Rules for Courts-Martial 306 - 308 or 401 - 406 of the Manual for Courts-Martial (MCM), forward expeditiously all available information regarding the alleged misconduct that is potentially subject to this jurisdiction to the first GCMCA in the chain of command for that GCMCA's disposition consideration under Rule for Courts-Martial 407, MCM. The notification shall include the reasoning in support of a UCMJ disposition.

3. Combatant Command GCMCA Notification Requirements. All GCMCAs assigned or attached to the geographic combatant commands shall notify in writing (including by email or facsimile) their respective geographic combatant command commander of their intended disposition by court-martial or nonjudicial punishment over persons subject to Article 2(a)(10), UCMJ, jurisdiction. This notification affords the

Attachment 3

commander of the geographic combatant command concerned the opportunity to accomplish the following notification requirements, as well as the opportunity to exercise authority under Rule for Courts-Martial 601(f), MCM.

4. Combatant Command Notification Requirements. Before initiating (preferring) court-martial charges and nonjudicial punishment based on Article 2(a)(10), UCMJ, jurisdiction, and regardless of whether the suspected offense may also be an offense under federal criminal laws, reference (e), the geographic combatant commander shall first provide notice of the case in writing (including by email or facsimile), in accordance with the procedures established in DoD Instruction 5525.11. This notification enables the Department of Defense to formally notify the Department of Justice (DoJ) of the case and any potential U.S. federal criminal jurisdiction, and affords DoJ an opportunity to determine if it intends to pursue U.S. federal criminal prosecution and to advise DoD accordingly.

a. Commanders should continue law enforcement, criminal investigations, and other military justice procedures that precede the initiation (preferral) of court-martial charges and nonjudicial punishment during this notification process, as applicable.

b. After DoD's formal notification to DoJ, DoJ shall expeditiously (but in no case longer than 14 calendar days) determine whether it intends to exercise jurisdiction over the case.

(1) If, within that 14-day review period, DoJ determines that extraordinary circumstances warrant additional time to complete its review, the Deputy Attorney General shall communicate that assessment to the Deputy Secretary of Defense and an extension shall be granted as mutually agreed upon.

(2) If, after this review period (to include any extension to which the Deputy Attorney General and Deputy Secretary of Defense agreed upon), DoJ does not advise DoD that it intends to pursue prosecution of the case, DoD may notify DoJ that it intends to authorize the initiation of UCMJ proceedings and may then inform the geographic combatant commander that, as a matter of command discretion, disciplinary action pursuant to Article 2(a)(10), UCMJ, may be initiated.

(3) When notifying the respective GCMCA who intends to take disciplinary action, the combatant commander shall also advise the respective GCMCA whether the combatant commander will, instead, exercise UCMJ authority pursuant to Rule for Courts-Martial 601(f), MCM. Similar procedures shall apply when DoJ advises DoD that the

(4) exercise of U.S. federal criminal jurisdiction is not applicable, or when DoJ indicates it does not intend to pursue prosecution.

c. Even where DoJ intends to pursue prosecution, continued DOD investigative assistance may be necessary. Thus, criminal investigative activity by DOD should continue in coordination with DoJ unless and until civilian law enforcement officials assume sole investigative responsibility for the matter.

d. When DoJ elects to exercise jurisdiction over the case, further action by the combatant command concerned, and all GCMCAs assigned or attached to that combatant command, to convene a court-martial or administer nonjudicial punishment is withheld, as stated in attachment 2.

e. The required notification process does not rescind or negate general court-martial convening authority over cases subject to Article 2(a)(10), UCMJ, jurisdiction and, in the event that U.S. federal criminal jurisdiction of the case is later declined or terminated, GCMCAs may then exercise this authority, as appropriate.

NOTES

CHAPTER 24

SPECIAL OPERATIONS

REFERENCES

1. 10 U.S.C. § 167, Unified Combatant Command for Special Operations Forces.
2. Legislative History, Sec. 1311, P.L. 99-661, 10 U.S.C. § 167.
3. 132 CONG. REC. S5971-05, 99TH CONG. 2ND SESS. (May 15, 1986).
4. 10 U.S.C. §§ 371-382, Support to Law Enforcement.
5. 10 U.S.C. § 401, Humanitarian and Civic Assistance Provided in Conjunction with Military Operations.
6. 10 U.S.C. § 2010, Participation of Developing Countries in Combined Exercises.
7. 10 U.S.C. § 2011, Special Operations Forces: Training with Friendly Foreign Forces.
8. NDAA 2005 § 1202, Assistance to Iraq and Afghanistan Military and Security Forces.
9. NDAA 2005 § 1208, Support of Military Operations to Combat Terrorism.
10. 18 U.S.C. § 1385, Posse Comitatus Act.
11. Executive Order 12333, U.S. Intelligence Activities.
12. JOINT CHIEFS OF STAFF, JOINT PUB. JP 2-0, DOCTRINE FOR INTELLIGENCE SUPPORT TO JOINT OPERATIONS (9 Mar. 2000).
13. JOINT CHIEFS OF STAFF, JOINT PUB. 1-04, LEGAL SUPPORT TO MILITARY OPERATIONS (1 Mar. 2007).
14. JOINT CHIEFS OF STAFF, JOINT PUB. 3-05, DOCTRINE FOR JOINT SPECIAL OPERATIONS (17 Dec. 2003).
15. JOINT CHIEFS OF STAFF, JOINT PUB. 3-05.1, JOINT SPECIAL OPERATIONS TASK FORCE OPERATIONS (27 Apr. 2007).
16. JOINT CHIEFS OF STAFF, JOINT PUB. 3-05.2, JOINT TACTICS, TECHNIQUES, AND PROCEDURES FOR SPECIAL OPERATIONS TARGETING AND MISSION PLANNING (21 May 2003).
17. JOINT CHIEFS OF STAFF, JOINT PUB. 3-07.1, JTTP FOR FOREIGN INTERNAL DEFENSE (FID) (30 Apr. 2004).
18. JOINT CHIEFS OF STAFF, JOINT PUB. 3-07.2, JTTP FOR ANTITERRORISM (14 Apr. 2006).
19. JOINT CHIEFS OF STAFF, JOINT PUB. 3-07.4, JOINT COUNTERDRUG OPERATIONS (17 Feb. 1998).
20. JOINT CHIEFS OF STAFF, JOINT PUB. 3-07.6 JTTP FOR FOREIGN HUMANITARIAN ASSISTANCE (15 Aug. 2001).
21. JOINT CHIEFS OF STAFF, JOINT PUB. 3-50, JOINT PERSONNEL RECOVERY (5 Jan. 2007).
22. JOINT CHIEFS OF STAFF, JOINT PUB. 3-53, JOINT DOCTRINE FOR PSYCHOLOGICAL OPERATIONS (5 Sept. 2003).
23. JOINT CHIEFS OF STAFF, JOINT PUB. 3-57, JOINT DOCTRINE FOR CIVIL-MILITARY OPERATIONS (8 Feb. 2001).
24. JOINT CHIEFS OF STAFF, JOINT PUB. 3-68, JOINT TACTICS, TECHNIQUES, AND PROCEDURES FOR NONCOMBATANT EVACUATION OPERATIONS (22 Jan. 2007).
25. U.S. DEP'T OF DEFENSE, DIR. 2060.02, DOD COMBATING WMD POLICY (19 Apr. 2007).
26. U.S. DEP'T OF DEFENSE, DIR. 2205.2, HUMANITARIAN AND CIVIC ASSISTANCE PROVIDED IN CONJUNCTION WITH MILITARY OPERATIONS (6 Oct. 1994).
27. U.S. DEP'T OF DEFENSE, DIR. 3000.05, MILITARY SUPPORT FOR STABILITY, SECURITY, TRANSITION, AND RECONSTRUCTION (SSTR) OPERATIONS (28 Nov. 2005).
28. U.S. DEP'T OF DEFENSE, DIR. 3305.6, SPECIAL OPERATIONS FORCES (SOF) FOREIGN LANGUAGE POLICY (4 Jan. 1993).
29. U.S. DEP'T OF DEFENSE, DIR.5111.10, ASSISTANT SECRETARY OF DEFENSE FOR SPECIAL OPERATIONS AND LOW INTENSITY CONFLICT (ASD(SO/LIC)) (22 Mar. 1995).
30. CJCSI 3121.01B, Standing Rules of Engagement, (13 June 2005).
31. U.S. DEP'T OF ARMY, FIELD MANUAL 3.0, OPERATIONS (14 June 2001).
32. U.S. DEP'T OF ARMY, FIELD MANUAL 3-05, ARMY SPECIAL OPERATIONS FORCES (20 Sept. 2006).
33. U.S. DEP'T OF ARMY, FIELD MANUAL 3-05.30, PSYCHOLOGICAL OPERATIONS (15 Apr. 2005).
34. U.S. DEP'T OF ARMY, FIELD MANUAL 3-05.301, PSYCHOLOGICAL OPERATIONS TTPS (31 Dec. 2003).
35. U.S. DEP'T OF ARMY, FIELD MANUAL 3-05.302, TACTICAL PSYCHOLOGICAL OPERATIONS TTPS (28 Oct. 2005).
36. U.S. DEP'T OF ARMY, FIELD MANUAL 3-05.40, CIVIL AFFAIRS OPERATIONS (29 Sept. 2006).
37. U.S. DEP'T OF ARMY, FIELD MANUAL 3-05.60, ARMY SOF AVIATION OPERATIONS (16 Oct. 2000).

38. U.S. DEP'T OF ARMY, FIELD MANUAL 3-05.102, ARMY SOF INTELLIGENCE (31 Aug. 2001).
39. U.S. DEP'T OF ARMY, FIELD MANUAL 3-05-105, ARMY SOF NEO (2 Feb. 2004).
40. FMI 3-05.140, Army SOF Logistics (28 Feb. 2007).
41. U.S. DEP'T OF ARMY, FIELD MANUAL 3-05-202, ARMY SOF FOREIGN INTERNAL DEFENSE (2 Feb. 2007).
42. U.S. DEP'T OF ARMY, FIELD MANUAL 3-05-231, SPECIAL FORCES PERSONNEL RECOVERY (13 June 2003).
43. U.S. DEP'T OF ARMY, FIELD MANUAL 3-05-232, SPECIAL FORCES GROUP INTELLIGENCE OPERATIONS (23 Feb. 2005).
44. U.S. DEP'T OF ARMY, REG. 381-10, U.S. ARMY INTELLIGENCE ACTIVITIES (3 May 2007).

I. INTRODUCTION

A. Special Operations (SO) are characterized by the use of small units involved in direct and indirect military activities that are generally of an operational or strategic objective. These missions may be conducted in time of war or peace. The involvement of Special Operations Forces (SOF) in an operation normally begins before the introduction of conventional troops and ceases long after conventional forces have left the theater. SOF units are generally regionally-focused, and SOF personnel typically possess the language skills, cultural familiarity, and maturity necessary to participate in an often politically-sensitive SO mission. Special Operations missions are inherently joint and they differ from conventional operations in degree of risk, operational techniques, modes of employment, and independence from friendly support and dependence on detailed operational intelligence and indigenous assets.

B. It should be apparent to the Judge Advocate (JA) supporting a SOF unit that the legal challenges associated with SO are often commensurate with the operational risks. Special Operations missions are legally intensive operations. Judge Advocates assigned to SOF units must be familiar with a wide variety of laws and regulations relevant to SO. Moreover, SOF have their own culture, with accompanying acronyms, tactics, traditions, unique planning techniques, unit configurations, and command structure.

II. HISTORY

A. Throughout our nation's history, SOF have contributed to the overall accomplishment of our nation's political and military objectives in ways that far exceed their organic assets. Historically, SOF units range from Major Robert Rogers' early American unconventional warriors (known as "Roger's Rangers") during the French and Indian Wars to the Colonial era's Francis Marion (the "Swamp Fox") conducting significant guerrilla raids on British forces stationed in South Carolina, and continue with American Civil War and Colonel John Singleton Mosby's 300 volunteers operating behind enemy lines. Modern SOF units trace their origins to World War II and the Office of Coordinator of Information (COI). The COI, which became the Office of Strategic Services in June 1942, participated in sabotage, espionage, subversion, unconventional warfare, and propaganda against both Japanese and German forces.

B. After minimal involvement in the Korean War and legendary successes in Viet Nam, SOF units suffered a staggering defeat in the Iranian Desert in an aborted attempt to rescue U.S. hostages. Following an in-depth study of those failures (dubbed the "Holloway Commission"), Congress became concerned that DoD had not implemented much of the Holloway Commission report, and perceived that, absent Congressional involvement, conventional commanders and civilian leaders in Department of Defense (DoD) would never bring SOF units up to the level they needed to be. As a result, in 1986, Congress passed Public Law 99-661, the Nunn-Cohen Amendment, codified at 10 U.S.C. § 167, making the U.S. Special Operations Command (USSOCOM) a reality. The wisdom of that decision has been demonstrated clearly through the effective worldwide employment of SOF units over the past several years, including in both Afghanistan and Iraq. The ability of present day SOF units to perform missions with exceptional success and impact can largely be attributed to the nature of SOF missions, specialized equipment, and the highly trained, skilled and motivated SOF operators.

III. SOF COMMAND STRUCTURE

A. As noted above, 10 U.S.C. §167 established USSOCOM. This Combatant Command is unique in that it is the only Combatant Command specifically established by Congress and required by law. The DoD could, for example, eliminate the Pacific Command (PACOM) and reorganize its sub-component units. However, DoD does not have the authority to disband USSOCOM. Congress realized that, if it created a Combatant Command without a separate funding authority, DoD would continue to have tremendous control and the ability to drawdown SOF assets simply by refusing to fund their programs. Therefore, an entirely new budgetary authority, Major Force Program

Eleven (MFP-11), was established to fund SO. Some have observed that USSOCOM is the only Combatant Command with its own "checkbook." This is important for SO because MFP-11 funds may only be used for articles and programs with an SO basis or nexus.

B. USSOCOM is both a supporting and supported command. It is a supporting command in that it is responsible for providing ready and trained SOF personnel to the geographic Combatant Commanders. It is a supported command in that, when directed by the President or Secretary of Defense (SECDEF), it must be capable of conducting selected strategic SO under its own command. USSOCOM is commanded by a General and is located at MacDill Air Force Base in Tampa, Florida.

C. 10 U.S.C. §167(i) explains that SOF units are those that are:

1. listed in the Joint Capabilities Plan, Annex X (17 Dec 85);

2. listed in the Terms of Reference and Conceptual Plan for the Joint Special Operations Command (1 Apr 1986); or

3. forces designated by the Secretary of Defense (SecDef).

D. Each service has its own specific SO command. For the Army, it is the U.S. Army Special Operations Command (USASOC), commanded by a Lieutenant General, at Fort Bragg, NC. The Naval Special Warfare Command (NAVSPECWARCOM) is commanded by a Rear Admiral at Coronado, CA. The U.S. Air Force Special Operations Command (AFSOC) is located at Hurlburt Field, FL and led by a Lieutenant General. These service-specific SO commands are responsible for selecting, training, and equipping the force. They are also responsible for SO doctrine within their respective services. In the Army, USASOC is a Army Service Component Command (formerly MACOM) and, therefore, Army SOF (ARSOF) is not within the FORSCOM chain of command.

E. There is also a Joint Special Operations Command (JSOC), a sub-unified command of USSOCOM, which is located at Fort Bragg, NC. This is a joint command that studies special operations requirements and techniques; ensures interoperability and equipment standardization; plans and conducts joint special operations exercises and training; and develops joint SO tactics.

F. In 2006, the U.S. Marine Corps Forces Special Operations Command (MARSOC) was established at Camp Lejeune, NC under the command of a Major General. Other than MARSOC, certain units of the Marine Corps, along with particular conventional elements of the U.S. Navy and U.S. Air Force, have been designated "special operations-capable." SO-capable units are, from time to time, designated as SOF units by SECDEF for specific operations. Many Marine Corps units perform and train to perform SO-type missions. The expeditionary nature of the Marine Corps makes it particularly well-suited as an SO-capable force.

G. U.S. Army Special Operations Forces (ARSOF) includes active duty, Army National Guard (ARNG) and U.S. Army Reserve elements. ARSOF falls under the command of USASOC, which is headquartered at Fort Bragg, NC. USASOC is comprised of the following subordinate commands:

1. U.S. Army Special Forces Command (Airborne) (USASFC(A)).

a. USASFC(A) is also located at Fort Bragg. Within USASFC(A), there are five active and two ARNG Special Forces (SF) groups (SFG). Special Forces units are often referred to in literature and by the public as the "Green Berets" because of their distinctive headgear. USASFC(A) is commanded by a Major General, and each SFG is led by a Colonel. Each active SFG unit has a geographical orientation, but they are employed wherever they are needed. Special Forces Soldiers study the language and culture of the countries within their area of operations (AO), and receive training in a variety of individual and special skills. These skills include operations, intelligence, communications, medical aid, engineering, and weapons. Special Forces Soldiers are highly skilled operators, trainers and teachers. Not only must they be capable of performing difficult military missions, they also must be able to teach these skills to foreign militaries and domestic agencies.

b. Within ARSOF, SF is the largest piece and has the most JAs assigned, and because SFG are unique in terms of organization, a brief description of that type of group follows. The group is commanded by a Colonel, with a Lieutenant Colonel Deputy Commanding Officer (DCO), a Lieutenant Colonel Executive Officer (XO) and a Command Sergeant Major (CSM) forming the remainder of the command group. The staff is similar to that of a

brigade combat team. There are four SF battalions,[1] each commanded by a Lieutenant Colonel; an additional Group Support Battalion, also commanded by a Lieutenant Colonel; and a Headquarters and Headquarters Company (HHC) commanded by a Captain. Within the Group Support Battalion are a Group Support Company and a Group Service Support Company, containing assorted detachments and platoons.

c. Each SF battalion has a Major XO and a CSM, along with the traditional battalion staff. The battalion is comprised of three operational companies, a battalion support company and a battalion headquarters detachment. An SF operational company command is a Major position, and the company has a Sergeant Major rather than a First Sergeant. The operational companies have headquarters detachments (ODB). The operational companies are further broken down into operational teams, known as "A" teams (ODA). ODAs are essentially small combined arms teams or task forces consisting of a headquarters element and infantry, engineer, military intelligence, signal, and medical Military Occupational Specialties (MOS). An ODA is commanded by a Captain, and the XO is a warrant officer. The team sergeant, or operations sergeant, is a Master Sergeant. There are nine other enlisted members, broken down by MOS. The junior member of an ODA is usually a Sergeant (E-5 or above). As a general rule, ODA commanders do not have UCMJ jurisdiction over team members because it has been withheld at the company level.

2. The 75th Ranger Regiment, commanded by a Colonel, and its three battalions, are also ARSOF. Its Regimental headquarters, along with one battalion, are located at Fort Benning, GA. One other battalion is located at Hunter Army Airfield in GA, and another battalion is stationed at Fort Lewis, WA. Members of the Regiment wear tan berets and comprise a highly responsive strike force. Ranger units are specialized airborne infantry troops that conduct special missions in support of U.S. national security policies and objectives.

3. The 160th Special Operations Aviation Regiment (SOAR), commanded by a Colonel and located at Fort Campbell, KY, provides special aviation support to ARSOF, using specialized aircraft and highly-trained personnel.

4. The 95th Civil Affairs (CA) Brigade and four active component CA battalions fall under USASOC. Additionally, the 4th Psychological Operations Group (4th POG) falls under USASOC. CA units support the commander's relationship with civil authorities and the civilian population. POG units support operations across the operational continuum to induce or reinforce attitudes and behaviors favorable to the United States.[2]

5. The John F. Kennedy Special Warfare Center and School (JFKSWCS) is responsible for training, leader development, and doctrine. A Major General commands this Fort Bragg "special operations university." Within JFKSWCS is the 1st Special Warfare Training Group (SWTG).

6. The Sustainment Brigade (Special Operations) (Airborne) provides Combat Service Support and Combat Health Support to ARSOF.

H. USASOC and USASFC(A) have Staff Judge Advocates (SJA). Within USASOC, Command Judge Advocates (CJA) are assigned to the 75th Ranger Regiment, 160th SOAR, 95th CA Brigade, 4th POG, JFKSWCS, SB(SO)(A), and the 1st SWTG. Within USASFC(A), there are Group and Battalion Judge Advocates assigned to each SFG.

IV. COMMAND AND CONTROL DURING OPERATIONS

A. Special Operations are inherently joint. Although USSOCOM can be a supported command, in most instances, when SOF deploy overseas, they are under the Combatant Command (COCOM) of the geographic combatant commander for the geographic area in which they are operating. Further, each geographic Combatant Command has a Special Operations Command (SOC). For example, the Special Operations Command for Pacific Command is referred to as SOCPAC. Usually these SOCs are commanded by a one-star General or Admiral. SOF in theater are usually under the operational control (OPCON) of the SOC; however, they may, on occasion, be under OPCON to a supported unit.

B. In an operation, the SOC may order the establishment of a Joint Special Operations Task Force (JSOTF). Generally speaking, the JSOTF commander will either be from the SOC or the service SOF with the largest presence

[1] The addition of a fourth special forces battalion is relatively recent, and sufficient trained personnel have not yet been available to form these battalions.

[2] The U.S. Army Civil Affairs (CA) and Psychological Operations (PSYOP) Command (Airborne) (USACAPOC(A)) now falls under U.S. Army Reserve Command. USACAPOC(A) is based at Fort Bragg, NC, and is commanded by a Major General. There are four reserve CA commands, each commanded by a Brigadier General, with seven reserve CA brigades and 28 reserve CA battalions.

in the AO. A JSOTF is a temporary joint SOF headquarters established to control more than one service-specific SOF or to accomplish a specific mission. If augmented by foreign units, the designation becomes Combined Joint Special Operations Task Force (CJSOTF) or a Combined Unconventional Warfare Task Force (CUWTF). To synchronize SO with land and maritime operations with conventional units, a Special Operations Command and Control Element (SOCCE) is often established. It collocates with the supported conventional forces. The SOCCE can receive operational, intelligence and target acquisition reports directly from deployed SOF, and provide them to the supported component. The Special Operations Coordination Element (SOCOORD) is the primary SOF integration advisor to an Army corps or Marine Expeditionary Force (MEF). The SOCOORD normally is a staff element within the G3 or J3 staff section.

C. As a general rule, military justice jurisdiction continues to reside with the parent supporting unit even while deployed. USASOC and USASFC(A) are General Courts-Martial Convening Authorities (GCMCA) for Fort Bragg units. However, ARSOF not located at Fort Bragg depend on their home installation commanders for GCMCA support. This can cause some tension between the servicing GCMCA (post commander) and the SOF command (tenant unit). The installation commander is responsible for maintaining good order and discipline on the installation, but is not responsible for the success or failure of the missions conducted by SOF tenants.

D. Consequently, more than one "chain-of-command" or criminal jurisdiction will have an interest in discipline issues that take place, especially overseas. For example, if an SF Soldier from the 1st SFG at Fort Lewis, WA commits an offense while TDY on Kadena AFB in Okinawa, SOCPAC, USARJ, the AFB Commander, the Fort Lewis Installation Commander (GCMCA), and the technical chain running from 1st SFG to USASFC(A) and USASOC at Fort Bragg may all have an interest in the outcome. The SOF JA must be extremely wary of the potential for command influence in situations where serious incidents occur overseas because of this multi-command interest. Although it is questionable whether unlawful command influence can be brought to bear from commands outside the "chain," technical chains of command do have the potential to significantly influence the independent individual judgment of a Soldier's actual commander. Direct coordination with the respective unit JAs is the best approach to resolve these issues.

E. SOF units may deploy as an entire unit or by smaller detachments to support Combatant Commanders' various missions. Because SFGs are often the lead ARSOF in theater, and because they are configured differently in combat than conventional units, a brief introduction as to how an SFG is configured for operations may be helpful. Additionally, it is important for SOF JAs to understand the basic composition of an SFG during operations, because group and battalion commanders may become the ARSOF, JSOTF or CJSOTF commanders, as occurred in both Afghanistan and Iraq.

F. If an entire SFG, or part of the SFG and the Group headquarters deploys, it will establish a Special Forces Operational Base (SFOB). Each SF battalion will in turn establish Forward Operational Bases (FOB). The SFOB and the FOB will have an Operations Center (OPCEN), which functions much like a main CP at the brigade or division. The SFOB and FOB will also have a Support Center (SUPCEN) and a Signal Center (SIGCEN). Future operations are planned and current operations are controlled at the OPCEN. Current and future operations are sustained at the SUPCEN. Special Operations require extremely sophisticated and redundant communications systems, thus the need for a SIGCEN. Doctrine places the JA in the SUPCEN with the S1 and S4. However, commanders usually recognize the inherent need to have the Group JA in the OPCEN to provide coordination with both current and future operations cells. In practice, FOBs are regularly augmented with a JA deployed down to the FOB level due to the physical separation between FOBs and the ARSOF, JSOTF or CJSOTF headquarters they support.

G. The FOB will also have an Isolation Facility (ISOFAC). Once an ODA receives a mission, it isolates from the rest of the unit. The teams use the ISOFAC to plan, train, and rehearse for the mission, out of view of the outside world. Several teams can isolate simultaneously in the ISOFAC, with each team having its own team room. No one can enter the ISOFAC without one of the isolating teams' permission. It is, however, during isolation that legal briefings to the teams are critical. Developing a strong relationship with the team prior to deployment is key to the JA getting access to the ISOFAC and providing timely legal advice. If the JA has provided competent legal advice in the past or has participated in activities with the team out of the legal office, such as on airborne operations, the team may be quicker to allow the JA to meet with them. The teams are closed, tightly knit societies; even the battalion and group commanders are often viewed as outsiders by the teams.

H. One of the critical functions JAs perform is their participation in the ISOFAC for mission "briefbacks." Just prior to final rehearsals, the team will conduct a briefback with the battalion, and sometimes group, commander.

During the briefback, the team will explain the concept of their operation in detail. Every member of the team will be present and will participate. During the briefback, the team obtains the commander's approval or disapproval of, or modifications to, its plan. This is the last opportunity the JA likely will have to review the operation and provide input. Once the mission is complete and the teams return from the operation, they return to the ISOFAC and remain in isolation until they are "debriefed." As part of the debrief with the S2, the team will review everything that it did and that the team members saw or heard, including potential law of war (LOW) or human rights violations by either side. Judge Advocates should be present for debriefs.

I. During day-to-day routine SOF operations, the parent unit will remain at home station. The teams will deploy from home station to conduct their missions independent of the SOF chain of command, and it is not unusual for an SFG to have teams in more than fifteen different countries at once. In times of war or high operational tempo (OPTEMPO), the group, battalions, companies and teams are often geographically separated. Command and control is maintained through sophisticated communications. The various deployed teams may generate legal issues without even realizing it.

J. Over the past several years it had become common practice to augment group legal staffs and deploy JAs down to the battalion level during prewar deployments. As a result, JAs were deployed to the FOB level almost continuously. In recognition of the OPTEMPO and the intensity of legal issues, this practice recently was formalized with the addition of official JA positions to the battalions. Even placed at the battalion level, the JA must learn to create a virtual presence with the deployed detachments. This is accomplished primarily by continuously monitoring message traffic at group and battalion headquarters, and by fostering a willingness on the team's part to "phone home" at the first sign of trouble by building trust and confidence prior to deployment. Part of building trust and confidence is getting involved in the intense planning, training, and briefings before each and every mission so the team understands the potential legal issues. To increase the JA's reach and issue-spotting effectiveness, the group and battalion staffs must be trained to recognize legal issues, and group legal NCOs must be highly skilled and motivated individuals in order to function as legal force multipliers. There are more missions than the JA alone can support without significant assistance. SOF legal NCOs must be capable of conducting training and presenting legal briefings to deploying teams.

V. SPECIAL OPERATIONS MISSIONS

A. Direct Action (DA).

1. These are short duration strikes and other small-scale offensive operations. For example, raids, ambushes, terminal guidance operations, recovery operations, and mine warfare are some of the missions considered to be DA. For the JA, such a mission must be reviewed for potential LOW and policy violations. As with conventional operations, all of the LOW relating to the use of force, targeting, chemical weapons, non-combatants, and principles such as distinction, military necessity, proportionality, and unnecessary suffering apply to SOF missions. Policy limitations, usually expressed through the Rules of Engagement (ROE), also have a significant impact on DA, as well as other SOF activities. Just like every JA, a SOF JA must have, at minimum, a copy of FM 27-10, The Law of War; DA PAM 27-1, Treaties Governing Land Warfare; DA PAM 27-1-1, Protocols to the Geneva Conventions; DoDD 2311.01E, Law of War Program; CJCSI 5810.01, Implementation of the Law of War Program; and CJCSI 3121.01B, Standing ROE (SROE) (an unclassified version appears in this Handbook).

2. An issue that routinely arises in these areas is that the mission-specific ROE do not always keep pace with mission changes. It is not unusual for SOF to receive a mission that is inconsistent with the mission-specific ROE. One way to handle this disconnect is to ask immediately for supplemental ROE. At the same time, send message traffic to higher headquarters indicating that the mission appears to be inconsistent with the ROE, and the subordinate unit assumes that inherent in the order to perform the mission is the authority to amend the ROE for the specific mission.

B. Special Reconnaissance (SR).

1. These are recon or surveillance actions conducted to obtain or verify, by visual observation or other collection methods, information concerning the capabilities, intentions, and activities of an actual or potential enemy. SR may also be used to collect data concerning the meteorological, hydrographic, or geographic characteristics of a particular area. SR may include environmental recon, armed recon, and target and threat assessment. There are numerous laws and regulations governing intelligence activities, many of which may impact on SR. SOF JAs must be thoroughly familiar with Executive Order 12333, U.S. Intelligence Activities, and AR 381-10, U.S. Army Intelligence Activities. They should also be familiar with DoDD 5240.1, DoD Intelligence

Activities; DoDD 5240.1-R, Procedures Governing the Activities of DoD Intelligence Components that Affect United States Persons; AR 381-20, The Army Counterintelligence Program; and AR 381-102 (S), Cover and Cover Support (U). In addition, a tremendous resource in the area of human intelligence (HUMINT) operations is the Defense Intelligence Agency, Intelligence Law Handbook.

2. In terms of the law, SOF Soldiers are generally most concerned about compromise by a non-combatant during SR. There is no SF exception to the LOW. Therefore, compromise alone does not provide grounds to kill a non-combatant. It would be permissible to capture and detain such a person, to evacuate with the non-combatant, or to incapacitate the individual temporarily. However, if the person is incapacitated, he or she should be left in a location where they can be discovered or eventually recover and return to the place from where they came. From a practical standpoint, even if the non-combatant was killed to avoid detection (especially if it is a child), compromise will likely take place as search parties are formed to look for the missing person.

C. Foreign Internal Defense (FID).

1. Special Operations Forces are routinely called upon to organize, train, advise, and assist host nation (HN) military and paramilitary forces. The goal in FID is to enable HN forces to maintain their own internal security. There are numerous legal issues related to FID. One of the most important is the status of SOF personnel and units. Although this is always an issue in operations, it is particularly acute in FID. Because the force is there with HN consent, HN law is, as a general rule, fully applicable. The JA must be familiar with any Status of Forces Agreements (SOFA) or Status of Mission Agreements that may be applicable. In any given mission, there may be agreements short of SOFAs, such as Diplomatic Notes, on point. It is not always easy to locate all the relevant international documents impacting a mission. The JA may start by researching Department of State (DoS) publications, such as Treaties in Force. JAs should contact the relevant Combatant Command's legal office. The Defense Attaché or Military Assistance Group at the embassy may have access to HN agreements, or to international agreements relating to the HN. CLAMO maintains many SOFAs on JAGCNet.

2. The second most important issue in FID is Fiscal Law. A SOF JA must understand how military operations are funded. In the area of FID, SOF JAs must fully understand 10 U.S.C. § 2011, Training with Friendly Foreign Forces, and 10 U.S.C. § 2010, Participation of Developing Countries in Combined Exercises. The JA should also know of other potential means of funding the training of foreign forces, such as: 10 U.S.C. § 166a, CINC Initiative Funds; 10 U.S.C. § 168, Mil to Mil Contacts; 10 U.S.C. § 1050, Latin American Cooperation; 10 U.S.C. § 1051, Bilateral or Regional Cooperation Programs; and Small Unit Exchange Agreements, as outlined in AR 12-15 (*see* Chapter 11).

a. *Combined Exercises as part of FID*. SOF spend significant time training on their wartime missions through exercises with HN armed forces overseas. 10 U.S.C. § 2010 allows U.S. Forces to pay the incremental costs of conducting training with Soldiers from a developing country. The following is required in order to comply with the law: (1) the combined training should be undertaken primarily to enhance the security interests of the U.S.; and (2) the participation of the developing country must be necessary to achieve the fundamental objectives of the training exercise. The mission planning documents should clearly reflect these statutory requirements. Combined exercises afford SOF with an excellent opportunity to train in regions of the world to which they are slated to deploy in "real world" situations. The JA must be aware of the jurisdictional status of U.S. Forces while in the host country. A SOFA may exist between the U.S. and the host country that establishes jurisdiction. If not, the JA should either seek to obtain one or some other diplomatic resolution to HN jurisdiction. The JA should work through the SOC or CINC legal office or through the military attaché or MILGROUP at the U.S. Embassy in the relevant country.

b. *Spending Operation & Maintenance (O&M) funds as part of FID.*

(1) In recognition of the need for SOF to train others in order to train itself to accomplish its FID and unconventional warfare missions, Congress granted to SOF an exception to the rule that O&M funds cannot be used in the training of foreign forces. Under 10 U.S.C. §2011, SOF are authorized to expend O&M funds for the costs of training itself, and for incremental costs of the foreign military it trains. The "primary purpose of the training for which payment may be made … shall be to train the special operations forces of the combatant command" (10 U.S.C. §2011(b)). Under 10 U.S.C. §167(e)(2)(c), the Commander of USSOCOM has the responsibility for exercising direction, authority, and control over the expenditure of funds for SOF training. Therefore, spending SOF O&M funds (termed MFP-11 funds) will take place with coordination with the normal

CJCS execute order process in conjunction with USSOCOM. The focus of such a mission must be on training SOF, and not training the HN military forces.

(2) The purpose of 10 U.S.C. §2011 is to enhance the ability of SOC to "prepare special operations forces to carry out assigned missions" by clarifying its authority to program and expend funds to train SOF in the U.S., its possessions and territories, and overseas. It also assists the commander of other Combatant Commands to fulfill their responsibilities for ensuring the preparedness of their forces to carry out assigned missions, among which is dealing with low-intensity conflict environments. Unlike conventional forces, the successful accomplishment of many types of SOF activities is dependent upon language capability and a thorough understanding of national and/or ethnic backgrounds, cultures, social norms, and customs. These specialized forces must develop and maintain their knowledge and understanding of the nations in which they operate. This training in peacetime facilitates the ability to work with indigenous forces in armed conflict as well. This is particularly true in view of their role as force multipliers, *i.e.*, trainers of indigenous forces in foreign internal defense and unconventional warfare scenarios.

c. *Current Operations – New Funding Authority*. In 2005, Congress provided another source of funding, NDAA 2005 § 1202, *Assistance to Iraq and Afghanistan Military and Security Forces*. While this is not strictly FID in the training sense, it comprises a source of funding which may be provided to the military and security forces of those countries in order to "combat terrorism and support United States or coalition military operations in Iraq and Afghanistan." This source of funding provides up to $500 million for this purpose, and may include funds for "equipment, supplies, services, and training." As it pertains to this source of funding, the term "military and security forces" means "national armies, national guard forces, border security forces, civil defense forces, infrastructure protection forces, and police." JAs must be aware of this new source of funding and its application within these theaters.

D. Unconventional Warfare (UW).

1. This activity covers a broad spectrum of military and paramilitary operations. It generally entails SOF leading or training a non-state paramilitary organization in combat operations. UW may involve operations with friendly indigenous personnel that are of a long duration. SOF involved in UW may participate in guerrilla warfare, subversion, sabotage, and support to escape and evasion networks. A thorough knowledge of the LOW is crucial in this area, especially international law relating to status; specifically, Articles 2 and 4 of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War (GPW) and Articles 43 through 47 of Protocol I to the Geneva Conventions (AP I). These Articles explain when the GPW and API are triggered and what is required of an individual in order to be treated as a prisoner of war (POW) upon capture.

2. POW status is a critical legal term of art because, if captured, all of the requirements of status must be met in order for an individual to be entitled to the protections of this body of international law. The two primary benefits of status are that a POW is no longer a legitimate target, and is entitled to immunity from prosecution for pre-capture warlike acts. As a general rule, the GPW and AP I are triggered if there is an international armed conflict. That is, an armed conflict between two **State** Parties. If these treaties are triggered, a person is entitled to status as a POW only if they conducted themselves in such a manner as to be distinguishable from the civilian population before capture. They must either have been a member of the armed forces of one of the Parties, or must be a member of a militia or resistance movement belonging to a Party to the conflict. Moreover, among other requirements, one seeking POW status must wear fixed insignia recognizable from a distance. They must also carry their weapons openly. AP I only requires that combatants in an international armed conflict carry their weapons openly in the attack and be commanded by a responsible person. There is no requirement for wearing insignia recognizable at a distance, for example. The U.S. is not a Party to AP I, and objects to this difference because it makes it difficult to distinguish civilians from combatants. However, the SOF JA must know how status is achieved in AP I. The JA will have to understand how enemy nations will view the status of captured U.S. SOF operatives and UW assets. The JA will also need to understand how ally signatories apply status.

3. The SOF JA should also consider what, if any, criminal jurisdiction the U.S. commander might have over the members of a U.S.-led militia. A central issue will be whether it is a "time of war" for the purposes of UCMJ, R.C.M. 103(19). This is critical because court-marital jurisdiction exists over persons serving with or

accompanying the force during time of war (UCMJ, Art. 2a(10)). This provision was recently extended to "declared war or contingency operation."[3]

E. Combating Terrorism.

1. This includes both antiterrorism (AT), defensive measures to reduce vulnerability to terrorist acts, and counterterrorism (CT), offensive measures taken to prevent, deter and respond to terrorism. When directed by the President or SECDEF, SOF may be involved in the recovery of hostages or sensitive material from terrorists; attack of terrorist infrastructure; or reduction of vulnerability to terrorism. While AT is within the realm of most SOF, CT is generally the province of Special Mission Units (SMU) and beyond the scope of this Handbook. (*See* Chapter on Terrorism.)

2. Judge Advocates should be aware, however, of a recent source of funding provided by Congress. NDAA 2005 § 1208, *Support of Military Operations to Combat Terrorism*, provides authority for the expenditure of up to $25 million to "provide support to foreign forces, irregular forces, groups or individuals engaged in supporting or facilitating ongoing military operations by United States special operations forces to combat terrorism."

F. Psychological Operations (PSYOP).

1. The purpose of PYSOP is to induce or reinforce foreign attitudes and behaviors. This may occur at the strategic, operational, and tactical level. The overall approval for PSYOP in peacetime or wartime rests at the Presidential/SECDEF level; however, PSYOP approval authority has been delegated to the Assistant Secretary of Defense for Special Operations and Low-Intensity Conflict. Additionally, U.S. policy requires review of PSYOP by the DoD General Counsel prior to approval (*see* Joint Pub. 3-53, Chapter II). Consequently, an overall PSYOP campaign ordinarily will have been reviewed and approved at echelons above the level of a unit or JTF JA. The role of the JA, then, is to provide advice on the implementation of the PSYOP campaign.

2. While PSYOP elements work closely with CA elements, the G3, not the G5, coordinates their activities. Still, CA, PSYOP, and public affairs actions can dramatically affect the perceived legitimacy of a given operation. When properly used, PSYOP is a force multiplier. It can be employed to enhance the safety and security of the force by communicating directly with the local and regional audience to inform them of such things as: (a) the existence and location of Civil Military Operations (CMO); (b) the nature and extent of the mission; and (c) instructions to avoid interfering with ongoing military operations. PSYOP is often the only means of mass communication a field commander has with both hostile and foreign friendly groups in the AO.

a. *Major Legal Considerations/Limitations in PSYOP*.

(1) *United States Citizens*. U.S. policy is to not conduct PSYOP toward U.S. citizens, whether they are located within the U.S. or OCONUS. Judge Advocates must be particularly cognizant of this policy during disaster relief operations, such as occurred following Hurricane Andrew, where PSYOP units were operating in CONUS.

(2) *Truth Projection*. "PSYOP techniques are used to plan and execute truth projection activities intended to inform foreign groups and populations persuasively" (Joint Pub. 3-53, Chapter I, para. 5a). We do not engage in misinformation, although information may be slanted to our perspective in order to persuade. To succeed, PSYOP information cannot be viewed as deceptive.

(3) *DoS Supervision*. In peacetime, DoS provides the overall direction, coordination, and supervision of overseas activities. DoS may restrict messages, themes, and activities within countries or areas. New missions, projects, or programs must be coordinated with the U.S. Country Team at the U.S. Embassy.

(4) *Geneva Conventions/Hague Regulations*. JAs must carefully review deception plans to ensure that they do not employ "treachery" or "perfidy," which are prohibited acts under the LOW.

(5) *Treaties in Force*. International agreements with host countries may limit the activities of PSYOP units. JAs must carefully review SOFAs and other agreements prior to, and during the course of, deployments.

[3] *See* John Warner National Defense Authorization Act, 109 P.L. 364, Section 552, amending 10 U.S.C. § 802(a) (10) (Article 2(a) (10) of the UCMJ).

(6) *Use of Public Affairs Office (PAO) Channels*. PAO channels are open media channels that provide objective reporting. Consequently, they *may* be used to counter foreign propaganda. PAO and PSYOP staffs should coordinate their efforts. However, because the PAO must remain credible, information passed through PAO channels *must not* propagandize. It must be objective truth.

(7) *Domestic Laws*. PSYOP uses extensive computer, audio, and video technology. Accordingly, JAs must be alert to copyright and fiscal issues, and ethics limitations on the use of PSYOP capabilities for private groups.

(8) *Fiscal Law*. PSYOP campaigns may include "giveaways" (T-shirts with a printed message, for example). The purchase and distribution of "giveaways" requires careful fiscal law analysis.

(9) *Personnel Issues*. Many PSYOP assets are in the Reserve Component (RC). Many PSYOP analysts are DoD civilians who voluntarily deploy to mission areas. Discipline, readiness, and LOW issues for RC and civilian personnel involved in PSYOP require the attention, and early proactive involvement, of JAs.

(10) *Disciplinary Exceptions*. PSYOP teams may require exceptions to restrictions often contained in General Orders. For example, PSYOP personnel conducting an assessment of PSYOP may have to wear civilian clothing in contravention of a general requirement to remain in uniform at all times.

G. Civil Affairs (CA) Operations.[4] See Chapter 22.

H. Counterproliferation (CP) of Weapons of Mass Destruction (WMD). CP refers to actions taken to seize, destroy, render safe, capture, or recover WMD. If directed, SOF can conduct Direct Action, Special Reconnaissance, Counterterrorism, and Information Operations to deter and/or prevent the acquisition or use of WMD.

I. Information Operations (IO). IO are the actions taken to affect adversary information and information systems while defending one's own information and information systems. An adversary's nodes, links, human factors, weapons systems, and data are particularly lucrative targets, capable of being affected through the use of lethal and nonlethal applications or coordinated SOF IO capabilities. This is a new area of the law and is in the development stage. (*See* the chapter on Information Operations, this Handbook.)

VI. SPECIAL OPERATIONS COLLATERAL ACTIVITIES

In addition to the nine listed SOF activities, SOF also conduct what are known as collateral activities. Based on inherent capabilities possessed by SOF required to complete their primary missions, they are particularly suited for these collateral activities as well. The seven most common collateral activities in which SOF participate in are stated below.

A. Coalition Support.

1. SOF units will deploy whenever possible in small groups to accompany coalition forces during deployments or actual combat operations. This includes training coalition partners on tactics and techniques, assisting with communications and integrating into the command and intelligence structure. SOF personnel possess the language capability, cultural awareness, and interpersonal skills that enable them to build tight professional and personal bonds with allied contingents. Termed "coalition support teams" (CST), SOF personnel train, live, deploy, and sometimes fight alongside our allies.

2. CST play an integral part in ensuring that the ROE are understood and followed by the members of the coalition. They will dramatically assist the JA responsible for training foreign forces in the Task Force ROE. CST must understand that they are required to document and report LOW violations. CST may not be able to prevent (nor are they usually required by law or direct command policy to intervene) all ROE, LOW, or human rights violations committed by allied forces. They remain subject to the UCMJ and may not participate in violations, but must document and report such incidents immediately.

[4] Historically, Civil Affairs units have fallen under the rubric of special operations (for example, Army CA units are assigned to USASOC). Judge Advocates should be aware that changes are underway. *See* Civil Affairs Pyschological Command Realigns from SOC to Army Reserve Command, USASOC NEWS SERVICE (24 May 2006) (noting that USACAPOC will move from USASOC to the USAR, but that USASOC will retain propency, and that 95th Civil Affairs Brigade (Provisional) and 4th PYSOPS Group will remain assigned to USASOC).

B. Combat Search and Rescue (CSAR).

1. CSAR involves the rescue and recovery of distressed personnel during war or across the range of military operations. USSOCOM is responsible for the CSAR of its own forces and, when directed, other forces as well. SOF's ability to conduct operations deep behind enemy lines makes it well-suited for CSAR.

2. As a result of the U.S. becoming a Party to the 1993 Chemical Weapons Convention, the use of riot control agents (RCA) in CSAR has become a significant legal issue. The Convention specifically bans the use of RCA as a "method of warfare." However, EO 11850, which is still in effect, specifically permits the use of RCA in CSAR. The implementation section of the Senate resolution ratifying the treaty requires that the President not modify EO 11850. (*See* S. Exec. Res. 75, Senate Report, s3373 on 24 April 1997, section 2 - conditions (26) RCA.) The President, in his certification document, wrote that "the United States is not restricted by the convention in its use of riot control agents in various peacetime and peacekeeping operations. These are situations in which the U.S. is not engaged in the use of force of a scope, duration, and intensity that would trigger the laws of war with respect to U.S. forces." Despite the fact that CSAR is defensive in nature, the use of RCA in such a case is arguably a method of warfare when used during international armed conflict. Therefore, even though EO 11850 is still valid, it is unlikely that the NCA would approve the use of RCA in CSAR during international armed conflict where LOW is applicable. It may, however, approve its use for CSAR in peacekeeping or peace enforcement operations.

C. Counterdrug Activities (CD). (*See also* the chapter on Domestic Operations, this Handbook).

1. SOF's participation in CD includes active measures to detect, monitor, and counter the production, trafficking, and use of illegal drugs. In OCONUS CD, SOF possess the cultural and linguistics capabilities to assist foreign governments, largely though training. SOF also may help U.S. and foreign law enforcement agencies with military applications, such as SR, in CD. In CONUS CD, SOF are often used to train and assist local, state and Federal law enforcement agencies. SOF JAs must realize that, when conducting military support to civilian law enforcement agencies inside the U.S., the SROE provisions of CJCSI 3121.01B do not apply. Rather, Enclosures L-Q of CJCSI 3121.01B, *Standing Rules for the Use of Force*, apply to such missions. JAs must be thoroughly familiar with these rules on the use of force. See also Domestic Operations Handbook.

2. In CD, like other military operations, the SOF JA must be sensitive to fiscal issues. Money for CD programs with SOF involvement primarily comes from the O&M appropriation. While the funds come from O&M, a specific statutory authorization must be located to support the planned CD. It is not enough that the CD represents a training opportunity in order to justify the expenditure of money for CD. This is because CD involves aid or augmentation of one sort or another to foreign governments or U.S. civilian law enforcement agencies (CLEA), activities that are generally contrary to the proper use of O&M. General statutory authorizations can be found in 10 U.S.C. §§ 371-382 and various Authorization Acts. *See* § 1004, Nat'l Def. Auth. Act for 1991, Pub. L. 101-510, extended through FY06 by § 1021, Nat'l Def. Auth. Act for FY2002, Pub. L. 107-107. Most SOF OCONUS CD comes in the form of training foreign troops and is funded by way of 10 U.S.C. § 2011.

3. Absent specific Congressional authority to the contrary, the Posse Comitatus Act, 18 U.S.C. § 1385, prohibits the direct participation of DoD personnel in law enforcement activities inside the United States. For example, SOF may not be directly involved in searching or seizing contraband or arresting suspects. However, the act does not prevent DoD personnel from conducting routine training that incidentally benefits CLEA. Therefore, it is absolutely critical that all CONUS CD directly relates to the unit's Mission Essential Task List (METL). It is up to the operators to determine their METL, but the JA may become involved in helping the operators determine whether what they are being asked to do comports with their METL. Legal review of CD is generally conducted by JAs assigned to the units that organize DoD involvement, such as JTF-6. However, the SOF JA cannot afford to defer completely to those other organizations because although the legally reviewed mission may be characterized as "legal," it may not comply with SOF CD policies and procedures. The Posse Comitatus Act does not apply overseas as a matter of law. However, SOF may not directly participate in law enforcement overseas as a matter of policy, in accordance with DoD Dir. 5525.5, absent SECDEF approval. Of course, the Posse Comitatus Act does not affect ARNG SOF acting in a state status, because they are not Federal troops in such a situation.

4. If SR is to be used in CD, the SOF JA must ensure that it does not include the collection of intelligence on U.S. persons in violation of EO 12333. (*See* the chapter on Intelligence Law, this Handbook.) Collection, however, is a term of art and means more than the mere acquisition of information. Collection entails the acquisition and maintenance of information for future use. This issue often arises in conjunction with Posse Comitatus in CD ground operations inside the U.S.. For example, a SOF team may be asked to establish an SR site

at a seemingly deserted airstrip in the U.S.. They are told to radio in to CLEA when and if planes land at the strip, and to record the aircraft's tail numbers or take pictures of the aircraft. A detachment may be asked to establish an SR site adjacent to a marijuana field in the U.S. and further directed to radio CLEA when anyone enters the field, and to take his or her picture. It is easy to see how these activities could be alleged to constitute direct participation in law enforcement and the collection of intelligence.

5. If information obtained in this fashion is immediately handed over to CLEA, either in the form of real time communication or undeveloped film, and not stored or maintained in any manner by SOF, then it does not constitute "collection" because there is no storage component. Although it is a METL task to develop film in the field, it should not be done if it involves taking pictures during a CD mission inside the United States. However, there is no requirement for SOF to wear blinders. SOF may pass on to CLEA information concerning criminal activities it observes while training. This points out the need to make sure that any CD activities in which SOF participates are clearly within their METL, or it may be characterized as law enforcement rather than training. If, as part of the SR, the team is to conduct an overall terrain reconnaissance, then taking pictures of the zone, including the field in question, would be permitted if it is part of that training mission. However, such a mission would not include the surveillance of persons. If the team begins to target individuals with a camera, it begins to look more like surveillance than zone reconnaissance. The purpose of taking pictures must be routine training.

6. Even if legally permissible, the decision to participate in CD has tremendous policy implications. The use of the military in any activity even remotely linked to CONUS law enforcement can generate considerable controversy, and potentially more controversial with the use of SOF. If a young infantryman makes a mistake during CD, it would be easier to explain the circumstances of such a Soldier's mistake than it would be to explain a similar mistake made by a seasoned SF NCO. Any CD military application in CONUS creates the possibility of exposure of the unit's activities through the courts and the media. In a criminal defense against alleged Posse Comitatus violations, members of SOF potentially could be brought into court and forced to testify regarding past and future CD ops and techniques used in SR.

D. Foreign Humanitarian Assistance (HA).

1. HA is provided by DoS through various economic aid programs. DoD does, however, provide some limited HA. For SOF, this generally is in the form of HCA (as discussed earlier), which is authorized by 10 U.S.C. § 401. HCA comes in three varieties. Demining, which will be discussed below, preplanned HCA, and "de minimis" or "target of opportunity" HCA. There is a clear nexus between a government's ability to provide basic human services to it citizens and its internal security. Insurgencies and organized criminal enterprises are more successful, as a general rule, in countries where the government either will not or cannot support the populace. Through HA, the U.S. government is able to help developing nations provide those much-needed services to their citizens. This may result in greater regional stability, which is beneficial to U.S. interests. Moreover, HCA is often the gateway for U.S. Forces into areas where access is limited because of diplomatic concerns. There are obvious benefits to SOF in the form of training and in obtaining information regarding counties in their regional area.

2. For SOF, at the execution level, most problems occur when the teams either exceed the scope of the statute or leave behind the tools or medicine involved with the HN locals. For example, if an operation calls for a team to repair a medical clinic in a rural area as is authorized by statute, SOF may not buy refrigerators, sterilizers, tables and chairs for the clinic because such purchases would be considered stocking a clinic, not repair. In addition, such purchases may constitute foreign aid with no nexus to training and no improvement of SOF readiness skills. Similarly, leaving behind medicine or tools purchased to accomplish an HCA mission would arguably unlawfully augment DoS funds for foreign aid. Leaving behind DoD-purchased property where the unit is no longer present means that there is no longer training value to the U.S. Forces involved.

(*See generally* the chapters on Fiscal Law and Contingency Contracting, this Handbook.)

E. Countermine Activities.

1. *Demining is a form of HA.* Demining projects may be funded by security assistance funds, 22 U.S.C. § 2765, or by HCA through 10 U.S.C. § 401(e)(5). The focus of this paragraph will be on HCA because it is the form of demining in which SOF units most often participate. HCA demining is funded by an annual O&M appropriation known as the Overseas Humanitarian, Disaster and Civic Aid (OHDACA) account. Although the money is appropriated annually, it is available for two years. Because OHDACA is actually a "fenced" pot of money within the general O&M account, it is often referred to as an appropriation within an appropriation. Five disaster and humanitarian programs, including § 401 demining, are funded with OHDACA. For FY 04, Congress

appropriated $59 million to OHDACA. (*See* Nat'l Def. Auth. Act for FY2004, Pub. L. 108-136.) HCA demining covers the detection and clearance of landmines, including activities relating to the furnishing of education, training, and technical assistance with respect to the detection and clearance of landmines. However, there are significant limitations. U.S. forces may not engage in the physical detection, lifting or destroying of landmines, unless it is done for the concurrent purpose of supporting a U.S. military operation.

2. Unlike other HCA however, the assistance is to be provided during military operations with HN forces, which means that it may indirectly or directly benefit HN forces. Moreover, the equipment used in the demining operation may be transferred to the HN.

F. Security Assistance (SA).

1. Special Operations Forces, particularly the Special Forces, are often tasked to deploy Mobile Training Teams (MTT) overseas to conduct security assistance training. The JA must review the proposed mission in order to ensure the jurisdictional status of the team members has been addressed. Typically, the mission will be conducted as a Foreign Military Sales (FMS) case under the Arms Export Control Act (AECA). The FMS Letter of Offer and Acceptance (LOA) should set forth the status of the team members while they are in the host country. These personnel likely will receive the same privileges and immunities as those accorded the administrative and technical staff of the U.S. Embassy pursuant to the Vienna Convention on Diplomatic Relations. Security assistance team members may also be considered part of the U.S. security assistance office (SAO) located in the host country. The JA should refer to the bilateral agreement between the U.S. and the host country in order to determine these privileges. If neither the LOA nor the SAO addresses the jurisdictional status of U.S. forces, the JA should contact the Security Assistance Training Management Organization, Fort Bragg, North Carolina (DSN: 239-9108/1599/5057/9008).

2. Although the MTT is responsible to the U.S. military mission in the host country, it may operate autonomously in the field. The team members must be aware of their sensitive, visible mission. For this reason, the JA should thoroughly brief the MTT on the laws and customs of the country to which they are deploying. This briefing is particularly important if team members have not previously deployed to this particular country. The MTT may deploy to a country experiencing internal armed conflict. In that situation, team members must be informed of the AECA (10 U.S.C. § 2671c), which prohibits U.S. personnel from performing any duties of a combatant nature, including duties related to training and advising, that may result in their becoming involved in combat activities. (*See* CJCS MSG DTG 1423587 Feb 91, which prohibits DoD personnel from accompanying HN forces on actual operations where conflict is imminent.) In addition, guidance with respect to the acceptance of gifts from foreign governments and humanitarian law concerns must be provided. (*See generally* the chapter on Fiscal Law, this Handbook.)

G. Peace Operations. SOF assist in peacekeeping operations, peace enforcement operations, and other military operations in support of diplomatic efforts to establish and maintain peace. (*See generally* Chapter 4 of this Handbook)

H. Special Activities. These are activities that are planned and executed so that the role of the U.S. Government is not apparent or acknowledged publicly. Special activities require a Presidential finding and Congressional oversight.

NOTES

CHAPTER 25

CIVIL AFFAIRS

REFERENCES

1. 10 U.S.C. § 401, Humanitarian and Civic Assistance Provided in Conjunction with Military Operations.
2. NDAA 2005 § 1202, Assistance to Iraq and Afghanistan Military and Security Forces.
3. Executive Order 12333, U.S. Intelligence Activities.
4. JOINT CHIEFS OF STAFF, JOINT PUB. 3-08, INTERAGENCY, INTERGOVERMENTAL ORGANIZATION, AND NONGOVERNMENTAL ORGANIZATION COORDINATION DURING JOINT OPERATIONS, VOLS. I & II (17 Mar. 2006).
5. JOINT CHIEFS OF STAFF, JOINT PUB. 3-57, JOINT DOCTRINE FOR CIVIL-MILITARY OPERATIONS (8 Feb. 2001).
6. JOINT CHIEFS OF STAFF, JOINT PUB. 3-57.1, JOINT DOCTRINE FOR CIVIL AFFAIRS (14 Apr. 2003).
7. U.S. DEP'T OF DEFENSE, DIR. 2000.13, CIVIL AFFAIRS (27 June 1994).
8. U.S. DEP'T OF DEFENSE, DIR. 2205.2, Humanitarian and Civic Assistance Provided in Conjunction with Military Operations (6 Oct. 1994).
9. U.S. DEP'T OF DEFENSE, DIR. 3000.05, Military Support for Stability, Security, Transition, and Reconstruction (SSTR) Operations (28 Nov. 2005).
10. U.S. DEP'T OF ARMY, FIELD MANUAL 3-05.40 (41-10) CIVIL AFFAIRS Operations (29 Sept. 2006).
11. U.S. DEP'T OF ARMY, FIELD MANUAL 3-05.401, CIVIL AFFAIRS TTPS (23 Sept. 2003).
12. U.S. DEP'T OF ARMY, FIELD MANUAL 41-10, CIVIL AFFAIRS OPERATIONS (14 Feb. 2000).

I. INTRODUCTION.

Military commanders must consider not only the military forces, but also the environment in which those forces operate. One factor of the environment that commanders must consider is the civilian population and its impact on military operations; that is, whether it is supportive, neutral, or hostile to the presence of U.S. military forces. Civil Affairs (CA) forces can support the commander in Civil Military Operations (CMO) by conducting Civil Affairs Operations (CAO). The mission of CA forces is to engage and influence the civil populace by planning, executing , and transitioning CAO using integrated effects-based capabilities in service, joint, interagency, and multinational operations to support their commanders in engaging the civil component of their operational environment, in order to enhance CMO or other stated U.S. objectives before, during, or after other military operations (*See* FM 3-05.40, para. 1-1).

A. Terms and Definitions.

1. **Civil Affairs forces** are the designated Active and Reserve Component forces and units organized, trained, and equipped specifically to conduct CAO and to support CMO. Approximately 95% of the CA force structure is in the USAR. The majority of CA Soldiers are in the CA branch, functional area, or career field designation of 38. The exceptions are Judge Advocates (JA) (AOC 27A) and Army Medical Department (AMEDD) officers.

2. **Civil Military Operations (CMO)** are the activities of a commander that establish, maintain, influence, or exploit relations between military forces, government and nongovernmental civilian organizations and authorities, and the civilian populace in a friendly, neutral, or hostile AO to facilitate military operations and consolidate and achieve U.S. objectives. CMO may include military forces performing activities and functions that are normally the responsibility of local, regional, or national government, and may include activities to build the capacity of those governments. These activities may occur before, during, or after other military actions. They may also occur, if directed, in the absence of other military operations. CMO are conducted to minimize civilian interference with military operations, to maximize support for operations, and to meet the commander's legal and moral obligations to civilian populations within the commander's area of control (*See* Joint Pub. 3-57).

3. **Civil Affairs Operations (CAO)** are military operations that are planned, supported, executed, or transitioned by CA forces to modify behaviors, mitigate or defeat threats to civil society, and assist in establishing the capacity for deterring or defeating future civil threats in support of CMO and other U.S. objectives. These operations may be conducted through, with, or by the indigenous population and institutions (IPI), intergovernmental organizations (IGO), nongovernmental organizations (NGO), or other governmental agencies (OGA). CAO are conducted within the scope of five core tasks and may occur simultaneously or sequentially with combat operations, depending on the operational environment. The five core tasks are: Population and Resource Control (PRC), Foreign Humanitarian Assistance (FHA), Nation Assistance (NA), Support to Civil Administration (SCA), and Civil Information Management (CIM).

4. **The Civil-Military Operations Center (CMOC)** is a standing capability formed by all CA units from the company level to the CACOM level. The CMOC serves as the primary coordination interface for U.S. Armed Forces between IPI, humanitarian organizations, IGOs, NGOs, multinational military forces, and other civilian agencies of the U.S. Government. The CMOC facilitates continuous coordination among the key participants with regard to CMO and CAO from local levels to international levels within a given AO, and develops, manages, and analyzes the civil inputs to the COP. The CMOC is the operations and support element of the CA unit as well as a mechanism for the coordination of CMO.

B. Relationship Between CMO and CAO.

1. CMO is broader in scope than CAO. CMO encompass the CAO that the commander takes to establish and maintain relations between the military forces and the civilian authorities, the general population, and the institutions in the AO. CMO occurs in virtually every operation across the full spectrum of military operations. CA forces support the commander in the execution of CMO by assisting in the planning, coordination, and supervision of CAO.

2. Designated CA forces, other military forces, or a combination of CA forces and other forces may perform CMO. In general, every U.S. military organization has some capability to support CMO. Activities include food and water distribution, medical treatment for HN civilians, repairing battle damage, and improving local infrastructure.

3. The authority of the commander to conduct CMO is derived from a decision of the President and/or SECDEF to conduct a military operation. Limitations on this authority may be found in: the mission statement; international agreements; the law of armed conflict; U.S. foreign policy decisions; U.S. and HN law; the relationship between the government of the U.S. and the HN; and the participation of other foreign countries in the operation. Other considerations that may affect CMO include: the availability of resources; U.S. fiscal law; the political-military situation; the requirement of the military situation; and the environment (*e.g.*, economic and social development of the HN). Although conditions may differ, the basic mission of securing local acceptance and support for U.S. Forces, and minimizing and eliminating the friction and misunderstandings that can detract from U.S. relations, remains the same.

C. CAO Supporting CMO.

1. The nature of the military operation will determine the specific CA Operations that will be conducted in support of CMO. In general, CA forces prepare estimates, country assessments, agreements, operation plans (OPLAN) and operation plan in concept format (CONPLAN) annexes, and other documentation required to support military operations. They coordinate CMO with other DoD and/or U.S. Government agencies, multinational, or HN governmental civil and military authorities, or other civilian groups, to facilitate an understanding of the objectives and synchronize efforts to achieve the mission. CA forces also supervise the execution of CMO performed by U.S. or foreign personnel or agencies. Finally, they serve as liaison between U.S. military and allied or coalition HN forces, IOs, NGOs, and PVOs.

2. As noted above, CA core tasks are Population and Resource Control (PRC), Foreign Humanitarian Assistance (FHA), Civil Information Management (CIM), Nation Assistance (NA), and Support to Civil Administration (SCA).

3. **Population and Resource Control (PRC) operations** consist of two distinct, yet linked, components: populace control and resources control. These controls are normally a responsibility of indigenous civil governments. They are defined and enforced during times of civil or military emergency. For practical and security reasons, military forces use PRC measures of some type and to varying degrees in military operations across the full

spectrum of operations. PRC operations can be executed in conjunction with, and as an integral part of, all military operations. Populace controls provide security for the populace, mobilize human resources, deny personnel to the enemy, and detect and reduce the effectiveness of enemy agents. Populace control measures include curfews, movement restrictions, travel permits, registration cards, and relocation of the population. Dislocated Civilian (DC) operations and noncombatant evacuation operations (NEO) are two special categories of populace control that require extensive planning and coordination among various military and nonmilitary organizations. Resources control measures regulate the movement or consumption of materiel resources, mobilize materiel resources, and deny materiel to the enemy. Resources control measures include: licensing; regulations or guidelines; checkpoints (for example, roadblocks); ration controls; amnesty programs; and facility inspections.

4. **Dislocated Civilian (DC) operations** are part of PRC. DC operations minimize local population interference with U.S. military operations and protect civilians from the collateral effects of combat. Uncontrolled masses of people seriously impair the movement of military units and supplies in support of the commander's operations. These operations also mitigate and control the outbreak of disease among DCs that can spread to military forces operating in the area. Finally, DC operations centralize the population of DCs into selected and controllable areas where they can receive supplies and services.

5. PRC operations occurred during OPERATION DESERT STORM and are occurring in OPERATION IRAQI FREEDOM. During DESERT STORM, CA forces supporting a French Division established a military checkpoint to screen DCs returning to the town of As Salman, Iraq. At the checkpoint, all vehicles and personnel were stopped and searched by CA forces for weapons and other contraband. Iraqi military personnel were identified, separated from the DCs, and transported to an enemy prisoner of war (EPW) camp. After screening and in-processing, the DCs were issued U.S.-made identity cards and rations. Finally, all DCs returning to the town were briefed by the muhktar (tribal leader) on the military's administration of and rules for As Salman.

6. CA forces support CMO by planning and conducting DC operations. In addition, they advise their organizations on the anticipated reaction of the populace to the planned military operations. CA forces coordinate with military police (MP) and/or security forces, PSYOP forces, and logistic support for the movement, collection, housing, feeding, and protection of DCs. They also coordinate with U.S. and HN agencies, international organizations, NGOs, and PVOs that are operating within the AO. The purpose of this coordination is to obtain the necessary support from these agencies and organizations, thereby reducing the requirements placed upon U.S. military forces in meeting the commander's legal obligations in providing the minimum standard of humane care and treatment for all civilians

7. In OPERATIONS DESERT STORM, IRAQI FREEDOM, and ENDURING FREEDOM in Afghanistan, CA forces controlled and provided humanitarian assistance to DCs, refugees and EPWs found on the battlefield. As a result of their efforts, CA forces minimized the effect these persons had on military operations, and safeguarded them from combat operations. In the rear areas, CA forces organized and managed the DCs and refugee collection points and camps, and assisted the transition of responsibility for these groups from military to international relief organizations. (*See e.g.*, DoD Report to Congress, Conduct of the Persian Gulf War.)

8. Other examples of DC operations occurred in Northern Iraq during OPERATION PROVIDE COMFORT, and in Kosovo and Macedonia during operations in and around the region of the Former Republic of Yugoslavia. The major CA efforts in these operations involved establishing and operating camps for Kurdish and Kosovar DCs. Civil Affairs units interfaced with numerous private and voluntary organizations, the USAF, the USMC, the armies of many allied countries and United Nations (UN) agencies in providing assistance to the Kurds and Kosovars. During these operations, they worked with various supporting units and organizations to ensure that over half a million Kurds and millions of Kosovars were housed, moved, clothed, fed and assisted while displaced from their homes.

9. **Noncombatant Evacuation Operations (NEO)** are PRC operations conducted to relocate threatened noncombatants from locations in a foreign country. They are normally conducted to evacuate U.S. citizens from a hostile environment created either by armed conflict, lawlessness or natural disaster. Evacuees may also include selected local citizens or third country nationals, including NGO and PVO volunteers, IO workers and members of media organizations. During NEO, the U.S. Ambassador is the senior authority for the evacuation, and is ultimately responsible for the successful completion of the NEO and the safety of the evacuees. However, the military commander is solely responsible for conducting the operation. (For a detailed review of NEO, *see* NEO Chapter of this Handbook and Joint Pub. 3-07.5, Joint Tactics, Techniques, and Procedures for Noncombatant Evacuation Operations.)

10. Civil Affairs forces support NEO by advising the commander on how to minimize population interference with evacuation operations. When possible, they obtain civil or indigenous support for the NEO. Civil Affairs forces maintain close liaison with embassy officials to ensure effective coordination and delineation of CMO responsibilities and activities. They may also assist embassy personnel in receiving, screening, debriefing, and identifying evacuees. Finally, CA forces can support operations at the evacuation site, holding areas for non-U.S. nationals denied evacuation, and reception and processing stations.

11. **Foreign Humanitarian Assistance (FHA) operations** are conducted to relieve or reduce the results of natural or man-made disasters or other endemic conditions such as human pain, disease, hunger, or privation that might present a serious threat to life or that can result in great damage to or loss of property. FHA provided by U.S. forces is limited in scope and duration. The foreign assistance provided is designed to supplement or complement the efforts of the HN civil authorities and IGOs that may have the primary responsibility for providing FHA. FHA operations are those conducted outside the United States, its territories, and possessions (JP 1-02). Examples of disasters include hurricanes, earthquakes, floods, oil spills, famine, disease, civil conflicts, terrorist incidents, and incidents involving weapons of mass destruction (WMD). Joint Pub. 3-07.6, Joint Tactics, Techniques, and Procedures for Foreign Humanitarian Assistance, provides additional information on FHA. FHA operations encompass Humanitarian and Civic Assistance (HCA), disaster relief, dislocated civilian support operations, technical assistance operations, and consequence management.

12. Civil Affairs forces support FHA operations by participating in the planning process, providing relief, coordinating programs for relief and rehabilitation, and providing control measures appropriate to the situation. In OPERATION RESTORE DEMOCRACY, CA forces coordinated the work of NGOs and PVOs, and planned and executed humanitarian assistance (HA) and HCA projects. CA activities included medical care, food distribution, and rudimentary construction of roads and sanitation facilities.

13. CA forces assist the military in providing or coordinating for the safety, sustenance and disposition of refugees and DCs. During OPERATION JOINT FORGE, the Combined-Joint Civil-Military Task Force (CJCMTF), a Stabilization Force (SFOR) formation, performed activities that supported the return of displaced persons and refugees (DPRE) to Bosnia and Herzegovina. CJCMTF prepared Municipality Information Reports (MIR), which included detailed information about the population, economy, public services, housing, and infrastructure of the municipalities within Bosnia and Herzegovina. The reports also included recommendations regarding the suitability of the municipality for the return of DPREs. Once completed, the reports were placed on the Repatriation Information Center webpage on the Internet. In this manner, DPREs could obtain information about their former communities when deciding whether to return to their pre-war homes. The CJCMTF also participated at all levels of the Reconstruction and Returns Task Force (RRTF). The RRTF coordinated international support for the process of DPRE returns. At the highest level, the RRTF developed policy, shared problems, and developed solutions to those problems with the membership. At the field level, the RRTF synchronized returns by bringing all relevant actors together to discuss and coordinate the return process. In addition, the CJCMTF established and maintained a liaison and coordination role with both the Federation and the Republika Srpska ministries responsible for DPRE returns. In Multinational Division North, the CA battalion determined the requirements for identification, submission, and verification of Community Infrastructure Rehabilitation Program (CIRP) projects. The CIRP program provided funding for the rebuilding of community infrastructure related to water, electricity, street lighting, roads, bridges, and other needed projects. In addition to developing the infrastructure, CIRP projects encouraged the local community to cooperate with DPRE returns. Finally, the CJCMTF provided functional expertise and support to various organizations (IOs, NGOs and PVOs) supporting the return process.

14. **Humanitarian and Civic Assistance (HCA)** is a form of FHA provided to the local populace by U.S. forces in conjunction with military operations and exercises. HCA is specifically authorized by 10 U.S.C. § 401 and funded under separate authorities. HCA is limited to: (a) medical, dental, and veterinary care provided in rural or underserved areas of a country; (b) construction of rudimentary surface transportation systems; (c) well drilling and construction of basic sanitation facilities; and (d) rudimentary construction and repair of public facilities. The assistance must fulfill unit-training requirements that incidentally create humanitarian benefit to the local populace. It should be noted that HCA is not the only form of assistance that may be conducted; other types of assistance are authorized by other provisions of the U.S. Code and other authorities.

15. **Nation Assistance (NA)** is civil or military assistance (other than FHA) rendered to a nation by U.S. forces within that nation's territory during peacetime, crises or emergencies, or war based on agreements mutually

concluded between the United States and that nation. NA operations support an HN by promoting sustainable development and growth of responsive institutions. The goal is to promote long-term regional stability. Nation Assistance programs often include but are not limited to, security assistance (SA), foreign internal defense (FID), and 10 U.S.C. (DoD) programs, as well as activities performed on a reimbursable basis by Federal agencies or IGOs. All NA operations are usually coordinated with the U.S. Ambassador through the Country Team.

16. **Military Civic Action (MCA)** is a type of NA that involves activities intended to win support of the local population for the foreign nation and its military. MCA use predominantly indigenous or paramilitary forces as labor and is planned as a series of short-term projects with the long-term goal of fostering national development. Properly planned, executed, and promulgated in close cooperation with local authorities, military, and community leaders, MCA projects can be useful in reaching desired objectives and goals. In MCA programs, U.S. personnel are limited to training and advising the HN military on planning and executing projects useful to the local population, such as building schools and clinics, digging wells, and developing roads. The intent of MCA is to enhance the image of the HN military and increase its acceptance and the supported government's acceptance with the local population.

17. MCA must comply with U.S. fiscal laws. Except for de minimis activities authorized under 10 U.S.C. 401, expenses for consumable materials, equipment leasing, supplies, and necessary services incurred as a direct result of MCA projects may not be paid out of U.S. Government funds unless authorized under a foreign aid or SA program for which funds are appropriated under 22 U.S.C., or which have other authority and funding.

18. Civil Affairs forces plan, coordinate, advise, and direct MCA operations for the host government. As an example, CA forces assist indigenous forces by providing skills in the technical areas of light-construction engineering and medical support. Successful CA operations eliminate or reduce military, political, economic and sociological problems. Although MCA may involve U.S. supervision and advice, the visible effort is conducted by the local military.

19. **Support to Civil Administration (SCA)** are military operations that help to stabilize or to continue the operations of the governing body or civil structure of a foreign country, whether by assisting an established government or by establishing military authority over an occupied population.

20. SCA occurs most often in stability operations. Some support to civil administration is manifested in the other CAO: PRC, FHA, and NA. SCA operations consist of two distinct mission activities:

a. ***Civil administration in friendly territory***. The Geographic Combatant Commander's support to governments of friendly territories during peacetime, disasters, or war. Examples of support include advising friendly authorities or performing specific functions within limits of the authority and liability established by international treaties and agreements.

b. ***Civil administration in occupied territory***. The establishment of a temporary government, as directed by the SECDEF, to exercise executive, legislative, and judicial authority over the populace of a territory which U.S. forces have taken from an enemy by force of arms until an indigenous civil government can be established.

21. CA support includes: (a) assisting a host/allied government in meeting its people's needs and maintaining a stable and viable civil administration; (b) establishing a temporary civil administration to maintain law and order and to provide life sustaining services until the HN can resume normal operations; and (c) establishing a civil administration in occupied enemy territory.

22. In OPERATION IRAQI FREEDOM, CA forces are currently conducting nationwide reconstruction and restoration of basic infrastructure services, as well as other governmental functions. After the first Gulf War, CA forces conducted SCA operations in support of the Kuwait government. Specifically, CA forces defined contract requirements, reviewed contract proposals, and advised Kuwait government officials on the merits of proposed contract arrangements. As a result of CA efforts, the Kuwait government awarded more than $558 million in contracts to restore country operations. In addition, CA forces were involved in the restoration of electric power, repair of the desalination plants, and disposal of ordnance in Kuwait.

23. In SCA, CA forces provide advisory assistance to a host government in a variety of areas such as rule of law, public safety, transportation, communications, and public education. For example, in OPERATION RESTORE DEMOCRACY, CA forces assessed the needs of the Haitian government ministries and provided training and assistance to the ministries. They worked with Haitian officials to improve public health, sanitation,

education, welfare, public administration, justice, transportation, and communication systems. CA forces also performed damage assessments of critical facilities within the country and recommended and coordinated short-term remedial action to restore the functions and services of the Haitian government.

24. In addition to the above, CA forces provide the commander with information on protected cultural assets such as arts, religious edifices, monuments, and archives. They provide safeguards and any other required protection over collections of artifacts and objects of historical or cultural importance, including appropriate records thereof. Additionally, CA forces make appropriate recommendations on plans to use or target buildings or locations of cultural value, such as temples, universities and shrines.

25. Civil Affairs forces also assist the commander in fulfilling his or her legal and moral obligations in accordance with international law, including the LOW, as well as domestic U.S. laws, directives, and policies. Toward that end, CA legal advisors, in coordination with the SJA of the supported command, review current plans and future operations with respect to applicable laws and agreements and advise the commander, as required. Additionally, CA forces observe conditions within the area of operations and ensure the commander is kept informed of the needs of the local populace.

26. **Civil Information Management (CIM)**. Civil information is information developed from data with relation to civil areas, structures, capabilities, organizations, people, and events, within the civil component of the commander's operational environment that can be fused or processed to increase the situational awareness, situational understanding, or situational dominance of DoD (and other agencies), IGOs, NGOs, and IPIs. CIM is the process whereby civil information is collected, entered into a central database, and internally fused with the supported element, higher headquarters, other U.S. Government and DoD agencies, IGOs and NGOs to ensure the timely availability of information for analysis and the widest possible dissemination of the raw and analyzed civil information to military and nonmilitary partners throughout the AO.

27. Functional Specialty Teams. Civil Affairs commands (CACOM) provide expertise in six functional specialty areas: rule of law, economic stability, governance, health and welfare, infrastructure, and education and public information. USAR CA brigades and battalions have capabilities in four of the functional specialty areas: rule of law, governance, health and welfare, and infrastructure. Although the Active Army CA battalions have the capability to execute missions in some of these functional specialty areas, they are not organized to maintain the high-level skills required for specialized CAO. Within each functional specialty area, technically qualified and experienced individuals, known as CA functional specialists, advise and assist the commander and can assist or direct their civilian counterparts. operational and strategic levels, may be employed in general support of interagency operations, in addition to direct support of military operations.

D. Command and Control.

1. CA mission capabilities support broad and specific U.S. foreign policy goals. Because the conduct of CAO and CMO entails joint and interagency coordination, commanders and senior staff must understand the U.S. organization for national security and the prevailing concepts of joint and multinational military operations. Therefore, CA forces require a centralized, responsive, and unambiguous C2 structure. Unnecessary layering of headquarters decreases responsiveness and available mission planning time and creates an opportunity for a security compromise.

2. Normally, CA forces are attached to supported commanders with minimal layering of subordinate levels of command. This command organization may require an operational headquarters (for example, CA brigade) to interact directly with joint forces. Frequent involvement in joint and interagency operations requires an understanding of the U.S. organization for national security and the nature of joint military operations.

E. Legal Personnel in Support of Civil Affairs[1].

1. Judge Advocates assigned to CA units are the primary legal advisors to their respective units. Within the USAR, JAs are assigned as International Law Officers at the command, brigade, and battalion levels. The senior JA of the unit is designated the Command Judge Advocate (CJA) and, therefore, is a member of the CA

[1] Historically, Civil Affairs units have fallen under the rubric of special operations (for example, Army CA units are assigned to USASOC). Judge Advocates should be aware that changes are underway. *See* Civil Affairs Psychological Command Realigns from SOC to Army Reserve Command, USASOC NEWS SERVICE (24 May 2006) (noting that USACAPOC will move from USASOC to the USAR, but that USASOC will retain propency, and that 95th Civil Affairs Brigade (Provisional) and 4th PYSOPS Group will remain assigned to USASOC). *See also* FM 27-100, § 4.6.2. An update of FM 27-100 will be renumbered as FM 1-04 and is expected to be published by 2009.

commander's personal and special staff. Civil Affairs JAs provide mission-essential legal services to the unit, including operational law legal services. A CJA of a deployed CA organization will coordinate with the SJA of the command to which the CA organization is assigned or attached for technical guidance and supervision.

2. Although JAs are assigned to CA units, the SJA should not assume that the deployed CA force will have its own organic legal support. When deployed, CA forces are task-organized based upon mission requirements. CA JAs may not be included on the statement of requirements, or they may be task-organized to work at locations away from their units. For example, the CA force deployed in support of OPERATION JOINT FORGE to Multinational Division North, Bosnia and Herzegovina, did not have a JA assigned to the CA battalion. Thus, the SJA for the supported command was responsible for providing legal services to the battalion.

3. One principal mission of JAs assigned to CA units is to perform rule of law operations, which require that they carry out operations to rebuild, reform, assist and, in some cases, administer the judicial sector of the host nation. The purpose of rule of law operations is to create security and stability for the civilian population by restoring and enhancing the effective and fair administration and enforcement of justice. Rule of law operations are of very great importance in stability operations and support operations. Rule of law operations are particularly significant in the immediate aftermath of major ground combat operations, when it is imperative to restore order to the civilian population in the vacuum that almost inevitably results when the routine administration of the society is disrupted by combat. There must be synchronization and synergy between efforts to restore, reform, and assist the court and legal system and efforts to restore, reform, and assist the public safety system. A judicial system is powerless without an effective public safety system, and a public safety system is not legitimate without a fair and efficient judicial system. Therefore, rule of law missions will normally be executed by JAs working in conjunction with public safety specialists. The rule of law functional specialty team will normally consist of JAs, paralegals, public safety specialists, property control specialists, and others.

F. Rule of Law Operations.[2]

1. Rule of law operations include measures to:

a. Provide for the restoration of order in the immediate aftermath of military operations.

b. Provide for reestablishing routine police functions, such as controlling the population, crime prevention, investigating crimes, and arresting those who commit crimes.

c. Restore and enhance the operation of the court system, to include vetting and training judges, prosecutors, defense counsel, legal advisors and administrators, and restoring and equipping court and administrative facilities.

d. Restore and reform the HN civil and criminal legal system, to include reviewing and revising statutes, codes, decrees, and other laws to ensure compliance with international legal standards, as well as adopting transitional measures for the immediate administration of justice.

e. Provide for an effective corrections system that complies with international standards, to include selecting, vetting, and training corrections officials, and constructing or renovating appropriate facilities.

2. Rule of law operations will rarely, if ever, be exclusively a military or even a U.S. Government activity. Rule of law operations must be a collaborative effort involving:

a. U.S. military assets, including military police (MP), engineers, combat forces, logistical elements, legal personnel, and CA personnel.

b. Other agencies of the Federal government, to include Department of State (DoS), Department of Justice (DoJ), and USAID.

c. IGOs.

d. Coalition and other national elements, including military and civilian agencies.

e. NGOs engaged in judicial and legal reform.

[2] The Center for Law and Military Operations (CLAMO, see also Chapter 28 of this Handbook) expects to publish a Rule of Law Handbook in 2007.

f. HN legal professionals, including judges, prosecutors, defense counsel, legal advisors, legal administrators, and legal educators.

g. HN law enforcement personnel, including administrators, police, investigators, and trainers.

h. Other HN government officials.

3. In CA organizations and task-organized forces based on CA organizations, the rule of law operations are carried out by JA personnel assigned or attached to the CA organization, by CA specialists in public safety with a background in law enforcement, and others with backgrounds in judicial administration, corrections, and other relevant areas. Rule of Law Section personnel may be detailed to work with an interagency, international, or other group carrying out rule of law operations. The JAs in the Rule of Law Section must have extensive training in international law, comparative law, and human rights law.

4. Capabilities of the Rule of Law Section[3] are to:

a. Determine the capabilities and effectiveness of the HN legal systems and the impact of those on CMO.

b. Evaluate the HN legal system, to include reviewing statutes, codes, decrees, regulations, procedures, and legal traditions for compliance with international standards, and advising and assisting the HN and other rule of law participants in the process of developing transitional codes and procedures and long-term legal reform.

c. Evaluate the personnel, judicial infrastructure, and equipment of the HN court system to determine requirements for training, repair and construction and acquisition.

d. Provide support to transitional justice, to include acting as judges, magistrates, prosecutors, defense counsel, legal advisors and court administrators, when required.

e. Coordinate rule of law efforts involving U.S. and coalition military, other U.S. agencies, IGOs, NGOs and HN authorities.

f. Assist the SJA in educating and training U.S. personnel in the indigenous legal system and its obligations and consequences.

g. Advise and assist the SJA in international and HN legal issues, as required.

h. Assist the SJA with regard to SOFA and status-of-mission agreement issues.

i. Provide technical expertise, advice and assistance in identifying and assessing indigenous public safety systems, agencies, services, personnel and resources.

j. Advise and assist in establishing the technical requirements for government public safety systems to support government administration (police and law enforcement administration and penal systems).

G. JA Functions in Rule of Law.

1. By statute, the Judge Advocate General (TJAG) is "the legal advisor of the Secretary of the Army and of all officers and agencies of the Department of the Army." Section 3037, Title 10, United States Code (10 U.S.C. 3037). TJAG carries out this statutory mission thorough the military attorneys of the JAG Corps and the civilian attorneys who work under TJAG's qualifying authority. These attorneys are responsible to the TJAG under statute, Army regulations, and codes of professional conduct by which licensed attorneys are governed, and are the only persons authorized to practice law in the Army.

2. Many activities conducted in rule of law operations involve the practice of law, and therefore must be performed by TJAG or other attorneys under TJAG's supervision. These activities include:

a. Evaluating and assisting in developing transitional decrees, codes, ordinances and other measures intended to bring immediate order to areas in which the HN legal system is impaired or nonfunctioning.

b. Evaluating the reform of HN laws to ensure compliance with international legal standards and providing appropriate assistance to the drafting and review process, when necessary.

[3] See FM 3-05.40, paras. 2-16 to 2-23.

c. Evaluating legal training given to HN judges, prosecutors, defense counsels, and legal advisors, and providing appropriate training, when necessary.

d. Evaluating the legal training given police and corrections officials to ensure compliance with international human rights standards.

e. Serving as judges, magistrates, prosecutors, defense counsels, and legal advisors for transitional courts.

f. Evaluating legal and administrative procedures to ensure compliance with international law, the law of the power administering the territory, and the law of the supported country.

g. Determining which HN offices and functions have the legal authority to evaluate, reform, and implement the law.

h. Advising U.S. military commanders and U.S., international, and HN authorities on the status of the HN legal system and its compliance with international standards, and providing recommended reforms.

i. Advising U.S. military commanders and others on the application of international law, U.S. domestic law, and HN law to the process of restoring and enhancing rule of law in the HN.

H. Legal Services in Support of Civil Affairs.

1. IAW FM 27-100, Legal Operations, the SJA of the supported command and the CA CJA will effect coordination in an effort to provide legal support and services during all phases of CA operations. In the planning phase, CA JAs will plan for and prepare to execute rule of law operations. Additionally, CA JAs provide advice and assistance in the preparation and review of CA plans for consistency with U.S. law, guidance by the President and/or SECDEF, and the rules and principles of international law, including those incorporated in treaties, other international agreements, and the provisions of the law of the place where U.S. Armed Forces will conduct operations.

2. CA JAs prepare the legal section of the CA area study and assessment. The area study and assessment is a planning document containing information on the designated area of operations, and is compiled before deployment or hostilities. The legal section is a general review of the legal system of the country under review, and includes such matters as the civil and criminal codes and the organization, procedures, and personnel involved in the administration of justice. (For a detailed review of the area study and assessment, *see* FM 3-05.40, App. D.)

3. CA JAs also provide pre-deployment training to CA forces. This training should include: (a) LOW; (b) human rights violations and reporting requirements; (c) ROE; (d) military justice; (e) legal assistance; and (f) miscellaneous information concerning the SOFA with the HN, if any.

4. During the combat operational phase, CA JAs address legal issues concerning population control measures; targeting to minimize unnecessary collateral damage or injury to the civilian population; treatment of DCs, civilian internees and detainees; requests for political asylum and refuge; acquisition of private and public property for military purposes; psychological operations and their effects on the civilian population; and other operational law matters. They will also, in conjunction with other members of the rule of law functional specialty team, plan and execute rule of law missions appropriate to the environment.

5. During the stability and consolidation phase, CA JAs, in conjunction with other members of the rule of law functional specialty team, plan and execute rule of law missions in support of the theater rule of law plan. Additionally, CA JAs may provide legal services concerning such matters as claims submitted by local civilians, disaster relief, and humanitarian and civic assistance issues.

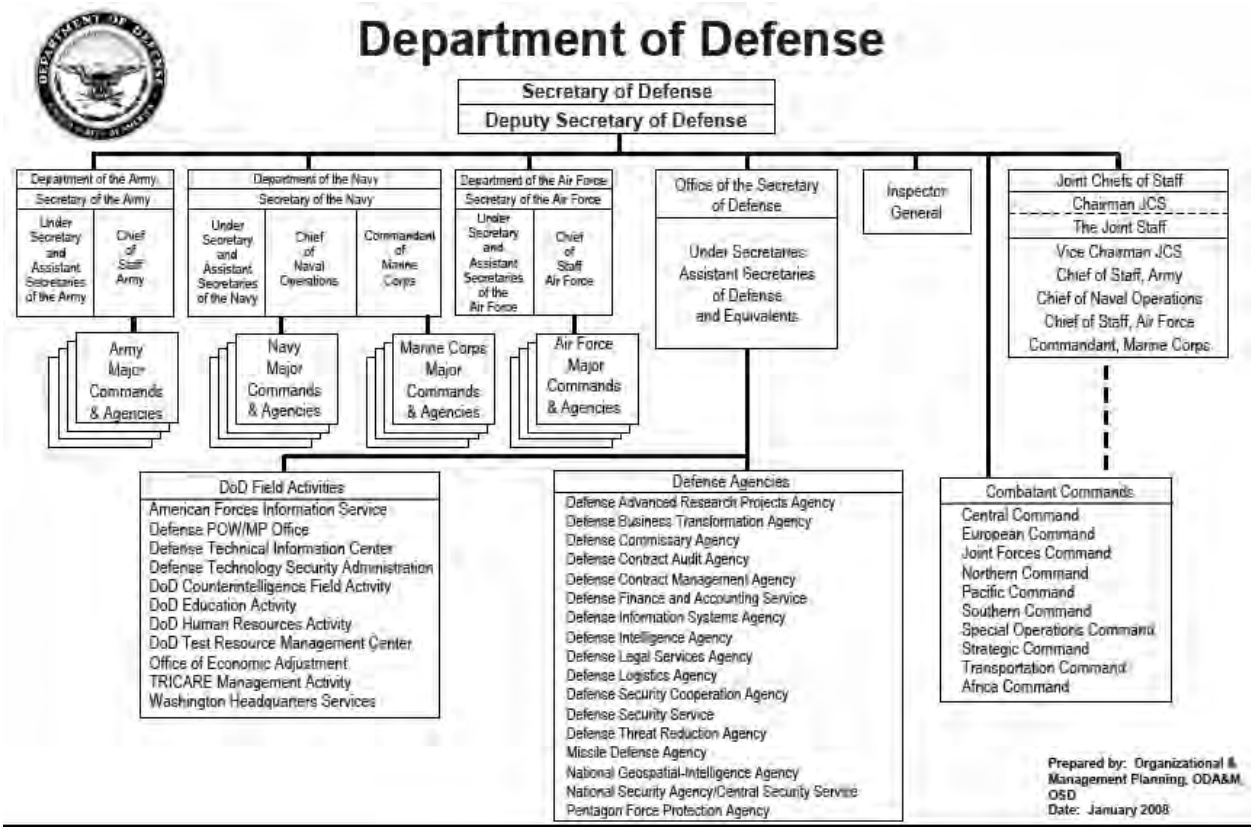
NOTES

CHAPTER 26

JOINT OPERATIONS

DEPARTMENT OF DEFENSE

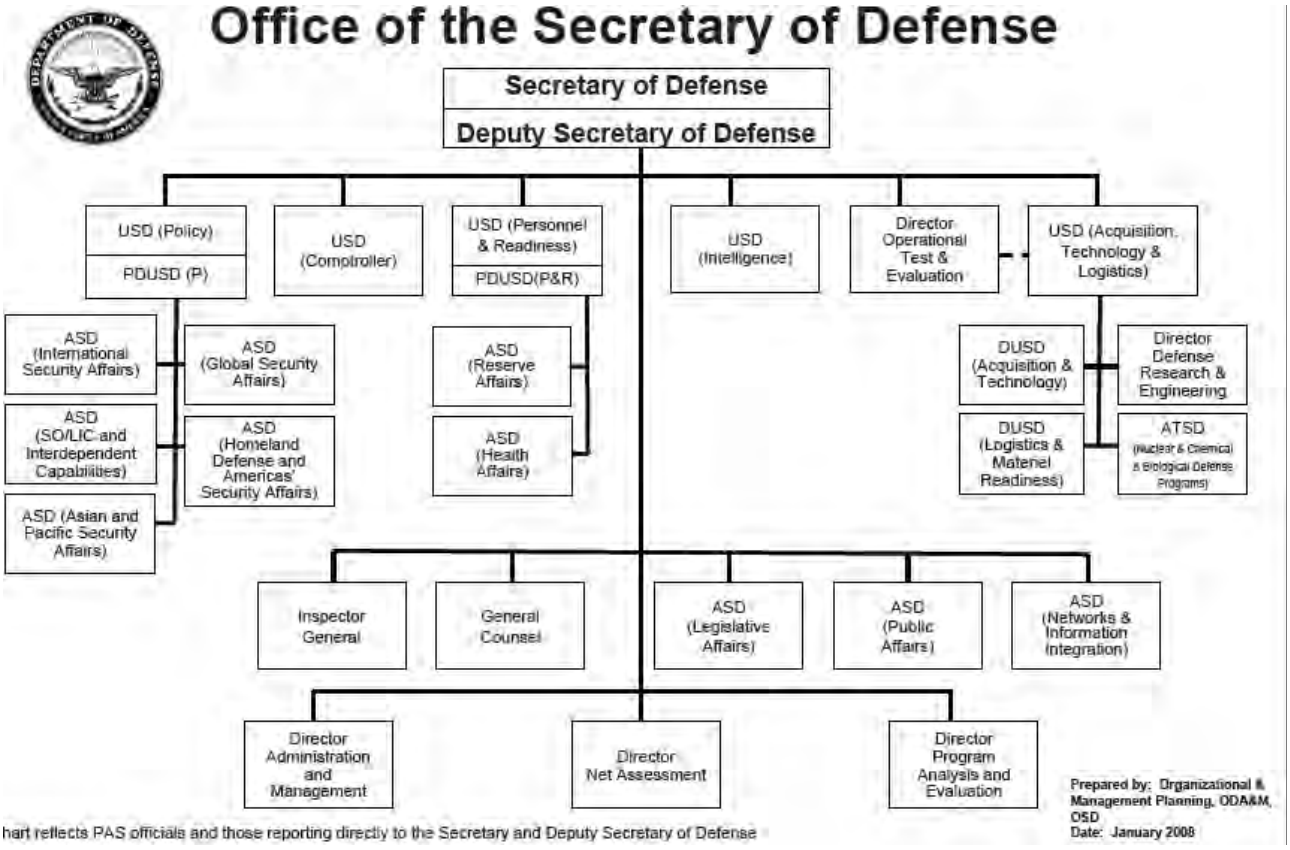
I. The Department of Defense (DoD) is responsible for providing the military forces needed to deter war and protect the security of the United States. The major elements of these forces are the Army, Navy, Air Force, and Marine Corps. Under the President, who is also Commander-in-Chief, the Secretary of Defense exercises authority, direction, and control over the Department which includes the Office of the Secretary of Defense, the Chairman of the Joint Chiefs of Staff, three Military Departments, the Unified Combatant Commands, the DoD Inspector General, the Defense Agencies, and the DoD Field Activities.



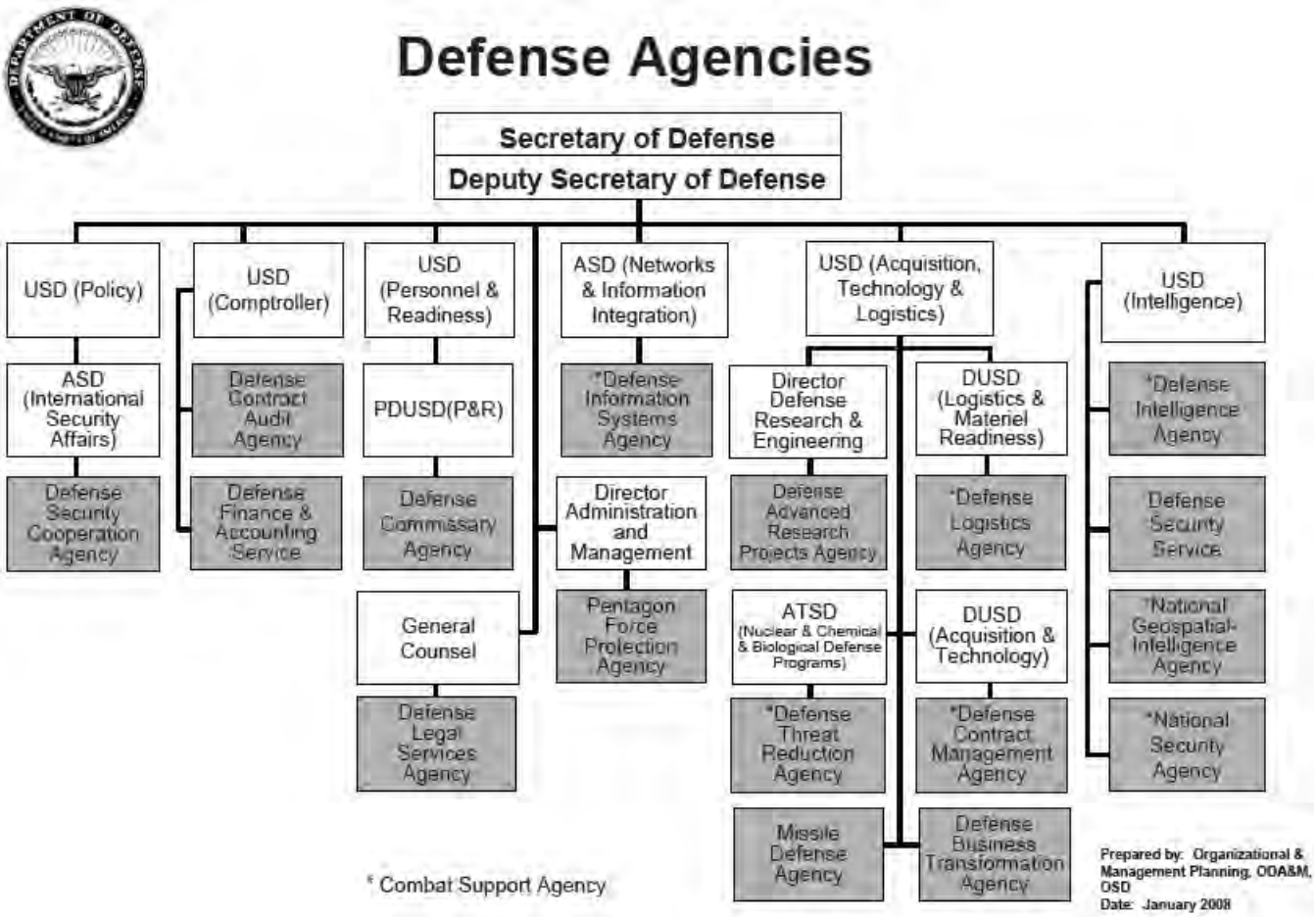
II. The Secretary of Defense (SECDEF) is the principal defense policy advisor to the President and is responsible for the formulation of general defense policy and policy related to all matters of direct and primary concern to the DoD, and for the execution of approved policy. Under the direction of the President, the SECDEF exercises authority, direction, and control over the DoD.

III. The Deputy Secretary of Defense is delegated full power and authority to act for the SECDEF and to exercise the powers of the SECDEF on any and all matters for which the SECDEF is authorized to act pursuant to law.

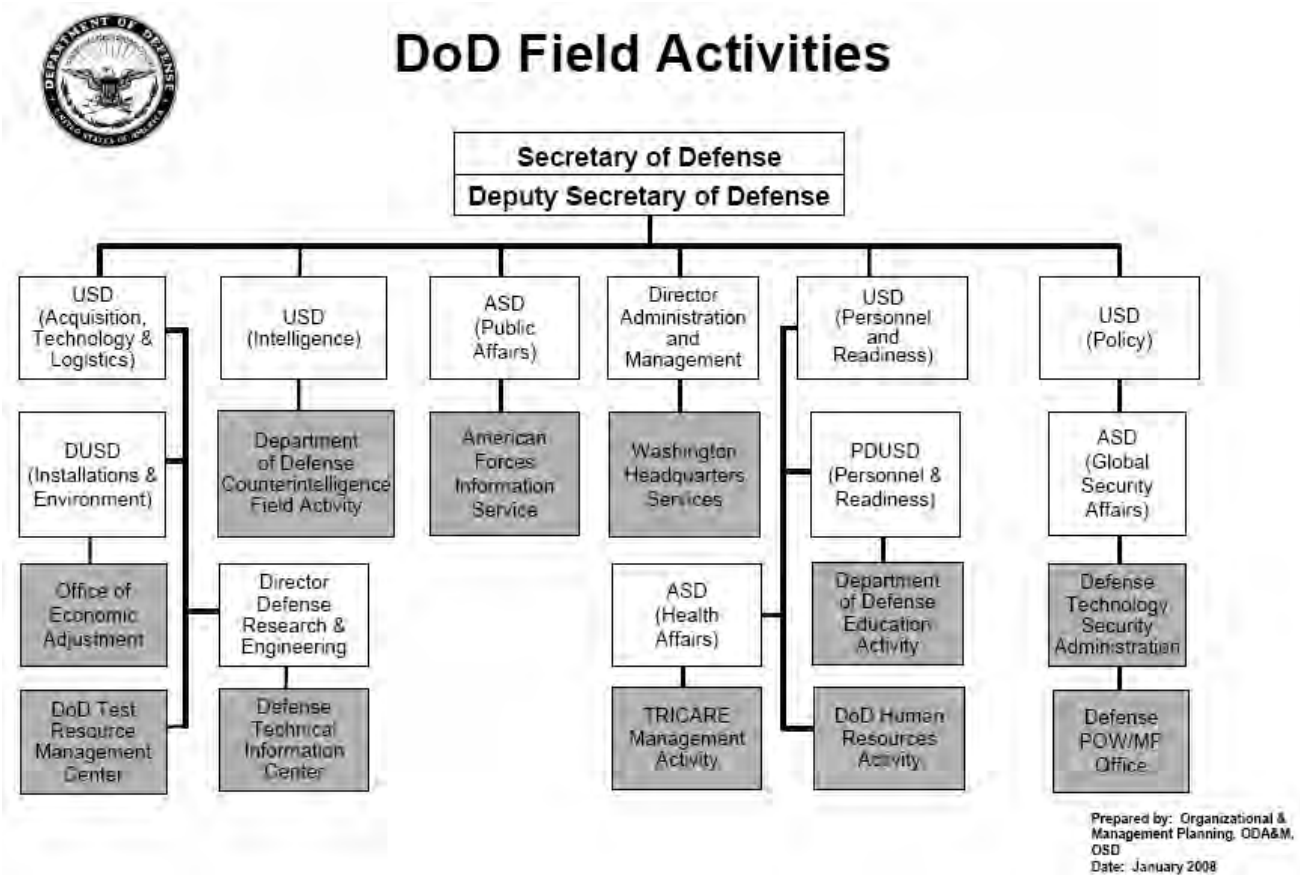
IV. The Office of the Secretary of Defense (OSD) is the principal staff element of the SECDEF in the exercise of policy development, planning, resource management, fiscal, and program evaluation responsibilities. OSD includes the immediate offices of the Secretary; Deputy Secretary of Defense;, Under Secretary of Defense for Acquisition, Technology, and Logistics; Under Secretary of Defense for Policy; Under Secretary of Defense for Personnel and Readiness; Under Secretary of Defense (Comptroller); Director of Defense Research and Engineering; Assistant Secretaries of Defense; General Counsel; Director of Operational Test and Evaluation; Assistants to the Secretary of Defense; Director of Administration and Management, and such other staff offices as the SECDEF establishes to assist in carrying out assigned responsibilities.



V. The Defense Agencies, authorized by the SECDEF pursuant to the provisions of Title 10, United States Code, perform selected consolidated support and service functions on a Department-wide basis; Defense Agencies that are assigned wartime support missions are designated as Combat Support.



VI. The DoD Field Activities are established by the Secretary of Defense, under the provisions of Title 10, United States Code, to perform selected consolidated support and service functions of a more limited scope than Defense Agencies.



JOINT COMMAND AND STAFF

The Joint Chiefs of Staff consist of the Chairman, the Vice Chairman, the Chief of Staff of the Army, the Chief of Naval Operations, the Chief of Staff of the Air Force, and the Commandant of the Marine Corps. The collective body of the JCS is headed by the Chairman (or the Vice Chairman in the Chairman's absence), who sets the agenda and presides over JCS meetings. Responsibilities as members of the Joint Chiefs of Staff take precedence over duties as the Chiefs of Military Services. The Chairman of the Joint Chiefs of Staff is the principal military adviser to the President, Secretary of Defense, and the National Security Council (NSC), however, all JCS members are by law military advisers, and they may respond to a request or voluntarily submit, through the Chairman, advice or opinions to the President, the Secretary of Defense, or NSC. The executive authority of the Joint Chiefs of Staff has changed. In World War II, the U.S. Joint Chiefs of Staff acted as executive agents in dealing with theater and area commanders, but the original National Security Act of 1947 saw the Joint Chiefs of Staff as planners and advisers, not as commanders of combatant commands. In spite of this, the 1948 Key West Agreement allowed members of the Joint Chiefs of Staff to serve as executive agents for unified commands, a responsibility that allowed the executive agent to originate direct communication with the combatant command. Congress abolished this authority in a 1953 amendment to the National Security Act. Today, the Joint Chiefs of Staff have no executive authority to command combatant forces. The issue of executive authority was clearly resolved by the Goldwater-Nichols DoD Reorganization Act of 1986: "The Secretaries of the Military Departments shall assign all forces under their jurisdiction to unified and specified combatant commands to perform missions assigned to those commands..."; the chain of command "runs from the President to the Secretary of Defense; and from the Secretary of Defense to the commander of the combatant command."

I. CHAIRMAN OF THE JOINT CHIEFS OF STAFF (CJCS)

A. The Goldwater-Nichols DoD Reorganization Act of 1986 identifies the Chairman of the Joint Chiefs of Staff as the senior ranking member of the Armed Forces. As such, the Chairman of the Joint Chiefs of Staff is the principal military adviser to the President. He may seek the advice of and consult with the other JCS members and combatant commanders. When he presents his advice, he presents the range of advice and opinions he has received, along with any individual comments of the other JCS members.

B. Under the DoD Reorganization Act, the Secretaries of the Military Departments assign all forces to combatant commands except those assigned to carry out the mission of the Services, i.e., recruit, organize, supply, equip, train, service, mobilize, demobilize, administer and maintain their respective forces. The chain of command to these combatant commands runs from the President to the Secretary of Defense directly to the commander of the combatant command. The Chairman of the Joint Chiefs of Staff may transmit communications to the commanders of the combatant commands from the President and Secretary of Defense, but does not exercise military command over any combatant forces.

C. The Act also gives to the Chairman of the Joint Chiefs of Staff some of the functions and responsibilities previously assigned to the corporate body of the Joint Chiefs of Staff. The broad functions of the Chairman of the Joint Chiefs of Staff are set forth in Title 10, United States Code, and detailed in DoD Directive 5100.1. In carrying out his duties, the Chairman of the Joint Chiefs of Staff consults with and seeks the advice of the other members of the Joint Chiefs of Staff and the combatant commanders, as he considers appropriate.

II. VICE CHAIRMAN OF THE JOINT CHIEFS OF STAFF

The DoD Reorganization Act of 1986 created the position of Vice Chairman of the Joint Chiefs of Staff who performs such duties as the Chairman of the Joint Chiefs of Staff may prescribe. By law, he is the second ranking member of the Armed Forces and replaces the Chairman of the Joint Chiefs of Staff in his absence or disability.

Though the Vice Chairman was not originally included as a member of the JCS, Section 911 of the National Defense Authorization Act of 1992 made him a full voting member of the JCS.

III. ASSISTANT TO THE CHAIRMAN

This three-star oversees matters requiring close personal control by the Chairman with particular focus on international relations and politico-military concerns.

IV. MILITARY SERVICE CHIEFS

The military Service Chiefs are often said to "wear two hats." As members of the Joint Chiefs of Staff, they offer advice to the President, the Secretary of Defense, and the NSC. As the chiefs of the Military Services, they are responsible to the Secretaries of their Military Departments for management of the Services. The Service Chiefs serve for 4 years. By custom, the Vice Chiefs of the Services act for their chiefs in most matters having to do with day-to-day operation of the Services. The duties of the Service Chiefs as members of the Joint Chiefs of Staff take precedence over all their other duties.

V. THE JOINT STAFF

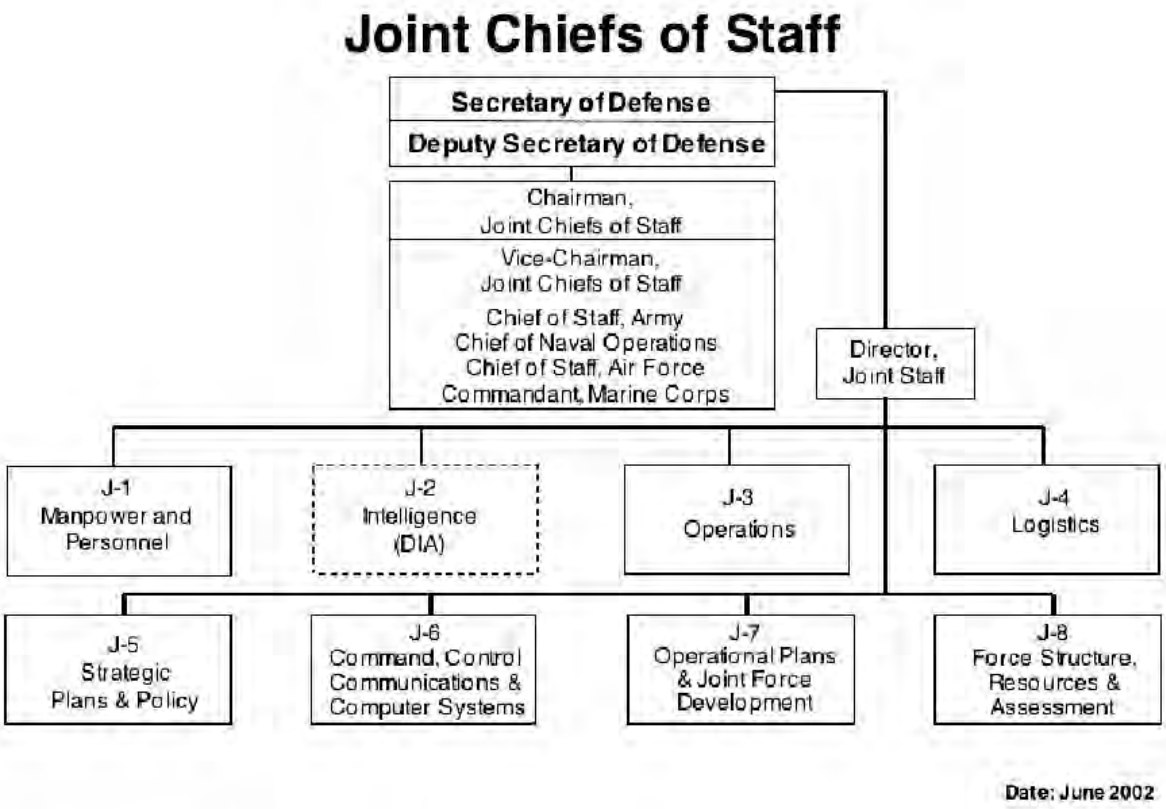
A. The Joint Staff assists the Chairman of the Joint Chiefs of Staff in accomplishing his responsibilities for: the unified strategic direction of the combatant forces; their operation under unified command; and for their integration into an efficient team of land, naval, and air forces. The "Joint Staff" is composed of approximately equal numbers of officers from the Army, Navy and Marine Corps, and Air Force. In practice, the Marines make up about 20 percent of the number allocated to the Navy.

B. Since its establishment in 1947, the Joint Staff is prohibited by statute from operating or organizing as an overall armed forces general staff; therefore, the Joint Staff has no executive authority over combatant forces.

C. The Chairman of the Joint Chiefs of Staff, after consultation with other JCS members and with the approval of the Secretary of Defense, selects the Director, Joint Staff, to assist in managing the Joint Staff. By law, the direction of the Joint Staff rests exclusively with the Chairman of the Joint Chiefs of Staff. As the Chairman directs, the Joint Staff also may assist the other JCS members in carrying out their responsibilities.

D. In the joint arena, a body of senior flag or general officers assists in resolving matters that do not require JCS attention. Each Service Chief appoints an operations deputy who works with the Director, Joint Staff, to form the subsidiary body known as the Operations Deputies or the OPSDEPS. They meet in sessions chaired by the Director, Joint Staff, to consider issues of lesser importance or to review major issues before they reach the Joint Chiefs of Staff. With the exception of the Director, this body is not part of the Joint Staff. There is also a subsidiary body known as the Deputy Operations Deputies (DEPOPSDEPs), composed of the Vice Director, Joint Staff, and a two-star flag or general officer appointed by each Service Chief. Currently, the DEPOPSDEPs are the Service directors for plans. Issues come before the DEPOPSDEPs to be settled at their level or forwarded to the OPSDEPS. Except for the Vice Director, Joint Staff, the DEPOPSDEPs are not part of the Joint Staff.

E. Matters come before these bodies under policies prescribed by the Joint Chiefs of Staff. The Director, Joint Staff, is authorized to review and approve issues when there is no dispute between the Services, when the issue does not warrant JCS attention, when the proposed action is in conformance with CJCS policy, or when the issue has not been raised by a member of the Joint Chiefs of Staff. Actions completed by either the OPSDEPs or DEPOPSDEPs will have the same effect as actions by the Joint Chiefs of Staff.


Joint Chiefs of Staff
Secretary of Defense
Deputy Secretary of Defense
Chairman, Joint Chiefs of Staff
Vice-Chairman, Joint Chiefs of Staff
Chief of Staff, Army
Chief of Naval Operations
Chief of Staff, Air Force
Commandant, Marine Corps
Director, Joint Staff
J-1 Manpower and Personnel
J-2 Intelligence (DIA)
J-3 Operations
J-4 Logistics
J-5 Strategic Plans & Policy
J-6 Command, Control Communications & Computer Systems
J-7 Operational Plans & Joint Force Development
J-8 Force Structure, Resources & Assessment
Date: June 2002

ARMY

You can fly over a land forever; you may bomb it, atomize it, pulverize it and wipe it clean of life but if you desire to defend it, protect it, and keep it for civilization you must do this on the ground, the way the Roman Legions did, by putting your young men in the mud.

T.R. Fehrenbach, THIS KIND OF WAR

I. ARMY MISSION

A. The Army's mission is to fight and win our Nation's wars by providing prompt, sustained land dominance across the full range of military operations and spectrum of conflict in support of Combatant Commanders.

B. The Army accomplishes its mission by: 1) executing Title 10 and Title 32 United States Code directives, to include organizing, equipping and training forces for the conduct of prompt and sustained combat operations on land; and 2) accomplishing missions assigned by the President, Secretary of Defense (SECDEF) and Combatant Commanders, and transforming for the future.

II. ARMY FORCE STRUCTURE

A. The major warfighting elements of the operational Army are the modular corps, the modular division, brigade combat teams (BCT) and support brigades. Operational units are task-organized to make the most effective use of the functional skills and specialized equipment each unit brings to the fight. In addition to conventional organizations, the Army maintains a number of Special Operations units (*e.g.*, the Special Forces Groups, the 160th Special Operations Aviation Regiment and the Ranger Regiment). The Army is currently transforming to a modular force centered on self-contained, highly-deployable BCTs. Above the brigade level, units will generally consist of headquarters elements, to which brigades will be task-organized as missions and circumstances dictate. Major modular force organizations include:

1. *Army Service Component Command (ASCC), or Theater Army*. Armies are commanded by 3- or 4-star Generals. Six ASCC headquarters are focused on six geographic regions (the five Combatant Commands, plus Korea).

2. *Corps*. Commanded by 3-star Generals, there are currently four modular corps headquarters: I Corps (Fort Lewis, WA); III Corps (Fort Hood, TX); V Corps (Germany); and XVIII Airborne Corps (Fort Bragg, NC).

3. *Division*. Divisions are commanded by 2-star Generals. The Army will retain 18 modular division headquarters (10 Active Component and 8 National Guard). These modular division headquarters will remain as currently designated (*e.g.*, light, armored, airborne, and air-assault); however, these headquarters will routinely have all types of brigades task-organized to them for operations.

4. *BCT*. Commanded by Colonels, BCTs are task-organized with a vast array of forces in order to make them self-contained, highly-deployable units. For example, artillery, engineer, and combat service support units are now assigned permanently to BCTs. Maneuver BCTs will be one of three modular packages: Infantry, Heavy and Stryker. The Army plans to field up to 48 BCTs (subject to Army growth projections) in the Active Component. For more information, see http://www.army.mil/thewayahead/foreword.html.

a. *Infantry BCT (IBCT)*. IBCTs are primarily light infantry units. Some specialized IBCTs are designated as airborne or air assault.

b. *Heavy BCT (HBCT)*. HBCTs utilize large, heavily armored, tracked vehicles such as the M1 Abrams tank, the M2/M3 Bradley Fighting Vehicle, and the M109 Paladin howitzer.

c. *Stryker BCT (SBCT)*. The Army developed the SBCT to combine the strengths of its light and heavy forces and their technological advantages, providing a strategically responsive force for future contingencies. The SBCT is centered on the Stryker vehicle, a wheeled light armored vehicle.

5. *Combat Support Brigades*. Brigades are commanded by Colonels. Combat support brigades perform specialized functions in support of BCTs and other forces, and are typically under the control of a Division headquarters. There are five types of combat support brigades: (1) Fires Brigade; (2) Combat Aviation Brigade (CAB); (3) Battlefield Surveillance Brigade (BfSB); (4) Combat Support Brigade (Maneuver Enhancement) [CSB(ME)]; and (5) Sustainment Brigade.

Army Units

UNIT	COMMANDER/LEADER	APPROX. SIZE	UNIT	COMMANDER/LEADER	APPROX. SIZE
ARMY	GENERAL OR LIEUTENANT GENERAL	100,000+	BATTALION	LIEUTENANT COLONEL	500-1,000
CORPS	LIEUTENANT GENERAL	50,000	COMPANY	CAPTAIN	100-200
DIVISION	MAJOR GENERAL	20,000	PLATOON	LIEUTENANT	40-50
BRIGADE	COLONEL	3,000-4,000	SQUAD	STAFF SERGEANT	10-13

B. In addition to units, Army personnel are divided into branches:

1. *Combat Arms*. Traditionally involved in the conduct of actual fighting. Includes Infantry, Armor, Field Artillery, Air Defense Artillery, Engineers, Aviation, and Special Forces.

2. *Combat Support*. Provides operational assistance to Combat Arms, including engagement in combat when necessary, along with additional responsibilities in providing logistical administrative support to the Army. Includes Signal, Chemical, Military Intelligence, and Military Police.

3. *Combat Service Support*[1]. Provides logistical and administrative support. Includes Adjutant General, Chaplain, Finance, Quartermaster, Medical, Ordnance, Transportation, and the Judge Advocate General.

[1] Doctrinally, the distinction between Combat Arms, Combat Support, and Combat Service Support is rapidly blurring, and the terms are becoming obsolete as all branches are blended together in the BCT.

III. ROLE OF THE ARMY OPERATIONAL LAWYER

A. ***Legal support to operations***[2] encompasses all legal services in support of units, commanders and Soldiers throughout an area of operation and across the spectrum of operations. Operational Law Attorneys deliver legal services in all six ***core legal disciplines***: military justice, international and operational law, administrative and civil law, contract and fiscal law, legal assistance, and claims. He or she must also be proficient in command and control functions, to include interpreting and drafting rules of engagement (ROE); training commanders, staff and Soldiers on ROE; participating in targeting cells; participating in the military decision making process; participating in information operations; and dealing with the Law of Armed Conflict.

B. The BCT staff includes a Brigade Judge Advocate (O-4), an Operational Law Attorney (O-3), and a Senior Paralegal NCO (E-7). A paralegal is assigned to most battalions. These service members provide legal support to the BCT in all core legal disciplines. Combat Support Brigades have a similar legal support structure.

C. At echelons above Brigades, there is typically a full-service SJA Office that provides legal support to operations. There is usually a section devoted full-time to Operational Law duties. Attorneys and paralegals assigned to these sections provide legal expertise across all of the war-fighting functions.

[2] *See* FM 27-100, Legal Support to Operations (2000). FM 27-100 is pending revision and will be reissued as FM 1-04, Legal Support to the Operational Army.

U.S. MARINE CORPS

I. MISSION

A. Under 10 U.S.C. § 5063, the Marine Corps' primary mission is to be "organized, trained, and equipped to provide fleet marine forces of combined arms, together with supporting air components, for service with the fleet in the seizure or defense of advanced naval bases and for the conduct of such land operations as may be essential to the prosecution of a naval campaign." In addition, the Marine Corps provides detachments and organizations for service on Navy vessels, security detachments for the protection of naval property at naval stations and bases, and such other duties as the President may direct.

B. The ground, air, and supporting forces that make up the Marine Corps are trained and equipped to make available to the President and the unified Combatant Commanders the capability to react quickly to any military contingency in the world. As a result, Marine operational forces are "task organized" and deployed to meet whatever contingency mission they may be assigned, ranging from a natural disaster, such as OPERATION UNIFIED ASSISTANCE, the relief effort following the December 2004 Southeast Asian Tsunami, to sustained ground combat such as in OPERATION IRAQI FREEDOM (OIF). Because Marine forces often deploy from and are sustained by sea-based platforms, they are referred to as "expeditionary" (being able to operate in areas where there was previously no supporting infrastructure).

II. FORCE STRUCTURE

A. The Marine Corps is organized as the nation's "force in readiness" into four broad categories: Headquarters Marine Corps (the Commandant of the Marine Corps and his advisory staff agencies); Operating Forces; Reserves; and the Supporting Establishment (personnel, bases, and activities that support the operating forces). According to 10 U.S.C. § 5063, "the Marine Corps, within the Department of the Navy, shall be so organized as to include not less than three combat divisions and three air wings, and such other land combat, aviation, and other services as may be organic therein." The Marine Corps present force structure is approximately 194,700 active duty Marines and 40,000 Reserves. The Marine Corps' projected end-strength for fiscal year 2009 is 202,000 personnel.

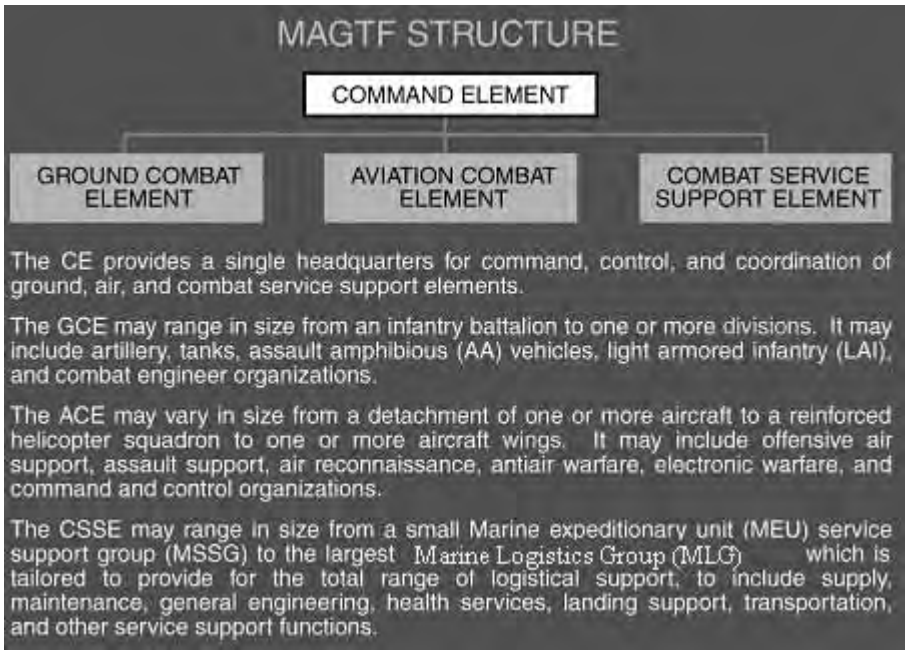
B. The operating forces (as supplemented by the Reserves), are considered the heart of the Marine Corps, and constitute the forward presence, crisis response, and fighting power available to the unified Combatant Commanders. Marine Corps Forces Command (MARFORCOM) is one of three major Marine Corps commands (along with U.S. Marine Corps Forces, Pacific (MARFORPAC) and U.S. Marine Corps Forces, Reserve (MARFORRES)) that provide operating forces to support Unified or Joint Task Force Commanders and Fleet Commanders in Chief (CINC). Commander, U.S. Marine Corps Forces Command (COMMARFORCOM) serves as a principal adviser to the Commander, U.S. Joint Forces Command (USJFCOM), on Marine Corps matters. He is responsible for organizing, training, and equipping forces for employment as directed by the CDR, USJFCOM. About 64 percent of all active duty Marines are assigned to these operating forces. As dictated by 10 U.S.C. § 5063, operating forces are made available from four (3 active, 1 reserve) Divisions, Wings, and Marine Logistics Groups (MLG). I and II Marine Expeditionary Force (I and II MEF) (MEFs are discussed below) are provided by the Commander, MARFORCOM, to the Commander, USJFCOM, and the III MEF are provided by the Commander, MARFORPAC, to the Commander, U.S. Pacific Command. This assignment reflects the recently realigned peacetime disposition of Marine Corps Forces (MARFOR). Marine forces are apportioned to the remaining

geographic combatant commands for contingency planning and are provided to the Combatant Commands when directed by the Secretary of Defense.

C. The MLG, within the MEF, performs the combat service support function. This organization contains the maintenance, supply, engineer support, landing support, motor transport, medical, dental, and other units necessary to support sustained combat operations. The MLG is also tasked with providing legal services to the operational units. This is accomplished through the Legal Services Support Section (LSSS) within the MLG. The LSSS consists of approximately twenty lawyers performing the functions of prosecution, defense, and administrative law. In garrison, the legal assistance function is performed by the host installation. When the MLG is deployed, however, this function transfers to the LSSS. While the Officer in Charge (OIC) is responsible for supporting the legal needs of the operational commands, he or she does not provide legal advice to the commanding general of the wing or division. That traditional duty remains with the SJA. Each major command (division, wing, MLG) has an SJA and a small legal staff consisting of a Deputy SJA and two or three clerks. The bulk of the legal assets remain in the LSSS. During OIF, lawyers have been directly assigned to deploying Battalion and Regimental staffs to work directly for that respective commander. This change, however, is not permanently embedded into the USMC Table of Organization (T/O).

III. TASK ORGANIZATION: THE MARINE AIR-GROUND TASK FORCE (MAGTF)

A. In order to meet mission-oriented expeditionary requirements, the Marine Corps has developed the concept of Marine Air-Ground Task Force (MAGTF) organization. The MAGTF is the Marine Corps principal organization for the conduct of all missions across the range of military operations. The MAGTF provides a combatant commander or other operational commander a versatile expeditionary force for responding to a broad range of crisis and conflict situations. MAGTFs are balanced, combined arms forces with organic command, ground, aviation, and sustainment elements. It is a building block concept: the fleet/joint commander's operational requirement or task is analyzed, and the appropriate units are drawn from a Marine division, aircraft wing, and MLG into an air-ground-logistics team under one commander to meet the task. The resulting MAGTF may be of any size, and the weight and composition of its component elements may vary, depending on the mission and enemy situation. In each case, there will be a MAGTF command element (CE), a ground combat element (GCE) (under certain conditions, more than one), an aviation combat element (ACE), and a combat service support element (CSSE).



B. Four types of MAGTFs can be task organized as follows: the MEF, the Marine Expeditionary Brigade (MEB), the Marine Expeditionary Unit (Special Operations Capable) (MEU(SOC)), and the Special Purpose Marine Air Ground Task Force (SPMAGTF).

C. A MEF is the principal Marine Corps warfighting organization, particularly for a larger crisis or contingency, and is normally commanded by a lieutenant general. A MEF can range in size from 20,000 to 90,000 Marines and sailors, from less than one to multiple divisions and aircraft wings, together with one or more MLGs. With sixty days of accompanying supplies, MEFs are capable of both amphibious operations and sustained

operations ashore in any geographic environment. With appropriate augmentation, the MEF command element is capable of performing as a Joint Task Force (JTF) Headquarters. A MEF will normally deploy in echelon and will designate its lead element as the MEF (Forward). MEFs are the primary "standing MAGTFs," existing in peacetime as well as wartime. The Marine Corps has three standing MEFs: I MEF is based in California and Arizona; II MEF is based in North and South Carolina; and III MEF is forward-based in Okinawa and mainland Japan.

D. A MEB is an intermediate-size MAGTF that bridges the gap between the MEF and the MEU, ranging in size from 3,000 to 9,000 Marines and sailors, and is normally commanded by a brigadier general. A MEB can operate independently or serve as the advance echelon of the MEF. It is normally composed of a reinforced infantry regiment, a composite Marine Air Group (MAG), and a Brigade Service Support Group (BSSG). With thirty days of supplies, a MEB is capable of conducting amphibious assault operations and maritime prepositioning force (MPF) operations. During potential crisis situations, a MEB may be forward deployed afloat (typically aboard fifteen amphibious ships, including five large-deck amphibious assault ships) for an extended period in order to provide an immediate combat response.

E. Forward deployed MEU(SOC) embarked aboard amphibious shipping (typically three ships) within a larger naval Expeditionary Strike Group (ESG) package operate continuously in the areas of responsibility of numerous unified combatant commanders. A MEU(SOC) is typically comprised of approximately 2,100 Marines and sailors. These units provide the President and combatant commanders an effective means of dealing with the uncertainties of future threats by providing forward-deployed units which offer unique opportunities for a variety of quick reaction, sea-based, crisis response options in either a conventional amphibious/expeditionary role or in the execution of maritime special operations. MEU(SOC) train for operations to be executed within six hours of receipt of the mission. The forward-deployed MEU(SOC), forged and tested in real-world contingencies, remains the benchmark forward operating Marine force. The MEU is commanded by a colonel and deploys with fifteen days of accompanying supplies. It is composed of a reinforced infantry battalion, a composite squadron, and a combat logistics battalion.

F. A SPMAGTF is task organized to accomplish a specific mission, operation, or regionally focused exercise. As such, SPMAGTFs can be organized, trained, and equipped to conduct a wide variety of expeditionary operations ranging from crisis response to training exercises and peacetime missions. Their duties cover the spectrum from NEOs to disaster relief and humanitarian missions as seen after the Asian Tsunami in the Indian Ocean in 2004.

G. Air Contingency Forces. Both MARFORCOM and MARFORPAC maintain Air Contingency MAGTFs (ACM) in a continuous state of readiness. ACMs are air-deployable forces available to the unified combatant commanders. ACM lead elements can deploy within eighteen hours of notification. The size can vary, with a task organization designed to meet the mission, threat, and airlift availability.

H. Maritime Prepositioning Force. As is evident from the above, an overriding requirement for MAGTFs, and especially MEU(SOC) MAGTFs, is the ability to plan rapidly and effectively for the execution of real world contingencies with the forces, lift, logistics, and enemy situation at hand. MAGTFs deploy by amphibious shipping and airlift and are sustained on the ground by their own organic assets, as well as by Maritime Prepositioning Force (MPF) or other prepositioned equipment. The MPF program, which began in 1981, consists of sixteen self-sustaining, roll-on/roll-off ships, civilian-owned and operated under long-term charters to the Military Sealift Command (MSC). The MPF is organized into three Maritime Prepositiong Ships Squadrons (MPSRON): MPSRON-1, based in the Mediterranean; MPSRON-2, based at Diego Garcia in the Indian Ocean; and MPSRON-3, based in the Guam-Saipan area. Each MPSRON provides enough tanks, artillery, vehicles, ammunition, supplies, food, fuel, and water to support a MEB for thirty days of combat. The ships can be used separately or in larger groups to support smaller or larger MAGTFs. A single MPF ship is capable of supporting a MEU for thirty days.

AIR FORCE

REFERENCES

1. Title 10, Chapter 803, Department of the Air Force, 10 U.S. Code §§ 8011 *et seq.*
2. AF Doctrine Document (AFDD) 1, Air Force Basic Doctrine (17 Nov. 2003) (currently in revision), *available at* https://www.doctrine.af.mil/Main.asp.
3. AFDD 2, Organization and Employment of Aerospace Power (3 Apr. 07), *available at* https://www.doctrine.af.mil/Main.asp.
4. JOINT CHIEFS OF STAFF, JOINT PUB. 1-02, DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS (12 Apr. 2001, as amended through 22 Mar. 07), *available at* http://www.dtic.mil/doctrine/jel/new_pubs/jp1_02.pdf.

I. AIR FORCE MISSION

A. The mission of the U.S. Air Force (USAF) is to defend the U.S. and protect its interests through air and space power. To achieve that mission, the USAF has a vision of *Global Vigilance, Reach, and Power*. That vision orbits around three core competencies: Developing Airmen; Technology-to-Warfighting; and Integrating Operations.

B. Our core competencies make our six distinctive capabilities possible: Air and Space Superiority; Global Attack; Rapid Global Mobility; Precision Engagement; Information Superiority; and Agile Combat Support. The USAF bases these core competencies and distinctive capabilities on a shared commitment to three core values: *integrity first, service before self, and excellence in all we do*.

II. AIR FORCE STRUCTURE

A. AF Organization. The USAF has three components: Active Duty, Air National Guard, and Air Force Reserve. The USAF organizes, trains and equips air forces through its Major Commands (MAJCOM). Active duty and Reserve component MAJCOMs are subdivided into Numbered Air Forces (NAF), wings, groups, and squadrons.

1. **MAJCOM**. MAJCOM forces are provided to Combatant Commands for employment. The organization of these MAJCOMs is based on combat, mobility, space, and special operations, plus the material support required for these operations. MAJCOM's are normally commanded by a General (O-10).

2. **NAF**. The NAF is the senior war-fighting echelon of the USAF. A NAF conducts operations with assigned and attached forces under a command element. When participating in joint operations, the tasked NAF presents its forces to the Joint Forces Commander as an Aerospace Expeditionary Task Force (AETF). Normally a Lieutenant General (O-9) commands a CONUS NAF, while a Major General (O-8) commands an OCONUS NAF.

3. **Wing**. A wing contains all of the organic assets required to accomplish its organizational function. For instance, a fighter wing has subordinate groups that provide combat, combat support, and combat service support functions in support of the wing's air combat mission. There are four main groups within a typical wing: the operations group; the maintenance group; the mission support group; and the medical group. Normally, a senior Colonel (O-6) commands a wing.

4. **Group**. There are several mutually-related squadrons within a group. For example, within a mission support group, there are usually civil engineer (CE); mission support (MS) (including personnel, family support and education flights); contracting; services; and security forces squadrons. Groups are normally commanded by a Colonel (O-6).

5. **Squadron.** The basic fighting unit of the USAF is the squadron. Squadrons are not designed to conduct independent operations. They interact with other Squadrons to provide the necessary synergy to conduct effective air and space operations. Combining squadrons or squadron elements, such as fighters, refueling and airlift, into deployable groups or wings, is the purpose of an AETF. Squadrons are normally commanded by a Lieutenant Colonel (O-5).

B. Organizing for Air Operations.

1. Joint Task Force (JTF). A JTF is a force composed of assigned or attached elements of the Army, the Navy or the Marine Corps, and the USAF, or two or more of these Services, which is constituted and so designated by the Secretary of Defense or by the Commander of a Unified Command, or an existing JTF (Joint Pub 1-02). A JTF often contains a ground component, an air component and a naval component.

2. Joint Force Air Component Commander (JFACC). The JTF commander derives authority from the joint force commander who has the authority to exercise operational control, assign missions, direct coordination among subordinate commanders, and redirect and organize forces to ensure unity of effort in the overall mission accomplishment. The joint force commander will normally designate a JFACC. The JTF commander assigns the JFACC's responsibilities and include, but are not limited to, planning, coordination, allocation, and tasking based on the JTF commander's apportionment decision. Using the joint forces commander's guidance and authority, and in coordination with other Services component commanders and other assigned or supporting commanders, the JFACC will recommend to the joint force commander apportionment of air sorties to various missions or geographic areas.

3. Air Operations Center (AOC). The AOC is the principal air operations installation from which aircraft and air warning functions of combat air operations are directed, controlled, and executed. It is the senior agency of the USAF Component Commander from which command and control of air operations are coordinated with other components and Services.

4. Aerospace Expeditionary Force (AEF). AEFs are composite organizations of aerospace capabilities from which a tailored AETF, composed of Aerospace Expeditionary Wings, Aerospace Expeditionary Groups, and Aerospace Expeditionary Squadrons, is created to provide forces to meet theater Commander-in-Chief requirements. An AEF is not a discrete war-fighting unit.

5. AETF. An AETF is a tailored, task-organized aerospace force presented to a joint force commander consisting of a deployed NAF headquarters, or command echelon subordinate to a NAF headquarters, and assigned and attached operating forces (command element plus operating forces). An AETF can be sized depending on the level and nature of the conflict, and the size of the aerospace component required. The AETF is commanded by the designated Commander, Air Force Forces (COMAFFOR) and is activated by MAJCOM G-series orders.

6. Aerospace Expeditionary Wing (AEW). An AEW is a wing or a wing slice assigned or attached to an AETF or an in-place NAF by MAJCOM G-series orders. Normally, the AETF or in-place NAF commander also exercises OPCON of AEWs. An AEW is composed of the wing command element and some groups. The AEW commander reports to a COMAFFOR.

7. Aerospace Expeditionary Group (AEG). An AEG is an independent group assigned or attached to an AETF or in-place NAF by MAJCOM G-series orders. Normally, the AETF or in-place NAF commander also exercises OPCON of AEGs. An AEG is composed of the group command element and one or more squadrons. The AEG, depending on the size and structure of the AEF, is the lowest command echelon of AEFs that may report directly to a COMAFFOR.

NAVY

I. NAVY MISSION

A. "The mission of the Navy is to maintain, train and equip combat-ready Naval forces capable of winning wars, deterring aggression and maintaining freedom of the seas."[1]

B. The Navy's "*priorities* for FY 2008 are simply stated: We will

> 1. Fight the Global War on Terror by investing in the **present** needs of our Navy and Marine Corps, while we
>
> 2. Prepare for future challenges by investing in our **people**, **facilities**, and **capabilities**.
>
> * * *
>
> The difficulty of preparing for future challenges has been striking the proper balance between building capabilities to support traditional and irregular warfare demands while transforming a blue water navy into one that can operate, fight and win in blue, green, and brown waters, and expanding the lethality and reach of the Marine Corps."[2]

C. The Navy is particularly well-suited to support the myriad of threats worldwide which require a U.S. military presence:

> As we fight the Global War on Terrorism, we cannot forget that the security challenges of the 21st Century are complex and varied. They range from the irregular, asymmetric threats of terrorists, and rogue states, to the sophisticated military technology of future peer competitors … [to] disaster relief and humanitarian assistance missions …. Naval forces are uniquely balanced to address these diverse strategic challenges with the capability and capacity to rapidly project power anywhere in the world.[3]

II. NAVY ORGANIZATION AND FORCE STRUCTURE

A. "The Department of the Navy has three principal components: The Navy Department, consisting of executive offices mostly in Washington, D.C.; the operating forces, including the Marine Corps, the

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[1] Mission of the Navy, *available at* http://www.navy.mil/navydata/organization/org-top.asp. "Freedom of the seas" includes the freedoms of navigation and overflight:

> The U.S. has always recognized and defended the traditional freedoms of navigation and overflight on and over the world's oceans for military and commercial purposes. Internationally agreed-upon freedoms of navigation key to our ability to import raw materials and export finished products to global markets are essential to our economic security. Freedom of navigation is also essential for national security, enabling the worldwide movement of U.S. military forces and the sealift and airlift needed for their support.

Turning to the Sea: American's Ocean Future, U.S. Cabinet report Sep. 2, 1999, *available at* http://www.publicaffairs.noaa.gov/oceanreport/freedomnav.html.

[2] Secretary of the Navy's FY 2008 Posture Statement, Mar. 1, 2007, p. 3 (emphasis in original), *available at* http://www.navy.mil/navydata/people/secnav/winter/secnav_posture_statement_2007.pdf. "Blue" water refers to the high seas, "green" water refers to coastal areas, and "brown" water refers to the littorals (i.e. near land) and inland waters (e.g. rivers and lakes).

[3] *Id.* at p. 5.

reserve components, and, in time of war, the U.S. Coast Guard (in peace, a component of the Department of Homeland Security); and the shore establishment."[4]

B. "The shore establishment provides support to the operating forces (known as 'the fleet') in the form of: facilities for the repair of machinery and electronics; communications centers; training areas and simulators; ship and aircraft repair; intelligence and meteorological support; storage areas for repair parts, fuel, and munitions; medical and dental facilities; and air bases."[5]

C. "The operating forces commanders and fleet commanders have a dual chain of command. Administratively, they report to the Chief of Naval Operations and provide, train, and equip naval forces. Operationally, they provide naval forces and report to the appropriate Unified Combatant Commanders. Commander Fleet Forces Command commands and controls fleet assets on both the Atlantic and Pacific coasts for interdeployment training cycle purposes. As units of the Navy enter the area of responsibility for a particular Navy area commander, they are operationally assigned to the appropriate numbered fleet. All Navy units also have an administrative chain of command with the various ships reporting to the appropriate Type Commander."[6]

D. The three primary types of Naval power projection are the Carrier Strike Group (CSG), the Expeditionary Strike Group (ESG), and its embarked Marine Expeditionary Unit (MEU—*see supra*).

1. A CSG generally consists of an aircraft carrier (CV/CVN[7]), its embarked air wing (CVW)[8] of approximately eighty fixed and rotary-winged aircraft,[9] a cruiser and two destroyers (aka CRUDES ships),[10] a replenishment ship,[11] and a submarine.[12] A CSG is normally commanded by a Rear Admiral (lower or upper half, one or two stars respectively), who has a Lieutenant Commander (O-4) as his staff judge

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[4] Navy Organization, *available at* http://www.navy.mil/navydata/organization/org-over.asp. The Navy Department is comprised of the Office of the Secretary of the Navy (SECNAV), and the Office of the Chief of Naval Operations (OpNav). "The Chief of Naval Operations (CNO) is the senior military officer in the Navy," and thus is akin to the Chief of Staff of the Army or Air Force. Office of the Chief of Naval Operations, *available at* http://www.navy.mil/navydata/organization/org-cno.asp. The Marine Corps is discussed *supra*, and the Coast Guard is discussed *infra*.

[5] The Shore Establishment, *available at* http://www.navy.mil/navydata/organization/org-shor.asp. Most naval bases have both a Naval Legal Service Office (NLSO), which provides criminal defense and legal assistance services to sailors, and a Regional Legal Service Office (RLSO), which provides criminal prosecution and command services (i.e. legal advice to commanders). *See generally* http://www.jag.navy.mil/FieldOffices/Offices3.htm.

[6] The Operating Forces, *available at* http://www.navy.mil/navydata/organization/orgopfor.asp. Thus, for example, a guided missile destroyer (DDG) homeported in San Diego might report *administratively* to a Destroyer Squadron (DESRON, i.e. its Type Commander), but deploy as part of an Expeditionary Strike Group (*see infra*), which reports *operationally* to Commander Third Fleet (C3F) when the ESG is transiting from San Diego to Hawaii, to Commander Seventh Fleet (C7F) when the ESG is transiting from Hawaii through the Indian Ocean, and to Commander Fifth Fleet (C5F) when the ESG arrives in the Arabian Gulf. Commander Fifth Fleet is dual-hatted as Commander U.S. Naval Forces Central Command (COMNAVCENT), the Naval Component Commander for Central Command (CENTCOM). *See generally* COMNAVCENT/C5F Mission & Area of Operations, *available at* http://www.cusnc.navy.mil/mission/index.html.

[7] "CV" is the hull classification symbol or code for "Carrier, Aircraft" (i.e. conventionally powered aircraft carrier, of which only the USS KITTY HAWK (CV 63) presently remains in service, although it is slated to be decommissioned soon). "CVN" is the hull classification symbol or code for "Carrier, Aircraft (Nuclear-Propulsion)" (i.e. nuclear powered aircraft carrier, of which there are currently ten). Modern nuclear powered aircraft carriers have a crew of approximately 3,200 sailors. *See generally* U.S. Navy Fact File—Aircraft Carriers, *available at* http://www.navy.mil/navydata/fact_display.asp?cid=4200&tid=200&ct=4.

[8] An air wing adds an additional 2,480 sailors onboard the aircraft carrier. *Id.*

[9] An embarked air wing will generally have a mix of F/A-18C/D Hornets and F/A-18E/F Super Hornets for both aerial defense and strike capabilities, EA-6B Prowlers (soon to be replaced by the EA-18G Growler) for electronic warfare, S-3B Vikings for surface warfare and aerial refueling (which can also be performed by the F/A-18E/F Super Hornets), E-2C Hawkeyes for airborne early warning and air traffic control, C-2 Greyhounds for carrier onboard delivery (COD) of supplies and personnel, and MH-60R, MH-60S and HH-60H Seahawk helicopters for anti-submarine warfare, anti-surface warfare, combat search and rescue (CSAR), troop transport, vertical replenishment (VERTREP), and medical evacuation (MEDEVAC).

[10] The cruisers and destroyers provide defense against air, surface, and submarine threats.

[11] The replenishment ship performs underway replenishment of food, ammunition, fuel, repair parts, and other provisions for the other ships in the CSG.

[12] The submarine provides defense against submarine threats, as well as other capabilities.

advocate (SJA). The SJA is the only lawyer assigned to the Admiral's staff.[13] The CSG Staff is typically assigned to a particular aircraft carrier (i.e. a CSG Staff is assigned to each of the eleven aircraft carriers).

2. An ESG generally consists of a "big-deck" amphibious assault ship (LHA/LHD), its embarked Marine Expeditionary Unit (MEU—*see supra*) including its Aviation Combat Element (ACE) of approximately thirty fixed and rotary-winged aircraft,[14] two smaller "amphibs" (LPD/LSD), a cruiser and two destroyers (aka CRUDES ships), and a submarine. [Note that unlike a CSG, an ESG does not have a dedicated replenishment ship.] Each of the three amphibs in an ESG will have a variety of landing craft used to transport Marines ashore, such as Landing Craft Air Cushioned (LCAC), Amphibious Assault Vehicle (AAV), and Landing Craft Utility (LCU). An ESG is normally commanded by either a Rear Admiral (lower half) or by a Marine Brigadier General. An ESG will normally have an O-3 or O-4 SJA assigned to the Admiral's staff. Unlike the CSG, however, the ESG Staff is not dedicated to a particular ship, but routinely "crossdecks" between ships before deployment, but occasionally during deployment[15] (i.e. there are far fewer ESG staffs than big-deck amphibs).

III. LEGAL ISSUES

A. The Navy operating environment provides the operational Judge Advocate (JA) with significant and unique legal challenges. Two examples illustrate this point. First, drafting mission-specific Rules of Engagement (ROE) requires significant attention as a result of diminished response times and the likelihood of target discrimination problems in heavily populated coastal areas. Furthermore, operating in the littoral environment requires extensive familiarity with freedom of navigation and overflight issues treated in the United Nations Convention of the Law of the Sea (UNCLOS III).[16]

B. The fundamental reference is the annotated version of The Commander's Handbook on the Law of Naval Operations, NWP 1-14M,[17] which is designed to support academic and research programs and is thus the rough equivalent of the Army's FM 27-10, The Law of Land Warfare.

IV. CONCLUSION

The concurrent alignment of global terrorism and political instability has necessitated a shift in the way the Navy organizes, deploys and operates its forces. The Navy is still in the process of "transforming a blue water navy into one that can operate, fight and win in blue, green, <u>and</u> brown waters."[18] The goal is a flexible force structure that will permit projecting decisive offensive and defensive combat power across a unified battlespace. The new doctrine will produce a dispersed, flexible and operationally agile force capable of meeting the nation's needs.

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[13] The strike group commander, if not operating as head of, or a component of a Joint Task Force (JTF), will usually be operating under the direction of a numbered fleet commander (*see supra*), who will have a more senior staff judge advocate (generally an O-5), but the strike group commander will rely almost exclusively on his own SJA. The CSG SJA will be relied upon for advice on a variety of issues ranging from rules of engagement to military justice and foreign claims. Note also that each carrier typically has two Judge Advocates (JAs) as part of the "ship's company," typically an O-4 and an O-3. Those JAs work for the commanding officer of the carrier (an O-6), and will be primarily concerned with discipline on board the carrier. However, the strike group SJA ("Battle JAG") and the carrier SJA ("Judge") often cooperate on military justice and claims issues.

[14] An embarked ACE will generally have a mix of AV-8B Harrier II "jump jets" capable of Vertical/Short Take Off and Landing (V/STOL) and primarily used for defense of Marines ashore, CH-53E Super Stallion helicopters used for heavy lift transport, CH-46 Sea Knight helicopters or MV-22 Osprey tilt-rotor aircraft used for assault transport, and AH-1W Cobra attack helicopters.

[15] *See, e.g.*, ESG 3 Proves Flexibility, Mobility with First Staff Cross Deck at Sea, *available at* http://www.news.navy.mil/search/display.asp?story_id=15133.

[16] The United States considers the freedom of navigation provisions of UNCLOS III to reflect customary international Law of the Sea. In 1983 President Reagan stated that the U.S. would follow those provisions as part of U.S. Ocean Policy. 19 WEEKLY COMP. PRES. DOC. 877 (Mar. 10, 1983). Furthermore, on 6 October 1994, following the U.S. signing of an agreement to amend the objectionable part of UNCLOS III dealing with deep seabed mining, President Clinton sent UNCLOS III to the Senate for its advice and consent. No further action has been taken to date. See Chapter 23 for a discussion of the current status of US ratification of UNCLOS III.

[17] NWP 1-14M is prepared by the Oceans Law and Policy Department, Center for Naval Warfare Studies at the Naval War College (Newport, Rhode Island), and is available at http://www.dsca.mil/diils/library/US%20Navy%20Marine%20Coast%20Guard%20Operational%20Law%20Manual%20for%20Lawyers.pdf.

[18] Secretary of the Navy's FY 2008 Posture Statement, Mar. 1, 2007, p. 3 (emphasis in original), *available at* http://www.navy.mil/navydata/people/secnav/winter/secnav_posture_statement_2007.pdf.

Semper Paratus

COAST GUARD

A. Core Values: Honor, Respect and Devotion to Duty

REFERENCES

1. U.S. Code:
   a. Title 6, U.S. Code (6 U.S.C. §§ 456, 468).
   b. Title 10, U.S. Code (10 U.S.C. §§ 371-382).
   c. Title 14, U.S. Code (14 U.S.C. §§ 1, 2, 3, 4, 81, 89, 141 and 143, in particular).
   d. Title 16, U.S. Code (16 U.S.C. §§ 1801, *et seq.*).
   e. Title 18, U.S. Code (18 U.S.C. § 1385).
   f. Title 33, U.S. Code (33 U.S.C. §§ 1225, 1226).
   g. Title 46, U.S. Code (46 U.S.C. §§ 70106, 70118, App. § 1903).
   h. Title 47, U.S. Code (47 U.S.C. § 81).
   i. Title 50, U.S. Code (50 U.S.C. § 191).
2. Public Laws:
   a. Homeland Security Act of 2002, Pub. L. 107-296, 116 Stat. 2135.
   b. Oil Pollution Act of 1990, Pub. L. 101-380, 104 Stat. 484.
   c. Maritime Transportation security Act (MTSA) of 2002, Pub. L. 107-295, 116 Stat. 2064.
3. COMDTINST:
   a. Maritime Law Enforcement Manual (MLEM), COMDTINST M16247.1D (FOUO).
   b. Maritime Counter Drug and Alien Migrant Interdiction Operations, COMDTINST M16247.4 (NWP 3-07.4) (FOUO).
   c. Marine Safety Manual, COMDTINST M16000 (series).
   d. Criminal Enforcement of Environmental Laws, COMDTINST M16201.1.
   e. Military Justice Manual, COMDTINST M5810.1D.
4. Coast Guard Publications:
   a. Coast Guard Publication 1, U.S. Coast Guard: America's Maritime Guardian (1 Jan. 2002).
   b. Coast Guard Publication 3-01, Maritime Strategy for Homeland Security.
5. DoDD:
   a. DoDD 5525.5, DoD Cooperation with Civilian Law Enforcement Officials (dated 15 Jan. 1986; incorporating change 1, 20 December 1989).
6. Executive Orders:
   a. EO 12807, Interdiction of Illegal Aliens, 57 FR 23133 (24 May 1992).
   b. EO 13276, Delegation of Responsibilities Concerning Undocumented Aliens Interdicted or Intercepted in the Caribbean Region, 67 FR 69985 (15 November 2002).
   c. EO 13286, Amendment of Executive Orders, and Other Actions, in Connection with the Transfer of Certain Functions to the Secretary of Homeland Security, 68 FR 10619 (28 Feb. 2003).

7. CFR and FR:
   a. 33 CFR §§ 165.9, 165.2025(b), 165.2030(b), Parts 6 and 165.
   b. 57 FR 23133.
8. SAR Convention, 1979, with Annex, T.I.A.S. No. 11093.
9. United Nations Convention on the Law of the Sea, 1982, 1833 U.N.T.S. 397.
10. Standing Rules of Engagement for U.S. Forces, CJCSI 3121.01B, dated 13 June 2005, CG Application – ALCOAST 214/00, COMDTNOTE 16242.
11. The U.S. Coast Guard Strategy for Maritime Safety, Security, and Stewardship (2007)
12. 1995 Memorandum of Agreement Between the Department of Defense and the Department of Transportation on the Use of U.S. Coast Guard Capabilities and Resources in Support of the National Military Strategy.
13. Commander's Handbook on the Law of Naval Operations, COMDTPUB P5800.7, (NWP 1-14M and Annotated Supplement) (1995).
14. Coast Guard 2020.
15. 2008 Budget in Brief and Performance Report (2007)
16. USCG Website - http://www.uscg.mil.
17. USCG Operational Law Enforcement Fast Action Binder (2006) (FOUO)
18. Presidential Directive 27.
19. SECNAVINST 5820.7B.

I. INTRODUCTION

This chapter provides a brief overview of the Coast Guard's missions and the unique operational law issues faced by the Coast Guard, with a focus on the Coast Guard's interaction with the Department of Defense (DoD) services. As an armed force, the Coast Guard shares many similar national security roles with the DoD services, and thus it must be prepared to address many of the same operational law issues. Nonetheless, because of its role as the nation's primary maritime law enforcement agency, Coast Guard missions involve many unique operational law issues that are different from those ordinarily faced by the DoD services. Principal among these differences is that Coast Guard law enforcement missions, which often involve exercising jurisdiction over foreign-flagged vessels, may have an adverse impact on U.S. foreign relations. As a result, Coast Guard operational cases and the legal issues arising therein are often resolved through the interagency process.[1]

II. MISSION

A. The United States Coast Guard (USCG) is a military, multi-mission, maritime service and one of the Nation's five armed forces.[2] Its mission is to protect the public, the environment and U.S. economic interests in the Nation's ports and waterways, along the coast, on international waters, or in any maritime region as required to support national security.[3] Following the events of September 11, 2001, the USCG

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[1] *See* The Maritime Operational Threat Response (MOTR) Plan (October 27, 2005) of the National Strategy for Maritime Security called for in NSPD-41/HSPD-13 (Maritime Security Policy, Dec. 21, 2004).

[2] *See* 14 U.S.C. § 1, which provides: "The Coast Guard as established January 28, 1915, shall be a military service and a branch of the armed forces of the United States at all times. The Coast Guard shall be a service in the Department of Homeland Security, except when operating as a service in the Navy." *See also* 10 U.S.C. § 101(a)(4)-(5) (defining the Coast Guard as an "armed force" and a "uniformed service"). *But see* 10 U.S.C. § 101 (a)(8) (excluding the Coast Guard from the definition of "military department").

[3] *See* Coast Guard Publication 1, U.S. Coast Guard: America's Maritime Guardian (1 Jan. 2002). This fundamental mission reflects the Coast Guard statutorily mandated primary duties. *See also* 14 U.S.C. § 2, which provides:

> The Coast Guard shall enforce or assist in the enforcement of all applicable Federal laws on, under, and over the high seas and waters subject to the jurisdiction of the United States; shall engage in maritime air surveillance or interdiction to enforce or assist in the enforcement of the laws of the United States; shall administer laws and promulgate and enforce regulations for the promotion of safety of life and property on and under the high seas and waters subject to the jurisdiction of the United States covering all matters not specifically delegated by law to some other executive department; shall develop, establish, maintain, and operate, with due regard to the requirements of national defense, aids to maritime navigation, ice-breaking facilities, and rescue facilities for the promotion of safety on, under, and over the high seas and waters subject to the jurisdiction of the United States; shall, pursuant to international agreements, develop, establish, maintain, and operate icebreaking facilities on, under, and over waters other than the high seas and waters subject to the jurisdiction of the United States; shall engage in oceanographic research of the high seas and in waters subject to the jurisdiction of the

was transferred to the Department of Homeland Security (DHS)[4] and focused on its homeland security mission; however, the USCG continues to carry out its other core missions as it has for over 200 years by statutory mandate.[5]

B. In the maritime environment, there is no geographical limit to the Coast Guard's authority (although the exercise of that authority may be subject to flag and coastal State consent in accordance with international law). To the extent that seizure, arrest, and prosecution are desired outcomes of any maritime interdiction, the USCG is well positioned to enforce U.S. law on the high seas and in U.S. and foreign territorial seas.

C. Since the beginning of the Republic, Congress has authorized the USCG to exercise law enforcement authority upon the high seas and waters over which the United States has jurisdiction, and aboard any vessel wherever located, subject to the jurisdiction, or to the operation of any law, of the United States.[6] The Coast Guard routinely exercises these authorities on foreign flag vessels thousands of miles from the United States, sometimes on the high seas, and sometimes in foreign waters.[7] The USCG is also authorized to carry weapons ashore, and to make seizures and arrests at maritime facilities.[8] Coast Guard commissioned, warrant, and petty officers are also designated by statute as officers of the customs.[9]

D. International and domestic laws that shape U.S. maritime interdiction policies across a spectrum of activities including drugs, migrants, firearms, fugitives, piracy, enforcement of Security Council resolutions, acts of violence in maritime navigation, and weapons of mass destruction govern the conduct of maritime interdiction operations. Generally, these laws focus on the exclusive jurisdiction of flag States on the high seas, and the sovereign rights and control exercised by coastal States in coastal waters. Thus, except in the exercise of national or collective self-defense, flag State and coastal State cooperation and consent are required for most maritime interdiction activities not undertaken pursuant to the enforcement of U.N. Security Council resolutions. Accordingly, USCG maritime interdiction activities throughout the world must take into consideration the need to cultivate and sustain such cooperation and consent.

E. Consistent with the well-settled legal principles discussed above, the USCG seeks flag or coastal State consent for extraterritorial enforcement operations on foreign vessels or in foreign waters, or exercises a variety of international legal authorities to obtain authority and jurisdiction over vessels not otherwise subject to unilateral U.S. jurisdiction.

F. In the exercise of its extraterritorial law enforcement authority in 2005, the USCG interdicted over 300,000 pounds of cocaine worth more than $9 billion and more than 9,000 illegal migrants. The USCG also made several hundred extraterritorial arrests and intervened in numerous extraterritorial cases involving fisheries enforcement, hijacking, and acts of violence. On any given day, USCG cutters and aircraft are deployed and engaged in maritime interdiction operations in the Caribbean Sea, the Atlantic Ocean, the deep Eastern Pacific Ocean, and in other locations throughout the world.

III. ORGANIZATION

A. The USCG ordinarily operates under DHS. However, upon declaration of war, or when the President otherwise directs, the USCG may transfer to the Department of the Navy.[10] While operating as

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United States; and shall maintain a state of readiness to function as a specialized service in the Navy in time of war, including the fulfillment of Maritime Defense Zone command responsibilities.

[4] *See* Homeland Security Act of 2002, Pub. L. 107-296, 116 Stat. §§ 103, 888, 1704. DHS organization and a description of its agencies can be viewed at www.dhs.gov.

[5] *See* 6 U.S.C. § 468.

[6] 14 U.S.C. § 89 (a); 33 U.S.C. § 1226.

[7] *See e.g.*, 46 U.S.C. App. § 1903.

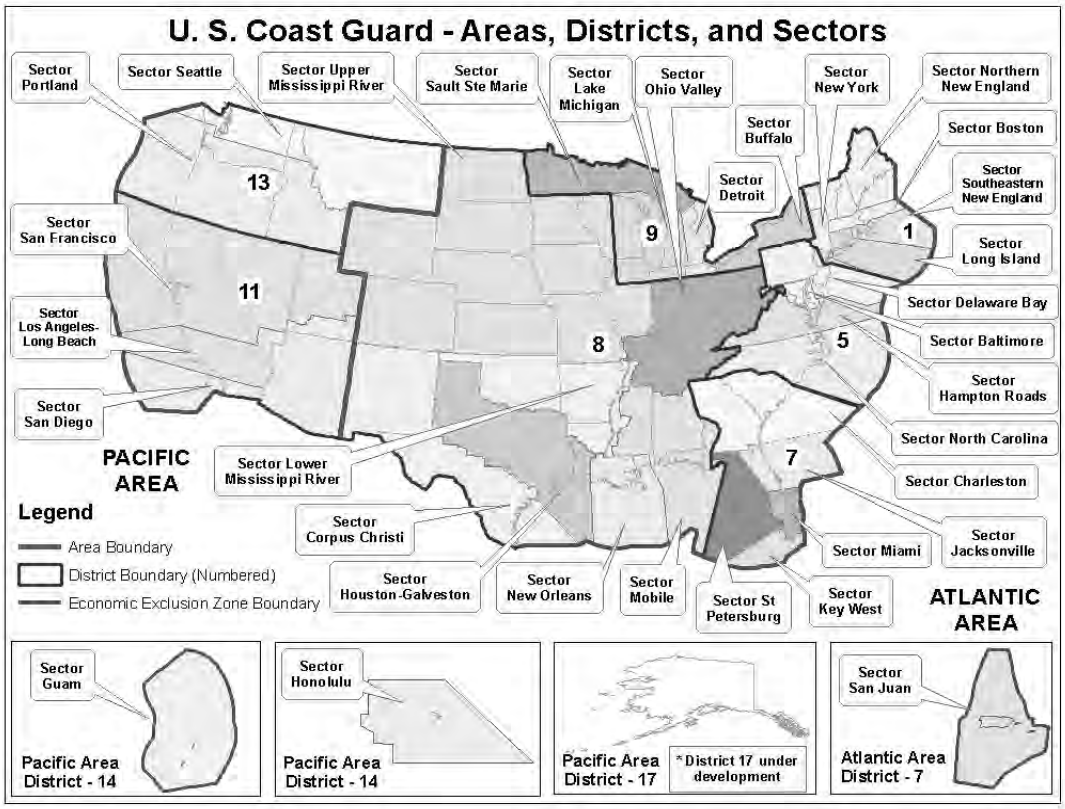
[8] 46 U.S.C. § 70118.

[9] 4 U.S.C. § 143; 19 U.S.C. § 1401.

[10] *See* 14 U.S.C. §§ 1, 3; *see also* Coast Guard and Maritime Transportation Act of 2006, Conf. Rept., H. Rept. 109-413, § 211, as adopted by House and Senate conferees 6 Apr 2006 (to accompany H.R. 889).

part of DHS, the Commandant of the USCG reports directly to the Department's Secretary. Coast Guard Headquarters is responsible for policy development and overall USCGoperations and logistics.

B. Operationally, there are two area commands, Atlantic Area and Pacific Area, with intermediate command authority over subordinate units. Each Area is further subdivided into several geographically-arranged Districts. The Districts in turn exercise operational control over shore commands such as Sectors, Air Stations, Small Boat Stations, and Marine Safety Offices. While the Area Commanders exercise operational control over larger Coast Guard cutters, the Districts and Sectors have operational control of smaller cutters. Additionally, each Area has a Maintenance and Logistics Command, with subordinate commands, that provide administrative, logistical, and engineering support to the operational commands at the District level and below. There are command centers at Headquarters, Areas, Districts and Sectors to control operations within their areas of responsibility (AOR). The following chart shows the Coast Guard's geographical alignment:



IV. MISSION OVERVIEW

A. The USCG's history reveals a gradual accumulation of additional responsibilities, resulting primarily from its status as the nation's primary maritime law enforcement agency and protector of U.S. ports and waterways.[11] Although the USCG occupies a unique position as a military service that serves as the nation's primary maritime law enforcement agency, and now the lead Federal agency for maritime homeland security, it is probably best known for its humanitarian service to the public.

B. The USCG's fundamental roles are to protect the public, the environment, and U.S. economic and security interests. This responsibility covers the following areas: in America's inland waterways, ports and harbors; along 95,000 miles of U .S. coastline; in the U.S. territorial seas; in the nearly 3.4 million square miles of Exclusive Economic Zones (EEZ); and on international waters, as well as in other maritime regions of importance to the United States. Reflecting its multi-mission character, prior to September 11,

[11] *See generally* Coast Guard Publication 1, *U.S. Coast Guard: America's Maritime Guardian* (1 Jan. 2002).

2001, the USCG organized its missions in five distinct core roles: Maritime Security, Maritime Safety, Protection of Natural Resources, Maritime Mobility, and National Defense.[12] Although each role is composed of several missions, many missions benefit more than one role. For example, while fisheries enforcement is a maritime security mission, it also serves the Coast Guard's Protection of Natural Resources role. The Homeland Security Act (HLSA) of 2002, which transferred the USCG to DHS, categorizes theUSCG's missions as either Homeland Security or Non-Homeland Security missions.[13] The USCG's Homeland Security missions consist of the following: Ports, Waterways, and Coastal Security; Drug Interdiction; Migrant Interdiction; Defense Readiness; and other Law Enforcement.[14] Non-Homeland Security missions consist of the following: Marine Safety; Search and Rescue; Aids to Navigation; Living Marine Resource Protection (Fisheries Enforcement); Marine Environmental Response; and Polar Icebreaking.[15] The following brief description of the USCG's principal missions is organized around this HLSA framework, but in certain places links those missions to the USCG's core roles.

V. HOMELAND SECURITY MISSIONS

A. Maritime Homeland Security (MHLS)/Maritime Homeland Defense (MHLD).

1. As both a military service and a Federal law enforcement agency, the USCG plays a unique role in homeland security and homeland defense. Although the notion of homeland security had always been incorporated into the USCG's maritime security role,[16] the USCG refocused its capabilities in the homeland security mission in the wake of the September 11th terrorist attacks. Following those attacks, the USCG quickly organized and conducted the largest port security operation since World War II to protect the U.S. Marine Transportation System (MTS). The USCG immediately deployed resources and established security zones around vessels and significant critical infrastructure such as power plants, bridges, dams, and locks, in addition to providing overall security in U.S. ports. Additionally, on September 21, 2001, the USCG promulgated temporary regulations creating Naval Vessel Protection Zones (NVPZ), in order to ensure the safety and security of U.S. naval vessels within U.S. territorial waters. The temporary NVPZ regulations were subsequently made permanent.[17]

2. As the Nation's lead maritime law enforcement agency, the USCG carries out its homeland security mission as a law enforcement agency working with the Department of Justice (DoJ), as well as with components and bureaus of DHS. In addition to its general law enforcement authorities, the USCG draws on a broad range of legal authorities specifically tailored to port and waterway safety and security[18] to carry out its homeland security functions. Moreover, the Maritime Transportation Security Act (MTSA) of 2002,[19] while establishing new security requirements, clarified USCG legal authorities and provided additional enforcement capabilities. Maritime Safety and Security Teams (MSST) are an example of one such capability. MSSTs are a quick-response force capable of rapid, nationwide deployment via air, ground, or sea transportation in response to changing threat conditions and evolving Ports, Waterways and Coastal Security (PWCS) mission requirements. MSSTs were created to "safeguard the public and protect vessels, harbors, ports, facilities, and cargo in waters subject to the jurisdiction of the U.S. from destruction, loss or injury from crime, or sabotage due to terrorist activity."[20]

3. As a military service, the USCG maintains its capability to carry out defense-oriented missions at the direction of the President. Accordingly, the USCG maintains a close relationship with NORTHCOM

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[12] *See id.*; *see also* 6 U.S.C. § 468(a).

[13] *See* 6 U.S.C. § 468(a).

[14] *Id.* § 468(a)(2).

[15] *Id.* § 468(a)(1).

[16] *See* 6 U.S.C. §§ 468(a), (c), & (e).

[17] 33 C.F.R. §§ 165.9, 165.2025(b), 165.2030(b).

[18] *See, e.g.*, 33 U.S.C. § 1225 (waterfront safety); 33 U.S.C. § 1226 (Port, harbor, and coastal facility security); 46 U.S.C. § 70118 (law enforcement ashore); 50 U.S.C. § 191 (Regulation of anchorage and movement of vessels during national emergency); and 14 U.S.C. § 91 (Safety of naval vessels).

[19] Maritime Transportation Security Act (MTSA) of 2002, Pub. L. 107-295, 116 Stat. 2064.

[20] 46 U.S.C. § 70106.

and other Combatant Commands that have responsibility for homeland defense, and the USCG is prepared to perform homeland defense missions in addition to homeland security.

4. Building on existing capabilities as well as traditional and expanded legal authorities, the USCG has outlined a Maritime Strategy for Homeland Security, which contains six elements: (1) Increase Maritime Domain Awareness (MDA); (2) Conduct Enhanced Maritime Security Operations; (3) Close Port Security Gaps; (4) Build Critical Security Capabilities and Competencies; (5) Leverage Partnerships to Mitigate Security Risks; and (6) Ensure Readiness for Homeland Defense Operations.[21]

5. Maritime Homeland Defense is a mission for all U.S. armed forces, including the USCG. Terrorist organizations can exploit the marine environment to attack vessels, ports, harbors, and adjacent infrastructure, and to introduce illicit personnel or equipment into the United States. Commercial ports provide lucrative targets to terrorists desiring to inflict damage and casualties through conventional attacks or the use of weapons of mass destruction. The vast number of vessels, coupled with the inherent difficulty of determining the specific intent of all commercial and private vessels, makes detection and monitoring of potential threats a difficult challenge. Accordingly, transparency in operations, robust communication and collaboration, and flexibility in the ability to shift forces and focus, depending on the circumstances, will be the guarantor of a successful response to any terrorist threat.

6. The key to understanding the appropriate relationship of the USCG and DoD in the context of maritime homeland defense is that incidents are not readily defined, at least initially, as having a discrete homeland defense or homeland security character. Maritime homeland security remains primarily a Federal law enforcement mission. The USCG continues to have the predominant role in maritime homeland security, and Congress most recently recognized that role in the MTSA, in charging the USCG to provide an armed deterrent and respond to acts of terrorism in the marine environment.[22] Although DoD's primary contribution to maritime homeland security is the provision of combat-capable forward deployed forces, U.S. policies acknowledge that law enforcement may not be capable of containing and resolving a terrorist incident, in which case a military response in defense of the U.S. may be necessary and appropriate. The Maritime Operational Threat Response (MOTR) Plan establishes an expedited, real-time process for national leaders to coordinate national policy for preventing and responding to acts of terrorism and other maritime threats, either internationally or domestically, including decisions on whether a particular case should be prosecuted as a law enforcement or military mission.[23]

7. Given DoD's primary mission of forward deployment to fight the nation's wars and protect national power, DoD assets simply may not be available on short notice to respond to maritime homeland security or defense operations in the approaches to the U.S. Consequently, it is wise to consider how decision-makers might employ ever-present USCG forces in various roles (both supported and supporting)

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[21] U.S. Coast Guard, *Maritime Strategy for Homeland Security*, at 3, 20 December 2002.

[22] 46 U.S.C. § 70106. Additional authority predating the MTSA includes 33 U.S.C. § 1226 (b)(3), 50 U.S.C. §§ 191-195, and implementing regulations at 33 CFR Part 6.

[23] National Security Presidential Directive-41/Homeland Security Presidential Directive-13 (NSPD-41/HSPD-13) (Maritime Security Policy, December 21, 2004) required the development and implementation of the MOTR Plan. The purpose of this strategic-level plan is to achieve a coordinated U.S. Government response consistent with desired national outcomes to threats against the United States and its interests in the maritime domain.

The MOTR Plan established a network of integrated national-level maritime command centers, including the Coast Guard Command Center, in order to achieve coordinated, unified, timely, and effective U.S. Government MOTR planning and operational maritime command and control. MOTR includes the deployment of capabilities and use of force required to intercept, apprehend, exploit, and, when necessary, defeat maritime threats. Additionally, the MOTR Plan sets forth roles and responsibilities of lead and supporting agencies and directs clear coordination relationships and operational coordination requirements enabling the U.S. Government to act quickly and decisively to counter maritime threats.

MOTR coordination protocols fall into two broad categories: special procedures for maritime terrorist acts or threats within the United States, and all other threats, including extraterritorial terrorist acts or threats.

MOTR execution commences upon identification of a maritime threat against the United States and its interests in the maritime domain and concludes upon completion of response activities. These activities include maritime security response and counterterrorism operations; maritime interception operations; the boarding of vessels for law enforcement purposes; prevention and detection of, and response to, mining of U.S. ports; detection, interdiction, and disposition of targeted cargo, people, and vessels; and countering attacks on vessels with U.S. citizens aboard; or any other maritime activities that affect U.S. interests anywhere in the world.

in homeland defense missions, rather than pigeonholing such missions as DoD-only.[24] Further, unlike the National Guard, which operates either in a non-Federal (Title 32) or Federal (Title 10) status, the USCG operates concurrently under Titles 10 and 14. In order to serve in a Title 10 status, the National Guard must be ordered to active Federal duty either by order of the President or with consent of the Governor. In contrast, the USCG is at all times an armed force (Title 10 status), even *while* performing law enforcement (Title 14). Coast Guard units conducting maritime homeland security operations could find themselves in a maritime homeland defense situation in a matter of minutes. Hence, the ability to handle evolving scenarios as a Federal law enforcement agency or an armed force is a unique characteristic of the USCG.

8. Although the Secretary of Homeland Security does not have authority to engage in warfighting, the military defense of the U.S., or other military activities under the Homeland Security Act, the USCG retains its identity and capabilities as an armed force within the DHS. Further, nothing in the Homeland Security Act limits "the existing authority of the Department of Defense or the Armed Forces to engage in warfighting, the military defense of the United States, or other military activities."[25] Accordingly, in its role as an armed force, the USCG is available at all times to the President, as Commander-in-Chief, as an instrument of national policy and defense. The USCG could assume the role of a supporting or supported commander in any homeland defense mission, regardless of DoD involvement.

9. Consistent with this analysis, military participation by the USCG in planned homeland defense operations could be by order of the President,[26] or in response to a request for forces by DoD, where USCG forces act under the direction of SECDEF. DoD and DHS have entered into reciprocal memoranda of agreement to manage the flow of forces between DoD and the USCG for both maritime homeland defense and maritime homeland security.[27]

B. Maritime Law Enforcement, Drug Interdiction and Migrant Interdiction.

1. Since its founding as the Revenue Marine in 1790,[28] the USCG has been the Nation's primary maritime law enforcement agency. The USCG's statutorily-defined law enforcement mission provides that it "shall enforce or assist in the enforcement of all applicable Federal laws on, under, and over the high seas and waters subject to the jurisdiction of the United States."[29] Coast Guard active duty commissioned, warrant, and petty officers are authorized to "make inquiries, examinations, inspections, searches, seizures, and arrests upon the high seas and waters over which the United States has jurisdiction, for the prevention, detection, and suppression of violations of laws of the United States."[30] The USCG, unlike the DoD services, is not constrained by the Posse Comitatus Act,[31] which prohibits the use of the Army or Air Force to execute the laws of the United States, or by 10 U.S.C. § 375, which prohibits direct participation by DoD personnel in search, seizure, arrest, or other similar activities unless otherwise authorized by law. Notwithstanding this prohibition, DoD assistance to USCG law enforcement missions could include: providing information collected during military operations; using military equipment and facilities, or providing DoD personnel to operate and maintain that equipment; and using U.S. Navy vessels to embark USCG Law Enforcement Detachments (LEDETS) for counterdrug support and homeland security

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[24] This consideration is also relevant to a problematic internal DoD seam. Pursuant to the Unified Command Plan, NORTHCOM's AOR extends 500 nautical miles from the United States. A typical terrorist scenario involves a threat in the maritime approaches to the United States beyond that boundary within the EUCOM, PACOM, or SOUTHCOM AORs. This presents considerable command and control (C2) issues involving particular incidents. This seam does not affect Coast Guard C2 of its own assets, which are available to all three COCOMs.

[25] 6 U.S.C. § 456.

[26] *See, e.g.,* E.O. 12807 (directing Coast Guard to prevent the entry of undocumented aliens as far as possible from U.S. shores, which is fundamentally an exercise of a national security mission); *see also* E.O. 13286 (28 Feb 2003) (amending E.O. 12807).

[27] Memorandum of Agreement between DoD and DHS for the Inclusion of the U.S. Coast Guard in Support of Maritime Homeland Defense (Nov. 30, 2004); Memorandum of Agreement between DoD and DHS for DoD Support to U.S. Coast Guard for Maritime Homeland Security (Apr. 5, 2006).

[28] The Revenue Marine was also known as the Revenue Cutter Service.

[29] 14 U.S.C. § 2.

[30] 14 U.S.C. § 89.

[31] 18 U.S.C. § 1385. The Act was made applicable to the Navy and Marine Corps by policy. *See* DoDD 5525.5, DoD Cooperation with Civilian Law Enforcement Officials, at E4.3, 2.2.1. (15 Jan. 1986); SECNAVINST 5820.7B (22 Mar. 1988).

missions.[32] Maritime Law Enforcement missions involve significant DoD-USCG interaction, as USCG LEDETs routinely deploy on U.S. Navy ships to interdict illegal narcotics[33] and for maritime homeland security operations.

2. The USCG is the lead Federal agency for maritime drug interdiction. As such, it is a key player in combating the flow of illegal drugs to the U.S. by denying smugglers the use of air and maritime routes in the Transit Zone, a six million square mile area, including the Caribbean, Gulf of Mexico, and Eastern Pacific. In meeting the challenge of patrolling this vast area, the USCG coordinates closely with other Federal agencies, including DoD services, and countries within the region to disrupt and deter the flow of illegal drugs. The USCG, DoS, and DoJ have negotiated over two dozen bilateral agreements, on behalf of the U.S., with Caribbean and South American Nations to assist in maritime law enforcement. The most comprehensive model agreement gives the USCG standing authority to do the following enforcement actions: shipriding; pursuit; entry to investigate; overflight; and interdiction support (detainee transfer).

3. The USCG's alien migrant interdiction operations are part humanitarian operations, part border control, and part law enforcement. Because migrants take great risks to flee their countries, often sailing in overloaded and unseaworthy conditions, USCG migrant interdiction operations often begin as search and rescue operations. Nonetheless, these migrants pose a significant potential security threat and, as outlined in Executive Orders and other Presidential directives, the President has suspended the entry of undocumented aliens into the U.S. and established a policy that the USCG interdict migrants as far as possible from U.S. shores.[34] The nature of the migrant interdiction mission continues to change in response to increasingly sophisticated smuggling operations and enhanced security risks that undocumented migration poses to the U.S.

C. National Defense.

1. The USCG is at all times an armed force of the United States.[35] Indeed, the USCG, is a military, multi-mission maritime service that has answered America's calls continuously for over 218 years. In addition to its status as a Federal maritime law enforcement agency[36] within the DHS, the USCG "shall be a military service and a branch of the armed forces of the United States at all times."[37] Thus, although the more familiar non-defense missions dominate the public perception of the USCG, it remains a military service. During peacetime, the USCG supports the Navy and regional Combatant Commanders by participating in military exercises, providing polar icebreaking capabilities, and conducting Freedom of Navigation (FON) operations. The USCG has served alongside the U.S. Navy in critical national defense missions in all major conflicts, and today is prepared to support DoD's homeland defense mission.

2. The close historical relationship between the USCG and Navy is reflected in a 1995 agreement between the Secretaries of Defense and Transportation.[38] Pursuant to the agreement and its five annexes, the USCG supports DoD and the regional Combatant Commanders by providing specialized, non-redundant capabilities in five specific national defense missions: Maritime Interception Operations (MIO); Military Environmental Response Operations; Port Operations, Security and Defense; Peacetime Military Engagement; and Coastal Sea Control Operations. The important role of the USCG's capabilities under the

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[32] 10 U.S.C. §§ 371-382; 10 U.S.C. § 379 (mandating the assignment of Coast Guard personnel to certain naval vessels for law enforcement purposes).

[33] 10 U.S.C. § 379.

[34] *See* Pres. Proc. 4865 (1981) (suspending entry of undocumented aliens into the United States by sea); E.O. 12807, *supra* note 24, 57 Fed. Reg. 23133 (1 June 1992) ("Kennebunkport Order"); Presidential Decision Directive 9, 18 June 1993. The Supreme Court, in *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155 (1993), upheld the presidential authority to control U.S. borders and suspend the entry of undocumented aliens into the U.S. *See also* E.O. 13276 (15 Nov. 2002) (Delegation of Responsibilities Concerning Undocumented Aliens Interdicted or Intercepted in the Caribbean Region).

[35] 14 U.S.C. § 1 (establishing the U.S. Coast Guard as a military service and branch of the armed forces); 10 U.S.C. § 101 (a)(4) (including "the Army, Navy, Air Force, Marine Corps, and Coast Guard" in the definition of "armed forces").

[36] 14 U.S.C. § 89.

[37] 14 U.S.C. § 1.

[38] Memorandum of Agreement Between the Department of Defense and the Department of Transportation on the Use of U.S. Coast Guard Capabilities and Resources in Support of the National Military Strategy, Washington DC, 3 Oct. 1995.

1995 agreement were demonstrated most recently in OPERATION IRAQI FREEDOM, during which the USCG deployed Port Security Units, the National Strike Team, a specialized oil pollution unit, and nine cutters to execute its specialized missions in MIO, Port Security and Defense, and Military Marine Environmental Response.

VI. NON-HOMELAND SECURITY MISSIONS

A. Marine Safety.

1. The USCG's Maritime Safety role involves a variety of mission areas, including establishing design and equipment standards, inspecting merchant and recreational vessels, conducting search and rescue operations, and tracking icebergs in the North Atlantic. Each of these missions is carried out with the fundamental goal of protecting the lives and safety of Americans in the maritime arena. Two of the principle missions encompassing the Maritime Safety role are marine safety and search and rescue.

2. The USCG Marine Safety program is multifaceted and includes both preventative and remedial activities. On the preventative side, the USCG inspects U.S. flag vessels, offshore drilling platforms, and marine facilities; licenses U.S. merchant mariners; and reviews and approves plans for vessel construction, repairs, and alterations. Moreover, Captains of the Port (COTP) manage the USCG's Port State Control program through which the USCG responds to potential safety and environmental threats posed by over 7,500 foreign flags calling at U.S. ports each year. These efforts help ensure that both foreign and domestic ships meet standards implemented under international conventions, such as the International Convention for the Safety of Life (SOLAS) and the International Convention for the Prevention of Pollution from Ships (MARPOL), as well as U.S. standards. The USCG's COTP missions involve substantial interface with the DoD services, both in regulating vessel movement and in establishing safety zones and security zones[39] around high threat areas and critical infrastructure. The USCG's remedial activities in the marine safety program include marine casualty investigations whenever vessels are involved in accidents in U.S. waters, and marine environmental responses when vessel accidents lead to oil spills or the release of other hazardous materials.

B. Search and Rescue.

1. From the founding of the U.S. Life Saving Service in 1848, Search and Rescue (SAR) has been a cornerstone USCG mission.[40] The USCG is the lead U.S. agency for maritime SAR in U.S. waters. Each year, the USCG saves thousands of lives and millions of dollars of property. Established and operated under international[41] and national legal obligations and standards, the USCG serves as a model for SAR services in other countries.

2. The quick-paced and transferable skills executed by the USCG during SAR operations were readily apparent during the response efforts to the 2005 hurricanes in the Gulf Coast. Normally, the USCG saves 5,500 people each year.[42] However, in response to Hurricane Katrina, "[m]ore than 5,290 USCG personnel conducted search-and-rescue operations, waterway reconstitution and environmental assessment operations. More than 400 USCG reservists were recalled to active duty."[43] "By Sept. 11, 2005, the USCG had rescued more than 24,000 people and assisted with the joint-agency evacuation of an additional 9,400 patients and medical personnel from hospitals in the Gulf coast region. More than 33,520 lives were saved and evacuated."[44]

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[39] *See* 33 C.F.R. Parts 6 (Protection and Security of Vessels, Harbors, and Waterfront Facilities) and 165 (containing general regulations governing regulated navigation areas).

[40] 14 U.S.C. § 88; 14 U.S.C. § 2.

[41] *See* International Convention on Maritime Search and Rescue Convention (SAR Convention), 1979, with Annex, T.I.A.S. No. 11093.

[42] *See* Coast Guard Average Day Fact Card, *available at* http://www.uscg.mil/hq/g-cp/comrel/factfile/Factcards/AvgDay.html (containing daily average statistics, current as of June, 2005).

[43] Coast Guard Response to Hurricane Katrina Fact Card *available at* http://www.uscg.mil/hq/g-cp/comrel/factfile/Factcards/Hurricane_Katrina.htm.

[44] *Id.*

C. Living Marine Resource Protection and Fisheries Enforcement.

1. Protecting the EEZ and key areas of the high seas is an important mission for the USCG. The U.S. EEZ is the largest in the world, containing 3.3 million square miles of ocean and 90,000 miles of coastline, in which the USCG carries out the Nation's primary at-sea fisheries enforcement activities. In carrying out this mission, the USCG enforces both international treaties and domestic fisheries laws, primarily the Magnuson-Stevens Fisheries Conservation and Management Act[45] that extended U.S. fisheries management authority out to the full 200 nautical miles authorized by international law.[46] The USCG's fisheries priorities, in order of importance, are: (1) to protect the U.S. EEZ from foreign encroachment; (2) to enforce domestic fisheries laws; and (3) to enforce international fisheries agreements. The USCG's efforts reflect the substantial economic interest the Nation has in protecting its ocean resources.

2. The USCG's role in protecting the Nation's resources combines Maritime Security and Maritime Safety missions. For example, the USCG enforces domestic fisheries and living marine resource laws through at-sea law enforcement activity. Yet, these missions are principally designed to protect the Nation's marine resources and the economic interests that are dependent on the continuing availability of those resources. Similarly, the USCG's environmental response program fulfills both roles to protect natural resource and maritime safety.

D. Marine Environmental Protection.

1. In response to the *Exxon Valdez* oil spill on March 23, 1989, Congress passed the Oil Pollution Act of 1990[47] (OPA 90), through which the USCG regulates the shipping industry to reduce the likelihood of oil spills. The Act placed new demands on the USCG and solidified the role of the USCG as the Federal agency with primary responsibility for preventing and responding to maritime oil spills. USCG Captains of the Port (COTP) are the pre-designated Federal On-Scene Coordinators (FOSC) for instances involving oil and hazardous substances in all coastal, and some inland, areas.

2. Increasingly, the USCG is playing an active role in the prosecution of environmental crimes involving other Federal statutes, such as the Clean Water Act (CWA),[48] the Act to Prevent Pollution From Ships (APPS),[49] the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA),[50] the Ocean Dumping Act,[51] and the Refuse Act.[52] Criminal prosecutions have also been based upon False Representations of an Official Matter.[53]

E. Maritime Mobility: Aids to Navigation and Icebreaking.

1. The U.S. Marine Transportation System (MTS) "facilitates America's global reach into foreign markets and the nation's engagement in world affairs."[54] The USCG is a leading force in ensuring a safe and efficient marine transportation system. Pursuant to its maritime mobility role, the USCG is responsible for maintaining aids to navigation;[55] administering the Nation's bridges; providing waterways and vessel traffic management systems; and conducting icebreaking operations.

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[45] 16 U.S.C 1801 *et seq*.

[46] *See* United Nations Convention on the Law of the Sea, 1982, 1833 U.N.T.S. 397 (entered into force 16 Nov. 1994), art. 57.

[47] Pub. L. No. 101-380, 104 Stat. 507 (1990).

[48] 33 U.S.C. § 1251 *et seq.*

[49] 33 U.S.C. §§ 1901-1912.

[50] 42 U.S.C. §§ 9610-9675.

[51] 33 U.S.C. §§ 1401 *et seq.*, as amended.

[52] 33 U.S.C. § 407.

[53] *See* 18 U.S.C. § 1001; Maritime Law Enforcement Manual (MLEM), COMDTINST M16247.1D, chs. 6, 9, and 12.

[54] Coast Guard Publication 1, *supra* note 11, at 11.

[55] *See* 14 U.S.C. § 81.

2. Additionally, the USCG plays a substantial role in, and is the country's principal point of contact for, diplomatic efforts involving international marine transportation issues at the International Maritime Organization (IMO).

VII. USE OF FORCE POLICY/RULES OF ENGAGEMENT

Since a primary USCG mission is law enforcement, most USCG use of force issues arise in that context. The USCG's use of force in law enforcement operations is governed by the USCG Use of Force Policy,[56] which implements the reasonableness requirement of the Fourth Amendment to the U.S. Constitution.[57] USCG units adhere to the Standing Rules of Engagement (SROE)[58] for unit self-defense, wherever located, when operating under DoD Tactical Control outside U.S. territory, and when engaged in national self-defense. Similarly, Navy units operating under USCG TACON follow the USCG Use of Force Policy for employing warning shots and disabling fire pursuant to 14 U.S.C. § 637, and the SROE for all other purposes.

VIII. MILITARY JUSTICE

Coast Guard members are subject to the Uniform Code of Military Justice (UCMJ). The USCG utilizes the Manual for Courts-Martial in the same manner as the DoD services, and virtually the same nonjudicial punishment provisions apply under Article 15, UCMJ. Coast Guard-specific procedures and forms are located in the USCG Military Justice Manual.[59]

IX. ROLE OF THE COAST GUARD JUDGE ADVOCATE AND CG/DOD LEGAL INTERFACE

A. The USCG does not have a separate Judge Advocate General's Corps or Department. All USCG Judge Advocates (JA) are unrestricted line officers and many serve in non-legal operational, training or administrative assignments during their careers. Coast Guard JAs are assigned to a variety of commands. While serving as JAs, USCG lawyers provide legal advice on a broad range of topics including military justice, administrative and personnel law, and operational law in all mission areas.

B. The Judge Advocate General of the USCG provides legal advice to the Commandant, manages the USCG's Legal Program, and supervises the delivery of legal services and military justice. The Chief, Office of Maritime and International Law, phone 202-372-3796 or 202-267-2100 (24x7), has primary responsibility for international, operational and marine safety legal issues. JAs are also assigned to larger support and training commands, and as Staff Judge Advocates to each operational commander. These include "District Legal Officers" who actively practice operational law within the geographical boundaries of the districts to which they are assigned, and JAs who are assigned to the Atlantic and Pacific Area Commanders. Additionally, JAs serve in liaison positions at various other Federal agencies, such as the Department of State and Department of Justice; at DoD commands such as NLSO Washington, DC and NORTHCOM; and at joint commands with significant law enforcement missions, like JIATF South.

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[56] *See* Maritime Law Enforcement Manual (MLEM), COMDTINST M16247.1D, ch. 4.

[57] *See e.g.*, *Tennessee v. Garner*, 471 U.S. 1 (1985); *Graham v. Connor*, 490 U.S. 386 (1989).

[58] Standing Rules of Engagement/Standing Rules for the Use of Force for US Forces, CJCSI 3121.01B, 13 Jun. 2005.

[59] Military Justice Manual, COMDTINST M5810.1D (17 Aug. 2000).

NORTH ATLANTIC TREATY ORGANIZATION (NATO)

I. OVERVIEW

A. The North Atlantic Treaty Organization (NATO) has existed for almost sixty years, yet its organizational structure remains obscure to many judge advocates. This chapter discusses its structure and decision making process.

B. Twelve countries founded the NATO on 4 April 1949 by signing the North Atlantic Treaty in Washington, D.C. Because it was signed in Washington, the North Atlantic Treaty is often referred to as the "Washington Treaty." Today, NATO's Headquarters are located in Brussels, Belgium.

C. Article 9 of the North Atlantic Treaty develops the basic structure of NATO, establishing a "Council to consider matters concerning the implementation of this Treaty." This Council is known as the North Atlantic Council (NAC). All NATO members have a Permanent Representative (PermRep) of ambassadorial rank in the NAC. PermReps must be available "to meet promptly at any time." The NAC meets regularly, usually on Wednesdays, to fulfill its treaty based obligation.

D. Article 9 also created "such subsidiary bodies as may be necessary," specifically requiring establishment of a defense committee now known as the "NATO Military Committee." This committee is composed of the Military Representatives (MilReps), usually general officers of three star or equivalent rank, from the members participating in NATO's integrated military command structure including, by special arrangement, France.[1] The Military Committee (MC) is the senior military authority in NATO and the primary source of military advice to the Secretary General and the NAC/ Defense Planning Committee. The Military Committee meets regularly, usually on Thursdays. The Defense Planning Committee (DPC), consisting of all NATO members except France, is the highest authority in defense policy matters involving the integrated force structure. Simply put, the DPC is a meeting of the PermReps except France.

E. Article 9 also specifically tasks the defense committee to "recommend measures for the implementation of Articles 3 and 5." Article 3 requires "the Parties, separately and jointly, by means of continuous and effective self-help and mutual aid, [to] maintain and develop their individual and collective capacity to resist armed attack." Thus NATO seeks to be interoperable across numerous military forces, many with several branches. France does not participate in the integrated military structure of NATO and Iceland has no military. The individual nations have joint and individual responsibilities to be able to defend themselves and others.

F. There are five other "subsidiary bodies": The International Staff (IS), the International Military Staff (IMS), the Political Committee, and the two Strategic Commands. The IS provides direct support to the NAC/DPC and the civilian committees under them. The IS facilitates attaining a consensus among the Allies by chairing meetings, preparing policy recommendations and drafting communiqués and reports. The IMS provides support for the Military Committee and is composed of military officers from each NATO country. The Political Committee is a forum for regular political consultations chaired by the

[1] In 1966 France made the political decision to withdraw from NATO's integrated military command structure, yet it remains the third largest provider of troops in NATO operations. French President Sarkozy recently has indicated his readiness to rejoin NATO's military command structure. *See, e.g.*, http://www.reuters.com/article/worldNews/idUSN2323371620070924.

Assistant Secretary General for Political Affairs. Its members are the political counselors of each NATO delegation. Besides keeping abreast of political trends and developments of interest to the members, the Political Committee prepares studies of political problems for discussion by the NAC and submits reports on subjects to be debated. The Political Committee is tasked to follow up on and implement NAC decisions.

G. The Strategic Commands (SC) of NATO are Allied Command Europe (ACE), now known as Allied Command Operations (ACO)[2] and Allied Command Transformation (ACT). ACO is located at Supreme Headquarters Allied Powers Europe (SHAPE) in Mons, Belgium, located about forty-five miles south of NATO Headquarters. ACT is located in Norfolk, Virginia. The SCs are responsible to the Military Committee for the overall direction and conduct of all NATO military matters within their command areas. The SCs provide direct advice about their command to the Military Committee and are authorized to provide direct advice to the NAC/DPC on matters pertaining to their commands while keeping the Military Committee simultaneously informed. When preparing for and conducting operations, the SCs receive political guidance directly from the NAC/DPC. ACO and ACT are continuously represented at NATO Headquarters by representatives from their respective staffs to facilitate the timely two-way flow of information.

H. Article 5 is the heart of NATO in that "[t]he 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 . . . ." This Article forms the basis for collective self-defense, but it is not unlimited since "if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence recognized 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." [emphasis added]. The first time NATO invoked Article 5 was in response to the September 11, 2001 attacks against the United States.

I. Article 5, as well as Article 51 of the United Nations Charter, requires notification to the United Nations Security Council of measures taken in self-defense. Actions planned or actually undertaken pursuant to Article 5 are referred to as "Article 5 Operations." Article 6 defines the area where Article 5 applies, that is, essentially, "on the territory of any of the Parties in Europe or North America" or the islands in the North Atlantic "under the jurisdiction of any of the Parties . . . north of the Tropic of Cancer." Also included in the geographic confines of Article 6 are attacks "on the forces, vessels, or aircraft of any of the Parties when in or over these territories . . . the Mediterranean Sea or the North Atlantic area north of the Tropic of Cancer." Besides Article 5 operations, NATO conducts Article 4 operations, such as Peace Support Operations (PSO).[3] The first NATO PSO was the Implementation Force (IFOR) in the Balkans in 1995, pursuant to the General Framework Agreement for Peace (GFAP, also known as the Dayton Peace Accord).

J. NATO has expanded five times and now numbers "at" twenty-six members, with two additional members expected to join in April 2009 as part of the sixth round of expansion.[4] The expansion process is elaborated in Article 10 of the Treaty. Specifically, "any other European State" may be invited to join NATO. The invitation is made by unanimous agreement of the current members and is based on the invitees' ability to further the principles of the Treaty and "contribute to the security of the North Atlantic area."

K. To assist the candidate nation, NATO has developed the Membership Action Plan (MAP). While not establishing criteria, the MAP is a consultative process between NATO and the prospective member State to ascertain the State's progress toward membership. The MAP is divided into five areas dealing with

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[2] http://www.nato.int/shape/news/2003/09/i030901.htm.

[3] Article 4 of the NATO Treaty provides that "[t]he Parties will consult together whenever, in the opinion of any of them, the territorial integrity, political independence or security of any of the Parties is threatened."

[4] At the NATO summit in Bucharest, Romania in April 2008, Albania and Croatia were officially invited to start accession talks with the alliance. See generally BalkanInsight.com, http://www.balkaninsight.com/en/main/news/9102/.

political and economic issues, military and defense issues, resource issues, security issues and legal issues. Each aspiring nation will draft an annual "national programme" on preparations for possible membership, setting objectives for its preparations, and containing specific information on steps being taken on the preparations. Participation in MAP does not imply a timeframe for or guarantee of NATO membership. Decisions on membership have been, and will continue to be, "taken" on a case-by-case basis. The Alliance has no precondition for stationing troops or nuclear weapons on the territory of new members. New members must accede to several key NATO status and technical agreements.

L. The Alliance rests upon commonality of views and a commitment to work for consensus. To enhance the consensus building process, NATO developed the "silence procedure."[5] The silence procedure permits the members to have a vote after discussions and debates have been held in the working groups.

M. The NAC tasks the Military Committee to provide guidance on an issue. The MC provides guidance to the SCs, who develop their input and report back to the MC. Then the MC tasks the IMS to develop a document called an IMS Working Memorandum (IMSWM). This document is sent to each member for consideration and coordination with the respective capitals. Each member has two options after reviewing the IMSWM. They may either maintain or break silence. This is the so-called "silence procedure." If silence is maintained, this means that the member agrees with the content of the IMSWM. If all members agree and maintain silence, then the IMSWM goes forward to the NAC as a MC Memorandum (MCM) of military advice. Silence is broken by the member nation sending a letter to the IMS indicating its objection and the rationale for this objection. When silence is broken, the working group meets to attempt to achieve consensus.

N. After this attempt at consensus, the Chairman of the Military Committee convenes the MC. If consensus is reached, the MCM is sent forward to the NAC as military advice. If not, however, the Chairman may send forward his own recommendation, called the Chairman's Memorandum (CMCM), to the Secretary General as military advice. Consensus is the goal, and often there is a lack of understanding, requiring a member to explain the importance of their position or perspective regarding an issue. Since the process may move quickly, or the Chairman may request approval "at the table," members assign very senior and knowledgeable officers to the position of MilRep and Deputy MilRep.

II. THE U.S. DECISION-MAKING PROCESS

A. The formulation of the U.S. position involves coordination between many agencies such as DoD, Department of State (DoS), and the Joint Staff. The U.S. Mission to NATO and the U.S. Military Delegation to the NATO Military Committee also coordinate with each other on a daily basis. On issues within the cognizance of the European Union, coordination is established with the U.S. Mission to the EU (USEU) located in Brussels as well.

B. When the U.S. position is formulated and the guidance issued, the planners begin to work the issue with the IMS and the other members' staffs in Brussels to arrive at consensus. If this background work is successful, the issue is resolved by the document "passing silence."

III. NATO RULES OF ENGAGEMENT

A. The NATO Rules of Engagement (ROE) provide "the sole authority to NATO/NATO-led forces to use force." The NATO ROE are "written as a series of prohibitions and permissions." The ROE issued as prohibitions "are orders to commanders not to take the designated action(s)." Promulgated as permissions, the ROE "define the limits of the threat or use of force, or of actions that might be construed as provocative, that commanders may take to accomplish their mission." In contrast with the U.S. Standing ROE which are considered generally permissive, NATO ROE are generally restrictive in nature.

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[5] Under the "silence procedure," basic premises of the text are negotiated, after which a draft version is circulated. If no NATO member "breaks the silence" by proposing an amendment (implying that the member State still has fundamental problems with parts of the text), all members are considered to have adopted the text (i.e. silence implies consent).

B. International law, including the law of armed conflict, applies to all NATO military operations. With the different obligations of each NATO member to "relevant conventions and treaties, every effort will be made to ensure . . . that a common approach is adopted . . . for the purpose of military operations."

C. NATO members must also adhere to their respective national laws. Each nation has two separate obligations under this provision. Each nation must issue instructions restricting and/or amplifying the ROE to their troops to ensure compliance with their respective national laws. "[N]ations must inform the NAC/DPC or the Strategic Commander of any inconsistencies, as early as possible." While separate obligations may exist under other treaties and conventions, the unifying element in the NATO is the commitment in the Preamble to the Washington Treaty to maintaining a common defense under the rule of law.

D. NATO defines "self-defense" as "the use of such necessary and proportional force, including deadly force, by NATO/NATO-led forces to defend themselves against attack or an imminent attack." The definition is further refined by defining "necessary" as "indispensable," "proportional" as "a response commensurate with the perception of the level of the threat posed," "imminent" as "manifest, instant and overwhelming," and "attack" as "the use of force against NATO/NATO-led forces . . . ." Note that Appendix 1 to Annex A of the NATO ROE, entitled Hostile Intent and Hostile Act, clarifies this guidance. NATO also employs the concept of "extended self-defense" to "defend other NATO/NATO-led forces and personnel in the vicinity from attack or imminent attack."

E. Guidance regarding the use of force during peacetime and in operations prior to a declaration of counter aggression is contained in paragraphs 9 and 10 of the NATO ROE. After a declaration of counter aggression, the NATO ROE "generally limit the otherwise lawful use of force." Annex A is entitled "Compendium of Rules of Engagement." For ease of use, there is an index to the ROE in Annex A. Additionally in Annex A there are "Notes" to some of the ROE. These notes should be carefully reviewed since they contain significant information regarding combined operations. Specific guidance on the use of ROE in each of the various war-fighting mediums are contained in Annexes B (air), C (land), and D (maritime). There is also a glossary in Annex F that is helpful. The Compendium may be obtained from the Center for Law and Military Operation (CLAMO) via SIPRNET (see the CLAMO chapter for contact information).

"We are . . . guided by the conviction that no nation can build a safer, better world alone. Alliances and multilateral institutions can multiply the strength of freedom-loving nations. The United States is committed to lasting institutions like the United Nations, the World Trade Organization, the Organization of American States, and North Atlantic Treaty Organization (NATO) as well as other long-standing alliances. Coalitions of the willing can augment these permanent institutions. In all cases, international obligations are to be taken seriously. They are not to be undertaken symbolically to rally support for an ideal without furthering its attainment."

US National Security Strategy 2002

COALITION OPERATIONS

REFERENCES

1. United States National Security Strategy September 2002
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3. JOINT CHIEFS OF STAFF, JOINT PUB. 3-16, MULTINATIONAL OPERATIONS (7 Mar. 2007).
4. JOINT CHIEFS OF STAFF, JOINT INSTR. 3121.01B, STANDING RULES OF ENGAGEMENT/STANDING RULES FOR THE USE OF FORCE FOR U.S. FORCES (13 June 2005).
5. 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, 1125 U.N.T.S. 48. Not ratified by the United States.
6. Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Landmines and on Their Destruction, 18 Sep. 1997, 36 I.L.M. 1507 (Ottawa Treaty). Not ratified by the United States.
7. Convention on the Prohibition of the Development, Production, Stockpiling, and Use of Chemical Weapons and on Their Destruction (13 Jan. 1993), 32 I.L.M. 800 (CWC).
8. ABCA Coalition Operations Handbook (Third Edition – Apr. 2005).

I. Introduction

While the United States will retain the capability to act alone, U.S. National Security Strategy reflects that "America will implement its strategies by organizing coalitions - as broad as practicable - of states able and willing to promote a balance of power that favors freedom."

Doctrinally,[1] operations conducted by more than one nation are defined as 'multinational operations'. These may be subdivided into those which are undertaken within the structure of a formal alliance and those which are undertaken by an ad hoc coalition, this chapter will concentrate on the latter of these two limbs.

A coalition is an ad hoc arrangement between two or more nations for common action. Coalitions are formed by different nations with different objectives, usually for a single occasion or for a longer period while addressing a narrow sector of common interest. They may not provide commanders with the same commonality of aim or degree of organizational maturity as alliances. Coalitions may, however, be utilized across the full spectrum of military operations and may require co-ordination not just with other coalition partners but also with a variety of US Government (USG) agencies, local authorities, intergovernmental organizations (IGOs), and nongovernmental organizations (NGOs).

Judge Advocates (JA) must account for differences in partners' laws, doctrine, organization, weapons, equipment, terminology, culture, politics, religion, and language. There is no standard template, indeed, each alliance or coalition normally develops its own protocols, standard operating procedures and operation plans.

[1] See JP 3-16 Joint Doctrine for Multinational Operations (5 April 2000)

II. Planning Coalition Operations

Perhaps the biggest challenge to any coalition operation is the requirement to protect the cohesion of the force. Political, practical, and legal considerations shape the nature of coalition action. Commanders must be clear about the terms under which the individual national contingents will operate and the likely political effect that the conduct of their operations may have on the strength and cohesion of the coalition.

Judge Advocates will be required to be conversant with and advise on the differing legal regimes applicable to coalition partners[2]. Signatures, ratifications etc. of treaties are published in the United Nations Journal and may be accessed electronically via the UN treaty database. Moreover, JAs will be aware that States who are party to the legal treaties will place differing interpretations of their obligations and responsibilities thereunder. This is another potential source of friction which may act to the detriment to the cohesion of the coalition.

Amongst the factors which limit the military capability of coalition partners the following may be of relevance; linguistic issues, domestic political considerations, arms control obligations, doctrine, organization, training, technology levels, and casualty tolerance. Such limitations are very often compensated for by the ability of coalition forces to merge capabilities in order to balance weaknesses in one contingent with strengths in others.

The rationalization, standardization, and cooperation procedures for formal alliances may assist with planning in this regard[3]. Moreover, JAs must familiarize themselves with any bi-lateral agreements that are created between coalition partners or SOFAs or status of mission agreements which may shape the legal landscape.

Indeed, it is not uncommon for nations to limit their particular role within a coalition, participation may be restricted to support or strictly defensive roles.

III. C2[4]

Command relationships in coalition operations will involve both national and multinational command chains. U.S. policy dictates that the President, as Commander in Chief, will always retain national authority but may place U.S. forces under the operational control (OPCON) of a coalition commander.[5]

While multinational operations within formal alliances lend themselves to an integrated command structure (where an integrated multinational headquarters supports the designated commander), the ad hoc nature of coalition operations are often typified by a lead nation command structure which may or may not rotate. Less common is a parallel command structure where no single force commander is designated and often consensus stems from compromise. As exemplified by the C2 structure for the coalition during OPERATION DESERT STORM lead nation and parallel command structures may sit along side one another and may evolve as the operation progresses.

IV. Military Justice

Jurisdiction over U.S. forces suspected of committing a criminal offense will be decided on a case-by-case basis in accordance with applicable international agreements with host nation civil authorities. It is U.S. policy to retain jurisdiction in all criminal cases to the fullest extent possible. Foreign military commanders exercising OPCON or tactical control (TACON) over U.S. forces will not administer discipline. The converse is also true, U.S. commanders exercising OPCON or TACON over multinational forces will not administer discipline over such forces.

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[2] The legal regime applicable to each nation will depend upon the treaty obligations of the nation and obligations arising from customary international law.

[3] Detailed guidance on rationalization, standardization, and interoperability (RSI) may be found in Chairman of the Joint Chiefs of Staff Instruction (CJCSI) 2700.01, *International Military Agreements for Rationalization, Standardization, and Interoperability Between the United States, Its Allies and Other Friendly Nations*

[4] Given the almost limitless possible variations to coalition structures pre determined C2 structures are of limited assistance. Recourse may, however, be had to the notional structures adopted in JP 3-16 Chapter III Para 2

[5] See JP 3-16 Chapter II

This position is common to most nations willing to contribute forces to coalition operations, who will seek, as far as practicable, to retain exclusive criminal jurisdiction over their own forces.[6]

V. Detention Operations

It is imperative that multinational force commanders provide clear guidance for detainee operations in a multinational environment.

The treatment and management of detainees is of particular importance to a number of our regular coalition partners, including Australia, Canada and the U.K. Concerns that may need to be addressed include different national interpretations for determining enemy prisoner of war (EPW) status and the procedures involved.

Coalition forces may also be involved in detaining criminal suspects who pose a threat to the force or law and order in the state in which they are operating.

Many European coalition partners may have significant human rights obligations[7] over individuals held in detention or internment facilities run by military forces operating overseas. Similar concerns have faced the Canadian Government over their handling of Afghan detainees. Human Rights obligations impact on areas such as transfer to civilian authorities or other coalition partners, indeed, may shape the willingness of some coalition partners to detain civilians during overseas military deployments.[8]

One possible solution is to negotiate an arrangement establishing procedures for the transfer of EPWs, civilian internees, and civilian detainees between coalition partners, as was done during OPERATION IRAQI FREEDOM.[9]

Given, however, the heightened political sensitivities surrounding the issue of management and treatment of detainees policy is increasingly being decided at the national level. Thus, the coalition commander may provide overarching guidelines as to the powers of troops to detain and the rights of detainees, however, the precise detail regarding treatment, review and management will be a national issue.

Engagement with the International Committee for the Red Cross (ICRC) is a central issue when considering detainee issues. Because detention facilities, even in coalition operations, are largely administered by individual nations the confidential reports provided by the ICRC tend to be directed to national Governments.[10]

VI. Use of Force

A. Rules of Engagement (ROE)

It is rare for the ROE for any coalition operation to be contained within a single document. More commonly each coalition partner operates under their own national ROE. The standing ROE (SROE) provide that U.S. forces assigned to be OPCON or TACON to a multinational force will follow the ROE of the multinational force if authorized by the SECDEF.[11] When U.S. forces, under U.S. OPCON or TACON,

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[6] Such was the position during Operation Iraqi Freedom where CPA Order 17 provided for coalition forces to be exempt from Iraqi Criminal Jurisdiction.

[7] Article 1 of the European Convention on Human Rights provides that the rights apply to all those within the jurisdiction of the state. Case law has determined that this can include civilians detained by military forces operating overseas.

[8] During OPERATION IRAQI FREEDOM the only coalition partners to establish detention facilities were the United States and United Kingdom, the latter establishing an internment camp (Divisional Temporary Detention Facility) at Shai'bah then the Contingency Operating Base in Basra.

[9] An Arrangement For The Transfer Of Prisoners Of War, Civilian Internees, And Civilian Detainees Between The Forces Of The United States Of America, The United Kingdom Of Great Britain And Northern Ireland, And Australia (23 Mar. 2003) (on file with CLAMO).

[10] Where a detention facility has been administered by several nations it is understood that the ICRC will provide reports to the commander of that facility who will pass the report up his own national and coalition reporting chains.

[11] SROE, encl. A, para.1(f)(1).

operate in conjunction with a multinational force, reasonable efforts will be made to effect common ROE. If such ROE cannot be established, U.S. forces operate under the SROE.[12]

When each coalition partner is operating under national ROE, differences in use of force terminology may result in different triggers for the use of force on the same operation. Even when the terminology looks familiar, JAs must ensure that they understand the coalition partner's meaning in advance of a mission. For example, the United States and the United Kingdom have different doctrine concerning "hostile intent." While the U.S. meaning is constant, and use of lethal force in response is always permitted, the U.K. meaning is mission-specific, and use of force in response must be specifically authorized in the ROE.[13]

Clearly, it is essential that the ROE for each coalition partner is understood and kept under review, as the ROE are likely to be subject to change, particularly as the nature of the operation changes in the view of the troop-sending nation. Differences in terminology should be kept to a minimum, and joint consultation, so far as is possible, whilst drafting the ROE is beneficial.

B. Self-Defense.

Regardless of the terms of the ROE, or any Status of Forces Agreement (SOFA), U.S. forces retain the right to use necessary and proportional force for unit self-defense in response to a hostile act or demonstration of hostile intent.[14] However, SECDEF must specifically authorize U.S. forces to defend coalition forces.[15] This may be contrasted to the position of many other coalition forces who retain the inherent right to defend themselves or others irrespective of nationality.

Self-defense is a term that does not enjoy universal meaning, and it must not be assumed that the coalition partner has the same understanding of the term as U.S. forces. Some States require specific ROE to authorize self-defense. Some believe that the right of self-defense is inherent, but have different criteria for when the right is triggered. Differences in interpretation may also arise in relation to the ability of commanders to limit Soldiers acting in self-defense, the ability, or requirement, to fire warning shots, and the ability to act in defense of coalition forces in the absence of specific ROE. Self-defense rules in relation to protection of property often differ very significantly. The United Kingdom and Canada are not permitted to use lethal force to defend property unless the loss of or damage to that property will result in an immediate threat to life. The designation of property as 'mission essential' and the requirement for there to be an imminent threat to life if such property is lost or destroyed will vary from state to state. A JA must be conversant with these differences. Advanced training and cooperation may assist military planners in configuring their forces in such a way as to benefit a particular operation.

C. Targeting/Military Objectives.

States may come to different conclusions regarding whether certain objects are military objectives in accordance with Art. 52(2) of Additional Protocol I to the 1949 Geneva Conventions.[16] Differences of opinion are common, for example, regarding television and radio stations that are state owned or may be used for propaganda purposes; symbols of the enemy regime such as palaces and statues; and civilian (non-uniformed) enemy regime officials. In addition, certain objects may not be politically acceptable targets to some coalition partners, despite their permissibility under international law. These may either be prohibited outright, or require high-level approval before engagement. An impermissible target influences not only a coalition partner's ability to deliver a weapon onto that object, but may also affect the level of permissible support that may be given to U.S. engagement of the target. For example, if the target is impermissible, then that coalition partner may also be prohibited from refueling strike aircraft, providing airborne early warning and control, or participating in the planning for that particular mission. Despite the

[12] *Id*, encl. A, para. 1(f)(2).

[13] United Kingdom Ministry of Defense, Joint Service Publication 398 app. A1 (partially classified document).

[14] SROE, encl. A, para 1(f)(1).

[15] *Id*, encl. A para. 3(c).

[16] Art 52(2) provides "Attacks shall be limited strictly to military objectives. 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."

legality of an operation against a military objective, some coalition partners may have particular sensitivities which need to be considered if the support of their public is to be maintained. Consultation in the planning process, and minor operational changes, may avoid potential negative consequences for coalition cohesion.

From a targeting perspective partners within a coalition may strike different balances when conducted collateral damage assessments and the determination of whether the anticipated concrete and direct military advantage outweighs the expected incidental loss of civilian life, injury to civilians, damage to civilian objects or combination thereof.

D. Anti-Personnel Landmines (APL).

Unlike many other nations the United States is not, of course, bound by the Ottawa Treaty which prohibits developing, producing, acquiring, stockpiling, retaining or transferring APL, either directly or indirectly, and from assisting, encouraging or inducing any of these activities.[17] When APL use is under consideration by the coalition, it is important to understand the parameters of the APL prohibition for a particular coalition partner, especially regarding assistance and whether they are permitted to take tactical advantage if the U.S. employs them.

These parameters are not necessarily the same for each State, as they will depend on national interpretation and policy. The prohibition on assistance may impact a coalition partner's ability to be involved in air-to-air refueling, transport, or even mission planning. While several regular coalition partners have issued unclassified guidance on their national interpretation of their obligations,[18] there is insufficient detail in these documents for mission planning.[19] Accordingly, JAs should seek the assistance of coalition attorneys to advise on their State's position.

E. Riot Control and Riot Control Agents (RCA).

The CWC requires that RCA be not used "as a method of warfare."[20] The phrase does not enjoy universal definition and interoperability issues arise with several States, including the United Kingdom and Germany, not sharing the U.S. interpretation.

The view adopted by the United Kingdom and Germany is that the CWC places a total prohibition on the use of RCA in an armed conflict. Indeed, other coalition partners apply this prohibition to situations which do not amount to armed conflict.

The use of military personnel in policing and riot control work is fraught with difficulties. Consultation with coalition partners is essential to see if their troops are permitted to be involved with such operations, and whether they have the necessary training, equipment, and experience to conduct such actions.

The British Army has considerable recent experience of quasi-police force action from its operations in the province of Northern Ireland, moreover, the Italian Caribinieri is one of the most well-equipped and trained military police forces accustomed to conducting various policing activities.

VII. Communications

The release of classified information to multinational partners is governed by national disclosure policy (NDP).[21] Coalition partners will frequently request access to U.S information. The security

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[17] Ottawa Treaty, art 1(1).

[18] *See* Landmines Act 1998 (UK) (the statute permits UK military members to participate in the planning of and conduct of military operations in which other coalition partners lawfully use APLs); Anti-Personnel Mines Convention Implementation Act 1997 (Canada) (can participate in an operation with a State that uses APL but may not actively assist). Declaration to the Ottawa Convention by Australia (assistance does not include permissible indirect support such as the provision of security for the personnel of a State not party to the Convention engaging in such activities.)

[19] Copies of classified policies releasable to the United States are on file with the International and Operations Law Department, The Judge Advocate General's Legal Center and School.

[20] CWC Art 1.

[21] Detailed guidance must be provided to the senior US commander by the chain of command in accordance with (IAW) National Security Decision Memorandum (NSDM) 119, "Disclosure of Classified United States Military Information to Foreign Governments

classification of such information, however, may preclude access. Lack of coalition access to SIPRNET is a major interoperability issue as a large amount of operational information is transmitted via this means. An effort should be made to have authorized coalition members granted access to the systems.

While NDP tends to be controlled by CENTCOM, JAs should be aware of the existence of international standardization agreements (ISAs) which tend to be established within standing alliances (e.g., North Atlantic Treaty Organization (NATO) standardization agreement (STANAG)). Such documents provide a useful starting point for rules and policies for conducting multinational intelligence operations. Due to the unique nature of coalition operations such agreements may need to be amended or modified based on the situation.

VIII. Reconstruction/CA efforts

"PRTs are intended to improve stability in a given area by helping build the host nation's legitimacy and effectiveness in providing security to its citizens and delivering essential government services."[22]

Provincial Reconstruction Teams (PRTs) may established in support of alliance or coalition operations. In either case, multinational partners may provide all or a portion of the PRT. Moreover, its personnel may be civilian, military or both. While formal alliance or coalition doctrine is yet to be developed with respect to PRTs guidance may also be found with documents such as the NATO-led ISAF PRT Handbook.

IX. Investigations/Claims

Incidents that give rise to investigations, including accidents and alleged war crimes, may involve members of more than one coalition partner. Each coalition partner will have its own national requirements for investigations and release of information, and it may not be possible for all partners to adopt the same policy. Indeed, each nation will tend to have its own nation policy with regard to claims received by the force. Differences may be exploited by the local population by way of 'forum shopping'.

While there is no simple solution, early discussion of what incidents each coalition partner will investigate and what information will be released may minimize the impact of national policy differences on the operation. Moreover, coalition members should aspire, as far as practicable, to produce consistent claims policies. Alliance operations may generate common claims procedures which multinational partners will be requested to follow.

X. Fiscal Law

Many coalition partners do not have the same degree of fiscal regulation as the United States. Coalition partners often make logistic requests of the United States, and it is imperative that JAs understand and can explain U.S. fiscal limitations, in particular the operation of acquisition and cross-servicing agreements (ACSA). In some circumstances, the greater fiscal flexibility of a coalition partner may be utilized to achieve coalition objectives that could not be funded from U.S. sources.

XI. Exchange Personnel

The United States has a number of permanent individual exchange positions with other coalition nations. Exchange personnel must comply with their own domestic law while they are on operations. Thus if an exchange officer's domestic law is more restrictive than that of his host unit, his government may place conditions on his involvement. Exchange personnel are essential to promoting communication and coalition interoperability and disseminating lessons learned from previous coalition operations. Exchange personnel can be key to explaining to other coalitional partners how the evolving nature of an operation may impact them, and therefore prevent misunderstanding and risk of weakening the strength and unity of coalition effort.

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and International Organizations" and NDP-1, "National Policy and Procedures for the Disclosure of Classified Military Information to Foreign Governments and International Organizations."

[22] CALL PRT Playbook No 07-34. This document provides a detailed analysis of the nature and roles of PRTs. See http://call.army.mil/docs/07-34/07-34.pdf

XII. The American-British-Canadian-Australian (ABCA) Program[23]

ABCA evolved from the World War II coalition, a security relationship between the United States and her Anglo-Saxon allies based on a common culture, historical experience, and language. The ABCA Armies' Program was seeded in 1946 when British Field Marshal Bernard Montgomery recommended to U.S. Army General Dwight D. Eisenhower that America, Britain, and Canada should "cooperate closely in all defense matters." Although not a formal alliance, ABCA has become an interoperability standard-bearer focused on the challenges associated with our current operating environment.

The ABCA nations have served together in ad hoc coalitions on several occasions to pursue common objectives. The Coalition Operations Handbook[24] (COH), now in its third edition, was designed to assist the ABCA nations in serving together in any coalitions and assist these nations when they serve in a coalition with other countries. The handbook serves as a thorough guide to interoperability issues which may be raised by coalition operations.

XIII. Resolving Interoperability Issues

Interoperability issues may be successfully managed through:

A. early and effective communication to identify any differences;

B. resolution of those differences where possible; and

C. where resolution proves problematic or is impossible, ensuring that the differences are not overstated and that action is taken to ensure that the differences are properly factored into the planning and execution of missions.

The development of relationships between coalition attorneys is an important aspect of this process. Operational and training experience is valuable and is enhanced by numerous bilateral, multilateral, and institutional contacts. Indeed, the U.S. Army JAG Corps has established exchange officers in the United Kingdom and Australia. Moreover, legal officers sent to the United States develop a thorough understanding of U.S. military culture and ethos, as well as seeing first hand the equipment, training and doctrine that JAG officers are provided with. It further enables officers to consider U.S. politics, policy, and history and such knowledge may offset any differences in military culture and practice.

XIV. Working in a Coalition

Close working relationships and liaison, both military and civilian, at all levels are key to coalition operational planning. Such relationships should continue routinely and be cultivated with potential coalition partners. However, each coalition will be different, and key liaison appointments and requirements should be reviewed at the outset of planning for a new operation. Potential future coalition partners, traditional allies, and less familiar partners must maintain contact and consistency with, as well as assess, each other's technical and doctrinal advances. This requires that forces must be organized, and regularly trained and resourced for interoperability with partners. Moreover, extensive information sharing must occur between coalition members if there is to be successful coalition action.

[23] ABCA was expanded in 2006 to include New Zealand.

[24] Available at www.abca-armies.org/

NOTES

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CHAPTER 27

THE MILITARY DECISION MAKING PROCESS AND OPERATION PLANS

REFERENCES

1. JOINT CHIEFS OF STAFF, JOINT PUB. 1-04, LEGAL SUPPORT TO MILITARY OPERATIONS (6 Mar. 2006).
2. JOINT CHIEFS OF STAFF, JOINT PUB. 3-0, OPERATIONS (17 Sept. 2006).
3. JOINT CHIEFS OF STAFF, JOINT PUB. 3-33, JOINT TASK FORCE HEADQUARTERS (16 Feb. 2007).
4. U.S. DEP'T OF ARMY, FIELD MANUAL 3-0, OPERATIONS (27 Feb. 2008).
5. U.S. DEP'T OF ARMY, FIELD MANUAL 5-0, ARMY PLANNING AND ORDERS PRODUCTION (20 Jan. 2005).
6. U.S. DEP'T OF ARMY, INTERIM FIELD MANUAL 5-0.1, THE OPERATIONS PROCESS (31 Mar. 2006).
7. JOINT CHIEFS OF STAFF, MANUAL 3122.01A, JOPES Vol. I (PLANNING POLICIES AND PROCEDURES) (29 Sept. 2006).
8. JOINT CHIEFS OF STAFF, MANUAL 3122.03C, JOPES Vol. II (PLANNING FORMATS AND GUIDANCE) (17 Aug. 2007).

I. OPERATIONS PLANS AND ORDERS IN THE ARMY ARENA

A. The military decision making process (MDMP) is an established and proven analytical process (Figure 1). It is an adaptation of the Army's analytical approach to problem-solving that helps organize the thought process of commanders and staffs, and is typically used to develop staff estimates and an operation plan (OPLAN) or operation order (OPORD). The difference between an OPLAN and OPORD is that an OPLAN becomes an OPORD when the commander sets an execution time. The Judge Advocate (JA) must be involved in every aspect of the MDMP process, beginning with the Plan Development process, not merely the Plan Review stage. Participation in the Plan Development process enables JAs to assist in the development of a plan that is suitable, feasible, and legal. Judge Advocates can accomplish this by fully integrating themselves into the planning staff and providing direct input into the decision-making process along with other staff officers.

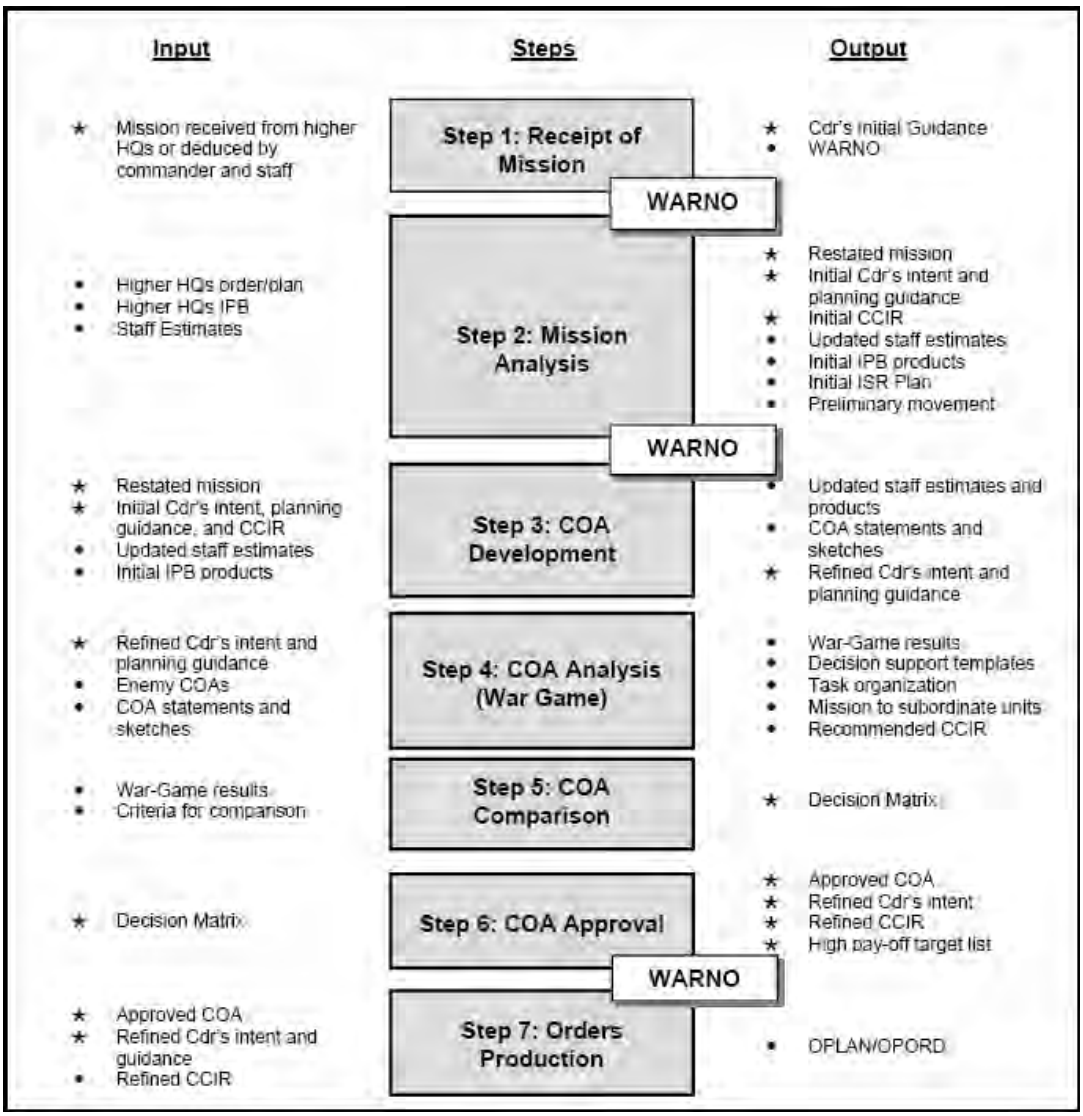

Figure 1. The Military Decision Making Process

B. The planning staff will vary in size and composition depending on the complexity of the operation and the size of the unit. The key players in the Brigade Combat Team (BCT) will be the brigade S3 (operations officer), S2 (intelligence), S4 (logistics officer), and the brigade fire support coordinator (FSCOORD). These officers are primarily responsible for taking the brigade commander's intent and producing a workable, thorough OPORD. There are other important members of the planning staff, usually a representative from each of the warfighting functions (WFF; doctrinal replacement for the battlefield operating systems) and perhaps Air Force, Air & Naval Gunfire Liaison Company (ANGLICO), allied, and special operations forces (SOF) liaisons, and of course the BCT JA. These supporting members of the planning staff all take an active part in the planning process and have the responsibility of assisting the key players in fulfilling the commander's intent. Significantly, all these officers have other crucial duties in the BCT. The planning staff comes together upon the receipt of a warning order (WARNO) from higher headquarters, then plans, produces an order, and moves into the execution phase.

C. The planning staff at the Division level or higher will usually be of such importance as to consist of officers and non-commissioned officers (NCOs) who serve on that staff as their primary duty. Often the planning staff will be called the Battle Management Cell (BMC) or the Future Plans Group (FPG). The operational law (OPLAW) attorneys at the Division level will work on a daily basis with the individuals who comprise the BMC. The relationship between those JAs and the officers who make up this planning cell is as crucial as the JAs' knowledge of relevant legal issues.

D. OPLAW Concerns in Plans and Orders. By participating in the MDMP, JAs can review plans and mission orders to determine if: (1) law of war issues have been addressed; (2) legally and practically sufficient rules of engagement (ROE) have been defined; and (3) other necessary legal issues have been adequately discussed. Legal issues can be found in various parts of the plan other than obvious places like the fire support annex. The best advice for JAs is to remain fully engaged in the process as the staff discusses and develops the plan. Judge Advocates must know the law and be able to identify operational issues that raise potential legal issues. Every plan will address many other OPLAW issues including, but not limited to, criminal jurisdiction; claims; flows of displaced persons; riot control agents; command and control; and fiscal law. The plan's Legal Annex is the focal point for the JA to capture guidance on policy matters that are contained in other annexes throughout the plan. The JA will be responsible for producing a Legal Annex that is consistent with the remainder of the plan.

E. MDMP Step 1: Receipt of Mission.

1. The MDMP begins with the receipt or anticipation of a new mission. As soon as a new mission is received, the unit's operations section alerts the staff of the pending planning requirement. The unit's standing operating procedure (SOP) will identify who is to participate and where they should assemble. The staff (including the JA) prepares for the mission by gathering the tools needed to conduct mission analysis. These include:

a. Higher headquarters order or plan.

b. Map of the area of operations (AO).

c. Appropriate field manuals.

d. Any existing staff estimates.

e. SOP for both your own and higher headquarters.

2. The JA must also prepare for the upcoming mission analysis by having the proper resources. These include:

a. Current ROE with any changes and any requests for changes.

b. Relevant status of forces agreement (SOFA) or relevant local law in the anticipated AO.

c. Higher headquarters Legal Annex.

d. FM 27-10, The Law of Land Warfare (1976); DA PAM 27-1, Treaties Governing Land Warfare (1956); and DA PAM 27-1-1, Protocols to the Geneva Conventions (1979). Alternatively, use the International and Operational Law Department's Law of War Documentary Supplement.

e. OPLAW Handbook.

3. A critical decision made during the "receipt of mission" step is the allocation of available time. The commander must provide guidance to subordinate units as early as possible to allow them the maximum time for

their own planning and preparation for operations. As a general rule, the commander allocates a minimum of two-thirds of available time for subordinate units to conduct their planning and preparation. This leaves one-third of the time for the commander and his staff to do their planning. The commander will then issue initial planning guidance to the staff. In a time-constrained environment, the commander may decide to abbreviate the MDMP.

4. The final task during this step is to issue a WARNO to subordinate and supporting units.

F. MDMP Step 2: Mission Analysis.

1. Mission analysis is crucial to the MDMP. It allows the commander to begin battlefield visualization, a combination of *situational awareness* (achieving a clear understanding of the current state of friendly forces in relation to the enemy and environment) and *commander's intent* (the desired end state that represents mission accomplishment and the key tasks that will get the force from the current state to the end state). The result of mission analysis is defining the tactical problem and beginning the process of determining feasible solutions. It consists of 17 steps, not necessarily sequential, and results in the staff formally briefing the commander. The JA has an important role in each step.

a. *Step 1 – Analyze the higher headquarters order*. Determine where the unit mission fits into the mission of higher and adjacent headquarters.

b. *Step 2 – Conduct initial intelligence preparation of the battlefield (IPB).* Analyze the threat and environment.

c. *Step 3 – Determine the specified, implied and essential tasks*. Ask: what tasks are specifically assigned to the unit by higher headquarters; what tasks must be performed to accomplish a specified task or mission, but are not stated in the higher headquarters order; and what specified or implied tasks must be satisfied to accomplish the mission.

d. *Step 4 – Review available assets.* Determine whether the unit has the assets needed to accomplish all tasks.

e. *Step 5 – Determine constraints*. Ascertain any restrictions a higher command has placed on the unit that dictate an action or inaction, thereby restricting freedom of action for planning.

f. *Step 6 – Identify critical facts and assumptions*.

g. *Step 7 – Conduct risk assessment*.

h. *Step 8 – Determine initial commander's critical information requirements (CCIR) and essential elements of friendly information (EEFI).* Determine the information the commander needs to support his visualization and make critical decisions (*i.e.*, CCIR), as well as critical aspects of the friendly operation that cannot be compromised (*i.e.*, EEFI).

i. *Step 9 – Determine the initial intelligence, surveillance and reconnaissance (ISR) plan.* This entails collection efforts to produce intelligence on the enemy and the environment that help develop situational awareness and effective plans.

j. *Step 10 – Update the operational time line*.

k. *Step 11 – Write the restated mission.* Compose a short sentence or paragraph describing the unit's essential task(s) and purpose that clearly indicates the action to be taken and the reason for doing so. It should contain the elements of "who, what, when, where and why" (but usually not "how").

l. *Step 12 – Conduct a mission analysis briefing.* Brief the commander, if time permits.

m. *Step 13 – Approve the restated mission.* Immediately after the mission analysis briefing, the commander approves the restated mission, which becomes the unit mission.

n. *Step 14 – Develop the initial commander's intent.* This is a clear, concise statement of what the force must do, and the conditions it must meet, to succeed with respect to the enemy, terrain and desired end state.

o. *Step 15 – Issue the commander's planning guidance*. This conveys the commander's visualization to the staff, focusing on course of action (COA) development, analysis, and comparison.

p. *Step 16 – Issue a WARNO.* Issued to subordinate and supporting units, the WARNO contains many of the outputs of mission analysis.

q. *Step 17 – Review facts and assumptions*. This is a continuous process to determine whether facts and/or assumptions have changed, requiring adjustments to the planning process.

2. Significant legal issues may arise during each of the above steps. The JA must ask the difficult questions of the plans officer leading the mission analysis to ensure that all relevant legal concerns are worked into the plan. **The Joint Operations Planning and Execution System (JOPES) checklist at the end of this chapter provides a useful checklist of legal issues that commonly arise**. Above all else, by actively participating in the mission analysis phase of orders development, the JA will become intimately familiar with the operation's parameters.

G. MDMP Step 3: COA Development. After receiving the restated mission, commander's intent, and commander's planning guidance, the staff develops courses of action (COAs) for the commander's approval. The commander must involve the entire staff in COA development. The commander's guidance and intent focus the staff's creativity to produce a comprehensive, flexible plan within the time constraints. Typically, the staff will develop at least two, and as many as five, different COAs for the commander to consider.

1. The staff will develop a concept of operations for each COA. The concept of operations describes how arrayed forces will accomplish the mission within the commander's intent. It concisely expresses the "how" of the commander's visualization, summarizing the contributions of each WFF, as well as information operations (IO). Also, the operations officer will prepare a COA statement and supporting sketch for each COA. The COA statement clearly portrays how the unit will accomplish the mission, and explains the concept of operations. The sketch provides a picture of the maneuver aspects of the concept of operations.

2. The JA must know the legal advantages and disadvantages of each COA and be ready to brief them if required. For example, COA 1 may involve bypassing a major urban area and subsequently using indirect fire on enemy forces defending the city. COA 2 might involve the destruction of an enemy dam in order to flood a likely enemy counterattack axis of advance. COA 3 might use FASCAM mines to achieve the same end. Each COA presents unique legal issues that the JA must be prepared to brief to the commander in a simple advantage/disadvantage style.

3. Most staffs use a synchronization matrix during COA development. The top of the matrix shows the "H-hour" (the hour at which the operation begins) sequence (*e.g.*, H-4, H-hour, H+2, etc.), which allows the staff to synchronize the COA across time and space in relation to anticipated enemy action (Figure 2). The first column on the left usually contains each WFF (intelligence, movement and maneuver, fire support, protection, sustainment, command and control), IO, projected enemy actions, and decision points to be made at certain H-hours. The synchronization matrix provides a highly visible, clear method for ensuring that planners address all WFF when they are developing COAs and recording the results of wargaming. The matrix clearly shows the relationships between activities, units, support functions and key events. It assists the staff in adjusting activities based on the commander's guidance and intent, as well as the enemy's most likely COAs.

TIME/EVENT		H – 8	H – hour	H + 8
Enemy Action		Enemy Monitors Movements	Defends from Security Zone	Commits Reserve
Decision Points		Launch Deep Attack		
MANEUVER	1st Bde	Move on Route Paula	Cross LD	Seize on OBJ Nick
	2nd Bde	Move on Route Mike	Cross LD	Seize on OBJ Dave
	3rd Bde	Move on Route Sean		FPOL with 1st BDE
	Avn Bde	Deep Attack on OBJ Rose @ H - 1		
	Div Cav		Screen North Flank	
Air Defense		Weapons Hold		
Fire Support		Prep Fires Initiated at H - 5		
Information Operations		Surrender Broadcasts		Enemy C2 Jammed
M/C M/S		Route Maintained		
CSS		MSR Tampa Closed Southbound		
C2			TAC CP with Lead Bde	

NOTE: The first column is representative only and can be modified to fit unit needs.

Figure 2. Example of Synchronization Matrix

H. MDMP Steps 4-6: COA Analysis / COA Comparison / COA Approval.

1. *COA Analysis*.

a. Using the process of wargaming, COA Analysis identifies which COA will accomplish the mission with minimum casualties, while best positioning the force to retain the initiative for future operations. Wargaming is a disciplined process with rules and steps with the objective of visualizing the flow of battle in each of the COAs. During wargaming, the staff takes a COA and begins to develop a detailed plan, while determining the strengths and weaknesses of each COA. Wargaming tests a COA or improves a developed COA.

b. The JA should be an active participant in the wargaming process. Such participation will not only increase the JA's knowledge of the military art and operational planning, but will also provide opportunities to address other legal issues that inevitably will arise as the staff wargames each COA. For example, during wargaming, the staff member playing the part of the opposing force may react to a U.S. air assault deep behind his lines by using poison gas on the landing zone. Suddenly, an unplanned legal issue is presented to the staff, and the JA is given the opportunity to resolve it before the COA is approved.

2. *COA Comparison*.

a. Each staff officer analyzes and evaluates the advantages and disadvantages of each COA from his or her perspective, using evaluation criteria developed prior to wargaming. Staff members present their findings for the others' consideration. Each WFF representative will rate each COA according to how well his or her function can support it. From these numerical ratings, a decision matrix will be assembled in which each COA is compared for supportability according to WFF. After completing the matrix and the analysis, the staff identifies its preferred COA and makes a recommendation to the commander.

b. Although JAs are not included as one of the WFF representatives, their input before this phase is crucial, since an initial COA may not be supportable from a legal standpoint. For example, COA 1 may rely on the use of riot control agents (RCA), without approval from the proper authority, for the suppression of enemy air defense (SEAD) on the drop zone before a planned airborne assault. In such a case, the JA must identify the critical issue during the COA development, and before the staff spends precious time and resources planning it.

3. *COA Approval*. After the decision briefing, the commander selects the COA he believes will best accomplish the mission. If the commander rejects all developed COAs, the staff will have to start COA development all over again. If the commander modifies a proposed COA or announces an entirely different one, the staff must wargame the revised or new COA to derive the products that result from that process. Based on the commander's decision, the staff will immediately issue another WARNO with the essential information subordinate units need to refine their plans.

I. MDMP Step 7: Orders Production.

1. Based on the commander's decision and final guidance, the staff refines the COA, completes the plan and prepares to issue the order. The staff prepares the order or plan by turning the selected COA into a clear, concise concept of operations and required supporting information.

2. The plans officers may ask the JA to read the finished order to see if it meets general standards of clarity, internal consistency, and completeness. The JA should seek every opportunity to serve in such a capacity, as it demonstrates that she is considered "one of the team." Increasingly, JAs serve as the "honest broker" in the review of plans and orders. Good advice to JAs serving in such a role is to: (a) look at the *entire plan*—both of your unit and of the higher unit; (b) *read and study* the mission statement and commander's intent (ask: Are the statement and intent clear? Do they sufficiently define the parameters of the operation, while affording the requisite flexibility to the unit?); (c) carefully review the parts of the plan that discuss fire support, civil affairs, military police, intelligence (particularly low level sources), acquisition and funding. Look to the command's authority to undertake proposed actions. Consider:

a. Express authority (*e.g.*, the mission statement).

b. Implied authority (*e.g.*, the authority to detain civilians can be implied from the mission to "restore order"; the authority to undertake minor, short-term repairs to a civilian power plant, thereby enabling lights to operate, can be implied from the mission to "enhance security and restore civil order").

c. Inherent authority (*e.g.*, authority—always—to protect the force).

d. Watch out for "mission creep," in that you should help the commander stay in his lane. When dealing with the State Department (DoS), typically through the Country Team, do not presume DoD/DoS synchronization. Protect the commander and use technical channel communications and resources. Remember that "color of money" issues are important, particularly in post-combat stability, security, transition and reconstruction (SSTR) operations and across the range of military operations generally. See this Handbook's Fiscal Law Chapter.

3. When called upon to proofread an order, try to use the following checklist:

a. Does the order use doctrinally-established terms?

b. Is there sufficient detail to permit subordinate commanders to accomplish the mission without further instructions?

c. Is there sufficient detail for subordinate commanders to know what other units are doing?

d. Does the order focus on essential tasks?

e. Does the order limit the initiative of subordinate commanders? That is, does it prescribe details of execution that lie within the subordinate commanders' province?

f. Does the order avoid qualified directives such as "try to hold" or "as far as possible"?

g. After finishing the order, does the reader have a grasp of the "big picture" of the operation?

II. OPERATION PLANS AND ORDERS IN THE JOINT ARENA

A. The Joint Task Force (JTF) OPLAN in Context.

1. Almost all future contingency operations will be based on the JTF, which will consist of combat and support units from all services. The JTF will have one commander, who will be responsible for coordinating the complex interplay between the services to produce maximum combat power. The JTF OPLAN is the mechanism by which this objective is planned. It does not exist in a vacuum. In that regard, as a supporting plan to the OPLAN of a particular Combatant Command, the JTF OPLAN must reflect the guidance contained in the Combatant Command OPLAN and be structured in such a way as to assist in the overall accomplishment of the Combatant Command mission.

2. Combatant Command OPLANs are the mechanisms through which Combatant Commanders (CCDRs) will accomplish national security objectives, as well as the derived military objectives and tasks assigned to them in the Joint Strategic Capabilities Plan (JSCP). This is one of the principal documents prepared by the Chairman of the Joint Chiefs of Staff (CJCS) for the purpose of translating national security policy (formulated by the National Security Council (NSC)) into strategic guidance, direction and objectives for operational planning by Combatant Commands.

3. Planning for military operations is conducted either deliberately or in crisis action mode.

a. *Deliberate (a/k/a contingency) planning*. Deliberate planning is triggered by the JSCP for the development of Combatant Command OPLANs or other plans. Deliberate planning involves four phases: (1) strategic guidance; (2) concept development; (3) plan development; and (4) plan refinement.

b. *Crisis action planning*. Crisis action planning is initiated by CJCS orders during a crisis, resulting in the development of an OPORD. Crisis action planning involves three phases: (1) situational awareness; (2) planning; and (3) execution.

4. As indicated earlier, JOPES is a single, standardized framework for developing and executing plans and orders, and is used to coordinate the actions of the various services to accomplish a mission. It prescribes a standardized format that is uniform, predictable, and thorough. Judge Advocates should be familiar with the JOPES format for constructing OPLANs and OPORDs because the relevant information will be located in standardized areas in the plan. For example, the legal annex will always be Appendix 4 to Annex E. The ROE are always Appendix 6 to Annex C. Note that the format and annexes for JOPES plans and orders differs slightly from the standard format and annexes for Army plans and orders.

B. Reviewing Plans and Mission Orders.

1. *Types of Plans and Mission Orders*. Units plan for specific contingencies and missions with OPLANs or contingency plans (CONPLANs). CONPLANs are abbreviated and require additional planning to become OPLANs. Once the time of execution is set, an OPLAN becomes an OPORD. Combatant Commands, and units down to the Division level, prepare and maintain OPLANs and CONPLANs days, months, or even years prior to execution. These plans, in conjunction with the forces assigned or apportioned to the CCDR, enable the staff to develop the Time Phased Force Deployment Data (TPFDD). The TPFDD is a sequenced plan that details the flow of forces into theater using available lift or transport assets. It determines the priority and sequence of units that the JA must ensure are trained in the ROE, and will impact the composition and availability of legal assets in theater.

2. *Responsibility for Plan and Order Review*. Operational Law attorneys must periodically review all existing OPLANs and CONPLANs, though the responsibility for the review rests with the Staff Judge Advocate (SJA). The plans review process must be continuous, with the SJA's representative in constant coordination with the G3 Plans (or the J3/5 or J5 if the JA is working with a JTF element). The SJA's representative must be in the decision-making cycle not only of his or her unit, but of the next higher unit as well. Some units assign an operational lawyer to work in the G3 Plans shop for several days each week. The key point is that the JA must be a member of the plans team and a "known commodity," not an interloper in the operations planning process.

3. At brigade level and below, written and oral mission orders are often prepared and executed within hours.

4. *The OPLAN/OPORD Review Process*. The appendix to this chapter contains an OPLAN checklist using the JOPES format. Though structured for the review of OPLANs at higher echelons, the checklist offers an extensive list of issues to look for in plans and mission orders at all levels of command. Judge Advocates with more experience than time may prefer to use a shorthand approach to OPLAN/OPORD review. The FAST-J method, which precedes the OPLAN checklist, is a good generalized mechanism for this review.

5. *Developing the Legal Appendix to an OPLAN*. A detailed and easily understood Legal Appendix to an OPLAN/OPORD, complete with relevant references, is essential. Specific Legal Annexes or Appendices must be tailored to each operation, and developed on the basis of individual mission statements and force composition. In addition, pay particular attention to tailoring a "General Order Number One" to each operation. For example, what worked (and made sense) in a conventional conflict may not be prudent for a UN peacekeeping operation. The appendix to this chapter includes relevant JOPES formats, as well as an example of Appendix 4 to Annex E (Legal) for U.S. Forces Haiti, the U.S. component of the UN Mission in Haiti (UNMIH), FRAGO 16 of OPLAN 2380 (Uphold Democracy).

6. *Personal Preparation for Deployment*. Deploying JAs must ensure that their personal affairs are current and that they are prepared for deployment. Personal equipment, TA-50, hygiene materials, and clothing should be assembled upon assignment to the unit and continually maintained in a state of readiness for deployment. Procedures for drawing/securing weapons and protective masks should be predetermined. Inquire whether additional equipment or special clothing will be required, what additional documents (such as Tactical Operations Center (TOC) passes and meal cards) may be needed, and how they will be obtained. Develop a plan to gain interim top secret clearances for all BCT JAs and other JAs who have a need to see top secret materials. Annual weapons qualification with assigned weapon, military skills proficiency, and physical fitness must be taken seriously. SJAs and other leaders must train subordinate JAs on preparation for, and execution of, deployment.

7. *Preparation of the Legal Deployment Package*. A deployment package includes tactical and office equipment, office supplies, and reference materials. This equipment should be packed and ready for deployment at all times. Store deployment materials in footlockers, plastic truck boxes, or other containers, and keep them up to date to prevent delays during the deployment sequence. Check the contents and condition of the containers according to a schedule. Determine how the deployment package can be palletized. Keep load plans for vehicles on file. Know how to prepare vehicles and equipment for air movement or shipment. In most units, the SJA deployment package is the responsibility of the OPLAW attorney or NCO, but the Legal Administrator and the Chief Paralegal NCO must participate in the preparation and care of the deployment package. Specifically, NCOs should take charge of palletizing, preparing for, and executing movement. Train on executing the office deployment plan. Take the deployment package to the field. Tailor the materials for your unit's AO and likely missions. Consider packing a manual typewriter, extension cords, transformers, and toilet paper, in addition to traditional legal and office materials. A mission-specific review of essential materials must be done as early as possible once

deployment is ordered. The deployment package should include all applicable SOFAs; country law and area studies; and publications of the Combatant Command with responsibility for the country in which operations will occur.

8. *Deployment SOP*. Deployable SJA offices must maintain an up-to-date deployment SOP, checklists and "smart," or "continuity," books. Corps and Division SOPs will necessarily vary as a result of differences in missions and force composition. To the extent possible, SOPs for SJA offices operating in the same theater should be coordinated for the purpose of ensuring uniformity and consistency of approach toward the provision of legal services to combat commanders. Deployment SOPs must be exercised and refined periodically.

THE FAST-J METHOD FOR OPLAN/OPORD REVIEW

1. **FORCE**.

When and what do we shoot?

Mission?

Commander's Intent?

ROE?

2. **AUTHORITY**

To conduct certain missions

- "Law enforcement"

- Training (FMS, FAA)

- HCA

To capture/detain locals

3. **STATUS**

Ours

- Law of the Flag (combat or vacuum [*e.g.*, Somalia])

- SOFA

- Other (*e.g.*, Admin. & Tech., P. & I. through Diplomatic Note)

Theirs

- Status

- Treatment

- Disposition

4. **THINGS**

Buying (Contracting)

Breaking (Claims)

Blowing Up (Targeting)

5. **JUSTICE**

Jurisdiction (Joint or service specific)

Convening Authorities

Control Measures (GO # 1)

TDS, MJ Support

APPENDIX

FORMATS FOR LEGAL APPENDICES

[See JOPES Volume II, *available at* http://www.dtic.mil/cjcs_directives/cjcs/manuals.htm]
NOTE: ADDITIONAL SAMPLE LEGAL ANNEXES ARE CONTAINED IN THE JAGCNET (CLAMO) DATABASE.

(Standardized JOPES Format, **Rules of Engagement Appendix**)

CLASSIFICATION

HEADQUARTERS, US EUROPEAN COMMAND
APO AE 09128
28 February 1999

APPENDIX 6 TO ANNEX C TO USCINCEUR OPLAN 4999-99 ( ) RULES OF ENGAGEMENT (ROE) ( )

( ) References: List DOD Directives, rules of engagement (ROE) issued by the Chairman of the Joint Chiefs of Staff, and existing and proposed ROE of the supported commander to be applied when conducting operations in support of this
OPLAN.
1. ( ) Situation
a. ( ) General. Describe the general situation anticipated when implementation of the plan is directed. Provide all information needed to give subordinate units accurate insight concerning the contemplated ROE.
b. ( ) Enemy. Refer to Annex B, Intelligence. Describe enemy capabilities, tactics, techniques, and probable COAs that may affect existing or proposed ROE on accomplishment of the U.S. mission.
c. ( ) Friendly. State in separate subparagraphs the friendly forces that will require individual ROE to accomplish their mission; for example, air, land, sea, SO, hot pursuit. Where appropriate, state the specific ROE to be applied.
d. ( ) Assumptions. List all assumptions on which ROE are based.
2. ( ) Mission. Refer to the Basic Plan. Further, state the mission in such a way that ROE will include provisions for conducting military operations according to the "Laws of War."
3. ( ) Execution
a. ( ) Concept of Operation
(1) ( ) General. Summarize the intended COA and state the general application of ROE in support thereof. Indicate the time (hours, days, or event) the ROE will remain in effect.
(2) ( ) U.S. National Policies. Refer to appropriate official US policy statements and documents published by the command pertaining to ROE and the Laws of War. Include reference to ROE for allied forces when their participation can be expected. When desired, include specific guidance in a tab. Refer to a separate list of NO STRIKE targets in Appendix 4 to Annex B, which may include facilities afforded special protection under international law.
b. ( ) Tasks. Provide guidance for development and approval of ROE prepared by subordinate units.
c. ( ) Coordinating Instructions. Include, as a minimum:
(1) ( ) Coordination of ROE with adjacent commands, friendly forces, appropriate second-country forces, neutral countries, appropriate civilian agencies, and Department of State elements.
(2) ( ) Dissemination of ROE.
(3) ( ) Provision of ROE to augmentation forces of other commanders.
(4) ( ) Procedures for requesting and processing changes to ROE.
4. ( ) Administration. Provide requirements for special reports.
5. ( ) Command and Control. Refer to the appropriate section of Annex K. Provide pertinent extracts of information required to support the Basic Plan, including:
a. ( ) Identification, friend or foe, or neutral (IFFN) ROE policy.
b. ( ) Relation of ROE to use of code words.
c. ( ) Specific geographic boundaries or control measures where ROE are applicable.

d. ( ) Special systems and procedures applicable to ROE.

CLASSIFICATION

(Standardized JOPES Format, **Enemy Prisoners of War, Civilian Internees, and Other Detained Persons Appendix**)

CLASSIFICATION

HEADQUARTERS, US EUROPEAN COMMAND
APO AE 09128
28 February 1999

APPENDIX 1 TO ANNEX E TO USCINCEUR OPLAN 4999-99 ( ) ENEMY PRISONERS OF WAR, CIVILIAN INTERNEES, AND OTHER DETAINED PERSONS ( )

( ) References: a. Joint Pub 3-57, (date), (title)
b. Joint Pub 1-0, (date), (title)
c. Cite other documents specifically referred to in this plan element.

1. ( ) Situation. Identify any significant factors (e.g., collection, processing, evacuation) that may influence EPW, CI, and DET activities in support of the OPLAN. Delineate the general policy for accomplishing EPW, CI, and DET activities by the Service components and other supporting commands.

a. ( ) Enemy. Refer to Annex B, Intelligence. Assess the impact of enemy capabilities and probable COAs on EPW, CI, and DET activities. Summarize the expected enemy military, paramilitary, and civilian forces and resources.

b. ( ) Friendly. Include any non-US military forces and US civilian agencies augmenting assigned forces for EPW, CI, and DET activities.

2. ( ) Execution

a. ( ) Concept of Operations. State the general concept of EPW, CI, and DET activities in support of the OPLAN.

b. ( ) Assignments of Tasks. In separate numbered subparagraphs for each applicable component, identify specific responsibilities for EPW, CI, and DET activities. Indicate the component responsible for each of the following as applicable:

(1) ( ) Developing, in coordination with intelligence planners, gross time-phased estimates of the number of EPWs, CIs, and DETs.

(2) ( ) Developing overall in-theater policy and coordinating matters pertaining to EPW, CI, and DET activities.

(3) ( ) Establishing and operating collection points and processing centers.

(4) ( ) Establishing and operating EPW and CI camps.

(5) ( ) Activating and operating EPW information centers and branches.

c. ( ) Coordinating Instructions. Include general instructions applicable to two or more components, such as:

(1) ( ) Agreements with the host country, allied forces, and US Government and nongovernment agencies.

(2) ( ) Relationships with the International Committee of the Red Cross (ICRC) or other humanitarian organizations.

(3) ( ) Arrangements for transfer of EPWs, CIs, and DETs between Service components or acceptance of EPWs, CIs, and DETs from allied forces.

3. ( ) Special Guidance. Provide guidance not discussed elsewhere concerning the collection, safeguarding, processing, evacuation, treatment, and discipline of EPWs and all personnel detained or captured. Include each of the following as applicable:

a. ( ) Handling, processing, and evacuating EPWs at the capture point. Discuss assignment of EPW escorts and their responsibilities (escorts should bring personal effects of EPWs to include uniforms, undergarments, civilian clothes). Discuss the requirements and assignment of a single point of contact to coordinate all return and administrative requirements of repatriated POWs.

b. ( ) Accounting for EPWs, CIs, and DETs.

c. ( ) Interrogating and exploiting EPWs. (Cross-reference to Annex B, Intelligence and Appendix 5, Human Resource Intelligence, and Annex C, Appendix 4, Psychological Operations.)

d. ( ) Granting of legal status.

e. ( ) EPW, CI, and DET advisory assistance programs.

f. ( ) Transferring of EPWs, CIs, and DETs to another detaining power.

g. ( ) Investigating, reporting, and adjudicating alleged violations of the laws of war applicable to detained persons.

4. ( ) Administration and Logistics. Provide a concept for furnishing logistic and administrative support for EPW, CI, and DET activities. Include guidance on the following:

a. ( ) Accounting for personal property and deceased EPWs, CIs, and DETs. (Cross-reference to Appendix 2, Mortuary Services, to Annex D, Logistics.)

b. ( ) EPW, CI, and DET documentation and records.

c. ( ) Medical care and treatment. (Cross-reference to Annex Q.)

d. ( ) EPW canteens and welfare funds.

e. ( ) EPW and CI labor programs.

5. ( ) Command and Control

a. ( ) Command

(1) ( ) Command Relationships. Discuss any unique command relationship issues for executing the mission.

(2) ( ) Reports. Indicate reports required by appropriate references.

b. ( ) Command, Control, Communications, and Computer Systems. Discuss C4 systems support and procedures necessary to conduct EPW, CI, and DET activities. Refer to appropriate sections of Annex K.

Tabs (None specified but may be included, as necessary, when required by length or detail of guidance.)

CLASSIFICATION

(Standardized JOPES Format, **Legal Appendix**)

CLASSIFICATION

HEADQUARTERS, US EUROPEAN COMMAND
APO AE 09128
28 February 1999

APPENDIX 4 TO ANNEX E TO USCINCEUR OPLAN 4999-99 ( ) LEGAL ( )

( ) References: Cite the documents specifically referred to in this plan element.
1. ( ) Legal Basis for the Operation. Recite appropriate international and domestic law.
2. ( ) General Order Number One. Recite for wide dissemination.
3. ( ) General Guidance. See appropriate references, including inter-Service support agreements.
4. ( ) Specific Guidance. Coordinate with supporting commanders and Service component commanders on the items listed below. For each subheading, state policies, assign responsibilities, and cite applicable references and inter-Service support agreements:

a. ( ) International Legal Considerations.
b. ( ) Legal Assistance.
c. ( ) Claims.
d. ( ) Military Justice.
e. ( ) Acquisitions During Combat or Military Operations.
f. ( ) Fiscal Law Considerations.
g. ( ) Legal Review of Rules of Engagement.
h. ( ) Law of War.
i. ( ) Environmental Law Considerations.
j. ( ) Intelligence Law Considerations.
k. ( ) Humanitarian Law.
l. ( ) Operations Other Than War.
m. ( ) Nuclear, Biological and Chemical Weapons.
n. ( ) Targeting and Weaponry (including nonlethal weapons).
o. ( ) Enemy Prisoners of War.
p. ( ) Interaction with the International Committee of the Red Cross and other nongovernmental and Private Voluntary Organizations (NGOs/PVOs).

CLASSIFICATION

SAMPLE LEGAL APPENDIX

APPENDIX 4 TO ANNEX E TO USFORHAITI OPORD(U)
LEGAL (U)

(U) **REFERENCES**:

a. UN Charter (U)
b. UN Security Council Resolutions 867 (1993), 905, 917, 933, 940, 949, 964 (1994), 975 (1995)(U)
c. Multinational Force (MNF) Status of Forces Agreement, dated 8 Dec 1994 (U)
d. UN Status of Mission Agreement, dated XXXXXXXX (U)
e. Agreement for Support of UNMIH, dated 19 Sep 1994 (U)
f. Governors Island Agreement of 3 July 1993 (U)
g. UN Participation Act (UNPA), 22 U.S.C. § 287 (U)
h. Foreign Assistance Act (FAA), 22 U.S.C.. § 2151-2429 (U)
i. Joint Pub 0-2, Unified Action Armed Forces (UNAAF) (U)
j. U.S.-Haiti, Bilateral Mutual Defense Assistance Agreement, dated 28 Jan 1955 (U)
k. International Agreement Negotiation: DoD Directive 5530.3, and CINCUSACOM 5711.1A (U)
l. Service regulations on Legal Assistance: AFI 51-504, AR 27-3, JAGMAN (USN/USMC) (U)
m. Uniform Code of Military Justice and Manual for Courts-Martial, United States, 1984 (U)
n. Service regulations on Military Justice: AFI 51-201, AFI 51-202, AR 27-10, JAGMAN (U)
o. CINCUSACOMINST 5710.3A, Political Asylum (U)
p. Claims: AR 27-20, DA Pam 27-162, JAGMAN, JAGINST 5890.1 AFM 112-1B, DoD Directive 5515.8 (U)
q. International Law: DA Pam 27-1 (Treaties Governing Land Warfare), DA FM 27-10 (Law of Land Warfare), NWP 9 (Rev. A)/FMFM 1-10 (Commander's Handbook on the Law of Naval Operations), AFP 110-20 (Selected International Agreements), AFP 110-31 (International Law-The Conduct of Armed Conflict and Air Operations), AFP 110-34 (International Law-Commander's Guide to the Law of Armed Conflict) (U)
r. Control and Registration of War Trophy Firearms: AR 608-4, OPNAVINST 3460.7A, AFR 125-13, MCO 5800.6A (U)

1. a. (U) **General Guidance**. JTF USFORHAITI will conduct operations in Haiti as the U.S. military component of the United Nations Mission in Haiti (UNMIH), OPCON to the Commander, UNMIH. Reference (a) establishes the general legal foundation for peacekeeping operations (Chapter VI) and peace enforcement operations (Chapter VII). References (b), (d), (e), and (f) are the specific authorizations for the UNMIH. References (g) and (h) contain statutory authority for U.S. manpower and logistics contributions to United Nations operations. Reference (i) establishes the general policy for addressing legal issues of U.S. joint service operations.

b. (U) The JTF SJA will:

(1) Provide legal advice to JTF and Staff.

(2) Serve as a single point of contact for operational legal matters affecting forces under the operational command of JTF within Haiti.

(3) Monitor foreign criminal jurisdiction matters involving U.S. personnel within Haiti.

(4) Ensure all plans, rules of engagement (ROE), policies, and directives, are consistent with the DoD Law of War Program and domestic and international law.

(5) Monitor foreign claims activities within country.

2. (U) **Specific Guidance**.

a. (U) Claims.

(1) (U) U.S. Claims. The Department of the Army (DA) has been assigned Executive Agency, UP ref (p), for claims arising from U.S. operations in Haiti. An Army Judge Advocate will be appointed as a Foreign Claims Commission to adjudicate U.S. claims, where possible, and forward them to DA. Any residual claims resulting from U.S. operations should be addressed through the SJA, USFORHAITI, to the Chief, Foreign Claims Branch, U.S. Army Claims Service, Ft. Meade, Maryland, DSN 923-7009, Ext. 255.

(2) (U) UN Claims. Per ref (e), the UN has held the United States and all U.S. members of the UNMIH harmless from all claims arising from acts or omissions committed by U.S. personnel serving with the UNMIH. Commanding officers of U.S. personnel assigned to the UNMIH will be sensitive to any damage caused by members of their command. Claims arising from UN operations will be submitted per UN direction, in accordance with the

UN claims procedures, ref (d), and UN directives.

(3) (U) Claims investigations. Any injury of a civilian or damage of personal property will be reported to the SJA, JTF USFORHAITI, immediately. JTF USFORHAITI will coordinate with the commanding officer of the service member involved in any alleged claim to ensure that an officer from that service is appointed to conduct a thorough investigation into the matter. All claims investigations will be promptly completed and forwarded to the SJA for review. Information copies will be forwarded to the SJA, U.S. Atlantic Command (USACOM). Unless otherwise directed, the SJA, JTF USFORHAITI, will review the investigation, and after approval by JTF USFORHAITI, forward the report through the appropriate chain of command for adjudication and payment.

b. (U) International Legal Considerations.

(1) (U) Status of Forces. UP of para. 52, of ref (c), any residual MNF personnel in country after transition to UNMIH will be covered by the MNF SOFA, ref (c). Reference (d) details the status of UNMIH, its component personnel, and assets. All questions regarding status and privileges should be referred to the Legal Advisor, Commander, UNMIH. Any U.S. bilateral security assistance elements will be given administrative and technical status of embassy personnel, as provided for in Article V of ref (j), upon negotiation of an implementing agreement.

(2) (U) Peacekeeping Operations. The UNMIH is a peacekeeping operation as described in Chapter VI, reference (a). It is organized under the command of the United Nations, exercised on behalf of the Security Council and the Secretary-General by a Special Representative. Both a military and a civilian component report to the Special Representative. Logistics support may be provided in part by one or more contractors. Participating nations give operational control of their military component forces to the Military Component Commander, UNMIH, but retain all other functions of command.

(3) (U) Jurisdiction Over Non-UNMIH Personnel. Per ref (d), jurisdiction over non-UNMIH personnel remains with the GOH.

(4) (U) Political asylum. UNMIH personnel are not authorized to grant political asylum. U.S. personnel should forward requests for asylum in the U.S. by immediate message to CINCUSACOM and refer applicant to the U.S. diplomatic mission. Temporary refuge will be granted only if necessary to protect human life. Reference (o) provides detailed information concerning political asylum and temporary refuge.

c. (U) Legal Assistance. JTF USFORHAITI will make arrangements for legal assistance for U.S. personnel of the UNMIH. U.S. service components should ensure maximum use of pre-deployment screening for wills and powers of attorney to reduce demands for emergency legal assistance. Component commanders will make arrangements for legal assistance for personnel assigned or attached to their respective forces. Use inter-service support to maximum extent. Ref (l) applies.

d. (U) Military Justice.

(1) (U) The inherent authority and responsibilities for discipline of the commanders of U.S. military personnel assigned to UNMIH, described in references (i), (m) and (n), remain in effect.

(2) (U) Courts-martial and nonjudicial punishment are the responsibility of service component commands, IAW service regulations.

(3) (U) Component commanders will establish appropriate arrangements for disciplinary jurisdiction, including attachment orders for units and individuals, where appropriate.

(4) (U) Immediately report to component and the JTF SJA all incidents in which foreign civil authorities attempt to assume jurisdiction over U.S. forces. The SJA, JTF USFORHAITI, will coordinate all military justice actions with the SJA, USACOM.

(5) (U) Jurisdiction. Under the privileges and immunities enjoyed by the UN, criminal and civil jurisdiction over U.S. members of UNMIH resides solely with the United States. Detailed guidance on the jurisdictional status of the UNMIH is contained in ref (d).

(6) (U) Criminal investigations. JTF USFORHAITI will coordinate with the commanding officer of any U.S. service member who is allegedly involved in an act of criminal misconduct to ensure that an official from the appropriate investigative service is appointed to conduct a thorough investigation into the matter. Allegations against non-military U.S. nationals should be forwarded to an appropriate investigative service after consultation with the SJA, JTF USFORHAITI. Allegations against non-U.S. persons will be forwarded to the UNMIH Special Representative for proper disposition. Completed reports of investigation that involve U.S. nationals shall be reviewed by the SJA, approved by JTF USFORHAITI, and forwarded to the appropriate authority, with copies to the SJA, USACOM, and the UNMIH Special Representative.

e. (U) Reporting violations of the Law of War and ROE.

(1) (U) Acts of violence. UNMIH personnel will report all acts of violence, to include homicides, assaults, rapes, robberies, abductions, and instances of mayhem or mass disorder, immediately to their commanding officer. Those officers shall immediately pass reports to JTF USFORHAITI and the UNMIH Special

Representative. UNMIH personnel will interfere with the actions of Haitian military or police personnel only as authorized by the rules of engagement.

(2) (U) Law of War. Ref (d) requires that military personnel assigned to UNMIH apply the minimum standards of the Law of War contained in ref (q). Component commanders who receive information concerning a possible violation of the Law War and ROE will:

(A) (U) Conduct a preliminary inquiry to determine whether violations were committed by or against U.S. personnel.

(B) (U) Cooperate with appropriate allied authorities should their personnel be involved.

(C) (U) Report all suspected violations to the JTF SJA, as well as through service component channels, according to service regulations, utilizing OPREP-3 procedures.

(D) (U) When U.S. personnel are involved as either victims or perpetrators, or when directed by CINCUSACOM, conduct a complete investigation, preserve all evidence of the suspected violation, and take appropriate corrective and/or disciplinary action.

(E) (U) Provide copies of all OPREPs, initial reports and reports of investigation to SJA, JTF USFORHAITI, and SJA, USACOM.

f. (U) Captured Weapons, war trophies, documents, and equipment. Component commanders will establish immediate accountability for all captured property, including weapons, trophies, documents and equipment. See refs (q) and (r), and MNF Guidelines, for disposition of captured public and private property remaining from MNF operations. UN directives apply to any items seized during the duration of UNMIH.

g. (U) Host Nation Support and Fiscal Authority.

(1) (U) Refs (c) and (d) contain basic provisions for host nation support, which is acquired by bilateral logistics agreements or off-shore contracts.

(2) (U) Fiscal authority is always available for U.S. support to U.S. forces, even when they are assigned a UN mission. UN operational requirements, even those involving U.S. personnel, should be supported under the authority discussed below. However, logistics support for U.S. forces which is above and beyond the capacity of UN logistics operations, and determined by the command to be essential to the sustainment of U.S. forces, is authorized under Article II of the U.S. Constitution and 22 U.S.C. § 2261.

(3) (U) Authority for support to other nations participating in MNF, provided under provisions of sections 506 (Drawdown), 451 and 632 (Peacekeeping) of the FAA [ref (h)], will terminate upon transition of those contingents to UNMIH.

(4) (U) U.S. support to UN operational requirements, the UNMIH staff, or UNMIH contingent nations should be effected pursuant to ref (e). Ref (e) and section 2357 of ref (h) require a request in writing from the UN, with a commitment for reimbursement. UN procedures should be used to ensure proper documentation of the request, and proper accounting of funds for reimbursement. Support for the UN may also be provided under separate authority, pursuant to section 7 of the UN Participation Act (22 U.S.C. § 287), where reimbursement may be waived by the NCA.

(5) (U) Economy Act reimbursement from DoS, cross-servicing agreements, separate 607 agreements with participating countries, and other alternate authorities may be relied on to support third countries in the absence of a UN request. Cross-servicing agreements are currently in effect with several nations participating in UNMIH. Copies of the agreements can be obtained from J4 or SJA, USACOM. As a last resort, in cases of an emergency request for food or shelter from other contingents, the President's Article II authority may be relied on to support a DoD response.

h. (U) Legal Review of the Rules of Engagement (ROE). UNMIH ROE are in effect as of 31 March 95. In cases not covered by the UNMIH ROE, U.S. Standing ROE (SROE) are in effect. U.S. MNF forces remaining in Haiti after transition to UNMIH will continue to operate under MNF ROE until redeployment to home station. The Commander, UNMIH, may promulgate further UN ROE policies. The SJA should review any policies or proposed changes to the UNMIH ROE, to ensure compliance with PDD 25 and other U.S. law and policy. Any modifications to the UNMIH ROE that will effect U.S. forces should be coordinated with USACOM prior to implementation.

i. (U) Law Enforcement and Regulatory Functions. All MNF General Orders are in effect until 31 March; they remain in effect for residual MNF forces in country. Commander, USFORHAITI may promulgate appropriate disciplinary regulations for U.S. forces in Haiti.

j. (U) Component and Supporting Commanders' and Staff Responsibilities: Subordinate component commanders will:

(1) (U) Ensure that all plans, orders, target lists, policies, and procedures comply with applicable law and policy, including the Law of War and ROE.

(2) (U) Report on all legal issues of joint origin or that effect the military effectiveness, mission

accomplishment, or external relations of USFORHAITI to the JTF SJA.

(3) (U) Provide a weekly status of general legal operations for their component to the JTF SJA. This report should include, at a minimum, the following information:

(A) (U) International law - incidents effecting any bilateral or UN agreements, a potential violation of the law of war or ROE, and diplomatic incidents involving U.S. forces the forces, government agents, or nationals of another country.

(B) (U) Military justice - incidents which may give rise to disciplinary action under the UCMJ, as well as the final disposition of such actions, and any U.S. forces in pretrial confinement. Immediately report serious incidents.

(C) (U) Claims - any incidents which may give rise to a claim against the United States or the UN.

k. (U) Acquisitions During Combat or Military Operations.

(1)(U) U.S. forces will acquire most goods and services in Haiti in accordance with UN procedures for contracting, per the authority discussed in paragraph g, above.

(2) (U) Goods and services to satisfy U.S.-specific requirements will be obtained in accordance with applicable U.S. and host nation laws, treaties, international agreements, and directives. Commander, USFORHAITI, does not have the authority to waive any of the statutory or regulatory requirements contained in the Federal Acquisition Regulation (FAR).

(3) (U) Only contracting officers may enter into and sign contracts on behalf of the U.S. Government. Only those persons who possess valid contracting warrants may act as contracting officers and then only to the extent authorized. Only those persons who have been appointed as ordering officers by competent authority may make obligations under the terms of, or pursuant to contracts.

(4) (U) Avoid unauthorized commitments. Although an unauthorized commitment is not binding on the U.S. Government, in appropriate cases it may be ratified by an authorized person in accordance with the FAR provisions. Unratified unauthorized commitments are the responsibility of the person who made the commitment. In appropriate cases, such persons may also be subject to disciplinary action.

l. (U) International Agreements and Congressional Enactments. All international agreements will be in writing. Pursuant to reference (k), agreements of any kind in which the U.S. or a U.S. military component is a party require the written authorization of CINCUSACOM. Agreements made under UN authority and procedures are not affected by reference (k).

m. (U) Nuclear, Biological, and Chemical Weapons. Riot control agents are an authorized method of employing non-deadly force under the UNMIH ROE. No further U.S. authorization is required for their employment.

n. (U) Targeting. A judge advocate will review all fire support targeting lists to ensure compliance with the Law of War and ROE, and will act as a member of the JTF targeting cell.

o. (U) Detainees. [The UNMIH will exercise only that degree of control over non-UNMIH persons that is necessary to establish and maintain essential civic order. UNMIH is not tasked to perform Haitian law enforcement or judicial responsibilities.] Wherever practicable, and as soon as possible, deliver custody of non-UNMIH personnel detained for suspected offenses against UN personnel or property to official representatives of the GOH. Further guidance regarding the detention of non-UNMIH persons is contained in the UNMIH rules of engagement, and ref (d).

p. (U) Interaction with the International Committee of the Red Cross (ICRC). All interaction with non-governmental organizations (NGOs) should be accomplished through the UNMIH staff, including the civilian staff of the Special Representative. The SJA will continue to monitor all Law of War issues and provide subject matter expertise to the UNMIH staff.

NOTES

CHAPTER 28

CENTER FOR LAW AND MILITARY OPERATIONS (CLAMO)

REFERENCES

1. U.S. DEP.'T OF ARMY, FIELD MANUAL 27-100, LEGAL SUPPORT TO OPERATIONS (1 Mar. 2000) (currently under revision as of the effective date of this Handbook's publication and will be republished as U.S. DEP.'T OF ARMY, FIELD MANUAL 1-04, LEGAL SUPPORT TO THE OPERATIONAL ARMY).
2. U.S. DEP.'T OF ARMY, FIELD MANUAL 5-0, ARMY PLANNING AND ORDERS PRODUCTION (Jan. 2005).

I. OVERVIEW

The purpose of this Chapter is to familiarize legal personnel with the Center for Law and Military Operations (CLAMO), the U.S. Army's Combat Training Centers (CTC), and to assist in preparing Judge Advocates (JAs) and paralegals for deployments.

II. CLAMO: A RESOURCE

A. Mission. CLAMO's mission is to collect and synthesize data relating to legal issues arising in military operations, to manage a central repository of information relating to these legal issues and to disseminating resources about these issues to facilitate the development of doctrine, organization, training, materiel, leadership, education, personnel, facilities as these areas affect the military legal community

1. CLAMO is a joint, interagency, and multinational legal center located at The U.S. Army Judge Advocate General's Legal Center and School (TJAGLCS) in Charlottesville, Virginia. In addition to U.S. Army JAs, CLAMO's staff includes legal advisors from the U.S. Marines, U.S. Navy, U.S. Coast Guard, Department of State, the British Army, the German Ministry of Defense, and the Canadian Forces.

2. As its name implies, CLAMO engages in collecting and synthesizing data relating to law and military operations, and has done so since inception via SECARMY order in 1988. This information is collected from a variety of resources, including both formal and informal after-action review (AAR) interviews with recently redeployed legal personnel, written AARs, observations from Army Combat Training Centers, source documents submitted by deployed JAs, and through written communications with deployed JAs submitting requests for assistance/information (RFIs/RFAs) to CLAMO.

3. The data CLAMO collects includes materials relating to the practice of military justice, international law, administrative law, civil law, claims, and legal assistance as well as information on legal issues arising during the conduct of homeland security operations, coalition operations, and interagency operations.

4. Once information is collected, CLAMO acts as the central repository within the Army and Marine Corps for these memoranda, after-action materials, and lessons learned. This information is maintained for current and future reference and to facilitate the development of training, doctrine, force structure, materiel, curriculum and other resources. This material is also used to integrate lessons learned from operations and the CTCs into the curricula of all relevant courses conducted at TJAGLCS.

B. Publications. CLAMO takes the lessons learned from the various resources and compiles them into written texts. CLAMO has written numerous publications on a wide variety of topics, ranging from hurricane relief to current operations in Iraq and Afghanistan. Recent AARs have suggested that a majority of the legal lessons learned in diverse contingency operations are similar in nature. As a result, many of the same "lessons" are relearned each time a new operation commences. To assist legal personnel in avoiding repeated relearning of these lessons, CLAMO recently published a compendium of lessons learned during major operations from 1994-2007.

CLAMO publications include:

1. Law and Military Operations in Haiti, 1994-1995: Lessons Learned for Judge Advocates (1995).

2. Law and Military Operations in the Balkans, 1995-1998: Lessons Learned for Judge Advocates (1998).

3. FM 27-100, Legal Support to Operations (with the Combat Developments Department, TJAGLCS) (2000) (currently under revision as of the date of this Handbook's publication; expect publication as FM 1-04 Legal Support to the Operational Army no later than Jan. 2009)

4. Rules of Engagement Handbook for Judge Advocates (2000).

5. Law and Military Operations in Central America: Hurricane Mitch Relief Efforts, 1998-1999: Lessons Learned for Judge Advocates (2000).

6. Law and Military Operations in Kosovo, 1999-2001: Lessons Learned for Judge Advocates (2001).

7. Deployed Marine Air-Ground Task Force Judge Advocate Handbook (2002).

8. Deployed Judge Advocate Resource Library 9th Edition (DVD) (Jan. 2008).

9. U.S. Government Interagency Complex Contingency Operations Organizational and Legal Handbook (2004).

10. Legal Lessons Learned from Afghanistan and Iraq: Volume I, Major Combat Operations (11 September 2001 to 1 May 2003) (Aug 2004).

11. Domestic Operational Law Handbook Volumes I & II (4th edition July 2006).

12. Legal Lessons Learned from Afghanistan and Iraq: Volume II, Full Spectrum Operations (1 May 2003 to 30 June 2004)

13. Forged in the Fire: Legal Lessons Learned During Military Operation 1994-2006 (2006).

14. Rule of law Handbook: A Practitioner's Guide for Judge Advocates (2007)

C. Resource Databases. CLAMO maintains an Internet-accessible database with more than 6,000 primary source documents; directives; regulations; country law studies; graphic presentations; photographs; and items of legal work product at http://www.jagcnet.army.mil/clamo. Registration for access to JAGCNet is available upon application by members of the Department of Defense legal community and legal personnel from certain foreign countries. Registered JAGCNet users are able to view the entire database while nonregistered users are able to view only certain portions of the database. The database includes the following major categories:

Administrative Law	Homeland Security
Civil Law	Interagency Operations
Claims	International Law
Coalition Operations	Legal Assistance
Country Materials	Military Justice
DOTMLPF / Country Materials	Regs / Pams / Pubs

To access the CLAMO unclassified database:

If you are a first time user (*i.e.*, you do not have a JAGCNet user name and password):

- *Go to the* www.jagcnet.army.mil *web site.*

- *Click the "Request/Update Account" link at the left side of the page.*

- *Follow the instructions.*

Once registered, or if you already have a JAGCNet user name and password:

- *Go to the CLAMO home page site directly at* www.jagcnet.army.mil/clamo *OR go to the* www.jagcnet.army.mil *web site and click the "Center for Law and Military Operations" link.*

- *Click* the "CLAMO Databases" *link.*

CLAMO also maintains a classified database containing many operational law products, ranging from classified international agreements to classified Rules of Engagement (ROE) presentations. Recognizing that in the deployed environment, SIPR connectivity is more robust than NIPR connectivity, the classified database also contains many unclassified legal documents. By mid-summer 2007, all documents available on the unclassified database should also be available on the classified database.

To access the CLAMO classified database:

- *Go to* http://www.us.army.smil.mil *(you will need Secure Internet Protocol Router Network (SIPRNET) access). First time users will have to register. If you are not in the Army, the site will ask you for an Army sponsor. If you do not have an Army sponsor, call CLAMO for assistance at 434-971-3339 (DSN prefix 521). First time users must wait 24 hours before proceeding to the next step.*

- *Click the "Collaborate" tab at the top of the page.*

- *Click "Army Communities."*

- *Under the "Unsubscribed Army Communities and Knowledge Centers" heading, click the "Legal" link.*

- *Under the "Legal" heading, check the "CLAMO" box.*

- *A "Subscribe" icon will appear at the top of the page. Click the icon to complete the process.*

D. The Army JAG Corps' JAGCNet Databases. In addition to the CLAMO databases, the Army Judge Advocate General's Corps maintains databases dedicated to all core legal disciplines. These databases are available to registered users at http://www.jagcnet.army.mil. On the JAGCNet home page, simply click on any one of the "public core functional areas" (administrative law, military justice, civil law, claims, international law, legal assistance, and operational law) to access the desired database.

E. CLAMO's Organization.

1. The CLAMO Director is an active duty Army JA lieutenant colonel. CLAMO is also staffed with a Director; Training and Development; a Director, Domestic Operational Law; a Director, Joint Operational Law; a Director, Interagency Operational Law; a Director, Coalition Operations; a Coast Guard JA; a Legal Administrator; and a CLAMO Staff NCO.

2. The Director of Training and Development provides assistance to legal teams preparing to deploy or deployed on both exercises and operations, as well as coordinates with the JAs and paralegal Observer Controllers at the CTCs to identify current legal issues and trends that rotational units confront. The Director of Domestic Operational Law is the primary point of contact for legal issues arising from domestic support operations and handles all Reserve Component legal issues. The Director of Joint Operational Law, a Marine Corps JA, handles all Marine-specific and joint legal issues. The Director of Interagency Operational Law, a State Department Attorney, addresses interagency legal issues and the Director of Coalition Operations, a British Army legal officer, addresses coalition legal issues. The Advanced Operational Law Studies Officer serves a one-year tour in CLAMO gaining additional operational law experience by deploying on real-world missions and to the CTCs to observe and assess legal issues from current operations. The Coast Guard JA is on a similar one-year tour with CLAMO. The

CLAMO Legal Administrator and Senior Operational Law NCO provide support to deployed legal administrators and enlisted paralegals. They gather and analyze legal lessons learned from the legal administrator and paralegal perspective. In addition to the specific responsibilities outlined above, all the CLAMO staff provide assistance to deployed legal personnel and participate in the production of CLAMO's various publications.

F. Contact CLAMO. CLAMO invites contribution of operational law materials, ideas from the field, comments about its products, and requests for information. E-mail, call, or write to request or submit materials. E-mail CLAMO at CLAMO@hqda.army.mil, SIPRNET or classified e-mail at CLAMO@hqda-s.army.smil.mil. Write to the Center for Law and Military Operations at 600 Massie Road, Charlottesville, Virginia 22903-1781. Call CLAMO at (434) 971-3248/3256, DSN prefix 521. Visit the CLAMO web page at www.jagcnet.army.mil/clamo.

III. COMBAT TRAINING CENTER (CTC) PARTICIPATION

The Army has four combat training centers: The Joint Readiness Training Center (JRTC), The National Training Center (NTC), The Joint Multinational Readiness Center (JMRC), and The Battle Command Training Program (BCTP). These four CTCs, along with the Joint Warfighting Center (JWFC), train all components of the fighting force. Each of the CTCs focuses on specific elements of a broad spectrum of military operations and incorporates lessons from all recent operations, including those in the Balkans, Afghanistan, and Iraq. This section will describe the CTCs, who they train, and the role of the JA and paralegal at each.

A. The Joint Readiness Training Center.

1. The JRTC is located at Fort Polk, LA. This CTC focuses primarily on training brigade task forces for the full spectrum of military operations in the contemporary operational environment (COE) and mission rehearsal exercises (MRX). This is accomplished through the use of tough, realistic training conditions in both remote and urban environments.

2. A rotation at JRTC varies in length, but generally lasts from fourteen to twenty-one days. Units ordinarily begin planning for their JRTC rotation more than seven months prior to the rotation, and identify their training objectives to JRTC at home station 210 days prior to execution. Around ninety days before the rotation, the unit will send primary staff members to JRTC for the Leadership Training Program (LTP). Judge Advocates should be integrated into the staff to participate in the LTP. During the LTP, JAs have the opportunity to plan an operation with the brigade staff. Judge Advocates will meet the OPLAW O/Cs during the time set aside for Battlefield Operating Systems (BOS) O/C linkup at the end of the LTP session. Time spent during LTP should be used to prepare for the upcoming rotation. Consider developing an office Mission Essential Task List (METL) or the major training objectives for the Brigade Operational Legal Team (BOLT) to accomplish during its JRTC rotation.

3. The typical training scenario at JRTC includes a brigade-sized joint task force conducting a relief in place (RIP) with a fictitious brigade in the location where it is scheduled to deploy. Observer/controllers act as the outgoing Brigade JA for one day. During the RIP day, JAs should identify issues for the outgoing unit to answer. Also identify areas in the maneuver area to see or personalities to meet based on planned interactions during the rotation. In addition to the approximately 3,500 troops supporting the brigade, there are also approximately 1,500 troops supporting echelons above division (EAD) units during a normal rotation. These EAD units may include a special forces unit, a PATRIOT battalion, a combat hospital or a corps support group. Numerous forces may augment the brigade task force to provide flexibility and "light-heavy" integration. Such forces include mechanized and armor units, special operations forces, Air Force Air Combat Command forces, and Civil Affairs (CA) and Psychological Operations (PSYOP) units. It is therefore incumbent upon the Brigade JA to determine how, when and where these units will receive training on the ROE for the rotation.

4. The JRTC provides a legally rich training environment. Judge Advocates will encounter issues such as the collection of intelligence from civilians; ROE; detention operations; claims; fiscal law (specifically Commanders' Emergency Response Program (CERP) and Operation and Maintenance (O&M) funds); and numerous investigations. Very few of the issues that arise for the BOLT are "injects." Instead, the vast majority of these issues arise as the result of actions taken by the brigade. For example, units that cause damage or act recklessly in civilian-populated areas will see a significant number of claims

arise as a result. Units may be directed to investigate fratricides or the deaths of civilians, even though the unit may not be aware that it caused the deaths of those persons, except from allegations that are made in the local media. The International Committee for the Red Cross (ICRC) will conduct inspections of the brigade detention/internment facility, and JAs will be directed to be present during such inspections. Expect that multiple events that require the presence of a JA will arise on the same day, forcing the BOLT to integrate paralegals more heavily into operations than otherwise expected. Anticipate that paralegals will be present at the battalion level, in accordance with Army doctrine and unit MTOE, rather than consolidated at the brigade level. Ensure that paralegals have the training required to spot issues during battalion planning sessions, and that they have a method of communication with the JAs at brigade. Take the time to review battalion-level TACSOPs and integrate paralegal tasks into the battalion TACSOP. Developing claims packets, investigations packets, detention packets, ROE matrices, CERP guidance, and reviewing SOPs will also assist the JA prior to deployment to Fort Polk.

5. While at the JRTC, U.S. forces encounter many difficult situations dealing with civilians. Over 1,000 civilians are on the battlefield, a significant number of whom are non-native English speakers who will not speak with rotational units in English. Civilians on the battlefield (COB) perform multiple roles, including those supporting the host nation (HN) government and the U.S. government, as well as those espousing the overthrow of the HN government. Many of the COBs are neutral, and can be swayed. What this means for the BOLT is that the prompt payment of claims, the rapid use of CERP monies, and plans in place to affect the neutral civilian populace can have a significant impact on the area of operations. Units will encounter non-governmental organizations (NGO), competing governmental organizations, political parties, news media, police and paramilitary forces, and insurgent military forces. The presence of these organizations may require JA involvement to determine their status and how they should be treated by U.S. Forces.

6. There are four O/Cs at JRTC: three JAs and one paralegal NCO. These O/Cs take a hands-on role in teaching, coaching, and mentoring the BOLTs involved in the exercises in an effort to help them improve their respective contributions to their unit's mission. After significant events or at the end of the day, JA O/Cs will conduct "green book" after-action reviews (AAR) to reinforce positive and negative actions or trends within the BOLT or throughout the brigade. AARs are designed to help the BOLT become better as a collective whole. Formal AARs are conducted after each operational phase, and a final exercise review occurs at the exercise conclusion. Upon leaving JRTC, note cards are given to the rotational unit to assist with actions that can be taken over the short term to improve BOLT and unit performance. Later, a Take Home Packet capturing O/C observations is provided to the BOLT and the unit to assist the unit over the long-term.

7. In conclusion, a BOLT should begin preparing for its rotation a minimum of 90 days prior to the rotation. Greater preparation by the BOLT results in a higher level of legal support to the brigade during operations. A BOLT that arrives with personnel who are untrained for the mission, lacks the prepared materials, and has not developed an ROE card will have far more work than it can handle during the unit's rotation. Similarly, paralegals who are not integrated with their battalion will find themselves pulling far more details than their peers and unable to perform their mission for the BOLT.

B. The National Training Center (NTC).

1. The NTC is located at Fort Irwin, California, in the middle of the Mojave Desert. In July 2004, the NTC training environment shifted from the traditional role of training heavy Brigade Combat Teams (BCT) in mid-to-high intensity conflict, to preparing brigade-level units to support the Global War on Terror (primarily, deployment to Afghanistan and Iraq). The NTC regularly hosts brigade-sized units—regular Army BCTs, Stryker Brigade Combat Teams (SBCT), or Army National Guard Brigade Combat Teams (collectively, "brigades")—sometimes deploying them directly from the NTC into other theaters of operation. Much like JRTC, this training is accomplished through the use of realistic joint and combined arms training in COE-based scenarios and MRXs. The NTC provides comprehensive training scenarios from force-on-force maneuver fighting in a high-intensity environment, to brigade-size live fire, to stability operations and support operations (SOSO) training in a continuous environment.

2. The maneuver box at the NTC is as large as the state of Rhode Island (1,001 square miles). The depth and width of the battle space gives a brigade the unique opportunity to exercise all of its elements in a realistic environment. This is often a unit's only opportunity to test its combat service and

combat service support elements over a doctrinal distance. Brigades must be able to communicate through up to eight communications corridors, evacuate casualties over forty kilometers, and navigate at night in treacherous terrain with few distinguishable roads. Other environmental conditions, such as a forty to fifty degree diurnal temperature range, winds over forty-five knots, and constant exposure to the sun, stress every system and Soldier to their limit.

3. The NTC's training scenario is typically based on COE scenarios originally developed at Fort Leavenworth. However, as NTC began training brigades for deployment to Iraq and Afghanistan, the scenarios shifted from COE to a true Iraq or Afghanistan scenario with actual Arabic names and Arabic-speaking role players that emphasize Theater TTPs and problem sets. These MRX rotations have become common at the NTC. The MRX scenario places the brigade in a country or region recently occupied by U.S. and coalition forces, much like Afghanistan or Iraq. The brigade conducts a transfer of authority with the outgoing unit, then takes responsibility for an area of operations containing seven to ten villages populated by 1,000-4,000 civilians (played by contracted personal and 11th ACR Soldiers). The brigade must conduct Full Spectrum Operation (FSO) dealing with local leaders, militant organizations, coalition forces, terrorists, displaced civilians, NGOs, and local and international press. The end state for the brigade is to conduct elections and hand over control of their sector to local security and government leaders. The COE-based scenario deploys the brigade into a country that is on the brink of invasion from its neighboring country. The brigade must conduct Reception, Staging, Onward Movement and Integration (RSOI) in a new theater of operations. Divisions then have the option to have brigades work through a high intensity conflict (HIC) problem set, fighting through desert and populated areas to restore the international border of the supported country, or the Division may elect to have the brigade spend its first training week conducting decentralized Situational Training Exercises (STX) at the Company level. This opportunity to exercise FSO provides the potential for experiences across the full range of military operations, to include HIC, to military operations in urban terrain (MOUT), to Civil-Military Operations (CMO) problem sets – all of which challenge the brigade resources and staff over the course of a 28-day rotation. In the COE scenario, the brigade will typically fight through 5-10 villages populated by civilians, militants and terrorists, and potentially occupied by military forces. After the brigade clears a village, it must conduct CMO to gain the support of the population left behind. The end state for the brigade may include defeat of aggressor forces, restoration of the international borders, reestablishment of safety and security in the host nation, and legitimization of the host nation's government.

4. Each fiscal year, NTC conducts 10 rotations, each rotation consisting of 28 days. The first 5 days (RSOI 1-5) are spent generating combat power and integrating the brigade into the notional division headquarters, 52nd ID (M). During this period, there are host nation visits, civilian demonstrations, FSO missions, media events, and attacks by militants and terrorists, which challenge the brigade JA and civil-military operations cell. The second phase, training days 1-6, is force-on-force or STX followed by Training days 7-14 dedicated to FSO. During this time period, the brigade will occupy a number of forward operating bases (FOB) in the AO and conduct live fire exercises throughout the course of the rotation. The NTC is the only training area in the U.S. that allows a complete brigade-sized unit to conduct both a live fire attack and a live fire defense integrating all Warfighting Functions, including direct air support from the Air Force and Naval platforms. The final 7 days of the typical NTC rotation are regeneration of combat power and redeployment back to the brigade's home station.

5. Judge Advocates can expect to encounter numerous legal issues during all phases of the rotation. During the RSOI phase, JAs will be involved in humanitarian assistance operations, ROE training and annex production, targeting cycle support, MDMP, interaction with key host nation civilians, and fiscal operations with an emphasis on CERP, Rewards programs and foreign claims, as well as "real world" legal assistance and military justice actions executed in a field environment. During the training days, JAs must deal with issues involving ROE; Law of War (LOW) violations; fratricide; detainee operations (Article V tribunals, status reviews, Central Criminal Court of Iraq Trials); evidence collection; targeting (lethal and non-lethal); foreign claims; funding for humanitarian assistance operations; CERP funds; field contracting; support of and interaction with NGOs, CA Soldiers and CMO; PSYOP; and information operations (IO).

6. For more information on how to prepare for, and what to expect during, an NTC rotation, see the NTC portion of the CLAMO Website on JAGCNet. This site contains an NTC orientation, current JA issues and a detailed packing list. To contact NTC O/Cs, send an e-mail to: bronco70@irwin.army.mil.

C. The Joint Multinational Readiness Center (JMRC).

1. The Joint Multinational Readiness Center is located at Hohenfels, Germany. The JMRC trains tailored forces and headquarters for full spectrum, joint, and combined operations. It provides Current Force, and Brigade Combat Teams with tough, realistic, Army/Joint battle-focused training. The focus is on training adaptive leaders for full spectrum operations by integrating Joint, Interagency, Multinational (JIM) players, exploiting distributive live-virtual-constructive (LVC) capabilities, and focusing on execution of simultaneous, non-contiguous operations scenarios on the Joint Operational Environment (JOE) battlefield.

2. The JMRC trains up to a task-organized BCT, with selected division/corps and Joint Force assets. It plans and conducts MRX and mission readiness exercises to prepare units for operational missions and conducts live fire exercises at the Company/Team level.

3. The JMRC supports the USAREUR Expeditionary Training Center with the Deployed Instrumentation System by providing CTC capabilities to deployed forces. It provides doctrinally-sound observations, training feedback and DOTMLPF feedback, and trends and lessons learned.

4. The JMRC typically conducts approximately five brigade rotations per year, each with embedded battalion rotations. The JMRC also conducts two MRXs per year and teaches two Individual Readiness Training Situational Training Exercises (IRT STX) per month. Each brigade rotation is comprised of up to three battalion-sized task forces. Rotations typically employ the 3-10-10-3 day rotational task force window model: 3 day deployment/MILES draw; 10 day company-focused lane training (STXs) and Brigade CPX ; 10 day force-on-OPFOR maneuver exercise in a counter-insurgency environment, and additionally, movement to contact/attack/defend stages; and a 3 day recovery.

5. Judge Advocates can expect to encounter a wide variety of legal issues at JMRC, whether involved in counter-insurgency, HIC, peacekeeping/enforcement, or stability and support operations. Issues that routinely arise include ROE training and annex production; detention operations; foreign claims; targeting (lethal and non-lethal); LOW violations and investigations; the handling of displaced persons; and fiscal law issues.

6. Currently, there is one JA O/C (known as “Mustang 05”) at JMRC. The role of the JA O/C is to teach, coach and mentor the JAs and enlisted paralegals involved in the exercise in order to help them improve their contribution to the unit’s mission. The JA O/C conducts an informal “hotwash” throughout the rotations and a more formal AAR is conducted at the culmination of the unit’s training exercise. Two brigade-wide, instrumented AARs are conducted during the rotation: one at the mid-point, and one upon conclusion of the rotation. The JA O/C captures his observations of the BOLT in a take home packet that is provided to the BJA upon the conclusion of the rotation.

D. The Battle Command Training Program (BCTP).

1. The BCTP is located at Fort Leavenworth, Kansas. The BCTP supports realistic, stressful training for corps, division, and BCT commanders, and supports Army components participating in joint exercises to assist the Army Chief of Staff in fulfilling his duties to provide trained and ready units to win decisively on the modern battlefield and conduct contingency operations worldwide.

2. The BCTP is composed of four Operations Groups (OPSGRP), a Headquarters, and the World Class Opposition Forces (WCOPFOR). The Operational Law Observer Trainers (OPLAW OTs), three JAs assigned to Headquarters, BCTP, support all of the OPSGRPs. Each OPSGRP is commanded by a colonel, known as the Commander, Operations Group (COG), and has a unique mission. Operations Groups A and B focus primarily on training division- and corps-sized units. The exercises ordinarily consist of traditional warfighter exercises (WFX) or specific MRXs. Operations Groups A and B also conduct planning conferences, seminars, and advanced-decision making exercises (ADME) for training units. Operations Group C focuses on training National Guard brigades and separate active duty BCTs. Operations Group C is also responsible for conducting brigade-level training on urban operations. To accomplish this mission, OPSGRP C has a mobile training team (MTT) that travels to units and conducts seminars on urban operations for brigade commanders, their staffs, and their subordinate commands. Before WFXs and MRXs conducted by OPSGRPs A, B, or C, the designated OPSGRP conducts a seminar at either Fort Leavenworth, KS, or the training unit’s home station. Operations Group D focuses on ASCC/ARFOR

training and Army components participating in joint exercises. This OPSGRP does not normally conduct its own exercises. Instead, it observes training units during joint exercises, often in conjunction with the Joint Warfighting Center of Joint Forces Command (JFCOM).

3. BCTP differs from NTC, JRTC, and JMRC in two respects. First, BCTP is a "mobile CTC." The OPSGRPs from BCTP travel to the unit to conduct training. Second, with BCTP exercises, there is no tangible maneuver battlespace, or "box." Instead, training is performed via computer simulation within a notional computer-generated box. Many spontaneous legal issues arise naturally during the course of an exercise, such as targeting issues, fratricides, detention operations and COB. Additionally, OPSGRPs inject legal issues into the training scenario. "Inject" topics include: law of armed conflict; ROE; international agreements; justification of the use of force; contract and fiscal law; military justice; foreign claims; and legal aspects of joint, inter-agency, NGO and international organization coordination. For corps and division MRXs and WFXs, many of these issues are injected via the "Green Cell," a neutral exercise control cell that adds greater realism to training events. Normally, two JAs from the training unit or an augmenting unit are tasked to support the contractors in the Green Cell. The tasked JAs inject and track legal issues and provide legal guidance to Green Cell personnel on other proposed injects. The number of legal events inserted depends on the training unit and the SJA's training objectives. Ideally, the training will stress all members of a unit's legal team and present an opportunity to examine the relationships between the legal team, unit commanders and staff sections.

4. Approximately one hundred days before a BCTP training exercise begins, the OPSGRP plans and executes a five to seven day Battle Command Seminar (BCS) at Fort Leavenworth, KS, or the unit's home station. The seminar affords the commander and staff an opportunity to focus on the military decision-making process (MDMP) and build the battle command staff. Normally, a reduced staff from the training unit that includes the SJA and the Chief of Operational Law participates in the seminar discussions and an MDMP exercise.

5. Each BCTP exercise is based on the training unit commander's METL. Once the exercise actually begins, the OPLAW OTs, with help from the JAs working in the Green Cell, support the unit's training objectives by monitoring events that indicate how well the unit has integrated the SJA cell into its operations. All BCTP OTs observe the relationships between the training unit's SJA cell and commanders and staff sections to help identify ways in which the SJA cell can be better integrated into the command information process. OPLAW OTs work directly with the SJA to help improve staff functions, information flow, and management processes.

6. Every OPSGRP rotation includes at least two formal AARs lead by the COG. In addition, the OPLAW OT conducts at least one informal AAR with the SJA cell, several "hotwashes," and a great deal of one-on-one mentoring for the JAs undergoing training.

IV. DEPLOYMENT PREPARATION

A. Deployment preparation falls into two categories: (a) general and (b) mission-specific. *General deployment preparation* should be continuous and ongoing. *Mission-specific deployment preparation* begins once a warning order is received or a deployment is imminent. Ongoing, general pre-deployment preparation is the key to success. There are many tasks the operational JA, Brigade JA, and other attorneys can perform now and on a regular basis to better prepare them for a short-notice deployment. The BJA could:

1. Create a pre-deployment SOP and checklists that are exercised and rehearsed.

2. War-game deployments. Walk up the escalating scale of contingencies with the SJA and create an office-level plan detailing who will deploy and how deployed JA and paralegal positions will be staffed. This is a prime opportunity to tie in nearby Reserve Component legal personnel and develop a working relationship with them before a contingency arises.

3. Create a "battle box" loaded with legal references, materials, CLAMO publications and its DVD, Electronic Judge Advocate Warfighting System (E-JAWS) and its supporting equipment, and office supplies.

4. Create and streamline an efficient Soldier Readiness Program (SRP) for supported units to avoid last minute waves of wills, powers of attorneys, family support plan issues, etc.

B. Whether deploying to a CTC, another exercise, or an actual operation, the keys to pre-deployment preparation remain the same:

1. Doctrine.
2. Training.
3. Leadership and Integration.
4. Legal Support Plan (Organization, Materiel and Soldiers considerations).

C. Doctrine. General deployment preparation must begin with the Judge Advocate General's Corps keystone doctrinal publication for legal support to operations, FM 27-100. FM 27-100 explains the role of the legal team in support of military operations through the core legal disciplines. It provides the basis for legal training, organizational and materiel development, and it contains guidance for SJAs and other legal personnel, as well as for commanders and their staffs. FM 27-100 is under revision as of the date of his Handbook's publication. Expect FM 27-100 to be revised and republished as FM 1-04 Legal Support to the Operation Army no later than January 2009.

D. Training. As reflected in current operations, there is no substitute for tough, realistic training. Preparation for deployment requires training of three target audiences: JA personnel, commanders and their staffs, and Soldiers. Training methods include briefings, individual training, leader/commander training, and collective training.

1. *Judge Advocate Personnel.* SJAs/Brigade Judge Advocates (BJAs) are responsible for implementing a training program for their legal personnel. This program should abide by the Army's principles of training. See FM 27-100, section 4.5, for a detailed description of these principles and how a training program should be established.

a. *METL*. A legal office training program must be integrated with the unit's overall mission and training program. This is done through the development of battle tasks and selection of those tasks that are mission essential to form the METL. Based on these tasks, subordinate, collective, and individual tasks are developed with conditions and standards.

b. *Training Plan*. Once the METL, battle, and supporting, collective, and individual tasks are identified, a *training plan* should be developed. The training plan should begin with an *assessment* of each task's training status; *i.e.*, trained, needs improvement or untrained. Then a long-range plan of specific training events and activities is developed to bring untrained tasks and tasks needing improvement to a trained level, while ensuring trained tasks remain constant. The training program should be a cycle of assessment, training, evaluation and retraining.

c. *Common Soldier Task Training (CTT).*[1] Training must address both the Soldier and the lawyer and include tactical skills and legal skills. Legal personnel must all train common Soldier tasks. Often, it is possible to get this training from the supported combat units, providing an added opportunity for integration with units.

d. *Legal Skills*. In today's legally complex operations, the JA must be a "jack of all trades," proficient in all of the core legal disciplines and legal functional areas.[2] Today's operational environment often requires JAs and their enlisted paralegals to be geographically dispersed and to operate individually. Thus, JAs and paralegals must all train in each of the core legal disciplines. Paralegals should be able to recognize legal issues requiring JA attention ("issue-spot"); research to obtain answers and guidance; initiate investigations and actions; and be familiar with all other aspects of the delivery of legal services in a potentially austere environment.

e. *Types (unit, office, individual).* Legal personnel should use all available training methods. Unit collective training is a prime mode of conducting common task training. Office professional

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[1] *See, e.g.*, DEP'T OF THE ARMY STP 21-1-SMCT, SOLDIER'S MANUAL OF COMMON TASKS, SKILL LEVEL 1 (October 2006).

[2] *See* U.S. DEP'T OF ARMY, FIELD MANUAL 27-100, LEGAL SUPPORT TO OPERATIONS (1 Mar. 2000). The six core legal disciplines are administrative law, civil law, claims, international law, legal assistance and military justice. The three legal functional areas are command and control, sustainment, and personnel service support (or support, for short). The practice of operational law consists of legal services that *directly* affect the *command and control* and *sustainment* of an operation.

development sessions and mini-JA exercises are good for training JAs in the core legal disciplines and the practice of operational law. When field training opportunities arise, legal teams should deploy and exercise their technical chains. Ultimately, all legal personnel must proactively seek out resources, reading materials and opportunities to train themselves.

2. *Commanders and Staff.* Judge Advocates must know how to train commanders and staffs in the critical operational issues of ROE[3] and LOW. However, general deployment preparation should also include a strong preventive law training program. For example, commanders and staff should be trained on fiscal law principles and constraints. This will help prevent unauthorized commitments in operations and exercises. Preventive legal assistance instruction should educate commanders about the Servicemembers' Civil Relief Act (SCRA), basic tax filing and exemption considerations that accompany a deployed environment, and more.

3. *Soldiers.* Judge Advocate-conducted ROE, LOW and Code of Conduct training of Soldiers is the minimum requirement. However, like commanders and their staffs, Soldiers also stand to gain from preventive law training in the core legal disciplines. Instruction on basic family and financial obligations and how they are affected by deployments should be part of ongoing general deployment preparation. Additionally, instruction on the concept and normal contents of general orders helps Soldiers understand the deployed disciplinary environment.

E. Leadership and Integration. A critical lesson learned and observation from most deployments is the importance of pre-deployment integration with the supported commander, staff and unit. Judge Advocates must take the initiative and proactively lead legal support to operations. This means focusing on deployment preparation, developing legal support plans (*see* para. D. below), and integrating with the unit. Efforts to integrate with the command and staff have become easier with Army transformation and the assignment of JAs to brigades. Legal personnel should attend regularly-scheduled meetings (training, command and staff), social events, field exercises and key training events. Moreover, legal personnel should ensure that legal issues and reporting requirements and formats (such as fratricides, LOW violations and civilian casualties) are integrated into unit standing operating procedures (SOPs). Mission-specific integration should include attending planning meetings, situational updates, commander backbriefs, and orders briefings.

F. Legal Support Plan (Organization, Materiel, and Soldiers Considerations).

1. In *general* deployment preparation, the legal support plan is the Deployment SOP. The Deployment SOP should be constantly reviewed, revised, and rehearsed. In *mission-specific* deployment preparation, the legal support plan is the *Legal Annex* to the Operations Order/Plan (OPORD/OPLAN). The legal support plan is the first and most significant task to be performed by the SJA/BJA in preparing for deployment.

2. For specific missions, decisions must be made as to the personnel, resources, materiel, and equipment required to provide legal support throughout the phases of the operation and throughout the area of operations. The legal support plan must consider and support each phase of the operation. It should map out the personnel, resources, materiel, and equipment needed, as well as where they are needed, and when and how they will get there. The plan should account for legal personnel in the Time Phased Force Deployment Data (TPFDD) so they arrive in theater at appropriate times, meet load-out deadlines for vehicles and equipment, and consider what communications support will be available throughout the theater, etc. The legal support plan should be tied to both the legal preparation of the battlefield and overall mission analysis. The *Legal Annex* to the OPLAN/OPORD is a formal, written distillation of the legal support plan.

a. *Legal Preparation of the Battlefield (LPB).*

(1) Even though the legal issues confronted by a JA in operations are varied, they also are predictable to a great extent. Predicting legal issues in an operation is important because doing so contributes directly to the JA's planning and decision-making process. One method of predicting the legal issues is to read AARs and lessons learned materials gathered and published by CLAMO. Another

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[3] *See* CENTER FOR LAW AND MILITARY OPERATIONS, RULES OF ENGAGEMENT (ROE) HANDBOOK FOR JUDGE ADVOCATES, Ch.2 (1 May 2000) (detailing ROE training).

proactive method of predicting legal issues is to conduct *Legal Preparation of the Battlefield* (LPB).[4] Legal preparation of the battlefield is a methodology, or a planning tool, derived from the Intelligence Community's Intelligence Preparation of the Battlefield (IPB), to help the JA anticipate legal issues in operations. Simply put, the JA prepares a chart analyzing requirements from each core legal discipline for each phase of the operation (*see* Figure 1).

(2) Next the JA identifies those issues that are mission-critical, and attempts to resolve them proactively—applies "preventive law" to any issues that can be addressed prior to deployment—and raises "show-stoppers" to the commander and his or her staff. This is done in the format of a *legal estimate*.

(3) The resulting LPB product should also be used to create a *legal support plan*. As operations change over time and by phase, so too will the type and quantity of legal issues. Phases of an operation may be generically labeled, such as mobilization and predeployment, deployment and entry, and redeployment and demobilization. Operations may have more mission-specific names, such as Joint Task Force Bravo's phases for the Hurricane Mitch relief operations in Honduras: readying, reaction, relief, and rebuilding.

(4) The type and quantity of legal issues faced by JAs, as well as the quality of information available upon which to base an analysis, and hence the basis of legal opinions, will vary by phase. This lesson was learned in Bosnia[5] and the Hurricane Mitch relief operations,[6] and most recently in Iraq. The patterns of legal issues that developed during past operations may help JAs to conduct better legal preparation of the battlefield for future operations. Accurately predicting the flow of legal issues allows the JA to better tailor legal support to the specific operation. An important lesson learned about rapidly changing phases in an operation is that legal opinions can grow "stale" (*i.e.*, become invalid or erroneous) with time. JAs must ensure legal opinions address each issue under the current facts and situation, and that commanders do not rely upon old or uniquely-grounded opinions as a continued basis of authority.

b. *The Military Decision Making Process*. The SJA or BJA must be part of the MDMP and its seven steps: (1) Receipt of mission; (2) Mission analysis; (3) Course of action development; (4) Course of action analysis; (5) Course of action comparison; (6) Course of action approval; and (7) Orders production.[7] Functions performed by staff members, to include the SJA/BJA, include providing information; making estimates; making recommendations; preparing plans and orders; and supervising the execution of decisions. Mission analysis is critical to the overall planning process and to the preparation of the legal support plan. Mission, Enemy, Terrain and weather, Troops and Support, Time, and Civil considerations (METT-TC) is an analytical tool critical to conducting mission analysis, creating the legal estimate, and creating a legal support plan. While LPB maps out the types and quantities of legal issues expected to arise through the operation, the METT-TC analysis fills in the remaining gaps, context and constraints. For example, by considering where friendly troops will be, what they will be doing, what enemy actions will likely occur, where displaced and/or host nation civilians are likely to be, etc., JAs can better decide where provision of legal support is most critical.

c. *The Resulting Product*. The Legal Annex to the OPLAN/OPORD LPB is a device for predicting the type and quantity of legal issues that will arise through the phases of an operation. Legal preparation of the battlefield is interrelated with METT-TC analysis, as LPB is based in part on the

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[4] Legal Preparation of the Battlefield (LPB) is a concept developed by then MAJ Geoffrey Corn of the International and Operational Law Department at the Judge Advocate General's School, Charlottesville, Virginia. A more complete explanation of the LPB process can be found at International and Operational Law Note, *A Problem Solving Model for Developing Operational Law Proficiency: An Analytical Tool for Managing the Complex*, ARMY LAW., Sept. 1998, at 36.

[5] *See* CENTER FOR LAW AND MILITARY OPERATIONS, LAW AND MILITARY OPERATIONS IN THE BALKANS, 1995-1998: LESSONS LEARNED FOR JUDGE ADVOCATES, pp. 53-55 (13 Nov. 1998).

[6] *See* CENTER FOR LAW AND MILITARY OPERATIONS, LAW AND MILITARY OPERATIONS IN CENTRAL AMERICA: HURRICANE MITCH RELIEF EFFORTS, 1998-1999 – LESSONS LEARNED FOR JUDGE ADVOCATES (2000).

[7] *See* U.S. DEP'T OF ARMY, FIELD MANUAL 27-100, LEGAL SUPPORT TO OPERATIONS, sec. 4.2 Planning and Decision-Making (1 Mar. 2000) and CENTER FOR LAW AND MILITARY OPERATIONS, RULES OF ENGAGEMENT (ROE) HANDBOOK FOR JUDGE ADVOCATES, Ch.1 (1 May 2000) (currently under revision) (for detailed descriptions of the Military Decision Making Process and the Judge Advocate's role therein).

projected phases of the operation. Accordingly, METT-TC analysis should be done in conjunction with the commander and other staff members during the decision-making process. By tying together the LPB-predicted flow of legal issues with the concept and phases of the operation, an idea of how many JAs will be needed and where, and at what times (when), may be developed. Then, after considering the overall task organization—units that will compose the deployed forces and their organic JA assets—the decision as to who (which specific JAs by name or position) will deploy is made. The result should be a written Legal Annex to the OPLAN/OPORD that summarizes the legal support to the operation throughout the area of operations for all needed phases.

NOTE: Sample Legal Annexes and other sample legal products may be found on the CLAMO database (see para. II.C. above for instructions on accessing the CLAMO database) and Deployed JA DVD.

Functional Legal Areas / Phases of Operation	Employment of Force	Treatment of Non-Combatants	Staff Integration & Coordination	Money [Contract, Fiscal & Claims]	Force Admin and Support	Force Discipline
Mobilization & Predeployment						
ISB						
Counter Insurgency						
Defend						
Attack						
Post Conflict						

Figure 1. Legal Preparation of the Battlefield.

Figure 2. CLAMO AAR FORMAT

Issue: What is the legal or other issue that was confronted?; **Decision**: How was the issue resolved/solved and why?; **Recommendation**: What should be improved in this particular area to make dealing with this particular issue easier of future forces?

1. International & Operational Law
    a. After Action Reports
    b. Arms Control
        1. Chemical Weapons/RCA
        2. Biological weapons
        3. Nuclear weapons (components or nuclear materials (e.g. uranium, plutonium))
        4. Delivery systems for CBN weapons
        5. WMD
    c. Artifacts and War Trophies
        1. Artifacts
        2. War Trophies
    d. Civil Affairs
    e. Civilians on the Battlefield/Contractors
    f. Detention Operations/POW Issues
        1. Article 5 Tribunals
        2. Article 78 Reviews
        3. Code of Conduct
        4. Detainees and Detention Operations
    g. Environmental
        1. Environmental damage from military operations
        2. Environmental issues of concern from civilian activities or sabotage
    h. Foreign Assistance/Relations
        1. USG/host nation interaction
        2. USG/ coalition interaction
        3. USG International organization interaction
        4. USG Non-Governmental Organization interaction
    i. General Orders
    j. Humanitarian Assistance
    k. Human Rights Law
    l. Information Operations
    m. Law Of War/LOAC
        1. Law of War Training
    n. Legal Basis for Conducting Operations
    o. Intelligence Law
    p. Interrogations
    q. Rule of Law/Judicial Reform
        1. Central Criminal Court of Iraq
        2. Coalition Provisional Authority
        3. Enduring Freedom
    r. Post Conflict Stability Operations
    s. ROE/Targeting
    t. Treaties & Other International Agreements
        1. Asylum
        2. SOFAs & ACSAs
    u. United Nations
        1. Security Council Resolutions
        2. UN Reports
    v. War Crimes
    w. Weapon Systems
        1. Legal Review on Weapons
        2. Lethal Weapons
        3. Less than Lethal Weapons

2. Administrative Law
    a. AAFES
    b. Customs and Passports
    c. Drawdowns
    d. Ethics/JER
    e. FOIA/Privacy Act
    f. Inspections
    g. Internet Use
    h. Investigations
        1. 15-6
        2. Line of Duty
        3. Mishap and Safety Investigation
        4. Reports of Survey
    i. Labor/Employment Law
    j. Law of Military Installations
    k. Medical Issues
    l. Military Personnel Law
        1. Administrative Separations
        2. Conscientious Objectors
        3. Evaluation Reports
            (a) Enlisted
            (b) Officer
        4. Females in Combat
        5. Hazing
        6. Homosexuality
        7. Lautenberg Amendment
        8. Letters of Reprimand
        9. Relief for Cause
    m. Morale, Welfare and Recreation
3. Civil Law
    a. Fiscal and Contract Law
        1. Commander's Emergency Response Program
        2. Contract Law
        3. Deployed Contracting
        4. Fiscal Law
            A. ACSAs
            B. General
        5. LOGCAP Contracting
4. Claims
    a. Foreign Claims
        1. Individual and corporate claims against the United States
        2. Claims of foreign governments
        3. Claims within the host nation that could affect US interests or operations.
    b. Personnel Claims
    c. Solatia
5. Legal Assistance
    a. Children
        1. Adoption
        2. Custody
        3. Paternity
        4. Child Support
    b. Citizenship
    c. Debtor/Creditor Issues
    d. Divorce
    e. Powers of Attorney
    f. Voting

g. Service members Civil Relief Act
h. Uniformed Services Employment and Reemployment Rights Act
i. Wills

6. Military Justice
   a. General Orders
   b. Judiciary
   c. Jurisdiction
   d. Magistrates
   e. Provisional Units
   f. Searches
   g. TDS
   h. Urinalysis Program
   i. Victim Witness Liaison Program
7. Coalition Operations
8. Interagency Operations
   a. Interagency coordination
   b. Points of contact
9. Homeland Security Operations
   a. Homeland Defense
      (1) DSCA
      (a) MSCLE & PCA
      (b) Special Events
      (c) Civil Disturbances
      (2) Port Security & Customs
   b. Consequence Management
      (1) Disaster Relief
      (2) WMD
   c. Counter Drug Operations
   d. Counter Terrorism
   e. Intelligence Law & Policy Considerations
   f. Rules for the Use of Force
   g. Status & Relationship of Different Agencies and Sub-Agencies Participating in Homeland Security Operations
   h. Funding
10. Doctrine, Organization, Training, Material, Leadership, Personnel, and Facilities (DOTMLPF) and Country Materials
   a. Doctrine
   b. Organization (Force Structure)
   c. Training, MDMP, and Readiness
      (1) Army
      (a) Annexes
      (b) FSOPs
      (c) MDMP
      (d) Office METL
      (2) CTCs
      (a) BCTP
      (b) JMRC
      (c) JRTC
      (d) NTC
      (3) Pre-deployment Training Material
      (4) Service Academies
   d. Material
   e. Leadership
   f. Personnel
   g. Facilities
   h. Country Materials

NOTES

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CHAPTER 29

INTERNET WEBSITES USEFUL FOR OPERATIONAL LAWYERS

Acquisition Deskbook Homepage http://www.deskbook.osd.mil

The United States Agency for International Development. www.usaid.gov

Air Force

Materiel Command http://www.afmc.wpafb.af.mil

Publications http://www.e-publishing.af.mil/

Aerospace Power Journal http://www.airpower.maxwell.af.mil

Army

Homepage http://www.army.mil

Materiel Command http://www.amc.army.mil/

Regulations http://www.army.mil/usapa/epubs/index.html

Field Manuals/TNG Cir./ Graphic TNG aids http://www-cgsc.army.mil/ or http://www.army.mil/usapa/doctrine/Active_FM.html

Various References http://www.usapa.army.mil

Associated Press http://www.ap.org

Association of the United States Army http://www.ausa.org

Australian Defence http://www.defence.gov.au/adfa/

Brookings Institution http://www.brook.edu/

Cable News Network

http://www.cnn.com/

http://www.cnn.com/world (CNN World News)

http://www.cnn.com/weather/index.html (CNN Weather)

http://www.cnn.com/ALLPOLITICS// (CNN Politics)

Center for Army Lessons Learned http://call.army.mil

Center for Defense Information http://www.cdi.org/

Center for Disaster Management & Humanitarian Assistance http://www.cdmha.org

Center for Nonproliferation Studies http://cns.miis.edu/

Center for Strategic and International Studies http://www.csis.org/

Center for Strategic Leadership http://carlisle-www.army.mil/usacsl/index.asp

Central Intelligence Agency http://www.cia.gov

Centre for Strategic Studies (New Zealand) http://www.vuw.ac.nz/css/

Coalition for International Justice http://www.cij.org/

Coast Guard www.uscg.mil

Code of Federal Regulations http://www.law.cornell.edu/regs.html

Combined Arms Research Library http://www-cgsc.army.mil/carl/

Comptroller General Decisions http://www.gpoaccess.gov/gaodecisions/index.html

Congress

www.senate.gov

http://www.house.gov

http://thomas.loc.gov/

Congressional Record http://www.gpoaccess.gov/index.html

Country Studies (DoS) http://libfind.unl.edu:2020

Country Studies (Library of Congress) http://lcweb2.loc.gov/frd/cs/

Court opinions

http://www.law.emory.edu (includes decisions for 4th, 6th, and 11th Cir.)

Court of Appeals for the Armed Forces www.armfor.uscourts.gov

Criminal Justice sites http://www.vera.org/

Defense Acquisition Regulations Directory http://www.acq.osd.mil/dpap/

Defense Financial Accounting System (DFAS) http://www.dod.mil/dfas/

Defense Intelligence Agency http://www.dia.mil

Defense Link http://www.defenselink.mil

Defense Technical Information Web http://www.dtic.mil

Demining http://www.humanitarian-demining.org/demining/default.asp

Department of Defense Directives and Instructions: http://www.dtic.mil/whs/directives

Department of National Defence http://www.dnd.ca/

Department of Justice http://www.usdoj.gov

Department of State http://www.state.gov

Department of Treasury http://www.ustreas.gov

DSN On-Line Directory http://dsnbbs.ncr.disa.mil/telephone.htm

Embassies http://www.embassy.org

Environmental Protection Agency http://www.epa.gov

Europa http://europa.eu.int

European Line http://www.europeonline.com (provides latest info on events in Europe)

Executive Orders http://www.fas.org/irp/offdocs/direct.htm

Federal Acquisition Regulations http://acquisition.gov/comp/far/index.html (includes FAR Circulars)

Federal Acquisition Virtual Library http://acquisition.gov/

Federal Bureau of Investigations (FBI) http://www.fbi.gov

Federal Communications Commission http://www.fcc.gov

Federal Emergency Management Agency (FEMA) http://www.fema.gov

Federal Register http://fr.cos.com/

FedWorld http://www.fedworld.gov/ (a one-stop location to locate/order USG documents)

Fletcher Forum http://fletcher.tufts.edu (Forum requires a subscription.)

Forces Command (FORSCOM) http:// www.forscom.army.mil/jag

Foreign Affairs http://www.foreignaffairs.org

General Accountability Office http://www.gao.gov

GAO Comptroller General Decisions http://www.gpoaccess.gov/gaodecisions/index.html

General Service Administration http://www.gsa.gov

German Information Center http://www.germany-info.org/relaunch/index.html

Government Printing Office (GPO) Access http://www.access.gpo.gov/

Hoover Institution http://www-hoover.stanford.edu/

House Armed Services Committee http://www.house.gov/hasc/

House of Representatives http://www.house.gov/

Human Resources Command (Army) https://www.hrc.army.mil/indexflash.asp

Human Rights http://www1.umn.edu/humanrts (Univ. Of Mn. Human Rights library)

Industrial College of of the Armed Forces http://www.ndu.edu/icaf ***/***

Institute for National Strategic Studies http://www.ndu.edu/inss/insshp.html

Institute for the Advanced Study of Information Warfare http://www.psycom.net/iwar.1.html

IntelWeb http://intelweb.janes.com/

Intelligence Related links http://www.fas.org/irp/index.html

Internal Revenue Service (IRS) http://www.irs.ustreas.gov/

International Committee of the Red Cross http://www.icrc.org

International Court of Justice Opinions http://www.lawschool.cornell.edu/library/

International Criminal Tribunal For the Former Yugoslavia http://www.un.org/icty/

International Institute for Strategic Studies http://www.iiss.org/

International Laws and Treaties

http://www.fletcher.tufts.edu/

http://www.jura.uni-sb.de/english/ (contains German & European codes)

International Security Network http://www.isn.ethz.ch

Jaffee Center for Strategic Studies http://www.tau.ac.il/jcss/

Janes's Information Store http://www.janes.com/

Joint Chiefs of Staff http://www.dtic.mil/jcs

Joint Doctrine http://www.dtic.mil/doctrine/doctrine.htm

Joint Electric Library (JEL) http://www.dtic.mil/doctrine/jel/index.html

Joint Forces Quarterly http://www.dtic.mil/doctrine/jel/jfq_pubs/index.htm

Journal of Humanitarian Assistance http://www.jha.ac/

Joint Readiness Training Center http://www.jrtc-polk.army.mil

Judge Advocate General Corps (Army) http://www.jagcnet.army.mil/

Justice Information Center (NCJRS) http://www.ncjrs.org

Legal Research

http://findlaw.com

http://www.lawcrawler.com/

Legislative Information

http://thomas.loc.gov

http://www4.law.cornell.edu/uscode (access to the U.S.C.)

Library of Congress http://www.loc.gov/

http://lcweb.loc.gov/homepage/lchp.html

http://thomas.loc.gov

MarineLink http://www.hqmc.usmc.mil/

Marine Corps Judge Advocate Division Home Page http://www.hqmc.usmc.mil

Marshall Center http://www.marshallcenter.org

Military Times http://www.militarycity.com

Military Spending Working Group http://www.fas.org/pub/gen/mswg/

Ministry of Defense (U.K.) http://www.mod.uk/

National Archives and Records Administration http://www.nara.gov

National Defense University http://www.ndu.edu/

National Public Radio http://www.npr.org/

National Security Agency http://www.fas.org/irp/nsa/index.html

National Technical Information Service http://www.ntis.gov/

National War College http://www.ndu.edu/nwc/index.htm

NATO http://www.nato.int/

Navy Electronic Directives System http://neds.daps.dla.mil/

NavyOnLine http://www.navy.mil/

Navy JAG Instructions http://www.jag.navy.mil/JAGTools/JAGINSTRUCTIONS.htm

Naval Postgraduate School http://www.nps.navy.mil/

Net Surfer Digest http://www.netsurf.com/nsd

New York Times http://www.nytimes.com/

Organization of American States http://www.oas.org/

Partnership for Peace Information Management System
http://www.pimswiki.org/index.php?title=Main_Page

RAND Corporation http://www.rand.org/

Search tools http://www.lycos.com

http://www.go.com

http://www.altavista.com

http://www.yahoo.com

http://www.google.com/

http://www.pointcom.com/

http://www.dogpile.com

http://webcrawler.com/

Senate http://www.senate.gov

Senate Armed Services Committee http://www.senate.gov/~armed_services/

Smithsonian Institution http://www.si.edu

Social Security Administration http://www.ssa.gov

Stockholm International Peace Research Institute (SIPRI) http://www.sipri.org/

Time Magazine http://www.time.com/time/

TRADOC http://www-tradoc.army.mil/

Treaties *See* United Nations

Unified Commands

http://www.northcom.mil/ (NORTHCOM)

http://www.transcom.mil (TRANSCOM)

http://www.eucom.mil (EUCOM)

http://www.pacom.mil/ (PACOM)

http://www.southcom.mil/ (SOUTHCOM)

http://www.centcom.mil (CENTCOM)

http://www.socom.mil (SOCOM)

http://www.jfcom.mil (JFCOM)

http://www.stratcom.mil/ (STRATCOM)

United Nations http://www.un.org/

http://www.un.org/depts/dpko (UN PKOs)

United Nations Scholars' Workstation http://www.library.yale.edu/un/

United States Agency for International Development http://www.usaid.gov/

U.S. Army Command and General Staff College http://www-cgsc.army.mil

United States Code (U.S.C.)

http://www.law.cornell.edu

U.S. Congress (Thomas) http://thomas.loc.gov/

U.S. Government (General) http://www.fedworld.gov

United States Institute of Peace http://www.usip.org/

U.S. Information Agency http://dosfan.lib.uic.edu/usia/

U.S. Marine Corps: www.usmc.mil

United States Military Academy http://www.usma.edu/

U.S. News & World Report http://www.usnews.com

U.S. Supreme Court Info http://www.uscourts.gov

USA Today http://www.usatoday.com/

Veterans Affairs http://www.va.gov

Virtual law library http://www.law.indiana.edu/v-lib/

Voice of America http://www.voa.gov/

Weather info http://www.nws.noaa.gov (Nat'l Weather Service)

http://cirrus.sprl.umich.edu/wxnet

White House http://www.whitehouse.gov/

World News Connection http://wnc.fedworld.gov/

Yahoo WWW Server http://dir.yahoo.com/government/law/

NOTES

GLOSSARY[1]

AAA	Army Audit Agency; Anti-Air Defense Artillery
AADC	Area Air Defense Coordinator
AADCOM	Army Air Defense Command
AADCOORD	Army Air Defense Coordinator
AATF	Air Assault Task Force
ABCA	Australian, British, Canadian, American
ABCC	Airborne Battlefield Command & Control
ABL	Ammunition Basic Load
ABN	Airborne
AC	Active Component
ACA	Airspace Control Authority
ACC	Air Combat Command
ACofS	Assistant Chief of Staff
ACMR	Army Court of Military Review
ACP	Army Country Profiles
ACR	Armored Cavalry Regiment
ACSA	Acquisition & Cross-Servicing Agreement
AD	Active Duty; Air Defense
ADA	Air Defense Artillery
ADC	Area Damage Control
ADC-M	Ass't Division Commander-Maneuver
ADC-S	Ass't Division Commander-Support
ADCON	Administrative Control
ADDS	Army Data Distribution System
ADP	Automated Data Processing
ADSW	Active Duty Special Work
ADT	Active Duty for Training
AE	Aeromedical Evacuation
AECC	Aeromedical Evacuation Control Center
AELT	Aeromedical Evacuation Liaison Team
AES	Airdrop Equipment Support
AF	Air Force
AFFS	Army Field Feeding System
AFARS	Army Federal Acquisition Regulation Supplement
AFSOC	Air Force Special Operations Command
AG	Adjutant General
AGR	Active (duty) Guard Reserve
AID	Agency for International Development
AJAG	Assistant Judge Advocate General
ALO	Air Liaison Officer
ALOC	Air Lines of Communication
AMC	At My Command; Army Material Command; Air Mobility Command
AMO	Automation Management Office
ANG	Air National Guard
ANGLICO	Air & Naval Gunfire Liaison Company
AO	Area of Operations
AOC	Air Operations Center
AOD	Area-Oriented Depots
AOR	Area of Responsibility
APC	Armored Personnel Carrier
APOD	(Aerial POD) Aerial Port of Debarkation
APOE	Aerial Port of Embarkation
AR	Army Regulation
ARC	American Red Cross
ARFOR	Army Forces
ARNG	Army National Guard
ARRC	Allied Rapid Reaction Corps
ARSOC	Army Special Operations Command
ARSOF	Army Special Operations Forces
ARTEP	Army Training and Evaluation Program
ASAP	As Soon As Possible
ASG	Area Support Group
ASIC	All Source Intelligence Center
ASP	Ammunition Supply Point
AT	Antiterrorism; Antitank; Annual Training
A&T,P&I	Administrative and Technical Staff, Privileges and Immunities
ATC	Air Traffic Control
ATF	Alcohol, Tobacco, & Firearms
AUTODIN	Automatic Digital Network
AVCRAD	Aviation Classification Repair Activity Depot (ARNG)
AVIM	Aviation Intermediate Maintenance
AVN	Aviation
AVUM	Aviation Unit Maintenance
AWACS	Airborne Warning and Control System
AWOL	Absent Without Leave
AWRS	Army War Reserve Sustainment
BAS	Battlefield Automated Systems
BB	Break Bulk
BBP	Break Bulk Points
BCOC	Base Cluster Operations Center
BCTP	Battle Command Training Program
BDE	Brigade

[1] *See also*DOD Dictionary of Military and Associtated Terms, as amended through 9 May 2005, *available at* http://www.dtic.mil/doctrine/jel/doddict/ (interactive version) or http://www.dtic.mil/doctrine/jel/new_pubs/jp1_02.pdf and FM 1-02 (previously 100-5-1), Operational Terms and Graphics, 21 Sep 2004, *available at* https://akocomm.us.army.mil/usapa/doctrine/DR_pubs/dr_aa/pdf/fm1_02.pdf (AKO login required).

BDOC	Base Defense Operations Center
BDU	Battle Dress uniform
BN	Battalion
BOMREP	Bombing Report
BSB	Base Support Battalion
BOS	Battlefield Operating Systems
BPS	Basic PSYOP Study
C2	Command & Control
C2I	Command, Control, & Intelligence
C3	Command, Control, & Communications
C3I	Command, Control, Communications, & Intelligence
C4	Command, Control, Communications, & Computers
CA	Civil Affairs
CAAF	Court of Appeals for the Armed Forces
CAG	Civil Affairs Group
CALL	Center for Army Lessons Learned
CARE	Cooperative for Assistance & Relief Everywhere
CAS	Close Air Support
CAV	Cavalry
CCIR	Commander's Critical Information Requirements
CCP	Civilian Collection Point
CCT	Combat Control Team
CD	Counterdrug
CDC	Center for Disease Control
CDS	Container Delivery System
CE	Corps of Engineers
CENTCOM	Central Command
CEP	Circular Error Probable
CFA	Covering Force Area
CFL	Coordinated Fire Line
CFZ	Critical Friendly Zone
CG	Commanding General
CGSC	Command & General Staff College
CI	Civilian Internee; counter-intelligence
CIA	Central Intelligence Agency
CID	Criminal Investigation Division
CIF	Central Issue Facility
CIMIC	Civil-Military Cooperation
CINC	Commander in Chief
CJA	Command Judge Advocate
CJCS	Chairman, Joint Chiefs of Staff
CJTF	Combined Joint Task Force or Commander, JTF
CMCA	Court-Martial Convening Authority
CMO	Civil-Military Operations
CMOC	Civil-Military Operations Center
CMTC	Combined Maneuver Training Center
CO	Commanding Officer; Conscientious Objector
COA	Course of Action
COM	Casualty Operations Management
COCOM	Combatant Command
COMA	Court of Military Appeals
COMMZ	Communications Zone
COMSEC	Communications Security
CONOPS	Continuous Operations
CONPLAN	Concept Plan
CONUS	Continental United States
CONUSA	Continental United States Army
COR	Contracting Officer's Representative
COS	Chief of Station
COSCOM	Corps Support Command
CP	Command Post
CPX	Command Post Exercise
CS	Combat Support
CSAR	Combat Search and Rescue
CSB	Combat Support Battalion
CSE	Combat Support Equipment
CSH	Combat Support Hospital
CSM	Command Sergeant Major
CSP	Contracting Support Plan
CSR	Controlled Supply Rate
CSS	Combat Service Support
CSSAMO	Combat Service Support Automation Management Office
CT	Counterterrorism
CTA	Common Table of Allowances
CTF	Combined Task Force
CV	Combat Vehicle
CW	Chemical Weapons
CWC	Chemical Weapons Convention
CZ	Combat Zone
DA	Department of the Army; Development Assistance
DACG	Departure Airfield Control Group
DAD	Defense Appellate Division
DAO	Defense Attaché Office
DART	Disaster Assistance Response Team
DC	Defense Counsel
DC	Dislocated Civilian
DCM	Deputy Chief of Mission
DCSLOG	Deputy Chief of Staff for Logistics
DCSOPS	Deputy Chief of Staff for Operations and Plans
DCSPER	Deputy Chief of Staff for Personnel
DEA	Drug Enforcement Administration
DFCP	DISCOM Forward Command Post
DIA	Defense Intelligence Agency
DIAM	Defense Intelligence Agency Manual
DISCOM	Division Support Command

DIVARTY	Division Artillery
DJMS	Defense Joint Military Pay System
DLI	Defense Language Institute
DMAIN	Division Main Area
DMPI	Desired Mean Point of Impact
DOC	Division Operations Center
DOC	Department of Commerce
DoD	Department of Defense
DoJ	Department of Justice
DoS	Department of State; Days of Supply
DOT	Department of Transportation
DRB	Division Ready Brigade
DREAR	Division Rear Area
DRF	Division Ready Force
DS	Direct Support
DSA	Division Support Area
DSCA	Defense Security Cooperation Agency
DSJA	Deputy Staff Judge Advocate
DSOC	Division Support Operations Center
DSU	Direct Support Unit
DTG	Date Time Group
DTOC	Division Tactical Operations Center
DX	Direct Exchange
DZ	Drop Zone
EA	Engagement Area; each
E&E	Evasion & Escape
EAC	Echelons Above Corps
EAD	Echelons Above Division
EBS	Emergency Broadcast System
EDRE	Emergency Deployment Readiness Exercise
EEP	Embassy Evacuation Plan
ENDEX	End of Exercise
EO	Executive Order; Equal Opportunity
EOC	Emergency Operations Center
EOD	Explosive Ordnance Disposal
EPW	Enemy Prisoner of War
EOD	Explosive Ordnance Disposal
ESF	Economic Support Fund
ETA	Estimated Time of Arrival
EUCOM	U.S. European Command
EW	Electronic Warfare
FA	Field Artillery
FA	Functional Area
FAA	Federal Aviation Administration; Forward Assembly Area
FAC	Forward Air Controller
FANS	Friendly/Allied Nation Support
FAO	Food and Agriculture Support
FAR	Federal Acquisition Regulation
FASCAM	Family of Scatterable Mines
FBI	Federal Bureau of Investigation
FBIS	Foreign Broadcast Information Service
FCA	Foreign Claims Act
FCZ	Forward Combat Zone
FDC	Fire Direction Center
FEBA	Forward Edge of the Battle Area
FEMA	Federal Emergency Management Agency
FID	Foreign Internal Defense
FIST	Fire Support Team
FLIR	Forward Looking Infrared
FLOT	Forward Line of Troops
FM	Field Manual
FN	Foreign Nation
FNS	Foreign Nation Support
FOA	Field Operating Agency
FOB	Forward Operating Base
FORSCOM	Forces Command
FSE	Fire Support Element
FSO	Fire Support Officer
FSOP	Field Standing Operating Procedures
FSU	Finance Support Unit
FTM	Full-TIme Manning (High Priority NG Units)
FTTD	Full-Time Training Duty (NG Title 32 Status)
FTX	Field Training Exercise
FYI	For Your Information
G-1 (Division)	Ass't Chief of Staff, Personnel
G-2 (Division)	Ass't Chief of Staff, Intelligence
G-3 (Division)	Ass't Chief of Staff, Operations & Plans
G-4 (Division)	Ass't Chief of Staff, Logistics
G-5 (Division)	Ass't Chief of Staff, Civil Affairs
GAD	Government Appellate Division
GCMCA	General Court-Martial Convening Authority
GJA	Group Judge Advocate
GPS	Global Positioning System
GS	General Support
GSR	General Support Reinforcing
GSR	Ground Surveillance Radar
GSU	General Support Unit
GUARDRAIL	Special Electronic Mission Aircraft
HA	Humanitarian Assistance
HAHO	High Altitude High Opening
HALO	High Altitude Low Opening
HAP	Humanitarian Assistance Program
HAST	Humanitarian Assistance Survey Team
H/CA	Humanitarian/Civic Assistance
HD	Heavy Drop
HE	High Explosive
HEAT (round)	High-Explosive Anti-Tank

HEMTT	Heavy Expanded Mobility Tactical Truck
HEP-T	High Explosive Plastic Tracer
HHB	Headquarters & Headquarters Battery
HHC	Headquarters & Headquarters Company
HHT	Headquarters & Headquarters Troop
HET	Heavy Equipment Transporter
HLZ	Helicopter Landing Zone
HMMWV	High-Mobility Multipurpose Wheeled Vehicle
HN	Host Nation
HNS	Host Nation Support
HOC	Humanitarian Operations Center
HPT	High Payoff Target
HQ	Headquarters
HQDA	Headquarters, Department of the Army
HSS	Health Service Support
HUMINT	Human Intelligence
HVT	High Value Target
I&S	Interrogation & Surveillance
IAW	In Accordance With
ICM	Improved Conventional Munitions
ICRC	International Committee of the Red Cross
ID Card	Identification Card
IDAD	Internal Defense and Development
IDT	Inactive Duty Training (NG Federal Status Training Performed while NOT on Active Duty)
IFF	Identification, Friend or Foe
IFR	Instrument Flight Rules
IFV	Infantry Fighting Vehicle
IG	Inspector General
IMA	Individual Mobilization Augmentee
IMINT	Imagery Intelligence
INS	Immigration & Naturalization Service
IO	Investigating Officer
IPB	Intelligence Preparation of the Battlefield
IPOA	Intelligence Preparation of the Operational Area
IPW	Prisoner of War Interrogation
IR	Information Requirements
ISB	Intermediate Staging Base
ITV	Improved TOW Vehicle
J-1	Manpower & Personnel Directorate of a joint staff
J-2	Intelligence Directorate of a joint staff
J-3	Operations Directorate of a joint staff
J-4	Logistics Directorate of a joint staff
J-5	Plans Directorate of a joint staff
J-6	Command, Control, Communications, Computer Systems Directorate of a joint staff
JA	Judge Advocate
JAG	Judge Advocate General
JAAP	Joint Airborne Advance Party
JAAT	Joint Air Attack Team
JAGSO	Judge Advocate General Service Organization
JCS	Joint Chiefs of Staff
JESS	Joint Exercise Simulation System
JFACC	Joint Force Air Component Commander
JFC	Joint Force Commander
JFCOM	Joint Forces Command
JFLCC	Joint Force Land Component Commander
JIB	Joint Information Bureau
JIC	Joint Information Committee
JMC	Joint Movement Center
JMRO	Joint Medical Regulating Office
JOA	Joint Operations Area
JOPES	Joint Operations Planning System
JP-4	Jet Propulsion Fuel, Type 4
JRA	Joint Rear Area
JRAC	Joint Rear Area Coordinator
JRTC	Joint Readiness Training Center
JRX	Joint Readiness Exercise
JSAC	Joint State Area Command
JSCP	Joint Strategic Capabilities Plan
JSEAD	Joint Suppression of Enemy Air Defense
JSOA	Joint Special Operations Area
JSOC	Joint Special Operations Command
JSOTF	Joint Special Operations Task Force
JSPS	Joint Strategic Planning System
JTF	Joint Task Force
KATUSA	Korean Augmentation to the U.S. Army
KIA	Killed In Action
KTO	Kuwait Theater of Operations
LAAWS	Legal Automation Army-Wide System
LAN	Local Area Network
LAW	Light Antitank Weapon
LAPES	Low Altitude Parachute Extraction System
LBE	Load Bearing Equipment
LCE	Load Carrying Equipment
LD/LC	Line of Departure/Line of Contact
LEA	Law Enforcement Authority
LO	Liaison Officer
LOC	Lines of Communication

LOGCAP	Logistics Civilian Augmentation Program
LOGPAC	Logistics Package
LOGSEC	Logistics Security
LOS	Line of Sight; Law of Sea
LP	Listening Post
LRF	Laser Range Finder
LRS	Long Range Surveillance
LRSD	Long Range Surveillance Detachment
LRSU	Long Range Surveillance Unit
LSA	Life Support Area
LSC	Legal Services Command
LSC	Life Support Center
LSO	Legal Support Organization
LTACFIRE	Lightweight Tactical Fire Direction System
LZ	Landing Zone
MA	Mortuary Affairs
MAAG	Military Assistance Advisory Group
MAC	Military Airlift Command
MACOM	Major Army Command
MBA	Main Battle Area
MCA	Military Civic Action
MCC	Movement Control Center
MCM	Manual for Courts-Martial
MCS	Maneuver Control System
MECH	Mechanized
MEDEVAC	Medical Evacuation
MEDLOG	Medical Logistics
MEDRETE	Medical Readiness Training Exercise
METL	Mission Essential Task List
METT-T	Mission, Enemy, Terrain, Troops, Time Available
METT-T-P	METT-T Plus Political Factors
MFT	Mighty Fine Trial
MI	Military Intelligence
MIA	Missing In Action
MILGP	Military Group
MIL-TO-MIL	Military to Military
MJT	Military Judge Team
MLRS	Multiple Launch Rocket System
MMC	Materiel Management Center
MOBEX	Mobility Exercise
MOS	Military Occupational Specialty
MOPP	Mission-Oriented Protective Posture
MOUT	Military Operations on Urbanized Terrain
MP	Military Police
MPI	Military Police Investigations
MRE	Meal, Ready to Eat
MRL	Multiple Rocket Launcher
MSE	Mobile Subscriber Equipment
MSG	Military Support Group
MSR	Main Supply Route
MTF	Medical Treatment Facility
MTOE	Modified Table of Organization & Equipment
MTP	Mission Training Plan
MTT	Mobile Training Team
NAC	North Atlantic Council
NATO	North Atlantic Treaty Organization
NBC	Nuclear, Biological, Chemical
NEO	Noncombatant Evacuation Operation
NFA	No Fire Area
NFL	No Fire Line
NG	National Guard
NGB	National Guard Bureau
NGF	Naval Gun Fire
NGO	Non-governmental Organization
NLT	No Later Than
NORAD	North American Air Defense Command
NOVAD	National Voluntary Organizations Active in Disaster
NSA	National Security Agency
NSC	National Security Council
NTC	National Training Center
NVD	Night Vision Device
O&M	Operations & Maintenance
O/C	Observer/Controller
OCOKA	Observation & Fields of Fire, Cover & Concealment, Obstacles, Key Terrain, and Avenues of Approach & Military Corridors
OCONUS	Outside Continental Limits of the U.S.
ODA	Office for Disaster Assistance
ODT	Overseas Deployment Training
OFDA	Office of Foreign Disaster Assistance
OHDCA	Overseas Humanitarian Disaster & Civic Aid
OJT	On-the-Job-Training
OP	Observation Post
OPCOM	Operational Command
OPCON	Operational Control
OPLAN	Operations Plan
OPLAW	Operational Law
OPLAWYER	Operational Law Attorney
OPORDER	Operations Order
OPSEC	Operational Security
ORF	Operational Readiness Float
PA	Public Affairs
PAC	Personnel Administrative Center
PACOM	Pacific Command
PAO	Public Affairs Office
PCA	Personnel Claims Act;

PCA	Per Curiam Affirmed
PCO	Peacetime Contingency Operation
PEC	Professional Education Center
PERSCOM	Personnel Command
PIR	Priority Intelligence Requirements
PJA	Post Judge Advocate
PKO	Peacekeeping Operation
PL	Phase Line
PLL	Prescribed Load List
PMO	Provost Marshal Office
POC	Point of Contact
POL	Petroleum, Oil, Lubricants
POLAD	Political Advisor
POM	Preparation for Overseas Movement
POMCUS	Pre-positioning of Material Configured to Unit Sets
PRC	Populace & Resources Control
PSC	Personnel Service Company
PSS	Personnel Service Support
PYSOP	Psychological Operations
PVO	Private Voluntary Organization
PW	Prisoner of War
PZ	Pickup Zone
PWRMS	Pre-positioned War Reserve Material Stocks
QSTAG	Quadripartite Standardization Agreement (see ABCA)
RAA	Rear Assembly Area
RAP	Rocket-Assisted Projectile
RC	Reserve Component
RCU	Remote Control Unit
RCZ	Rear Combat Zone
RCA	Riot Control Agent
REDCON	Readiness Condition
REFORGER	Return of Forces to Germany
REMFS	Rear Echelon Pukes
RFA	Restrictive Fire Area
RFL	Restrictive Fire Line
RJA	Regimental Judge Advocate
RLC	Regional Legal Center
ROC	Rear Operations Center
ROE	Rules of Engagement
ROM	Refuel on the Move
ROZ	Rear Operations Zone
RP	Release Point
RSC SJA	Regional Support Command Staff Judge Advocate
RSO	Regional Security Officer
RSR	Required Supply Rate
S-1	Adjutant
S-2	Intelligence Officer
S-3	Operations and Training Officer
S-4	Supply Officer
S-5	Civil Affairs Officer
S&S	Supply & Service
SA	Security Assistance; Secretary of the Army
SAD	State Active Duty (Guard Units Order to State Service)
SAC	Stand Alone Capability; Special Agent in Charge
SAM	Surface to Air Missile
SAMS	School of Advanced Military Studies
SAO	Security Assistance Organization
SAR	Search & Rescue
SCI	Sensitive Compartmented Information
SCM	Summary Court-Martial
SCMCA	Summary Court-Martial Convening Authority
S/D	Self-Defense
SECDEF	Secretary of Defense
SERE	Survival, Evasion, Resistance, Escape
SF	Special Forces
SFOB	Special Forces Operational Base
SFOD	Special Forces Operational Detachment
SGS	Secretary of the General Staff
SHAPE	Supreme HQ Allied Powers Europe
SIDPERS	Standard Installation/Division Personnel System
SITREP	Situation Report
SJA	Staff Judge Advocate
SLAR	Side-Looking Airborne Radar
SO	Special Operations
SOCOM	Special Operations Command
SOF	Special Operations Forces
SOFA	Status of Forces Agreement
SOMA	Status of Mission Agreement
SOP	Standing Operating Procedure
SME	Subject Matter Expert
SPCM	Special Court-Martial
SPCMCA	Special Court-Martial Convening Authority
SPT	Support
SOUTHCOM	Southern Command
SSCR	Single-Service Claims Responsibility
SSCRA	Soldiers' & Sailors' Civil Relief Act
STANAG	Standardization Agreement
STANAG	Standard NATO Agreement
STARC	State Area Command
SWO	Staff Weather Officer
TA	Theater Army; Table of Allowances
TAA	Tactical Assembly Area
TAACOM	Theater Army Area Command
TACAIR	Tactical Air

TAC CP	Tactical Command Post
TACFIRE	Tactical Fire Control
TACON	Tactical Control
TACSAT	Tactical Satellite
TAI	Target Area of Interest
TAJAG	The Assistant Judge Advocate General
TALO	Tactical Airlift Liaison Officer
TAMMC	Theater Army Material Management Center
TBD	To Be Determined
TC	Trial Counsel or Tank Commander
TCP	Traffic Control Point
TCSB	Third Country Support Base
TDA	Table of Distribution & Allowance
TDS	Trial Defense Service
TEWT	Tactical Exercise Without Troops
TF	Task Force
THREATCON	Threat Condition
TMO	Transportation Movement Office
TOC	Tactical Operation Center
TO&E	Table of Organization and Equipment
TOR	Terms of Reference
TOT	Time On Target (for Arty); Time Over Target for AF
TOW	Tube-launched, Optically tracked, Wire-guided
TPFDL	Time Phased Force Deployment List
TPL	Time Phase Line
TRADOC	U.S. Army Training and Doctrine Command
TRP	Target Reference Point
TSOP	Tactical Standing Operating Procedure
TTP	Tactics, Techniques, & Procedures
TVA	Target Value Analysis
UAV	Unmanned Aerial Vehicle
UBL	Unit Basic Load
UHF	Ultra High Frequency
UIC	Unit Identity Code
UMR	Unit Manning Report
UN	United Nations
UNHCR	UN High Commissioner for Refugees
UNICEF	UN International Children's Emergency Fund
UNMIH	UN Mission in Haiti
UNODIR	Unless Otherwise Directed
USACAPOC	U.S. Army Civil Affairs & Psychological Operations Command
USAFR	U.S. Air Force Reserve
USAIA	U.S. Army Intelligence Agency
USAID	U.S. Agency for International Development
USALSA	U.S. Army Legal Services Agency
USAR	U.S. Army Reserve
USARCS	U.S. Army Claims Service
USAREUR	U.S. Army Europe
USASOC	U.S. Army Special Operations Command
USDA	U.S. Department of Agriculture
USG	U.S. Government
USIA	U.S. Information Agency
USIS	U.S. Information Service
UW	Unconventional Warfare
VFR	Visual Flight Rules
VHF	Very High Frequency
WCS	Weapons Control Status
WFZ	Weapons Free Zone
WHNS	Wartime Host Nation Support
WHO	World Health Organization
WIA	Wounded in Action
WMD	Weapons of Mass Destruction
WO	Warning Order
WP	White Phosphorous
WRMS	War Reserve Material Stocks
WPR	War Powers Resolution
XO	Executive Officer

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