OPERATIONAL LAW HANDBOOK
(2004)

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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.

The Handbook was designed and written for the 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, "cargo pocket sized" 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 Eric Jensen, 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 Jensen at DSN 521-3383; Commercial (434) 971-3383; or email eric.jensen@hqda.army.mil.

The 2004 Operational Law Handbook is on the Internet at www.jagcnet.army.mil. After accessing this site, Enter JAGCNet, then go to the Operational Law sub-directory. The 2004 edition is also linked to the CLAMO General database under the keyword Operational Law Handbook – 2004 edition. 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. If you find a blue link, click on it and Lotus Notes will retrieve the cited document from the Internet for you. The hypertext linking is an ongoing project and will only get better with time. A word of caution: some Internet links require that your computer contain Adobe Acrobat software.

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CHAPTER 1

LEGAL BASES FOR USE OF FORCE

I. INTRODUCTION

There are a variety of internationally recognized legal bases for use of force in relations between States, found in both customary and conventional law. Generally speaking, however, modern *jus ad bellum* (the law of resort to war) is generally reflected in the United Nations Charter. The Charter provides two bases for the resort to force: Chapter VII enforcement actions under the auspices of the 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 satisfy 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 in domestic legal authority (including application of the 1973 War Powers Resolution (WPR)).

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

The UN Charter mandates that all member nations 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 nonintervention, that States must refrain from interference in the internal affairs of another. Stated another way, nonintervention stands for the proposition that States must respect one another's sovereignty. 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 UN and the Organization of American States (OAS),[3]

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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 the back of this Handbook.

[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] OAS Charter, art. 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 threat or the use of force in any manner inconsistent with the provisions of the Charter of the United Nations or this Treaty."

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 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, breach of the peace, or 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 delinquent State, to compel compliance with its decisions. Should those measures be 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:

-- Security Council Resolution 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 Security Council's authority under Chapter VII.

-- 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."

-- 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 . . . ."

-- Security Council Resolution 1031 (1995) authorized the 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; Authorizes 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 . . ."

-- 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 fulfil this mandate . . ."

--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."

2. OPERATION IRAQI FREEDOM

a. In the months leading up to the U.S.-led invasion of Iraq in 2003, U.S. diplomats worked furiously 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. A review of the record, however, reveals that this allegation is false. In November 1990, the Council passed Security Council 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. Of significant note, the resolution not only authorized the use of force to expel Iraqi forces from Kuwait (implement 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 Council passed resolution 687. The resolution formalized the cease-fire between coalition and Iraqi forces, but in doing so placed certain requirements on the government of Iraq. Among them:

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. Resolution 687 never terminated the authorization to use force contained in Resolution 678. It merely suspended it with a cease-fire conditioned upon Iraq's acceptance and compliance with the terms contained in the document and discussed above. While the Government of Iraq accepted the terms, compliance was never achieved. The Council recognized this situation in November 2002 with the adoption of resolution 1441, which stated 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 resolution 687, the cease-fire contained therein was null and void and that the authorization to use "all necessary means" to return peace and stability to the region (resolution 678) remained in effect. Under this rationale, a new Security Council resolution again authorizing "all necessary means" was politically advisable, yet legally unnecessary.

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 Organization of American States, 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 authorize, on their own, the use of force (Article 53). Rather, the Security Council may utilize the regional organization to carry out Security Council enforcement actions.

III. SELF DEFENSE

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. . . ."

The questions that inevitably arises in conjunction with the "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 Charter, thus eliminating the customary concept of *anticipatory self defense* (see below) and extinguishing a State's authority to act independent of the Security Council in the exercise of self defense?

Those in the international community who advocate a restrictive approach in the interpretation of the 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.

In contrast, the majority of States, including the U.S., argue that an expansive interpretation of the 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.

A. Customary International Law and the UN Charter

1. It is well accepted that the UN Charter provides the essential framework of authority for use of force, effectively defining the foundations for a modern *jus ad bellum*. Inherent in its principles are the requirements for both **necessity** (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) and **proportionality** (limitation of force to the magnitude, scope and duration to that which is reasonably necessary to counter a threat or attack), as well as an element of timeliness (i.e., delay of a response to attack or threat of attack attenuates the immediacy of the threat and the necessity for use of force).

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. Judge advocates must be familiar with these foundational issues, as well as basic concepts of self defense, as they relate to both overseas deployments and operations, such as the CJCS Standing 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 a host State is either unable or unwilling to protect them. This right is cited as the justification for non-combatant evacuation operations, discussed in greater detail in Chapter 21 of this Handbook.

2) The protection of U.S. nationals was also cited 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 both valid and an 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 (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, to enter into treaties, and 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.

B. 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 - with the additional requirement that assistance is requested. There is *no* recognized right of a third-party State to 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 the North Atlantic Treaty (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 do not 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," in specified situations, and 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., collective self defense).

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 in any given situation. Moreover, such agreements, like collective defense treaties, also provide no intrinsic legal basis for the use of military force.

C. Anticipatory Self Defense Under Customary Law

1. As discussed above, many States embrace an interpretation of the UN Charter that extends beyond the black letter language of Article 51, embracing the customary law principle of "anticipatory self defense;" that is, justifying use of force to repel not just actual armed attacks, but also "imminent" armed attacks. 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 1842 *Caroline* case and a pronouncement by then-U.S. Secretary of State Daniel Webster 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 actions (i.e., 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 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.

D. Pre-emptive Uses of Force

1. In "The National Security Strategy of the United States of America" published in September 2002, the U.S. government takes a step toward what many view as a significant expansion of use of force doctrine from anticipatory self defense to preemption.

> 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.[4]

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.[5]

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. The risks are far too great. "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."[6]

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

[5] *Id*. at 15.

[6] *Id*. at 15.

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

A. In every situation involving the possible use of U.S. force abroad, one of the first legal determinations to be made embraces application of Constitutional principles and the 1973 War Powers Resolution (WPR), Public Law 93-148, 50 U.S.C. §§ 1541-1548.

B. The Constitution divides the power to wage war between the Executive and Legislative branches of government. Under Article I, 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 into execution the foregoing is held by the Congress. 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 ambiguous delegation 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 use of U.S. forces overseas, Congress passed, over presidential veto, the WPR. The stated purpose of the WPR is to ensure the "collective judgment" of both 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; or

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

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 terminate the triggering action and 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 War Powers Resolution was enacted over the President's veto, one of the original purposes of the act—establishment of a consensual, inter-branch procedure for committing our forces overseas—was undercut: no President has conceded the constitutionality of the WPR or technically complied 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 judge advocate 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 (e.g., the WPR's 60 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 Advisor 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 Judge Advocate or his 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].*
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. Dep't of the Army, Field Manual 27-10, The Law of Land Warfare (July 1956) [hereinafter FM 27-10].
14. 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 (October 1995) [hereinafter NWP 1-14M].
15. Dep't of Defense Instruction 5000.2 (12 May 2003), Subj: Defense Acquisition.
16. Dep't of Defense Directive 5100.77, DoD Law of War Program, 9 December 1998.
17. Chairman of the Joint Chiefs of Staff Instruction 5810.01A, Implementation of the DoD Law of War Program, 27 August 1999.

*Treaties unratified by United States.

I. INTRODUCTION

The Law of War provides rights and assigns responsibilities. This Chapter will summarize key law of war provisions for military personnel and commanders in the conduct of operations in both international and non-international armed conflicts. This chapter will discuss the purposes and basic principles of the Law of War, 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. The Appendices to this chapter include The Soldier's Rules, a Law of War Teaching Outline and a Troop Information Outline.

II. DEFINITION

The law of war is defined as "that part of international law that regulates the conduct of armed hostilities. It often is termed the law of armed conflict." The law of war 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. (DOD Dir. 5100.77, 9 December 1998).

III. POLICY

U.S. Law of War obligations are national obligations, binding upon every soldier, sailor, airman or Marine. DoD policy is to to comply with the Law of War "in the conduct of military operations and related activities in armed conflict, however such conflicts are characterized." (DoD Directive 5100.77, para. 5.3.1) CJCSI 5810.01, para. 5.a. states that the U.S. "will apply law of war principles during all operations that are categorized as Military Operations Other Than War."

III. PURPOSES AND BASIC PRINCIPLES OF THE LAW OF WAR

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

1. protecting both combatants and noncombatants from unnecessary suffering;
2. safeguarding the fundamental human rights of 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.

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

A. Principle of Military Necessity or Military Objective. 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 law of war. This principle must be applied in conjunction with other law of war principles discussed in this chapter, as well as other, more specific legal constraints set forth in law of war treaties to which the U.S. is a party.

2. In part, this principle authorizes attacks only against those targets that are valid military objectives. The definition of military objective is found in Article 52(2) of Protocol I: *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.*

a. 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, etc.

b. 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, bridge over which the enemy's main supply route (MSR) crosses, a key road intersection through which the enemy's reserve will pass, etc.

c. 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. The criterion of purpose is concerned with the intended, suspected or possible future use of an object.

d. 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, a hotel which is used as billets for enemy troops. The criterion of use is concerned with the present function of the object.

3. Military necessity not a Criminal Defense. Military necessity is not a defense for acts expressly prohibited by treaty. Rationale: laws of war treaty texts were crafted to include consideration of military necessity.

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

b. Protected Places - The Rendulic Rule. Civilian objects are protected from intentional attack or destruction, so long as they are not being used for military purposes, or there is no military necessity for their destruction or seizure. The law of war permits destruction of civilian objects if military circumstances necessitate such destruction. (FM 27-10, para. 56 and 58), or if the civilian object has become a military objective. The circumstances justifying destruction of civilian 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 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 or "unless demanded by the necessities of war." (HR, art. 23g.)

c. There may be situations where because of incomplete intelligence or the failure of the enemy to abide by the law of war, 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 may have 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 law of war? No. Based on 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 law of war violation because the attackers acted in good faith based upon the information reasonably available at the time the decision to attack was made. *See* DEPARTMENT OF DEFENSE, CONDUCT OF THE PERSIAN GULF WAR, FINAL REPORT TO CONGRESS 615-16 (1992).

B. Principle of Unnecessary Suffering- "It is especially forbidden . . . to employ arms, projectiles or material calculated to cause unnecessary suffering." (HR, art. 23e.) This principle applies to the legality of weapons. Combatants 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, irregularly shaped bullets, dum-dum rounds, lances with barbed heads).

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 misused in ways that might be prohibited.

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

C. Principle of Discrimination or Distinction. This principle requires that combatants be distinguished from non-combatants, 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 "<u>indiscriminate attacks</u>." 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. <u>*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 a direct 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 objects or 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. (Article 51, para. 2, AP I).</u>

D. Principle of Proportionality - The anticipated loss of life and damage to property incidental to attacks must not be excessive in relation to the <u>concrete and direct</u> 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 law of war principle of *distinction*, while avoiding actions that are indiscriminate.

1. <u>Incidental Injury and Collateral Damage</u>. Collateral damage consists of unavoidable and unplanned damage to civilian personnel and property incurred while attacking a military objective. Incidental (a/k/a collateral) damage is <u>not</u> a violation of international law. While no law of war treaty defines this concept, its inherent lawfulness is implicit in treaties referencing the concept. As stated above, AP I, Article 51(5) describes indiscriminate attacks as those causing "<u>incidental</u> loss of civilian life . . . excessive . . . to . . . the military advantage anticipated."

That being said, the term, "attacks" 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 civilians 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."

V. APPLICATION OF THE LAW OF WAR

A. The Law of War applies to all cases of declared war or any other armed conflicts that arise between the U.S. 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 Law of War applied. The 1977 Protocol I Additional to the 1949 Geneva Conventions has expanded this scope of application to include certain wars of "national liberation" for States Parties to that convention. The U.S. is not a Party to AP I and does not recognize this extension of the Law of War. 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 Law of War applies to those operations. The issue is less applicability of the law of war as such but complete applicability of particular treaties. Despite the possible inapplicability of the Law of War in military operations short of international armed conflict, it is, nonetheless, the position of the U.S., UN, and NATO that their forces will apply the "principles and spirit" of the Law of War in these operations.

2. This approach is consistent with DoD policy, previously stated. In applying the DoD policy, however, allowance must be made for the fact that during these operations U.S. Forces often do not have the resources to comply with the Law of War to the letter. It has been U.S. practice to comply with the Law of War 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, law of war treaties provide an invaluable template for military conduct. It will be the responsibility of the military commander, with the assistance and advice of the judge advocate, to determine those provisions that best fit the mission and situation.

VI. SOURCES OF THE LAW OF WAR.

A. The Law of The Hague (ref. (1) and (2)). Regulates "methods and means" of warfare—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 [hereinafter HR] annexed to Hague Convention IV. (HR, 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 U.S. has not ratified AP I and II, 155 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. U.S. military forces may not be obligated to comply with AP I provisions that do not codify the customary practice of nations. This difference in obligation has not proved 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)). Geneva Protocol of 1925 prohibits use in war of asphyxiating, poisonous, or other gases (and bacteriological weapons; see below). U.S. 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), article I(1), which prohibits production, acquisition, stockpiling,

retention and use (even in retaliation). The U.S. 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, or weapons, equipment or means of delivery designed to use such toxins for hostile purposes or in armed conflict.

3. 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 the primary effect of which is to injure by fragments which 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', a non-existent weapon. The U.S. ratified the UNCCW and Protocols I and II in 1995, and Amended Mines Protocol in 1999. The Senate has not offered its advice and consent as to Protocols III and IV.

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).)

VII. THE CONDUCT OF HOSTILTIES

A. Lawful Combatants and Unprivileged Belligerents

1. **Combatants**. Generally, 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 law of war;

(4) May be tried for breaches of the law of war;

(5) May only be punished for breaches of the law of war 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. 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. H. IV Reg. Art. 23. It is also forbidden to kill or wound treacherously individuals belonging to the hostile nation or armed forces. H. IV Reg. Art. 23. Belligerents are likewise prohibited to compel nationals of the enemy state to take part in hostilities against their own country. H. 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.) 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. **Non-combatants**. The law of war prohibits intentional attacks on non-combatants. Among others, non-combatants include civilians not taking an active part in hostilities, military medical personnel, chaplains, and those out of combat – including prisoners of war and the wounded, sick and shipwrecked.

VIII. METHODS AND MEANS OF WARFARE/WEAPONS

A. "The rights 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 for legality under the law of war. (DoD Instr. 5000.2, AR 27-53, AFI 51-402 and SECNAVINST 5711.8A.) A review occurs before the award of the engineering and manufacturing development contract and again before the award of the initial production contract. (DoD Instr. 5000.2) Legal review of new weapons is also required under Article 36 of AP I.

1. The Test. Is a weapon or munition's acquisition or use consistent with law of war and arms control treaties to which the United States is a State Party, or customary international law? In U.S. weapons reviews in determining the legality of a weapon or munition, a balancing must be made between *military necessity* -- that is, the purpose for the weapon or munition -- and the prohibition of weapons or munitions calculated to cause unnecessary suffering.

C. The prohibition of *unnecessary suffering* constitutes acknowledgement that *necessary suffering* to combatants is lawful, and may include severe injury or loss of life. 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 or munition's effects must be weighed in light of comparable, lawful weapons or munitions in use on the modern battlefield.

D. A weapon cannot be declared unlawful merely because it *may* cause severe suffering or injury. The appropriate determination is whether a weapon 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 misused in ways that might be prohibited. Illegal use of a weapon does not make the weapon unlawful.

E. 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, irregularly shaped bullets, projectiles filled with glass. (FM 27-10, para. 34.)

b. Improper use. Any weapon may be used unlawfully; for example, use of M9 pistol to murder a prisoner of war. 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 its 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 that, in part, increases accuracy.

(2) Hollow point or soft point ammunition. Hollow point or soft-point ammunition contain projectiles with either a hollow point 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 (hostage rescue, aircraft security), or materiel 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 opening up 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 land mines (APL). U.S. forces may no longer employ APL that do not self-destruct or self-neutralize, (sometimes called "dumb" anti-personnel land mines) according to a 16 May 1996 policy statement issued by the President. Exceptions to this policy: the use of non-self-destructing APL on the Korean Peninsula and for training purposes. *See* Antipersonnel Land Mines Law and Policy, *Army Lawyer*, Dec. 1998, at 22.

(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.

(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). U.S. policy became the basis for Protocol IV, UNCCW, which prohibits blinding laser weapons that meet the same definition. The Senate has not offered its advice and consent to ratification.

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

(8) Chemical weapons. Chemical weapons are governed by the CWC.

(a) The CWC was ratified by U.S. and came into force in April 1997.

(b) 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. Definitions of 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. 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.

(i) Riot Control Agents (RCA). U.S. RCA Policy is found in Executive Order 11850. Applies to use of Riot Control Agents and Herbicides; requires presidential approval before first use in an armed conflict.

(ii) Executive Order 11850: Renounces first use 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 PWs 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.

(iii) 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 U.S. 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.

(iv) 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 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."

(vi) Oleoresin Capsicum Pepper Spray (OC) a/k/a Cayenne Pepper Spray: U.S. 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.)

(vii) 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. U.S. renounced all use of biological and toxin weapons.

(10) Nuclear Weapons. Not prohibited by international law. On 8 July 1996, the International Court of Justice (ICJ) issued an advisory opinion that "There 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 "The 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).

IX. BOMBARDMENTS, ASSAULTS, AND PROTECTED AREAS AND PROPERTY

A. Military Objectives. Military objectives are defined in AP I as "Objects that, by their nature, use, location, or purpose, 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 *lawful target*. The definition sets forth objective, simple criteria when military necessity exists to consider an object a lawful target that may be seized or attacked.

b. A definition for objects that may be regarded as military objectives is important only for objects other than military bases, units, equipment and forces. Each of these may be attacked at any time, wherever located, as lawful targets, without weighing the factors described in this paragraph to determine whether the object in question is a military objective.

c. 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 Lieber Code that the law of war permits a commander to take "those measures which are indispensable for securing the ends of war" that are not expressly prohibited by the law of war. 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.

d. 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. The provision deals only with intentional attack, and not with collateral damage to civilian objects incidental to the lawful attack of military objectives adjacent to the civilian objects.

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.

c. *Nature* refers to the type of object, for example, military transports, command and control centers, or communication stations.

e. *Location* includes areas which are militarily important because they must be captured or denied an enemy, or because the enemy must be made to retreat from them. An area of land, such as a mountain pass, or a like route through or around a natural or man-made obstacle, may be a military objective. A town, village or city may become a military objective even if it does not contain military objectives if its seizure is necessary, *e.g.*, to protect a vital line of communications, or for other legitimate military reasons.

f. *Purpose* means the future intended or possible use, while *use* refers to its present function. The potential dual use of a civilian object, such as a civilian airport, also may make it a military objective because of its future intended or potential military use.

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 up position in buildings that otherwise would be regarded as civilian objects, such as a school, retail store, or museum, 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 abandon the building, there has been a change of circumstances that precludes its treatment as a military objective.

B. <u>Warning Requirement</u>. HR, art. 26. General requirement to warn before a <u>bombardment</u>. Only applies if civilians are present. <u>Exception</u>: if it is an <u>assault</u> (any attack where surprise is a key element). Warnings need not be specific as to time and location of attack, but can be general and issued through broadcasts or leaflets.

C. <u>Defended Places</u>. (FM 27-10, paras. 39 & 40, change 1.) 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 that 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. (HR, 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 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 (presence of enemy medical units, enemy sick and wounded, and enemy police forces are allowed). (FM 27-10, art. 39b, change 1.)

2. While HR 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, or (b) their destruction, capture or neutralization, in the circumstances ruling at the time, would offer a definite military advantage. For example, even were a home or other structure undefended, it might be destroyed to collapse it onto a roadway in order to block an enemy advance.

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. (Art. 23, GWS; Art. 14, GC.) 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).) 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." Warning requirement before attacking a hospital in which individuals are committing "acts harmful to the enemy." The hospital is given a reasonable time to comply with warning before attack. 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 - 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 the Geneva Conventions of 1949, medical aircraft were protected from direct attack only if they flew in accordance with a previous agreement between the parties as to their route, time, and altitude. AP I extends further protection to medical aircraft flying over areas controlled by friendly forces. Under this regime, identified medical

aircraft are to be respected, regardless of whether a prior agreement between the parties exists. (AP I, art. 25.) In "contact zones," protection can only be effected by prior agreement; nevertheless, medical aircraft "shall be respected after they have been recognized as such." (AP I, art. 26 - considered customary international law by U.S.) Medical aircraft in areas controlled by an adverse party must have a prior agreement in order to gain protection. (AP I, art. 27.)

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 amends slightly, but does not expand, the protections accorded cultural property found in other treaties (HR, 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 enemy has duty to indicate presence of such buildings with visible and distinctive signs, State adherence to marking requirement has been limited. U.S. practice has been to rely on its intelligence collection to identify such objects in order to avoid their attack or damage to them.

G. Works and Installations Containing Dangerous Forces. (GP I, art. 56, and GP II, art. 15.) The rules are not U.S. 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. (U.S. objects to "severe loss" language as creating a different standard than customary proportionality test - "excessive" incidental injury or damage.) Military objectives that are nearby these potentially dangerous forces are also immune from attack if the attack may cause release of the forces (parties also have a duty to avoid locating military objectives near such locations). May attack works and installations containing dangerous forces only if they provide "significant and direct support" to military operations and attack is the only feasible way to terminate the support. The U.S. objects to this provision as creating a standard that differs from the customary definition of a military objective as an object that makes "an effective contribution to military action." Parties may construct defensive weapons systems to protect works and installations containing dangerous forces. These weapons systems may not be attacked unless they are used for purposes other than protecting the installation.

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 Conventions. (GWS, art. 38.)

1. Medical and Religious Emblems. Red Cross, Red Crescent, Lion and Sun. Red Star of David: Not mentioned in the 1949 Geneva Convention, but is protected as a matter of practice.

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. (GP I, annex I, art. 16.)

X. Stratagems and Tactics

A. Ruses. (FM 27-10, para. 48). Injuring the enemy by legitimate deception (abiding by the law of war—actions are in good faith). 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. (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 effect his escape (Art. 93, GPW). 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 U.S. interprets the "improper use" of a national flag (HR, art. 23(f).) to permit the use of national colors and insignia of 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. Must remove all enemy insignia in order to fight with it. 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. (HR, 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 U.S. 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).

3. 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.

B. Psychological Operations. Psychological operations are lawful. In the 1991 Gulf War, U.S. PSYOPS 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. Prohibited under the law of war. (HR. art. 23b.) Perfidy involves injuring the enemy by his adherence to the law of war (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. Distinguish feigning from 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, 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. (HR, art 23(f))

b. Feigning incapacitation by wounds/sickness. (acts harmful to enemy. 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 Red Cross, Red Crescent, and cultural property symbol. Designed to reinforce/reaffirm HR, Article 23f. 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. Protection may be lost if these protected persons or objects are used to commit

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 law of war violation. No protection, however, under Geneva Conventions for acts of espionage. If captured, a spy may be tried under the laws of the capturing nation. E.g., Art. 106, UCMJ. Reaching friendly lines immunizes 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 law of war, for the sole purpose of enforcing future compliance with the law of war. (FM 27-10, para. 497). Individual U.S. soldiers and units do not have the authority to execute a reprisal. That authority is retained at the national level.

F. War Trophies/Souvenirs . The law of war authorizes the confiscation of enemy military property. War trophies or souvenirs taken from enemy military property are legal under the law of war. War trophy personal retention by an individual soldier is restricted under U.S. domestic law. Confiscated enemy military property is property of the U.S. 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 (Article 47, Annex to Hague IV; Article 15, GWS; Article 18, GWS (Sea); Article 33, GC).

1. War Trophy Policy. Section 1171 of the 1994 National Defense Authorization Act states the U.S. policy on war trophies. In essence, the law amends Title 10 by adding section 2579; 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. 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.

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. Defined: 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 Law of War, national policy, public opinion, and military operational constraints. ROE are often more restrictive than what the Law of War would allow.

XI. PROTECTED PERSONS

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

B. Prisoners of War. (GPW, art. 4, HR, art. 23c, d.)

1. Surrender may be made by any means that communicates the intent to give up. No clear-cut rule as to what constitutes a 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 PW 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.[7] The U.S. applies a broad interpretation to the term "international armed conflict" set forth in common Article 2 of the Conventions. Furthermore, DoD Directive 5100.77, 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 PW," not that such persons "will have the status of PW." When doubt exists as to whether captured enemy personnel warrant continued PW status, Art. 5 (GPW) Tribunals must be convened. It is important that judge advocates be prepared for such tribunals. During the Vietnam conflict, a theater directive established procedures for the conduct of Art. 5 Tribunals. The combatant commander or Army component commander may promulgate a comparable directive where appropriate.[8]

3. Treatment. There is a legal obligation to provide adequate food, facilities, and medical aid to all PWs. This obligation poses significant logistical problems in fast-moving tactical situations; thus, judge advocates must be aware of how to meet this obligation while placing a minimum burden on operational assets.[9] PWs must be protected from

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[7] 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 the Gulf War was well publicized.

[8] 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."

[9] 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 PWs 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

physical and mental harm. They must be transported from the combat zone as quickly as circumstances permit. Subject to valid security reasons, PWs 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 PW'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 Military Operations Other Than War (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 prisoner of war protection as provided by the GPW because MOOTW do not involve an international armed conflict to which the U.S. is a Party (Art. 2, GPW). These persons may be termed "detainees" instead of PW. The GPW nonetheless provides a useful template for detainee protection and care.

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, and Article 12, GWS (Sea)). "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 (Article 12, GWS). 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 PWs; however, at a minimum they receive PW 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 PWs. 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 law of war. 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 requirement 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 military medical facility, care must be offered solely on the basis of medical priority (Article 12, GWS).

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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 PWs were not initially available) to construct PW camps. Because the LOW does not require combatants to use their own assets to construct PW camps, the U.S. used captured property and PWs to construct adequate camps. (In fact, in Grenada the PWs 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 PWs, 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.

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, castaways.

1. Parachutists and paratroopers (FM 27-10, supra, 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" (Article 42, AP I).

E. Civilians.

1. General Rule. Civilians and civilian property may not be the subject or sole object of intentional attack. Civilians are persons who are not members of the enemy's armed forces, and who do not take part in the hostilities (AP I, art. 50 and 51).

2. Indiscriminate Attacks. AP I provides for protection for 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 (Article 15, AP I). 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. (Article 79, AP I. 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 is entitled to prisoner of war status (Article 4(A)4, GPW).

XII. 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. H. IV Regs. 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. H IV. Regs. 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. H. IV. Regs 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 Law of War.

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 and 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," H. IV. Regs. 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 (Article 47, Annex to Hague IV; Article 15, GWS; Article 18, GWS (Sea); Article 33, GC). 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 obliged to pay cash for such requisitions or provide a receipt and make payment as soon as possible. Article 52, Annex to Hague IV.

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. 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." Art. 50, Annex to Hague IV; Art. 33, GC.

7. In areas occupied by United States forces, military jurisdiction over individuals, other than members of the U.S. armed forces, is exercised by courts of the 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.

XIII. 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 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. Historically, neutrality rights include the following:

1. The territory of the neutral state is inviolable. H. 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. H. 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. H. 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. H. 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 are impartial as applied to all belligerents. H.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. H. 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. H. V. Art. 16. However, if such neutrals reside in occupied territory during the conflict, they are not entitled to claims different treatment, in general, from that accorded the other inhabitants. 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. *See* GC Art. 4.

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. H. 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 U.S. is a declared neutral, while others are in full force and effect at all times. See 18 U.S.C. 956-968; 22 U.S.C. 441-457, 461-465.

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 members 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.

XIX. 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[10] 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 Law of War, 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 law of war 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 prisoners of war. 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.

[10] Articles 9 - 12 of the GC.

1. The role of the ICRC as an impartial humanitarian organization is formally recognized in common articles 9 – 11and Articles 125, GPW, and 63, GC, of the Geneva Conventions[11]. 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 PWs and provide them certain types of relief. Typically, the U.S. will invite the ICRC to observe PW , 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.

b. Given his professional qualifications and specialized training in the Law of War, the judge advocate should serve as the escort and liaison officer with the ICRC.[12] This role is doctrinal, and stated in FM 71-100-2, INFANTRY DIVISION OPERATIONS TACTICS, TECHNIQUES, AND PROCEDURES, page 6-28. The judge advocate can quickly identify and resolve many Law of War issues before they become a problem for the commander. For those Law of War matters requiring command decision, the judge advocate is best suited to provide advice to the commander and obtain timely responses. These same skills are essential in dealing with ICRC observers. The judge advocate can best serve as the commander's skilled advocate in discussions with the ICRC concerning the Law of War.

c. Both the commander and the judge advocate should recognize that the ICRC, as an impartial humanitarian organization, is not a political adversary, eagerly watching for and reporting Law of War violations.[13] 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 PWs and civilian detainees. By maintaining a close working relationship with ICRC representatives, the judge advocate receives a two-fold benefit. He is assisted in identifying Law of War issues before they pose problems to the command, and he has access to additional legal resources that may be used to resolve other Law of War 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).

XX. REMEDIES FOR VIOLATIONS OF THE LAW OF WAR

A. U.S. Military and Civilian Criminal Jurisdiction

1. It has been the historic practice of the military services that a member of the U.S. military who commits an offense that may be regarded as a "war crime" will be charged under a specific article of the UCMJ.

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[11] Articles 10 - 12 of the GC.

[12] 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.

[13] 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.

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. § 2401) 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 violation willfully kills or causes serious injury to civilians.

5. U.S. policy on application of the Law of War is stated in DoD Directive 5100.77 (DoD Law of War Program [9 December 1998]) and further explained in CJCSI 5810.01A (27 August 1999) (Implementation of the DoD Law of War Program). "The Army Forces of the United States will comply with the law of war during all armed conflicts and, unless directed by competent authorities, will comply with the principles and spirit of the law of war during all other operations."

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 commander's inquiry procedures. (Command regulations, drafted IAW DoD Directive 5100.77, 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. The second is when the investigation is directed by HQDA (para. 3-3a(7), AR 195-2).

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 judge advocate duties related to international law, including the investigation and reporting of violations of the

Law of War, 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 judge advocates.

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 law of war. 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 law of war, 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 Law of War. The two principal means of effecting 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 law of war 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 Law of War, 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

LAW OF WAR CLASS OUTLINE

The topics and order of this outline match the topics and order of presentation of the main chapter

LAW OF WAR

I. LEGAL FRAMEWORK

A. Customary International Law

B. Hague Conventions

C. Geneva Conventions of 1949

D. Geneva Protocols I and II of 1977

E. Treaties

F. Regulations

II. THE PRINCIPLES

A. **Military Necessity**: targeting not prohibited by LOW and of a military advantage. **Military Objective**: persons, places, or objects that make an effective contribution to military action.

B. **Humanity or Unnecessary Suffering**: minimize unnecessary suffering - incidental injury to people and collateral damage to property.

C. **Proportionality**: 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.

D. **Discrimination or Distinction**: Discriminate or distinguish between **combatants** and **non-combatants**; military objectives and protected people/protected places.

III. TARGETS

A. Persons

1. Combatants

a. Lawful Combatants: Geneva Convention Definition

(1) Under Responsible Command

(2) Distinctive Emblem Recognizable at a Distance

(3) Carry Arms Openly

(4) Abide by the Laws of War

b. Geneva Protocol I, Article 44 - Carry Arms Openly In the Attack

c. Unlawful Combatants

2. Noncombatants

a. Civilians

b. Out of Combat (hors de combat):

(1) Prisoners of War

(2) Wounded and Sick in the Field and at Sea

(3) Parachutist (as distinguished from paratrooper)

c. Medical Personnel

(1) Military - Exclusively engaged or auxiliary

(2) Civilian - AP I

(3) Chaplains

(4) Red Cross Societies and Recognized Relief Societies

(5) Relief Societies from Neutral Countries

(6) Civilian Medical and Religious Personnel

d. Cultural Property Protectors

e. Journalists

B. Places

1. Defended Places

2. Undefended Places

3. Natural Environment

4. Protected Areas - hospital zones, safety zones, cultural districts

C. Property

1. Military Objectives - Military Equipment, Buildings, Factories, Transportation, Communications

2. Protected Property

a. Civilian Property

b. Medical Establishments - Fixed and Mobile Hospitals

c. Medical Transport

d. Cultural Property - Dedicated to the Arts, Sciences, Religion, Education, History, Charity

3. Works and installations containing dangerous forces

4. Objects indispensable to the survival of civilians

D. Protective Emblems

1. Geneva

2. Hague

3. Works and Installations Containing Dangerous Forces

IV. WEAPONS

A. Legal Review

B. Small Arms Projectiles

C. Fragmentation

D. Landmines and Booby Traps

E. Incendiaries

F. Lasers

G. Chemical Weapons and Riot Control Agents

H. Herbicides

I. Biological

J. Nuclear

V. TACTICS

A. Psychological Operations

B. Ruses - Deception

1. Naval Tactics

2. Land Warfare - false armies, equipment, bases

3. Use of Enemy Property

a. Uniforms

b. Colors

c. Equipment

C. Use of Property - Confiscation, Seizure, Requisition, Contribution

D. Treachery and Perfidy - Feigning and Misuse

1. Wounds or Sickness

2. Surrender or Truce

3. Civilian or Noncombatant Status

4. UN and Neutral Emblems

5. Protective Emblems

6. Distress Signals

7. Booby Traps

E. Assassination

F. Espionage

G. Reprisals

H. Rules of Engagement

VI. WAR CRIMES

A. Definition of war crimes

B. Command responsibility

C. Investigative Assets

D. Reports

E. Prevention of War Crimes

F. Charging of War Crimes

VII. OTHER LEGAL ISSUES IN ARMED CONFLICT

A. War Trophies

B. Interaction with the International Committee of the Red Cross

VIII. CONCLUSION

A. Principles

B. Targets

C. Weapons

D. Tactics

APPENDIX B

TROOP INFORMATION

I. REASONS TO COMPLY WITH THE LOW—EVEN IF 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 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 case when an order seems unlawful, don't carry it out right away but don't 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.

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—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 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. Enemy may seek such a meeting to arrange surrender but meeting may also be sought for other reasons (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 Battlefield.

1. Again, follow established unit procedures for the handling of EPWs (recall the "5 Ss" 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, must move EPWs to 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 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.[14]

   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 needed by 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 others.

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, Judge Advocate, or Chaplain).

[14] One attention getter is to have all students pull out their green military ID Card. Note that at the bottom of the front of the card, and at the top of the back of the card, there is reference to the card serving as proper identification for purposes of the Geneva Convention on Prisoners of War.

CHAPTER 3

HUMAN RIGHTS

REFERENCES

1. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 6 U.S.T. 3516.
2. Restatement (Third) of the Foreign Relations Law of the United States.
3. Universal Declaration of Human Rights, G.A. Res. 217 A (III), UN Doc. A/810 at 71 (1948).

I. INTRODUCTION

To best understand human rights law, it may be useful to think in terms of obligation versus aspiration. This results from the fact that human rights law exists in two forms: treaty law and customary international law.[15] Human rights law established by treaty generally only binds the state in relation to its own residents; human rights law based on customary international law 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 customary international law that establishes the human rights considered fundamental, and therefore obligatory. Analysis of the content of this customary international law is therefore the logical start point for this discussion

II. CUSTOMARY INTERNATIONAL LAW HUMAN RIGHTS: THE OBLIGATION

A. If a specific human right falls within the category of customary international law, it should be considered a "fundamental" human right. As such, it is binding on U.S. forces during all overseas operations. This is because customary international law 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 customary international law, then it is considered binding on U.S. state actors wherever such actors deal with human beings. 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"[18] a violation of human rights considered customary international law. The Restatement makes no qualification as to where the violation might occur, or against whom it may be directed. Therefore, it is the customary international law 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 treaties, and any subsequent executing legislation, to determine if this general rule is inapplicable in a certain circumstance.[19] 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.

B. 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. Among these sources, the most informative is the Restatement (Third) of Foreign Relations Law of the United States. According to the Restatement, the United States accepts the position that

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

[16] *See* the *Paquete Habana The Lola*, 175 U.S. 677 (1900); *see also supra* note 1 at § 111.

[17] *Supra* note 1 at §701.

[18] *Supra* note 1, at §702.

[19] 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.

certain fundamental human rights fall within the category of customary international law, 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 or slave trade,
3. Murder or causing the disappearance of individuals,
4. Torture or other cruel, inhumane, or degrading treatment or punishment,
5. Prolonged arbitrary detention,
6. Systematic racial discrimination, or
7. A consistent pattern of gross violations of internationally recognized human rights.[20]

C. Although international agreements, declarations, and scholarly works suggest that the list of human rights binding under international law is far more expansive than this list, the Restatement's persuasiveness is reflected by the authority relied upon by the drafters of the Restatement to support their list. Through the Reporters' Notes, the Restatement details these sources, focusing primarily on U.S. court decisions enunciating the binding nature of certain human rights, and federal statutes linking international aid to respect by recipient nations for these human rights.[21] These two sources are especially relevant for the military practitioner, who must be more concerned with the official position of the United States than with the suggested conclusions of legal scholars. This list is reinforced when it is combined with the core provisions of the Universal Declaration of Human Rights[22] (one of the most significant statements of human rights law, **some portions** of which are regarded as customary international law[23]), and Article 3 common to the four Geneva Conventions of 1949 (which although a component of the law of war, is used as a matter of Department of Defense Policy as both a yardstick against which to assess human rights compliance by forces we support,[24] and as the guiding source of soldier conduct across the spectrum of conflict[25]). By "cross-leveling" these sources, it is possible to construct an "amalgamated" list of those human rights judge advocates should consider customary international law. These include the prohibition against any state policy that results in the conclusion that the state practices, encourages, or condones:

1. Genocide,
2. Slavery or slave trade,
3. Murder of causing the disappearance of individuals,
4. Torture or other cruel, inhuman, or degrading treatment or punishment,
5. All violence to life or limb,

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[20] *Supra* note 1, at §702.

[21] *Supra* note 1, at §702, Reporters' Notes.

[22] G.A. Res. 217A (III), UN Doc. A/810, at 71 (1948).

[23] RICHARD B. LILLICH & FRANK NEWMAN, INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW AND POLICY 65-67 (1979); RICHARD B. LILLICH, INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW, POLICY, AND PRACTICE, 117-127 (2d. ed. 1991); Filartiga v. Pena-Irala, 630 F.2d 876, 882-83 (2d Cir. 1980). Other commentators assert that only the primary protections announced within the Declaration represent customary law. These protections include the prohibition of torture, violence to life or limb, arbitrary arrest and detention, and the right to a fair and just trial (fair and public hearing by an impartial tribunal), and right to equal treatment before the law. GERHARD VON GLAHN, LAW AMONG NATIONS 238 (1992) [hereinafter VON GLAHN].

[24] *See* DEP'T OF THE ARMY REG. 12-15, JOINT SECURITY ASSISTANCE TRAINING, para. 13-3.

[25] *See* DoD DIR. 5100.77; *see also* CJCS INSTR. 5810.01A.

6. Taking of hostages,

7. Punishment without fair and regular trial,

8. Prolonged arbitrary detention,

9. Failure to care for and collect the wounded and sick,[26]

10. Systematic racial discrimination, or

11. A consistent pattern of gross violations of internationally recognized human rights.

D. A judge advocate must also recognize that "state practice" is a key component to a human rights violation. What amounts to state practice is not clearly defined by the law. However, it is relatively clear that acts which directly harm individuals, when committed by state agents, fall within this definition.[27] This results in what may best be understood as a "negative" human rights obligation—to take no action that directly harms individuals. The proposition that U.S. forces must comply with this "negative" obligation is not inconsistent with the training and practice of U.S. forces. For example, few would assert that U.S. forces should be able to implement plans and policies which result in cruel or inhumane treatment of civilians. However, the proposition that the concept of "practicing, encouraging, or condoning" human rights violations results in an affirmative obligation—to take affirmative measures to prevent such violations by host nation forces or allies—is more controversial. How aggressively, if at all, must U.S. forces endeavor to prevent violations of human rights law by third parties in areas where such forces are operating?

E. This is perhaps the most challenging issue related to the intersection of military operations and fundamental human rights: what constitutes "encouraging or condoning" violations of human rights? Stated differently, does the obligation not to encourage or condone violations of fundamental human rights translate into an obligation on the part of U.S. forces to intervene to protect civilians from human rights violations inflicted by third parties when U.S. forces have the means to do so? The answer to this question is probably no, despite plausible arguments to the contrary. For the military practitioner, the undeniable reality is that resolution of the question of the scope of U.S. obligations to actively protect fundamental human rights rests with the National Command Authority, as reflected in the CJCS Standing Rules of Engagement. This resolution will likely depend on a variety of factors, to include the nature of the operation, the expected likelihood of serious violations, and perhaps most importantly, the existence of a viable host nation authority.

F. Potential responses to observed violations of fundamental human rights include reporting through command channels, informing Department of State personnel in the country, increasing training of host nation forces in what human rights are and how to respond to violations, documenting incidents and notifying host nation authorities, and finally, intervening to prevent the violation. The greater the viability of the host nation authorities, the less likelihood exists for this last option. However, judge advocates preparing to conduct an operation should recognize that the need to seek guidance, in the form of the mission statement or rules of engagement, on how U.S. forces should react to such situations, is absolutely imperative when intelligence indicates a high likelihood of confronting human rights violations. This imperative increases in direct correlation to the decreasing effectiveness of host nation authority in the area of operations.

III. HUMAN RIGHTS TREATIES: THE ASPIRATION

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.**[28] This was the "groundbreaking" aspect of human rights law: that international law could regulate the way

[26] This provision must be understood within the context from which it derives. This is not a component of the Restatement list, but instead comes from Article 3 of the Geneva Conventions. As such, it is a "right" intended to apply to a "conflict" scenario. As such, the JA should recognize that the "essence" of this right is not to care for **every** sick and wounded person encountered during **every** military operation, but relates to wounded and sick in the context of some type of conflict. As such, it is legitimate to consider this obligation limited to those individuals whose wound or sickness is directly attributable to U.S. operations. While extending this protection further may be a legitimate policy decision, it should not be regarded as obligatory.

[27] *See supra* note 1, Reporters' Notes.

[28] *See supra* note 1 and accompanying text.

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.[29]

B. It is the original scope of human rights law that is applied as a matter of **policy** by the United States when analyzing the scope of human rights treaties. In short, the United States interprets human rights treaties to apply to persons living in the territory of the United States, and not to any person with whom agents of our government deal in the international community.[30] This theory of treaty interpretation is referred to as "non-extraterritoriality."[31] 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 customary international law 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.

C. 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,"[32] some are not enforceable in U.S. courts absent subsequent legislation or executive order to "execute" the obligations created by such treaties.[33]

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[29] *See supra* note 1 at Part VII, Introductory Note.

[30] 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 supra* note 1 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).

[31] *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 the 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).

[32] 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." *Supra* note 1, 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.

[33] The Restatement Commentary indicates:

> In the absence of special agreement, it is ordinarily for the United States to decide how it will carry out its international obligations. Accordingly, the intention of the United States determines whether an agreement is to be self-executing in the United States or should await implementation by legislation or appropriate executive or administrative action. If the international agreement is silent as to its self-executing character and the intention of the United States is unclear, account must be taken of any statement by the President in concluding the agreement or in submitting it to the Senate for consent or to the Congress as a whole for approval, and any expression by the Senate or the Congress in dealing with the agreement. After the agreement is concluded, often the President must decide in the first instance whether the agreement is self-executing, *i.e.*, whether existing law is adequate to enable the United States to carry out its obligations, or whether further legislation is required . . . Whether an agreement is to be given effect without further legislation is an issue that a court must decide when a party seeks to invoke the agreement as law . . .
>
> Some provisions of an international agreement may be self-executing and others non-self-executing. If an international agreement or one of its provisions is non-self-executing, the United States is under an international obligation to adjust its laws and institutions as may be necessary to give effect to the agreement.

Supra note 1, at cmt h. *See also* Foster v. Neilson, 27 U.S. (2 Pet.) 253, 254 (1829). In *Foster*, the Court focused upon the Supremacy Clause of the United States Constitution and found that this clause reversed the British practice of not judicially enforcing treaties, until Parliament had enacted municipal laws to give effect to such treaties. The Court found that the Supremacy Clause declares treaties to be the supreme law of the land and directs courts to give them effect without waiting for accompanying legislative enactment. The Court, however, conditioned this rule by stating that only treaties that operate of themselves merit the right to immediate execution. This qualifying language is the source of today's great debate over whether or not treaties are self-executing; *see also* DEP'T OF ARMY, PAMPHLET 27-161-1, LAW OF PEACE, VOLUME I para. 8-23 (1 September 1979) [hereinafter DA PAM 27-161-1], which states:

> [w]here a treaty is incomplete either because it expressly calls for implementing legislation or because it calls for the performance of a particular affirmative act by the contracting states, which act or acts can only be performed through a legislative act, such a

D. This "self-execution" doctrine relates primarily to the ability of a litigant to secure enforcement for a treaty provision in U.S. courts.[34] 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.[35] More significantly, once a 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.[36]

E. 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."[37] Thus, the United States 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 United States adds such a declaration to a treaty, the declaration determines the interpretation the United States will apply to determining the nature of the obligation.[38]

F. The bottom line is that compliance with international law is not a suicide pact nor even unreasonable. Its observance, for example, does not require a military force on a humanitarian mission within the territory of another nation to immediately take on all the burdens of the host nation government. A clear example of this rule is the conduct of U.S. forces during Operation UPHOLD DEMOCRACY in Haiti regarding the arrest and detention of civilian persons. The failure of the Cedras regime to adhere to the minimum human rights associated with the arrest and imprisonment of its nationals served as part of the United Nation's justification for sanctioning the operation. Accordingly, the United States desired to do the best job it could in correcting this condition, starting by conducting its own detention operations in full compliance with international law. The United States did not, however, step into the shoes of the Haitian government, and did not become a guarantor of all the rights that international law requires a government to provide its own nationals.

G. Along this line, the Joint Task Force (JTF) lawyers first noted that the Universal Declaration of Human Rights does not prohibit detention or arrest, but simply protects civilians from the arbitrary application of these forms of liberty denial.[39] The JTF could detain civilians who posed a legitimate threat to the force, its mission, or other Haitian civilians.[40]

H. Once detained, these persons become entitled to a baseline of humanitarian and due process protections. These protections include the provision of a clean and safe holding area; rules and conduct that would prevent any form of

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> treaty is for obvious reasons not self-executing, and subsequent legislation must be enacted before such a treaty is enforceable. . . On the other hand, where a treaty is full and complete, it is generally considered to be self-executing. . .

[34] *See supra* note 1, at cmt h.

[35] 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." *Supra* note 1, 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.*

[36] "[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).

[37] *See supra* note 1 at § 131.

[38] *See supra* note 1 at § 111, cmt.

[39] Common article 3 does not contain a prohibition of arbitrary detention. Instead, its limitation regarding liberty deprivation deals only with the prohibition of extrajudicial sentences. Accordingly, the judge advocates involved in Operation Uphold Democracy and other recent operations looked to the customary law and the Universal Declaration of Human Rights as authority in this area. It is contrary to these sources of law and United States policy to arbitrarily detain people. Judge advocates, sophisticated in this area of practice, explained to representatives from the International Committee of the Red Cross the distinction between the international law used as guidance, and the international law that actually bound the members of the Combined Joint Task Force (CJTF). More specifically, these judge advocates understood and frequently explained that the third and fourth Geneva Conventions served as procedural guidance, but the Universal Declaration (to the extent it represents customary law) served as binding law.

[40] "The newly arrived military forces (into Haiti) had ample international legal authority to detain such persons." Deployed judge advocates relied upon Security Council Resolution 940 and article 51 of the United Nations Charter. *See* CLAMO HAITI REPORT, *supra* note 17, at 63.

physical maltreatment, degrading treatment, or intimidation; and rapid judicial review of their individual detention.[41] The burden associated with fully complying with the letter and spirit of the Universal Declaration of Human Rights[42] permitted the United States to safeguard its force, execute its mission, and reap the benefits of "good press."[43]

I. Accurate articulation of these doctrines of non-extraterritoriality and non-self-execution is important to ensure consistency between United States policy and practice. However, a judge advocate should bear in mind that this is background information, and that it is the list of human rights considered customary international law that is most significant in terms of policies and practices of U.S. forces. The judge advocate must be prepared to advise his or her commander and staff that many of the "rights" reflected in human rights treaties and in the Universal Declaration, although not binding as a matter of treaty obligation, are nonetheless binding on U.S. forces as a matter of customary international law.

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[41] *See supra* note 17 at 64-65.

[42] Reprinted for reference purposes in the Appendix is the Universal Declaration of Human Rights. This is intended to serve as a resource for judge advocate to utilize as a source of law to "analogize" from when developing policies to implement the customary international law human rights obligations set out above.

[43] The judge advocates within the 10th Mountain Division found that the extension of these rights and protections served as concrete proof of the establishment of institutional enforcement of basic humanitarian considerations. This garnered "good press" by demonstrating to the Haitian people, "the human rights groups, and the International Committee of the Red Cross (ICRC) that the U.S. led force" was adhering to the Universal Declaration principles. *See* OPERATION UPHOLD DEMOCRACY, 10TH MOUNTAIN DIVISION, OFFICE OF THE STAFF JUDGE ADVOCATE MULTINATIONAL FORCE HAITI AFTER-ACTION REPORT 7-9 (March 1995) [10TH MOUNTAIN AAR].

APPENDIX

UNIVERSAL DECLARATION OF HUMAN RIGHTS

Preamble

Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice, and peace in the world.

Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people,

Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law,

Whereas it is essential to promote the development of friendly relations between nations,

Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom,

Whereas Member States have pledged themselves to achieve, in cooperation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms,

Whereas a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge,

Now, therefore,

The General Assembly

Proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.

Article 1

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

Article 2

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinctions of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

Article 3

Everyone has the right to life, liberty and the security of person.

Article 4

No one shall be held in slavery or servitude, slavery and the slave trade shall be prohibited in all their forms.

Article 5

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Article 6

Everyone has the right to recognition everywhere as a person before the law.

Article 7

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

Article 8

Everyone has the right to effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

Article 9

No one shall be subjected to arbitrary arrest, detention or exile.

Article 10

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

Article 11

1. Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in public trial at which he has had all the guarantees necessary for his defence.

2. No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.

Article 12

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

Article 13

1. Everyone has the right to freedom of movement and residence within the borders of each state.

2. Everyone has the right to leave any country, including his own, and to return to his country.

Article 14

1. Everyone has the right to seek and to enjoy in other countries asylum from persecution.

2. This right may not be invoked in the case of prosecutions genuinely arising from nonpolitical crimes or from acts contrary to the purposes and principles of the United Nations.

Article 15

1. Everyone has the right to a nationality.

2. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

Article 16

1. Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.
2. Marriage shall be entered into only with the free and full consent of the intending spouses.
3. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

Article 17

1. Everyone has the right to own property alone as well as in association with others.
2. No one shall be arbitrarily deprived of his property.

Article 18

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

Article 19

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Article 20

1. Everyone has the right to freedom of peaceful assembly and association.
2. No one may be compelled to belong to an association.

Article 21

1. Everyone has the right to take part in the government of his country, directly or through freely chosen representative.
2. Everyone has the right of equal access to public service in his country.
3. The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

Article 22

Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social, and cultural rights indispensable for his dignity and the free development of his personality.

Article 23

1. Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.
2. Everyone, without any discrimination, has the right to equal pay for equal work.
3. Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.
4. Everyone has the right to form and to join trade unions for the protection of his interests.

Article 24

Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.

Article 25

1. Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

2. Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.

Article 26

1. Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.

2. Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.

3. Parents have a prior right to choose the kind of education that shall be given to their children.

Article 27

1. Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.

2. Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

Article 28

Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.

Article 29

1. Everyone has duties to the community in which alone the free and full development of his personality is possible.

2. In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

3. These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.

Article 30

Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.

CHAPTER 4

LAW OF WAR IN MILITARY OPERATIONS OTHER THAN WAR[44]

REFERENCES

1. Dep't of Defense Directive 5100.77, DoD Law of War Program, 9 December 1998.
2. Chairman of the Joint Chiefs of Staff Instruction 5810.01A, Implementation of the DoD Law of War Program, 27 August 1999.

I. INTRODUCTION

Military Operations Other Than War (MOOTW)[45] is the doctrinal term used to describe the broad range of military operations which fall outside the traditional definition of "armed conflict." These diverse operations do not trigger the application of the traditional law of war regimes because of a lack of the legally requisite armed conflict needed to trigger such regimes. This resulting lack of binding traditional legal authority for the resolution of myriad issues during MOOTW has led judge advocates to resort to other sources of law. These sources start with binding customary international law 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.

II. STRUCTURE FOR ANALYSIS

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) fill these "gaps" by application of non-binding sources of law as a matter of policy.

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.[46] 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 is required or authorized (maybe this distinction is where the problem lies) to implement Annex 1-A of the Dayton Accord. Yet the Accord seems 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."[47]

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

[45] DEP'T OF ARMY, FIELD MANUAL 100-5, OPERATIONS chs. 2 & 13 (14 June 1993) [hereinafter FM 100-5].

[46] 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.

[47] *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 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).

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.[48] The result was that the forces on the ground did not have a clear picture of the mission. Fortunately, judge advocates, adept at the difficulty of these type situations, have learned that in the absence of well-defined mission statements, they 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;[49] (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,[50] what statement or directives have been made by that organization?

E. After gaining the best possible understanding of the mission's objective, the operational lawyer must then go about the business of deciding what bodies of law should be relied upon to respond to various issues. The judge advocate 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 judge advocate must realize that as the operation changes, the potential application of the regulation within each of the four tiers must be constantly reassessed.

III. SOURCES OF LAW

A. **Fundamental Human Rights**

1. Fundamental human rights are customary international law 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.[51] 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"[52] 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 MOOTW missions, judge advocates must understand the technical and pragmatic significance of host nation law within the area of operations.

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[48] *See* John Pomfret, *Perry Says NATO Will Not Serve As "Police Force" in Bosnia Mission,* WASH. POST, January 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* Internet: 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").

[49] 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).

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

[51] *See* Restatement (Third) of the Foreign Relations Law of the United States, at § 701, cmt. [hereinafter Restatement].

[52] 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.

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.[53] So, in a nutshell, our forces enter a nation either as invaders or tourists or somewhere between.

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 Law of War. 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[54] 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.[55]

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.[56] 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."[57]

5. Keep in mind, it is important to note that Public International Law assumes a default setting.[58] 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."[59] The modern rule, however, 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.[60] This makes the circumstances that move military forces away from this

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[53] In essence, the category of MOOTW referred to as 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.

[54] 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].

[55] *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.

[56] *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].

[57] HAITI CONST. Art. 268-1 (1987).

[58] *See* DEP'T OF ARMY, PAM. 27-161-1, Law of Peace, Volume I, para. 8-23 (1 September 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.

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

[60] 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 15, at 11-1.

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:[61]

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,[62] 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 these types of arrangements. In fact the Carter-Jonassaint Agreement[63] 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 Persian Gulf War, the coalition invasion force did not bother to stop at Iraqi traffic lights in late February 1991. The domestic law of Iraq did not bind the invasion force.[64] This exception is based on the classical application of the Law of the Flag theory.[65]

9. The Law of the Flag has two prongs. The first prong is referred to as the combat exception,[66] is described above, and is exemplified by the lawful disregard for host nation law exercised during such military operations as DESERT STORM. This prong is still in favor and represents the state of the law.[67] The second prong is referred to as the consent exception, described by the excerpt from the United States Supreme Court in *Coleman v. Tennessee* 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 (but to say it is now in disfavor would be an overstatement).[68]

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

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

[63] The entry agreement for Operation UPHOLD DEMOCRACY, *reprinted in* CLAMO HAITI REPORT, *supra* note 11, at 182-83.

[64] 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.

[65] *See* Whitaker, *supra* note 18, at 31.

[66] *Id*. at footnotes 34 and 35.

[67] *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...."

[68] *See* DA PAM 27-161-1, *supra* note 15, at 11-1.

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,[69] 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 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.[70] 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,[71] but the same immunity is available to the extent it is necessary when combat is not contemplated.[72]

13. The bottom line is that judge advocates 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 law of war 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**

1. Because the primary body of law intended to guide conduct during military operations (the law of war) is normally not triggered during MOOTW, the judge advocate 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

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

[70] Whitaker, *supra* note 18, at n. 35.

[71] UN CHARTER, Chapter VII, art. 42.

[72] *See* United Nations Resolutions 940 and 1031. 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. This is exactly what happened. *See* 10th Mountain AAR, *supra* note 13, at pages 6-9 and 10-11. The same type of approach is being applied by the United States element of the multinational force executing the mandate of Resolution 1031 and the Dayton Accord.

of imperatives that come from that law, judge advocates need a mechanism to employ to provide the command with "specific" legal guidance in the absence of controlling "specifics." In MOOTW, starting with Operation JUST CAUSE,[73] and continuing with Operations RESTORE HOPE, UPHOLD DEMOCRACY, and JOINT ENDEAVOR, application of an "analogized" version of the law of war has been employed to fill this gap and provide the command with imperative "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 5100.77), as implemented by the Joint Chiefs of Staff (CJCSI 5810.01 (1996)). These two authorities direct the armed forces of the United States to apply the law of war to any conflict, no matter how characterized; and to apply principles of the law of war to any operation characterized as a MOOTW. Because of the nature of these MOOTW, sources of law relied upon to resolve various issues extend beyond the law of war. These sources include, but are not limited to, tenants and principles from the law of war, 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 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 law of war. For example, when dealing with treatment of civilians, a logical starting point is the law of war 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 judge advocates 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. JAs 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 law of war and domestic law, but also non-binding human rights treaty provisions, and host nation law. The imperative is that the judge advocate 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.

[73] Operation JUST CAUSE is cited as the first (well known) contemporary MOOTW, instead of 1983's Operation URGENT FURY. Although URGENT FURY is frequently cited to as the first MOOTW, it actually represents an international armed conflict. URGENT FURY was the United States' unilateral operation to remove a Marxist de facto government (the People's Revolutionary Government), and restore the constitutional government to the tiny Caribbean island of Grenada. Some point to the ostensible legitimate government of Grenada's request for the United States' intervention. One might point out that both the United States and Cuba (the other national force within Grenada) both announced that they were not at war. In spite of these arguments, the United States acknowledged that its military forces did engage Cuban forces in combat. It further acknowledged that, as a consequence, "de facto hostilities existed and that the article 2 threshold was satisfied. See Memorandum, Hugh J. Clausen, to the Vice Chief of Staff of the Army, subject: Geneva Conventions Status of Enemy Personnel Captured During URGENT FURY (4 Nov. 1983).

APPENDIX A

TREATMENT OF PERSONS

VI. FOUR TYPES OF LIBERTY DEPRIVATION:

A. Detainment;

B. Internment;

C. Assigned residence;

D. Simple imprisonment (referred to as confinement in AR 190-8[74]):

1. Includes pre/post-trial incarceration.

2. Pretrial confinement must be deducted from any post-trial period of confinement.

3. A sentence of to imprisonment may be converted to a period of internment.

VII. DETAINMENT IN MOOTW.

A. Detainment defined: Not formally defined in International Law. Although it may take on characteristics of confinement, it is more analogous to internment (which is formally defined and explained in the Fourth Geneva Convention (civilian convention)). Within Operation JOINT ENDEAVOR detention was defined as "a person involuntarily taken into custody for murder, rape, aggravated assault, or any act or omission as specified by the IFOR Commander which could reasonably be expected to cause serious bodily harm to (1) civilians, (2) non-belligerents, or (3) IFOR personnel."[75]

B. Detainment is typically authorized (by a designated task force commander) for:

1. Serious crimes (as described above);

2. Posing a threat to U.S. forces (or based upon Combatant Commander authority, the coalition force);

3. Violating rules set out by the intervention forces. For example, the IFOR in Operation JOINT ENDEAVOR authorized detainment for persons who attempted to enter controlled areas or attack IFOR property.

4. Obstructing the forces' progress (obstructing mission accomplishment in any number of ways to include rioting, demonstrating, or encouraging others to do so).

C. While these categories have proved effective in past operations, JA's must ensure that the categories actually selected for any given operation are derived from a mission analysis, and not simply from lessons learned.

D. The LOW (and therefore, the Geneva Conventions) does (do) not technically apply to military operations that do not involve armed conflict (MOOTW). However, pursuant to the "law by analogy" methodology, the LOW should be used as guidance during MOOTW.

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[74] The distinction between confinement and internment is that those confined are generally limited to a jail cell ("CI camp stockade"), while internees remain free to roam within the confines of a internee camp. AR 190-8, para. 6-12.

[75] *See* Task Force Eagle: Joint Military Commission Policy and Planning Guidance Handbook (21 Mar. 1996).

E. In MOOTW, judge advocates should:

1. Advise their units to exhaust all appropriate non-forcible means before detaining persons who obstruct friendly forces.

2. Look to the mission statement to determine what categories of civilians will be detained. The USCINCENT Operation Order for Unified Task Force Somalia (1992) set out detailed rules for processing civilian detainees. It stated:

> In the area under his control, a commander must protect the population not only from attack by military units, but also from crimes, riots, and other forms of civil disobedience. To this end, commanders will: . . . Detain those accused of criminal acts or other violations of public safety and security.

3. After determining the type of detainees that will find their way into U.S. hands, JA's should determine what protections should be afforded to each detainee.

   a. Detainment SOPs might provide that all detainees will be treated consistently with Common article 3 to ensure respect for fundamental human rights.

   b. Using law by analogy, these protections are translated into rules such as those listed below, which were implemented by the IFOR during Operation JOINT ENDEAVOR:

      (1) Take only items from detainees that pose an immediate threat to members of the force or other detainees.

      (2) Use minimal force to detain or prevent escape (this may include deadly force if ROE permits).

      (3) Searches must be conducted in such a way as to avoid humiliation and harassment.

      (4) Detainees shall be treated humanely.

      (5) Detainees shall not be physically abused.

      (6) Contact with detainees may not be of a sexual nature.

      (7) Detainees may not be used for manual labor or subservient tasks.

4. Apply procedural protections afforded by the host nation to individuals detained under similar conditions. For example, if the host nation permits the right to a magistrate review within so many hours, attempt to replicate this right if feasible.

5. Categorization and Segregation. The SOPs then go on to provide that the detainees will be categorized as either criminal or hostile (force protection threats). Those accused of crimes should be separated from those detained because they pose a threat to the force. In addition, detainees must be further separated based upon clan membership, religious beliefs, or any other factor that might pose a legitimate threat to their safety.

F. In both Somalia and Haiti, the U.S. ran extremely successful Joint Detention Facilities (JDFs). The success of these operations was based upon a simple formula.

1. Detain people based upon a clear and principled criteria.

2. Draft a JDF SOP with clear rules that each detainee must follow and rights to which each detainee is entitled.

3. Base the quantity and quality of the rights upon a principled approach.

G. When applying law by analogy, look to the GC, in addition to the GPW when dealing with civilians. (The practice of JTF judge advocates in Operations RESTORE HOPE and RESTORE DEMOCRACY was to look only to the GPW. This caused a number of problems "because the GPW just did not provide an exact fit.").

VIII. SNAPSHOT OF MOOTW DETAINMENT RULES (ANALOGIZED FROM THE GC AND OTHER APPLICABLE DOMESTIC AND INTERNATIONAL LAW)

A. Every civilian has the right to liberty and security. NO ONE SHALL BE SUBJECTED TO ARBITRARY ARREST OR DETENTION. This is consistent with the GC requirement that detention be reserved as the commander's last option. GC Art. 42.

B. Treatment will be based upon international law, without distinction based upon "race, colour, sex, language, political or other opinion, national or social origin, property, birth, or other status."

C. No detainee shall be subjected to cruel, inhuman, or degrading treatment.

D. Detain away from dangerous areas. GC Arts. 49 and 83.

E. The place of detainment must possess (to the greatest extent possible) every possible safeguard relative to hygiene and health. GC Art. 85.

F. Detainees must receive food (account shall be taken of their customary diet) and clothing in sufficient quantity and quality to keep them in a good state of health. GC Art. 89.

G. Detainees must be maintained away from PWs and criminals. GC Art. 84. In fact, U.S. commanders should establish three categories of detainees:

1. Those detained because of suspected criminal activity;

2. Those detained because they have been convicted of criminal misconduct;

3. Those detained because they pose a serious threat to the security of the force (an expectation of future activity, whether criminal or not).

H. Detainees shall be detained in accordance with a standard procedure, which the detainee shall have access to. GC Art. 78. Detainees have the right to appeal their detention. The appeal must be process without delay. GC Art. 78.

I. Adverse decisions on appeals must (if possible) be reviewed every six months. GC Art. 78.

J. Detainees retain all the civil rights (HN due process rights), unless incompatible with the security of the Detaining Power. GC Art. 80.

K. Detainees have a right to free medical attention. GC Arts. 81, 91, & 92.

L. Families should be lodged together during periods of detainment. Detainees have the right to request that their children be brought to the place of detainment and maintained with them. GC Art. 82.

M. Forwarding Correspondence.

1. Detainees will be allowed to send and receive letters and cards. There is no restriction on the number or length of letters or cards detainees may receive. Detainees will be permitted to send not less than two letters and four cards monthly. AR 190-8, para. 3-5.

2. No restriction on whom the detainee may correspond with. AR 190-8, para. 6-8.

3. No restriction on the number or type of correspondence to either military authorities or humanitarian organization.

APPENDIX B

TREATMENT OF PROPERTY

IX. TREATMENT OF PROPERTY.

A. Every person has the right to own property, and no one may be arbitrarily deprived of such property.

B. The property laws of the host nation will control to the extent appropriate under Public International Law (unless displaced by the nature of the operation or because of fundamental incompatibility with mission accomplishment).

1. Consider the entire range of host nation law, from its constitution to its property codes. For example in Operation UPHOLD DEMOCRACY the JTF discovered that the Haitian Constitution afforded Haitians the right to bear arms. This right impacted the methodology of the JTF Weapons Confiscation Program.

C. If a non-international armed conflict is underway, only limited provisions of the law of war apply as a matter of law (primarily common article 3 and Geneva Protocol II). These provisions provide no explicit protection for private property. If an international armed conflict is underway, the property protections found in the Hague Convention and the fourth Geneva Convention apply.

D. Law by Analogy.

1. The occupying power cannot destroy "real or personal property . . . , except where such destruction is rendered absolutely necessary". G.C. Art. 53.

2. **Pillage**. Defined as the "the act of taking property or money by violence." Also referred to as "plundering, ravaging, or looting."

a. Forbidden in all circumstances

b. Punishable as a war crime or as a violation the UCMJ.

c. The property of a protected person may not be the object of a reprisal. (G.C. Art. 33).

d. **Control of Property**. The property within an occupied territory may be controlled by the occupying power to the extent:

(1) Necessary to prevent its use by hostile forces.

OR

(2) To prevent any use which is harmful to the occupying power.

(3) **NOTE**: As soon as the threat subsides, private property must be returned. FM 27-10, Para. 399.

e. Understand the relationship between the battlefield acquisition rules of the law of war and the U.S. Military's Claims System. See the chapter on Claims in this Handbook.

f. Protection of civilian property for persons under the control of our forces (detained persons, etc.). The United States has frequently provided protection of property provided to EPWs under the Third Geneva Convention. For instance, all effects and articles of personal use, except arms and military equipment

shall be retained by an EPW (GPW, art. 18). This same type of protection has a natural extension to civilians that fall under military control.

APPENDIX C

DISPLACED PERSONS

X. 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 MOOTW 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 customary international law. 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.

(1) 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, Dept. of Army Regulation 550-1, <u>Procedures for Handling Requests for Political Asylum and Temporary Refuge</u> (1 October 1981) [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) Immediately report all requests for political asylum/temporary refuge" to the Army Operations Center (AOC) at Commercial (703) 697-0218 or DSN 227-0218.

(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.

During the application process and refuge period the refugee will be protected. Refuge will end only when directed by higher authority.

CHAPTER 5

RULES OF ENGAGEMENT

REFERENCES

1. CJCSI 3121.01A, Standing Rules of Engagement for U.S. Forces, 15 January 2000.
2. CJCSI 3121.02, Rules on the Use of Force by DoD Personnel During Military Operations Providing Support to Law Enforcement Agencies Conducting Counterdrug Operations in the United States, 31 May 2000.
3. DoD Instruction 5210.56, Use of Deadly Force and the Carrying of Firearms by DoD Personnel Engaged in Law Enforcement and Security Duties, 25 February 1992.

I. INTRODUCTION

A. Rules of Engagement (ROE) are the primary tool used to regulate the use of force, and thereby serve as one of the cornerstones of the Operational Law discipline. The legal factors which serve as a foundation for ROE, that is, customary and conventional law principles regarding the right of self defense and the laws of war, are varied and complex. They do not, however, stand alone: non-legal issues, such as political objectives and military mission limitations, also play an essential role in the construction and application of ROE. As a result of the multidisciplinary reach of ROE, judge advocates play a significant role in their preparation, dissemination, and training. Notwithstanding the import of their role, judge advocates must understand that, ultimately, ROE are the commander's rules—and that those rules must be implemented by the soldier, sailor, airman, or marine who executes the mission.

B. In order to ensure that ROE are legally and tactically sound, versatile, understandable, and easily executed, both the judge advocate and operators must understand the full breadth of policy, legal, and mission concerns they 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, battlefield operating systems, and the 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, judge advocates 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, survey CJCSI 3121.01A, *Standing Rules of Engagement for U.S. Forces* (SROE), and review the judge advocate's role in the ROE process, while providing unclassified extracts from the 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 is classified SECRET, and there are important concepts within it that may not be reproduced here. The operational lawyer should ensure that he has ready access to the publication. Once he has access, he should read it from cover to cover until he knows it. Judge advocates play such an important role in the ROE process because we are experts in ROE—but you cannot be an expert unless you read 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 to delineate the circumstances and limitations under which its own 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 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 policy and objectives are reflected in the action 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, the ROE may restrict the engagement of certain targets, or the use of particular weapons systems, out of a desire not to antagonize the enemy, tilt world opinion in a particular direction, or as a positive limit on the escalation of hostilities. 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 status of forces agreements with the United States (i.e., SOFAs).

2. *Military Purposes*: ROE provide parameters within which the commander must operate in order to accomplish his 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 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 <u>training</u> rather than <u>combat</u> nature of the mission

3. *Legal Purposes*: ROE provide restraints on a commander's action consistent with both domestic and international law and may, under certain circumstances, impose greater restrictions on action than those required by the law. For many contemporary missions, particularly peace operations, the mission is stated in a document such as a UN Security Council Resolution, 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. Commanders must therefore be intimately familiar with the legal bases for their mission. The commander may issue ROE to reinforce principles of the law of war, such as prohibitions on the destruction of religious or cultural property, and minimization of injury to civilians and civilian property.

III. CJCS STANDING RULES OF ENGAGEMENT (SECRET)

A. The new SROE went into effect on 15 January 2000, the result of an all-DoD review and revision of the previous 1994 edition. It provides implementation guidance on the inherent right of self-defense and the application of force for mission accomplishment. It is designed to provide a common template for development and implementation of ROE for the full range of operations, from peace to war. The Chairman of the Joint Chiefs of Staff is currently revising 3121.01A and has sent 3121.01B out for comment. Its prospective release date is unknown at the time of this printing. However, it is likely to be issued before the next edition of the OPLAW Handbook is published.

B. *Applicability*. The SROE applies to all U.S. forces responding to military attacks within the United States, and to all military operations outside the United States, unless superseded by other ROE that have been approved by the President or Secretary of Defense. It does not apply to peacetime domestic support operations. CJCSI 3121.02, Rules on the Use of Force by DoD Personnel During Military Operations Providing Support to Law Enforcement Agencies Conducting Counterdrug Operations in the United States, and DoD Instruction 5210.56, Use of Deadly Force and the Carrying of Firearms by DoD Personnel Engaged in Law Enforcement and Security Duties, apply to these operations. It also does not apply to domestic civil disturbances which are covered by the ROE for Operation Garden Plot (see chapter 4 of the Domestic Operational Law Handbook, CLAMO) or to disaster assistance (see chapter 5 of the Domestic Operational Law Handbook).

C. *Responsibility.* The President and Secretary of Defense approve all ROE for US forces. The J-3 (Current Operations) is responsible for ROE maintenance. Each geographic Combatant Commander is given the authority to promulgate theater specific ROE, after approval from the President and Secretary of Defense.

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.

E. The SROE is 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:**

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) *National self defense*: The act of defending the United States, U.S. forces, and in certain circumstances, U.S. citizens and their property, and U.S. commercial assets from a hostile act, hostile intent, or hostile force.

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

3) *Unit self defense:* The act of defending elements or personnel of a defined unit, as well as U.S. forces in the vicinity thereof, against a hostile act or hostile intent.

4) *Individual self defense*. The right to defend oneself and other U.S. forces in the vicinity from a hostile act or hostile intent. This is a subset of unit self-defense and an individual's exercise of the right to self-defense **must remain consistent with lawful orders of their superiors, the rules contained in the SROE, and other applicable rules of engagement promulgated for the mission or AOR.**

5) *Defense of Mission & 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.**

b. **Hostile Act:** An attack or other use of force against the United States, U.S. forces, and, in certain circumstances, U.S. nationals, their property, U.S. commercial assets, and/or other designated non-U.S. forces, foreign nationals and their property. It is also force used directly to preclude or impede the mission and/or duties of U.S. forces, including the recovery of U.S. personnel and vital U.S. Government property. A hostile act triggers the right to use *proportional force* in self defense to deter, neutralize, or destroy the threat.

c. **Hostile Intent:** The threat of imminent use of force by a foreign force or terrorist unit against the United States, U.S. forces, or other designated persons and property. When hostile intent is present, the right exists to use *proportional force* in self defense to deter, neutralize, or destroy the threat.

d. **Hostile Force:** Any civilian, paramilitary, or military force or terrorist(s), with or without national designation, that has committed a hostile act, exhibited hostile intent, or has been declared hostile by appropriate U.S. authority.

e. **Declaring Forces Hostile:** 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. The authority to declare a force hostile is limited, and may be found at Appendix A to Enclosure A of the SROE.

3. **Enclosures B-I**: These classified enclosures provide general guidance on specific types of operations: Maritime, Air, Land, and Space Operations; Information Operations; Noncombatant Evacuation Operations, Counterdrug Support Operations; and Domestic Support Operations.

4. **Enclosure J (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 of Secretary of Defense approval, those that require either President or Secretary of Defense 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 now recognizes a fundamental difference between the supplemental measures. Those measures that are reserved to the President or Secretary of Defense or Combatant Commander are generally **restrictive**, that is, either the President or Secretary of Defense or Combatant Commander must specifically permit the particular operation, tactic, or weapon before a field commander may utilize them. Contrast this with the remainder of the supplemental measures, those delegated to subordinate commanders. These measures are all **permissive** in nature, *allowing a commander to use any weapon or tactic available and to employ reasonable force to accomplish his mission*, without having to get permission first. Inclusion within the subordinate commanders supplemental list does not suggest that a commander needs to seek authority to use any of the listed items. *SUPPLEMENTAL ROE RELATE TO MISSION ACCOMPLISHMENT, NOT TO SELF DEFENSE, AND NEVER LIMIT A COMMANDER'S INHERENT RIGHT AND OBLIGATION OF SELF DEFENSE.*

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

5. **Enclosure K (Combatant Commanders' Theater-Specific ROE):** Enclosure K contains specific rules of engagement submitted by Combatant Commanders for use within their Area of Responsibility (AOR). Those special ROE address specific strategic and political sensitivities of the Combatant Commander's AOR and must be approved by CJCS. They are included in the SROE as a means to assist commanders and units participating in operations outside their assigned AORs. To date, two Combatant Commanders have received approval of and promulgated theater-specific ROE, CENTCOM and PACOM. Their theater-specific ROE can be found at: CENTCOM – http://www.centcom.smil.mil/ccj3/ops2.htm; PACOM – http://www.hq.pacom.smil.mil/j06/j06/jo6.htm. If you anticipate an exercise or deployment into any geographic Combatant Commanders AOR, check with the Combatant Commander SJA for ROE guidance.

6. **Enclosure L (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 J-3 or J-5 in developing and integrating ROE into operational planning.

IV. MULTINATIONAL ROE

A. US 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 the President or Secretary of Defense. If not so authorized, the CJCS SROE apply. In all cases, US forces retain the right to use necessary and proportional force for unit and individual self-defense in response to a hostile act or demonstration of hostile intent.

B. The US 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 law of war and will be party to different law of war obligations that will affect their ROE. And ultimately, each nation is bound by its own domestic law and policy that will significantly affect its use of force and ROE.

V. ROLE OF THE JUDGE ADVOCATE

A. The judge advocate at all levels plays an important role in the ROE process. The remainder of this chapter will discuss the four major tasks with which the judge advocate will be confronted. Although presented as discrete tasks, the judge advocate may find himself involved with some or all of them simultaneously.

B. **Determining the current ROE**

1. A judge advocate in an operational unit will typically find himself tasked with briefing the ROE to a commander during the daily operational brief (at least during the first few days of the operation). In preparing his brief, a judge advocate will want to consult the following sources:

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

b. As applicable, those 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, found in Enclosure K.

d. The base-line ROE for this particular mission as provided in the OPLAN or as promulgated by separate message.

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 a judge advocate. During the first few days of an operation, the ROE may be quite fluid. A judge advocate will want to ensure that any ROE message is brought to his immediate attention (close liaison with the JOC/TOC Battle Captain is necessary here). A judge advocate should periodically review the message traffic himself to ensure that no ROE messages were missed, and should maintain close contact with judge advocates at higher levels who will be able to alert him 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 judge advocates at all levels determine where the ROE stands.

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

C. **Requesting Additional ROE**

1. The SROE provides that commanders at <u>any level</u> 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 is unclear, or too restrictive, or otherwise unsuitable for his particular mission. In that case, he 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 J) will often be assigned to the judge advocate, he cannot do it alone: there must be extensive command and operator input. The concept of an "ROE Planning Cell," consisting of representatives from all sections of the command, including the judge advocate, is recognized in Enclosure L of the SROE. Such a cell should prove ideal for the task of drafting an ROE request. The judge advocate, who <u>should</u> 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 Secretary of Defense approval—these items have already received the greatest thought. 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 which earlier ROE planners could not have foreseen, and which the ROE do not quite fit. If this circumstance is clearly explained, the approval authority is more likely to approve the request.

c. Remember the policy regarding supplemental measures is that they are generally permissive in nature (except for those reserved to the President or Secretary of Defense 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 necessary. See the discussion in enclosure J of the SROE for more detail.

d. Maintain close contact with judge advocates 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.

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. Recall that supplemental measures are grouped according to the authority who approves them, and that the last (and largest) group are those which may be delegated to commanders subordinate to the Combatant Commander. Rarely will this delegation go below the component commander/JTF level. Therefore, only judge advocates at that level and above will face this task.

2. The process involves taking what ROE 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 of Secretary of Defense, are generally addressed to the Combatant Commander and Service level. The supported Combatant Commander takes those President or Secretary of Defense-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. If the subordinate commander/JTF commander has been delegated the authority to approve certain supplemental measures, he will take the President or Secretary of Defense- 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 unobserved, indirect fire (assuming that this is among the measures for which the JTF commander has been delegated authority).

3. Accordingly, the drafting of ROE is applicable at each of these levels. As above, however, a judge advocate cannot do it alone. The ROE Planning Cell concept is also appropriate to this task. Some of the considerations applicable 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 his personally communicated guidance to subordinates.

b. Avoid Restating the Law of War. ROE should not restate the law of war. Commanders may desire to emphasize an aspect of the law of war that is particularly relevant to a specific operation (e.g., see the 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 complimentary, 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. ROE must be 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 in 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 confronts a threat.

4. Promulgation of ROE***:*** Mission ROE are promulgated at Appendix 8, Annex C, of JOPES-formatted Operational Orders, and via formatted messages as found at Appendix F to Enclosure J of the SROE (discussed above).

Once again, follow the message format!

E. **Training ROE**

1. Once the mission specific ROE are received, the question becomes, "How can I as a judge advocate help to ensure that the troops understand the ROE and are able to apply the rules reflected in the ROE?" A judge advocate can play a significant role in assisting in the training of individual soldiers and the staff and leaders of the Battlefield Operating Systems (BOS).

2. It is the commander, not a judge advocate, 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 judge advocate'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 is not a discreet 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 how to specifically 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 validated time and again, and proven to be far superior to classroom instruction on ROE. ROE training should be conducted by the soldiers' NCOs and officers. The soldier will apply the ROE with his or her NCOs and officers, not with the judge advocate. The judge advocate should be willing to assist in drafting realistic training, and to be present when possible to observe training and to answer questions regarding the application of the ROE. If the 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 the soldier and the NCOs, on a one-on-one or small group basis. A soldier should be able to articulate the meaning of the terms hostile force, hostile act, hostile intent, and other key ROE principals. 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 a soldier and his 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 goal in STX training is primarily to help the soldiers to 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 the 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 in cases where deadly force is not authorized, they may use force short of deadly force in order 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 non-mission essential property. A lane may be established where 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 the soldiers be trained on the ROE, but the staff and BOS elements should be trained as well. This can best be accomplished in FTXs and CPXs. Prior to a real world deployment, ROE integration and synchronization should be conducted to ensure that all BOS elements understand the ROE and how each system will apply the rules. The judge advocate 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. 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 a 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. 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.

c. Tailored 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, 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 Card mission specific. Though the commander may want to reinforce a few law of war principles in conjunction with ROE, the purpose of the card is to remind soldiers of mission specific issues that are not part of his 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.

e. Changing Rules. If the ROE change during an operation, two options possible ways to disseminate the information are to change the color of the card stock used to produce the new ROE card (and collect the old ones and destroy them) or ensure every card produced has an "as of" date on it. This, combined with an aggressive training and refresher training program, will help ensure soldiers are operating off the current ROE. ROE for a multi-phased operation, where the ROE is 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," but are intended to provide a frame of reference for the command/operations/judge advocate team as they develop similar tools for assigned operations.

CHAIRMAN OF THE JOINT CHIEFS OF STAFF INSTRUCTION

J-3 CJCSI 3121.01A
DISTRIBUTION: A, C, S 15 January 2000

STANDING RULES OF ENGAGEMENT FOR U.S. FORCES

Reference: See Enclosure M.

1. Purpose. This instruction establishes:

a. SecDef-approved standing rules of engagement (SROE) that implement the inherent right of self-defense and provide guidance for the application of force for mission accomplishment.

b. Fundamental policies and procedures governing action to be taken by U.S. force commanders during all military operations and contingencies as specified in paragraph 3.

2. Cancellation. CJCSI 3121.01, 1 October 1994, is canceled.

3. Applicability. ROE apply to U.S. forces during military attacks against the United States and during all military operations, contingencies, and terrorist attacks occurring outside the territorial jurisdiction of the United States. The territorial jurisdiction of the United States includes the 50 states, the Commonwealths of Puerto Rico and Northern Marianas, U.S. possessions, and U.S. territories.

a. Peacetime operations conducted by the U.S. military within the territorial jurisdiction of the United States are governed by use-of-force rules contained in other directives or as determined on a case-by-case basis for specific missions (see paragraph 4 of Enclosure H and Enclosure I).

b. Inclusion of NORAD. For purposes of this document, the Commander, U.S. Element NORAD, will be referred to as a Combatant Commander.

4. Policy. See Enclosure A.

Note: The pagination of these extracts do not match the SROE.

5. Definitions. Definitions are contained in the enclosures and the Glossary.

6. Responsibilities. The PRESIDENT OR SECRETARY OF DEFENSE approve ROE for U.S. forces. The Joint Staff, Joint Operations Division (J-3), is responsible for the maintenance of these ROE.

a. The Combatant Commanders may augment these SROE as necessary to reflect changing political and military policies, threats, and missions specific to their areas of responsibility (AORs). When a Combatant Commander's theater-specific ROE modify these SROE, they will be submitted to Chairman of the Joint Chiefs of Staff for PRESIDENT OR SECRETARY OF DEFENSE approval, if required, and referenced in Enclosure K of this instruction.

b. Commanders at every echelon are responsible for establishing ROE for mission accomplishment that comply with ROE of senior commanders and these SROE. The SROE differentiate between the use of force for self-defense and for mission accomplishment. Commanders have the inherent authority and obligation to use all necessary means available and to take all appropriate actions in the self-defense of their unit and other U.S. forces in the vicinity. ROE supplemental measures apply only to the use of force for mission accomplishment and do not limit a commander's use of force in self-defense (see Enclosure A for amplification).

c. The two types of supplemental measures are -- those that authorize a certain action and those that place limits on the use of force for mission accomplishment. Some actions or weapons must be authorized either by the PRESIDENT OR SECRETARY OF DEFENSE or by a Combatant Commander. In all other cases, commanders may use any lawful weapon or tactic available for mission accomplishment unless specifically restricted by an approved supplemental measure. Any commander may issue supplemental measures that place limits on the use of force for mission accomplishment (see Enclosure J for amplification).

d. The Combatant Commanders distribute these SROE to subordinate commanders and units for implementation.

7. Procedures. Guidance for the use of force for self-defense and mission accomplishment is set forth in this document. Enclosure A, minus appendixes, is UNCLASSIFIED and intended to be used as a coordination tool with U.S. allies for the development of combined or multinational ROE consistent with these SROE. The supplemental measures list in Enclosure J is organized by authorization level to facilitate quick reference during crisis planning. As outlined in paragraph 6 above, the Combatant Commanders will submit theater-specific SROE for reference in this instruction to facilitate theater-to-theater coordination.

8. Releasability. This instruction is approved for limited release. DOD components (to include the combatant commands) and other Federal agencies may obtain copies of this instruction through controlled Internet access only (limited to .mil and .gov users) from the CJCS Directives Home Page--http://www.dtic.mil/doctrine/jel.htm. The Joint Staff activities may access or obtain copies of this instruction from the Joint Staff LAN.

9. Effective Date. This instruction is effective upon receipt for all U.S. force commanders and supersedes all other nonconforming guidance.

10. Document Security. This basic instruction is UNCLASSIFIED. Enclosures are classified as indicated.

HENRY H. SHELTON
Chairman
of the Joint Chiefs of Staff

Enclosures:
A -- Standing Rules of Engagement for U.S. Forces
Appendix A - Self-Defense of U.S. Nationals and Their Property at Sea
Appendix B - Recovery of U.S. Government Property at Sea
Appendix C - Protection and Disposition of Foreign Nationals in the Custody of U.S. Forces
B -- Maritime Operations
C -- Air Operations
D -- Land Operations
E -- Space Operations
F -- Information Operations
G -- Noncombatant Evacuation Operations
H -- Counterdrug Support Operations

I -- Domestic Support Operations
J -- 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
K -- Combatant Commander's Theater-Specific ROE
L -- Rules of Engagement Process
M -- References
GL -- Glossary

ENCLOSURE A
STANDING RULES OF ENGAGEMENT FOR U.S. FORCES

1. Purpose and Scope

a. The purpose of these SROE is to provide implementation guidance on the application of force for mission accomplishment and the exercise of the inherent right and obligation of self-defense. In the absence of superseding guidance, the SROE establish fundamental policies and procedures governing the actions to be taken by U.S. force commanders in the event of military attack against the United States and during all military operations, contingencies, terrorist attacks, or prolonged conflicts outside the territorial jurisdiction of the United States, including the Commonwealths of Puerto Rico and Northern Marianas, U.S. possessions, and U.S. territories. 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 their forces.

b. Except as augmented by supplemental ROE for specific operations, missions, or projects, the policies and procedures established herein remain in effect until rescinded.

c. U.S. forces operating with multinational forces:

(1) U.S. 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 the PRESIDENT OR SECRETARY OF DEFENSE. U.S. forces always retain the right to use necessary and proportional force for unit and individual self-defense in response to a hostile act or demonstrated hostile intent.

(2) When U.S. forces, under U.S. OPCON or TACON, operate in conjunction with a multinational force, reasonable efforts win be made to effect common ROE. If such ROE cannot be established, U.S. forces will operate under these SROE. To avoid misunderstanding, the multi-national forces will be informed prior to U.S. participation in the operation that U.S. forces intend to operate under these SROE and to exercise unit and individual self-defense in response to a hostile act or demonstrated hostile intent. For additional guidance concerning peace operations, see Appendix A to Enclosure A.

(3) Participation in multinational operations may be complicated by varying national obligations derived from international agreements: e.g., other coalition members may not be parties to treaties that bind the United States, or they may be bound by treaties to which the United States is not a party. U.S. forces remain bound by U.S. international agreements even if the other coalition members are not parties to these agreements and need not adhere to the terms.

d. Commanders of U.S. forces subject to international agreements governing their presence in foreign countries (e.g., Status of Forces Agreements) retain the inherent authority and obligation to use all necessary means available and take all appropriate actions for unit self-defense.

e. U.S. forces in support of operations not under OPCON or TACON of a U.S. Combatant Commander or that are performing missions under direct control of the PRESIDENT OR SECRETARY OF DEFENSE, Military Departments, or other-USG departments or agencies (e.g., Marine Security Guards, certain special security forces) will operate under use-of-force policies or ROE promulgated by those departments or agencies. U.S. forces, in these cases, retain the authority and obligation to use all necessary means available and to take all appropriate actions in unit self-defense in accordance with these SROE.

f. U.S. Naval units under USCG OPCON or TACON conducting law enforcement support operations will follow the use-of-force and weapons policy issued by the Commandant, USCG, but only to the extent of use of warning shots and disabling fire per 14 USC 637 (reference w). DOD units operating under USCG OPCON or TACON retain the authority and obligation to use all necessary means available and to take all appropriate actions in unit self-defense in accordance with these SROE.

g. U.S. forces will comply with the Law of War during military operations involving armed conflict, no matter how the conflict may be characterized under international law, and will comply with its principles and spirit during all other operations.

2. Policy

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

b. The goal of U.S. national security policy is to preserve the survival, safety, and vitality of our nation and to maintain a stable international environment consistent with U.S. national interests. U.S. national security interests guide global objectives of deterring and, if necessary, defeating armed attack or terrorist actions against the United States to include U.S. forces and, in certain circumstances, U.S. nationals and their property, U.S. commercial assets, persons in U.S. custody, designated non-U.S. forces, and foreign nationals and their property.

3. Intent. These SROE are intended to:

a. Implement the right of self-defense, which is applicable worldwide to all echelons of command.

b. Provide guidance governing the use of force consistent with mission accomplishment.

c. Be used in peacetime operations other than war, during transition from peacetime to armed conflict or war, and during armed conflict in the absence of superseding guidance.

4. Combatant Commanders' Theater-Specific ROE

a. Combatant Commanders may augment these SROE as necessary as delineated in subparagraph 6a of the basic instruction.

b. Combatant Commanders will distribute these SROE to subordinate commanders and units for implementation. The mechanism for disseminating ROE supplemental measures is set forth in Enclosure J.

5. Definitions

a. Inherent Right of Self-Defense. A commander has the authority and obligation to use all necessary means available and to take all appropriate actions to defend that commander's unit and other US forces in the vicinity from a hostile act or demonstration of hostile intent. Neither these rules, nor the supplemental measures activated to augment these rules, limit this inherent right and obligation. At all times, the requirements of necessity and proportionality, as amplified in these SROE, will form the basis for the judgment of the on-scene commander (OSC) or individual as to what constitutes an appropriate response to a particular hostile act or demonstration of hostile intent.

b. National Self-Defense. Defense of the United States, U.S. forces, and, in certain circumstances, U.S. nationals and their property, and/or U.S. commercial assets. National self-defense may be exercised in two ways: first, it may be exercised by designated authority extending protection against a hostile act or demonstrated hostile intent to U.S. nationals and their property, and/or designated U.S. commercial assets [in this case, U.S. forces will respond to a hostile act or demonstrated hostile intent in the same manner they would if the threat were directed against U.S. forces]; second, it may be exercised by designated authority declaring a foreign force or terrorist(s) hostile [in this case, individual U.S. units do not need to observe a hostile act or determine hostile intent before engaging that force or terrorist(s)].

c. Collective Self-Defense. The act of defending designated non-U.S. forces, and/or designated foreign nationals and their property from a hostile act or demonstrated hostile intent. Unlike national self-defense, the authority to extend U.S. protection to designated non-U.S. forces, foreign nationals and their property may not be exercised below the PRESIDENT OR SECRETARY OF DEFENSE level. Similar to unit self-defense and the extension of U.S. forces protection to U.S. nationals and their property and/or commercial assets, the exercise of collective self-defense must be based on an observed hostile act or demonstrated hostile intent.

d. Unit Self-Defense. The act of defending a particular U.S. force element, including individual personnel thereof, and other U.S. forces in the vicinity, against a hostile act or demonstrated hostile intent.

e. Individual Self-Defense. The inherent right to use all necessary means available and to take all appropriate actions to defend oneself and U.S. forces in one's vicinity from a hostile act or demonstrated hostile intent is a unit of self-defense. Commanders have the obligation to ensure that individuals within their respective units understand and are trained on when and how to use force in self-defense.

f. Elements of Self-Defense. Application of force in self-defense requires the following two elements:

(1) Necessity. Exists when a hostile act occurs or when a force or terrorists exhibits hostile intent.

(2) Proportionality. Force used to counter a hostile act or demonstrated hostile intent must be reasonable in intensity, duration, and magnitude to the perceived or

demonstrated threat based on all facts known to the commander at the time (see Glossary for amplification).

g. Hostile Act. An attack or other use of force against the United States, U.S. forces, and, in certain circumstances, U.S. nationals, their property, U.S. commercial assets, and/or other designated non-U.S. forces, foreign nationals and their property. It is also force used directly to preclude or impede the mission and/or duties of U.S. forces, including the recovery of U.S. personnel and vital U.S. Government property (see Glossary for amplification).

h. Hostile Intent. The threat of imminent use of force against the United States, U.S. forces, and in certain circumstances, U.S. nationals, their property, U.S. commercial assets, and/or other designated non-U.S. forces, foreign nationals and their property. Also, 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 USG property (see Glossary for amplification).

i. Hostile Force. Any civilian, paramilitary, or military force or terrorist(s), with or without national designation, that has committed a hostile act, exhibited hostile intent, or has been declared hostile by appropriate U.S. authority.

6. Declaring Forces Hostile. Once a force is declared hostile by appropriate authority, U.S. units need not observe a hostile act or a demonstration of hostile, intent before engaging that force. The responsibility for exercising the right and obligation of national self-defense and as necessary declaring a force hostile is a matter of the utmost importance. All available intelligence, the status of international relationships, the requirements of international law, an appreciation of the political situation, and the potential consequences for the United States must be carefully weighed. The exercise of the right and obligation of national self-defense by competent authority is separate from and in no way limits the commander's right and obligation to exercise unit self-defense. The authority to declare a force hostile is limited as amplified in Appendix A of this Enclosure.

7. Authority to Exercise Self-Defense

a. National Self-Defense. The authority to exercise national self-defense is outlined in Appendix A of this Enclosure.

b. Collective Self-Defense. Only the PRESIDENT OR SECRETARY OF DEFENSE may authorize the exercise of collective self-defense.

c. Unit Self-Defense. A unit commander has the authority and obligation to use all necessary means available and to take all appropriate actions to defend the unit, including elements and personnel, or other U.S. forces in the vicinity, against a hostile act or demonstrated hostile intent. In defending against a hostile act or demonstrated hostile intent, unit commanders will use only that degree of force necessary to decisively counter the hostile act or demonstrated hostile intent and to ensure the continued protection of U.S. forces (see subparagraph 8a of this enclosure for amplification).

d. Individual Self-Defense. Commanders have the obligation to ensure that individuals within their respective units are trained on and understand when and how to use force in self-defense.

8. Action in Self-Defense

a. Means of Self-Defense. All necessary means available and all appropriate actions may be used in self-defense. The following guidelines apply for individual, unit, national, or collective self-defense:

(1) Attempt to De-Escalate the Situation. When time and circumstances permit, the hostile force should be warned and given the opportunity to withdraw, or cease threatening actions (see Appendix A of this Enclosure for amplification).

(2) Use Proportional Force -- Which May Include Nonlethal Weapons -- to Control the Situation. When the use of force in self-defense is necessary, the nature, duration, and scope of the engagement should not exceed that which is required to decisively counter the hostile act or demonstrated hostile intent and to ensure the continued protection of U.S. forces or other protected personnel or property.

(3) Attack to Disable or Destroy. An attack to disable or destroy a hostile force is authorized when such action is the only prudent means by which a hostile act or demonstration of hostile intent can be prevented or terminated. When such conditions exist, engagement is authorized only while the hostile force continues to commit hostile acts or exhibit hostile intent.

b. Pursuit of Hostile Forces. Self-defense includes the authority to pursue and engage hostile forces that continue to commit hostile acts or exhibit hostile intent.

c. Defending U.S. Nationals, Property, and Designated Foreign Nationals

(1) Within a Foreign Nation's U.S.-Recognized Territory or Territorial Airspace. The foreign nation has the principal responsibility for defending U.S. nationals and property within these areas (see Appendix A of this Enclosure for amplification).

(2) At Sea. Detailed guidance is contained in Appendix A to Enclosure B.

(3) In International Airspace. Protecting civil aircraft in international airspace is principally the responsibility of the nation of registry. Guidance for certain cases of actual or suspected hijacking of airborne U.S. or foreign civil aircraft is contained in CJCSI 3610.01, 31 July 1997, "Aircraft Piracy and Destruction of Derelict Airborne Objects."

(4) In Space. Military or civilian space systems such as communication satellites or commercial earth-imaging systems may be used to support a hostile action. Attacking third party or civilian space systems can have significant political and economic repercussions. Unless specifically authorized by the PRESIDENT OR SECRETARY OF DEFENSE, commanders may not conduct operations against space-based systems or ground and link segments of space systems. Detailed guidance is contained in Enclosure E.

(5) Piracy. U.S. warships and aircraft have an obligation to repress piracy on or over international waters directed against any vessel, or aircraft, whether U.S. or foreign flagged and are authorized to employ all means necessary to repress piratical acts. For ships and aircraft repressing an act of piracy, the right and obligation of self-defense extends to persons, vessels, or aircraft assisted. If a pirate vessel or aircraft fleeing from pursuit proceeds into the territorial sea, archipelagic waters, or superjacent airspace of another country, every effort should be made to obtain the consent of the coastal state prior to continuation of the pursuit.

d. Operations Within or in the Vicinity of Hostile Fire or Combat Zones Not Involving the United States

(1) U.S. forces should not enter, or remain in, a zone in which hostilities (not involving the United States) are imminent or occurring between foreign forces unless directed by proper authority.

(2) If a force commits a hostile act or exhibits hostile intent against U.S. forces in a hostile fire or combat zone, the commander is obligated to act in unit self-defense in accordance with SROE guidelines.

e. Right of Assistance Entry

(1) Ships, or 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 or island state to engage in legitimate efforts to render 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 self-defense extends to and includes persons, vessels, or aircraft being assisted. The right of self-defense in such circumstances does not include interference with legitimate law enforcement actions of a coastal nation. However, once received onboard the assisting ship or aircraft, persons assisted will not be surrendered to foreign authority unless directed by the PRESIDENT OR SECRETARY OF DEFENSE.

(4) Further guidance for the exercise of the right of assistance entry is contained in CJCS Instruction 2410.01A, 23 April 1997, "Guidance for the Exercise of Right of Assistance Entry."

ENCLOSURE L
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 PRESIDENT OR SECRETARY OF DEFENSE or Combatant Commander approval (001-199) are available for use by commanders unless expressly withheld by higher authority.

2. ROE Development

a. General. 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 and may require development and request of supplemental measures requiring PRESIDENT OR SECRETARY OF DEFENSE or Combatant Commander approval for mission accomplishment. The issues addressed throughout the planning process will form the basis for supplemental ROE requests requiring PRESIDENT OR SECRETARY OF DEFENSE 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 CAP and deliberate planning. Normally, the Director for Operations (J-3) is responsible for developing ROE during CAP while the Director for Strategic Plans and Policies (J-5) develops ROE for deliberate planning. The Staff Judge Advocate (SJA) assumes the role of principal assistant to the J-3 or J-5 in developing and integrating ROE into operational planning.

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 the Combatant Commander theater-specific ROE contained in Enclosure K.

(b) Review supplemental ROE measures already approved by higher headquarters, and determine existing constraints and restraints.

(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. International law, including the UN Charter.
3. U.S. domestic law and policy.
4. HN law and bilateral agreements with the United States.
5. For multinational or coalition operations:
   a. Foreign forces ROE, NATO ROE, or other use of force policies.
   b. UN resolutions or other mission authority.

(d) Desired End State. Assess ROE requirements throughout preconflict, deterrence, conflict, and postconflict 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) 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 echelon (PRESIDENT OR SECRETARY OF DEFENSE, Combatant Commander) 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.

(7) Commander's Estimate. Identify PRESIDENT OR SECRETARY OF DEFENSE-level ROE required to support recommended COA.

(8) Preparation of Operations Order (OPORD).

(a) Prepare and submit requests for all supplemental ROE measures in accordance with Enclosure A. Normally, the OPORD should not be used to request supplemental measures.

(b) Prepare the ROE appendix of the OPORD in accordance with 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. 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 multinational forces or coalitions).

(9) ROE Request and Authorization Process. Commanders will request and authorize ROE, as applicable, in accordance with Enclosure A of this enclosure.

(10) ROE Control. Commanders and their staffs must continuously analyze ROE and recommend modifications required to meet changing operational parameters. The ROE process must anticipate changes in the operational environment and modify supplemental measures to support the assigned mission.

(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 or J-5 is responsible for the ROE Planning Cell and, assisted by the SJA, developing 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. ROE Planning Cell can be established at any echelon to refine ROE derived from the OPG or JPG planning and to produce ROE requests and/or authorizations.

(1) The J-3 or J-5 is responsible for the ROE Cell.

(2) The SJA assists the J-3 and J-5.

APPENDIX B

SAMPLE ROE CARDS

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: OPERATION IRAQI FREEDOM (Iraq, 2003)

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 no PID, contact your next higher commander for decision.

b. Do not engage anyone who has surrendered or is out of battle due to sickness or wounds.

c. Do not 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 Objects (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.

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.

There ROE will remain in effect until your commander orders you to transition to post-hostilities ROE.

NOTES

CHAPTER 6

NATIONAL SECURITY STRUCTURE AND STRATEGY

REFERENCES

1. U.S. Constitution.
2. National Security Act of 1947, P.L. 80-253 (1947).
3. National Security Act Amendments of 1949, P.L. 81-216 (1949).
4. Department of Defense Reorganization Act of 1958, P.L. 85-599 (1958).
5. Goldwater-Nichols Department of Defense Reorganization Act of 1986, P.L. 99-433 (1986).
6. U.S. Code, Title 10, Chapter 2, Department of Defense.
7. U.S. Code, Title 10, Chapter 5, Joint Chiefs of Staff.
8. U.S. Code, Title 10, Chapter 6, *Combatant Commands*

1) Historical Overview

   a) Constitution establishes President as the Commander-in-Chief (CINC).

   b) Department of War, created 7 August 1789, headed by Secretary of War with limited authority over land and naval forces.

   c) National Security Acts of 1947 and 1949.
      i) Created: National Security Council (NSC), Central Intelligence Agency (CIA), National Military Establishment (NME), Joint Chiefs of Staff (JCS).
         (1) NME headed by Secretary of Defense (SECDEF).
         (2) Chairman, JCS (CJCS) primary military advisor to CINC and SECDEF.
      ii) Reflects civilian control over the military.

   d) Additional Changes.
      i) 1958 – Department of Defense Reorganization Act of 1958 recognized Combatant Commanders.
      ii) 1986 – Goldwater-Nichols Act.
         (1) Established CJCS as the senior ranking member of the Armed Forces, making him the primary military advisor to the President.
         (2) Required the President to publish an annual national security strategy (NSS)
            (a) NSS is an attempt to promote U.S. national interests by coordinating instruments of national power (diplomatic, military, economic, and information).
            (b) Military forces figure prominently throughout the NSS' discussion of its current eight core objectives.
            (c) NSS available online at **www.whitehouse.gov/nsc/nss.pdf**
            (d) In addition to the National Security Strategy, the Bush Administration has issued several other strategic level strategies intended to help coordinate the response to the threat of terrorism in the United States and against US nationals and interests abroad. They include the National Strategy for Homeland Security (July 2002), National Strategy to Combat Weapons of Mass Destruction, (December 2002), National Strategy for Combating Terrorism (February 2003), National Strategy for the Physical Protection of Critical Infrastructure and Key Assets (February 2003), and the National Strategy to Secure Cyberspace (February 2003). Copies of these strategies are available at www.whitehouse.gov and on the Center for Law and Military Operations' databases at www.jagcnet.army.mil

2) Key Players.

a) There are basically three sets of players in the process: the policy makers, the resource providers, and the military commanders who execute.
   i) The policy makers include the President, SECDEF, and the National Security Council (NSC) and its various working subgroups.
   ii) The resource providers are the various Services, each headed by their respective Secretary and Chief. They are discussed in detail separately elsewhere in this handbook.
   iii) The military commanders responsible for execution from the national strategy-level perspective are the nine combatant commanders.

3) Policy Makers.

   a) National Security Council.

      i) Mission is to "advise the President on the integration of domestic, foreign, and military policies relating to national security, thus enabling military Services and others departments and agencies of the government to cooperate more effectively in matters involving national security.

      ii) Membership. NSC has statutory members and statutory advisors.

         (1) Members: President, VP, SECDEF, SECSTATE.

         (2) Advisors: CJCS and Director, CIA (DCIA).

         (3) Civilian status of voting members reflects civilian control of military.

         (4) President can add members; specific structure and function is at the President's discretion.

            (a) Current structure (Bush Administration) outlined in National Security Presidential Directive (NSPD) 1 (13 Feb 2001).

            (b) Current attendees: President, VP, SECSTATE, SECTREAS, SECDEF, DCI, CJCS, and Assistant to the President for National Security Affairs ("National Security Advisor"). May also include: Chief of Staff, Ass't to President for Economic Policy, Attorney General, and Director, OMB.

      iii) Subset of NSC is National Command Authority (NCA).
         (1) Includes President and SECDEF.
         (2) Current administration does not want term (NCA) used.

      iv) Principals Committee (NSC/PC).

         (1) See 3.a)ii)(4)(a)(ii), above.

      v) Deputies Committee (NSC/DC).

         (1) Comprised of the deputies of the NCS/PC.

         (2) Primary working group of the NSC.

      vi) Policy Coordinating Committees (NSC/PCCs).

         (1) Responsible for management and interagency coordination of the development and implementation of national security policies on a day-to-day basis.

         (2) Chaired by a Undersecretary or Assistant Secretary designated by SECSTATE.

(3) Regionally focused.
    (a) Europe and Eurasia.
    (b) Western Hemisphere.
    (c) East Asia.
    (d) South Asia.
    (e) Near East and North Africa.
    (f) Africa.

4) Operational Elements.

a) Combatant Commanders: Unless otherwise directed by the President, the chain of command to a unified or specified combatant command runs - (1) from the President to the Secretary of Defense; and (2) from the Secretary of Defense to the commander of the combatant command. 10 U.S.C. § 162(b).

Note: Neither the CJCS, the relevant Service Secretary, nor relevant Chief of Staff/Operations is in the chain of command.

i) Includes all specific and unified commands.

(1) Unified Command – a military command with broad, continuing missions, composed of forces from two or more military departments (e.g., U.S. Forces, Korea (USFK), or Pacific Command (PACOM)).

(2) Specified - a military command with broad, continuing missions, composed of forces from a single military department. There are currently NO specific commands.

ii) Supported versus Supporting.
(1) "Supported" command is typically the geographic combatant command in whose area of responsibility the operation is to occur, however, USSOCOM may also be designated a supported commander as missions require.
(2) The supported command receives the support of all supporting commands.
(3) The functional combatant commands (especially USJFCOM, as the primary provider of U.S.-based forces to other combatant commanders), and occasionally other geographic combatant commands are designated as "supporting" commands based on the supported command's needs, mission, and other factors.

iii) Existence, responsibilities, and force structure established biennially by the President in his Unified Command Plan (UCP). Current UCP is 1 October 2001.

iv) Subordinate forces report directly to Combatant Commander, not Service Chief, regardless of service of force or Combatant Commander.
(1) "The Secretaries of the Military Departments shall assign all forces under their jurisdiction to unified and specific combatant commands to perform mission assigned to those commands."
(2) Fundamental change to way services historically functioned mandated by Reorganization Act of 1986

b) Geographic Combatant Commands – 5 (map follows).

i) U.S. Northern Command (**USNORTHCOM**). HQs in Colorado Springs, CO. Responsible for all forces in North America.

ii) U.S. European Command (**USEUCOM**). HQs in Stuttgart, Germany. Responsible for all forces in Europe, Russia, Greenland, most of Africa (minus CENTCOM AOR), European waters, waters off Africa's west coast, and approximately ½ of the Atlantic Ocean (north and south).

iii) U.S. Pacific Command (**USPACOM**). HQs at Camp Smith, HI. Responsible for most of Asia, most of the Pacific Ocean, the Pacific Rim countries, Australia, and Antarctica.

iv) U.S. Southern Command (**USSOUTHCOM**). HQs in Miami, FL. Responsible for Central and Latin America, and the Caribbean.

v) U.S. Central Command (**USCENTCOM**). HQs at MacDill AFB, FL. Responsible for Southwest Asia, some North African countries, the Horn of Africa, Pakistan, Afghanistan, part of the Indian Ocean.

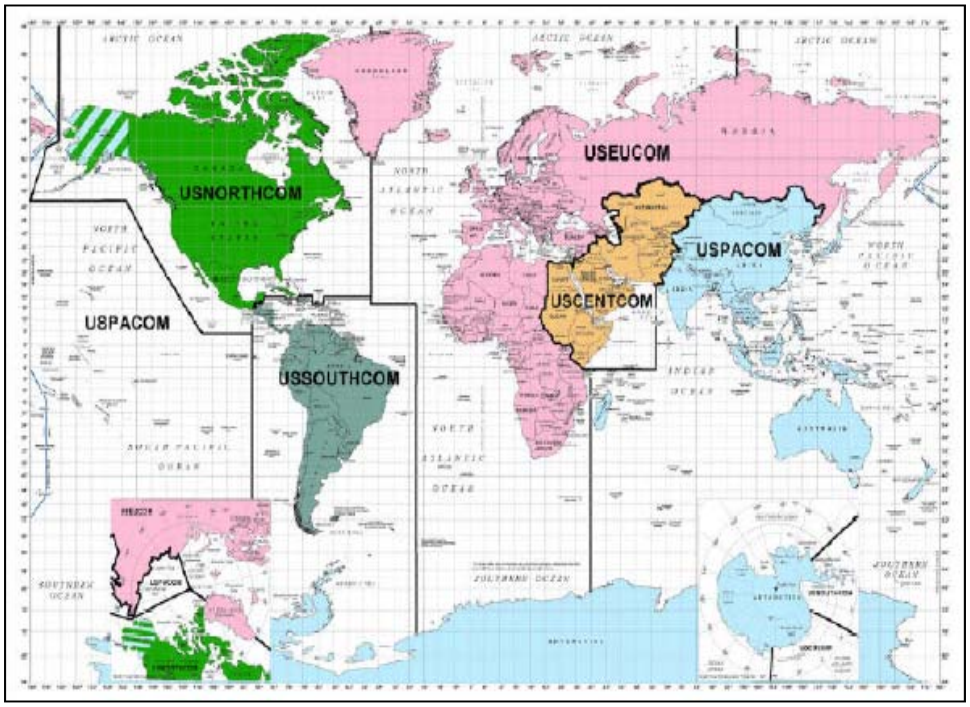

Figure 1. Geographic Combatant Command AORs

vi) Functional Combatant Commands – 4

(1) U.S. Transportation Command (**USTRANSCOM**). HQs at Scott AFB, IL. Responsible global air, land, and sea transportation.

(2) U.S. Special Operations Command (**USSOCCOM**). HQs at MacDill AFB, FL. Responsible for training and equipping all Services special operations forces.

(3) U.S. Joint Forces Command (**USJFCOM**). HQs in Norfolk, VA. Responsible for reviewing, writing, and validating joint doctrine by conducting joint training, simulation, experimentation and modeling to prepare battle-ready joint forces.

(4) U.S. Strategic Command (**USSTRATCOM**). HQs at Offutt AFB, NE. Responsible for deterring military attacks on U.S. and her allies in the areas of air, missile, and space defense.

c) Combatant Commander Authority

i) A combatant commander exercises "Combatant Command," or "COCOM."

(1) Nontransferable command exercised only by commanders of unified or specified combatant commands unless otherwise directed by the President or the Secretary of Defense. Combatant command (command authority) cannot be delegated and 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, and logistics necessary to accomplish the missions assigned to the command. Combatant command (command authority) provides full authority to organize and employ commands and forces as the combatant commander considers necessary to accomplish assigned missions. Operational control is inherent in combatant command (command authority). See Joint Pub 0-2, *Unified Action Armed Forces.*

(2) 10 U.S.C. §164 enumerates specific powers that a combatant commander shall have, to include:
(a) Giving authoritative direction to subordinate commands, including authoritative direction over all aspects of military operations, joint training, and logistics.
(b) Prescribing the chain of command.
(c) Organizing the command and forces as he considers necessary.
(d) Employing forces as he considers necessary.
(e) Assigning command functions to subordinate commanders.
(f) Coordinating administration and support.
(g) Selecting subordinate commanders, selecting combatant command staff, suspending subordinates, and convening courts-martial.

5) The Joint Chiefs of Staff.

a) Composed of Chairman, Vice Chairman, Military Service Chiefs, Assistant to the Chairman (3-star), Assistants to the Chairman for National Guard and Reserve matters (both 2-stars).

(1) CJCS is responsible for conveying President and/or SECDEF's orders to Combatant Commanders.

(2) Vice Chairman is a full voting member (since NDAA 1992).

(3) Military Service Chiefs are "dual hatted" and remain responsible to Secretaries of their Military Departments for management of their Services.

b) Responsible for unified strategic direction of the combatant forces (e.g., Unified Command Plan).

c) Reviews plans and programs of combatant commanders to determine their adequacy, consistency, acceptability, and feasibility.

d) By law, no executive authority over combat forces and serve only as advisors.

e) Prohibited from operating or organizing as an overall armed forces General Staff.

6) U.S. National Command and Control Architecture (Figure 2).

a) Definitions and Examples:

i) COCOM – Combatant Command (see 4)c)(i)(1), above).

ii) OPCON – Operational Command. Inherent in COCOM; organized at any level at or below COCOM; can be delegated/transferred; authority to perform functions of command, involving organizing and employing commands and forces, assigning tasks, and designating objectives.

iii) Joint Task Force –Organized to accomplish limited objectives and usually disolved once objective is complete (i.e., JTF Provide Promise in the Former Yugoslavia; JTF-6, a joint task force entering its 15th year)

iv) Subordinate Unifed Command – Command focuses on a specific area of interest; can be geographical or functional; operates on a continuing basis. Examples include U.S. Forces Korea (USFK), U.S. Forces Japan (USFJ), and Pacific Command (PACOM).

v) Functional Components – Organized to perform particular operational missions (i.e., air war, special operations) but not synonymous with Joint Task Force, even when composed of multiple services. Examples include Combined Forces Land Component (CFLC) and Joint Force Air Component (JFAC).

vi) Service Component Commands – Consists of the Service component commander and all those Service forces, such as individuals, units, detachments, organizations, and installations under that command, including the support forces that have been assigned to a combatant command or further assigned to a subordinate unified command or joint task force (i.e., MARFORPAC, USAREUR, USAFE).

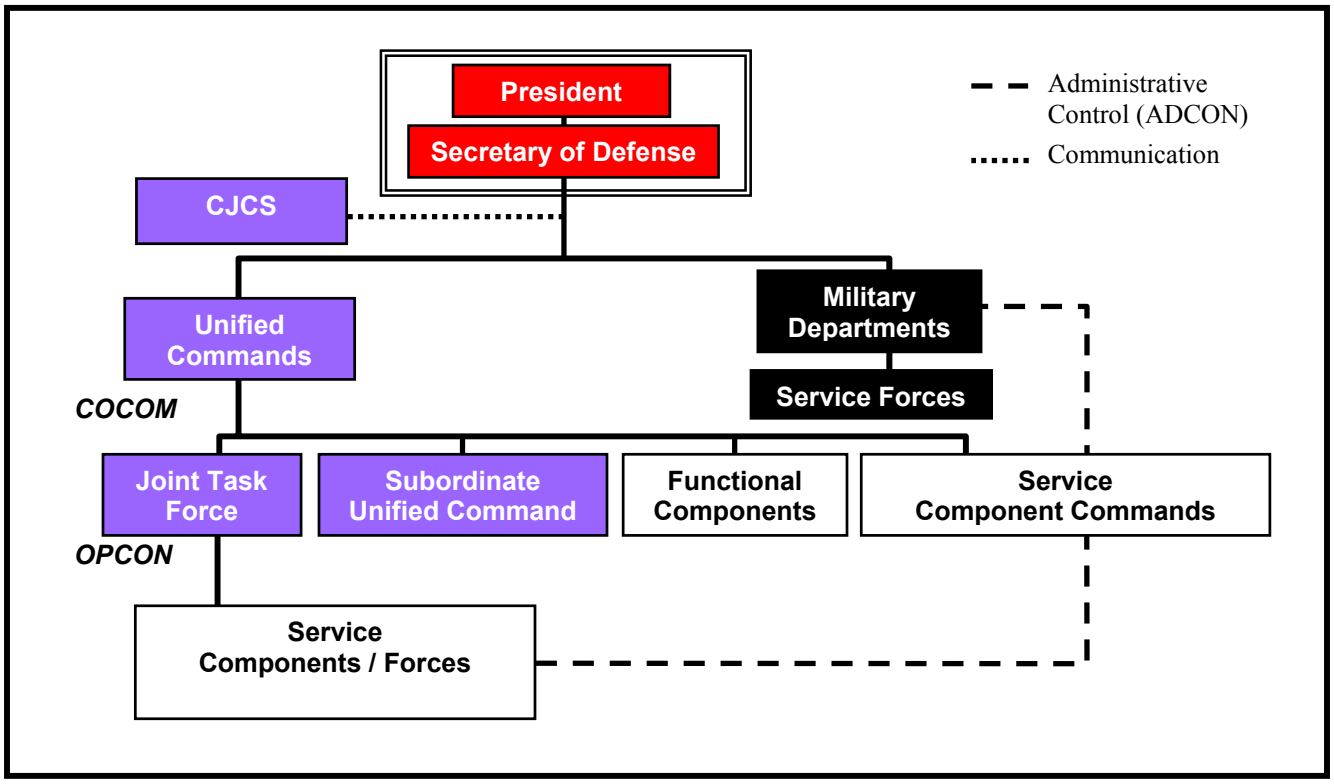

Figure 2. U.S. National Command and Control Architecture

CHAPTER 7

LAW OF THE SEA, AIR, AND SPACE

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 Jul 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. DoD 2005.1-M, Maritime Claims Reference Manual.
18. NWP 1-14M, Annotated Supplement to the Commander's Handbook on the Law of Naval Operations, 1997.
19. CJCSI 2410.01B, Guidance for the Exercise of the Right of Assistance Entry, 1 May 2001.

I. INTRODUCTION

A. Unlike many other topics of instruction, which primarily address questions of "What" or "How," this topic addresses the question of "Where." In other words, <u>what</u> an individual or state may do depends on <u>where</u> the action is to take place.

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 this area, but three are particularly noteworthy.

1. *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 (60 ratifications). Previous conventions on the law of the sea had been concluded, but none were comprehensive as UNCLOS III. UNCLOS I (1958) was a series of 4 conventions (Territorial Sea/Contiguous Zone, High Seas, Continental Shelf, and Fisheries/Conservation). A major defect of these was the failure to define the breadth of the territorial sea. UNCLOS II (1960) was an attempt to resolve issues left unresolved in 1958. However, it closed without an agreement. UNCLOS III, which was negotiated over a period of nine years, 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*—jurisdiction, as well as navigational rights and duties—between States that carefully balances the interests of States in controlling activities off their own coasts and the interests of all States in protecting the freedom to use ocean spaces without undue interference.

b. On July 9, 1982, the United States announced that it would not sign the Convention, objecting to provisions related to deep sea-bed mining (Part XI of the Convention). In a March 19, 1983 Presidential Policy Statement, the United States reaffirmed that it would not ratify UNCLOS III because of the deep seabed mining provisions. The United States considers the navigational articles to be generally reflective of customary international law, and therefore binding upon all nations. In 1994, the UN General Assembly proposed amendments to the mining provisions. In October 1994, the Convention, as amended, was submitted to the Senate for its advice and consent. No action has been taken to date.

2. *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 (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 operations and procedures. This is a continuing responsibility of the International Civil Aviation Authority (ICAO), which was created by the Convention.

3. *Outer Space Treaty of 1967.*

This treaty limited State sovereignty over outer space. Outer space was declared to be the common heritage of mankind. It prevented certain military operations in outer space and upon celestial bodies, specifically, 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. Various other international conventions, such as the Moon, Registration, and Liability Treaties, expand upon provisions found in the Outer Space Treaty.

II. LEGAL DIVISIONS

The Earth's surface, sub-surface, and atmosphere are broadly divided into National and International areas.

A. **National Areas.**

1. *Land Territory* includes all territory within recognized borders. Although most borders are internationally recognized, there are still some border areas which are in dispute.

2. *Internal Waters*. These are all waters landward of the Baseline.[76] The Baseline is an artificial line corresponding to the low-water mark along the coast.[77] The coastal State has the responsibility for determining and publishing its baselines. The legitimacy of those baselines is determined by international acceptance or rejection of the claim. UNCLOS III recognizes several exceptions to the general rule:

[76] UNCLOS III, Article 8.

[77] UNCLOS III, Article 5.

a. *Straight Baselines* may be utilized by the coastal State when its coastline is deeply indented (e.g., Norway) or there are fringing islands.[78] 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[79] and across the furthest extent of river deltas or other unstable coastline features.[80]

b. *Bays*. Depending on the shape, size, and historical usage, the coastal State may draw a baseline across the mouth of a bay, which makes the bay internal waters. The bay must be a well-marked indentation, and more than a mere curvature in the coastline. A *juridical bay* (i.e., one 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.[81] *Historic bays* (bodies of water with closures of greater than 24 NM) may be claimed as internal waters where the following criteria is met: the claim of sovereignty is an open, effective, continuous and long term exercise of authority couple with acquiescence—as opposed to mere absence of opposition—by foreign states.[82] The United States does not recognize any claims to historic bay status, such as Libya's claim to the Gulf of Sidra (closure line in excess of 300 NM).

c. *Archepelagic Baselines*. UNCLOS III allows archipelagic States (those consisting of groups of islands) to draw baselines around their outermost islands, subject to certain restrictions.[83] The waters within are given special status as archipelagic waters.

d. *Maritime Claims Reference Manual*. This DoD publication (available on the Internet at http://www.dtic.mil/whs/directives/corres/html/20051m.htm) sets out in detail all State claims, including specific points of latitude and longitude, and the U.S. position in regard to those claims.

3. *Territorial Sea*. That zone lying immediately seaward of the baseline. States must claim a territorial sea, to include its breadth. The maximum breadth is 12 NM.[84] 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. See the DoD Maritime Claims Reference Manual for claims of specific States, or NWP 1-14M (available on the Internet at http://www.nwc.navy.mil/ILD/NWP%201-14M.htm) for a synopsis of State claims.

4. *National Airspace* includes all airspace over the land territory, internal waters, and territorial sea.[85]

B. **International Areas**

1. *Contiguous Zone*. That zone, immediately seaward of the territorial sea, extending no more than 24 NM from the baseline.[86]

2. *Exclusive Economic Zone*. That zone, immediately seaward of the territorial sea, extending no more than 200 NM from the baseline.[87]

3. *High Seas* includes all areas beyond the Exclusive Economic Zone.[88]

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[78] UNCLOS III, Article 7.

[79] UNCLOS III, Article 9.

[80] UNCLOS III, Article 7(2).

[81] UNCLOS III, Article 10.

[82] UNCLOS III, Article 10(6).

[83] UNCLOS III, Article 47.

[84] UNCLOS III, Article 3.

[85] UNCLOS III, Article 2.

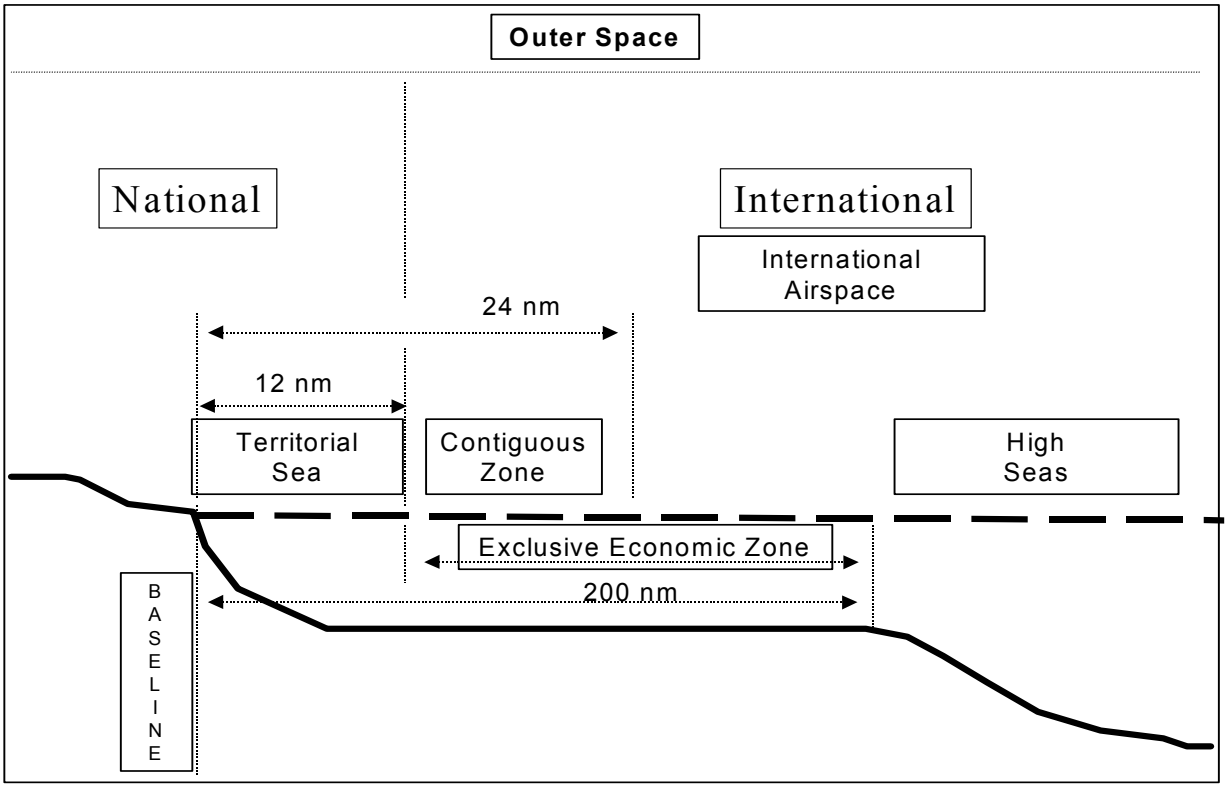
[86] UNCLOS III, Article 33.

[87] UNCLOS III, Articles 55, 57.

4. *International Airspace* includes all airspace beyond the furthest extent of the territorial sea.

5. *Outer Space*. The Outer Space Treaty and following treaties do not define the point where national airspace ends and outer space begins, nor has their been any international consensus on the line of delimitation. Some of the potential delimitations suggested 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 applies to the area south of 60º South Latitude, reserving that area for peaceful purposes only. Specifically, "any measure 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. However, the Treaty does not prejudice the exercise of rights on the high seas within that area.



III. NAVIGATIONAL REGIMES.

Now that the various legal divisions have been presented, the navigational regimes within those zones will be discussed. The freedom of navigation within any zone is inversely proportional to the powers that may be exercised by the coastal State (see the discussion below on State Competencies). Where the State has the greatest powers (e.g., land territory, internal waters), the navigational regime is most restrictive. Where the State has its least powers (e.g., high seas, international airspace), the navigational regime is most permissive.

A. **National Areas.**

1. With limited exception, States exercise full sovereignty within their national areas. The navigational regime is therefore Consent of the State. Although the State's consent may be granted based on individual requests, it may also be manifested generally in international agreements such as:

[88] UNCLOS III, Article 86.

- *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.

- *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.

- *Chicago Convention*. States party to the Chicago Convention have granted limited consent to aircraft of other State parties to enter and land within their territory.

2. The DoD Foreign Clearance Guide (DoD 4500.54-G, available on the Internet at http://www.fcg.pentagon.mil/fcg/fcg.htm) sets out the entry and clearance requirements for both aircraft and personnel, and overflight rights where applicable, for every country.

3. *Exceptions in the Territorial Sea*. Although the territorial sea is a national area, the need for greater freedom of navigation than consent of the coastal State has convinced the international community to recognize the following exceptions. Note that these exceptions do not apply to internal waters, for which consent 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.[89] Stopping and anchoring is permitted when (1) incident to ordinary navigation, or (2) made necessary by *force majeur* (e.g., mechanical casualty, bad weather, other distress). Passage is innocent so long as it is not prejudicial to the peace, good, order, or security of the coastal State. There is no provision in international law for prior notification or authorization in order to exercise that right. 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 activities not deemed to be innocent:

- any threat or use of force against the sovereignty, territorial integrity, or political independence of the coastal state or other acts in violation of the principles of international law as embodied in the UN Charter;

- any exercise or practice with weapons of any kind;

- any act aimed at collecting information to the prejudice of the security of the coastal state;

- any act of propaganda aimed at affecting the defense or security of the coastal state;

- launching, landing, or taking on board of any aircraft;

- the launching, landing, or taking on board of any military device;

- loading or unloading of any commodity, currency or person contrary to the customs, fiscal, immigration, or sanitary laws and regulations of the coastal state;

- any willful and serious pollution;

- any fishing activities;

- the carrying out of any research or survey activity;

[89] UNCLOS III, Article 18.

- any act aimed at interfering with any system of communication or any other facilities or installations of the coastal state; and

- any other activity not having a direct bearing on passage.[90]

1) The United States takes the position that the above list 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.

2) Innocent passage extends to all shipping and is not limited by cargoes, armament, or type of propulsion. 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. Submarines in innocent passage must transit on the surface, showing their flag.[91]

4. Challenges to Innocent Passage: (1) Merchant ships must be informed of the basis for the challenge and provided an opportunity to clarify intentions or 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. (2) 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 resort to minimum force to enforce the ejection.[92]

5. 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.[93]

b. *Right of Assistance Entry*. Based on the long-standing obligation of mariners to aid those in peril on the sea, the right of assistance entry gives limited permission to enter into the territorial sea to render assistance to those in danger. The location of the persons in danger must be reasonably well known. The right does not permit a search. Aircraft may be used to render assistance, though this right is not as well recognized as that for ships rendering assistance. See CJCSI 2410.01B for further guidance on the exercise of the right of assistance entry (available on the Internet at http://www.dtic.mil/doctrine/jel/cjcsd/cjcsi/2410_01b.pdf).

c. *Transit Passage*. Transit passage applies to passage through *International Straits*, which are defined as: (1) routes between the High Seas or Exclusive Economic Zone and another part of the High Seas or Exclusive Economic Zone;[94] (2) the strait must be overlapped by the territorial sea of one or more coastal states; (3) there must be no High Seas or Exclusive Economic Zone route of similar convenience;[95] (4) natural, not constructed (i.e., Suez Canal); and (5) must actually be used for international navigation. The U.S. position is that the strait must be susceptible to such use.

Transit passage is unimpeded, continuous, and expeditious passage through the strait.[96] The navigational regime is Normal Mode.[97] In Normal Mode ships may launch and recover aircraft if that is normal during

[90] UNCLOS III, Article 19.

[91] UNCLOS III, Article 20.

[92] UNCLOS III, Article 30.

[93] UNCLOS III, Article 25(3).

[94] UNCLOS III, Article 37.

[95] UNCLOS III, Article 36.

[96] UNCLOS III, Article 38.

[97] UNCLOS III, Article 39.

their navigation and submarines may transit submerged. Aircraft may exercise transit passage. Transit passage may not be suspended by the coastal states.[98]

d. *Archipelagic Sea Lanes Passage (ASLP)*. ASLP is the exercise of 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.[99]

Qualified archipelagic states may designate sea lanes for the purpose of establishing the Archipelagic Sea Lanes Passage 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* 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.[100] Once Archipelagic Sea Lanes are designated, transiting ships and aircraft may not deviate more than 25 NM off 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 sea lane. Once ASLs are designated, the regime of innocent passage applies to Archipelagic Waters outside the sea lanes. Archipelagic Sea Lanes Passage is non-suspendable; however, if ASLs are designated, innocent passage outside the lanes—but within Archipelagic Waters—may be suspended in accordance with UNCLOS III.

B. International Areas.

In all international areas, the navigational regime is Due Regard for the rights of others.[101] Although reserved for peaceful purposes, 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."

III. 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, in 18 U.S.C. § 7, defined the "special maritime and territorial jurisdiction" of the United States as including registered vessels, U.S. aircraft, and U.S. space craft. 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 below) and whether the craft is considered state or civil.

1. *State craft*. State Ships include warships[102] 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.[103]

2. *Civil craft* 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., SOFA, etc.).

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[98] UNCLOS III, Article 44.

[99] UNCLOS III, Article 53.

[100] UNCLOS III, Article 53(12).

[101] UNCLOS III, Article 58 for the Exclusive Economic Zone, Article 87 for the High Seas.

[102] "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 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.

[103] Article 3, Chicago Convention.

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. The state competency within the territorial sea is, therefore, somewhat less than full sovereignty.

a. *Innocent Passage*.

1) Civil. The State's power is limited to: (1) Safety of navigation, conservation of resources, control of pollution, and prevention of infringements of the customs, fiscal, immigration, or sanitary laws; (2) Criminal enforcement, but only when the alleged criminal act occurred within internal waters, or the act occurred while in innocent passage, and it affects coastal state;[104] (3) 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 (i.e., pollution).[105]

2) State. State vessels enjoy complete sovereign immunity.[106] 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.[107] The coastal State's only power over state vessels not complying with their rules is to require them to leave the territorial sea immediately.

b. *Transit Passage and Archepelagic Sea Lane Passage*.

1) Civil. The coastal State enjoys almost no State competencies over those craft in transit passage or archipelagic sea lane passage, other than those competencies applicable within the Contiguous Zone and Exclusive Economic Zone. These include customs, fiscal, immigration, and sanitary laws, and prohibitions on fishing. Additionally, the coastal State may propose a traffic separation scheme, but it must be approved by the International Maritime Organization.

2) 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.

C. **International Areas.**

1. *Contiguous Zone*. The Contiguous Zone was created solely to allow the coastal State to exercise its customs, fiscal, immigration, and sanitary laws.[108]

2. *Exclusive Economic Zone*. Within this area, the coastal State exercises sovereign rights for managing the natural resources.[109] Coastal State consent is required for marine scientific research (no exception for State vessels), but such consent should normally be given.[110]

3. *High Seas*.

a. *Civil*. On the high seas, the general rule is flag state jurisdiction only.[111] Non-flag States have almost no competencies over craft on the high seas, with the following exceptions:

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[104] UNCLOS III, Article 27.

[105] UNCLOS III, Article 28.

[106] UNCLOS III, Article 30.

[107] UNCLOS III, Article 31.

[108] UNCLOS III, Article 33.

[109] UNCLOS III, Article 56.

[110] UNCLOS III, Article 246.

[111] UNCLOS III, Article 92,

- Ships engaged in the slave trade.[112] 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.

- Ships or aircraft engaged in piracy.[113] Any State may seize, arrest, and prosecute pirates.

- Ship or installation (aircraft not mentioned), engaged in unauthorized broadcasting.[114] Any State which receives such broadcasts, or is otherwise subject to radio interference, may seize and arrest the vessel and persons on board.

- Right of visit.[115] The right of visit, which is quite similar to a 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, piracy, or unauthorized broadcasting; (2) the ship is without nationality (a ship that belongs to no state belongs to all States); or (3) the ship, although flying a foreign flag, actually is of the same nationality of the visiting state ship or aircraft. The visiting State ship may ask to see the visited ship's documents.

- Hot Pursuit.[116] Again only conducted by state ships and aircraft, craft which have committed some 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 CZ, or a fishing regulation within the Exclusive Economic Zone. 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.

- 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 deter hijacking as a method of terrorism. These conventions include the Tokyo Convention, Hague Convention, and Montreal Convention.

b. *State*. State vessels are absolutely immune on the high seas.[117]

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[112] UNCLOS III, Article 99.

[113] UNCLOS III, Articles 101-107.

[114] UNCLOS III, Article 109.

[115] UNCLOS III, Article 110.

[116] UNCLOS III, Article 111.

[117] UNCLOS III, Article 95.

Legal Division	Navigational Regime	State Competency
Land Territory	Consent	Full sovereignty
Internal Waters	Consent	Full sovereignty
Territorial Sea	Innocent Passage (ships only)	Limited navigational, criminal, and civil
International Straits	Transit Passage/Normal mode	Fiscal, customs, immigration, and sanitary
Archipelagic Sea Lanes	Archipelagic Sea Lane Passage	Fiscal, customs, immigration, and sanitary
Contiguous Zone	Due Regard	Fiscal, customs, immigration, and sanitary
Exclusive Economic Zone	Due Regard	Natural resources
High Seas	Due Regard	Almost none

CHAPTER 8

CIVILIAN PERSONNEL SUPPORTING MILITARY OPERATIONS

REFERENCES

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5. AR 690-11, Mobilization Planning and Management, 14 September 1990 (under revision).
6. AR 715-9, Contractors Accompanying the Force, 29 October 1999 (under revision).
7. DA Pam 690-47, DA Civilian Employee Deployment Guide, 1 November 1995.
8. DA Pam 715-16, Contractor Deployment Guide, 27 February 1998.
9. FM 3-100.21, Contractors on the Battlefield, 3 January 2003. Available at http://www.adtdl.army.mil/cgi-bin/atdl.dll/fm/3-100.21/toc.htm.
10. AFI 36-3026(I), Identification Cards for Members of the Uniformed Services, Their Family Members, and Other Eligible Personnel, 29 July 1999 (Joint Instruction Adopted by Order of the Secretaries of the Air Force, Army, Navy, Marine Corps, and Coast Guard.)
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12. Department of State Standardized Regulation 404, Chapter 500 (Post Differential) and Chapter 650 (Danger Pay Allowance).
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14. Federal Employees' Compensation Act (FECA), 5 U.S.C. § 8101.
15. Hours of Duty, 5 C.F.R. § 610.
16. Anthrax Notification Requirements, 10 U.S.C. § 1580a.
17. Criteria for Designating Emergency Essential Employees, 10 U.S.C. § 1580.
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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 Instruction:

> It is DoD policy that the DoD civilian workforce shall be prepared to respond rapidly, efficiently, and effectively to meet mission requirements for all contingencies and emergencies." (DoDI 1400.32, para 4.)

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 advising commanders while deployed.

II. DESIGNATING EMERGENCY ESSENTIAL POSITIONS

A. It is DOD policy to limit the number of EE positions to those specifically required to ensure the success of combat operations or the availability 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. The first step in designating an EE position is to identify positions required to be performed in deployed environments, which a military member cannot be expected to perform because the position requires uninterrupted performance. Civilian positions should be designated EE only when civilians are required for direct support to combat operations, or to combat systems support functions that must be continued, and that could not otherwise immediately be met by using deployed military possessing the skills in the number and in the functions expected to be needed to meet combat operations or systems support requirements in a crisis situation.

B. The specific crisis situation duties, responsibilities and physical requirements of each EE position must be identified and documented to ensure EE employees know what is expected. Documentation can be 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. Advise applicants for EE positions that individuals selected to fill these positions are required to sign the DD Form 2365, "DoD Civilian Employee Overseas Emergency-Essential Position Agreement." The agreement 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. All individuals selected for EE positions must be exempted from recall to the military Reserves or recall to active duty for retired military.

D. The EE position designation is included in the position description of each EE identified position. Example:

> This position is emergency-essential (EE). 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 the 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.

E. Incumbents of positions that become EE must sign DD Form 2365 as soon as reasonably practicable and consistent with the needs of the military mission. Employees who decline to sign the agreement should be detailed or reassigned to non-EE positions. If that is not possible, no tour extensions should be approved. If an employee declines to sign the agreement, but possesses special skills and expertise, which in management's view renders it necessary to send that employee on the assignment without signing the agreement, the employee may be directed on involuntary temporary duty to the location where the employee's skills are required. All civilian employees deploying to combat operations/crisis situations are considered EE regardless of volunteer status or the signing of the EE position agreement. The employee will be in an EE status for the duration of the assignment.

F. The FY 2001 National Defense Authorization Act amended Title 10, U.S. Code, to require that EE civilians be notified of anthrax immunization requirements. This requirement applies to both current and new EE employees. The notice must be written, and the employee must sign acknowledging 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 included 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)*].

G. Notice of the anthrax vaccine requirements must also be included in all vacancy announcements for EE positions. The notice may mirror that provided above.

III. DEPLOYMENT PREPARATIONS

A. **Identification.** Issue EE employees, or employees occupying positions determined to be EE, Geneva Convention Identity cards. EE employees shall also be issued passports, visas, country clearances, and any required security clearances.

B. **Documentation.** Civilian employees fill out DD Form 93, "Record of Emergency Data." Components will establish procedures for storing and accessing civilian DD 93s. Civilian casualty notification and assistance should be the same as or parallel to that provided to military personnel.

C. **Clothing and Equipment Issue.** Organization Clothing and Individual Equipment (OCIE) will be issued to EE and other civilians who may be deployed and will be worn in a tactical environment in accordance with supported unit procedures. Maintenance and accountability of OCIE is the employee's responsibility. Personal clothing and care items are the responsibility of the individual. Civilian employees should bring work clothing required by their particular job.

D. **Training Requirements.** Civilian EE employees shall be provided the same specialized training as military members on a periodic basis and prior to any deployment, including the use of protective gear. EE civilians should also be trained in their responsibilities as members of the force, e.g. standards of conduct, cultural awareness training, POW coping skills, Law of War training, and the Uniform Code of Military Justice.

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 HIV before deployment, if the country of deployment requires it. DA policy (DA DCSPER/ OTJAG decision) is that when a requirement exists for mandatory HIV screening, and the test is 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. Civilians shall carry with them a minimum of a 90-day supply of any medication they require. During a contingency, returning EE civilians shall receive cost-free military physical examinations within 30 days if the medical community decides it is warranted, or required for military personnel.

F. **Casualty, Mortuary, and Family Care.** All EE civilians who PCS or are TDY outside the United States shall have panarex or DNA samples taken for identification purposes. Dental x-rays may be substituted when the ability to take panarex or DNA samples is not available. Civilians may also be issued "dog tags" for identification purposes.

1. EE civilians with dependents who are in or deploying to a theater of operations are encouraged to make Family Care Plans. As a condition of employment, single parents or families where both parents are emergency-essential civilians are required to prepare a family care plan equivalent to that required of military (AR 690-11).

2. Graves Registration personnel shall process civilians killed in a theater of operations. An escort officer is authorized, and a flag shall be purchased for the casket 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.

H. **Weapons Certification and Training**. Under certain conditions, and subject to training IAW FM 23-35 in proper use and safe handling of firearms, EE employees may be issued a military firearm for personal self-defense. Acceptance of a firearm is voluntary. Authority to carry firearms for personal self-defense is contingent upon the approval and guidance of the supported Combatant/ MACOM Commander. Only government issued firearms/ammunition are authorized.

IV. COMMAND AND CONTROL DURING DEPLOYMENTS.

A. During deployments, EE civilians are under the direct command and control of the on-site supervisory chain who 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 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 USERID 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 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 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 8 hour day or 40 hour week. Employees whose rate exceeds that of a GS-10, Step 1, will be paid at the rate of one and one-half times the basic hourly rate of a GS-10, Step 1. If overtime is not approved in advance, the EE employee's travel orders should have this 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) On-call duties required 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; 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 forfeited during a combat or crisis situation, which has been 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. **Foreign Post Differential**. 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 Foreign Post Differential (FPD) after being stationed in the area in excess of 41 days. FPD is exempt from the pay cap and is paid as a percentage of the basic pay rate not to exceed 25% of the basic pay. The Department of State

determines areas 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.

G. **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 (i.e., within grade increases). There is no tax exclusion for civilian employees similar to the combat tax exclusion for military members.

H. **Danger Pay.** Civilian employees serving at or assigned to foreign areas designated for danger pay by the Secretary of State 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 a danger pay allowance (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 Secretary of State. This allowance is in addition to any foreign post differential prescribed for the area but in lieu of any special incentive differential authorized the post prior to its designation as a danger pay area. For employees already in the area, DPA starts on the date of the area's designation for danger pay. For employees later assigned or detailed to the area, DPA starts upon 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 the DPA. The DPA paid to Federal civilian employees should not be confused with the Imminent Danger Pay (IDP) paid to the military. The IDP is triggered by different circumstances and is not controlled by the Secretary of State.

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."

VI. CONTRACTOR EMPLOYEES

"In all countries engaged in war, experience has sooner or later pointed out that contracts with private men of substance and understanding are necessary for the subsistence, covering, clothing, and moving of any Army. " Robert Morris, Superintendent of Finance, 1781.

Contractor employees have also served with the force during contingency operations. Although the United States Government has a similar relationship towards its contractor employees as it does towards its civilian employees, there are significant differences which must be resolved by referring to the specific contractual language defining the relationship of the contractor employee to the United States.

A. **Command and Control**. The command and control of contractor employees is significantly different than that of EE employees. For contractor employees, command and control is tied to the terms and conditions of the government contract. Contractor employees are not under the direct supervision of military personnel in the chain of command. The Contracting Officer (KO) or the Contracting Officer's Representative (KOR) is the designated liaison for implementing contractor performance requirements. While the government does not directly command and control contractor employees, key performance requirements should be reflected in the contract. For example, theater commander directives, orders and essential standard operating procedures can be incorporated into the government contract. If those requirements should change, the contracting officer can modify the contract. Contractor employees will be expected to adhere to all guidance and obey all instructions and general orders issued by the Theater Commander. All instructions and guidance will be issued based upon the need to ensure mission accomplishment, personal safety, and unit cohesion. If the instructions and orders of the Theater Commander are violated, the Theater Commander may limit access to facilities and/or revoke any special status that a contractor employee has as an individual accompanying the force. The KO or KOR may also direct that the contractor remove from the theater of operations any contractor employee whose conduct endangers persons or property or whose continued employment is inconsistent with the interest of military security.

B. **Legal Assistance**. Contractor employees in the U.S. preparing to deploy abroad or already deployed overseas to perform work pursuant to any contract or subcontract generally will not be eligible to receive legal assistance from

military or civilian attorneys. They should satisfy all legal requirements they deem necessary, such as a last will and testament, guardianship arrangements for children and estate planning, with privately retained attorneys before deployment.

> **Exceptions:** If contractor employees are accompanying the Forces outside the United States, they may receive certain legal assistance from attorneys when DA or DoD is contractually obligated to provide this assistance as part of their logistical support. The specific terms of the contract under which contractor employees are deploying must be reviewed to verify if DA is obligated to provide legal service. Where DA is under a contractual obligation to provide legal assistance, the following rules apply: 1) 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. 2) 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 attorneys. Note that 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.

C. **Identification Cards**. Identification cards, badges, etc. will be issued at the Individual Deployment Site (IDS), the CONUS Replacement Center (CRC), or in-theater, depending upon the basis for the operation. The DD Form 489 *(Geneva Conventions Identity Card for Persons who Accompany the Armed Forces)* identifies the employee's status as a contractor accompanying the U.S. Armed Forces. This card must be carried at all times when in the theater of operations. Personal identification tags will also be issued and 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. If contractor employees are processed for deployment by their employer, it is the responsibility of the employer to ensure its employees receive required identification prior to deployment.

D. **Organizational Clothing and Equipment Issue.** Contractors will be issued Organizational Clothing and Individual Equipment (OCIE) according to the theater to which deployed, but will not be issued Battle Dress Uniforms (BDUs), boots, etc. without a Department of the Army waiver. Requests for exception will be submitted to the Office of the Deputy Chief of Staff G4 (DALO-PLS), 500 Army Pentagon, Washington, D.C. 20310-0500 for consideration. The wearing of OCIE by contractor personnel is voluntary. Items of personal clothing and personal care, to include casual attire and work clothing, are the responsibility of the individual contractor employee. The contractor is encouraged to require a uniform appearance among their employees, but the use of current U.S. Armed Forces uniforms is prohibited.

E. **Force Protection**. The government will provide force protection for those contractor personnel accompanying forward-deployed forces.

F. **Weapons and Training.** The IDS or CRC may issue military firearms to contractor employees for their personal self-defense. The issuance of such weapons must be authorized by the Theater Commander and must comply with military regulations regarding firearms training and safe handling. Weapons familiarization is provided to contractor employees as part of the IDS/CRC deployment processing. The acceptance of self-defense weapons by a contractor employee is voluntary and should be in accordance with the gaining theater and the contractor's company policy regarding possession and/or use of weapons. Authorization for the use of privately owned weapons may be required through the U.S. Embassy channels vice military chain of command. Weapons safety and training may be also implemented by embassy Regional Security Officers (RSOs).

VII. CONTRACTOR ISSUES DURING DEPLOYMENTS

A. **Accountability.** Information on deployed contractors must be input to the CIVTRACKS system at https://cpolrhp.belvoir.army.mil/civtracks/default.asp. Contracting Officers should ensure that data for their deployed contractors are entered into CIVTRACKS so theater commanders know whom they are responsible for. Additionally, a password is given to the contractor by his/her deployment center for data entry purposes.

B. **Vehicle and Equipment Operation.** Deployed contractor employees may be required 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 country they are being deployed to, i.e. German driver's license. While operating a military owned or leased vehicle, a contractor employee is 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 Theater Commander guidance. 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.

C. **Living under field conditions.** Generally, a contractor employee's living conditions, privileges, and limitations will be equivalent to those of the units supported unless the contract specifically mandates or prohibits certain living conditions.

D. **Medical and Dental care**. Military and/or host nation emergency medical and dental care will be available to contractors should the need arise, at a level commensurate with that afforded government employees and military personnel. Deployed contractor personnel generally do not receive routine medical and dental care at military medical treatment facilities unless specifically included in the contract. In the absence of such agreements, contractors should make provisions for their employees' medical and dental care.

E. **MWR Support.** Contractor employees may be eligible to use some or all MWR facilities and activities subject to the installation or Theater Commander's discretion and the terms of the contract. 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 Theater Commander's discretion, the terms of the contract with the government, and the terms of the applicable Status of Forces Agreement.

F. **Status of Forces Agreements (SOFAs).** Contractor employee's 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. Contractor employees may or may not be subject to criminal and/or civil jurisdiction of the host country to which they are deploying. 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. The NATO SOFA covers three general classes of sending state personnel: Members of the "force," i.e., members of the armed forces of the sending state; Members of the "civilian component, " i.e., civilian employees of the sending state; "Dependents," i.e., the spouse or child of a member of the force or civilian component that is dependent upon them for support. **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 formed to afford contractor employees the rights and privileges associated with SOFA status.

G. **Discipline of Contractor Employees.** Contractor personnel may have administrative privileges (i.e., suspension of exchange or MWR privileges, etc.) suspended for disciplinary infractions. Such conduct includes making any sale, exchange, transfer, or other disposition of exchange merchandise or services to unauthorized persons, whether or not for a profit; using exchange merchandise or services in the conduct of any activity for the production of an income; theft of exchange merchandise or other assets by shoplifting; and intentional or repeated presentation of dishonored checks or other indebtedness. The process for removal of contractor employees from the theater of operations is dependent upon the policies issued by the Theater Commander, and the extent to which those policies are incorporated in the terms of the contract and are exercised through the contracting officer.

H. **Tours of Duty and "On-Call" Requirements.** A contractor employee's Tour of Duty is established by the employer and the terms and conditions of the contract between the employer and the government. On-call requirements, if any, will be included as special terms and conditions of an employer's contract with the Government.

VIII. CRIMINAL JURISDICTIONAL ISSUES

A. The *Military Extraterritorial Jurisdiction Act of 2000*, 18 U.S.C. §3261, provides federal criminal jurisdiction over DoD civilian employees, dependents and contractors accompanying the force overseas. Crimes punishable by over a year are covered by the legislation. The implementing guidance is forthcoming.

B. The *Military Extraterritorial Jurisdiction Act of 2000* fills a large jurisdictional gap overseas but it does not replace existing Status of Forces Agreements (SOFA). Deployed Judge Advocates must still look to the SOFA for controlling guidance on jurisdiction.

NOTES

CHAPTER 9

FOREIGN AND DEPLOYMENT CLAIMS

REFERENCES

1. AR 27-20, Claims (12 November 2002).
2. AR 27-40, Litigation (19 September 1994).
3. DA Pamphlet 27-162, Claims (1 April 1998).
4. USARCS Federal Tort Claims Handbook (September 1998).
5. JA 241, Federal Tort Claims Act (May 2000).
6. DA Pamphlet 27-50-282, The Army Lawyer (Claims Report).
7. Claims Forum, JAGCNet.
8. JAGINST 5890.1 (JAGMAN) (17 January 1991).
9. JAGINST 5800.7C, Chapter 8 (30 October 1990).
10. AFI 51-501, Tort Claims (9 August 2002).
11. AFI 51-502, Personnel and Government Recovery Claims (1 March 1997).

1. INTRODUCTION

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. 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 must be prepared to thoroughly investigate, impartially adjudicate, and promptly settle all meritorious claims.

2. SINGLE SERVICE RESPONSIBILITY

Department of Defense Directive 5515.8, Single Service Assignment of Responsibility for Processing of Claims (9 June 1990) assigns to each service exclusive geographical responsibility for settling tort claims against and on behalf of all of the Department of Defense. However, this Directive is often amended by memorandum. When processing tort claims, judge advocates must use the rules and regulations of the service that has single service responsibility for the country in which the claim arose.[118] The current single service responsibility assignments are listed in Appendix A. If a judge advocate is 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.

3. POTENTIAL CLAIMS

The statutes and regulations that provide relief for damages resulting from deployments often overlap. To determine the proper claims statutes and regulations to apply, one must look to the applicable regulations, the status of the claimant, the location of the incident that gave rise to the claim, and the type of incident. Although a judge advocate may encounter some of the same types of claims while deployed as seen at their home station, most deployment claims operations will differ from those conducted in garrison in several respects. Additionally, not all "claims" for payment (for example, claims arising out of a contract) are cognizable under the military claims system.

[118] For example, in Afghanistan, single service responsibility for processing claims is assigned to the Air Force. The Air Force, in coordination with the Army, assigned an Army JAG as a single member FCC with a settlement authority of $5,000.

4. TYPES OF CLAIMS APPLICABLE DURING A DEPLOYMENT

a. Claims Cognizable under the Federal Tort Claims Act (FTCA).[119] The Federal Tort Claims Act 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, if someone is harmed by the tortious conduct of one of our service members or employees, they 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 will not apply in most deployments because it does not typically cover acts or omissions that occur outside the United States. As a practical matter, the FTCA will apply most often in U.S.-based disaster relief operations.[120]

b. Claims Cognizable under the Personnel Claims Act (PCA).[121] The PCA applies worldwide; however, it is limited to claims for loss, damage, or destruction of personal property of military personnel and Department of Defense 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 being 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 must be prepared to comply fully with small claims procedures immediately upon arrival at the deployment or exercise site.[122]

c. Claims Cognizable under the Military Claims Act (MCA).[123] The MCA also applies worldwide. CONUS tort claims must first be considered under the FTCA, however. Overseas, the MCA will apply only when the claim cannot be paid under the PCA or the Foreign Claims Act. These limitations generally restrict application of the MCA overseas to claims made by family members accompanying the force. 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."[124] 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).[125] 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, judge advocates and unit claims officers 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.[126] Categories of claims that may not be allowed include losses from combat, contractual matters, domestic obligations, and claims which are either not in the best interest of the U.S. to pay, or which are contrary to public policy.[127]

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[119] 28 U.S.C. §§ 2671 – 2680.

[120] For more information on disaster relief operations *see* Noncombat Deployment Operations, *infra.*

[121] 31 U.S.C. § 3721.

[122] Under the small claims procedures set forth in AR 27-20, paras. 11-10 and 2-17, personnel claims that can be paid for $1,000 or less and tort claims that can be settled for $2,500 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.

[123] 10 U.S.C. § 2733.

[124] AR 27-20, Glossary, sec. II.

[125] 10 U.S.C. § 2734.

[126] AR 27-20, para. 10-3.

[127] AR 27-20, para. 10-4.

1) Similar to the MCA, claims under the FCA may be based either on the negligent or wrongful acts or omissions of U.S. military personnel or the noncombat activities of U.S. forces. Unlike the MCA, however, there generally is no scope of employment requirement. The only actors required to be "in scope" for the United States to have liability are local nationals of the host nation 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.[128] 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.[129]

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. 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.[130]

3) FCA claims are investigated and adjudicated by foreign claims commissions (FCC). FCCs may have one or three members. They are usually comprised of judge advocate claims officers, although other commissioned officers often serve as single member commissions as well. At least two members of three-member FCCs must be judge advocates or claims attorneys. Regardless of their composition, proper authority must appoint FCCs.[131] These appointments should take place before deployment whenever possible. All legal offices subject to mobilization or deployment should identify FCC members and alternates as a part of their predeployment planning.

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 to joint tortfeasors. Payments for punitive damages, court costs, attorney fees, bailment and filing costs are not allowed under the FCA. Before deploying, judge advocates should become familiar with the application of foreign law and attempt to compile local law summaries for all countries in which the unit is likely to conduct operations.[132] After deployment, claims personnel may contract for local attorney assistance or obtain information on local law and custom from the U.S. Consulate or Embassy located in country.[133]

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 a 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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[128] AR 27-20, para. 10-2*a*.

[129] AR 27-20, para. 10-4*h* and *i*.

[130] AR 27-20, para. 10-9*b*.

[131] In the Army, normally the Commander of the U.S. Army Claims Service appoints FCCs. The U.S. Army Claims Service 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 judge advocate or a claims attorney may pay or deny claims up to $15,000. Line-officer commissioners may pay claims up to $2,500, 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. U.S. Army Claims Service (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 U.S., 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. 10-6 to 10-9.

[132] Before deploying, Army Judge Advocates 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 U.S. Army Claims Service, Tort Claims Division, Foreign Torts Branch, Fort Meade, Maryland 20755-5360 (Comm 301-677-7009/DSN 923-7009) for further information and guidance.

[133] Although the Army claims regulation does not specifically set out conflicts of laws 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 the 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).[134] As a general rule, the FCA will not apply in those 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."[135] For example, if a unit deploys to Korea, Japan, or any NATO country, claims matters will be managed by a command claims service under provisions outlined in the applicable status of forces agreement.[136]

1) A deployment to a SOFA country places additional predeployment responsibilities on judge advocates. First, knowledge of the claims provisions contained in the applicable SOFA is mandatory. Second, judge advocates 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 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.[137]

1) Both the PVA and SAA contain two-year statutes of limitation, 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 lies under the Admiralty Jurisdiction Extension Act, 46 U.S.C. app. § 740, a claim is required. If a claim is filed, unlike a FTCA claim, 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 damage can be determined with a reasonable degree of certainty. Filing a claim does not toll the two-year limitation 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 limitation.

2) Unlike the FTCA, the 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 an U.S. government vessel or the actions of government personnel in a host country's territorial waters are adjudicated by the host country under a 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. In some instances, however, 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 the SOFA adjudication by the 1960 Note Verbale to the SOFA, even though the damage is caused by a U.S. warship.

1) 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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[134] 10 U.S.C. § 2734a (commonly referred to as the International Agreement Claims Act).

[135] *Id.*

[136] *See* figure 7-4, DA PAM 27-162 for a list of U.S. sending state and single-services offices.

[137] 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, judge advocate should contact their command claims service for guidance.

i. Solatia Payments.[138] If a unit deploys to the Far East, or other parts of the world where payments in sympathy or recognition of loss are common, judge advocates should explore the possibility of making solatia payments to accident victims. Solatia payments are not claims payment. 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 remorse in accordance with local custom. Solatia payments are not paid from claims funds but, rather, from unit operation and maintenance budgets. Prompt payment of solatium 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.[139]

j. Article 139 Claims.[140] Article 139, UCMJ, authorizes collection of damages directly from a service member'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 judge advocate. Every unit must prepare for these challenges and contingencies during predeployment planning.

k. Real Estate Claims. A Corps of Engineer Real Property Team 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. Coordination and regular communication between the judge advocate 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.

1) 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) Staff 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.[141]

l. Claims Involving Non-appropriated Fund Instrumentalities (NAFI). Frequently, FCCs will receive claims involving NAFIs. Although FCCs may adjudicate such a claim, 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 independent authority to settle small claims. For example, Army and Air Force Exchange 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 the FCC would any other FCA claim. However, instead of making payment, the FCC will forward the adjudicated claim to 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 that the claim can be asserted against, this should be reported to the responsible claims service. In

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[138] *See, e.g.,* AR 27-20, paras. 10-10 and 13-13 and DA PAM 27-162, paras. 10-10 and 13-13.

[139] Army judge advocates must also coordinate with U.S. Army Claims Service.

[140] 10 U.S.C. § 939. *See generally* ch. 9, AR 27-20 and ch. 9, DA PAM 27-162.

[141] For an example of implementing guidance for real property claims, *see* Appendix D, Enclosure 4, *infra*.

countries where the Department of the Army has single-service claims responsibility, the responsible claims service may appoint a recovery judge advocate to assert and collect payment. Recovery judge advocates 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.

5. PREDEPLOYMENT PLANNING

a. Many factors must be considered during predeployment planning. All personnel involved in the claims mission must be properly trained. Principal players must be properly appointed. Further, international agreements with the host nation, 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.[142]

b. Training. The initial step in any successful claims operation is the establishment of education and prevention programs. The first aspect of these programs is training. Claims judge advocates must ensure that all parties to the claims operation are properly trained on not only legal requirements, but also 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 judge advocates, attorneys, and legal NCOs and specialists must know the procedures for serving as Foreign Claims Commissions (FCC), Foreign Claims NCOICs, and operating Special Claims Processing Offices. Claims personnel must also brief service members and unit claims officers on how to avoid property damage or 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, a 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 judge advocates or FCCs. Recognition and documentation of possible claims, and initial contact with claimants often rests with UCOs and MDCOs. They are, therefore, a very important asset to the claims operation.

6. NONCOMBAT DEPLOYMENT OPERATIONS

a. The operation of deployment claims offices varies depending upon the type and location of operation. 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 Hurricane Andrew. The military is called to react to these types of disasters both within and outside of the United States. These operations place a great demand on claims personnel.[143] 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

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[142] *See also* Claims Deployment Checklist in the Checklist chapter of this Handbook.

[143] In November 1998, U.S. Army Claims Service 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 JAGC Net. *See* DISASTER CLAIMS HANDBOOK, U.S. Army Claims Service, November 1998, on JAGCnet for more information on disaster claims operations.

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, several rotations of claims personnel in Bosnia were subject to force protection rules that prohibited them from leaving their base camps except in four-vehicle convoys with crew-served weapons. Convoy itineraries had to be submitted to and approved by the G2 several days in advance of the proposed mission. Unfortunately, the SJA office 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) While claims forms, legal memoranda, and finance vouchers do not necessarily have to be typed, clerical duties still comprise a significant portion of the claims mission. FCCs must receive adequate clerical support to perform effectively. Equipment support is also essential. Whenever possible, claims judge advocates should have available a mobile legal office, including a laptop computer with claims software and email capability.

2) Every unit's claims deployment plan must address three areas: the projected location of the claims office, claims investigation, and payment of claims. 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 G-5 and Public Affairs Offices can publish the location and hours of operation of the office. 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. Judge advocates and other claims investigators must, however, 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 unit claims officers. 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 the claim. Payment requires the presence of a Class A agent and a sufficient amount of local currency. Don't 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. 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 predeployment planning through extensive coordination with unit comptroller personnel and higher level claims offices with claims appropriations.

7. 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 status of forces or other agreement that addresses claims issues, it may be suspended in time of armed conflict.[144] The agreement may also

[144] For example, NATO SOFA Art. XV, provides that in the event of hostilities, a party may suspend the SOFA by giving 60 days notice.

exclude claims arising from "war damage." One option the judge advocate should investigate, however, is concluding an agreement under which the host nation assumes responsibility for paying all claims that result from any combat activity.[145]

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[146] 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 Foreign Claims Act.[147] 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 Foreign Claims Act, the Military Claims Act,[148] and the Personnel Claims Act.[149] Solatia[150] payments are not barred by the combat activities rule and will commonly be based on injury or death resulting from combat activities. Claims under Article 139 of the UCMJ[151] and real estate claims also arise in combat deployments. The judge advocate 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 provide us with insight into how we can maintain the support of the local population while observing the legal restrictions on combat-related damages.

1) Each of our substantial combat scenarios over the last 30 years have been unique. The three major deployments before the Gulf War—Vietnam, Grenada, and Panama—provide an historical precedent of methodologies used to deal with combat claims. 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.[152] 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.[153] Following Operation Just Cause (OJC) in Panama, the United States provided funds to the government of Panama to both stimulate the Panamanian economy and to help Panama recover from the effects of OJC. These funds were used for emergency needs, economic recovery, and development assistance. The U.S. also provided Panama credit guarantees, trade benefits, and other economic assistance programs.[154]

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

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[145] For example, South Vietnam had responsibility for processing and paying all combat claims generated by U.S. and "Free World forces."

[146] 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,.

[147] 10 U.S.C. § 2734.

[148] 10 U.S.C. § 2733.

[149] 31 U.S.C. § 3721 (which provides compensation to service members for property losses due to enemy action.)

[150] *See* notes 138 and 22 and accompanying text.

[151] 10 U.S.C. § 939.

[152] Dep't of the Army, Vietnam Studies, Law of War: Vietnam 1964-1073, Prugh, George S., Major General; Wash. D.C. 1975.

[153] 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 the 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 U.S. Army Claims Service (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.

[154] 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 Foreign Claims Act 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 Foreign Claims Act and incorporating the special requirement of the LOI. $1,800,000 of USAID money was made available: $200,000 to support the claims office and personnel and the remainder to pay claims.

whenever there is a valid military necessity.[155] 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.[156] To ensure proper documentation of requisition claims, the servicing judge advocate 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. Assignment of Single Service Responsibility

B. Unit Claims Officer Deployment Guide

C. Deployment Claims Office Operation Outline

D. Sample Deployment Claims SOP

[155] A common example is the taking of private vehicles for tactical transportation. U.S. forces took vehicles in Operations Urgent Fury, Just Cause, and Desert Storm. 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.

[156] AR 27-20, para. 10-3*c*(2).

APPENDIX A

Assignment of Single-Service Responsibility for Tort Claims

SERVICE	COUNTRY	AUTHORITY
ARMY	Albania	Approved, John McNeil, 17 Apr 96
	Austria	DoD Directive 5515.8, 9 Jun 90
	Belarus	Approved, John McNeil, 17 Apr 96
	Belgium	DoD Directive 5515.8, 9 Jun 90
	Bosnia and Herzegovina	Memo, David Koplow, 7 Jul 99
	Bulgaria	Approved, John McNeil, 17 Apr 96
	Croatia	Memo, David Koplow, 7 Jul 99
	Czech Republic	Approved, John McNeil, 17 Apr 96
	El Salvador	DoD Directive 5515.8, 9 Jun 90
	Estonia	Approved, John McNeil, 17 Apr 96
	Federal Republic of Yugoslavia	Memo, David Koplow, 7 Jul 99
	Federal Republic of Germany	DoD Directive 5515.8, 9 Jun 90
	Former Yugoslavian Republic of Macedonia	Memo, David Koplow, 7 Jul 99
	[~~France~~]	Reassigned to Air Force, 25 Nov 96
	Grenada	DoD Directive 5515.8, 9 Jun 90
	Haiti	Memo, John McNeil, 22 Sep 94
	Honduras	DoD Directive 5515.8, 9 Jun 90
	Hungary	Approved, John McNeil, 17 Apr 96
	Kuwait	DA Pam 27-162, paragraph 1-11
	Latvia	Approved, John McNeil, 17 Apr 96
	Lithuania	Approved, John McNeil, 17 Apr 96
	The Marshall Islands	DoD Directive 5515.8, 9 Jun 90
	Moldova	Approved, John McNeil, 17 Apr 96
	Montenegro	Memo, David Koplow, 7 Jul 99
	The Netherlands	Memo, John McNeil, 1 Sep 94
	Poland	Approved, John McNeil, 17 Apr 96
	Republic of Korea	DoD Directive 5515.8, 9 Jun 90
	Romania	Approved, John McNeil, 17 Apr 96
	Rwanda	Memo, John McNeil, 1 Sep 94
	Serbia	Memo, David Koplow, 7 Jul 99
	Slovak Republic	Approved, John McNeil, 17 Apr 96
	Slovenia	Approved, John McNeil, 17 Apr 96
	Switzerland	DoD Directive 5515.8, 9 Jun 90
	Ukraine	Approved, John McNeil, 17 Apr 96
	US-NATO / Singapore SOFAs	DoD Directive 5515.8, 9 Jun 90
	Receiving State in USA	DoD Directive 5515.8, 9 Jun 90
NAVY	Bahrain	DoD Directive 5515.8, 9 Jun 90
	Greece	Memo, John McNeil, 1 Sep 94
	Iceland	DoD Directive 5515.8, 9 Jun 90
	Israel	DoD Directive 5515.8, 9 Jun 90
	Italy	DoD Directive 5515.8, 9 Jun 90
	Portugal	DoD Directive 5515.8, 9 Jun 90
	Spain	Memo, John McNeil, 1 Sep 94
	[~~Tunisia~~]	Reassigned to Air Force, 17 Apr 96
	United Arab Emirates	Approved, John McNeil, 17 Apr 96
	Vietnam (war era)	DoD Directive 5515.8, 9 Jun 90

AIR FORCE	Australia	DoD Directive 5515.8, 9 Jun 90
	Azores	DoD Directive 5515.8, 9 Jun 90
	Canada	DoD Directive 5515.8, 9 Jun 90
	Cyprus	DoD Directive 5515.8, 9 Jun 90
	Denmark	DoD Directive 5515.8, 9 Jun 90
	Egypt	DoD Directive 5515.8, 9 Jun 90
	France	Memo, William Dalton, 25 Nov 96
	[~~Greece~~]	Reassigned to Navy 1 Sep 94
	India	DoD Directive 5515.8, 9 Jun 90
	Iraq	DA Pam 27-162, para. 1-11
	Japan	DoD Directive 5515.8, 9 Jun 90
	Luxembourg	DoD Directive 5515.8, 9 Jun 90
	Morocco	DoD Directive 5515.8, 9 Jun 90
	Nepal	DoD Directive 5515.8, 9 Jun 90
	[~~the Netherlands~~]	Reassigned to Army 1 Sep 94
	Norway	DoD Directive 5515.8, 9 Jun 90
	Oman	DoD Directive 5515.8, 9 Jun 90
	Pakistan	DoD Directive 5515.8, 9 Jun 90
	Saudi Arabia	DoD Directive 5515.8, 9 Jun 90
	[~~Spain~~]	Reassigned to Navy 1 Sep 94
	Tunisia	Approved, John McNeil, 17 Apr 96
	Turkey	DoD Directive 5515.8, 9 Jun 90
	United Kingdom	DoD Directive 5515.8, 9 Jun 90
	CENTCOM Operations*	DoD Directive 5515.8, 9 Jun 90
	USSOC*	DoD Directive 5515.8, 9 Jun 90
	*Applicable only in countries not otherwise assigned to the Army or Navy	

Changes from assignments made in DOD Directory 5515.8, 9 Jan 90, are noted by listing the original assignment, in brackets and crossed out, with an appropriate notation in the Authority block. These countries are also listed under the currently assigned service.

APPENDIX B

UNIT CLAIMS OFFICER DEPLOYMENT GUIDE

I. PURPOSE. To provide information regarding the use of Unit Claims Officers (UCOs) to investigate and document claims incidents on behalf of Foreign Claims Commissions (FCCs) 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 U.S.

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 for 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. Predeployment 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 this end, UCOs should interview all possible witnesses and reduce their statements to writing; 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 UCOs findings. The servicing judge advocate can provide guidance as to which form is better. In certain cases, such as when a formal 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; and if the UCO feels that something must be said in this regard, the UCO should document this on 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. Investigators 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 2000

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 2-2d(1)(a).

3. Purpose: As indicated in the applicable directives.

4. Period: 12 September 2000 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 (UCOs) 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 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

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. The 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 the 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

XI. PURPOSE. TO OUTLINE THE PLANNING FACTORS NECESSARY TO CONSIDER DURING THE PREDEPLOYMENT, 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.

XII. OVERVIEW. THE AR 27-20 SCHEME. AR 27-20, LEGAL SERVICES—CLAIMS (31 DEC 1997), ENVISIONS THE FOLLOWING GENERAL SCHEME FOR DEPLOYMENT CLAIMS OPERATIONS:

A. Unit Claims Officers (UCOs) and Maneuver Damage Control Officers (MDCOs) 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 journal.

D. Potential claims files are transferred to the active claims files system and given a claims file number when a claimant actually files a claim.

E. FCCs investigate actual claims as necessary, and adjudicate them. Claimants are notified of the commissions' decisions, and approved claims are processed for payment.

F. Special Claims Processing Offices (SCPOs) handle the claims of members of the force or civilian component for damages to personal property.

XIII. PREDEPLOYMENT 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 journal, the actual claims files and journals, 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 Foreign Claims 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 on the Claims Deployment Checklist in chapter 32 of this Handbook for possible use by a FCC.

H. Train one judge advocate and one NCO to staff an SCPO.

XIV. 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 FCCs, appoint Foreign Claims Commissioners, and issue fund cites to 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, 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.

XV. 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 claims resulting from damages to their citizens and property 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 set up 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, that is, 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 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 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

XVI. 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.

XVII. UCO/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 U.S. On a monthly basis, forward information with regard to possible claims on behalf of the U.S. to 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.

XVIII. LOGGING IN CLAIMS

A. Make notation in potential claims log that claim actually received.

B. Pull potential file, and insert materials into new case file on the right hand side in reverse chronological order.

C. Staple new chronology sheet (Enclosure 1) onto left side of folder.

D. Fill in the claimant's name, the amount claimed in local currency and converted to dollars using the exchange rate on the day the claim was filed, the date of the incident, and the date the claim filed. 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. On the file folder the file number should be written on the left hand corner using the FY, the assigned commission number, the type of claim (use "T" for in-scope tort, "M" for maneuver damage, or "N" for non-scope tort), and the next available claims number. For example, 96-E99-T001.

XIX. NEW CLAIM PAPERWORK.

A. If an attorney represents the claimant, make sure a POA is in the file, under the chronology sheet.

B. Write up certificate as to 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 limitation.

E. If the tortfeasor will pay voluntarily, write "P" on the right front corner of the file.

F. If Art. 139, UCMJ, is to be used, write "139" on the right hand corner of the file.

G. Maintain 30-day suspense for correspondence with claimants. Annotate correspondence on chronology sheet.

XX. ADJUDICATION REVIEW.

A. If claimed amount is over your authorized payment threshold, send completed file with any comments or recommendations up to next higher claims authority.

B. If within your authority, determine the applicable claims laws and regulations, and whether you have Single Service Responsibility (SSR) under DoD Directive 5515.8 or Individual Service Responsibility (ISR) for the claim.

C. Review substantiation of causation and of damages. Consult USACSEUR policy guidelines, local law, and USARCS or the responsible command claims service if there are further questions.

D. Prepare decision in either 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 soldiers, send either the decision memo or the data sheet to the soldiers' commander with a request for the commander to counsel the soldiers accordingly. If the soldiers choose 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 tortfeasor will not pay voluntarily, advise commander of the possibility of Art. 139, UCMJ, procedures.

H. Prepare letter to claimant or representative in English with a courtesy copy in local or third language informing the claimant of your decision. In cases where payment will be approved, have claimant sign the appropriate release form, DA Form 1666, Claims Settlement Agreement. In cases where claims are to be denied, claimants should be notified of such and given the opportunity to submit additional matters for consideration before a final decision is made.

XXI. 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 and to obtain a fund cite and make sure 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 out, fund cites used, exchange rates and any other relevant information. Send up all completed claims files for review and storage by USARCS or the responsible command claims service.

XXII. REPORTING CLAIMS AND CLAIMS LOG.

A. It is important that the settlement of claims be reported to the responsible claims service for a number of reasons, the foremost of which, is to keep track of expenditures. No standard format or report form currently exists for reporting deployment claims. Deploying claims personnel should look at claims reports filed by their predecessors or contact the appropriate claims office for guidance. 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 are 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 an example 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

Enclosure 2 - Sample Scope Certificate

DEPARTMENT OF THE ARMY
U.S. ARMY CLAIMS SERVICE, EUROPE
Unit 30010, APO AE 09166-5346

AEAJ-CD-FC 15 November 2000

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

XXIII. 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

XXIV. GENERAL:

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.

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.

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.

XXV. DETAILED IMPLEMENTING GUIDANCE:

1. 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.

2. 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.

3. When the Claims Office receives a demand of both rent and damages to that property, the Claims Office will verify the claimants ownership of the property and that U.S. Forces currently occupy or occupied the property and for what period. If either ownership or occupancy cannot be established, the claims office can properly deny the claim. The claims office will notify the claimant of the denial.

4. 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.

5. 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 who 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.

6. 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.

7. 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 the claimant is not compensated twice for the same damage at the conclusion of the lease.

Enclosure 5 - FCC Data Sheet

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

CHAPTER 10

CRIMINAL LAW

REFERENCES

1. Manual for Courts-Martial (2002).
2. Army Regulation 27-10, Military Justice, 6 September 2002.
3. Air Force Instruction 51-201, Administration of Military Justice, 3 October 1997.
4. Air Force Instruction 51-202, Nonjudicial Punishment, 1 October 1996.
5. JAGINST 5800.7C w/chgs 1-3, Manual of the Judge Advocate General (JAGMAN), 3 October 1990.
6. Army Regulation 15-6, Procedures for Investigating Officers and Boards of Officers, 30 September 1996.
7. Army Regulation 220-5, Designation, Classification, and Change in Status of Units, 3 September 1991.
8. Army Regulation 635-200, Enlisted Personnel, 1 November 2000.
9. JP 1-02, DOD Dictionary of Military and Associated Terms, 23 March 1994.
10. FM 27-100, Legal Support to Operations, 1 March 2000.

Introduction

Recent events confirm that processing military justice actions in a deployed setting remains a difficult, critical task.[157] Judge advocates 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, judge advocates must simultaneously maintain efficiency forward and rear while processing of military justice actions in accordance with the Uniform Code of Military Justice (UCMJ),[158] the Manuel for Courts-Martial (MCM),[159] and Army Regulations (AR).[160]

This chapter draws primarily from previous installments of the Operational Law Handbook.[161] The first section of this chapter addresses issues that face military justice managers during the four main phases of deployment. Primary emphasis is upon mobilization. During mobilization it is critical to determine and publish clear UCMJ channels, and to determine, publish and train General Orders. The second section discusses criminal law issues that arise during joint operations. Finally, the third section analyzes criminal law issues particular to combat operations. The primary focus of this section is substantive legal issues including offenses punishable only during time of war or punishments that increase during time of war.

Military Justice During Deployment Phases

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[157] Center for Law & Military Operations, The Judge Advocate General's School & Center, US Army, After Action Report, Iraqi Freedom (June 2003) [hereinafter Iraqi Freedom AAR].

> If you're wondering whether we do any [legal] work here, SPC Wilkins just finished his 8th and 9th summary courts-martial, I'm in the midst of three General Courts-Martial, and CPL Maples is keeping everything running smoothly between managing our Article 15s (which number 107 now), reporting to Division, and keeping a good log of all our legal issues.

Id., remarks of CPT Pritchard, 1BCT, 3d ID, in OSJA Newsletter # 19, dated 2 June 03.

[158] 10 U.S.C. § 801–941 [hereinafter UCMJ].

[159] MANUAL FOR COURTS MARTIAL, UNITED STATES (2002 Edition) [hereinafter MCM].

[160] See e.g. US DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE (6 Sept. 2002) [hereinafter AR 27-10], US DEP'T OF ARMY, REG. 15-6, PROCEDURES FOR INVESTIGATING OFFICERS AND BOARDS OF OFFICERS (30 Sept. 1996) [hereinafter AR 15-6], and US DEP'T OF ARMY, REG. 635-200, ENLISTED PERSONNEL (1 Nov. 2000) [hereinafter AR 635-200].

[161] INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GENERAL'S SCHOOL, US ARMY, JA 422, OPERATIONAL LAW HANDBOOK (2003), Chapter 10 [hereinafter OPLAW HANDBOOK]. The Criminal Law Department contributing authors have been Major William T. Barto (1996), Major Charles N. Pede (1997 and 1998), Major Walter M. Hudson (2000 and 2001), Major Charles H. Rose III (2002), and Major Brad Huestis (2003 and 2004).

Field Manual (FM) 27-100 lists four phases in military operations

Premobilization, Mobilization, Deployment, and Redeployment/Demobilization.[162]
Different military justice concerns need to be addressed at each stage of the operation.
Beware of the "field due process" myth throughout the full spectrum of operations.
Court-martial and NJP procedures remain largely unchanged in a deployed setting.

Premobilization Considerations

Actual deployment mission and location have not yet been identified.[163]

The primary focus is planning and identifying possible issues.
Military justice supervisors should designate personnel and equipment available for deployment
Ensure these personnel have been trained to the greatest extent possible.

The size of the deployment will often dictate who deploys from a legal office.
Supervisors must ensure potentially deployable judge advocates know how to process military justice actions on their own, before deployment.
Deployed settings present difficult supervisory issues
Increased distances between judge advocates
Communication and transportation limitations
"Imported" counsel (judge advocates crossing over from legal assistance, administrative law, operational law or claims)
New / "imported" counsel may be inexperienced with common military justice actions.
Supervisors must therefore attempt to identify and train potentially deployable judge advocates
Ensure they are knowledgeable about AR 15-6 investigations, NJP procedures, court-martial procedures and administrative separations.

Military justice supervisors must identify and marshal the resources needed to conduct operations in the field.
Electricity, phone lines, internet-based e-mail and fax capability are ordinarily limited in deployed settings.
Ensure possession of the required regulations and legal forms in electronic format[164] and hard copy.
Computers may help to eliminate the need for some hard copy resources, however
Potential unreliability in the harsh environment of a deployment requires JAs to plan for the worst.
Past Army deployments validate the need to deploy with a hardbound set of essential publications
Manual for Courts-Martial,
AR 27-10 (Military Justice) and any relevant 27-10 supplements,
DA Pam 27-9 (The Military Judge's Benchbook),
AR 15-6 (Investigations),
AR 635-200 (Enlisted Personnel),
AR 600-8-24 (Officer Separations),
Military Rules of Evidence (MRE) hornbook, and Evidentiary Foundations book
JAOBC Criminal Law Deskbook and the Crimes and Defenses Deskbook.[165]

Mobilization Considerations

Unit has received a mission and deployment locations[166]

Military justice supervisor and trial counsel must now transition and conduct mission-specific training

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[162] US DEP'T OF ARMY, FIELD MANUEL 27-100, LEGAL SUPPORT TO OPERATIONS (1 Mar. 2000) [hereinafter FM 27-100].

[163] *Id.* at 4-22.

[164] E.g. LAAWS XXI CD-ROM/DVD (a comprehensive multi-disc set).

[165] Many of these resources can be accessed on the JAGCNet at http://www.jagcnet.army.mil/.

[166] FM 27-100, *supra* note 162, at 4-22.

Transition tasks include designating and aligning the convening authority structure for the deployment theater and home station (rear detachments; non-deploying units)
Obtain or drafting a General Order for the operation
To be effective, the GO must be aggressively published to deploying soldiers

Command and control relationships are becoming increasingly complex.
Brigade combat teams may deploy in whole or part
"Slice elements" and personnel who may be supplied by sister units, sister services or civilian contractors are often attached
It is imperative that judge advocates think long and hard about designating and aligning the convening authority structure for the deployment theater and home station.
The most important legal concept is that to qualify as a convening authority (CA) an officer must be in command.[167]
A unit may only have one commander at a time.
A commander not present for duty (TDY, leave, hospitalization, etc.), must have an acting commander appointed in accordance with service regulations.[168]
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.

Note: Some confusion arises in the area of NJP. Arguably an Army rear detachment OIC who has **not** assumed command could nevertheless offer and adjudicate NJP,[169] but the same rear detachment "commander" could not act as a CA. This is because Articles 22, 23 and 24, UCMJ, do not use a functional analysis; they look for true command. For a rear detachment OIC "commander" to acquire CA status under the UCMJ, the rear detachment must be an actual unit under Army regulations. For example, the rear "detachment" could consist of a stay-behind battalion with non-deployable soldiers attached to the headquarters company (HHC). Or, the departing unit could go through channels to create a new, temporary provisional unit under the authority of AR 220-5.[170]

Deploying CA has three options for handling military justice actions
CA may exercise his military justice authority over all *unit personnel from the CA's deployed location*
CA may remain in the rear and exercise his military justice authority from that location
CA may elect to place deployed or stay-behind unit personnel under the administrative control of separate convening authorities[171]

CA exercises UCMJ authority from deployed location or CA remains in rear and exercises UCMJ authority from that location
May be appropriate with small scale deployments
Significant potential communications / logistical issues between deployed location and home station
Timeliness of processing greatly suffers
Must ensure deployed soldiers' orders clarify retention of UCMJ authority

CA deploys and leaves CA authority in the rear with Acting CA
Generally preferred approach for larger-scale deployments
Requires extensive coordination to handle pending cases
Most CONUS installations have residual GCM authority already designated in the Installation Commander pursuant to Department of the Army General Order,

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[167] UCMJ, Articles 22, 23 and 24 (designating CAs for GCMs, SPCMs and SCMs, respectively).

[168] US DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY (6 Sept. 2002), para 2-6 [hereinafter AR 600-20].

[169] See AR 27-10, *supra* note 160, para 3-7, which describes a function analysis, "Whether an officer is a commander is determined by the duties he or she performs, not necessarily by the title of the position occupied."

[170] US DEP'T OF ARMY, REG. 220-5, DESIGNATION, CLASSIFICATION, AND CHANGE IN STATUS OF UNITS (6 Sept. 2002) [hereinafter AR 220-5].

[171] As defined in Articles 22, 23 and 24, UCMJ.

If authority is not present, JAs should coordinate with OTJAG, Criminal Law for Secretarial designation of a new GCMCA.[172]
Cases should be transferred to this new convening authority when necessary.[173]

Note: As an important aside, the term "jurisdiction" is sometimes used incorrectly 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.[174] However, as a matter of policy JAs should ensure the CA with administrative control (ADCON)[175] over the accused servicemember exercises primary UCMJ authority. Absent clear command guidance ADCON can be an elusive concept. AR 27-10 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.[176] Article 15 NJP procedures and the Rules for Courts-Martial implementing the UCMJ, however, are worlds apart. United States v. Egan[177] provides 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 force (EUCOM) after the soldier's Army chain of command decided not to refer the case to trial. Notwithstanding the ability of any CA to refer any servicemember's case to trial, it is simply good practice to ensure units and individual soldiers, sailors, Marines and airmen are properly assigned to the deploying force. As discussed above, AR 27-10 shows a clear preference for language authorizing "admin and UCMJ actions" explicitly written into assignment orders. Judge advocates need to monitor this issue at two levels: unit and individual.

JAs must coordinate with the personnel (S/G-1) and operations (S/G-3) sections
Ensure units are assigned or attached to the appropriate organization for administration of military justice
Ensure individual and unit orders reflect correct attachments and assignments
Unit commanders determine which units, or portions of units, will deploy or remain in the rear
Example: deploying company deploys with a previously unrelated battalion may create the need for orders attaching the company to the deploying battalion

Note: 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

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[172] The Chief, The Office of The Judge Advocate General, Criminal Law is currently Colonel William Condron, (703) 588-6776.

[173] *See e.g.* sample of transfer of jurisdiction at the end of this chapter.

[174] See MCM, supra note 159, RCM 601(b) *discussion*.

[175] Administrative control (ADCON as opposed to OPCON, operational control) 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. *See* Joint Publication 1-02, Operational Terms and Symbols.
>
> 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. *See* FM 27-100, *supra* note 162.

[176] AR 27-10, *supra* note 160, para 3-8.a.(4), "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 at 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.

[177] 53 M.J. 570 (Army Ct. Crim. App. 2000). In *Egan* a SPCM was convened by Air Force colonel, who was the commander of a EUCOM joint unit. The accused who was a soldier assigned to the joint unit was convicted of drug use and distribution. The SPCMCA approved the sentence, which included a BCD. On appeal the Army Court of Criminal Appeals held that the SPCMCA did not have the authority under the applicable joint service directive to convene a special court-martial empowered to adjudge a BCD in the case of an Army soldier. The court set aside the BCD, and further modified the case on other grounds.

discretion.[178] 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.
May be necessary to create provisional units (p-units)[179] to support the deployment.
Commanders decide whether or not p-units will be "organized," and if so, to what unit they will be attached.
Often used to create a UCMJ structure or fill the gaps
Can be created at any level, to include company, battalion, and brigade.
They help to ensure that commanders at all levels are available to process UCMJ and administrative actions.
Non-deploying soldiers may either be attached to previously unrelated units or to p-units during the period of deployment.
Should be done in consultation with the S/G-1 and the JA.[180]
Creation of a rear detachment, staffed by non-deploying soldiers, must be integrated into a new or existing chain of command.
Should be done in consultation with the S/G-1 and the JA.[181]

Nondeployable soldiers
Unit trial counsel should monitor the status of these soldiers within their jurisdiction
Judicial action by military or civil authorities, while generally making a soldier non-deployable for exercises, may not bar deployment for actual combat operations
Trial counsel must advise commanders of those soldiers who are required to participate in legal proceedings (i.e., witnesses).
The decision as to whether these soldiers will deploy is the commander's, usually made after coordination with the trial counsel.
Unit adjutant should initiate procedures to obtain the release of soldiers in confinement whom the commander requests be made available for deployment.

Panel Members
Coordinate the selection of court-martial panel for theater and rear detachment
Brigade trial counsel should consider establishing special court-martial panels in theater
Expeditious forum for resolution of NJP refusals and other low-level misconduct
Recent changes to AR 27-10 that allow Army SPCMCAs to refer cases directly to special courts-martial empowered to adjudge a bad conduct discharge
JAs should also familiarize themselves with legally sound selection processes and deploy with prepared panel selection advice.

Pending Cases
JAs must advise commanders on disposition of pending cases
Recommend whether to take pending actions (and soldier!) to the deployed setting or leave them in garrison

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[178] 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 request for orders (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."

[179] 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, *supra* note 14.

[180] 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. JAs must assist in this process to ensure a UCMJ command structure exists, and that this structure continues 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.

[181] 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. JAs must assist in this process to ensure a UCMJ command structure exists, and that this structure continues 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.

For courts-martial this is largely 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
Soldiers pending administrative separation normally should remain in garrison pending separation
NJP actions normally go forward with the deploying force

General Order (GO)
Commander's tool to promote mission accomplishment and protect deployed forces
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
JAs should have a GO ready for publication as soon as possible
First determine if higher headquarters has already published one
If not, look to the past and lift language from general orders used in past operations[182]
When drafting an order from "scratch" think first about mission requirements and command guidance
Consult with S/G-1, S/G-3, the unit medical, chaplain, civil affairs and public affairs officers to vet issues that could be addressed in a unit GO
The GO must be disseminated to all soldiers prior to deployment
Judge advocates must be thoroughly familiar with the GO for the operation and must provide extensive briefings prior to deployment.
The best time to publish the GO and to conduct mission training is during pre-deployment briefings.
Also schedule GO and ROE refresher training upon arrival in theater, and at regular intervals throughout the deployment.
Preventive law classes are among the most critical of judge advocate tasks, because they may head off potential problems before they arise.
Violations of a properly published GO may be punished under Article 92, UCMJ[183]
The government need not prove knowledge of a lawful GO as an element of the offense to obtain a conviction, the contents of the general order should be aggressively briefed to all deploying soldiers. The rational for this is simple – soldiers who know and follow the general order will be safer and in a better position to accomplish the unit's mission.

Additional Legal Services' Availability
Include coordinating for trial defense and judiciary services (including court reporter(s)!) in the forward area.
Coordinate for the potential use of the closest military confinement facility
When pretrial confinement is necessary, the soldier is normally shipped to the rear (Mannheim, Germany or CONUS)
With the exception of the Vietnam War, Army forces have typically not maintained confinement facilities in theater for US personnel
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 US military personnel

Drug Testing
During longer deployments (> 3 months) JAs should encourage routine urinalysis testing
Ensure units have the ability to conduct urinalysis testing in theater.
Coordinate with the unit alcohol and drug coordinating officer (ADCO), the Installation Biochemical Testing Coordinator and the relevant stateside lab prior to deployment.[184]
Consider the advisability of bringing canine support, to include drug and explosive detection capable dogs. MP working dogs may also be able to assist in force protection efforts.

Deployment Considerations

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[182] See examples of GOs for operations in Desert Shield, Haiti, and Allied Force at this end of this chapter.

[183] UCMJ, art. 92, failure to obey order or regulation. Elements. (1) Violation of or failure to obey a lawful general order or regulation. (a) That there was in effect a certain lawful general order or regulation; (b) That the accused had a duty to obey it; and (c) That the accused violated or failed to obey the order or regulation. MCM, *supra* note 159, at IV-23.

[184] Fort Meade Drug Testing Lab: (301) 677-7085 / Tripler Drug Testing Lab: (808) 433-5176.

Ensure orders assigning units and personnel clearly indicate which commanders have non-judicial punishment and court-martial convening authority
An ongoing process, as new soldiers (and possibly members from other services) will be incoming to the command
Requires coordination with the appropriate S/G-1 personnel staff elements

Postponement of NJP punishment
Is restriction in a deployed environment a viable punishment?
AR 27-10 allows commanders to postpone imposition of punishment[185]
Provision contemplates such delay will not normally exceed 30 days
Intent is likely to ensure swift punishment consistent with the purposes of NJP
Delays > 30 days should coordinate with the JA's supervisory JA
AR 27-10 is silent as to the lawfulness or propriety of such a course of action
JAs must ensure the soldier is notified of the commander's intent to delay imposition.
Decision should be reflected in writing on the DA Form 2627.

Rear detachment military justice supervision
Additional challenges because of fewer resources available
Expect that rear detachment commanders have little to no military justice experience
Must plan for and prepare legal briefings for all new OICs/commanders in the rear detachment and additional training as necessary.
Pay particular attention to areas such as unlawful command influence.

Redeployment/Demobilization Considerations

Military justice supervisor must ensure a return back to home station status quo
Restructuring commands of rear convening authorities to ensuring a return to the original convening authority structure
Assignment/attachment of units and personnel back to appropriate organizations for administration of military justice
Transfer individual cases back to appropriate jurisdictions

Rescission of any general order for the operation.

Conduct a thorough AAR and capture lessons learned

Criminal Law Issues During Joint Operations

Joint operations post a host of complications for the commander seeking to maintain good order and discipline in the field.[186] A joint commander may be faced with the need to court-martial or offer NJP to a member of another service. How exactly would an Army commander deal with a Marine or airman accused of violating the UCMJ? The short answer is that both courts-martial and NJP have reciprocal jurisdiction.

Army commanders may refer courts-martial cases of personnel of other services assigned or attached to their unit[187]

United States v. Egan[188]
USAF commander referred a soldier's case to trial by a special court-martial
TC was Air Force, the DCs were Army and Air Force and the military judge was Army
ACCA held, due to the lack of specific language in EUCOM regulations, the Air Force CA was unable to approve a bad conduct discharge, because he did not forward the case to a GCMCA for referral (even though Air Force SPCMCAs have the authority to refer BCD special cases to trial)

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[185] AR 27-10, *supra* note 160, para. 3-21.

[186] For a comprehensive analysis of the legal issues confronting joint units see, Major Mark W. Holzer, *Purple Haze: Military Justice in Support of Joint Operations*, ARMY LAW. 1, July 2002 [hereinafter HOLZER].

[187] See UCMJ art. 17 (2000) and MCM, *supra* note 159, R.C.M. 201(e).

[188] 53 M.J. 570 (Army Ct. Crim. App. 2000).

Army commanders may impose NJP on personnel of other services assigned or attached to the unit

Commander must do so in accordance with the individual's parent service regulation[189]

JAs should consult with other service judge advocates to understand the impact of NJP on other service personnel[190]

If possible, members offered NJP should be allowed to consult with defense counsel from their own service

Joint commanders unfamiliar with sister service NJP procedures may also designate a service representative within the joint command to administer NJP to members of their service

CRIMINAL LAW ISSUES DURING COMBAT OPERATIONS
This section addresses criminal law problems associated with combat and, specifically, wartime-related offenses.

"Time of War" for criminal law purposes

Certain offenses can only occur in time of war
Certain offenses are punishable by death only in time of war
Time of war is an aggravating factor in still other offenses
Court-martial jurisdiction may exist over civilians who are "accompanying the force in the field."

"Time of War" defined

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."

The definition applies only to the following portions of the MCM
Aggravating circumstances that must be present to impose the death penalty[191]
Punitive articles[192]
Nonjudicial punishment[193]
It does *not* apply to statute of limitations or jurisdiction over civilians

Wartime specific offenses

Improper use of a countersign[194]

Misconduct as a prisoner[195]

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[189] *See* AR 27-10, *supra* note 160, para 3-8c. *See also* AFI 51-202, para 2, 2.2.1; Navy and Marine JAGMAN 0106d; Coast Guard MJM, Art 1-A-3(c)). 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.

[190] For a side-by-side comparison of the various services' NJP procedures *see* HOLZER, *supra* note 186, at 25.

[191] MCM, supra note 159, R.C.M. 1004(c)(6)).

[192] *Id.*, Part IV.

[193] *Id.*, Part V.

[194] Improper use of a countersign prohibits disclosing the parole or countersign to one not entitled to receive it and giving a parole or countersign different from that authorized by the command. UCMJ art. 101.

Spying[196]

Offenses punishable by death penalty only in time of war
Desertion[197]
Assaulting or willfully disobeying a superior commissioned officer[198]
Misbehavior of sentinel or lookout[199]
Homicide and rape are both capital offenses in time of war as well as at other times

In addition, time of war may be an aggravating factor
Maximum penalty that may be imposed by court-martial is increased in time of war
Drug offenses
Malingering
Loitering/wrongfully sitting on post by sentinel/lookout

Increased NJP Authority
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.[200]

Jurisdictional rules and statutes of limitation may both be affected by a determination that a time of war exists

"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 NJP punishment
Article 43, UCMJ, extends the statute of limitations for certain offenses committed in time of war[201]
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[202]
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[203]
The statute of limitations is suspended for three years after the end of hostilities for offenses involving fraud, real property, and contracts with the United States[204]

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[195] Misconduct as a prisoner makes it criminal to improve one's position as a prisoner (a) to the detriment of other prisoners and (b) contrary to law, custom or regulation. Art. 105 also makes criminal the maltreatment of prisoners while the accused is in a position of authority. UCMJ art. 105.

[196] Spying imposes a mandatory death penalty upon those who lurk, act under false pretenses to collect, or attempt to collect information for conveyance to the enemy. Spying does not violate the law of war. UCMJ art. 106. "Spies are punished, not as violators of the law of war, but to render that method of obtaining information as dangerous, difficult, and ineffective as possible." DEP'T OF THE ARMY, FIELD MANUEL 27-10, LAW OF LAND WARFARE, para. 77).

[197] Desertion with intent to remain away permanently, shirk important service, or avoid hazardous duty *may* be punished by death in time of war. UCMJ art. 85.

[198] Assaulting or Willfully Disobeying a Superior Commissioned Officer. UCMJ art. 90.

[199] Misbehavior of Sentinel or Lookout, such as being found drunk or asleep on their post, or leaving it before proper relief, *may* be punished by death in time of war. UCMJ art. 113.

[200] *See* MCM, *supra* note 159, pt. V, para. 5b(2)(B)(iv).

[201] CMA held that Vietnam was a time of war for statute of limitations purposes. U.S. v. Anderson, 38 C.M.R. 386 (1968).

[202] UCMJ art. 43(a).

[203] UCMJ art. 43(c).

[204] UCMJ art. 43(f). The date hostilities end is proclaimed by the President or established by a joint resolution in Congress.

For statute of limitations purposes, 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[205] and whether legislation, executive orders, or proclamations concerning the hostilities are indicative of a time of war.[206]

Persons "serving with or accompanying an armed force in the field" may be subject to trial by court-martial[207]
In *U.S. v. Averette*,[208] 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.
In the near future The Military Extraterritorial Jurisdiction Act of 2000[209] may expand criminal jurisdiction to cover civilians accompanying the Armed Forces overseas in peacetime. This legislation has not yet taken effect, however, because a DoD regulation governing apprehension, detention, delivery and removal of persons to the U.S. (for trial in Federal District Court) has not been submitted to the Senate and House Judiciary Committees.

There is no geographical component to the "time of war"
Absence from the combat zone at the time of an offense does not prevent the offense from occurring in "time of war."[210]
For example, in a case in which an accused absented himself without leave from Fort Lewis, Washington, during the Korean conflict, the 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."[211]

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.

Article 99, UCMJ
An amalgamation of nine different offenses and is meant to cover all offenses of misbehavior "before the enemy"[212]
Each of these crimes must be committed before, or in the presence of, the enemy
Enemy includes forces of the enemy in time of war, or any hostile body that our forces may be opposing, such as a rebellious mob or a band of renegades, and includes civilians as well as members of military organizations[213]
To be before, or in the presence of, the enemy, one must stand in close tactical, not physical, proximity to the foe.
CAAF: "*It may not be possible to carve out a general rule to fit all situations, but if an organization is in a position ready to participate in either an offensive or defensive battle, and its weapons are capable of delivering fire on the enemy within effective range of the enemy weapons, then that unit is before the enemy.*"[214]
Examples of "before the enemy":
Member of a front line platoon
Member of a mortar unit supporting friendly troops,
A soldier running away near friendly artillery units less than six miles from the front
Issue is left to the trier of fact.[215]

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[205] U.S. v. Shell, 23 C.M.R. 110 (1957).

[206] U.S. v. Bancroft, 11 CMR 3 (1963).

[207] UCMJ art. 2(a)(10).

[208] 41 C.M.R. 363 (1970),

[209] 18 U.S.C. §§ 3261-67.

[210] U.S. v. Averette, 41 C.M.R. 363 (1970).

[211] U.S. v. Ayers, 15 C.M.R., at 227 (1954).

[212] As such, UCMJ, Article 134 is not a catch-all designed to apply to these types of misbehavior before the enemy violations.

[213] U.S. v. Monday, 36 C.M.R. 711 (A.B.R. 1966), *pet. denied*, 37 C.M.R. 471 (C.M.A. 1969)

[214] U.S. v. Sperland, 5 C.M.R. 89, 91 (1952).

[215] During Urgent Fury, a soldier who refused to board a plane at Pope Army Airfield (Ft. Bragg) was charged with misbehavior before the enemy. The judge dismissed the charge (not "before the enemy"). The accused was convicted of missing movement by design.

Misbehavior before the enemy offenses
An accused is guilty of running away if, without authority, he leaves his place of duty to avoid actual or impending combat. He need not actually run, but must only make an unauthorized departure.
Shamefully abandoning, surrendering, or delivering up command punishes cowardly conduct of commanders who, without justification, give up their commands. Only the utmost necessity or extremity can justify such acts.
An accused endangers the safety of a command when, through disobedience, neglect, or intentional misconduct, he puts the safety of the command in peril.
Soldiers may not cast away arms or ammunition before the enemy for any reason. It is immaterial whether the accused acted to aid himself in running away, to relieve fatigue, or to show his disgust with the war effort.
Cowardly conduct consists of an act of cowardice, precipitated by fear, which occurs in the presence of the enemy. The mere display of the natural feeling of apprehension before, or during, battle does not violate this article; the gravamen of this crime is the accused's refusal to perform his duties or abandonment of duties because of fear.[216]
Quitting one's place of duty to plunder or pillage occurs when an accused leaves his place of duty with the intent to unlawfully seize public or private property. It is enough that the accused quit his duty with the specified purpose; he need not ever actually plunder or pillage to violate this subdivision of the article.
Causing false alarms includes the giving of false alarms or signals, as well as spreading false or disturbing rumors or reports. It must be proven that a false alarm was issued by the accused and that he did so without reasonable justification or excuse.
An accused willfully fails to do his utmost to encounter the enemy when he has a duty to do so and does not do everything he can to encounter, engage, capture, or destroy certain enemy troops, combatants, vessels or aircraft. An example of this offense might be a willful refusal to go on a combat patrol.
The failure to afford relief and assistance involves situations where friendly troops, vessels or aircraft are engaged in battle and require relief or assistance. The accused must be in a position to provide this relief without endangering his own mission and must fail to do so. The accused's own specific tasks and mission limit the practicable relief and assistance he can give in a particular battle situation.

War Trophies & Destruction

War Trophies
Soldiers must give notice and turn over to the proper authorities, without delay, all captured or abandoned enemy property.
Individuals failing to adhere to this requirement can be punished for three separate acts
Failing to give notice or turn over property[217]
Buying, selling, trading, or in any way disposing of, captured or abandoned property.
Engaging in looting or pillaging.
The violation of 26 U.S.C. §§ 5844, 5861 (unlawful importation, transfer, and sale of a dangerous firearm) may also be charged as a violation of clause three, UCMJ art. 134.

Wrongful Taking of Private Property
Although there are no provisions in Article 121, UCMJ that apply *specifically* to wartime situations, situations may arise that amount to the wrongful taking of private property. The maximum punishment for violation of this provision is a dishonorable discharge, forfeiture of all pay and allowances, and confinement for five years.
Private property may always be requisitioned or destroyed if military necessity so requires.
Goal during combat is to avoid unnecessary destruction of such property, as well as disciplinary problems, by training soldiers in the law regarding private property.
Training will aid the commander in accounting for property and in paying for only proper claims.
Article 109, UCMJ, however, prohibits the willful or reckless destruction or damage to private property and carries a maximum punishment of a dishonorable discharge, total forfeitures, and confinement for five years.

Mutiny and Sedition

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[216] *See* U.S. v. Smith, 7 C.M.R. 73 (A.B.R. 1953), and U.S. v. Barnett, 3 C.M.R. 248 (A.B.R. 1951).

[217] *See* U.S. v. Morrison, 492 F.2d 1219 (1974). Captured or abandoned property (here, money) discovered during wartime becomes the property of the government whose forces made the discovery.

Extremely dangerous wartime offenses, because they go to the very heart of prejudice to good order and discipline[218]
Mutiny and sedition consist of four separate offenses, all of which require the endangerment of established military or civilian authority
Neither mutiny nor sedition has to occur during "time of war" to be punishable by death
Mutiny requires an intent to usurp or override military authority and can be committed by either creating violence or a disturbance or by refusing to obey orders or perform duties
While creating violence or a disturbance can be accomplished either alone or with others, a refusal to obey orders or perform duties requires a concert of purpose among two or more people to resist lawful military authority
Resistance may be nonviolent or unpremeditated and may consist only of a persistent refusal to obey orders or to perform duties
Sedition is a separate offense and requires a concert of action among two or more people to resist civil authority through violence or disturbance
Failure to prevent, suppress, or report a mutiny or sedition also constitutes a crime
Failure to prevent these acts requires that the mutiny or sedition took place in the accused's presence and that he failed to do his utmost to prevent and suppress the insurrection. If the accused fails to use the force, to include deadly force, necessary to quell the disturbance under the circumstances, he has failed to do his utmost.
Failure to take all reasonable means to inform his superiors of an offense of mutiny or sedition, which he had reason to believe was taking place, is the fourth offense under Article 94. One must take the most expeditious means available to report the crime.
Whether he had reason to believe these acts were occurring is judged by the standard of the response of a "reasonable person" in similar circumstances.

Subordinate Compelling Surrender[219]
Compelling a commander to surrender, an attempt to compel surrender, and for striking the colors or flag to any enemy without proper authority
Capital offense
Compelling surrender involves the commission of an overt act by the accused that was intended to, and did, compel the commander of a certain place, vessel, aircraft or other military organization to give it up to the enemy or to abandon it.
Attempt is comprised of the same elements, except the act must only "apparently tend" to bring about the compulsion of surrender or abandonment, and the overt act must amount to more than mere preparation.
Offenses are similar to mutiny, except that no concert of purpose is required to be found guilty.
Striking the colors or the flag requires that the accused make, or be responsible for, some unauthorized offer of surrender to the enemy. The offer to surrender can take any form and need not be communicated to the enemy. Sending a messenger to the enemy with an offer of surrender is sufficient to constitute the offense; it is not necessary for the enemy to receive it.

Improper use of countersign[220]
A countersign is a word or procedure used by sentries to identify those who cross friendly lines; the parole is a word to check the countersign and is given only to those who check the guards and the commanders of the guards.
Two separate offenses fall within the ambit of Article 101
Disclosing the parole or countersign to one not entitled to receive it
Giving a parole or countersign different from that authorized. Those authorized to receive the parole and countersign must be determined by the peculiar circumstances and orders under which the accused was acting at a particular time.
Negligence or inadvertence is no defense to the crime, nor is it excusable that the accused did not know the person to whom the countersign or parole was given was not entitled to receive it.

Forcing a safeguard[221]
A safeguard is a guard detail or written order established by a commander for the protection of enemy and neutral persons, places, or property

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[218] Mutiny or Sedition (UCMJ art. 94).

[219] UCMJ art. 100.

[220] UCMJ art. 101.

[221] UCMJ art. 102.

Purpose of a safeguard is to pledge the honor of the nation that U.S. forces will respect the person or property
A belligerent may not employ a safeguard to protect its own forces
A safeguard may not be established by the posting of guards or off-limits signs unless a commander takes those actions necessary to protect enemy or neutral persons or property
This offense is committed when one violates the safeguard and he knew, or should have known, of its existence
Any trespass of the safeguard is a violation of this article.

Aiding the enemy[222]
Five separate acts are made punishable by Article 104
Aiding the enemy
Attempting to aid the enemy
Harboring or protecting the enemy
Giving intelligence to the enemy
Communicating with the enemy
Article 104 does not prohibit aiding prisoners of war, it does prohibit assisting or attempting to assist the enemy with arms, ammunition, supplies, money, or any other form of assistance.

Spying
Mandatory punishment death[223]
This offense makes it a crime to act under false pretenses to collect, or attempt to collect, information for the enemy in areas in which people are working to aid the U.S. war effort.
The prosecution must prove that the accused intended to convey information to the enemy, but need not prove that the accused actually received information or conveyed it to the enemy.
Anyone, military or civilian, may be tried for spying, except:
Members of an armed force or civilians who are not wearing a disguise and perform their missions openly after penetrating friendly lines.
Spies, who after having returned to enemy lines, are later captured.
Persons living in occupied territory that report on friendly activities without lurking, and without acting clandestinely or under false pretenses. Such individuals may be guilty of aiding the enemy, however.

Misbehavior by a Sentinel
Drunk or asleep on his post
Leaving post before being properly relieved
Potentially capital if the offense is committed in time of war.[224]

Conclusion

Military justice is critical to maintaining good order and discipline of the force. It establishes basic standards of conduct and procedures by which those standards are enforced. This is true whether the unit is in the field or garrison. Military justice managers must ensure that during deployment they are able to support the commanders they advise, the counsel they supervise and the soldiers who stand accused. Thoughtful planning, attentive execution and an unwavering commitment to due process will carry the day in every situation.

[222] UCMJ art. 104.

[223] UCMJ art. 106.

[224] UCMJ art. 113.

Appendices

A. Sample Transfer of Jurisdiction
B. Sample Letter Transferring Court-Martial Convening Authority
C. Sample General Orders Number 1

Appendix A
SAMPLE TRANSFER OF JURISDICTION
(APPX Entry & Letter)

APPX 7 (LEGAL AFFAIRS) TO ANNEX E (PERSONNEL AND ADMIN) TO 1ST ID (MECH) REFORGER PLANNING DIRECTIVE (REAR DETACHMENT OPERATIONS)
REFERENCES:
a. AR 27-10
b. FT Riley Supplement to AR 27-10
AR 27-20
d. AR 27-40
e. AR 27-50
f. AR 210-40
g. AR 735-11
h. Manual for Courts-Martial
1. SITUATION. Basic Planning Directive.
2. MISSION. To provide legal services and support to the 1st ID(Mech) Rear (Prov) and FT Riley during REFORGER 86.
3. EXECUTION.
a. General. Basic Planning Directive.
b. Military Justice.
(1) Commander, 1st ID (Mech), upon departure from FT Riley will:
(a) Transfer General Court Martial Convening Authority (GCMCA) for 1st ID (Mech) Rear (Prov) to the Deputy Post commander, FT Riley, Kansas, until his return from REFORGER 86.
(b) Transfer all cases he has referred to trial to the Deputy Post commander, FT Riley, Kansas, until his return from REFORGER 86.
(2) Deputy Post commander, FT Riley, will:
(a) Assume command of FT Riley during the absence of the commander, 1st ID (Mech) and FT Riley, for REFORGER 86.
(b) Exercise GCMCA over all service members and units assigned or attached to the 1st ID (Mech) Rear (Prov), FT Riley, and the U.S. Army Correctional Activity.
(3) Commanders of all deploying Major Subordinate Commands (MSC), 1st ID (Mech), will:
(a) Organize provisional headquarters and chain of command for rear detachments, as appropriate.
(b) Provide G3, Force Development, unit organizational structure and chain of command for respective rear detachment NLT 1 Nov 1985.
(c) Upon departure from FT Riley, transfer Special Court-Martial Convening Authority (SPCMCA) over respective rear detachments to commander, 937th Eng. Group.
(d) Upon departure from FT Riley, transfer all cases they have referred to trial to the commander, 937th Engineer Group, until their return from REFORGER 86.
(e) Insure service members facing charges that have been referred to trial are not deployed on REFORGER 86.
(4) The commander, 937th Engineer Group, will exercise SPMCA over all MSC, 1st ID (Mech), rear detachments during the absence of MSC commanders for REFORGER 86.
(5) G3, Force Development, will:
(a) Issue appropriate orders implementing the command structures of the 1st ID (Mech) Rear (Prov), and FT Riley.
(b) Issue appropriate orders attaching all provisional MSCs and rear detachment personnel to the 937th Engineer Group for special court-martial jurisdiction.
(6) SJA, 1st ID (Mech) and FT Riley, will:
(a) Prepare letter transferring GCMCA to the Deputy post commander for the signature of the commander, 1st ID (Mech) and FT Riley, prior to his departure for REFORGER 86.
(b) Prepare letter for MSC commanders' signatures transferring SPCMCA to the commander, 937th Engineer Group, prior to their departure for REFORGER 86.
(c) Assist G3 in establishment of rear detachment jurisdiction and publication of appropriate attachment orders.
c. Legal Assistance, Administrative Law, Claims.
The SJA, 1st ID (Mech) and FT Riley, will maintain sufficient staffing to provide full legal support in all areas of responsibility to the 1st ID (Mech) Rear (Prov) and FT Riley during REFORGER 86.
4. SERVICE SUPPORT. Basic Planning Directive.

5. COMMAND AND SIGNAL. Basic Planning Directive.

Appendix B
Order Transferring Special Court-Martial Jurisdiction.
SUBJECT: Order Transferring Special Court-Martial Jurisdiction.

1. Effective 0001 hours, _____ Jan 1999, I hereby order the transfer, to the commander 937th Engineer Group, 1st ID (Mech), of special court-martial jurisdiction over all court-martial cases referred to trial by the command and all new cases coming into existence on, and after, the date of this order.
2. The departure of the _____(Brigade/DIVARTY/DISCOM) for REFORGER 86 causes the transfer of special court-martial convening authority.
3. The return of the _____(Brigade/DIVARTY/DISCOM) from REFORGER 86 will rescind this order.

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.

Signed, Wesley K. Clark, Commander-in-Chief, U.S. European Command, General, U.S. Army.

NOTES

CHAPTER 11

ENVIRONMENTAL LAW IN OPERATIONS

REFERENCES

1. Field Manual 3-100.4, Environmental Considerations in Military Operations (1 June 2000).
2. Executive Order 12,114, 44 Fed. Reg 1957 (1979).
3. DoD Directive 6050.7, Environmental Effects Abroad of Major Department of Defense Actions (31 March 1979).
4. 32 C.F.R Part 651, Environmental Analysis of Army Actions.
5. AFI 32-7006, Environmental Programs in Foreign Countries (29 Apr 1994).
6. OPNAVINST 5090.1B, Environmental and Natural Resources Manual (1 Nov 94).
7. OPNAVINST 3100.5E, Navy Operating Area and Utilization of Continental Shelf Program (17 Nov. 88).
8. MCO 5090.2A, Environmental Compliance and Protection Manual (10 Jul 98).
9. Joint Pub. 4-04, Joint Doctrine for Civil Engineering Support, II-7 (26 Sep. 1995).
10. DoD Instruction 4715.5, Management of Environmental Compliance at Overseas Installations (22 Apr. 1996).

I. INTRODUCTION.

a) The U.S. Army's Environmental Strategy for the 21st Century, states "[T]he Army will be a leader in environmental stewardship."

   i) Broad statement of objective is not limited to garrison environments. As a result, the JA must advise commanders and train soldiers regarding environmental law issues related to overseas and domestic military operations.

   ii) JAs must recognize environmental law issues that other officers and officials may not have considered.

   iii) JAs must know how to analyze these issues and develop appropriate and credible solutions for such issues. Third, judge advocates must be prepared to advise and train supported commanders and units in environmental aspects of domestic and overseas operations along the entire operational spectrum.

b) Doctrine in this area has developed faster than the underlying law and policy.

   i) Field Manual (FM) 3-100.4 [jointly issued with the Marines as Marine Corps Reference Publication (MCRP) 4-11B] *Environmental Considerations in Military Operations,* 1 June 2000, is critical.

   ii) Virtually every other reference document relating to environmental issues, can be found at www.denix.osd.mil, the Department of Defense's Environmental Network and Information Exchange.

   Note: Attorneys should access this site as early as possible in order to obtain a password and fuller access to restricted databases.

c) Protecting the environment is today a major international, U.S., and Department of Defense concern. The international community is increasingly vigilant in its oversight of the environmental consequences of military operations. Judge advocates must ensure that leaders are aware of both the rules and the importance of complying with these rules. Failure to take adequate account of environmental considerations can jeopardize current and future operations, generate domestic and international criticism, result in a loss of command money due to fines and penalties, produce costly litigation, and result in personal liability for both the leader and the individual soldier.

d) As a final introductory matter, planners must be aware of the significant role played by contractors in environmental matters. Whether a Logistics Civilian Augmentation Program (LOGCAP) contract or some other vehicle, much of the environmental work in an operation is likely to be done by contract. Get your contract and fiscal law people involved early. For a useful, short study of lessons learned in the various Bosnia operations see "*U.S. Army Environmental Protection Activities during Operations Joint Endeavor, Joint Guard, and Joint Forge"* by Zettersten and Dale, in the Winter 2000 edition of Federal Facilities Environmental Journal (available on DENIX).

II. ENVIRONMENTAL PLANNING REQUIREMENTS v. COMPLIANCE REQUIREMENTS

In thinking about the application of environmental law to U.S. military operations, it is useful to distinguish between two types of law. Some laws require that some type of environmental planning process be conducted in conjunction with military operations. Other legal requirements may impose substantive restrictions on our operations (e.g. our ability to discharge wastes into the air or water, or bury wastes in the ground, or transport them across international boundaries).

As a general rule, domestic environmental statutes have no extraterritorial application during overseas operations. For instance, the Endangered Species Act (ESA), 16 U.S.C. §§1531-1543 (1973)[225] and the National Environmental Policy Act (NEPA) 42 U.S.C. §§4321-4370 (1969)[226] are not generally considered to have extraterritorial application.[227] NEPA does, however, apply to major federal actions located outside of the U.S. that have significant environmental impacts inside the U.S. The location of the impact, and not the action, determines NEPA applicability.

Although the strict requirements of domestic statutes do not apply to most overseas operations, U.S. executive branch policy, discussed below, is often couched as a requirement to adhere to "U.S. environmental requirements, if feasible."[228] 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 our activity in Southwest Asia.[229] In reality, no such waiver was needed.

1) Planning Requirements: Executive Order No. (EO) 12,114.[230]

a) Executive Order 12,114 creates "NEPA like" rules for overseas operations. EO 12,114, however, only applies to specific categories of major federal actions which have significant effects on the environment outside the U.S.

b) EO is implemented in DoD by DoD Directive 6050.7, *Environmental Effects Abroad of Major Department of Defense Actions*, 31 March 1979. This Directive is in turn implemented by various Regulations and Instructions

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[225] The U.S. Supreme Court reversed the one case where the ESA had been found to have extraterritorial application. The Court's rationale, however, was not based upon any of the substantive environmental issues involved, but on lack of standing. 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 considered the extraterritoriality question.

[226] 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.

[227] 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." With one exception, courts have consistently refused to apply NEPA outside of the U.S. 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 (the exception and not the rule) was based upon the absence of a sovereign within Antarctica and because the agency decision-making occurred within the U.S.. More recently, 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 (1) the strong presumption against extraterritorial application, (2) possible adverse affect upon existing treaties, and (3) the adverse affect upon U.S. foreign policy.

[228] 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 Judge Advocates 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 No. 12,114. Every SINGLE U.S. activity within Southwest Asia (taken pursuant to Operations Desert Shield/Storm) was exempted under Executive Order No. 12,114 (*see* discussion later in this chapter for an explanation of exempted status under EO 12,114).

[229] *See id*. at Environmental Law 1-3.

[230] Exec. Order No. 12,114, 44 Fed. Reg. 1957 (1979) *reprinted at* 42 U.S.C. § 4321, at 515 (1982) [hereinafter EO 12,114].

of the Armed Services. For the Army, 32 C.F.R. Part 651 *Environmental Analysis of Army Actions* implements it. It is implemented in the Air Force by AFI 32-7006, *Environmental Program in Foreign Countries*, Chapter 4 (29 Apr 1994). The Navy implements it by OPNAVINSTs 5090.1B and 3100.5E. The Marine Corps implements the directive by MCO 5090.2A. The following analysis walks you through the application of EO 12,114 to a military mission.

c) Pre-Operation Planning

i) General Considerations. Judge advocates must recognize that Executive Order 12,114 always mandates *some degree* of environmental stewardship by U.S. forces in regard to its operations outside of the U.S. 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 to the Order, military lawyers should turn to the more specific documents that implement the Order: Department of Defense Directive 6050.7 (DoD Directive 6050.7),[231] and 32 C.F.R. Part 651.

(1) When executing a mission within a foreign nation, the military leader should first consider three general rules that dictate the interpretation and compliance with all other rules.

(2) U.S., based upon operational realities and necessities, should take all reasonable steps to act as a good environmental steward.

(3) U.S. should respect treaty obligations and the sovereignty of other nations. This means, at a minimum, "exercising restraint in applying U.S. laws within foreign nations unless Congress has expressly provided otherwise."[232]

(4) Any acts contemplated by officials within the Department of Defense that require "communications with foreign governments concerning environmental agreements and other formal arrangements with foreign governments" must be coordinated with the Department of State.[233]

ii) The Required Analysis and Actions. Instead of promulgating additional and possibly more onerous requirements, the Army's regulation generally restates the requirements of DoD Directive 6050.7.[234] Very similar to Executive Order 12,114, DoD Directive 6050.7 is organized around four types of environmental events described within the Order:

(1) Major federal actions that do significant harm to the "global commons;"[235]

(2) Major federal actions that significantly harm the environment of a foreign nation that is not involved in the action;[236]

(3) Major federal actions that are determined to be significant[ly] harm[ful] to the environment of a foreign nation because they provide to that nation: (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 U.S. because of its toxic effects [to] the environment create a serious public health risk; or (2) a physical

[231] Dep't of Defense, Dir. 6050.7, Environmental Effects Abroad of Major DoD Actions (31 March 1979) [hereinafter DoD Dir. 6050.7].

[232] *Id*. at para. 4.3. This general rule has a substantial impact on the interpretation of domestic law requirements. For instance, the scope and format of any environmental review conducted within a foreign nation is controlled not just by U.S. law and regulation, but by relevant international agreements and arrangements. *See id*. para 8-5 (a).

[233] *Id*. at para. 4.4. The judge advocates that work the environmental law issues should open a line of communication with a point of contact (POC) in the Department of State early on in the process.

[234] 32 C.F.R Part 651, Subpart H, Environmental Effects of Major Army Actions Abroad.

[235] DoD Dir. 6050.7, Enclosure 1, para. E1.1.

[236] *Id.* at Enclosure 2, para. E2.2.1.1

project that is prohibited or strictly regulated in the U.S. by Federal law to protect the environment against radioactive substances;[237]

(4) Major federal actions outside the U.S. that significantly harm natural or ecological resources of global importance designated by the President or, in the case of such a resource protected by international agreement binding on the U.S., designated for protection by the Secretary of State.[238]

(5) The judge advocate 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 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).

iii) The Participating Nation Exception. As the judge advocate proceeds through the regulatory flowchart of required analysis and actions, the most important and frequently encountered problem is the "participating nation" determination.[239] 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 (major federal actions that significantly harm the environment of a foreign nation that is not involved in the action).

(1) 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.[240] Out of four relatively recent contingency operations (Somalia; Haiti; Guantanamo Bay, Cuba; and Bosnia), the U.S. relied upon the so called "participating nation exception" in Haiti and Bosnia. In Somalia and Guantanamo Bay, because neither Somalia nor Cuba participated with the U.S. forces in either Operation Restore Hope or Operation Sea Signal, the U.S. could not utilize the participating nation exception. Accordingly, the U.S. had a choice of accepting the formal obligation to conduct either an ES or an ER, or seeking an exemption. In both cases, the U.S. sought and received an exemption.[241]

(2) How does the military lawyer and operational planner distinguish between participating and non-participating nations? The applicable Army regulation states that the foreign nation involvement may be signaled by either direct or indirect involvement with the U.S., and even by involvement through a third nation or international organization.[242]

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[237] *Id*. at Enclosure 2, para. E2.2.1.2.

[238] *Id*. at Enclosure 2, para E2..2.1.3.

[239] *Id*. at Enclosure 2, para. E2.2.2.

[240] Nevertheless, a study or review of some nature has been promulgated in every recent operation.

[241] *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] (In regard to Operation Sea Signal, General Kross forwarded the CINCUSACOM request for exemption. The request was based on a disciplined review of Sea Signal'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 March 1995) [hereinafter RESTORE HOPE AAR]. It is important to note that in both operations, even though United States forces received an exemption from the review and documentation requirement, the United States still prepared an environmental audit and United States forces applied well established environmental protection standards to events likely to degrade the host nation's environment.

Lieutenant Colonel Richard (Dick) B. Jackson, having served as a legal advisor with the United States Atlantic Command Staff Judge Advocate's Office during both Operations Uphold Democracy and 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 United States 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 September 18, 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 (Mar. 20, 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].

[242] DoD Dir. 6050.7, Enclosure 2, para. E2.2.1.1.

(a) The foregoing regulatory guidance is helpful, but the nuanced and uncertain nature of contingency operations requires additional discussion on this point. One technique for discerning participating nation status is to consider the nature of the entrance into the host nation.

(b) There are generally three ways that military forces enter a foreign nation: 1) a forced entry, 2) a semi-permissive entry, or a 3) permissive entry. U.S. forces that execute a permissive entry are typically dealing with 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 judge advocate must look to the actual conduct of the host nation. If the host nation has signed a stationing or status of forces agreement, 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 U.S. (at a minimum in an indirect manner). If the host nation expressly agrees to the U.S.' entry and to cooperate with the military forces of U.S., the case for concluding the nation is participating is even stronger.[243] Finally, if the host nation agrees to work with the U.S. on conducting a bilateral environmental review, the case is stronger still.[244]

(4) There is no requirement for a status of forces or other international agreement between the host nation and U.S. forces in order to document participating nation status. Participation and cooperation, however evidenced, is the only element required under Executive Order 12,114 and its implementing directive. As lawyers, however, we look to the most logical and obvious places for evidence of such participation. In recent operations, the U.S. and its host nation partners have documented the requisite participation within such agreements.

(a) The decision to assume participating nation status is made at the unified command level, by the combatant commander.[245] In addition, once this election is made, the second decision of what type of environmental audit[246] to perform is also made at the unified command level.[247] In the cases of Operations Uphold Democracy and Joint Endeavor, the complete action was prepared by the tandem effort of the respective J4-Engineer Section and the Staff Judge Advocate's Office.[248] It was also these members of the staff that disseminated the environmental guidelines and standards adopted in the operations plans.

(5) The Exemptions. If the facts in a particular operation, are similar to those in either Operations Joint Endeavor or Uphold Democracy, then judge advocates would, under most circumstances, find that the host nation is a participating nation, and no further action would be required under regulations that

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[243] *See* Memorandum, Major Mike A. Moore, United States Atlantic Command, J4 - Engineer to Lieutenant Colonel Richard (Dick) B. Jackson, subject: Environmental Concerns of MNF (24 Jan. 1995) [hereinafter Moore Memorandum] (explaining the EO 12,114 did not apply to Operation Uphold Democracy because Haiti was a participating nation, and going on to explain that United States forces should coordinate with Haitian authorities to conduct a bilateral environmental audit).

[244] *Id*. at para. 4.

[245] *See* DoD Dir. 6050.7, *supra* note 7.

[246] *See* Moore Memorandum, *supra* note 17. The word "audit' was adopted in lieu of the words "review" or "study" to make clear that the environmental assessment was driven by policy and not the formal documented review or study requirement of EO 12,114 or DoD Dir. 6050.7.

[247] Telephone interview Lieutenant Colonel Mike A. Moore (the same officer referred to as Major Mike A. Moore in earlier notes), United States Atlantic Command, J4 - Engineer (27 Mar. 1997) [hereinafter Moore Interview] (Lieutenant Colonel Moore served as the action officer tasked with determining what legal responsibilities the Command owed the environment during Operations Sea Signal and Uphold Democracy. He was also tasked with ensuring that an environmental audit was performed for Operation Uphold Democracy. Based upon his almost daily coordination with judge advocates with 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 12,114 were pre-delegated down to United States Atlantic Command).

[248] *Id*.

implement Executive Order 12,114. If an exemption applies, and is granted by the proper authority, then the Executive Order requires no further action (meaning no formal documented review or study is required under DoD Directive 6050.7).[249]

(a) Operations Restore Hope and Sea Signal provide recent examples of exempted operations. In Operation Sea Signal, for example, military lawyers quickly determined that Cuba could not be considered as a participating nation. Consequently, they considered the array of exemptions provided in DoD Directive 6050.7 and forwarded an exemption request based upon national security concerns.[250]

(b) 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 Executive Order 12,114.

(c) Unlike the participating nation exception, however, some of the exemptions require that the military leader take an affirmative step to gain a variance from the formal documentation requirements.[251] In the case of Operation Sea Signal, the Commander, U.S. Atlantic Command (CINCUSACOM) 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 appropriate legal channels and the Joint Staff (through the Chairman's Legal Advisor's Office) to Mr. Paul G. Kaminski, The Under Secretary of Defense (Acquisition and Technology), for approval. Mr. Kaminski approved the request, citing the importance of Operation Sea Signal to national security.[252] The entire written action was only three pages long, including the one page memorandum action--three short paragraphs signed by Mr. Kaminski.[253] 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 military lawyers involved in the process (the probable drafters of the action) need only know that the proposed operation is:

(i) A Major Federal Action;

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[249] DoD Dir. 6050.7, *supra* note 7.

[250] *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).

[251] Under the participating nation exception, the unified commander may simply approve the operation plan that integrates the exception into its environmental consideration appendix. *See* Joint Endeavor Operation Plan, *supra* note 35.

[252] The decision memorandum integrated into the final action informed the Under Secretary of Defense, For 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. *See* Kross Memorandum, *supra* note 24.

[253] The memorandum action provided the (1) "general rule," as required by Executive Order 12,114 and DoD Directive 6050.7, (2) the explanation of why the operation does not fall within either of the two exceptions (either an action that does not cause a significant environmental impact or involving a host nation that is a "participating" nation), and (3) the four courses of action. The courses of action were provided as follows:

(1) Determination 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 an "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 the Department of Defense 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. *See* Kross Memorandum, *supra* note 15. It should be noted that some of the exemptions (like the exemption for "Actions taken by or pursuant to the direction of the President or a cabinet officer in the course of armed conflict"(DODI 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" (DODI 6050.7, para. E2.3.3.1.4).

(ii) Which will likely Cause Significant Harm to the Host Nation's Environment;

(iii) Where the Host Nation Is Not Participating; and

(iv) One of the Ten Exemptions Is Applicable.

(d) Once the exemption is approved, then the exempted status should be integrated into the operation plan. If this event occurs after the original plan is approved, the exempted status should be added as a FRAGO to the plan to provide supplemental guidance to the environmental consideration section of the basic plan.

(e) It is the policy of the U.S. to always conduct a good faith environmental audit to reduce potential adverse consequences to the host nation's environment.[254] The reason the U.S. seeks to avoid the formal review or study requirement is to enhance operational flexibility, and in turn, enhance the opportunity for operational success.[255]

(f) The practical result of the U.S. policy is that U.S. forces require "adherence to United States domestic law standards for environmental actions where such procedures do not interfere with mission accomplishment."[256] Accordingly, from the planning phase to the execution phase, the environment is an important aspect of all U.S. operations.

(g) Early involvement by judge advocates is "essential to ensure that all appropriate environmental reviews have been completed" either prior to the entry of United States forces, or as soon thereafter as is possible.[257] Additionally, lawyers 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 operation plans and orders, training events, and civil-military operations.[258]

2) Post-Planning - Executing the Operation Plan

The military lawyer's job is not complete once the operation plan is drafted and approved. He must be heavily involved in the execution phase. Leaders, having read the general guidance contained within the operation order, will seek the lawyer's assistance in the onerous task of translating this guidance into action.[259] The judge advocate must ensure

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[254] *See* DEP'T OF DEFENSE, JOINT PUB. 4-04, JOINT DOCTRINE FOR CIVIL ENGINEERING SUPPORT, II-7, para. 4.a. (26 Sep. 1995) [hereinafter JOINT PUB. 4-04] ("[O]perations should be planned and conducted with appropriate consideration of their effect on the environment in accordance with applicable U.S. and HN agreements, environmental laws, policies, and regulations").

[255] It is not the intent of United States forces to circumvent their environmental stewardship responsibilities. Military leaders must work within the system of law to balance operational success with many concerns, to include their environmental stewardship obligations.

[256] During Operation Restore Hope, in Somalia, the multi-national force, under United States leadership, determined that the actions of United States forces in that operation were exempted from Executive Order 12,114's formal review or study requirement, but the force adhered to United States domestic law to the greatest extent possible (defined as the extent to which such adherence did not frustrate operational success). *See* RESTORE HOPE AAR, *supra* note 15, at 23.

[257] *Id*. at para. 4.b.

[258] *Id*. at para. 4.c.

[259] Interview, then 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 February 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 the Department of Defense's general environmental standards).

that this translation takes a form that those charged with its execution can easily understand.[260] All four of the operations cited above serve as good examples of this type of lawyering.

1. Joint doctrine provides the framework for the foregoing translation and related legal work.[261] This framework contains seven elements for environmental planning and compliance. These elements are as follows:

(2) Policies and Responsibilities to Protect and Preserve the Environment During the Deployment;

(3) Certification of Local Water Sources by Medical Field Units;

(4) Solid and Liquid Waste Management;

(5) Hazardous Materials Management (Including Pesticides);

(6) Flora and Fauna Protection

(7) Archeological and Historical Preservation; and

(8) Base Field Spill Plan.[262]

i) Lawyers can use this framework to assist military leaders in the construction of an environmental compliance standard. In each of the foregoing operations, a checklist similar to the seven element 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, military lawyers working in conjunction with the civil engineering support elements and medical personnel established concise standards for the protection of host nation water sources and the management of waste.[263] This aspect of host nation environmental protection was executed and monitored by a team comprised of judge advocates, medical specialists, and representatives from the engineer community.[264]

ii) In addition to the seven elements listed above, military lawyers must also integrate into the operation plan a directive for documentation of initial environmental conditions. This was done in Operation Joint Endeavor, and pursuant to this directive unit commanders took photographs and made notes in regard to the status of land that came under their unit's control.[265] As a result of this excellent planning and execution, United States forces were protected against dozens of fraudulent claims filed by local nationals.[266]

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[260] The translation will usually require more than a single articulation. For example, some degree of soldier training 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*.

[261] *See* JOINT PUB 4-04, *supra* note 34, at II-8.

[262] Joint Publication 4-04 provides a description and examples of several of these seven elements. *See id.*

[263] 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 others 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 APRIL 1996).

[264] This obligation was written into the operation plan under the heading "Potable 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." *See* Joint Endeavor Operation Plan, *supra* note 25, at para. 3.c.(1), Tab B to Appendix 5, to Annex D.

[265] *See* Joint Endeavor Operation Plan, *supra* note 25, at para. 3.c.14.

[266] 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) (Captain Balmer stated 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." Captain Balmer also stated that such pictures repeatedly "saved the day when fraudulent claims were presented by local nationals").

2) **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 U.S. has signed, but not ratified, imposes strict rules on signatory countries with respect to the movement of hazardous waste across international boundaries. This presented problems for our operations in both Bosnia and Kosovo—particularly with respect to Germany and Macedonia. The lead agency for DOD with respect to Basel is the Defense Logistics Agency (DLA); and DLA hosted a conference in July 2000 on "Overseas Hazardous Waste Disposal and Readiness: What Basel Means to DOD." Should your particular operation involve potential Basel issues, you should contact the experts at DLA, particularly in their General Counsel's office.

3) **The Future and Changes in U.S. Policy and Law**. As mentioned at the beginning of this chapter, doctrine in the area of environmental considerations in military operations has evolved quicker, and more clearly, than law and policy. During the Clinton administration, a lot of effort was expended towards developing environmental policy for military operations. This effort never bore final fruits. Time will tell if there are further developments during the current administration.

4) DoDI 4715.5, which requires FGSs (Final Governing Standards) be developed for each country, does not apply to operations conducted off of overseas facilities/installations. Therefore, it does not apply during the temporary operations characterized as MOOTW. However, at some point an operation that begins as an MOOTW might mature into a permanent U.S. presence, triggering the Directive's application. On this issue, you should contact the Unified Command in charge of the operation.

3. 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;[267] or

3) U.S. forces enter under the auspices of a UN sanctioned security enforcement mission.[268]

b) The question of immunity is unresolved where U.S. forces enter in a noncombat 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;

3) Operation was sanctioned by the UN as a Chapter VII enforcement action (even though peace enforcement in this context does not provide an exact fit).

c) Bottom Line. Judge advocates should contact the unified or major command to determine DoD's position relative to whether any host nation law applies. Judge advocates should request copies of relevant treaties or international agreements from the MACOM SJA or the unified command legal advisor. Finally, judge advocates should aggressively seek information relative to any plan to contact foreign governments to discuss environmental

[267] 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. WILLIAM W. BISHOP, JR., INTERNATIONAL LAW CASES AND MATERIALS 659-661 (3d ed. 1962).

[268] This theory is a variation of the combat exception. Operations that place a UN force into a hostile environment, with a mission that places it at odds with the de facto government, triggers this exception. This is another of the very few examples where the Law of the Flag version of sovereign immunity survives.

agreements or issues. The Army must consult with the Department of State before engaging in "formal" communications regarding the environment.[269]

4. Traditional Law of War (LOW)

Although the LOW is technically not triggered until a state of armed conflict exists,[270] many MOOTW require the application of LOW principles as guidance.[271] The prudent judge advocate generally advises the application of LOW in these operations because (1) to apply some other standard confuses troops that have been trained to the LOW standards and (2) because the situation can quickly evolve into an armed conflict.[272] The entire body of LOW that impacts on the treatment of the environment may be referred to as ELOW.

(a) Customary Law. Although the environment was never considered during the evolution of customary international law or during the negotiation of all of the pre-1970s LOW treaties, the basic LOW principles discussed in Chapter 2 of this Handbook apply to limit the destruction of the environment during warfare. For example, the customary LOW balancing of military necessity, proportionality, and 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 have tremendous impact as ELOW treaties. These treaties are discussed below.

(c) Hague IV.[273] Hague IV (H.IV or HR) and the regulations attached to it represent the first time that ELOW principles were codified into treaty law. The HR restated the customary principle that methods of warfare are not unlimited (serving as the baseline statement for ELOW).[274]

1. Article 23e forbids the use or release of force calculated to cause unnecessary suffering or destruction. Judge advocates should analyze the application of these principles to ELOW issues in the same manner they would address the possible destruction or suffering associated with any other weapon use or targeting decision.

2. The HR also prohibits destruction or damage of property in the absence of military necessity.[275] When performing the analysis required for the foregoing test, the judge advocate should pay particular attention to (1) the geographical extent (how widespread the damage will be) (2) the longevity, and the (3) severity of the damage upon the target area's environment.

3. HR ELOW protections enjoy the widest spectrum of application of any of the ELOW conventions. They apply to all property, wherever located, and by whomever owned.

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[269] DoD Dir. 6050.7, para. 4.4.

[270] The type of conflict contemplated by article 2, common to the four Geneva Conventions.

[271] During most of Operation Provide Comfort and during all of Operation Restore Hope, the U.S. position was that the LOW was not triggered. However, U.S. forces complied with the general tenets of the LOW. *See* DSAT, *supra* note 4, at Operational Law 15-16.

[272] With regard to Operation Provide Comfort, the question of whether we were an occupying force remains open. The DSAT reported that we were not, however in its report to Congress, DoD reported that we were occupants and were bound by the international law of occupation. This reinforces the point that Judge Advocates should err, when possible, on applying the LOW standards to situations that are analogous to armed conflict, might become armed conflict, or might be easily interpreted by others as armed conflict. DEP'T OF DEFENSE, FINAL REPORT TO CONGRESS: CONDUCT OF THE PERSIAN GULF WAR (April 1992).

[273] 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 H.IV or H.R.].

[274] *Id*. at art. 22.

[275] *Id*. at art. 23g. Most nations and scholars agree that Iraq's release of oil into the Persian Gulf during its retreat 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.

(d) The 1925 Gas Protocol.[276] The Gas Protocol bans the use of "asphyxiating, poisonous, or other gases, and all analogous liquids, materials, and devices...." during war. This treaty is an important component of ELOW 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 U.S. reserved its right to use both herbicides and riot control agents (RCA).[277]

(e) The 1993 Chemical Weapons Convention (CWC).[278] The U.S. ratified the CWC on April 25, 1997. The CWC does not supersede the Gas Protocol. Instead, it "complements" the Gas Protocol. Yet, wherever the CWC creates a more rigorous rule, the CWC applies.[279] EO 11850[280] specifies U.S. policy relative to the use of chemicals, herbicides, and RCA. EO 11850 sets out several clear rules regarding the CWC.[281] As a general rule, the U.S. renounces the use of both herbicides and RCA against combatants. As a matter of policy, herbicides and RCA may not be used "in war" in the absence of national command authority (NCA) authorization. Finally, these restrictions do not apply relative to uses that are not methods of warfare.

In regard to herbicides, the Order sets out the two uses that are expressly permitted, even without NCA authorization. These two uses are (1) domestic use and (2) control of vegetation within and around the "immediate defensive perimeters"[282] of U.S. installations.

(f) 1980 Conventional Weapons Convention (COWC). The U.S. ratified the COWC on 24 Mar 1995 (accepting only Optional Protocols I and II of the three optional protocols). Only Optional Protocol II has ELOW significance because it places restrictions on the use of mines, booby traps, and other devices. The ELOW significance of this treaty lies in the fundamental right to a safe human environment. The COWC bans the indiscriminate use of these devices. Indiscriminate is defined as use:

(1) which is not directed against a military objective, (2) which employs a method or means of delivery that cannot be directed at a specific military objective, or (3) which may be expected to cause incidental loss of civilian life, injury to civilian objects (which includes the environment), which would be excessive in relation to the concrete and direct military advantage to be gained.[283]

(g) The Fourth Geneva Convention (GC).[284] The GC is a powerful ELOW convention, but it does not have the wide application enjoyed by the HR. The most important provision, Article 53, protects only the environment of an occupied territory. Article 53 prohibits the destruction or damage of property (which includes the environment) in the absence of "absolute military necessity." Article 147 provides the enforcement mechanism for the GC. Under its provisions "extensive" damage or destruction of property, not justified by military necessity, is a grave breach of the conventions. 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.[285] A

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[276] 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].

[277] The U.S. position is that neither agent meets the definition of a chemical under the treaty's provisions.

[278] 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].

[279] *Id*. at Preamble.

[280] Exec. Order No. 11850, 40 Fed. Reg. 16187 (1975), *reprinted in* FM 27-10, at C1-C2 [hereinafter EO 11850].

[281] For a full discussion of EO 11850, see Chapter 2.

[282] 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.

[283] Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Excessively Injurious of Have Indiscriminate Effects, October 10, 1980, 19 I.L.M. 1525 [hereinafter COWC].

[284] 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 GC].

[285] *Id*. at art. 146, cl. 2.

simple breach only requires parties to take measures necessary for the suppression of the type of conduct that caused the breach.[286]

U.S. policy requires the prompt reporting and investigation of all alleged war crimes (including ELOW violations) as well as appropriate disposition under the provisions of the UCMJ.[287] These obligations make our own soldiers vulnerable if they are not well trained relative to their responsibilities under ELOW provisions.

(h) The ENMOD Convention.[288] The U.S. negotiated the ENMOD Convention during the same period as it negotiated Protocol I Additional to the Geneva Conventions, and ratified it in 1980. Unlike all the other ELOW treaties, which ban the effect of various weapon systems upon the environment, the ENMOD Convention bans the manipulation or use of the environment itself as a weapon. Any use or manipulation of the environment that is (1) widespread, (2) long lasting, or (3) severe, violates the ENMOD (single element requirement).[289] Another distinction between the ENMOD Convention and other ELOW provisions is that it only prohibits environmental modifications which cause damage to another party to the ENMOD Convention.

1. The application of the 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...." Examples of this type of manipulation are (1) alteration of atmospheric conditions to alter weather patterns, (2) earthquake modification, and (3) ocean current modification (tidal waves etc.).

2. The drafters incorporated the distinction between high versus low technological modification into the ENMOD to prevent the unrealistic extension of the ENMOD. For example, if the ENMOD reached low technological activities, then such actions 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 the ENMOD. Judge advocates should understand that none of these activities, or similar low technological activities, is controlled by the ENMOD.

3. Finally, the ENMOD does not regulate the use of chemicals to destroy water supplies or poison the atmosphere.[290] As before, this is the application of a relatively low technology, which the ENMOD does not reach.[291] Although the relevance of the ENMOD Convention appears to be minimal given the current state of military technology, judge advocates 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 the ENMOD Convention, even if this advice amounts only to an explanation as to why the ENMOD Convention has no application, despite the position of other coalition states.[292]

(i) The 1977 Protocols Additional to the Geneva Conventions (GP I & GP II).[293] The U.S. has not yet ratified GP I, accordingly, the U.S. is ostensibly bound by only the provisions within GP I that reflect customary international law. To

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[286] *Id*. at art. 146, cl. 3.

[287] Dept. of Defense, Dir. 5100.77, *DoD Law of War Program*, paras. C.3. & E.2.e.(2)-(3) (July 10, 1979); Dep't of Army, Field Manual 27-10, *The Law of Land Warfare*, para. 507 (18 July 1956).

[288] 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].

[289] For a discussion of the meaning of these three elements see the discussion in the next section of similar elements found in articles 35 and 55 of the 1977 Protocol I Additional to the Geneva Conventions of 1949.

[290] Although these type of activities would violate the HR and the Gas Protocol.

[291] Environmental Modification Treaty: Hearings Before the Committee on Foreign Relations, U.S. Senate, 95th Cong., 2nd Sess. 83 (1978) (Environmental Assessment) [hereinafter Senate Hearings].

[292] AUSTRALIAN DEFENCE FORCE PUBLICATION 37, THE LAWS 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 the ENMOD Convention ignores the "high technology" requirement, and serves as an example of the type of misinformation that requires U.S. Judge Advocates to be conversant in treaties like the ENMOD Convention.

[293] Protocol I Additional to the Geneva Conventions, Dec. 12, 1977, 16 I.L.M. 1391, 1125 U.N.T.S. 3 [hereinafter GP I].

some extent, GP I articles 35, 54, 55, and 56 (the environmental protection provisions within GP I) merely restate HR and GC environmental protections. To this extent, these provisions are enforceable. However, the main focus of GP I protections go far beyond the GC or the HR protections. GP I is much more specific relative to the declaration of these environmental protections. In fact, GP I is the first LOW treaty that specifically provides protections for the environment by name.

1. The primary difference between GP I and the protections found with the HR or the GC is that once the degree of damage to the environment reaches a certain level, GP 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 ELOW.

2. 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 the ENMOD Convention).

3. Most experts and the Commentary to GP 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.[294] Within GP I, the term "widespread" probably means several hundred square kilometers, as it does in the ENMOD Convention.[295] "Severe" can be explained by Article 55's reference to any act that "prejudices the health or survival of the population."[296] 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.[297] 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.[298]

4. Specific GP 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 or installations containing dangerous forces (dams, dikes, nuclear plants) if such targeting would result in substantial harm to civilian persons or property.[299]

5. 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.[300] A knowing violation of article 56 is a grave breach. Additionally, with respect

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[294] Claude Pilloud, International Committee of the Red Cross, Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, at 410 to 420 (Yves Sandoz ed., 1987) [hereinafter Sandoz].

[295] *Id*. at 417. Sandoz cites to the Report of the Conference of the Committee on Disarmament, Vol. I, United Nations General Assembly, 31st session, supplement 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.

[296] *Id*. at 417. The article 55 language has roughly the same meaning as the meaning of "severe" within the ENMOD Convention.

[297] Although some experts have argued 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 allegation of war crimes any time the damage to the environmental 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 V.J.I.L. 109, 146-47 (1985).

[298] *See* Sandoz, *supra* note 83, at 417.

[299] The specific protections afforded by articles 54, 55, and 56 should be applied in conjunction 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 (damn, dikes, nuclear power plants, drinking water installations, etc.).

[300] However, if the food center is shared by both enemy military and the 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."

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 article 147.[301]

5. Peacetime Environmental Law (PEL)

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).[302] 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.[303]

CONCLUSION

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. In fact, the Army Judge Advocate General's Corps' current version of its own keystone doctrinal source for legal operations recognizes that environmental law considerations should play in the planning and execution of operations.[304]

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.

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[301] 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 that 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 55, at a minimum, is a grave breach.

[302] *See* HR, *supra* note 62 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 protected a certain person, place, or thing.

[303] *See* SECRETARY-GENERAL REPORT, *supra* note 90, at 15.

[304] FM 27-100*, Legal Support to Operations*, 3.6, (30 Sept. 1999).

SUMMARIES OF SOME OF THE MAJOR DOMESTIC (U.S.) ENVIRONMENTAL LAWS

ANTARCTIC PROTECTION - 16 U.S.C. § 2461. This major legislation prohibits prospecting, exploration, and development of Antarctic mineral resources by persons under the jurisdiction of the U.S..

THE CLEAN AIR ACT - 42 U.S.C. §§ 7401-7671q (CAA §§ 101-618), which 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 PORTS - 33 U.S.C. § 1501 INTERNATIONAL APPLICATION THROUGH 33 U.S.C. § 1510. 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. §§ 1531-1544. The purpose of this Act is to protect threatened and endangered fish, wildlife, and plant species and the "critical habitat" of such species.

THE FEDERAL WATER POLLUTION CONTROL ACT (CLEAN WATER ACT) - 33 U.S.C. 1251-1387, as amended. 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 - 22 U.S.C. § 2151p, ENVIRONMENTAL AND NATURAL RESOURCES. 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. 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..

INTERNATIONAL AGREEMENTS CLAIMS ACT - 10 U.S.C. § 2734A. Regulates payment of claims by the U.S., where such claims are based on an international agreement applying to the U.S. Armed Forces and the civilian component.

MARINE PROTECTION, RESEARCH AND SANCTUARIES ACT (72), as amended - 16 U.S.C. §§ 1401-1445 IMPLEMENTED THRU 33 U.S.C. § 1419. 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-citizens of the U.S..

MARINE MAMMAL PROTECTION - 16 U.S.C. § 1361 & 1378. 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.

NATIONAL ENVIRONMENTAL POLICY ACT (NEPA) - 42 U.S.C. §§4321-4370 (1969) Requires that the environmental impacts be considered before any major federal action significantly affecting the quality of the human environment is conducted.

NATIONAL HISTORIC PRESERVATION ACT - 16 U.S.C. § 470a - 2. 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 - 33 U.S.C. § 1401 THRU 1419. Regulates the dumping of any material into ocean waters, which would adversely affect human health, welfare, amenities or the marine environment or its economic potential.

THE OIL POLLUTION ACT OF 1990 - 33 U.S.C. § 2701-2761. This is an Act to implement the provisions of the International convention for the Prevention of the Pollution of the Sea by Oil, 1954. Specifically it implements the 1969 and 1971 amendment to the International convention; but, this Act is not in effect at present time.

PRE-COLUMBIAN MONUMENTS - P.L. 92-587, TITLE II - REGULATION OF IMPORTATION OF PRE-COLUMBIAN MONUMENTAL OR ARCHITECTURAL SCULPTURE OR MURALS. This Public Law prohibits the importation into the U.S. of pre-Columbian monumental or architectural sculptures or murals which are the product of 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. This Act provides the enabling legislation which 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. § 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.

DoDI 4715.5, Management of Environmental Compliance at Overseas Installations, April 22, 1996.

DoDI 4715.8, Environmental Remediation for DoD Activities Overseas, February 2, 1998.

ARMY REGULATIONS

AR 27-20, CLAIMS (14 November 2002), Chapter 10 – Claims Cognizable Under the Foreign Claims Act (FCA). (a) This chapter implements the FCA 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).

AR 200-1, ENVIRONMENTAL PROTECTION AND ENHANCEMENT (February 1997). Regulates compliance with environmental standards set out in HN law or Status of Forces Agreements (SOFA) and supplies regulatory standards for OCONUS commanders at locations where there is an absence of HN law or SOFA requirements.

32 C.F.R. Part 651, Subpart H – Environmental Effects of Major Army Actions Abroad, requires that proposed actions affecting "global commons" be subject to a documented decision making process. "Global commons" are areas outside the jurisdiction of any nation, including such areas as the oceans and Antarctica. The regulation also requires that proposed actions significantly harming the environment of a foreign nation or a protected "global resource" also be subject to a documented decision making process.

AR 200-3, NATURAL RESOURCES – LAND, FOREST, AND WILDLIFE MANAGEMENT (28 February 1995). Deals with natural resources and the Army's endangered species program.

AR 200-4, CULTURAL RESOURCES MANAGEMENT (1 October 1998). This regulation prescribes management responsibilities and standards for the treatment of historic properties, including buildings, structures, objects, districts,

sites, archaeological materials, and landmarks, on land controlled or used by the Army. Outside the U.S., Department of Army activities will comply with: (1) historic preservation requirement of the HN; (2) International and Status of Forces Agreements; (3) requirements for protections of properties on the World Heritage List, and this regulation to the extent feasible.

NAVY REGULATIONS[305]

NAVY OPNAVINST 5090.1B - NAVY PROGRAM FOR THE PROTECTION OF THE ENVIRONMENT AND CONSERVATION OF NATURAL RESOURCES. This recently updated instruction 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 12,114 and DoD Directive 6050.7, and sets out the factors that require environmental review for OCONUS actions.

MARINE CORPS ORDERS[306]

MARINE MCO P5090.2A - ENVIRONMENTAL COMPLIANCE AND PROTECTION MANUAL. This codification of Marine Corps environmental policies and rules instructs the deployed commander to adhere to SOFA guidance and HN laws that establish and implement HN pollution standards.

AIR FORCE INSTRUCTIONS

AFI 32-7006 ENVIRONMENTAL PROGRAM IN FOREIGN COUNTRIES (29 April 1994).

AFI 32-7061 THE ENVIRONMENTAL IMPACT ANALYSIS PROCESS (24 January 1995).(EIAP) OVERSEAS. This regulation is the Air Force's implementing guidance for Executive Order 12,114 and DoD Directive 6050.7. It sets out service activities that require environmental documentation and the type of documentation required.

[305] *See* Chapter 36 (Environmental Protection Overseas), NAVJUSTSCOL Envir. Law Deskbook (Rev.5/94); Sec. 1006 (Foreign Environmental Law), JAGINST 5800.7C, JAGMAN, 3 Oct. 90; Art. 0939, U.S. Navy Reg, 1990.

[306] *See* MCO P5090.2, Envir. Compliance and Protection Manual, 26 Sep 91.

NOTES

CHAPTER 12

FISCAL LAW

REFERENCES:

1. Contract & Fiscal Law Department, TJAGLCS, *Fiscal Law Deskbook.*
2. The Honorable Bill Alexander, B-213137, Jan. 30, 1986 (unpublished).
3. The Honorable Bill Alexander, B-213137, 63 Comp. Gen. 422 (1984) (Honduras).
4. DoD Directive 7250.13, *Official Representation Funds* (ORFs) (Sep. 10, 2002).
5. Dep't of Army Reg. 37-47, Representation Funds of the Secretary of the Army (May 31, 1996).
6. DoD Directive 7280.4, *Commander in Chief's Initiative Fund* (Oct. 26, 1993).
7. CJCSI 7401.01A, *CINC Initiatives Fund* (Jan. 30, 1999).
8. The Honorable Michael B. Donley, B-234326.15, Dec. 24, 1991 (unpublished).
9. DoD Directive 2205.2, Humanitarian and Civic Assistance Provided in Conjunction with Military Operations (Oct. 6, 1994).
10. DoD Instruction 2205.3, Implementing Procedures for the Humanitarian and Civic Assistance Program (Jan. 27, 1995).
11. 10 U.S.C. § 166a, Combatant Commanders' Initiative Funds.
12. 10 U.S.C. § 401, 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. 22 U.S.C. § 2318, Presidential Drawdowns.
23. 22 U.S.C. § 2347, International Military Education and Training Program (IMET).
24. 22 U.S.C. § 2761, Foreign Military Sales Program (FMS).
25. 22 U.S.C. § 2763, Foreign Military Financing Program (FMFP).
26. 22 U.S.C. § 2770a, Reciprocal Training.
27. 31 U.S.C. § 1301(a), Purpose Statute.
28. Foreign Assistance Act of 1961, 75 Stat. 434, as amended and codified at 22 U.S.C. §§ 2151-2349aa-9 (FAA).
29. Arms Export Control Act of 1976, 90 Stat. 734, as amended and codified at 22 U.S.C. 2751-2796c (AECA).
30. Senate Committee on Foreign Relations & House Committee on Foreign Affairs, Legislation on Foreign Relations Through 1999, vols. I--A and I--B, (Apr 2000) (containing up-to-date printing of the FAA and AECA and reflecting all current amendments, as well as relevant portions of prior year authorization and appropriations acts which remain in effect).
31. Foreign Operations, Export Financing, and Related Programs Appropriations Acts, passed yearly (FOAA).
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33. National Defense Authorization Act, passed yearly (NDAA).
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35. Afghanistan Freedom Support Act of 2002, P.L. 107-327, 4 December 2002.
36. Emergency Wartime Supplemental Appropriations Act, 2003, P.L. 108-11, 16 April 2003.

37. Executive Order No. 11958, Jan. 18, 1977, 42 Fed. Reg. 4311 (assigns Security Assistance responsibilities among the Executive departments).
38. U.S. Department of State, Congressional Presentation Foreign Operations Fiscal Year 2003 (CPD).
39. DoD 5105.38-M, Security Assistance Management Manual (SAMM), Feb. 5, 2002.
40. DoDD 5105.65, Defense Security Cooperation Agency (DSCA), Oct. 31, 2000.
41. DoDD 5105.47, U.S. Defense Representative (USDR) in Foreign Countries, Sep. 20, 1991.
42. AR 12-15 / AFR 50-29 / SECNAVINST 4950.4, Security Assistance and International Logistics: Joint Security Assistance Training (JSAT) Regulation, June 5, 2000 (AR 12-15).

I. INTRODUCTION

A. The application of fiscal principles often appears counterintuitive. 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; or construction, maintenance, and repair. Deployed judge advocates 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. The principles of federal appropriations law permeate all federal activity, both within the United States, as well as overseas. Thus, there are few "contingency" exceptions to the fiscal principles discussed throughout this chapter. The statutes, regulations, case law, and policy applicable at Fort Drum, for example, likely will control operations in Bosnia, Nicaragua, Hungary, Afghanistan, and Iraq. Fiscal issues arise frequently during drug interdiction, humanitarian and civic assistance, security assistance, disaster relief, and peacekeeping operations. Failure to understand fiscal nuances may lead to the improper expenditure of funds and administrative and/or criminal sanctions against those responsible for funding violations. Moreover, early and continuous judge advocate involvement in mission planning and execution is essential. Judge Advocates who participate actively 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.

C. 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.[307] *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, in annual authorization or appropriations acts or in permanent legislation.

D. Legal advisors 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) agency regulations; and (7) 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.

[307] 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.

E. Road map for this Chapter. This Chapter is divided into several sections. Sections II through V provide an overview of Basic Fiscal Controls – Purpose, Time, and Amount. Section VI highlights a method of analysis that JAs might apply to resolving fiscal law questions. Section VII highlights various DoD appropriations and their purposes. Section VIII addresses Foreign Assistance, including Security Assistance and Development Assistance, in particular the focus is on DoD's role in each of these areas. Section IX details DoD's Title 10 authorities to conduct Military Cooperative Programs, and Humanitarian Operations. Section X provides a discussion of DoD support to Multilateral Peace and Humanitarian Operations, particularly US participation in UN operations. Section XI and XII highlight current funding authorities in relation to combating Terrorism and funding operations in Iraq. Because DoD frequently finds itself involved in construction during its deployments, Section XIII provides a discussion of the relevant authority and funding sources. Finally, Section XIV notes the requirement that DoD notify Congress before transferring any defense articles or services to another nation or international organization.

II. BASIC FISCAL CONTROLS.[308]

Congress imposes fiscal controls through three basic mechanisms, each implemented by one or more statutes. The U.S. Comptroller General, who heads the General Accounting 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:

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. Judge advocates should ensure, therefore, that:

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;

3. The expenditure is not provided for otherwise, *i.e.*, it does not fall within the scope of some other appropriation. *See, e.g.*, The Honorable Bill Alexander, B-213137, Jan. 30, 1986 (unpub.) [hereinafter Honduras II] (concluding that the Purpose Statute applies to OCONUS military exercises); The Honorable Bill Alexander, B-213137, 63 Comp. Gen. 422 (1984) [hereinafter Honduras I]; Secretary of the Interior, B-120676, 34 Comp. Gen. 195 (1954).

B. Augmentation of Appropriations and Miscellaneous Receipts

1. 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,

[308] For a more in-depth review of fiscal law issues, *See,* CONTRACT & FISCAL L. DEP'T, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, FISCAL LAW COURSE DESKBOOK, current edition. Available at: http://jagcnet.army.mil/ContractLaw, (registration & password required) and http://www.jagcnet.army.mil/TJAGLCS. (No password or registration required.)

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. 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 intra- and intergovernmental 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); 22 U.S.C. § 2318 (emergency Presidential draw down 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. Interdep'tal 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 (CLEAs) 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, note. 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. 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 recover/deobligate the funds used erroneously and seek the proper appropriation. For example, if the command constructs a $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.)

2. To correct this violation, the command must recover 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. While this is a matter of adjusting agency accounts, if proper funds (UMMC) were unavailable both at the time of the original obligation, e.g., contract award, and when the adjustment is made, the command must report a potential Anti-Deficiency Act (ADA) violation. *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. **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, Operation and Maintenance 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 computers needed and purchased in the current fiscal year. Conversely, commands may not use current year funds for computers that are not needed until the next fiscal year. Year-end spending for computers 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. *See* Defense Finance and Accounting Service Reg.--Indianapolis 37-1 [DFAS-IN 37-1], Chapter 8. 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 recurring services considered severable. Use current year funds for recurring services performed in the current fiscal year. As an exception, however, 10 U.S.C. § 2410a permits funding a contract (or other agreement) for severable services using an appropriation current when the contract is executed, even if some services will be performed in the subsequent fiscal year. 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. *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)) 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 a formal subdivision of funds; or in excess of amounts permitted by regulations prescribed under 31 U.S.C. § 1514(a). 31 U.S.C. § 1517.

3. Accepting voluntary services, unless authorized by law. 31 U.S.C. § 1342.

B. 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; 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. 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; DFAS-IN 37-1, ch. 4. 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. THE PURPOSE STATUTE—SPECIFIC MILITARY OPERATIONAL ISSUES

A. **Method of Analysis.** Judge advocates enhance mission success by guiding the staff and commander to the appropriate fiscal authority. The following method of analysis will help the attorney, operator, comptroller, and logistician formulate a course of action for the commander:

1. Determine the commander's intent;

2. Define the mission (both the organization's assigned mission and the specific task to be performed);

3. Divide it into discrete parts (specified and implied tasks);

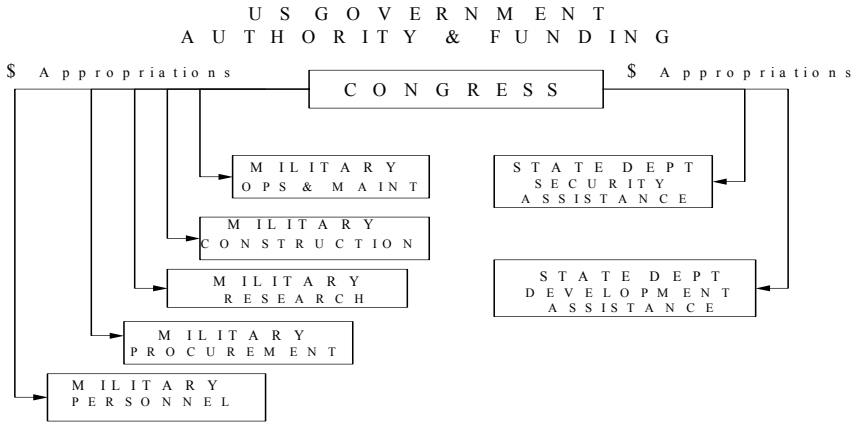
4. Find legislative or regulatory authority and determine the proper fund type;

5. Articulate a sound rationale for the specific expenditures; and

6. Seek approval/guidance from higher headquarters, if necessary.

B. It may be necessary to review an appropriation or permanent statutory provision to determine Congressional intent. For proposed expenditures that are non-routine or unique in nature, a clear, written rationale explaining why the use of funds is proper is essential. Again, if the issues are particularly problematic, seek assistance from higher headquarters.

VII. DOD APPROPRIATIONS AND THEIR PURPOSES



A. **Operation & Maintenance (O&M) Appropriations**. These appropriations are for day-to-day expenses of DoD components in garrison and during exercises, deployments, and military operations. Commands may use O&M appropriations for all "necessary and incident" operational expenses. However, they are subject to specific statutory limitations. For example, end items costing $250,000 or more, or which are centrally managed, may not be purchased with these funds. *See* DoD 7000.14-R, vol. 2A, ch. 1, para. 0102; and DFAS Manual 37-100-XX (XX= current FY). Additionally, exercise-related construction of permanent facilities during exercises coordinated or directed by the Joint Chiefs of Staff outside the United States, or any construction in excess of $750,000, may not be funded with O&M appropriations. *See* 10 U.S.C. § 2805; *but see* Military Construction (MILCON) -- A Special Problem Area, *infra*, (discussing use of O&M for construction necessary to meet temporary operational needs during combat or declared contingencies).

B. **O&M Appropriations—Use During Deployments and Contingency Operations**.

1. **Emergency and Extraordinary (E&E) Expenses Funds.** These are special funds within the O&M appropriation under 10 U.S.C. § 127. The secretaries of the military departments and the Secretary of Defense (SECDEF) may expend these funds without regard to other provisions of law. These funds are very limited in amount, however, and regulatory controls apply to prevent abuse, including congressional notification requirements for expenditures over $500,000. Recently, EEE funds were used in conjunction with Presidential Drawdown authority, and CINC Initiative funds, both discussed below, to cover the costs of training and equipping the new Afghan National Army. The Emergency Wartime Supplemental Appropriations Act, 2003, increased the funding available to SECDEF for EEE from the current limit of $34.5 million to $50 million. Additionally, a commander would not use generic O&M to purchase a memento or gift for the mayor of Tuzla. Official representation funds (authorized under 10 U.S.C. § 127), however, would be available for this purpose. *See* DoD Dir. 7250.13, OFFICIAL REPRESENTATIONAL FUNDS (Sep. 11, 2002); DEPT OF ARMY, REG. 37-47, REPRESENTATION FUNDS OF THE SECRETARY OF THE ARMY, (May 31, 1996); and, DEPT OF ARMY, REG. 195-4, USE OF CONTINGENCY LIMITATION .0015 FUNDS FOR CRIMINAL INVESTIGATIVE ACTIVITIES (15 APR 1983). Note: The Army's Deputy General Counsel, Ethics and Fiscal, has opined that "generic" O&M funds are available to acquire weapons from indigenous or opposing forces under a cash-for-weapons program. Thus, commanders need not expend E&E funds for this purpose.

2. **Contingency Operations Funding Authority.** This authority, under 10 U.S.C. § 127(a) (amended by DoD Authorization Act for FY 1996, Pub. L. No. 104-106, § 1003 (1996)), applies to certain deployments as outlined below.

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 $50M; 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 $100M.

b. This authority does *not* apply to operations with incremental costs not expected to exceed $10M. 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 authority to reimburse WCF activities from O&M accounts. (In addition, if any activity director determines that absorbing these costs could cause an Anti-Deficiency Act violation, reimbursement is required.) The statute authorizes SECDEF to transfer up to $200M in any fiscal year to reimburse accounts used to fund operations for incremental expenses incurred. Due to provisions requiring both Congressional notification & GAO compliance reviews, this statute is rarely used.

3. **Combatant Commander (formerly CINC) Initiative Funds** (CIF) (10 U.S.C. § 166a) are O&M funds available for special training, humanitarian and civic assistance, incremental costs of third country participation in a combined exercise, and operations that are unforeseen contingency requirements critical to combatant commander joint warfighting readiness and national security interests. *See* CJCSI 7401.01A (30 Jan 1999) (detailing procedures for CJCS approval of these expenditures). In the recent Emergency Wartime Supplemental Appropriations Act, 2003, Congress raised the amount available for combatant commanders in the CINC Initiative Fund from $25 million to $50 million. With the doubling of available funds came an increase in the current spending limits for different purchases within the fund. The limits have changed as follows: for equipment, from $7 million to $10 million; for joint exercises, from $1 million to $10 million; and for military education and training from $2 million to $10 million. The combatant commanders also receive O&M funding through the service component commands for "Traditional CINC Activities" (TCA), like military-to-military contacts, combined training, and regional conferences.

C. **Military Construction (MILCON) Appropriations**. Congress scrutinizes military construction closely. In fact, 41 U.S.C. § 12 provides that no public contract relating to erection, repair, or improvements of public buildings shall bind the Government for funds in excess of the amount specifically appropriated for that purpose. Thus, construction projects in excess of $1.5 million require specific approval by Congress. While not requiring specific "line-item" approval, projects between $750,000 and $1.5 million are limited to amounts provided in the Unspecified Minor Military Construction (UMMC) appropriations within the MILCON appropriation.

D. **Procurement Appropriations**. These appropriations fund purchases of investment end items (or systems) that cost $250,000 or more and items that are centrally managed, regardless of cost.

E. **Additional Appropriations**. DoD has available to it other appropriations and support authorities. These include funds and authority under the Foreign Assistance Act (FAA)(Title 22), the Acquisition and Cross-Servicing statute, and the Overseas Humanitarian, Disaster, and Civic Aid appropriations (Title 10). Congress appropriates funds to be used only for specific purposes. For example, the O&M title of the appropriations act includes funding for humanitarian assistance authorized under various Title 10 provisions. (10 U.S.C. §401 – Demining and 10 U.S.C. §2561 – Humanitarian Assistance) *See, e.g.*, Department of Defense Appropriations Act, 2003, Pub. L. No. 107-314, (2002) (providing $58.4 million for Overseas Humanitarian, Disaster, and Civic Aid (OHDACA) available during FYs 2003-2004). Such earmarked appropriations require separate fiscal accounting. Generally, DoD may not use generic O&M appropriations for the same purposes as funds earmarked for specific purposes within an appropriations act.

VIII. FOREIGN ASSISTANCE AND SECURITY ASSISTANCE

A. INTRODUCTION

1. As noted in Part VII, Operation and maintenance appropriations pay for the day-to-day expenses of training, exercises, contingency missions, and other deployments. Deploying units normally use "generic" O&M funds to support their operations. Examples of O&M expenses include force protection measures, sustainment costs, and repair of main supply routes. Included also are those expenses that are "necessary and incident" to an assigned military mission (*e.g.*, costs of maintaining public order and emergency health and safety requirements of the populace in Haiti during the NCA-directed mission of establishing a secure and stable environment). Beware of "mission creep," however, where the military mission departs from security, combat, or combat-related activity, and begins to intersect other agencies' authority/appropriations, the expenditure bears close scrutiny by the judge advocate. For example, commanders must have special authorization before engaging in "nation-building" activities or recurring refugee assistance. These activities normally fall within the category of foreign assistance functions administered by the State Department or U.S. Agency for International Development (USAID).

2. **General Rule**: The Department of State (DoS) has the primary responsibility, authority, and funding to conduct foreign assistance on behalf of the United States government.

3. 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 relatively confusing mesh of statutes, annual appropriations, regulations, directives, messages and policy statements. The key issue is deciding whether State Department authority (under Title 22 of the U.S. Code) and money, or Defense Department authority (under Title 10 of the U.S. Code) and money should be used to accomplish a particular objective. This sophisticated task often consumes a great amount of time and effort on the part of operational lawyers at all levels of command. Understanding the individual components of the State Department's and Defense Department's foreign assistance programs is very important. The real challenge is to learn how the various programs interrelate with each other. This is where the judge advocate earns credibility with the commander. By understanding the complex relationships between the various authorities and funding sources, the judge advocate is better equipped to provide the commander with advice that can mean the difference between accomplishing the desired objective legally, accomplishing it with unnecessary legal and political risk, or not accomplishing it at all.

B. LEGAL FRAMEWORK FOR FOREIGN ASSISTANCE

1. The Foreign Assistance Act

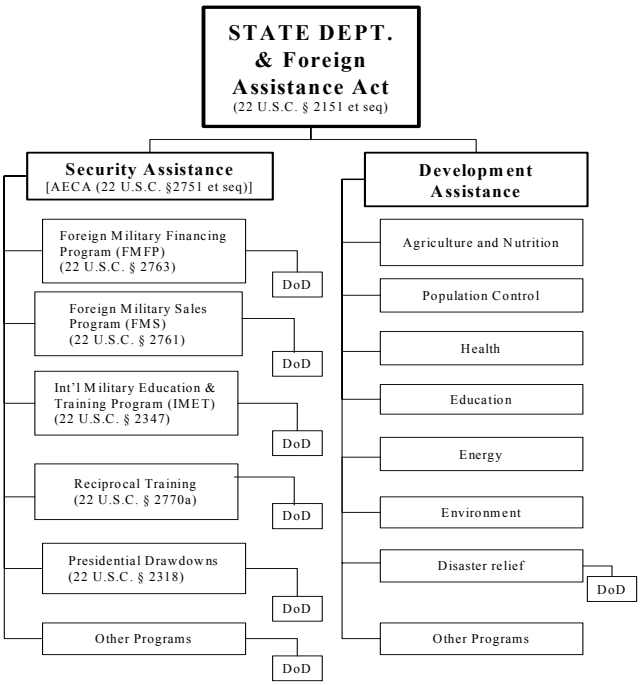
a. The Foreign Assistance Act of 1961 (FAA)[309] constituted landmark legislation providing a key blueprint for a grand strategy of engagement with friendly nations. The FAA intended to support friendly foreign nations against communism on twin pillars:

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 the masses of many developing nations.

[309] 22 U.S.C. §§ 2151 et seq.

3) The first pillar is commonly referred to as "security assistance" and is embodied in Part II of the FAA. The second pillar is generally known as "development assistance" and it is found in Part I of the FAA.



b. The FAA charged the State Department 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 State Department to execute the FAA programs.[310]

c. As noted earlier, the FAA has two principal parts. Part I provides for foreign assistance to developing nations; and Part 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 Part 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 the State Department 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

[310] Annual Foreign Operations Appropriations Acts.

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. The State Department 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 both DoD and DoS conduct human rights vetting of any recipient of any kind of training.

f. With regard to the second pillar of the FAA, Development Assistance, the U.S. Agency for International Development (USAID), the Office for Foreign Disaster Assistance (OFDA) within the Department of State, 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 emanate from the FAA, the funding flows from the State Department's annual Foreign Operations Appropriations, and the policy supervision also rests with the State Department. But as represented by the above diagram, the U.S. military plays a relatively small role in the State Department Development Assistance programs.

C. DOD AGENCIES THAT PARTICIPATE IN PROVIDING SECURITY ASSISTANCE:

1. 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.

2. 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, DISAM prepares a valuable publication entitled "The Management of Security Assistance," and the periodical "DISAM Journal." DISAM is located at Wright-Patterson AFB, OH.

3. The Military Departments.

a. Secretaries of the Military Departments. Advise the Secretary of Defense on all Security Assistance matters related to their Departments. Functions include conducting training and acquiring defense articles.

b. 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 Material Command. The executive agent is the U.S. Army Security Assistance Command, Security Assistance Training Field Activity (SAFTA) and Security Assistance Training Management Office (SATMO). These offices coordinate with force providers to provide mobile training teams (MTTs) to conduct the requested training commonly referred to as a "train and equip" mission.

c. 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.

d. 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.

e. Security Assistance Organizations (SAOs). 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.

D. SECURITY ASSISTANCE

1. Department of State's Security Assistance Programs Under the Foreign Assistance Act (FAA) and Arms Export Control Act (AECA)

a. The DoD Dictionary of Military and Related Terms, Joint Publication 1-02, defines Security Assistance as "Groups of programs authorized by the Foreign Assistance Act of 1961, as amended, and the Arms Export Control Act (AECA) of 1976,[311] as amended, and other related statutes by which the United States provides defense articles, military training, and other defense related services, by grant, loan, credit or cash sales in furtherance of national policies and objectives." The Policy of the program is threefold:

1) Promote peace and security through effective self-help and mutual aid;

2) Improve the ability of friendly countries and international organizations to deter, and defeat, aggression; and

3) Create an environment of security and stability in developing countries.

b. Funding for aid to foreign armies is specifically provided for in foreign assistance appropriations. Except as authorized under the acquisition and cross-servicing authority, Arms Export Control Act regulates transfers of defense items and services to foreign countries. 22 U.S.C. §§ 2751-96. *See also* DoD 7000.14-R (Financial Management Regulation), vol. 15, Security Assistance Policy and Procedures (Mar. 18, 1993). Providing weapons, training, supplies, and other services to foreign countries must be done under the Arms Export Control Act, the Foreign Assistance Act (FAA) (22 U.S.C. §§ 2151-2430i), and other laws.

c. **The Arms Export Control Act**.

1) The Arms Export Control Act permits DoD and commercial sources to provide defense articles and defense services to foreign countries to enhance the internal security or legitimate self-defense needs of the recipient; permit the recipient to participate in regional or collective security arrangements; or permit the recipient to engage in nation-building efforts. 22 U.S.C. § 2754. Section 21(a)(1) of the Arms Export Control Act (22 U.S.C. § 2761(a)(1)) permits the sale of defense articles and services to eligible foreign countries. State Department appropriations and foreign countries' own revenues fund Arms Export Control Act activities. To sell defense articles and services (procured with DoD appropriations) to foreign countries, the State Department first obtains them from the DoD. The Defense Security Cooperation Agency (DSCA) manages the process of procuring and transferring defense articles and services to foreign countries for the State Department. This process provides for reimbursement of applicable DoD accounts from State Department funds or from funds received from sales agreements directly with the foreign countries.

2) The reimbursement standards for defense articles and services are established in Section 21(a)(1) of the Arms Export Control Act (22 U.S.C. § 2761(a)(1)). For defense articles the reimbursement standards are: <u>not less than [the] actual value</u> [of the article], or <u>the estimated cost of replacement</u> of the article, <u>including the contract or production costs</u> less any depreciation in the value of such article.

3) For defense services the reimbursement standards are: <u>[f]ull cost</u> to the U.S. Government of furnishing such service [unless the recipient is purchasing military training under the International Military Education and Training or IMET section the FAA, 22 U.S.C. § 2347] . . . [the value of services provided in addition to purchased IMET is recovered at] <u>additional costs incurred</u> by the U.S. Government in furnishing such assistance.

[311] 22 U.S.C. §§ 2751 et seq.. The purpose of the AECA was to consolidate and revise foreign relations legislation related to reimbursable military support. It is the statutory basis for the conduct of Foreign Military Sales and Foreign Military Construction Sales, and establishes certain export licensing controls on Direct Commercial Sales of defense articles and services.

4) Section 21(e) of the Arms Export Control Act (22 U.S.C. § 2761(e)) requires the recovery of DoD costs associated with its administrative services in conducting sales, plus certain nonrecurring costs and inventory expenses.

2. For the sake of discussion, the **Department of State's Security Assistance programs are organized into three categories: appropriated programs, non-appropriated programs, and special programs**.

a. **Appropriated Programs.** These are programs for which Congress appropriates money in the annual Foreign Operations, Export Financing, and Related Programs Appropriations Act.

1) **Foreign Military Financing Program (FMFP).** Concept. Eligible governments or international organizations receive Congressionally appropriated grants and loans to help them purchase U.S. defense articles, services, or training (or design and construction services) through Foreign Military Sales (FMS)/Foreign Military Construction (FMC) or Direct Commercial Sales (DCS) channels. Statutory Authority. AECA §§ 23-24 (22 U.S.C. §§ 2763-64). Governing Regulations. Security Assistance Management Manual (SAMM) (DoD 5105.38-M). Administering Agency. DoD, with provisions for consultation with DoS and Department of Treasury.

2) **International Military Education and Training (IMET) Program.** Concept. Provide training to foreign military personnel in the United States, in overseas U.S. military facilities, and in participating countries on a grant basis. The "Expanded IMET Program" focuses on civilian control of the military, military justice systems, codes of conduct, and protection of human rights, and permits training of influential non-Ministry of Defense civilian personnel. Statutory Authority. FAA §§ 541-45 (22 U.S.C. §§ 2347-47d). Governing Regulations. AR 12-15; SAMM, at ch. 10. Administering Agency. DoD. The Defense Security Cooperation Agency (DSCA) has overall responsibility within DoD for implementing IMET. The Defense Institute for International Studies (DIILS), located at the Naval Justice School, coordinates all IMETs involving legal education or training.

3) **Economic Support Fund (ESF).** Concept. In special economic, political or security circumstances, make loans or grants to eligible foreign countries for a variety of economic purposes, including balance of payments support, infrastructure and other capital and technical assistance development projects, and health, education, agriculture, and family planning. Statutory Authority. FAA §§ 531-35 (22 U.S.C. §§ 2346-46d). Administering Agency. Department of State, to be exercised in cooperation with the Director of the United States International Development Cooperation Agency and USAID.

4) **Peacekeeping Operations (PKO).** Concept. Provide funds for the Multinational Force and Observers (MFO) implementing the 1979 Egyptian-Israeli peace treaty, for the U.S. contribution to the United Nations Force in Cyprus (UNFICYP), and for other international peace enforcement and peacekeeping operations. Statutory Authority. FAA §§ 551-53 (22 U.S.C. §§ 2348-48c). Administering Agency. Department of State.

5) **Non-proliferation, Antiterrorism, De-Mining, and Related Programs (NADR).** Concept. Captures several related programs in a single account, including non-proliferation and disarmament fund, which is designed to halt the proliferation of nuclear, biological, and chemical weapons; destroy or neutralize existing weapons of mass destruction; and limit the spread of advanced conventional weapons. 22 U.S.C. §§ 5851-61, codifying the Freedom for Russia and Emerging Eurasian Democracies and Open Markets [FREEDOM] Support Act of 1992, Pub. L. No. 102-511, §§ 501-511, 106 Stat. 3320 (1992).

6) **International Atomic Energy Agency support.** The IAEA is primarily responsible for overseeing safeguard agreements concluded under the Non-Proliferation Treaty of 1968. FAA § 301 (22 U.S.C. § 2221).

7) **Korean Peninsula Energy Development Organization (KEDO)**, Established in 1994 to arrange for financing and construction of light water nuclear reactors for North Korea, with the shipment of fuel oil in the interim, in exchange for North Korea's dismantling of its nuclear weapons program. FAA § 301 (22 U.S.C. § 2221). Pursuant to the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 2003, [Hereinafter Foreign Operations Appropriations Act (FOAA)], P.L. 108-7, 20 Feb. 2003, there will be no FY03 funding for assistance to KEDO given the current situation with North Korea breaching its obligations under the 1994 agreement.

8) **Anti-Terrorism Assistance**, which provides specialized training to foreign governments to help increase their capability and readiness to deal with terrorists and terrorist incidents. FAA § 571-(22 U.S.C. § 2349aa).

9) **Global Humanitarian De-Mining**, which provides funds that are devoted to identifying and clearing land mines. AECA § 23 (22 U.S.C. § 2763).

10) **Refugee Assistance (22 U.S.C. 2601c).** The Department of State is responsible for refugee support in the Migration and Refugee Assistance Act of 1962. *See* Foreign Operations Appropriations Act (FOAA) for FY 03, P. L. 108-7, (2003) ($787M appropriated to DoS to support refugee operations, the International Organization for Migration (IOM), the International Committee of the Red Cross (ICRC) and the United Nations High Commissioner for Refugees (UNHCR); as well as $26M of no-year money to support the Emergency Refugee and Migration Assistance Fund). (*See also* provisions of the Refugee Assistance Act of 1980, § 501 (8 U.S.C. § 1522 note), authorizing the President to direct other agencies to support Cuban and Haitian Refugees on a reimbursable or non-reimbursable basis).

b. **Non-Appropriated Programs.** These programs authorize certain activities. Because they do not require Congressional funding, there is no annual appropriation for their implementation.

1) **Foreign Military Sales (FMS) Program and Foreign Military Construction (FMC) Program.** Concept. Eligible recipient governments or international organizations purchase defense articles, services, or training (or design and construction services), often using grants provided under the Foreign Military Financing program discussed above, from the United States government on the basis of formal contracts or agreements (normally documented on a Letter of Offer and Acceptance (LOA) and managed by DoD as "cases") with contractors who are part of DoD's network of defense industry contractors. The articles or services come either from DoD stocks or new procurements under DoD-managed contracts. FMS cases must be managed at no cost to the U.S. Government. Recipient countries are charged an administrative surcharge to pay for the costs of administering the program, including most personnel costs. Statutory Authority. AECA §§ 2122 (22 U.S.C. §§ 2761-62) (authorizing FMS); AECA § 29 (22 U.S.C. § 2769) (authorizing FMC). Governing Regulations. SAMM. Administering Agency. Department of Defense (DoD).

2) **Direct Commercial Sales (DCS).** Concept. Eligible governments or international organizations purchase defense articles or services under a Department of State-issued license directly from U.S. industry, often using grants provided under the Foreign Military Financing program discussed above. No management of the sale by DoD occurs (unlike FMS). Statutory Authority. AECA § 38 (22 U.S.C. § 2778). Governing Regulations. 22 C.F.R. §§ 120-30 (comprising chapter entitled "International Traffic in Arms Regulations (ITAR)). The SAMM, at 202-6 - 202-14, includes a reprint of the United States Munitions List (USML). The USML is a list containing items considered "defense articles" and "defense services" pursuant to AECA §§ 38 and 47(7) that are therefore strictly controlled. Administering Agency. Departments of State, Commerce, Treasury.

3) **Reciprocal Training, 22 U.S.C. § 2770a.** When conducted in accordance with a bilateral international agreement, U.S. military units may train and support foreign units (*e.g.*, at combat training centers) provided that the foreign country reciprocates with equivalent value training within one year.[312] If the foreign country has not reciprocated, they are expected to pay for the value of the training received. Because Congress does not appropriate funds specifically for reciprocal training, the U.S. military unit conducting the training will incur the cost or it may want to seek funding from other sources such as the CINC Initiative Funds.

c. **Special Programs.**

1) **Excess Defense Articles (EDA) Provisions.** General. EDA are essentially defense articles no longer needed by the U.S. armed forces.[313] There is a general preference to provide EDA to friendly countries whenever

[312] The bilateral international agreement must be negotiated and concluded by an element of DoD with appropriate authority as outlined in DoD Directive 5530.3, International Agreements, 11 June 1987, Ch1, 18 Feb 1991, and AR 550-51, International Agreements, 15 April 1998. The bilateral international agreement is not merely a handshake and a promise between two commanders, one U.S. and one foreign military, neither of whom may have the requisite authority legally to bind their respective governments.

[313] Section 644(g), FAA, defines Excess Defense Articles:

"Excess defense articles means the quantity of defense articles (other than construction equipment, including tractors, scrapers, loaders, graders, bulldozers, dump trucks, generators, and compressors) owned by the United States government, and not procured in anticipation of military assistance

possible rather than having them procure new items. Only countries that are justified in the annual Congressional Presentation Document (CPD) by the Department of State or separately justified in the FOAA during a fiscal year are eligible to receive EDA. EDA must be drawn from existing stocks. Congress requires 15 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. EDA are priced on the basis of their condition, with pricing ranging from 5 to 50 percent of the items original value. The sale/grant of EDA must include an agreement for the recipient country to pay the costs of packing, crating, handling, and transportation (PCH&T). On an exceptional basis, the President may provide transportation (on a space available basis), in accordance with FAA § 516(e) (22 U.S.C. § 2321j(e)). Finally, the annual value of EDA is limited to $425 million of the articles' current value. FAA § 516(g)(1) (22 U.S.C. § 2321j(g)(1)). Governing Regulations. SAMM, chapter 11. Administering Agency.

2) **Presidential Emergency Drawdown Authorities.**

i) **What it is?** The emergency presidential draw down authority of 22 U.S.C. § 2318 authorizes the President to direct DoD support for various State Department efforts that further national security, including counterdrug programs (22 U.S.C. § 2318(a)(2)(A)(i)).[314] In addition, Part VIII of subchapter I (in Part I of the FAA) is the International Narcotics Control provision of the act (22 U.S.C. §§ 2291-2291k). The State Department writes the appropriate presidential determination. After signature by the President, DoD, specifically DSCA, administers the drawdown, up to the specified dollar value. The Presidential drawdown authority merely provides authority to spend previously appropriated money, Service O&M, to provide training services, packing, crating, and handling services, transportation services, repair/refurbishment services, and the provision of spare parts or support services from the Working Capital Fund-operated by the Defense Logistics Agency activities. There is no specific appropriation tied to the initiation of a Presidential drawdown, although a dollar figure is always given. Because the drawdown is not a planned or budgeted activity, there is an immediate impact on the Service's O&M budget when executing a drawdown. Bottomline: a drawdown is only useful to a military unit if it is already established and provides a possible authority, not funding, if no other more specific authority exists, for a unit to conduct a particular mission with its own funds.[315]

Since 1992, over 50 drawdowns have been executed at a value of 1.5 billion dollars. Drawdowns appear to be an easy solution to achieve a Department of State mission with DoD articles and services, but drawdowns often take time to establish and execute, anywhere from two to four months or ten to twelve depending on the mission.

A drawdown of DoD resources may be reimbursed by a subsequent appropriation (22 U.S.C. § 2318(c)); however, this seldom occurs. Recently, DoD has been reimbursed twice under the Emergency Wartime Supplemental Appropriation Act, 2003, 16 April 03, for an Iraq Drawdown of $97 million (DoD has been reimbursed $63.5 million) and an Afghanistan DrawDown of $300 million (to provide defense articles and services, counternarcotics,

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or sales requirements, or pursuant to a military assistance or sales order, which is in excess of the Approved Force Acquisition Objective and Approved Force Retention Stock of all Department of Defense Components at the time such articles are dropped from inventory by the supplying agency for delivery to countries or international organizations under this Act [Section 9(b), P.L. 102-583]

The National Defense Authorization Act of FY 1993 amended Title 10, U.S.C. by adding a new Section 2562 which restricts the sale or transfer of excess construction or fire equipment. Such transfers or military sales may only occur if either of the following conditions apply: 1) no department/agency of the U.S. government (excluding DoD), and no State, and no other person or entity eligible to receive excess or surplus property submits a request for such equipment from the Defense Reutilization and Marketing Service (DRMS) during the period for which such a request may be accepted by the DRMS; or 2) the President determines that such a transfer is necessary in order to respond to an emergency for which the equipment is especially suited [Section 4304(a), P.L. 102-484].

[314] The Defense Security Cooperation Agency has proponency for Drawdowns. *See* http://www.dsca.osd.mil/. For a good "nuts & bolts" guide to drawdowns see, DSCA Action Officer (AO) Handbook for Foreign Assistance Act (FAA) Drawdown of Defense Articles and Services, (as of 15 Dec. 2000), available at: http://129.48.104.198/programs/erasa/Drawdown%20handbookrl.pdf.

[315] For example, the Foreign Operations Appropriations Act, 2003, authorizes the drawdown of commodities and services up to $30 million for the U.N. War Crimes Tribunal with regard to the former Yugoslavia or such other tribunals (ICTR) as the U.N. Security Council may establish or authorize to deal with violations of the law of war. In Bosnia and Kosovo when the Chief Prosecutor for ICTY, Mrs. Carla Della Ponte comes into the area of operations and requires support, this drawdown would authorize such support. Frequently, units have provided her with special protection as part of their training because she falls into a category of personnel authorized such special protection, a person of special interest. JAs need to be aware that any costs accrued beyond the costs of normal training could be accounted for under this drawdown and reimbursement might subsequently be forthcoming . As yet, DoS has not received an appropriation from Congress to reimburse such costs even though the drawdown authority has been renewed annually for a number of years.

crime control and police training services, military education and training and other support through 30 Sep 2006) (thus far, DoD has been reimbursed $165 million).[316] When no subsequent appropriation is forthcoming, a Presidential drawdown is another example of an authorized augmentation of accounts (DoD appropriations are used to achieve an objective ordinarily funded from State Department appropriations).

ii) **What it is NOT**? A drawdown is not authority to give away excess defense articles and services. As noted above, there are no funds appropriated specifically for a drawdown unless appropriated after the fact and tied to reimbursement. In 1995, the DoD General Counsel issued an opinion that DoD may not let any new contracts under the drawdown authority for either defense articles or services. The one exception is that contracts for commercial airlift and sealift transportation may be entered into if the cost is less than the cost of military transport.[317] This exception was formalized in Section 576, P.L. 105-118 that amended the FAA to provide the authority for the use of commercial transportation and related services acquired by contract for the drawdown if the contracted services cost less than the cost of using U.S. government transportation assets. As of November 2002, DoD General Counsel modified its earlier opinion to allow for the contracting of services as well as commercial transport, but not articles, under the drawdown authority.[318]

iii) **Types of Presidential Emergency Drawdown Authorities**.

- Military Emergencies: FAA § 506(a)(1) (22 U.S.C. § 2318(a)(1)). The President may draw down defense articles, defense services, and military education and training if an unforeseen emergency arises that requires immediate military assistance that cannot be met under any other section. The authority is limited to $100 million per fiscal year.

- Other Emergencies: FAA § 506(a)(2) (22 U.S.C. § 2318(a)(2)). If the President determines that it is in the United States' national interest to drawdown to support counternarcotics, disaster relief, refugee and migration assistance, antiterrorism, and non-proliferation assistance, he may draw down article and services from the inventory and resources of any agency of the U.S. and military education and training from DoD. Certain restrictions apply. The aggregate value of articles, services, and military education and training cannot exceed $200 million in any fiscal year. Not more than $75 million may be provided from the inventory and resources of DoD. Not more than $75 million may be provided for international narcotics control assistance. Not more than $15 million may be provided to support DoD-sponsored humanitarian projects associated with POW/MIA recovery operations in Vietnam, Cambodia, and Laos.

- Peacekeeping Emergencies: FAA § 552(c) (22 U.S.C. § 2348a(c)). With respect to peacekeeping operations, the President has emergency authority to transfer funds if he determines that, as the result of an unforeseen emergency, it is in our national interests to provide assistance. He may also direct the drawdown of commodities and services from the inventory and resources of any U.S. Government agency of an aggregate value not to exceed $25 million in any fiscal year.

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[316] Under this authority, DoD is able to reimburse the Services for a drawdown of $165 million under the Afghanistan Freedom Support Act (AFSA) of 2002 (4 Dec. 2002). This drawdown was necessary to cover the requirements for training and equipping the Afghan National Army (ANA)($150 million); to build a bridge between Tajikistan and Afghanistan ($8 million); and to assist Jordan in its operations in Afghanistan ($7 million). Under AFSA, the military services reduced their training and exercise accounts as a means for DoD to complete these missions. The $165 million are used to restore funds drawn down from the Services' FY2003 Operation and Maintenance appropriations in the amount of $35 million from the Army, $75 million from the Navy, and $55 million from the Air Force. Similarly, this Supplemental also authorized the reimbursement funding from DoD to the Services for $63.5 million under the Iraq Liberation Act of 1998. This support was necessary to meet the requirements to train and equip the Free Iraqi Forces (FIF). The $63.5 million is used to restore funds drawn from the Services' FY2003 O&M in the amount of $29 million from the Army, $11 million from the Navy, $23.4 million from the Air Force, and $0.1 million from the FY2003 Operation and Maintenance, Defense-Wide appropriations (required for the Special Operations Command).

[317] Memorandum, Office of the General Counsel, Department of Defense, Subject: Contracting for Commercial Airlift and Sealift Pursuant to a Presidential Drawdown of Transportation Services, 4 Dec. 1995.

[318] Memorandum, Office of the General Counsel, Department of Defense, Subject: Implementation of "Drawdown" Authority Under Iraq Liberation Act, 21 Nov. 2002. Although the subject line appears to focus on drawdown authority under one act, the language of the memorandum makes it clear that contracting for services applies to all Presidential Drawdowns not just those relating to Iraq.

NOTE: Recipients for all three types of drawdown can be either a foreign country or an international organization.

3. **Prohibitions and Potential Legal Issues.**

a. **General**. Congress appropriates funds for Security Assistance in its annual Foreign Operations, Export Financing, and Related Programs Appropriations Act. Security Assistance funds are often referred to as "Title 22 money" after the authorizing U.S. Code provisions. DoD receives its money under a separate appropriation ("Title 10 money"). General principles of fiscal law restrict the expenditure of funds to the purpose for which those funds were appropriated. **Critical for judge advocates to remember: activities, programs and operations which are essentially Security Assistance, and which should therefore be funded with State Department Title 22 money, may not be funded with Defense Department Title 10 money.**

b. **Unauthorized Training of Foreign Personnel.** Congressional Purpose. Training of foreign military forces should occur through the IMET, an FMS case, or some other specifically authorized program. Security Assistance programs that furnish training must not be supported by appropriations intended to be used for the operation and maintenance (O&M) of United States forces. (Remember the 1984 and 1986 GAO Honduras opinions.) The law 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.

1) **Not all activity that appears to be training of foreign personnel is considered to be security assistance training**.

i) Providing foreign armed forces with **interoperability, safety, and familiarization information** is not security assistance training. "[M]inor amounts of interoperability and safety instruction [do] not constitute "training" as that term is used in the context of security assistance, and could therefore be financed with O&M appropriations." *The Honorable Bill Alexander, House of Representatives*, B-213137, Jan. 30, 1986 (unpublished GAO opinion).

ii) Additionally, if **the primary purpose of the exercise or activity is to train U.S. troops**, then the activity is not considered to be security assistance training of foreign forces. "In our view, a U.S. military training exercise does not constitute "security assistance: as long as (1) the benefit to the host government is incidental and minor and is not comparable to that ordinarily provided as security assistance and (2) the clear primary purpose of the exercise is to train U.S. troops*." Gen. Fred F. Woerner*, B-230214, Oct. 27, 1988.

2) The FAA also contains **special prohibitions concerning the training of foreign police**. No FAA funds "shall be used to provide training or advice, or provide any financial support, for police, prisons, or other law enforcement forces for any foreign government or any program of internal intelligence or surveillance on behalf of any foreign government within the United States or abroad." FAA § 660(a) (22 U.S.C. § 2420(a)). **Exemptions**. FAA § 660(b) exempts from the general prohibition "assistance, including training, relating to sanction monitoring and enforcement," and "assistance provided to reconstitute civilian police authority and capability in the post-conflict restoration of host nation infrastructure for the purposes of supporting a nation emerging from instability, and the provision of professional public safety training, to include training in internationally recognized standards of human rights, the rule of law, anti-corruption, and the promotion of civilian police roles that support democracy."

3) The general prohibition also does not apply to longtime democracies with no standing armed forces and with good human rights records.

c. **Unauthorized Defense Services of a Combatant Nature. "**Personnel performing defense services sold under this chapter may not perform any duties of a combatant nature, including any duties related to training and

advising that may engage United States personnel in combat activities, outside the United States in connection with the performance of those defense services." AECA § 21(c)(1) (22 U.S.C. §2761(c)(1)).

d. **Eligibility Problems With the Foreign Country.**

1) Consistently violate internationally recognized human rights. FAA § 502(B) and FOAA 03, § 556.

2) Expropriation of Property Owned by U.S. Citizens. FAA § 620(e)(1) (22 U.S.C. § 2370(e)(1)).

3) Involvement in Nuclear Transactions. FAA § 669-70 (22 U.S.C. § 2429-29a).

4) In Arrears on Debts. FAA § 620(q) (22 U.S.C. § 2370(q)).

5) Support to Prevent International Terrorism. FAA § 620A (22 U.S.C. § 2371) and AECA § 40 (22 U.S.C. § 2780).

(6) Transfer, Failing to Secure, or Use of Defense Articles, Services, or Training for Unintended Purposes. FAA § 505 (22 U.S.C. § 2314). (End Use Agreement)

7) Has by military coup or decree deposed its duly elected Head of Government. FOAA 03, § 508. Pursuant to Section 1(b)(1) of the Pakistan Waiver Act, P.L. 107-57, 27 Oct. 2001, Presidential Determination 2003-16, dated 14 March 2003, waives this prohibition for furnishing assistance to Pakistan.

8) Congress requires special notification to Congress before obligating funds for Colombia, Liberia, Pakistan, Zimbabwe, Serbia, Sudan, or the Democratic Republic of the Congo. FOAA 03, § 520.

e. **Restriction on providing Military Assistance to States who have signed and ratified the Rome Statute of the International Criminal Court (ICC)**. The American Service Members Protection Act, 2002, § 2007, prohibits "military assistance" to states that are a party to the Rome Statute.[319] This provision became effective July 2003. The ASPA defines "military assistance" exclusively in terms of Title 22 authorities such as foreign military financing (FMF), IMET, and EDA. It does not apply to Title 10 authorities such as CINC Initiative Funds, Humanitarian and Civic Assistance funds, and Latin American Cooperation funds. Applicability. This prohibition does not apply to the government of a NATO member country; a non-NATO ally (including Australia, Egypt, Israel, Japan, Jordan, Argentina, the Republic of Korea, Bahrain, and New Zealand); and Taiwan. All others who are a party to the Rome Statute must either enter into an Article 98 agreement[320] or be given a National Interest Waiver by the President.

f. **Weapons-Specific Prohibitions**.

1) Tank Ammunition. Sales of depleted uranium tank rounds are limited to countries that are NATO members, Taiwan, and countries designated as a major non-NATO ally. FAA, § 620G (22 U.S.C. § 2378a).

2) Stingers. Congress continued the annual provision prohibiting making available Stingers to any country bordering the Persian Gulf (Iraq, Iran, Kuwait, Saudi Arabia, Qatar, United Arab Emirates, and Oman), except Bahrain. Bahrain may buy Stingers on a one-for-one replacement basis. FOAA 2000 § 705.

3) For the restrictions on the transfer of white phosphorus munitions, napalm, and RCA, see SAMM, at 203-3.

4. **Interagency Funding Issues**.

[319] 2002 Supplemental Appropriations Act for Further Recovery from and Response to Terrorist Attacks on the United States, Title II, § 2001-2015, P.L. 107-206, 2 August 2002 [Hereinafter American Service Members Protection Act].

[320] An Article 98 agreement is an agreement entered into pursuant to Article 98 of the Rome Statute of the ICC. Article 98 provides that the ICC may not proceed with a request for surrender [of an individual(s)], which would require the requested state to act inconsistently with its obligations under international agreements.

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. State Department reimbursements for DoD or other agencies' efforts under the FAA are governed by 22 U.S.C. § 2392(d). Except under emergency Presidential draw down authority (22 U.S.C. § 2318), reimbursement to any government agency supporting State Department 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 State Department'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 State Department 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 State Department 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* Defense Authorization Act for Fiscal Year 1999, Pub. L. No. 105-261, § 1021, 112 Stat. 2120 (1998) (extending DoD's counterdrug authority through FY 2003).

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 State Department 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.

i. Emergency authorities also exist to permit the U.S. to provide essential assistance to foreign countries when in the interest of U.S. security. *See, e.g.,* 22 U.S.C. § 2364 (President may authorize assistance without regard to other limitations if he determines it will assist U.S. security interests, and notifies Congress; certain limitations still apply).

5. **Summary of Security Assistance**. The key point to remember about Security Assistance is that the State Department provides the overall policy guidance even though U.S. military agencies administer many of the individual programs. Security assistance is a foreign policy tool employed by the Administration and Congress, and thus programs, funding, and eligible recipients will frequently change as political realities change. Security Assistance must be funded with State Department's Annual Foreign Operations Appropriations, commonly referred to as Title 22 money. Finally, as is evident from the discussion above, the U.S. military plays a role in administering the various security assistance programs. The baseline rule is that although DoD may be authorized to conduct an activity under Title 22, it may not use Title 10 money to fund its role in these programs. If, however, it does expend Title 10 funds, as for example under a Presidential Drawdown, then it should seek reimbursement from DoS under the appropriate authority in the form of Title 22 money or the annual Foreign Operations Appropriations Act (FOAA).

E. DEVELOPMENT ASSISTANCE PROGRAMS

1. This section will provide a very brief description of the State Department's Developmental Assistance programs, as depicted in the second pillar of the diagram at Section VIII.B.1.a.3). Although the U.S. military has a relatively minor and infrequent role in most of these programs, it plays a key role in the provision of Foreign Disaster Relief. Again, the legal authority to conduct these programs emanates from the FAA, funding flows from the Department of State's annual Foreign Operations Appropriations, and the policy supervision also rests with Department of State.

2. **General.** The State Department supervises and conducts a large number of activities authorized by Part I of the FAA designed to strengthen the socio-economic well being of the civilian population. There are too many activities to list them all, but a partial list of the primary programs will provide the reader with a flavor for the wide range of objectives envisioned by this legislation. The activities under the Development Assistance program include, but are not limited to:

Agriculture	Trade credit	Overseas Private Investment Corp.
Rural development	Endangered species	Disadvantaged children in Asia
Nutrition	Shale development	Famine prevention
Population control & health	Tropical forests	Disaster Assistance
Education	Human rights	International Narcotics Control
Energy	Housing guarantees	Loan guarantees
Cooperatives	Central America Democracy, Peace & Development	
Integration of women into the economy	Protection of the environment & natural resources	
Economic & Democratic Development for the Independent States of the Former Soviet Union		

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.[321] The current statutory authority continuing this tradition is located in the Foreign Assistance Act.[322] 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."[323] 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.[324] 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.[325] The Administrator of the USAID controls these funds because the President has designated that person as the Special Coordinator for International Disaster Assistance.[326] In addition, the President has designated USAID as the lead agency in coordinating the U.S. response for foreign disaster.[327] Normally these funds support NGO and PVO efforts in the disaster area. However, certain disasters can overwhelm NGO and PVO capabilities, or the military possess unique skills and equipment to accomplish the needed assistance. In these situations, the State Department, 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.

c. Natural or manmade disasters have increasingly become the basis for military operations. The object of foreign disaster relief operations is to provide sufficient food, water, clothing, shelter, medical care, and other life support to victims of natural and man-made disasters. To accomplish this objective, the military may be tasked to establish a secure operational environment and begin to support PVO/NGO supply, medical, and transportation systems. Recent examples of such operations include SEA ANGEL in Bangladesh, SUPPORT HOPE in Rwanda, RESTORE HOPE in Somalia, PROVIDE COMFORT in Northern Iraq, and STRONG SUPPORT in response to Hurricane Mitch in Central America.[328] OPERATION STRONG SUPPORT was funded not only with International Disaster Assistance fund dollars (Title 22) but also with Overseas Humanitarian, Disaster, and Civic Aid appropriations (OHDACA) dollars (FY99 DoD expended $50 million in OHDACA on this operation. Title 22 funds are often used conjunctively with Title 10 funds. The specific nature and limitations of Title 10 authorities and funds will be discussed below. In addition, foreign disaster relief operations may coexist with other operations, and arise in unexpected contexts. For example, in September 1994, the U.S. Ambassador to Haiti declared that the "corruption and repression in the *de facto* regime" had caused a man-made state of disaster in that country. The declaration opened the door for additional relief, rehabilitation, and reconstruction assistance (and funds) for Haiti.

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[321] 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.

[322] 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* Foreign Operations Appropriations Act for FY 03, Pub. L. 108-7, (2003) ($230M appropriated to DoS for international disaster assistance under this authority).

Additionally, Congressional policy is espoused in 22 U.S.C. § 2292(a) as follows:

> The Congress, recognizing that prompt United States assistance to alleviate human suffering caused by natural and manmade disasters is an important expression of the humanitarian concern and tradition of the people of the United States, affirms the willingness of the United States to provide assistance for the relief, and rehabilitation of people and countries affected by such disasters.

[323] 22 U.S.C. § 2292(b).

[324] E.O. 12966, 60 F.R. 36949 (July 14, 1995).

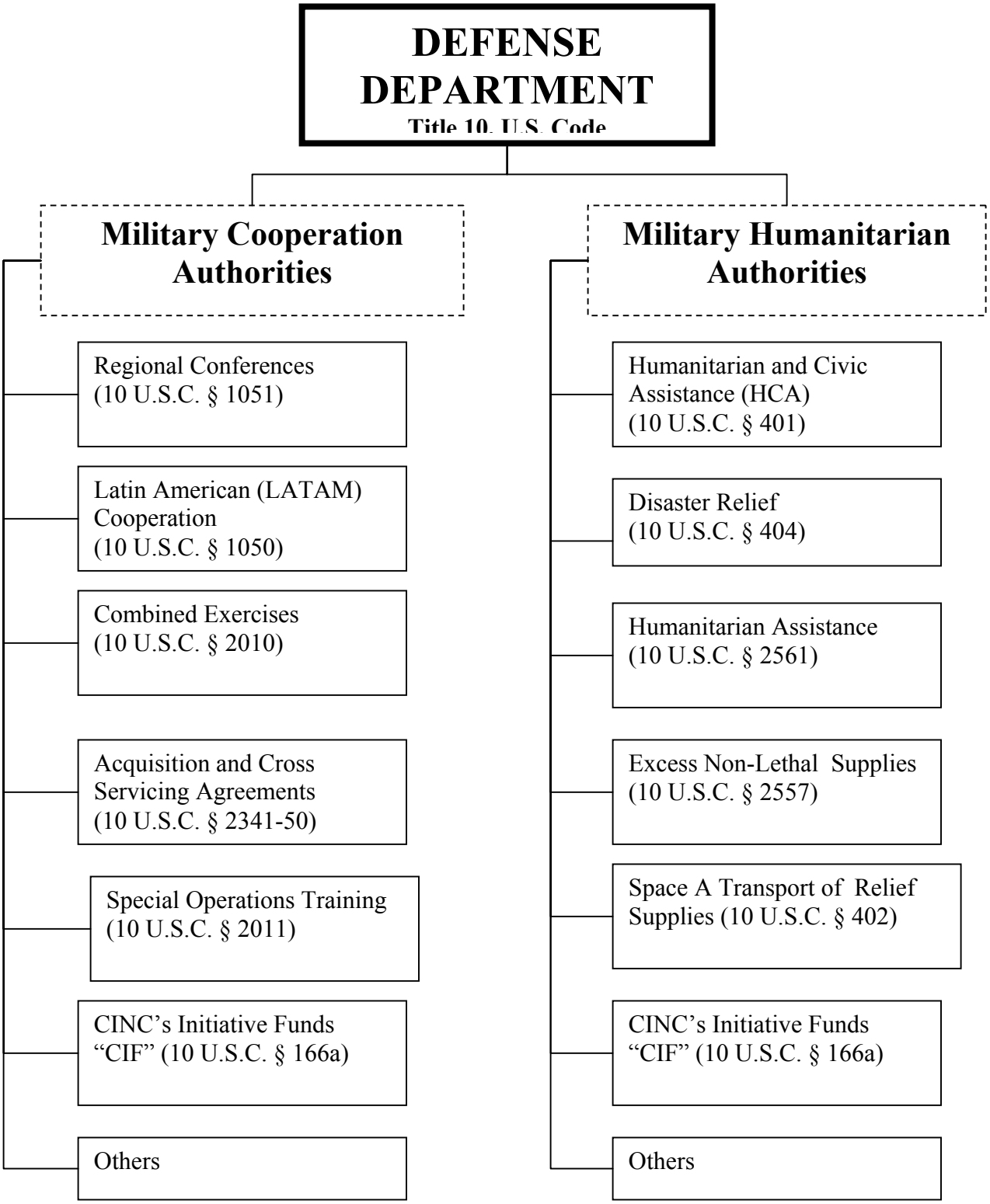
[325] FAA §§ 491 - 495K, 22 U.S.C. §§ 2292 - 2292q.

[326] *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).

[327] *See generally,* E.O. 12966, 60 F.R. 36949 (July 14, 1995).

[328] Operations Sea Angel and Strong Support were traditional Foreign Disaster Relief Operations where the affected Governments requested U.S. assistance. Operations Support Hope, Restore Hope, Provide Comfort presented additional challenges because they were largely non-permissive in nature. In the cases of the last three examples, the United Nations essentially conducted a humanitarian intervention.

5. **Summary.** As reflected in the foregoing discussion, DoD's role is one of support to DoS in accomplishing its foreign assistance goals. There are however, specific Title 10 authorities that allow DoD to execute certain programs and operations independently, though still complementing and supplementing DoS's global humanitarian assistance efforts. These specific authorities are detailed in the next sections.



IX. DEFENSE DEPARTMENT'S MILITARY COOPERATIVE PROGRAMS AND HUMANITARIAN OPERATIONS.

In addition to its substantial support role in the administration of Security Assistance programs, the U.S. military executes several cooperative programs and humanitarian operations funded with Title 10 Defense Department O&M money. The majority of these cooperative programs and humanitarian operations are statutorily based. The cooperative programs are organized into three categories: training foreign forces, logistic support to foreign forces, and contacts and cooperation with foreign militaries. The humanitarian operations include Humanitarian and Civic Assistance (HCA), Humanitarian DeMining (HD), Transportation of Relief Supplies, Provision of Excess Defense Equipment, and Humanitarian Assistance (HA). Both types of authorities are depicted on the diagram below.

A. **MILITARY COOPERATIVE PROGRAMS**

1. **Training Foreign Forces**

a. As noted in Part VIII, the primary authority for training foreign forces is Title 22 as part of Security Assistance. There exist, however, additional statutory authorities under Title 10 and GAO interpretations allowing for training to be authorized and funded using O&M rather than using DoS appropriations. The two GAO interpretation exceptions are interoperability, safety, and familiarization training and training that primarily benefits the U.S. and provides foreign forces only an incidental benefit. These have been addressed previously in Section VIII. D., 3.,b.,1) of this Chapter.

b. The specific Title 10 provisions authorizing **training of foreign forces** are:

1) Special Operations Forces, 10 U.S.C. § 2011 Provided that the training primarily benefits U.S. special operations forces, SOF may train, and train with, friendly foreign forces. U.S. forces may pay incremental expenses incurred by friendly developing countries as the direct result of such training. U.S. Special Operations Command has interpreted this authority to mean that the training must occur overseas.

(2) Combatant Commander Initiative Funds, 10 U.S.C. § 166a. The Chairman, JCS, provides funds to Combatant Commanders for a wide variety of purposes, including military education and training of foreign forces. No more than $10 million may be expended for this training per fiscal year worldwide. This fund, referred to as CIF money, operates essentially as a contingency fund that permits the Combatant Commander to pay for initiatives. The CIF money provides the Combatant Commander with flexibility to cover expenses that, for one reason or another, cannot be covered by the designated pot of money.

2. **Logistics Support for Foreign Militaries**

a. Acquisition and Cross-Servicing Agreements (ACSA), 10 U.S.C. §§ 2341–2350. DoD has authority to acquire logistic support without resort to commercial contracting procedures and to transfer support to foreign militaries outside of the AECA. Under the statutes, after consulting with the State Department, DoD 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 logistic support, supplies, and services. Acquisitions and transfers are on a cash reimbursement or replacement-in-kind or exchange of equal value basis. Foreign militaries often prefer this method of obtaining logistical support because they do not have to pay the administrative fees associated with sales under the Foreign Military Sales program, and it is quicker and often more flexible.

b. The present Acquisition and Cross-Servicing (ACSA) authorities have their origins in the North Atlantic Treaty Organization (NATO) Mutual Support Act of 1979 (NMSA), which was originally enacted on 4 August 1980 (P.L. 96-323). Before passage of this legislation, U.S. forces acquired and transferred logistic support through highly formalized means. Logistic support, supplies and services were acquired from foreign governments through commercial contracting methods and application of U.S. domestic procurement laws and regulations (i.e., offshore procurement agreements). Allied requests for logistic support from U.S. forces could only be processed as Foreign Military Sales (FMS) cases under the Arms Export Control Act (AECA). Reductions in the numbers of U.S. logistics forces stationed in the European theater caused greater reliance on host nation support. Allied government sovereignty

concerns resulted in refusal to accept U.S. commercial contracting methods. Application of FMS procedures to allied requests for routine logistic support caused additional friction. Finally, DoD turned to Congress for legislative relief.

c. Through passage of the NMSA, Congress granted DoD a special, simplified authority to acquire logistic support, supplies, and services without the need to resort to traditional commercial contracting procedures. In addition, the NMSA also authorized DoD, after consultation with the State Department, to enter into cross-servicing agreements with our NATO allies and with NATO subsidiary body organizations for the reciprocal provision of logistic support. In so doing, Congress granted DoD a second acquisition authority as well as the authority to transfer logistic support outside of AECA channels.

3. **Military Contact and Cooperative Authorities.**

a. Congress has provided ample authority for bilateral and multilateral contacts with foreign militaries. These authorities are the heart of the current Partnership for Peace (PFP) program, as well as many other joint training, military-to-military contact, and exercise programs. These authorities fund U.S. costs of preparing and conducting combined training, as well as paying selected incremental costs for our training partners. All of these activities are funded with O&M funds.

b. **Bilateral and Multilateral Contacts.**

1) **10 U.S.C. § 1050 (Latin American Cooperation - LATAM COOP)** authorizes service secretaries to pay 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) **10 U.S.C. § 1051 (Bilateral or Regional Cooperation Programs)** provides similar authority to pay travel expenses and other costs associated with attendance at bilateral or regional conferences, seminars, or similar meetings if the SECDEF deems attendance in the U.S. national security interest. The National Defense Authorization Act, 2003, § 1212, amends this provision by adding authority to pay the travel expenses of defense personnel, from a developing country that is participating in the Partnership for Peace (PfP) program of the North Atlantic Treaty Organization (NATO), to the territory of any country participating in the PfP program or the territory of any NATO member country. *See also* DoD Authorization Act for FY 97, Pub. L. No. 104-201 (110 Stat. 3009), § 1065 and §8121 (1996), authorizing support for participation in Marshall Center activities for European and Eurasian nations, and attendance by foreign military officers and civilians at seminars and similar studies at the Asia-Pacific Center for Security Studies, respectively.

3) **10 U.S.C. § 168 (Military-to-Military Contacts)** authorizes the SECDEF to engage in military-to-military contacts and comparable activities that are designed to encourage democratic orientation of defense establishments and military forces of other countries.

4) **10 U.S.C. § 169 (Administrative support and services for coalition liaison officers)** provides DoD authority to provide administrative services and support for the performance of duties by a foreign liaison officer involved in a coalition while the liaison officer is assigned temporarily to the headquarters of a combatant command, component command, or subordinate operational command of the United States in connection with the planning for or conduct of a coalition operation.[329] Under this authority DoD may also pay the travel, subsistence, and personal expenses directly necessary to carry out the duties of a liaison officer of a developing country in connection with assignment to the headquarters of a combatant command, if the assignment is requested by the combatant commander. Based on a determination of SECDEF, these services and support may be provided either with or without reimbursement.

5) **5 U.S.C. § 4109-4110; 31 U.S.C. § 1345(1); 37 U.S.C. § 412 (Travel).** Travel to conferences and site visits are supported with a variety of statutory authorities.[330] U.S. civilian employees and military personnel are

[329] Section 1211 of The National Defense Authorization Act, 2003, adding § 169, defines "administrative services and support" as "base or installation support services, office space, utilities, copying services, fire and police protection, and computer support." It also defines "coalition" as "an adhoc arrangement between or among the United States and one or more other nations for common action."

[330] 31 U.S.C. § 1345 requires a specific appropriation for travel, transportation, and subsistence expenses for meetings. *See also* National Highway Traffic Safety Admin.—Travel and Lodging Expenses, 62 Comp. Gen. 531 (1983).

authorized to expend U.S. funds under the Joint Travel Regulations (JTR), para. C.6000.3; individuals performing services for the government may also be funded.

c. **Bilateral and Multilateral Exercise Programs.**

1) **10 U.S.C. § 2010 (Developing Country Exercise Program - DCCEP)** authorizes payment of incremental expenses of a developing country incurred during bilateral or multilateral exercises if it enhances U.S. security interests and is essential to achieving the fundamental objectives of the exercise.

2) **10 U.S.C. § 2011 (Special Operations Force - SOF Training)** permits the SOCOM Commander or Combatant Commander to fund the expenses of training all Special Operations Forces [Civil Affairs, PSYOP, Special Forces, SEALS, Rangers, Special Boat Units, AFSOC, etc.] training with the armed forces or security forces of a friendly foreign country, including incremental expenses.

3) **Incremental expenses** incurred as the result of these training authorities include rations, fuel, training aids, ammunition, and transportation; they do not include pay, allowances, and other normal costs for the country's personnel.

d. **Regional Cooperation Programs, Education and Training.**

1) **Partnership for Peace** activities are authorized by existing authorities, outlined above.[331]

2) **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;[332] Congress appropriated $416.7M for the CTR program in FY 2003.[333] These are three-year funds available until 30 September 2005.

B. DEFENSE DEPARTMENT'S MILITARY HUMANITARIAN OPERATIONS

1. Predicate: The 1984 and 1986 GAO Honduras Opinions and their impact on the evolution of Military Humanitarian Operations

a. Historically, DoD conducted limited Humanitarian and Civic Assistance (HCA) operations in foreign nations without separate statutory authority.[334] In 1984, the Comptroller General opined that DoD's extensive use of O&M funds to provide HCA violated the Purpose Statute (31 U.S.C. § 1301(a)) and other well-established fiscal principles. *See* To The Honorable Bill Alexander, B-213137, 63 Comp. Gen. 422 (1984) (Honduras I). The Comptroller General concluded that DoD had used its O&M accounts improperly to fund foreign aid and security assistance. The Honduras I opinion applied a three-pronged test to determine whether certain expenses for construction and to provide medical and veterinary care were proper expenditures:

> First and foremost, the expenditure must be reasonably related to the purposes for which the appropriation was made . . . . Second, the expenditure must not be prohibited by law . . . . Finally, the expenditure must not fall specifically within the scope of some other category of appropriations. Honduras I at 427-28.

b. This test is used to analyze fiscal law problems. Applying it to the military construction, training, and HCA operations conducted in Honduras in 1983, the Comptroller General disapproved certain O&M expenditures that

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[331] *See* H.R. Conf. Rep. No. 747, 103d Cong., 2d Sess. 63 (1994)

[332] National Defense Authorization Act for FY 99, Pub. L. No. 105-261, 112 Stat. 2161, § 1301 (1998). *But see* Defense Authorization Act, § 1303 (prohibiting use of funds for peacekeeping or peacekeeping-related activity, housing, environmental restoration, or job training).

[333] Defense Appropriations Act for FY 2003, Pub. L. No. 107-248, 116 Stat. 1519 (2002).

[334] In the early 1980's, the U.S. government tasked DoD to provide military assistance to the Nicaraguan "contra" rebels who were committed to overthrow the Sandanistas (then ruling Communist party of Nicaragua). The U.S. military conducted operations out of Soto Cano Airbase in Honduras. As part of its mission, U.S. forces conducted joint and combined exercises with the Honduran Army. During these exercises the U.S. military conducted a wide range of construction, and humanitarian and civic assistance programs using O&M funds.

were reasonably related to DoD purposes (that is, expenditures which achieved "readiness and operational benefit" for DoD), but which failed the other tests. The Comptroller General determined that certain O&M expenditures were improper either because they were prohibited by law (violating the second prong of the above test), or because they achieved objectives that were within the scope of more specific appropriations, such as appropriations to the State Department for foreign aid under the FAA or the Arms Export Control Act (violating the third prong). *See* The Honorable Bill Alexander, B-213137, Jan. 30, 1986 (unpub.) (Honduras II) at 27-30. The Comptroller General did recognize, however, that limited HCA was permissible with O&M funds. *See* Honduras II at 38. *See also* 10 U.S.C. § 401c(4) and DoD Dir. 2205.2, Humanitarian and Civic Assistance. This controversy spurred the development of separate legislative authority (discussed below) for the conduct of humanitarian activities by the military.

c. GAO concluded its opinion by "recommending to DoD that it seek specific funding authorization from the Congress if it wishes to continue performing such a wide variety of activities under the aegis of an O&M funded exercise." DoD wasted no time in acting on GAO's recommendation. Within a few years following the 1984 Honduras Opinion, DoD sought and obtained several legislative authorizations permitting the use of DoD O&M funds to conduct limited operations and activities that benefit foreign nations. These operations and activities are very similar to those conducted by State Department agencies pursuant to the FAA. The key to these DoD authorized activities is that they must complement, supplement, and support the primary FAA programs, but should not, duplicate, or frustrate the FAA programs. The right column of the diagram at the beginning of Section IX lists some of the principal DoD legislative authorities that permit the U.S. military to conduct operations that complement State Department's Security Assistance and Development Assistance programs.

d. To ensure that the DoD operations and activities complement but do not duplicate or frustrate State Department foreign assistance and development assistance programs, the DoD authorizing legislation usually:

1) Limits the funding levels to relatively small amounts;

2) Requires coordination and approval by the State Department and U.S. embassy in the target nation; and

3) Requires reporting of activities to Congress.

e. Before discussing the military programs, however, we should understand the policy underlying these programs, and possible trade-offs involved. Why is the Department of Defense involved in what looks like Department of State business that is not directly related to national security? Many civilian policy makers and military commanders argue that there exists a nexus between providing basic human needs and national security. They believe that: 1) nations that fail to provide basic human needs often fail to maintain the support of their citizens; 2) insurgencies thrive in areas where the government can not or will not provide basic services; and 3) the provision of humanitarian assistance by the U.S. forces helps teach the proper role of the military in a democracy to developing countries. U.S. forces providing humanitarian services to the civilian population demonstrate to host nation forces that the military serves the civilian population.

f. The U.S. military also benefits from its participation in humanitarian activities. Such activities: 1) provide a method for introducing U.S. forces in areas where they may not otherwise have access; 2) reduce the number of permanent forward deployed troops; and 3) provide training opportunities that are impossible to duplicate in the U.S.

2. **Title 10 U.S. Code, Legislative Authorities: Military Humanitarian Operations.**

a. **Humanitarian and Civic Assistance (HCA), 10 U.S.C. § 401**. The enactment of HCA legislation is a direct Congressional response to the 1984 GAO Honduras Opinion. Congress recognized the benefits of permitting U.S. armed forces to conduct limited HCA projects.

1) The typical sequence for the initiation and execution of HCA projects is as follows. The embassy country teams and the service components of the regional Combatant Commanders nominate HCA projects for their respective countries to the Combatant Commander having responsibility for that country. That commander, usually at an annual HCA conference, then develops an order of merit list. Proposed HCA projects that fall below the funding "cut

line" may not be completed because the funds were unavailable. HCA funding comes directly from the Services to the Combatant Commanders. The money is Service O&M funds that are fenced off by the Services specifically for HCA. Each service is responsible for funding a particular Combatant Command (*e.g.*, Army: SOUTHCOM & EUCOM).

2) Congress imposed certain restrictions on the conduct of HCA by the U.S. military. The Department of State must approve all HCA projects. The security interests of both the U.S. and the receiving nation must be promoted. The mission must serve the basic economic and social needs of the people involved. HCA must complement but not duplicate any other form of social or economic assistance. The aid may not be provided to any individual, group or organization engaged in military or paramilitary activity. HCA must be conducted in conjunction with an exercise to include CJCS-directed, or a deployment for training (DFT), or an ongoing military operation. The HCA activity being conducted must promote specific operational readiness skills of the individual soldier.

3) HCA funds are used to pay for expenses incurred as a "direct result" of the HCA activity. These expenses include the following: consumable materials, equipment leasing, supplies, and necessary services. Pursuant to DoDD 2205.2, *Humanitarian and Civic Assistance*, expenses as a "direct result" do not include costs associated with the military operations, *which likely would have been incurred whether or not the HCA was provided*, such as: transportation, military personnel, petroleum oil and lubricants, and repair of U.S. government equipment. HCA expenditures are reported each year to Congress by country, type and amount.

4) The statute lists four kinds of activities that may be performed as traditional HCA:

i) Medical, dental, and veterinary care provided in rural areas of a country;

ii) Construction of rudimentary surface transportation systems.

iii) Well drilling and construction of basic sanitation facilities.

iv) Rudimentary construction and repair of public facilities.

5) Legal issues that typically arise during the conduct of HCA projects include the following:

i) <u>Furnishing and equipping newly constructed buildings</u>. Engineer units that complete a construction project desire to leave behind a "turn-key" facility that is ready to be used. Blackboards, in practice, have been considered a fixture and therefore would be authorized under this authority. HCA authority, however, does not authorize the purchase of medical equipment for installing in a new building designed to be a clinic, nor does it authorize the purchase of school desks, or other movable personal property, and books to be placed in a building designed to be a schoolhouse. The judge advocate could suggest alternative funding sources for the desired equipment. For example, USAID may have funds available to equip the new building. DoD may have excess non-lethal equipment it can transfer through USAID to the host nation. Private and non-governmental organizations often have funds or equipment available that could be used to furnish the building. Finally, U.S. military personnel, on a truly volunteer basis and on their personal time, could use scrap pieces of lumber to build desks, blackboards, etc., to furnish a building.

ii) <u>Donation of unused materials, supplies and minor equipment</u>. Sometime the U.S. military unit may wish to leave behind small tools or excess construction materials or medical supplies that were not consumed during the HCA project. As a general rule, the U.S. military cannot leave tools, supplies or materials behind with the local authorities. The problem with leaving these items behind with the local authorities is that once the unit leaves, there is no longer a nexus to training. Leaving these items behind (in significant quantities) amounts to foreign aid that should be funded with State Department Title 22 funds under the FAA. If there were no way to economically or practically save the items for a follow-on HCA exercise, then they could be declared excess and disposed of through the normal procedures. Ultimately, USAID would take possession of the items and distribute them to the local authorities. Remember: USAID is authorized to provide Developmental Assistance to foreign governments; military units are not and thus cannot provide the items directly to the local authorities.

iii) <u>Promotion of operational readiness skills</u>. The issue that arises more frequently than any other is whether or not the specific operational readiness skills of the members of the unit participating are being promoted by

the HCA project. The promotion of these skills is a statutory requirement. The judge advocate should ask: are the skills being utilized during the HCA project within the unit's METL? What is the ratio of U.S. participation relative to foreign military participation? Are they relying too heavily on foreign civilian contractor participation? DoDD 2205.2 provides additional guidance in this regard.

iv) *De minimis* HCA. Sometimes, during the course of a combined exercise in a foreign country, an unexpected opportunity to perform minor humanitarian and civic assistance arises. For example, during the conduct of an infantry platoon level combined exercise, a young girl in the local village near the exercise site may require minor medical attention to set a broken bone. 10 U.S.C. § 401(c)(2) authorizes the military commander to permit the treatment of the child by the platoon's assigned doctor or medic. The costs associated with this treatment would likely be minimal and would be paid for from the unit's O&M funds. This kind of activity is referred to as *de minimis* HCA. Only HCA amounting to "minimal expenditures" may be provided. Although minimal expenditures are not defined in the statutes, DoD Directive 2205.2 provides guidance in determining what minimal means.[335] Remember that *de minimis* HCA activities must be one of the four activities statutorily allowed as an HCA activity. (e.g. medical/dental care or rudimentary construction. Additionally, all of the other restrictions for the conduct of HCA mentioned above apply to *de minimis* HCA as well.

b. **De-Mining. Title 10 U.S. Code § 401(e)(5).**

1) The HCA statute also provides for activities relating to the furnishing of education, training, and technical assistance with respect to the detection and clearance of landmines. This activity is contained within the HCA statute, but it is not restricted by the rules pertaining to traditional HCA. In fact, many of the rules pertaining to de-mining are completely contrary to those pertaining to traditional HCA. Thus, for purposes of our discussion, it is more logically consistent to categorize § 401 de-mining as a separate kind of activity rather than associating it with traditional HCA. Additionally, § 401 de-mining is funded differently than HCA. It is funded with OHDACA, not fenced or budgeted O&M.

2) Rules. U.S. forces are not to engage in the physical detection, lifting, or destroying of landmines (unless it is part of a concurrent military operation other than HCA). Unlike traditional HCA activities, assistance with regard to de-mining must be provided to military or armed forces. Unlike HCA, equipment, services and supplies acquired for de-mining, including non-lethal, individual, or small-team landmine clearing equipment or supplies may be transferred to the foreign country (limit of $5 million value worldwide annually). Additionally, U.S. forces training de-mining can enter into contracts for interpreters, supplies and other items necessary to execute this mission.

c. **Humanitarian Assistance, 10 U.S.C. § 2561.** Authorizes use of funds for transportation of humanitarian relief and for other humanitarian purposes worldwide. 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. 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. JAs must obtain and review for implementation purposes the Department of Defense message on current guidance for Humanitarian Assistance Activities. *See* DoD Message dated 10 Mar 03, Subject: Guidance for FY04 Overseas Humanitarian, Disaster, and Civic Aid (OHDACA) Activities.

d. **Excess non-lethal supplies: humanitarian relief, 10 U.S.C. § 2557.** Sometimes the provision of troops and transportation alone is not enough. This statute allows DoD to provide excess non-lethal supplies for

[335] See "Definitions" where DoD explains that a commander is to use reasonable judgment in light of the overall cost of the operation in which the expenditure is incurred, taking into account the amount of time involved and considering congressional intent. DoD then gives two examples of De Minimis. (1) A unit's doctor examining villagers for a few hours, administering several shots and issuing some medicine but not a deployment of a medical team providing mass inoculations. (2) Opening an access road through trees and underbrush for several hundred yards, but not asphalting a roadway.

humanitarian relief. Excess property may include any property except: real property, weapons, ammunition, and any other equipment or material that is designed to inflict 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 Department of State, 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, above.

e. **Transportation of humanitarian relief supplies to foreign countries, 10 U.S.C. § 402.** This statute authorizes the transportation of non-governmental privately donated relief supplies. It is administered by DoS and DSCA. The relief supplies are transported on a Space-A basis under certain conditions: 1) supplies must be in useable condition; 2) supplies must be suitable for humanitarian purposes, and 3) adequate arrangements must have been made for their distribution in country. Once in-country, the supplies may be distributed by any U.S. government agency, a foreign government agency, an international organization, or a private nonprofit organization. DoD may not use this authority to supply a military or paramilitary group. In light of the fact that the supplies are transported on a Space-A basis, no separate funding is necessary. However, reports must be submitted to Congress. Administrative details for the use of the § 402 authority may be found at: http://public.transcom.mil/J3/denton/steps.html.

f. **Foreign Disaster Assistance, 10 U.S.C. § 404.** In consultation with the Secretary of State, USAID is the lead agency for foreign disaster relief, with the primary source of funding being the International Disaster Assistance Funds, 22 U.S.C. § 2292-2292k. DoD has limited authority to engage in disaster assistance. The President may direct DoD through the Secretary of Defense to respond to manmade or natural disasters. The President delegated disaster relief authority to SECDEF with concurrence of DoS (except in emergency situations). See EO 12966, 60 Fed. Reg. 36949 (15 July 1995). DoD's participation must be necessary to "save lives." Assistance may include: transportation, supplies, services, and equipment. The President must notify Congress within 48 hours after the commencement of the assistance. The notice must include: The manmade or natural disaster involved, the threat to human lives presented, the U.S. military personnel and material resources involved or expected to be involved, disaster relief being provided by other nations or organizations, and the expected duration of the assistance activities. This authority is rarely used because there is no implementing guidance. As a result, DoD relies on the broad authority of 10 U.S.C. § 2561 to conduct the foreign disaster assistance contemplated under 10 U.S.C. § 404.

g. **Combatant Commander (formerly CINC) Initiative Funds, 10 U.S.C. § 166a.** This authority provides the Combatant Commanders with a great deal of legal flexibility to conduct humanitarian operations and activities. The statute specifically lists "Humanitarian and civil assistance" as an authorized activity.

3. **Funding sources for Military Humanitarian Operations:**

a. **Fenced or Budgeted O&M** used to pay for HCA to include *de minimus* HCA (i.e. all activities other than de-mining).

b. **Overseas Humanitarian, Disaster, and Civic Assistance (OHDACA).** In an attempt to bring some order to the scattered authorities and funding sources for military humanitarian programs, Congress began appropriating funds into an account labeled "Overseas Humanitarian, Disaster, and Civic Assistance" (OHDACA) account. OHDACA funds are generally used to pay for operations and activities which are authorized by Title 10 § 2561, Humanitarian Assistance, and De-Mining under 10 U.S.C. § 401. Even though the law specifically lists HCA and Disaster Relief as appropriate uses for the fund, the actual practice is that OHDACA funds are used to pay for § 2561 authorized activities.

X. SUPPORTING MULTILATERAL PEACE AND HUMANITARIAN OPERATIONS.

A. U.S. support to other nations or international organizations during multilateral operations is authorized by a number of provisions of the Foreign Assistance Act, Title 10 U.S.C., the Arms Export Control Act, and other statutes. With respect to UN support, Presidential Decision Directive (PDD)-25 emphasizes the necessity for reducing costs for UN peace operations, reforming UN management of peace operations, and improving U.S. management and funding of peace operations (including increased cooperation between the Legislative and Executive branches). The United States generally will seek either direct reimbursement for the provision of goods and services to other nations or international organizations, or credit against a UN assessment. In rare circumstances, the United States may contribute goods, services, and funds on a nonreimbursable basis. DoS is responsible for oversight and management of Chapter VI operations where

U.S. combat units are not participating, as well as Chapter VI operations in which U.S. forces are participating and all Chapter VII operations.

B. **Authorities**. Much like Disaster Relief and Refugee Support, DoS has the lead in supporting other nations engaged in Peacekeeping Operations (PKO). *See* FAA § 551 (22 U.S.C. § 2348). *See also* Foreign Operations Appropriations Act for FY 2003 (additional appropriations), P.L. 108-7, (2003) (DoS provided $114.25M to support PKO). Other than the authorities mentioned below, DoD is prohibited from providing direct or indirect contributions to the UN for peacekeeping operations or to pay UN arrearages under 10 U.S.C. § 405. In addition, under § 8066 of the Defense Appropriations Act for FY 2003, P. L. 107-248 (2002), DoD also must notify Congress 15 days before transferring to another nation or international organization any defense articles or services in connection with peace operations under Chapter VI or VII of the UN Charter or any other international peacekeeping, peace enforcement, or humanitarian assistance operation. This requirement affects all of the authorities described in this section, or the preceding section, unless they already require congressional notification. In practice, DoD provides blanket notification for all PKO or Humanitarian operations where goods or services are being transferred to other nations or international organizations.

C. **UN Participation Act (UNPA) § 7 (22 U.S.C. § 287d-1)** authorizes support to the UN, upon its request, to assist in the peaceful settlement of disputes (not involving the employment of armed forces under Chapter VII). Includes detail of up to 1000 military personnel as observers, guards, or any other non-combatant capacity, and furnishing of facilities, services, or other assistance and loan of U.S. supplies and equipment. The statute generally requires reimbursement, except when it has been waived in the national interest (authority delegated to DoS by EO 10206, 16 Fed. Reg. 529 (1951)).

D. **FAA § 506(a)(1&2) (22 U.S.C. § 2318(a)(1&2)) (Emergency Drawdown).** With the limitations discussed above, these drawdowns also may be used to support multilateral peace and humanitarian operations.

E. **FAA § 552(c)(2) (22 U.S.C. § 2348(c)(2)) (PKO Drawdown).** A FAA § 552 drawdown, of up to $25M per year from any federal agency, may be used to support peace operations in "unforeseen emergencies, when deemed important to the national interest."

F. **Detailing of Personnel.** FAA § 627 (22 U.S.C. § 2387) authorizes detailing of officers or employees to foreign governments, when the President determines it furthers the purposes of the FAA. FAA § 628 (22 U.S.C. § 2388) allows similar details to international organizations, to serve on their staff or to provide technical, scientific, or professional advice or services. Per § 630 of the FAA (22 U.S.C. § 2390), detailed individuals may not take an oath of allegiance or accept compensation. 22 U.S.C. § 1451 authorizes the Director of the U.S. Information Agency (USIA) to assign U.S. employees to provide scientific, technical, or professional advice to other countries. This does not authorize details related to the organization, training, operations, development, or combat equipment of a country's armed forces. 10 U.S.C. § 712 authorizes the President to detail members of the armed forces to assist in military matters in any republic in North, Central, or South America. All of this detailing of personnel may be on a reimbursable or a non-reimbursable basis.

G. **FAA § 516 (22 U.S.C. § 2321j) (Excess Defense Articles).** Defense articles no longer needed may be made available to support any country for which receipt of grant aid was authorized in the Congressional Presentations Document (CPD). Priority is still accorded to NATO and southern-flank allies. There is an aggregate ceiling of $425M per year, beginning in FY 96; cost is determined using the depreciated value of the article. No space available transportation is authorized, normally; but DoD may pay packing, crating, handling and transportation costs to PFP eligible nations under the Support to Eastern European Democracy (SEED) Act of 1989. *See* Defense Security Assistance and Improvements Act, § 105, Pub. L. No. 104-164 (1996).

H. **Reimbursable Support.** The primary authority for reimbursable support is FAA § 607 (22 U.S.C. § 2357), which authorizes any federal agency to provide commodities and services to friendly countries and international organizations on an advance of funds or reimbursable basis. Support to the UN and other foreign nations are usually provided under the terms of a "607 Agreement" with the nation or organization, detailing the procedures for obtaining such support. DoS must authorize DoD to negotiate these agreements. FAA § 632, authorizing transfer of funds from DoS and the Economy Act are also means of providing reimbursable DoD support. Finally, Foreign Military Sales (FMS) or Leases, provided under authority of the Arms Export Control Act (AECA) §§ 21-22 & 61-62 (22 U.S.C. §§

2761-62 & 2796), respectively, permit the negotiation of FMS contracts or lease agreements to support countries or international organizations. Reimbursement usually includes administrative overhead under Defense Security Cooperation Agency (DSCA) procedures.

I. **10 U.S.C. §§ 2341-2350 (Acquisition and Cross-Servicing Agreements (ACSAs)).** As noted previously, these statutory provisions allow DoD to acquire logistic support without resort to commercial contracting or FMS procedures and to transfer support outside of the AECA. After consultation with DoS, DoD may execute agreements with NATO countries, NATO subsidiary bodies, other eligible countries, the UN, and international or regional organizations for the reciprocal provision of logistic support, supplies, and services. Acquisition and transfers are on a cash reimbursement, replacement-in-kind, or exchange-of-equal-value basis. Many ACSAs already exist. Check CLAMO website for latest list or consult your MACOM or Combatant Command legal advisors for details.

J. **Restriction on U.S. participation in U.N. Peacekeeping Operations**. The American Servicemembers Protection Act (ASPA), 2002, § 2005, requires that the President certify to Congress that the U.N. Security Council has permanently exempted U.S. forces from the jurisdiction of the International Criminal Court (ICC) or that each of the other Participating States has provided adequate assurances that U.S. personnel would not be subject to the jurisdiction of the ICC, prior to the deployment of U.S. forces on such operations. Article 16 of the Rome Statute of the ICC authorizes the U.N. Security Council acting under Chapter VII of the U.N. Charter to defer any investigation or prosecution by the ICC in a particular case for a twelve-month period. This deferral may be renewed every twelve months. On 12 June 2003, pursuant to a request by the United States, the U.N. Security Council issued UNSCR 1487 exempting personnel of states, such as the U.S., who are not a party to the Rome Statute from jurisdiction of the ICC. As a result, U.S. personnel participating in U.N. Peacekeeping Operations are currently exempted from the ICC's jurisdiction.

XI. COMBATING TERRORISM

A. **Authority to offer and pay rewards to individuals assisting in combating terrorism**. The National Defense Authorization Act of 2003, § 1063, amended Title 10 U.S.C. to add § 127b. This statute provides that the SECDEF may pay a monetary amount, or provide a payment-in-kind, to a person as a reward for providing the U.S. Government with information or nonlethal assistance that is beneficial to: 1) an operation or activity of the armed forces conducted outside the United States against international terrorism; or 2) force protection of the armed forces. The amount of the 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.[336] 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.

XII. FUNDING OPERATIONS IN IRAQ

A. Operations in Iraq are authorized and funded under several different authorities. Unlike other operations that would rely primarily on the statutory provisions outlined throughout the Chapter above, operations in Iraq are unique and are authorized under international law (treaty law, supreme law of the land) that allows for the use of vested and seized properties (discussed below) to fund the reconstruction and humanitarian assistance. Under the Convention (IV) Respecting the Laws and Customs of War on Land and its annex: Regulation concerning the Laws and Customs of War on Land, 1907, [hereinafter Hague Regulations], Article 42, territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised. Thus, the commencement of a military occupation is de facto standard – invasion + firm control. In the current situation depending on which documents one refers to, different dates have been offered as to the commencement of the occupation by coalition forces in Iraq. On 16 April 03, the CENTCOM Commander issued Instructions to the Citizens of Iraq. These clearly spelled out the controls that he was implementing, as the Coalition Force Commander, to include notice of sanction if these controls were violated. In the EO 13315 issued by President Bush on 28 August 03, Section 4(d), defines the "former Iraqi regime" to mean the Saddam Hussein regime that governed

[336] Note: The combatant commander to whom this authority has been delegated may further delegate that authority to this Deputy Commander for a reward in an amount or with a value not to exceed $50,000.

Iraq until on or about 1 May 03. The key is that at some point in time, arguably 16 April 03, the coalition forces representing the Occupying Power and had certain obligations, to wit authority, under the Hague Regulations and the Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War (1949) [hereinafter GCIV].

B. The Hague Regulations, Article 55, and GCIV, Article 53, require that the Occupying Power administer immovable public property of the state and the proceeds or products derived from it. In order to implement this obligation, among others, the President, as Commander-in-Chief, in a White House memorandum, dated 30 April 03, confirmed SECDEF's authority to exercise all powers, consistent with the Law of War, related to the seizure, sale, administration, or use of state- or regime-owned assets, funds, or realizable securities in Iraq. Property seized, sold, or administered under this Presidential delegation of authority are to be used only to assist the Iraqi people and support the reconstruction.

C. On 29 May 03, SECDEF further delegated this authority to the Coalition Provisional Authority (CPA). This memorandum of delegation also addressed vested property authority of which was to pass from the Department of Treasury to the CPA. Vested property are Iraqi assets confiscated by the President under the International Emergency Economic Powers Act (50 U.S.C. § 1601 *et seq.*) within the United States. By 20 May 03, $1.7 billion had been confiscated under this authority and $91.6 million had been delegated to the SECDEF to assist the Iraqi people and assist in the reconstruction. Additionally, on 29 May 03, the SECDEF approved the initial Procedures for Administering, Using and Accounting for Vested and Seized Iraqi Property. Pursuant to these Procedures the Secretary of the Army was given the responsibility, as the Executive Agent, for receiving, transporting, safeguarding, disbursing, and accounting for the vested and seized property. Seized property is defined in the memorandum as state- or regime-owned property in Iraq to be held and administered on behalf of, and for the benefit of, the Iraqi people, to assist the Iraqi people and to support the reconstruction of Iraq.

D. On 16 May 03, the CPA issued Regulation #1[337] detailing his authority. Subsequently, on 10 June 03, the CPA issued Regulation #2 establishing the Development Fund. This Fund is held by the Central Bank of Iraq but administered by the CPA. The Development Fund is comprised of vested and seized property, 95% of proceeds from export sales of petroleum, petroleum products, natural gas from Iraq, and any returned Iraqi assets provided by U.N. member states. The Development Fund is to be used for the humanitarian needs of the Iraqi people; for the economic reconstruction and repair of Iraq's infrastructure; for the continued disarmament of Iraq; for the costs of Iraqi's civil administration and for other purposes the Administrator, the CPA, determines to be for the benefit of the people of Iraq.

E. The operational costs of the U.S. forces to execute the mission in Iraq are covered by several recent appropriations contained in the Emergency Wartime Supplemental Appropriations Act, 2003, to include the Iraq Freedom Fund (replaced the Defense Emergency Response Fund) $15.7 billion (DoD has transfer discretion over $10.4 billion[338]); and $46.9 billion appropriated to specific DoD appropriation accounts such as O&M, Procurement, Military Personnel, Military Construction, and R&D. Additionally, Congress appropriated $489.3 million into a Natural Resources Risk Remediation Account attempting to anticipate the cost of cleaning up contamination from burning Iraqi oil wells. Given the authority and specific appropriations noted above, it is unlikely, at least in the near term, that units will need to resort to HCA or HA authorities and appropriations to fund the cost of the reconstruction and humanitarian assistance in Iraq.

XIII. MILITARY CONSTRUCTION (MILCON) -- A SPECIAL PROBLEM AREA.

A. **Definition.** Military construction, as defined in 10 U.S.C. § 2801 and AR 415-15, includes any construction, development, conversion, or extension carried out with respect to a military installation. The definition of a military installation is very broad and includes foreign real estate under the operational control of the U.S. military. Pursuant to the Emergency Wartime Supplemental Appropriations Act, P.L. 108-11, 2003, this definition has been further expanded to include "any building, structure, or other improvement to real property to be used by the Armed Forces, regardless of whether such use is anticipated to be temporary or of longer duration." Military construction includes all work necessary to produce a complete and usable facility or a complete and usable improvement to an existing facility. *See* The

[337] All of the current CPA Regulations, Orders, and Memoranda are located at http://www.cpa-iraq.org.

[338] Transfer authority allows SECDEF to transfer at his discretion, vice Congress', moneys from the Iraqi Freedom Fund into other specific DoD appropriation accounts. In this case, Congress limited his authority directly to control 2/3 of the pot of money.

Honorable Michael B. Donley, B-234326.15, Dec. 24, 1991 (unpub.) (prohibiting project splitting to avoid statutory thresholds). As defined further in AR 415-15, Glossary, sec. II, Terms, construction includes the following:

1. The erection, installation, or assembly of a new facility;

2. Change to a real property facility, such as addition, expansion, or extension of the facility, which adds to its overall external dimensions;

3. Acquisition of an "existing facility," or work on an existing facility that improves its functions or enables it to fulfill changed requirements. Such work is often called an alteration of the facility and includes installation of equipment made a part of the existing facility;

4. Conversion of the interior or exterior arrangements of a facility so that the facility can be used for a new purpose. This includes installation of equipment made a part of the existing facility;

5. Replacement of a real property facility, which is a complete rebuild of a facility that has been destroyed or damaged beyond economical repair;

6. Relocation of a facility from one installation to another and from one site to another;

7. Costs of installed equipment made part of a new or existing facility, related site preparation, excavation, filling, landscaping, or other land improvements; and

8. Relocatable buildings in some circumstances. *See also* DoDI 4165.56, Relocatable Buildings, (13 Apr. 1988); AR 420-18, Facilities Engineering, Materials, Equipment, and Relocatable Building Management (3 Jan. 1992); AFI 32-1021, Planning and Programming of Facility Construction Projects (12 May 1994); and OPNAVIST 11010.33 B, Procurement, Lease and Use of Relocatable Buildings (14 July 1988).

B. **Maintenance and Repair Are Not Construction.**

1. Maintenance is recurring work to prevent deterioration, *i.e.*, work required to preserve or maintain a facility in such condition so it is usable for its designated purpose. AR 420-10, Management of Installation Directorates of Public Works, Glossary, Sec. II, Terms (15 April 1997).

2. Repair is restoration of a facility, so it may be used for its designated purpose, by overhauling, reprocessing, or replacing parts or materials that have deteriorated by action of the elements or by wear and tear in use, and which have not been corrected through maintenance. When repairing a facility, its components may be repaired by replacement, and the replacement can be up to current standards or codes. *See* DoD Reg. 7000.14-R, vol. 2B ch. 8 para. 080105. The Army requires that a facility or component of a facility be in a "failed or failing" condition to qualify as a repair project. See Memorandum, Assistant Chief of Staff for Installation Management, subject: New Definition of "Repair" (4 Aug. 1997) and AR 415-15, para. 2-3b.

3. When construction and maintenance or repair are performed together as an integrated project, each type of work is funded separately, unless the work is so integrated that separation of construction from maintenance or repair is not possible. In the latter case, fund all work as construction. AR 420-10, Glossary, Sec. II, Terms.

C. **Construction Using O&M Funds.**

1. 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 it is used as a generic O&M fund would be, *i.e.*, to conduct the specified operation.)

a. 10 U.S.C. § 2805(c) authorizes the use of O&M funds for unspecified minor military construction up to $750,000 per project. Thus, as a matter of DoD policy, commanders must use O&M for these undertakings. *See* AR 415-15 (4 Sep. 1998); DA Pam 420-11 (7 Oct 1994). Again, however, an exception to this rule is that commanders must use

MMC funds, not O&M, for all permanent construction during OCONUS CJCS exercises. *See* 10 U.S.C. § 2805(c)(2). 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, 2001, Pub. L. No. 106-246, § 113, 114 Stat. 511 (2000).

b. Only funded costs count against the $750,000 O&M threshold. Funded costs 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.

2. Methodology for analyzing minor construction issues:

a. Define the scope of the project;

b. Classify the work as construction, repair, or maintenance;

c. Determine the funded cost of the project; and

d. Select the proper appropriation.

D. **Construction Using O&M Funds During Combat or Declared Contingency Operations.**

1. Prior to April 2003, per Army policy, use of O&M funds in excess of the $750,000 threshold discussed above is proper when erecting structures/facilities during combat or contingency operations declared per 10 U.S.C. § 101(a)(13)(A). *See*, Memorandum, Deputy General Counsel (Ethics & Fiscal), Office of the General Counsel, Department of the Army, Subject: Construction of Contingency Facility Requirements (22 Feb. 2000). This policy applies only if the construction is intended to meet a temporary operational need that facilitates combat or contingency operations. The rationale for this opinion is that O&M funds are the primary funding source supporting contingency or combat operations; therefore, if a unit is fulfilling legitimate requirements necessitated only by those operations, then O&M appropriations are proper. *See* TJAGSA Practice Notes, *Contract Law Note: Funding Issues in Operational Settings*, ARMY LAW., Oct. 1993, at 38. Whether combat or contingency operation construction is "temporary" depends on the duration and purpose of a facility's use by U.S. forces, not on the materials used in the construction. Coordinate with higher headquarters before relying on the "temporary operational need" justification.

2. On 27 February 2003, DoD issued similar guidance, see Memorandum, Under Secretary of Defense, Department of Defense, Subject: Availability of Operation and Maintenance Appropriations for Construction, (27 Feb. 2003). DoD guidance states that O&M may be obligated and expended for construction if: a) there is a properly documented determination that construction is necessary to meet urgent operational requirement of a temporary nature; b) the construction is not in a location where the U.S. is reasonably expected to have long-term interest or presence; and c) U.S. has no intention to use the construction after the operational requirement has been satisfied and the nature of the construction is the minimum necessary to meet the temporary operational need. Rationale: DoD anticipated that in Iraq there would exist a need for construction to meet such military operational requirements.

3. In April 2003, a Congressional conference report took this guidance to task viewing it as an attempt to turn an alleged practice into de facto law, vitiating and/or amending 10 U.S.C. § 169 requiring notice to Congress of military construction projects and requesting as necessary appropriation. As a result, Congress enacted in the Emergency Wartime Supplemental Appropriation, 2003, (16 April 2003), authority for the DoD to expend up to $150 million of funds from the Act for military construction, not otherwise authorized by law, which is certified necessary to support the war on terrorism or operations in Iraq. Bottomline: this critical comment by Congress that DoD's guidance exceeds it's authority under the law is a cautionary reminder to all JAs that Congress controls the purse and DoD requires affirmative authority to act. In this case, the affirmative authorities are the existing limits proscribed by statute, i.e. don't exceed $750,000 when erecting structures/facilities during combat or contingency operations and request separate MILCON dollars for construction costs that exceed this amount. DoD is currently reviewing how it is conducting construction in Iraq and more guidance should be forthcoming.

E. **The Unspecified Minor MILCON Program.**

1. Normal construction funding rules apply when the aforementioned conditions are not met, including the funding of construction for which the United States would have a follow-on or contingency use after the termination of military operations necessitating the construction. Thus, assuming the funded costs of a construction project exceed $750,000, commanders must seek special funding and approval to proceed. One alternative is to obtain Unspecified Minor Military Construction (UMMC) funds. Under this program, Congress funds minor military construction projects with estimated costs between $750,000 and $1.5M (up to $3 million if the project is intended to correct a deficiency that is life, health, or safety threatening).

2. 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. 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).

a. An Army unit deploys to central Europe at the request of a newly elected democratic government and uses a former Soviet installation as a base. A large multi-story barracks facility is proposed for conversion to an administration facility. The Division Engineer advises the work will include: (a) replacing the roof, the flooring, several interior walls, and the heating system ($1.1 million); (b) repairing numerous other failing components of the building ($450,000); (c) installing new air-conditioning ($150,000); and (d) constructing new walls to accommodate the new configuration ($100,000). The Division Engineer proposes to classify the project work as mostly repair work, with a small amount of new construction. The total funded cost of the project is estimated to be $1.8 million. Because the air-conditioner and new walls will cost only $250,000, the Division Engineer contends that the entire project can be approved locally and funded with O&M. Is the Division Engineer right? <u>No</u>. By definition, a <u>conversion is construction</u>. <u>All</u> work is required for the conversion of this building to an administrative facility, so it must <u>all</u> be funded as construction (use MILCON money because the cost exceeds $1.5 million). If U.S. forces were to continue using the facility as a barracks, then the air-conditioning and new walls could be segregated from the other (repair) efforts, and all work could be funded with O&M money. [Note: Although the repair work may be physically divisible from the conversion, consider the repair costs in this case to be "funded" costs of the conversion project if the repair work would not have been done, but for the need for the conversion.]

b. The road to the same unit's fuel supply point needs immediate repair. The division's OPTEMPO increased substantially in the past few weeks, so the road has been used more and by vehicles heavier than it was designed to handle. Delivery trucks used by the fuel supplier have been breaking up the road. The Division Engineer believes that, in addition to filling potholes, two inches of asphalt must be added to support the increased and heavier traffic. The sustainment contractor estimates costs of $780,000 to fill the holes and add two inches of asphalt. The Division Engineer insists that O&M funds may be used. Is the Engineer correct? <u>Maybe</u>. Filling the potholes is clearly a repair, and this cost does not count against the cost of the construction effort. Resurfacing the road <u>may</u> be a repair if the resurfacing is intended to restore the road to its former capacity, not to improve it for heavier use, and if this is the method normally used to maintain and/or repair roads of this type. To the extent it upgrades the road, however, it may be construction, particularly considering the fact that the exterior dimensions of the road will change (two inches thicker). The cost of this portion of the work may be less than $750,000 (if the potholes cost more than $30,000 to repair), however, so O&M funds may be appropriate for this work even if it is considered construction. As of April 2003, use of O&M funds would not be proper for the entire project if the work was necessary to meet a temporary operational need during combat or declared contingency operations. *See* <u>**Construction Using O&M Funds During Combat or Declared Contingency Operations**</u>, above.

F. **Emergency Construction Authority.**

1. Upon a presidential declaration of national emergency, 10 U.S.C. § 2808 permits the Secretary of Defense to undertake construction projects not otherwise authorized by law that are necessary to support the armed forces. These projects are funded with any unobligated military construction and family housing appropriations. On 14 November

1990, President Bush invoked this authority in support of Operation Desert Shield. *See* Executive Order 12734, Nov. 14, 1990, 55 Fed. Reg. 48099. Other emergency construction authorities available under existing law include the following:

a. **Emergency Construction, 10 U.S.C. § 2803**. **Limitations**: (1) determination that project is vital to national defense; (2) a 21-day congressional notice and wait period; (3) $30 million cap per fiscal year; and (4) funds must 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. Pursuant to the Emergency Wartime Supplemental Appropriations Act, 2003, § 1901 authorizes that SECDEF may transfer not more than $150 million of funds appropriated or otherwise made available to DoD under the Act to the Contingency Construction account authorized under § 2804. Such a transfer requires a seven day waiting period from date of the written notification to Congress certifying the necessity, purpose, and amount of the transfer. Once DoD decides to obligate the funds, Congress requires notification within 15 days.

XIV. Congressional Notification and Human Rights Vetting requirements:

A. **Section 8066 Notification**. DoD Appropriations Act for FY 2003, Pub. L. No. 107-314, § 8066 (2002). 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 (a) peace operations under chapters VI or VII of the UN charter or (b) any other international peacekeeping, peace-enforcement, or humanitarian assistance operation. *See also,* DoD Appropriations Act for FY 96, Pub. L. 104-61 § 8117 (1995). 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. Section 8117 of the DoD Appropriations Act for FY 1996 was originally part of the House DoD Appropriations Bill (H.R. 2126) that was adopted in the first Conference without comment. 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 8080**. DoD Appropriations Act for FY 2003, Pub. L. No. 107-314, § 8080. Mandates that none of the funds made available in the Act may be used to support 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.

XV. CONCLUSION

A. 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 judge advocates for fiscal advice. Active participation by judge advocates 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. Judge advocates must ensure that the military's participation in a Title 22 foreign assistance activity or in a Title 10 military cooperation or humanitarian operation accomplishes the commander's intent and complies with U.S. fiscal law, regulations, and policy.

C. **Necessity For the Judge Advocate 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 so too do other U.S. government agencies, international non-governmental organizations, U.S. Guard and Reserve components. 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, but 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 Anti-deficiency Act, and possible reprimands or criminal sanctions for the responsible commanders and officials.

D. **How the Judge Advocate Can Get It Right—Early Judge Advocate Involvement.**

1. Judge advocates must be part of the planning team from the inception of the concept, through all planning meetings, through execution of the operation or activity. It is too late for the judge advocate 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 judge advocate must understand the statutory, regulatory and policy framework that applies to military operations and activities that benefit foreign nations. More importantly, the judge advocate must ensure that the commander understands what that legal authority is and what limits apply to the legal authority. The judge advocate must then ensure that the commander complies with such authorities.

NOTES

CHAPTER 13

DEPLOYMENT CONTRACTING AND BATTLEFIELD ACQUISITION

REFERENCES

1. Army Federal Acquisition Regulation Manual No. 2 (Contingency Contracting), Nov. 1997.
2. Air Force FAR Supplement, Appendix CC – Contingency Operational Contracting Support Program (COCSP), 1 May 2003.
3. NAVSUP Instruction4230.37A, 9 April 1996.
4. Marine Corps Order (MCO) P4200.15G. Appendix B: Marine Corps Purchasing Procedures Manual.
5. Joint Pub. 1-06, Joint Tactics, Techniques, and Procedures for Financial Management During Joint Operations, 22 December 1999.
6. Joint Pub. 4-0, *Doctrine for Logistics Support of Joint Operations*, 6 April 2000 (Chapter V, Contractors in Theater).
7. Joint Pub. 4-07, Joint Tactics, Techniques, and Procedures for Common-User Logistics During Joint Operations, 11 June 2001.
8. AR 700-137, Logistics Civil Augmentation Program (LOGCAP), 16 Dec. 85.
9. AR 715-9, Army Contractors on the Battlefield, 29 Oct. 99.
10. DA Pam. 715-16, *Contractor Deployment Guide*, 27 Feb. 98.
11. AMC PAM 700-30, *Logistics Civil Augmentation Program* (LOGCAP), 31 Jan 00.
12. AMC LOGCAP Battle Book, 31 Jan 00.
13. FM 4-100.2, Contracting Support on the Battlefield, 15 Apr 99.
14. DA PAM 700-31, *Commander's Handbook for Peacekeeping Operations* (A Logistics Perspective), 1 Jul 94.
15. DA PAM 700-15, Logistics Support of United Nations Peacekeeping Forces, 1 May 86.
16. DA PAM 690-80/NAVSO P-1910/AFM 40-8/MCO P12910.1, Use and Administration of Local Civilians in Foreign Areas During Hostilities, 12 Feb 71.
17. AMC PAM 715-18, AMC Contracts and Contractors Supporting Military Operations, June 2000.
18. AMC LOGCAP Homepage: http://www.amc.army.mil/dcs_logistics/lg-ol/infopage.html.
19. Air Force Contract Augmentation Program (AFCAP) homepage: https://wwwmil.afcesa.af.mil/Directorate/CEX/CEXX/AFCAP/afcap.html.
20. FM 3-100.21, Contractors on the Battlefield, January 2003.
21. USAF Contingency Contracting Web site: http://www.safaq.hq.af.mil/contracting/contingency/

I. INTRODUCTION[339]

Operations DESERT SHIELD/DESERT STORM highlighted the role that contracting plays in military operations. Contracting became an effective force multiplier for deployed forces. Operations DESERT SHIELD/DESERT STORM also revealed that a challenging problem for deployed forces is compliance with contract and fiscal law while conducting military operations in the field. Recent operations in Somalia, Haiti, and Bosnia proved again the value of contracted support to a deployed force. Attorneys participating in future deployments must be prepared to handle contract and fiscal law issues.

The primary reason our forces conduct deployment contracting is because it serves as a force multiplier. It is a means of leveraging our assets and reducing our dependence on CONUS based logistics. In addition to serving as a force

[339] For a complete overview of contracting in an operational setting, see CONTRACT & FISCAL L. DEP'T, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, CONTRACT ATTORNEYS COURSE DESKBOOK, Chapter 30, Contingency and Deployment Contracting. The current version of the deskbook is available on either JAGCNET: http://jagcnet.army.mil/ContractLaw, or on the TJAGLCS homepage: http://www.jagcnet.army.mil/TJAGSA.

multiplier, deployment contracting also provides some collateral benefits. Some collateral benefits of deployment contracting are: (1) contracting with local sources frees-up our limited air and sea lift assets for other higher priority needs; (2) contracting with local contractors reduces the time between identification of needs and the delivery of supplies or performance of services; and (3) contracting with local contractors provides alternative sources for supplies and services.

A. 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.

b. The Law of War—Occupation (may be directly applicable, or followed as a guide when no other laws clearly apply, such as in Somalia during Operation Restore Hope).

c. International Agreements.

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.

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.

B. 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, Panama, Grenada) were not declared "wars."

C. Wartime Contract Law. Congress has authorized the President and his delegees to initiate contracts that facilitate national defense notwithstanding any other provision of law. Pub. L. No. 85-804, *codified at* 50 U.S.C. § 1431-1435; Executive Order 10789 (14 Nov. 1958); FAR Part 50. These powers are extremely broad, but authority to obligate funds in excess of $50,000 may not be delegated lower than the Army Secretariat. Earlier versions of this statute were the basis for the wholesale overhaul of defense acquisition at the beginning of World War II. This may occur again in a future general conflict. Although these are broad powers, Congress still must provide the money to pay for obligations incurred under this authority.

II. PREPARATION FOR DEPLOYMENT CONTRACTING

The Unified Command or MACOM controlling the deployment will set policy and procedure affecting contracting plans. Coordinate with the controlling headquarters and other MACOMs that will have roles in expected deployments. OPLANs will determine when the contracting personnel will deploy. The contracting element generally consists of contracting officers, ordering officers, legal and other support personnel.

A. General Considerations. Recent operations have demonstrated the need to begin planning early for contracting during a deployment. The personnel necessary for effective contracting must be identified and trained. 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. Judge Advocates must also review any existing CONPLANS or OPLANS, paying particular attention to the acquisition and/or contracting appendices. Reserve assets

may provide some contracting support. Coordinate in advance to determine the extent of this support. Prior to deployment, the command should determine who will have the authority to approve requests for contract support. An acquisition review board should be established in any major deployment.[340] In a joint setting, these boards are referred to as Joint Acquisition Review Boards or JARBs.

B. Contracting Officer (KO) / Ordering Officer Support. Commanders should identify KO/ordering officer support requirements. Only contracting officers and their authorized representatives (e.g., ordering officers) may obligate government funds. KOs award, administer, or terminate contracts and make determinations and findings permitted by statute and regulation. FAR 1.602-1.

1. Commanders should ensure that KOs and ordering officers are properly appointed and trained. The Head of Contracting Activity (HCA) or certain officials in the Army Secretariat may appoint KOs. FAR 1.603; AFARS 5101.603-1. An HCA may delegate appointment power to a Principal Assistant Responsible for Contracting (PARC). This is the official who usually exercises authority to hire and fire KOs.

2. The chief of the contracting office may appoint ordering officers. AFARS 5101.602—2-91. There is no specific guidance on appointing ordering officers—common practice is to appoint a commissioned officer, warrant officer, or noncommissioned officer. Ordering officers usually are not part of the contracting element, but are a part of the forward units. Ordering officers make purchases with imprest funds, make over the counter purchases with SF 44s, and issue delivery orders against existing indefinite delivery contracts awarded by KOs. AFARS 5101.603-1-90. Ordering officers may also be government purchase card holders. AFARS 5113.2. KOs and ordering officers are subject to limitations in their appointment letters and procurement statutes and regulations. Contracting authority may be limited by dollar amount, subject matter, purpose, time, etc., or may be unlimited. Typical limitations are restrictions on the types of items that may be purchased and on per purchase dollar amounts.

C. Administrative Needs. Deployable units should assemble contracting support kits. Package and label kits in footlockers or similar containers for easy deployment. Administrative needs forgotten may be difficult to obtain in the area of operations. The kits should contain a 90-day supply of administrative needs and all essential references.

1. References.

a. Statutes: Titles 10, 22, 31, and 41 of U.S. Code.

b. Regulations: FAR, DFARS, AFARS/AFFARS/NAPS, DFAS-IN 37-1, DFAS-IN Manual 37-100- XX (XX= current FY), DoD Reg. 7000.14-R, vol. 5, and command supplements to these regulations. If these are too much to deploy with, take a pocket FAR or the CFR version maintained with your own updating. Take CD-ROM contract references and LEXIS/WESTLAW software, as well as necessary computer and communications equipment. The CLAMO CD-ROM: Deployed Judge Advocate Resource Library, Fourth Edition, contains a complete copy of the FAR, FAR Matrix, and the GAO Redbook.

2. Contract Forms.

a. These are essential. The contracting element should ensure it brings a 90-day supply of: Standard Form (SF) 44s (Purchase Order-Invoice-Voucher), 1449s (Solicitation/Contract/Order for Commercial Items), DD Form 1155s (Purchase Order), SFs 26, 30, 33, and 1442 (solicitation, award, and modification, and construction solicitation forms), DA Form 3953 (Purchase Request and Commitment), and form specifications for common items, such as: Subsistence items; Labor and Services; Fuel; Billeting; Construction Materials; Fans, Heaters, etc.

b. Typing contract documents manually is tedious and time-consuming. Contracting elements should deploy with PD2 software loaded on personal computers for automated production of contract documents. Otherwise, ensure the contracting office obtains the FAR in CD form, together with software necessary to lift FAR provisions from the CD to

[340] 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.

word-processing documents. Translation of contract forms, specifications, and other provisions also should be obtained before deployment if possible.

3. Other Logistical Needs.

a. Bring maps, area phone books, catalogs with pictures, etc., to assist in finding and dealing with potential vendors in the deployment theater. Also bring desks, typewriters, computers, paper, etc., as well as personnel trained to use them. Arrange for translator support for the contracting element (coordinate with Civil Affairs unit in COSCOM or TAACOM; contact embassy if necessary to obtain this support). Deploy with a notebook computer, and include a CD-ROM drive to access FAR, DFARS, and service supplements to the FAR, if these references are available in this format.

D. Finance and Funding Support. Finance specialists are not part of the contracting element and not under its control. A deploying unit should train its personnel to properly account for funds when they must do so without the aid of a finance office. Generally, deploying units will receive a bulk-funded DA Form 3953, Purchase Request and Commitment (PR&C)[341] if requested to support needs while deployed.

1. Consider establishing an imprest fund in advance of deployment notification.[342] FAR 13.4; DFARS 213.4; DoD Reg. 7000.14-R, vol. 5, paras. 020906 to 020907. Imprest fund cashiers should receive training in their duties, liabilities, and the operation of an imprest fund prior to deployment. Installation commanders may establish funds up to $10,000. An imprest fund operates like a petty cash fund; it is replenished as payments are made from it. The fund should include local currency if available before deployment. FAR 25.501 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).

2. Finance personnel or designees (e.g., Paying agents) hold money and will accompany an ordering officer to actually make payment if a vendor will not take a SF 44 or other contract document and invoice the U.S. later. Identify the deploying Paying agents, and ensure they are appointed and trained as necessary.

III. CONTRACTING DURING A DEPLOYMENT

This section discusses various 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. The key to successful contracting operations is the proper training and appointment of contracting personnel. Units should verify that contracting support personnel have received necessary training. If time permits, provide centralized refresher training. Also review warrants and letters of appointment for contracting officers and ordering officers for currency. Ensure that personnel know the limitations on their authority. Review and update contents of contracting support kits. Ensure that references include latest changes.

A. Competition Requirements. The Competition in Contracting Act, 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 for full and open competition by providing all responsible sources an opportunity to compete. No automatic exception is available for contracting operations during deployments.

1. 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) for solicitations issued, and contracts awarded and performed, within the Continental U.S. (CONUS). The 45-day PALT results from a requirement to publish notice of the proposed acquisition 15 days before issuance of the solicitation (thru synopsis of the contract action in the Governmentwide Point of Entry (GPE)), then 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 requirement definition and solicitation preparation; 2) time needed for evaluation of offers and award of the contract; and 3) time needed after

[341] For the Department of the Navy, use the NAVCOMPT Form 2275/2276; for the Air Force, use AF Form 9 (O&M).

[342] 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 Reg. 7000.14-R, vol. 5,ch.2, para. 0208.

contract award for delivery of supplies or performance of services. Exceptions to the usual requirement for full and open competition include:

a. Unusual and compelling urgency; this exception authorizes a contract action without full and open competition. It permits the contracting officer to limit the number of sources solicited to those who are able to meet the requirements in the limited time available. FAR 6.302-2. This exception also authorizes an agency to dispense with publication periods (minimum 45-day PALT) if the government would be seriously injured by this delay. It also allows preparation of written justifications for limiting competition after contract award. FAR 6.302-2(c)(1). DFARS specifically states the unusual and compelling urgency exception is appropriate when supplies, services, or construction is needed at once because of fire, flood, explosion, or other disaster. DFARS 206.302-2.[343]

b. National security is another basis for limiting competition; it may apply if the existence of the operation or the acquisition is classified. 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.

c. Public interest is another exemption to full and open competition, but only the head of the agency can invoke it. FAR 6.302-7. For defense agencies, the determination may only be made by the Secretary of Defense. DFARS 206.302-7.

2. Use of the urgent and compelling, national security, and public interest exceptions requires a "Justification and Approval," (J&A). FAR 6.303. Approval levels for justifications are listed in FAR 6.304:

a. Actions under $500,000: the contracting officer.

b. Actions from $500,000 to $10 million: the competition advocate.

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 Research, Development, and Acquisition (ASA(RDA)).

3. Contract actions awarded and performed outside the United States, its possessions, and Puerto Rico, for which only local sources will be solicited, generally are exempt from compliance with the requirement to synopsis the acquisition in the GPE. These actions therefore may be accomplished with less than the normal minimum 45-day PALT, but they are not exempt from the requirement for competition. *See* FAR 5.202 (a)(12); *see also* FAR 14.202-1(a) (thirty-day bid preparation period only required if requirement is synopsized). Thus, during a deployment, contracts may be awarded with full and open competition within an overseas theater faster than within CONUS, thus avoiding the need for a J&A for other than full and open competition for many procurements executed in rapid fashion. Obtain full and open competition under these circumstances by posting notices on procurement bulletin boards, soliciting potential offerors on an appropriate bidders list, advertising in local newspapers, and telephoning potential sources identified in local telephone directories.

B. **Methods of Acquisition**.

Sealed bidding: award is based only on price and price-related factors, and is made to the lowest, responsive, responsible bidder.

Negotiations (also called "competitive proposals"): award is based on stated evaluation criteria, one of which must be cost, and is made to the responsible offeror whose proposal offers either the lowest cost, technically acceptable solution to the government's requirement, or the technical/cost trade-off, even if it is not lowest in cost. The basis for

[343] The unusual and compelling urgency exception was used by DLA to procure firefighting boots on short notice during the 2000 wildfire season. Although ready to deploy, the 20th Engineer Battalion, 1st Cavalry Division could not execute their mission without appropriate equipment. Due to the severity of the fire season, normal stockpiles of firefighting equipment had been exhausted.

award (low-cost, technically-acceptable or trade-off), and a description of the all factors and major subfactors that the contracting officer will consider in making this determination, must be stated in the solicitation.

Simplified acquisition procedures: simplified acquisition procedures are for the acquisition of supplies, nonpersonal services, and construction in amounts less than the simplified acquisition threshold.

1. Sealed Bidding as a Method of Acquisition.

a. 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); Racal Filter Technologies, Inc., B-240579, Dec. 4, 1990, 70 Comp. Gen. 127, 90-2 CPD ¶ 453.

1) Time permits the solicitation, submission, and evaluation of sealed bids;

2) Award will be made only on the basis of price and price-related factors;

3) It is not necessary to conduct discussions with responding sources about their bids; and

4) There is a reasonable expectation of receiving more than one sealed bid.

b. Use of sealed bidding results in little discretion in the selection of a source. Bids are solicited using Invitations for Bids (IFBs) 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 prevent the government from accepting the offer, because such errors are likely to make the bidder nonresponsive. Only fixed-price type contracts are awarded using these procedures. Sealed bidding procedures seldom are used during active military operations. The fluidity of a military operation generally requires discussions with responding offerors to explain our requirements and/or to assess their understanding of, and capability to meet, U.S. requirements. Accordingly, sealed bidding procedures rarely are used until the situation has stabilized. *See* FAR Part 14.

2. Negotiations (Competitive Proposals) as a Method of Acquisition. 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). Discussions with offerors permit better understanding of needs and capabilities. Negotiations permit the use of any contract type. Negotiations procedures also permit the use of letter contracts and oral solicitations to expedite awards of contracts and more rapidly fulfill requirements. *See* FAR Part 15.

3. Simplified Acquisition Procedures

a. "Simplified acquisition" refers to contractual actions up to $100K in peacetime and during normal military exercises, or up to $200K during a contingency operation as defined by 10 U.S.C. § 101(a)(13), or a humanitarian or peacekeeping operation, for contracts awarded and performed outside the United States as defined by 10 U.S.C. § 2302(8). *See* FAR 2.101; DFARS 213.000. The Department of Defense has invoked this increased threshold during recent contingency operations, including during Operations Desert Storm/Desert Shield in the gulf region, Operation Restore Hope in Somalia, Operation Restore Democracy in Haiti, Operations in the Balkans, Operation Enduring Freedom, and Operation Iraqi Freedom.

b. 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 $2000 and complex requirements. The types of simplified acquisition procedures likely to be used during a deployment are:

1) Purchase Orders. FAR Subpart 13.5; DFARS Subpart 213.5; AFARS Subpart 5113.302.

2) Blanket Purchase Agreements (BPAs). FAR Subpart 13.303; DFARS Subpart 213.303; AFARS Subpart 5113.303.

3) Imprest Fund Purchases. FAR 13.305; DFARS Subpart 213.305; DOD 7000.14-R, vol. 5, ch. 2, paras. 020901 to 200908; AR 37-103.

4) Government Purchase Card Purchases. FAR 13.301; DFARS 213.301; AFARS Subpart 5113.2.

5) Accommodation checks/government purchase card convenience checks. DoD 7000.14-R, vol. 5, ch. 2, para. 0210; see also DFARS 213.270(c)(6) and 213.305-1(3).

6) Commercial Items Acquisitions. 10 U.S.C. § 22304(g)(1)(B); FAR 13.5.

c. *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. 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 two different forms.

1) Dep't of Defense (DD) Form 1155 or SF 1449. This is a multi-purpose form which can be used as a purchase order, blanket purchase agreement, receiving/inspection report, property voucher, or public voucher. It contains some contract clauses, but users must incorporate all other applicable clauses. FAR 13.507; DFARS 213.507. *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 this form.

2) Standard Form (SF) 44. *See* Appendices A & B. 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. Ordering officers, as well as KOs, may use this form. Reserve unit commanders may use the SF 44 for purchases not exceeding $2,500 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. DFARS 213.306, AFARS 5113.306. Conditions for use:

- As limited by appointment letter.

- Away from the contracting activity.

- Goods or services are immediately available.

- One delivery, one payment.

3) Ordering officers may use SF 44s for purchases up to $2,500 for supplies or services, except 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 ($100K normally, or $200K if overseas in the theater where the SECDEF has declared a contingency). *See* DFARS 213.306(a)(1)(B).

d. *Blanket Purchase Agreements (BPAs).* 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. KO negotiates firm-fixed-prices for items covered by the BPA, or attaches to the BPA a catalog with pertinent descriptions/prices.

1) BPAs are prepared and issued on DD Form 1155 or SF 1449 and must contain certain terms/conditions. FAR 13.303-3:

i. Description of agreement.

ii. Extent of obligation.

iii. Pricing.

iv. Purchase limitations.

v. Notice of individuals authorized to purchase under the BPA and dollar limitation by title of position or name.

vi. Delivery ticket requirements.

vii. Invoicing requirements.

2) KOs may authorize ordering officers and other individuals to place calls (orders) under BPAs. DFARS 213.303, AFARS 5113.303-2. Existence of a BPA does not per se justify sole-source acquisitions/procurements. Consider BPAs with multiple sources. If insufficient BPAs exist, solicit additional quotations for some purchases and make awards through separate purchase orders.

e.*Imprest Funds.*[344] 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. See DoD 7000.14-R, vol. 5, ch. 2, para. 0209; DFARS 213.305-1. The maximum amount in a fund at any time is $10,000. 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 ($2500). DFARS 213.305-3.

1) Ordering officers, as well as KOs, may use the imprest fund procedures. Imprest fund cashiers, however, cannot be ordering officers and cannot make purchases using imprest funds.

2) Each purchase using imprest funds must be based upon 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.

f. *Government Credit Card Program.* Authorized government credit card holders, including a KO, may use the cards to purchase goods and services up to $2,500 per purchase, or $25,000 outside the U.S. for commercial items, but not for work to be performed by workers recruited within the U.S. Card holders may also use the cards to place task and delivery orders. FAR 13.301. (DOD has proposed increasing this limit to $200,000. As of 3 April 2001, this limit has not yet been raised.) A KO may use the card as a method of payment for purchases up to the simplified acquisition threshold when used in conjunction with a simplified acquisition method. Funds must be available to cover the purchases. Special training for cardholders is required. AFARS Subpart 5113.270. 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.

g. *Accommodation Checks/Purchase Card Convenience Checks*. Commands involved in a deployment may utilize accommodation checks and/or government purchase card convenience checks in the same manner as they are used during routine operations. Checks should only be used when Electronic Funds Transfer (EFT) or the use of the government purchase card is not possible. See DoD 7000.14-R, vol. 5, ch. 2, para. 0210; see also DFARS 213.270(c)(6) and 213.305-1(3). Government purchase card convenience checks may not be issued for purchases exceeding the mirco purchase threshold of $2,500. See DoD 7000.14-R, vol. 5, ch. 2, para. 021001.E.1.

h. *Commercial Items Acquisitions.* Much of our deployment contracting involves purchases of commercial items. The KO is authorized to use "special simple" commercial procedures to make commercial item acquisitions up to

[344] *See* note 4, *supra*, regarding the phased elimination of imprest funds.

$5,000,000. 10 U.S.C. § 2304(g)(1)(B); FAR Subpart 13.5. Under this procedure the KO may use any simplified acquisition method, subject to any specific dollar limitation applicable to the particular procedure. FAR 13.500.

i. *Simplified Acquisition Competition Requirements.* Competition requirements apply to simplified acquisitions as well as to larger procurements. The standard for simplified acquisitions is to obtain competition "to the maximum extent practicable," which ordinarily means soliciting quotes from sources within the local trade area. FAR 13.104. For new purchases up to $2,500, only one oral quotation is required, if the KO finds the price to be fair and reasonable. FAR 13.202 (a)(2); Northern Virginia Football Officials Assoc., B-231413, Aug. 8, 1988, 88-2 CPD ¶ 120. The KO should distribute such purchases equitably among qualified sources. FAR 13.202; Grimm's Orthopedic Supply & Repair, B-231578, Sept. 19, 1988, 88-2 CPD ¶ 258. If practicable, solicit a quotation from other than the previous supplier before placing a repeat order.

1) For purchases between $2500 and the simplified acquisition threshold ($100K normally, $200K during declared contingencies), obtain oral quotations from a reasonable number of sources. Omni Elevator, B-233450.2, Mar. 7, 1989, 89-1 CPD ¶ 248. Unless the action requires FAR 5.101 synopsis and an exception under FAR 5.202 is inapplicable, consider soliciting at least three sources. 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.

2) Use written solicitations for construction over $2000 or when oral quotations are not feasible. If only one source is solicited, justify the absence of competition in writing.

3) Requirements aggregating more than the simplified acquisition dollar limitations may not be broken down into several purchases to permit the use of simplified acquisition procedures. FAR 13.003(c).

4) Subject to the following exceptions, the KO is not required to publicize contract actions that will not exceed the simplified acquisition threshold:

i. Synopsizing in the CBD is required for contract actions expected to exceed $25,000. FAR 13.105; 5.101. Public posting of the request for quotations for 10 days is required if the order is estimated to be between $10,000 and $25,000, except when ordering perishable subsistence items. 15 U.S.C. § 637(e); 41 U.S.C. § 416; FAR 5.101.

ii. For a CONUS contract action, if the order is estimated to exceed $10,000, and only one source is expected to compete, publish notice of the Request for Quotations (RFQ) in the GPE. 41 U.S.C. § 416. KOs must also publish a synopsis of CONUS sole-source awards in the GPE. 15 U.S.C. § 637(e).

iii. There is no requirement to publish a synopsis of pending contract actions by defense agencies which will be made and performed outside the U.S., its possessions or Puerto Rico, and for which only local sources will be solicited. Many KOs forget the "local sources only" limitation. FAR 5.202(a)(12).

5) In evaluating quotations, if the KO receives a single quotation, the KO must verify price reasonableness (e.g., through obtaining another quote, or by comparison with established catalog prices) only when the requiring activity or the KO suspects or has information to indicate that the price may not be reasonable, or when the government is purchasing an item for which no comparable pricing information is available (e.g., an item that is not the same as, or similar to, other items recently purchased on a competitive basis). If a price variance between multiple quotations reflects a lack of adequate competition, the KO must document how he determined the price to be fair and reasonable. FAR 13.106-3.

6) Occasionally an item can be obtained only from a supplier who quotes a minimum order price or quantity that either unreasonably exceeds stated quantity requirements or results in an unreasonable price for the quantities required. In these instances, the KO should inform the requiring activity of all facts regarding the quotation, and request it to confirm or alter its requirement. The file shall be documented to support the final action taken.

C. 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.

1. 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[345] 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, construction, and other general logistics support. LOGCAP Homepage (Army AMC) is: http://www.amc.army.mil/LOGCAP/.

3. LOGCAP is an expensive contracting tool and should be used as a last resort. Examples of recent LOGCAP funding include: $100 million in Somalia, $122 million in Haiti, and over $2.2 billion in the Balkans. These high costs associated with LOGCAP contract have resulted in closer scrutiny by Congress. In a recent report, the GAO noted that commanders were unaware of the cost ramifications for what they were doing. In Bosnia, the 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 did not realize that the cost of plywood would cost them about $86 per sheet because it only costs $14.06 in the U.S. They thought they were paying only $14.

4. Another contractual vehicle available for deployments is called LOGJAMMS contract (Logistics Joint Administrative Management Support Services). It is a task-order driven multiple award contract. This contract is administered by Forces Command (FORSCOM) and is geared to provide support to FORSCOM, U.S. Army Reserve Command, Third Army, and TRADOC, and others upon request. LOGJAMMS is an alternative to the LOGCAP contract. It provides much the same services as the LOGCAP and other Force Sustainment contracts, but is much broader in scope. The LOGJAMSS homepage is: http://www.forscom.army.mil/aacc/LOGJAMSS/default.htm.

5. Another options 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.afcesa.af.mil/Directorate/CEX/AFCAP/afcap.html.

6. The U.S. Navy's Contingency Construction Capabilities (CONCAP) program is similar to AFCAP. CONCAP is a Navy construction contracting program to provide 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.

7. If LOGCAP or other existing contracts are used, you must take into account the following factors: (1) MACOM/MAJCOM must review the OPLAN to determine which contracts will be used and what, if any advanced procurement is going to take place; (2) recognize that there is a higher degree of risk in contractor performance during deployments; and (3) must account for the safety of contractor personnel.

D. <u>Alternative Methods for Fulfilling Requirements</u>. New and existing contracts are not the only method of 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, other government agencies may fill requirements for deployed forces, either from

[345] Operation Provide Refuge, the housing of Kosovar Refugees at Fort Dix, NJ, May-July 1999, was supported by LOGCAP.

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 are addressed in 10 U.S.C. § 2341-50; DoD Dir. 2010.9; and AR 12-16. 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. The Economy Act (31 U.S.C. § 1535) provides 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. Procedural requirements for Economy Act orders, including obtaining contracting officer approval on such actions, are set forth in FAR Subpart 17.5, DFARS 217.5, and DFAS-IN 37-1. A general officer or SES must approve Economy Act Orders placed outside DoD. *See* DFAS-IN 37-1, para. 12-7f.

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 few 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.

E. <u>Leases of Real Property</u>. The Army is authorized to lease foreign real estate at an annual rent of under $250,000. 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 area teams.

IV. INTERNATIONAL LAW CONSIDERATIONS IN THE ACQUISITION OF SUPPLIES AND SERVICES DURING MILITARY OPERATIONS

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. Chapter 2 provides a summary of the international law principles that govern the acquisition of property while opposing an enemy force or in occupied territory.

A. <u>U.S. Rights and Obligations Under International Law Relating to Battlefield Procurement of Goods.</u>

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 <u>public</u> property found on the battlefield. HR (Hague Conv. Annex Reg.), art. 23, para. (g); HR, art. 53; Field Manual 27-10, Law of Land Warfare, paras. 59, 393-424 (July 1956) (hereinafter FM). 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 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. HR, 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. 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. HR, 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).

B. 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 (PW's) and the local populace as a source of services for military forces. PWs and civilians may not be compelled to perform services of a military character or purpose.

1. *Use of PWs as Source for Services in Time of War.* PWs may be used as a source of labor; however, the work that PWs may perform is very limited. Geneva Conv. for the Protection of PWs (GPW), art. 49; FM 27-10, para. 125-133. PWs may not be used as source of labor for work of a military character or purpose. GPW, art. 49; FM 27-10, para. 126. The regulation governing PW labor is AR 190-8, which requires a legal review (with copy to OTJAG) of proposed PW labor in case of doubt concerning whether the labor is authorized under the law of war. Note that PWs may be used to construct and support (food preparation, e.g.) PW 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. Geneva Conv. Relative to Protection of Civilian Persons in Time of War (GC), art. 51; FM 27-10, para. 418-424. 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 BATTLEFIELD.

The Grenada and Panama operations spawned a large number of irregular or unauthorized procurements and other actions with procedural defects. At the end of active hostilities, 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.

A. Ratification of Contracts Executed by Unauthorized Government Personnel. Only certain officials (chief of a contracting office, Principal Assistant Responsible for Contracting (PARC), Head of Contracting Agency (HCA)) may ratify agreements made by unauthorized persons, which bind the U.S. in contract. FAR 1.602-3. There are dollar limits on the authority to ratify unauthorized commitments:

1. Up to $10,000 - Chief of Contracting Office

2. $10,000 - $100,000 - PARC

3. Over $100,000 – HCA

4. These 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.

B. 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 Part 50.

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).

C. General Accounting Office (GAO) Claims. GAO claims procedures provide another method of settling claims[346] 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, paras. 20-19 & 20-96.

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.

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, contracting personnel also must know basic fiscal law principles (*see* Chapter 12). Unauthorized commitments are easier to avoid than to correct through ratifications. Avoid them by putting

[346] 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.

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

Copy No. 1 (Seller's Invoice)- Give to seller for use as the invoice or as an attachment to his commercial invoice.

Copy No. 2 (Seller's Copy of the Order)- Give to seller for use as a record of the order.

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.

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

C
R

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.

INSTRUCTION TO COMMANDERS

1. You must accomplish your mission and ensure the safety of the lives and equipment entrusted to you. You must also obey the law and respect the lives and property of the local population.

2. During combat operations, international law allows you to seize property if you have valid military necessity. Seizing private or public property for mere convenience is unlawful. You may not leave civilians without adequate food, clothing, shelter, or medical supplies. **COMBAT OPERATIONS DO NOT GIVE YOU LICENSE TO LOOT**. Improper seizure of property may result in personal liability.

3. This Property Control Record is used to document seizure of property on the battlefield by U.S. Armed Forces. It is very important that the form be filled out completely, legibly, and accurately. Property should be described 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.

Seizure Record

Number	Owner's Name	Date .

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.

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

I acknowledge receipt of this document.

J'accuse re'ception du document.

Name_____

Nom:_____

Address_____

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 _____

CHAPTER 14

INTELLIGENCE LAW

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 12333, United States Intelligence Activities

Introduction. Intelligence is information and knowledge about an adversary obtained through observation, investigation, analysis, or understanding. This information is essential to a commander in conducting operations and in accomplishing his mission. Rudimentary in their early origins, intelligence activities have become a sophisticated and essential battlefield operating system. Because intelligence is so important to the commander, operational lawyers must understand Intelligence Law.

Intelligence in General. Intelligence can be either strategic or tactical. Strategic intelligence is that information necessary for the National Command Authority to make policy decisions in the realm of national security. Such intelligence is gathered from numerous collection methodologies such as human intelligence (HUMINT), electronics intelligence (ELINT), signals intelligence (SIGINT), or measures and signature intelligence (MASINT). This intelligence is normally nonperishable and is collected and analyzed for the consumer on a long term basis. Tactical intelligence is that intelligence which a commander uses to ascertain the capabilities of a threat. It is usually of a perishable and temporary nature.

Legal Basis. The statutory and policy authorities for Intelligence Law are listed under References, above, numbers 1 through 5.

The Intelligence Community. The intelligence community is large and has a varied mission. The community is headed by the Director of Central Intelligence (DCI). The DCI is also the head of the Central Intelligence Agency (CIA). He is the President's principal legal advisor in all foreign and domestic intelligence matters.[347] The Department of Defense is supported by the Defense Intelligence Agency (DIA), the National Security Agency (NSA) and the various Service intelligence commands, such as the U.S. Army Intelligence and Security Command and its military intelligence brigades and groups located throughout the world. In consultation with the DCI, the Secretary of Defense, through the Under Secretary of Defense for Intelligence, must implement DCI policies and resource decisions applicable to DoD elements within the National Foreign Intelligence Program, while ensuring that the tactical intelligence activities provide responsive and timely support to operational commanders.[348]

Operational Issues. Aspects of intelligence law exist in all operations. It is imperative that operational lawyers consider them when planning and reviewing both operations in general and intelligence operations in particular. The JOPES format puts the intelligence annex of the OPLAN/CONPLAN at Annex B. (see the chapter on Military Decision Making Process and OPLANS of this Handbook, which includes the JOPES format and each Annex with every appendix listed). Annex B is the starting point for the judge advocate to participate in the intelligence aspects of operational development.

1. **Intelligence collection against U.S. persons**. The restrictions on collection of intelligence against U.S. persons stems from Executive Order 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.

[347] 50 U.S.C. § 403-3.

[348] 50 U.S.C. § 403-5.

a. DoD 5240.1-R is the **sole authority** for DoD intelligence components to collect, retain, and disseminate intelligence concerning U.S. persons. In other words, unless specific authorization to collect, retain, or disseminate information is found in the Regulation, it cannot be done. AR 381-10 restates DoD 5240.1-R and specifies additional requirements and approval authorities.

b. There are two threshold questions which must first 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), by an employee of an intelligence component in the course of his official duties. The second question is whether the information collected is about a "U.S. person." A "U.S. person" is defined as a citizen, permanent resident alien, U.S. corporation, or association substantially composed of any of the above groups. Unless there is evidence to the contrary, a person or organization within the U.S. is presumed to be a U.S. person; outside the U.S. the presumption is that they are not U.S. persons.

c. Once the threshold matters have been met, the analysis then turns to whether the information may be properly **collected**. Procedure 2 of DoD 5240.1-R and AR 381-10 govern this area. In short, the intelligence component must have a mission to collect the information, the information must be contained within one of 13 categories of information presented in the Procedure, and must be collected by the least intrusive means.

d. Once collected, the component should determine whether the information may be **retained** (Procedure 3). In short, if properly collected, it 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 90 days solely for the purpose of determining its proper retainability.

2. **Dissemination** to other agencies is governed by Procedure 4. In general, the other agency must have a reasonable need for the information. However, if disseminating to another DoD intelligence component, that determination need not be made because that component will do its own Procedure 2 and 3 analyses.

3. **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 judge advocate confronting any of these techniques must consult the detailed provisions of DoD 5240.1R.

a. Electronic Surveillance – Procedure 5.

b. Concealed Monitoring – Procedure 6.

c. Physical Searches – Procedure 7.

d. Searches and Examinations of Mail – Procedure 8.

e. Physical Surveillance – Procedure 9.

f. Undisclosed Participation in Organizations – Procedure 10.

4. **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 on behalf of foreign powers, hostile organizations, or international terrorists. Counterintelligence is concerned with identifying and counteracting threats to our national security.

a. Within the United States, the FBI has primary responsibility for conducting counterintelligence and coordinating the counterintelligence efforts of all other U.S. government agencies.[349] Coordination with the FBI will be in accordance with the "Agreement Governing the Conduct of Defense Department Counterintelligence Activities in

[349] EO 12333, ¶ 1.14(a).

Conjunction with the Federal Bureau of Investigation," between the Attorney General and the Secretary of Defense, April 5, 1979, as supplemented by later agreements.

b. Outside the United States, the CIA has primary responsibility for conducting counterintelligence and coordinating the counterintelligence efforts of all other U.S. government agencies.[350] 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).

c. DoD has primary responsibility for conducting military-related counterintelligence world-wide.[351] These activities are typically carried out by Service counterintelligence units. Coordination of effort with the FBI or CIA, in most cases is still required.

5. **Counterintelligence Force Protection Source Operations (CFSO)**. A critical force protection tool available to any deploying commander overseas is CFSO. CFSO focuses on the collecting perishable information on local terrorists, sabotage, subversion, foreign intelligence activities, security organizations, and hostile intentions and activities that may pose a threat to friendly forces. A key aspect of this type of operation is coordination with the Chief of Station of the Country Team through the Combatant Command or Joint Task Force J2.

6. **Cover and Cover Support**. A judge advocate should become familiar with the basics of cover. This is particularly true for judge advocates 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.

7. **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. The following classified regulations compliment unclassified regulations that apply to intelligence operations:

a. (U) Intelligence Contingency Funding, *see* AR 381-141 (C).

b. (U) Intelligence Property Accountability, *see* AR 381-143 (C).

c. (U) Intelligence Procurement, *see* AR 715-30 (C).

d. (U) Annual Intelligence Appropriations Acts.

8. **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 judge advocate may be called upon to advise an intelligence oversight officer of an intelligence unit or may be asked to be an intelligence oversight officer. EO 12333, the Intelligence Oversight Act (50 U.S.C. § 413) and Procedure 15 of DoD 5240.1-R and AR 381.10 provide the proper regulatory guidance regarding intelligence oversight.

[350] EO 12333, ¶ 1.8(c) and (d).

[351] EO 12333, ¶ 1.11(b).

APPENDIX A

REFERENCES

The attached list of references is designed to enable a new practitioner to develop an intelligence law library at their installation.

National

National Security Act of 1947, 50 USC §§ 401-441d

Foreign Intelligence Surveillance Act of 1978, 50 USC §§ 1801-1863

EO 12333, *United States Intelligence Activities*

NSCID 5, *US 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

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/Force Protection (AT/FP) Program*

DODD 3305.2, *DOD General Intelligence Training*

DODD S-3600.1, *Information Operations*

DODD 5105.21, *Defense Intelligence Agency*

DODD 5105.29, *Human Resources Intelligence (HUMINT) Activities*

DODD 5210.50, *Unauthorized Disclosure of Classified Information to the Public*

DODD C-5230.23, *Intelligence Disclosure Policy*

DODD5240.1, *DOD Intelligence Activities*

DODD 5240.1-R, *Procedures Governing the Activities of DOD Intelligence Components that Affect United States Persons*

DODD 5240.2, *DOD Counterintelligence (CI)*

DODD 5240.6, *Counterintelligence Awareness Briefing Program*

DODD 5525.5, *DOD Cooperation with Civilian Law Enforcement Officials*

DODI S-3600.2, *Information Operations Security Classification Guidance*

DODI 5240.4, *Reporting of Counterintelligence and Criminal Violations*

DODI S-5240.9, *Support to DOD Offensive Counterintelligence Operations*

DODI 5240.10, *DOD Counterintelligence Support to Unified and Specified Commands*

DODI C-5240.8, *Security Classification Guide for Information Concerning the DOD Counterintelligence Program*

DIA Regulation 60-4, *Procedures Governing DIA Intelligence Activities that Affect US Persons*

Joint

CJCSI 5902.01, *Oversight of Intelligence Activities*

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 Intelligence Support to Military Operations* and Appendix C thereto

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 3-05.3, *Joint Special Operations Operational Procedures*

Army

AR 381-10, *US Army Intelligence Activities*

AR 381-12, *Subversion and Espionage Directed Against the US Army (SAEDA)*

AR 381-19, *Intelligence Dissemination*

AR 381-20 (NOFORN), *The Army Counterintelligence Activities*

AR 381-172, *Counterintelligence Force Protection Source Operations and Low Level Source Operations*

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*

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*

Air Force

AFI 31-210, *The Air Force Antiterrorism Program*

AFI 31-301, *Air Base Defense*

AFI 31-401, *Managing the Information and Security Program*

AFI 71-101 (VOL I & II), *Criminal Investigations, Counterintelligence, and Protective Service Matters*

AFOSII 71-104VI, *Counterintelligence and Security Services*

AFOSIMAN 71114, *Surveillance Operations*

AFOSIMAN 71-144V4, *Antiterrorism Services*

NOTES

CHAPTER 15

ADMINISTRATIVE LAW

I.	Conscientious Objectors	III.	Reports of Survey
II.	Gifts	IV.	Administrative Investigations

I. CONSCIENTIOUS OBJECTORS

A. References:

1. 50 U.S.C. App. § 456 (j) (2003).

2. DOD Dir. 1300.6, Conscientious Objection (20 Aug 1971, w/C4, 11 Sep. 75).

3. Dept of Army, Reg. 600-43, Conscientious Objection (15 May 98).

4. Marine Corps Order 1306.16E (21 Nov. 86).

5. MILPERSMAN 1306-020 & 1900-020 (22 Aug 02).

6. AFI 36-3204 (15 Jul. 94).

B. Definition and Classifications of Conscientious Objection:

1. Defined: 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-O: 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-O: 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 (but, claims arising out of experiences before entering military service however, 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.

C. 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.

D. Application Procedures:

1. 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. The SPCMCA responsibilities:

a. Appoint Investigating Officer (IO) in the grade of O-3 or higher.

b. Ensures IO conducts proper investigation

5. IO responsibilities. The IO conducts a hearing at which the applicant may appear and present evidence. The IO prepares a written report, and forwards it to the General Court-Martial Convening Authority (GCMCA).

6. GCMCA Responsibilities: Army GCMCAs may approve 1-A-O status. Once approved, the service member is eligible only for deployment to areas where duties normally do not involve handling of weapons. Additionally, Army GCMCA must forward to HQDA any applications for 1-O status and any applications for 1-A-O status upon which he or she recommends disapproval. Approval authorities for other services vary.

E. 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. A soldier who receives individual orders for reassignment or who has departed his unit in compliance with individual reassignment orders may not apply for CO status until he arrives 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, a 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 conscientious objector 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 the soldier's 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 (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.

II. GIFTS

First, determine whether the gift is to the government (DoD/Army) or to an individual.

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 USC §§ 2601 & 2608. For the Army, AR 1-100 implements § 2601 and allows acceptance of gifts to be used for a school, hospital, library, museum, cemetery, or other similar institutions. 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 Mr. Thomas Feazell, (703) 325-4530, Commander, PERSCOM, ATTN: TAPC-PDO-IP, Alexandria, VA, 22332-0474. 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 4001.2G, Acceptance of Gifts.

b. Title 10, Section 2608, is the broadest gift acceptance authority for the Army. It was passed shortly after Operation Desert Shield/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 reappropriated by the 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 nonappropriated fund instrumentalities or Installation Morale, Welfare, and Recreation Fund. AR 215-1, para 7-39, authorizes NAFI fund managers to accept gifts to MWR up to $5,000; local commanders up to $25,000; and MACOM commanders up to $50,000. Gifts over $50,000 must be processed through the Army Community and Family Support Center, Alexandria, Virginia. 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 4001.2G.

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 JAG School's Ethics Deskbook may be found in the SOC Database on JAGCNet as well as the DoD SOCO web site, http://www.defenselink.mil/dodgc/defense_ethics/.) 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 (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. <u>Gifts To Individuals From Foreign Governments</u>

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 Congress authorizes. 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 $285.

b. The rules allow a federal employee to personally accept a gift given from a foreign governmental representative if the gift is worth $285 or less. Each level of the foreign government (separate sovereigns) has a $285 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 Joint Ethics Regulation.** 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 1650.1F, Chapter 7.

c. If the gift is valued at more than $285, then the employee must forward a report through the chain of command to DA PERSCOM (for Army personnel). POC is Mr. Tom Feazell, 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 1650.1F, Chapter 7.) Gifts of more than $285 become government property. The employee can forward the gift with the report to PERSCOM, who 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 the gift worth more than $285, the employee may purchase the gift before it is auctioned off.

d. It is never inappropriate to accept a gift from a foreign government, even one valued at more than $285, 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 as discussed to PERSCOM.

e. There are several other variations of the rule. For multiple gifts given at a presentation ceremony, the employee may accept those gifts whose aggregate value is $285 or less. The gift(s) which in the aggregate exceed the $285 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 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. <u>Gifts To Individuals From An Outside Source</u>

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 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 $20.00 or less per source, per occasion. The cumulative value from any single source may not exceed $50.00 during the year. Other exceptions allow acceptance of gifts: based upon an outside relationship (i.e., family), certain broadly available discounts and awards, free attendance at certain widely-attendant gatherings, gifts of food or entertainment in foreign areas, and others. 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*).

5. <u>Gifts To Individuals From Other Federal Employees</u>

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. There are two exceptions to the general prohibition: gifts on special infrequent occasions (i.e. marriage, PCS, retirement, etc.) and gifts on an occasional basis (birthdays and holidays).

1) Special Infrequent Occasions. Gifts are generally limited to $300.00 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 $10.00 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 (retirement, resignation, transfer outside of the chain of command), gifts may exceed $300 per donating group only if they are appropriate to the occasion, are 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 $300.00.

2) Occasional Basis. This exception includes meals at an employee's home and customary gifts brought to the home (i.e., flowers). Also included are gifts valued at $10.00 or less given on appropriate occasions, such as birthdays, Christmas, etc. No collection of money from other employees is permissible under this exception.

6. <u>Gifts To Individuals - Handling Improper Gifts</u>

a. 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.

III. REPORTS OF SURVEY

<u>References</u>

AR 37-1, Army Accounting and Fund Control, 30 Apr 91.
AR 600-4, Remission of Indebtedness for Enlisted Members, 1 April 1998.

AR 735-5, Policies and Procedures for Property Accountability, 10 June 2002.
DA PAM 735-5, Survey Officer's Guide, 1 March 1997.
Air Force Manual 23-220, Reports of Survey of Air Force Property, 1 July 1996.
Navy Instruction 5500.4G, Reporting of Missing, Lost, Stolen, or Recovered (MLSR) Government Property, 24 June 1993.

B. INTRODUCTION - The Report of Survey, DA Form 4697, has three purposes. It documents circumstances surrounding loss or damage to government property, serves as a voucher for adjusting property records, and documents a charge of financial liability, or provides 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. 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.

C. REPORT OF SURVEY SYSTEM.

1. Alternatives to Reports of Survey that Commanders Should Consider.

a. 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.

b. Cash sales of hand tools and organizational clothing and individual equipment.

c. Unit level commanders may adjust losses of durable hand tools up to $100 per incident, if no negligence or misconduct is involved.

d. Abandonment order may be used in combat, large-scale field exercises simulating combat, military advisor activities, or to meet other military requirements.

e. Recovery of property unlawfully held by civilians is authorized - show proof it is U.S. property and do not breach the peace.

f. AR 15-6 investigations and other collateral investigations can be used as a substitute for the report of survey investigation.

g. If the commander determines that no negligence was involved in the damage to the property, no report of survey is required as long as the approving authority concurs.

2. Initiating a Report of Survey.

a. Active Army commanders will initiate the report of survey within 15 calendar days of discovering the loss or damage.

b. The goal is a thorough investigation.

c. Mandatory requirements for a report of survey or AR 15-6 investigation.

(1) 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 report of survey.

(3) Whenever a sensitive item is lost or destroyed.

(4) 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.

d. In the Active Army, reports of survey will normally be processed within 75 days. Reports of survey in the National Guard will normally be processed within 150 days; in the U.S. Army Reserves, 240 days.

3. Approving Authority.

a. The approving authority is normally the battalion or brigade commander, but it may be any commander, chief of a HQDA staff agency, director of a MACOM staff office, or chief of a separate MACOM activity in the grade of LTC or higher, or a DA Civilian employee in a supervisory position in the grade of GS-14 or above. The approving authority does not have to be a court-martial convening authority.

b. Regardless of who initiates the report of survey, it is processed through the chain of command of the individual responsible for the property at the time of the incident if the individual is subject to AR 735-5.

c. If negligence is clearly established on the report of survey, the approving authority may recommend liability without appointing a surveying officer. The approving authority is then responsible for ensuring that the charges are properly computed and the individual against whom liability is recommended is properly notified and given an opportunity to respond.

4. Appointing Authority.

a. The appointing authority may be a lieutenant colonel or colonel, or U.S. DoD civilian employee in the grade of GS-13 or above (or a major or GS-12 filling a position of a lieutenant colonel or GS-13).

b. The appointing authority appoints report of survey investigating officers. The appointing authority also reviews all reports of survey arising within his or her command or authority.

5. Surveying Officer.

a. The surveying officer will be senior to the person subject to possible financial liability, "except when impractical due to military exigencies."

b. The surveying officer 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 survey officers.

c. Consult AR 600-8-14, Table 8-1, for the grade equivalency between military personnel and civilian employees.

d. The investigation is the surveying officer's primary duty.

e. The surveying officer should get a briefing from a judge advocate.

6. Legal Considerations for Imposing Liability. (AR 735-5, Appendix C)

a. Standard of liability.

(1) Simple negligence - the failure to act as a reasonably prudent person would have acted under similar circumstances.

(a) A reasonably prudent person is an average person, not a perfect person. Consider also:

(i) The person's age, experience, and special qualifications.

(ii) The type of responsibility involved.

(iii) The type and nature of the property. More complex or sensitive property normally requires a greater degree of care.

(b) Examples of simple negligence.

(i) Failure to do required maintenance checks.

(ii) Leaving weapon leaning against a tree while attending to other duties.

(iii) Driving too fast for road or weather conditions.

(iv) Failing to maintain proper hand receipts.

(2) 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.

(a) Reckless, deliberate, or wanton.

(i) These elements can be express or implied.

(ii) Does not include thoughtlessness, inadvertence, or error in judgment.

(b) Foreseeable consequences.

(i) Does not require actual knowledge of actual results.

(ii) Need not foresee the particular loss or damage that occurs, but must foresee that some loss or damage of a general nature may occur.

(c) Examples of gross negligence.

(i) Soldier drives a vehicle at a speed in excess of 40 mph of the posted speed limit. Intentionally tries to make a sharp curve without slowing down.

(ii) Soldier lives in family quarters and has a child who likes to play with matches. Soldier leaves matches out where child can reach them.

(3) Willful misconduct - any intentional or unlawful act.

(a) Willfulness can be express or implied.

(b) Includes violations of law and regulations such as theft and misappropriation of government property.

(c) A violation of law or regulation is not negligence *per se*.

(d) Examples of willful misconduct.

(i) Soldier throws a tear gas grenade into the mess tent to let the cooks know what he thought about breakfast, and, as a result, the tent burns to the ground.

(ii) Soldier steals a self-propelled howitzer, but he does not know how to operate it. Accordingly, his joy ride around post results in damage to several buildings.

(4) 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 it would not have occurred.

(a) The damage arises out of the original act of negligence or misconduct.

(b) A continual flow or occurrence of events from the negligent act or misconduct.

(c) Use common sense.

(d) Examples of proximate cause.

(i) Soldier driving a vehicle fails to stop at a stop sign and strikes another vehicle after failing to look. Proximate cause is the soldier's failure to stop and look.

(ii) Soldier A illegally parks his vehicle in a no parking zone. Soldier B backs into A's vehicle. B did not check for obstructions to the rear of his vehicle. A's misconduct is not the proximate cause of the damage. Instead, B's negligent driving is the proximate cause.

(5) Independent intervening cause - an act that interrupts the original flow of events or consequences of the original negligence. It may include an act of God, criminal misconduct, or negligence.

(6) Joint negligence or misconduct - two or more persons may be held liable for the same loss.

(a) There is no comparative negligence.

(b) The financial loss is apportioned according to AR 735-5, Table 12-4.

b. Loss. There are two types of losses that can result in financial liability.

(1) Actual loss. Physical loss, damage or destruction of the property.

(2) 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.

c. Responsibility for property.

(1) Command responsibility.

(a) The commander has an obligation to insure proper use, care, custody, and safekeeping of government property within his or her command.

(b) Command responsibility is inherent in command and cannot be delegated. It is evidenced by assignment to command at <u>any</u> level.

(2) Direct responsibility.

(a) An obligation of a person to ensure the proper use, care, custody, and safekeeping of all government property for which the person is receipted.

(b) Direct responsibility is closely related to supervisory responsibility, which is discussed below.

(3) 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.

(4) Supervisory responsibility.

(a) 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.

(b) If supervisory responsibility is involved, consider the following additional factors.

(i) The nature and complexity of the activity and how that affected the ability to maintain close supervision.

(ii) The adequacy of supervisory measures used to monitor the activity of subordinates.

(iii) The extent supervisory duties were hampered by other duties or the lack of qualified assistants.

(5) Custodial responsibility.

(a) The obligation of an individual for property in storage awaiting issue or turn-in to exercise reasonable and prudent actions to properly care for and ensure proper custody and safekeeping of the property.

(b) When unable to enforce security, they must report the problem to their immediate supervisor.

7. Determining the Amount of Loss.

a. 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.

b. If other means of valuation are not possible, consider depreciation. Compute the charge according to AR 735-5, Appendix B.

c. Limits on financial liability.

(1) The general rule is that an individual will not be charged more than one month's basic pay.

(a) Charge is based upon the soldier's basic pay at the time of the loss.

(b) For ARNG and USAR personnel, basic pay is the amount they would receive if they were on active duty.

(2) As exceptions to the general rule, there are times when personnel are liable for the full amount of the loss.

(a) Any person is liable for the full loss to the Government (less depreciation) when they lose, damage, or destroy personal arms or equipment.

(b) Any person is liable for the full loss of public funds.

(c) Accountable officers will be held liable for the full amount of the loss.

(d) Any person assigned government quarters is liable for the full amount of the loss to the quarters, furnishings, or equipment as a result of gross negligence or willful misconduct of the responsible individual, his guests, dependents, or pets.

8. Rights of Individual for Whom Financial Liability is Recommended.

a. The report of survey form (DA Form 4697) contains a rights notice; however, to adequately inform an individual of his or her rights, *see* AR 735-5, para 13-40 and Figure 13-11.

b. If financial liability is recommended, the surveying officer must take the following actions.

(1) Give the person an opportunity to examine the report of investigation.

(2) Ensure the person is aware of rights.

(3) Fully consider and attach any statement the individual desires to submit.

(4) Carefully consider any new or added evidence and note that the added evidence has been considered.

(5) Explain the consequences of a finding of gross negligence for a survey involving government quarters, furnishings and equipment.

9. Duties of the Approving Authority.

a. If the survey officer recommends liability, a judge advocate must review the adequacy of the evidence and the propriety of the findings and recommendations before the approving authority takes action.

b. The approving authority is not bound by the surveying officer's or judge advocate's recommendations.

c. If the approving authority decides to assess financial liability contrary to the recommendations of the surveying officer or judge advocate, that decision and its rationale must be in writing.

d. If considering new evidence, the approving authority must notify the individual and provide an opportunity to rebut.

e. The approving authority must ensure that the individual was advised of rights.

f. Initiate collection action by sending documentation to the servicing finance office.

g. The approving authority may request that a charge be prorated beyond 2 months.

10. Involuntary Withholding of Current Pay.

a. Members of the armed forces may have charges involuntarily withheld. 37 U.S.C. §1007.

b. Involuntary withholding for civilian employees. (*See* 5 U.S.C. § 5512, AR 37-1, Chapter 15.)

c. No involuntary withholding for the loss of NATO property (DAJA-AL 1978/2184).

d. No involuntary withholding for the loss of MFO property.

D. RELIEF FROM REPORTS OF SURVEY.

1. Appeals.

a. The appeal authority is the next higher commander above the approving authority (*see* AR 735-5, para. 13-49, for delegation authority).

b. Individual has 30 days to appeal unless he or she shows good cause for an extension.

c. Appeal is submitted to 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) The action must be forwarded to the appeal authority within 15 days.

e. Action by the appeal authority is final.

f. Issues on appeal.

(1) Survey not initiated within 15 calendar days after discovery of the loss as required by AR 735-5. Time limits are for the benefit of the government. This is a factor to consider, but insufficient basis in and of itself to grant the appeal.

(2) Surveying officer was not senior to the person held financially liable as required by AR 735-5. Purpose of the requirement is to prevent a "chilling effect" on the surveying officer. If senior individual is held liable, then the purpose of the regulation has been met. Deny the appeal.

(3) Rights warning not given by the surveying officer. This is an administrative procedure. A failure to warn does not invalidate the survey. This is a factor to consider, but insufficient basis in and of itself to grant the appeal.

(4) Surveying officer does not complete the investigation within 30 days as required by AR 735-5. Some investigations may take longer than others. This is a factor to consider, but insufficient basis in and of itself to grant the appeal.

(5) Survey not processed through the chain of command of the person responsible for the property at the time of the loss as required by AR 735-5. This a purely administrative requirement and harmless error. Deny the appeal.

2. Re-opening Reports of Survey.

a. Not an appeal.

b. Authority to reopen rests with the approval authority.

c. May occur:

(1) As part of an appeal of the assessment of financial liability.

(2) When a response is submitted to the surveying officer from the person charged subsequent to the approving authority having assessed liability.

(3) When a subordinate headquarters recommends reopening based upon new evidence.

(4) When the property is recovered.

(5) When 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 the grievance/arbitration procedures.

E. STAFF JUDGE ADVOCATE'S 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. The same attorney cannot perform both legal reviews.

F. CONCLUSION - Commanders must ensure that the Report of Survey 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 survey officers focus their investigations, and to ensure that individual rights are addressed before imposition of liability.

IV. ADMINISTRATIVE INVESTIGATIONS

References:

DOD:

Accident Investigations. DODI 6055.7, Accident Investigation, Reporting, and Record Keeping, 3 Oct 00.

Safety Investigations. 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, 24 May 2001. Found at: http://www.safetycenter.navy.mil/ashore/downloads/jmou.pdf.

Missing Persons Investigations. DODI 2310.5, Accounting for Missing Persons, 31 Jan 00; DODI 2310.4, Repatriation of Prisoners of War (POW), Hostages, peacetime Government Detainees and Other Missing or Isolated Personnel, 21 Nov 00.

Conscientious Objection. DoDD 1300.6, Conscientious Objection, 20 Aug 1971, w/C4, 11 Sep 75.

Army:

Administrative Investigations. AR 15-6, Procedure for Investigating Officers and Boards of Officers, 11 May 88 w/ch 1, 30 Sep 96.
Safety & Collateral Investigations. AR 385-40, Accident Reporting and Records, 1 Nov 94.
Family Presentations and Collateral Investigations. AR 600-34, Fatal Training/Operational Accident Presentations to the Next of Kin, 2 Jan 03.
Line of Duty. AR 600-8-1, Army Casualty and Memorial Affairs and Line of Duty Investigations, 18 Sep 86 (an expired regulation in temporary use pending replacement).
Missing Persons Act Investigations. AR 600-8-1, Army Casualty Operations/Assistance/Insurance, 20 Oct 94.
Flying Evaluation Boards. AR 600-105, Aviation Service of Rated Army Officers, 15 Dec 94.
Conscientious Objection. AR 600-43, Conscientious Objection, 15 May 1998.
Reports of Survey. AR 735-5, Policies and Procedures for Property Accountability, 10 Jun 02.
Information Security. AR 380-5, Department of the Army Information Security Program, 25 Sep 00.

Air Force:

Accident Investigation Boards. AFI 51-503, Aerospace Accident Investigations, 9 Aug 02.
Safety Investigation Boards. AFI 91-204, Safety Investigations and Reports, 11 Dec 01.
Information Security. AFI 31-401, Information Security Management Program, 1 Nov 01.
Line of Duty. AFI 36-2910, Line of Duty (Misconduct) Investigations, 4 Oct 02.
Reports of Survey. AFMAN 23-220, Reports of Survey for Air Force Property, 1 Jul 96.
Conscientious Objectors. AFI 36-3204, Procedures for Applying as a Conscientious Objector, 15 Jul 94.
The Air Force Commander-Directed Investigation Guide, 1 Apr 01.

Navy/Marine Corps

Safety Accident Investigations. OPNAVINST 3750.6-R, Naval Aviation Safety Program, 1 Mar 01; OPNAVINST 5100.19D, Afloat, Navy Occupational Safety and Health (NAVOSH) Program Manual for Forces Afloat, 30 Aug 01; OPNAVINST 5100.23F, Ashore, Navy Occupational Safety and Health (NAVOSH) Program Mannual, 15 Jul 02.
Marine Corps Ground Mishaps. MCO P5102.1A, Marine Corps Ground Mishap Investigations and Reporting Manual, 29 Dec 00, w/ch 1.
Command Investigations. JAGINST 5800.7C (JAGMAN), para. 0209, 3 Oct 90, w/c 1-3.
Courts and Boards of Inquiry. JAGINST 5800.7C (JAGMAN), para. 0211
Litigation Reports. JAGINST 5800.7C (JAGMAN), para. 0210
Line of duty. JAGINST 5800.7C (JAGMAN), para. 0221
Loss of property. JAGINST 5800.7C (JAGMAN), para. 0250.

1. General

a. 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 the 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.

b. Some of the more likely types of investigations that Army judge advocates may encounter during deployments include accidents investigations, which may require both a Safety Investigation and a Collateral Investigation under AR 385-40 and AR 600-34, Line of Duty Investigations under AR 600-8-1 (the 18 Sep 86 version), Conscientious Objector Investigations under AR 600-43, and Missing Persons Investigations under AR 600-8-1, Chapter 8.

c. 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 Discharge of Airmen). In any event, the ability to initiate a command-directed investigation flows from the commander's inherent authority.

d. 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.

e. 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.

2. Command Investigations, Generally.

a. 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, Criminal Investigation Division, or other appropriate law enforcement authorities conduct the investigation.

b. 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 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," or "CI." The Air Force term is "Command Directed Investigations," or "CDI."

c. 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).

d. 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.

1) Investigation. Conducted by a single investigating officer using informal procedures. An investigation would be appropriate for relatively simple matters. It could also be useful in a serious matter to conduct a preliminary inquiry to be followed by a formal proceeding.

2) 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. Additionally, a single fact-finder will be designated a board when formal procedures are to be used.

3) 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 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 investigating officer reviews all written materials provided by the appointing authority and consults with a servicing staff or command judge advocate to obtain appropriate legal guidance. Some of the most important services a judge advocate can perform include assisting the investigating officer in developing an investigative plan, and providing advice during the conduct of the investigation on what the evidence establishes, what areas might be fruitful to pursue, and the necessity for rights warnings

4) Formal Procedures. These board will meet 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.

e. 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 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.

3. Authority to Appoint an Investigation or Board (AR 15-6, Chapter 2)

a. Formal. After consultation with the servicing judge advocate or legal advisor, the following individuals may appoint a formal board of officers in the Army:

(1) Any general court-martial convening authority (GCMCA) or special court-martial convening authority (SPCMCA), including those who exercise that authority for administrative purposes only;

(2) Any general officer;

(3) Any commander or principal staff officer in the grade of colonel or above at the installation, activity, or unit level;

(4) Any State adjutant general; or

(5) 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.

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 General Court Martial Convening Authority takes charge in case of a "major incident."

b. Informal investigations or boards may be appointed by:

(6) Any officer authorized to appoint a formal board or investigation.

(7) 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.

(8) (In the Army) A principal staff officer or supervisor in the grade of major or above.

c. Selection of members. In the Army, if the appointing authority is a general officer, he may delegate the selection of board members to members of his staff.

d. Limitation. In investigations under AR 15-6, only a GCMCA may appoint an investigation or board for incidents resulting in property damage of $1M 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. Moreover, a copy of any investigation involving a fratricide/friendly fire incident must be forwarded after action by the appointing authority to the next higher Army headquarters.

4. Choosing the Informal AR 15-6 Officer

a. The AR 15-6 investigating officer (IO) must meet Service regulatory requirements, and should also be assigned based on 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 command investigations 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 CI investigators.

b. 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 provides a good opportunity to provide a written investigative guide to the IO. The Army OTJAG 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.

5. Method of Appointment (AR 15-6, para. 2-1b)

a. 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 any special instructions should be detailed.

b. 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.

c. The memorandum also names the parties to 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.

6. Conducting the Informal Investigation

a. 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:

(1) Purpose of the Investigation: Need to carefully consider the guidance of the appointment memorandum on purpose and timeline;

(2) Facts known;

(3) Potential witnesses;

(4) Securing physical and documentary evidence;

(5) Possible criminal implications (including need for Article 31, UCMJ warnings);

(6) Civilian witness considerations (securing non-military witness information, giving appropriate rights to collective bargaining unit members);

(7) Regulations and statutes involved;

(8) Order of witness interviews; and

(9) Chronology.

Continued meetings between the IO and the legal advisor will allow proper adjustments to the investigative plan as the investigation progresses, and allow for proper ongoing coordination with the appointing authority.

7. Findings and Recommendations

The report of investigation contains two final products—the findings and the recommendations.

a. 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 investigating officer.

(10) Navy investigations 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, difficulties encountered, and any other information necessary for a complete understanding of the case.

(11) 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 on whether the allegations were substantiated or not.

b. Findings. A finding is a clear, concise statement of fact readily deduced from evidence in the record. Findings 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 the 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.

c. Recommendations. Recommendations must be consistent with the findings, and must thus be supported by the record of investigations. Air Force CDIs and Navy CIs will not contain recommendations unless specifically requested by the convening authority.

8. Legal Review and Action by the Appointing Authority

a. The completed report of investigation should, as a practical matter, always receive legal review. In fact, AR 15-6 requires legal review of Army investigations where 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 investigation CDIs that are not simply "diagnostic" to ensure compliance with applicable regulations and law. The Navy neither requires nor precludes legal review.

b. An attorney other than the advisor to the IO should conduct the review. In the Army, that review focuses on whether the proceedings complied with legal requirements, what effects any errors would have, whether sufficient evidence supports the findings, and whether the recommendations are consistent with the findings.

c. After reviewing the report of investigation, the appointing authority has three options. First, the appointing authority can approve the report as is. In addition, the appointing authority can return the report for additional investigation, either with the same or with a new IO. Finally, the appointing authority can substitute findings and recommendations. The record must support any substituted findings and recommendations. Unless otherwise provided in other regulations, the appointing authority is not bound by the findings or recommendations. The appointing authority may also consider information outside the report of investigation in making personnel, disciplinary, or other decisions.

APPENDIX

ARMY REGULATION 15-6

INVESTIGATION GUIDE

FOR

INFORMAL INVESTIGATIONS

JANUARY, 1997

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 applicable to formal investigations. Legal advisors responsible for advising investigating officers may also use it. 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. This guide includes the changes implemented by Change 1 to AR 15-6. Many of those changes are significant; consequently, the information in the guide based on the changes is italicized.

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 usually 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 designated.

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.

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 reports of survey and line of duty investigations. If such directives contain guidance that is more specific than that set forth in AR 15-6 or these procedures, 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 contains 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.*

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 $1,000,000, the loss or destruction of an Army aircraft or missile, an injury or illness resulting in, or likely to result in, total disability, or the death of one or more persons.

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 to avoid duplication of effort wherever possible. If available, the results of other investigations may be incorporated into the AR 15-6 investigation and considered by the investigating officer. Additionally, an investigating officer should immediately coordinate with the legal advisor if he or she discovers evidence of serious criminal misconduct.

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. 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 evidence supports the finding of no fault, no loss, or no wrongdoing.

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. Witness statements should be taken on DA Form 2823. 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. Investigating officers do not have the authority to subpoena witnesses, and their authority to interview civilian employees may be subject to certain limitations. Prior to interviewing civilians, the investigating officer should discuss this matter with the local Labor Counselor. Commanders and supervisors, however, have the authority to order military personnel and to direct Federal employees to appear and testify. Civilian witnesses who are not Federal employees may agree to appear, and, if necessary, be issued invitational travel orders. This authority should be used only if the information cannot be otherwise obtained 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. 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.

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, only the individual who would be accused of the crime may assert these rights. 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 Report of Survey, 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.

- When planning who to interview, work from the center of the issue outward. 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 key witnesses to be as complete as possible, avoiding the "backtracking" described above.

- 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 to the inquiry.

- Any information that is relevant should be collected regardless of the source; however, investigating officers should collect the best information available from the most direct source.

- It may be necessary or advisable to interview experts having specialized understanding of the subject matter of the investigation.

- At some point, there will be no more witnesses available with relevant and useful 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:

- 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.

- 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.

- Focus on relevant 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 useful 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 material and relevant to the matter being investigated. Relevancy depends on the circumstances in each case. Compare the following examples:

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.

Example 2: In an investigation of alleged sexual harassment in the unit, information on the commander's leadership style might be relevant.

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.

- 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.

- 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.

- The information must be relevant and material to the matter or matters under investigation.

- 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.

- The result of polygraph examinations may be used only with the subject's permission.

- 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.

- "Off-the-record" statements are not acceptable.

- 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 that, after considering all evidence presented, points to a particular conclusion as being more credible and probable than any other conclusion.

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.

- 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? Who was involved, and to what extent? Exact descriptions and values of any property at issue in the investigation should be provided.

- 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. The documented evidence that will become part of the report must support findings (including findings of no fault, no loss, or no wrongdoing). Exhibits should be numbered in the order they are discussed in the findings.

- 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.

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 in the following order:

- appointing order,

- initial information collected,

- rights warning statements,

- chronology, and

- exhibits (with an index).

3. **LEGAL REVIEW**:

a. AR 15-6 does not require that all informal investigations receive 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:

- whether the investigation complies with requirements in the appointing order and other legal requirements,

- the effects of any errors in the investigation,

- whether the findings (including findings of no fault, no loss, or no wrongdoing) and recommendations are supported by sufficient evidence, and

- 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 the appointing authority appointed an appropriate 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, MFRs of phone conversations, photographs, etc.) being retained and organized?

c. Is routine coordination with the legal advisor being accomplished?

4. **Preparing Findings and Recommendations**.

a. Is the evidence assembled in a logical and coherent fashion?

b. Does the evidence support the findings (including findings of no fault, no loss, or no wrongdoing)? Does each finding cite the exhibits that support it?

c. Are the recommendations supported by the findings? Does each recommendation cite the findings that support it?

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. Did the appointing authority approve the findings and recommendations? If not, have appropriate amendments been made and approved?

CHAPTER 16

INTERNATIONAL AGREEMENTS AND SOFAS

REFERENCES

1. The Case-Zablocki Act, , Pub.L. 92-403, 1 U.S.C. §112b (1995).
2. 22 C.F.R Part 181, Coordination, Reporting, and Publication of International Agreements.
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(1994).
5. DoDD 5525.1, Status of Forces Policies and Information w/ C1 (9 Apr. 1985).
6. DoDD 5525.3, Jurisdiction of Service Courts of Friendly Foreign Forces in the United States, 18 Aug 66.
7. DoDD 5530.3, *International Agreements*, 11 Jun 87 (CH. 1, 18 Feb 91) (to include interim guidance Memos dated 11 July 1996 and 12 September 1997).
8. CJCS INST. 2300.1A, INTERNATIONAL AGREEMENTS (12 Feb. 1999). [SEPARATE COMBATANT COMMANDS MAY HAVE INSTRUCTIONS, e.g., CINCPACINST 5711.6D]
9. AR 27-50/SECNAVINST 5820.4G, Status of Forces Policies, Procedures, and Information, 14 Jan 90.
10. AR 27-51, Jurisdiction of Service Courts of Friendly Foreign Forces in the United States, 15 Dec 75.
11. AR 550-51, International Agreements, 15 Apr 98.
12. AFI 51-701, Negotiating, Concluding, Reporting, and Maintaining International Agreements, 1 Apr 98.
13. AFI 51-703, Foreign Criminal Jurisdiction, 6 May 94.
14. AFI 51-705, Jurisdiction of Service Courts of Friendly Foreign Forces in the United States, 31 Mar 94.
15. SECNAVINST 5710.21, Jurisdiction of Service Courts of Friendly Foreign Forces in the United States, 13 Apr 67.
16. SECNAVINST 5710.25A, *International Agreements*, 2 Feb 95.
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, THE AIR FORCE LAW REVIEW, (1994).
21. SUPERVIELLE, THE LEGAL STATUS OF FOREIGN MILITARY PERSONNEL IN THE UNITED STATES, THE ARMY LAWYER, (MAY 1994).
22. CLAMO: Selected After-Action Reports: Legal Operations in Grenada, Panama, Kuwait, Somalia, Haiti and Bosnia.

I. INTRODUCTION

This chapter does not attempt to discuss specific international agreements that may affect military operations. They are too numerous, and too many are classified. Instead, this discussion focuses the role of the judge advocate in this area. The operational judge advocate may be faced with the following tasks relating to international agreements and SOFAs:

Determining the existence of an agreement.

Negotiating an agreement.

Implementing/ensuring compliance with the agreement.

II. DETERMINING THE EXISTENCE OF AN AGREEMENT

1. 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 judge advocate supporting a unit that is deploying often has to conduct an extensive search to determine whether an agreement exists, and then must try to find the text of the agreement. The following sources may help.

2. The U.S. Department of State is the repository for all international agreements to which the United States is a party (1 U.S.C. § 112a). The Department publishes annually a document entitled *Treaties in Force* (TIF), containing 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 web site of the Office of the Legal Advisor, Treaty Affairs, http://www.state.gov/www/global/legal_affairs/tifindex.html. It is available in printed form from the Government Printing Office (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 the appropriate citation.[352] TIF does not include the text of the agreement; the practitioner must find it based on the citation. Many agreements in TIF have no citations, because they have not yet been published in one of the treaty series (which are often years behind), or are cited as "NP," indicating that they will not be published. Classified agreements are not included in TIAS. So, although TIF is a good place to start, it is not the total solution.

3. There are a number of sources to turn to next. Sticking with the State Department, it may be useful to contact the Country Desk responsible for the country to which you are deploying. A complete list of phone numbers for each Country Desk can be found at http://www.state.gov/www/regions/country_offices.html. As these desks are located in Washington, they should be 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.state.gov/www/about_state/contacts/key_officers99/index.html. Either the Country Desk or the Military Group should have the most current information about any agreements with "their" country.

4. Within DoD, the judge advocate has a number of options. First, start with your operational chain of command, ending with the Combatant Commander's legal staff. Some combatant commands list the agreements with countries within their area of responsibility on their web sites, though it is more likely that they will do so on their classified (SIPRNET) site. The next option could be the Service international and operational law divisions: Army (DAJA-IO) (703) 588-0143, DSN 225; Air Force (JAI) (703) 695-9631, DSN 225; Navy/Marine Corps (Code 10) (703) 697-9161, DSN 225.

5. The Center for Law and Military Operations (CLAMO) maintains a list of Status of Forces Agreements (SOFAs), with text, at http://www.jagcnet.army.mil. Other agreements may be found elsewhere on the Internet, for example, at the United Nations site (http://un.org) or the NATO site (http://www.nato.int).

III. NEOGTIATING AN INTERNATIONAL AGREEMENT

Although a judge advocate may be involved in the negotiation of an international agreement, it is unlikely that he will be doing so without State Department representation or in such an austere environment that this handbook will be the only reference available. Accordingly, this discussion will be rather summary. However, this section is still very important for the following reasons:

- It is important to know what constitutes an international agreement so that you avoid inadvertently entering into one. This applies not only to the judge advocate, but to the commander and staff as well.

[352] The citation may be to United States Treaties (U.S.T.) series; Treaties and Other International Agreements (TIAS) series; and/or United Nations Treaty Series (U.N.T.S.).

- 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.

There are two significant concepts related to negotiating and concluding international agreements: approval and coordination.

A. Approval.

1. Elements. The elements of an international agreement are (1) an agreement (2) between governments (or agencies, instrumentalities or political subdivisions thereof) or international organizations (3) signifying an 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. Similarly, the actual status or position of the signer is not as important as the representation that he speaks for his government. The judge advocate should be suspicious of any document that begins, "The Parties agree . . ." unless appropriate delegation of authority to negotiate and conclude has been granted.

2. 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* or *aide memoire*. Forms that usually are not regarded as international agreements include contracts made under the FAR, credit arrangements, standardization agreements (STANAGs), 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. The point is that form is not as important as substance.

3. Authority.

a. General. An international agreement binds the United States 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.

b. Military. Military units, under their own authority, have no such power; accordingly, any power it has is derivative of the President's executive power or of a Congressionally created law. In other words, there must be a specific grant of authority to enter into an international agreement.

1) Most agreements with which judge advocates will be interested are implementing powers possessed by the Secretary of Defense. 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 Secretary of Defense. 10 U.S.C. § 2342, Cross-servicing Agreements, is more direct, providing "… the Secretary of Defense may enter into an agreement …" to provide logistical support, etc.

2) 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.

3) In CJCSI 2300.01A, CJCS has delegated much of his authority in this area to the combatant commanders. Redelegation 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.

4) 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 portion of DoDD 5530.3 addressing the subject is as follows:

> 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, coproduction 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.
>
> This list in subparagraphs 8.4.1.1. through 8.4.1.4., above, is not inclusive of all types of agreements having policy significance.

5) 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.

6) 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 judge advocate 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.

B. Coordination. In addition to the approval requirements summarized above, Congress has created another level of review in 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." 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 (which may be found at http://foia.state.gov/Famdir/fam/11fam/11fam.html), 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 the State Department 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.

1. Negotiation. Once the proposed agreement has been approved and coordinated, the actual negotiation with the 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.

2. Reporting Requirements. Once concluded, there remain procedural requirements. Chief among these is the requirement to send a certified copy of the agreement to the Department of State within 20 days. DoDD 5530.3 requires that another two copies be forwarded to the DoD General Counsel and copies will also 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 2300.01A requires 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 10 days.).

IV. IMPLEMENTING/ENSURING COMPLIANCE WITH THE AGREEMENT

Like any other "law," international agreements to which the United States is a party must be followed. The judge advocate will be a principle player in this effort. Some of the areas, such as foreign criminal jurisdiction, will fall within the judge advocate's ambit in any case. Others, such as logistics agreements, will be handled by experts in other staff sections, with judge advocate support. In areas in which we have been exercising an agreement for a long time, such as the NATO Acquisition and Cross-Servicing Agreement (ACSA), the subject-matter experts, such as the logisticians, will require little legal support. Infrequently used or newly concluded agreements may require substantial judge advocate involvement.

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 judge advocate, status of forces agreements are probably the most important, followed by logistics support agreements.

A. Status of Forces Agreements

Historically there was little formal international law governing 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 Status of Forces Agreements (SOFAs) were deemed necessary to address the myriad of legal issues that would arise and to clarify the legal relationships between the countries. The SOFAs came to be quite varied in format and length ranging from the complex NATO SOFA with additional country supplements sometimes applicable to very limited one page Diplomatic Notes. Topics addressed in SOFAs may cover a large variety of issues such as the following.

1. Status/Foreign Criminal Jurisdiction (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 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.

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.

a. Types of Criminal Jurisdiction Arrangements. Beyond the possibilities of 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), a Visiting Forces Act and deploying without an applicable SOFA.

1) NATO SOFA: Article VII of the NATO SOFA provides a scheme of shared jurisdiction among 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 will assume a U.S. soldier 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 U.S..

(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, traffic offenses violate German law, but not U.S. law, so Germany has exclusive jurisdiction over the offense.

(c) Concurrent Jurisdiction. For all conduct that constitutes an offense under the laws of both the Receiving and Sending State, there is concurrent jurisdiction, with primary jurisdiction being assigned to one of the parties:

1. 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 U.S. because the victim is of the Sending State. Second are acts or omissions committed in the performance of official duty. For example, a soldier, driving to another post for a meeting that hits and kills a pedestrian could be charged with some sort of homicide by both the U.S. and Germany, but because it was committed while in the performance of official duty, primary jurisdiction rests with the U.S.

2. 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 so. 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. court-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 that 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 U.S. 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 U.S. does not have an agreement with a host nation, some nations still extend protections to visiting forces in domestic statutes commonly called a Visiting Forces Act. The Commonwealth nations are those nations most likely to have a Visiting Forces Act (i.e. Jamaica, 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 judge advocate 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 law. While it is generally U.S. policy to avoid these situations, there are some situations where a political decision is made to send U.S. forces into a country without any jurisdictional protections. 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 cases, if U.S. military personnel are subjected to foreign criminal jurisdiction, 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 will typically 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 ICC. After the entry into force of the Rome Statute of the International Criminal Court in July 2002, the U.S. has begun negotiating Article 98 Agreements with other nations. These agreements are so named after article 98 of the ICC Statute, which states:

> 1. 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.
>
> 2. 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.[353]
>
> Article 98 agreements are being negotiated in order to protect U.S. service members and other U.S. nationals from being handed over to the ICC by another nation. In addition to Article 98 Agreements, an applicable SOFA in which the U.S. 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 U.S. 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 Judge Advocates should check with their technical chain regarding the existence of any applicable Article 98 Agreements and the impact of existing SOFAs on potential ICC jurisdictional issues.

2. Claims and Civil Liability. Claims for damages almost always follow deployments of U.S. forces. Absent agreement to the contrary (or a combat claims exclusion), the U.S. is normally 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 duty 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

[353] Rome Charter for the International Criminal Court, 17 July 1998, available at http://www.icc-cpi.int/docs/basicdocs/rome_statute(e).html.

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,[354] 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 U.S. under the FCA.

3. 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 responsibility for the safety (*i.e.,* self-defense) of his unit. As part of the predeployment preparation, the judge advocate 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 U.S. to be responsible for security internal to the areas and facilities it uses. It may also be desirable to provide for the U.S. to have 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 United States armed forces shall be authorized to take such measures in the vicinity of the 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.

4. Entry/Exit Requirements. Passports and visas are the normal procedures 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 unacceptably slow. Even in peacetime, the time it takes to process visa requests impacts significantly 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 other expedited procedures.

5. Customs and Taxes. While U.S. Forces clearly should pay for goods and services requested and received, sovereigns do not generally tax other sovereigns. As a result, U.S. forces will normally be exempted from the payment of host nation customs, duties and taxes on goods and services imported into or acquired in the territory of the receiving state for official use. Likewise, the personal items of deploying soldiers will also likely be exempt from any customs or duties.

6. 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, provision should always be made to exempt goods and services brought into 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.

7. Vehicle Registration/Insurance/Drivers' Licenses. The Receiving State may attempt to require that 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.

The U.S. Government is "self-insured." That is, the USG bears the financial burden of risks of claims for damages, and the Foreign Claims Act provides specific authority for the payment of claims. As a result, negotiation of any agreement should emphasize that official vehicles need not be insured.

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 POVs to be registered with receiving state authorities upon payment of only nominal fees to cover the actual costs of administration.

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,

[354] 10 U.S.C. § 2734. Keep in mind that the payment of claims under the Foreign Claims Act is based not on legal liability, but on the maintenance of good foreign relations.

in the alternative, issue licenses on the basis of possession of a valid stateside license without requiring additional examination.

8. 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.

B. Logistics Agreements

1. Pre-positioning of Material. If U.S. equipment or material is to be pre-positioned in a foreign country, an international agreement should contain the following provisions:

-- Host nation permission for the U.S. to store stocks there.

-- Unimpeded U.S. access to those stocks.

-- Right of removal, without restriction on subsequent use.

-- Adequate security for the stocks.

-- Host nation must promise not to convert the stocks to its own use, nor to allow any third party to do so. (Legal title remains vested in the U.S.).

-- Appropriate privileges and immunities (status) for U.S. personnel associated with storage, maintenance or removal of the stocks.

In some cases, the DoD General Counsel has allowed some leeway in negotiating pre-positioning agreements, provided host government permission for U.S. storage in its territory and unequivocal acknowledgment of 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 stock is 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 prepositioned stock's 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.

2. 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.

3. Acquisitions and Cross-Servicing Agreements (ACSA). Subchapter 138 of Title 10, U.S.C., also provides authority for government-to-government acquisitions and for cross-servicing agreements for mutual logistics support. Under 10 U.S.C. § 2342, U.S. Forces and those of an eligible country[355] may 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

[355] 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.

value; or cash. In addition, ACSA allows the deletion of several common contractual paragraphs required by the FAR but frequently objectionable to other sovereigns.[356] There are limits on the on the total amount of liabilities the U.S. 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.[357] 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.

4. 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.

C. The U.S. as a Receiving State.

In the past, the focus of the Status of Forces was on U.S. service members 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 U.S.[358] The status of these foreign armed forces personnel depends on what nation's soldiers are conducting training in the U.S. Almost all status of forces agreements entered into by the U.S. have been non-reciprocal in nature. For example, the Korean SOFA only applies to U.S. armed forces in the Republic of Korea. Therefore, if ROK soldiers are present in the U.S., then exclusive jurisdiction would rest with the U.S. On the other hand, if the U.S. may have entered into a Status of Forces Agreement that is reciprocal. The NATO SOFA and the PFP SOFA are such agreements. With nations party to the NATO SOFA and Partnership for Peace SOFA, the jurisdictional methodology is same as when the U.S. is sending forces, only the roles are reversed.

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 (i.e., 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 serviceman 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 judge advocate 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 U.S. 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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[356] *See* 10 U.S.C. § 2343.

[357] *See* 10 U.S.C. § 2347.

[358] For example, at Holliman Air Force Base, there is a German Tornado Fighter Squadron permanently assigned there with talk of adding an additional squadron. Fort Bliss, Texas is home to a substantial German Air Defense training detachment.

CHAPTER 17

LEGAL ASSISTANCE

REFERENCES

1. AR 27-3, Legal Services: The Army Legal Assistance Program, 10 September 1995.
2. AFI 51-504, Legal Assistance, Notary, and Preventive Law Programs, 1 May 1996.
3. JAGINST 5801.2, Navy-Marine Corps Legal Assistance Program, 11 April 1997.

INTRODUCTION.

Winning in wartime depends in large part on the efficiency of each soldier in combat. A soldier's combat efficiency can be affected by legal problems left behind at deployment. One objective of the Army Legal Assistance Program is to enhance combat efficiency by assisting the soldier with their legal issues. The Deployment Guide, JA 272, outlines a program that enables judge advocates to tailor their legal assistance program to meet the needs of soldiers and their families both before and during deployments.

Given the nature of legal assistance, this chapter cannot summarize all laws and identify all resources. However, it does provide material that will help a Legal Assistance Office (LAO) prepare for pre-deployment and deployment operations. Refer to AR 27-3, Legal Services: The Army Legal Assistance Program (10 Sep 95), JAGCNET, and JA 272, Deployment Guide, for policy guidance, sample SOPs, and letters.

THE LEGAL ASSISTANCE MISSION.

From an operational standpoint, the legal assistance mission must ensure that the soldiers' personal legal affairs are in order prior to deployment, and then, in the deployment location, to meet the soldiers' legal assistance needs as quickly and efficiently as possible. Accomplishing this mission is one of the judge advocate's most important functions. Personal legal difficulties may not only reduce combat efficiency, but can also result in problems requiring disciplinary action.

Given this situation, performing legal assistance functions during peacetime exercises is crucial, as the legal problems soldiers encounter on exercises are often the same as those which arise during combat. Prior to deployment, both the soldier and the soldier's family must be prepared for the deployment. For the soldier, this preparation is an ongoing effort that should begin upon his arrival at the unit and end only upon transfer. The SJA office must make an aggressive and continuous effort to ensure soldiers' legal affairs are reviewed and updated.

I. SOLDIER READINESS PROGRAM (PREPARATION FOR EXERCISES, DEPLOYMENT, AND MOBILIZATION).

A. **Prior Planning Prevents Poor Performance!** SJA offices must ensure that their LAO has an SRP & Mobilization SOP, that the LAO coordinates the SOP fully with other staff elements in advance, and that all parts of the SJA Office are trained and ready to support SRP processing when needed.

B. Introduction.

1. The Army Legal Assistance Program (ALAP), AR 27-3, provides a number of client and preventive law services. No distinction is made between the type of legal assistance service provided to a client seeking help with a personal legal problem and service to a deploying soldier.

2. Legal Assistance is provided by Active Army (AA) and Reserve Component (RC) judge advocates and civilian attorneys in a variety of settings, to include:

a. During combat readiness exercises such as an emergency deployment readiness exercise (EDRE), ARNG readiness for mobilization exercise (REMOBE), or mobilization deployment readiness exercise (MODRE);

b. During a RC Premobilization Legal Preparation (PLP);

c. During Soldier Readiness Program (SRP) processing; and

d. During a demobilization briefing.

C. A soldier readiness program (peacetime) is established by and operated under AR 600-8-101, Personnel Processing (In- and Out- and Mobilization Processing) and Change 2, eff. 1 April 1997.

1. DA Form 5123-1-R (Personnel In-processing Record) is used to determine the readiness status of the soldier (AR 600-8-101, page 43).

2. The Soldier Readiness Processing Team (SRPT) from the installation and community staff agencies:

a. Accomplishes the "unit and individual annual" and "30 days prior to actual deployment" soldier readiness checks, under general leadership of the G1/AG (Chief, Military Personnel Division); and

b. Includes a representative from the legal office (as well as personnel, medical, dental, provost marshal, finance, security, logistics, and operations).

3. Reserve Component Regional Support Command and State Area Command (National Guard) Judge Advocates will plan and execute Premobilization Legal Preparation (PLP) for units under their command, utilizing organic legal assets, LSO and MSO attorneys. Such PLP will be conducted based on the tiered readiness level of command units, as well as any potential activation of particular units for peacekeeping duties.

4. There are five (5) levels of requirements to prepare soldiers for basic movement through deployment and wartime movement (AR 600-8-101, Chapter 4). Each level requires different legal preparation.

a. Level 1 - Basic movement soldier readiness processing requirements. No specific legal review requirements; however, SGLI forms will be reviewed or revised, and soldiers requiring them will have satisfactory Family Care Plans (DA Form 5304-R) on file; otherwise, they are non-deployable (AR 600-20, para 5-5k(3)).

b. Level 2 - Wartime movement stopper soldier readiness processing requirements. Prior to deployment, soldiers must have received a Geneva Conventions briefing some time in their current enlistment/career. (see Chapter 2 for an example of LOW training)

Note: At Levels 1 and 2, signature of the person in charge of the individual SRPT station is required, signifying all requirements are met, before the soldier is cleared for movement.

c. Level 3 - Other soldier readiness processing requirements.

(1) Each soldier pending civil felony charges will be provided assistance and may not move as a result of these charges.

(2) Time and resources permitting, wills and powers of attorney will be provided to each soldier.

(3) Soldiers will be counseled on insurance and other civil matters.

d. Level 4 - Deployment area/mission unique soldier readiness processing requirements. Each soldier will be briefed on the applicable local laws.

e. Level 5 - Peacetime PCS/transition soldier readiness processing requirements. Assistance will be provided soldiers pending civil and military charges, which may result in the soldier not complying with PCS orders.

D. Unit and individual movement (peacetime).

1. Unit movement policy.

a. Contingency operations.

(1) Prior to actual soldier or unit movement in support of combat or contingency operations, commanders will physically review on-site, within 30 days of departure, processing requirements in Levels 1 through 4. Levels 1 and 2 are mandatory compliance levels while 3 and 4 may be waived by a general officer in command (AR 600-8-101, para 5-2*a*).

(2) The Soldier Readiness Processing Team (SRPT) will assist commanders.

b. Administrative movement.

(1) Prior to actual movement during peacetime, commanders will review processing requirements at Level 1.

(2) SRPT will assist commanders.

2. Conducting unit movement soldier readiness check:

a. Chief, SRPT coordinates with Bn S1 on schedule, location and roster of personnel to be checked.

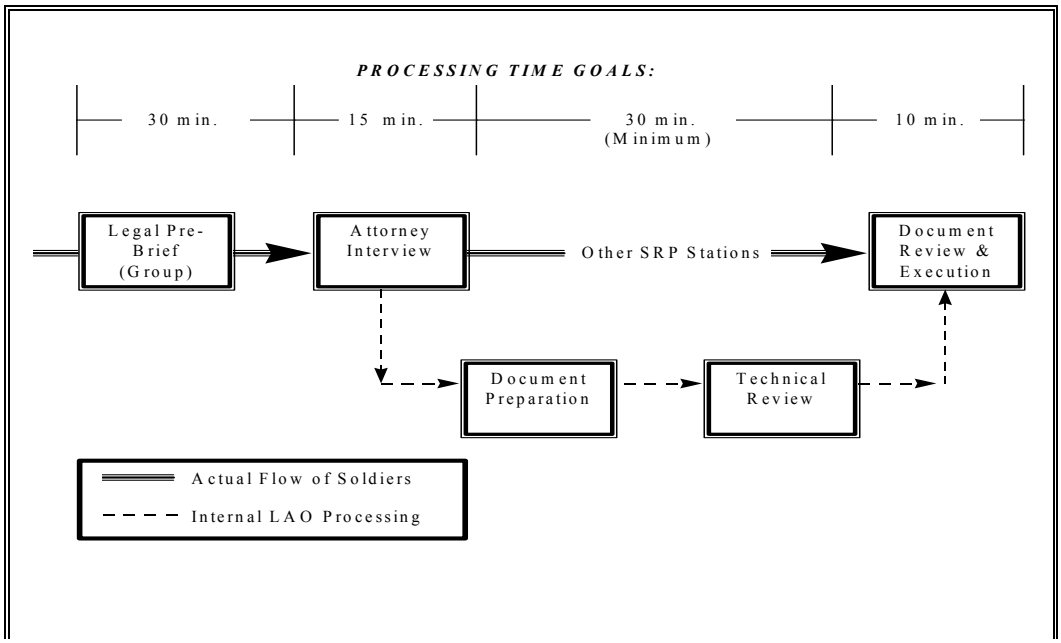
b. Chief, SRPT provides list of non-deployable and reason(s) for this status to Bn S1 for corrective action, with copy furnished to G1/AG and G3 operations.

c. AR 600-8-101, Table 5-1, provides steps and work centers for unit movement soldier readiness checks.

STEPS	WORK CENTER	REQUIRED ACTION
1	BN S1	Issue soldier DA Form 5123-1-R
2	SOLDIER	Process at personnel station
3	SOLDIER	Process at medical station
4	SOLDIER	Process at dental station
5	SOLDIER	Process at finance station
6	SOLDIER	Process at legal station
7	SOLDIER	Process at security clearance station
8	SOLDIER	Process at Bn S3
9	SOLDIER	Return completed DD Form 5123-1-R to Bn S1
10	BN S1	Verify completeness of forms
11	BN S1	Inform unit commander and Bn S3 of unit processing status and specific deficiencies by soldier
12	BN S1	File form for future reference

TABLE 1: UNIT MOVEMENT SOLDIER READINESS CHECKS
(Reproduced from Table 5-1, AR 600-8-101)

The next chart details a suggested SRP site layout and a suggested flow of processing within the SJA sections. These proposed layouts allow judge advocate assets to prepare legal documents while soldiers process through other SRP stations. This reduces soldier waiting time for legal products and is more efficient. The model also allows attorneys to counsel soldiers regarding documents they will see at the personnel station, like SGLI elections and Family Care Plans.



II. THE RESERVES.

A. Mobilization Processing Program.

- Involves home station and mobilization station processing requirements to integrate individuals and units into the active force administratively.
- Involves expansion of the peacetime in- and out-processing (IOPR) activity as a sub-work unit of the installation mobilization and deployment center (MADC).
- Involves installation task force operations, if partial or higher state of mobilization has been declared.

1. Mobilization is the process by which the Armed Forces or a part thereof are expanded and brought to a state of readiness for war or other national emergency.

   a. Includes calling all or part of the Reserve Components to active duty and assembling and organizing personnel supplies and material.

   b. The call of Reserve Component units to active duty may include a number of different types of mobilization that effect the length of their active duty and their potential legal assistance problems. See the chapter on The Reserves and Mobilization for more details.

2. There are 5 phases of federalizing/mobilizing RC units:

   a. Phase I - Preparatory. Concerns RC units at home station during peacetime. The units plan, train, and prepare to accomplish assigned mobilization missions.

   b. Phase II - Alert. Begins when RC units receive notice of pending order to active duty and ends when units enter active Federal service.

   c. Phase III - Mobilization at Home Station (HS). Begins units' entry onto active Federal duty and ends when units depart for their mobilization stations (MS) or ports of embarkation (POE).

   d. Phase IV - Movement to Mobilization Stations. Begins with units departing from HS, by most expeditious and practical means available, and ends when units arrive at MS or POE.

   e. Phase V - Operational Readiness Improvement. Begins when units arrive at their MS and ends when they are declared operationally ready for deployment.

   f. Many Reserve units are mobilizing at home station and going directly to the POE, without going to a MS. Organic Reserve Component Judge Advocate sections, Legal Support Organizations (LSOs) and Mobilization Support Organizations (MSOs), will provide legal assistance.

3. Concept of Mobilization Processing is the same as SRP – "Both active and Reserve Component units must keep personnel records and actions current and accurate to ensure not only the availability of personnel, but also to reduce processing time at home stations and installations." AR 600-8-101, para. 6-4. The following are major workload generators at mobilization processing and must be kept up to date routinely (AR 600-8-101, para. 6-10h.):

   a. DD Form 93

   b. SGLI Election

   c. DD Form 2A (ID Card)

   d. ID Tags

e. Immunizations

f. HIV Testing not posted to medical record

g. Eyeglasses and mask inserts

h. Panographic X-ray at Central Storage

i. Requirements for Wills

j. Dental Readiness

4. CONUS Replacement Centers (CRC).

   a. The CRC Replacement Battalion (USAR) on pre-designated Army installations executes operations. CRC units normally ordered to duty under Presidential Selected Reserve Call-up.

   b. CRC mission is, among other things, to verify completion of SRP (Soldier Readiness Processing). While the CRC is capable of full SRP service, the volume of personnel processing through a CRC may require the SJA to direct reduced legal support per AR 27-3, para. 3-6b(2)(b) ("Needs" based triage of estate planning clients).

5. Soldier Readiness Processing Requirements.

   a. Levels I and II SRP requirements (see above) are mandatory. Deficiencies will be remedied on the spot during processing or follow-up referrals made.

   b. SGLV 8286 (SGLI) and needed Wills are SRP requirements which are major workload generators at both home station and mobilization station.

6. Mobilization Packet (AR 600-8-101, para. 6-11) must contain:

   a. DD Form 1934 (Geneva Conventions Identity Card for Medical and Religious Personnel Who Serve in or Accompany the Armed Forces), if applicable.

   b. DD Form 1172 (Application for Uniformed Services Identification Card DEERS Enrollment).

   c. TD Form IRS W4 (Employee's Withholding Allowance Certificate).

   d. Marriage certificate with raised certification seal.

   e. Birth certificates of family members.

   f. DA Form 3955 (Change of Address and Directory Card).

   g. DD Form 2558 (Authorization to Start, Stop or Change an Allotment for Active Duty or Retired Personnel).

   h. Blank VA Form 29-8286 (Servicemen's Group Life Insurance Election).

   i. Family Care Plan if required.

7. AR 600-8-101, chapter 6, details the mobilization process. Paragraph 6-43 provides rules for mobilization processing at the legal station:

a. All soldiers will process through this station.

b. AR 600-8-101, chapter 4, details SRP requirements.

c. If resources permit, Wills and powers of attorney may be made. See AR 27-3, para 3-6b(2)(b).

d. Copies of Wills and Powers of Attorney will be filed in the soldier carried mobilization packet. The original and one copy will be given to soldier. LAAs should encourage soldiers to leave wills with the personal representative or other responsible individual. Soldiers should give or mail powers of attorney to the designated attorney.

e. AR 600-8-101, Table 6-17, provides steps and work centers for Mobilization Processing at the Legal Station.

Step	Work Center	Required Action
1	IOPR ACTIVITY	Verify Geneva Convention Briefing
2	IOPR ACTIVITY	Determine soldier's requirement for a Will
3	IOPR ACTIVITY	Provide powers of attorney services
4	IOPR ACTIVITY	Verify pending military charges
5	IOPR ACTIVITY	Verify pending civilian charges
6	IOPR ACTIVITY	Process application for Soldiers' and Sailors' Civil Relief Act if required

TABLE 2: MOBILIZATION PROCESSING AT THE LEGAL STATION
(Reproduced from Table 6-17, AR 600-8-101)

III. LEGAL ASSISTANCE PREPARATION FOR READINESS EXERCISES AND DEPLOYMENT.

A. Legal Assistance offices should be aggressive in sponsoring preventive law programs to educate soldiers and their families before deployment occurs. Topics covered should include:

1. Who is eligible for legal assistance services.

2. SGLI designations (Note: Soldiers may **no longer** use the "By Law" designation.)

3. Wills for both spouses.

4. Powers of Attorney.

5. Consumer law issues.

6. Reemployment rights issues (Reserve Component only).

B. Typically readiness exercises and rapid deployments will be conducted on no-notice or short-notice basis.

1. The Chief, Legal Assistance should plan for deployments and contingency missions by:

a. Designating teams of attorneys and clerks to staff exercise and deployment sites.

b. Establishing an SOP (Standard Operating Procedure) for legal administration both on-site and at the legal assistance office during the exercise or deployment.

c. During an exercise, judge advocates should attempt to replicate wartime or real-world deployment services. If soldiers require legal services, the SJA should deploy sufficient resources to meet the needs of the supported units. If soldier needs exceed the capability of available resources, the exercise will not be delayed. Judge advocates should identify units or individuals with outstanding, unmet, legal needs and plan to address those needs upon the return of the unit or end of the exercise.

d. Additional Planning considerations:

(1) Designate time and place for legal team to meet for the exercise or deployment.

(2) Establish who remains at the legal assistance office as back-up support for the exercise/deployment legal team.

(3) Reschedule office hours of operation as necessary.

(4) Ensure close coordination with unit commanders for sufficient logistical support and full soldier participation.

(5) Ensure all needed supplies, forms and equipment are available at the site.

(6) Get adequate feed-back after the exercise from the legal team.

(7) Plan to include Reserve Component Judge Advocate LSOs and MSOs and Garrison Support Unit (GSU) Legal Sections in SRP rotations.

2. During exercises and deployments, judge advocates should be prepared to render the following services:

a. Will and Power of Attorney preparation.

(1) Wills will not be prepared using preprinted fill-in-the-blank wills.

(2) Will executions will be supervised by an attorney.

(3) Attempt to use non-deploying personnel as witnesses for wills. Self proving wills do not eliminate the need to locate and produce witnesses, particularly if the will is contested at probate.

b. Provide guidance concerning soldiers pending civil and criminal proceedings.

(1) Requests for stays of civil proceedings should be made via letter from the soldier's commanding officer - requests for stays by legal assistance attorneys may be considered appearances and work to the detriment of the soldier (See: JA 260, The Soldiers' and Sailors' Civil Relief Act Guide (Apr 98)).

(2) Attorneys may request postponements of criminal proceedings, but such stays are not governed by the SSCRA.

c. During deployment, the legal assistance office should continue briefing family members as needed. Reserve Component commands' legal sections will support their family members as needed.

d. After deployment, the legal assistance office should follow-up on legal assistance matters not resolved prior to deployment.

IV. FAMILY CARE PLANS (AR 600-20, PARA 5-5, 15 JUL 99).

A. Mission, readiness, and deployability needs especially affect Active Army (AA) and Reserve Component (RC) single parents and dual military couples with dependent family members.

B. AR 600-20, para 5-5, requires those soldiers to implement a Family Care Plan to provide for the care of their family members when military duties prevent the soldier from doing so.

1. 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.

2. RC soldiers are subject to these policies and regulations. They are required to maintain valid Family Care Plans to ensure their availability for active duty during a mobilization (see AR 600-20, para 5-5h, which includes IRR, IMA, Standby Reserve, Cat I and II retires, and Inactive NG personnel).

C. All married soldiers who have dependent family members are encouraged, even if not required by the regulation, to complete and maintain a Family Care Plan.

D. Family Care Plan Responsibility.

1. Commanders have responsibility for ensuring soldiers complete the Family Care Plan.

a. The unit commander may designate an authorized representative to conduct Family Care Plan counseling using DA Form 5304-R (Family Care Counseling Checklist) and to initial and sign the form on behalf of the commander (AR 600-20, para 5-5g(1)).

b. The unit commander is the sole approval authority for DA Form 5305-R (Family Care Plan). This responsibility will not be delegated (AR 600-20, para 5-5g(2)).

2. Affected soldiers are considered non-deployable until a Family Care Plan is validated and approved (AR 600-20, para 5-5k(3)).

E. In conjunction with Family Care Plan counseling, commanders will encourage, but not require, soldiers to consult legal assistance attorneys for Will preparation.

F. JA 272, Legal Assistance Deployment Guide provides more information concerning Family Care Plans.

V. LEGAL ASSISTANCE SUPPORT PRIOR TO AND DURING DEPLOYMENT.

A. Preparation.

1. The term “mobilization” refers broadly to the preparation of both AA and RC units for deployment overseas or other distant movements.

2. Effective legal support of the mobilization of AA and RC units depends on the following five factors:

a. Familiarity with the general legal support needed during mobilization, so that SJA offices are organized and have prioritized functions to provide such support;

b. Knowledge of the requirements in each substantive area of the law so that all legal personnel are properly trained, and proper references and forms are available;

c. Opportunities to participate in Corps/Division exercises to test the deployment plans and the training provided;

d. Effective utilization of RC legal personnel wherever feasible; and

e. Establishment of good working relationships with key personnel within the Corps and Division.

B. MOBILIZATION AND MOVE OUT

1. Legal assistance considerations that may arise and considerations that should be addressed from the point of the alert, or notification of deployment, up to the time of actual deployment.

   a. Establish sites to process deploying personnel rapidly. It may be necessary to draw upon other cross-trained attorneys in the office to assist in this effort.

   b. Are there sufficient forms to handle last-minute legal assistance problems at departure site?

   c. Spot-check deploying soldiers to ensure basic legal assistance needs have been met.

   d. Notify judge advocates remaining at the installation of follow up legal assistance requirements.

   e. If reservists will augment the SJA office, leave guidance.

   f. Organize and initiate legal assistance briefings for dependents.

2. Equipment / Resources: Determine what will be available in theater; what supported unit will provide; what appropriated or contingency funds will be available; and voltage used in theater (120 or 220).

C. In the Theater of Operations.

1. Legal Assistance in Theater. The nature of combat causes Legal Assistance services to become more pronounced and 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. As soon as possible, do the following:

   a. Establish communications links with the Rear;

   b. Establish courier/fax service to home station;

   c. Identify means and modes of transportation to and from remote locations;

   d. Anticipate problems arising with Casualty Assistance.

2. Casualty Assistance.

   a. In addition to legal assistance problems arising at the deployment location, casualties may occur, both on deployment and at home station. If so, the SJA elements, both on the exercise and with the rear detachment, must assist the next of kin of the soldier, the command, and the Survivor Assistance Officer (SAO). Among the many issues that attend the death of a soldier are reporting the casualty, notifying the next of kin, appointing an SAO and providing legal advice to that officer, disposition 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. Pre-deployment preparation is essential.

   b. Familiarity with DA Pam 608-33 (Casualty Assistance Handbook) and AR 600-8-1 (Army Casualty Operations/Assistance/Insurance) is essential.

   c. Judge advocates will also become involved in helping next of kin of soldiers missing in action or taken prisoner. DoD 7000.14-R, Part 4 (40304), DoD Pay Entitlements Manual (1 Jan 93), permits the

Secretary of the Department concerned to initiate or increase an allotment on behalf of family members if circumstances so warrant.

d. 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.

D. Legal Resources Needed: See Checklists at the end of this chapter for a comprehensive list, but major items include, Library Book Reader (or LAAWS XXI CD-Rom/DVD set containing ARs), Up-to-date electronic research tools; DL Wills/Quickscribe, JAGC Personnel Directory, and Martindale Hubbell CD (or Martindale Hubbell Law Digest on LEXIS).

E. General Legal Assistance Considerations.

1. In the area of deployment, the Legal Assistance section should:

a. Respond to inquiries from soldiers in country.

b. Establish liaison with communication, transportation, and aviation elements for contact and courier service with judge advocates in the rear echelon (the installation from which the deployment took place).

c. Establish liaison with U.S. Consulate at deployment location for overseas marriage and adoption coordination; in addition to emergency leave procedures.

2. At the home installation, the Legal Assistance section should:

a. Follow up on legal assistance cases referred by deployed LAOs.

b. Coordinate with communication, transportation, and aviation elements on the installation to ensure contact and courier service with deployed LAOs.

c. Extend legal assistance office hours, as necessary, to handle legal assistance problems of working dependents.

d. Continue legal assistance briefings for family members. Notice of these meetings should be mailed to the individual, using previously obtained mailing addresses and be disseminated by post newspaper and local television and radio media.

e. Coordinate with local banks and financial institutions to expect a higher usage of powers of attorney.

f. Coordinate with local courts concerning the failure of deployed members to appear.

g. Be prepared to brief and assist survivor assistance officers.

CHECKLISTS

Table 3: Sample Ready Box		
Item	***Quantity***	✔
Lap top computer/printer	2	
DL Wills		
Quickscribe		
CIS		
Manual Typewriter/ribbons/correction tape	2	
Client Interview Cards (DA Form 2465, Jul 92)	100	
Electrical extension cords	3	
Will Cover Letters	200	
Envelopes, 4" x 9 ½" (DA)	50	
Envelopes, 4" x 9 ½" (plain)	50	
Markers, red	10	
Masking tape, rolls	2	
Scotch Tape, rolls	5	
Paper, Printer (Ream)	2	
Paper, tablets	4	
Pens, boxes	5	
DA Form 4944-R (Jul 92) Report on Legal Assist. Services	10	
Powers of Attorney (10 U.S.C. § 1044a Notary)		
General	200	
Blanks	50	
Special Forms & Clauses (Check Cashing, Medical, Guardianship, Use of Car, etc.)	50 ea.	
Regulations & References (*See* Table 20-4)		
Seals (authority of 10 U.S.C. § 1044a)*	2	
Signs (Legal Assistance)	2	
Staple removers	4	
Stapler w/extra staples	4	
Will Guides	3	
Will Interview Worksheets	100	

Simple Will Forms	100	
Routine Form Letters (*See* Table 19-6).	100 ea.	

* 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 4: Deployment Legal Assistance Official References

Regulation	***Title***	✓
AR 27-3	The Army Legal Assistance Program (10 Sep 95)	
AR 27-55	Notarial Services (10 Apr 97)	
AR 600-8-101	Personnel Processing (In- and Out- and Mobilization Processing) (26 Feb 93)	
AR 600-15	Indebtedness of Military Personnel (14 Mar 86); DoD Dir. 1344.9 (Indebtedness of Military Personnel (Oct 1994)	
AR 608-99	Family Support, Child Custody, and Paternity (1 Nov 94)	
DA PAM 608-33	Casualty Assistance Handbook (17 Nov 87)	
DA PAM 608-4	A Guide for the Survivors of Deceased Army Members (23 Feb 89)	
Martindale-Hubbell	Law Digests and Selected International Conventions (most recent edition).	

Table 5: TJAGSA Publications on the JAGCNet & CD ROM		
Publication #	***Title***	✓
JA 260	Soldiers' & Sailors' Civil Relief Act	
JA 261	Real Property Guide	
JA 262	Wills Guide	
JA 263	Family Law Guide	
JA 265	Consumer Law Guide	
JA 267	Legal Assistance Office Directory	
JA 271	Legal Assistance Office Administration Guide	
JA 272	Legal Assistance Deployment Guide	
JA 274	Uniformed Services Former Spouses' Protection Act Guide	
JA 276	Preventive Law Series	

Table 6: Form Letters	
Letter	✓
Letter to creditor requesting extension of payment date because of deployment.	
Letter to landlord/mortgagor requesting extension because of deployment.	
Letter: Soldiers' and Sailors' Civil Relief Act (e.g., request for stay of proceedings; request for interest rate reduction to 6%).	
IRS Forms requesting extension of filing deadline or local JAG office form letter requesting extension because of deployment.	
Form letters to state or municipal tax authorities requesting extension because of deployment.	

Legal Assistance Resources: See the Legal Assistance Database on JAGCNet for resources and links to resources.

CHAPTER 18

COMBATING TERRORISM

REFERENCES

1. 1944 Chicago Convention on International Civil Aviation, (international standards for safeguarding civil aircraft), 14 C.F.R. 107-108.
11. 1963 Tokyo Convention on Offenses and Certain Other Offenses Committed on Board Aircraft, P.L. 91-449; 84 Stat. 921.
12. 1970 Hague Convention for the Unlawful Seizure of Aircraft, see Anti-Hijacking Act of 1974, P.L. 93-366, 49 U.S.C. App. §§ 1472 (i-n).
13. 1971 Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Aircraft, (covers acts of sabotage such as bombings aboard aircraft while in flight), see Comprehensive Crime Control Act of 1984, P.L. 98-473, 18 U.S.C. § 32.
14. 1971 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.
15. 1973 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, (protects senior government officials and diplomats), see P.L. 94-467, 18 U.S.C., §§ 112, 1116, 878, 1201 (a) (4).
16. Convention on the Physical Protection of Nuclear Material, P.L. 97-351 18 U.S.C. § 831.
17. 1979 International Convention Against the Taking of Hostages, P.L. 98-473 18 U.S.C. § 1203.
18. 1988 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Aviation, which supplements the 1971 Montreal Convention on Civil Aviation Safety by extending coverage to airports and aircraft on the ground, Sec. 60021 of the Violent Crime Control and Law Enforcement Act of 1994, P.L. 103-322.
19. 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Sec. 60019 of the Violent Crime Control and Law Enforcement Act of 1994, P.L. 103-322. The U.S. subsequently deposited its instruments of ratification for the maritime and airports conventions Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf
20. The 1991 Convention on the Marking of Plastic Explosives for the Purposes of Detection (signed in Montreal in March, 1991) but not yet in force. The U.S. Senate gave its advice and consent in November, 1993. The implementing legislation passed the Senate on June 7, 1995 as part of the Omnibus Counterrorism Bill, and is contained in the pending House of Representatives version.
21. 1997 International Convention for the Suppression of Terrorist Bombings. Signed by the U.S. on January 18, 1998, submitted to the Senate for advice and consent to ratification on September 8, 1998.
22. 1999 International Convention for the Suppression of Financing Terrorism. Signed by the U.S. on January 10, 2000, submitted to the Senate for advice and consent to ratification on October 12, 2000.
23. 10 U.S.C. et seq., Armed Forces
24. 10 U.S.C. § 371-382, Military Support to Law Enforcement
25. 10 U.S.C. §§ 331-334, Insurrections
26. 14 U.S.C. § 712, U.S. Coast Guard
27. 18 U.S.C. § 1385, Posse Comitatus Act
28. 32 U.S.C. § 112, Drug Interdiction and Counter Drug Activities
29. 42 U.S.C. §§ 5121-5204c, Stafford Act
30. 50 U.S.C. §§ 401-441d, National Security Act
31. 50 U.S.C. § 413, Intelligence Oversight Act of 1980
32. 50 U.S.C. §§ 2311- 2367, Weapons of Mass Destruction Act of 1996
33. 50 U.S.C. §§ 2251-2303, Civil Defense Act

34. National Defense Authorization Act for Fiscal Year 1991, P.L. 101-510, Section 1004, Additional Support for Counter Drug Activities
35. National Defense Authorization Act for Fiscal Year 1997, P.L. 104-201, Section 1031, Authority to Provide Additional Support for Counter-Drug Activities of Mexico
36. Authorization for Use of 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.
37. 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 Terrorists Acts in the U.S. and Abroad, and to Enhance Law Enforcement Investigative Tools
38. Aviation and Transportation Security Act, 2001, P.L. 107-71
39. Intelligence Authorization Act of Fiscal Year 2002, P.L. 107-108
40. National Defense Authorization Act for Fiscal Year 2002, P.L. 107-107, Authority to Provide Additional Support for Activities Relating to Combating Terrorism
41. Homeland Security Act of 2002, P.L. 107-296
42. E.O. 12148, Federal Emergency Management
43. E.O. 12333, U.S. Intelligence Activities
44. E.O. 12472, Assignment of National Security and Emergency Telecommunications Functions
45. E.O. 12656, Assignment of Emergency Preparedness Responsibilities
46. E.O. 13010, Critical Infrastructure Protection
47. E.O. 13099, Naming al-Qaida as an FTO
48. E.O. 13129, Blocking Taliban assets
49. E.O. 13223, Ordering the Ready Reserve to Active Duty
50. E.O. 13224, Freezing Assets of 27 organizations/persons linked to al-Qaida
51. E.O. 13228, Establishing Office of Homeland Security
52. E.O. 13231, Critical Infrastructure
53. E.O. 13260, Homeland Security Advisory Council and Senior Advisory Committees
54. E.O. (dated 28Feb03), Amendment of E.O.'s and other Actions in the Connection with the Transfer of Certain Functions to the Secretary of Homeland Security
55. NSD 66, Civil Defense
56. PDD 39, U.S. Policy on Counterterrorism (Unclassified Extract)
57. PDD 62, Combating Terrorism
58. PDD 63, Critical Infrastructure Protection
59. President Clinton, *A National Security Strategy for a New Century,* October 1998.
60. NSPD-1, Organization of the Security Council (February, 2001)
61. Military Order, Authorizing the Establishment of Military Commissions (November 13, 2001)
62. DoD Military Commission Order (MCO) No.1, *Procedures for Trials by Military Commission of Certain Non-United States Citizens in the War Against Terrorism* (21 Mar 02)
63. DoD MCO No. 2, *Designation of Deputy Secretary of Defense as Appointing Authority* (21Jun03)
64. DoD Military Commission Instruction (MCI) No. 1, *Establishment of Policies and Interpretations of Military Commission Instructions* 30 Apr 03)
65. DoD MCI No. 2, *Crimes and Elements for Trial by Military Commissions* (30Apr03
66. DoD MCI No. 3, *Responsibilities of the Chief Prosecutor, Prosecutors and Assistant Prosecutors* 30 Apr 03)
67. DoD MCI No. 4, *Responsibilities of the Chief Defense Counsel, Detailed Defense Counsel and Civilian Defense Counsel* 30 Apr 03)
68. DoD MCI No. 5, *Qualifications of Civilian Defense Counsel* 30 Apr 03)
69. DoD MCI No. 6, *Reporting Relationship of Military Commission Personnel* 30 Apr 03)
70. DoD MCI No. 7, *Sentencing* 30 Apr 03)
71. DoD MCI No. 8, *Administrative Procedures* 30 Apr 03)
72. DoDD 2000.12, *DoD Combating Terrorism Program*
73. DoDD 2000.14, Draft, *DoD Combating Terrorism Program Procedures*

74. DoDD O-2000.12H, *Protection of DoD Personnel and Activities Against Acts of Terrorism and Political Turbulence*
75. DoDI, O-2000.16, *DoD Combating Terrorism Program Standards*
76. DoDD 3020.26, *Continuity of Operations, Polices and Planning*
77. DoDD 3020.36, *Assignment of National Security*
78. DoDD 3025.1, *Military Support to Civil Authorities*
79. DoDD 3025.12, *Military Support to Civil Disturbances*
80. DoDM 3025.1M, *Manual for Civil Emergencies*
81. DoDD 3150.5, *DoD Response to Improvised Nuclear Device*
82. DoDD 3150.8, *DoD Response to Radiological Incidents*
83. DoDD 4000.19, *Interservice and Intergovernmental Support*
84. DoDM 5100.52M, *Nuclear Weapon Accident Response Procedures*
85. DoDD 5160.54, *DoD Key Asset Protection Plan*
86. DoDM C-5210.41-M, *Nuclear Weapons Safety Manual*
87. DoDD 5210.84, *Security of DoD Personnel at U.S. Missions Abroad*
88. DoDD 5240.1, *DoD Intelligence Activities*
89. DoDD 5240.1-R, *Procedures Governing the Activities of DoD Intelligence Components that Affect United States Persons*
90. DoDD 5240.6, *Counterintelligence Awareness and Briefing Program*
91. DoDD 5525.5, *DoD Cooperation with Law Enforcement Officials*
92. CJCSI 3710.01, *Operational Support to Drug Law Enforcement Agencies*
93. CJCSI 5261.01A, *Combating Terrorism Readiness Initiatives Fund*
94. CJCSI 5262.01, *Combating Terrorism Technology Request Process*
95. DoD Civil Disturbance Plan, GARDEN PLOT
96. DoD Report to Congress, *Domestic Preparedness Program in the Defense Against Weapons of Mass Destruction,* May 1, 1997
97. DoD Plan for Integrating National Guard and Reserve Component Support for Response to Attacks Using Weapons of Mass Destruction, January 1, 1998.
98. Joint Pub 2-0, Doctrine for Intelligence Support for Joint Operations
99. Joint Pub 3-05, Doctrine for Joint Operations
100. Joint Pub 3-05.3, Joint Special Operations Operational Procedures
101. Joint Pub 3-07.2, Joint Tactics, Techniques, and Procedures for Antiterrorism
102. Joint Pub 3-07.7, Joint Tactics, Techniques, and Procedures for Domestic Support Operations
103. Joint Pub 3-10.1, Joint Tactics, Techniques, and Procedures for Base Defense
104. Joint Pub 3-54, Joint Doctrine for Operations Security
105. AR 381-10, U.S. Army Intelligence Activities
106. NGR 500-1/ANGI 10-8101, Military Support to Civil Authorities
107. NGB 500-2/ANGI 10-801, National Guard Counterdrug Support to Law Enforcement
108. AR 500-51, Support to Civilian Law Enforcement
109. AR 700-131, Loan and Lease of Army Material
110. SECNAVINST 5820.7B, Cooperation with Civilian Law Enforcement Officials
111. OPNAVINST 3440.16C, Navy Civil Emergency Management
112. AFI 10-801, Air Force Assistance to Civilian Law Enforcement Officials
113. AFI 10-802, Military Support to Civil Authorities
114. AFI 31-202, Working Dog Program
115. FM 100-19, Domestic Support Operations

I. INTRODUCTION

A. On September 11, 2001, the world changed. The unprecedented terrorist attacks against the United States on that day clearly demonstrated to the international community the depth and scope of global terrorism. The terrorist attacks in New York, Pennsylvania, and our Nation's Capital also undoubtedly demonstrated the terrorists' willingness and ability to target both 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 70's and 80's 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 continue 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 and the proliferation of technologies of 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 September 11th attacks clearly placed global terrorism on center-stage, both domestically and internationally. This focus on global terrorism has resulted in a close examination on how to combat global terrorism. As the world is discovering since the September 11th attacks, combating terrorism, particularly terrorism from non-state organizations such as the al-Qaida network, does not fit neatly into any existing paradigms. Operation Enduring Freedom (OEF) and other on-going military operations against the al-Qaida terrorist group worldwide is not the traditional type of armed conflict contemplated by the drafters of existing law of war conventions. Since September11th, many issues and questions have been raised and many remain unresolved. The manner in which the United States and the international community is combating terrorism is still evolving. One thing is clear however; the United States is leading an unprecedented worldwide campaign against global terrorism, wherever it exists.

C. The international response has been swift and unprecedented. 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 September 28, 2001, The U.N. Security Council unanimously adopted UNSCR 1373 under Chapter VII of the U.N. Charter. UNSCR 1373 is extremely significant in that it established a body of legally binding obligations on all U.N. member states. It also defines 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 United States has taken a broad range of steps to combat terrorism since September11th. 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 and the Homeland Security Council were established to help protect against future terrorist attacks. There has been a flurry of legislation passed by Congress including the Authorization for Use of Force and the "PATRIOT Act". Operation Enduring Freedom continues with its unprecedented use of military force against global terrorism.

E. The purpose of this chapter is to assist the judge advocate in understanding DoD's role in combating terrorism. Clearly, Operation Enduring Freedom is an obvious example of DoD's role combating terrorism. Yet, DoD's role in combating terrorism is much broader than the use of military force and therefore the remainder of the chapter will focus mainly on DoD's role in supporting the U.S. effort in these other areas in combating terrorism. The manner in which the U.S. and the international community combats terrorism is literally changing day-to-day. There is little doubt that DoD's role, as well as other agencies' roles, will significantly evolve in the coming years as a result of September 11. Even before September 11, there were several recent studies that propose a greater role for the U.S. military in combating terrorism.

F. The Department of Defense (DoD) is not the lead agency for combating terrorism. However, DoD does play a significant supporting role in several areas. DoD is responsible for providing technical assistance or forces when requested by the President of the United States and/or the Secretary of Defense. 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, and DoD Civilian, contractor and host nation laborer should be educated and alerted to possible terrorist attacks. The Command Judge Advocate should participate in all foreign and domestic antiterrorism plans and in the implementation of those plans. Command 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 DoD Dir. 2000.12 as the "calculated use of violence or threat of violence to inculcate fear; 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.

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, Presidential Decision Directives, National Security Presidential Directives, contingency plans 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 the planning, resourcing, preventive measures, 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 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 judge advocate must provide essentially the same kind of legal advice to the commander of a force deployed overseas as he 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 limitations, if any, on the use of force, and on the use of 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 the soldiers are operating under clear, concise rules of engagement, 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 the CJCS SROE include "any force or terrorist unit (civilian, paramilitary, or military)" within the definition of "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 (response, reprisal, self-defense, and anticipatory self-defense). PDD 39 and PDD 62 should be reviewed.

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 recent creation of the Department of Homeland Security has significantly transformed the government in its response to terrorism.

B. The National Security Council. 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 establishes this committee. (NSPD-1 establishes the organization of the NSC under the Bush Administration. NSPD-1 abolishes the previous system of interagency working groups and replaces them with a policy coordination committee (PCC)). This committee is comprised of representatives from State, Justice, DoD, CJCS, CIA and 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. Department of State. DoS is the lead agency for responses to terrorism that takes place outside the United States, 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. Department of Justice. DoJ is normally responsible for overseeing the Federal response to acts of terrorism within the U.S. The U.S. Attorney General, 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 DEST (Domestic Emergency Support Team) an ad hoc collection of interagency experts. INS (part), Office for Domestic Preparedness, and Domestic Emergency Support Teams are now part of the new Department of Homeland Security.

F. Federal Bureau of Investigation. The FBI has been designated the primary operational agency for the management of terrorist incidents occurring within the U.S. When a terrorist incident occurs, the lead official is generally the Special Agent in Charge (SAC) of the field office nearest the incident under 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 weapons of mass destruction the FBI also has the lead. In these efforts, the FBI coordinates with the Departments of Energy, DoD, the Nuclear Regulatory Commission, and the Environmental Protection Agency as well as several states that have established nuclear, chemical & biological and/or weapons of mass destruction threat emergency response plans. The FBI's National Domestic Preparedness Office has been shifted to the new Department of Homeland Security.

G. Department of Energy. DoE has important national security responsibilities. The Office of Defense Programs maintains the safety, security and reliability of U.S. nuclear weapons stockpile, 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. The Department's Nuclear Incident Response Team, CBRN Countermeasures Programs, Environmental Measures Laboratory, and Energy Security and Assurance Program have been shifted to the new Department of Homeland Security

H. Department of Transportation. DoT and/or FAA are the federal agencies responsible for responding to terrorist incidents on aircraft in flight within U.S. jurisdiction. The FAA has exclusive responsibility in instances of air piracy for the coordination of law enforcement responses. The FBI maintains procedures, in coordination with DoS and DoT, to ensure efficient resolution of terrorist hijackings. DoT, through the USCG, is responsible for reducing risk of maritime terrorist acts within the territorial seas of the Untied States. The USCG and FBI have an interagency agreement and cooperate when coordinating counterterrorism activities. (USCG Commandant Instruction 16202.3a). The Department's Transportation Security Administration, as well as the Coast Guard is now part of the new Department of Homeland Security.

I. Department of the Treasury. The Department of the Treasury is responsible for preventing unlawful traffic in firearms and explosives, and by 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 the new Department of Homeland Security.

J. The Director, Central Intelligence . DCI is the lead in the Intelligence Community for reducing vulnerabilities through aggressive foreign intelligence collection, analysis, counterintelligence, and covert action in accordance with the National Security Act of 1947 and E.O. 12333.

K. Federal Emergency Management Agency. 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 the new Department of Homeland Security and is under the Emergency Preparedness and Response division.

L. Department of Homeland Security. On 1 March 2003, the Department of Homeland Security officially became into existence. The creation of the DHS is a significant transformation of the U.S. government by consolidating 22 disparate domestic agencies consisting of over 170,000 employees into one department to protect the nation against threats to the homeland. The transformation is currently ongoing. The new department'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 the response of our nation to future emergencies. Additionally, DHS is also dedicated 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 22 agencies have been reconfigured into the following nine divisions: Border and Transportation Security, Emergency Preparedness & Response, Information Analysis & Infrastructure Protection, Science & Technology, Management, Coast Guard, Secret Service, Citizenship & Immigration Services, State & Local Government Coordination, and Private Sector Liaison and coordinate a comprehensive national strategy to strengthen the current protections against terrorist threats and attacks in the United States. The Office will coordinate federal, state, and local counterterrorism efforts. 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 the Office of Homeland Security, FEMA was generally the lead agency in Consequence Management operations. As of this publication, how the Office of Homeland Security will impact the roles of the other agencies remains unclear. Chapter 24 provides a more detailed discussion regarding Homeland Security.

M. Department of Defense. U.S. Armed forces are prepared, on order, to attack terrorists or states involved in sponsoring terrorism. DoD Directive 2000.12 now prescribes that the Assistant Secretary of Defense (Special Operations and Low Intensity Conflict - ASD-SO/LIC) has the lead role within the Department of Defense 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 composed of members of the Armed Forces and employees of DoD with the appropriate expertise. Active Duty, National Guard, and Reserve forces posses 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. DOMS will serve as the executive agent for all domestic consequence support. However, the Attorney General, through the FBI, will remain responsible for coordinating :

1. The activities of all Federal agencies assisting in the resolution of the incident and in the administration of justice in the affected areas.

2. These activities with those state and local agencies similarly engaged.

For the military planner in the United States, its territories and possessions, this relationship between DoJ and the DoD requires the development of local memorandums 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. These local agreements, because of military turnover and reorganization, should be reviewed and tested annually.

N. Military Authority. Upon notification of Presidential approval to use military force, the Attorney General 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 military authority when the SAC relinquished 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 accomplished without seriously endangering the safety of military personnel or others involve 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 be promptly 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 would not apply providing lawful combatant status. Only lawful combatants can legitimately attack proper military targets. For this reason, captured terrorists are not afforded the protection from criminal prosecution attendant to prisoner of war status. However, common article 3 of the 1949 Geneva Conventions, which requires that noncombatants be treated in a humane manner, also applies 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 Chapter 19, Domestic Operations. 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:

Constitutional Exceptions: The President, based on his inherent authority as the Executive, 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 (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 DoD Directive 3025.12.

B. 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 Director of Military Support (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.

5. Emergency situations include, but are not limited to, the following:

(a) Providing civilian or mixed civilian and military fire-fighting assistance where base fire departments have mutual aid agreements with nearby civilian communities.

(b) Providing emergency explosion ordnance disposal (EOD) service.

(c) Using military working dog (MWD) teams in an emergency to aid in locating lost persons (humanitarian acts) or explosive devices (domestic emergencies).

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 law enforcement function, subject to the policy considerations discussed in the preceding section. Federalization of the National Guard, in such a case, will not affect the Guard's functioning as they would, obviously, not be excepted from the PCA as well. For more information on these statutes, see the preceding section. In addition, some lesser-known statutes contain exceptions to the PCA:

1. To assist the Department of Justice 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.

2. To assist the Department of Justice in enforcing 18 U.S.C. § 831, dealing 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.

3. 18 U.S.C. § 382 allows DoD to assist the Department of Justice in enforcing 18 U.S.C. § 175 & 2332, during an emergency situation involving chemical or biological weapons of mass destruction. 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 in **very limited** situations provide authorization for DoD to arrest, search and seize.

C. 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 found in being an employee of the Federal Government; thus making the commander subject to a civil suit by any hostages injured. Civil or criminal personal liability may result from unlawful acts, negligence, or failure to comply with statutory guidance by subordinates or agents. 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 legal adviser has become increasingly important to the commander in 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 occurs. 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 United States, a state has no authority to investigate or prosecute violations of state law. The Assimilative Crimes Act, 18 U.S.C. § 13, however, 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 United States 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 United States 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 United States, a state has no authority to investigate or prosecute violations of state law, unless that authority is expressly reserved. The Federal Government may, however, prosecute violations of state law under the Assimilate Crimes Act.

4. Proprietary jurisdiction means that the United States 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 United States, the United States 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, for example, 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 prescribe conduct that is a crime for anyone but in which a terrorist may engage to accomplice his purposes, for example, 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 United States, 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 the situation, both state and Federal enforcement authorities have power under their respective criminal codes to investigate the offense and to 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. (Recall Federal and state prosecutions re: 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

PDD-39 directs federal agencies to ensure that the people and facilities under their jurisdiction are protected against terrorism. This applies to DoD facilities both abroad and in the U.S. In response to a Downing Assessment Task Force recommendation concerning the Khobar Towers bombing, DoD and the State Dept. are reviewing their responsibilities to protect U.S. military and personnel assigned overseas.

A. Domestic Incidents. Although the FBI has primary law enforcement responsibility for terrorist incidents in the United States (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 force to isolate, contain, and neutralize a terrorist incident within the capability of installation resources. In the United States, 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, public affairs assets.

2. If the FBI assumes jurisdiction, the Attorney General 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 or 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.

B. 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 AORs, existing contingency plans provide guidance to the installation commander regarding notification procedures. DoS has the primary responsibility for dealing with terrorism involving Americans abroad. The installation's response is also subject to agreements established with the host nation. Such agreements, notwithstanding, the Standing Rules of Engagement (CJCS Instruction 3121.01A), make it clear that the commander retains the inherent right and obligation of self-defense even in such situations.

C. 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 (MOU) and coordination through the U.S. embassy in that country. Military forces will not be provided to host-nation authorities without a directive from the Department of Defense that has been coordinated with DoS. The degree of DoS interest and the involvement of U.S. military forces depend on the incident site, nature of the incident, extent of foreign government involvement, and the overall threat to U.S. security.

VIII. VARIOUS ISSUES REGARDING THE CURRENT WAR ON TERRORISM

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.

A. **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".

B. **Application of LOAC**. As a matter of U.S. policy, DoDD 5100.77, *DoD Law of War Program* states the U.S. armed forces must "comply with the law of war during all armed conflicts, however such conflicts are characterized, and with the principles and spirits of the law of war during all other operations."

C. **Status of Enemy Participants in Conflict**. Unlawful Combatants. Taliban and al-Qaida lack some or all of the four attributes specified in Article 4, GC III, thus they are unlawful combatants. (See January 22, 2002 NSC statement of U.S. policy regarding al-Qaida and Taliban detainees).

D. **Status of Detainees in Guantanamo Bay**. The White House statement released on February 7, 2002 resolved this issue. The President determined that neither Taliban nor al-Qaida detainees are entitled to POW status. The President confirmed that the Geneva Conventions do apply to the Taliban detainees, but not to the al-Qaida detainees. In regards to the al-Qaida detainees, al-Qaida is not a state party to the Geneva Convention, it is a foreign terrorist group. Its members are therefore not entitled to the protections of the Geneva Convention. In regards to the Taliban detainees, although Afghanistan is a party to the Geneva Convention and the Geneva Conventions apply to the Taliban detainees, the Taliban detainees are not entitled to POW status because they do not satisfy the four conditions specified in Article 4, Geneva Convention Relative to the Treatment of Prisoners of War. The White House position is that the Taliban have not effectively distinguished themselves from the civilian population of Afghanistan and they have not conducted their operations in accordance with the laws and customs of war. Although the Taliban and al-Qaida detainees are not entitled to POW status, the United States "has treated and will continue to treat all Taliban and al-Qaida detainees in Guantanamo Bay humanely and consistent with the principles of the Geneva Convention."

E. **Military Commissions**. On November 13, 2001, the President signed an order authorizing the creation of military commissions to try certain individuals. Individuals subject to the order include members of al-Qaida, those who have engaged in, aided or abetted, or conspired to commit acts of international terrorism that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, or its citizens, or to have knowingly harbored such individuals. The President will decide who is subject to the order on a case-by-case basis. On March 21, 2002, SECDEF issued Military Commissions Order No. 1, which contains the rules and procedures for the military commissions. Specifically:

- SECDEF or a designee may issue orders appointing one or more military commissions. (Military Commission Order No. 2 dated 21 June 03 designated the Deputy Secretary of Defense as the Appointing Authority).

- Offenses triable by the military commissions will be violations of the law of war. (Military Commission Instruction No. 2 dated 30 April 03 states the crimes and elements fro trial by military commission).

- An Appointing Authority (AA) will appoint at least three but no more than seven members to the Commission.

- The members must be commissioned officers of the U.S. armed forces including reserve personnel on active duty, National Guard on active duty in Federal service, and retired personnel recalled to active duty.

- The Presiding Officer shall be a Military Officer who is a judge advocate.

- The Presiding Officer admits or excludes evidence, subject to override by a majority of Commission members.

- The Chief Prosecutor shall be a judge advocate. (Military Commission Instruction No. 3 dated 30 April 03 details the responsibilities of the Chief Prosecutor, Prosecutors and Assistant Prosecutors)

- A military judge advocate shall be detailed by the Chief Defense Counsel (also a military judge advocate) to represent each accused. (Military Commission Instruction No. 4 dated 30 April 03 details the responsibilities of the Chief Defense Counsel, Detailed Defense Counsel and Civilian Defense Counsel).

- The Accused may retain the services of a civilian counsel of his choosing, at no expense to the government, provided certain requirements are met. (Military Commission Instruction No.5 dated 30 Apr 03 details the qualifications of Civilian Defense Counsel).

- The Accused shall be presumed innocent until proven guilty beyond a reasonable doubt.

- The Accused may not be compelled to testify or present evidence against himself.

- The Accused may be present at every stage of the trial (except proceedings closed by the Presiding Officer), unless the Accused engages in disruptive conduct that justifies exclusion.

- Detailed military defense counsel may not be excluded from any trial proceedings or portion, thereof.

- The Accused shall be afforded a trial open to the public, except proceeding closed by the Presiding Officer.

- The Accused may plead guilty and may enter a plea agreement with the government.

- Opening statements, presentation of evidence, and closing arguments on findings and, if appropriate, sentence are generally consistent with U.S. court-martial practice.

- The Rules for Courts-Martial and the Military Rules of Evidence do not apply.

- A two-thirds vote is required for a finding of guilty.

- A two-thirds vote is required to determine sentence, except that a sentence of death requires a unanimous vote. (Military Commission No. 7 dated 30 Apr 03 details Sentencing procedures)

- Upon conviction, the Commission shall impose an appropriate sentence, which may include death, life imprisonment or other lawful punishment.

- Only a Commission of seven members may sentence an accused to death.

- Acquittals are final once the Presiding Officer authenticates the record of trial.

- After the Presiding Office authenticates the record of trial, it is forwarded to the AA.

- If SECDEF is not the AA, the AA administratively reviews the record of trial and forwards to the Review Panel.

- The review Panel consists of three Military Officers, which may include civilian members commissioned by the President under Title 10, section 603. At least one member must have experience as a judge.

- If no material error of law, the Review Panel forwards the case with recommendations to SECDEF.

- After review, SECDEF remands the case for further proceedings or forwards the case to the President for final decision, unless the President has authorized SECDEF to render the final decision.

- Once the President or SECDEF makes a final decision, DoD ensures the sentence (if approved) is carried out promptly.

In addition to the Military Commission Instructions Numbers 2-5 and 7 cited above, Military Commission Instruction No. 1 dated 30 April 03 establishes the policies and interpretation of Military Commission Instructions, Military Commission Instruction No. 6 dated 30 April 03 details the reporting relationship for military commission personnel; and Military Commission Instruction No. 8 dated 30 April 03 details the administrative procedures.

On 3 July 2003, President Bush determined that six enemy combatants currently detained by the U.S. are subject to his November 13, 2001 Military Order. This step may lead to the first military commissions regarding the current GWOT. As of this publication, no charges on any of the six detainees have been approved. According to the DoD News Release, there is evidence that the designated individuals may have attended terrorist training camps and may have been involved in such activities as: financing al-Qaida, providing protection for Usama bi Laden, and recruiting future terrorists.

Chapter 19

INFORMATION OPERATIONS

REFERENCES

1. USA Patriot 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, 18 U.S.C. §1030.
5. Economic Espionage Act of 1996, 18 U.S.C. §1831-2
6. Electronic Communications Privacy Act of 1986. Pub. L. No. 99-508, 100 Stat. 1848 (1986)
7. The Foreign Intelligence Surveillance Act of 1978 (FISA) Pub. L. No. 95-511, 92 Stat. 1783 (1978), 50 U.S.C. §§ 1801-29
8. Intelligence Identities Protection Act of 1982, 50 U.S.C. §421-26.
9. Executive Order 12684
10. Executive Order 13010
11. Executive Order 13231
12. Presidential Decision Directive 62, *Combating Terrorism*, 22 May 1998
13. Presidential Decision Directive 63, *Critical Infrastructure Protection*, 22 May 1998
14. DoD DIR. S-3600.1 INFORMATION OPERATIONS (U) (9 Dec. 1996).
15. DoD DIR. 5200.28, SECURITY REQUIREMENTS FOR AUTOMATED INFORMATION SYSTEMS (21 Mar. 1998).
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17. DoD 0-5505.9-M Procedures for Wire, Electronic, and Oral Interceptions for Law Enforcement Purposes (May 1995).
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19. CHAIRMAN, JOINT CHIEFS OF STAFF INSTR. 3210.01A, JOINT INFORMATION OPERATIONS POLICY (2d ed., Aug. 1999).
20. CHAIRMAN, JOINT CHIEFS OF STAFF INSTR. 6510.01C, INFORMATION ASSURANCE AND COMPUTER NETWORK DEFENSE (1 MAY 2001).
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23. THE JOINT CHIEFS OF STAFF, JOINT PUB. 3-51, JOINT DOCTRINE FOR ELECTRONIC WARFARE (7 Apr. 2000).
24. THE JOINT CHIEFS OF STAFF, JOINT PUB. 3-53, DOCTRINE FOR JOINT PSYCHOLOGICAL OPERATIONS (10 July 1996).
25. THE JOINT CHIEFS OF STAFF, JOINT PUB. 3-54, JOINT DOCTRINE FOR OPERATIONS SECURITY (27 Jan. 1996).
26. U.S. DEP'T OF ARMY, FIELD MANUAL 100-6, INFORMATION OPERATIONS (27 Aug. 1996).
27. U.S. DEP'T OF ARMY, FIELD MANUAL 380-53, INFORMATION SYSTEMS SECURITY MONITORING (29 Apr. 1998).

I. INTRODUCTION

A. **"**Information Operations involve actions taken to affect adversary information and information systems while defending one's own information and information systems."[359] IO require the close, continuous integration of offensive and defensive capabilities and activities, as well as effective design, integration, and interaction of command and control (C2) with intelligence support. IO are conducted through the integration of many capabilities and related activities. Major IO capabilities include, but are not limited to, operations security (OPSEC), psychological operations (PSYOP), military deception, electronic warfare (EW), physical attack and/or destruction, and could include Computer Network Operations (CNO). IO-related activities include, but are not limited to, public affairs (PA) and civil affairs (CA) activities.

1. Department of Defense Directive (DODD) S-3600.1, "Information Operations," and Chairman of the Joint Chiefs of Staff Instruction (CJCSI) 3210.01A, "Joint Information Operations Policy," outline general and specific information operations (IO) policy for Department of Defense (DOD) components and delineate specific responsibilities.

2. A subset of IO is **Information Warfare** (IW). IW is information operations conducted during time of crisis or conflict to achieve or promote specific objectives over a specific adversary or adversaries. IW consists of targeting the enemy's information and information systems, while protecting our own, with the intent of degrading his will or capability to fight. IW may involve actions to deny, exploit, corrupt, or destroy the enemy's information and its functions; protecting ourselves against those actions; and exploiting our own information systems. IW is any attack against an information system, regardless of the means.

a. IW is a method of warfare to achieve objectives, rather than an objective in itself, in precisely the same manner that air or ground warfare are methods of warfare to achieve objectives. The means of conducting IW are varied and range from kinetic attack (e.g., iron bombs on target) through Computer Network Attack (CNA). Bombing a telephone switching facility is IW. So is, destroying the switching facility's software. We may use IW as a method to conduct strategic attack and interdiction, just as we may use air or ground warfare to conduct strategic attack and interdiction.

b. IW is also any action to protect our information or information systems, regardless of the means. Hardening and defending the switching facility against air or ground attack is IW. So is using an anti-virus program to protect the facility's software.

3. Information Operations (IO) can be divided into two major categories: Offensive IO and Defensive IO. Offensive IO "involve the integrated use of assigned and supporting capabilities and activities, mutually supported by intelligence, to affect adversary decision makers and achieve or promote specific objectives."[360] Defensive IO "integrate and coordinate policies and procedures, operations, personnel, and technology to protect and defend information and information systems."[361]

4. **Offensive IO** involve the integrated use of assigned and supporting capabilities and activities, mutually supported by intelligence, to affect adversary decision-makers and achieve or promote specific objectives. When employed as an integrating strategy, IO weave together related capabilities and activities toward satisfying a stated objective. Offensive IO applies perception management actions such as PSYOP, OPSEC, and military deception, and may apply attack options such as EW, physical attack/destruction, and CNA to produce a synergistic effect against the elements of an adversary's information systems.

a. **OPSEC** contributes to offensive IO by slowing the adversary's decision cycle and providing an opportunity for easier and quicker attainment of friendly objectives. OPSEC denies the adversary critical

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[359] THE JOINT CHIEFS OF STAFF, JOINT PUB 3–13, JOINT DOCTRINE FOR INFORMATION OPERATIONS vii (Oct. 9, 1998), *available at* http://www.dtic.mil/doctrine/jel/new_pubs/jp3_13.pdf (hereinafter JP 3-13).

[360] *Id at viii.*

[361] *Id.*

information about friendly capabilities and information needed for effective and timely decision making, leaving the adversary vulnerable to other offensive capabilities.

b. **PSYOP** are actions to convey selected information and indicators to foreign audiences. They are designed to influence emotions, motives, reasoning, and ultimately, the behavior of foreign governments, organizations, groups, and individuals.[362] Though the vast majority of PSYOP do not raise issues of truthfulness, the 1907 Hague Convention No. IV states that ruses of war are legal so long as they don't amount to treachery or perfidy. PSYOP have played a major role in recent operations, to include Desert Shield/Desert Storm, Bosnia, Kosovo, and the War against Terrorism in Afghanistan.

c. **Military Deception** targets adversary decision makers through effects on their intelligence collection, analysis, and dissemination systems. 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. Military deception operations have been used throughout history, including WWII in order to divert attention from Normandy for the D-Day invasion.

d. **EW**. There are three major subdivisions of EW. They are electronic attack (EA), electronic protection (EP), and electronic warfare support (ES). All three contribute to both offensive and defensive IO.

1) **EA** is any military action involving the use of electromagnetic and directed energy to control the electromagnetic spectrum or to attack the enemy. EA involves actions taken to attack the adversary with the intent of degrading, neutralizing, or destroying adversary combat capability to prevent or reduce an adversary's effective use of the electromagnetic spectrum.

2) **EP** involves such actions as self-protection jamming and emission control taken to protect friendly use of the electronic spectrum by minimizing the effects of friendly or adversary employment of EW that degrade, neutralize, or destroy friendly combat capability.

3) **ES** contributes to the Joint Force's situational awareness by detecting, identifying, and locating sources of intentional or unintentional radiated electromagenetic energy for the purpose of immediate threat recognition.

e. **Physical attack/destruction** refers to the use of "hard kill" weapons against designated targets as an element of an integrated IO effort.

f. **CNO** is the umbrella term for all facets of computer operations, including CNA and CND. JTF-CNO was created in October 2000 and placed under SPACECOM to coordinate DoD's CNO activities.

g. **CNA** is defined as operations to disrupt, deny, degrade, or destroy information resident in computers and computer networks or the computers and networks themselves.[363] Specific issues with CNA will be discussed below.

5. **Defensive IO** integrate and coordinate policies and procedures, operations, personnel, and technology to protect and defend information and information systems. Defensive IO are conducted and assisted through information assurance (IA), OPSEC, physical security, counter deception, counterpropaganda, counterintelligence (CI), EW, and CNO. Defensive IO ensure timely, accurate, and relevant information access while denying adversaries the opportunity to exploit friendly information systems for their own purposes. Offensive IO can support defensive IO. Defensive IO activities are conducted on a continuous basis and are an inherent part of force deployment, employment, and redeployment across the range of military activities.[364]

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[362] THE JOINT CHIEFS OF STAFF, JOINT PUB 3–53, DOCTRINE FOR JOINT PSYCHOLOGICAL OPERATIONS v (Jul. 10, 1996), *available at* http://www.dtic.mil/doctrine/jel/new_pubs/jp3_53.pdf

[363] *See* JP 3-13, *supra* note 1 at I-9.

[364] *Id.* at viii-ix.

a. **IA** ensures the "availability, integrity, identification and authentication, confidentiality, and non-repudiation" of information systems.[365] IA, in combination with CND, is key to ensuring our information and systems are protected and defended from adversaries, thereby allowing us to share awareness, create knowledge, enhance command and control and support collaboration and self-synchronization.[366]

b. **OPSEC** is a "process of identifying critical information and subsequently analyzing friendly actions attendant to military operations and other activities to identify those actions that can be observed by adversary intelligence systems; determine indicators adversary intelligence systems might obtain that could be interpreted or pieced together to derive critical information in time to be useful; and select and execute measures that eliminate or reduce to an acceptable level the vulnerabilities of friendly actions to adversary exploitation."[367]

c. **EW.** Along with those activities mentioned above, EW activities that contribute to defensive IO include frequency management, changing call signs and taking steps to counteract attacks against force radio frequencies, and electro-optical and infrared capabilities.

d. **Counterdeception** supports defensive IO by negating, neutralizing, or diminishing the effects of—or gaining advantages from—a foreign deception operation.

e. **Counter-propaganda Operations.** Activities identifying adversary propaganda contribute to situational awareness and serve to expose adversary attempts to influence friendly populations and military forces.

f. **CI** activities contribute to defensive IO by providing information and conducting activities to protect and defend friendly information systems against espionage, sabotage, or terrorist activities.

g. **CND** is the mission to "defend computer systems and networks from unauthorized activity, which degrade mission performance and adversely impact survivability. CND will be discussed below.

6. **Activities Related to IO**. The following activities relate to and support the conduct of IO.

a. **Public Affairs (PA)**. PA seek a timely flow of information to both external and internal audiences. PA programs contribute to information assurance by disseminating factual information. Factual information dissemination counters adversary deception and propaganda. "Coordination of PA and IO plans is required to ensure that PA initiatives support the commander's overall objectives, consistent with the DOD principles of information. PA and IO efforts will be integrated consistent with policy or statutory limitation and security."[368]

The news media and other information networks' increasing and virtually instantaneous availability to society's leadership, population, and infrastructure can have significant impact on national will, political direction, and national security objectives and policy.

b. **Civil Affairs (CA)**. "CA activities are an important contributor to IO because of their ability to interface with key organizations and individuals in the information environment. CA activities can support and assist the achievement of IO objectives by coordinating with, influencing, developing, or controlling indigenous infrastructures in foreign operational areas."[369]

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[365] *Id*. at III-1.

[366] CHAIRMAN, JOINT CHIEFS OF STAFF INSTR. 6510.01C, INFORMATION ASSURANCE AND COMPUTER NETWORK DEFENSE (1 MAY 2001), at A-1 (hereinafter CJCSI 6510.01C).

[367] *See* JP 3-13, *supra* note 1 at III-4.

[368] *Id*. at I-17.

[369] *Id*.

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."[370]

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 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. **Presidential Decision Directive (PDD) 62, *Combating Terrorism* and Presidential Decision Directive 63, *Critical Infrastructure Protection***. 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. **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. **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, Pres. 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.

G. 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, DOJ has the lead in investigation and prosecution of any attacks on those critical IO systems.

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[370] W.G. SHARP, CRTITICAL INFRASTRUCTURE PROTECTION: *A NEW ERA OF NATIONAL SECURITY*, THE FEDERALIST SOCIETY INTERNATIONAL AND NATIONAL SECURITY LAW NEWS, Vol.2, at 1 (Summer 1998).

III. INTERNATIONAL LEGAL CONSIDERATIONS IN IO

A. CNO and the "use of force." While the phrase 'use of force' is commonly understood to include a military attack of one state by the organized military of another state, i.e., an *armed attack*, some coercive state activities that fall short of an armed attack may also cross the thresholds of Article 2. "The Article 2(4) prohibition on the use of force also covers physical force of a non-military nature committed by any state agency. . . . [U]narmed, non-military physical force may produce the effects of an armed attack prompting the right of self-defense laid down in Article 51."[371]

1. Equipment necessary for CNA is readily available and inexpensive, and access to many computer systems can be obtained through the Internet. As a result of this, many 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.

2. **Attribution** of attack is very important in determining an appropriate response but also very difficult. Identification of a CNA originator has often been a difficult problem, especially 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.

3. C**haracterization** of the intent and motive underlying attack may also be very difficult, though equally important when determining an appropriate response. However, factors such as persistence, sophistication 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.

4. How these principles of international law will be applied to 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 a CNA than in the means used. A CNA can cause significant property and economic damage, as well as human fatalities, by utilizing the Internet 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 actor. The effect can be the same, if not more severe, as if the destruction was caused by conventional kinetic means of warfare.[372]

5. If 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. Even if the systems attacked were unclassified military logistics systems, an attack upon such systems might seriously threaten a nation's security.

6. If a particular CNA is 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 CNA or by conventional military means to respond in self-defense. A state might respond in self-defense to disable the equipment and personnel used to mount the offending attack.

7. 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, or an attack would not be

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[371] *Id* at 101.

[372] *Id* at 101-102.

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).

8. 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.

9. 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.

10. It is far from clear the extent to which the world community will regard CNA as "armed attacks" or "uses of force," and how the doctrine of self-defense will be applied to CNA. The most likely result is an acceptance that a nation subjected to a state-sponsored 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 negotiate a treaty addressing CNA, international law in this area will develop through the actions of nations and through the positions the nations adopt publicly as events unfold.

B. 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 that generate information, rather than merely relay communications. 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* (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** 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 and are comprised by membership that virtually guarantees not all members of the 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 this language permits use by UN Security Council authorized forces, even while engaged in armed conflict.

C. Treachery or Perfidy. Article 37 of Protocol I to the Geneva Conventions prohibits belligerents from killing, injuring, or capturing and 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 used to create an image of the enemy's chief of state, etc. informing troops that an armistice or cease-fire agreement exists, if false, would be considered perfidy and constitutes a war crime.

D. Assessment. It is not clear what information operation techniques will be considered to be a "use of force," or what kinds of information operations may be considered to constitute "armed attack." 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 action are likely to be judged by applying traditional LOW principles. DOD GC adopts a results test. In their "Assessment" (reference 18 above), 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." While this is helpful in the event of a catastrophic CNA, it does not provide much guidance for CNAs that affect only one of the systems mentioned.

E. Communications law and IO

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 information operations.

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 would appear to restrict information operations 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' information operations.

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. **47 USC § 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."
Department of Justice, Office of Legal Counsel, issued a written opinion providing in effect that 47 USC § 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.

3. **Assessment.** Neither international nor domestic communications law presents any significant barrier to U.S. military information operations. International Communications law contains no direct and specific prohibition against the conduct of information operations 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 information operations.

IV. FOREIGN DOMESTIC LAW AND CNO

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 information operations. 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; and the state of the nation's domestic criminal law may have a significant effect on U.S. information operations 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 information operations 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, DOJ has the lead in investigating and prosecuting those responsible, until it is determined to involve some other investigative agency. There are several domestic statutory provisions that provide the basis for criminal prosecution in such cases.

A. Electronic Communications Privacy Act of 1986 (ECPA).[373] ECPA was enacted 18 U.S.C. §§ 2701-11, §§ 3121-27, § 1367, § 3117, § 2521, and 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 subpoena the government can obtain the name, address, local and long distance telephone billing

[373] Pub. L. No. 99-508, 100 Stat. 1848 (1986).

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 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. § 209 of the USA Patriot Act now authorizes the seizure of stored voice communications under §2703 with a search warrant. § 211 of the USA Patriot Act also clarifies that ECPA and "trap and trace" rules govern cable companies records for telephone and Internet services.

2. There are nine Statutory Exceptions (of which three are central to IO): 1) System Administrator "while engaged in any activity which is 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) Not unlawful "where such person is a party to the communication or one of the parties has given consent to such interception." 18 U.S.C. § 2511(2)(c); 3) 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 Counterintelligence access to telephone toll 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 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.

C. 18 U.S.C. § 1029 prohibits a wide range of offenses dealing with using counterfeit access devices knowingly and with intent to defraud (a)(1); trafficking in or using one or more unauthorized access devices during a one year period (which can include unauthorized use of passwords)(a)(2); possessing 15 or more unauthorized or counterfeit access devices (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 initiate a transfer of funds. (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 to the act broadened its coverage to include all telecommunications service as defined in section 3 of title I of the Communications Act of 1934[374] (*codified at* 47 U.S.C. § 153). The USA Patriot Act § 377 provides for extraterritorial jurisdiction for certain "access device" offenses under 18 USC § 1029 such as stolen computer passwords, credit card account numbers, or other counterfeit or unauthorized devices.

D. Computer Fraud and Abuse Act, (*codified as amended at* 18 U.S.C. § 1030). The Act contains eleven specified crimes: 6 felony offenses and 5 misdemeanor offenses, including:

1. Computer Espionage (a)(1): knowing access or exceeding authorized access obtaining information and willfully communicating, delivering, transmitting 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 (a)(2): intentional access without authorization or exceeding authorized access to information from any department of the U.S., computer records of financial institutions, or information from a protected computer involved in interstate commerce.

[374] 48 Stat. 1064 , *codified as amended* 47 U.S.C. 151 – 614.

3. Government Computers (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 (a)(4): knowingly and with intent to defraud accessing a protected computer.

5. Unlawful Computer Trespassers (a)(5): knowingly causes the transmission of a program, information code, or command and as a result of such conduct, intentionally causes damage to a protected computer.

6. Password Trafficking (a)(6): knowingly and with intent to defraud traffics (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 (a)(7): knowingly and with intent to defraud transmits any communication containing a threat to cause damage to a protected computer.8. § 202 of the USA Patriot Act added any felony violation of the Computer Fraud and Abuse Act to list of offenses that support a voice wiretap order.

E. 18 U.S.C. § 793 deals with Gathering, Transmitting, or Losing Defense Information. The information need not be classified to constitute a violation of this statute if the information is not generally accessible to the public.[375] 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 Foreign Government. 18 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. 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). 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 DoD.D 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[376] (FISA). FISA revolves around the core definition of

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[375] 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).

[376] Pub. L. No. 95-511, 92 Stat. 1783 (1978), *codified as amended* 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.

FOREIGN INTELLIGENCE INFORMATION: 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[377] without the consent of a person who is a party to an electronic communication or, in the case of a nonelectronic 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. § 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. § 218 changes the requirement that obtaining foreign intelligence was "the" purpose of the search to now being "a significant purpose" of the search.

J. USA Patriot Act. In addition to those specific provision mentioned above, the Patriot Act also makes the following changes to pre-existing laws:

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" (LE or CI) to monitor trespassers on their computer systems;

5. § 219 allows judge, in domestic or international terrorism cases, to issue search warrant in any district in which acts may have occurred, for property or persons within or outside district; and

6. § 220 allows single jurisdiction search warrants for email.

K. COMSEC monitoring. This is a clearly defined, bright line exception to the general limitations on content monitoring. § 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. COMSEC is one of the tools available to fulfill the DoD mandate to accredit automated information systems and ensure "compliance with automated information systems security requirements."[378]

1. Implemented within the Army by AR 380-53,[379] Information Systems Security Monitoring will be conducted only in support of security objectives. Information Systems Security Monitoring will not be

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[377] Such means include wiretaps of phones, teleprinter, facsimile, computers, computer modems, radio intercepts, microwave eavesdropping,

[378] U.S. DEP'T OF DEFENSE, DIR. 5200.28, SECURITY REQUIREMENTS FOR AUTOMATED INFORMATION SYSTEMS (21 Mar. 1998).

[379] U.S. DEP'T OF ARMY, FIELD MANUAL 380-53, INFORMATION SYSTEMS SECURITY MONITORING (29 Apr. 1998). <http://www.acert.belvoir.army.mil/ar380_53.pdf>

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. *See* para. 2-4 for 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.

A. There seems to be little likelihood that the international legal system will soon generate a coherent body of "information operations" law.

B. The most useful approach to the international legal issues raised by information operations activities will continue to be to break out the separate elements and circumstances of particular planned activities and then make an informed judgment as to how existing international legal principles are likely to apply them.

C. In some areas, such as the law of war, existing legal principles can be applied with considerable confidence. For example, attacks upon "dual-use" infrastructures (those used for both military and civilian purposes) require that commanders make reasonable efforts to discover forseeable collateral damage. Commanders must consider whether the system contemplated for attack is essential to public health and safety. The proportionality principle operates in the same way whether an attack is conducted using traditional kinetic weapons or in the form of CNA.

D. In other areas, such as the application of use of force principles, it is much less clear where the international community will come out. The result will probably depend much more on the perceived equities of the situations in which the issues first arise in practice.

E. The growth of international law in these areas will be greatly influenced by what decision-makers say and do at those critical moments.

NOTES

CHAPTER 20

DOMESTIC OPERATIONS

REFERENCES

1. 18 U.S.C. § 1385, Posse Comitatus Act.
2. 10 U.S.C. §§ 371-382, Chapter 18, Military Support For Civilian Law Enforcement Agencies.
3. 10 U.S.C. §§ 331-335, Chapter 15, Insurrections.
4. 32 U.S.C. § 112, Drug Interdiction and Counter-Drug Activities.
5. 42 U.S.C. § 5121, et seq., as amended (Stafford Act).
6. 50 U.S.C. § 2301-2317, Chapter 40, Defense Against Weapons of Mass Destruction.
7. National Defense Authorization Act for Fiscal Year 1991, P.L. 101-510, Section 1004, as amended, Additional Support for Counter-Drug Activities.
8. 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
9. 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
10. 44 CFR Part 206, Federal Emergency Management Agency.
11. DoDD 3025.15, *Military Assistance to Civil Authorities*, 18 February 1997.
12. DoDD. 3025.1, *Military Support to Civil Authorities*, 15 January 1993.
13. DoD 3025.1-M, *Manual for Civil Emergencies*, June 1994.
14. DoDD. 3025.12, *Military Assistance for Civil Disturbances*, 4 February 1994.
15. DoDD. 5525.5, *DoD Cooperation With Civilian Law Enforcement Officials*, 15 January 1986, through Change 1, 20 December 1989.
16. DoDI 5525.10, *Using Military Working Dog Teams to Support Law Enforcement Agencies in Counterdrug Missions*, 17 September 1990.
17. DoDD 5210.56, *Use of Deadly Force and the Carrying of Firearms by DoD Personnel Engaged in Law Enforcement and Security Duties*, 1 November 2001.
18. Secretary of Defense Memorandum of 6 October 1998, Subj: Military Support to Counternarcotics Activities
19. Deputy Secretary of Defense Memorandum of 29 June 1996, Subj: DoD Training Support to U.S. Civilian Law Enforcement Agencies.
20. DoD Civil Disturbance Plan GARDEN PLOT.
21. Office of the Defense Coordinator for Drug Enforcement Policy and Support Policy of 26 Jan 95, *Priorities, Policies, and Procedures for Department of Defense Counterdrug Support to Domestic Drug Law Enforcement Agencies*.
22. NGR 500-1/ ANGI 10-8101, *Military Support to Civil Authorities*, 1 February 1996.
23. NGR 500-2/ ANGI 10-801, *National Guard Counterdrug Support*, 31 March 2000.
24. CJCS Instruction 3121.02, *Rules on the Use of Force by DoD Personnel Providing Support to Law Enforcement Agencies Conducting Counterdrug Operations in the United States*, 31 May 2000.
25. CJCS Instruction 3710.01, *Delegation of Authority for Approving Operational Support to Drug Law Enforcement Agencies and Counterdrug-Related Deployment of DoD Personnel*, 28 May 1993 (under revision).
26. AR 190-12, *Military Working Dogs*, 30 September 1993.
27. AR 190-14, *Carrying of Firearms and Use of Force for Law Enforcement and Security Duties*, 12 March 1993.
28. AR 500-51, *Support to Civilian Law Enforcement*, 1 July 1983.
29. AR 500-60, *Disaster Relief*, 1 August 1981.
30. AR 500-50, *Civil Disturbances*, 21 April 1972.

31. AR 700-131, *Loan and Lease of Army Materiel*, 1 September 1996.
32. FM 19-15, *Civil Disturbances*, 25 November 85.
33. FM 100-19, *Domestic Support Operations*, 01 July 1993.
34. SECNAVINST 5820.7B, *Cooperation With Civilian Law Enforcement Officials*, 28 March 1988.
35. OPNAVINST 3440.16C, *Navy Civil Emergency Management Program*, 10 March 1995
36. OPNAVINST 5585.2B, *Department of the Navy Military Working Dog (MWD) Program*, 25 August 1997.
37. AFI 10-801, *Assistance to Civilian Law Enforcement Agencies*, 15 April 1994.
38. AFI 10-802, *Military Support to Civil Authorities*, 25 February 1994.
39. AFI 31-202, *Military Working Dog Program*, 1 August 1999.
40. AFI 31-207, *Arming and Use of Force by Air Force Personnel*, 1 September 1999.
41. MCO 3440.7A, *Support to Civil Authorities*, 13 October 1998.

I. OVERVIEW.

A. The military's mission is to fight and win the nation's wars. In today's world, this includes the mission of Homeland Security. The current concept of Homeland Security consists of two major components: (1) homeland defense; and (2) support to civil authorities. This chapter focuses on DoD support to civil authorities. Chapter 24 provides further information on the overall Homeland Security mission. In the area of civil support, DoD cooperates with civil authorities, but the relationship is generally one of <u>support</u>—the civilian authorities retain <u>primary</u> responsibility. This chapter will explore the various authorities and restrictions in the area of domestic operations. The chapter will follow the following outline:

1. Homeland Security

2. Starting point for <u>all</u> DoD support: DoDD 3025.15.

3. Posse Comitatus Act, 18 U.S.C. § 1385.

   a. Who? Applies to persons on active federal military service.

   b. What? Direct enforcement of the civil law, but not activities that are military functions.

   c. Where? Generally, no extraterritorial effect.

   d. Effect? Criminal penalties.

4. Support to Law Enforcement.

   a. Sharing Information: 10 U.S.C. § 371, DoDD 5525.5.

   b. Loan of Equipment: 10 U.S.C. § 372, DoDD 5525.5.

   c. Expert Advice and Training: 10 U.S.C. § 373, DoDD 5525.5.

   d. Maintenance and Operation of Equipment: 10 U.S.C. § 374, DoDD 5525.5.

   e. Law Enforcement Detachments: 10 U.S.C. § 379.

   f. Emergencies Involving Chemical or Biological Weapons: 10 U.S.C. § 382.

   g. Miscellaneous Exceptions: DoDD 5525.5

h. Counterdrug Support.

(1) Detection and Monitoring: 10 U.S.C. § 124.

(2) National Guard: 32 U.S.C. § 112.

(3) Training and other support: Section 1004, FY 91 NDAA; CJCSI 3710.01.

(4) Weapons of Mass Destruction: Public Law 104-201.

5. Civil Disturbances: Insurrection Act (10 U.S.C. §§ 331-334); DoDD 3025.12.

6. Civil Disasters and Emergencies: Stafford Act, DoDD 3025.1.

II. GUIDE FOR PRACTICE.

- Respond to situations requiring immediate action to save lives, prevent human suffering, or mitigate great property damage under imminently serious conditions. Notify the appropriate approval authority as soon as possible.
- Consult DoDD 3025.15.
- Review the 6 criteria from DoDD 3025.15 for support: legality, lethality, risk, cost, appropriateness, and readiness.
- Note that SECDEF has, in certain circumstances, changed the approval authority (i.e., he has reserved the authority to himself) previously set out in other DoD Directives.
- Consult the appropriate DoD/Service regulation.
- Find and forward the requests to the appropriate approval authority.
- Remember the fiscal implications: most support is reimbursable, so ensure costs are captured.

III. HOMELAND SECURITY

A. Since September 11, 2001, the role of the military in domestic operations has changed drastically. Prior to September 11th, military involvement in domestic operations was almost exclusively in the area of civil support operations. Post-September 11th, the military's role has expanded to cover "homeland defense" and/or "homeland security" missions, somewhat undefined terms.

1. The most recent Quadrennial Defense Review Report (September 30, 2001) "restores the defense of the United States as the Department's primary mission." How this national security mission interacts with the traditional framework for the civil support mission is unclear.

2. "Homeland security (HLS)" is defined in The National Strategy for Homeland Security (July 2002) 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." Clearly the focus is on acts of terrorism and responses thereto. The document does not break the mission of "homeland security" down further. However, the Vice Chairman of the Joint Chiefs of Staff testified to Congress that the DoD "homeland security" mission breaks down into two functions: homeland defense and civil support.

a. "Homeland defense (HLD)" is not defined in the National Strategy for Homeland Security. However it is generally considered to consist of war-fighting missions led by the Department of Defense. Examples include combat air patrols and maritime defense operations.

b. "Civil support (CS)" is not defined in the National Strategy for Homeland Security. However it is generally considered to consist of missions where the DoD provides assistance or support to other lead federal or state agencies. Examples include disaster response, counterdrug support, and support to civilian law enforcement.

3. The challenge in today's environment is determining which type of mission the military is being asked to perform. The type of mission, HLD or CS, dictates the applicable legal structure, to include: rules of engagement/ rules for use of force, applicability of statutory restrictions such as the Posse Comitatus Act, chain of command and authority levels, and funding sources.

B. Homeland Security Act of 2002

1. This Act establishes the Department of Homeland Security in the executive branch of the United States government and defines its primary missions and responsibilities. The primary missions of the department include preventing terrorist attacks within the United States, reducing the vulnerability of the United States to terrorism at home, and minimizing the damage and assisting in the recovery from any attacks that may occur. The Department's primary responsibilities correspond to the five major functions established by the bill within the Department: information analysis and infrastructure protection; chemical, biological, radiological, nuclear, and related countermeasures; border and transportation security; emergency preparedness and response; and coordination with other parts of the federal government, with state and local governments, and with the private sector. These primary missions and responsibilities are not exhaustive, and the Department will continue to carry out other functions of the agencies it will absorb.

2. Implementation Guidance Regarding the Office of the Assistant Secretary of Defense for Homeland Defense (25 March 2003). Appoints an Assistant Secretary of Defense for Homeland Defense (ASD (HD)) whose principal duty is the overall supervision of the HLD activities of the DoD. The ASD (HD) serves as the DoD Domestic Crisis Manager. Secretary of the Army is therefore no longer the DoD executive agent under DoDD 3025.1, 3025.15, and 10 USC 2564. The functions and resources of the Office of the Director of Military Support (DOMS) are transferred to CJCS with policy oversight by ASD (HD).

IV. DODD 3025.15

A. This directive governs <u>all</u> DoD military assistance provided to civil authorities within the 50 States, District of Columbia, Puerto Rico, U.S. possessions, and territories. It 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.

1. Legality - compliance with the law.

2. Lethality - potential use of lethal force by or against DoD forces.

3. Risk - safety of DoD forces.

4. Cost - who pays, impact on DoD budget.

5. Appropriateness - whether the requested mission is in the interest of DoD to conduct.

6. Readiness - impact on DoD's ability to perform its primary mission.

B. <u>Approval Authority</u>. The directive 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 directive consulted. NOTE: See attached 23 March 2003 memorandum from Deputy Secretary of Defense Wolfowitz (Secretary of the Army no longer DoD Executive Agent for Homeland Security).

1. The Secretary of Defense has reserved to himself the authority to approve DoD support for:

a. Civil Disturbances.

b. Responses to acts of terrorism.

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.

2. When Combatant Command assigned forces are to be used, there must be coordination with the Chairman of the Joint Chiefs of Staff. CJCS will determine whether there is a significant issue requiring SECDEF approval, after coordination with the affected Combatant Command.

3. Immediate response authority in the local commander is not affected.

C. Note that the memo referenced above, "Implementation Guidance Regarding the Office of the Assistant Secretary of Defense for Homeland Defense" directs the Assistant Secretary of Defense for Homeland Defense to "update and streamline" DoDD 3025.15, DoDD 3025.1, DoDD 3025.12, and "other related issuances." There is no specific deadline for these changes noted. **Therefore before relying on this information, you MUST check to ensure you have the most current version of the directive you are using.**

V. POSSE COMITATUS ACT

A. The **Posse Comitatus Act** (18 U.S.C. § 1385) (PCA) prohibits use of Army and Air Force personnel to execute the civil laws of the U.S., "except in cases and under circumstances expressly authorized by the Constitution or Act of Congress." Violation of the Act carries with it criminal liability (felony) and the possibility of a fine and imprisonment. This prohibition is applicable to Navy and Marine Corps personnel as a matter of DoD policy [see DoD Directive 5525.5]. The primary prohibition of the PCA is against direct military involvement in law enforcement activities. Generally, court interpretations have held that military support short of actual search, seizure, arrest, or similar confrontation with civilians, (i.e., traditional law enforcement functions) is not a violation of the Act. Examples of permitted support include the provision of information, equipment, and facilities.

1. To Whom the PCA Applies.

a. Active duty personnel in the Army and Air Force.

(1) 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)).

(2) 10 U.S.C. § 375 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. (See DoDD 5525.5, para. B(1), and enclosure 4, para C.). SECDEF and SECNAV may grant exceptions on a case-by-case basis. DoDD 5525.5, Encl. 4, para. C., SECNAVINST 5820.7b, para. 9c.

b. Reservists on active duty, active duty for training, or inactive duty for training.

c. National Guard personnel in Federal service (Title 10 status).

d. Civilian employees of DoD when under the direct command and control of a military officer. (DoDD 5525.5, encl. 4; AR 500-51, para. 3-2; SECNAVINST 5820.7B, para. 9b(3)).

e. The PCA does NOT cover:

(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.

(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 1971 Department of Justice opinion, then-Assistant Attorney General William Rehnquist addressed the assignment of Army personnel to the Department of Transportation to act as US Marshals. He determined that this was not a violation of the PCA as: (1) a statute (49 USC 1657) expressly authorized the detailing of military members to DoT; (2) under the statute the assigned members were not charged against statutory limits on grade or end strength; and (3) 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."

2. To What the PCA Applies.

a. 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.

b. By directive and regulation.

(1) Prohibits direct law enforcement assistance, including:

(a) Interdiction of a vehicle, vessel, aircraft, or other similar activity;

(b) A search or seizure;

(c) An arrest, apprehension, stop and frisk, or similar activity; and

(d) Use of military personnel for surveillance or pursuit of individuals, or as undercover agents, informants, investigators, or interrogators. DoDD 5525.5, Encl. 4, para. A.3.

c. By case law.

(1) Analytical framework. There are three separate tests courts apply to determine whether the use of military personnel has violated the PCA.

(a) FIRST TEST: whether the action of the military personnel was "active" or "passive." United States v. Red Feather, 392 F. Supp. 916, at 921 (W.D.S.D 1975); United States v. Yunis, 681 F. Supp. 891, at 892 (D.D.C. 1988); United States v. Rasheed, 802 F.Supp. 312 (D. Hawaii 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:

(i) Regulatory (a power regulatory in nature is one which controls or directs);

(ii) Proscriptive (a power proscriptive in nature is one that prohibits or condemns); or

(iii) Compulsory (a power compulsory in nature is one 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, at 895-6 (D.D.C. 1988); United States v. Kahn, 35 F.3d 426 (9th Cir. 1994).

d. Military Purpose Activities. The PCA does NOT apply to actions furthering a military or foreign affairs function of the United States. This is sometimes known as the "Military Purpose Doctrine." The primary purpose of the action must be to further a military interest. Civilians may receive an incidental benefit. DoDD 5525.5, Encl. 4, para. A.2.a. Such military purposes include:

(1) 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).

(2) 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.

(3) 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).

(4) Protection of classified military information or equipment.

(5) 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).

(6) Such other actions that are undertaken primarily for a military or foreign affairs purpose.

3. Where the PCA Applies. Extraterritorial Effect of the PCA

a. A 1989 DoJ Office of Legal Counsel opinion concluded that the Posse Comitatus Act does not have extraterritorial application. Memorandum, Off. Legal Counsel for General Brent Scowcroft, 3 Nov. 1989. This opinion also states the restrictions of 10 U.S.C. §§ 371 - 381, specifically 10 U.S.C. § 375, also were not intended to have extraterritorial effect

b. Some courts have also adopted the view that the Posse Comitatus Act 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). (Note: both *Chandler* and *D'Aquino* involved law enforcement in an area of US 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.")

c. 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.

4. What is the effect of violating the PCA?

a. Criminal Sanctions. 2 years imprisonment, fine, or both.

b. Note that to date, no direct action has been brought for violation 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 violation 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 US civilian in the course of a HLS mission, if the state charged the member with murder and determined that the military member 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.

VI. SUPPORT TO LAW ENFORCEMENT

A. Although the PCA prohibits the type of direct law enforcement action discussed above, it does not prohibit all military support to civilian law enforcement. For such support to be authorized, it must either: (1) fall outside the strictures of the PCA; or (2) be specifically authorized by the Constitution or statute. Some support, such as that authorized in 10 U.S.C. §§ 371-382, arguably falls outside the strictures of the PCA. In case there was any doubt, however, Congress specifically stated in passing this legislation that it intended DoD to provide the authorized support.

1. **Sharing Information (§ 371).** DoD may provide information to LEAs gained during normal military training or operations, and shall "to the maximum extent practicable" consider the information needs of LEAs when planning normal training or military operations; and shall, "to the extent consistent with national security," share intelligence with LEAs (10 U.S.C. §371, DoDD 5525.5). [NOTE: During an otherwise valid training mission or exercise, information gathered may be passed to other agencies. Moreover, 10 U.S.C. § 371 requires DoD to take LEA needs into account when planning/executing operations. Examples cited in legislative history include "scheduling training exercises using night vision devices in border areas, conducting photo-reconnaissance training missions in a manner that serves the need of a LEA for aerial surveillance of potential marijuana fields, and similar activities." House Conference Report No. 100-989, Nat'l Def. Auth. Act FY 89, p. 2529, U.S. Cong. and Admin. News.]

a. Care must be taken to ensure that information/intelligence shared with LEAs about U.S. persons complies with intelligence law restrictions. See Chapter 15, Intelligence Law, of this handbook for further information on this subject.

b. Approval Authority. DoDD 5525.5 does not specifically mention the approval authority for sharing information. Although 10 U.S.C. § 374 says "The Secretary of Defense may," and there has been no delegation in DoDD 5525.5, it is reasonable to conclude that any commander may share information on his own authority, given the highly perishable nature of much of the information and that such sharing does not, independent of § 374 authority, violate the PCA.

2. **Loan of Equipment and Facilities (§ 372)**.

a. 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. (10 U.S.C. § 372, DoDD 5525.5) There must be no adverse impact on national security or military preparedness. **Loans** (the preferable mechanism between DoD and other federal law enforcement agencies because there is a statutory provision for reimbursement between these entities that does not exist for loans between DoD and State, or local law enforcement agencies) and **leases** (the preferable mechanism between DoD and State and local agencies because there is a provision for reimbursement) must comply with relevant statutes, e.g., the Economy Act (31 U.S.C. § 1535) and the Leasing Statute (10 U.S.C. § 2667), and service regulations, e.g., AR 500-51, AR 700-131, and AFI 10-801, Attachment 1, Section C.

b. Approval authority.

(1) SECDEF. Any requests for potentially lethal support, including loans of arms, combat and tactical vehicles, vessels, or aircraft, and ammunition. DoDD 3025.15, DoDD 5525.5.

(2) Army:

(a) HQDA (DALO-SMS). Non-lethal equipment in excess of 60 days. Installation Commander can approve all other equipment requests if loan/lease is for 60 days or less.

(b) HQDA (DAMO-ODS). Requests for use of installation or research facilities. AR 500-51, para. 2-5.

(3) Navy & Marines: Assistant SECNAV (Manpower and Reserve Affairs) for non-lethal equipment for more than 60 days. All other requests may be approved as specified in SECNAVINST 5820.7B, para. 9e(3).

(4) Air Force: Ass't SECAF for Manpower, Reserve Affairs, Installations, and Environment for all non-drug related requests. AFI 10-801, Attachment 4.

(5) National Guard: Loan of weapons, combat/tactical vehicles, vessels and aircraft require approval of the service secretary or their designee. Requests for loan/lease of NG equipment, which require HQDA or HQAF approval, will be reviewed by NGB. NGB 500-1/ANGI 10-8101, para. 3-1.

c. In addition to loan/lease authority, 10 U.S.C. § 2576a, "Excess Personal Property; Sale or Donation for Law Enforcement Activities," permits DoD to provide excess personal property suitable for use in counter-drug and counter-terrorism activities to federal and state agencies. This includes authority to furnish small arms and ammunition. The Defense Logistic Agency manages this program. Memorandum of the Secretary of Defense for the Under Secretary of Defense for Acquisition and Technology, 26 June 1995. The four Regional Logistics Support Offices (Buffalo, Miami, El Paso, Los Angeles) actually provide this excess property.

3. **Expert Advice and Training (§ 373)**.

a. Military personnel may be used to train civilian law enforcement personnel in the use of equipment, including equipment loaned or leased as described above (10 U.S.C. § 373, DoDD 5525.5). 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. Training should be limited to situations when the use of non-DoD personnel would be unfeasible or impractical from a cost or time perspective and would not otherwise compromise national security or military preparedness concerns. Such assistance may not involve DoD personnel in a direct role in a law enforcement operation, except as otherwise authorized by law. Except as otherwise authorized by law, the performance of such assistance by DoD personnel shall be at a location where there is not a reasonable likelihood of a law enforcement confrontation.

(1) Note that the Deputy Secretary of Defense has provided policy guidance in this area, which limits the types of training U.S. forces may provide. (Deputy Secretary of Defense Memorandum of 29 June 1996, Subj: DoD Training Support to U.S. Civilian Law Enforcement Agencies, reproduced as an appendix to this Chapter.) The policy is based on prudential concerns that advanced training could be misapplied or misused by CLEAs, 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 (TTPs) required to apprehend, arrest, detain, search for, or seize a criminal suspect when the potential for a violent confrontation exists." Examples of such training are sniper training, Military Operations in Urban Terrain (MOUT), Advanced MOUT, and Close Quarter Battle/Close Quarter Combat (CQB/CQC) training.

(2) A single general exception exists to provide this advanced training at the U.S. Army Military Police School. In addition, Commander, U.S. Special Operations Command (SOCOM) may approve this training, on an exceptional basis, by special operations forces personnel.

b. 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) Military Working Dog Team. A specific example of this type of support is military working dog team support to civilian law enforcement. The dogs have been analogized to equipment and its handler provides expert advice. See DoDD 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.

(2) Weapons of Mass Destruction. Congress has directed that DoD provide certain expert advice to federal, state, and local agencies with regard to weapons of mass destruction (WMD). This training is non-reimbursable because Congress has appropriated specific funds for these purposes.

(a) 50 U.S.C. § 2312: Training in emergency response to the use or threat of use of WMD.

(b) 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.)

c. Approval Authority.

(1) SECDEF.

(a) Training or expert advice to law enforcement in which there is a potential for confrontation between the trained law enforcement and specifically identified civilian individuals or groups.

(b) Assignments of 50 or more DoD personnel or a period of assignment of more than 30 days. The Assistance Secretary of Defense (Manpower, Reserve Affairs, and Logistics) is the approval authority for any other assignment.

(2) Army. DOMS is the approval authority. AR 500-51, para. 3-1d. **NOTE:** DOMs functions have been transferred to the CJCS (JDOMS) by a 25 March 2003 Deputy Secretary of Defense memorandum (attached below).

(3) Navy & Marines. The Secretary of the Navy is the approval authority. SECNAVINST 5820.7B, para. 9.e.

d. Funding. Support provided under these authorities is reimbursable under the Economy Act (10 U.S.C. § 377), unless:

(1) The support is provided in the normal course of training or operations; or

(2) The support results in a substantially equivalent training value.

4. **Maintenance and Operation of Equipment (§ 374)**. DoD may make personnel available to maintain and operate equipment for LEAs (10 U.S.C. § 374, DoDD 5525.5). The statute sets out a non-exclusive list of purposes for which DoD personnel may operate equipment, to include:

a. DoD may make personnel available to operate equipment for a federal LEA with responsibility for controlled substances laws, including the Maritime Drug Law Enforcement Act (e.g., DEA and Coast Guard); Immigration and Nationality Act enforcement (e.g., INS); and customs law enforcement (e.g., U.S. Customs Service). The request for this support must come from the head of the federal agency.

b. DoD may make personnel available to operate equipment for a federal LEA with respect to "assistance that such agency is authorized to furnish to a state, local, or foreign government which is involved in the enforcement of . . ." laws similar to federal controlled substances laws (including the Maritime Drug Law Enforcement Act), immigration and customs law enforcement. The request for this support must come from the head of the federal agency.

c. Detection, monitoring, and communication of the movement of air and sea traffic. [Note that for this and subsequent items, the support applies to any civilian law enforcement agency, with no requirement that the request for support come from the head of the agency.]

d. Detection, monitoring, and communication of the movement of surface traffic outside the geographic boundary of the U.S. and within the U.S. not to exceed 25 miles if the initial detection occurred outside of the boundary.

e. Aerial reconnaissance.

f. Interception of vessels or aircraft detected outside the land area of the U.S. for purposes of communicating with them and directing them to go to a location designated by appropriate civilian officials. DoD personnel may continue to operate this equipment to pursue these vessels or aircraft into the land area of the U.S. in cases where the detection began outside such land area. [Note: this "hot pursuit" provision is exceptional authority for DoD to conduct operations within CONUS that would normally fall within the purview of LEAs]. This authority does not permit physical force downs of aircraft.

g. Operation of equipment to facilitate communications for LEAs.

h. Subject to the joint approval of SECDEF and the Attorney General, transport federal LEA personnel and operate a base of operations for them. In the case of law enforcement operations OCONUS, the conduct of these operations also requires the approval of the Secretary of State.

i. Finally, the statute permits any other operation of equipment for civilian law enforcement agencies so long as such support does not involve direct participation by DoD personnel in a civilian law enforcement operation unless such direct participation is otherwise authorized by law.

5. **Law Enforcement Detachments (§ 379)**. U.S. Coast Guard personnel shall be assigned to naval vessels operating in drug interdiction areas (10 U.S.C. § 379). Such personnel have law enforcement powers, and are known as Law Enforcement Detachments (LEDETs). 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, the law enforcement duties should be left to the Coast Guard personnel. Military members should offer necessary support.

6. **Emergencies Involving Chemical or Biological Weapons (§ 382)**. In response to an emergency involving biological or chemical weapons of mass destruction which is beyond the capabilities of the civil authorities to handle, the Attorney General may request DoD assistance directly (10 U.S.C. § 382). The assistance provided includes monitoring, containing, disabling, and disposing of the weapon. Regulations, required by the statute, implementing the authority, have not yet been promulgated.

7. **Miscellaneous Exceptions**. DoDD 5525.5, Encl. 4, para. A.2.e., contains a list of federal statutes that contain express authorization for the use of military forces to enforce the civil law. Among them are protection of the President, Vice President, and other dignitaries, and assistance in the case of crimes against members of Congress, foreign officials, or involving nuclear materials

B. **Counterdrug Support**.

1. General.

a. Counterdrug support operations have become an important activity within DoD. All 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)).

b. 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.

2. Use of Force: The use of force in counterdrug missions will be governed by the Standing Rules of Engagement (CJCSI 3121.01A), Rules on the Use of Force by DoD Personnel during Military Operations Providing

Support to Law Enforcement Agencies Conducting Counterdrug Operations in the United States (CJCSI 3121.02), and any mission specific limitations imposed by the commander. Much of the format and text of CJCSI 3121.02 is similar to that of the SROE. The rules concerning self-defense and a commander's obligations to protect his unit from a hostile threat are identical. Perhaps the key aspects of CJCSI 3121.02 concern the requirement to use non-deadly force if it can be used without increasing the danger or threat of death or serious physical injury to DOD personnel.

3. Detection and Monitoring.

a. 10 U.S.C. § 124 made DoD the lead federal agency for detection and monitoring (D&M) of aerial and maritime transit of illegal drugs into the United States. D&M is therefore a DoD mission.

(1) Although a mission, D&M is to be carried out in support of federal, state, and local law enforcement authorities. Note that the statute does not extend to D&M missions covering land transit (i.e., the Mexican border). 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. Vessels or aircraft detected outside of the United States may be pursued over the United States.

b. D&M missions involve airborne (AWACs, aerostats), seaborne (primarily USN vessels), and land-based radar (to include Relocatable Over The Horizon Radar (ROTHR)) sites.

4. National Guard.

a. National Guard forces are a critical source of military support to CLEAs. Operating under state law and National Guard regulations, these units conduct counterdrug operations in all 54 states and territories. National Guard units provide 16 types of support, which are listed in NGR 500-2.

b. 32 U.S.C. § 112 provides federal funding for National Guard counterdrug activities. The statute provides that SECDEF may provide funds for: (1) pay, allowances, clothing, subsistence, gratuities, travel, and related expenses, as authorized by State law, of personnel of the National Guard of that State used, while not in Federal Service, for the purpose of drug interdiction and counter-drug activities; (2) the operation and maintenance of the equipment and facilities of the National Guard of that State used for the purpose of drug interdiction and counter-drug activities; and (3) the procurement of services and leasing of equipment for the National Guard of that State used for the purpose of drug interdiction and counter-drug activities.

c. The State must prepare a drug interdiction and counter-drug activities plan. DEP&S reviews each State's implementation plan and disburses funds.

d. An important aspect of 32 U.S.C. § 112 is that, although the National Guard 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 Posse Comitatus Act or for any other purpose." (Legis. Hist., House Conf. Report 100-989, Pub. L. 100-456, p. 2583, U.S. Cong. and Admin. News.). Also note that National Guard members are covered by the Federal Tort Claims Act while engaged in counterdrug operations, although they remain in a non-federal status. (*see* commentary, *The Use of National Guard Personnel for Counterdrug Operations: Implications Under the Federal Tort Claims Act*, ARMY LAW., June 1991).

e. The National Guard, as a state militia, is not subject to the restrictions of the Posse Comitatus Act while not in federal service. Thus, the Guard has more flexibility than federal forces in conducting counterdrug support operations. However, the National Guard Bureau (NGB) has imposed a number of policy restrictions on counterdrug operations (see NGR 500-2, National Guard Counterdrug Support to LEAs). **State law** will determine whether a particular operation may be legally supported by the Guard. NGR 500-2 contains excellent operational guidance to National Guard units engaged in counterdrug operations.

5. Additional Support to Counterdrug Agencies.

a. General. Congress has given DoD additional authorities to support Federal, State, local, and foreign agencies that have counterdrug responsibilities. These are in addition to the authorities contained in 10 U.S.C. §§ 371-377 (discussed above). Congress has not chosen to codify these authorities, however, so it is necessary to refer to the public laws instead. Many of these are reproduced in the notes following 10 U.S.C. § 374 in the annotated codes.

b. Section 1004. (Reproduced in an appendix to this Chapter)

(1) Section 1004 is the primary authority used for counterdrug operations. The statute permits broad support to the following law enforcement agencies that have counterdrug responsibilities:

(a) Federal, State, and Local.

(b) Foreign, when requested by a U.S. Federal counterdrug agency. (Typically the DEA or member of the State Department Country Team that has counterdrug responsibilities within the country.)

(2) Types of support:

(a) Maintenance and repair of equipment.

(b) Transportation of personnel (U.S. & foreign), equipment, and supplies CONUS/OCONUS.

(c) Establishment of bases of operations CONUS/OCONUS.

(d) Training of law enforcement personnel, to include associated support and training expenses.

(e) Detection and monitoring of air, sea, surface traffic outside the United States, and within 25 miles of the border if the detection occurred outside the United States.

(f) Construction of roads, fences, and lighting along U.S. border.

(g) Linguist and intelligence analyst services.

(h) Aerial and ground reconnaissance.

(i) Establishment of command, control, communication, and computer networks for improved integration of law enforcement, active military, and National Guard activities.

(3) These authorities are not exceptions to the Posse Comitatus Act. Any support provided must comply with the restrictions of the PCA. Additional, any domestic training provided must comply with the Deputy Secretary of Defense policy on advanced training.

(4) Approval Authorities: CJCSI 3710.01.

(a) Non-Operational Support. That which does not involve the active participation of DoD personnel, to include the provision of equipment only, use of facilities, and formal schoolhouse training, is requested and approved in accordance with DoDD 5525.5 and implementing Service regulations, discussed above.

(b) Operational Support.

1. The Secretary of Defense 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 Combatant Commanders, 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

3710.01. Example: For certain missions along the southwest border, the delegations runs from SECDEF to JFCOM to FORSCOM to Joint Task Force SIX (JTF-6). (**Note**: current studies are considering whether to stand down JTF-6 as a standing task force.) However , SECDEF has continued to withhold the delegation for approval of counterdrug ground reconnaissance training missions within the United States. (Secretary of Defense Memorandum of 6 October 1998, Subj: Military Support to Counternarcotics Activities, reproduced as an appendix to this Chapter.)

(5) Requests for DoD support must meet the following criteria:

(a) Support requested has a clear counterdrug connection,

(b) Support request must originate with a federal, state or local agency having counterdrug responsibilities,

(c) Request must be for support that DoD is authorized to provide,

(d) Support must clearly assist with the counterdrug activities of the agency,

(e) Support is consistent with DoD support of the National Drug Control Strategy. DEP&S has promulgated the following priorities for the provision of support:

1. Multi-jurisdictional, multi-agency task forces that are in a high intensity drug trafficking area (HIDTA)

2. Individual agencies in a HIDTA

3. Multi-jurisdictional, multi-agency task forces not in a HIDTA.

4. Individual agencies not in a HIDTA

(f) All approved counterdrug operational support must have military training value.

c. Other Statutes.

(1) Section 1206, FY 90 NDAA. Congress directed the armed forces, to the maximum extent practicable, to conduct training exercises in declared drug interdiction areas.

(2) 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.

(3) 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.

C. **Weapons of Mass Destruction** In 1996, Congress passed the Defense Against Weapons of Mass Destruction Act, commonly known as the Nunn-Lugar-Domenici Act. Public Law 104-201. The intent of the Act was to enhance the capability of the Federal Government to prevent and respond to terrorist incidents involving weapons of mass destruction. Funding is provided to DoD to develop and maintain domestic terrorism rapid response teams to aid federal, state, and local officials and responders. There are currently 35 response teams, composed of full time Army and Air National Guard members. These teams are federally resourced, trained, evaluated, and operating under federal doctrine. They perform their mission, however, primarily under command and control of state governors. If the teams are federalized, they fall under the command and control of Joint Task Force, Civil Support (JTF-CS).

VII. CIVIL DISTURBANCES

A. Policy. Although the President has Constitutional (Art. IV, § 4) and statutory authority (10 U.S.C. §§ 331-334) to use the armed forces to suppress insurrections and domestic violence, the primary responsibility for protecting life and property and maintaining law and order in the civilian community is vested in the State and local governments. Military resources may be employed **in support of** civilian law enforcement operations in the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, and the U.S. territories and possessions. Any employment of military forces in support of law enforcement operations shall maintain the primacy of civilian authority (DoD Directive 3025.12). Note that there is specific Constitutional and statutory authority for the military to conduct this mission. Therefore the PCA does not apply to civil disturbance missions.

B. The insurrection statutes permit the President to use the armed forces to enforce the law in the following circumstances:

1. An insurrection within a State. The legislature or governor must request assistance from the President. § 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. § 332.

3. Any insurrection or domestic violence which:

a. opposes or obstructs federal law; or

b. hinders the execution of State law so that the people are deprived of their Constitutional rights, and the State is unable or unwilling to protect those rights. § 333.

C. The Federal response.

1. The Attorney General coordinates all federal government activities relating to civil disturbances.

2. If the President decides to respond to the situation, he must first issue a proclamation, prepared by the Attorney General, to the insurgents directing them to disperse within a limited time. See Proclamation 6427 (1 May 1992) for the proclamation issued in connection with the Los Angeles riots. At the end of that time period, the President may issue an execute order directing the use of armed forces. See Executive Order 12804 (1 May 1992) for the execute order issued in connection with the Los Angeles riots.

3. The Attorney General appoints a Senior Civilian Representative of the Attorney General (SCRAG) as his on-scene action agent.

D. The DoD Response.

1. SECDEF has reserved to himself the authority to approve support in response to civil disturbances (DoDD 3025.15). **Note**, however, the Secretary of the Army is still listed as the approval authority in DoDD 3025.12.

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.

3. The Assistant Secretary of Defense for Homeland Defense, along with JDOMS, in coordination with CJCS, direct the required DoD assistance, normally by designating supported and supporting Combatant Commanders. The DoD Civil Disturbance Plan GARDEN PLOT will be implemented, with modifications as necessary. Detailed Use of Force Policy/ROE is found in Appendix 1 and Appendix 8 to Annex C.

E. Emergency Employment of Military Forces.

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, in cases of civil disturbances, if the duly constituted authority local authorities are unable to control the situation and circumstances preclude obtaining prior Presidential authorization.

b. When duly constituted state or local authorities are unable or decline to provide adequate protection for Federal property or functions.

2. Note that this is limited authority. Commanders should use all available means to seek Presidential authorizations through the chain of command while applying their emergency authority under the directive (DoD Directive 3025.12). See also AR 500-50, par. 2-4, which highlights the fact that, given ready access to rapid communications, it is unlikely that such action would be justified without prior approval.

F. Operational Issues.

1. Use of Force. JTF Los Angeles highlighted the need to have military forces employ a unified and consistent set of ROE. GARDEN PLOT ROE, subject to CJCS/Combatant Commander modification, provide such consistency. Some of the fundamental concepts in those ROE follow:

a. Minimum force must be used at all times when responding to civil disturbances.

b. Warning shots are not permitted because of the danger to innocent persons and the potential to create the impression on the part of citizens or fellow law enforcement personnel that sniping is widespread.

c. Deadly force may be used only if:

(1) Lesser means have been exhausted or are unavailable; and

(2) Risk of harm to innocent persons is not significantly increased; and

(3) Purpose of use is one of the following:

(a) In self-defense to avoid death or serious bodily harm.

(b) To prevent crime involving serious risk of death or serious bodily harm.

(c) To prevent destruction of vital public health/safety/property.

(d) To prevent escape of person who is serious threat to person or property.

d. ROE should also address "arming orders." These are discussed in Annex C, appendix 8 of GARDEN PLOT. It is important to ensure the consistent application of these orders by all troops in the JTF, both National Guard and active duty forces.

e. Judge advocates deployed to JTF Los Angeles stressed the need to disseminate ROE early (although this may be difficult given the time constraints) and to provide realistic training to soldiers, e.g. using vignettes to illustrate GARDEN PLOT guidance.

2. Restrictions on Activities. Recognize that the Insurrection Act (10 U.S.C. §§ 331-334) is an exception to the normal restrictions of the Posse Comitatus Act. Consequently, during civil disturbance operations, forces may directly enforce the law. However, the overarching policy of providing **support** to civilian officials should always be kept in mind. Active duty military personnel (other than Military Police or similar personnel) are not trained in law enforcement.

National Guard personnel may receive some law enforcement training. When possible, law enforcement duties should be left to State and local law enforcement authorities, and military forces reserved for tasks suitable to their training.

3. Loan/Lease of Military Equipment to Civilian Law Enforcement. Civilian law enforcement officials often request the loan of military equipment during civil disturbance operations. In light of the DoD goal to minimize the military presence in such operations, this practice is viewed as an effective means of accomplishing that goal. The details of providing this support to civilian authorities is discussed below in Loans of Equipment and Facilities.

4. Exercise of Authority over Civilians.

a. Custody and Detention: Annex C, appendices 1 and 8 of GARDEN PLOT, state the general policy that civilian authorities should take civilians into custody. However, military personnel do have the authority to detain or take into custody rioters, looters, or others committing offenses, when necessary or in the absence of civilian police.

b. Searches: Annex C, appendices 1 and 8 of GARDEN PLOT, permit searches of individuals and private property, without a warrant, in limited circumstances, e.g. a reasonable belief that an individual is armed or presents an immediate risk of harm to JTF personnel or others. Generally, however, searches should be conducted by civilian law enforcement because of their greater familiarity with search and warrant procedures.

VIII. CIVIL DISASTERS AND EMERGENCIES

A. The statutory basis for providing relief is the Stafford Act. Under the U.S. constitutional system the state has primary responsibility for responding to disasters. The Stafford Act and its predecessors (which date back to 1950) provide a means by which the Federal Government can assist State governments in fulfilling those responsibilities. The Stafford Act is NOT a statutory exception to the PCA; therefore all missions done during a disaster relief response must comply with the restrictions of the PCA. DoDD 3025.1 and DoD 3025.1-M provide all the information necessary for practitioners in this area.

B. Five mechanisms that trigger involvement of Federal troops.

1. President's **emergency 10-day authority.** 42 U.S.C. § 5170bI. The President may use DoD to perform work "essential for the preservation of life and property." This is done prior to any Presidential declaration of an emergency or major disaster. Emergency work includes clearing and removing debris and wreckage and the temporary restoration of essential public facilities and services.

2. Presidential declaration of a **major disaster**. 42 U.S.C. § 5170.

a. Must be at the request of the Governor, after an appropriate finding that the incident is of such severity and magnitude that it is beyond the capabilities of the State, and that Federal assistance is required.

b. As a prerequisite, the Governor must—

(1) Respond under State law (e.g., activate the State National Guard under Title 32).

(2) Execute the State's emergency plan.

(3) Provide information (to FEMA) regarding the resources that have been committed.

(4) Certify that the State will comply with cost sharing provisions under the Act.

3. Presidential declaration of an **emergency**. 42 U.S.C. § 5191(a).

a. Must be at the request of the Governor, after an appropriate finding that the incident is of such severity and magnitude that it is beyond the capabilities of the State, and that Federal assistance is required.

b. As a prerequisite, the Governor must—

(1) Respond under State law (e.g., activate the State National Guard under Title 32).

(2) Execute the State's emergency plan.

(3) Provide information (to FEMA) regarding the resources that have been committed.

(4) Define the type and amount of federal aid required. This is the primary difference between a major disaster and an emergency. Congress created the "emergency" disaster category in 1974 in recognition that there are less severe disasters that do not require the full complement of federal disaster aid (e.g., unemployment assistance, legal services, etc.). Consequently, the Disaster Relief Act of 1974 established the new category to increase the flexibility of the federal responses and to make it more practicable to provide aid to these lesser emergencies. Because these situations contemplated less comprehensive assistance, the emergency provision included the requirement for the state to specify the nature and amount of support needed.

4. Certain emergencies involving **Federal primary responsibility**. 42 U.S.C. § 5191(b).

a. President may declare an emergency (not a major disaster) regarding a situation for which the primary responsibility for response rests with the United States because the emergency involves a subject area which, under the Constitution or laws of the United States, the United States exercises exclusive or preeminent responsibility and authority.

b. This authority was exercised for the first time following the bombing of the Murrah Federal Building in Oklahoma City, OK, on April 19, 1995. One week later, the President declared a major disaster under the provisions of 42 U.S.C. § 5170.

5. **Immediate Response Authority**. DoD Directive 3025.1.

a. Note this is not authority provided in the Stafford Act.

b. Authorizes local military commanders to save lives, prevent human suffering, and mitigate great property damage in imminently serious conditions when time does not permit approval from higher headquarters.

c. Contemporaneous notification to higher authority is required. In the Army, notification should be made to the Joint Director of Military Support (JDOMS), located in the Pentagon.

d. Authorizes following types of support: rescue, evacuation, and emergency treatment of casualties; emergency restoration of power; debris removal and EOD; and food distribution.

e. This is limited authority. According to DoD 3025.1-M, Immediate Response Authority is "time sensitive." Requests for assistance should come within 24 hours of a damage assessment.

f. Regarding reimbursement, the DoD Directive states that, although this assistance should be provided to civil authorities on a cost-reimbursable basis, the assistance should not be delayed or denied because of the inability or unwillingness of the requester to make a reimbursement commitment.

g. Although the response should not be delayed, a request for reimbursement from the state or local government to whom assistance was provided must be made. If the state or local government is unable to reimburse DoD, then the following should be done:

(1) Forward the request for reimbursement to the Iraq Freedom Fund (Pursuant to the Emergency Wartime Supplemental Appropriations Act, 2003, § 1313, the Defense Emergency Response Fund authority and dollars have been merged with the Iraq Freedom Fund and shall be available for the same purposes, i.e. operations authorized under P.L. 107-40, 18 Sep. 2001.).

(2) Should there not be any funds available in this appropriation, then forward the request to FEMA. On occasion, FEMA has provided reimbursement to the DoD for Immediate Response assistance by "ratifying" the DoD action after the fact. Such ratification, however, is done on a case-by-case basis. Commanders cannot rely on FEMA doing so in every case. FEMA is under no obligation to reimburse the DOD for response actions taken prior to a Presidential Determination.

(3) If no one reimburses the affected command, the costs of the Immediate Response assistance are funded with unit O&M.

C. Types of support authorized under the Stafford Act.

1. 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)).

2. Distribution of medicine, food, and other consumable supplies, and emergency assistance (42 U.S.C. §§ 5170a(4) and 5192(a)(7)).

3. 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)).

4. 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—

a. Debris removal.

b. 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 or persons.

c. Clearance of roads and construction of temporary bridges necessary to the performance of emergency tasks and essential community services.

d. Provision of temporary facilities for schools and other essential community services.

e. Demolition of unsafe structures that endanger the public.

f. Warning of further risks and hazards.

g. Dissemination of public information and assistance regarding health and safety measures.

h. Provision of technical advice to State and local governments on disaster management and control.

i. Reduction of immediate threats to life, property, and public health and safety. (42 U.S.C. § 5170b(a)(3)).

D. The Federal Response.

1. Executive Order 12656 designates the Federal Emergency Management Agency (FEMA) as the lead Federal agency for all domestic disaster relief. FEMA directs and coordinates the federal response on behalf of the President.

2. FEMA has prepared the *Federal Response Plan*, which defines 12 Emergency Support Functions (ESFs) for which certain federal agencies have either a primary or supporting role.

ESF 1 - Transportation. (Department of Transportation)

ESF 2 - Communications. (Office of Science and Technology Policy)

ESF 3 - Public Works and Engineering. (DoD/Army Corps of Engineers)

ESF 4 - Firefighting. (Department of Agriculture/Forest Service)

ESF 5 - Information and Planning. (FEMA)

ESF 6 - Mass Care. (American Red Cross)

ESF 7 - Resource Support. (General Services Administration)

ESF 8 - Health and Medical Services. (U.S. Public Health Service)

ESF 9 - Urban Search and Rescue (FEMA)

ESF 10 - Hazardous Materials. (Environmental Protection Agency)

ESF 11 - Food. (Department of Agriculture)

ESF 12 - Energy. (Department of Energy)

NOTE: a supporting agency can be, and DoD often is, tasked with primary responsibility for a particular mission (or for the entire ESF) outside its primary agency responsibility. DoD has supporting agency responsibilities for all ESFs.

Most States have an additional 3 (for a total of 15) ESP's.

ESF 13 - Law Enforcement

ESF 14 - Donations/Volunteers

ESF 15 - Recovery

3. FEMA appoints a Federal Coordinating Officer (FCO), typically the senior FEMA official on-scene, to manage the federal effort. Because of the likelihood of DoD involvement, a Defense Coordinating Officer (DCO) is assigned to the FCO. The DCO, an O-6 or above, is generally the Training Support Brigade Commander for that FEMA region. The DCO will be the CFO's single point of contact for DoD support.

4. After an assessment of the situation, the FCO issues Mission Assignments to participating federal agencies, defining the task and maximum reimbursement amount. FEMA reimburses those agencies from moneys either set aside or specially appropriated for a particular disaster (42 U.S.C. § 5147). Federal agencies that exceed the reimbursement amount or execute tasks not within the Mission Assignment may not be reimbursed. FEMA, under its implementing regulations (44 CFR Part 206), is the sole authority that decides whether or not reimbursement is forthcoming. If FEMA decides to reimburse an agency, it will be for incremental expenses defined in DoD Financial Management Regulation (FMR) 7000.14-R, vol. 12, Ch. 6, para. 060204. **All requests for assistance should be routed through FEMA, with a view toward the issuance of a FEMA Mission Assignment.** All mission tasking must either originate from FEMA, or be routed through FEMA for approval prior to execution. Other than under the emergency 10-day provision (42 U.S.C. § 5170bI), the federal property emergency provision (42 U.S.C. § 5191(b)), and the DoDD 3025.1 immediate response authority, DoD has no authority to provide disaster relief independent from FEMA. All requests for DoD assistance should be routed in either one of two manners—

a. From the State or local agency to FEMA. FEMA, through the FCO, will evaluate the request and approve, disapprove, or partially approve the request. Approved requests are tasked by the FCO to the DCO, who in turn disseminates the task down to the unit(s) providing the support.

b. From the State or local agency to a DoD unit. This request should be forwarded to the DCO, who will coordinate with the FCO to determine if it will be approved, disapproved, or partially approved. Approved requests are tasked by the FCO to the DCO, who in turn disseminates the task down to the unit(s) providing the support.

E. The DoD Response.

1. In DoDD 3025.1, SECDEF appointed the Secretary of the Army as the DoD Executive Agent for disaster relief operations. As such, he is the approval authority for all such support, unless it involves Combatant Commander-assigned forces (see the discussion of DoDD 3025.15, above). **NOTE:** The Assistant Secretary of Defense for Homeland Defense has been made the DoD Executive Agent for disaster relief operations by a 25 March 2003 Deputy Secretary of Defense memorandum (attached below).

2. The Joint Director of Military Support (JDOMS) is the Assistant Secretary of Defense for Homeland Defense's action agent. JDOMS coordinates and monitors the DoD effort through the DCO.

3. JFCOM (CONUS, Puerto Rico, and the Virgin Islands) and USPACOM (Alaska, Hawaii, and Pacific possessions and territories) are responsible for developing disaster response plans and for the execution of those plans. They may form a Joint Task Force for this purpose.

F. Operational Issues.

1. The Stafford Act is **not a statutory exception** to the Posse Comitatus Act (discussed above). Thus, military personnel deployed on a disaster relief mission do not have a law enforcement function. Some of the following PCA problems are often encountered:

a. Traffic Control Points. Often local officials will seek military assistance in operating traffic control points to replace non-operational traffic lights. The PCA prohibits Federal troops from manning traffic control points unless there is a military purpose in doing so, e.g., opening the way for a convoy or keeping a military supply route open. If there is no military purpose involved, traffic control in the civilian community is a civilian law enforcement function. National Guard troops in Title 32 status may be used to perform this function.

b. Patrolling. Whenever a military commander is assigned an area of responsibility, one of the first priorities of work will be to ensure that the area is secure. Looting and other illegal activities may be occurring within a commander's sector. Patrolling in civilian neighborhoods for the purpose of providing security, whether on foot or in military vehicles, violates the PCA. It is important to distinguish patrols designed to execute a humanitarian relief mission (e.g., delivering MREs, medical assistance, and other essentials) from patrols designed to ensure security of the sector. The former are proper, the latter violate the PCA. Even though the mere presence of a humanitarian relief patrol may deter potential lawbreakers, there is no violation of the PCA so long as troops do not become involved in a law enforcement function.

c. Security at Supply Depots. Using Federal troops to guard any <u>military</u> facility, to include a supply depot under the control of the military, does not violate the PCA. As long as the facility is operated by the military, the fact that some or all of the materials and supplies stored there are State and local property (by virtue of their donation from other agencies) is irrelevant.

d. Security at Life Support Centers (LSCs). Although the American Red Cross has responsibility under ESF 6 for providing temporary shelter, often the military is called upon to provide tentage and personnel support for these LSCs. LSCs are under the control of, and operated by, State and local governments and <u>not by the military</u>, irrespective of the degree of military material and personnel on site. As such, the security of LSCs is exclusively a local law enforcement function. This function should be performed by local law enforcement officials, locally deputized Federal Marshals, or National Guardsmen in Title 32 status.

2. Rules for the Use of Force.

a. Unlike the GARDEN PLOT Rules of Engagement, there are no preexisting stand-alone ROE/Rules for the Use of Force for domestic disaster relief operations. The CJCS Standing Rules of Engagement (SROE) do not apply to disaster relief operations; rather, U.S. forces will follow the use-of-force guidelines issued in the disaster relief mission's execute order and subsequent orders. As a baseline, however, the soldier's inherent right of self-defense, as stated in the SROE, would apply.

b. It should be noted that, given the nature of the operation, no additional ROE/Rules for the Use of Force are generally necessary. Indeed, in most instances troops are entering a non-hostile environment and are welcomed by the local populace with open arms.

c. In the absence of any mission specific rules for the use of force, security and guard force personnel will operate under their normal rules for the use of force as stated in DoD Directive 5210.56 and their Service regulations.

3. Force Protection.

a. During disaster relief operations in metropolitan areas, the force may be subjected to the threat of violence by local street gangs and other criminal elements. In these instances, commanders will wish to effect liaison with local law enforcement agencies (LEA) in order to properly assess the threat to the force.

b. Although liaison with LEA is often necessary, great care should be taken when that liaison results in the collection, retention, or dissemination of information on U.S. persons. See the chapter on Intelligence Law, this Handbook, for additional information.

4. Election Support.

a. Federal law (18 U.S.C. § 592) prohibits the positioning of troops "at any place where a general or special election is held." Disaster relief operations may be ongoing during the time of a scheduled election. Elections are considered essential community services under the Stafford Act, and are eligible for Federal support, subject to the restrictions of 18 U.S.C. § 592.

b. The Department of Justice has opined that, where State and local officials set up polling sites in the immediate proximity of troop concentrations (e.g., billeting areas, food distribution centers, and life support centers), there is no violation of Federal law so long as, to the maximum extent practicable, troops avoid any demonstration of Federal military authority at or near the polling site. Furthermore, DoJ has opined that troops can erect tents with light sets and provide generator maintenance for these sites without violating Federal law.

5. Chaplain Activities. Chaplains routinely deploy with their units (usually at the battalion-level or larger). Their role in disaster relief operations is not expanded by the Stafford Act. Chaplains must refrain from ministering to civilian disaster victims, which violates the Establishment Clause's prohibition on government sponsorship of religion. Many chaplains also have secular counseling expertise that they may want to put to use. While this practice would not violate the Establishment Clause, it may not be prudent because it creates the appearance of a violation as well as placing chaplains in the untenable position of having to bifurcate their secular and religious functions.

6. Claims.

a. The Stafford Act (42 U.S.C. § 5148) states that "the Federal Government shall not be liable for any claim based upon the exercise of or failure to exercise or perform a discretionary function or duty on the part of a Federal agency or an employee of the Federal Government in carrying out the provisions of this chapter." US Army Claims Service has interpreted this language as having no impact on how claims and potential claims are processed.

b. The Stafford Act (42 U.S.C. § 5173) conditions Federal debris removal assistance on the affected State and local governments agreeing to "indemnify the Federal Government against any claim arising from such removal." USARCS and FEMA share the opinion that it is FEMA, rather than the Army, that will seek indemnification from a State or local government. Accordingly, from investigation through adjudication, the normal Army claims procedures are

followed. After adjudication, however, claims resulting from debris removal by Army units should be forwarded to USARCS, who will turn them over to FEMA.

7. Debris Removal.

a. Federal agencies are authorized to remove debris from both public and private lands (42 U.S.C. § 5173). Such assistance is conditioned on the affected State or local government obtaining unconditional authorization for the debris removal, and, in the case of private lands, the Federal Government must also be indemnified against any claim arising from such removal.

b. As a policy matter, commanders may wish to restrict troops from removing debris from private property in the absence of the property owner's request and presence. This will avoid adverse publicity that can arise from angry property owners whose lots were cleared against their will. As an alternative, property owners can be instructed to remove debris to the public right of way for removal, and troops can assist property owners who are present and request assistance in hauling debris to the right of way.

8. Donated Property.

a. It is very common for military units (predominantly Army Materiel Command) to be tasked to establish depots to warehouse and distribute construction materials, clothing, furniture, and other property that has been donated for distribution to disaster victims. All donated property is considered to be donated to the State, and distribution of property is done at the direction of the State agency designated as the coordinating agent for this purpose (usually the State chapter of the American Red Cross).

b. At the close of operations, when military units are returning to home station, FEMA must be contacted to coordinate a transition plan with the State. Often, private relief organizations will appear at depots requesting transfer to them of property contained within the depot. Donated property in military custody that has not been distributed to disaster victims or other relief agencies must be disposed of according to the instructions of the State entity having dominion over it.

9. Environmental Compliance. The Stafford Act (42 U.S.C. § 5159) exempts actions taken by Federal agencies while providing disaster relief from being considered a "major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969." While Environmental Impact Statements are specifically waived, however, due consideration must be given to the effects of disaster relief operations and compliance with other federal environmental laws (such as the Clean Air Act and Clean Water Act), which are not waived. This is especially important in the area of debris removal. Often debris is removed to open burn sites, which requires a State waiver under the Clean Air Act.

10. Medical Support to Relief Workers.

a. The Stafford Act (42 U.S.C. § 5170b(a)(3)(B)) clearly envisions the provision of medical care to disaster victims. On its face, the statute appears to apply only to disaster victims, and not to the numerous relief workers in the area who may also require medical treatment. Army Regulations (AR 40-3, Medical Services) do not provide an independent source of authority.

b. The Office of the General Counsel, FEMA, has opined that the Stafford Act does authorize the provision of medical care to all persons within the disaster area, to include relief workers. Under this authority, the Public Health Service, which has primary responsibility for relief worker health under the Federal Response Plan, may request that FEMA task DoD to provide these medical services.

11. Operating a Disaster Relief Radio Station. There is no authority under the Stafford Act to operate a radio station to broadcast public service messages related to DoD disaster relief efforts. However, the Federal Communications System has, in the past, granted a limited license to operate a radio station for these purposes. The FCC should be contacted through FEMA and the National Communications System (responsible for ESF 2). The radio station can be

operated by PSYOP personnel, with the caveat that it broadcast only public service messages (no music or commercial programming) and cease operation with the termination of DoD relief efforts.

12. Volunteers.

a. There are statutory exceptions to the general prohibition against accepting voluntary services under 31 U.S.C. § 1342 that can be used to accept the assistance of volunteer workers. The statute itself authorizes the acceptance of voluntary services in "emergencies involving the safety of human life or the protection of property." The Stafford Act (42 U.S.C. §§ 5152(a), 5170(a)(2)) authorizes the President to use the personnel of private disaster relief organizations and to coordinate their activities.

b. Despite these exceptions, military units should not attempt to organize or supervise volunteer workers. Considerations of liability and control dictate that all volunteers be channeled through private relief organizations.

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

National Defense Authorization Act, Fiscal Year 1991, Public Law 101-510, as amended, Section 1004, Additional Support for Counter-Drug Activities

(a) Support to Other Agencies. During fiscal years 1991 through 2002,[380] 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 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 purpose 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 subparagraph (A) 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 compatibility of that equipment with equipment used by the Department of defense.

(3) The transportation of personnel of the Untied 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 (an unspecified minor military construction project[381]) and operation of bases of operations and training facilities for the purpose of facilitating counter-drug activities of the Department of Defense or any Federal, State, or local law enforcement agency[382] within or outside the United States or counter-drug activities of a foreign law enforcement agency outside the United States.[383]

(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) [384] 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 Untied 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 Untied States.

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[380] Section 1088(a)(1) of Public Law 102-190 struck out "During fiscal year 1991" and inserted in lieu thereof "During fiscal years 1991, 1992, and 1993,".

Section 1041(a) of Public Law 102-484 struck out "and 1993" and inserted in lieu thereof "1993, and 1994,".

Section 1121(a) of Public Law 103-160 struck out "fiscal years 1991, 1992, 193, and 1994" and inserted in lieu thereof "fiscal years 1991 through 1995"

Section 1011(a) of Public Law 103-337 struck out Athrough 1995" and inserted in lieu thereof "through 1999."

Section 1021(a) of Public Law 105-261 struck out "through 1999" and inserted in lieu thereof "through 2002."

[381] Section 1021(b)(1) of Public Law 105-261 struck through "unspecified minor construction" and inserted in lieu thereof "an unspecified minor military construction project."

[382] Section 1021(b)(2) of Public Law 105-261 inserted "of the Department of Defense or any Federal, State, or local law enforcement agency."

[383] Section 1021(b)(3) of Public Law 105-261 inserted "or counter-drug activities of a foreign law enforcement agency outside the United States."

[384] Section 1041(b)(1) of Public law 102-484 struck out "(6) Aerial and ground reconnaissance outside, at, or near the borders of the United States."; and inserted a new par. (6).

(8) Establishment of command, control, communication, and computer networks for improved integration of law enforcement, active military, and National Guard activities.

(9) [385] The provision of linguist and intelligence analyst services.

(10) [386] Aerial and ground reconnaissance.

I [387] 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 State. 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 subsection (2), not subject to the requirement of chapter 18 of title 10, United Sates Code.

(2) Support under this section shall be subject to the provision of section 375 and, except as proved in subsection (e), section 376 of title 10, United States Code.

(h) [388]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.

[385] Section 1041(b)(2) of Public Law 102-484 added a new par. (9).

[386] Section 1121(b) of Public Law 103-160 added a new par. (10).

[387] Section 1041(c) of Public Law 102-484 redesignated subsecs. (c) through (g) as (d) through (h), and inserted a new subsec. (c).

[388] Section 1021(c) of Public Law 105-261 inserted a new par. (h).

THE SECRETARY OF DEFENSE
1000 DEFENSE PENTAGON
WASHINGTON, DC 20301-1000

October 6, 1998

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS
CHAIRMAN OF THE JOINT CHIEFS OF STAFF
UNDER SECRETARY OF DEFENSE FOR POLICY
GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
COMMANDERS OF THE COMBATANT COMMANDS
DIRECTOR OF ADMINISTRATION AND MANAGEMENT
DIRECTOR, DEFENSE INTELLIGENCE AGENCY
DIRECTOR, NATIONAL SECURITY AGENCY

SUBJECT: Military Support to Counternarcotics Activities

This memorandum supersedes the Secretary of Defense (SecDef) policy memorandum dated September 18, 1989, subject: "Military Support to International Counternarcotics Activities." The Department of Defense (DoD) executes its statutory civilian law enforcement counterdrug support responsibilities pursuant to the National Security Strategy, the National Military Strategy, and the National Drug Control Strategy. As a consequence of the evolving tactics of drug traffickers, DoD is responding to requests by drug law enforcement agencies for increased training in riverine, coastal maritime, and small unit tactics; for extension of our training, enhanced intelligence collection, analysis and dissemination support; and for expansion of our helicopter and maritime transportation support. Due to this changing operational environment, the application of new technologies and increased levels of DoD support, it is necessary to update and clarify DoD policy regarding military support to counternarcotics activities both domestically and internationally. Accordingly, the following policies apply to all Military departments, Commander-in-Chief (CINC) assigned forces, and DoD agencies.

- DoD personnel shall not deploy or otherwise travel into a foreign country in connection with a non-DoD agency request for counterdrug support or a counterdrug operation, unless the

Secretary of Defense or Deputy Secretary of Defense has approved the deployment or travel, or has specifically delegated that approval authority to the respective theater CINC, a Service, or the DoD Coordinator for Drug Enforcement Policy and Support.

- DoD personnel shall not directly participate in law enforcement activities such as a search, seizure, arrest, or similar activity. Consistent with this proscription, DoD counterdrug support to drug law enforcement agencies will be distinguishable and separate from law enforcement activities undertaken by the drug law enforcement agents.
- DoD personnel are prohibited from accompanying U.S. drug law enforcement agents or host nation law enforcement forces and military forces with counterdrug authority on actual counterdrug field operations or participating in any activity in which counterdrug-related hostilities are imminent. DoD personnel will make every effort to minimize the possibility of confrontation (armed or otherwise) with civilians.
- DoD personnel will not accompany U.S. drug law enforcement agents, host nation law enforcement forces or host nation military forces with counterdrug authority to/or provide counterdrug support from, a location outside a secure base or area. If included as part of an approved SecDef deployment order, DoD personnel may proceed to a forward operating base or area in accordance with the deployment order when directed by the commander or other official designated by the responsible CINC.
- Counterdrug training or support provided by DoD personnel must be requested by a U.S. law enforcement agency. If overseas, counterdrug support must be requested by an appropriate official of a department or agency of the Federal Government that has counterdrug responsibilities in that foreign country. The request must be made to the appropriate representative of said department or agency on behalf of the host nation and be approved by the U.S. Chief of Mission.
- All counterdrug training or support provided by DoD personnel must be authorized by statute. It may only be provided to Federal, state and local law enforcement agencies, or host nation police, security forces, and military forces that have counterdrug responsibilities.
- The authority delegated in Chairman of the Joint Chiefs of Staff Instruction (CJCSI) 3710.01, dated May 28, 1993, to approve counterdrug ground reconnaissance training missions in support of law enforcement agencies by the U.S. Armed Forces in federal status in the 54 States/Territories of the United States, is withdrawn. This withdrawal does not affect DoD funded National

Guard counterdrug ground reconnaissance support missions, approved in the Governor's State Plans, pursuant to 32 U.S.C. § 112.

The approval procedures for military support to counternarcotics are as follows:

1. The Military Departments and the CINCs of the Unified Commands will process all requests received directly from non-DoD agencies for operational support to counternarcotics activities in accordance with CJCSI 3710.01. Requests for equipment loans and transfers should be handled in accordance with applicable domestic laws and DoD policies and directives.
2. The Chairman of the Joint Chiefs of Staff shall forward all requests for support, with his recommendation, to the Secretary or Deputy Secretary of Defense through the Under Secretary of Defense for Policy and the DoD Coordinator for Drug Enforcement Policy and Support. The DoD Coordinator for Drug Enforcement Policy and Support will forward the request for support to the General Counsel for review. When the support will occur outside the United States and its territories, the DoD Coordinator for Drug Enforcement Policy and Support shall be responsible for coordinating the request with the Department of State before its submission to the Secretary or Deputy Secretary of Defense for approval. DoD personnel shall not deploy or otherwise travel into a foreign country in connection with such a request unless the Secretary or Deputy Secretary of Defense has approved the movement, or has specifically delegated that approval authority to the respective theater CINC, a Service, or DoD Coordinator for Drug Enforcement Policy and Support.
3. Messages to the Chairman of the Joint Chiefs of Staff (Attention: J-3, Joint Staff) concerning requests described in paragraph (1) should include the following:
   a) The identity (name or specific position title) of the official who requested the support.
   b) Mission of the DoD personnel involved and the source of the DoD supporting personnel (in theater assigned or other than theater assigned).
   c) Numbers of personnel involved.
   d) Proposed dates of the operation. Additionally, for international missions, the arrival in and departure from the host nation.

d) Status of approval by host country (name and specific position of host nation official granting approval), U.S. Ambassador, and appropriate CINC.

f) Explanation of counterdrug nexus of the DoD support provided.

g) Source of funding.

h) Citation of statutory and other legal authority for providing the support.

i) Command relationships.

j) Brief review of the risk involved to U.S. personnel.

k) Whether or not personnel will be armed and nature of the armament.

l) Applicable rules of engagement as well as limitations on participation.

m) Legal status of U-S. personnel deployed in a foreign nation.

I do not want to deter initiatives to improve and enhance the Department's support. However, I want to minimize and consciously address any new risks. All addressees are to ensure that requests for Department support, that go beyond the basis tenets in this policy, are forwarded through the Chairman of the Joint Chiefs of Staff to the Office of the Secretary of Defense for review and the Secretary of Defense for approval.

/s/Bill Cohen

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 AGANECIES
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 May16, 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.

CHAPTER 21

NON-COMBATANT EVACUATION OPERATIONS (NEO)

REFERENCES

1. DoD Directive 3025.14, *Non-Combatant Evacuation Operations*, 5 November 1990.
2. DoD Directive 2000.11, Handling Requests for Political Asylum and Temporary Refuge, 3 March 1972.
3. Executive Order No. 12656, Assignment of Emergency Preparedness Responsibilities, 3 C.F.R. 585 ('88 Compilation), 18 November 1988.
4. Chairman, Joint Chiefs of Staff Instruction 3121.01A, *Standing Rules of Engagement (SROE) for U.S. Forces*, 15 January 2000 (portions of this document are classified SECRET).
5. Executive Order 11850, Renunciation of Certain Uses in War of Chemical Herbicides and Riot Control Agents, 3 C.F.R. 980 ('71-75 Compilation) 8 Apr 75, reprinted in FM 27-10 at C.1 p. 2 (56).
6. 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.
7. DoD Directive 5515.8, Single-Service Assignment of Responsibility for Processing of Claims, 9 June 1990.
8. FMFM 8-1, Special *Operations* [*See* Chapter 26] 13 August 1974.
9. JAG INST 5800.7C, Manual of the Judge Advocate General, Sec. 1013, 3 October 1990.
10. FM 90-29, Non Combatant Operations, 20 May 1994.
11. Steven Day, *Legal Considerations in NEOs*, 40 Naval L. Rev. 45, 1992.

I. NATURE AND CHARACTERISTICS OF NEOs

A. NEOs 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 United States. Recent examples include:

1. Somalia (Eastern Exit): 300 civilians, U.S. & Soviet Ambassadors extracted, January 1991.

2. Rwanda (Distant Runner): 230 civilians, April, 1994.

3. Liberia (Assured Response): 2200 civilians, April-June 1996.

4. Central African Republic (Quick Response): April 1996.

5. Albania (Silver Wake): 900 civilians, March-April 1997

II. COMMAND AND CONTROL

B. Executive Order 12656 assigns primary responsibility for safety of U.S. citizens abroad to the Secretary of State.

1. **Department of State** establishes and chairs the "Washington Liaison Group" (WLG) to oversee NEOs.

a. WLG membership consists of representatives from various government agencies. (DoS, DoD, CIA, DIA, DoT, DHHS).

b. Function of WLG is to ensure national-level coordination of government agencies in effecting a NEO.

c. WLG also serves as coordinator with Regional Liaison Groups (RLGs).

2. **Chief of Diplomatic Mission** or principal officer of the Department of State is the lead official in threat area responsible for the evacuation of all U.S. noncombatants.

a. Chief of Mission will give order for the evacuation of civilian noncombatants, except for Defense Attaché System personnel and DIA personnel.

b. Evacuation order of military personnel is given by CINC, but in reality the call is made by the Chief of Mission.

c. Chief of Mission is responsible for drafting evacuation plan (usually done by Regional Security Officer (RSO)).

3. **Secretary of Defense** plays a supporting role in planning for the protection, evacuation and repatriation of U.S. citizens in threat areas.

a. Within Department of Defense, responsibility for NEO assigned under DoD Directive 3025.14.

b. DoD assigns members from service components and Joint Staff to WLG.

c. Department of the Army is executive agent for the repatriation of civilians following the evacuation. Accomplished through establishment of Joint Reception Center (JRC)/Repatriation Processing Center.

4. **Combatant Commanders**

a. Prepare and maintain plans for the evacuation of noncombatants from their respective area of operations (AO).

b. Planning accomplished through liaison and cooperation with the Chiefs of Mission in the AO.

c. Assist in preparing local evacuation plan.

d. Rules of Engagement guidance for NEOs are found in Enclosure A of CJCS SROE.

B. **Amendment to Executive Order 12656**

1. An amendment to E.O. 12656 and a new Memorandum of Understanding between the Department of Defense and the Department of State address the relative roles and responsibilities of the two departments in a NEO. The Department of State retains ultimate responsibility for Noncombatant Evacuation Operations.

2. On 9 February 1998, the President amended Executive Order 12656 to state that the Department of Defense 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." The Executive Order states that the amendment was made in order to "reflect the appropriate allocation of funding responsibilities" for NEOs. The E.O. refers to "procedures to be developed jointly by the Secretary of Defense and the Secretary of State" in order to implement the amendment. DoS and DoD subsequently signed a memorandum of understanding that addresses those procedures.

3. On 14 July 98, the Department of State and Department of Defense entered into a Memorandum of Understanding (MOU) 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 NEOs, except that DoD has responsibility for a NEO from the U.S Naval Base at Guantanamo. (Sections C.2. and C.3.b.)

b. DoD also prepares and implements plans for the protection and evacuation of DoD noncombatants worldwide. In appropriate circumstances, the Secretary of Defense may authorize the evacuation of DoD noncombatants, after consultation with the Secretary of State. (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 MOU 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 NEOs

A. **International Law.** NEOs 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, there must be a legal basis. 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 NEOs—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 NEOs are of such a limited duration and purpose that they don't rise to the level of force contemplated by Article 2(4).

b. Article 51: 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 Area of Operations. Absent consent, U.S. forces should respect the territorial boundaries of countries in the ingress and egress routes of the NEO.

1. Extent of territorial seas and airspace: Law of Sea allows claims of up to 12NM. 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 7 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 once removed from danger. They are then taken to their ultimate destination.

D. **Status of Personnel**. In NEOs, 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 host nation upon departure.

2. Civilians seeking refuge: Temporary Refuge v. Asylum.

a. U.S. Policy: DoD Directive 2000.11 sets out procedures for Asylum/Temporary Refuge. U.S. Commanders may not grant political asylum to foreign nationals. Immigration and Naturalization Service, Department of Justice is lead agency for granting asylum requests. U.S. Commanders may, however, offer temporary refuge in emergencies.

b. General policy: If applicant makes request at 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 ASD (International Security Affairs) and applicant referred to appropriate diplomatic mission.

2. **Temporary refuge** will be granted (if requester is in **imminent danger**), ASD (ISA) informed, and applicant will not be surrendered without Service Secretary approval.

c. If applicant makes request at unit, installation, or vessel in U.S. territorial waters or on the high seas, then the applicant is "received" and request for asylum forwarded to DoJ. Do not surrender applicant to foreign power without higher headquarters approval (MilDep 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 Department of State 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 "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.) 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. DoD Inst. 2200.11. States in paragraph IV(B)(2)(a)(2) 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.

E **Law of War Considerations**

1. Targeting. Rule of Thumb: follow targeting guidance of Hague Regulations, Geneva Conventions, and applicable articles of the 1977 Protocols regardless of whether NEO is "international armed conflict." Under CJCSI 5810.01 of 12 August 1996, U.S. armed forces will apply the principles of the law of war in military operations other than war. Use of Force guidance for NEOs found in Enclosure G of the CJCS SROE (CJCSI 3121.01A).

2. Riot Control Agents (RCA). E.O. 11850 allows use of RCA in non-armed conflict and defensive situations, to include "rescue of hostages." But the Chemical Weapons Convention prohibits use of RCA as a "method of warfare." Whether use of RCA in a NEO is a "method of warfare" may depend on the circumstances of the NEO. However, under E.O. 11850, Presidential approval is always required prior to RCA use, this approval may be delegated through the CINC. Authorization to use RCA would normally be requested as a supplemental ROE under Enclosure J to the CJCS SROE.

3. Drafting ROE. Coordinate CINC forces ROE with ROE of Marine Security Guards (who work for DoS), Host Nation Security, and Embassy Security. As always, ensure 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 a NEO). Even if they were accredited, luggage may be inspected if "serious grounds" exist to suspect that luggage is misused. "Accredited" diplomatic bag retains absolute inviolability.

2. Force protection, however, 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 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 diplomat refuses to be searched—to include their diplomatic bag, CDR may refuse transportation.

NOTES

CHAPTER 22

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.
6. 10 U.S.C. § 2010, Combined Exercises.
7. 10 U.S.C. § 2011, Special Operations Forces: Training with Friendly Foreign Forces.
8. 18 U.S.C. § 1385, Posse Comitatus Act.
9. Executive Order 12333, U.S. Intelligence Activities.
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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. Special Operations Forces (SOF) involvement in an operation normally begins before the introduction of conventional troops and ceases long after conventional forces have left the theater. SOF are generally regionally focused and SOF personnel typically posses the language skills, cultural familiarity and maturity necessary to participate in the often times politically sensitive SO. SO are inherently joint and differ from conventional operations in degree of risk, operational techniques, modes of employment, independence from friendly support and dependence on detailed operational intelligence and indigenous assets.

B. It should be apparent to the judge advocate supporting SOF that the legal challenges associated with SO are often commensurate with the operational risks. SO missions are legally intensive operations. Judge advocates assigned to SOF must be familiar with a wide variety of laws and regulations relevant to SO. Moreover, SOF is an army within an army. It has its own culture, with accompanying acronyms, tactics, traditions, unique planning techniques, unit configurations, and command structure.

II. HISTORY

Special Operations Forces in the United States enjoy a long and illustrious tradition, 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. Continuing with American Civil War Colonel John Singleton Mosby's 300 volunteers operating behind enemy lines, modern SOF trace their origin to World War II and the Office of Coordinator of Information (COI) which, in June of 1942, became the Office of Strategic Services (OSS) participating in sabotage, espionage, subversion, unconventional warfare and propaganda against both Japanese and German forces. After minimal involvement in the Korean War, and legendary successes in Viet Nam, SOF suffered a staggering defeat in the Iranian Desert in an aborted attempt to rescue the 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 DoD would never bring SOF up to the level it 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 a reality.

III. SOF COMMAND STRUCTURE

A. As a result of 10 U.S.C. § 167, the United States Special Operations Command (USSOCOM) was established. This Combatant Command is unique in that it is the only Combatant Command specifically established by Congress and required by law. DoD could, for example, do away with the Pacific Command and reorganize its sub-component units. However, DoD does not have the authority to disband USSOCOM. However, 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 its 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 to the geographic Combatant Commanders. It is a supported command in that when directed by the President or Secretary of Defense, it must be capable of conducting selected SO of a strategic nature 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 are those units which 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 in turn 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 SO command is referred to as the Naval Special Warfare Command (NAVSPECWAR), with a Rear Admiral in charge 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 U.S. Army, USASOC is a Major Command (MACOM) and therefore, U.S. 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 which studies special operations requirements and techniques, ensures interoperability and equipment standardization, plans and conducts joint special operations exercises and training, and develops joint special operations tactics.

F. There are no standing Marine Corps SOF, however, in mid-2003 the Marine Corps initiated a two-year project, which is designed to test the concept of Marines serving with units under the U.S. Special Operations Command. In the test project, the Marine Corps Special Operations Command Detachment will initially train and then be tasked to operate in coordination with SEAL units. Although the concept is being tested, Marine Corps units are not listed in either of the two SOF designation documents cited in 10 U.S.C. § 167(i) and neither DoD nor the Marine Corps have sought to amend those documents. Outside of this project 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." Special operations capable units are from time to time designated as SOF by SECDEF for specific operations. Many Marine Corps units perform and train to perform special operations type missions. The expeditionary nature of the Marine Corps makes it particularly well suited as a special operations capable force.

G. U.S. Army Special Operations Forces (ARSOF) include active duty, Army National Guard (ARNG) and U.S. Army Reserve elements. There are five active and two ARNG Special Forces (SF) groups (SFG). SF are often referred to in literature and by the public as the "Green Berets" because of their distinctive headgear. These SFG are under the command of the U.S. Army Special Forces Command (Airborne) (USASFC(A)), a sub-command of USASOC, also located at Fort Bragg, NC. USASFC(A) is commanded by a Major General, while each SFG is lead by a Colonel. Each of the active SFG has a geographical orientation. SF soldiers study the language and culture of the countries within their area of operations (AOR), and receive training in a variety of individual skills and special skills. These skills include operations, intelligence, communications, medical aid, engineering and weapons. SF soldiers are highly skilled operators, trainers and teachers. Not only must they be capable of performing difficult military missions; they must also be able to teach these skills to foreign militaries and domestic agencies as well.

H. The Ranger Regiment, commanded by a Colonel, and its three battalions are also ARSOF. Regimental headquarters, along with one battalion, are at Fort Benning, GA. One other battalion is located at Hunter Army Airfield in Georgia, and the final battalion is stationed at Fort Lewis, WA. Members of the Regiment wear the tan beret and make up a highly responsive strike force. Ranger units are specialized airborne infantry troops that conduct special missions in support of U.S. national security polices and objectives.

I. The 160th Special Operations Aviation Regiment, commanded by a Colonel and located at Fort Campbell, KY, provides special aviation support to ARSOF, using specialized aircraft and highly trained personnel. The Civil Affairs/Psychological Operations Command (USACAPOC) is based at Fort Bragg, NC. There are three reserve CA commands, with nine reserve CA brigades. There is one active and two reserve PSYOPS groups. CA units support the commander's relationship with civil authorities and the civilian population by promoting mission legitimacy. PSYOPS units support operations across the operational continuum to induce or reinforce attitudes and behaviors favorable to the U.S.. The John F. Kennedy Special Warfare Center and School is responsible for training leader development, and doctrine. A Major General commands this Fort Bragg "special operations university." There are also various support

commands within USASOC such as the Special Operations Support Command (SOSCOM) and the Special Operations Chemical Reconnaissance Detachment (CRD).

J. Because, within ARSOF, SF is the largest piece, has the most judge advocates assigned, and because an SFG is unique in terms of organization, a brief description of an SFG will follow. 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 separate infantry brigade. There are three battalions, each commanded by a Lieutenant Colonel, a Group Support Company (GSC), led by a Major, and a Headquarters and Headquarters Company (HHC) commanded by a Captain. There are several detachments and sections within the GSC such as the Military Intelligence Detachment (MI DET), Signal Detachment (SIG DET), Service Detachment (SVC DET) and the rigger section. Each of these detachments is typically commanded by a Captain and usually has company grade UCMJ authority.

K. Each battalion has a Major XO and a CSM, along with the traditional battalion staff. There are three operational companies, a battalion support company and a battalion headquarters detachment within the battalion. A SF operational company command is a Major position and the company has a SGM rather than a 1st Sergeant. The company Headquarters Detachment is often referred to as a Special Forces Operational Detachment "C" (ODC). The operational companies have headquarters detachments (ODBs). The operational companies are further broken down into operational teams, known as "A" teams or ODA's. 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 is usually at least a Sergeant E-5 on an ODA. As a general rule, ODA commanders do not have UCMJ jurisdiction over team members because it has been withheld at the company level.

L. USASOC, USASFC(A) and USACAPOC have Offices of Staff Judge Advocates. Each SFG, the Ranger Regiment, PSYOPS Group, CA command, and the John F. Kennedy Special Warfare Center and School have command judge advocates.

IV. COMMAND AND CONTROL DURING OPERATIONS

A. As noted above, SO are inherently joint. SOF assigned in a theater are under the combatant command (COCOM) of the geographic combatant commander. Moreover, because USSOCOM and its Army sub-component are supporting commands, in most instances, when SOF deploy overseas, they are under the operational control (OPCON) of the combatant command for the geographic area in which they are operating. Further, each geographic combatant command has a Special Operations Command (SOC). SOF in theater are under the operational control (OPCON) of the 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.

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 the SOC or the service SOF with the largest presence in the AOR. 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). In order 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 provides 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 for Fort Bragg units. However, ARSOF not located at Fort Bragg depend on their own installation commanders for GCMCA support. This can cause some tension between the servicing GCMCA and the SOF command. The installation commander is responsible for maintaining good order and discipline on the installation, however, is not responsible for the success or failure of the missions conducted by SOF tenants. This can cause friction between the post commander and tenant SOF.

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 judge advocate 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. Intense coordination with the respective unit judge advocates is the best tact to take in resolving these issues.

E. SOF units may deploy as an entire unit, or, as is more likely the case, by smaller detachments to support combatant commanders' various missions Because SFGs are often the lead ARSOF in a theater and because in combat they are configured differently than conventional units, a brief introduction as to how a SFG is configured for operations may be helpful. Additionally, it is important for SOF judge advocates to understand the basic composition of the SFG during operations because the Group Commander may become the ARSOF, JSOTF or CJSOTF commander.

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 FOBs 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. The current and future operations are sustained at the SUPCEN. SO require extremely sophisticated and redundant communications systems, thus the need for a SIGCEN. Doctrine places the judge advocate in the SUPCEN with the S-1 and S-4. However, a judge advocate can be far more effective at the OPCEN. The commander is usually willing to move the GJA to the OPCEN to provide better coordination with current and future operations cells.

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, outside the 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. The key to getting access to the ISOFAC and to providing timely legal advice is often the relationship the judge advocate has with the team prior to deployment. If the judge advocate has provided competent legal advice in the past or has participated in activities with the team out of the legal office such as airborne operations, the team may be quicker to allow the judge advocate to meet with them. The teams are very closed, tight knit societies; even the battalion and group commanders are often looked at as outsiders by the teams.

H. The judge advocate must make sure to be present in the ISOFAC for the "briefback." 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 participate. During the briefback, the team obtains the commander's approval or disapproval or modifications to its plan. This is the last opportunity the GJA will likely 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 they remain in isolation until they are "debriefed." As part of the debrief with the S2, the team will review everything it did and the team members saw or heard, including potential law of war or human rights violations by either side. The Group judge advocate should obviously be present for debriefs as well.

I. During the day-to-day SOF routine 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 15 different countries at once. In times of war or other times of high operational tempo the Group, Battalions, Companies and teams are often all geographically separated. Command and control is maintained through sophisticated communications. . It is obviously impossible for the GJA to be with them on all deployments. The various teams deployed may be generating numbers of legal issues without even realizing it.

J. To prevent legal catastrophes, it has become common practice to augment Group legal staffs and deploy JAs down to the battalion level. Even placed at the battalion level, the judge advocate 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. Finally, the GJA has no choice but to rely on their NCOs. Group Legal NCOs must be highly skilled and motivated individuals. There are more missions than the judge advocate alone can support without significant assistance. SOF legal NCOs must be capable of conducting training and legal briefs 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 direct actions. For the judge advocate, such a mission must be reviewed for potential law of war and policy violations. As with conventional operations, all of the law of war relating to the use of force, targeting, chemical weapons, non-combatants, and principals such as distinction, military necessity, proportionality and unnecessary suffering applies to SOF missions. Policy limitations, usually expressed through the Rules of Engagement, also have significant impact on DA as well as other SOF activities. Just like every judge advocate, a SOF judge advocate must have at a 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; DoD Dir. 5100.77, Law of War Program; CJCSI 5810.01, Implementation of the Law of War Program; and CJCSI 3121.01A, Standing Rules of Engagement (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 immediately ask 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 that 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, target and threat assessment. There are numerous laws and regulations that regulate intelligence activities, many of which may impact on SR. (see Chapter 15). SOF judge advocates must be thoroughly familiar with E.O. 12333, U.S. Intelligence Activities, and AR 381-10, U.S. Army Intelligence Activities. They should also be familiar with DoD Dir. 5240.1, DoD Intelligence Activities; DoD Reg. 5240.1R, Procedures Governing the Activities of DoD Intelligence Components that Affect United States Persons; AR 381-20, The Army Counterintelligence Program; AR 381-102 (S), Cover and Cover Support (U). A tremendous resource in the area of 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 temporarily incapacitate the individual. If however, the person is incapacitated, he or she should be left in a location where they can be discovered or eventually recover and return to where they came. From a practical standpoint, even if the non-combatant were 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. SOF 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 judge advocate must be familiar with any Status of Forces Agreements 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 judge advocate may start by researching DoS publications such as Treaties in Force. Judge advocates 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. DAIO may have international agreements relating to the HN on file. CLAMO maintains many SOFAs on JAGCNet.

2. The second most important issue in FID is Fiscal Law. A SOF judge advocate must understand how military operations are funded. In the area of FID, SOF judge advocates must fully understand 10 U.S.C. § 2011, Training with Friendly Foreign Forces, and 10 U.S.C. § 2010, Combined Exercises. The judge advocate 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 Chapters 12 and 14.)

a. Combined Exercises as part of FID.

SOF spend significant time practicing their wartime missions through exercises with host country 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. To comply with the law the combined training should be 1) undertaken primarily to enhance the security interests of the United States, and 2) the participation of the developing country is 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 judge advocate 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 judge advocate should either seek to obtain one or some other diplomatic resolution to HN jurisdiction. The judge advocate 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 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 U.S. Special Operations Command 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. §2011is to enhance the ability of Special Operations Command to "prepare special operations forces to carry out assigned missions" by clarifying his 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.

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 law of war 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 (GPI). These articles explain when the GPW and GPI are triggered and what is required of an individual in order to be treated as a 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 not longer a legitimate target, and the POW is entitled to immunity from prosecution for pre-capture warlike acts. As a general rule, the GPW and GPI 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. GPI 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 United States is not a party to GPI, and objects to this difference because it makes it difficult to distinguish civilians from combatants. However, the SOF judge advocate must know how status is achieved in GPI. The judge advocate will have to understand how enemy nations will view the status of captured U.S. SOF operatives and UW assets. The judge advocate will also need to understand how ally signatories apply status.

3. The SOF judge advocate 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).

E. **Combating Terrorism.**

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 the Secretary of Defense, SOF may be involved in the recovery of hostages or sensitive material from terrorists; attack of terrorist infrastructure; 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 18, Combating Terrorism)

F. **Psychological Operations (PSYOPS).**

1. The purpose of PYSOPS is to induce or reinforce foreign attitudes and behaviors. This may occur at the strategic, operational and tactical level. The overall approval for PSYOPS in peacetime or wartime rests at the Presidential/Secretary of Defense level, however, PSYOP approval authority has been delegated to ASD SO/LIC. Additionally, U.S. policy requires review of PSYOPS by the DoD General Counsel prior to approval (see Chapter II, Joint Pub 3-53). Consequently, an overall PSYOPS campaign will have ordinarily been reviewed and approved at echelons above the level of a unit or JTF judge advocate. The role of the judge advocate, then, is to provide advice on the implementation of the PSYOPS campaign.

2. While PSYOPS elements work closely with Civil Affairs (CA) elements, the G-3, not the G-5, coordinates their activities. Still, CA, PSYOPS, and public affairs actions can dramatically affect the perceived legitimacy of a given operation. When properly used, PSYOPS 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: (1) the existence and location of Civil Military Operations (CMO); (2) the nature and extent of the mission; and, (3) instructions to avoid interfering with ongoing military operations. PSYOPS is often the only means of mass communications a field commander has with both hostile and foreign friendly groups on the area of operations.

a. *Major Legal Considerations/Limitations in PSYOPS:*

1) United States Citizens. U.S. policy is to not conduct PSYOPS 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 PSYOPS units were operating in CONUS.

2) Truth Projection. "PSYOPS 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, PSYOPS 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. Judge advocates must carefully review deception plans to ensure that they do not employ "treachery" or "perfidy," which are prohibited acts under the law of war.

5) Treaties in Force. International agreements with host countries may limit the activities of PSYOPS units. Judge advocates must carefully review SOFAs and other agreements prior to, and during the course of, deployments.

6) Use of PAO Channels. PAO channels are open media channels that provide objective reporting. Consequently, they MAY be used to counter foreign propaganda. PAO and PSYOPS 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. PSYOPS uses extensive computer, audio, and video technology. Accordingly, judge advocates must be alert to copyright and fiscal issues, and ethics limitations on the use of PSYOPS capabilities for private groups.

8) Fiscal Law. PSYOPS 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 PSYOPS assets are in the Reserve Component (RC). Many PSYOPS analysts are DoD civilians who voluntarily deploy to mission areas. Disciplinary, readiness, and law of war issues for RC and civilian personnel involved in PSYOPS require the attention, and early proactive involvement, of judge advocates.

10) Disciplinary Exceptions. PSYOPS teams may require exceptions to restrictions often contained in General Orders. For example, PSYOPS personnel conducting an assessment of PSYOPS may have to wear civilian clothing in contravention of a general requirement to remain in uniform at all times.

G. **Civil Affairs (CA) Operations.**

1. 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-whether it is supportive, neutral, or hostile to the presence of military forces. CA forces enhance the relationship of the military command with the civilian populace. They assist commanders in working with civil authorities and in controlling the populace in the operational area. (Dep't of Army, Field Manual 41-10, Civil Affairs Operations 1-1, 6-1).

a. *Terms and Definitions*

1) CA are the designated Active and Reserve Component forces and units organized, trained, and equipped specifically to conduct CA activities and to support civil-military operations (CMO). Approximately 95% of the CA force structure reside in the USAR.

2) CA activities are activities performed or supported by CA forces that: (1) embrace the relationship between military forces and civil authorities in areas where military forces are present; and (2) involve the application of CA functional specialty skills, in areas normally the responsibility of civil governments, to enhance the conduct of CMO. All CA activities support CMO.

3) 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 civilian populace in a friendly, neutral, or hostile area of operations in order to facilitate military operations and consolidate and achieve U.S. objectives. CMO may include performance by military forces of activities and functions normally the responsibility of local, regional, or national government. 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. (Joint Publication 3-57, Joint Doctrine for Civil-Military Operations).

4) Civil-Military Cooperation (CIMIC) refers to NATO's broad approach to security. CIMIC covers a wide variety of activities ranging from sustaining life to restoring government. CIMIC functions normally are divided into the following three groups: pre-operational, operational, and transitional. NATO describes CIMIC as those measures undertaken between NATO Commanders and national authorities, civil and military, which concern the relationship between NATO forces and the national governments and civil populations in an area where these military forces are, or plan to be, stationed, supported or employed. Such measures also include cooperation between the Commanders of the NATO forces and UN-agencies, Non-Governmental Organizations (NGO), Private Volunteer Organizations (PVO) and other authorities. (NATO Logistical Handbook).

5) Civil-Military Operations Center (CMOC) is the nerve center for CMO. It is an ad hoc organization, normally established by the geographic combatant commander or subordinate joint force commander, to assist in the coordination of activities of engaged military forces, and other U.S. Government agencies, nongovernmental organizations, and regional and international organizations (IO). There is no established structure, and its size and composition are situation dependent. This organization is where coordination occurs between the several DoD agencies and other non-DoD agencies (i.e., DoS, USAID, DART). It also performs essential coordination or liaison with host nation (HN) agencies, the Country Team, and if applicable, UN agencies.

b. *Relationship Between CMO and CA Activities*

1) CMO is broader in scope than CA activities. CMO encompass the CA activities that the commander takes to establish and maintain relations between the military forces and the civilian authorities and general population, and the institutions in the area of operation. CMO occurs in virtually every operation across the range of military operations including peacetime, military operations other than war (MOOTW), and war. CA forces support the commander in the execution of CMO by assisting in the planning, coordination, and supervision of CA activities.

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 the 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 National Command Authorities (NCA) 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. *CA Activities Supporting CMO*

1) As previously noted, CMO occurs in peacetime, MOOTW, and war. The nature of the military operation will determine the specific CA activities that will be conducted in support of CMO. In general, CA forces prepare estimates, country assessments, agreements, operation plan (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) CA activities include foreign nation support (FNS), populace and resource control (PRC), humanitarian assistance (HA), military civic action (MCA), emergency services and support to civil administration. PRC, HA and MCA were designed for low intensity conflict scenarios (foreign internal defense (FID) and unconventional warfare), but the activities may be used in other environments.

3) FNS involves the identification, coordination, and acquisition of resources, such as supplies, material, facilities and labor, in support of a U.S. military mission during peace, preparation for war, and wartime. FNS includes both HN support (HNS) and third country support. HNS is support provided by a friendly country for U.S. military operations conducted within its borders, based upon status of forces agreements or other mutually concluded agreements. Third country support includes support provided by friendly or allied nations. By receiving this support, the U.S. military reduces the need for U.S. personnel, material, and services within the area of operations. FNS is the preferred method of obtaining combat service support.

4) The Assistant Chief of Staff G5/CMO (G5/CMO) is responsible for identifying and acquiring FNS required by the force. CA forces assist the G5/CMO by identifying available resources, facilities, services, and support, within the supported command's area of operations. Additionally, they coordinate U.S. requirements for, and assist in the acquisition of local resources, facilities, services, and support. For example, in the acquisition process, CA forces make recommendations concerning the availability of local resources, identify the source, and serve as the initial intermediary for the U.S. military and the local source.

5) CA operations in FNS were clearly demonstrated during Operations DESERT SHIELD/STORM. In particular, CA forces met with Saudi officials to arrange for the use of various facilities such as laundry, shower, mail, warehouse, and maintenance space. Also, CA forces arranged for the acquisition of food, water, medicine, and other supplies to support both dislocated and enemy prisoner of war operations.

6) Populace and resource control operations are measures to deny support and assistance to an enemy by controlling the movement of people, information, and goods. Examples of population controls operations include such measures as registration, identification cards, movement control, curfews, travel permits, censorship, and resettlement of the local population. Resource controls operations include rationing, regulations or guidelines, price-controls, licensing, amnesty programs, inspection of facilities, and checkpoint operations. CA forces support PRC operations by providing advice and assistance in planning and conducting PRC. Although HN police or military forces normally carry out these operations, U.S. forces may be required to conduct these operations until HN forces are available to relieve them.

7) An example of PRC operations occurred during Operation DESERT STORM. CA forces supporting a French Division established a military checkpoint to screen dislocated civilians (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 card and rations. Finally, all DCs returning to the town were briefed by the muhktar (tribal leader) on the military's administration of the town and rules for As Salman.

8) In addition to the above, PRC operations include dislocated civilian (DC) operations and noncombatant evacuation operations (NEO). 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.

9) The G5/CMO is the primary planner of DC operations. CA forces support the G5/CMO by planning and conducting DC operations. In addition, they advise the G5/CMO on the anticipated reaction of the populace to the planned military operations. CA forces coordinate with military police (MP) and/or security forces, psychological operations (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 (IO), NGOs and PVOs that are operating within the area of operation. 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. Finally, CA forces may be called upon to provide humanitarian and civic assistance to dislocated civilians located outside the combat zone.

10) In Operation DESERT STORM, CA forces controlled and provided humanitarian assistance to displaced civilians, 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 displaced civilians and refugee collection points and camps and assisted the transition of responsibility for these groups from military to international relief organizations. (*see*, DoD Report to Congress, Conduct of the Persian Gulf War).

11) Another example of DC operations occurred in Northern Iraq during Operation PROVIDE COMFORT. The major CA effort in this operation involved establishing and operating camps for the displaced Kurdish civilians. CA units interfaced with over 60 private and voluntary organizations, the USAF, the USMC, the armies of over eight allied countries and United Nations (UN) agencies in providing assistance to the Kurds. During this operation, they worked with various supporting units and organizations to insure that over a half million Kurds were housed, moved, clothed, fed and assisted while displaced from their homes.

12) NEOs are military 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 NEOs, 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 NEOs, *see* Operational Law Handbook, Chapter 21 and Joint Pub 3-07.5, Joint Tactics, Techniques, and Procedures for Noncombatant Evacuation Operations).

13) CA forces support NEOs by advising the commander on how to minimize population interference with evacuation operations. When possible, they obtain civil or indigenous support for the NEO. CA forces maintain close liaison with embassy officials to ensure effective coordination and delineation of CMO responsibilities and activities. They may also assist the 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.

14) Humanitarian assistance operations are conducted to relieve or reduce the results of natural or manmade 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. HA may be considered as part of the FID when the support is provided to a HN that is experiencing lawlessness, subversion, or insurgency. However, HA efforts may be in response to unforeseen disaster. HA is designed to supplement or complement the efforts of the HN civil authorities or agencies that have the primary responsibility for providing humanitarian assistance. In addition, the assistance provided by U.S. forces is limited in scope and duration. Examples of HA operations include medical assistance programs, transportation assistance, or other activities that provide basic services to the local populace.

15) HA operations encompass disaster relief, refugee assistance and humanitarian and civic assistance (HCA). Disaster relief operations provide emergency assistance to victims of natural or manmade disasters in overseas areas. These operations are responses to requests for immediate assistance and rehabilitation from foreign governments

or international agencies. Disaster relief operations may include refugee assistance, food programs, medical treatment and care or other civilian welfare programs.

16) CA forces support HA operations by 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 and civic action projects. CA activities included medical care, food distribution, and rudimentary construction of roads and sanitation facilities.

17) Refugee Assistance operations support the resettlement of refugees and displaced persons. CA forces assist the military in providing or coordinating for the safety, sustenance, and disposition of refugees and displaced persons. 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 a recommendation 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.

18) Humanitarian and Civic Assistance (HCA) is provided to the local populace by predominantly U.S. forces in conjunction with military operations and exercises. This assistance is specifically authorized by title 10, United States Code, section 401 and funded under separate authorities. Assistance provided under these provisions is limited to: (1) medical, dental, and veterinary care provided in rural areas of a country; (2) construction of rudimentary surface transportation systems; (3) well drilling and construction of basic sanitation facilities; and (4) rudimentary construction and repair of public facilities. The assistance must fulfill unit-training requirements that incidentally create humanitarian benefit to the local populace.

19) Military Civic Action (MCA) involves activities intended to win support of the local population for the foreign nation and its military. MCA is an essential part of military support to a FID. MCA is the use of preponderantly indigenous military forces on projects useful to the local population at all levels in such fields as education, training, public works, agriculture, transportation, communications, health, sanitation, and others contributing to economic and social development, which would also serve to improve the legitimacy of the military forces and host government with the populace. The long-range goal of MCA is to nurture national development. CA 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 will be conducted by the local military.

20) Emergency Services operations support the ability of a HN to respond to disasters or other emergencies. CA forces provide advice and assistance in identifying and assessing the HN's emergency service capabilities and resources. In addition, they assist in emergency planning and operations. For example, during Operation DESERT SHIELD, CA forces assisted the Saudi government in civil defense emergency planning. They were also familiar with the status of the Saudi civil defense preparedness including dispersal locations, warning systems, shelters, and NBC defense resources for civilians. (*see* DoD Report to Congress, Conduct of the Persian Gulf War).

21) DoD also conducts operations outside the continental U.S. (OCONUS) that respond to immediate emergency conditions that are created by a disaster and effect emergency repairs to, or the emergency restoration of, vital utilities and facilities destroyed or damaged by any such disaster. CA forces can assess the damage to the civil infrastructure, assist in the operation of temporary shelters, and serve as liaison between the military and local relief organizations, NGOs, PVOs, IOs, and other U.S. agencies involved in the operation.

22) Civil Administration is established by a foreign government in: (1) friendly territory, under an agreement with the government of the area concerned, to exercise certain authority normally the function of the local government, or (2) hostile territory, occupied by US forces, where a foreign government exercises executive, legislative, and judicial authority until an indigenous civil government can be established.

23) CA support includes: (1) assisting a host/allied government in meeting its people's needs and maintaining a stable and viable civil administration; (2) establishing a temporary civil administration to maintain law and order and to provide life sustaining services until the HN can resume normal operations; and (3) establishing a civil administration in occupied enemy territory at the direction of the National Command Authority. U.S. commanders will only undertake this unique action when directed or approved by the NCA. Civil affairs forces plan, coordinate, advise, or assist those activities that reinforce or restore a civil administration that supports U.S. and multinational objectives in friendly or hostile territory.

24) After the first Gulf War, CA forces conducted Civil Administration 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 dollars in contracts to restore country operations. In addition, CA forces were involved in the restoration of electric power, the repair of the desalination plants, and ordnance disposal in Kuwait.

25) In Civil Assistance operations, CA forces provide advisory assistance to a host government in a variety of areas such as 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.

26) 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.

27) CA forces also assist the commander in fulfilling his legal and moral obligations in accordance with international law including the law of war, as well as domestic U.S. laws, directives, and policy. Toward that end, CA legal advisers, in coordination with the Staff Judge Advocate 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.

d. *Command and Control*

1) CA forces supporting a general-purpose force operation may be assigned to the unit they support and either augment or work under the staff supervision of the G5/CMO. The G5 is the principal staff assistant to the commander in all matters concerning political, economic, and social aspects of military operations. The G5/CMO acts as a liaison between the military forces, civil authorities, and people in the area of operations. The G5/CMO supervises CA activities in the areas of government, economics, public facilities, and special functions, such as displaced civilians, refugees, evacuees; arts, monuments, and archives; cultural affairs; and civil information. Finally, the G5/CMO coordinates with the SJA on all legal maters related to CMO.

2) Upon mobilization, the CA Command (or senior CA unit in a theater) is normally under the command of the theater Army (TA). The TA will normally exercise OPCON of the CA Command directly. Subordinate CA forces may be General Support (GS), Direct Support (DS), or under operational control OPCON to supported headquarters within the theater. In all cases, CA units look to the next higher-level CA unit in country for technical and policy guidance. It should be noted that, in peacetime and in time of armed conflict, CA operations must be thoroughly coordinated and synchronized with the Country Team to insure unity and synergism of effort.

e. *Legal Personnel in Support of Civil Affairs*

1) Judge advocates assigned to CA units are the primary legal advisors to their respective units. Within the USAR, judge advocates are assigned as International Law Officers at the command, brigade and battalion levels. The senior judge advocate of the unit is designated the Command Judge Advocate (CJA) and, therefore, is a member of the CA commander's personal and special staff. CA judge advocates provide mission-essential legal services to the unit, including operational law legal service. 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 judge advocates 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 tasked-organized based upon mission requirements. Judge advocates may not be included on the statement of requirements. For example, CA force deployed in support of Operation Joint Forge to Multinational Division North, Bosnia and Herzegovina, did not have a judge advocate assigned to the CA battalion. Thus, the SJA for the supported command was responsible for providing legal services to the to the battalion.

f. *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, judge advocates provide advice and assistance in the preparation and review of CA plans for consistency with U.S. law, NCA guidance, 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) Judge advocates 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 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 41-10, CIVIL AFFAIRS OPERATIONS, Appendix G).

3) Judge advocates also provide predeployment training to CA forces. This training should include: (1) law of war, (2) human rights violations and reporting requirements, (3) rules of engagement, (4) military justice, (5) legal assistance, and (5) miscellaneous information concerning status of forces agreement (SOFA) with the HN, if any.

4) During the combat operational phase, judge advocates address legal issues concerning population control measures; targeting to minimize unnecessary collateral damage or injury to the civilian population; treatment of dislocated civilians, 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.

5) During the stability and consolidation phase, judge advocates provide legal services concerning such matters as claims submitted by local civilians, disaster relief, and humanitarian and civic assistance issues. Additionally, judge advocates may be called upon to give advice and assistance on matters relating to civil administration within a friendly or enemy country once occupied. Judge advocates may also provide counsel regarding the creation and supervision of military tribunals and other activities for the proper administration of civil law and order. In addition, legal services may be necessary with respect to the issue of a local court's jurisdiction over U.S. military personnel and activities.

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).**

Information Operations 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 it 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.**

SOF 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 integration into the command and intelligence structure. SOF possesses the language capability, cultural awareness, and interpersonal skills, which enable them to build tight professional and personal bonds with allied contingents. Termed "coalition support teams" (CST), the SOF train, live, deploy, and sometimes fight alongside our allies. CST play an integral part in ensuring that the Rules of Engagement are understood and followed by the members of the coalition. They will dramatically assist the judge advocate responsible for training foreign forces in the Task Force Rules of Engagement. CST must understand that they are required to document and report violations of the law of war. CST may not be able to prevent (nor are they usually required by law or direct command policy to intervene) in all ROE, Law of War, or Human Rights violations committed by allied forces. They remain subject to the UCMJ and may not participate in violations; and, additionally, must document and report incidents immediately.

B. **Combat Search and Rescue (CSAR).**

1. CSAR involves the rescue and recovery of distressed personnel during war or MOOTW. 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 RCA in CSAR has become a significant legal issue. The Convention specifically bans the use of RCA as a "method of warfare." E.O. 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 E.O. 11850. (S. Exec. Res. 75, Senate Report, s3373 on 24 April 1997, section 2 - conditions (26) RCA.) The President, in his certification document, wrote, "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 E.O. 11850 is still valid, it is unlikely that the NCA would approve the use of RCA in CSAR during international armed conflict where the law of war is applicable. It may however approve its use for CSAR in peacekeeping or peace enforcement operations.

C. **Counterdrug Activities (CD). (See 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 may also 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.

2. In CD, like other MILOPS, the SOF judge advocate must be sensitive to fiscal issues. Money for CD programs where SOF is involved primarily comes from the Operations and Maintenance (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 otherwise, the Posse Comitatus Act, 18 U.S.C. § 1385, prohibits the direct participation of DoD personnel in law enforcement activities in CONUS. For example, SOF may not be directly involved in searching or seizing contraband or arresting suspects. The act does not prevent DoD personnel from conducting routine training that has the incidentally benefits CLEA. Therefore, it is absolutely critical that all CONUS CD directly relates to the units METL. It is up to the operators to determine their METL, but the judge advocate may become involved in helping the operators determine whether what they are being asked to do comports with their Mission Essential Task List (METL). Legal review of CD is generally conducted by judge advocates assigned to the units that organize DoD involvement, such as JTF-6. However, the SOF judge advocate 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, 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 judge advocate must insure that it does not include the collection of intelligence on U.S. persons in violation of E.O. 12333. (See Chapter 15, Intelligence Law). 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 CONUS based CD ground operations. For example, a SOF team may be asked to establish an SR site at a seemingly deserted airstrip CONUS. They are told to radio in to CLEA when and if planes land at the strip and to record the tail numbers of the aircraft 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 in the form of 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 CONUS CD. There is however, 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 activities participated in by SOF in CD are clearly within their METL or it may be characterized as law enforcement rather than as 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 the camera, it begins to look more like surveillance than zone reconnaissance. The purpose of taking the 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 generates controversies with many. It is even potentially more controversial when SOF is being used. 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, which alleges a Posse Comitatus violation, members of SOF could be potentially hauled 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 Humanitarian and Civic Assistance (HCA) 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 assist 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 they 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; that is not repair, that is stocking a clinic. That may constitute foreign aid with no nexus to training and no improvement of the 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 DoD purchased property behind 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, Chapter 12, 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 most often participates. 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 Operations and Maintenance (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 03, Congress appropriated $58,400,000 to OHDACA.HCA demining includes 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. There are however, significant limitations. U.S. forces are not to 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. SOF, particularly the Special Forces, are often tasked to deploy Mobile Training Teams (MTTs) overseas to conduct security assistance training. The judge advocate must review the proposed mission in order to ensure that 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 will most probably 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 United States security assistance office (SAO) located in the host country. The judge advocate 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 judge advocate 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 judge advocate 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 this 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 Host Nation 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, chapter 12, 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 23, United Nations and Peace Operations).

H. **Special Activities.**

These are activities that are planned and executed so that the role of the United States government is not apparent or acknowledged publicly. Special activities require a Presidential finding and Congressional oversight.

NOTES

UNITED NATIONS AND PEACE OPERATIONS

REFERENCES

1. United Nations Charter.
2. Presidential Decision Directive, 25 May 1994.
3. Joint Pub 3-07.3, Joint Tactics, Techniques, and Procedures for Peace Operations, 12 February 1999 [hereinafter Joint Pub 3-07.3].
4. FM 100-8, The Army in Multi-National Operations, 24 November 1997 [hereinafter FM 100-8].
5. FM 3-07, Stability Operations and Support Operations, 20 February 2003 [hereinafter FM 3-07].
6. Peacekeeping: Issues of U.S. Military Involvement, Congressional Research Service Issue Brief for Congress, updated 27 June 2003 [hereinafter Peacekeeping].
7. United Nations Peacekeeping: Issues for Congress, Congressional Research Service Issue Brief for Congress, updated 7 May 2003 [hereinafter United Nations Peacekeeping].

I. INTRODUCTION. The key to a successful peace operation rests with a fundamental understanding of operational goals and objectives. The legal, doctrinal, and operational context of peace operations requires attorneys who work proactively with an often ad hoc staff to articulate legal support for diverse facets of these complex missions. Joint Pub 3-07 contrasts the operational reality of Peace Operations with armed conflicts by declaring that "All US military PO support strategic and policy objectives and their implementing diplomatic activities. Military support of diplomatic activities improves the chances for success in the peace process by lending credibility to diplomatic actions and demonstrating resolve to achieve viable political settlements. In addition to PO, the military may conduct operations in support of diplomatic efforts to establish peace and order before, during, and after conflict." [389] As a corollary to this reality, the military elements conducting OCONUS peace operations must remember that the ambassador has the statutory responsibility for coordinating the activities of executive branch employees and conducting foreign affairs on behalf of the President.[390] This chapter will give you a thumbnail sketch of the history of Peace Operations, followed by an overview of the National Policy and the Doctrinal Framework for Peace Operations. The remainder of this chapter will supplement other chapters, focusing on selected legal issues unique to Peace Operations.

II. HISTORICAL BACKDROP. In the area of Peace Operations, Judge Advocates should be especially familiar with the UN Charter, specifically Chapter VI, Pacific Settlement of Disputes (Articles 33-38), and Chapter VII, Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression (Articles 39-51). Chapter VI envisions a Security Council role in assisting parties to "any dispute likely to endanger the maintenance of international peace and security" as they strive to resolve conflicts through "peaceful means of their own choice."[391] Chapter VI does not specifically envision or authorize the deployment of military forces under UN authority to interpose themselves between hostile parties. The frequent use of military forces as Peacekeepers, however, evolved as an extension of the UN desire to facilitate the "adjustment or settlement of international disputes or situations which might lead to a breach of the peace."[392] Peacekeeping is an internationally accepted mode of managing conflicts and giving states a buffer to seek long term, peaceful resolutions.[393] Because Peacekeeping was a compromise generated from the Security Council's inability to use its Chapter VII enforcement powers, Peacekeeping Operations (PKO) have become an inherent part of the UN

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[389] Joint Pub 3-07.3 at I-4.

[390] 22 U.S.C. § 3927. For a discussion of the relationship between the Combatant Commander's COCOM authority under 10 U.S.C. §§ 161-168 and the ambassador's normal peacetime authority, see the chapter on Non-Combatant Evacuation Operations. For the legal basis of COCOM see 10 U.S.C. § 164.

[391] UN Charter, art. 33, para. 1.

[392] UN Charter, art. 1, para. 1.

[393] There are currently 15 Peacekeeping Missions throughout the world. For a current list of active missions with personnel, budget, and fatality statistics see http://www.un.org/Depts/dpko/dpko/home.shtml.

strategy for resolving international disputes in the absence of more comprehensive and lethal collective security operations.

A. The Cold War context within which the UN operated for its first 44 years prevented the full use of Chapter VII authority. Chapter VII gives the Security Council authority to maintain international peace and security by taking "such action by air, sea, or land forces as may be necessary."[394] Member states of the UN are obligated to "accept and carry" out the decisions of the Security Council.[395] Since 1990, the changing international security environment increased the scope and number of UN efforts. On the one hand, the thawing of Cold War hostilities allowed the Security Council to take prompt and decisive action in response to Iraqi aggression in Kuwait. In the wake of the Gulf War success, the Security Council used Chapter VII to authorize numerous operations which went well beyond traditional peacekeeping (including enforcement of human rights provisions, establishment of safe havens for fleeing refugees, International Criminal Tribunals, election monitoring, sanctions enforcement, nonproliferation monitoring, preventative diplomacy, and nation building). The rapid increase in operations, both in number and complexity, generated some successes (Cambodia, El Salvador, Macedonia, Ethiopia/Eritrea, Congo, and Sierra Leone) as well as some failures (Somalia and Bosnia-Herzegovina before IFOR).

B. The number of U.S. Army deployments is up 300% since 1989.[396] Before 1991, only a handful of U.S. military observers served in three UN peacekeeping operations. Since the end of the Cold War U.S. military personnel have served in UN peace operations in Kuwait/Iraq, the Western Sahara, Ethiopia/Eritrea, Georgia, Cambodia, the former Yugoslavia, Somalia, Rwanda, Haiti, and Liberia). The DoD has provided logistic support and planning expertise to most UN peace operations, as well as providing assistance to other peacekeeping operations where the UN is not involved (i.e., Sinai, Beirut, Africa, and the Caribbean). These activities, undertaken in close cooperation with the DoS, support U.S. foreign policy objectives for the peaceful resolution of conflict, reinforce the collective security efforts of the U.S., our allies, and other UN member states, and enhance regional stability.

C. **PRESIDENTIAL DECISION DIRECTIVE 25 (May 1994)[397].** 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."[398] 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)." **This policy remains in effect for the Bush Administration unless revoked or superseded by a subsequent directive.[399]** 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 judge advocate, 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, the extent of U.S. support for other nations to name a few. The six areas highlighted by PDD-25 follow:

1. Making disciplined and coherent choices about which peace operations to support. (3 Phase Analysis)

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[394] UN CHARTER, art. 42.

[395] UN CHARTER, art. 25. If preventive or enforcement action becomes necessary, the General Assembly has the power to suspend the offending state from the exercise of rights and privileges of UN membership at the request of the Security Council. UN Charter, art. 5.

[396] The Honorable Togo D. West, Jr. & General Dennis J. Reimer, United States Army Posture Statement FY 97: Meeting the Challenges of Today, Tomorrow, and the 21st Century 3 (1996).

[397] 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).

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

[399] Peacekeeping at 3.

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

> 1) 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); 2) 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); 3) There are clear objectives and an understanding of whether the mission is defined as neutral peacekeeping or peace enforcement; 4) Does a working cease-fire exist between the parties prior to Chapter VI missions? **OR** 5) Is there a significant threat to international peace and security for Chapter VII missions?; 6) 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); 7) The political, humanitarian, or economic consequences are unacceptable; 8) 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).

b. 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:

> 1) 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); 2) Personnel, funds, and other resources are available (NOTE: may assist DoD obtain funding from other executive agencies in the interagency planning process); 3) U.S. participation is necessary for the success of the mission; 4) Whether the endstate is definable (NOTE: the political nature of the objective should be as clearly articulated as possible to guide the commander); 5) Domestic and Congressional support for the operation exists; and 6) Command and control arrangements are acceptable (NOTE: within defined legal boundaries).

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

> 1) There is a clear determination to commit sufficient forces to achieve the clearly defined objective; 2) The leaders of the operation possess clear intention to achieve the stated objectives; and 3) 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).

2. Reducing U.S. costs for UN peace operations. This is the area of greatest congressional power regarding control of military operations.[400] 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. This is the exception to the normal rule. PDD-25 calls for U.S. contributions to be reduced to 25%. Although the United Nations assessment was generally 5% higher than this amount, the limited its payments to the 25% target for fiscal years 1997 – 2001, based on Section 404 (b)(2), P.L. 103-236.[401] With the UN General Assembly's passage of a resolution that limits the UN assessment for the US to the 25% goal set with PDD-25, the President signed

[400] U.S. CONST. art. 1, sec. 8.

[401] United Nations Peacekeeping at 2.

P.L. 107-46, which authorizes payment of US arrears to the UN. This brings the actual contribution level of the US to 27.9% for fiscal year 2002.[402]

3. Policy regarding the command and control of U.S. forces.

a. 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 that is 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.

b. 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) 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**.

c. The judge advocate 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.[403] **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.**[404] The Command and Control lines between foreign commanders and U.S. forces represent legal boundaries that the lawyer should monitor.

1) **COCOM** is the command authority over assigned forces vested only in the commanders of combatant commands by Title 10, U.S. Code, Section 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.

2) **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.

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[402] Id.

[403] The precise definitions of the degrees of command authority are contained in Joint Pub 0-2, UNIFIED ACTION ARMED FORCES (UNAAF)(24 February 1995) and Joint Pub 3-0, DOCTRINE FOR JOINT OPERATIONS (1 February 1995).

[404] DEP'T OF ARMY, FIELD MANUAL 100-8, THE ARMY IN MULTINATIONAL OPERATIONS (24 November 1997)<http://www.atsc-army.org/cgi-bin/atdl.dll/fm/100-8/default.htm>

3) **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.

4) **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.

4. Reforming and Improving the UN Capability to Manage Peace Operations. The policy recommends 11 steps to strengthen UN management of peace operations.

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

6. 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.

III. DOCTRINAL FRAMEWORK

FM 3-07, Stability Operations and Support Operations, Chapter 4, 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.[405] These concepts affect every facet of operations and remain fluid throughout any mission. Joint Pub 3-07[406] is also a valuable guide. 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. Chapter V of Joint Pub 3-0, Doctrine for Joint Operations (1 February 1995) is an excellent summary of the operational considerations and principles for Military Operations Other Than War (MOOTW) that apply directly to Peace Operations. The principles for Joint MOOTW are **objective, unity of effort, security, restraint, perseverance, and legitimacy**. Chapter V defines the meaning of the principles of MOOTW and provides excellent illustrations from actual operations.

A. DEFINITIONS. There is still no universally accepted definition for "peacekeeping" or of related activities. 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 new and comprehensive term that covers a wide range of activities. Defined in FM 3-07 as: "Peacekeeping operations and peace enforcement operations conducted in support of diplomatic efforts to establish and maintain peace."

[405] FM 3-07 at 4-14.

[406] Joint publications can be found electronically at http://www.dtic.mil/doctrine

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 Desert Storm (i.e. with the start of military operations on 15 January 1991).

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. In his report, An Agenda for Peace, 17 June 1992, the UN Security General defined peacekeeping as: The deployment of a UN Presence in the field, hitherto with the consent of all the parties concerned, normally involving United Nations military and/or police personnel and frequently civilians as well. Peacekeeping is a technique that expands the possibilities for both the prevention of conflict and the making of peace.

3. 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 giving the peacemakers 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.

4. 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:

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

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

- Conducting regular liaison visits to units within their AO.

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

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

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

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

5. 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.

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:

- Protection of humanitarian assistance.

- Restoration and maintenance of order and stability.

- Enforcement of sanctions.

- Guarantee or denial of movement.

- Establishment and supervision of protected zones.

- Forcible separation of belligerents.

E. Peacemaking. 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. An Agenda for Peace: Action to bring hostile parties to agreement, essentially through such peaceful means as those foreseen in Chapter VI of the Charter of the United Nations. Peacemaking is strictly diplomacy. Confusion still exists in this area because the former U.S. definition of peacemaking was synonymous with the definition of peace enforcement.

F. Preventative Diplomacy

1. FM 3-07: Diplomatic actions taken in advance of a predictable crisis to prevent or limit violence. Joint Pub 3-07.3: Diplomatic actions, taken in advance of a predictable crisis, aimed at resolving disputes before violence breaks out. 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 has become 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, preventative deployments and in some situations, demilitarized ones.

3. Whereas peacekeeping and preventative deployments have many of the characteristics (i.e. similar rules of engagement and no or very limited enforcement powers), preventative 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. 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. An Agenda for Peace uses the term Post Conflict Peace Building and is defined as: Action to identify and rebuild support structures which will tend to strengthen and solidify peace in order to avoid relapse into conflict. Includes many of the traditional civil affairs/nation building operations. Tasks may also include disarming of former combatants, engineering projects, training of security personnel, monitoring of elections, and reforming or strengthening of governmental institutions. 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. You need to be sure that such activities are included in the mission and that the proper funds are used.

H. Other Terms. The reality of modern Peace Operations is that a mission will almost never fit neatly into one doctrinal category. The judge advocate 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 missions. The following is a list of **non-doctrinal** terms that have been used to place a label on a mission or operation that does not neatly fall into one of the above definitions.

- Second generation peacekeeping[407]

- Protective/humanitarian engagement[408]

- Stability operations[409]

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 which would likely be doomed by a superpower. 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 <u>international</u> 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."[410]

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 judge advocate 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.[411] 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.[412]

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

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[407] 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.

[408] 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.

[409] This term dates from Special Forces doctrine in the early Vietnam period. FM 3-07 states the objective of stability operations as, "Promote and protect US national interests by influencing the threat, political, and information dimensions of the operational environment through a combination of peacetime developmental, cooperative activities and coercive actions in response to crisis.

[410] UN CHARTER art. 2, para. 7.

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

[412] 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).[413] § 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. § 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.**[414] 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 was authorized by S.C. Res. 1031, Joint Guard is authorized by UNSCR 1088. The operations are subject to an almost infinite variety of permutations. For example, Operations Sharp Guard and Deny Flight enforced embargoes based on Chapter VII.

V. JUDGE ADVOCATE LEGAL CONSIDERATIONS:

A. Legal Authority and Mandate

1. UNDERSTAND THE RELATIONSHIP BETWEEN THE MANDATE AND MISSION!! The first concern for the judge advocate 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, 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:

- Include the tasks of functions to be performed.

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

- State the size and organization of the Force.

- List those states that may provide contingents.

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[413] P.L. 72-264, *codified at* 22 U.S.C. § 287.

[414] 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 30.4% of the overall UN PKO budget).

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

- Set the initial time limit for the operation.

- 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 lawyer 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. UNSCR 1088 applies to SFOR at the time of this writing, but references the General Framework Agreement for Peace (Dayton Accords) as well as the Peace Implementation Council Agreements, signed in Florence on 14 June 1996.

B. <u>Chain of Command Issues</u>

1. U.S. Commanders may never take oaths of loyalty to the UN or other organization.[415]

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. In Haiti, 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,(e.g. Desert Shield/Storm, Somalia, Haiti, and IFOR/SFOR, to name a few), 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. Under the Dayton Peace Accord, sanctioned by UN Security Council Resolution 1088, SFOR operates under the authority of, and is subject to, the direction and political control of the North Atlantic Council.

C. <u>Mission Creep</u>

1. Ensure that the mission, ROE, and fiscal authority are meshed properly. Mission creep comes in two forms. First, new or shifting guidance or missions that require different military operations than what was initially planned. This kind of mission creep comes from above; you as Judge Advocate, 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).

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[415] 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. The other potential type of mission creep occurs when attempting to do more than what is allowed in the current mandate and mission. This usually comes from a commander wanting to do good things (nation building) in his AO: rebuilding structures, training local nationals, and other activities which may be good for the local population, but outside the mission. This problem typically manifests itself in not having the right kind of money to pay for these types of assistance. In Bosnia, there is no generic authority for humanitarian assistance operations, and Judge Advocates have helped prevent mission expansion that could alter the underlying strategic posture of SFOR as an essentially neutral interpositional force.

D. Status of Forces/Status of Mission Agreement

1. Know the Status of U.S. Forces in the AO & Train Them Accordingly

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

3. Watch for Varying Degrees of Status for Supporting Units on the Periphery of the AO

4. This 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:

- The international status of the UN Force and its members.
- Entry and departure permits to and from the HN.
- Identity documents.
- The right to carry arms as well as the authorized type(s) of weapons.
- Freedom of movement in the performance of UN service.
- Freedom of movement of individual members of the force in the HN.
- The utilization of airports, harbors, and road networks in the HN.
- The right to operate its own communications system across the radio spectrum.
- Postal regulations.
- The flying of UN and national flags.
- Uniform regulations.

- Permissions to operate UN vehicles without special registration.

- Military Police.

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

- 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." (*see infra*). 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 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 armed conflict applies. **(2)** The Convention on the Privileges and Immunities of the United Nations, 1946 (*see infra*) 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. <u>Laws of War.</u>

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 answer will depend on the situation. Are the UN personnel engaged as combatants against organized armed forces (example 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, it was not international armed conflict and the U.S. was not an occupying force. However, the fourth Geneva Convention (the civilians convention) was used to help guide U.S. obligations to the local nationals. In NATO's 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 aircrew were in an "expert on mission" status and they could not be fired upon or kept prisoner. If taken into custody, they must be immediately released. Whether the Geneva Conventions do or do not legally apply, the minimum humanitarian protections contained within the Geneva Conventions will always apply.

2. As a matter of U.S. policy (CJCSI 5801.01), U.S. forces will comply with the law of war during the conduct of all military operations and related activities in armed conflict, however such conflicts are characterized, and unless otherwise directed by competent authorities, will apply law of war principles during all operations that are characterized as Military Operations Other Than War.

F. <u>Rules of Engagement</u>

1. **Pure Chapter VI missions**: The two principal tenets are the use of force for self-defense only, 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. **<u>Peacekeeping forces normally have no mandate to prevent violations of an agreement by the active use of force</u>**. 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. **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. See the chapter on Rules of Engagement for tips in drafting ROE, training ROE, and sample peace operations ROE. See also the CLAMO ROE Handbook described in the chapter on CLAMO.

G. Funding Considerations

1. **FIND POSITIVE AUTHORITY FOR EACH FISCAL OBLIGATION AND APPROPRIATE FUNDS TO ALLOCATE AGAINST THE STATUTORY AUTHORITY!!** (Judge advocates from Operation Joint Guard report that these issues take up to 90% of their time).

2. Be certain that Congress receives at least 15 days prior notice before you expend any DoD funds to "transfer to another nation or an international organization any defense articles or services."[416]

3. Recognize that you can use simplified acquisition procedures for expenditures up to $200,000 outside the U.S. in support of a contingency operation,[417] or a humanitarian or peacekeeping operation (defined for this purpose as operations under Chapter VI or VII).[418]

4. Recognize when the U.S. will be required to seek reimbursement for its expenses, ensure that an adequate accounting system is in place, and diligently prepare legal opinions documenting the spending decisions reached throughout the deployment.

5. **Do not allow O&M funds to be obligated** directly or indirectly to pay the costs of a Chapter VI Peacekeeping Assessment (Congress makes a special appropriation as necessary) or to pay any U.S. arrearages to the United Nations.[419]

H. AUTHORITIES FOR EXPENDITURES TO SUPPORT NON-U.S. FORCES DURING PEACE OPERATIONS:

1. Section 7 of the United Nations Participation Act (UNPA) (22 U.S.C. § 287d-1).

a. **Authority.** Authorizes the President, upon request of the UN, to furnish services, facilities, or other assistance in support of UN activities directed to the peaceful settlement of disputes **and not involving the employment of armed forces contemplated by Chapter VII**. Support is provided "notwithstanding the provisions of any other law."

b. Procedures.

1) Executive Order (E.O.) 10106, dated 19 Jan 1951, authorizes SECSTATE to request SECDEF to provide assistance requested by the UN. In practice, the UN will issue a Letter of Assist (LOA) (e.g., funded-order form used by the UN to request goods and services directly from a member State) to the U.S. Mission to the UN in New York

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[416] § 8080 of the FY 98 DoD Appropriations Act, P.L. 105-56. The provision applies to "any international peacekeeping or peace enforcement activity under the authority of Chapter VI or VII." In practice, DoD has executed a blanket agreement, the judge advocate should ensure that the recipient and DoD good or service is covered by the notification to Congress.

[417] Defined in 10 U.S.C. § 127a. Allows units receiving support from elements of the Department of Defense during statutorily defined operations to waive reimbursement to the Defense Business Operations Fund.

[418] 10 U.S.C. § 2302(7).

[419] 10 U.S.C. § 405.

2) (U.S./UN). U.S./UN forwards the LOA to the State Department where it is reviewed and transmitted to DoD with a cover letter recommendation as to approval and funding. Within DoD, USD(P) coordinate UN request. In some cases, SECDEF has delegated to USD(P) authority to approve. Upon approval, SECDEF will direct a military department to implement.

3) Support provided to the UN under Section 7 authority does not require the negotiation and conclusion of an overcharging agreement but is handled solely on the basis of the UN's LOA. Army procedures for processing UN requests under Section 7 of the UNPA are set out in DA PAM 700-15, dated 1 May 1986.

c. Requirements.

1) Statute prescribes that reimbursement shall ordinarily be required from the UN Reimbursements flow back to appropriate service accounts. Reimbursement may be waived, however, when the President finds exceptional circumstances or that such waiver is in the national interest. E.O. 10206 delegates to SECSTATE authority to waive reimbursement after consultation with SECDEF.

2) PDD-25 on reforming multilateral peace operations sets current policy. PDD-25 has modified E.O. 10206 to the extent that current policy is to seek reimbursement for all assistance provided by DoD to assessed UN peace operations. Reimbursement only waived in exceptional cases and when both SECSTATE and SECDEF agree. In the case of disagreement, final decision resides with the President.

2. **SECTION 607 OF THE FOREIGN ASSISTANCE ACT OF 1961(FAA) (22 U.S.C. § 2357).**

a. **Authority.** Upon determination of the President, that it is consistent with and in furtherance of the purposes of Subchapter I of the FAA, any agency of the U.S. government is authorized to furnish **"commodities and services"** to, *inter alia*, friendly foreign countries and to international organizations. Peacekeeping and disaster relief efforts are examples of Subchapter I purposes. The term "commodities and services" has been interpreted very broadly.

b. Procedures.

1) The determination required by the statute must be made each time a new UN operation will be supported under this authority. The authority for making this determination has been delegated to the Director of the U.S. Trade and Development Agency by E.O. 12163, dated 29 Sep. 1979.

2) Each new UN operation requires the negotiation and conclusion of a separate "607 agreement" with the UN These 607 agreements set the overall terms and conditions that govern the provision of assistance and are currently in place to support UN authorized operations in Somalia, Former Republic of Yugoslavia, Rwanda, and Haiti. The UN LOA procedure is the ordering mechanism specified in those agreements. NOTE: 607 agreements are international agreements negotiated under the authority of SecState (often negotiated by DoD personnel under Circular 175 authority).

c. Reimbursements.

1) Under section 607, assistance may only be furnished on an advance of funds or reimbursable basis. **Reimbursement from the UN cannot be waived**. (THEREFORE THE UNITS MUST CAPTURE AND REPORT INCREMENTAL COSTS OF PROVIDING SUCH SUPPORT).

2) Reimbursements received may be deposited by the service providing the assistance back into the appropriation originally used or, if received within 180 days of the close of the fiscal year in which the assistance was furnished, into the current account concerned. These amounts then remain available for the purposes for which they were appropriated. Reimbursements received after this 180-day period cannot be retained by DoD and must be deposited in the miscellaneous receipts account of the general treasury (*see*: GAO Report No. GAO/NSIAD-94-88. Cost of DoD Operations in Somalia, March 1994.

3. **DRAWDOWN AUTHORITIES THAT PROVIDE LEGAL GROUNDS FOR EXPENDING O&M FUNDS FOR SPECIFIED STATUTORY PURPOSES (GENERALLY WITH ONLY PARTIAL OR NO REIMBURSEMENT).**

a. Section 506(a)(1) Foreign Assistance Act[420] (Military Assistance).

1) **Requirement for Use.** Presidential determination and report, in advance to Congress that:

i. An unforeseen emergency exists that requires immediate military assistance to a foreign country or international organization; and

ii. The emergency requirement cannot be met under the Arms Export Control Act (AECA) <u>or any other law</u>.

2) **Forms of Assistance.** President may authorize the drawdown of defense articles and services from the stocks of DoD, and military education and training from DoD **(ergo, NO AUTHORITY TO CONTRACT UNDER THE DRAWDOWN AUTHORITY, with one new exception: Congress amended this statute to allow "the supply of commercial transportation and related services that are acquired by contract for the purposes of the drawdown in question if the cost to acquire such commercial transportation and related services is less than the cost to the United States Government of providing such services from existing agency assets").**[421]

3) Limitations.

i. **Purpose.** Drawdown must be for a FAA subchapter II purpose. These include: military assistance (CH 2); peacekeeping (CH 6); and anti-terrorism (CH 8).

ii. **Ceiling Amount.** Assistance provided under this section is limited to an aggregate value of <u>$100 million</u> in any fiscal year.

b. Section 506(a)(2) Foreign Assistance Act[422] (Any Agency of the U.S. Government).

1) **Requirement for Use.** Presidential determination and report (IAW § 652 FAA), in advance to Congress that it is in the national interests of the United States.

2) **Forms of Assistance.** President may authorize the drawdown of articles and services from the inventory and resources of any agency of the U.S. government, and military education and training from DoD **(ERGO, NO AUTHORITY TO CONTRACT UNDER THE DRAWDOWN AUTHORITY).**

3) Limitations.

i. **Purpose.** Drawdown must be for the purposes and under the authority of FAA Chapter 8 (relating to international narcotics control), Chapter 9 (relating to international disaster assistance), or The Migration and Refugee Assistance Act of 1962.

ii. **Ceiling Amount.** Assistance provided under this section is limited to an aggregate value of <u>$150 million</u> in any fiscal year (of which no more than $75 million can come from DoD).

iii. **Contract Authority.** Section 506(a) provides neither funds nor contract authority. It does not authorize new procurement to provide the material, services, or training directed (DoD 5105.38-M, section 1102).

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[420] 22 U.S.C. § 2318. For example, President Clinton authorized drawdowns in support of the Rapid Reaction Force in Bosnia (60 Fed. Reg. 35465, 60 Fed. Reg 44721, & 60 Fed. Reg 40257) and in support of ECOMOG Peacekeeping in Liberia (61 Fed. Reg. 56859 & 61 Fed. Reg. 56861)

[421] Foreign Operations Authorization Act, Fiscal Year 1998, 111 Stat. 2433, § 525.

[422] 22 U.S.C. § 2318.

c. Section 551 Foreign Assistance Act[423]

1) **Requirements for Use.** President decides to furnish assistance to friendly countries and international organizations, on such terms and conditions as he may determine, for peacekeeping operations and other programs carried out in the furtherance of the national security interests of the U.S. (22 U.S.C. § 2348)

2) **Limitations.** No more than $5 million may be used to reimburse DoD for expenses incurred pursuant to § 7 of the UN Participation Act.

d. Section 552(c)(2) Foreign Assistance Act [424] (Peacekeeping).

1) **Requirement for Use.** Presidential determination that:

i. As a result of an unforeseen emergency the provision of assistance under part II of the FAA (Military or Security Assistance), in excess of the funds otherwise available for such assistance, is important to the U.S. national interests; and

ii. An unforeseen emergency requires the immediate provision of assistance; and

iii.Reports, in advance, to Congress as required by section 652 of the FAA (22 U.S.C. § 2411).

2) **Forms of Assistance.** President may authorize the drawdown of "commodities and services" from the inventories and resources of any U.S. Government agency.

3) **Limitations.**

i. **Purpose.** Drawdown must be for a purpose and under the authority of Chapter 6, Peacekeeping Operations, of Part II of the FAA. Congress provided a special allowance of up to $25 million in commodities and services for the United Nations War Crimes Tribunal established with regard to the Former Yugoslavia. This special drawdown authority is subject to two conditions 1) the President makes a special determination that DoD goods or services will contribute to a just resolution of the charges of genocide or other violations of international humanitarian law and 2) the Secretary of State submits reports every 180 days to the Committees on Appropriations describing the steps the U.S. is taking to provide information concerning the crimes of genocide and other violations of international law.[425]

ii. **Ceiling Amount.** Assistance provided under this section is limited to an aggregate value of $25 million in any fiscal year.

4. Miscellaneous Authorities.

a. **Section 451 Foreign Assistance Act "Unanticipated Contingency" Authority.**[426] Section 451 of the FAA is a special presidential authority to use up to $25 million in any fiscal year of funds made available for FAA purposes to provide FAA-authorized assistance for "unanticipated contingencies." These funds may be used "notwithstanding any other provisions of law." Their use is virtually unrestricted. There is a congressional reporting requirement associated with the use of this authority.

b. **Section 632 Transfer Authority.** Section 632 of the FAA authorizes the President to allocate or transfer funds appropriated for FAA purposes to any agency of the U.S. Government for carrying out the purposes of the FAA.

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[423] 22 U.S.C. § 2348.

[424] 22 U.S.C. § 2348a.

[425] P.L. 105-118, 111 Stat. 2386 § 553 (1997).

[426] 22 U.S.C. § 2261.

Such funds may be expended by that agency pursuant to authorities conferred in the FAA or under authorities specific to that agency.

VI. BOTTOM LINE: During a Chapter VI, the judge advocate must be familiar with UN purchasing procedures and what support should be supplied by the UN or host nation. The judge advocate 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 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 judge advocate should aggressively weave lawful funding authorities with available funds in pursuit of the needs of the mission.

APPENDIX A

CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS, 1 UNTS 15, 13 FEBRUARY 1946.

Whereas Article 104 of the Charter of the United Nations provides that the Organization shall enjoy in the territory of each of its Members such legal capacity as may be necessary for the exercise of its functions and the fulfillment of its purposes and

Whereas Article 105 of the Charter of the United Nations provides that the Organization shall enjoy in the territory of each of its Member such privileges and immunities as are necessary for the fulfillment of its purposes and that representatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization.

Consequently the General Assembly by a Resolution adopted on the 13 February 1946, approved the following Convention and proposed it for accession by each Member of the United Nations.

Article I

Juridical Personality

SECTION 1. The United Nations shall possess juridical personality. It shall have the capacity:

(a) to contract;

(b) to acquire and dispose of in movable and movable property;

(c) to institute legal proceedings.

Article II

Property, Funds and Assets

SECTION 2. The United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity shall extend to any particular case it has expressly waived its immunity. It is, however, understood that no waiver of immunity shall extend to any measure of execution.

SECTION 3. The premises of the United Nations shall be inviolable. The property and assets of the United Nations, wherever located and by whomsoever held, shall be immune from search, requisition, confiscation, expropriation and any other form of interference, whether by executive, administrative, judicial or legislative action.

SECTION 4. The archives of the United Nations, and in general all documents belonging to it or held by it, shall be inviolable wherever located.

SECTION 5. Without being restricted by financial controls, regulations or moratoria of any kind,

(a) The United Nations may hold funds, gold or currency of any kind and operate accounts in any currency;

(b) The United Nations shall be free to transfer its funds, gold or currency from one country to another or within any country and to convert any currency held by it into any other currency.

SECTION 6. In exercising its rights under Section 5 above, the United Nations shall pay due regard to any representations made by the Government of any Member insofar as it is considered that effect can be given to such representations without detriment to the interests of the United Nations.

SECTION 7. The United Nations, its assets, income and other property shall be:

(a) Exempt from all direct taxes; it is understood however, that the United Nations will not claim exemption from taxes which are, in fact, no more than charges for public utility services;

(b) Exempt from customs duties and prohibitions and restrictions on imports and exports in respect of articles imported or exported by the United Nations for its official use. It is understood, however, that articles imported under such exemption will not be sold in the country into which they were imported except under conditions agreed with the Government of that country;

(c) Exempt from customs duties and prohibitions and restrictions on imports and exports in respects of its publications.

SECTION 8. While the United Nations will not, as a general rule, claim exemption from excise duties and from taxes on the sale of movable and immovable property which form part of the price to be paid, nevertheless when the United Nations is making important purchases for official use of property on which such duties and taxes have been charged or are chargeable, Members will, whenever possible, make appropriate administrative arrangements for the remission or return of the amount of duty or tax.

Article III

Facilities in Respect of Communications

SECTION 9. The United Nations shall enjoy in the territory of each Member for its official communications treatment not less favourable than that accorded by the Government of that Member to any other Government including its diplomatic mission in the matter of priorities, rates and taxes on mails, cables, telegrams, radiograms, telephotos, telephones and other communications; and press rates for information to the press and radio. No censorship shall be applied to the official correspondence and other official communications of the United Nations.

SECTION 10. The United Nations shall have the right to use codes and to dispatch and receive its correspondence by courier or in bags, which shall have the same immunities and privileges as diplomatic couriers and bags.

Article IV

The Representatives of Members

SECTION 11. Representatives of Members to the principal and subsidiary organs of the United Nations and to conferences convened by the United Nations, shall, while exercising their functions and during the journey to and from the place of meeting, enjoy the following privileges and immunities:

(a) Immunity from personal arrest or detention and from seizure of their personal baggage, and, in respect of words spoken or written and all acts done by them in their capacity as representatives, immunity from legal process of every kind;

(b) Inviolability for all papers and documents;

(c) The right to use codes and to receive papers or correspondence by courier or in sealed bags;

(d) Exemption in respect of themselves and their spouses from immigration restrictions, aliens registration or national service obligations in the State they are visiting or through which they are passing in the exercise of their functions;

(e) The same facilities in respect of currency or exchange restrictions as are accorded to representatives of foreign governments on temporary official missions;

(f) The immunities and facilities in respect of their personal baggage as are accorded to diplomatic envoys, and also;

(g) Such other privileges, immunities and facilities not inconsistent with the foregoing as diplomatic envoys enjoy, except that they shall have no right to claim exemption from customs duties on goods imported (otherwise than as part of their personal baggage) or from excise duties or sales taxes.

SECTION 12. In order to secure, for the representatives of Members to the principal and subsidiary organs of the United Nations and to conferences convened by the United Nations, complete freedom of speech and independence in the discharge of their duties, the immunity from legal process in respect of words spoken or written and all acts done by them in discharging their duties shall continue to be accorded, notwithstanding that the persons concerned are no longer the representatives of Members.

SECTION 13. Where the incidence of any form of taxation depends upon residence, periods during which the representatives of Members to the principal and subsidiary organs of the United Nations and to conferences convened by the United Nations are present in a state for the discharge of their duties shall not be considered as periods of residence.

SECTION 14. Privileges and immunities are accorded to the representatives of Members not for the personal benefit of the individuals themselves, but in order to safeguard the independent exercise of their functions in connection with the United Nations. Consequently a Member non only has the right but is under a duty to waive the immunity of its representative in any case where in the opinion of the Member the immunity would impede the course of justice, and it can be waived without prejudice to the purpose for which the immunity is accorded.

SECTION 15. The provisions of Sections 11, 12 and 13 are not applicable as between a representative and the authorities of the state of which he is a national or of which he is or has been the representative.

SECTION 16. In this article the expression & "representatives"; shall be deemed to include all delegates, deputy delegates, advisers, technical experts and secretaries of delegations.

Article V

Officials

SECTION 17. The Secretary-General will specify the categories of officials to which the provisions of this Article and Article VII shall apply. He shall submit these categories to the General Assembly. Thereafter these categories shall be communicated to the Governments of all Members. The names of the officials included in these categories shall from time to time be made known to the Governments of Members.

SECTION 18. Officials of the United Nations shall:

(a) Be immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity;

(b) Be exempt from taxation on the salaries and emoluments paid to them by the United Nations;

(c) Be immune from national service obligations;

(d) Be immune, together with their spouses and relatives dependent on them, from immigration restrictions and alien registration;

(e) Be accorded the same privileges in respect of exchange facilities as are accorded to the officials of comparable ranks forming part of diplomatic missions to the Government concerned;

(f) Be given, together with their spouses and relatives dependent on them, the same repatriation facilities in time of international crisis as diplomatic envoys;

(g) Have the right to import free of duty their furniture and effects at the time of first taking up their post in the country in question.

SECTION 19. In addition to the immunities and privileges specified in Section 18, the Secretary-General and all Assistant Secretaries- General shall be accorded in respect of themselves, their spouses and minor children, the privileges and immunities, exemptions and facilities accorded to diplomatic envoys, in accordance with international law.

SECTION 20. Privileges and immunities are granted to officials in the interests of the United Nations and not for the personal benefit of the individuals themselves. The Secretary-General shall have the right and the duty to waive the immunity of any official in any case where, in his opinion, the immunity would impede the course of justice and can be waived without prejudice to the interests of the United Nations. In the case of the Secretary-General, the Security Council shall have the right to waive immunity.

SECTION 21. The United Nations shall cooperate at all times with the appropriate authorities of Members to facilitate the proper administration of justice, secure the observance of police regulations and prevent the occurrence of any abuse in connection with the privileges, immunities and facilities mentioned in this Article.

Article VI

Experts on Missions for the United Nations

SECTION 22. Experts (other than officials coming within the scope of Article V) performing missions for the United Nations shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions during the period of their missions, including the time spent on journeys in connection with their missions. In particular they shall be accorded:

(a) Immunity from personal arrest or detention and from seizure of their personal baggage;

(b) In respect of words spoken or written and acts done by them in the course of the performance of their mission, immunity from legal process of every kind. This immunity from legal process shall continue to be accorded notwithstanding that the persons concerned are no longer employed on missions for the United Nations;

(c) Inviolability for all papers and documents;

(d) For the purpose of their communications with the United Nations, the right to use codes and to receive papers or correspondence by courier or in sealed bags;

(e) The Same facilities in respect of currency or exchange restrictions as are accorded to representatives of foreign governments on temporary official missions;

(f) The same immunities and facilities in respect of their personal baggage as are accorded to diplomatic envoys.

SECTION 23. Privileges and immunities are granted to experts in the interests of the United Nations and not for the personal benefit of the individuals themselves. The Secretary-General shall have the right and the duty to waive the immunity of any expert in any case where, in his opinion, the immunity would impede the course of justice and it can be waived without prejudice to the interests of the United Nations.

Article VII

United Nations Laissez-Passer

SECTION 24. The United Nations may issue United Nations *laissez-passer* to its officials. *These laissez-passer* shall be recognized and accepted as valid travel documents by the authorities of Members, taking into account the provisions of Section 25.

SECTION 25. Applications for visas (where required) from the holders of United Nations *laissez-passer*, when accompanied by a certificate that they are traveling on the business of the United Nations, shall be dealt with as speedily as possible. In addition, such persons shall be granted facilities for speedy travel.

SECTION 26. Similar facilities to those specified in Section 25 shall be accorded to experts and other persons who, though not the holders of United Nations laissez-passer, have a certificate that they are traveling on the business of the United Nations.

SECTION 27. The Secretary-General, Assistant Secretaries-General and Directors traveling on United Nations *laissez-passer* on the business of the United Nations shall be granted the same facilities as are accorded to diplomatic envoys.

SECTION 28. The provisions of this article may be applied to the comparable officials of specialized agencies if the agreements for relationship made under Article 63 of the Charter so provide.

Article VIII

Settlement of Disputes

SECTION 29. The United Nations shall make provisions for appropriate modes of settlement of:

(a) Disputes arising out of contracts or other disputes of a private law character to which the United Nations is a party;

(b) Disputes involving any official of the United Nations who by reason of his official position enjoys immunity, if immunity has not been waived by the Secretary-General.

SECTION 30. All differences arising out of the interpretation or application of the present convention shall be referred to the international Court of Justice, unless in any case it is agreed by the parties to have recourse to another mode of settlement. If a difference arises between the United Nations on the one hand and a Member on the other hand, a request shall be made for an advisory opinion on any legal question involved in accordance with Article 96 of the Charter and Article 65 of the Statute of the Court. The opinion given by the Court shall be accepted as decisive by the parties.

Final Article

SECTION 31. This convention is submitted to every Member of the United Nations for accession.

SECTION 32. Accession shall be affected by deposit of an instrument with the Secretary-General of the United Nations and the Convention shall come into force as regards each Member on the date of deposit of each instrument of accession.

SECTION 33. The Secretary-General shall inform all Members of the United Nations of the deposit of each accession.

SECTION 34. It is understood that, when an instrument of accession is deposited on behalf of any Member, the Member will be in a position under its own law to give effect to the terms of this Convention.

SECTION 35. This convention shall continue in force as between the United Nations and every Member which has deposited an instrument of accession for so long as that Member remains a Member of the United Nations, or until a revised general convention has been approved by the General Assembly and that Member has become a party to this revised Convention.

SECTION 36. The Secretary-General may conclude with any Member or Member supplementary agreements adjusting the provisions of this Convention so far as that Member or those Members are concerned. These supplementary agreements shall in each case be subject to the approval of the General Assembly.

APPENDIX B

CONVENTION ON THE SAFETY OF UNITED NATIONS AND ASSOCIATED PERSONNEL, G.A. RES. 49/59, 49 UN GAOR SUPP. (NO. 49) AT 299, UN DOC. A/49/49 (1994).

The General Assembly,

Considering that the codification and progressive development of international law contributes to the implementation of the purposes and principles set forth in Articles 1 and 2 of the Charter of the United Nations,

Gravely concerned at the increasing number of attacks on United Nations and associated personnel that have caused death or serious injury,

Bearing in mind that United Nations operations may be conducted in situations that entail risk to the safety of United Nations and associated personnel,

Recognizing the need to strengthen and to keep under review arrangements for the protection of United Nations and associated personnel,

Recalling its resolution 48/37 of 9 December 1993, by which it established the Ad Hoc Committee on the Elaboration of an International Convention Dealing with the Safety and Security of United Nations and Associated Personnel, with particular reference to responsibility for attacks on such personnel,

Taking into account the report of the Ad Hoc Committee, in particular the revised negotiating text resulting from the work of the Ad Hoc Committee,

Recalling its decision, in accordance with the recommendation of the Ad Hoc Committee, to re-establish, at its current session, a working group within the framework of the Sixth Committee to continue consideration of the revised negotiating text and of proposals relating thereto,

Having considered the text of the draft convention prepared by the working group and submitted to the Sixth Committee for consideration with a view to its adoption,

1. Adopts and opens for signature and ratification, acceptance or approval, or for accession, the Convention on the Safety of United Nations and Associated Personnel, the text of which is annexed to the present resolution;

2. Urges States to take all appropriate measures to ensure the safety and security of United Nations and associated personnel within their territory;

3. Recommends that the safety and security of United Nations and associated personnel be kept under continuing review by all relevant bodies of the Organization;

4. Underlines the importance it attaches to the speedy conclusion of a comprehensive review of arrangements for compensation for death, disability, injury or illness attributable to peace-keeping service, with a view to developing equitable and appropriate arrangements and to ensuring expeditious reimbursement.

84th plenary meeting

9 December 1994

CONVENTION ON THE SAFETY OF UNITED NATIONS AND ASSOCIATED PERSONNEL

The States Parties to this Convention,

Deeply concerned over the growing number of deaths and injuries resulting from deliberate attacks against United Nations and associated personnel,

Bearing in mind that attacks against, or other mistreatment of, personnel who act on behalf of the United Nations are unjustifiable and unacceptable, by whomsoever committed,

Recognizing that United Nations operations are conducted in the common interest of the international community and in accordance with the principles and purposes of the Charter of the United Nations,

Acknowledging the important contribution that United Nations and associated personnel make in respect of United Nations efforts in the fields of preventive diplomacy, peacemaking, peace-keeping, peace-building and humanitarian and other operations,

Conscious of the existing arrangements for ensuring the safety of United Nations and associated personnel, including the steps taken by the principal organs of the United Nations, in this regard,

Recognizing none the less that existing measures of protection for United Nations and associated personnel are inadequate,

Acknowledging that the effectiveness and safety of United Nations operations are enhanced where such operations are conducted with the consent and cooperation of the host State,

Appealing to all States in which United Nations and associated personnel are deployed and to all others on whom such personnel may rely, to provide comprehensive support aimed at facilitating the conduct and fulfilling the mandate of United Nations operations,

Convinced that there is an urgent need to adopt appropriate and effective measures for the prevention of attacks committed against United Nations and associated personnel and for the punishment of those who have committed such attacks,

Have agreed as follows:

Article 1

Definitions

For the purposes of this Convention:

(a) "United Nations personnel" means:

(i) Persons engaged or deployed by the Secretary-General of the United Nations as members of the military, police or civilian components of a United Nations operation;

(ii) Other officials and experts on mission of the United Nations or its specialized agencies or the International Atomic Energy Agency who are present in an official capacity in the area where a United Nations operation is being conducted;

(b) "Associated personnel" means:

(i) Persons assigned by a Government or an intergovernmental organization with the agreement of the competent organ of the United Nations;

(ii) Persons engaged by the Secretary-General of the United Nations or by a specialized agency or by the International Atomic Energy Agency;

(iii) Persons deployed by a humanitarian non-governmental organization or agency under an agreement with the Secretary-General of the United Nations or with a specialized agency or with the International Atomic Energy Agency, to carry out activities in support of the fulfillment of the mandate of a United Nations operation;

(c) "United Nations operation" means an operation established by the competent organ of the United Nations in accordance with the Charter of the United Nations and conducted under United Nations authority and control: (i) Where the operation is for the purpose of maintaining or restoring international peace and security; or (ii) Where the Security Council or the General Assembly has declared, for the purposes of this Convention, that there exists an exceptional risk to the safety of the personnel participating in the operation;

(d) "Host State" means a State in whose territory a United Nations operation is conducted;

(e) "Transit State" means a State, other than the host State, in whose territory United Nations and associated personnel or their equipment are in transit or temporarily present in connection with a United Nations operation.

Article 2

Scope of application

1. This Convention applies in respect of United Nations and associated personnel and United Nations operations, as defined in article 1.

2. This Convention shall not apply to a United Nations operation authorized by the Security Council as an enforcement action under Chapter VII of the Charter of the United Nations in which any of the personnel are engaged as combatants against organized armed forces and to which the law of international armed conflict applies.

Article 3

Identification

1. The military and police components of a United Nations operation and their vehicles, vessels and aircraft shall bear distinctive identification. Other personnel, vehicles, vessels and aircraft involved in the United Nations operation shall be appropriately identified unless otherwise decided by the Secretary-General of the United Nations.

2. All United Nations and associated personnel shall carry appropriate identification documents.

Article 4

Agreements on the status of the operation

The host State and the United Nations shall conclude as soon as possible an agreement on the status of the United Nations operation and all personnel engaged in the operation including, *inter alia*, provisions on privileges and immunities for military and police components of the operation.

Article 5

Transit

A transit State shall facilitate the unimpeded transit of United Nations and associated personnel and their equipment to and from the host State.

Article 6

Respect for laws and regulations

1. Without prejudice to such privileges and immunities as they may enjoy or to the requirements of their duties, United Nations and associated personnel shall: (a) Respect the laws and regulations of the host State and the transit State; and (b) Refrain from any action or activity incompatible with the impartial and international nature of their duties.

2. The Secretary-General of the United Nations shall take all appropriate measures to ensure the observance of these obligations.

Article 7

Duty to ensure the safety and security of United Nations and associated personnel

1. United Nations and associated personnel, their equipment and premises shall not be made the object of attack or of any action that prevents them from discharging their mandate.

2. States Parties shall take all appropriate measures to ensure the safety and security of United Nations and associated personnel. In particular, States Parties shall take all appropriate steps to protect United Nations and associated personnel who are deployed in their territory from the crimes set out in article 9.

3. States Parties shall cooperate with the United Nations and other States Parties, as appropriate, in the implementation of this Convention, particularly in any case where the host State is unable itself to take the required measures.

Article 8

Duty to release or return United Nations and associated personnel captured or detained

Except as otherwise provided in an applicable status-of-forces agreement, if United Nations or associated personnel are captured or detained in the course of the performance of their duties and their identification has been established, they shall not be subjected to interrogation and they shall be promptly released and returned to United Nations or other appropriate authorities. Pending their release such personnel shall be treated in accordance with universally recognized standards of human rights and the principles and spirit of the Geneva Conventions of 1949.

Article 9

Crimes against United Nations and associated personnel

1. The intentional commission of: (a) A murder, kidnapping or other attack upon the person or liberty of any United Nations or associated personnel; (b) A violent attack upon the official premises, the private accommodation or the means of transportation of any United Nations or associated personnel likely to endanger his or her person or liberty; (c) A threat to commit any such attack with the objective of compelling a physical or juridical person to do or to refrain from doing any act; (d) An attempt to commit any such attack; and (e) An act constituting participation as an accomplice in any such attack, or in an attempt to commit such attack, or in organizing or ordering others to commit such attack, shall be made by each State Party a crime under its national law.

2. Each State Party shall make the crimes set out in paragraph 1 punishable by appropriate penalties which shall take into account their grave nature.

Article 10

Establishment of jurisdiction

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the crimes set out in article 9 in the following cases: (a) When the crime is committed in the territory of that State or on board a ship or aircraft registered in that State; (b) When the alleged offender is a national of that State.

2. A State Party may also establish its jurisdiction over any such crime when it is committed:

   (a) By a stateless person whose habitual residence is in that State; or

   (b) With respect to a national of that State; or

   (c) In an attempt to compel that State to do or to abstain from doing any act.

3. Any State Party which has established jurisdiction as mentioned in paragraph 2 shall notify the Secretary-General of the United Nations. If such State Party subsequently rescinds that jurisdiction, it shall notify the Secretary-General of the United Nations.

4. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the crimes set out in article 9 in cases where the alleged offender is present in its territory and it does not extradite such person pursuant to article 15 to any of the States Parties which have established their jurisdiction in accordance with paragraph 1 or 2.

5. This Convention does not exclude any criminal jurisdiction exercised in accordance with national law.

Article 11

Prevention of crimes against United Nations and associated personnel

States Parties shall cooperate in the prevention of the crimes set out in article 9, particularly by:

(a) Taking all practicable measures to prevent preparations in their respective territories for the commission of those crimes within or outside their territories; and

(b) Exchanging information in accordance with their national law and coordinating the taking of administrative and other measures as appropriate to prevent the commission of those crimes.

Article 12

Communication of information

1. Under the conditions provided for in its national law, the State Party in whose territory a crime set out in article 9 has been committed shall, if it has reason to believe that an alleged offender has fled from its territory, communicate to the Secretary-General of the United Nations and, directly or through the Secretary-General, to the State or States concerned all the pertinent facts regarding the crime committed and all available information regarding the identity of the alleged offender.

2. Whenever a crime set out in article 9 has been committed, any State Party which has information concerning the victim and circumstances of the crime shall endeavour to transmit such information, under the conditions provided for in its national law, fully and promptly to the Secretary-General of the United Nations and the State or States concerned.

Article 13

Measures to ensure prosecution or extradition

1. Where the circumstances so warrant, the State Party in whose territory the alleged offender is present shall take the appropriate measures under its national law to ensure that person's presence for the purpose of prosecution or extradition.

2. Measures taken in accordance with paragraph 1 shall be notified, in conformity with national law and without delay, to the Secretary-General of the United Nations and, either directly or through the Secretary-General, to: (a) The State where the crime was committed; (b) The State or States of which the alleged offender is a national or, if such person is a stateless person, in whose territory that person has his or her habitual residence; (c) The State or States of which the victim is a national; and (d) Other interested States.

Article 14

Prosecution of alleged offenders

The State Party in whose territory the alleged offender is present shall, if it does not extradite that person, submit, without exception whatsoever and without undue delay, the case to its competent authorities for the purpose of prosecution, through proceedings in accordance with the law of that State. Those authorities shall take their decision in the same manner as in the case of an ordinary offence of a grave nature under the law of that State.

Article 15

Extradition of alleged offenders

1. To the extent that the crimes set out in article 9 are not extraditable offences in any extradition treaty existing between States Parties, they shall be deemed to be included as such therein. States Parties undertake to include those crimes as extraditable offences in every extradition treaty to be concluded between them.

2. If a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may at its option consider this Convention as the legal basis for extradition in respect of those crimes. Extradition shall be subject to the conditions provided in the law of the requested State.

3. States Parties which do not make extradition conditional on the existence of a treaty shall recognize those crimes as extraditable offences between themselves subject to the conditions provided in the law of the requested State.

4. Each of those crimes shall be treated, for the purposes of extradition between States Parties, as if it had been committed not only in the place in which it occurred but also in the territories of the States Parties which have established their jurisdiction in accordance with paragraph 1 or 2 of article 10.

Article 16

Mutual assistance in criminal matters

1. States Parties shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of the crimes set out in article 9, including assistance in obtaining evidence at their disposal necessary for the proceedings. The law of the requested State shall apply in all cases.

2. The provisions of paragraph 1 shall not affect obligations concerning mutual assistance embodied in any other treaty.

Article 17

Fair treatment

1. Any person regarding whom investigations or proceedings are being carried out in connection with any of the crimes set out in article 9 shall be guaranteed fair treatment, a fair trial and full protection of his or her rights at all stages of the investigations or proceedings.

2. Any alleged offender shall be entitled: (a) To communicate without delay with the nearest appropriate representative of the State or States of which such person is a national or which is otherwise entitled to protect that person's rights or, if such person is a stateless person, of the State which, at that person's request, is willing to protect that person's rights; and (b) To be visited by a representative of that State or those States.

Article 18

Notification of outcome of proceedings

The State Party where an alleged offender is prosecuted shall communicate the final outcome of the proceedings to the Secretary-General of the United Nations, who shall transmit the information to other States Parties.

Article 19

Dissemination

The States Parties undertake to disseminate this Convention as widely as possible and, in particular, to include the study thereof, as well as relevant provisions of international humanitarian law, in their programmes of military instruction.

Article 20

Savings clauses

Nothing in this Convention shall affect:

(a) The applicability of international humanitarian law and universally recognized standards of human rights as contained in international instruments in relation to the protection of United Nations operations and United Nations and associated personnel or the responsibility of such personnel to respect such law and standards;

(b) The rights and obligations of States, consistent with the Charter of the United Nations, regarding the consent to entry of persons into their territories;

(c) The obligation of United Nations and associated personnel to act in accordance with the terms of the mandate of a United Nations operation;

(d) The right of States which voluntarily contribute personnel to a United Nations operation to withdraw their personnel from participation in such operation; or

(e) The entitlement to appropriate compensation payable in the event of death, disability, injury or illness attributable to peace-keeping service by persons voluntarily contributed by States to United Nations operations.

Article 21

Right of self-defence

Nothing in this Convention shall be construed so as to derogate from the right to act in self-defence.

Article 22

Dispute settlement

1. Any dispute between two or more States Parties concerning the interpretation or application of this Convention which is not settled by negotiation shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the parties are unable to agree on the organization of the arbitration, any one of those parties may refer the dispute to the International Court of Justice by application in conformity with the Statute of the Court.

2. Each State Party may at the time of signature, ratification, acceptance or approval of this Convention or accession thereto declare that it does not consider itself bound by all or part of paragraph 1. The other States Parties shall not be bound by paragraph 1 or the relevant part thereof with respect to any State Party which has made such a reservation.

3. Any State Party which has made a reservation in accordance with paragraph 2 may at any time withdraw that reservation by notification to the Secretary-General of the United Nations.

Article 23

Review meetings

At the request of one or more States Parties, and if approved by a majority of States Parties, the Secretary-General of the United Nations shall convene a meeting of the States Parties to review the implementation of the Convention, and any problems encountered with regard to its application.

Article 24

Signature

This Convention shall be open for signature by all States, until 31 December 1995, at United Nations Headquarters in New York.

Article 25

Ratification, acceptance or approval

This Convention is subject to ratification, acceptance or approval. Instruments of ratification, acceptance or approval shall be deposited with the Secretary-General of the United Nations.

Article 26

Accession

This Convention shall be open for accession by any State. The instruments of accession shall be deposited with the Secretary-General of the United Nations.

Article 27

Entry into force

1. This Convention shall enter into force thirty days after twenty-two instruments of ratification, acceptance, approval or accession have been deposited with the Secretary-General of the United Nations.

2. For each State ratifying, accepting, approving or acceding to the Convention after the deposit of the twenty-second instrument of ratification, acceptance, approval or accession, the Convention shall enter into force on the thirtieth day after the deposit by such State of its instrument of ratification, acceptance, approval or accession.

Article 28

Denunciation

1. A State Party may denounce this Convention by written notification to the Secretary-General of the United Nations.

2. Denunciation shall take effect one year following the date on which notification is received by the Secretary-General of the United Nations.

Article 29

Authentic texts

The original of this Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations, who shall send certified copies thereof to all States.

CHAPTER 24

RESERVE COMPONENT SOLDIERS AND OPERATIONS

I. TYPES OF OPERATIONALLY DEPLOYED RC SOLDIERS.

A. The Army's reserve components are the Army Reserve (USAR) and the Army National Guard of the United States (ARNGUS).[427]

B. Army Reserve: The Army Reserve consists of units (almost exclusively combat support and combat service support units known as Troop Program Units) and individual soldiers (most of whom serve in a manpower pool known as the Individual Ready Reserve). Reserve soldiers and units normally serve under the U.S. Army Forces Command (FORSCOM). Some Reserve units serve as part of the U.S. Army Civil Affairs and Psychological Operations Command (USACAPOC).[428]

C. Army National Guard of the United States: Each state and territory has a National Guard consisting of a variety of combat, combat support, or combat service support units, as well as a state/territorial headquarters. Under normal circumstances, these units report to the Governor of their state or territory. They may also have an association with other states' National Guard units or Active Army units with whom they mobilize. In addition to their service to the state, National Guard soldiers and units hold a dual status as Reserve soldiers in the United States Army. For that reason, National Guard soldiers may serve either in a "federal" status like other reserve soldiers, or in a "State" status under the command of the Governor.[429]

1. National Guard soldiers serving in their home state in such roles as disaster relief or control of civil disturbances typically serve in their state status. By regulation and policy, National Guard soldiers serving outside the United States must serve in their federal status.

2. The distinction between state and federal status sometimes assumes critical legal importance. Unless ordered into federal service under Title 10 U.S. Code, National Guard soldiers serve under a state chain of command, with the Governor as commander in chief.

a. The Uniform Code of Military Justice does not apply to soldiers on duty in a state status. Instead, state law provides for military justice.

b. The federal *posse comitatus* act does not apply to National Guard soldiers in state service. Thus, they may legally participate in some law enforcement activities.

c. When National Guard soldiers and units are ordered into federal service, most of these distinctions disappear. As a result, their command, control and administration closely resemble that of mobilized reserve soldiers and units and Active Army commands.

II. TYPES OF RESERVE/ARNG DUTY IN THE OPERATIONAL ENVIRONMENT

A. Reserve and National Guard soldiers and units may participate in operations under several different authorities. The list below summarizes some of the more important ones.

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[427] *See* 10 U.S.C. § 3062(c)(1)(LEXIS 2003).

[428] *See also,* CENTER FOR LAW AND MILITARY OPERATIONS, U.S. ARMY, DOMESTIC OPERATIONAL LAW HANDBOOK FOR JUDGE ADVOCATES 187-8 (2001).

[429] *See also, id.* at 182-7; 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).

1. With consent: RC members may be ordered to active duty at any time with their consent. (10 U.S.C. § 12301(d).)

2. 15 days annual duty: RC soldiers may be ordered to perform up to 15 days of active duty per year without their consent. Soldiers in USAR units normally perform this duty together as annual training. (10 U.S.C. § 10147). Soldiers in the Army National Guard likewise perform annual training but in a Title 32 status. (32 U.S.C. §502(a).)

3. Selective Mobilization: This authority exists for peacetime domestic mobilization to suppress insurrection, enforce Federal authority, or prevent interference with state or federal law. (10 U.S.C. §§ 331-333).

4. Presidential Selected Reserve Call-up: Up to 200,000 RC soldiers may be involuntarily called to active duty for up to 270 days, for purposes related to external threats to U.S. security. Soldiers may not be retained under this authority for more than 270 days, including time spent on active duty prior to and after deployment. The statute allows for call-up of units or individual soldiers not assigned to a unit. Sometimes, special units (referred to as "derivative UICs") may be created to mobilize needed unit members without mobilizing entire units. (10 U.S.C. § 12304.)

5. Partial Mobilization: Upon presidential proclamation of a national emergency, up to 1 million RC soldiers may be involuntarily called to duty for up to 24 months. (10 U.S.C. § 12302(a).)

6. Full Mobilization: Under public law or Congressional resolution, all remaining RC soldiers may be involuntarily ordered to active duty for the duration of the war or emergency plus six months. (10 USC § 12301(a).)

B. Determining when a soldier's active duty terminates can be critically important. Some types of duty end by operation of law. For example, no authority exists to extend a 270 day Presidential Selected Reserve Call-up.[430] Therefore, the command must either finish 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. Whenever the imminent departure of an RC soldier or a unit could cause problems, military personnel specialists need to review the records involved to accurately determine when the active duty period ends. The legal advisor should review that determination carefully. For example, if a soldier has a tour end date on her initial orders, that date will control over subsequent orders issued by subordinate commands.

III. ADVERSE ACTIONS AGAINST DEPLOYED RC SOLDIERS

A. Mobilized RC soldiers in federal service have rights and obligations comparable to an Active Army soldier. 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 an RC soldier. They are jurisdiction over the RC soldier at the time of the offense and jurisdiction over the RC soldier at the time of the UCMJ action.

1. Status at the time of the offense: In order to be subject to UCMJ liability, a soldier has to be in a Federal duty status at the time of commission of the offense.

[430] This does not preclude the continuation of a service member on active duty under some other authority and the possibility that certain other scenarios might occur . Members ordered to active duty may be released before the end of the period of active duty specified in their orders. In such cases, they would still be subject to recall for the remainder of the period specified in their orders. *See* U.S. DEP'T OF DEFENSE DIR. 1235.10, ACTIVATION, MOBILIZATION, AND DEMOBILIZATION OF THE READY RESERVE para. 4.3.2.1 (1July 1995). Servicemembers ordered to active duty under a Presidential Selected Reserve Call-up 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 consecutive period of active duty in the event of a full mobilization. *Id*.

a. Proving this can sometimes pose problems. For example, consider a urine sample submitted shortly after the beginning of a soldier's 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.[431]

b. The UCMJ is inapplicable to members of the National Guard serving in state active duty status or in a Title 32 status.

2. Status at the time of the action: In order to take UCMJ action against an 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.[432]

3. 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 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 assignment command to request any necessary amendments.

4. 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.

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. However, attachment orders may reserve authority for administrative actions to the soldier's reserve chain of command.

2. Generally, Active Army regulations will apply to actions against RC soldiers assigned to an Active Army command. For example, administrative separation action against a mobilized soldier would proceed under AR 635-200[433] rather than AR 135-178.[434] Practical considerations are also a factor. It is imperative to check the applicable regulation carefully and determine its impact when an 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 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. (*See, e.g.,* AR 600-37,[435] paragraph 3.4 (d), which allows completion of the letter of reprimand process after departure of a soldier from the command.)

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[431] *See, e.g.,* United States v. Chodara, 29 M.J. 943 (ACMR, 1990).

[432] *See generally,* U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE chapter 21 (6 Sep. 2002).

[433] U.S. DEP'T OF ARMY, REG. 635-200, ENLISTED PERSONNEL (1 Nov. 2000).

[434] U.S. DEP'T OF ARMY, REG. 135-178, ENLISTED ADMINISTRATIVE SEPARATIONS (3 Dec. 2001).

[435] U.S. DEP'T OF ARMY, REG. 600-37, UNFAVORABLE INFORMATION (19 Dec. 1986).

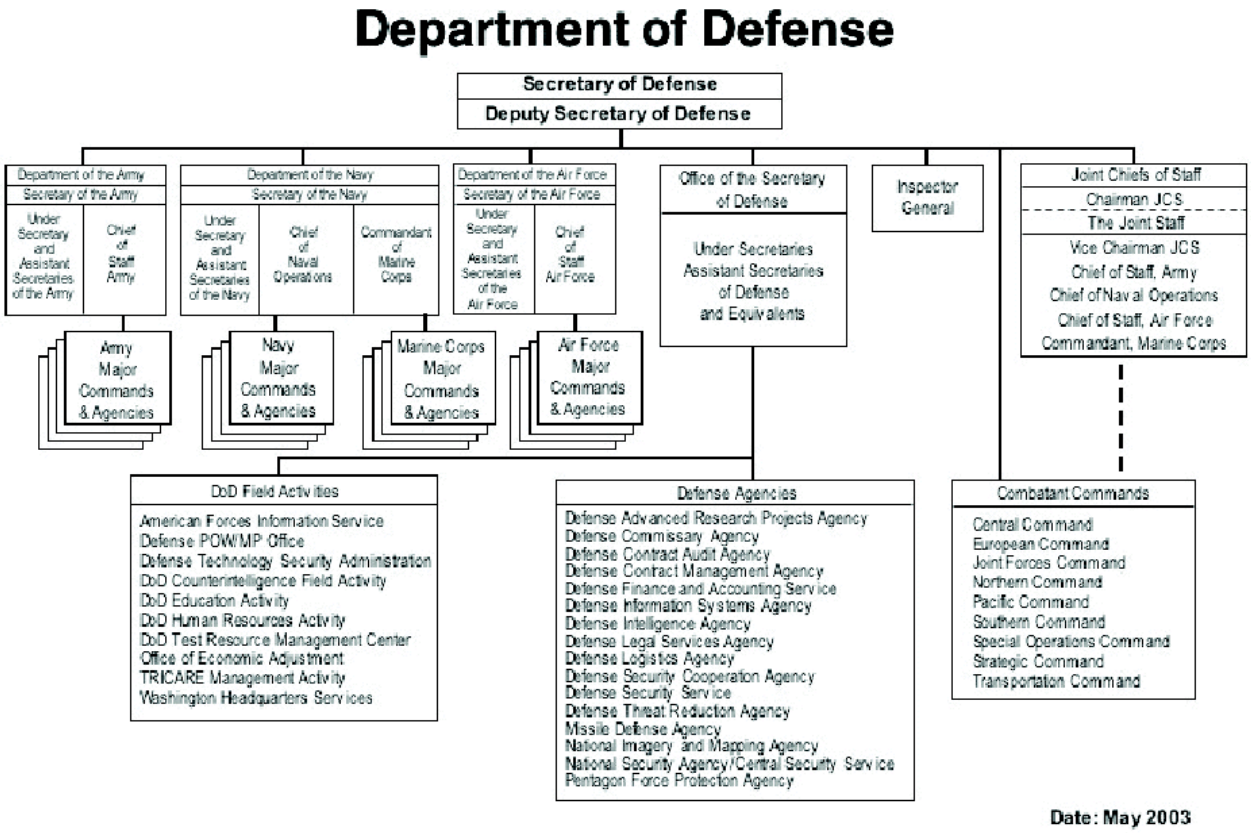
NOTES

CHAPTER 25

JOINT OPERATIONS

DEPARTMENT OF DEFENSE

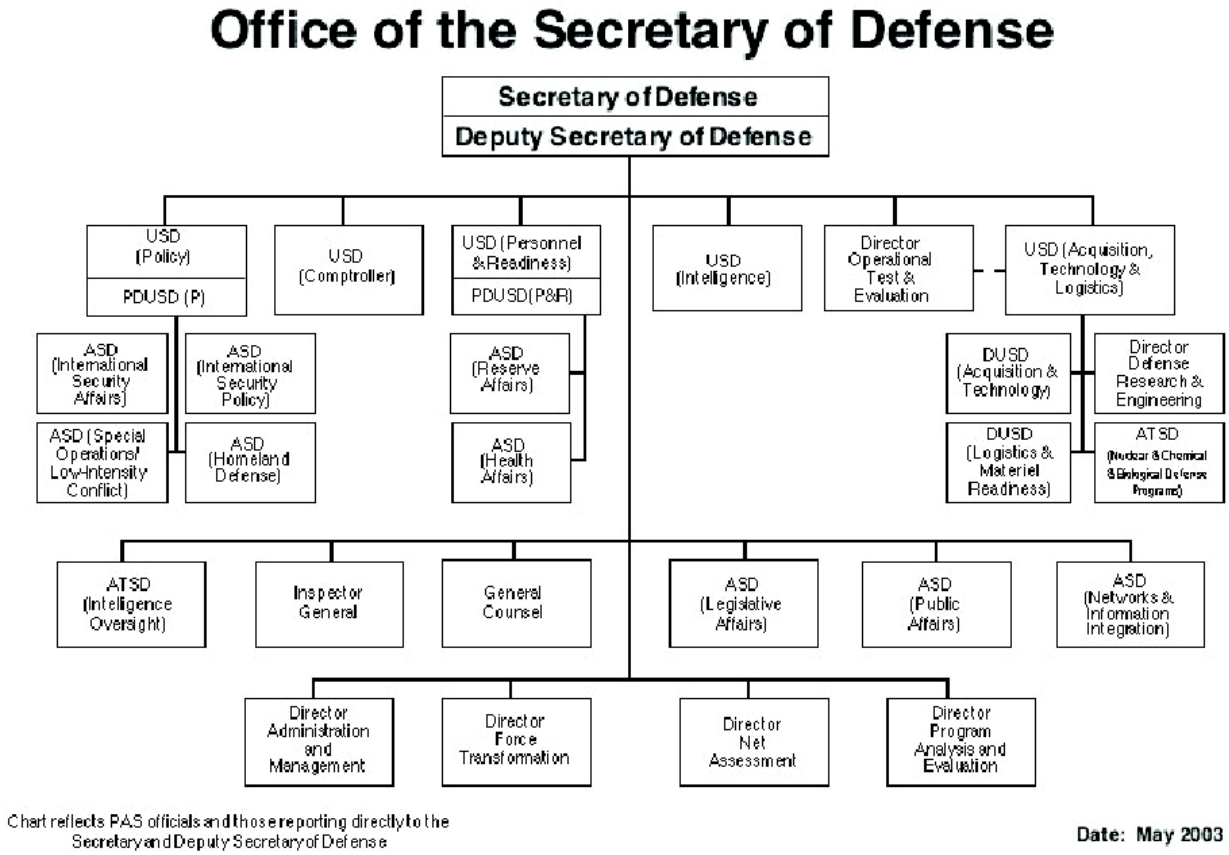
I. The **Department of Defense** (DoD) is responsible for providing the military forces needed to deter war and protect the security of the United States. The major elements of these forces are the Army, Navy, Air Force, and Marine Corps. Under the President, who is also Commander-in-Chief, the Secretary 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, nine Unified Combatant Commands, the DoD Inspector General, fifteen Defense Agencies, and seven DoD Field Activities.



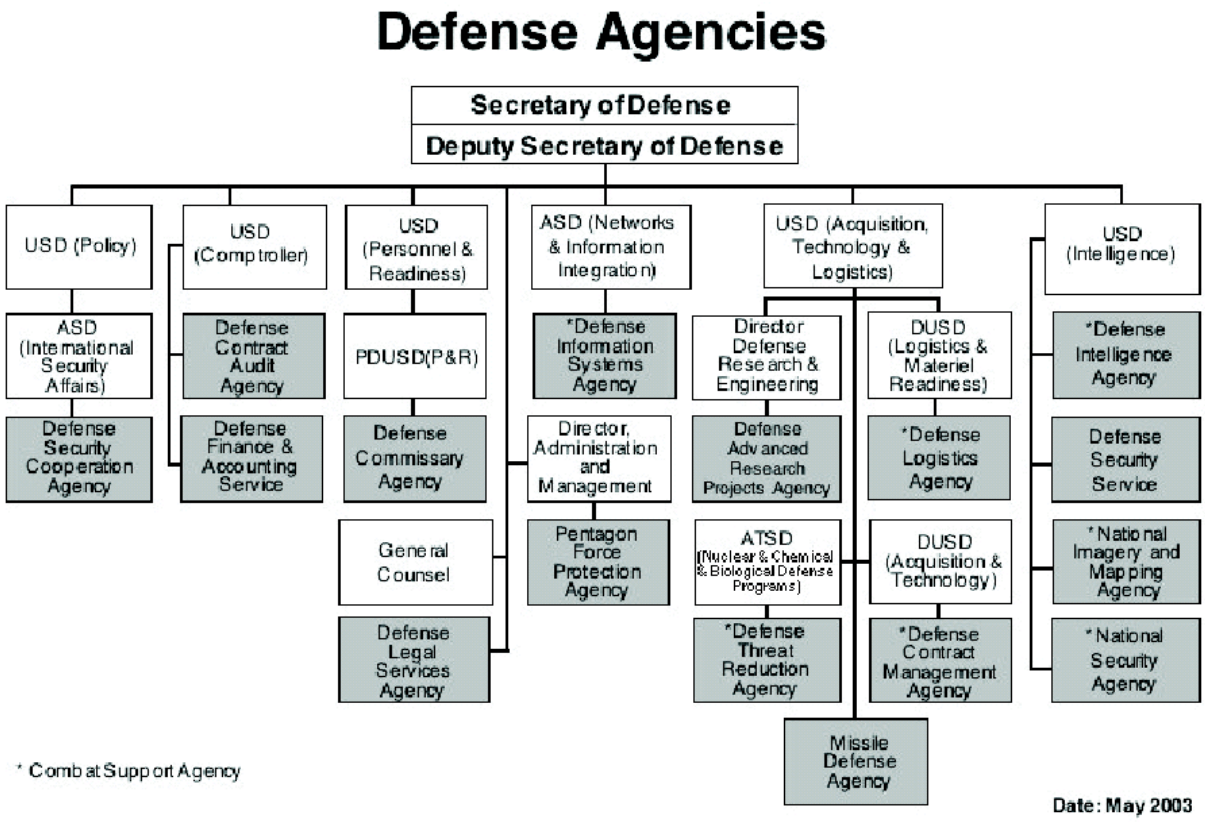
II. The **Secretary of Defense** is the principal defense policy advisor to the President and is responsible for the formulation of general defense policy and policy related to all matters of direct and primary concern to the DoD, and for the execution of approved policy. Under the direction of the President, the Secretary exercises authority, direction, and control over the Department of Defense.

III. The **Deputy Secretary of Defense** is delegated full power and authority to act for the Secretary of Defense and to exercise the powers of the Secretary on any and all matters for which the Secretary is authorized to act pursuant to law.

IV. The **Office of the Secretary of Defense** (OSD) is the principal staff element of the Secretary in the exercise of policy development, planning, resource management, fiscal, and program evaluation responsibilities. OSD includes the immediate offices of the Secretary and 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 Secretary establishes to assist in carrying out assigned responsibilities.

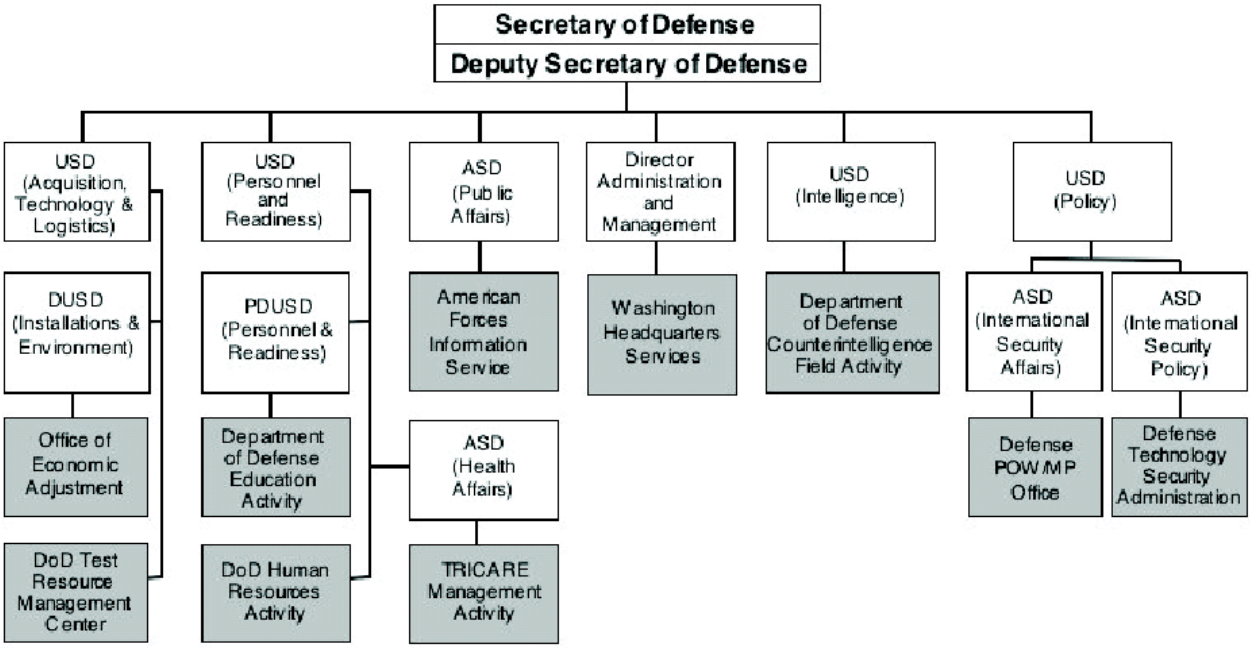


V. The **Defense Agencies**, authorized by the Secretary of Defense pursuant to the provisions of Title 10, United States Code, perform selected consolidated support and service functions on a Department-wide basis; Defense Agencies that are assigned wartime support missions are designated as Combat Support Agencies.



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.

DoD Field Activities



Date: May 2003

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

Error! Bookmark not defined. 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

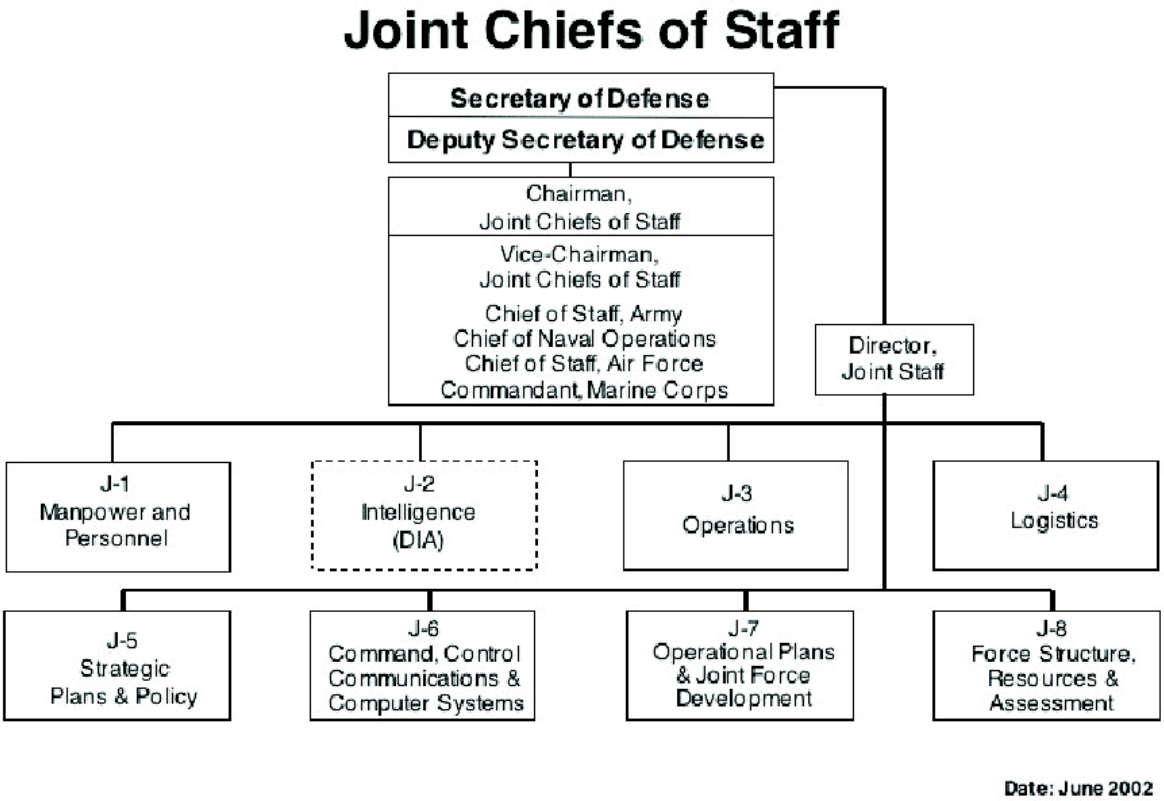
A. **Error! Bookmark not defined.**The Joint Staff assists the Chairman of the Joint Chiefs of Staff in accomplishing his responsibilities for: the unified strategic direction of the combatant forces; their operation under unified command; and for their integration into an efficient team of land, naval, 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, statute has prohibited the Joint Staff 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

> Through all this welter of change and development, your mission remains fixed, determined, inviolable—it is to win our wars.
>
> **GEN Douglas MacArthur**
> Address to the Corps of Cadets, May 12, 1962

I. ARMY MISSION

A. America's Army is organized, trained, and equipped to succeed across the full spectrum of military operations—providing the nation a full range of capabilities for a range of threats and challenges. The primary mission remains, as it always has been, **to fight and win our nation's wars**—some of which are increasingly ambiguous and difficult to define. The pattern of international conflict in the post-Cold War environment requires military forces that can do more than just fight. Our experiences over the past six years prove that the nation's military might is also defined by our ability to deter, reassure, and support.

B. The Army must always have capabilities to **compel** any adversary to do what he otherwise would not do of his own free will. These same capabilities also contribute to our ability to **deter** adversaries, to keep them from acting inimically to our interests in the first place. The employment of military forces without necessarily engaging in combat to **reassure** allies and friends promotes stability and contributes to our ability to influence international outcomes. Finally, our armed forces use their capabilities to **support** domestic authority in times of natural disaster, civil disturbance, or other emergencies requiring humanitarian assistance.

II. ARMY FORCE STRUCTURE

A. The Army's current conventional force structure is summarized on the charts below. The Army is the Nation's first full spectrum force, capable of conducting prompt and sustained land operations across the entire spectrum of military operations—from assistance to local authorities in times of emergency, to full scale conflict. It also is multi-mission capable, providing a range of options for America's participation in the post-Cold War world. It is a Total Army made up of Active, Army National Guard, and U.S. Army Reserve soldiers and civilians.

Army Force Structure and End-Strength, FY 2000	
Active Component	
Divisions	10
Separate brigades and armored cavalry regiments	2
End-strength[a]	475,000
Army National Guard	
Divisions	8
Separate brigades and armored cavalry regiments[b]	18
End-strength[a]	363,000
Army Reserve End-Strength[a]	210,000
[a] Includes all functional areas of combat, combat support, and combat service support. [b] Fifteen will be enhanced separate brigades.	
Civilian End-Strength	227,000

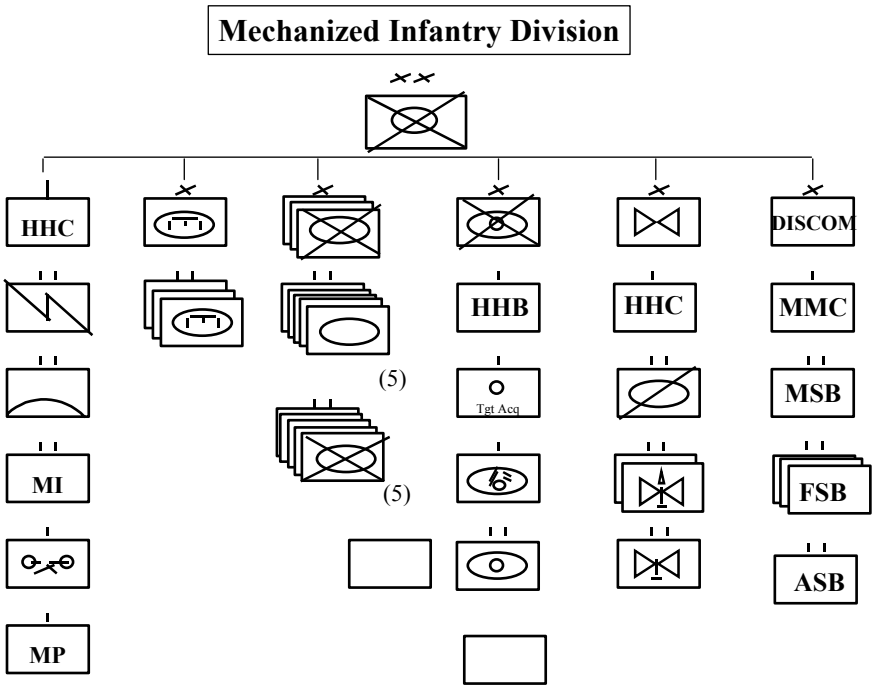
Unit Type	Typical Size	
Corps	Up to 100,000 soldiers	4 Corps in the Army
Divisions	10,000-18,000 soldiers	10 active in the Army
Brigades	1,000-6,000 soldiers	27 separate Brigades, most Army National Guard
Battalions	600 soldiers	
Companies	120-180 soldiers	
Platoons	35 soldiers	
Squads	9 soldiers	

Conventional Force Structure Summary			
	FY 1997	**FY 1999**	**QDR**
Army			
Active Corps	4	4	4
Divisions (Active/National Guard)	10/8	10/8	10/8
Active Armored Cavalry Regiments	2	2	2
Enhanced Separate Brigades (National Guard)	15	15	15
Separate Brigades (National Guard)	3	3	3

B. The major warfighting elements of the operational Army are its corps, divisions, and separate brigades. These combat elements and their supporting elements are the deployable forces that execute the full spectrum of military operations; many are based overseas. Operational units of different types are grouped together (task organized) to make the most effective use of the different functional skills and equipment characteristics of these different units. Aside from the conventional organizations above, there are the Army's Special Operations units (such as the Special Operations Groups, the 160th Special Operations Aviation Regiment, the Ranger Regiment, and so forth).

C. There are different types of divisions— armored, mechanized, light infantry, airborne, air assault, and medium— and not all of these types are exclusive. For instance, airborne divisions are capable of all missions assigned to light infantry divisions. The essence of the division unit, regardless of type, is that it trains and fights as a team, and it has the necessary equipment to fight for a significant time. Although Army doctrine designates the corps as the largest tactical organization, the division is the largest organization that regularly trains as a team. A typical light infantry division has three infantry brigades (each comprising three battalions), an aviation brigade, a brigade-sized artillery element, a brigade-sized logistical support element, and a number of separate battalions. In rough terms, it consists of about 18,000 soldiers equipped with rifles, machine guns, mortars, anti-tank missiles, bridging equipment, air defense missiles, artillery tubes, helicopters, and other weapons and equipment.

D. A typical mechanized infantry division has two mechanized and one armored brigade (sometimes referred to as "maneuver brigades"), an engineer brigade, an aviation brigade, a brigade-sized artillery element, a brigade-sized logistical element, and a number of separate battalions. The maneuver brigades will include, as a whole, five mechanized and five armored battalions, task organized by the division commander according to METT-TC. A typical armored division features the same capabilities as the mechanized infantry division except that it has two armored brigades and one mechanized brigade. These maneuver brigades in the armored division will include, as a whole, six armored and four mechanized battalions task organized into brigades according to METT-TC.

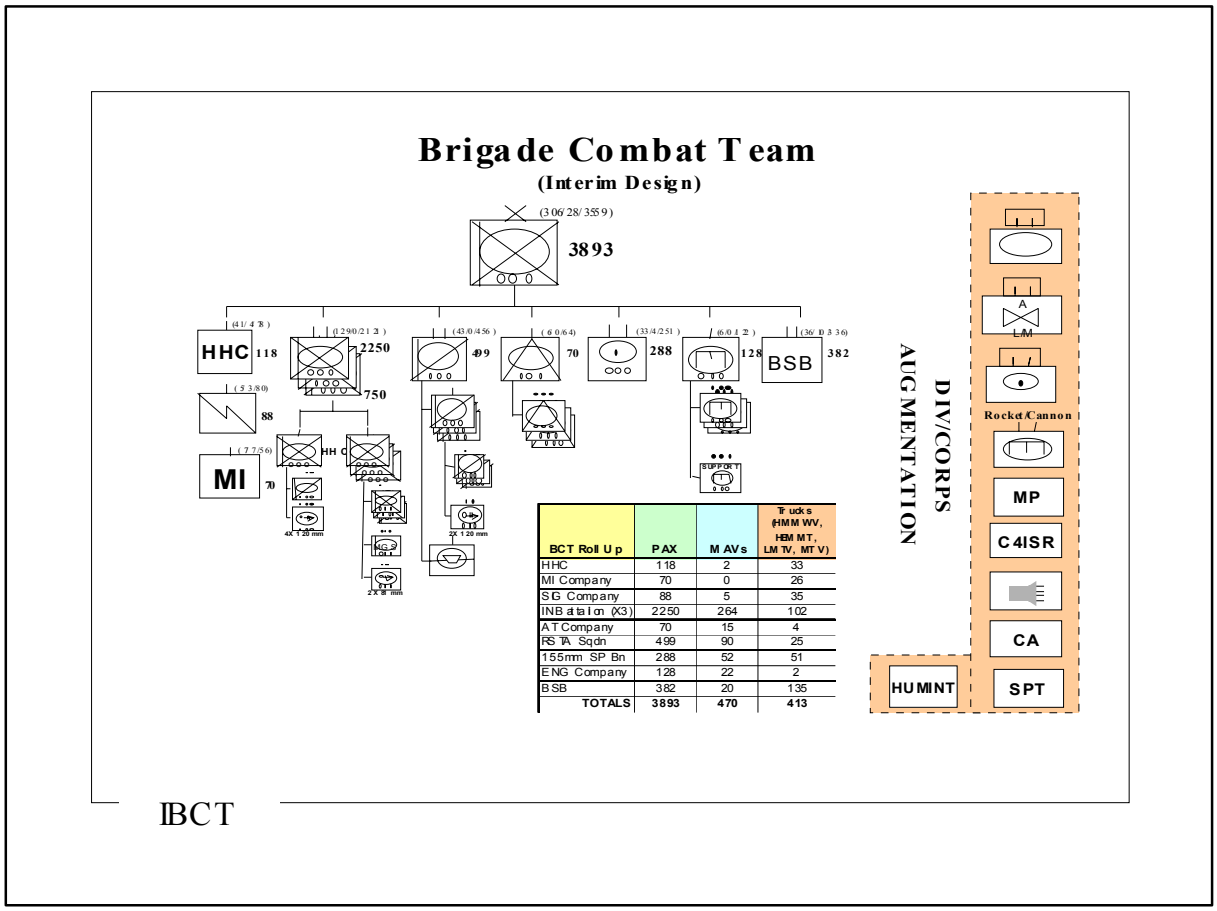


E. **The Stryker Brigade Combat Team (SBCT) / Interim Brigade Combat Team (IBCT)**: The high frequency of joint contingency operations since the 1990s has sharply increased the significance of strategic responsiveness. The faster that a joint contingency force can respond to a crisis, the faster the crisis can be resolved. In fact, rapid response by integrated joint forces can have a greater or equally significant impact on crisis resolution as a larger operational capability built up over a longer period of time. Rapid response deters, reduces risk, constrains enemy options, expands the array of possible favorable outcomes, and facilitates rapid decision. At present, the Army is transforming to optimize its strategic responsiveness. Army light forces can deploy quite rapidly--within a matter of days--but they lack the lethality, mobility, and staying power necessary to assure decision. On the other hand, Army mechanized forces possess substantial lethality and staying power, but they require too much time to deploy, given current joint capabilities for strategic lift, affording the adversary too much time to prepare for the arrival of U.S. forces. The Army is developing the

SBCT/IBCT to combine the strengths of its light and heavy forces and their technological advantages, providing a strategically responsive force for future contingencies.

F. The SBCT/IBCT is a ***full spectrum, combat force,*** capable of deploying within 96 hours to wherever it may be needed. The Team deploys very rapidly, executes early entry, and conducts effective combat operations immediately on arrival to prevent, contain, stabilize, or resolve a conflict through shaping and decisive operations. The Brigade Combat Team participates in major theater war (MTW), with augmentation, as a subordinate maneuver component within a division or corps, in a variety of possible roles. The Team also participates with appropriate augmentation in stability and security operations (SASO) as an initial entry force and/or as a guarantor to provide security for stability forces by means of its extensive combat capabilities.

G. The first two brigades to transform will be the 3rd Brigade of the 2nd Inf Div, and the 1st Brigade of the 25th Inf Div, both at Fort Lewis. The design and transformation processes are ongoing.



BCT Roll Up	PAX	MAVs	Trucks (HMMWV, HEMMT, LMTV, MTV)
HHC	118	2	33
MI Company	70	0	26
SG Company	88	5	35
INBattalion (X3)	2250	264	102
AT Company	70	15	4
RSTA Sqdn	499	90	25
155mm SP Bn	288	52	51
ENG Company	128	22	2
BSB	382	20	135
TOTALS	3893	470	413

H. Army personnel are divided into Branches. The Combat Arms Branches are directly involved in the conduct of actual fighting and include Infantry, Armor, Field Artillery, Air Defense Artillery, Engineers, Aviation, and Special Forces. Combat Support Branches provide operational assistance to the combat arms, including engagement in combat when necessary, and have additional responsibilities in providing logistical administrative support to the Army. They include Signal, Chemical, Military Intelligence and Military Police. Combat Service Support Branches provide logistical and administrative support and include the Adjutant General's, Chaplains', Finance, Quartermaster, Medical, Ordnance, Transportation, and Judge Advocate General's Corps. The Army's operational organizations are comprised of officers and enlisted troops from among these various branches.

III. ROLE OF THE ARMY OPERATIONAL LAWYER

A. The mission of the Army's Judge Advocate General's Corps (JAGC) is to provide professional legal services at all echelons of command throughout the range of military operations. ***Legal support to operations*** encompasses all legal services provided by JAGC personnel in support of units, commanders and soldiers throughout an area of operation and across the spectrum of operations. Legal support to operations falls into three functional areas: command and control, sustainment, and personnel service support (or support for short). The Operational Law Attorney must be capable of delivering legal support in the six traditional ***core legal disciplines*** of administrative and civil law, claims, contract and fiscal law, international law, legal assistance, and military justice. He or she must also be proficient in command and control functions to include interpreting, drafting, disseminating, and training commanders, staffs, and soldiers on rules of engagement; participating in targeting cells; participating in the military decision making process; participating in information operations; and, dealing with the Law of Armed Conflict (LOAC).

B. The division SJA section is the lowest- echelon, organic, full-service element of legal support to operations. It is modular—capable of being tailored to provide legal support for specific missions that may be undertaken during a war. It also features significant synergy—a product of bringing together diverse, technically skilled legal professionals and providing them the informational and legal research infrastructure necessary for tackling complex legal issues.

C. Operational law duties in the main CP (or, when appropriate, in the TAC CP/ assault CP) involve the counselor function and disciplines associated with the engagement battlefield operating systems and the command and control battlefield operating system. Legal support to operations associated with the combat service support/personnel service support battlefield operating system are performed by judge advocates in the rear CP. The remainder of the division SJA section deploys with the command posts of subordinate brigades, brigade-sized commands, or separate battalions. The SJA will determine which subordinate commands are directly supported by judge advocates. In making this determination, the SJA will consider the principles of modularity and synergy in light of the complexity and volume of legal issues likely to be faced by the subordinate unit, the ability of the unit to receive support from other operational law assets within the area of operations, and other aspects of METT-TC.

AIR FORCE

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I. OVERVIEW

This chapter provides an overview of Air Force operational concepts, missions, and organization. Its intent is to familiarize the reader with the typical missions of Air Force judge advocates' clients—the operational aviators and commanders of air and space forces. It closes with a review of the judge advocate's role in support of operations.

II. AIR FORCE OPERATIONS LAW

Operations law in the U.S. Air Force embodies all facets of the military law practice in a contingency environment. The environment is often expeditionary and joint in nature. The Air Force Ops lawyer must understand aerospace doctrine, campaigning, and targeting procedures as well as military justice, international agreements, claims, rules of engagement, contracting, fiscal, environmental, foreign criminal jurisdiction, labor law, and legal assistance. Ops law is the highest expression of an Air Force judge advocate's practice of military law. The Air Force details Ops lawyers on the staffs of most unified commands, all AF major commands and numbered air forces. However, the International & Operations Law Division, Office of The Judge Advocate General (HQ AF/JAO, DSN 225-9631, 703-695-9631) establishes Air Force policy in the operations law field.

A. Tenets of Aerospace Power

Air and space power is intrinsically different from either land or sea power, and its use must be guided by different axioms than those of surface forces (AFDD 1, at 21-27).

1. Centralized Control/Decentralized Execution. Aerospace forces should be centrally controlled by an airman to achieve advantageous synergies, establish effective priorities, capitalize on unique strategic and operational flexibilities, ensure unity of purpose, and minimize the potential for conflicting objectives. Execution of aerospace missions should be decentralized to achieve effective spans of control, responsiveness, and tactical flexibility.

2. Flexibility/Versatility. The unique flexibility and versatility of aerospace power should be fully used and not compromised. The ability to concentrate force anywhere and attack any facet of the enemy's power is the outstanding strength of aerospace power.

3. Priority. Effective priorities for the use of aerospace forces flow from an informed dialogue between the joint or combined commander and the air component commander. The air commander should assess the possible uses as to their importance to (1) the war, (2) the campaign, and (3) the battle. Air commanders should be alert for the potential diversion of aerospace forces to missions of marginal importance.

4. Synergy. Internally, the missions of aerospace power, when applied in comprehensive and mutually supportive air campaigns, produce effects well beyond the proportion of each mission's individual contribution to the campaign. Externally, aerospace operations can be applied in coordinated joint campaigns with surface forces, either to enhance or be enhanced by surface forces.

5. Balance. The air commander should balance combat opportunity, necessity, effectiveness, and efficiency against the associated risk to friendly aerospace resources. Technologically sophisticated aerospace assets are not available in vast numbers and cannot be produced quickly.

6. Concentration. Aerospace power is most effective when it is focused in purpose and not needlessly dispersed.

7. Persistence. Aerospace power should be applied persistently. Destroyed targets may be rebuilt by a resourceful enemy. Commanders should plan for restrikes against important targets.

B. Core Competencies

Core competencies are the basic areas of expertise that the Air Force brings to any activity across the range of military operations, whether as a single Service or in conjunction with the core competencies of other Services in joint operations. Core competencies are made possible by the effective integration of platforms, people, weapons, bases, logistics, and all supporting infrastructure. Core competencies are the heart of Air Force strategy. Additionally, what distinguishes the Air Force's core competencies from the core competencies of other Services are the speed and the global nature of its reach and perspective. In this context, the competencies represent air and space power capability. They are not doctrine per se, but are the enablers of AF doctrine. Core competencies begin to translate the central beliefs of doctrine into operational concepts (AFDD 1, at 27-35).

1. Air and Space Superiority. It is an important first step in military operations. It provides freedom to attack as well as freedom from attack. Success in air, land, sea, and space operations depends upon air and space superiority. Air and space power is so flexible and useful, there will be many demands that it be diverted to other tasks before any measure of air and space superiority is secured. That is a false economy that ultimately costs more in long term attrition and ineffective sorties. Superiority is that degree of dominance that permits friendly land, sea, and air forces to operate at a given time and place without prohibitive interference by the opposing force. Supremacy is that degree of superiority wherein opposing air and space forces are incapable of effective interference anywhere in a given theater of operations. To gain control of the air, friendly forces must counter enemy air, missile, and air defense artillery threats not only to assure full force protection for surface forces, but also to enable full flexibility to conduct parallel warfare across the theater of operations. Space superiority provides the freedom to conduct operations without significant interference from enemy forces. To ensure that our forces maintain the ability to operate without being seen, heard, or interfered with from space, it is essential to gain and maintain space superiority.

2. Precision Engagement. Air and space power provide the "scalpel" of joint service operations—the ability to forgo the brute force-on-force tactics of previous wars and apply discriminate force precisely where required. The Air Force is clearly not the only Service capable of precise employment of its forces, but the Air Force enjoys superior capability to apply the technology and techniques of precision engagement anywhere on the face of the earth in a matter of hours or minutes. It is the effect, rather than forces applied, that is the defining factor. In addition to the traditional application of force, precision engagement includes non-lethal as well as lethal force. The fact that air and space power can concentrate in purpose, whether or not massing in location or concentrating in time, challenges traditional understandings of precision and creates opportunity for a unique method to harnessing military power to meet national security policy objectives.

3. Information Superiority. Information superiority is the ability to collect, control, exploit, and defend information while denying an adversary the ability to do the same and, like air and space superiority, includes gaining control over the information realm and fully exploiting military information functions. The major operator of sophisticated air- and space-based intelligence, surveillance, and reconnaissance (ISR) systems, the Air Force can quickly respond to the information they provide. Whoever has the best ability to gather, understand, control, and use information has a substantial strategic advantage. One of a commander's primary tasks is to gain and maintain information superiority with the objective of achieving faster and more effective command and control of assigned forces than the adversary.

4. Global Attack. All military Services provide strike capabilities, but the Air Force's ability to attack rapidly and persistently, with a wide range of munitions, anywhere on the globe at any time is unique. The decline of both total force structure and worldwide bases has decreased the size of our forward presence and forced the U.S. military to become primarily and expeditionary force. The Air Force may rapidly project power over global distances and maintain a virtually indefinite "presence" over an adversary. When combined with our inherent strategic perspective, Air Force operations can be both a theater's first and potentially most decisive force in demonstrating the nation's will to counter an adversary's aggression.

5. Rapid Global Mobility. In the post-Cold War era, global mobility has increased in importance to the point where it is required in virtually every military operation. U.S. forces overseas have been reduced significantly, while rapid power projection based in the continental United States (CONUS) has become the predominant military strategy. It is the particular competence of air and space forces to most rapidly provide what is needed, including weapons on target and an increasing variety of surface force components, where it is needed.

6. Agile Combat Support. The need to provide highly responsive force support is certainly not unique to the Air Force, but a force that is poised to respond to global taskings within hours must also be able to support that force with equal facility. This includes all elements of a forward base-support structure: maintenance, supply, transportation, communications, services, engineering, security, medical, and chaplaincy. Each of these areas must be integrated to form a seamless, agile, and responsive combat support system of systems. Equally important to a technologically dependent Service like the Air Force is agility—agility in acquisition and modernization processes, in organizations, in innovation to meet future challenges, and in ability to adapt to the changing world.

C. AIR AND SPACE POWER FUNCTIONS.

The Air Force engages in 17 functions or types of missions (AFDD 1, at 45-60). This is a recent change in doctrine. Typical Air Force missions include those detailed below:

1. Counterair. Counterair consists of operations to attain and maintain a desired degree of air superiority by the destruction or neutralization of enemy forces. Counterair's two elements, offense counterair and defensive counterair, enable friendly use of otherwise contested airspace and disable the enemy's offensive air and missile capabilities to reduce the threat posed against friendly forces. The entire offensive and defensive counterair effort should be controlled by one air officer under the "centralized control, decentralized execution" concept. Offensive Counterair (OCA) is often the most effective and efficient method for achieving the appropriate degree of air superiority. This function consists of operations to destroy, neutralize, disrupt, or limit enemy air and missile power as close to its source as possible and at a time and place of our choosing. This is freedom from attack that enables action by friendly forces—free to attack. Defensive Counterair (DCA). DCA concentrates on defeating the enemy's offensive plan and on inflicting unacceptable losses on attacking enemy forces.

2. Counterspace. Counterspace involves those operations conducted to attain and maintain a desired degree of space superiority by the destruction or neutralization of enemy forces. The main objectives of counterspace operations are to allow friendly forces to exploit space capabilities, while negative the enemy's ability to do the same. Offensive Counterspace (OCS). OCS operations destroy or neutralize an adversary's space systems or the information they provide at a time and place of our choosing through attacks on the space, terrestrial, or link elements of space systems. Defensive Counterspace (DCS). DCS operations consist of active and passive actions to protect our space related capabilities from enemy attack or interference.

3. Counterland. Counterland involves those operations conducted to attain and maintain a desired degree of superiority over surface operations by the destruction or neutralization of enemy surface forces. The main objectives of counterland operations are to dominate the surface environment and prevent the opponent from doing the same.

a. Interdiction. Interdiction is traditionally a form of air maneuver. Interdiction consists of operations to divert, disrupt, delay, or destroy the enemy's surface military potential before it can be used effectively against friendly forces. Although non-traditional in the classic sense, information warfare may also be used to conduct interdiction by intercepting or disrupting information flow or damaging/destroying controlling software and hardware. Interdiction and surface maneuver can be mutually supporting. Joint force interdiction needs the direction of a single commander who can exploit and coordinate all the forces involved, whether air-, space-, surface-, or information-based. The joint force air

component commander (JFACC) is the supported commander for air interdiction. The JFACC uses the JTF commander's priorities to plan and execute the theater-wide interdiction effort.

b. Close Air Support (CAS). CAS consists of air operations against hostile targets in close proximity to friendly forces; further, these operations require detailed integration of each air mission with the fire and maneuver of those forces. CAS provides direct support to help friendly surface forces carry out their assigned missions. CAS produces the most focused but briefest effects of any counterland mission; by itself, it rarely achieves campaign-level objectives. However, at times it may be the more critical mission by ensuring the success or survival of surface forces. CAS should be used at decisive points in a battle.

4. Strategic Attack. those operations intended to directly achieve strategic effects by striking at the enemy's centers of gravity (COG). These operations are designed to achieve their objectives without first having to necessarily engage the adversary's fielded military forces in extended operations at the operational and tactical levels of war. This function may be carried out in support of a theater CINC or as a stand-alone operation by direction of the NCA. Strategic attack should affect the enemy's entire effort rather than just a single action, battle or campaign. If properly applied, strategic attack is the most efficient means of employing air and space power. Strategic attack is a function of objectives or effects achieved, not forces employed. The target, not the weapons system, determines if an attack is strategic.

5. Counterinformation. seeks to establish information superiority through control of the information realm. The focus of the effort is on countering the enemy's ability to attain information advantage. Offensive Counterinformation (OCI): includes actions taken to control the information environment. The purpose of OCI is to disable selected enemy information operations. Defensive Counterinformation (DCI): includes those actions that protect our information, information systems, and information operations from the adversary.

6. Airlift. Airlift is viewed as the transportation of personnel and materiel through the air and can be applied across the entire range of military operations in support of national objectives. Airlift is viewed as a bedrock of U.S. national security at the strategic level and as a crucial capability for operational commanders within a theater. Air Force airlift can be classified as strategic (inter-theater), theater (intra-theater), and operational support. Inter-theater airlift provides the air bridge that links theaters to the CONUS and to other theaters, as well as airlift with the CONUS. Intra-theater airlift provides the air movement of personnel and materiel within a CINC's area of responsibility. Operational support airlift is airlift provided by assets that are an integral part of a specific Service, component or major command (MAJCOM), and that primarily support the requirements of the organization to which they are assigned.

7. Air Refueling. an integral part of U.S. air power across the range of military operations, air refueling significantly expands the employment options available to a commander by increasing the range, payload, and flexibility of air forces. Therefore, aerial refueling is an essential capability in the conduct of air operations worldwide and is especially important when overseas basing is limited or not available.

8. Spacelift. projects power by delivering satellites, payloads, and materiel into or through space. During a period of increased tension or conflict, the spacelift objective is to launch or deploy new and replenishment space assets as necessary to achieve national security objectives. There are three launch purposes. Launch to Deploy: launches required to initially achieve a satellite systems designed operational capability. Launch to Sustain: launches to replace satellites that are predicted to fail or abruptly fail. Launch to Augment: launches to increase operational capability in response to contingency requirements, crisis, or war.

9. Intelligence, Surveillance, and Reconnaissance (ISR). Intelligence provides clear, brief, relevant, and timely analysis on foreign capabilities and intentions for planning and conducting military operations. Surveillance is the function of systematically observing air, space, surface, or subsurface areas, places, persons, or things, by visual, aural, electronic, photographic, or other means. Reconnaissance complements surveillance in obtaining, by visual observation or other detection methods, specific information about the activities and resources of an enemy or potential enemy; or in securing data concerning the meteorological, hydrographic, or geographic characteristics of a particular area.

10. Combat Search and Rescue (CSAR). CSAR consists of those air operations conducted to recover distressed personnel during wartime or MOOTW. CSAR is a key element in sustaining the morale, cohesion, and fighting capability of friendly forces. It preserves critical combat resources and denies the enemy potential sources of intelligence.

11. Navigation and Positioning. The function of navigation and positioning is to provide accurate location and time of reference in support of strategic, operational and tactical operations. For example, space-based systems provide the Global Positioning System, airborne-based systems provide air-to-surface radar, and ground-based systems provide various navigation aids.

12. Weather Services. Air Force weather services supply timely and accurate environmental information, including both space environment and atmospheric weather, to commanders for their objectives and plans at the strategic, operational, and tactical levels. Weather services also influence the selection of targets, routes, weapons systems, and delivery tactics, and are a key element of information superiority.

13. Additional Air Force missions include Countersea, Command and Control (C2), and Special Operations Employment.

III. ORGANIZATIONAL STRUCTURE

A. AF Organization. The Air Force has three components: Active Duty, the Air National Guard, and the Air Force Reserve. The Air Force organizes, trains, and equips air forces through its major commands (MAJCOMs). Active duty and Reserve component MAJCOMs are subdivided into numbered air forces, wings, groups, and squadrons.

1. AF Major Commands (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. Normally commanded by a General (O-10).

2. Numbered Air Force (NAF). The NAF is the senior warfighting echelon of the Air Force. 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 JFC 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 logistics group, the 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—includes personnel, family support, and education flights), contracting, services (formerly morale, welfare and recreation or MWR), and security forces squadrons. .

5. Squadron. The basic fighting unit of the Air Force 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. Normally commanded by a Lieutenant Colonel (O-5).

B. <u>Organizing for Air Operations</u>

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 Air Force, 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 accomplishment of the overall mission. The joint force commander will normally designate a JFACC. The JFACC's responsibilities are assigned by the JTF commander and normally 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 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 Air Force 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 Aerospace Expeditionary Task Force, composed of Aerospace Expeditionary Wings, Aerospace Expeditionary Groups, and Aerospace Expeditionary Squadrons, is created to provide forces to meet theater Commander in Chief (CINC) requirements. An AEF is not a discrete warfighting unit.

5. Aerospace Expeditionary Task Force (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.

8. Contingency Air Base. Contingency air bases are usually group sized elements that provide base operations support (BOS) personnel, equipment, and infrastructure capable for rapid spin-up to support airlift, refueling, ISR, or air combat missions in response to NCA or combatant commander directed crisis response taskings.

IV. THE OPERATIONAL LAWYER

A. Operations Law provides the legal basis for the conduct of all these operations. Following are some examples of areas in which Air Force judge advocates provide advice to operational unit Commanders during war.

1. Even before bombs are dropped on targets, judge advocates of all services must review all weapons for compliance with international law. In the Air Force, AF/JAO has that job. Once our weapons are deemed lawful, the next question is whether the targets against which they will be employed are also proper under the laws of war. Answering that question, both in prior planning and in real time, and translating the answer into rules of engagement are perhaps the most important JAG combat functions. Although EPW (enemy prisoner of war) matters reside within the Army's executive control, the Air Force is the DoD executive agent for POW issues (issues involving U.S. personnel in enemy captivity). As such, AF/JAO provides legal advice on problems such as the code of conduct, enemy treatment of our prisoners, and others.

2. Operations law also applies to many peacetime matters. Operations lawyers advise on freedom of aerial navigation, landing issues, and answer questions regarding our rights and responsibilities in space. Law of armed conflict training for all our personnel is an essential duty for Air Force operations lawyers.

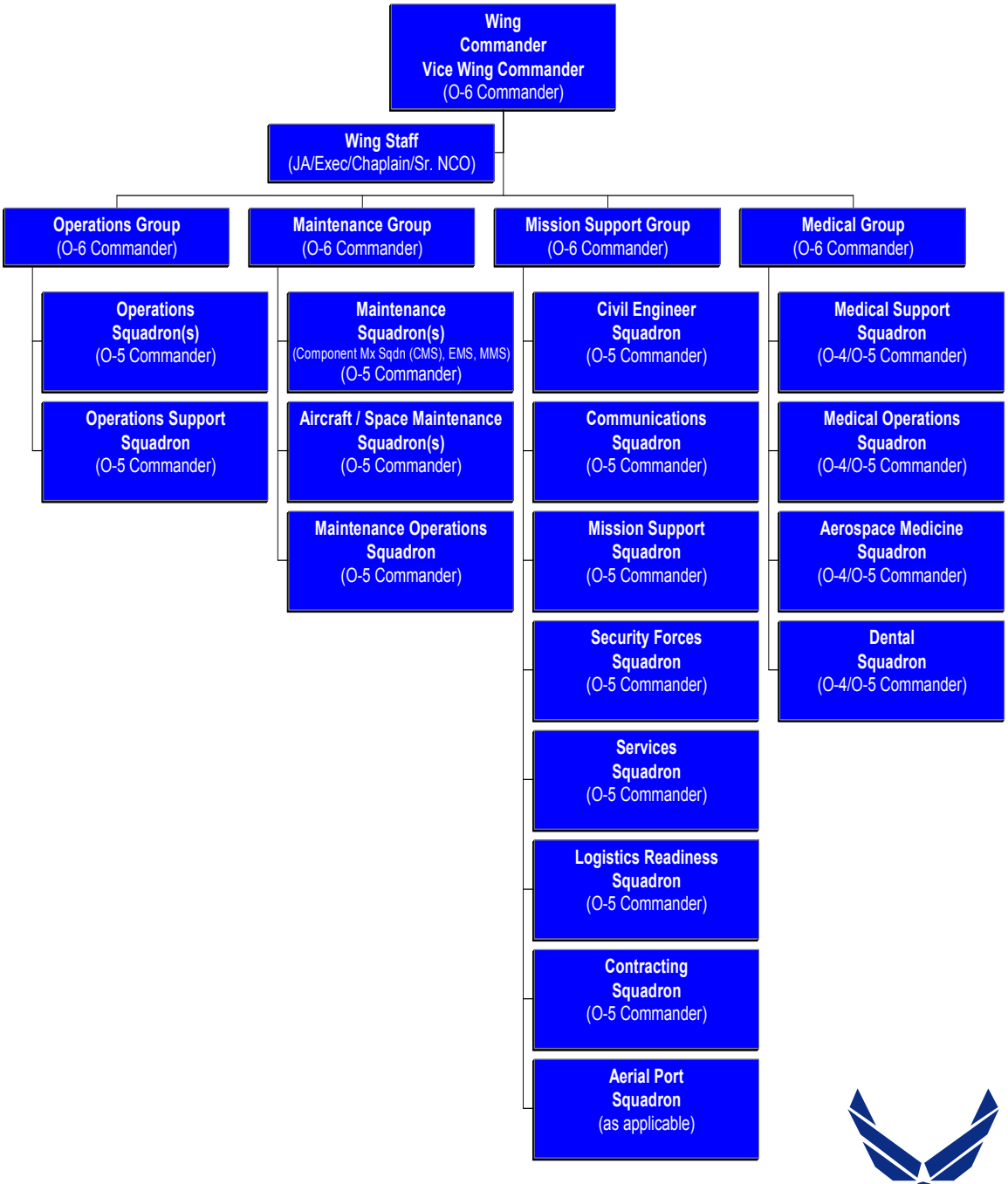
3. New forms of warfare such as information operations/information warfare are as challenging to the Air Force as to the other services, and pose significant and novel legal issues. The Air Force is now conducting counterdrug

operations alone and as components to unified commands. AF/JAO is the principal advisor to the Air Force counterdrug operations division and, as such, coordinates on all deployments of troops in support of law enforcement agencies or foreign governments. Special operations in low intensity conflict require considerable Air Force support. Legal advice in this area comes primarily from the judge advocates at the Air Force Special Operations Command (AFSOC/JA) at Hurlburt Field, Florida.

B. In addition to the operations law support given by Air Force judge advocates at AF/JAO and the unified commands, it is important to note the other echelons at which it is available. The Air Force is organized along major command (MAJCOM) lines. Under Headquarters, Air Force at the Pentagon, field MAJCOMs like Air Combat Command (ACC), Air Force Materiel Command (AFMC), Air Mobility Command (AMC), U.S. Air Forces in Europe (USAFE), and Pacific Air Forces (PACAF) provide operational support to the unified commands of which they are components. Below MAJCOMs are Numbered Air Forces (NAF) and, below NAFs, wings. The wing is the smallest self-contained unit capable of going into battle. Judge advocates sit on the command staffs at all three of these echelons and provide operations law advice. During DESERT STORM, JOINT ENDEAVOR, SOUTHERN WATCH, NORTHERN WATCH, ALLIED FORCE, ENDURING FREEDOM, NOBLE EAGLE, and IRAQI FREEDOM judge advocates deployed with their unit Commanders and provided that important advice.

C. Although the Air Force has a number of discrete, independent missions, its efforts are always in support of the unified combat effort of all land, sea, and air forces. From the Air Force perspective, the operations lawyer's primary responsibility is to insure that those efforts are conducted within the boundaries of international and domestic U.S. law.

AF Combat Wing Organization

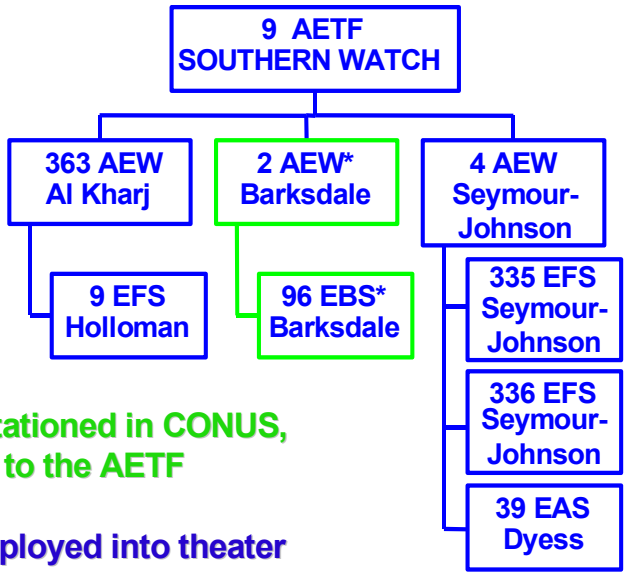


Implementation: 1Oct 02 to 30 Sep 03

U.S. AIR FORCE

AEROSPACE EXPEDITIONARY TASK FORCE (AETF) STRUCTURE

Actual Example of an AETF
(Deployed NAF)



*** Bombers stationed in CONUS, but attached to the AETF**

All others deployed into theater

Nomenclature:
CW(P) - Composite Wing (Provisional)
AEW - Aerospace Expeditionary Wing
EBS - Expeditionary Bomber Squadron
EFS - Expeditionary Fighter Squadron
EAS - Expeditionary Airlift Squadron

ON-CALL FORCE COMPOSITION

AEF (x2)

- 2 Air Superiority SQ
- 4-6 Multi-Role Fighter SQ
  - PGM
  - CAS
  - SEAD
- 2 Bomb SQ
  - CALCM
  - PGM
  - Maritime Ops
- 2 Theater Airlift SQ
- 2 Air Refueling SQ
- OSA, LD/HD & ECS

AEW

- 3 Air Superiority / Multi-Role Fighter SQ
  - PGM
  - CAS
  - SEAD
- 1 B-1 SQ (50% of the time)
- 1 F-117 SQ
- 1 B-2 SQ
- 1 Theater Airlift SQ
- 1 Air Refueling SQ
- Expeditionary Combat Support (ECS)

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 hasty Noncombatant Evacuation Operation (NEO), such as Operation EASTERN EXIT, the evacuation of U.S. and foreign nationals from Somalia in 1991, to sustained ground combat such as in Operation IRAQI FREEDOM. Because Marine forces deploy from and are sustained by sea-based platforms, they are often 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." A critical priority of the Marine Corps is to maintain its present force structure of approximately 175,000 active duty Marines and 40,000 Reserves.

B. Operating forces (as supplemented by the Reserves), considered the heart of the Marine Corps, constitute the forward presence, crisis response, and fighting power available to the unified combatant commanders. Major elements include the Marine Corps Forces Atlantic (MARFORLANT), Marine Corps Forces Pacific (MARFORPAC), Marine Corps Security Forces, and the Marine Security Guard Battalion with its detachments at embassies and consulates around the world. 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 Force Service Support Groups (FSSGs). The II Marine Expeditionary Force, or II MEF (MEFs are discussed below), is provided by the Commander, MARFORLANT, to the Commander, U.S. Joint Forces Command, and the I and III Marine Expeditionary Forces are provided by the Commander, MARFORPAC, to the Commander, U.S. Pacific Command. This assignment reflects the peacetime disposition of Marine Corps Forces (MARFORs). 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 FSSG, 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 FSSG is also tasked with providing legal services to the operational units. This is accomplished through the Legal Services Support Section (LSSS) within the FSSG. Traditionally, the LSSS is headed by an officer-in-charge usually of the rank of lieutenant colonel. The OIC is responsible for leading the Marines and managing the assets that will provide the legal services to the fleet. 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 FSSG is deployed, however, this function transfers to the LSSS. While the 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, FSSG) has a SJA and a small legal staff consisting of a DSJA and two or three clerks. The bulk of the legal assets remain in the LSSS.

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 type units are drawn from a Marine division, aircraft wing, and FSSG 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 Marine Expeditionary Force (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 FSSGs. With 60 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 located at bases in California and Arizona; II MEF is located at bases 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 30 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 15 amphibious ships, including 5 large-deck amphibious assault ships) for an extended period in order to provide an immediate combat response.

E. Forward deployed MEU(SOCs) embarked aboard amphibious shipping (typically 3 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 2,000 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(SOCs) train for operations to be **executed** within 6 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 15 days of accompanying supplies. It is composed of a reinforced infantry battalion, a composite squadron, and a MEU service support group.

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.

G. 4TH MARINE EXPEDITIONARY BRIGADE (ANTI-TERRORISM). In September 2001, the Marine Corps reactivated the 4th Marine Expeditionary Brigade (4th MEB(AT)) as an anti-terrorism organization within the Marine Corps operating forces. The 4th MEB(AT) provides unified combatant commanders with specialized anti-terrorism forces, and is organized around the Marine Corps Security Force (MCSF) Battalion; the Marine Security Guard (MSG) Battalion; the Chemical, Biological, and Incident Response Force (CBIRF); and the Anti-Terrorism Battalion. The MCSF Battalion provides armed anti-terrorism and physical security trained personnel to high-value naval installations or units, and is located at 14 different locations, ranging from Iceland to Cuba to Bahrain. The MCSF Battalion also maintains two Fleet Anti-Terrorism Security Team (FAST) companies for deployment as directed by Commander, U.S. Joint Forces Command. The CBIRF is trained to rapidly respond to chemical or biological threats. The MSG Battalion provides security services to selected Department of State Foreign Service posts. The Anti-Terrorism Battalion focuses on the training of specialized skills such as urban assault climbing, enhanced marksmanship, and advanced security techniques and weapons skills.

H. AIR CONTINGENCY FORCES. Both MARFORLANT and MARFORPAC maintain Air Contingency MAGTFs (ACMs) in a continuous state of readiness. ACMs are air-deployable forces available to the unified combatant commanders. ACM lead elements can deploy within 18 hours of notification. The size of the ACM can vary, with a task organization designed to meet the mission, threat, and airlift availability.

IV. MAGTF CAPABILITIES

A. The naval character of MAGTFs enhances their global mobility, lethality, and staying power. In other words, as the U.S. reduces the number of its permanently based overseas military forces, forward-deployed, self-sustainable, naval forces provide the ability for continued presence and power projection. MAGTF capabilities include:

1. Move forces into crisis areas without revealing their exact destinations or intentions;

2. Provide continuous presence from secure sea bases in international waters;

3. Provide immediate national response in support of humanitarian and natural disaster relief operations;

4. Provide credible but non-provocative combat power over the horizon of a potential adversary, for rapid employment as the initial response to a crisis;

5. Support diplomatic processes for peaceful crisis resolution before employing immediate response combat forces;

6. Project measured degrees of combat power ashore, at night and under adverse weather conditions if required;

7. Introduce additional forces sequentially into a theater of operations;

8. Operate independent of established airfields, basing agreements, and overflight rights;

9. Conduct combat operations ashore using inherent combat service support brought into the theater of operations;

10. Enable the introductions of follow-on MAGTF or joint and/or combined forces by securing staging areas ashore;

11. Operate in rural and urban environments and hostile nuclear, biological, and chemical situations;

12. Withdraw rapidly at the conclusion of operations or remain to help restore stability to the affected areas; and

13. Plan and commence execution of a mission within 6 to 48 hours of receiving a warning or execute order.

B. 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 contingency with the forces, lift, logistics, and enemy situation at hand. To this end, 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 16 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 (MPSRONs): 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 30 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 30 days.

V. ROLE OF THE MARINE OPERATIONAL LAWYER

A. The expeditionary nature of the Marine Corps mission sets the tone for the practice of operational law in the Marine Corps. Because expeditionary operations will necessarily involve ground, air, and sea forces, Marine operational lawyers must be familiar with the law of land warfare as well as the law of the sea, air, and space. While the Marine Corps is rarely involved in overseas stationing, the Marine JA must nevertheless be familiar with applicable SOFAs, the foreign claims process, and contingency contracting in order to properly support short-term deployments to foreign countries. Furthermore, the Marine Corps' ability to shape events short of war requires that the operational JA have a solid grasp of the standing rules of engagement as well as appreciation for the combat considerations that may require the modification of ROE to the specific mission.

B. The specific role of the Marine operational lawyer is largely determined by the extent to which the JA gains the confidence of the commander and his staff. Consequently, a Marine operational lawyer must not only be technically proficient, but must continue to acquire and hone those military skills that readily identify Marine JAs with the elite units they support. A Marine operational lawyer must be familiar with, and involved in, the operations planning and plan review process as well as functionally proficient in the more traditional tasks of legal assistance, claims, military justice, and fiscal law. Every MAGTF will have at least one JA deployed with the unit, and in the case of a MEF, will have a number of JAs assigned. These JAs are selected from the pool of assets available in the LSSS. The MAGTF JA for a MEU-size or smaller unit will serve as the legal advisor to the commander of the deployed unit. MEU JAs have traditionally performed a variety of additional non-legal duties, such as Detachment Executive Officer, Assistant Operations Officer, Landing Force Operations Center watch officer, Staff Secretary, MEU Adjutant, and custodian of classified documents and cryptographic equipment.

MAGTF STRUCTURE

COMMAND ELEMENT

- GROUND COMBAT ELEMENT
- AVIATION COMBAT ELEMENT
- COMBAT SERVICE SUPPORT ELEMENT

The CE provides a single headquarters for command, control, and coordination of ground, air, and combat service support elements.

The GCE may range in size from an infantry battalion to one or more divisions. It may include artillery, tanks, assault amphibious (AA) vehicles, light armored infantry (LAI), and combat engineer organizations.

The ACE may vary in size from a detachment of one or more aircraft to a reinforced helicopter squadron to one or more aircraft wings. It may include offensive air support, assault support, air reconnaissance, antiair warfare, electronic warfare, and command and control organizations.

The CSSE may range in size from a small Marine expeditionary unit (MEU) service support group (MSSG) to the largest force service support group (FSSG) which is tailored to provide for the total range of logistical support, to include supply, maintenance, general engineering, health services, landing support, transportation, and other service support functions.

MARINE EXPEDITIONARY FORCE

COMMAND ELEMENT
Approx. 3,900 personnel
Headquarters Bn
Communications Bn
Radio Bn

GROUND COMBAT ELEMENT
Marine Division
Approx. 17,900 personnel
Headquarters Bn
3 Infantry Regts
Artillery Regt
Tank Bn
Assault Amphibious Bn
Light Armored Vehicle Recon Bn
Combat Engineer Bn

AVIATION COMBAT ELEMENT
Marine Aircraft Wing
Approx. 14,800 personnel
Headquarters Sqdn
2 Marine Aircraft Groups (F/W)
2 Marine Aircraft Groups (R/W)
Marine Wing Support Group

COMBAT SERVICE SUPPORT ELEMENT
Force Service Support Group
Approx. 9,500 personnel
Headquarters Bn
Medical Bn
Maintenance Bn
Dental Bn
Motor Transport Bn
Supply Bn
Landing Support Bn
Engineer Support Bn

Principal Equipment

58	M1A1 Tank
233	AAV
130	LAV
72	155mm Howitzer
151	81/60mm Mortar
108	Dragon AT Missile
186	TOW AT Missile

Aircraft

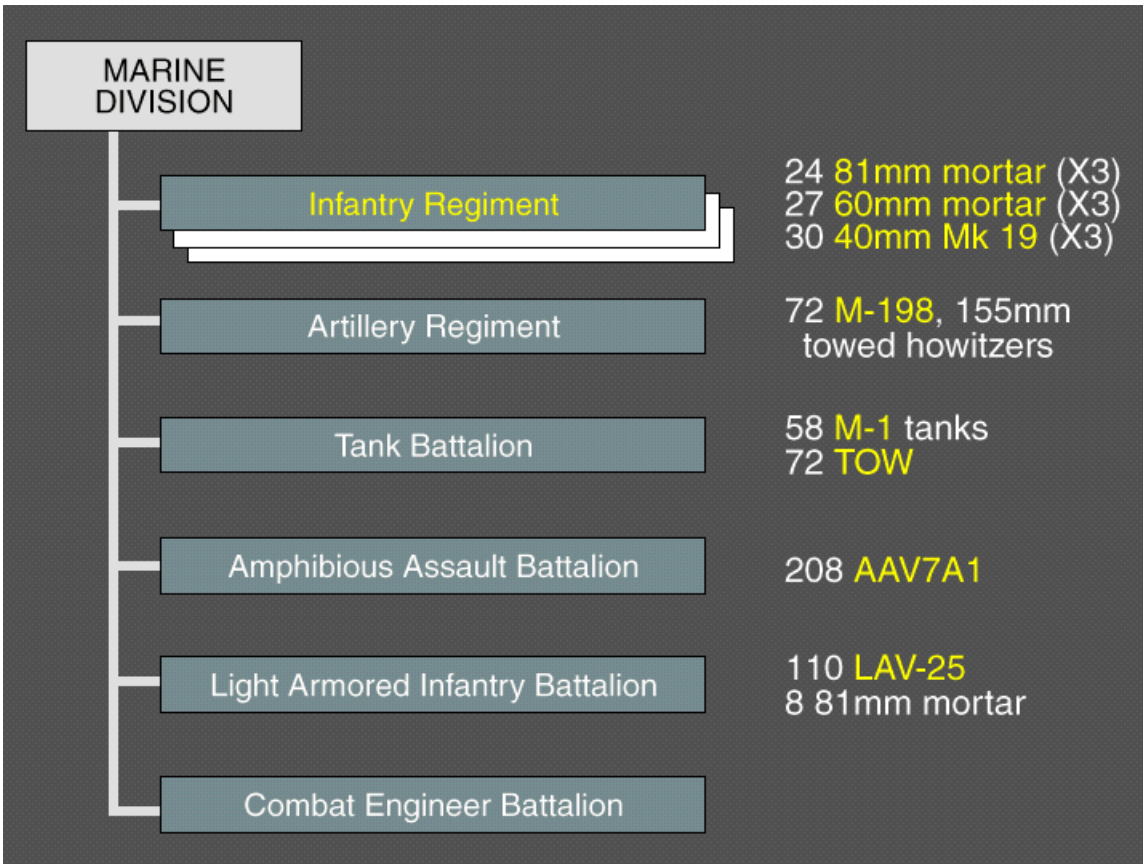
Fixed Wing		Rotary Wing	
12	KC-130	72	CH-46E
48	F/A-18C	24	CH-53D
36	F/A-18D	32	CH-53E
60	AV-8B	36	AH-1W
10	EA-6B	18	UH-1N

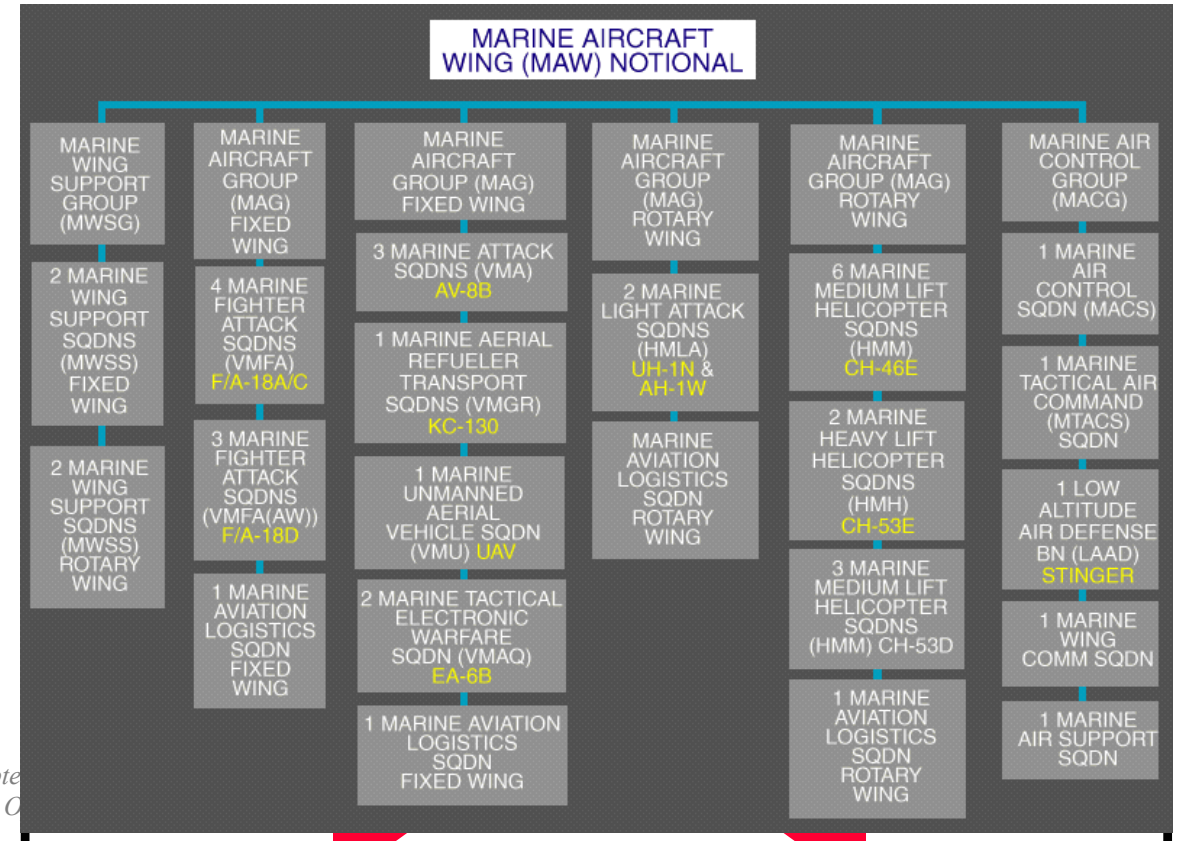
Air Defense

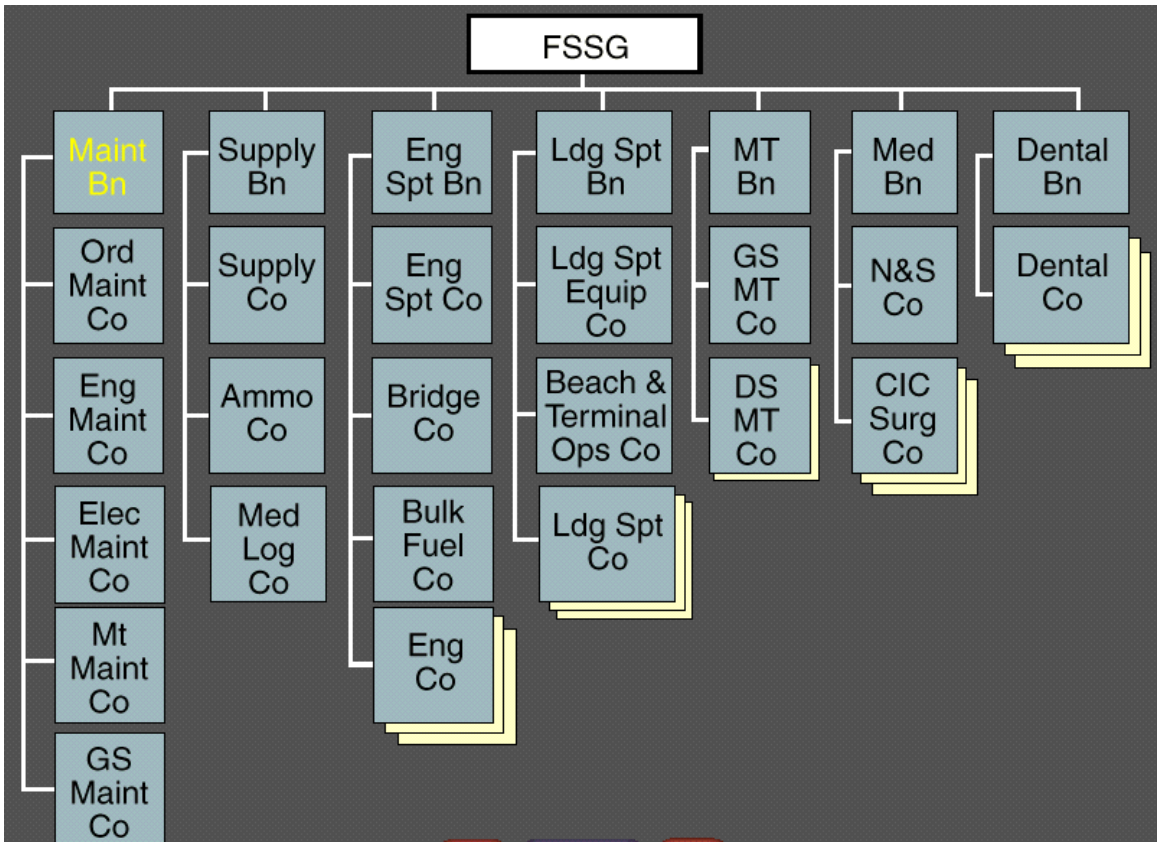
12	Hawk Missile Launchers
60	Avengers
30	Stingers

Principal Equipment

20	M970 Refueler
41	M998 Truck
158	M923 Truck
6	MGB
3	Ribbon Bridge
6	Scraper
28	D7G Bulldozer
41	ROWPU


MARINE DIVISION
Infantry Regiment
24 81mm mortar (X3)
27 60mm mortar (X3)
30 40mm Mk 19 (X3)
Artillery Regiment
72 M-198, 155mm towed howitzers
Tank Battalion
58 M-1 tanks
72 TOW
Amphibious Assault Battalion
208 AAV7A1
Light Armored Infantry Battalion
110 LAV-25
8 81mm mortar
Combat Engineer Battalion


MARINE AIRCRAFT WING (MAW) NOTIONAL
MARINE WING SUPPORT GROUP (MWSG)
2 MARINE WING SUPPORT SQDNS (MWSS) FIXED WING
2 MARINE WING SUPPORT SQDNS (MWSS) ROTARY WING
MARINE AIRCRAFT GROUP (MAG) FIXED WING
4 MARINE FIGHTER ATTACK SQDNS (VMFA) F/A-18A/C
3 MARINE FIGHTER ATTACK SQDNS (VMFA(AW)) F/A-18D
1 MARINE AVIATION LOGISTICS SQDN FIXED WING
MARINE AIRCRAFT GROUP (MAG) FIXED WING
3 MARINE ATTACK SQDNS (VMA) AV-8B
1 MARINE AERIAL REFUELER TRANSPORT SQDNS (VMGR) KC-130
1 MARINE UNMANNED AERIAL VEHICLE SQDN (VMU) UAV
2 MARINE TACTICAL ELECTRONIC WARFARE SQDN (VMAQ) EA-6B
1 MARINE AVIATION LOGISTICS SQDN FIXED WING
MARINE AIRCRAFT GROUP (MAG) ROTARY WING
2 MARINE LIGHT ATTACK SQDNS (HMLA) UH-1N & AH-1W
MARINE AVIATION LOGISTICS SQDN ROTARY WING
MARINE AIRCRAFT GROUP (MAG) ROTARY WING
6 MARINE MEDIUM LIFT HELICOPTER SQDNS (HMM) CH-46E
2 MARINE HEAVY LIFT HELICOPTER SQDNS (HMH) CH-53E
3 MARINE MEDIUM LIFT HELICOPTER SQDNS (HMM) CH-53D
1 MARINE AVIATION LOGISTICS SQDN ROTARY WING
MARINE AIR CONTROL GROUP (MACG)
1 MARINE AIR CONTROL SQDN (MACS)
1 MARINE TACTICAL AIR COMMAND (MTACS) SQDN
1 LOW ALTITUDE AIR DEFENSE BN (LAAD) STINGER
1 MARINE WING COMM SQDN
1 MARINE AIR SUPPORT SQDN


FSSG
Maint Bn
Ord Maint Co
Eng Maint Co
Elec Maint Co
Mt Maint Co
GS Maint Co
Supply Bn
Supply Co
Ammo Co
Med Log Co
Eng Spt Bn
Eng Spt Co
Bridge Co
Bulk Fuel Co
Eng Co
Ldg Spt Bn
Ldg Spt Equip Co
Beach & Terminal Ops Co
Ldg Spt Co
MT Bn
GS MT Co
DS MT Co
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CIC Surg Co
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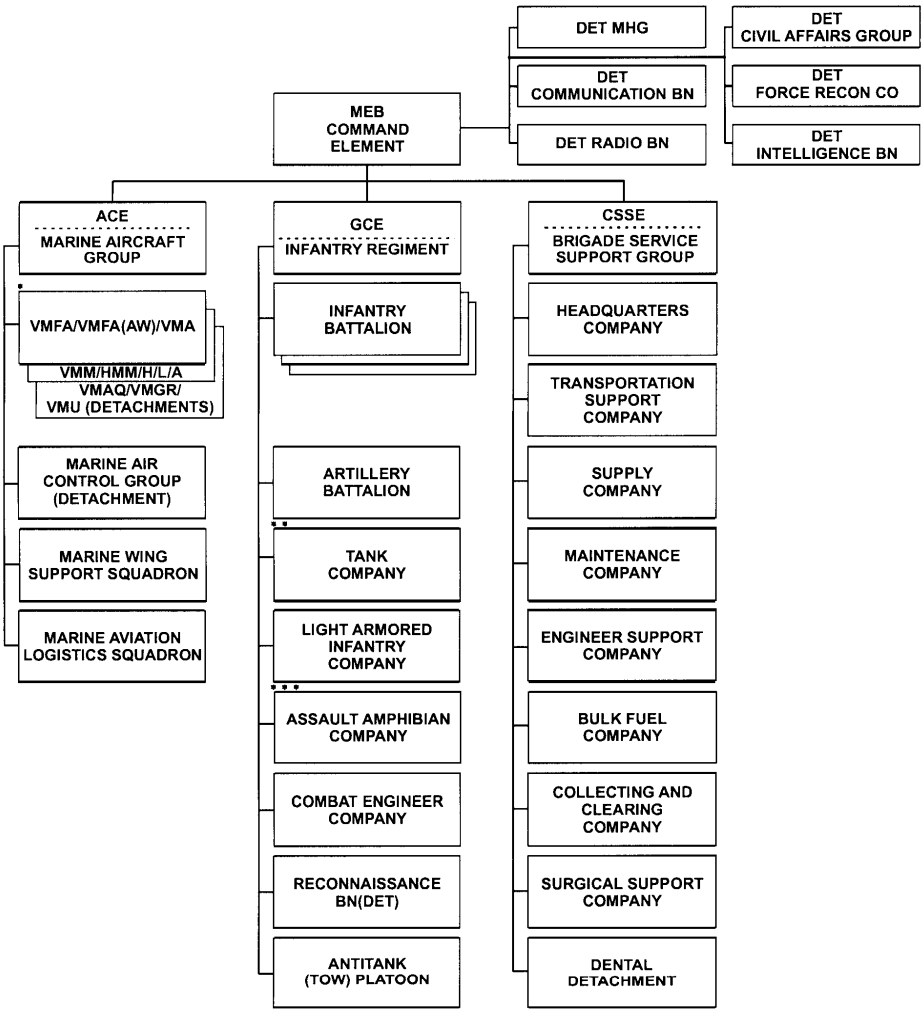


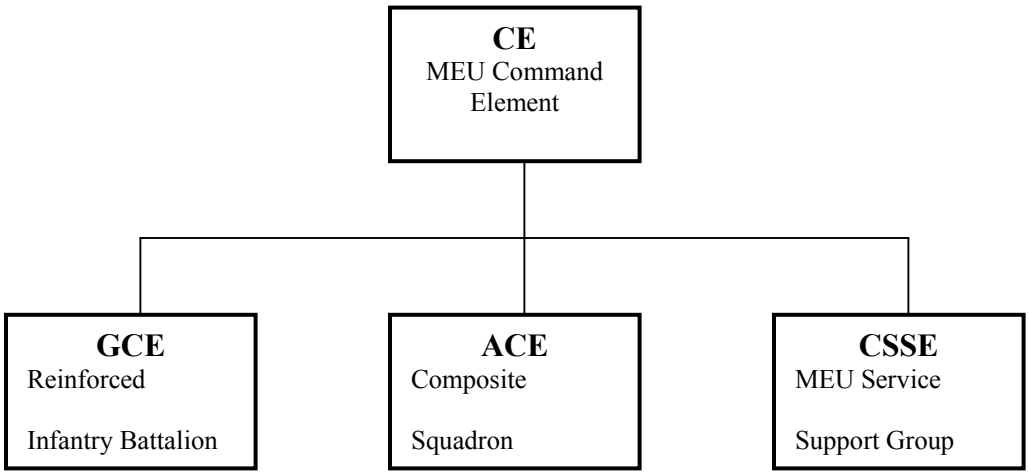
Legend

* VMFA: Marine Fixed-Wing Fighter/Attack Squadron
VMA: Marine Fixed-Wing Attack Squadron
VMFA/(AW): Marine Fixed-Wing Fighter Attack Squadron/(All-Weather)
VMAQ/VMGR/VMU (DETACHMENTS): Marine Fixed-Wing Tactical Electronic Warfare/ Aerial Refueling Transport
VMM: Marine Medium Tilt-Rotor Squadron
HMM/H/L/A: Marine Helicopter Medium/Heavy/Light/Attack Squadron

** In MPF MEB, Tank Battalion vice Tank Company

*** In MPF MEB, Assault Amphibian Battalion(-) vice Assault Amphibian Company

Marine Expeditionary Unit



16 Light Armored Vehicles (LAV)
8 81mm Mortars
8 TOWs
8 Javelins
15 AAVs
6 155mm Howitzers
4 M-1A1 Main Battle Tanks

12 CH-46E Medium Lift Helicopters
4 CH-53E Heavy Lift Helicopters
3 UH-1N Utility Helicopters
4 AH-1W Attack Helicopter
6 AV-8B Harrier Jets
2 KC-130 Refueler/transport Aircraft (On call in CONUS)

2 Reverse Osmosis Water Purification Units
1 LMT 3000 Water Purification Unit
1 Sea Tractor
4 TRAMs (10,000 lb. Capacity Forklifts)
2 Four Thousand lb. Capacity Forklifts
3 D-7 Bulldozers
30 Five-ton Trucks
1 Dump Truck
4 Logistical Vehicle Systems (LVS)
7 Five-hundred gallon Water Containers
63 HMMWVs

NAVY

A. The 1997 National Military Strategy is based upon an integrated, strategic approach embodied by the terms *Shape, Respond,* and *Prepare Now*.[436] It builds upon the premise that the U.S. will remain globally engaged to *Shape* the international environment, creating conditions favorable to U.S. interests and security; it emphasizes that our forces must be able to *Respond* to the full spectrum of crises, and that we must, as a nation, take steps to *Prepare Now* for an uncertain future. The U.S. Navy plays a key role in accomplishing these goals, providing the strategic tools for overseas presence and power projection.[437]

B. In September 1992 the Navy and Marine Corps published their strategy white paper entitled ".. From the Sea, Preparing the Naval Service for the 21st Century." Closely followed in 1994 by "Forward…from the Sea," these documents represented the Sea Services' analysis of post Cold War strategy. Instead of focusing attention on open ocean warfighting against the Soviet Union, the new strategies emphasized regional conflicts in the littoral ("near land") regions of the world. "From the Sea" defined the littoral region as consisting of a seaward and landward segments.[438] To accomplish the overall mission, naval forces emphasized the traditional expeditionary roles of naval forces, an eagerness to conduct joint operations, the need to operate forward, and the need to tailor forces for National Needs.[439] The strategies recognized that future operations would have a significant joint/combined flavor, on the excellent model of Operation UPHOLD DEMOCRACY (Haiti).[440] Once completed, the evolution outlined in these publications led to a strategy in which naval forces were fully integrated with both joint and coalition partners, able to project and direct decisive combat power around the globe against regional and transnational threats.[441]

C. The fundamental building blocks of naval power were (and currently remain) the Marine Air Ground Task Force (MAGTF), discussed above, and the aircraft carrier battle group (CVBG). The CVBG generally consists of the aircraft carrier (CV/CVN) and its embarked airwing of approximately 80 fixed and rotary-winged aircraft (F-14, F/A-18, S-3, EA-6B, E-2, SH-3); two cruisers, two or three destroyers; two frigates; one or two replenishment/repair ships; and two submarines. The Battle Group (BG) is normally commanded by a rear admiral (one or two stars), who has a lieutenant commander (O-4) as his staff judge advocate (SJA). The SJA is essentially a solo practitioner who is assigned to the admiral's staff.[442]

D. This littoral environment provides operational judge advocates with significant and unique legal challenges. Two examples illustrate this point. First, drafting 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 requires extensive familiarity with freedom of navigation and overflight issues treated in the United Nations Convention of the Law of the Sea (UNCLOS III).[443]

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[436] Chairman, Joint Chiefs of Staff, National Military Strategy of the United States of America (1997).

[437] *Id*.

[438] Seaward is defined as "the area from the open ocean to the shore which must be controlled to support operations ashore;" Landward is defined as "the area inland from the shore that can be supported and defended directly from the sea." SECRETARY OF THE NAVY, .. FROM THE SEA, PREPARING THE NAVY FOR THE 21ST CENTURY 6 (1992).

[439] *Id.* at 7. *See also,* NAVAL DOCTRINE PUBLICATION 1, 28 March 1994.

[440] Aircraft carriers America (CV 66) and Eisenhower (CVN 69) embarked approximately 2,000 soldiers from the 10th Mountain Division and 2,000 from the 82d Airborne Division, plus their associated helicopters. The JTF Staff Judge Advocate, COL Altenburg, XVIII Airborne Corps SJA, was embarked on USS Mount Whitney (LCC 20). *Clinton Offers Haitian Junta Chance to Go Without Fight,* N.Y. TIMES, Sept. 15, 1994, at A1.

[441] Admiral Vern Clark, *Sea Power 21: Projecting Decisive Joint Capabilities,* PROCEEDINGS OF THE UNITED STATES NAVAL INSTITUTE (OCTOBER 2002), *at* http://www.chinfo.navy.mil/navpalib/cno/proceedings.html.

[442] The battle 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 (2d, 3d, 5th, 6th, or 7th), who will have a more senior staff judge advocate (O-5), but the battle group commander will rely almost exclusively on his own SJA. He or she 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 has two judge advocates as part of the "ship's company." Those judge advocates work for the commanding officer of the carrier (an O-6), and will be primarily concerned with discipline on board the carrier. However, the battle group SJA and the carrier SJA often cooperate on military justice and claims issues.

[443] 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).

E. The fundamental reference for those operating in the littoral environment is the annotated version of NWP 1-14M (previously NWP 9(A)), The Commander's Handbook on the Law of Naval Operations. The basic document contains no reference to sources of authority for statements of relevant law in order to simplify the reading for that publication's intended audience—the operational commander and his non-lawyer staff. The annotated version of the NWP, however, is particularly helpful to Judge Advocates. Prepared by the Oceans Law and Policy Department, Center for Naval Warfare Studies at the Naval War College (Newport, Rhode Island), the annotated NWP 1-14M provides the text of the Commander's Handbook verbatim—with accompanying citation to authorities, as well as supplementary annexes, figures and tables. The annotated NWP 1-14M is designed to support academic and research programs and is thus the rough equivalent of the Army's FM 27-10.

F. The concurrent alignment of global terrorism and political instability have necessitated a shift in the way the Navy organizes, deploys and operates its forces. In *Sea Power 21: Projecting Decisive Joint Capabilities*, the Chief of Naval Operations outlines his vision for navigating the challenging seas ahead. The new doctrine highlights a flexible force structure that evolves from MAGTFs and CVBGs to Carrier Strike Groups (CSGs), Expeditionary Strike Groups (ESGs), and Missile-defense Surface Action Groups.[444] Ultimately this realignment will increase the Navy's flexibility and enable the Navy to project decisive offensive and defensive combat power across a unified battlespace. With 12 CSGs and 12 ESGs, the new doctrine will produce a dispersed, flexible and operationally agile force capable of meeting the nations needs well into this new Century.[445]

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.

[444] A CSG is expected to contain: 1 CV/CVN, 1 CVW, 3 surface combatants (one Aegis CG, 2 Aegis DDGs), 1 SSN and 1 multiple product CLF ship. An ESG is expected to contain: 1 LHA/LHD, 1 LPD, 1 LSD, 1 USMC aviation combat element, 1 MEU, 4 surface combatants (1 Aegis CG, 2 Aegis DDGs, 1 FFG), 1 SSN.

[445] Clark, *supra* note 6.

COAST GUARD

REFERENCES

1. Title 14, U.S. Code (14 USC 1, 2, 3, 4, 89, 141 and 143, in particular)
116. Commander's Handbook on the Law of Naval Operations, COMDTPUB 5800.7, (NWP 1-14M and Annotated Supplement)
117. Maritime Law Enforcement Manual (MLEM), COMDTINST M16247.1A (FOUO)
118. Maritime Counter Drug and Alien Migrant Interdiction Operations, COMDTINST M16247.4 (NWP 3-07.4)(FOUO)
119. Marine Safety Manual, COMDTINST M16000 (series)
120. Criminal Enforcement of Environmental Laws, COMDTINST M16201.1
121. Coast Guard 2020
122. Commandant's Direction 1998-2002
123. USCG Website - http://www.uscg.mil
124. OPS Law Fast Action Binder – http://cgweb.comdt.uscg.mil/G-OPL/G-OPL.htm
125. Coast Guard Roles and Missions Study – http://www.uscg.mil/news/R&M.html
126. Standing Rules of Engagement for U.S. Forces, CJCSI 3121.01A, dated 15 Jan 2000, CG Application – ALCOAST 214/00, COMDTNOTE 16242
127. Military Justice Manual, COMDTINST M5810.1D

I. OVERVIEW

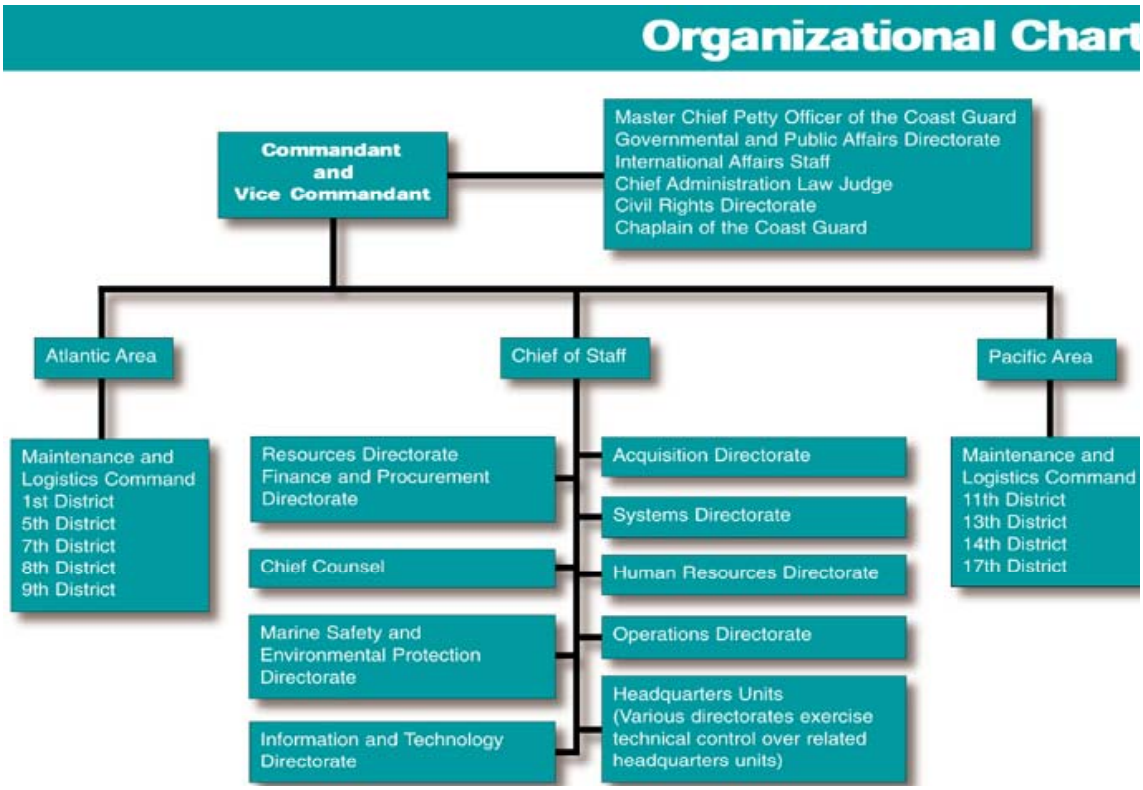
This chapter provides an overview of the unique operational law issues faced by the Coast Guard, with a focus upon the Coast Guard's interaction with the DoD services. As an armed service, the Coast Guard shares many similar roles with the DoD services with regard to OPLAW and national security. However, as part of the Department of Transportation, and the primary maritime law enforcement agency, the Coast Guard's missions are unique, and some operational law issues are significantly different. Coast Guard OPLAW issues are often related to law enforcement jurisdiction and are often resolved through the interagency process. (See Presidential Directive 27, *Procedures Dealing with Non-Military Incidents*, 17 Jan 78).

II. MISSION

"The United States Coast Guard is a multimissioned maritime service and one of the Nation's five armed forces. 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." (reference 7).

III. ORGANIZATION

The Coast Guard operates under the Department of Transportation, except in time of war or when directed by the President to report to the Secretary of the Navy. Coast Guard Headquarters is responsible for policy development and overall Coast Guard operations and logistics. There are two area commands, Atlantic Area and Pacific Area, with intermediate command authority. The area commanders are also district commanders. The Areas each have a Maintenance and Logistics Command for support functions and several districts for operational command of units. The districts have operational control over most Coast Guard operational units, including cutters, groups, air stations and marine safety offices/captain of the port offices. Smaller units, however, such as patrol boats and stations, are normally under the operational control of groups. There are command centers at Headquarters, the Areas and the Districts to control operations within their areas of responsibility.


Organizational Chart
Commandant and Vice Commandant
Master Chief Petty Officer of the Coast Guard
Governmental and Public Affairs Directorate
International Affairs Staff
Chief Administration Law Judge
Civil Rights Directorate
Chaplain of the Coast Guard
Atlantic Area
Chief of Staff
Pacific Area
Maintenance and Logistics Command
1st District
5th District
7th District
8th District
9th District
Resources Directorate
Finance and Procurement Directorate
Chief Counsel
Marine Safety and Environmental Protection Directorate
Information and Technology Directorate
Acquisition Directorate
Systems Directorate
Human Resources Directorate
Operations Directorate
Headquarters Units
(Various directorates exercise technical control over related headquarters units)
Maintenance and Logistics Command
11th District
13th District
14th District
17th District

Commander, Atlantic Area and Fifth District – Portsmouth, VA

Commander, Maintenance and Logistics Command Atlantic – Norfolk, VA

Commander, First District – Boston MA

Commander, Seventh District – Miami, FL

Commander, Eighth District – New Orleans, LA

Commander, Ninth District – Cleveland, OH

Commander, Pacific Area and Eleventh District – Alameda, CA

Commander, Maintenance and Logistics Command Pacific – Alameda, CA

Commander, Thirteenth District – Seattle, WA

Commander, Fourteenth District – Honolulu, HI

Commander, Seventeenth District – Juneau, AK

IV. MISSION OVERVIEW

A. The Coast Guard occupies a unique position as an armed service that serves as the nation's primary maritime law enforcement agency, but is probably best known for its humanitarian service to the public. The Coast Guard's history reveals a gradual accumulation of additional responsibilities resulting primarily from its status as the nation's primary maritime law enforcement agency. The Coast Guard enforces all federal laws and regulations pertaining to maritime matters.

B. While the more familiar non-defense missions dominate the public perception of the Coast Guard, it remains a military service. Indeed, it is an important and unique asset in America's multifaceted security strategies at home and abroad. Its fundamental roles are to protect the public, the environment, and U.S. economic and security interests in America's inland waterways, ports and harbors; along some 95,000 miles of U .S. coastline; in the U.S. territorial seas and our nearly 3.4 million square miles of exclusive economic zones; on international waters and in other maritime regions of importance to the United States. The nation's maritime borders reflect maritime jurisdiction and sovereignty concerns which continue to expand, as evidenced by the recent declaration that extended the U.S. contiguous zone from 12 to 24 nautical miles (reference 11).

V. LAW ENFORCEMENT

A. The specific statutory authority for the Coast Guard Law Enforcement mission is 14 U.S.C. § 2: "The Coast Guard shall enforce or assist in the enforcement of all applicable laws on, under and over the high seas and waters subject to the jurisdiction of the United States." In addition, 14 U.S.C. § 89 provides the authority for U.S. Coast Guard active duty commissioned, warrant and petty officers to enforce applicable U.S. law on waters subject to U.S. jurisdiction, as well as on all vessels subject to U.S. jurisdiction (including U.S., foreign and stateless vessels). 14 U.S.C. § 141 authorizes the Coast Guard to assist other agencies and to receive assistance from other agencies.

B. The Coast Guard, unlike the DoD services, is not constrained by the Posse Comitatus Act (see 18 U.S.C. §1385), which makes it a crime to willfully use the Army or Air Force as a posse comitatus or otherwise to execute the laws. The Act was made applicable to the Navy and Marine Corps by policy (SECNAVINST 5820.7 of 15 May 1974). Notwithstanding these provisions, the DoD services are authorized to assist, and do significantly assist, Coast Guard law enforcement with intelligence information and equipment, as authorized by 10 U.S.C. §371, et seq. Coast Guard Law Enforcement Detachments (LEDETS) are routinely deployed on U.S. Navy ships and have been very successful in interdicting illegal narcotics.

VI. DRUG INTERDICTION:

The Coast Guard 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 United States. The Coast Guard's mission is to reduce the supply of drugs 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 Coast Guard coordinates closely with other federal agencies and countries within the region to disrupt and deter the flow of illegal drugs. The U.S. has negotiated a number of bilateral agreements with Caribbean and South American Nations to assist in law enforcement.

VII. MIGRANT INTERDICTION

The Federal Government has implemented policies to streamline the interdiction of illegal migrants at sea. In 1992, President Clinton signed Executive Order 12807, which eliminated the requirement that migrants be screened at sea for refugee status. Presidential Directive 9, signed in 1993, provides policy guidance to federal agencies stating that the U.S. Government "will take the necessary measures to preempt, interdict and deter alien smuggling into the U.S." It now specifically tasks the Coast Guard with interdicting illegal migrants as far as possible from U.S. shores. The nature of the migrant interdiction mission has been changing to respond to increasingly sophisticated smuggling operations.

VIII. FISHERIES

Protecting the U.S. Exclusive Economic Zone and key areas of the high seas is an important mission for the Coast Guard. The Coast Guard enforces fisheries laws at sea, primarily the Magnuson-Stevens Fisheries Conservation and Management Act (MFCMA). Coast Guard fisheries priorities, in order of importance, are:

1. *Protecting the U.S. Exclusive Economic Zone from foreign encroachment*: The MFCMA of 1976 extended U.S. fisheries management authority out to the full 200 nautical miles authorized by international law. The U.S. EEZ is the largest in the world, containing 3.3 million square miles of ocean and 90,000 miles of coastline.

2. *Enforcing domestic fisheries law*: U.S. domestic fisheries support a 24 billion dollar industry. Fisheries Management Plans (FMPs), to ensure the sustainability of these fisheries, are developed by regional Fisheries Management Councils. The Coast Guard is responsible for enforcing these FMPs at sea, in conjunction with National Marine Fisheries Service. In addition to FMP enforcement, the Coast Guard enforces laws to protect marine mammals and endangered species.

3. *International fisheries agreements*: The Coast Guard works closely with the Department of State to develop and enforce international fisheries agreements. Most notably, the Coast Guard enforces the United Nations High Seas Driftnet Moratorium in the North Pacific, where illegal driftnetters may catch salmon of U.S. origin.

IX. ENVIRONMENTAL CRIMES

The Coast Guard role in protecting the marine environment manifests itself most clearly on the issue of oil pollution. Arguably, the grounding of the Exxon Valdez on March 23, 1989 was the catalyst for the public's demand for greater protection of our marine environment. In response to this largest oil spill in U.S. history, Congress passed the Oil Pollution Act of 1990 ("OPA 90"). OPA 90 tasked the Coast Guard with writing new federal regulations aimed at substantially reducing the likelihood of oil spills. These regulations placed new demands on the Coast Guard and solidified the role of the Coast Guard as the federal agency with primary responsibility for preventing and responding to maritime oil spills. Increasingly, the Coast Guard is involved in the prosecution of environmental crimes. Critical acts for environmental enforcement include OPA 90, Clean Water Act (CWA), Act to Prevent Pollution From Ships (APPS), Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), Ocean Dumping Act, and Refuse Act. Criminal prosecutions have also been based upon False Representations of an Official Matter (18 U.S.C. 1001)(see reference 6).

X. NATIONAL SECURITY

The Coast Guard is one of the armed forces of the United States. It has fought in all of our nation's wars. It continues to operate with the Navy in all theaters. Coast Guard vessels participate in Freedom of Navigation (FON) exercises and other military exercises. Coast Guard Area Commanders are Commanders of Maritime Defense Zones. The Coast Guard can also issue regulations to create safety zones and security zones to facilitate force protection.

XI. USE OF FORCE POLICY/RULES OF ENGAGEMENT

The Coast Guard follows the Standing Rules of Engagement (SROE) for all Coast Guard Operations with regard to unit self defense, notwithstanding the DoD limitation of extraterritorial application (reference 12). However, most use of force issues arise in the mission accomplishment context of law enforcement and are governed by the Coast Guard Use of Force Policy contained in Chapter 4 of the Maritime Law Enforcement Manual (reference 3). Navy units operating under Coast Guard OPCON or TACON will follow the Coast Guard Use of Force Policy for employing warning shots or disabling fire, and the SROE for all other purposes. This law enforcement focus on the force necessary for compliance, as well as defense of self and others, distinguishes Coast Guard use of force from more traditional military use of force issues. However, peacekeeping and domestic operations for the DoD services address many of the same use of force issues.

XII. MARINE SAFETY

The Coast Guard Marine Safety Program is multifaceted. It includes Marine Inspections, Marine Investigations, Licensing, Captain of the Port, Environmental Response, and Special Interest Vessel Programs, as well as promulgating local regulations. The Port State Control Program responds to the potential threats of 7,500 foreign ships calling at U.S. ports each year, ensuring that the ships meet international 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 Coast Guard Captain of the Port (COTP) is responsible for vessel boardings, ensuring the safety of vessels and protecting the navigable waterways throughout his or her geographic zone. There are 45 COTPs zones outlined in Title 33, Code of Federal Regulations (33 CFR Part 3). The major interface with the DoD services is in the Captain of the Port Area, both in regulating vessel movement and in

establishing safety zones and security zones. Marine Safety Offices/COTPs will also be the primary units responding to environmental issues such as oil spills.

XIII. SEARCH AND RESCUE

Search and Rescue (SAR) is a cornerstone mission of the Coast Guard. The Coast Guard saves thousands of lives and millions of dollars of property each year. However, SAR is also a mission governed by risk management and with significant danger for the Coast Guard units responding. It is controlled by the National SAR Plan which divides the U.S. area of SAR responsibility. The Coast Guard is the Maritime SAR Coordinator. Also, while the Coast Guard has limited duty to respond in search and rescue cases, it may incur substantial liability if it responds and does not respond adequately. False SAR cases are also vigorously prosecuted, due to the commitment of Coast Guard resources, under 14 U.S.C. §88(c).

XIV. MILITARY JUSTICE

The Coast Guard is an armed force subject to the UCMJ. The Coast Guard utilizes the Manual for Courts-Martial in the same manner as the DoD services. Virtually the same nonjudicial punishment provisions apply under Article 15, UCMJ. Coast Guard specific procedures and forms are located in the Coast Guard Military Justice Manual (reference 13).

XV. CG/DOD LEGAL INTERFACE

Legal advice on issues of Coast Guard Operational Law is readily available. Most issues will fall under the responsibility of the Chief, Office of Maritime and International Law at Coast Guard Headquarters (G-LMI), phone (202) 267-1527. Also, each operational commander has a staff judge advocate. Finally, Coast Guard law specialists are assigned to joint commands with significant law enforcement mission focus, for example JIATF East.

NORTH ATLANTIC TREATY ORGANIZATION (NATO)

I. OVERVIEW

A. The North Atlantic Treaty Organization (NATO) has existed for just over 50 years, yet its organizational structure remains obscure to many judge advocates. This chapter discusses the NATO 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. The location of the signing of this treaty explains why it is often referred to as the "Washington Treaty." Today, NATO's Headquarters is located in Brussels, Belgium.

C. Article 9 of the North Atlantic Treaty develops the basic structure of NATO. First, a "Council" is established "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.

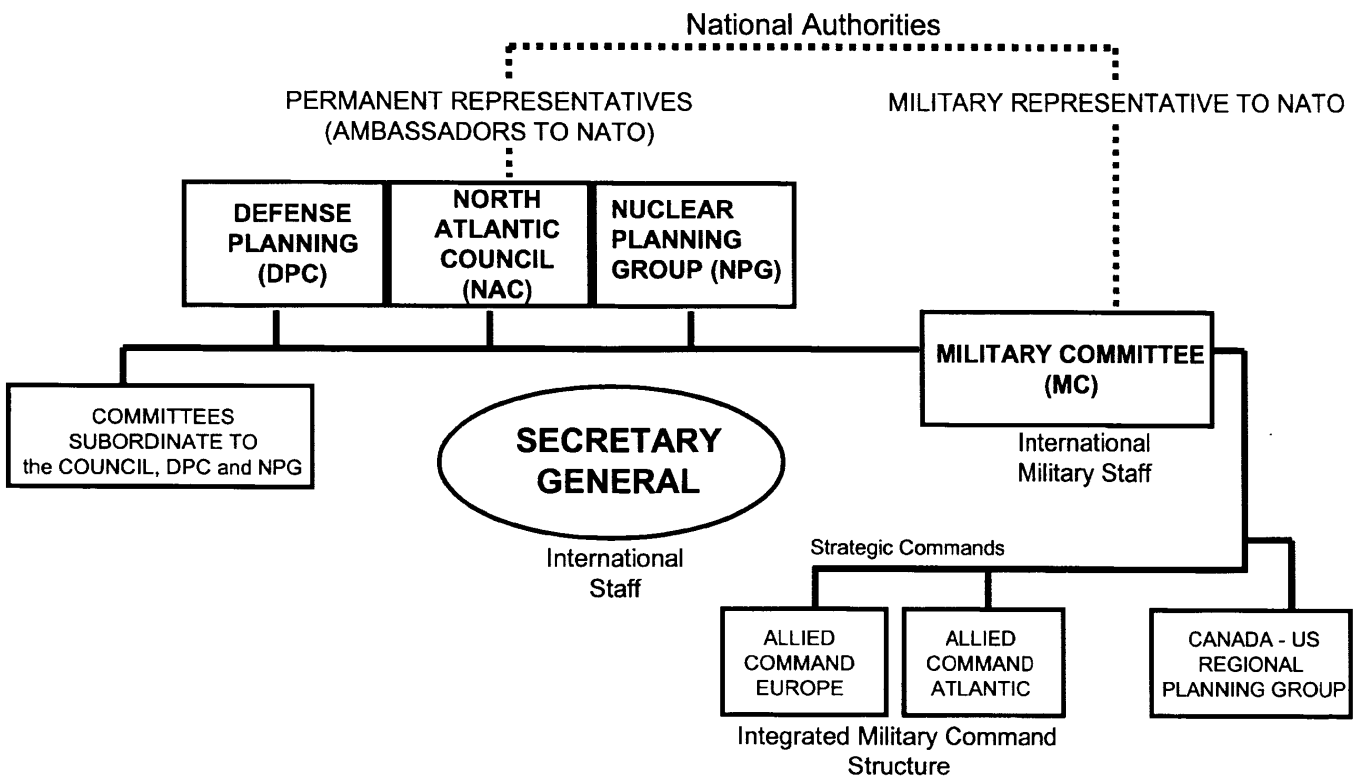
D. Article 9 also created "such subsidiary bodies as may be necessary," specifically requiring establishment of a defence committee. We know this committee as the "NATO Military Committee." **Error! Bookmark not defined.**This committee is composed of the Military Representatives (MilReps), usually three star officers, from the members participating in NATO's integrated military structure including, by special arrangement, France. The Military Committee (MC) is the senior military authority in NATO and is the primary source of military advice to the Secretary General and the NAC/ Defence Planning Committee. The Military Committee meets regularly, usually on Thursdays. The Defence Planning Committee (DPC), **Error! Bookmark not defined.**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 defence 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 17 militaries, some with several branches. The reader should note that 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" that warrant consideration, the International Staff, the International Military Staff, the Political Committee, and the two Strategic Commands. The International Staff (IS) provides direct support to the NAC/DPC and the civilian committees under them. The IS plays a facilitating role to attain consensus among the Allies by chairing meetings, preparing policy recommendations and drafting communiqués and reports. The International Military Staff (IMS) is the supporting staff for the Military Committee. It is composed of military officers from each NATO country. The Political Committee is a forum for regular political consultations that is chaired by the Assistant Secretary General for Political Affairs. Its members are the political counsellors of each NATO delegation. Besides keeping abreast of political trends and developments of interest to the members, the 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 (SCs) of NATO are SACEUR and SACLANT. The SACEUR is located at Supreme Headquarters Allied Powers Europe (SHAPE) in Mons, Belgium, located about 45 miles south of NATO Headquarters. SACLANT**Error! Bookmark not defined.** 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, keeping the Military Committee simultaneously informed. When preparing for and conducting operations, the SCs receive political guidance directly from the NAC/DPC. SACEUR and SACLANT are continuously represented at NATO Headquarters by a representative from their respective staffs to facilitate the timely two-way flow of information.

NATO'S Civil and Military Structure



H. Article 5 is the soul 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 the collective 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 recognised 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].

I. This article, as well as Article 51 of the United Nations Charter, requires notification to the United Nations Security Council of "[m]easures taken" in self-defence. 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 "non-Article 5" operations. Often these "non-Article 5 operations" are referred to as Peace Support Operations, or PSOs. 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 four times and now numbers 19 members. A fifth expansion is ongoing and pending final ratification by current members. These seven potential new members include: Bulgaria, Estonia, Latvia, Lithuania, Romania, Slovakia and Slovenia. 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 to ascertain the progress toward membership. The MAP is divided into five areas dealing with political and economic issues, military and defence 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 step 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, decided 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.

NATO Decision Process: Silence Procedure

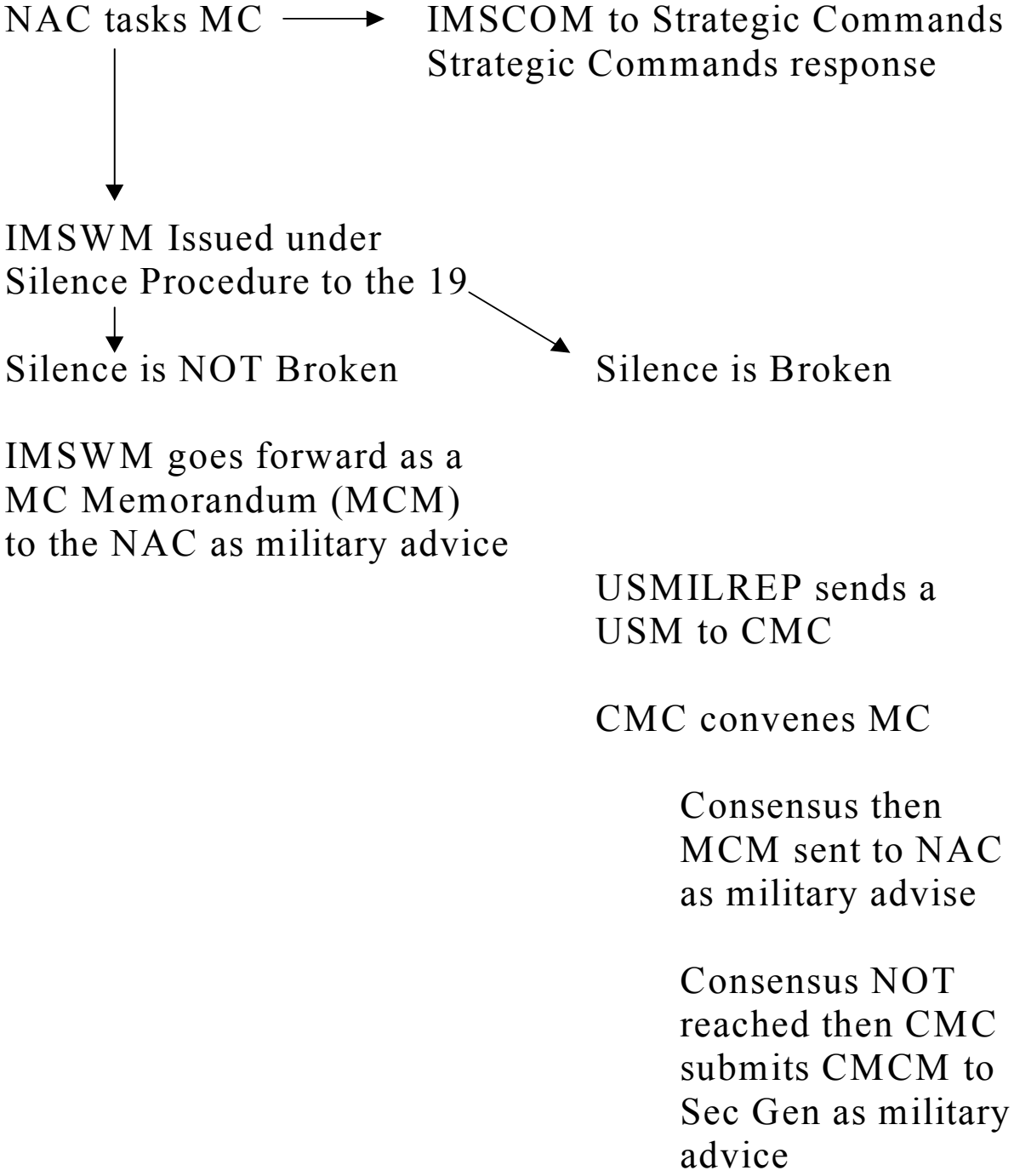


FIGURE 2: NATO DECISION-MAKING PROCESS

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. 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, pronounced Im Swim). 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. Sometimes a breaking nation will supply wording acceptable to it as it tries to achieve consensus. 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. 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. This procedure can be time consuming yet it can also work rather quickly.

II. THE U.S. DECISION-MAKING PROCESS

A. The United States MilRep has a staff of planners that coordinate and work the issues that are presented in the MC. Planners are experts in the topics found in their portfolios. The planners coordinate with the Joint Staff in Washington, who then coordinate the Inter-Agency Working Groups (IWGs) that formulate the U.S. position on the topic.

B. 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 issues within the cognizance of the European Union, coordination is established with the U.S. Mission to the EU (USEU) located in Brussels.

C. When the U.S. position is formulated and the guidance issued, the planners begin to work the issue with the IMS and the other member's 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

Error! Bookmark not defined.Error! Bookmark not defined. The NATO Rules of Engagement (ROE) provide "the sole authority to NATO/NATO-led forces to use force." Three exceptions to this general rule exist, specifically, "self-defence, during peacetime and operations prior to a declaration of counter aggression…." These 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."

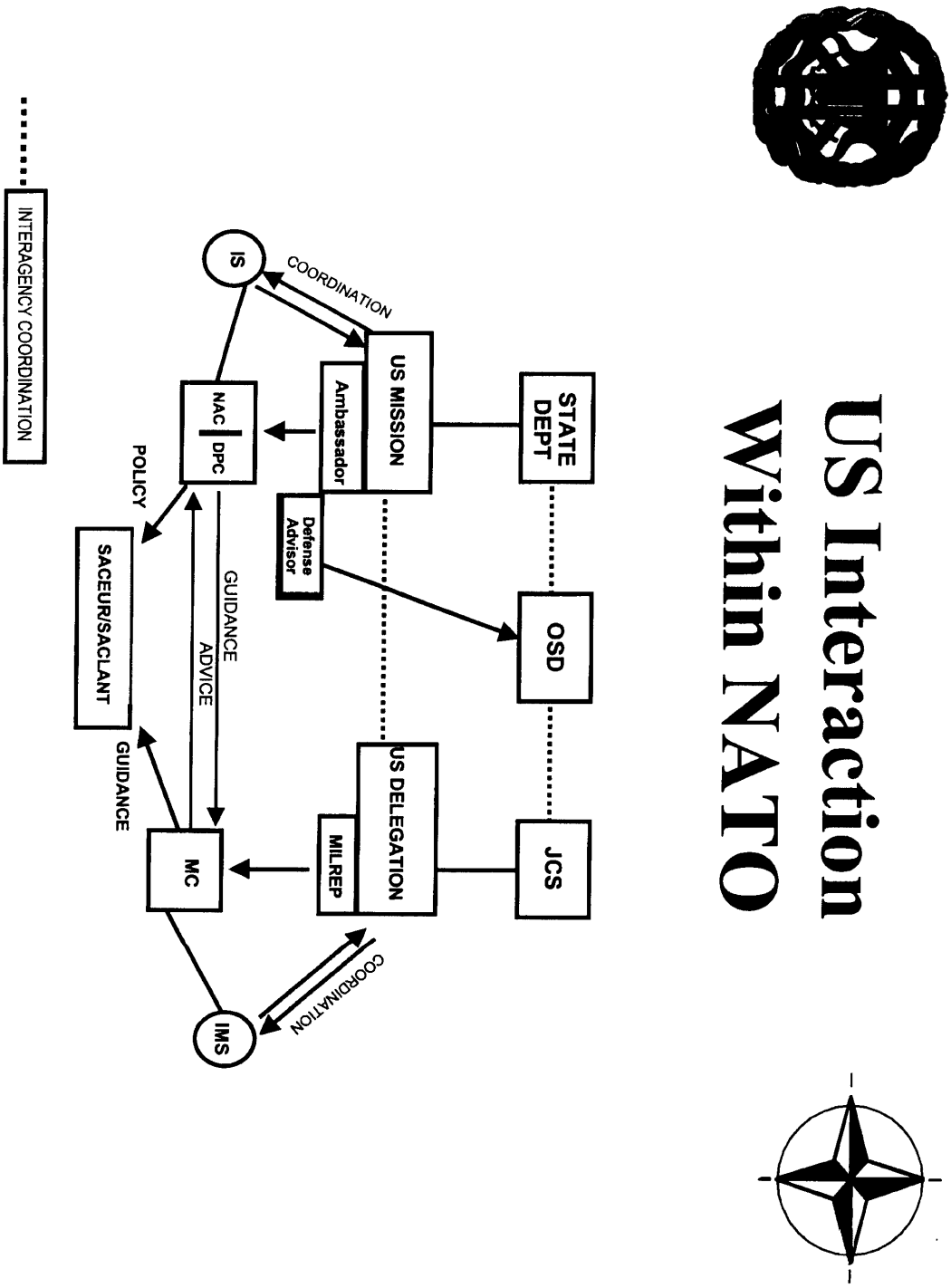


Figure 3: NATO-U.S. Coordination

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. The nation must issue instructions restricting and/or amplifying the ROE to their troops to ensure compliance with these national laws. Perhaps more importantly, "nations must inform the NAC/DPC or the Strategic Commander of any inconsistencies, as early as possible." While separate obligations, the unifying element is the commitment in the Preamble to the Washington Treaty to maintaining the rule of law.

D. NATO defines "self-defence" as "the use of such necessary and proportional force, including deadly force, by NATO/NATO-led force 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, entitled Hostile Intent and Hostile Act, clarifies this guidance. NATO also employs the concept of "extended self-defence" 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 document. After a declaration of counter aggression, the 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. Carefully read these "Notes," as they contain significant information regarding combined operations. Specific guidance on the use of ROE in each of the various warfighting media is contained in Annex B (air), Annex C (land), and Annex D (maritime). There is a glossary in Annex F that is quite helpful. The Compendium may be obtained from the Center for Law and Military Operation (CLAMO) via SIPRNET (see the CLAMO chapter for contact information).

CHAPTER 26

MEDIA RELATIONS: DEALING WITH THE PRESS (PAO GUIDANCE)

REFERENCES

1. Joint Publication 3-61, Doctrine for Public Affairs in Joint Operations (14 May 1997) (especially ch. 3 and app. A).
2. Dept of Def., Dir. 5122.5, Assistant Secretary of Defense for Public Affairs (ASD(PA)), (27 Sep 00)
3. Dept of Def., Dir. 5040.4, *Joint Combat Camera Program* (13 Aug 02))
4. Dept of Def, Instr. 5405.3, Development of Proposed Public Affairs Guidance (PPAG) (Apr. 1991).
5. Joint Warfighting Center, Joint Task Force Commander's Handbook for Peace Operations, ch. 8 (June 1997).
6. SECDEF Washington DC 101900Z Feb 03, Public Affairs Guidance (PAG) on Embedding Media During Possible Future Operations/Deployments in the U.S. Central Commands (CENTCOM) Area of Responsibility (AOR)

I. INTRODUCTION[446]

1. In February 2003, in anticipation of military operations in the Central Command AOR, the Defense Department published policies and guidelines that will apply to future media access and coverage. The DoD policy states,

> The Department of Defense (DOD) policy on media coverage of future military operations is that media will have long-term, minimally restrictive access to U.S. air, ground and naval forces through embedding…. These embedded media will live, work and travel as part of the units with which they are embedded to facilitate maximum, in-depth coverage of U.S. forces in combat and related operations.

2. Specifically, the policy requires military units to:

a. Provide billeting, rations and medical attention, if needed, to the embedded media commensurate with that provided to members of the unit, as well as access to military transportation and assistance with communications filing/transmitting media products, if required;

b. Allow media members to use media owned communications equipment. (No communications equipment for use by the media will be specifically prohibited; however, unit commanders may impose temporary restrictions on electronic transmissions for operational security reasons.)

c. Ensure that all embedded media and their news organizations have signed the "Release, Indemnification, and Hold Harmless Agreement, and Agreement not to Sue," found at http://www.defenselink.mil/news/feb2003/d20030210embed.pdf.

d. Ensure the media are provided with every opportunity to observe actual combat operations. (The personal safety of correspondents is not reason to exclude them from combat areas.)

3. In exchange for this level of access, the media must adhere to certain ground rules. These ground rules recognize the right of the media to cover military operations and are in no way intended to prevent the release of derogatory, embarrassing, negative or uncomplimentary information. Among the rules are:

a. Media embedded with U.S. Forces are not permitted to carry personal firearms.

[446] Excepts taken from SECDEF Washington DC 101900Z Feb 03.

4. The following categories of information are releasable/reportable:

a. Approximate friendly force strength;

b. Approximate friendly force casualty figures by service. (Embedded media may, within OPSEC limits, confirm unit casualties they have witnessed.)

c. Confirmed figures of enemy personnel detained or captured;

d. Size of friendly forces participating in an action or operation can be disclosed using approximate terms. (Specific force or unit identification may be released when it no longer warrants security protection.)

e. Information and location of military targets and objectives previously under attack;

f. Generic description of origin of air operations (such as "land-based");

g. Date, time or location of previous conventional military missions and actions, as well as mission results are releasable only if described in general terms;

h. Types of ordnance expended in general terms;

i. Number of aerial combat or reconnaissance missions or sorties flown in the AOR;

j. Type of forces involved (e.g. air defense, infantry, armor, Marines);

k. Allied participation by type of operation (ships, aircraft, ground units, etc.) after approval of the allied unit commander;

l. Operation code names;

m. Names and hometowns of U.S. military units;

n. Service members' names and hometowns with the individuals' consent.

5. The following categories of information are not releasable since their publication or broadcast could jeopardize operations and endanger lives:

a. Specific number of troops in units below Corps/MEF level;

b. Specific number of aircraft in units at or below the Air Expeditionary Wing level;

c. Specific numbers regarding other equipment or critical supplies (e.g. artillery, tanks, landing craft, radars, trucks, water, etc.);

d. Specific numbers of ships in units below the Carrier Battlegroup level;

e. Names of military installations or specific geographic locations of military units in the AOR unless specifically released by the DoD or authorized by the Unified Commander.

f. Information regarding future operations;

g. Information regarding force protection measures at military installations or encampments (except those which are visible or readily apparent);

h. Photography showing levels of security at military installations or encampments;

i. Rules of Engagement;

j. Information on intelligence collection activities compromising tactics, techniques or procedures;

k. Extra precautions in reporting will be required at the commencement of hostilities to maximize operational surprise. Live broadcasts from airfields, on the ground or afloat, by embedded media are prohibited until the safe return of the initial strike package or until authorized by the unit commander;

l. During an operation, specific information on friendly force troop movements, tactical deployments, and dispositions that would jeopardize operational security or lives. Information on on-going engagements will not be released unless authorized for release by the on-scene commander;

m. Information on Special Operations Units, unique operations methodology or tactics, for example, air operations, angles of attack and speeds; naval tactical or evasive maneuvers, etc. General terms such as "low" or "fast" may be used;

n. Information on effectiveness of enemy electronic warfare;

o. Information identifying postponed or canceled operations;

p. Information on missing or downed aircraft or missing vessels while search and rescue and recovery operations are being planned or underway;

q. Information on effectiveness of enemy camouflage, cover, deception, targeting, direct and indirect fire, intelligence collection, or security methods;

r. No photographs or other visual media showing an enemy prisoner of war or detainee's recognizable face, nametag or other identifying feature or item may be taken;

s. Still or video imagery of custody operations or interviews with persons under custody.

Judge Advocates providing advice on media restrictions should read *Nation Magazine v. U.S. Department of Defense*, 762 F. Supp. 1558 (S.D.N.Y. 1991).

II. PUBLIC AFFAIRS OFFICE (PAO) GUIDANCE

Following is a guide for those times when you, or someone you advise, must or should talk with the press. You must always work through the PAO, as well as notify, and get approval from, your boss before talking to the press.[447] Once approval has been granted, use the pointers below in talking to the media.

1. Why Talk To The Media?

a. Organizations work a long time to achieve a reputation for a reliable product, a good service, and stability. It does this by delivering the same over and over again. That reputation is a fragile commodity for it can be destroyed by a single mishap. One bad news item is remembered forever, while 100 good news items seem to be forgotten.

b. Though it may seem unfair at times, our society cherishes the freedom of the press that encourages "headline news." That is, the press will print whatever news it can find by deadline, and if an edge can be put on the information to create a stir, all the better. This "selling" of the news—as opposed to "reporting" the news—results in

[447] TJAG Policy Memo 91-2 to SJAs states, "Generally, no member of your office should, without your approval, prepare a written statement for publication or permit himself or herself to be quoted by the media on official matters within the purview of your office. Similarly, unless first cleared through the Executive, neither you nor any member of your office should be interviewed by, or provide statements to, representatives of the media on issues or subjects having Army-wide, national or international implications."

biased articles. If only one side of a story is available, that is what is printed. The "No comment" gambit will not sit well with the viewing public (though it may be appropriate in limited cases).

c. Management training stresses positive action as the best way out of a dilemma, and the media is your primary channel to the American people. As a leader in the military, you are responsible for the management of Defense dollars and, more importantly, of American youth. Americans pay for the military and send their sons and daughters to fill its ranks. They "own" the military and are entitled to know the "how" and "why" it operates.

d. Men and women of the media are competent professionals as dedicated to their profession as you are to yours. They oftentimes have no prior military association; however, they will usually work hard to gather the facts and present an accurate story. Treat them with the respect you expect and never underrate their capability to gather information. They can be tenacious and may have sources of information not available to you.

e. Your command or agency has an important story to tell to the American people who support your activities. Your soldiers and employees and their activities are "news" to both local and national audiences. You are the most believable spokesman to represent them. Preparation and practice on your part will result in newsworthy, informative articles and programs that may be seen by millions of viewers and readers.

2. <u>Preparing to Meet the Media</u>

What you do before you meet the media is as important as what you do when you meet them. Often, it is the preparatory activities that will determine the success or failure of your media interview. By being prepared, you will not only be more confident and comfortable, but you will also be able to get your story across to the audience.

a. Some preparatory suggestions:

- Find out who the reporter is.
- Find out why you were asked for the interview.
- Establish ground rules on what will be covered.
- Set how much time will be allowed for the interview.
- Anticipate questions and think through your responses.
- Do your homework. (Make certain you are familiar with the facts supporting your position and that they're up-to-date. Even if you're the expert, a quick brush-up will help.
- Know the key points you want to make. (You might want to type them up on a card and put the card in a prominent place on your desk. Before the interview, review them often. Are they honest, meaningful and to the point?)
- Don't memorize a statement! (You'll look stilted/pompous).
- Question your own position. Have your PAO or other staff experts play devil's advocate. If possible, practice your responses before a television camera and view the play back with members of your staff to conduct a critique. Do not be thin skinned—it is better to correct errors before friends than commit them before 1.5 million viewers.
- Read the morning paper and listen to the radio/TV before your interview in case a late-breaking news story affects your command.

3. <u>The "Five and Five" Rule</u>

The Five and Five Rule is "Know the five best and worst things about your agency—and be able to discuss them in detail any time." Stay current—have your staff keep you up-to-date. Practice answering a question about a bad news subject and transition to a good news subject.

4. <u>Specific suggestions if you're going on the air:</u>

a. Know the format and theme of the show. Know who will be in the audience—do they let reporters sit in the audience and ask questions? Who is the viewer audience? It may be helpful to watch the show several times.

b. Arrive early to check the setting and your appearance.

c. When you arrive, talk to the hosts or questioners. Offer subjects or points you'd like to discuss. Ask them what they'll be covering.

5. <u>You're on!</u>

a. This is your chance to tell your story accurately and forcefully. Many people are intimidated by all the blinding lights and the ominous, expressionless, one-eyed cameras staring directly at them. There's no need for anxiety. Think of the cameras and the microphones as your friends, and imagine that you are visiting friends in their living room because that's where you will be seen or heard—on the television set in someone's living room or on a car radio. If you've prepared well, all you will have to do is take advantage of a few techniques that will help you come across to the audience in a forceful yet friendly way.

1) First, your appearance:

a) Check your appearance. (Be vain. Have yourself inspected. Remember, you're representing the entire military.)

a. Ask for makeup to help control perspiration and to avoid glare from the lights. (If you have a heavy beard, shave before you go).

b. Don't wear sunglasses outdoors, or tinted glasses indoors.

c. If seated, keep your jacket buttoned. To remove wrinkles in the front, pull the jacket down in the rear.

b) If you're in civilian clothes:

a. Men should wear medium-tone gray, blue or brown suits. Women should wear solid, medium-color dresses. Avoid very light or very dark dresses (conservative street-length dresses or pantsuits are preferred). Never wear bold prints or patterns.

b. Wear light-color shirts. However, avoid whites, since it is difficult for the technical crew to adjust contrasts.

c. Avoid bow ties. They have a tendency to bob when you are talking.

d. Wear over-the-calf socks. (That way, if you cross your legs, your shins won't outshine your shoes.)

e. Keep jewelry simple. (That sparkling ring may look terrific at a dinner party, but on television it's going to detract). Military brass may be coated with soap to prevent glare.

2) Second, your action. (Or, what do I do with my hands?):

a) In stand-up interviews, stand straight. (Don't lean into the microphone and don't rock back and forth). You may want to place one foot slightly forward of the other. This will help you keep from rocking or shifting back and forth.

b) Hands should be relaxed at your side at the beginning of the interview. However, if you are comfortable, use them when talking. Effective use of hands is natural and provides action and emphasis.

c) When seated, sit with the base of the spine back on the chair and lean slightly forward. Place your hands well forward on the arms of the chair or your knees. Don't put them in your lap.

d) Warmth, friendliness and sincerity are important to the interview. Key tools are smiles, gestures and pauses, at appropriate times. But don't smile at serious matters or out of discomfort. Remember to keep an open face.

e) Don't adopt the questioner's attitude, even on hostile questions. (Remember, the viewer/listener at home may be on your side.)

f) Don't distract your home audience. (Don't pull up your socks, fiddle with your ring, or look at your watch hoping you've almost finished).

g) Concentrate on the interviewer, and listen! (Avoid looking around the room: It will give you the "darting eye" look of a sinister villain). Look the interviewer in the face and use her/his name if possible.

h) Keep your head up so you won't look guilty. It lets the light onto your face and prevents deep shadows around the eyes. (This is especially important if you wear military glasses: If the audience can't see your eyes, they may not trust you!)

i) Keep your hands off the mike. Ignore the mike and volume—that's what the sound technician is paid to do.

j) If you have a real physical reason for preferring one profile or side (e.g. a hearing problem), make this known to the program staff.

k) If possible, don't sit between two questioners. (It's not an inquisition, and your shifting head will make you feel and look guilty.)

l) Be yourself! Concentrate on how to get ideas across—not just words.

3) *Third, how do I say what I want to say?*

a) Welcome the reporter and the questions. Take the attitude that the reporter is your conduit to your audience and they are interested in what you have to say.

b) Be relaxed, confident; you are the expert.

c) Avoid jargon, acronyms and technical terms.

d) Phrase your responses with the public in mind rather than bringing out how the military benefited from a decision or action.

e) Phrase your answers in terms and experiences your audience will relate to. Talk as though you were talking to your mother or father.

f) Minimize the use of "we"; whenever possible, use "I."

g) Keep your answers short! Give your "headline" first and then support your answers. Make the interviewer keep the conversation going, but don't just give a "yes" or "no." If you have answered the question, stop talking. Just because the reporter leaves the mike up doesn't mean you have to talk—that's what he gets paid to do. Otherwise, you may talk through your answer and wander into dangerous ground.

h) Above all, be positive in your answers!

i) Use pitch and rate changes for variety.

j) Build in a "cut-off" with your answer if you wish to drop the topic.

k) Don't be curt (even in response to the dumbest question).

l) Don't restate the question in total or begin with gratuitous remarks such as, "I'm glad you asked that." Sometimes, however, you may wish to partially restate the question just to clarify what you are answering. Also you may restate the question if the audience does not hear the question.

m) Pause before you speak. Take a second or two to think about your answer. Not only do rapid responses appear rehearsed, but many officials wish they had thought about an answer before answering. In electronic journalism, the pauses will be edited out and print reporters don't care.

n) Answer only one question at a time. (If there are multiple questions, answer the one you want to answer and then ask what the other questions were).

o) Use your key points when you have a chance. You can use one question as a springboard to your points by building on your answer. Remember the Five and Five rule.

p) If you're not sure of the facts, say so in you response and promise to get them. (Then be sure to follow up).

q) If you don't know the answer or can't discuss it for any reason, say so. If it's classified, don't get into a verbal fencing match; say it's classified. Never give a "no comment" response.

r) Discuss only those activities and policies within the purview of your command or area of responsibility. Don't discuss hypothetical situations. Don't speculate.

s) Don't be defensive-take the opportunity and use it to your benefit.

t) Don't repeat a reporter's terminology or accept his "facts and figures" as truth unless you know they're accurate. Don't let reporters put words in your mouth or ideas in the minds of the audience.

u) If it's a pretaped or print interview, be careful of "off-the-record" comments. Anything you say may be used—and probably will be. Never go off the record with a reporter you don't know.

v) Always assume the tape is rolling and the microphone is on! (Even during breaks, commercials, etc.).

w) If you're confronted with a news conference or a multitude of reporters on a noisy street, don't shout. Television is an intimate medium and, although you may reach millions of people, you are really talking to groups of two to three in their living rooms.

x) Never lie to a reporter. Not only could you get yourself in trouble, you may lessen the credibility of the whole Army.

y) Have your PAO sit in on the interview and, if possible, tape it. This is a technique which news media representatives consider professional and which serves a very useful purpose: It provides an accurate record and protects you from being quoted out of context.

6. <u>After It's All Over</u>

a. Don't demand to see the show or article in advance publication. You can ask, but they aren't under any obligation. If you demand, they may not give it to you and you may hurt your credibility and the chances of a favorable piece.

b. Provide anything you promised you'd get back to them with.

c. Be available for follow-up. Reporters often will have points they may want clarified or need additional information on.

d. Have your staff available for corroboration and follow-up.

e. Clarify any points you think may have been misunderstood, and provide additional information you think may be needed.

f. Actively seek other opportunities to tell the military's story.

7. <u>A Media Survival Guide</u>

a. Rear Admiral Brent Baker, the Navy's former Chief of Information, offers nine recommendations for getting information out to the media accurately and without compromising security:

1) Generally, it is in the institution's best interest to deal honestly and in a timely manner with the media. If you do not play, you surrender to your critics who will be eagerly at hand.

2) Understand the media's obsession with speed, and through daily contact, keep working to win the battle of the first media perception.

3) Leaders must learn to take time to articulate their positions to the media. They must use short, simple language that the media will use and the public will understand.

4) Use the media to inform the public proactively, not just to react to critics.

5) Understand that the news is almost always skewed towards the side of those willing to talk to the media, and against those who say, "No comment."

6) Remember that CNN will correct the television record, while other networks rarely will do that because of time constraints.

7) Realize that there are reporters who do want to be accurate and have balanced stories. Too often editors or television producers get in the way and interject the political or budget spin on an otherwise positive story about our people. Getting reporters out to the fleet, field, or factory floor is a beginning.

8) Play the media game. Understand there are times for a low profile, but more often, a media opportunity to tell your story should not be lost because of fear. We need to tell people, through the media, what we are about.

9) Don't be thin-skinned. We will not win every media engagement, but we must continue to communicate to our own people and to the public.

8. <u>Summary</u>

a. The best and easiest way to be relaxed when talking to the media or to a group of people is to do so, often. Generals who have spent their lives talking before hundreds and thousands of troops often clam up when confronted by the "camera, lights, action" of television or by a hostile group of reporters. There's no need to be defensive. They are our conduits to the American public.

b. Your PAO can give you the best advice before, during and after an interview. As soon as you've been asked for an interview, bring your PAO into the action. PAOs know the media and the news business and can give you sound advice on what you should and should not do. If you go into the interview or speaking engagement with a positive attitude, and really care about your points, you'll do fine. Remember, we're talking about our organization and our soldiers and we have a terrific story to tell. Let's tell it.

<u>9. AS A QUICK RECAP, REMEMBER THESE POINTS</u>:

a. Prepare—don't "wing it."

b. Conversational—treat the mike and the interviewer as friends.

c. Concentrate—forget yourself and concentrate on the questions and on your key ideas.

d. Control—know the key points you want to make, and answer questions on your own terms, in your own way. Use the "five and five" rule.

e. Confidence—you're the expert and you know what you're doing.

f. Comfortable—relax and enjoy it. Forget about your hands and the mike and camera, and be natural.

g. Concise—get your points across directly, quickly, and in language the audience will understand.

h. Care-care about the Army, the audience, the interview, and your subject. If you don't, neither will anyone else.

i. Relax. Be Honest. Be Sincere.

j. Keep an open face.

APPENDIX

JOINT PUB 3-61, (May 1997)
GUIDELINES FOR DISCUSSIONS WITH THE MEDIA

1. Preparation results in effective discussions with the news media. Central to the process is the effort to identify what information will be released based on prevailing public affairs guidance and operations security. Commanders, briefers, and public affairs personnel should be aware of the basic facts of any operation and sensitive to the various consequences of communicating them to the public.

2. "Security at the source" serves as the basis for ensuring that no information is released which jeopardizes operations security or the safety and privacy of joint military forces. Under this concept, individuals meeting with journalists are responsible for ensuring that no classified or sensitive information is revealed. This guidance also applies to photographers, who should be directed not to take pictures of classified areas or equipment or in any way to compromise sensitive information.

3. Each operational situation will require a deliberate public affairs assessment in order to identify specific information to be released. The following categories of information are usually releasable, though individual situations may require modifications:

a. The arrival of U.S. units in the commander's area of responsibility once officially announced by the Department of Defense or by other commands in accordance with release authority granted by the Office of the ASD(PA). Information could include mode of travel, sea or air, date of departure and home station or port.

b. Approximate friendly force strength and equipment figures.

c. Approximate friendly casualty and prisoner of war figures by Service. Approximate figures of enemy personnel detained during each action or operation.

d. Non-sensitive, unclassified information regarding U.S. air, ground, sea, space, and special operations, past and present.

e. In general terms, identification and location of military targets and objectives previously attacked and the types of ordnance expended.

f. Date, time, or location of previous conventional military missions and actions as well as mission results.

g. Number of combat air patrol or reconnaissance missions and/or sorties flown in the operational area. Generic description of origin of air operations, such as "land" or "carrier-based."

h. Weather and climate conditions.

i. If appropriate, allied participation by type (ground units, ships, and aircraft).

j. Conventional operations' unclassified code-names.

k. Names and hometowns of U.S. military personnel.

l. Names of installations and assigned units.

m. Size of friendly force participating in an action or operation using general terms such as "multi-battalion," or "naval task force."

n. Types of forces involved (e.g., aircraft, ships, carrier battle groups, tank and infantry units).

4. Classified aspects of equipment, procedures, and operations must be protected from disclosure to the media. In more general terms, information in the following categories of information should not be revealed because of potential jeopardy to future operations, the risk to human life, possible violation of host nation and/or allied sensitivities, or the possible disclosure of intelligence methods and sources. While these guidelines serve to guide military personnel who talk with the media, they may also be used as ground rules for media coverage. The list is not necessarily complete and should be adapted to each operational situation.

a. For U.S. (or allied) units, specific numerical information on troop strength, aircraft, weapons systems, on-hand equipment, or supplies available for support of combat units. General terms should be used to describe units, equipment and/or supplies.

b. Any information that reveals details of future plans, operations, or strikes, including postponed or canceled operations.

c. Information and imagery that would reveal the specific location of military forces or show the level of security at military installations or encampments. For date lines, stories will state that the report originates from general regions unless a specific country has acknowledged its participation.

d. Rules of engagement.

e. Information on intelligence activities, including sources and methods, lists of targets and battle damage assessments.

f. During an operation, specific information on friendly force troop movement or size, tactical deployments, and dispositions that would jeopardize operations security or lives. This would include unit designations and names of operations until released by the JFC.

g. Identification of mission aircraft points of origin, other than as land or carrier-based.

h. Information on the effectiveness or ineffectiveness of weapon systems and tactics (to include, but not limited to enemy camouflage, cover, deception, targeting, direct and indirect fire, intelligence collection, or security measures).

i. Specific identifying information on missing or downed aircraft or ships while search and rescue operations are planned or underway.

j. Special operations forces' unique methods, equipment, or tactics which, if disclosed, would cause serious harm to the ability of these forces to accomplish their mission.

k. Information on operational or support vulnerabilities that could be used against U.S. or allied units until that information no longer provides tactical advantage to the enemy and is therefore released by the joint commander. Damage and casualties may be described as "light," "moderate," or "heavy."

l. Specific operating methods and tactics (e.g., offensive and defensive tactics or speed and formations). General terms such as "low" or "fast" may be used.

NOTES

CHAPTER 27

THE MILITARY DECISION MAKING PROCESS AND OPERATION PLANS

I. OPERATIONS PLANS AND ORDERS IN THE ARMY ARENA

A. The military decision-making process (MDMP) is a single, established, and proven analytical process. (Figure 1). The MDMP is an adaptation of the Army's analytical approach to problem solving. The MDMP is a tool that assists the commander and staff in developing estimates and a plan. The ultimate goal of the MDMP is to produce a comprehensive, clear, and concise operations order. FM 101-5, Staff Organization and Operations, is the key reference in this area. The judge advocate must learn the MDMP and be involved in every aspect of the MDMP process. Judge advocates should become involved in the Plan Development process and not merely in the Plan Review stage. Participation in the Plan Development process enables judge advocates to prevent the inclusion of legally questionable actions into the OPLAN. The judge advocate can accomplish this by his/her participation in the Operational Planning Group or OPG, where the Legal Advisor provides direct input into the decision-making process, along with other coordinating and special staff officers and subject matter experts.

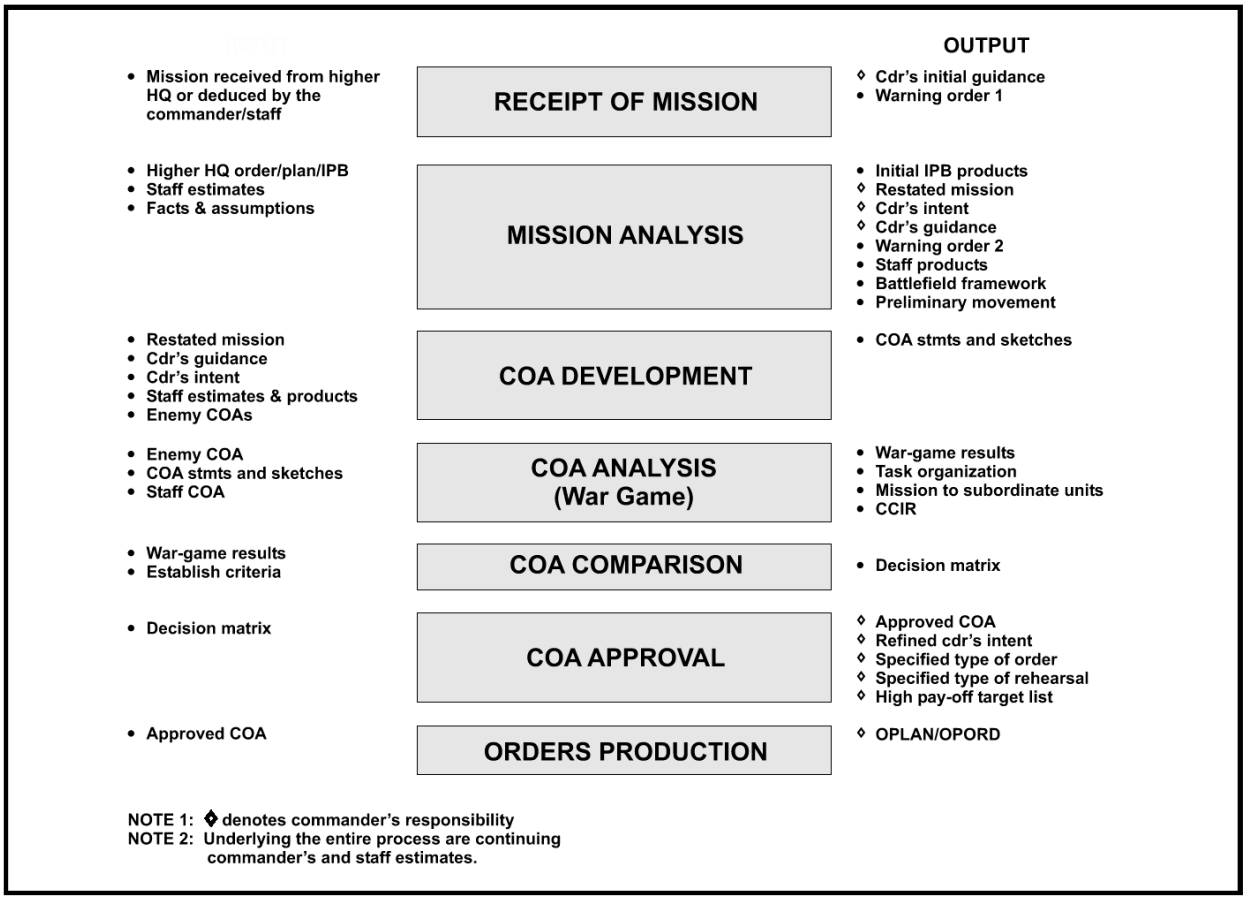


Figure 1. The Military Decision Making Process Model.

B. The Operational Planning Group will vary in size and composition depending on the complexity of the operation and the unit size. The key players in the brigade TF OPG will be the brigade S-3 (operations officer), the brigade S-2 (intelligence), the brigade fire support officer (FSO), and the brigade logistics officer (S-4). These officers are primarily

responsible for taking the brigade commander's intent and producing a workable, thorough operation order. There are other important members of the planning cell, usually a representative from each of the battlefield operating systems (BOS) and perhaps Air Force, ANGLICO and allied and SOF liaisons, and of course the brigade trial counsel. These supporting members of the OPG 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 brigade besides working in the planning cell. The OPG comes together upon the receipt of the warning order from the higher headquarters, produces the order and then goes into the execution phase.

C. The OPG at the division level or higher will usually be of such importance as to consist of officers and NCOs who have the OPG as their primary duty. Often the OPG will be called a Battle Management Cell (BMC) or the Future Plans Group (FPG). The operational law attorney at the division level will work with the individuals who make up the BMC on a daily basis. The relationship between the judge advocate and the officers who make up this planning cell is as crucial as the judge advocate's knowledge on relevant legal issues.

D. **Operational Law Concerns in Plans and Orders**. By participating in the MDMP process, judge advocates can review plans and mission orders to determine if: (a) law of war issues have been addressed, (b) legally and practically sufficient rules of engagement have been defined, and (c) other necessary legal issues have been adequately discussed. Law of War issues weave between the targeting annex, the movement plans, and the Fire Support Plan. The best advice for judge advocates is to remain fully engaged in the process as the staff discusses and develops the plan. The judge advocate must know the law, and be alert to operational issues that raise the potential for violating the Law of War. Every OPLAN will address many other OPLAW issues, such as criminal jurisdiction and claims, refugee flows, riot control agents, command and control, fiscal law, etc. The Legal Annex is the focal point for the judge advocate to capture guidance on policy matters that are contained in other annexes throughout the plan. The judge advocate will be responsible for producing a Legal Annex that is consistent with the remainder of the plan.

E. **Receipt of Mission:** The decision-making process begins with the receipt or anticipation of a new mission. As soon as a new mission is received, the unit's operations section issues a warning order to the staff alerting them of the pending planning process. Unit SOPs identify who is to attend and where they should assemble. The staff (which includes the judge advocate) prepares for the mission by gathering the tools needed to do mission analysis. These include –

- Higher headquarters order or plan
- Map of the area of operations
- Appropriate FMs
- Any existing staff estimates
- Both own and higher headquarters SOPs.

The judge advocate must also prepare for the upcoming Mission Analysis by having the proper resources. These include:

- A copy of the current ROE with any changes and any requests for changes
- A copy of relevant SOFA or relevant local law in the anticipated AO
- A copy of the legal Annex
- FM 27-10, DA Pam 27-1, and DA Pam 27-1-1.

The critical decision made during the receipt of mission is the allocation of available time. The commander must provide guidance to subordinate units as early as possible to allow subordinates 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.

F. **Mission Analysis:** Mission analysis is crucial to the MDMP. It allows the commander to begin his battlefield visualization. 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 judge advocate has an important role in each of the steps:

Step 1. Analyze the higher headquarters' order.

Step 2. Conduct initial intelligence preparation of the battlefield (IPB).

Step 3. Determine the specified, implied, and essential tasks.

Step 4. Review available assets.

Step 5. Determine constraints.

Step 6. Identify critical facts and assumptions.

Step 7. Conduct risk assessment.

Step 8. Determine initial commander's critical information requirements (CCIR).

Step 9. Determine the initial reconnaissance annex.

Step 10. Plan use of available time.

Step 11. Write the restated mission.

Step 12. Conduct a mission analysis briefing.

Step 13. Approve the restated mission.

Step 14. Develop the initial commander's intent.

Step 15. Issue the commander's guidance.

Step 16. Issue a warning order.

Step 17. Review facts and assumptions.

Significant legal issues will arise during each of the above steps. The judge advocate 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 which commonly arise**. Above all else, by actively participating in the mission analysis phase of orders development, the judge advocate will become intimately familiar with the operation's parameters.

G. **Course of Action Development:** After receiving guidance, the staff develops COAs for analysis and comparison. The commander must involve the entire staff in their development. His 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 courses of action for the commander to consider.

1. The judge advocate must know the legal advantages and disadvantages of each of the COAs 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 of the COAs present unique legal issues which the judge advocate must be prepared to brief to the commander in a simple advantage/disadvantage style.

2. Most staffs use a synchronization matrix during the COA development. At the top of the matrix is an H hour sequence (H+2, H+6 etc.) which provides a common time reference for all phases of the operation (Figure 2). The first column on the left usually contains the BOSs (maneuver, ADA, fire support, IEW, engineer Combat service support, and command and control), 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 operating systems when they are developing courses of action and recording the results of war gaming. The matrix clearly shows the relationships between activities, units, support functions, and key events. The matrix supports the staff in adjusting activities based on the commander's guidance and intent and the enemy's most likely courses of action.

H. **COA Analysis/COA Comparison/COA Approval:** The *COA analysis* identifies which COA accomplishes the mission with minimum casualties while best positioning the force to retain the initiative for future operations. The COA analysis is accomplished using war gaming. The war game is a disciplined process, with rules and steps, which attempts to visualize the flow of battle in each of the COAs. During the war game, the staff takes a COA and begins to develop a detailed plan, while determining the strengths and weaknesses of each COA. War gaming tests a COA or improves a developed COA.

1. The judge advocate should be an active participant in the war gaming process. Such participation will not only increase the judge advocate's knowledge of the military art and operational planning, but other legal issues will present themselves as the staff wargames each COA. For example, during the war game the staff member playing the part of the opposing force reacts to a U.S. air assault deep behind his lines by using poison gas on the landing zone. Suddenly, a heretofore unplanned legal issue is presented to the staff and the judge advocate is given the opportunity to resolve it before a COA is decided upon.

2. The *COA comparison* starts with each BOS representative staff officer analyzing and evaluating the advantages and disadvantages of each COA from his BOS's perspective. Each staff member presents his findings for the other's consideration. Each representative of the BOS (maneuver, fires, intelligence, ADA, mobility/countermobility, combat service support, command and control) will rate each of the COAs according to how well his system can support it. From these numerical ratings, a decision matrix will be assembled where each COA is compared for supportability from each of the BOSs. After completing the matrix and the analysis, the staff identifies its preferred COA and makes a recommendation to the commander.

3. Although the judge advocate is not included as one of the BOS's representatives, his input before this phase is crucial. One of the original COAs may have been insupportable from a legal standpoint. For example, COA 1 may rely on the use of RCAs (without NCA approval) for the suppression of enemy air defense (SEAD) on the drop zone before the planned airborne assault. In such a case, the judge advocate must identify such critical problems during the COA development—before the staff spends precious man hours and resources planning it.

4. After the decision briefing, the commander decides on the COA he or she believes to be the most advantageous. If he rejects all developed COAs, the staff will have to start the process all over again. If the commander modifies a proposed COA or gives the staff an entirely different one, the staff must war-game the revised or new one to derive the products that result from the war-game process. Based on the commander's decision, the staff immediately issues a warning order with essential information so that subordinate units can refine their plans.

Time		-18 hours	-14 hours	-12 hours
Enemy Action		Enemy monitors movement	Continue deep preparation	
Decision Points		Initiate movement AA ROSE		
Maneuver	Deep			
	Security	Recon secures routes	Cav prepares to screen north flank	
	Close		1 Bde moves on routes 1 & 2	
	Reserve		3 Bde moves on routes 1 & 2	
	Rear			
Air Defense		Weapons HOLD		Weapons TIGHT
Fire Support				
EW		Confirm second belt and RAG position	Confirm reserve position	
Engineer		Route maintenance		
CSS	Man		Replacements held at division	
	Arm			
	Fix	Cannibalization authorized at DS level		Establish Div main CP
	Fuel			
	Move	Initiate movement from AA Rose		
	Sustain			
CP				TAC CP with lead Bde

Figure 2. Example of a synchronization matrix.

I. **Orders Production:** Based on the commander's decision and final guidance, the staff refines the COA and completes the plan and prepares to issue the order. The staff prepares the order or plan to implement the selected COA by turning it into a clear, concise concept of operations, a scheme of maneuver, and required fire support.

1. The G-3 plans officers (or the S-3 at the BDE level) may ask the judge advocate to read the finished order to see if it meets general standards of clarity, internal consistency, and completeness. The judge advocate should seek every opportunity to serve in such a capacity since it demonstrates that he is considered "one of the team." Increasingly, judge advocates serve as "the honest broker" in the review of plans and orders. Good advice to judge advocates serving in such a role is to: (1) look at the ENTIRE PLAN—both of your unit and of the higher unit; (2) READ AND STUDY the Mission Statement and Commander's Intent (is the statement and intent clear - does it sufficiently define the parameters

of the operation, while affording the requisite flexibility to the unit); (3) carefully review the parts of the plan which discuss Civil Affairs, Military Police, Intelligence (particularly low level sources), Acquisition, and Funding. Look to the command's authority to undertake proposed actions. Consider:

Express authority (e.g., in the Mission Statement).

Implied authority (e.g., authority to detain civilians implied from the mission to "restore order"; authority to undertake minor, short term repairs to a civilian power plant, thereby enabling lights to operate, implied from the mission to "enhance security and restore civil order.")

Inherent authority (e.g., authority—always—to protect the force.)

Watch out for "**mission creep**": help the commander stay in his/her lane. When dealing with DoS (through, most often, 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 operations and MOOTW. See the chapters on Fiscal Law and Security Assistance of this Handbook.

J. When called upon to proofread an order, try to use the following checklist:

- Does the order use doctrinally established terms?
- Is there sufficient detail to permit subordinate commanders to accomplish the mission without further instructions?
- Is there sufficient detail for subordinate commanders to know what other units are doing?
- Does the order focus on essential tasks?
- Does the order limit the initiative of subordinate commander, i.e., does it prescribe details of execution that lie within their province?
- Does the order avoid qualified directives such as "try to hold" or "as far as possible"?
- After finishing the order, does the reader have a grasp of the "big picture" of the operation?

II. OPERATIONS PLANS AND ORDERS IN THE JOINT ARENA

A. <u>The JTF OPLAN in Context</u>

1. Almost all future contingency operations will be based on the joint task force. The joint task force (JTF) will consist of combat and support units from all the services. The JTF will have one commander who will be responsible for coordinating the complex interplay between the services to produce the maximum combat power. The JTF OPLAN is the mechanism by which this objective is planned – it does not exist in a vacuum. As a supporting plan to the OPLAN of a particular Unified Command, it must reflect the guidance contained in that plan and be structured in such a way as to assist in the overall accomplishment of the Unified Command mission.

2. Unified Command OPLANs are the mechanisms through which CINCs will accomplish the national security objectives and derived military objectives and tasks assigned them in Vol. I of the Joint Strategic Capabilities Plan (JSCP). This is one of the principal Joint Strategic Planning System (JSPS) documents prepared by the CJCS for the purpose of translating national security policy (formulated by the National Security Counsel (NSC)) into strategic guidance, direction, and objectives for operational planning by Unified and Specified commands.

3. The JSCP, Vol. I and II (Vol. II identifies the major combat forces assigned a CINC, for planning purposes, in the development of his OPLAN) triggers the Joint Operations Planning and Execution System (JOPES).[448] JOPES applies to those OPLANS prepared by CINCs in response to the missions assigned them by the CJCS in the JSCP, Vol. I. CJCS Manual 3122.03 (1 June 1996) provides the Planning Formats and Guidance needed to comply with the JOPES process. **Above all else, JOPES provides a standardized process that is uniform, predictable, and thorough. The judge advocate should be familiar with the JOPES format for constructing OPLANS because the relevant information will be located in standardized locations through the plan. For example, the legal annex will always be Appendix 4 to Annex E of each plan to the judge advocate picks up. The Rules of Engagement are always Appendix 8, Annex C. This chapter includes every appendix and annex required by JOPES in their correct order and substance.**

4. JOPES provides the guidance and procedures for use in the development, coordination, dissemination, review, and approval of Unified Command joint operations plans. It also prescribes standard formats and the minimum content for OPLANS. Planning for military operations is conducted deliberately, or in the crisis action mode.

5. The Deliberate Planning Process, most often used in developing Unified Command CONPLANs or OPLANs, as well as supporting plans, involves 5 distinct phases: (1) Initiation, (2) Concept Development, (3) Plan Development, (4) Plan Review, and (5) Supporting Plans. The Crisis Action Planning Process begins in response to a developing situation that may require the deployment of military forces. Crisis Action planning produces an OPORD for a particular mission, and includes similar phases: (1) Situation Development, (2) Crisis Assessment, (3) Course of Action (COA) Development, (4) COA Selection, (5) Execution Planning, and (6) Execution. Military planners will often use a CONPLAN or OPLAN as the starting point for a Crisis Action Plan.[449]

B. **Reviewing Plans and Mission Orders**

1. **Types of Plans and Mission Orders**. Units plan for specific contingencies and missions. In an actual deployment, operations or concept plans (OPLANS/CONPLANS) become operations orders (OPORD) which direct how to accomplish a particular mission. Divisions and higher-level units prepare OPLANs and CONPLANs days, months, or years prior to deployment. The detailed plans, in conjunction with the forces assigned or apportioned to the CINC in the JSCP, 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. The TPFDD determines the priority and sequence of units the judge advocate must ensure are trained in the ROE, and will impact on what legal assets are available in theater in when they are available.

2. **Responsibility for Plans and Order Review**. Operational law attorneys must periodically review all existing OPLANs and CONPLANs. Many divisions utilize brigade trial counsel to review plans and orders in their units. Regardless of who conducts the review, the responsibility for the review rests with the SJA. The plans review process must be continuous, with the SJA's representative in constant coordination with the G-3 Plans (or J-3 if the judge advocate is working with a Joint Task Force) element. The SJA's representative must be in the decision-making cycle not only of his unit, but of the next higher unit as well. Some units have assigned an operational lawyer to work in the G-3 Plans shop for several days each week. The key point is that the judge advocate must be a member of the "plans team," a "known commodity," not an interloper in the operations planning process.

At brigade level and below, written and oral mission orders are often prepared and executed within hours. All plans and orders identify the **SITUATION**, the **MISSION**, how the mission will be executed (**EXECUTION**), how the mission will be supported (**SERVICE SUPPORT**), and how the mission will be controlled (**COMMAND AND SIGNAL**). Additional details appear in annexes, appendices, and tabs following the basic plan or order. Plan for change—orders will probably be modified through Fragmentary Orders (FRAGOs).

3. **The OPLAN Review Process.** As noted in the Preface of the OPLAN Checklist, the Checklist uses 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

[448] See JOINT PUB. 5-03.2, JOINT OPERATIONS PLANNING AND EXECUTION SYSTEM, VOL. II, PLANNING AND EXECUTION FORMATS AND GUIDANCE (10 Mar 1992) .

[449] See JOINT PUB. 5-0, DOCTRINE FOR PLANNING JOINT OPERATIONS (13 April 1995).

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 OPLAN/OPORD review.

4. **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. Pay particular attention to tailoring a "General Order Number 1" to each operation. What worked—and made sense—in SWA may not be prudent for a UN peacekeeping operation, for example. Appendix A to this chapter includes relevant JOPES formats, as well as an example of Appendix 4 to Annex E [Legal] for the U.S. Forces Haiti, the U.S. component of the UN Mission in Haiti (UNMIH), FRAGO 16 of OPLAN 2380 (Uphold Democracy).

5. **Personal Preparation for Deployment.** Deploying judge advocates must ensure that their personal affairs are up-to-date 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 TOC passes and meal cards) may be needed, and how they will be obtained. Develop a plan to gain interim top secret clearance for all brigade legal advisors and other judge advocates with a need to see top secret materials. Annual weapons qualification with assigned weapon, and military skills proficiency and physical fitness, must be taken seriously! SJAs and other leaders must train subordinate judge advocates on preparation for, and execution of, deployment.

6. **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 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. Have load plans for vehicles. Know how to prepare vehicles and equipment for air movement or shipment. In most units, the SJA deployment package is the responsibility of the Operational Law Attorney, but the Legal Administrator and the Chief Legal NCO must participate in the preparation and care of the deployment package. Specifically, NCOs should take charge of palletizing and 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 AOR 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. SOFAs, if applicable, Country Law and Area Studies, and publications of the unified command having responsibility for the country in which operations will occur should made a part of the deployment package.

7. **Deployment SOPs.** 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 [Somalia, e.g.])
   - SOFA
   - Other (Admin. & Tech. P. & I. through Diplomatic Note, e.g.)

   Theirs
   - Status
   - Treatment
   - Disposition

4. **THINGS**
   Buying (Contracting)
   Breaking (Claims)
   Blowing Up (Targeting)

5. **JUSTICE ("Job One")**
   Jurisdiction (Joint or service specific)
   Convening Authorities
   Control Measures (GO # 1)
   TDS, MJ Support

APPENDIX

FORMATS FOR LEGAL APPENDICES

NOTE: THERE ARE ADDITIONAL SAMPLE LEGAL ANNEXES CONTAINED IN THE JAGCNET DATABASE. [See JOPES Volume II, JEL Library]

(Standardized JOPES Format, **Enemy Prisoners of War, Civilian Internees, and Other Detained Persons Appendix**)

CLASSIFICATION

HEADQUARTERS,
U.S. EUROPEAN COMMAND APO AE 09128 28
February 1992

APPENDIX 1 TO ANNEX E TO USCINCEUR OPLAN 4999-92 (U) ENEMY PRISONERS OF WAR, CIVILIAN INTERNEES, AND OTHER DETAINED PERSONS (U)

( ) REFERENCES: Cite the documents necessary for a complete understanding of this appendix.
1. ( ) General
a. ( ) Purpose. State the purpose of the appendix.
b. ( ) Scope. Indicate the specific activities (e.g., collection, processing, evacuation) applicable to the OPLAN and the extent to which they pertain to EPWs, CIs, and DETs.
c. ( ) Policy. Delineate the general policy for accomplishing EPW, CI, and DET activities by the Service components and other supporting commands.
2. ( ) Situation. Identify any significant factors that may influence EPW, CI, and DET activities in support of the OPLAN. The following subparagraphs may be used to the extent necessary.
a. ( ) Enemy. Refer to Annex B, Intelligence. Assess the impact of enemy capabilities and probable COAs on EPW, CI, and DET activities and summarize the enemy military, paramilitary, and civilian forces and resources expected to be encountered.
b. ( ) Friendly. Include any non-U.S. military forces and U.S. civilian agencies that will augment assigned forces for EPW, CI, and DET activities.
3. ( ) 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 what component is responsible for as many of the following as applicable:
(1) ( ) Developing, in coordination with intelligence planners, gross time-phased estimates of the number of EPWs, CIs, and Des. These estimates should be provided to medical planners.
(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 U.S. Government and non-Government agencies.
(2) ( ) Relationships with the ICRC or other humanitarian organizations.
(3) ( ) Arrangements for transfer of EPWs, CIs, and DETs between Services or acceptance of EPWs, CIs, and DETs from allied forces.
4. ( ) 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 as many of the following as applicable:
a. ( ) Handling, processing, and evacuating EPWs at the capture point. Discuss assignment of POW escorts and their responsibilities (escorts should bring personal effects of POW's 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 POW's.

b. ( ) Accounting for EPWs, CIs, and DETs.

c. ( ) Interrogating and exploiting EPWs. (Cross-reference to Annex B, Intelligence, and Appendix 5. Human Resource Intelligence.)

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 as applicable to detained persons.

5. ( ) Administration and Logistics. Provide a concept for furnishing logistic and administrative support for EPW, CI, and DET activities. As appropriate, 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.

6. ( ) Command and Control. Discuss C3 systems support and procedures necessary to conduct EPW, CI, and DET activities. Refer to appropriate sections of Annex K.

7. ( ) Reports. Indicate reports required by appropriate reference(s).

Appendix 1 to Annex E

CLASSIFICATION

(Standardized JOPES Format, **Legal Appendix**)

CLASSIFICATION

HEADQUARTERS,
U.S. EUROPEAN COMMAND APO AE 09128 28
February 1992

APPENDIX 4 TO ANNEX E TO USCINCEUR OPLAN 4999-92 (U) LEGAL (U)

( ) REFERENCES: Cite the documents necessary for a complete understanding of this appendix.
1. ( ) General Guidance. See appropriate references, including inter-Service support agreements.
2. ( ) 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. ( ) Claims.
b. ( ) International legal considerations.
c. ( ) Legal assistance.
d. ( ) Military justice.
e. ( ) Reporting violations of the law of war.
f. ( ) Captured weapons, war trophies, documents, and equipment.
g. ( ) Host-nation support.
h. ( ) Legal review of rules of engagement.
i. ( ) Law enforcement and regulatory functions.
j. ( ) Component and supporting commanders' and staff responsibilities.
k. ( ) Acquisitions during combat or military operations.
l. ( ) International agreements and congressional enactments.
m. ( ) Nuclear, biological, and chemical weapons.
n. ( ) Targeting.
o. ( ) Enemy prisoners of war and detainees.
p. ( ) Interaction with the International Committee of the Red Cross (ICRC).

Appendix 4 to Annex E

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)
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
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. Dep't of the Army, Field Manual 27-100, *Legal Support to Operations*, 1 March 2000.
2. Dep't of the Army, Field Manual 101-5, *Staff Organization and Operations*, 31 May 1997.

1. OVERVIEW

The primary purpose of this Chapter is to familiarize JAs with the Center for Law and Military Operations (CLAMO) and to familiarize JAs with the U.S. Army's Combat Training Centers (CTCs), and to assist JAs in preparing for and executing deployments.

2. CLAMO: A RESOURCE

a. <u>Mission</u>. The Center for Law and Military Operations (CLAMO) is a **resource organization for operational lawyers** in the Army and Marine Corps. It was created in 1988 at the direction of the Secretary of the Army and is part of the Legal Center at The Judge Advocate General's Legal Center and School located in Charlottesville, Virginia. CLAMO's mission is to examine legal issues that arise during all phases of military operations and to devise training and resource strategies for addressing those issues. It seeks to fulfill this mission in five ways:

1) It is the central *repository* within The Judge Advocate General's Corps and Marine Corps for all-source data/ information, memoranda, after-action materials, and lessons learned pertaining to legal support to operations, foreign and domestic.

2) It supports judge advocates by *analyzing* all data and information, *developing lessons learned* across all military legal disciplines, and by *disseminating* these lessons learned and other operational information to the Army, Marine Corps, and Joint communities through publications, instruction, training, and databases accessible to operational forces world-wide.

3) It supports judge advocates in the field by responding to *requests for assistance*, by engaging in a continuous exchange of information with the *Combat Training Centers* (CTCs) and their judge advocate observer-controllers, and by creating operational law *training guides.*

4) It *integrates lessons learned* from operations and the Combat Training Centers into emerging *doctrine* and into the *curricula* of all relevant courses, workshops, orientations, and seminars conducted at The Judge Advocate General's School.

5) In conjunction with The Judge Advocate General's School, it sponsors *conferences and symposia* on topics of interest to operational lawyers.

CLAMO contributes to the JAGC's operational role by reviewing doctrinal and resource development, through education and training, and by providing assistance during operations. All of CLAMO's initiatives enhance legal support to operations within the Army, the Marine Corps, and throughout the Department of Defense. CLAMO focuses on the practice of operational law—all domestic, foreign, and international law that directly affects the conduct of operations.

b. <u>Initiatives</u>. CLAMO Initiatives **include—**

1) *Law and Military Operations in Haiti 1994-1995: Lessons Learned for Judge Advocates (1995)*
2) *Nuremberg and the Rule of Law, A Fifty-Year Verdict (1995)*

3) *In the Operations Center: A Judge Advocate's Guide to the Battle Command Training Program (1996)*
4) *Tackling the Contingency Deployment: A Judge Advocate's Guide to the Joint Readiness Training Center (1996)*
5) *An Introduction to the Combat Training Centers (1998)*
6) *Law and Military Operations in the Balkans, 1995-1998: Lessons Learned for Judge Advocates (1998)*
7) *FM 27-100, Legal Support to Operations (With the Combat Developments Department, TJAGSA) (Mar. 2000)*
8) *Rules of Engagement Handbook for Judge Advocates (May 2000)*
9) *Law and Military Operations in Central America: Hurricane Mitch Relief Efforts, 1998-1999: Lessons Learned for Judge Advocates (2000)*
10) *Deployed Judge Advocate Resource Library 2d Edition (on CD)(Oct. 2000)*
11) *Domestic Operational Law Handbook (Apr. 2001)*
12) *Law and Military Operations in Kosovo, 1999-2001: Lessons Learned for Judge Advocates (Dec. 2001)*
13) *Deployed Marine Air-Ground Task Force Judge Advocate Handbook (July 2002)*
14) *Deployed Judge Advocate Resource Library 4th Edition (on CD) (Oct. 2002) (5th Edition forthcoming Oct. 2003)*
15) *U.S. Government Interagency Complex Contingency Operations Handbook: A Guide to the Operational Capabilities and Legal Authorities of the Agencies, Departments, and Military Services Involved (forthcoming 2003).*

c. Internet Resource Databases

In addition to publishing guides for the operational law practitioner, CLAMO creates and maintains an Internet accessible database. CLAMO has created a database with more than 4,000 primary source documents, directives, regulations, country law studies, graphic presentations, photographs, and items of legal work product accessible via installation Lotus Notes servers or the Internet at www.jagcnet.army.mil/clamo for registered users. The database includes categories such as:

Domestic Operational Law (DOPLAW)	Noncombatant Evacuation Operations (NEO)
Kosovo	War Crimes
Bosnia: Operations Joint Endeavor & Guard	71D Operations (Legal Specialists)
General Operational Law Materials	Korea
Iraqi Freedom	Reserve Corps and RC AARs
Country Materials	Unclassified SOFAs
UN Resolutions	GAO Reports
Rules of Engagement (ROE)	MAGTF (Marine Air Ground Task Force) for Marines
Combat Training Centers (CTCs)	Enduring Freedom and Noble Eagle

To access the database:

- If you are a first time user (do not have a JAGCNet user name and password):
  - *Go to* www.jagcnet.army.mil *web site.*
  - *Click the "New Account Request" link at the bottom of the page.*
  - *Follow the instructions.*
- *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" button.*

- *Click* the "CLAMO Databases" *link*.

To access the CLAMO classified database:

- *Go to* http:www.us.army.smil.mil *(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 434-244-6279 (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. <u>The Army JAG Corps' JAGCNet Databases</u>

In addition to the CLAMO databases, the Army's Judge Advocate General's Corps maintains databases on all core legal disciplines, available to registered users at www.jagcnet.army.mil. Among others, JAG Corps databases include the following:

Administrative Law	Ethics – Attorney Professional Responsibility
Contract Law	Ethics – Standards of Conduct
Environmental Law	Medical Legal Issues
Labor and Employment Law	Judge Advocate Leader Development
International and Operational Law	Government Appellate Division Brief Bank
Legal Assistance	U.S. Army Trial Defense Services (TDS)
Claims	Military Justice – Criminal Law

To access the databases:

- If you are a first time user (do not have a JAGCNet user name and password):
  - *Go to* www.jagcnet.army.mil *web site.*
  - *Click the "Enter JAGCNet Intranet" button.*
  - *Click the "New Account" link.*
  - *Follow the instructions.*
- *If you already have a JAGCNet user name and password:*
  - *Go to* www.jagcnet.army.mil *web site.*
  - *Click the "Enter JAGCNet Intranet" button.*

e. <u>CLAMO's Organization</u>

The Chief of CLAMO heads the main office in Charlottesville, Virginia. CLAMO is also staffed with a Deputy Chief; a Director, Domestic Operational Law; a Director, Joint Operational Law; a Director, Interagency Operational Law; two Advanced Operational Law Studies Officers; a Legal Administrator; a CLAMO Staff NCO; and a part-time civilian automation technician.

The Deputy Chief provides assistance to judge advocates and units preparing to deploy or deployed on both exercises and real-world missions, as well as coordinating with the JAs and 27Ds at the CTCs to identify current legal issues and trends that rotational units confront. The Director, Domestic Operational Law, is the primary point of contact for legal issues arising out of domestic support operations and handles all Army National Guard and Reserve Component legal issues. The Director, Joint Operational Law, a Marine Corps officer, handles all Marine-specific and joint legal issues and is the primary coordinator, along with the Automation Technician, for CLAMO's databases and Deployed JA CD-ROM. The Director, Interagency Operational Law, a State Department Representative, addresses all interagency legal

issues. Lastly, the Advanced Operational Law Studies Officers, two post-Graduate Course Army majors, serve one-years tours 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. In addition to the specific responsibilities outlined above, all of these individuals provide assistance to deployed judge advocates and participate in the production of CLAMO's various publications.

Chief	LTC Pamela M. Stahl
Deputy Chief	CPT Daniel P. Saumur
Director, Domestic Op. Law	LTC Joseph S. Dice
Director, Joint Operational Law	Maj Cody M. Weston, USMC
Director, Interagency Operational Law	Mr. Bernie L. Seward
Automation Technician	Mr. Ben R. Morgan
Advanced Operational Law Studies	MAJ Russell L. Miller
	MAJ Laura K. Klein
Legal Administrator	CW2 Damon L. Collier
CLAMO Staff NCO	SSG James W. Smith

Judge Advocate Observer-Controllers at the Combat Training Centers (CTCs):

Battle Command Training Program (BCTP)	3 JA Observer-Trainers
Combat Maneuver Training Center (CMTC)	1 JA Observer-Controller
Joint Readiness Training Center (JRTC)	3 JA and 1 27D Observer-Controllers
National Training Center (NTC)	2 JA and 1 27D Observer-Controllers

More information on the CTCs and contact information for the individual observer-controllers and observer-trainers is available in CLAMO's *Combat Training Centers* database (see par. 2.C. above).

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 the Center for Law and Military Operations, 600 Massie Road, Charlottesville, Virginia 22903-1781. Call CLAMO at (434) 971-3278/9, DSN prefix 251. Visit the CLAMO web page at www.jagcnet.army.mil/clamo.

3. COMBAT TRAINING CENTER (CTC) PARTICIPATION

The Army employs four combat training centers (CTCs): The Joint Readiness Training Center (JRTC), The National Training Center (NTC), The Combat Maneuver Training Center (CMTC), 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 warfighting elements incorporating lessons from all recent operations including those in the Balkans, Afghanistan, and Iraq. This section will describe the CTCs and the JWFC, who they train, and the role of the judge advocate at each.

a. The Joint Readiness Training Center (JRTC)

1) JRTC is located at Fort Polk, Louisiana. This CTC focuses primarily on training light infantry brigade task forces for combat and peacekeeping missions. This is accomplished through the use of tough, realistic training conditions.

2) A combat rotation to JRTC consists of 16 days. This time is divided roughly as follows: Days 1-4 are spent in the Intermediate Staging Base (ISB) and days 5-16 are spent performing the exercise itself ("in the box").

3) A typical training scenario at JRTC includes a brigade-sized joint task force deploying to the fictional island of Aragon to support the friendly nation of Cortina. 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 usually include a combat hospital as well as a corps support group. The permissive or forced entry of coalition forces into Cortina is intended to improve stability in the region by quelling an ongoing insurgency in Cortina. A combat rotation generally has three operational phases. First is an insertion and counter-insurgency operation; second is a defense (in response to an Atlantican attack); and third is an attack into a state-of-the-art Military Operations in Urban Terrain (MOUT) complex.

4) Numerous forces augment the airborne, air assault, and light infantry brigades to provide flexibility and "light-heavy" integration. Such forces include mechanized and armor units, special operations forces, Air Force Air Combat Command forces, and Naval, Marine Aviation and Marine Air Naval Gunfire Liaison Company (ANGLICO) units.

5) Due to the combat environment, the different phases of the operation, and the various parties involved, JRTC is a legally rich training environment. In the Entry/Counter-Insurgency Phase, JAs will encounter issues such the international justification for the entry of U.S. and other friendly forces, use of facilities, justification for the use of force, and the collection of intelligence from civilians. This phase also stresses issues relating to rules of engagement (ROE), security assistance, nation assistance, and force protection. In the Defensive Operations phase, additional issues arise, such as noncombatant evacuation operations (NEOs), requests for political asylum, the handling of refugees, and other diplomatic issues. Atlantican attacks will also trigger application of the law of war. In the Offensive Operations Phase, JAs will encounter still more issues, such as maneuver damage claims, weapons and targeting issues, peculiarities relative to operations on urban terrain, the handling of prisoners of war, and issues relating to the occupation of territory.

6) While in Cortina, U.S. forces encounter many difficult situations dealing with civilians. Units will deal with civilians on the battlefield (COBs), including those supporting the Cortinian democratic government (pro-U.S.), Cortinians espousing the overthrow of the Cortinian government (anti-U.S.), Atlanticans posing as Cortinians (anti-U.S.), and neutrals who can be swayed. Rotational units will also encounter non-governmental organizations, competing governmental organizations, political parties, news media, Cortinian police and paramilitary forces, and uniformed and non-uniformed insurgent military forces.

7) Mission Rehearsal Exercises (MREs) are generally shorter in duration (approximately 12 days in length) but include many of the legally intense issues associated with a peacekeeping deployment. They are currently used to train both AD and NG units that are due to assume the rotations in Bosnia and Kosovo. These exercises attempt to replicate COB and issues that will be encountered by the unit in either Balkan location.

8) There are four observer/controllers (O/Cs) at JRTC, three JAs and one 27D NCO. Their role is to teach, coach, and mentor the Brigade Operational Law Teams (BOLTs) involved in the exercises in an effort to help rotational JAs and 27Ds improve their respective contributions to their unit's mission. After-action reviews (AARs) are conducted after each operational phase and a final exercise review occurs at the exercise conclusion. Later, a Take Home Packet capturing O/C observations is provided to the BOLT and the unit.

b. <u>The National Training Center (NTC)</u>

1) NTC is located at Fort Irwin, California, in the middle of the Mojave Desert. The NTC focuses primarily on training heavy Brigade Combat Teams (BCTs) in mid-to-high intensity conflict. This training is accomplished through the use of realistic joint and combined arms training in contingency-based scenarios. NTC provides comprehensive force-on-force maneuver and live fire training.

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 brigade elements 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. BCTs must be able to communicate through up to 8 communications corridors, evacuate casualties over 40 kilometers, and navigate at night in treacherous terrain with few distinguishable roads. Other environmental conditions such as a 40 to 50 degree diurnal

temperature range, winds over 45 knots, and constant exposure to the sun stresses every system and soldier to their limit.

3) The NTC's training scenario is set on the fictional island of Tierra Del Diablo. The discovery of weapons grade Uranium in the disputed region of Parumphistan (a province of Mojave) has led to increasing tensions between the U.S., the People's Democratic Republic of Krasnovia (a Warsaw pact nation and Soviet-style enemy), the Kingdom of Parumphia (a Krasnovian ally), and the Republic of Mojave (friendly, democratic, pro-western country). The Baja Republic to the south remains neutral. U.S. troops deploy to Mojave in support of the peace process and to aid in the defense of Mojave if necessary. The other group involved in the region is the Parumphian Peoples' Guerillas (PPG). This is a loosely organized group of terrorists / freedom fighters who want Parumphistan to return to Krasnovian control.

4) Each fiscal year, NTC conducts ten (10) rotations, each rotation consisting of 28 days. The first 5 days (RSOI 1-5) are spent generating combat power and integrating the BCT into the 52nd ID (M). During this period, there are host nation visits, demonstrations, stability and support operation (SASO) missions, media events, and attacks by the PPG, which challenge the BCT JA and civil-military operations cell. The second phase, training days 6-9, is force-on-force training where the BCT conducts high intensity operations with the Krasnovian forces. During this time period a BCT will normally conduct one defense in sector, two attacks and a movement to contact. The battle rhythm gives the BCT 24 hours between missions with two of the battles fought back-to-back. The third phase of the operation is live fire. This phase usually runs training days 9-14. NTC is the only facility in the U.S. Army that allows a full Brigade Combat Team to conduct both a live fire attack and a live fire defense integrating all of the Battle Operating Systems (BOSs), including direct air support from the Air Force. The BCT then fights through the ground upon which it conducts the live fire. Live fire may also include an attack on a local village by light forces or MPs to clear PPG. The final 8 days of the operation is regeneration of combat power and redeployment.

5) JAs can expect to encounter numerous legal issues during all phases of the rotation. During the RSOI phase, JAs can expect to encounter issues involving humanitarian assistance operations, ROE, escalation of force, international agreements, and claims as well as emergency legal assistance and trial counsel duties. In the Force-On-Force/Live Fire Training phases, issues relating to civilians on the battlefield, media representatives, non-governmental organization visits, local government concerns and requests, guerrilla activity, and law of armed conflict are typically encountered. Throughout the rotation, JAs are usually responsible for tracking fratricide and law of war violation reports and investigations. Regeneration has little legal "play," but this is where all of the "real world" issues tend to surface.

6) There are currently two JA O/Cs at NTC. One of the OCs is the primary JA trainer, responsible for teaching, coaching, and mentoring the JAs involved in the exercise. The other OC is a scenario writer, OC for the civilians on the battlefield (COB) program, and replicates the 52nd ID (M) SJA. There is a "Hummer top" AAR after each civilian event, and BCT-wide AARs at the end of RSOI and after each battle.

c. <u>The Combat Maneuver Training Center (CMTC)</u>

1) The CMTC is located at Hohenfels, Germany. Until recently, CMTC was loosely considered the "NTC of Europe," focusing on force-on-force maneuver training. However, CMTC now boasts state-of-the-art MOUT and ancillary training facilities that allow CMTC to provide training in both combat operations and military operations other than war (MOOTW). The CMTC provides training across the spectrum of conflict, using scenarios developed from past operations (Haiti, Somalia, Bosnia, and Kosovo, etc.) and mission rehearsals to prepare forces for deployment or likely contingency operations. The CMTC focuses on brigade and below commands and staffs, force-on-force maneuver training for armored and mechanized infantry battalions, company-level situational training exercises (STXs), and individual replacement training (IRT) for forces entering the Bosnia and Kosovo theaters of operations.

2) The maneuver "box" at the CMTC is 10 km x 20 km in area. The size of the "box" is ideal for battalion task force sized elements. Typically, a brigade headquarters will deploy to the CMTC and serve as the higher headquarters as each of its battalions rotates through their training exercise. At least twice during each rotation, two battalions operate in the "box" at one time. During these periods, the brigade headquarters also

deploys into the "box" and operates with the two battalions, conducting both defensive and offensive operations. The brigade judge advocate functions within the brigade headquarters, responding to legal issues both during "brigade ops" and when only one battalion is in rotation.

3) CMTC offers training in both high-intensity conflict (HIC), force-on-force scenarios, and low-to-mid-intensity conflict (LIC/MIC), and military operations other than war (MOOTW). Except for mission-specific rehearsal exercises, CMTC uses the same general scenario. The HIC portion generally involves three neighboring countries, Sowenia, Vilslakia, and Juraland. Sowenia is a fledgling democracy and an ally with the United States and NATO. The Vilslakian government was recently overthrown by a military coup and is now making claims to a small portion of Sowenia, inhabited mostly by ethnic Vilslakians. Juraland struggles to remain neutral. The scenario begins either as a PSO scenario that moves to HIC when the Vilslakians cross the international border or it begins as a HIC rotation once the Vilslakians have already crossed the border.

4) CMTC conducts approximately 5 brigade rotations (up to 63 days each) per year, each with imbedded battalion rotations (25 days each). CMTC also conducts two Mission Rehearsal Exercises (up to 28 days each) per year and teaches 4 Individual Readiness Training Situational Training Exercises (IRT STX) per month. Each brigade rotation is comprised of up to 3 task forces and 1 Cavalry squadron. Rotations typically employ the 3-5-14-3 day rotational task force window model: 3 day deployment/MILES draw; 5 day company focus lane training (STXs); 14 day force-on-OPFOR maneuver exercise in movement to contact/attack/defend stages; and a 3 day recovery.

5) JAs can expect to encounter numerous legal issues at CMTC, whether involved in HIC or LIC/MIC. Issues that routinely arise include weapons and targeting, claims resulting from maneuver damage, the Law of War, armed civilians, and civilian protection.

6) There is currently one JA O/C at CMTC. The role of the JA O/C is to teach, coach, and mentor the JAs involved in the exercise. An AAR is conducted at the culmination of the unit's training exercise and the unit is provided a Take Home Package.

d. <u>The Battle Command Training Program (BCTP)</u>

1) BCTP, the Army's capstone combat training center, is located at Fort Leavenworth, Kansas. BCTP supports realistic, stressful training for ASCC/ARFOR, Corps, Division, and Brigade commanders and supports Army components participating in joint exercises to assist the CSA in fulfilling his duties to provide trained and ready units to win decisively on the modern battlefield and to conduct contingency operations worldwide. BCTP uses simulation centers worldwide to train commands and staffs.

2) BCTP is composed of four Operations Groups (OPGPs A, B, C, and D) as well as a Headquarters, and the World Class Opposition Forces (WCOPFOR). The three JAs assigned to BCTP, the Operational Law Observer Controllers (OPLAW OCs), are assigned to the Headquarters and support each of the Operations Groups (OPGPs). Each OPGP is commanded by a colonel (Commander, Operations Group or COG) and has a unique mission. OPGPs A and B focus primarily on division and corps warfigther exercises (WFX). These two OPGPs have a combined capability to conduct 14 division WFXs per year. A corps WFX equals two division WFXs, as both OPGPs are required. They also conduct seminars, mission rehearsal exercises (MREs), and advanced-decision making exercises (ADMEs) for units deploying in support of peacekeeping operations. OPGP C focuses on training National Guard brigades and the Army's new Initial Brigade; and conducts 14 brigade rotations per year. Prior to each WFX conducted by OPGPs A, B, or C, each OPGP conducts a WFX seminar at Fort Leavenworth, Kansas or at the training unit's home station. OPGP D focuses on ASCC/ARFOR training and Army components participating in joint exercises. OPGP D does not normally conduct its own exercises. Instead, it observes its training audience while participating in a joint-conducted exercise.

3) BCTP differs from NTC, JRTC, and CMTC in that there is no tangible maneuver "box" at BCTP. Instead, all training is performed via computer simulation and centers around a notional computer-generated "box." Many spontaneous legal issues arise naturally during the course of a WFX (such as targeting issues,

fratricides, and civilians on the battlefield). Additionally, OPGPs A, B, and C insert legal and information operations issues (such as 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, non-governmental and international organization coordination) into the training scenario. JAs should also be prepared to face traditional issues, such as weapons utilization and targeting. The number of legal "events" inserted depends on the training unit and the SJA's training objectives; however, the JA Observer trainers have increased the number of events from about sixty to about ninety over the past training year. Many of the new events are focused at legal NCOs. The idea is to stress all members of a unit's legal team. Recent training units have reported experiencing a healthy degree of training stress. For corps and division WFXs, many of these issues are inserted via the "Green Cell," which is a neutral information operations exercise control cell tasked to bring greater training realism to the exercise. Normally, two JAs will be tasked to support the contractors in the "Green Cell" to provide legal guidance regarding the information operations issues and to insert the legal/operational law issues into the WFX.

4) Approximately 100 days before an OPGP A, B, or C exercise actually begins, the OPGP plans and executes a five to seven day Battle Command Seminar at Fort Leavenworth, Kansas. The Seminar is designed to afford the CG an opportunity to focus on the military decision-making process (MDMP) and build his battle command staff. A reduced staff from the training unit deploys to Fort Leavenworth, Kansas, to either the Battle Seminar Facility (for OPGPs A and B seminars) or the Leadership Development Center (for OPGP C Seminars), where they focus on doctrine and tactics. TRADOC Regulation 350-50-3 requires the Staff Judge Advocate and the Chief, Operational Law, attend the Battle Command Seminar.

5) The nature of operations at BCTP varies, as each WFX is geared to the training commander's mission-essential task list (METL). Once the exercise actually begins, the JAs working in the "Green Cell" insert events into the exercise and the BCTP OC team observes the training unit's response to these and any naturally occurring legal events during the WFX.

6) Every OPGP A, B, or C rotation includes at least two formal COG-lead AARs, lasting about 2 hours. In addition, the judge advocate OC team conducts an informal AAR for the JAs undergoing training.

4. DEPLOYMENT PREPARATION

Be prepared. Once the order comes, it's too late![450]

See the chapter on Checklists in this Handbook for general and core legal discipline-specific Predeployment Checklists.

Deployment preparation falls into two categories: (1) General and (2) 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 predeployment preparation is the key to success. There are many tasks the operational judge advocate, trial counsel/Brigade Operational Law Team (BOLT) Chief, and other attorneys can perform now and on a regular basis to better prepare them for a short-notice deployment. A few examples include:

- Have a predeployment SOP and checklists and rehearse them.
- War-game deployments. Walk up the escalating scale of contingencies with the Staff Judge Advocate. There should be an office-level plan detailing who will deploy and how deployed JAs positions will be back filled and/or their duties and responsibilities reassigned. This is a prime opportunity to tie in nearby Reserve Component JAs and develop a working relationship with them prior to the need arising.
- Have a "battle box" loaded with legal references, materials, the E-JAWS (Electronic Judge Advocate Warfighting System) and its supporting equipment, and office supplies.

[450] Major Dale N. Johnson, Joint Task Force Aguila: Legal Operations After Action Review (AAR) (March 1999) (unpublished compilation of Hurricane Mitch disaster relief materials, on file with CLAMO).

- Run an efficient Soldier Readiness Program (SRP) for supported units, saving last minute waves of wills, powers of attorneys, family support plan issues, etc.

Whether deploying to a Combat Training Center, another exercise, or an actual operation, the keys to predeployment preparation remain the same:

- Doctrine
- Training
- Leadership and Integration
- Legal Support Plan (Organization, Materiel and Soldiers considerations)

a. <u>Doctrine</u>

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 Judge Advocate, organizing to support Army operations, operational law and the core legal disciplines, and legal support in theater operations, war, operations other than war, and domestic operations. It provides the basis for legal training, organizational, and materiel development. It contains guidance for Staff Judge Advocates and other legal personnel, as well as for commanders and their staffs. It implements relevant Joint and Army doctrine, incorporates lessons learned from recent operations, and conforms to Army keystone doctrine.

b. <u>Training</u>

There is no substitute for tough, realistic training. Preparation for deployment requires training of three target audiences: judge advocate personnel, commanders and their staffs, and troops. Training methods include briefings, individual training, leader/commander training, and collective training.

(1) Judge Advocate Personnel

Staff/Command Judge Advocates 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 or JAG 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 Mission Essential Task List (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—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 so. The training program should be a cycle of assessment, training, evaluation, and retraining.

c. Common Soldier Task Training (CTT).[451] Training must address both the soldier and the lawyer—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 supported units.

d. Legal Skills. In today's legally complex operations and conflicts, judge advocates must be "jacks of all trades," proficient in all of the core legal disciplines and legal functional areas.[452] Today's operational

[451] *See, e.g.,* DEP'T OF THE ARMY STP 21-1-SMCT, SOLDIER'S MANUAL OF COMMON TASKS, SKILL LEVEL 1 (October 1994).

[452] *See* DEP'T OF THE 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,

environment often requires JAs and their enlisted paralegals to be geographically dispersed and to operate individually. Legal support often sees JAs and their paralegal dispersed and operating alone. 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"), know where to turn and research to get answers and guidance, initiate investigations and actions, and all other aspects of the delivery of legal services in a potentially austere environment.

e. Types (unit, office, individual). Legal personnel should use all training methods available. Unit collective training is a prime mode of conducting common task training. Office professional 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, JAs should deploy and exercise their technical chains. Ultimately all Judge Advocates must proactively seek out resources, reading materials and opportunities to train themselves.

(2) Commanders and Staff

JAs know to train commanders and staffs in the critical operational issues of rules of engagement (ROE)[453] and law of war (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 Soldiers and Sailors Civil Relief Act (SSCRA), basic tax filing and exemption considerations that accompany a deployed environment, and more.

(3) Soldiers

Judge Advocate conducted ROE, Law of War 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. Instruction on the concept and normal contents of general orders helps soldiers to understand the deployed disciplinary environment.

c. <u>Leadership and Integration</u>

A critical lesson learned and observation from most every deployment is the importance of predeployment 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 before an actual mission arises should include attending regularly scheduled meetings (training, command and staff), social events, field exercises, and key training events. Legal personnel should ensure they, legal issues, and reporting requirements and formats (such as fratricides, law of war violations, and civilian casualties) are integrated into unit standing operating procedures (SOPs). Mission-specific integration should include attending planning meetings, situational updates, commander back briefs, and orders briefings.

d. <u>Legal Support Plan (Organization, Materiel, and Soldiers considerations)</u>

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 a Staff or Command Judge Advocate in preparing for deployment.

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

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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.

[453] *See* CENTER FOR LAW AND MILITARY OPERATIONS, RULES OF ENGAGEMENT (ROE) HANDBOOK FOR JUDGE ADVOCATES, Ch.2 (1 May 2000) (for details on ROE training).

equipment needed, as well as where they are needed, and when and how they will get there. The plan should account for including legal personnel in the TPFDD (Time Phased Force Deployment Data) so they arrive in theater at appropriate times, meet load-out deadlines for vehicles and equipment, check with the signal officer as to what communications support will be available throughout the theater, etc. The legal support plan should be tied to both the LPB and METT-TC analyses. The *Legal Annex* to the OPLAN/OPORD is a formal, written distillation of the legal support plan.

(1) Legal Preparation of the Battlefield (LPB)

Even though the legal issues confronted by a JA in operations are varied, they are, to a great extent, predictable. 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 after action reports and lessons learned materials gathered and published by CLAMO. Another, proactive method of predicting legal issues is to conduct *Legal Preparation of the Battlefield*, or *LPB*.[454] LPB 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 (Figure 1).

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 staff. This is done in the format of a *legal estimate*.

The resulting LPB product should also be used to create a *legal support plan*. As operations change over time and by phase, so will the type and quantity of legal issues change. 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.

The type and quantity of legal issues faced by JAs, as well as the quality of information available upon which to base analysis, and hence the basis of legal opinions, will vary by phase. This lesson was learned in Bosnia[455] and the Hurricane Mitch relief operations,[456] among others. 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" (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.

(2) METT-TC

The Staff or Command Judge Advocate (SJA or CJA) must be part of the Military Decision Making Process (MDMP) and its seven-step process: (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.[457] Functions performed by staff members, to include the SJA/CJA, 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. *METT-TC* is an analytical tool

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[454] Legal Preparation of the Battlefield (LPB) is a concept developed by 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., Sep. 1998, at 36.

[455] *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).

[456] *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).

[457] *See* 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).

critical to conducting mission analysis, creating the legal estimate, and creating a legal support plan. METT-TC requires the staff officer to consider the factors of Mission, Enemy, Troops, Terrain, Time available, and Civilians. While LPB maps out the types and quantities of legal issues expected to arise through the operation, 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.

(3) The Resulting Product: Legal Annex to the Operations Plan/Order (OPLAN/OPORD)

LPB is a device for predicting the type and quantity of legal issues that will arise through the phases of an operation. LPB is interrelated with METT-TC analysis, as LPB is based in part on the projected phases of the operation. METT-TC 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 *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 judge advocate assets—the decision as to *who* (which specific judge advocates 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 par. 2.C. above for instructions on accessing the CLAMO database) and Deployed JA CD-ROM.

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.

NOTES

CHAPTER 29

INTERNET WEB SITES USEFUL FOR OPERATIONAL LAWYERS

Acquisition Deskbook Homepage http://www.deskbook.osd.mil

The United States Agency for International Development. www.usaid.gov

Air Force

Material Command www.afmc.wpafb.af.mil

Publications http://www.af.mil/lib (Requires authorization)

Aerospace Power Journal http://www.airpower.maxwell.af.mil

Army

Acquisition Corps http://dacm.rdaisa.army.mil/

Homepage http://www.army.mil/

Material Command http://www.amc.army.mil

Regulations http://www.usapa.army.mil

Field Manuals/TNG Cir./ Graphic TNG aids http://www-cgsc.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/

Battle Labs (TRADOC) http://battlelabs.monroe.army.mil/pam525/pam525.htm

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/

China News Digest http://www.cnd.org

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.gao.gov/decisions (Permission required to access)

Congressional E-mail Directory http://www.webslingerz.com/jhoffman/congress-e-mail.html

Congress

www.senate.gov

http://www.house.gov

http://thomas.loc.gov/

Congressional Record http://www.access.gpo.gov/su_docs/

Country Studies (DoS) http://libfind.unl.edu:2020 (Authorization required)

Country Studies (Library of Congress) http://lcweb2.loc.gov/frd/cs/

Court opinions

http://www.ca11.uscourts.gov/opinions/opinions.htm (11th Circuit only)

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/dp/dars/dfars.html

Defense Financial Accounting System (DFAS) www.dfas.mil/

Defense Intelligence Agency http://www.dia.mil

Defense Link http://www.defenselink.mil

Defense Technical Information Web http://www.dtic.mil/dtiw/

Demining http://www.demining.brtrc.com

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://www.arnet.gov/far (includes FAR Circulars)

Federal Acquisition Virtual Library http://www.arnet.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.)

Force XXI http://www.dfcc.army.mil

Forces Command (FORSCOM) http:// www.forscom.army.mil/jag

Foreign Affairs http://www.foreignaffairs.org

Foreign Military Studies Office http://call.army.mil/fmso/fmso.htm

France Defense http://www.ensmp.fr/~scherer/adminet/min/def/

General Accounting Office http://www.gao.gov

GAO Comptroller General Decisions http://www.gao.gov/decisions (Need authorization)

General Service Administration http://www.gsa.gov (contains over 1,400 site links)

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 Rights http://www1.umn.edu/humanrts (Univ. Of Mn. Human Rights library)

Industrial College of the Armed Forces http://www.ndu.edu/ndu/icaf (Authorization required)

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/scripts/index.asp

International Laws and Treaties

http://www.fletcher.tufts.edu/

gopher://gopher.peachnet.edu (Eastern European Info)

http://www.jura.uni-sb.de/english/ (contains German & European codes)

International Security Network http://www.isn.ethz.ch

Jaffe 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.usmc.mil or 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/ndu/nwc/nwchp.html

NATO http://www.nato.int/

NavyOnLine http://www.ncts.navy.mil/

Naval Postgraduate School http://www.nps.navy.mil/

Net Surfer Digest http://www.netsurf.com/nsd

New York Times http://www.nytimes.com/

See also http://nytimesfax.com

Organization of American States http://www.oas.org/

Partnership for Peace Information Management System http://www.ppc.pims.org/

Personnel Command (Army) http://www-perscom.army.mil

RAND Corporation http://www.rand.org/

Search tools http://www.lycos.com

http://www.go.com

http://www.my.excite.com

http://www.altavista.com

http://www.yahoo.com

http://www.google.com/

http://www.pointcom.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.se/

Time Magazine http://www.time.com/time/

TRADOC http://www-tradoc.army.mil/

Treaties *See* United Nations

Unified Commands

http://www.acom.mil (JFCOM)

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.spacecom.af.mil/usspace/ (SPACECOM)

http://www.socom.mil (SOCOM)

United Nations http://www.un.org/

http://www.un.org/depts/dhl/resguide/iltreat.htm#uhts (provides direct access to the UN's Treaty data base)

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.info.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.uscode/uscode.house.gov/usc.htm

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://www.usinfo.state.gov

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

West's Legal Directory http://www.lawoffice.com/

White House http://www.whitehouse.gov/

World News Connection http://wnc.fedworld.gov/

Yahoo WWW Server http://dir.yahoo.com/government/law/

NOTES

GLOSSARY

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
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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