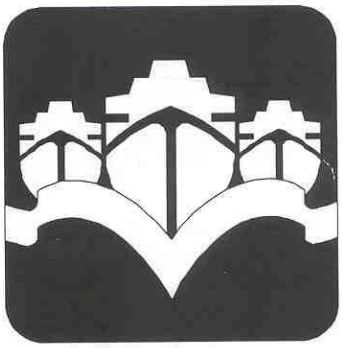
# OPERATIONAL LAW HANDBOOK

# 2002



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# OPERATIONAL LAW HANDBOOK
# (2002)

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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 100-5 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, and sailors 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 School (TJAGSA). Send comments, suggestions, and work product from the field to TJAGSA, International and Operational Law Department, Attention: Capt Jeanne Meyer, Charlottesville, Virginia 22903-1781. To gain more detailed information or to discuss an issue with the author of a particular chapter or appendix call Capt Meyer at DSN 934-7115, ext. 374; Commercial (804) 972-6374; or email jeanne.meyer@hqda.army.mil.

The 2002 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 2002 edition is also linked to the CLAMO General database under the keyword Operational Law Handbook – 2002 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

## 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, the United Nations Charter provides the primary authority for use of force under the auspices of either Security Council sanctions (Chapter VII enforcement) or self defense pursuant to Article 51 (which sanctions acts of both individual and collective self defense).

### Policy and Legal Considerations

Before committing U.S. military force abroad, decision-makers must make a number of fundamental policy determinations. The National Command Authority (NCA) 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)).

Though these issues will normally be resolved at the NCA level, it is nevertheless essential that judge advocates understand the basic concepts involved in a determination to use force. Using this 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 their conduct 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.

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.

### 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]

as well as other multilateral international agreements which specifically incorporate nonintervention as a basis for mutual cooperation.

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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 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."

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."

## 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 sanctioned 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.

### UN Enforcement Actions (Chapter VII)

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. Using this authority over the past decade, the Security Council has taken the following actions to restore peace and security:

-- Security Council Resolution 678 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 Iraqi invasion of Kuwait, pursuant to the Security Council's authority under Chapter VII.

-- Security Council Resolution 794 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 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 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 . . ."

### 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.

## SELF DEFENSE

The inherent 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.

## Customary International Law and the UN Charter

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).

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.

### *Protection of Nationals*

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 the chapter on Non-Combatant Evacuation Operations in this Handbook.

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.

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).

*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.

*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.

**Collective Self Defense**

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 no request by the *de jure* government for assistance.

*Collective Defense Treaties and Bilateral Military Assistance Agreements.*

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).

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.

**Anticipatory Self Defense Under Customary Law**

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 was not required to absorb the "first hit" before it could resort to the use of force in self defense to repel an imminent attack.

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.

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.

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.

**DOMESTIC LAW AND THE USE OF FORCE: THE WAR POWERS RESOLUTION**

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.

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.

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.

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.

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.

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 (i.e., the WPR's 60 day clock).

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.

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.

# 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 GP 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 1993 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 1972 Biological Weapons Convention].
12. 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 1980 Conventional Weapons Treaty].
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, Operation of the Defense Acquisition System, 23 October 2000.
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.


## INTRODUCTION

This Chapter will describe in detail the restrictions placed upon military members 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 a Law of War Teaching Outline and a Troop Information Outline.

**PURPOSES AND BASIC PRINCIPLES OF THE LAW OF WAR**

The fundamental purposes of the law of war are both 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 armed belligerents; and

3. facilitating the restoration of peace.

The functional purposes include:

1. preventing the deterioration of good order and discipline in the unit;

2. maintaining the humanity of the soldiers involved in the conflict; and

3. maintaining the support of the public for the conflict.

To further the above ends, the Law of War rests on four basic principles:

**Principle of Military Necessity or Military Objective -** This principle states that attacks may be made only against those targets which 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.*

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.

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.

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 future use of an object.

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.

Criminal Defense. Military necessity has been urged as a defense to law of war violations, but generally has been rejected as a defense for acts forbidden by customary and conventional laws of war. Rationale: laws of war were crafted to include consideration of military necessity. Look to whether international law allows targeting of a person or property:

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

Protected Places - The Rendulic Rule. The law of war typically allows destruction of civilian property if military circumstances necessitate such destruction. (FM 27-10, para. 56 and 58.) The circumstances justifying destruction of protected property are those of "urgent military necessity" as they appear to the commander at the time of the decision. See IX Nuremberg Military Tribunals, *Trials of War Criminals Before the Nuremberg Military Tribunals*, 1113 (1950). The Tribunal dismissed charges that General Lothar Rendulic unlawfully destroyed civilian property via a "scorched earth" policy because "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: Do not destroy real or personal property of civilians "except where such destruction is rendered absolutely necessary by military operations. (GC, art. 53.) It is "forbidden . . . to destroy or seize the enemy's property . . unless demanded by the necessities of war." (HR, art. 23g.)

There may be situations where because of poor intelligence or the failure of the enemy to abide by the law of war, mistakes are made concerning the status of a site: Example: Al Firdus Bunker. During the Persian Gulf War, planners identified this bunker as a military objective. Barbed wire surrounded the complex, it was camouflaged, and armed sentries guarded its entrance and exit points. Unknown to coalition planners, however, Iraqi civilians used the shelter as nighttime sleeping quarters. The complex was bombed, 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 a reasonable assessment that the target was a military. Although the attack unfortunately resulted in numerous civilian deaths, (and that in hindsight, the attack might have been disproportionate to the military advantage gained—had the attackers known of the civilians) there was no international law violation because the attackers, at the time of the attack, acted reasonably. *See* DEPARTMENT OF DEFENSE, CONDUCT OF THE PERSIAN GULF WAR, FINAL REPORT TO CONGRESS 615-16 (1992).

**Principle of Unnecessary Suffering or Humanity** - "It is especially forbidden . . . to employ arms, projectiles or material calculated to cause unnecessary suffering." (HR, art. 23e.) This concept also extends to unnecessary destruction of property. Combatants may not use arms that are per se calculated to cause unnecessary suffering (e.g., projectiles filled with glass, irregularly shaped bullets, dum-dum rounds, lances with barbed heads), and may not use otherwise lawful arms in a manner that causes unnecessary suffering; for example, with the intent to cause unnecessary suffering.

**Principle of Proportionality** - The anticipated loss of life and damage to property incidental to attacks must not be **excessive** in relation to the concrete and direct military advantage expected to be gained. (FM 27-10, para. 41, change 1.)

Protocol I. Under GP I, Article 51 (*Protection of the civilian population*), paragraph 5(b) prohibits "indiscriminate attacks," defined in part as an attack where incidental injury to civilians or incidental damage to civilian objects would be "excessive in relation to the concrete and direct military advantage anticipated." Under GP I, Article 57 (*Precautions in the attack*), paragraph (2)(b) requires planners to cancel an attack in the same circumstances. The U.S. considers these provisions customary international law.

Example: During Operation Allied Force, Serbian civilians painted red targets on themselves and congregated on key bridges over the Danube River. These bridges were military objectives because they enabled the Serbs to quickly transfer military forces. The Commander making the targeting decision had to balance the concrete and direct military advantage gained by destruction of the bridge against the anticipated number of civilian deaths resulting from the attack.

Incidental Injury and Collateral Damage. 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 not 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, GP I, Article 51(5) describes indiscriminate attacks as those causing "incidental loss of civilian life . . . excessive . . . to . . . the military advantage anticipated."

Judging Commanders. It may be a grave breach of GP I to launch an attack that a commander *knows* will cause excessive incidental damage in relation to the military advantage gained. The requirement is for a commander to act *reasonably.* Those who plan or decide upon an attack, therefore, must take all reasonable steps to ensure not only that the objectives are identified as military objectives or defended places . . . but also that these objectives may be attacked without probable losses in lives and damage to property disproportionate to the military advantage anticipated. (FM 27-10, para. 41.)

In judging a commander's actions one must look at the situation as the commander saw it in light of all circumstances. *See* A.P.V. Rogers, *Law on the Battlefield* 66 (1996) and discussion of the "Rendulic Rule," above. But based on case law and modern applications, the test is not entirely subjective—"reasonableness" implies an objective element as well. In this regard, two questions seem relevant. First, did the commander reasonably gather information to determine whether the target was a military objective and that the incidental damage would not be disproportionate? Second, did the commander act reasonably based on the gathered information? Of course, factors such as time, available staff, and combat conditions affecting the commander must also weigh in the analysis.

**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. (GP I, Art. 48) GP I prohibits "indiscriminate attacks." Under Article 51, paragraph 4, these are attacks that: are "not directed against a specific military objective," (e.g., Iraqi SCUD missile attacks on Israeli and Saudi cities during the Persian Gulf War); "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..."(GP I, art. 51, para. 5(a))); or "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 (GP I, art. 56) or collateral damage excessive in relation to concrete and direct military advantage (GP I, art. 51, para. 5(b)); and "consequently, in each case are of a nature to strike military objectives and civilians or civilian objects without distinction."

**APPLICATION OF THE LAW OF WAR**

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. FM 27-10, para. 8. It also applies to cases of partial or total occupation. This threshold is codified in common article 2 of the Geneva Conventions. Armed conflicts such as the Falklands War, the Iran-Iraq War, and Desert Storm were clearly international armed conflicts to which the Law of War applied. While the 1977 Protocol I to the 1949 Geneva Conventions has expanded this scope of application to include certain wars of "national liberation," the U.S. is not a Party to the Protocol and does not recognize this extension of the Law of War.

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 hinges on whether the peace operations forces undertake a combatant role. It has thus far been the U.S., UN, and NATO opinion that their forces have not become combatants, despite carrying out some offensive-type operations (e.g. Task Force Ranger in Somalia, Operations Deny Flight and Deliberate Force in Bosnia). Despite the legal inapplicability of the Law of War to these operations, 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.

This approach is consistent with DoD policy 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." 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." Memorandum of W. Hays Parks to the Judge Advocate General of the Army, 1 October 1990.

**SOURCES OF THE LAW OF WAR.**

The Law of The Hague (ref. (1) and (2)). Regulates "methods and means" of warfare—prohibitions against using certain weapons such as poison; and humanitarian concerns such as warning the civilian population before a bombardment. 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.) Article 22 states that the means of injuring the enemy are not unlimited.

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.

1977 Geneva Protocols (ref. (7)). Although the U.S. has not ratified GP I and II, judge advocates must be aware that approximately 150 nations have ratified the Protocols (thus most of the 185 member states of the UN). The Protocols will come into play in most international operations. U.S. Commanders must be aware that many allied forces are under a legal obligation to comply with the Protocols. Furthermore, the U.S. considers many of the provisions of the Protocols to be applicable as customary international law. The impetus for drafting the Protocols was the International Committee of the Red Cross' belief that the four Geneva Conventions and the Hague Regulations insufficiently covered certain areas of warfare in the conflicts following WWII, specifically aerial bombardments, protection of civilians, and wars of national liberation. New or expanded areas of definition and protection contained in Protocols include provisions for: medical aircraft, wounded and sick, prisoners of war, protections of the natural environment, works and installations containing dangerous forces, journalists, protections of civilians from indiscriminate attack, and legal review of weapons.

The U.S. views the following GP I articles as either legally binding as customary international law or acceptable practice though not legally binding: 5 (appointment of protecting powers); 10 (equal protection of wounded, sick, and shipwrecked); 11 (guidelines for medical procedures); 12-34 (medical units, aircraft, ships, missing and dead persons); 35(1)(2) (limiting methods and means of warfare); 37 (perfidy prohibitions); 38 (prohibition against improper use of protected emblems); 45 (prisoner of war presumption for those who participate in the hostilities); 51 (protection of the civilian population, except para. 6 -- reprisals); 52 (general protection of civilian objects); 54 (protection of objects indispensable to the survival of the civilian population); 57-60 (precautions in attack, undefended localities, and demilitarized zones); 62 (civil defense protection); 63 (civil defense in occupied territories); 70 (relief actions); 73-89 (treatment of persons in the power of a party to the conflict; women and children; and duties regarding implementation of GPI).

The U.S. specifically objects to articles: 1(4) (GP I applicability to certain types of armed conflicts - wars of national liberation from "colonial domination," "alien occupation," and "racist regimes"); 35(3) (environmental limitations on means and methods of warfare); 39(2) (limits on the use of enemy flags and insignia); 44 (expansion of definition of combatants, relaxing of requirement to wear fixed distinctive insignia recognizable at a distance; reducing threshold of lawful combatants status to requirement to carry arms openly during military engagement or in military deployment preceding an attack; when visible to an adversary); 47 (non-protection of mercenaries); 55 (protection of the natural environment) and 56 (protection of works and installations containing dangerous forces). *See* Michael J. Matheson, The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions, 2 Am. U. J. Int'l L. & Pol'y 419, 420 (1987)

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

Gas (ref. (8) and (9)). Geneva Protocol of 1925 prohibits use in war of asphyxiating, poisonous, or other gases . . . . U.S. reserved the right to respond with chemical weapons to a chemical attack by the enemy. The Chemical Weapons Convention (CWC), article I(1), prohibits production, stockpiling, and use (even in retaliation). The U.S. ratified the CWC in April 1997.

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 does regard 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.

Biological Weapons (ref. (11)). Biological weapons are prohibited by the 1925 Geneva Protocol. In addition, prohibitions on their use in retaliation, as well as on production, manufacture, and stockpiling, are included in the 1972 Biological Weapons Convention.

Conventional Weapons (ref. (12)). The 1980 Conventional Weapons Treaty restricts or prohibits the use of certain weapons deemed to cause unnecessary suffering or to be indiscriminate: Protocol I – non-detectable fragments; Protocol II - mines, booby traps and other devices; Protocol III - incendiaries; and Protocol IV - laser weapons. The U.S. has ratified the treaty by ratifying Protocols I and II. The Senate is currently reviewing Protocols III and IV and amendments

to Protocol II for its advice and consent to ratification. The treaty is often referred to as the UNCCW - United Nations Convention on Certain Conventional Weapons.

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

## THE CONDUCT OF HOSTILTIES

### Lawful Combatants and Unprivileged Belligerents

**Combatants**. Anyone engaging in hostilities in an armed conflict on behalf of a party to the conflict. Combatants are lawful targets unless "out of combat."

Lawful Combatants. Receive protections of Geneva Conventions, specifically, the GWS, GWS (Sea), and GPW; gain "combatant immunity" for their warlike acts; and become prisoners of war if captured.

Geneva Convention of 1949 Definition. (GPW, art. 4; GWS, art. 13.) Combatants include: armed forces of a Party to the conflict; militia, volunteer corps, and organized resistance movements belonging to a 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.

Protocol I Definition. Article 43 states that members of the armed forces of a party to the conflict, except medical personnel and chaplains, are combatants. Article 44(3) of GP I allows that a belligerent attains combatant status by merely carrying his arms openly during each military engagement, and when visible to an adversary while deploying for an attack. GP I thus drops the requirement for a fixed recognizable sign. The U.S. believes this does not reflect customary international law and diminishes the distinction between combatants and civilians, thus undercutting the effectiveness of the Law of War.

Unprivileged belligerents. May be treated as criminals under the domestic law of the captor. Unprivileged belligerents may include spies, saboteurs, or civilians who are participating in the hostilities.

Forbidden Conduct with Respect to Enemy Combatants and Nationals

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.

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 leadership, however, is not assassination. See W. Hays Parks, *Memorandum of Law: Executive Order 12333 and Assassination*, Army Law. Dec. 1989, at 4.

**Non-combatants**. The law of war prohibits attacks on non-combatants. Among others, non-combatants include civilians, medical personnel, chaplains, and those out of combat – including prisoners of war and the wounded and sick.

## METHODS AND MEANS OF WARFARE/WEAPONS

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

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 GP I.

The Test. Is the acquisition and procurement of the weapon consistent with all applicable treaties, customary international law, and the law of armed conflict? (DoD Instr. 5000.2, para. 4.7.3.1.4.) In the TJAG reviews, the discussion will often focus on whether the suffering occasioned by the use of the weapon is needless, superfluous, or grossly disproportionate to the advantage gained by its use.

Weapons may be illegal:

*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.)

By improper use. Using an otherwise legal weapon in a manner to cause unnecessary suffering. Example: a conventional air strike against a military objective where civilians are nearby vs. use of a more precise targeting method that is equally available - if choice is made with intent to cause unnecessary suffering. (The LOW does not mandate the use of guided munitions.)

By agreement or prohibited by specific treaties. Example: certain land mines, booby traps, and laser weapons are prohibited under the Protocols to the 1980 Conventional Weapons Treaty.

Small Arms Projectiles. Must not be exploding or expanding projectiles. The Declaration of St. Petersburg of 1868 prohibits exploding rounds of less than 400 grams (14 ounces). Expanding rounds were prohibited by an 1899 Hague Declaration (of which U.S. was never a party). U.S. practice, however, accedes to this prohibition as being customary international law. State practice is to use full metal-jacketed small arms ammunition (which reduces bullet expansion on impact).

Hollow point ammunition. Typically, this is semi-jacketed ammunition that is designed to expand dramatically upon impact. This ammunition is prohibited for use in armed conflict by customary international law and the treaties 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 to noncombatants and protected property (hostage rescue, aircraft security). "Matchking" ammunition - has a hollow tip—but is not expansive on impact. Tip is designed to enhance accuracy only and does not cause unnecessary suffering.

High Velocity Small Caliber Arms. Early controversy about M-16 causing unnecessary suffering due to movement of the high velocity round upon impact. Tests concluded the rounds did not cause unnecessary suffering.

Sniper rifles, .50 caliber machine guns, and shotguns. Much "mythology" exists about the lawfulness of these weapon systems. Bottom line: they are lawful weapons, although rules of engagement (policy and tactics) may limit their use.

Fragmentation. (FM 27-10, para 34.) Legal unless used in an illegal manner (on a protected target or in a manner calculated to cause unnecessary suffering). Unlawful if fragments are undetectable by X-ray (Protocol I, 1980 Conventional Weapons Treaty).

Land Mines and Booby Traps. Lawful if properly used, however, international process underway to outlaw all antipersonnel land mines.

Indiscriminate. Primary legal concern: indiscriminate use that endangers civilian population. Articles 4 and 5, Protocol II of the 1980 Conventional Weapons Treaty, restrict placement of mines and booby traps in areas of "civilian concentration."

Remotely delivered mines (those planted by air, artillery, etc.): Only used against military objectives; and then only if their location can be accurately recorded and if they are self-neutralizing or self-destructing.

Non-remotely delivered mines, booby traps, and other devices: May not be used in towns or cities or other places where concentrations of civilians are present unless: they are placed in the vicinity of a military objective under the control of an adverse party; or measures are in place to protect civilians from their effects (posting of signs etc.).

Booby Traps: Amended Protocol II of the 1980 Conventional Weapons Treaty also prohibits use of booby traps on the dead, wounded, children's toys, medical supplies, and religious objects, among other objects (art. 6).

Amended Protocol II (Mines Protocol). The Senate gave its advice and consent to ratification of Amended Protocol II and the President subsequently signed the instrument of ratification in May 1999. Amended Protocol II:

(1) Expands the scope of the original Protocol to include internal armed conflicts;

(2) Requires that all remotely delivered anti-personnel land mines (APL) be equipped with self-destruct devices and backup self-deactivation features;

(3) Requires that all non-remotely delivered APL not equipped with such devices ("dumb mines") be used within controlled, marked, and monitored minefields (Falls short of President's APL policy statement of 16 May 1996 that prohibited U.S. military use of "dumb" APL except on the Korean Peninsula and in training);

(4) Requires that all APL be detectable using available technology;

(5) Requires that the party laying mines assume responsibility to ensure against their irresponsible or indiscriminate use; and

(6) Provides for means to enforce compliance. In his letter of Transmittal, the President emphasized his continued commitment to the elimination of all APL.

U.S. policy on anti-personnel land mines. 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; *see generally* Presidential Decision Directive 48 (on file with the Chairman, Joint Chiefs of Staff, Legal Counsel).

Ottawa Process. Initiated by the Canadian Foreign Minister. One hundred nations and assorted NGOs met in Oslo, Norway in September 1997 to draft the Convention on the Prohibition of the Use, Stockpiling, Production, and Transfer of Anti-Personnel Mines (APL) and on Their Destruction. The Convention was signed in Ottawa, Canada in December 1997. As of April 1999, 133 nations had signed the convention and 67 had ratified it. The treaty entered into force on 1 March 1999. Although the U.S. joined the Process in September of 1997, it withdrew when other countries would not allow exceptions for the use of APL mines in Korea and other uses of self-destructing/self neutralizing APL.

U.S. Developments. On 17 September 1997, the President announced the following U.S. initiatives in regards to anti-personnel land mines:

Develop alternatives to APL by the year 2003; field them in South Korea by 2006.

Appointed a Presidential advisor on land mines.

Pursue a ban on APL through the UN Conference on Disarmament.

Increase demining programs.

APL moratorium. Section 580 of the Foreign Operations Authorization Act of 1996 (110 Stat. 751) was to establish a moratorium on the use of antipersonnel land mines for one year beginning 12 February 1999. Section 1236 of the FY 99 DoD Authorization Act repealed Section 580: no moratorium will take place.

Incendiaries. (FM 27-10, para. 36.) Examples: Napalm, flame-throwers, tracer rounds, and white phosphorous. None of these are illegal per se or illegal by treaty. The only U.S. policy guidance is found in paragraph 36 of FM 27-10 which warns that they should "not be used in such a way as to cause unnecessary suffering."

Napalm and Flame-throwers. Designed for use against armored vehicles, bunkers, and built-up emplacements.

White phosphorous. Designed for igniting flammable targets such as fuel, supplies, and ammunition and for use as a smoke agent. White phosphorous (Willy Pete) artillery and mortar ammunition is often used to mark targets for aerial bombardment.

Protocol III of the 1980 Conventional Weapons Convention. Prohibits use of air-delivered incendiary weapons on military objectives located within concentrations of civilians. Has not been ratified by the U.S. The U.S. is currently considering ratifying the protocol - with a reservation that incendiary weapons may be used within areas of civilian concentrations, if their use will result in fewer civilian casualties. For example: the use of incendiary weapons against a chemical munitions factory in a city could cause fewer incidental civilian casualties. Conventional explosives would probably disperse the chemicals, where incendiary munitions would burn up the chemicals.

Lasers. U.S. Policy (announced by SECDEF in Sep. 95) prohibits use of lasers specifically designed, as their sole combat function or as one of their combat functions, to cause permanent blindness to unenhanced vision. Recognizes that collateral or incidental damage may occur as the result of legitimate military use of lasers (range-finding, targeting). This policy mirrors that found in Protocol IV of the 1980 Conventional Weapons Treaty (this portion not yet ratified by U.S.). The Senate is reviewing the Protocol for its advice and consent to ratification.

Chemical Weapons. (FM 27-10, para. 37.) Poison has been outlawed for thousands of years. Considered a treacherous means of warfare. Problem—once unleashed it is hard to control. (HR, art. 23a.)

The 1925 Geneva Protocol. (FM 27-10, para 38, change 1.) Applies to all international armed conflicts. Prohibits use of lethal, incapacitating, and biological agents. Protocol prohibits use of "asphyxiating, poisonous, or other gases and all analogous liquids, materials or devices. . . ." The U.S. considers the 1925 Geneva Protocol as applying to both lethal and incapacitating chemical agents. Incapacitating Agents: Those chemical agents producing symptoms that persist for hours or even days after exposure to the agent has terminated. U.S. views riot control agents as having a "transient" effect—and thus are NOT incapacitating agents. Therefore, the treaty does not prohibit their use in war. (Other nations disagree with interpretation.) There are, however, policy limitations that are discussed below. Under the Geneva Protocol of 1925 the U.S. reserved right to use lethal or incapacitating gases if the other side uses them first. (FM 27-10, para. 38b, change 1.) Presidential approval required for use. (E.O. 11850, 40 Fed. Reg. 16187 (1975); FM 27-10, para. 38c, change 1.) HOWEVER THE U.S. RATIFIED THE CHEMICAL WEAPONS CONVENTION (CWC) IN 1997. THE CWC DOES NOT ALLOW THIS "SECOND" USE. Riot Control Agents: U.S. has an understanding to the Treaty that these are not prohibited.

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.

EO 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.

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.)

1993 Chemical Weapons Convention (CWC) (ref. 9). The CWC was ratified by U.S. and came into force in April 1997.

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) not allowed; 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.

RCA Controversy. The Chemical Weapons Convention prohibits RCA use as "method of warfare." "Method of warfare" is undefined, however some argue the phrase includes any actions that involve "combatants" - including traditional hostage rescue/SAR missions and human shield scenarios previously allowed by EO 11850. The rationale for the prohibition - we do not want to give states the opportunity for subterfuge. Keep all chemical equipment off the battlefield, even if it is supposedly only for use with RCA. Secondly, we do not want an appearance problem - with combatants confusing RCA equipment as equipment intended for chemical warfare. EO 11850 is still in effect and RCA can be used in certain defensive modes with presidential authority. (However, any use in which "combatants" may be involved will most likely not be approved.) 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.

The implementation section of the 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." Thus, during peacekeeping missions (such as Bosnia, Somalia, Rwanda, and Haiti) it appears U.S. policy will maintain that we are not a party to the conflict for as long as possible. Therefore RCA would be available for all purposes under E.O. 11850. However, in armed conflicts (such as Desert Storm, Panama, and Grenada) it is unlikely that the NCA will approve the use of RCA in situations where "combatants" are involved due to the CWC's prohibition on the use of RCA as a "method of warfare." (Opinion: use of RCA would be unlikely in the CSAR and the human shield situations used as examples of defensive modes under E.O. 11850, if the RCA use would appear to be a "method of warfare.")

Herbicides. E.O. 11850 renounces first use in armed conflicts, except for domestic uses and to control vegetation around defensive areas. (e.g., Agent Orange in Vietnam.)

Biological. The 1925 Geneva Protocol prohibits bacteriological methods of warfare. The 1972 Biological Weapons Convention (ref. 11) supplements the 1925 Geneva Protocol and prohibits the production, stockpiling, and use of biological and toxin weapons. U.S. renounced all use of biological and toxin weapons.

Nuclear Weapons. (FM 27-10, para. 35.) 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).)

**BOMBARDMENTS, ASSAULTS, AND PROTECTED AREAS AND PROPERTY**

**Military Objectives**. Objects that, by their nature, use, location, or purpose, make an effective contribution to military action are legitimate military objectives. (FM 27-10, para. 40, GP I, art. 52(2).) Their destruction, capture or neutralization is justified if it offers a definite military advantage. There must be a nexus between the object and a

"definite" advantage toward military operations. Examples: enemy equipment, munitions factories, roads, bridges, railroads, or electrical powers stations.

Warning Requirement. (FM 27-10, para. 43,; see HR, art. 26.) General requirement to warn before a bombardment. Only applies if civilians are present. Exception: if it is an assault (any surprise attack or an attack where surprise is a key element). GP I, Article 57(2)(c), however, requires warning of civilians before an attack (not necessarily a bombardment), unless circumstances do not permit (this is considered customary international law by the U.S.).

Defended Places. (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. See also, GP I, Article 51(5)(a), which seems to clarify this rule. Specifically, it prohibits bombardments that treat "as a single military objective a number of clearly separated and distinct military objectives located in a city, town, or village. . . ."

Undefended places. The attack or bombardment of towns, villages, dwellings, or buildings, which are undefended, is prohibited. (HR, art. 25.) An inhabited place may be declared an undefended place (and open for occupation) if the following criteria are met:

All combatants and mobile military equipment are removed;

No hostile use made of fixed military installations or establishments;

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

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.)

To gain protection as an undefended place, the city must be open to occupation by the adverse party.

(GP I, art. 59)

Natural environment. The environment cannot be the object of reprisals. In the course of normal military operations, care must be taken to protect the natural environment against "long-term, widespread, and severe damage." (GP I, art. 55 - U.S. specifically objects to this article, as the terminology is so vague as to be ineffective.)

Protected Areas. Hospital or safety zones may be established for the protection of the wounded and sick or civilians. (FM 27-10, para. 45.) 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 and art storage areas in Europe have been designated under the convention as "specially protected." The U.S. asserts that the Hague Cultural Property Convention special protection regime does not reflect customary international law.

**Protected Property.**

Civilians. Prohibition against attacking civilians or civilian property. (FM 27-10, para. 246; GP I, art. 51(2).) Presumption of civilian property attaches to objects traditionally associated with civilian use (dwellings, school, etc.) (GP I, art. 52(3)), as contrasted with military objectives such as industrial facilities such as munitions factories, which remain legitimate military objectives even if manned by civilian workers.

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.

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.

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. GP 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. (GP 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." (GP 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. (GP I, art. 27.)

Cultural Property. Prohibition against attacking cultural property. The 1954 Cultural Property Convention elaborates, but does not expand, the protections accorded cultural property found in other treaties (HR, art. 27; FM 27-10, para. 45, 57.) The convention has not been ratified by the U.S. (treaty is currently under review with a view toward ratification with minor understandings). (*See* GP I, art. 53, for similar prohibitions.) Cultural property includes buildings dedicated to religion, art, science, charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected. Misuse will subject them to attack. Enemy has duty to indicate presence of such buildings with visible and distinctive signs.

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 GP 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.

Objects Indispensable to the Survival of the Civilian Population. Article 54 of GP 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.

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

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.

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).

Hague Convention No. IX Concerning Bombardment by Naval Forces in Time of War (art. 5). "[L]arge, stiff, rectangular panels divided diagonally into two colored triangular portions, the upper portion black, the lower portion white."

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.)

**Stratagems and Tactics**

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:

Naval Tactics. A common naval tactic is to rig disguised vessels or dummy ships, e.g., to make warships appear as merchant vessels.

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. (FM 27-10, para. 51.)

Gulf War - Coalition: 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).

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

Uniforms. Combatants may wear enemy uniforms but cannot fight in them. Note, however, that military personnel not wearing their own uniform lose their PW status if captured and risk being treated as spies (FM 27-10, para. 54, 74; NWP 1-14M, para. 12.5.3; AFP 110-31, 8-6.) For listing of examples of the use of enemy uniforms, *see* W. Hays Parks, *Air War and the Law of War*, 32 A.F. L. Rev. 1, 77-78 (1990).

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.

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).

Protocol I. GP I, Article 39(2) prohibits virtually all use of these enemy items. (*See* NPW 1-14M, para 12.5.3.) Article 39 prohibits the use in an armed conflict of enemy flags, emblems, uniforms, or insignia while engaging in attacks or "to shield, favour, 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, thus the customary rule that naval vessels may fly enemy colors, but must hoist true colors prior to an attack, lives on. (GP I, art 39(3); NWP 1-14M, para. 12.5.1.)

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.

Psychological Operations. Gulf War - U.S. PSYOPS leaflet program - 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).

Treachery and Perfidy. Prohibited under the law of war. (FM 27-10, para. 50; 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.)

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 GP 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]." (U.S. considers customary law.) Article 37(1) does not prohibit perfidy per se, only certain perfidious acts that result in killing, wounding, or capturing, although it comes very close. The ICRC could not gain support for an absolute ban on perfidy at diplomatic conference. Note, however, that the U.S. view includes breaches of moral, as well as legal, obligation as being a violation, citing the broadcasting of an announcement to the enemy that an armistice had been agreed upon when it had not as being treacherous. (FM 27-10, para 50.) Note that in order to be a violation of GP I, Article 37, the feigning of surrender or an intent to negotiate under a flag of truce must result in a killing, capture, or surrender of the enemy. Simple misuse of a flag of truce, not necessarily resulting in one of those consequences is, nonetheless, a violation of Article 38 of Protocol I, which the U.S. also considers customary law. An example of such misuse would be the use of a flag of truce to gain time for retreats or reinforcements. (HR, art 23(f))

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

Feigning surrender or the intent to negotiate under a flag of truce. (GP I, Art 37(1)(a).)

Feigning civilian, noncombatant status. "Attacking enemy forces while posing as a civilian puts all civilians at hazard." (GP I, art 37(1)(c); NWP 1-14M, para. 12.7.)

Feigning protected status by using UN, neutral, or nations not party to the conflict's signs, emblems, or uniforms. (GP I, art 37(1)(d).)

Misuse of Red Cross, Red Crescent, and cultural property symbol. Designed to reinforce/reaffirm HR, Article 23f. GWS requires that wounded & sick, hospitals, medical vehicles, and in some cases, medical aircraft be respected and protected. Protection lost if committing acts harmful to enemy. Cultural property symbols include 1954 Hague Cultural Property Convention, Roerich Pact, and 1907 Hague Conventions symbol.

Espionage. (FM 27-10, para. 75; GP 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.

Reprisals. (FM 27-10, para 497.) An otherwise illegal act done in response to a prior illegal act by the enemy. The purpose of a reprisal is to get the enemy to adhere to the law of war. Reprisals are authorized if the following requirements are met: it's timely; it's responsive to enemy's act; must first attempt a lesser form of redress; and must be proportional. Prisoners of war and other protected persons "in your control" cannot be objects of reprisals. Protocol I prohibits reprisals against numerous targets such as the entire civilian population, civilian property, cultural property, objects indispensable to the survival of the civilian population (food, livestock, drinking water), the natural environment, installations containing dangerous forces (dams, dikes, nuclear power plants) (GP I, arts. 51-56). The U.S. position is that reprisals are prohibited only when directed against protected persons as defined in the Geneva Conventions. U.S. policy is that a reprisal may be ordered only at the highest levels (NCA).

War Trophies. The law of war authorizes the confiscation of enemy military property. War trophies, as long as taken from enemy military property, are legal under the law of war. The problem with war trophies arises under U.S. domestic law, rather than under the law of war. 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—only if the U.S. so designates the property IAW law and regulation.

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). Ample flexibility (or ambiguity) is created by the law so as to continue the need for punitive command policies or regulations which limit the items that may properly be taken as war trophies. (AR 190-XX, Control and Requisition of War Trophies, will implement the law; as of this writing, the regulation is still in draft.) 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.

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":

1. COMMON SENSE—does the policy make sense?

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

3. 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.)

4. 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.)

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

6. 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 Gulf, 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."

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.

**PROTECTED PERSONS**

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

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

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. GP I art. 44 expands the definition of prisoners of war to include any combatant "who falls into the power of an adverse Party" Combatants include those who do not distinguish themselves from the civilian population except when carrying arms openly during an engagement and in the deployment immediately preceding the engagement; e.g., national liberation movements. (GP I, art. 44.) U.S. asserts this definition does not reflect customary international law. Captured civilians accompanying the force also receive PW status (GPW, art. 4(a)(4)).

Identification and Status. The initial combat phase will likely result in the capture of a wide array of individuals.[4] 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 Directive established procedures for the conduct of Art. 5 Tribunals; however, no comparable Directive is presently in effect.[5]

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.[6] PWs must be protected from physical and mental harm. They must be transported from the combat zone as quickly as circumstances permit. Subject to valid security reasons, 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 or identification cards be taken. These protections continue through all stages of captivity, including interrogation.

**Detainees**. Particularly in Military Operations Other Than War, where there are no lawful enemy combatants (e.g., Somalia, Haiti, Bosnia, as discussed above), persons who commit hostile acts against U.S. forces or serious criminal acts and are captured do not meet the legal criteria of PW under the GPW. These persons may be termed "detainees" instead of PW.

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[4] 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.

[5] 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."

[6] 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 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.

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

The first and second Geneva Conventions as well as the 1977 Protocol I to the Geneva Conventions deal with protections for the wounded and sick, to include the shipwrecked.

All wounded and sick in the hands of the enemy must be respected and protected (*See* para. 208, FM 27-10, GWS Art 13, and GC, Art 16). "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 (triage). No adverse distinctions in treatment may be established because of sex, race, nationality, religion, political opinions, or any other similar criteria (GWS, Art 12).

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).

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.

Medical units and establishments may not be attacked. (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).

Those soldiers who have fallen by reason of sickness or wounds and who cease to fight are to be respected and protected. Under GP I, civilians are included in the definition of wounded and sick (who because of trauma, disease, . . . are in need of medical assistance and care and who refrain from any act of hostility). (GP I, art. 8.) As a practical matter, care should be provided to civilians if medical resources are available. Otherwise, civilian care remains the primary responsibility of the civilian authorities.

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.

Parachutists (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. Parachutists, according to GP I, Article 42, "shall be given the opportunity to surrender before being made the object of attack."

**Civilians.**

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

Indiscriminate Attacks. GP I provides for expanded protections of 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. (GP I, art. 51(4).)

Civilian Medical and Religious Personnel. Article 15 of GP I requires that civilian medical and religious personnel shall be respected and protected. They receive the benefits of the provisions of the Geneva Conventions and

the Protocols concerning the protection and identification of medical personnel. All available help shall be given to civilian medical personnel when civilian services are disrupted due to combat.

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.

Journalists. Given protection as "civilians" provided they take no action adversely affecting their status as civilians. (GP I, art. 79 -considered customary international law by U.S.).

## MILITARY OCCUPATION

### 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.

### 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.

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.

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.

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 is formally forbidden." H. IV. Regs. Art. 47. 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. H. IV. Regs. Art. 52.

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; *see* H. IV. Regs. Art. 23.

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.

**Security of the Occupying Force: Penal Law and Procedure**

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.

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.

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.

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.

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.

The occupying power is prohibited from imposing mass punishments on the populace for the offenses of individuals. That is, "No 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." H. IV. Regs Art. 50; see GC, Art. 33.

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.

## NEUTRALITY

### Customary Law Reflected in Hague Convention No. V

Under customary international law, as reflected in Hague Convention No. V, 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. Those neutrality rights include the following:

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.

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.

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.

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.

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.

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.

### Impact of the United Nations Charter Regime on the Law of Neutrality

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.

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.

## COMPLIANCE WITH THE LAW OF WAR

### The Role of Protecting Powers and the ICRC

The System of Protecting Powers. Common Articles 8 - 11 of the Geneva Conventions of 1949[7] 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.

Such protecting power activities are especially valued when the second and third state do not have effective diplomatic relations, which is traditionally the case in time of war between them. 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.

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. Article 5 of GP I seeks to supplement (not supplant) the protecting power system embodied in the Geneva Conventions by imposing on the parties to the conflict the duty to implement that system from the beginning of the conflict.

**The Contributions and Role of the International Committee of the Red Cross (ICRC).** Originally formed in 1863, the ICRC is an organization of Swiss citizens that has played a seminal role in the development of humanitarian law applicable in armed conflict. In addition, 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.

The role of the ICRC as an impartial humanitarian organization is formally recognized in both common articles 9 - 11 of the Geneva Conventions[8] and in the Protocols. 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 protecting powers in international conflicts, under the auspices of common articles 9 and 10 of the Geneva Conventions[9] and Articles 5 and 6 of Protocol I.

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.

GP II, however, fails to reaffirm this ICRC prerogative and recognizes, in Article 18, only the offer of services by "relief societies located in the territory" of a party to the conflict.

### Relations between U.S. Forces and the ICRC

Subject to essential security needs and other reasonable requirements, 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 conditions as soon as

[7] Articles 9 - 12 of the GC.

[8] Articles 10 - 12 of the GC.

[9] Articles 10 and 11 of the GC.

circumstances permit. Once on the scene, the ICRC will closely examine compliance with the Law of War and, in particular, the Geneva Conventions concerning a broad range of issues.

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.[10] 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.

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.[11] 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.

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 Nongovernment organizations (NGOs) in the field is large; approximately 350 humanitarian relief agencies are registered with the U.S. Agency for International Development (USAID).

## REMEDIES FOR VIOLATIONS OF THE LAW OF WAR

### U.S. Military and Civilian Criminal Jurisdiction

It is DoD policy that a member of the armed forces who commits an offense that qualifies as a "war crime" will be charged under a specific article of the UCMJ. 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.

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.

"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.

U.S. policy on application of the Law of War is stated in DoD Directive 5100.77 (DoD Law of War Program) and further explained in CJCSI 5810.01 (12 Aug 96) (Implementation of the DoD Law of War Program). Except when

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[10] 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.

[11] 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.

properly determined by the National Command Authority that it is not applicable, DoD Components "will comply with the Law of War in the conduct of all military operations and related activities in armed conflict, however such conflicts are characterized…." The CJCS SROE state that, "U.S. Forces will always comply with the Law of Armed Conflict."

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

(1) The commander ordered the commission of the act;

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

(3) 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).

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.

Investigative Assets. Several assets are available to assist commanders investigating suspected violations of the LOW. 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.) An investigation may also be conducted by the Criminal Investigation Division Command (CID). 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).

In addition to CID, and organic assets and legal support, a commander may have Reserve Component JAGSO teams available to assist in the investigation. 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.

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.

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.

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.

(1) High friendly losses.

(2) High turnover rate in the chain of command.

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

(4) Poorly trained or inexperienced troops.

(5) The lack of a clearly defined enemy.

(6) Unclear orders.

(7) High frustration level among the troops.

Soldiers who receive unclear 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.

**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 - GP 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

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

D. Treachery and Perfidy - Feigning and Misuse

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2. Surrender or Truce

3. Civilian or Noncombatant Status

4. UN and Neutral Emblems

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E. Assassination

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G. Reprisals

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**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.[12]

   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.

B. Reporting Obligation. Soldiers must promptly report any actual or suspected violations of the LOW to their superiors; if that is not feasible, soldiers report to other appropriate military officers (e.g., IG, Judge Advocate, or Chaplain).

[12] 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).

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.[13] 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

## CUSTOMARY INTERNATIONAL LAW HUMAN RIGHTS: THE OBLIGATION

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,[14] and human rights law operates to regulate the way state actors (in this case the U.S. armed forces) treat all humans.[15] 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"[16] 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.[17] 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.

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

[14] *See* the *Paquete Habana The Lola*, 175 U.S. 677 (1900); *see also supra* note 13 at § 111.

[15] *Supra* note 13, at §701.

[16] *Supra* note 13, at §702.

[17] 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.[18]

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.[19] 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[20] (one of the most significant statements of human rights law, **some portions** of which are regarded as customary international law[21]), 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,[22] and as the guiding source of soldier conduct across the spectrum of conflict[23]). 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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[18] *Supra* note 13, at §702.

[19] *Supra* note 13, at §702, Reporters' Notes.

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

[21] 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].

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

[23] *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,[24]

10. Systematic racial discrimination, or

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

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.[25] 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?

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.

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.

## HUMAN RIGHTS TREATIES: THE ASPIRATION

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

[24] 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.

[25] *See supra* note 13, Reporters' Notes.

[26] *See supra* note 13 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.[27]

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.[28] This theory of treaty interpretation is referred to as "non-extraterritoriality."[29] 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.

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,"[30] some are not enforceable in U.S. courts absent subsequent legislation or executive order to "execute" the obligations created by such treaties.[31]

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[27] *See supra* note 13 at Part VII, Introductory Note.

[28] 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 13 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).

[29] *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).

[30] 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 13, 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.

[31] 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 13, 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

This "self-execution" doctrine relates primarily to the ability of a litigant to secure enforcement for a treaty provision in U.S. courts.[32] 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.[33] 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.[34]

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."[35] 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.[36]

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 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.

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.[37] The JTF could detain civilians who posed a legitimate threat to the force, its mission, or other Haitian civilians.[38]

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. . .

[32] *See supra* note 13, at cmt h.

[33] 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 13, 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.*

[34] "[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).

[35] *See supra* note 13 at § 131.

[36] *See supra* note 13 at § 111, cmt.

[37] 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.

[38] "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 29, at 63.

physical maltreatment, degrading treatment, or intimidation; and rapid judicial review of their individual detention.[39] The burden associated with fully complying with the letter and spirit of the Universal Declaration of Human Rights[40] permitted the United States to safeguard its force, execute its mission, and reap the benefits of "good press."[41]

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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[39] *See supra* note 29 at 64-65.

[40] 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.

[41] 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[42]

### 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.

Military Operations Other Than War (MOOTW)[43] 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.

## STRUCTURE FOR ANALYSIS

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.

When attempting to determine what laws apply to American conduct in an area of operations, a specific knowledge of the exact nature of the operation becomes immediately necessary.[44] 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."[45]

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

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

[44] The importance of clear mandates and missions was pointed out as a "critical" lesson learned from the recent 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.

[45] *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).

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.[46] 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.

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;[47] (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,[48] what statement or directives have been made by that organization?

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.

## SOURCES OF LAW

### FUNDAMENTAL HUMAN RIGHTS

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.[49] 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.

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"[50] 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.

### HOST NATION LAW

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. Although in theory

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[46] *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").

[47] 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).

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

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

[50] 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.

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

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.[51] So, in a nutshell, our forces enter a nation either as invaders or tourists or somewhere between the two statuses.

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[52] 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.[53]

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.[54] 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-defence, within the bounds of his domicile."[55]

Keep in mind, it is important to note that Public International Law assumes a default setting.[56] 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."[57] 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.[58] This makes the circumstances that move military forces away from this

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[51] In essence, the category of MMOOTW 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 49, at §§ 433 and 441.

[52] 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].

[53] *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.

[54] *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].

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

[56] *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.

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

[58] 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 56, at 11-1.

default setting of extreme importance. Historically, military commentators have stated that United States forces are immune from host nation laws in any one of three possible scenarios:[59]

(1) immunity is granted in whole or part by international agreement;

(2) United States forces engage in combat with national forces; or

(3) United States forces enter under the auspices of a United Nations sanctioned security enforcement mission.

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,[60] providing it with immunity from laws that protect host nation civilians. For example, under what conditions can commanders of United States forces, deployed to the territory of another nation, disregard the due process protections afforded by the host nation law to its own citizens?

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[61] 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.

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.[62] This exception is based on the classical application of the Law of the Flag theory.[63]

The Law of the Flag has two prongs. The first prong is referred to as the combat exception,[64] 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.[65] 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).[66]

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

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

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

[61] The entry agreement for Operation UPHOLD DEMOCRACY, *reprinted in* CLAMO HAITI REPORT, *supra* note 52, at 182-83.

[62] 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.

[63] *See* Whitaker, *supra* note 59, at 31.

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

[65] *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...."

[66] *See* DA PAM 27-161-1, *supra* note 56, at 11-1.

invitations, and it is clear that the relationship between nations is both mature and normal,[67] 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).

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.

The third exception, although based upon the United Nations Charter, is a variation of the Law of the Flag's combat exception.[68] 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,[69] but the same immunity is available to the extent it is necessary when combat is not contemplated.[70]

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.

## 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.

## LAW BY ANALOGY

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 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,[71]

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

[68] Whitaker, *supra* note 59, at n. 35.

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

[70] *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 54, 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.

[71] 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

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."

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.

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.

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.

Obviously, the listing of sources is not exclusive. JA's 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.

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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

## I. FOUR TYPES OF LIBERTY DEPRIVATION:

A. Detainment;

B. Internment;

C. Assigned residence;

D. Simple imprisonment (referred to as confinement in AR 190-57):

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.

## II. 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."[72]

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 CINC 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.

E. In MOOTW, judge advocates should:

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

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 an 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.").

## III. 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. In absence of operational limitations, there is no restriction on the number or length of letters sent or received. In no circumstance, will the number sent fall below two cards and four letters. AR 190-57, para. 2-8.

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

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

# APPENDIX B

# TREATMENT OF PROPERTY

## IV. 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

## I. TREATMENT OF DISPLACED PERSONS.

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

1. REFUGEE DEFINED. Any Person:

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

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

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

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

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

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

B. MAIN SOURCES OF LAW:

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

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

a. Adopts same language as 1951 Convention.

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

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

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

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

**c.** The U.S. Supreme Court ratified the government interpretation of "non-refoulment" in *United States v. Sale.* This case held that the RP does not prohibit the practice of rejection of refugees at our borders.

(**This holding is inconsistent with the position of the UNHCR, which considers the RP to prohibit "refoulment" once a refugee crosses any international border).**

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

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

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

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

   a. Qualifies refugees for U.S. assistance.

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

C. RETURN/EXPULSION RULE. These rules apply **only** to individuals who qualify as refugees:

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

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

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

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

1. Freedom of Religion (equal to nationals).

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

3. Freedom of Association (equal to nationals).

4. Freedom of Movement (equal to aliens).

5. Access to Courts (equal to nationals).

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

7. Right to Housing (equal to aliens).

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

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

10. Right to Expedited Naturalization.

E. DETAINMENT (See 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 AR 550-1, para 7.

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.

d. 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.

## INTRODUCTION

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.

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.

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.

## OVERVIEW

**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. They are the means by which the National Command Authority (NCA) and operational commanders regulate the use of armed force in the context of applicable political and military policy and domestic and international law.

**Purposes of ROE**. As a practical matter, ROE perform three functions: (1) Provide guidance from the National Command Authority (NCA) 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 which encompasses national policy goals, mission requirements, and the rule of law.

*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).

*Military Purposes*: ROE provide parameters within which the commander must operate in order to accomplish his assigned mission:

- 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.

- 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.

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

*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.

## CJCS STANDING RULES OF ENGAGEMENT

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.

*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, with limited exceptions, the most prominent being for Multi-National Force operations. It no longer applies 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.

The SROE is divided as follows:

**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].

**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.

**Enclosure J (Supplemental Measures):** 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 NCA approval, those that require either NCA or Combatant Commander approval, and those that are delegated to subordinate commanders (though the delegation may be withheld by higher authority). The new SROE now recognizes a fundamental difference between the supplemental measures. Those measures that are reserved to the NCA or CINC are generally **restrictive**, that is, either the NCA or CINC 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.*

**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.

**Enclosure L (Rules of Engagement Process):** This new, 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.

**Key Definitions / Issues:**

**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.**

*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.

*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 NCA may authorize the exercise of collective self defense. Collective self defense is generally implemented during combined operations.

*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.

*Individual self defense*. The right to defend oneself and other U.S. forces in the vicinity from a hostile act or hostile intent.

*Defense of Mission & Self Defense***:** The SROE distinguish between the right and obligation of self defense, *which is non-derogable*, 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.**

**Hostile Act:** An attack or other use of force by a foreign force or terrorist unit against the United States, U.S. forces, or other designated persons and property, or a use of force intended to preclude or impede the mission of U.S. forces. A hostile act triggers the right to use *proportional force* in self defense to deter, neutralize, or destroy the threat.

**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.

**Hostile Force:** Any force or unit that has committed a hostile act, demonstrated hostile intent, or has been declared hostile.

**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.

**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.

## ROLE OF THE JUDGE ADVOCATE

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 all of them at once.

### Determining the current ROE

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:

- 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.

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

- Depending on the location of an operation, the combatant commander's special ROE for his AOR, found in Enclosure K.

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

- 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) will help judge advocates at all levels determine where the ROE stands.

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 attention.

**Requesting Additional ROE**

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

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 should have the best grasp of ROE in general and the SROE in particular, will still play a significant advisory role in this process.

Some considerations for drafting an ROE request message:

- Base-line ROE typically are promulgated at the CINC-level and higher, and receive great thought. Be especially careful about requesting supplemental measures that require NCA 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.

- 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.

- Remember the policy regarding supplemental measures is that they are generally permissive in nature (except for those reserved to the NCA or CINC). 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.

- 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.

- 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.

**Disseminating ROE to subordinate units**

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 CINC. Rarely will this delegation go below the component commander/JTF level. Therefore, only judge advocates at that level and above will face this task.

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 NCA, are generally addressed to the CINC and Service level. The supported CINC takes those NCA-approved measures, adds appropriate supplemental measures from the group the CINC 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 NCA- and CINC-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 CINC'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).

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:

- Drafting
    - 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.
    - 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.
    - 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.
    - 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.
- 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 <u>unambiguous</u> guidance to a soldier, sailor, airman and marine before he confronts a threat.
- Once again, follow the message format

**<u>Training ROE</u>**

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).

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 "3" 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. For example, at range training, it is very rare indeed that all soldiers will be on the firing line at once. Stations at a range could be set up for ROE training. Lane training for soldiers and staff training could be built into FTXs and CPXs as well.

There is no 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.

Training should begin with individual discussions between the soldier and the NCOs, on a one-on-one 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). 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.

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.

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.

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.

POCKET CARDS:

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. 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:

- 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.

- 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.

- 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.

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 CINC.

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 NCA approve ROE for U.S. forces. The Joint Staff, Joint Operations Division (J-3), is responsible for the maintenance of these ROE.

a. The CINCs 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 CINC's theater-specific ROE modify these SROE, they will be submitted to Chairman of the Joint Chiefs of Staff for NCA 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 NCA or by a CINC. 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 CINCs 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 CINCs 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 NCA. 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. CINC or that are performing missions under direct control of the NCA, 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. CINCs' Theater-Specific ROE

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

b. CINCs 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 NCA 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 NCA 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 NCA, 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 NCA.

(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 NCA or CINC 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 NCA or CINC approval for mission accomplishment. The issues addressed throughout the planning process will form the basis for supplemental ROE requests requiring NCA or CINC 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 CINC 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 (NCA, CINC) 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 NCA-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

**Peacekeeping: UNMIH (Haiti - 31 March 1995)**

**UNITED NATIONS MISSION IN HAITI (UNMIH)**
**PEACEKEEPING OPERATION**

31 March 95
MILITARY FORCE ROE

NOTHING IN THIS ROE LIMITS YOUR RIGHT TO TAKE ALL NECESSARY AND APPROPRIATE ACTION TO DEFEND YOURSELF, YOUR UNIT, AND OTHER UNMIH PERSONNEL.

1. Treat all persons with dignity and respect.
2. Use of force must be proportionate to the level of perceived threat.
3. If possible, warnings should be provided prior to the use of force.
4. Never use more force than the minimum necessary to carry out your duties or remove a threat to UNMIH.
5. In the event of attack or threat of imminent attack, use necessary force up to and including deadly force for self defense and defense of UNMIH personnel, and installations designated as "key" by the Force Commander.
6. UNMIH Forces may intervene to prevent death or grievous bodily harm of innocent civilians at the hands of an armed person or group.
7. When deadly force is employed, targets will be engaged with observed, deliberately aimed fire to avoid collateral damage. (If a weapon is fired, follow ROE reporting requirements.)
8. Search, apprehension, and disarmament are authorized when acting in self defense or to enforce the rules above. Persons apprehended will be detained using minimal force and turned over to appropriate Haitian authorities as soon as possible.
9. Use of chemical riot control agents is an authorized form of force.

PROCEDURES AFTER FIRING A WEAPON

1. First aid will be given as soon as possible when such aid can be given without endangering lives.
2. Record details of the incident, to include:
   - date, time, and place of firing.
   - unit and personnel involved.
   - the events leading up to the firing.
   - why UNMIH personnel opened fire.
   - shot or what was fired on.
   - the weapons fired.
   - the apparent results of the firing.
3. Report above information and current situation through the UN chain of command to the Force Commander as soon as possible.

**Peacekeeping: UNOSOM (Somalia - 1995 )**

**JTF UNITED SHIELD**
Rules of Engagement Ser #1 11 Jan 95

**NOTHING IN THESE RULES OF ENGAGEMENT LIMITS YOUR RIGHT TO TAKE APPROPRIATE ACTION TO DEFEND YOURSELF AND YOUR UNIT**

A. You have the right to use deadly force in response to a hostile act or where there is clear indication of hostile intent.

B. Hostile fire may be returned effectively and promptly to stop a hostile act.

C. When U.S. forces are attacked by unarmed hostile elements, mobs and/or rioters, U.S. forces should use the minimum force necessary under the circumstances and proportional to the threat.

D. Inside designated security zones, once a hostile act or hostile act is demonstrated, you have the right to use minimum force to prevent armed individual/crew-served weapons from endangering U.S./UNOSOM II forces. This includes deadly force.

E. Detention of civilians is authorized for security reasons or in self defense.

**Remember**

1. The United States is not at war
2. Treat all persons with dignity and respect
3. Use minimum force to carry out mission
4. Always be prepared to act in self defense

## Peacekeeping: IFOR (Bosnia, January 1996)

NATO UNCLASSIFIED

**IFOR - OPERATION DECISIVE ENDEAVOR**
**Commander's Guidance on Use of Force**

***MISSION***

Your mission is to stabilize and consolidate the peace in Bosnia and Herzegovina

***SELF DEFENSE***

1. You have the right to use force (including authorized weapons as necessary) in self defense.
2. Use only the minimum force necessary to defend yourself.

***GENERAL RULES***

1. Use the minimum force necessary to accomplish your mission.
2. Hostile forces/belligerents who want to surrender will not be harmed. Disarm them and turn them over to your superiors.
3. Treat everyone, including civilians and detained hostile forces/belligerents, humanely.
4. Collect and care for the wounded, whether friend or foe.
5. Respect private property. Do not steal. Do not take "war trophies".
6. Prevent and report all suspected violations of the Law of Armed Conflict to superiors.

***CHALLENGING AND WARNING SHOTS***

1 If the situation permits, issue a challenge:

| | |
|---|---|
| In English: | "IFOR! STOP OR I WILL FIRE!" |
| or in Serbo-Croat: | "IFOR! STANI ILI PUCAM!" |
| Pronounced as: | "IFOR! STANI EEL LEE PUTSAM!" |

2. If the person fails to halt, you may be authorized by the on-scene commander or by standing orders to fire a warning shot.

NATO UNCLASSIFIED

**Front Side**

## Peacekeeping: IFOR (Bosnia, January 1996)

NATO UNCLASSIFIED

***OPENING FIRE***

1. You may open fire only if you, friendly forces, or persons or property under your protection are threatened with deadly force. This means:
   a. You may open fire against an individual who fires or alms his weapon at you, friendly forces, or persons with designated special status under your protection.
   b. You may open fire against an individual who plants, throws, or prepares to throw an explosive or incendiary device at you, friendly forces, or persons with designated special status or property with designated special status under your protection.
   c. You may open fire against an individual who deliberately drives a vehicle at you, friendly forces, persons with a designated special status or property with designated special status under your protection.
2. 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 other way of avoiding this.

***MINIMUM FORCE***

1. If you have to open fire, you must:
   - Fire only aimed shots, and
   - Fire no more round as necessary, and
   - Take all reasonable efforts not to unnecessarily destroy property, and
   - Stop firing as soon as the situation permits.
2. 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 purpose and engagement is authorized by your commander.

NATO UNCLASSIFIED

**REVERSE SIDE**

## Peacekeeping: SFOR (Bosnia, December 1996)

NATO UNCLASSIFIED

**SFOR - OPERATION CONSTANT GUARD**
**Commander's Guidance on Use of Force**

***MISSION***

Your mission is to stabilize and consolidate the peace in Bosnia and Herzegovina.

***SELF DEFENSE***

1. You have the right to use force (including authorized weapons as necessary) in self defense.
2. Use only the minimum force necessary to defend yourself.

***GENERAL RULES***

1. Use the minimum force necessary to accomplish your mission.
2. Hostile forces/belligerents who want to surrender will not be harmed. Disarm them and turn them over to your superiors.
3. Treat everyone, including civilians and detained hostile forces/belligerents, humanely.
4. Collect and care for the wounded, whether friend or foe.
5. Respect private property. Do not steal. Do not take "war trophies".
6. Prevent and report all suspected violations of the Law of Armed Conflict to superiors.

***CHALLENGING AND WARNING SHOTS***

1 If the situation permits, issue a challenge:

| | |
|---|---|
| In English: | "SFOR! STOP OR I WILL FIRE!" |
| or in Serbo-Croat: | "SFOR! STANI ILI PUCAM!" |
| Pronounced as: | "SFOR! STANI EEL LEE PUTSAM!") |

2. If the person fails to halt, you may be authorized by the on-scene commander or by standing orders to fire a warning shot.

NATO UNCLASSIFIED

**FRONT SIDE**

**Peacekeeping: SFOR (Bosnia, December 1996)**

NATO UNCLASSIFIED

***OPENING FIRE***

1. You may open fire only if you, friendly forces, or persons or property under your protection are threatened with deadly force. This means:
   a. You may open fire against an individual who fires or alms his weapon at you, friendly forces, or persons with designated special status under your protection.
   b. You may open fire against an individual who plants, throws, or prepares to throw an explosive or incendiary device at you, friendly forces, or persons with designated special status or property with designated special status under your protection.
   c. You may open fire against an individual who deliberately drives a vehicle at you, friendly forces, persons with a designated special status or property with designated special status under your protection.
2. 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 other way of avoiding this.
3. You may use minimum force, including opening fire, against an individual who unlawfully commits, or is about to commit, an act which endangers Life, or is likely to cause serious bodily harm, in circumstances where there is no other way to prevent the act.

***This para. 3. Is the key difference between the previous IFOR card and this, the SFOR card.***

***MINIMUM FORCE***

1. 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.
2. 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 purpose and engagement is authorized by your commander.

NATO UNCLASSIFIED

**REVERSE SIDE**

**Peacekeeping: 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.**

# 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**

**Peacekeeping: SFOR (Bosnia, December 1996)**

## OPENING FIRE.

a. You may open fire only if you, friendly forces or persons or property under your protection are threatened with deadly force. This means:

(1) You may open fire against an individual who fires or aims his weapon at, or otherwise demonstrates an intent to imminently attack, you ,friendly forces, or Persons with Designated Special Status (PDSS) or property with designated special status under your protection.

(2) You may open fire against an individual who plants, throws, or prepares to throw, an explosive or incendiary device at, or otherwise demonstrates an intent to imminently attack you, friendly forces, PDSS or property with designated special status under your protection.

(3) You may open fire against an individual deliberately driving a vehicle at you, friendly forces, or PDSS or property with designated special status.

b. You may also fire against an individual who attempts to take possession of friendly force weapons, ammunition, or property with designated special status, and there is no way of avoiding this.

c. You may use minimum force, including opening fire, against an individual who unlawfully commits or is about to commit an act which endangers life, in circumstances where there is no other way to prevent the act.

## MINIMUM FORCE.

a. If you have to open fire, you must:
- Fire only aimed shots; and
- Fire no more rounds than necessary; and
- Take all reasonable efforts not to unnecessarily destroy property; and
- Stop firing as soon as the situation permits.

b. You may not intentionally attack civilians, or property that is exclusively civilian or religious in character, except if the property is being used for military purposes or engagement is authorized by the commander.

**REVERSE SIDE**

## Armed Conflict: DESERT STORM (Iraq, 1991)

**DESERT STORM**
**RULES OF ENGAGEMENT**

**ALL ENEMY MILITARY PERSONNEL AND VEHICLES TRANSPORTING THE ENEMY OR THEIR SUPPLIES MAY BE ENGAGED SUBJECT TO THE FOLLOWING RESTRICTIONS:**

A. Do not engage anyone who has surrendered, is out of battle due to sickness or wounds, is shipwrecked, or is an aircrew member descending by parachute from a disabled aircraft.

B. Avoid harming civilians unless necessary to save U.S. lives. Do not fire into civilian populated areas or buildings which are not defended or being used for military purposes.

C. Hospitals, churches, shrines, schools, museums, national monuments, and other historical or cultural sites will not be engaged except in self defense.

D. Hospitals will be given special protection. Do not engage hospitals unless the enemy uses the hospital to commit acts harmful to U.S. forces, and then only after giving a warning and allowing a reasonable time to expire before engaging, if the tactical situation permits.

E. Booby traps may be used to protect friendly positions or to impede the progress of enemy forces. They may not be used on civilian personal property. They will be recovered and destroyed when the military necessity for their use no longer exists.

F. Looting and the taking of war trophies are prohibited.

G. Avoid harming civilian property unless necessary to save U.S. lives. Do not attack traditional civilian objects, such as houses, unless they are being used by the enemy for military purposes and neutralization assists in mission accomplishment.

H. Treat all civilians and their property with respect and dignity. Before using privately owned property, check to see if publicly owned property can substitute. No requisitioning of civilian property, including vehicles, without permission of a company level commander and without giving a receipt. If an ordering officer can contract the property, then do not requisition it.

I. Treat all prisoners humanely and with respect and dignity.

J. ROE Annex to the OPLAN provides more detail. Conflicts between this card and the OPLAN should be resolved in favor of the OPLAN.

**REMEMBER**

1. FIGHT ONLY COMBATANTS.
2. ATTACK ONLY MILITARY TARGETS.
3. SPARE CIVILIAN PERSONS AND OBJECTS.
4. RESTRICT DESTRUCTION TO WHAT YOUR MISSION REQUIRES.

# CHAPTER 6

# ADMINISTRATIVE LAW


| | | | |
|---|---|---|---|
| **I.** | **Conscientious Objectors** | **III.** | **Reports of Survey** |
| **II.** | **Gifts** | **IV.** | **Administrative Investigations** |


## I. CONSCIENTIOUS OBJECTORS

References
- 50 U.S.C. App. § 456(j) (West 1990) (the Military Selective Service Act: Deferments and Exemptions from Training and Service).
- DoD Dir. 1300.6, Conscientious Objection (20 Aug 1971, w/C4, 11 Sep 75); 32 CFR Part 75.
- Dept of Army, Reg. 600-43, Conscientious Objection (1 Aug 83, w/ Ch. 1, 15 May 1998).
- Dept of Army, Reg. 614-30, Assignments, Details and Transfers: Overseas Service (1 Apr 88).
- Marine Corps Order 1306.16E (21 Nov 86); Navy MILPERSMAN 1860120 & 3620200; Air Force Inst 36-3204 (15 Jul 94).
- MILPERSMAN 1900-020, CONVENIENCE OF THE GOVERNMENT SEPARATION BASED ON CONSCIENTIOUS OBJECTION (ENLISTED AND OFFICERS) (JAN. 2000).

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.

The two classes of COs are:

1. Class 1-O: A service member who, by reason of conscientious objection, sincerely objects to participation of any kind in war in any form.

2. 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 non-combatant status.

Neither category of CO status will be granted when requests are:

- Based on a CO claim that existed, but was not presented, prior to notice of induction, enlistment, or appointment. Claims arising out of experiences before entering military service, however, that did not become fixed until after entry, will be considered.

- Based solely upon policy, pragmatism, or expediency.

- Based on objection to a certain war.

- Based upon insincere beliefs.

- Based solely on CO claim that was denied by the Selective Service System.

The applicant for CO status must prove by "clear and convincing" evidence that:

1) the basis of the claim satisfies the definition and criteria for CO; and

2) his or her belief is honest, sincere, and deeply held.

Once the soldier makes this *prima facie* showing, the military service must grant the application unless the administrative record shows affirmative written evidence supplying a "basis in fact" for denial of the application. A 1-0 applicant cannot be granted 1-A-0 status as a compromise, nor can 1-A-0 applicants be discharged (AR 600-43; *but see* 32 CFR Part 75.7b).

The applicant will be counseled by his or her commander and interviewed by a chaplain and psychiatrist (or other medical officer). The commander's recommendations and the chaplain's and psychiatrist's findings are forwarded with the application to the Special Court-Martial Convening Authority, who appoints an investigating officer (IO). 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). Army GCMCAs may approve 1-A-O status. The 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.

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.

On the other hand, a soldier who is assigned or attached to a unit that has unit reassignment 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) 325-8671 / 8672).

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 (AR 600-43, I01). 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.

### Gifts To Dod And The Army

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 institution. A local commander can accept unconditional gifts valued up to $1,000. Conditional gifts or gifts valued over $1,000 may be accepted only by the Secretary of the Army. POC is 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.

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.

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.

**Gifts To Individuals**

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.

**Gifts To Individuals From Foreign Governments**

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 $260. That figure will change in 2002.

The rules allow a federal employee to personally accept a gift given by a foreign governmental representative if the gift is worth $260 or less. Each level of the foreign government (separate sovereigns) has a $260 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.

If the gift is valued at more than $260, 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 $260 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 $260, the employee may purchase the gift before it is auctioned off.

It is never inappropriate to accept a gift from a foreign government, even one valued at more than $260, 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.

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 $260 or less. The gift(s) which in the aggregate exceed the $260 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.

**Gifts To Individuals From An Outside Source**

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.

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.

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.

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.

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*).

**Gifts To Individuals From Other Federal Employees**

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).

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.

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.

**Gifts To Individuals - Handling Improper Gifts**

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

References

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, 31 January 1998.
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.

A. 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.

B. 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.

C. 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.

D. 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.

E. 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

**Army**:

Administrative Investigations: AR 15-6, Procedure for Investigating Officers and Boards of Officers, 11 May 1988 w/Ch. 30 September 1996.

Safety Investigations: AR 385-40, Accident Reporting and Records, 1 November 1994.

Reports of Survey: AR 735-5, Policies and Procedures for Property Accountability, 31 January 1998.

Line of Duty: AR 600-8-1, Army Casualty and Memorial Affairs and Line of Duty Investigations, 18 September 1986 (an expired regulation in temporary use pending replacement).

Flying Evaluation Boards: AR 600-105, Aviation Service of Rated Army Officers, 15 December 1994.

Conscientious Objection; AR 600-43, Conscientious Objection, 15 May 1998.

Information Security: AR 380-5, Department of the Army Information Security Program, 25 February 1988.

**Air Force:**

Accident/Mishap Investigation Boards. AFI 51-503, Aircraft, Missile, Nuclear, and Space Accident Investigations, 1 December 1998.

Safety Investigation Boards. AFI 91-204, Safety Investigations and Reports, 29 November 1999.

Information Security. AFI 31-401, Information Security Management, 1 January 1999.

Line of Duty. AFI 36-2910, Line of Duty (Misconduct) Investigations, 15 August 1994.

Reports of Survey. AFMAN 23-220, Reports of Survey for Air Force Property, 1 July 1996.

Conscientious Objectors. AFI 36-3204, *Procedures for Applying as a Conscientious Objector*, 15 July 1994

**Navy**

Aviation accident investigations. Naval Aviation Safety Program, OPNAV 3750.6Q.

Safety Investigations. Afloat, Navy Occupational Safety and Health (NAVOSH) Program Manual for Forces Afloat, OPNAVINST 5100.19 D. Ashore, Navy Occupational Safety and Health (NAVOSH) Program Manual, OPNAVINST 5100.23 E.

Line of duty. JAGINST 5800.7C (Manual of the Judge Advocate General), paras. 0221-0241.

Loss of property. JAGINST 5800.7C (Manual of the Judge Advocate General), para. 0250.

### Procedure for Investigating Officers and Boards of Officers

Army Regulation 15-, 6 (Procedure for Investigating Officers and Boards of Officers) contains the basic rules for Army regulatory boards. Many boards, however, are appointed under a specific regulation or directive (e.g., AR 635-200 provides for the appointment of boards to consider the separation of enlisted personnel). In that case, the provisions of the specific regulation or directive 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.

The Air Force has no single regulation or instruction governing non-IG investigations. Some types of investigations may be specifically authorized by instruction (for example, 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.

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 AR 15-6.

Investigations in all services follow similar basic concepts. In the joint environment, the goal, of course, 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.

A. General.

1. Function and Purpose. The primary purpose of an investigation or board of officers is to look into and report on the matters that the appointing authority has designated for inquiry. The report will include findings of fact and recommendations. Often, when criminal misconduct is suspected, it may be more appropriate to conduct an R.C.M. 303 preliminary inquiry or to have either the military police, Criminal Investigation Division, or other appropriate law enforcement authorities conduct the investigation.

2. Methods. An administrative fact-finding procedure under AR 15-6 may be designated an investigation or a board of officers. The proceedings may be informal or formal. Proceedings that involve a single officer using the informal procedures are designated investigations. Proceedings that involve more than one investigating officer 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."

3. Uses. No service requires as a blanket rule that an investigation be conducted before taking adverse administrative action. But, if inquiry is made under AR 15-6 or other general investigative authority, the findings and recommendations may be used in any administrative action against an individual. An adverse administrative action does not include actions taken pursuant to the Uniform Code of Military Justice (UCMJ) or the Manual for Courts-Martial (MCM).

B. 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. 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.

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

Formal Procedures. The 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 will be 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*.

When a respondent is designated, a hearing must be held. A respondent may be designated when the appointing authority desires to (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.

**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:

1. Any officer authorized to appoint a formal board or investigation.

2. 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.

3. (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. A copy of any investigation involving a fratricide/friendly fire incident will be forwarded after action by the appointing authority to the next higher Army headquarters.

**Function of Investigations and Boards of Officers (AR 15-6, para. 1-5)**

The primary function of any investigation or board of officers is to ascertain facts and report them to the appointing authority. It is the duty of the investigating officer or board to ascertain and consider the evidence on all sides of each issue thoroughly and impartially and to make findings and recommendations that are warranted by the facts and that comply with the instructions of the appointing authority.

**Method of Appointment (AR 15-6, para. 2-1b)**

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 will 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 governing regulation should be specified and any special instructions should be detailed.

If the board or investigation is appointed in writing, a Memorandum of Appointment will be used. 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, AR 15-6, para. 2-3c, should be consulted. It may be possible for the appointing authority to ratify the board's action.

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) would also be named in the Memorandum of Appointment.

**Choosing the Informal AR 15-6 Officer**

The 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 will be 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.

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 (on the world wide web at www.ig.ha.af.mil).

**Conducting the Informal Investigation**

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

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.

**Findings and Recommendations**

The report of investigation contains two final products—the findings and the recommendations.

A. Report Structure. Navy CI and Air Force CDI reports begin with narrative information from the investigating officer

1. 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.

2. 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.

3. Army informal investigations normally begin with DA Form 1574, which provides a "fill in the box" guide to procedures followed during the investigation.

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. Factors such as demeanor, imputed knowledge, and ability to recall may be considered by the IO. 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.

**Legal Review and Action by the Appointing Authority**

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.

An attorney other than the advisor to the investigating officer should conduct the review. In the Army, that review will focus 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.

After reviewing the report of investigation, the appointing authority has three options. First, of course, the appointing authority can approve the report as is. The appointing authority can return the report for additional investigation, either with the same or with a new investigating officer. 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 regulations. 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 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. AFP 110-31, The Conduct of Armed Conflict and Air Operations, 1976.
20. CJCSI 2410.01A, Guidance for the Exercise of the Right of Assistance Entry, 23 April 1997.


## INTRODUCTION

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.

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.

There are many sources of law which impact on this area, but three are particularly noteworthy.

*United Nations Convention on the Law of the Sea (UNCLOS III).*

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.

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.

*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.

*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.

## LEGAL DIVISIONS

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

### National Areas.

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

*Internal Waters*. These are all waters landward of the Baseline.[73] The Baseline is an artificial line corresponding to the low-water mark along the coast.[74] 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:

[73] UNCLOS III, Article 8.

[74] UNCLOS III, Article 5.

*Straight Baselines* may be utilized by the coastal State when its coastline is deeply indented (e.g., Norway) or there are fringing islands.[75] 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[76] and across the furthest extent of river deltas or other unstable coastline features.[77]

*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.[78] *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.[79] 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).

*Archepelagic Baselines*. UNCLOS III allows archipelagic States (those consisting of groups of islands) to draw baselines around their outermost islands, subject to certain restrictions.[80] The waters within are given special status as archipelagic waters.

*Maritime Claims Reference Manual*. This DoD publication (available on the Internet at http://web7.whs.osd.mil/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.

*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.[81] 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 1-14 for a synopsis of State claims.

*National Airspace* includes all airspace over the land territory, internal waters, and territorial sea.[82]

**International Areas**

*Contiguous Zone*. That zone, immediately seaward of the territorial sea, extending no more than 24 NM from the baseline.[83]

*Exclusive Economic Zone*. That zone, immediately seaward of the territorial sea, extending no more than 200 NM from the baseline.[84]

*High Seas* includes all areas beyond the Exclusive Economic Zone.[85]

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[75] UNCLOS III, Article 7.

[76] UNCLOS III, Article 9.

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

[78] UNCLOS III, Article 10.

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

[80] UNCLOS III, Article 47.

[81] UNCLOS III, Article 3.

[82] UNCLOS III, Article 2.

[83] UNCLOS III, Article 33.

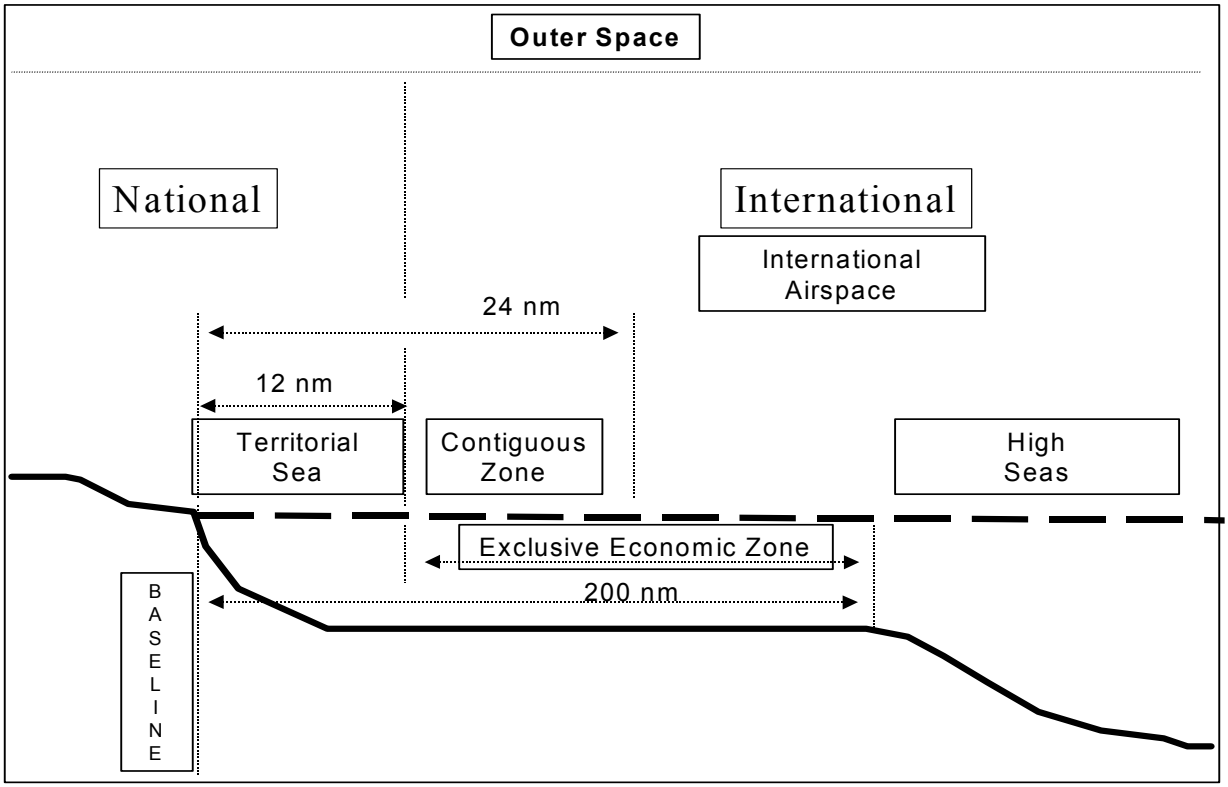
[84] UNCLOS III, Articles 55, 57.

[85] UNCLOS III, Article 86.

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

*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).

*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.




**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.

**National Areas.**

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:

- *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.

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.

*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.

*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.[86] 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;

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

[86] UNCLOS III, Article 18.

- any other activity not having a direct bearing on passage.[87]

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.

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.

Innocent Passage does not apply to aircraft. Submarines in innocent passage must transit on the surface, showing their flag.[88]

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.[89]

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.[90]

*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 2410.01A 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_01a.pdf).

*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;[91] (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;[92] (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.[93] The navigational regime is Normal Mode.[94] In Normal Mode ships may launch and recover aircraft if that is normal during their navigation and submarines may transit submerged. Aircraft may exercise transit passage. Transit passage may not be suspended by the coastal states.[95]

*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

[87] UNCLOS III, Article 19.

[88] UNCLOS III, Article 20.

[89] UNCLOS III, Article 30.

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

[91] UNCLOS III, Article 37.

[92] UNCLOS III, Article 36.

[93] UNCLOS III, Article 38.

[94] UNCLOS III, Article 39.

[95] UNCLOS III, Article 44.

of the High Seas / Exclusive Economic Zone and another part of the High Seas / Exclusive Economic Zone through archipelagic waters.[96]

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.[97] 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.

**International Areas.**

In all international areas, the navigational regime is Due Regard for the rights of others.[98] 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."

**STATE COMPETENCIES**

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.

*State craft*. State Ships include warships[99] 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.[100]

*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.

**National Areas.**

*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.).

*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.

*Innocent Passage*.

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[96] UNCLOS III, Article 53.

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

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

[99] "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.

[100] Article 3, Chicago Convention.

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;[101] (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).[102]

State. State vessels enjoy complete sovereign immunity.[103] 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.[104] The coastal State's only power over state vessels not complying with their rules is to require them to leave the territorial sea immediately.

*Transit Passage and Archepelagic Sea Lane Passage*.

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.

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.

**International Areas.**

*Contiguous Zone*. The Contiguous Zone was created solely to allow the coastal State to exercise its customs, fiscal, immigration, and sanitary laws.[105]

*Exclusive Economic Zone*. Within this area, the coastal State exercises sovereign rights for managing the natural resources.[106] Coastal State consent is required for marine scientific research (no exception for State vessels), but such consent should normally be given.[107]

*High Seas*.

*Civil*. On the high seas, the general rule is flag state jurisdiction only.[108] Non-flag States have almost no competencies over craft on the high seas, with the following exceptions:

- Ships engaged in the slave trade.[109] 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.[110] Any State may seize, arrest, and prosecute pirates.

[101] UNCLOS III, Article 27.

[102] UNCLOS III, Article 28.

[103] UNCLOS III, Article 30.

[104] UNCLOS III, Article 31.

[105] UNCLOS III, Article 33.

[106] UNCLOS III, Article 56.

[107] UNCLOS III, Article 246.

[108] UNCLOS III, Article 92,

[109] UNCLOS III, Article 99.

- Ship or installation (aircraft not mentioned), engaged in unauthorized broadcasting.[111] Any State which receives such broadcasts, or is otherwise subject to radio interference, may seize and arrest the vessel and persons on board.

- Right of visit.[112] 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.[113] 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.

*State*. State vessels are absolutely immune on the high seas.[114]

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[110] UNCLOS III, Articles 101-107.

[111] UNCLOS III, Article 109.

[112] UNCLOS III, Article 110.

[113] UNCLOS III, Article 111.

[114] 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


1. DoDD 1404.10, Emergency-Essential (EE) DoD U.S. Citizen Civilian Employees, 10 April 1992.
2. DoDD 1400.31, DoD Civilian Work Force Contingency and Emergency Planning and Execution, 28 April 1995.
3. DoDI 1400.32, DoD Civilian Work Force Contingency and Emergency Planning Guidelines and Procedures, 24 April 1995.
4. AR 690-11, Mobilization Planning and Management, 14 September 1990.
5. DA Pam 690-47, DA Civilian Employee Deployment Guide, 1 November 1995.
6. DA Pam 715-16, Contractor Deployment Guide, 27 February 1998.
7. 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.)
8. Military Extraterritorial Jurisdiction Act of 2000, 18 U.S.C. §3261.


## INTRODUCTION

Civilian employees have always accompanied the force during operations. Recently, Operations DESERT STORM and Joint Endeavor highlighted 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.)

An understanding of the process for designating, training, and directing the efforts of emergency-essential civilians (EE) while deployed is essential for judge advocates advising commanders while deployed.

## DESIGNATING EMERGENCY ESSENTIAL POSITIONS

The first step in designating an EE position is to identify positions required to be performed in deployed environments, which a military member can not 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.

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.

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.

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.

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.

**DEPLOYMENT PREPARATIONS**

**Identification.** Issue EE employees, or employees occupying positions determined to be EE, the DD Form 489, "Geneva Convention Identity Card for Civilians Who Accompany the Armed Forces," or DD Form 1934, "Geneva Convention Identity Card for Medical and Religious Personnel Who Serve In or Accompany the Armed Forces," as appropriate. EE employees can be issued DD Form 2764, "*United States DoD/Uniformed Services Civilian Geneva Conventions Identification Card.*" The DD Form 2764 is an automated identification card available on the Real Time Automated Personnel Identification System (RAPIDS) and is not a manual form like the DD Form 469. If the RAPIDS system is not available, the DD Form 489 is a valid manual identification card for EE employees. EE employees shall also be issued passports, visas, country clearances, and any required security clearances.

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

**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.

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

**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.

**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.

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 which is equivalent to that required of military (AR 690-11).

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.

**Legal Assistance.** Legal assistance, including wills and any necessary powers of attorney relating to deployments, is available to EE 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.

**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 personal self-defense sidearms. Acceptance of a sidearm is voluntary. Authority to carry sidearms is contingent upon the approval and guidance of the supported Combatant/ MACOM Commander. Only government issued sidearms/ammunition are authorized.

**COMMAND AND CONTROL DURING DEPLOYMENTS.**

During deployments, EE 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 initiating and effecting recognition and disciplinary actions.

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.

**COMMON ISSUES DURING DEPLOYMENTS.**

**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.

**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.

**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.

**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.

**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.

**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.

**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. The DPA commences for employees already in the area on the date of the area's designation for danger pay. For employees later assigned or detailed to the area, DPA commences upon arrival in the area. For employees returning to the post after a temporary absence it commences 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.

**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 sidearms for personal protection are not "in actual combat."

## 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 specific contractual language which defines the relationship of the contractor employee to the United States.

**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, to satisfy the commander's new requirements 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.

**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, and 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.

**Identification Cards**. Contractor employees will receive the following three distinct forms of identification: DD Form 1173 (Uniformed Services Identification and Privilege Card). This card is required for access to facilities and use of privileges afforded to military, government civilians and/or military dependents. DD Form 489 (Geneva Conventions Identity Card for Persons who Accompany the Armed Forces). This card identifies one's status as a contractor employee accompanying the U.S. Armed Forces. This card must be carried at all times. Personal identification tags that include the following information: full name, social security number, blood type and religious preference. These tags should be worn at all times. In addition, other identification cards, badges, etc., may be issued depending upon the basis for the operation. For example, when U.S. forces participate in United Nations (UN) or multinational peace-keeping operations, contractor employees may be required to carry identification that verifies their relationship to the UN or multinational force. If their employer processes contractor employees for deployment, it is the employer's responsibility to ensure its employees receive required identification.

**Organizational Clothing and Equipment Issue.** Personal clothing and personal care items, to include both casual attire and work clothing required by the assignment, are the responsibility of the individual contractor employee and will not be issued at the processing center. If required by the Theater Commander, the deployment processing center will issue Organizational Clothing and Individual Equipment (OCIE) to contractor personnel. The wearing of such equipment by contractor personnel, however, is voluntary, unless required in the contractual agreement.

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

**Weapons and Training.** Individual Deployment Sites (IDS) or CONUS Replacement Centers (CRC) may issue sidearms 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).**

**CONTRACTOR ISSUES DURING DEPLOYMENTS**

**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.

**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.

**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.

**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.

**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 concluded to afford contractor employees the rights and privileges associated with SOFA status.

**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.

**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.

## CRIMINAL JURISDICTIONAL ISSUES

On 22 November 2000, the President signed the *Military Extraterritorial Jurisdiction Act of 2000*, 18 U.S.C. §3261. This legislation 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.

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.

# CHAPTER 9

# FOREIGN AND DEPLOYMENT CLAIMS

### REFERENCES

1. AR 27-20, Claims (31 December 1997).
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 (1 May 1996).
11. AFI 51-502, Personnel and Government Recovery Claims (1 March 1997).

## 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.

## SINGLE SERVICE RESPONSIBILITY

Department of Defense Directive 5515.8, Single Service Assignment of Responsibility for Processing of Claims, 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. 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.

## 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 giving 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.

**TYPES OF CLAIMS APPLICABLE DURING A DEPLOYMENT**

Claims Cognizable under the Federal Tort Claims Act (FTCA).[115] 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 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.[116]

Claims Cognizable under the Personnel Claims Act (PCA).[117] 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.[118]

Claims Cognizable under the Military Claims Act (MCA).[119] 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."[120] Examples include maneuver damage caused by the administrative movement of troops and equipment to and from military operations and exercises, and military training.

Claims Cognizable under the Foreign Claims Act (FCA).[121] 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.[122] 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.[123]

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[115] 28 U.S.C. §§ 2671 – 2680.

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

[117] 31 U.S.C. § 3721.

[118] 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.

[119] 10 U.S.C. § 2733.

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

[121] 10 U.S.C. § 2734.

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

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

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.[124] 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.[125]

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.[126]

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 unit claims 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.[127] 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.

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. Punitive damages, court costs, attorney fees, bailment and filing costs are not allowed. 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.[128] 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.[129]

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

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

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

[127] 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 for up to $15,000. Line-officer commissioners may pay claims for up to $2,500, although they have no denial authority. A three-member FCC may deny claims of any amount, and settle claims for 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.

[128] 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.

[129] 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.

Claims Cognizable under International Agreements (SOFA Claims).[130] As a general rule, the FCA will not apply in those foreign countries with which 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."[131] 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.[132]

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."

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.[133]

Both the PVA and SAA contain two-year limitation periods running 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.

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.

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.

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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[130] 10 U.S.C. § 2734a (commonly referred to as the International Agreement Claims Act).

[131] *Id*.

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

[133] 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).

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.

Solatia Payments.[134] If a unit deploys to the Far East or parts of Asia, judge advocates must consider the custom, widespread in that area of the world, 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.[135]

Article 139 Claims.[136] 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.

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.

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.[137]

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.

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

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

[136] 10 U.S.C. § 939. *See generally* ch. 9, AR 27-20 and ch. 9, DA PAM 27-162.

[137] 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.

**PREDEPLOYMENT PLANNING**

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.[138]

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.

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. Units are responsible for appointing UCOs and MDCOs, nevertheless, claims personnel should stand ready with formats and regulatory guidance to assist them in this endeavor.

**NONCOMBAT DEPLOYMENT OPERATIONS**

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.

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 tragic Gander air crash in 1985, the 1991 volcanic eruption of Mount Pinataubo in the Philippines, and the military's role in the aftermath of Hurricane Andrew. The military is called to react to these types of disasters both within and outside of the continental United States. These operations place a great demand on claims personnel.[139] Claims offices must have operational claims disaster plans to execute claims contingencies when called

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

[139] 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

upon to compensate persons harmed by military activities that cause the disasters, as well as military disaster relief activities that cause further harm. Additionally, the Army is DoD's executive agent for tort claims arising from chemical disasters under the purview of the Chemical and Biological Defense Command, and has other significant responsibilities for the resolution of tort, maneuver damage, and personnel claims arising from man-made natural disasters.

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.

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.

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.

Transportation assets will be limited in any deployment. Judge advocates and other claims investigators must, however, be able to travel to claim 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.

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.

## COMBAT CLAIMS

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

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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.

agreement that addresses claims issues, it may be suspended in time of armed conflict.[140] The agreement may also 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.[141]

Noncombat Claims Arising on Conventional Combat Deployments. A basic principle embodied in U.S. claims statutes is that damage resulting directly from combat activities[142] 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.[143] 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,[144] and the Personnel Claims Act,[145] which provide compensation to service members for property losses due to enemy action. Solatia[146] 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[147] 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.

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.

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.[148] 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.[149] 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.[150]

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

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

[142] 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." Glossary, sec. II, AR 27-20.

[143] 10 U.S.C. § 2734.

[144] 10 U.S.C. § 2733.

[145] 31 U.S.C. § 3721.

[146] *See* notes 134 – 22 and accompanying text.

[147] 10 U.S.C. § 939.

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

[149] 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.

[150] 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.

Requisitions under the Law of War. The impact of lawful requisitions of private property on the battlefield is an often overlooked area of deployment claims. Under the law of war, a soldier may requisition any type of property whenever there is a valid military necessity.[151] 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.[152] 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

[151] 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.

[152] 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 |

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

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)

**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.

**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 and all evidence obtained.

10. **Exhibits**. List all exhibits and attach them to the report.

11. **Recommendations**.

    **It is Recommended That**. Leave this block blank.

    **Reasons for Recommendations**. Leave this block blank.

UCOs will send their recommendations on a separate sheet of paper. This is because local (receiving state) law often determines payment of claims. Claimants who are not satisfied with their settlements may go to court. 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

**I. 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.**

**II. 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.

**III. 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.

## IV. DEPLOYMENT PLANNING

A. U.S. Army Claims Service (USARCS). Immediately upon being informed of a possible deployment, contact the Chief, Foreign Torts Branch, USARCS, Ft. Meade, MD, for current claims information and technical guidance. USARCS has the authority to constitute 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.

## V. DEPLOYMENT/STATIONING PHASE. ONCE THE UNIT HAS BEGUN DEPLOYING INTO THE RECEIVING STATE, THE FOLLOWING FACTORS NEED TO BE CONSIDERED IN CONDUCTING A DEPLOYMENT CLAIMS ACTIVITY:

A. Coordination with receiving state authorities. It is very important to inform host nation authorities of the way in which the deployment claims activity will work. They have an interest in seeing 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 which 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) which 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

**I. INTRODUCTION. THIS SOP IS BASED UPON THAT USED BY USACSEUR TO HANDLE CLAIMS UNDER ITS FOREIGN CLAIMS COMMISSIONS (FCCS). THE ACTUAL SOP USED IN A DEPLOYMENT SITUATION BY AN FCC WILL VARY WITH THE MISSION AND THE CIRCUMSTANCES OF THE DEPLOYMENT.**

## II. 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 or 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.

## III. 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.

## IV. NEW CLAIM PAPERWORK.

A. If the claimant is represented by an attorney, 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.

## V. 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.

## VI. PAYMENT.

A. Use SF 1034, Public Voucher, to pay the claimant. Attach DA Form 1666 (Claims Settlement Form), DA Form 1668 (Small Claims Certificate), and either the data sheet or seven-paragraph memo to the voucher, as appropriate. Send all materials to finance under DA Form 200. Also include a copy of the POA if necessary.

B. Depending on the situation, coordinate with USARCS or a command claims service before payment to review any questions 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.

## VII. 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 |
|---|---|---|
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**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**

## I. REFERENCES:

A. OPORD

B. Any Previous Technical Implementing Guidance for Termination and Restoration Settlements for Properties Leased in Support of the Operation

C. Army Regulation 27-20

## II. GENERAL:

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.

## III. 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.

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

| 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** |

# CHAPTER 10

# CRIMINAL LAW

### REFERENCES

1. Manual for Courts-Martial (2000).
2. Army Regulation 27-10, Military Justice, 20 August 1999.
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 5890.1, Manual of the Judge Advocate General (JAGMAN), 17 January 1991.
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.

Military justice supervisors and trial counsel must ensure efficient and expeditious processing of military justice actions (courts, NJP and administrative separations) in the deployed setting. This obligation exists throughout the spectrum of operations, to include training exercises, emergency relief operations, peacekeeping/making operations and war itself. At the same time, however, judge advocates must maintain the same level of efficiency in rear detachment military justice actions.

## MILITARY JUSTICE DURING DEPLOYMENT PHASES

FM 27-100 lists four phases in military operations: premobilization, predeployment/mobilization, deployment, and redeployment/demobilization. Different military justice concerns should be addressed at each stage of the operation.

### *PREMOBILIZATION CONSIDERATIONS*

During premobilization, the actual deployment mission and location have not been identified. The primary focus is planning and identifying possible issues. Military justice supervisors should designate personnel and equipment available for deployments and ensure such personnel have been trained to the greatest extent possible.

### *PREDEPLOYMENT/MOBILIZATION CONSIDERATIONS*

During predeployment/mobilization, a mission and deployment location have been identified. The military justice supervisor and counsel must execute the military justice transition and conduct mission training to prepare for the deployment. Transition tasks may include:

Preparation of key personnel for deployment. Successful management of military justice actions during a deployment requires planning and training of key personnel. The size of the deployment will often dictate who deploys from a legal office. Regardless of the deployment scale, supervisors must ensure potentially deployable judge advocates know how to process military justice actions on their own, before deployment. Deployed settings present difficult supervisory challenges, primarily caused by increased distances between judge advocates, communication and transportation limitations, and "imported" counsels (judge advocates from legal assistance, administrative law or claims) that may be inexperienced with military justice actions. Supervisors must therefore attempt to train potentially deployable judge advocates before deployment in the following areas: AR 15-6 investigations, NJP procedures, court-martial procedures and administrative separations. Coordination of support for trial defense and judiciary services also must be considered at this time.

Identification/marshaling resources to conduct operations. Resources, to include electricity, phone lines and fax capability are ordinarily limited in deployed settings. Judge advocates must ensure possession of the required regulations

and legal forms in electronic format (CD ROM) **and** hard copy. Computers may help to eliminate the need for some hard copy resources. However, given their potential unreliability in the harsh environment of a deployment, judge advocates must plan for the worst. Judge Advocates must also consider inclusion of the hardbound military justice reporters. CD ROM research is subject to the computer's limitations in a field environment. Past Army deployments have demonstrated the need to deploy with a hardbound set of reporters for the prosecution of courts-martial in the field. Other essential publications include the Manual for Courts-Martial, AR 27-10 and any relevant 27-10 supplements, AR 15-6, the enlisted and officer ranks updates, a Military Rules of Evidence hornbook, a Basic Course Criminal Law Deskbook and the Crimes and Defenses Deskbook. Many of these resources can be accessed on the JAG BBS, Criminal Law Files.

In addition, judge advocates must ensure the availability of other resources, to include:

*Urinalysis Testing*. Based upon mission requirements and command guidance, judge advocates should ensure units have the ability to conduct urinalysis testing in theater. Inevitably, contraband finds its way to the deployed setting. At a minimum, the commander should have the option to conduct a urinalysis. Coordination should be made with unit ADCOs, the Installation Biochemical Testing Coordinator and the relevant stateside lab prior to deployment. Fort Meade Drug Testing Lab: (301) 677-7085/ Tripler Drug Testing Lab: (808) 433-5176.

*Dogs*. Judge advocates must also consider the advisability of bringing canine support, to include drug and explosive detection capable dogs. In addition to the drug support, dogs are able to assist in force protection efforts.

*Confinement Facility*. With the exception of the Vietnam War, Army forces have typically not maintained confinement facilities in theater for U.S. personnel. Although jails run by U.S. or UN forces may exist for local nationals, they are not intended, and generally should not be used, for holding U.S. forces personnel. When pretrial confinement is necessary, the soldier is normally shipped to the rear (Mannheim, Germany or CONUS).

Designating/aligning the convening authority structure for the deployment theater and home station. There are different options available in regards to designating and aligning convening authorities. The GCMCA may deploy and take his GCM authority (his command flag) to the deployed setting. In such a case, military justice actions can either be forwarded to the deployed commander for disposition or to a nearby CONUS GCMCA after prior coordination. He may elect not to take his GCM authority with him and turn it over to the rear detachment. Finally, he may elect to retain GCM authority for deploying units, and also to have GCM authority in the rear. If he elects to leave all or some GCM authority in the rear detachment, coordination must be made. Although most CONUS installations have a residual GCM authority already designated in the Installation Commander pursuant to Department of the Army General Order, when this authority is not present, judge advocates should coordinate with The Office of The Judge Advocate General, Criminal Law for Secretarial designation of a new GCMCA. Cases should be transferred to the new convening authorities when necessary. See sample of transfer of jurisdiction at the end of this chapter.

Ensuring units are assigned/attached to the appropriate organization for administration of military justice. Initially, unit commanders at all levels must determine which units, or portions of units, will deploy or remain in the rear. This determination will dictate the need for orders attaching individual personnel, or units to other organizations. It will also dictate the need to create provisional units to support the deployment. For example, a deploying company may be attached to a previously unrelated deploying battalion. The unit commander must also determine the need to create a rear detachment. Rear detachments often will have their own chain of command from Company to Division level. Non-deploying soldiers and units may be attached to previously unrelated units or provisional units[153] during the period of deployment.

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[153] 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, 3 Sep. 91. Provisional units are often used to create a UCMJ structure or fill the gaps in UCMJ authority or convening authority. They help to ensure that commanders at all levels are available to process UCMJ and administrative actions. Commanders decide whether or not p-units will be "organized," and if so, to what unit they will be attached. This should be done in consultation with the S1 and the judge advocate. When a unit deploys, it normally leaves behind individuals or portions of the unit. Those elements can either be attached to another preexisting unit remaining in the rear or a p-unit can be created at the commander's discretion. Provisional units can be created at any level, to include company, battalion, and brigade. Deploying elements may also need to provisionalize depending upon whether a portion of the unit is deploying and/or whether the commander of the original unit is deploying as the commander of that unit, that is, the commander "takes his flag" to the deployed setting.

The S1/PSC is normally the staff element responsible for executing the commander's intent by processing the documents that "organize" and "attach" p-units. JAs must assist in this process to ensure a UCMJ command structure exists, and that this structure continues the sensible flow of

Ensuring individuals are assigned/attached to the appropriate organization for administration of military justice. All soldiers, whether deploying or not, should be assigned or attached to a unit that can dispose of criminal and administrative actions that may arise during the deployment period. The unit adjutant should initiate a request for orders to attach non-deploying soldiers to a unit remaining at the post, camp, or station. Commanders must identify non-deployable soldiers within the unit. TCs should monitor the status of those soldiers within their jurisdiction who may be non-deployable for legal reasons. Judicial action by military or civil authorities, while generally making a soldier non-deployable for exercises, may not bar deployment for actual combat operations. The unit adjutant should initiate procedures to obtain the release of soldiers in confinement whom the commander requests be made available for deployment. TCs should also advise commanders of those soldiers who are not themselves the subject of legal action, but who are required to participate in legal proceedings (such as witnesses or court or board members). The decision as to whether these soldiers will deploy is the commander's, usually made after coordination with the TC.

Guidance for disposing of pending cases upon deployment. Judge advocates must consider whether to take pending actions to the deployed setting or leave them in garrison. For courts-martial this will largely be a function of the seriousness of the offense and whether the witnesses are primarily civilian or military. Serious criminal offenses or cases with primarily civilian witnesses often remain in the rear. Similarly, soldiers pending administrative separation normally should remain in garrison pending separation. NJP actions normally go forward with the deploying force.

Selection of court-martial panel, if necessary, in the deployment theater and rear detachment. Supervisory judge advocates must plan for new panel selection for both the rear garrison and the deployed setting. Brigade judge advocates should also consider establishing straight special court-martial panels in theater to provide an expeditious forum for resolution of NJP refusals and other low-level misconduct. Judge advocates should also familiarize themselves with a legally sound selection process and deploy with prepared panel selection advice.

Content of the general order for the operation. Based upon mission requirements and command guidance, military justice supervisors and trial counsel must draft the general order for the operation and have it ready for publication as soon as possible. See examples at this end of this chapter (General Orders for operations in Desert Shield, Haiti, and Allied Force).

Publishing the general order for the operation. The general order must be published and disseminated to all soldiers prior to deployment. The contents of the general order must be briefed as well (see below).

Conducting mission training/predeployment briefings. Judge advocates must be thoroughly familiar with the general order for the operation and pay particular attention to provide extensive briefings prior to deployment. As with ROE training, supervisory judge advocates must ensure refresher training on the general order upon arrival in theater, at regular intervals throughout the deployment and during the redeployment phase.

*DEPLOYMENT CONSIDERATIONS*

During deployment, the military justice supervisor must ensure the following is accomplished:

Ensure orders assigning units and personnel clearly indicate which commanders have nonjudicial punishment and court-martial authority. This is an ongoing process, as new soldiers (and possibly members from other services) will be incoming to the command. This requires coordination with the appropriate G1/S1 personnel staff elements.

Conduct training in military justice for rear detachment commanders. A military justice supervisor in the rear detachment should prepare for military justice challenges in the rear because of fewer resources available. Also the supervisor should

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UCMJ actions. Provisional units must have a commander on orders. Such commanders must be commissioned officers (including commissioned warrant officers). They have normal UCMJ authority. Check local military justice supplements to identify modifications or reservations of authority in this regard.

Judge advocates must monitor the PSC publication of orders that "organize" and then "attach" p-units to other units. This process is typically initiated by the commander submitting a request for orders to "organize" a p-unit, and then a second RFO to "attach" the unit to a "parent" unit. Often, given the volume of units deployed and p-units organized and the delay in publication of orders, it is sometimes more efficient to publish a regulation or General Order which sets out the jurisdictional scheme for both forward and rear area elements. This ensures all commanders and units, especially newly attached units, are aware of their "food chain."

expect that rear detachment commanders have little to no experience in military justice actions and will need training and guidance, particularly in areas such as unlawful command influence. Rear detachment military justice supervisors must plan for and prepare legal briefings for all new commanders in the rear detachment and additional training as necessary.

*REDEPLOYMENT/DEMOBILIZATION CONSIDERATIONS*

During redeployment/demobilization, the military justice supervisor must ensure the following is accomplished: 1) return to the original convening authority structure is returned to; 2) units and personnel are assigned/attached back to appropriate organizations for administration of military justice; 3) designations of home station convening authorities are revoked; 4) individual cases are transferred to appropriate jurisdictions; and 5) the general order for the operation is rescinded.

## RELATED MILITARY JUSTICE ISSUES

**Nonjudicial Punishment**. NJP procedures remain largely unchanged in the deployed theater. Practical issues face judge advocates and commanders.

Postponement of Punishment. Where deployed soldiers are already required to remain in small compounds, is restriction a viable punishment? AR 27-10, para. 3-21 allows commanders to postpone imposition of punishment. This provision contemplates such delay will not normally exceed 30 days. The intent is likely to ensure swift punishment consistent with the purposes of Article 15, UCMJ. In cases where the commander desires a delay in excess of 30 days, judge advocates should coordinate with their supervisory judge advocate. The regulation is silent as to the lawfulness or propriety of such a course of action. In any event, judge advocates must ensure the soldier is notified of the commander's intent to delay imposition. This should be reflected on the DA Form 2627.

Reciprocal Jurisdiction. Army commanders may impose NJP on personnel of other services assigned or attached to the unit.[154] Another option in a joint command is to designate a service representative to administer NJP to members of their service.

## COMBAT CRIMINAL LAW ISSUES

This section addresses criminal law problems associated with combat and, specifically, wartime-related offenses.

Time of War. The existence of a "time of war" is relevant to many criminal law matters: certain offenses can only occur in time of war, other offenses are punishable by death only in time of war, time of war is an aggravating factor in still other offenses, and court-martial jurisdiction will exist over civilians who are "accompanying the force in the field." Time of war, however, is defined in a variety of ways that depend upon the purpose of the specific article in which the phrase appears, and on the circumstances surrounding the application of the article.

Time of War: A Definition. 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: the aggravating circumstances that must be present to impose the death penalty (R.C.M. 1004(c)(6)), the punitive articles (MCM, Part IV), and nonjudicial punishment (MCM, Part V). It does not apply to statute of limitations and/or jurisdiction over civilians.

**Time of War and the Punitive Articles.**

Offenses that can only occur during time of war:

[154] However, the commander must do so IAW the individual's parent service regulation (AFI 51-202, para 2, 2.2.1; Navy and Marine JAGMAN 0106d; Coast Guard MJM, Art 1-A-3(c)). See AR 27-10, para 3-8c. JAs must note certain differences in procedures. For AF personnel, a joint commander may only impose NJP on AF personnel if the offense "arises from a joint origin or has joint forces implications." Other service procedures must also be followed. For example, the AF provides 72 hours to consult with counsel. The Navy/Marine burden of proof is a preponderance of the evidence. Also, appeals typically proceed through the servicemember's parent service. Coordination, therefore, must be made with the servicing judge advocate. This list of procedural differences is not exhaustive. JAs should consider consultation with other service JAs to understand the impact of NJP on other service personnel.

1. Improper use of a countersign (UCMJ art. 101) 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.

2. Misconduct as a prisoner (UCMJ art. 105) makes it criminal to improve one's position as a prisoner (a) to the detriment of other prisoners[155] 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.

3. Spying (UCMJ art. 106) 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.[156]

**Offenses that can be punished by the death penalty only in time of war:**

1. Desertion (UCMJ art. 85) [157] with intent to remain away permanently, shirk important service, or avoid hazardous duty *may* be punished by death in time of war.

2. Assaulting or Willfully Disobeying a Superior Commissioned Officer (UCMJ art. 90).

3. Misbehavior of Sentinel or Lookout (UCMJ art. 113), 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.

**Time of War as an Aggravating Factor.**

1. Homicide and rape are both capital offenses in time of war as well as at other times. RCM 1004 provides that it is an aggravating factor sufficient to justify a death sentence that the rape or homicide was committed in time of war *and* in territory in which the U.S. or an ally was then an occupying power or in which U.S. forces were then engaged in active hostilities.

2. The maximum penalty that may be imposed by court-martial is increased in time of war for drug offenses, malingering, and loitering/wrongfully sitting on post by sentinel/lookout.

3. The maximum period of confinement *may* be suspended in time of war for solicitation to desert, mutiny, misbehavior before the enemy, or sedition.

Time of War and Nonjudicial Punishment. A commander in the grade of major/lieutenant commander or above may reduce enlisted members above the pay grade E-4 *two* grades in time of war *if* the Service Secretary has determined that circumstances require the removal of peacetime limits on the commander's reduction authority. *See* MCM, pt. V, para. 5b(2)(B)(iv).

"Time of War" for Jurisdiction, and Statutes of Limitation. Jurisdictional rules and statutes of limitation may both be affected by a determination that a time of war exists. As stated previously, "time of war" is defined differently for jurisdiction and statutes of limitations purposes than it is for aggravating factors for a capital case, the punitive articles, and nonjudicial punishment.

1. **Jurisdiction**. UCMJ art. 2(a)(10) provides that in time of war, persons "serving with or accompanying an armed force in the field" may be subject to trial by court-martial. In the case *U.S. v. Averette*, 41 C.M.R. 363 (1970), the Court of Military Appeals 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.

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[155] For example, reporting plans of escape, secret food and arms caches, etc. An escape that causes injury to fellow prisoners does not fall within the ambit of this offense.

[156] UCMJ art. 106. Spying does not violate the law of war. "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." (FM 27-10, para. 77).

[157] The last execution for desertion occurred during World War II. See Slovik, E. Theater of Operations CMCO No. 5555.

**Statutes of Limitation**. UCMJ art. 43 extends the statute of limitations for certain offenses committed in time of war.[158]

a. There are no statutes of limitation for the crimes of Desertion, Absence Without Leave, Aiding the Enemy, Mutiny, Murder, or Rape in time of war, and persons accused of these crimes may be tried and punished anytime. (UCMJ art. 43(a)).

b. The President or Service Secretary may certify particular offenses that should not go to trial during a time of war if prosecution would be inimical to national security or detrimental to the war effort; statute of limitations may be extended to six months after the end of hostilities. (UCMJ art. 43(c)).

c. The statute of limitations is also suspended for three years after the end of hostilities for offenses involving fraud, real property, and contracts with the United States.[159]

In determining whether "time of war" exists for statute of limitations purposes, CMA held that the conflict in Vietnam, though not formally declared a war by Congress, was a "time of war."[160] 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[161] and whether legislation, executive orders, or proclamations concerning the hostilities are indicative of a time of war.[162]

Military courts have also rejected the notion that there is a geographical component to the "time of war" in the sense that absence from the combat zone at the time of an offense does not prevent the offense from occurring in "time of war."[163] For example, in a case in which an accused absented himself without leave from Fort Lewis, Washington, during the Korean conflict, CMA held that the Korean conflict was a war within the meaning of UCMJ, art. 43(a) and that the accused's geographical location at the time of the offense was irrelevant. "In either instance, the Armed Forces are deprived of a necessary—perhaps vitally necessary—combat replacement."[164]

**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.

Misbehavior Before the Enemy. Art. 99, UCMJ, is an amalgamation of nine different offenses and is meant to cover all offenses of misbehavior before the enemy. UCMJ, article 134 is not a catch-all designed to apply to these types of violations. Each of these crimes must be committed before, or in the presence of, the enemy.

**"Enemy**" Defined. 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.[165]

"**Before the Enemy**" Defined. To be before, or in the presence of, the enemy, one must stand in close tactical, not physical, proximity to the foe. CMA has defined the concept as follows:

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[158] CMA held that Vietnam was a time of war for statute of limitations purposes. U.S. v. Anderson, 38 C.M.R. 386 (1968).

[159] UCMJ art. 43(f). The date hostilities end is proclaimed by the President or established by a joint resolution in Congress.

[160] U.S. v. Anderson, 38 C.M.R. 386 (1968).

[161] U.S. v. Shell, 23 C.M.R. 110 (1957).

[162] U.S. v. Bancroft, 11 CMR 3 (1963).

[163] U.S. v. Averette, 41 C.M.R. 363 (1970).

[164] U.S. v. Ayers, 15 C.M.R., at 227 (1954).

[165] U.S. v. Monday, 36 C.M.R. 711 (A.B.R. 1966), pet. denied, 37 C.M.R. 471 (C.M.A. 1969)

> 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.[166]

In applying this definition, courts have held that a member of a front line platoon, a member of a mortar unit supporting friendly troops, and a soldier running away near friendly artillery units less than six miles from the front lines were all "before the enemy." The definition and the court interpretations make this element dependent upon the circumstances surrounding the offense and leave the issue to the trier of fact.[167]

**"Before the Enemy" Offenses.**

a. 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.

b. **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.

c. An accused **endangers the safety of a command** when, through disobedience, neglect, or intentional misconduct, he puts the safety of the command in peril.

d. 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.

e. **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.[168]

f. **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.

g. **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.

h. 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.

i. 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. 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.

1. Failing to give notice or turn over property.[169]

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[166] U.S. v. Sperland, 5 C.M.R. 89, 91 (1952).

[167] 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.

[168] *See* Smith, 7 C.M.R. 73 (A.B.R. 1953), and Barnett, 3 C.M.R. 248 (A.B.R. 1951).

2. Buying, selling, trading, or in any way disposing of, captured or abandoned property.

3. Engaging in looting or pillaging. Violation of 26 U.S.C. §§ 5844, 5861 (unlawful importation, transfer, and sale of a dangerous firearm) may be charged as violations of clause three, UCMJ art. 134.

Private Property. As a general rule, private property may always be requisitioned or destroyed if military necessity so requires. The 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. This training will aid the commander in accounting for property and in paying for only proper claims.

1. **Wrongful destruction of private property.** UCMJ, art. 109 prohibits 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.

2. **Wrongful taking of private property.** UCMJ, art. 121. There are no provisions in this article that apply *specifically* to wartime situations. The maximum punishment for violation of this provision is dishonorable discharge, forfeiture of all pay and allowances, and confinement for five years.

A Detailed Analysis of Other Potential Wartime Offenses.

Mutiny or Sedition (UCMJ art. 94). 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. The 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 (UCMJ art. 100). The death penalty can be given for the offense of compelling a commander to surrender, an attempt to compel surrender, and for striking the colors or flag to any enemy without proper authority. **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. An 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. These 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.

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[169] See 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.

Improper Use of Countersign (UCMJ art. 101). 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 and 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. Revealing these procedures or words is done at one's peril, despite the intent or motive at the time of disclosure. 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 (UCMJ art. 102). A **safeguard** is a guard detail or written order established by a commander for the protection of enemy and neutral persons, places, or property. The purpose of a safeguard is to pledge the honor of the nation that the person or property will be respected by U.S. forces. 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 (UCMJ art. 104). *Five separate acts* are made punishable by this article: aiding the enemy, attempting to aid the enemy, harboring or protecting the enemy, giving intelligence to the enemy, and communicating with the enemy. Although this article 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. **Harboring or protecting the enemy** requires that the accused, knowing the person being helped is the enemy, and without proper authority, shields him from injury or other misfortune. The protection can take any form; physical assistance or deliberate deception will both violate the article. One **gives intelligence to the enemy** by giving accurate, or impliedly accurate, information to the enemy. This is an aggravated form of communicating with the enemy, because the offense implies that the information passed has potential value to the opposition. The information need not be entirely accurate, nor must the passing of the information be directly from the accused to the enemy; however, the accused must have actual knowledge of his acts. The final offense under this article is **communication with the enemy**. Any form of unauthorized communication, correspondence, or intercourse with the enemy is prohibited, whatever the accused's intent. The content or form of the communication is irrelevant, as long as the accused is actually aware that he is communicating with the enemy. Completion of the offense does not depend on the enemy's use of the information or a return communication from the enemy to the accused; the offense is complete once the correspondence issues—either directly or indirectly—from the accused. Prisoners of war and citizens of neutral powers residing in, or visiting invaded or occupied territory can violate this article, as it applies to all persons, whether or not they are otherwise subject to military law.

Spying (UCMJ art. 106). 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, unless they fall into the following categories.

1. Members of an armed force or civilians who are not wearing a disguise and perform their missions openly after penetrating friendly lines.

2. Spies, who after having returned to enemy lines, are later captured.

3. Persons living in occupied territory who 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 of a Sentinel (UCMJ art. 113). A sentinel who is found drunk or asleep on his post, or who leaves his post before being properly relieved, may suffer the death penalty if the offense is committed in time of war. One is **drunk** when intoxicated sufficiently to "impair the rational and full exercise of the mental or physical faculties." The definition of "**asleep**" requires impairment of the sentinel's mental and physical condition, sufficient enough that, although not completely comatose, he is unable to fully exercise his faculties. The **sentinel's post** is the area at which he is required to perform his duties. Straying from this area slightly does not amount to an offense, unless the departure would prevent the sentinel from fully executing his mission. A sentinel is posted when he is ordered to begin his duties. No formal order or

ceremony is needed; it is enough that routine or standard operating procedure requires the individual to be on post at a particular time. The term applies equally in garrison, in the field, or in combat when listening posts, observation posts, forward security, and other warning devices are used.

Malingering (UCMJ art. 115). Soldiers who **feign illness**, **physical disablement**, or **mental impairment** or who **intentionally injure themselves** in order to avoid duty are guilty of malingering. The offense punishes those who intend to avoid work. The severity and the method of infliction of the injury are immaterial to the issue of guilt.

Offenses by a Sentinel (UCMJ art. 134). Sentinels are held to a high standard of conduct, especially in wartime. Thus, it is a criminal offense for a sentinel to **loiter or wrongfully sit down on his post when that conduct is prejudicial to good order and discipline or brings discredit to the armed forces**. These are criminal acts in peacetime and wartime; however, the maximum punishment is increased to a dishonorable discharge, forfeiture of all pay and allowances, and confinement for two years in time of war.

Straggling (UCMJ art. 134). Straggling applies in peacetime and combat to soldiers who, while accompanying their organization on a march, maneuver, or similar exercise wander away, stray, or become separated from their unit. The specification must include the specific mission or maneuver.[170]

**APPENDICES**

1. Sample Transfer of Jurisdiction

2. Sample Letter Transferring Court-Martial Convening Authority

3. Sample General Orders Number 1

[170] During Operation Urgent Fury, a platoon radio-telephone operator straggled behind the unit and eventually became so scared that he was found cowering in a ditch. He was charged with straggling (UCMJ art. 134) and endangering the safety of his platoon (UCMJ art. 99(3)).

# 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

c. 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.

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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

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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.

# 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. AR 200-2, Environmental Effects of Army Actions (23 Dec. 1988).
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).

According to the U.S. Army's Environmental Strategy for the 21st Century, "[T]he Army will be a leader in environmental stewardship." This sweeping statement of objective is not limited to garrison environments. As a result, the judge advocate must advise commanders and train soldiers regarding environmental law issues related to overseas and domestic military operations. First, judge advocates must recognize environmental law issues that other officers and officials may not have considered. Second, judge advocates 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.

Frankly, this is an area where the doctrine has actually gotten ahead of law and policy. In particular, documents like 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, are excellent tools to assist the operational law attorney. This publication, as well as virtually every other reference document you may need relating to environmental issues, can be found at www.denix.osd.mil, the Department of Defense's Environmental Network and Information Exchange. Attorneys should access this site as early as possible in order to obtain a password and fuller access to restricted databases.

Protecting the environment is today a major international, United States, 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.

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).

**ENVIRONMENTAL PLANNING REQUIREMENTS VS. ENVIRONMENTAL 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)[171] and the National Environmental Policy Act (NEPA) 42 U.S.C. §§4321-4370 (1969)[172] are not generally considered to have extraterritorial application.[173] 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."[174] 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.[175] In reality, no such waiver was needed.

Environmental Planning Requirements: Executive Order No. (EO) 12,114.[176] 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. This 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 of the Armed Services. For the Army, AR 200-2, *Environmental Effects of Army Actions* (23 Dec. 1988, but a completely rewritten regulation is due out in the future) 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.

**Pre-Operation Planning**

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[171] 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.

[172] 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.

[173] 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.

[174] 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).

[175] *See id*. at Environmental Law 1-3.

[176] Exec. Order No. 12,114, 44 Fed. Reg. 1957 (1979) *reprinted at* 42 U.S.C. § 4321, at 515 (1982) [hereinafter EO 12,114]. Portions of EO 12,114 are reprinted and discussed in Appendixes G and H, Army Regulation 200-2, *Environmental Effects of Army Actions* (23 Dec 88).

General Considerations. Judge advocates must recognize that Executive Order 12,114 always mandates *some degree* of environmental stewardship by United States forces in regard to its operations outside of the United States or its territories. Judge advocates should add this short document to their operational law library and refer to it during the operational planning phase. In addition 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),[177] and Army Regulation 200-2 (AR 200-2).

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. First, the United States, based upon operational realities and necessities, should take all reasonable steps to act as a good environmental steward. Second, the United States 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."[178] Third, any acts contemplated by officials within the Department of Defense that require "formal communications with foreign governments concerning environmental agreements and other formal arrangements with foreign governments" must be coordinated with the Department of State.[179]

The Required Analysis and Actions. Instead of promulgating additional and possibly more onerous requirements, the Army's regulation simply restates the requirements of DoD Directive 6050.7.[180] 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;"

2. Major federal actions that significantly harm the environment of a foreign nation that is not involved in the action;

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 United States because of its toxic effects [to] the environment create a serious public health risk; or (2) a physical project that is prohibited or strictly regulated in the United States by Federal law to protect the environment against radioactive substances;

4. Major federal actions outside the United States 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 United States, designated for protection by the Secretary of State.[181]

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).

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.[182] This is because most overseas contingency operations do not generate the first, third, or fourth types of environmental

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[177] Dep't of Defense, Dir. 6050.7, Environmental Effects Abroad of Major DoD Actions (31 March 1979) [hereinafter DoD Dir. 6050.7].

[178] *Id*. at para. 8-3 (b). 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 United States law and regulation, but by relevant international agreements and arrangements. *See id*. para 8-5 (a).

[179] *Id*. at para. 8-3 (c). 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.

[180] *Id*. at App. H.

[181] *Id*. at App. H, para. B.

[182] *Id*. at App H, para. B.1.a.

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).

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.[183] Of the four recent contingency operations (Somalia; Haiti; Guantanamo Bay, Cuba; and Bosnia), the United States relied upon the so called "participating nation exception" in Haiti and Bosnia. In Somalia and Guantanamo Bay, because neither Somalia nor Cuba participated with the United States forces in either Operation Restore Hope or Operation Sea Signal, the United States could not utilize the participating nation exception. Accordingly, the United States had a choice of accepting the formal obligation to conduct either an ES or an ER, or seeking an exemption. In both cases, the United States sought and received an exemption.[184]

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 United States, and even by involvement through a third nation or international organization.[185]

The foregoing regulatory guidance is helpful, but the nuanced and uncertain nature of peace 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. 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. United States forces that execute a permissive entry are typically dealing with a participating (cooperating) nation. Conversely, United States 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.

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 United States deployment within the host nation's borders, the host nation is probably participating with the United States (at a minimum in an indirect manner). If the host nation expressly agrees to the United States' entry and to cooperate with the military forces of United States, the case for concluding the nation is participating is even stronger.[186] Finally, if the host nation agrees to work with the United States on conducting a bilateral environmental review, the case is stronger still.[187]

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[183] Nevertheless, a study or review of some nature has been promulgated in every recent operation.

[184] *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].

[185] *See* AR 200-2, *supra* note 176, at App. H, para. A.1.a.

[186] *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).

[187] *Id*. at para. 4.

There is no requirement for a status of forces or other international agreement between the host nation and United States 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 United States and its host nation partners have documented the requisite participation within such agreements.

The decision to assume participating nation status is made at the unified command level, by the combatant commander.[188] In addition, once this election is made, the second decision of what type of environmental audit[189] to perform is also made at the unified command level.[190] 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.[191] It was also these members of the staff that disseminated the environmental guidelines and standards adopted in the operations plans.

Operation Joint Endeavor is the most recent example of a participating nation. Under the terms of the Dayton Peace Accords,[192] the parties agreed to "welcome and endorse" the arrangements and agreements to implement the Accord's military aspects, to include the mission of the Implementation Force (IFOR) led by United Sates forces.[193] The detailed nature of the Accord, particularly article VI, removes any doubt that all parties agreed to participate in an endeavor to bring peace to the nations of the Former Yugoslavia. The obligation to work together, coordinate decisions, and provide logistical support is abundantly clear.

The operational planners for Operation Joint Endeavor and their legal advisors integrated this analysis into their planning.[194] They found that each of the nations that the operation might impact was participating. They forwarded their conclusions to General George A. Joulwan, then Commander-in-Chief, European Command, who approved the participating nation status by approving the environmental appendix to the operation plan.[195] As described earlier, General Joulwan's action took advantage of the participating nation exception.

<u>The Exemptions</u>. 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 implement Executive Order 12,114. If an exemption applies,

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[188] *See* DoD Dir. 6050.7, *supra* note 177.

[189] *See* Moore Memorandum, *supra* note 186. 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.

[190] 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).

[191] *Id*.

[192] General Framework Agreement for Peace in Bosnia and Herzegovina [hereinafter the Dayton Accords]. The text of the Dayton Accords was initialed in Dayton, Ohio on November 21, 1995, and signed in Paris, France, on December 14, 1995. The United nations Security council, in acknowledgment of the Accords , issued Resolution 1031 (attaching , authorizing a multi-national implementation force (IFOR) "to take all necessary measures to effect the implementation" of Annex 1-A of the Accords. *See* S.C. Res. 1031, U.N. SCOR, 50th Sess., 3607th mtg., UN Doc. S/RES/1031 (1995) [hereinafter Resolution 1031].

[193] *Id*. at art. II.

[194] *See* Tab B to Appendix 5 to Annex D to United States Atlantic Command, Commander in Chief, Operations Plan 4243 (Operation Joint Endeavor): Environmental Considerations and Services (Unclassified) (2 December 1995) [hereinafter Joint Endeavor Operation Plan] The planners wrote that one of several major assumptions was that "[a]ll foreign nations potentially impacted by [the] operation are active participants or [are] otherwise involved in the operation." The import of this assumption is that it grants the "participating nation" exception to Executive Order 12,114's formal environmental review or study requirement. The plan went on to document that the limited amount of time available to prepare for the execution of the operation warrants the use of the exception. Very important to this analysis and not mentioned within the plan is the fact that the decision to take advantage of the participating nation exception can be made at the Unified Command level. Accordingly, the Commander and Chief, United States European Command does not have to forward this decision to a higher level of authority.

[195] *Id*.

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).[196]

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 the exemption of national security.[197]

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.

Unlike the participating nation exception, however, exempted status requires that the military leader take an affirmative step to gain a variance from the formal documentation requirements.[198] In the case of Operation Sea Signal, the Commander in Chief, United States 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.[199]

The entire written action was only three pages long, including the one page memorandum action--three short paragraphs signed by Mr. Kaminski.[200] 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:

(1) A Major Federal Action;

(2) Which will likely Cause Significant Harm to the Host Nation's Environment;

(3) Where the Host Nation Is Not Participating; and

(4) One of the Ten Exemptions Is Applicable.

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[196] DoD Dir. 6050.7, *supra* note 177.

[197] *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).

[198] 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 194.

[199] 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 184.

[200] 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 184.

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 an additional appendix to the plan to provide supplemental guidance to the environmental consideration section of the basic plan.

It is the policy of the United States to always conduct a good faith environmental audit to reduce potential adverse consequences to the host nation's environment.[201] The reason the United States seeks to avoid the formal review or study requirement is to enhance operational flexibility, and in turn, enhance the opportunity for operational success.[202]

The practical result of the United States policy is that United States forces require "adherence to United States domestic law standards for environmental actions where such procedures do not interfere with mission accomplishment."[203] Accordingly, from the planning phase to the execution phase, the environment is an important aspect of all United States operations.

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.[204] 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.[205]

**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.[206] The judge advocate must ensure that this translation takes a form that those charged with its execution can easily understand.[207] All four of the operations cited above serve as good examples of this type of lawyering.

Joint doctrine provides the framework for the foregoing translation and related legal work.[208] This framework contains seven elements for environmental planning and compliance. These elements are as follows:

(1) Policies and Responsibilities to Protect and Preserve the Environment During the Deployment;

(2) Certification of Local Water Sources by Medical Field Units;

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[201] *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").

[202] 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.

[203] 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 184, at 23.

[204] *Id*. at para. 4.b.

[205] *Id*. at para. 4.c.

[206] 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).

[207] 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*.

[208] *See* JOINT PUB 4-04, *supra* note 201, at II-8.

(3) Solid and Liquid Waste Management;

(4) Hazardous Materials Management (Including Pesticides);

(5) Flora and Fauna Protection

(6) Archeological and Historical Preservation; and

(7) Base Field Spill Plan.[209]

Lawyers can use this framework when assisting 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.[210] 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.[211]

Lawyers, using this same type of framework, can troubleshoot problems that arise in compliance. For example, during Operation Restore Hope, judge advocates working for the task force legal advisor conducted weekly coordination meetings with members of the task force staff using a checklist similar to the seven element list described above.

The same approach was subsequently used in Operations Sea Signal, Uphold Democracy, and Joint Endeavor. Using this approach, lawyers in Restore Hope discovered that the task force engineers planned to use waste oil to suppress the dust problem, typical of many areas in Somalia, that hampered early aspects of the mission. Working with the task force staff, task force lawyers advised the use of environmentally sound dust suppressants.[212]

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.[213] As a result of this excellent planning and execution, United States forces were protected against dozens of fraudulent claims filed by local nationals.[214]

A particularly vexing problem for overseas operations is the transportation of hazardous waste across international boundaries. The Basel Convention of 1989, which the United States has signed, but not ratified, imposes strict rules on signatory countries with respect to the movement of hazardous waste across international boundaries. This presented problems for our operations in both Bosnia and Kosovo—particularly with respect to Germany and Macedonia. The lead

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[209] Joint Publication 4-04 provides a description and examples of several of these seven elements. *See id.*

[210] 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).

[211] 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 194, at para. 3.c.(1), Tab B to Appendix 5, to Annex D.

[212] Unfortunately, the suppressants did not perform well and eventually the task force had to resort to waste oil. However, the effort made to avoid the use of oil demonstrates the sensitivity of United States forces to the Somali environment. In addition, once the decision was finally made to use waste oil, the task force developed a plan to limit the use of oil and to prevent an unnecessarily harsh impact on the environment. *See* RESTORE HOPE AAR, *supra* note 184, at 24.

[213] *See* Joint Endeavor Operation Plan, *supra* note 194, at para. 3.c.14.

[214] 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").

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.

When searching for applicable standards to apply to the seven elements expressed in Joint Publication 4-04, military lawyers can direct their search to several readily available sources. First, they can review and consider familiar environmental standards set out in Department of Defense directives and regulations. Second, they can consider the rules and standards set out in the DoD Overseas Environmental Baseline Guidance Documents (OEBGD).[215] Although baseline documents are not technically applicable to overseas contingency operations where the United States presence is less than permanent,[216] they provide a solid starting point for the formulation of environmental standards.

In each of the operations described within this article, the measures established within a country-specific baseline document were used (to varying extents) to develop the applicable environmental standards. For example, in Operation Joint Endeavor, the Germany baseline document was integrated into the operation plan as a reference[217] and as a "source of additional environmental standards, as [might be] deemed appropriate," in the interpretation or supplementation of the plan.[218]

It is important to bear in mind, however, that country specific baseline documents do not control the conduct of United States forces during a contingency operation. These guidelines are only used as a tool, providing lawyers and other staff officers a starting point when dealing with host nation environmental issues.

A third source of guidance for the construction of a system of standards is the growing collection of after action reports and operation plans and orders from recent operations. The plans from each of the foregoing operations would each serve as excellent starting points.[219] With each successive operation United States forces have become more expert in their handling of the environmental dimension of overseas operations[220]

Command environmental standard operating procedure manuals, regulations, and instructions serve as the final source of guidance.

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[215] Department of Defense Instruction 4715.5 requires that "DoD components operating abroad develop country specific "final governing standards" (FGSs)). The OEBGD are issued to help in this task. The baseline consists of standards applicable to similar operations conducted in the United States. The baseline is compared with existing host nation law. After consultation with the United States Diplomatic Mission in the host nation, the 'Executive Agent' for that country determines whether to apply the baseline standards, the host nation standards, or some hybrid of the two. *See* Dep't of Defense, Instruction 4715.5, Management of Environmental Compliance at Overseas Installations, para. C. (22 April 1996). A new version of the OEBGD was issued on 15 March 2000 and is available on DENIX.

[216] The OEBGD "applies where EO 12,114 does not apply, . . . it establishes the environmental standards by which we run our installations overseas." *See* Briefing Slides, Lieutenant Colonel Richard D. Rosen, Deputy Legal Counsel, Office of the Chairman of the Joint Chiefs of Staff, subject: Combatant Commander's Environmental Responsibilities Overseas, slides 10-11 (Unpublished Slide Presentation, on file with author).

[217] *See* Joint Endeavor Operation Plan, *supra* note 194, at 3.c.

[218] *Id*. The general guidance placed in the plan stated "that operations shall be conducted in a manner that exhibits leadership in the area of protection of human health and the environment. Operations will be conducted with the effects on the environment considered to the extent feasible under the existing conditions. Commanders will ensure potential harm to the environment is avoided or minimized when possible. The referenced OEBGD may be used as a source for additional environmental standards, as deemed appropriate. Units will operate under their respective service environmental procedures while ensuring compliance with the following minimum standards and mitigative measures." At this point the plan continues on with additional standards and guidance.

[219] The legal work done in regard to the environment during Operation Restore Hope was excellent. The work done during Operation Uphold Democracy was even better, and the work already done and currently being done in Operation Joint Endeavor is better yet. These improvements are largely because (1) judge advocates have done a superb job of documenting their lessons learned and (2) the service judge advocate general's corps have made capturing lessons from recent operations a priority.

[220] Interview, Lieutenant Colonel John M. McAdams, Jr., Judge Advocate Division (Code JAO), Headquarters, U.S. Marine Corps, in Charlottesville, Virginia (27 Mar 1997) [hereinafter McAdams Interview] (Lieutenant Colonel McAdams served as the Joint Task Force Legal Advisor during Operation Sea Signal and stated that environmental issues consumed an appreciable amount of his time. He believes that he profited from the legal work done in Operation Restore Hope, and feels that United States Atlantic Command clearly profited from the lessons he and his staff learned during Sea Signal. He stated that he saw the product of these lessons in the execution of Operation Uphold Democracy. Specifically, he cites the decision to perform a more detailed environmental audit during Uphold Democracy, instead of the less detailed assessment performed during Sea Signal). Judge advocates should also be aware that there is an ongoing initiative to prepare DoD environmental standards for contingency operations.

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. We will have to see what happens during the George W. Bush administration—although this author believes chances are good that not much will develop on this front.

Finally, 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. This might trigger the Directive's application. On this issue, you should contact the Unified Command in charge of the operation.

**Laws of Host Nations.**

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;[221] or

(3) U.S. forces enter under the auspices of a UN sanctioned security enforcement mission.[222]

The question of immunity is unresolved where U.S. forces enter in a noncombat mode and not to enforce peace or end cross-border aggression. In Operation RESTORE DEMOCRACY, U.S. forces entered 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;223

(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).

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 agreements or issues. The Army must consult with the Department of State before engaging in "formal" communications regarding the environment.[224]

**Traditional Law of War (LOW).**

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[221] 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).

[222] 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.

[223] See DA PAM 27-161-1, *Law of* Peace, Volume I, para. 11-1 (1 Sep 1979).

[224] *See* AR 200-2, *supra* note 176, at para. 8-3 c.

Although the LOW is technically not triggered until a state of armed conflict exists,[225] many MOOTW require the application of LOW principles as guidance.[226] 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.[227] The entire body of LOW that impacts on the treatment of the environment may be referred to as ELOW.

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.

Conventional Law. A number of the well-known LOW treaties have tremendous impact as ELOW treaties. These treaties are discussed below.

Hague IV.[228] 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).[229]

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.

The HR also prohibits destruction or damage of property in the absence of military necessity.[230] 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.

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.

The 1925 Gas Protocol.[231] 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).[232]

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[225] The type of conflict contemplated by article 2, common to the four Geneva Conventions.

[226] 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 174, at Operational Law 15-16.

[227] 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).

[228] 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.].

[229] *Id*. at art. 22.

[230] *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.

[231] 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].

[232] The U.S. position is that neither agent meets the definition of a chemical under the treaty's provisions.

The 1993 Chemical Weapons Convention (CWC).[233] 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.[234] EO 11850[235] specifies U.S. policy relative to the use of chemicals, herbicides, and RCA. EO 11850 sets out several clear rules regarding the CWC.[236] 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"[237] of U.S. installations.

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.[238]

The Fourth Geneva Convention GC.[239] 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.[240] A simple breach only requires parties to take measures necessary for the suppression of the type of conduct that caused the breach.[241]

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[233] 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].

[234] *Id*. at Preamble.

[235] Exec. Order No. 11850, 40 Fed. Reg. 16187 (1975), *reprinted in* FM 27-10, at C1-C2 [hereinafter EO 11850].

[236] For a full discussion of EO 11850, see Chapter 2.

[237] 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.

[238] 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].

[239] 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].

[240] *Id*. at art. 146, cl. 2.

[241] *Id*. at art. 146, cl. 3.

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.[242] These obligations make our own soldiers vulnerable if they are not well trained relative to their responsibilities under ELOW provisions.

The ENMOD Convention.[243] 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).[244] 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.

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.).

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.

Finally, the ENMOD does not regulate the use of chemicals to destroy water supplies or poison the atmosphere.[245] As before, this is the application of a relatively low technology, which the ENMOD does not reach.[246] 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.[247]

The 1977 Protocols Additional to the Geneva Conventions (GP I & GP II).[248] 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 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

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[242] 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).

[243] 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].

[244] 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.

[245] Although these type of activities would violate the HR and the Gas Protocol.

[246] Environmental Modification Treaty: Hearings Before the Committee on Foreign Relations, U.S. Senate, 95th Cong., 2nd Sess. 83 (1978) (Environmental Assessment) [hereinafter Senate Hearings].

[247] 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.

[248] Protocol I Additional to the Geneva Conventions, Dec. 12, 1977, 16 I.L.M. 1391, 1125 U.N.T.S. 3 [hereinafter GP I].

environmental protections. In fact, GP I is the first LOW treaty that specifically provides protections for the environment by name.

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.

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).

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.[249] Within GP I, the term "widespread" probably means several hundred square kilometers, as it does in the ENMOD Convention.[250] "Severe" can be explained by article 55's reference to any act that "prejudices the health or survival of the population."[251] 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.[252] 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.[253]

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 (damn, dikes, nuclear plants) if such targeting would result in substantial harm to civilian persons or property.[254]

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.[255] A knowing violation of article 56 is a grave breach. Additionally, with respect to the three element threshold set out in articles 35 and 55, the standard is so high that a violation of these provisions may

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[249] 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].

[250] *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.

[251] *Id*. at 417. The article 55 language has roughly the same meaning as the meaning of "severe" within the ENMOD Convention.

[252] 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).

[253] *See* Sandoz, *supra* note 249, at 417.

[254] 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.).

[255] 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."

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.[256]

**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).[257] 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.[258]

**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.[259]

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. The purpose of this article is to help judge advocates from all services provide accurate, up to date, and meaningful advice.

**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 United States (primarily through the use of the National Pollution Discharge Elimination System (NPDES)) and also regulates wetlands.

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[256] 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.

[257] *See* HR, *supra* note 228 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.

[258] *See* SECRETARY-GENERAL REPORT, *supra* note 256, at 15.

[259] FM 27-100*, Legal Support to Operations*, 3.6, (30 Sept. 1999).

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 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 United States; 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.

AR 200-2 (Subpart H & G) - EFFECTS OF ARMY ACTIONS ABROAD. Appendix 6, 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. AR 200-2, Glossary.

Appendix H 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 RESOURCE MANAGEMENT. Deals with natural resources and the Army's endangered species program.

AR 200-4 HISTORIC PRESERVATION. 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[260]

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[261]

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

[260] *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.

[261] *See* MCO P5090.2, Envir. Compliance and Protection Manual, 26 Sep 91.

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.

# CHAPTER 12

# FISCAL LAW

### REFERENCES:

1. Contract & Fiscal Law Department, TJAGSA, *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 7201.01, *Official Representation Funds* (Aug. 15, 1999).
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).

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.

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, or Hungary. 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.

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. [262] *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

[262] 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.

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.

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.

**BASIC FISCAL CONTROLS[263]**

Congress imposes fiscal controls through three basic mechanisms. Each is 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 statues and regulations. The three basic fiscal controls are:

(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.

The enforcement mechanism for these controls is the Antideficiency Act (ADA). *See* 31 U.S.C. § 1341(a), 1517. The ADA prohibits any government officer or employee from making or authorizing an expenditure in excess of the amount available in an appropriation; incurring an obligation in advance of an appropriation, except as authorized by law; or making or incurring obligations in excess of formal subdivisions of funds within the executive branch, or in excess of amounts prescribed by regulations governing the formal subdivisions of funds. Penalties for violations may be criminal or civil. 31 U.S.C. § 1349, 1350. Commanders must investigate suspected violations to establish responsibility and discipline violators. DoD 7000.14-R, Financial Management Regulation, Vol. 14. [*hereinafter* DoD 7000.14-R].

**THE PURPOSE STATUTE—GENERALLY**

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).

**Augmentation of Appropriations and Miscellaneous Receipts**

[263] 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/TJAGSA. (No password or registration required.)

A corollary to the Purpose control is the prohibition against augmentation. *See* Nonreimbursable Transfer of Admin. Law Judges, B-221585, 65 Comp. Gen. 635 (1986); *cf.* 31 U.S.C. § 1532 (prohibiting transfers from one appropriation to another except as authorized by law). Appropriated funds designated for a general purpose may not be used for another purpose for which Congress has appropriated other funds. Secretary of the Navy, B-13468, 20 Comp. Gen. 272 (1940). If two funds are equally available for a given purpose, an agency may elect to use either, but once the election is made, the agency must continue to charge the same fund. *See*, Funding for Army Repair Projects, B-272191, Nov. 4, 1997. The election is binding even after the chosen appropriation is exhausted. Honorable Clarence Cannon, B-139510, May 13, 1959 (unpub.) (Rivers and Harbors Appropriation exhausted; Shipbuilding and Conversion, Navy, unavailable to dredge channel to shipyard).

Thus, if an agency retains funds from a source outside the normal fund distribution process, an augmentation occurs 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).

There are, however, several statutory exceptions to the augmentation prohibition. For example, DoD may expend O&M funds for humanitarian assistance efforts that complement (but do not duplicate) activities funded by the appropriations of other agencies, such as the State Department. *See* 10 U.S.C. § 401.

There also 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. Congress also has authorized certain expenditures for military support to civil law enforcement agencies (CLEAs) in counterdrug operations. *See* Chapter 19 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.

Other statutes that permit DoD to accomplish missions assigned primarily to other executive departments ("non-traditional DoD missions") include: 10 U.S.C. § 402 (transportation of humanitarian supplies), 10 U.S.C. § 404 (foreign disaster or refugee relief), and 10 U.S.C. § 2551 (other humanitarian support). These purposes also are met through foreign assistance appropriations, which are generally administered by the State Department. *See* Chapter 14 for further discussion of these authorities.

**DoD Appropriations and Their Purposes**

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. They are subject, however, to specific statutory limitations. For example, end items costing $100,000 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 $500,000, 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 expanded use of O&M for construction necessary to meet temporary operational needs during combat or declared contingencies).

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 $500,000 and $1.5 million are limited to amounts provided in the Unspecified Minor Military Construction (UMMC) appropriations within the MILCON appropriation.

Procurement Appropriations. These appropriations fund purchases of investment end items (or systems) that cost $100,000 or more and items that are centrally managed, regardless of cost.

Additional Appropriations. DoD has available to it other appropriations and support authorities. These include funds and authority under the Foreign Assistance Act (FAA), the Acquisition and Cross-Servicing statute, and the Overseas Humanitarian, Disaster, and Civic Aid appropriations. These are detailed below.

## THE PURPOSE STATUTE—SPECIFIC MILITARY OPERATIONAL ISSUES

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.

On occasion, 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.

### O&M Appropriations—Use During Deployments and Contingency Operations

Deploying units normally use "generic" O&M funds to support their operations. Operation and maintenance appropriations pay for the day-to-day expenses of training, exercises, contingency missions, and other deployments. Examples of O&M expenses include force protection measures, sustainment costs, and repair of main supply routes. Likewise, 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).

Congress also 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. *See, e.g.*, Department of Defense Appropriations Act, 2001, Pub. L. No. 106-259, 114 Stat. at 656 (2000) (providing $55.9 million for Overseas Humanitarian, Disaster, and Civic Aid available during FYs 2001-2002). 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. For example, a commander would not use generic O&M to purchase a memento or gift for the mayor of Tuzla. Official representation funds, however, would be available for this purpose. *See* following discussion and regulations cited.

Emergency and Extraordinary (E&E) Expenses Funds (10 U.S.C. § 127) are special funds within the O&M appropriation. The secretaries of the military departments and the 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. *See* DoD Dir. 7201.01, OFFICIAL REPRESENTATIONAL FUNDS (Aug. 15 1999); 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.

Contingency Operations Funding Authority 10 U.S.C. § 127(a) (amended by DoD Authorization Act for FY 1996, Pub. L. No. 104-106, § 1003 (1996)). 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 funds have not been provided, which are expected to exceed $50M, or 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. 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. 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 operation for incremental expenses incurred. Statute contains provisions for both Congressional notification & GAO compliance reviews.

Section 8070 Notification. DoD Appropriations Act for FY 2001, Pub. L. No. 106-259, § 8070 (2000). 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: 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) which 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).

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 CINC joint warfighting readiness and national security interests. *See* CJCSI 7401.01A (30 Jan 1999) (detailing procedures for CJCS approval of these expenditures). The CINCs 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. *See also* discussion in Chapter 14 on CIF and TCA.

**Military Construction (MILCON) -- A Special Problem Area.**

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. 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 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:

(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 a "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. This 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.

Construction also includes the cost of installed equipment made part of a new or existing facility, related site preparation, excavation, filling, landscaping, or other land improvements.

**Maintenance and Repair Are Not Construction.**

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).

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* Memorandum, Deputy Comptroller, Office of the Under Secretary of Defense (Program/Budget), subject: Definition for Maintenance and Repair (2 July 1997). 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).

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.

**Construction Using O&M Funds.**

Deployed commands normally receive only O&M-type funds. (In this context, the O&M may be from a 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.)

(1) 10 U.S.C. § 2805(c) authorizes the use of O&M funds for unspecified minor military construction up to $500,000 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).

(2) Only funded costs count against the $500,000 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.

Methodology for analyzing minor construction issues:

- Define the scope of the project;
- Classify the work as construction, repair, or maintenance;
- Determine the funded cost of the project; and
- Select the proper appropriation.

**Construction Using O&M Funds During Combat or Declared Contingency Operations**.

Per Army policy, use of O&M funds in excess of the $500,000 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 basis 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.

The Unspecified Minor MILCON Program. 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 $500,000, 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 $500,000 and $1.5 million (up to $3 million if the project is intended to correct a deficiency that is life, health, or safety threatening).

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).

Examples.

1. 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? No. A conversion is construction by definition. All work is required for the conversion of this building to an administrative facility, so it must all 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.]

2. 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 $530,000 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? Maybe. Filling the potholes is clearly a repair, and this cost does not count against the cost of the construction effort. Resurfacing the road may 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 $500,000 (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. Likewise, use of O&M funds would be proper for the entire project if the work was necessary to meet a temporary operational need during combat or declared contingency operations. *See* **Construction Using O&M Funds During Combat or Declared Contingency Operations**, above.

**Emergency Construction Authority.**

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:

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.

Contingency Construction, 10 U.S.C. § 2804. Limitations similar to those under 10 U.S.C. § 2803 apply.

**Contacts and Exercises with Foreign Militaries**

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. [*See also* Chapter 14, Security Assistance]

**Bilateral and Multilateral Contacts.**

**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.[264] U.S. civilian employees and military personnel are 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.

**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.

**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. *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.

**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.

**Funding** - All of these activities are funded with O&M funds [often with service funding, TCA, or CIF, as described above].

**Bilateral and Multilateral Exercise Programs.**

**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.

**10 U.S.C. § 2011 (Special Operations Force - SOF Training)** permits the SOCOM Commander or Combatant CINC 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.

**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.

**Regional Cooperation Programs.**

**Partnership for Peace** activities are authorized by existing authorities, outlined above.[265]

**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;[266] Congress appropriated $440.4M for the CTR program in FY 99.[267] These are three-year funds available until 30 September 2001.

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[264] 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).

[265] *See* H.R. Conf. Rep. No. 747, 103d Cong., 2d Sess. 63 (1994)

[266] Defense Authorization Act for FY 99, Pub. L. No. 105-261, 112 Stat. 2161, § 1301 (1998). *But see* Authorization Act, § 1303 (prohibiting use of funds for peacekeeping or peacekeeping-related activity, housing, environmental restoration, or job training).

[267] Defense Appropriations Act for FY 99, Pub. L. No. 105-262, 112 Stat. 2286 (1998).

**International Military Education and Training (IMET)** - [Foreign Assistance Act (FAA) §§ 541-545 (22 U.S.C. §§ 2347-2347d)] is a security assistance program to provide training to foreign militaries, including the proper role of the military in civilian-led democratic governments and human rights [often called **Expanded-IMET**].

**Overseas Humanitarian, Disaster, and Civic Aid (OHDCA) Operations *See* Chapter 14**

Congress has provided limited authority to DoD to conduct Overseas Humanitarian, Disaster, and Civic Aid (OHDCA) operations [also known as Humanitarian Assistance Programs (HAP)]. *See* DoD Appropriations Act, 2001, Pub. L. No. 106-259, Title II, 114 Stat. 663 (2001) (providing $55.9M for all programs conducted under the authority of 10 U.S.C. §§ 401, 402, 404, 2547, and 2551 during FYs 2001 and 2002).

Primary responsibility for Humanitarian, Refugee. and Disaster Relief operations lies with the Department of State, through USAID and other agencies, like the Office of Foreign Disaster Assistance (OFDA).

**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 Assistance Appropriations Act for FY 98, Pub. L. 1054-118, Title II, 111 Stat. 2391 (1997) ($190M appropriated to DoS for international disaster assistance under this authority).

**FAA § 506(a)(1) (22 U.S.C. § 2318(a)(1))(Emergency Drawdown)** permits the President to draw down defense stocks and services in response to unforeseen emergencies requiring military assistance to a foreign country or international organization. Use of this authority requires notice to Congress, and is limited to $100 million per fiscal year. Contracting is not allowed under Drawdown authority, with the exception of transportation, when less expensive than military transportation. *See*, 22 U.S.C. § 2318(c). 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%20handbookr1.pdf.

**FAA § 506(a)(2) (22 U.S.C. § 2318(a)(2))(Emergency Drawdown).** The President also may require any federal agency to provide support to counterdrug activities, disaster relief, or migrant and refugee assistance, antiterrorism, and non-proliferation assistance efforts of other federal agencies through a FAA § 506 drawdown, up to $200M per year. 506(a)(2). Drawdowns for counterdrug activities and POW accounting are limited to $75M and $15M, respectively, and DoD provides no more than $75M of goods and services per year under this authority.

**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 Assistance Appropriations Act for FY 98, Pub. L. 105-118, Title II, 111 Stat. 2386 (1997) ($650M 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 $50M 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).

**FAA § 632 (22 U.S.C. § 2392)(DoS Reimbursement).** Under this authority, similar to the Economy Act, discussed below, DoS may provide funds to other executive departments to assist DoS in accomplishing their assigned missions (usually implemented through "632 Agreements" between DoD and DoS).

Fiscal Law Issues in Honduras. Historically, DoD conducted limited Humanitarian and Civic Assistance (HCA) operations in foreign nations without separate statutory authority. 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.

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 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.

DoD Statutory Authorities. (*See* Chapter 14*, this Handbook*).

**10 U.S.C. § 401 (HCA)** provides for HCA projects, approved in coordination with the Combatant CINCs and DoS, that improve operational readiness skills of participating U.S. forces and are conducted in conjunction with military operations. HCA projects are often conducted during CJCS-directed exercises or deployments for training. Section 401 includes authority for training host nations in the removal of land mines. *See* 10 U.S.C. § 401(e)(5).

**10 U.S.C. § 402 (Transportation).** DoD may transport supplies provided by non-governmental, U.S. sources without charge on a space-available basis. DoD may not use this authority to supply a military or paramilitary group. Administrative details for the use of the § 402 authority may be found at: http://public.transcom.mil/J3/denton/steps.html.

**10 U.S.C. §404 (Foreign Disaster Assistance).** The President may direct SECDEF to provide disaster assistance outside the United States to respond to manmade or natural disasters when necessary to prevent the loss of life. Includes transportation, supplies, services, and equipment; but requires notice to Congress within 48 hours. OHDCA funds are available for organizing general policies and programs for disaster relief programs. The President delegated disaster relief authority to the SECDEF, with concurrence from DoS (except in emergency situations). *See* EO 12966, 60 Fed. Reg. 36949 (15 July 1995).

**10 U.S.C. § 2547 (Excess Nonlethal Supplies: Humanitarian Relief)** authorizes excess supplies to be made available for humanitarian relief to DoS, which will be responsible for distribution. May be used in conjunction with other authorities to provide transportation or § 2551 authority for funding incidental costs.

**10 U.S.C. § 2551(Transportation and Other Humanitarian Support).** DoD also may provide fully funded transportation (on an other-than space-available basis), if it pays such transportation costs with its O&M funds earmarked for OHDCA purposes. In addition, this statute permits the use of funds for "other humanitarian purposes, worldwide," including contracts if necessary.

The Judge Advocate's Role. The judge advocate's primary role during military operations that involve disaster relief, humanitarian, or refugee support operations is to ensure mission accomplishment within the constraints of law. It requires an in-depth understanding of the statutory authorities. The general rule is that only O&M funds earmarked for OHDCA purposes are used for this support. Secondary sources of authority include 10 U.S.C. § 127a Contingency Funds; § 166a CINC Initiative Funds (CIF); and Traditional CINC Activity funding (TCA). The judge advocate must ensure that problems are identified during exercise planning and avoided. After-the-fact justifications that stretch DoD authority risk Comptroller General scrutiny and adverse actions against those who circumvent congressionally-imposed limitations.

**Supporting Multilateral Peace and Humanitarian Operations**

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.

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 97 (additional appropriations), Title V, Chapter 7, *reprinted in* H.R. Rep. 863, 104th Cong., 2d Sess. 536 (1996) (DoS provided $65M 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. 10 U.S.C. § 405. In addition, under § 8074 of the Defense Appropriations Act for FY 99, Pub. L. No. 105-262 (1998), 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.

**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)).

**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.

**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."

**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 these details may be on a reimbursable or a non-reimbursable basis.

**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 $350M per year, beginning in FY 97; 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).

**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.

**10 U.S.C. §§ 2341-2350 (Acquisition and Cross-Servicing Agreements (ACSAs)).** 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. Consult your MACOM or CINC legal advisors for details.

**Security Assistance**.

Funding for aid to foreign armies is specifically provided for in foreign assistance appropriations. Except as authorized under the acquisition and cross-servicing authority, transfers of defense items and services to foreign countries are regulated by the Arms Export Control Act. 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.

**The Arms Export Control Act**.

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.

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.

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.

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.

**The Foreign Assistance Act (FAA).**

The FAA has two principal parts. Part I provides for foreign assistance to developing nations; 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. § 2302), but under the FAA, the recipient is more likely to receive the defense articles or services free of charge.

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).

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 <u>military assistance goals</u> of the FAA is generally accomplished on a <u>full cost recovery basis</u>; DoD support of the <u>foreign assistance and humanitarian assistance goals</u> of the FAA is accomplished on a <u>flexible cost recovery basis</u>.

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.

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 <u>equal to the value</u> [as defined in the act] of the defense articles or of the defense services [salaries of military personnel excepted], or other assistance furnished, <u>plus expenses arising from or incident to operations</u> under [Part II] [salaries of military personnel and certain other costs excepted].

This reimbursement standard is essentially the "full reimbursement" standard of the Economy Act (see below). 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.

The <u>emergency presidential draw down authority</u> 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)). 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. A draw down of DoD resources may be reimbursed by a subsequent appropriation (22 U.S.C. § 2318(c)); however, this seldom occurs. When no appropriation is forthcoming, a Presidential draw down is another example of an authorized augmentation of accounts (DoD appropriations are used to achieve an objective ordinarily funded from State Department appropriations).

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.

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 (<u>not</u> 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.

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).

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.

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).

**Domestic Disaster Relief Operations. *See* the chapter on Domestic Operations, this Handbook.**

DoD Directive 3025.1 (Use of Military Resources during Peacetime Emergencies within the United States, its Territories, and Possessions) and AR 500-60 (Disaster Relief) regulate emergency disaster relief operations within the U.S. In 1989, Congress created the Defense Emergency Response Fund (DERF), funded with $100 million, to remain available until expended, to reimburse current appropriations used for supplies and services in anticipation of requests from other agencies for disaster assistance. Defense Appropriations Act, 1990, Pub. L. No. 101-165, Title V, 103 Stat. 1112, 1126-27 (1989). The DERF legislation permits DoD to use DERF funds if the Secretary of Defense determines that immediate action is necessary before receipt of a formal request for assistance on a reimbursable basis from another federal agency or a state government. In 1993, Congress expanded DoD's ability to use DERF funds, to make this appropriation available after a request for assistance from another federal agency or a state government, if the Secretary of Defense determines that use of the fund is necessary. Defense Appropriations Act, 1994, Pub. L. No. 103-139, § 8131, 107 Stat. 1418, 1470 (1993). This change makes DERF funds available for DoD domestic disaster assistance efforts after a request for assistance, and avoids DoD jeopardizing its O&M accounts by providing disaster assistance in the absence of a reimbursement agreement. However, DoD activities should continue to obtain reimbursement agreements as emergency conditions permit, rather than relying on DERF funding exclusively.

The Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. §§ 5121-5203) authorizes the President to direct federal agencies to provide assistance essential to meeting immediate threats to life or property resulting from a major disaster, with or without reimbursement. 42 U.S.C. §§ 5170a & 5170b. Agencies may incur obligations immediately by contract or otherwise in such amounts as are made available by the President. 42 U.S.C. § 5149(b). Federal agencies may receive reimbursement for their relief efforts if the Federal Emergency Management Agency (FEMA) requests assistance. Reimbursement is limited to expenses above normal operating levels. Agencies may credit reimbursements received to their operating accounts. 10 U.S.C. § 5147; AR 500-60, paragraph 5-3. A Memorandum of Understanding between DoD and FEMA should address reimbursements. DoD activities also should seek a FEMA tasking letter defining the exact scope of disaster relief responsibilities. The letter should state a not-to-exceed reimbursable amount, which DoD units should not exceed without approval from higher headquarters.

**Purpose Statute Violations**

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 $550,000 (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 $500,000.) 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 $500,000 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 Antideficiency 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 $100,000 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.

**AVAILABILITY OF APPROPRIATIONS AS TO TIME**

The "Time" control includes two major elements. First, appropriations have a definite life span. Second, appropriations normally must be used for the needs that arise during their period of availability.

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 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).

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).

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.).

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 which 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.

**AVAILABILITY OF APPROPRIATIONS AS TO AMOUNT**

The Antideficiency 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.

Commanders must ensure that fund obligations and expenditures do not exceed amounts provided by higher headquarters. Although overobligation of an installation O&M account normally does not trigger a reportable Antideficiency Act (ADA) violation, an overobligation 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, Purpose section, above, overobligation of a statutory limit, e.g., the $500,000 O&M threshold for construction, may lead to an ADA violation.

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. Lawyers, commanders, contracting officers, and resource managers all have been found to be responsible for violations. Common problems that have triggered ADA violations include:

(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 $500,000 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)

**CONCLUSION**

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.

# 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), AFAC 96-3, March 31, 2000.
3. Joint Pub. 1-06, *Joint Tactics, Techniques, and Procedures for Financial Management During Joint Operations*, 22 December 1999.
4. Joint Pub. 4-0, *Doctrine for Logistics Support of Joint Operations*, 6 April 2000 (Chapter V, Contractors in Theater).
5. AR 700-137, *Logistics Civil Augmentation Program* (LOGCAP), 16 Dec. 85.
6. AR 715-9, *Army Contractors on the Battlefield*, 29 Oct. 99.
7. DA Pam. 715-16, *Contractor Deployment Guide*, 27 Feb. 98.
8. AMC PAM 700-30, *Logistics Civil Augmentation Program* (LOGCAP), 31 Jan 00.
9. AMC LOGCAP Battle Book, 31 Jan 00.
10. FM 100-10-2, *Contracting Support on the Battlefield*, 15 Apr 99.
11. DA PAM 700-31, *Commander's Handbook for Peacekeeping Operations* (A Logistics Perspective), 1 Jul 94.
12. DA PAM 700-15, *Logistics Support of United Nations Peacekeeping Forces*, 1 May 86.
13. 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.
14. AMC PAM 715-18, *AMC Contractor Deployment Guide for Contracting Officers*, 8 Jul. 96.
15. AMC LOGCAP Homepage: http://www.amc.army.mil/dcs_logistics/lg-ol/infopage.html.
16. Air Force Contract Augmentation Program (AFCAP) homepage: http://www.afcesa.af.mil/Directorate/CEX/AFCAP/afcap.html.
17. FM 100-21, *Contractors on the Battlefield*, 26 Mar 00.
18. USAF Material Command Contingency Contracting Web site: https://www.afmc-mil-wpafb.af.mil/HQ-AFMC/PK/pko/gotowar.htm.


## INTRODUCTION[268]

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 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

[268] 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 DESKBOOK, Chapter 29, Contract and Fiscal Law for Deploying Forces. The current version of the deskbook is available on either JAGCNET: http://jagcnet.army.mil/ContractLaw, or on the TJAGSA homepage: http://www.jagcnet.army.mil/TJAGSA.

or performance of services; and (3) contracting with local contractors provides alternative sources for supplies and services.

**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.

International Law.

The Law of War—Combat.

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).

International Agreements.

U.S. Contract and Fiscal Law.

Armed Services Procurement Act of 1947, as amended. 10 U.S.C. §§ 2301-31.

Federal Acquisition Regulation (FAR) and Agency Supplements.

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).

Executive Orders and Declarations.

**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."

**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.

## 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.

**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.[269]

**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.

Commanders should ensure that KOs and ordering officers are properly appointed and trained. The Head of Contracting Activity (HCA), an attaché, a chief of a foreign mission (Army), or certain officials in the Army Secretariat may appoint KOs. FAR 1.603; AFARS 1.603-2. 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.

The chief of the contracting office may appoint ordering officers. AFARS 1.603-1(2). 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 1.603-1-90. Ordering officers may also be government credit card holders. AFARS 13.9. 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.

**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.

**References.**

Statutes: Titles 10, 22, 31, and 41 of U.S. Code.

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, Second Edition, contains a complete copy of the FAR, FAR Matrix, and the GAO Redbook.

**Contract Forms.**

These are essential. The contracting element should ensure it brings a 90-day supply of: Standard Form (SF) 44s (Purchase Order-Invoice-Voucher), 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.

Typing contract documents manually is tedious and time-consuming. Contracting elements should deploy with Standard Army Automated Contracts System (SAACONS) 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 word-processing documents. Translation of contract forms, specifications, and other provisions also should be obtained before deployment if possible.

[269] 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, paras. 2-3, 2-4.

**Other Logistical Needs.**

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.

**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)[270] if requested to support needs while deployed.

Consider establishing an imprest fund in advance of deployment notification.[271] 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).

Finance personnel or designees (e.g., Class A 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 Class A paying agents, and ensure they are appointed and trained as necessary.

## 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.

**Competition Requirements.** The Competition in Contracting Act, 10 U.S.C. § 2304, requires the government to seek competition for its requirements. See also FAR 6.003. 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.

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 Commerce Business Daily (CBD)), 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 contract award for delivery of supplies or performance of services. Exceptions to the usual requirement for full and open competition include:

[270] For the Department of the Navy, use the NAVCOMPT Form 2275/2276; for the Air Force, use AF Form 9 (O&M).

[271] 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.

(1) 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.[272]

(2) 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.

(3) 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.

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:

Actions under $500,000: the contracting officer.

Actions from $500,000 to $10 million: the competition advocate.

Actions from $10 million to $50 million: the HCA or designee.

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)).

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 CBD. 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.

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 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.

[272] 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.

**Simplified acquisition procedures**: simplified acquisition procedures are for the acquisition of supplies, nonpersonal services, and construction in amounts less than the simplified acquisition threshold.

**Sealed Bidding as a Method of Acquisition.**

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.

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.

**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.

**Simplified Acquisition Procedures**

"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. 10 U.S.C. § 2302(8); DFARS 213.000; Army Acquisition Letter (AL) 94-9. 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, and during Operations in the Balkans.

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 13.5.

(2) Blanket Purchase Agreements (BPAs). FAR Subpart 13.2; DFARS Subpart 213.2; AFARS Subpart 13.2.

(3) Imprest Fund Purchases. FAR Subpart 13.4; DFARS Subpart 213.4; AFARS Subpart 13.4.

(4) Government Credit Card Purchases. AFARS Subpart 13.9.

(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 13.601.

*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. 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 1.603-1-90(c). Conditions for use:

- As limited by appointment letter.

- Away from the contracting activity.

- Goods or services are immediately available.

- One delivery, one payment.

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).

*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.

BPAs are prepared and issued on DD Form 1155 and must contain certain terms/conditions. FAR 13.203-1(j):

(1) Description of agreement.

(2) Extent of obligation.

(3) Pricing.

(4) Purchase limitations.

(5) Notice of individuals authorized to purchase under the BPA and dollar limitation by title of position or name.

(6) Delivery ticket requirements.

(7) Invoicing requirements.

KOs may authorize ordering officers and other individuals to place calls (orders) under BPAs. DFARS 213.303, AFARS 13.204-90. 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.

*Imprest Funds.*[273]

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.

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.

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.

*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 13.9. 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.

*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.

[273] *See* note 271, *supra*, regarding the phased elimination of imprest funds.

*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 $5,000,000. 10 U.S.C. § 2304(g)(1)(B); FAR 13.601. Under this procedure the KO may use any simplified acquisition method.

*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.

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.

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.

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 13.103(b).

Subject to the following exceptions, the KO is not required to publicize contract actions that will not exceed the simplified acquisition threshold:

(1) 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.

(2) 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 Commerce Business Daily (CBD). 41 U.S.C. § 416. KOs must also publish a synopsis of CONUS sole-source awards in the CBD. 15 U.S.C. § 637(e).

(3) 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).

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(c).

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.

**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.

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.

LOGCAP is primarily designed for use where no treaties exist but can be used CONUS[274] 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/dcs_logistics/lg-ol/infopage.html.

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.[275] 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.

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.

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 provided 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.

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.

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.

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[274] Operation Provide Refuge, the housing of Kosovar Refugees at Fort Dix, NJ, May-July 1999, was supported by LOGCAP.

[275] Data is current through September 2000. Includes funding for the Bosnia Sustainment Contract, an outgrowth of the LOGCAP contract.

**Alternative Methods for Fulfilling Requirements.** 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 in-house resources or by contract. Finally, service secretaries retain substantial residual powers under Public Law 85-804 which may be used to meet critical requirements that cannot be fulfilled using normal contracting procedures.

Host nation support and cross-servicing agreements as means of fulfilling the needs of deployed U.S. forces are addressed in 10 U.S.C. § 2341-50; DoD Dir. 2010.9; 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.

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.

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 50.4. Congress still must appropriate funds needed to pay obligations incurred under this authority.

**Leases of Real Property.** 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.

## 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 which govern the acquisition of property while opposing an enemy force or in occupied territory.

### U.S. Rights and Obligations Under International Law Relating to Battlefield Procurement of Goods.

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).

*Acquisition of Enemy Property in Combat.*

**Confiscation** is the permanent taking or destruction of enemy public 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.

**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.

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.

*Acquisition of Enemy Property in Occupied Territories.*

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.

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.

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.

**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.

**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).

**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.

*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.

*Use of Civilian Persons as Source for Services in Time of War.*

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.

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.

*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).

**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.

**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:

Up to $10,000 - Chief of Contracting Office

$10,000 - $100,000 - PARC

Over $100,000 – HCA

These officials may ratify only when:

The government has received the goods or services.

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.

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.

The price is fair and reasonable.

**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.

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).

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).

**General Accounting Office (GAO) Claims.** GAO claims procedures provide another method of settling claims[276] 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.

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.

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.

[276] 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.

## 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 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:

**<u>Instructions are located on the inside cover of the form booklet.</u>**

**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 |
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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 . |
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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

# SECURITY ASSISTANCE AND FOREIGN ASSISTANCE

### REFERENCES


1. 10 U.S.C. § 166a, CINC's Initiative Funds.
2. 10 U.S.C. § 401, Humanitarian and Civic Assistance (HCA).
3. 10 U.S.C. § 402, Space Available Transportation of Relief Supplies.
4. 10 U.S.C. § 404, Disaster Relief.
5. 10 U.S.C. § 1050, Latin American (LATAM) Conferences.
6. 10 U.S.C. § 1051, Regional Conferences.
7. 10 U.S.C. § 2010, Combined Exercises.
8. 10 U.S.C. § 2011, Special Operations Training.
9. 10 U.S.C. § 2341-50, Acquisition and Cross Servicing Agreements.
10. 10 U.S.C. § 2547, Excess Non-Lethal Supplies.
11. 10 U.S.C. § 2551, Humanitarian Assistance (HA).
12. 22 U.S.C. § 2318, Presidential Drawdowns.
13. 22 U.S.C. § 2347, International Military Education and Training Program (IMET).
14. 22 U.S.C. § 2761, Foreign Military Sales Program (FMS).
15. 22 U.S.C. § 2763, Foreign Military Financing Program (FMFP).
16. 22 U.S.C. § 2770a, Reciprocal Training.
17. 31 U.S.C. § 1301(a), Purpose Statute.
18. Foreign Assistance Act of 1961, 75 Stat. 434, as amended and codified at 22 U.S.C. §§ 2151-2349aa-9 (FAA).
19. Arms Export Control Act of 1976, 90 Stat. 734, as amended and codified at 22 U.S.C. 2751-2796c (AECA).
20. 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).
21. Foreign Operations, Export Financing, and Related Programs Appropriations Acts, passed yearly (FOAA).
22. Executive Order No. 11958, Jan. 18, 1977, 42 Fed. Reg. 4311 (assigns Security Assistance responsibilities among the Executive departments).
23. U.S. Department of State, Congressional Presentation Foreign Operations Fiscal Year 2001 (CPD).
24. DoD 5105.38-M, Security Assistance Management Manual (SAMM).
25. Defense Institute of Security Management, The Management of Security Assistance.
26. DoDD 5105.38, Defense Security Assistance Agency (DSAA), 10 August 1978
27. DoDD 5105.47, U.S. Defense Representative (USDR) in Foreign Countries, 20 September 1991
28. AR 12-15 / AFR 50-29 / SECNAVINST 4950.4, Security Assistance and International Logistics: Joint Security Assistance Training (JSAT) Regulation, 28 Feb. 1990 (AR 12-15).
29. The Honorable Bill Alexander, B-213137, 63 Comp. Gen. 422 (1984).


## INTRODUCTION

The United States military has engaged in operations and activities that benefit foreign nations for many decades. The authorities and funding sources for these operations and activities have evolved into a relatively confusing mesh of statutes, annual appropriations, regulations, directives, messages and policy statements. How do we make sense of all

these rules? Is there a logical, relatively simple methodology for analyzing this tangled web of activities, authorities and funding sources? Is there some connection and relationship between the various legislative authorities and funding sources? We think so. This chapter will attempt to paint the "big picture" of U.S. foreign assistance and then focus on specific areas of the big picture. Specifically, this chapter will:

Describe the legal framework for the provision of foreign assistance by the U.S. State Department and Defense Department.

Depict the State Department Security Assistance programs designed to strengthen friendly foreign militaries, including the U.S. military's significant role in these programs.

Illustrate the Defense Department military cooperative programs that supplement and support the goals of the security assistance programs of the State Department.

Very briefly describe a few of the State Department Development Assistance programs aimed at improving the socio-economic foundations of friendly foreign nations, including the U.S. military's extremely limited role in these programs.

Summarize the Defense Department humanitarian programs intended to complement the development assistance programs of the State Department.

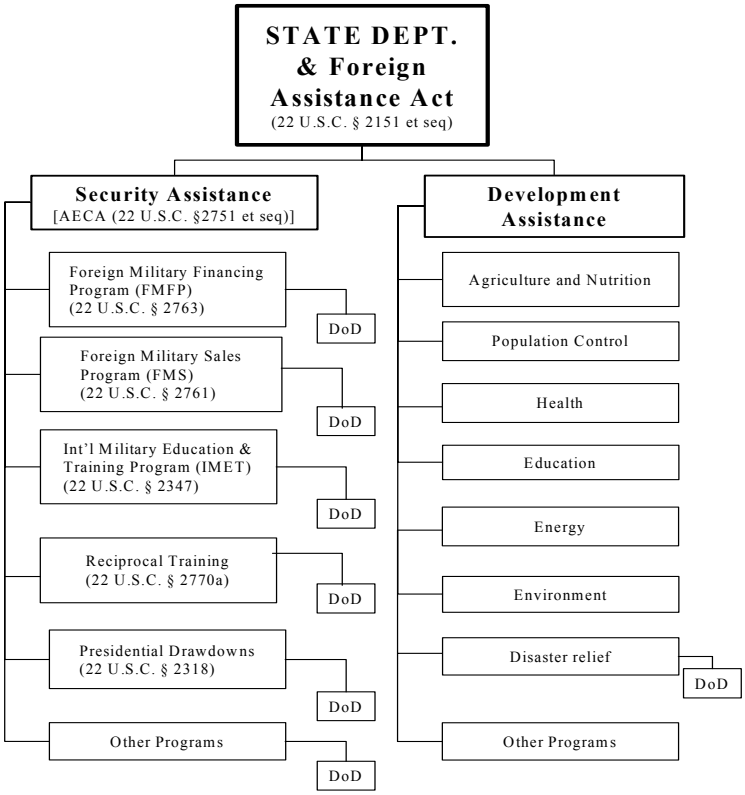
Throughout the chapter, we will spotlight areas where Judge Advocates should pay special attention. The issue usually boils down to deciding whether State Department authority (under Title 22 of the U.S. Code) and money, or Defense Department authority (under Title 10 of the U.S. Code) and money should be used to accomplish a particular objective. This sophisticated task often consumes a great amount of time and effort from an operational lawyer at all levels of command. Understanding the individual components of the State Department's and Defense Department's foreign assistance programs is very important, but a relatively simple matter. 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.

## LEGAL FRAMEWORK FOR THE PROVISION OF FOREIGN ASSISTANCE BY THE US GOVERNMENT

### The Foreign Assistance Act

A landmark legislation that provided a key blueprint for this grand strategy of engagement with friendly nations was the Foreign Assistance Act of 1961 (FAA).[277] 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. 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.

[277] 22 U.S.C. §§ 2151 et seq.




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.[278]

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 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.

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.

The enactment of the FAA in 1961, which clearly empowered the State Department to serve as the principal U.S. agent for foreign assistance, did not cause the U.S. military to cease performing its traditional operations and activities that benefited foreign militaries and civilian populations. In fact, the Vietnam War, Arab – Israeli wars, and an escalation of communist insurgencies throughout Asia, Africa, and Latin America caused an expansion of direct U.S. military

[278] Annual Foreign Operations Appropriations Acts.

assistance to foreign militaries and to civilian populations in developing nations. The U.S. military viewed these activities as a cost-effective means to contain communism, and the containment of communism was a legitimate national security goal of the U.S. military. After all, if communism could not be contained by bolstering foreign militaries and making it harder for the communists to foment insurgencies within the civilian population, then the U.S. military might ultimately have to engage in combat on the borders and shores of the United States. Friendly countries had to become more militarily self-reliant and socially stable.

In light of the fact that the U.S. military viewed its own traditional foreign assistance role as a national security matter, it felt that use of its operations and maintenance funds for this purpose was very appropriate and within the purpose for which Congress provided those funds.

**U.S. Fiscal Law and The 1984 GAO Honduras Opinion**

In the early 1980s the U.S. government tasked the U.S. military to provide assistance to the Nicaraguan "contra" rebels that where committed to the overthrow of the Sandanista/communist government in Nicaragua. To provide this assistance, the U.S. military began support and training operations for the Nicaraguan contras from Soto Cano Airbase in neighboring Honduras.

In addition to the assistance provided to the "contras," the U.S. military conducted joint combined exercises with the Honduran armed forces. Prior to these exercises and during the exercises themselves, the U.S. Army provided military training to Honduran armed forces and conducted a wide range of civic and humanitarian assistance to the Honduran rural villagers located near the exercise sites. Both of these activities were funded using Department of Defense (DoD) Operations and Maintenance (O&M) funds. These O&M funds were made available by Congress to the military for the general "operation and maintenance" of the military, including the conduct of exercises.

In 1984 the U.S. Congress tasked the U.S. General Accounting Office (GAO) to investigate the U.S. military's activities at Soto Cano Airbase in Honduras. Specifically, Congress asked GAO to provide a legal decision "regarding the propriety of funding methods used by the Department of Defense in its recent joint combined exercises in Honduras." GAO concluded that:[279]

1. "Costs pertaining to the training of Honduran armed forces during, or in preparation for, the … exercise should have been financed as security assistance to Honduras. Use of [Defense Department] O&M funds for such activities was unauthorized."; and

2. "DoD has no separate authority to conduct civic action or humanitarian assistance activities, except on behalf of other Federal agencies (such as AID) … or (for minor projects) as incidental to the provision of security assistance. Such activities conducted in Honduras during the course of … [the exercise] were improperly charged to DoD's O&M appropriations."

GAO's basis for the above conclusions results from its application of the Purpose Statute.[280] Simply put, Congress specifically authorized and funded the State Department to conduct Security Assistance and Development Assistance. The Defense Department, on the other hand, received congressional authorization and operation and maintenance funds to provide for national defense. Since the authority and funding provided to State Department were specific in nature concerning security assistance and the development assistance, GAO concluded that the Defense Department was prohibited from expending its general O&M funds to perform similar kinds of activities. In short, if Congress had intended to spend more money on these kinds of activities and programs, it would have appropriated funds to the State Department for that fiscal year. The U.S. military's use of Defense Department O&M funds to do the same kind of work resulted in the augmentation of the State Department's budget, contrary to Congressional intent.

Following this analysis, the GAO determined that

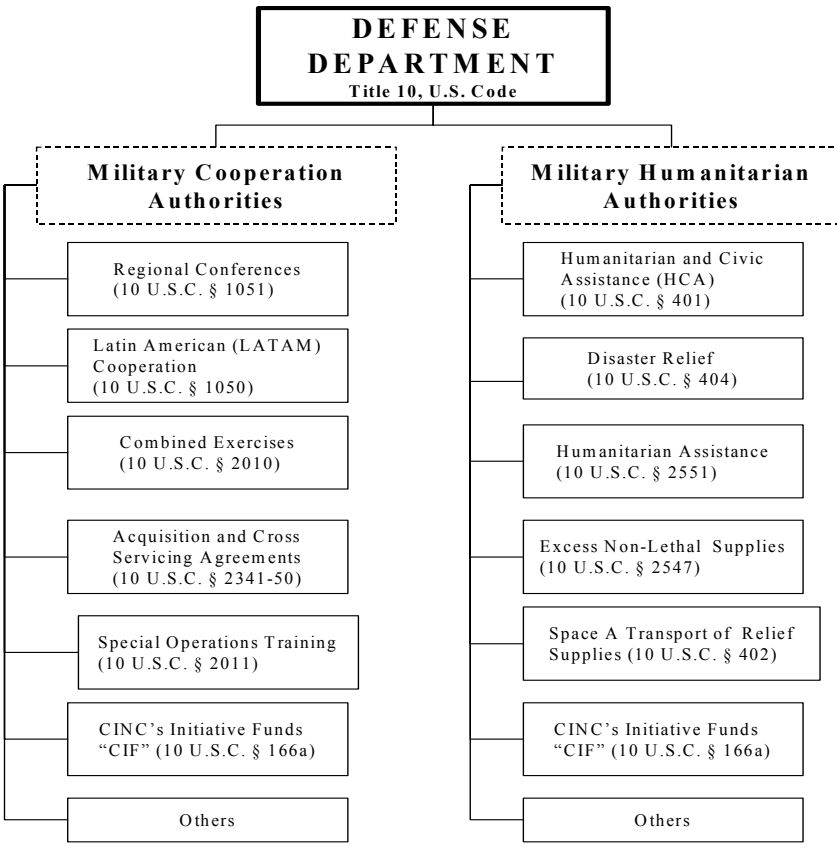
[279] GAO also made conclusions regarding the use of O&M funds for military construction projects which are not relevant to the discussion in this chapter.

[280] 31 U.S.C. Sec 1301(a). See discussion in the chapter entitled *Fiscal Law* concerning this statute.

> expenses for training Honduran forces, and for the provision of civic and humanitarian assistance, have been charged to DoD's O&M funds in violation of [The Purpose Statute,] 31 U.S.C. sec 1301(a). Although 31 U.S.C. sec 1301(a) does not specify the consequences (or remedies) for its violation, it is clear that such an expenditure is subject to disallowance by this Office. … In the present case, it is our view that reimbursement should be made to the applicable O&M appropriation, where funds remain available, from the appropriations that we have identified to be the proper funding sources (i.e., security assistance funds for training of Honduran forces, foreign aid funds for civic/humanitarian assistance activities).

GAO's remedy required the State Department to reimburse the Defense Department's O&M accounts for money spent by the Defense Department to perform activities that should have been paid for from State Department funds.

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 following diagram demonstrates 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.



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.

The preceding discussion sets the stage for a more detailed analysis of four major groups of programs and authorities: 1) State Department's Security Assistance programs; 2) the Defense Department's Military Cooperative programs; and 3) State Department's Development Assistance programs; and 4) the Defense Department's humanitarian programs. We begin with a look at security assistance.

## SECURITY ASSISTANCE

This section will discuss in some detail the State Department's Security Assistance program, and the U.S. military's significant supporting role in this program. It will also highlight common legal issues that arise during the course of conducting security assistance activities.

### State Department's Security Assistance Programs Under the FAA.

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,[281] 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:

Promote peace and security through effective self-help and mutual aid.

Improve the ability of friendly countries and international organizations to deter, and defeat, aggression.

Create an environment of security and stability in developing countries.

For the sake of discussion, we have organized the State Department's Security Assistance programs into three categories: appropriated programs, non-appropriated programs, and special programs.

### Appropriated Programs.

These are programs for which Congress appropriates money in the annual Foreign Operations, Export Financing, and Related Programs Appropriations Act.

*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.

[281] 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.

*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 IMET.

*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.

*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.

*Non-proliferation, Antiterrorism, Demining, and Related Programs (NADR).*

Concept. Captures several related programs in a single account, to include:

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).

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).

Korean Peninsula Energy Development Organization (KEDO), which was 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).

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).

Global Humanitarian Demining, which provides funds that are devoted to identifying and clearing land mines. AECA § 23 (22 U.S.C. § 2763).

Administering Agency. Department of State.

**Non-appropriated Programs.**

These programs authorize certain activities, but do not require Congressional funding, so there is no need for annual appropriations for implementation.

*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"). 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).

*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) which are therefore strictly controlled. Administering Agency. Departments of State, Commerce, Treasury.

*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. If the foreign country has not reciprocated, they are expected to pay for the value of the training received.

**Excess Defense Articles (EDA) Provisions.**

General. EDA are essentially defense articles no longer needed by the U.S. armed forces. There is a general preference to provide EDA to friendly countries whenever possible rather than having them procure new items. Only countries that are justified in the annual Congressional Presentation Document 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 $350 million of the articles' current value. FAA § 516(g)(1) (22 U.S.C. § 2321j(g)(1)). Governing Regulations. SAMM, chapter 11. Administering Agency. The State Department writes the appropriate presidential determination. After signature by the President, DoD administers the drawdown, up to the specified dollar value.

**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, or refugee and migration

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 $150 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.

**The Military's Role in Security Assistance.**

Although the State Department retains responsibility for the supervision of all Security Assistance programs and actually administers certain programs, DoD has the greatest involvement in Security Assistance of any department within the Executive Branch. DoD expends approximately 20,000 man-years per year on Security Assistance. Among the agencies within DoD which participate in providing Security Assistance are:

- Defense Security Cooperation Agency (DSCA). DSCA was created by DoD Directive 5105.38 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.

- 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.

- The Military Departments.

  - 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.

  - 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.

  - 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.

  - 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.

- 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.

**Prohibitions and Potential Legal Issues.**

*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.**

*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 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.

Not all activity that appears to be training of foreign personnel is considered to be security assistance training. 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). 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.

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)). FAA § 660(b) exempts from the general prohibition:

(a) "assistance, including training, relating to sanction monitoring and enforcement," and

(b) "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."

The general prohibition also does not apply to longtime democracies with no standing armed forces and with good human rights records.

*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)).

*Eligibility Problems With the Foreign Country.*

Expropriation of Property Owned by U.S. Citizens. FAA § 620(e)(1) (22 U.S.C. § 2370(e)(1)).

Involvement in Nuclear Transactions. FAA § 669-70 (22 U.S.C. § 2429-29a ).

In Arrears on Debts. FAA § 620(q) (22 U.S.C. § 2370(q)).

Support to prevent International Terrorism. FAA § 620A (22 U.S.C. § 2371) and AECA § 40 (22 U.S.C. § 2780).

Transfer, Failing to Secure, or Use of Defense Articles, Services, or Training for Unintended Purposes. FAA § 505 (22 U.S.C. § 2314).

Has by military coup or decree deposed its duly elected Head of Government. FOAA 00, § 508.

Congress requires special notification to Congress before obligating funds for Colombia, Haiti, Liberia, Pakistan, Panama, Peru, Serbia, Sudan, or the Democratic Republic of the Congo. FOAA 00, § 520.

Haiti. Congress limited assistance to Haiti until the Secretary of State certifies that Haiti is conducting thorough investigations into extra-judicial killings and taken action to remove from the National Police those individuals credibly alleged to engage in gross human rights violations. The limitation does not prohibit providing humanitarian, electoral, counter-narcotics, or law enforcement assistance. FOAA 00, §559.

*Weapons-Specific Prohibitions.*

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).

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 00 § 530.

For the restrictions on the transfer of white phosphorus munitions, napalm, and RCA, see SAMM, at 203-3.

**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 Funds, commonly referred to as Title 22 money. Finally, despite the large role that the U.S. military plays in administering the various programs, the Defense Department's Title 10 money may not be used to fund these security assistance programs.

## DEFENSE DEPARTMENT'S MILITARY COOPERATIVE PROGRAMS

In addition to its substantial support role in the administration of Security Assistance programs, the U.S. military executes several cooperative programs funded with Title 10 Defense Department O&M money. The majority of these cooperative programs are statutorily based. The programs are organized into three categories: training foreign forces, logistic support to foreign forces, and contacts and cooperation with foreign militaries.

### Training Foreign Forces

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.

CINC 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 $2 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 CINC to pay for initiatives. The CIF money provides the CINC with flexibility to cover expenses which, for one reason or another, cannot be covered by the designated pot of money.

### Logistics Support for Foreign Militaries

Acquisition and Cross-Servicing Agreements (ACSA), 10 U.S.C. §§ 2341–2350. DoD 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.

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.

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.

### Military Contact and Cooperative Authorities

Bilateral or Regional Conference, Seminar or Meeting, 10 U.S.C. § 1051. CINCs may pay for the "travel, subsistence, and similar personal expenses of defense personnel of developing countries in connection with the attendance of such personnel at a bilateral or regional … meeting." To qualify, the meeting must take place within the area of

responsibility of the unified combatant command in which the traveler's country is located, or in the United States or Canada if sponsored by a U.S.-based CINC.

Latin American Cooperation, 10 U.S.C. § 1050. The Secretary of a Department may use these funds to pay for the "travel, subsistence, and special compensation of officers and students of Latin American countries and other expenses that the Secretary considers necessary for Latin American Cooperation." These funds are held by the service secretaries and then allocated to various commands and offices by service channels, not by Joint channels. Some commands and offices within each service have published regulations concerning the expenditure of these funds, others have not. Thus the guidance varies between the services and within each service. Due to extremely limited guidance contained in the statute, and the variance of regulatory instruction, this is an area which requires careful review and consideration by Judge Advocates. Often, analysis by analogy is the only available course of action. In other words, in the absence of a regulation that is on point, the Judge Advocate should rely on a regulation covering a similar type of expenditure. For example, the Judge Advocate may wish to adhere to the rules contained in the Joint Travel Regulation for guidance on what the rule should be concerning an expenditure for a Latin American traveler.

Combined Exercises, 10 U.S.C. § 2010. The Secretary of Defense, through the CINCs, "may pay the incremental expenses of a developing country that are incurred by that country as the direct result of participation in a bilateral or multilateral military exercise." Incremental expense means the reasonable cost of goods and services consumed by the developing country as a direct result of participating in the exercise with the U.S.. It includes costs for rations, fuel, training ammunition, and transportation. It does "not include pay, allowances, and other normal costs of such country's personnel."

Military-to-Military Contacts and Comparable Activities, 10 U.S.C. § 168. This statute authorizes the Secretary of Defense, usually through the CINCs, "to conduct military-to-military contacts and comparable activities that are designed to encourage a democratic orientation of defense establishments and military forces of other countries." Examples of the activities specifically listed in the law for which funds may be expended include the activities of "contact" teams; military liaison teams; exchanges of civilian or military personnel between defense establishments and units; and costs of seminars, conferences and publications. These contacts would normally be initiated by CINC's of unified commands based on needs in their AOR.

CINC Initiative Fund, 10 U.S.C. § 166a. As stated above, the Chairman, JCS, provides funds to Combatant Commanders for a wide variety of purposes, including the payment of costs for foreign forces to participate in bilateral, regional, and multilateral conferences, meetings and exercises. This statute provides the CINC with authority to spend money specifically set aside to cover unprogrammed contingencies and initiatives. It works sort of as an emergency contingency fund that pays for expenses not otherwise payable (usually for budgetary reasons, not authority reasons) from other budgets.

## STATE DEPARTMENT'S DEVELOPMENT ASSISTANCE PROGRAMS

This section will provide a very brief description of the State Department's Developmental Assistance programs, and the U.S. military's relatively minor and infrequent role in these programs, particularly, in the provision of Foreign Disaster Relief.

### 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:

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|---|---|---|
| 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 | | |

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.

*Foreign Disaster Relief In Support of OFDA*

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.[282] The current statutory authority continuing this tradition is located in the Foreign Assistance Act.[283] 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."[284] The President's primary implementing tool in carrying out this mandate is USAID.

The USAID is the primary response agency for the U.S. Government to any international disaster.[285] 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.[286] The Administrator of the USAID controls these funds because the President has designated that person as the Special Coordinator for International Disaster Assistance.[287] In addition, the President has designated USAID as the lead agency in coordinating the U.S. response for foreign disaster.[288] 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.

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

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[282] 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.

[283] 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.

[284] 22 U.S.C. § 2292(b).

[285] E.O. 12966, 60 F.R. 36949 (July 14, 1995).

[286] FAA §§ 491 - 495K, 22 U.S.C. §§ 2292 - 2292q.

[287] *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).

[288] *See generally,* E.O. 12966, 60 F.R. 36949 (July 14, 1995).

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.[289] 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.

## DEFENSE DEPARTMENT'S MILITARY HUMANITARIAN PROGRAMS

Following the 1984 GAO Honduras opinion, Congress, recognizing the need for continued U.S. military involvement with the provision of certain limited humanitarian types of activities to developing nations, began passing legislation in the late 1980s intended to permit humanitarian activities by the military. The legislation resulted in Title 10 authorized, and DoD funded, military programs intended to complement the goals and objectives of the State Department's development assistance programs.

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.

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.

### Legislative authorities: Military Humanitarian Operations

*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.

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 CINCs nominate HCA projects for their respective countries to the CINC having responsibility for that country. The CINC, usually at an annual HCA conference, 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 CINCs. 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 CINC (e.g., Army: SOUTHCOM & EUCOM).

Congress imposed certain restrictions on the conduct of HCA by the U.S. military. HCA projects must be approved by the Secretary of State. 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 funds are used to pay for expenses incurred as a "direct result" of the HCA activity. These expenses include: consumable materials, equipment leasing, supplies, and necessary services. Pursuant to DoDD 2205.2,

[289] 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.

*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.

The statute lists four kinds of activities that may be performed as traditional HCA:

- Medical, dental, and veterinary care provided in rural areas of a country;
- Construction of rudimentary surface transportation systems.
- Well drilling and construction of basic sanitation facilities.
- Rudimentary construction and repair of public facilities.

Legal issues that typically arise during the conduct of HCA projects include the following:

Furnishing and equipping newly constructed buildings. Engineer units that complete a construction project desire to leave behind a "turn-key" facility that is ready to be used. 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, blackboards, and books to be placed in a building designed to be a school house. 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.

Donation of unused materials, supplies and minor equipment. 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 which 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.

Promotion of operational readiness skills. 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.

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.[290]

*Demining. Title 10 U.S. Code § 401(e)(5)*

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 demining are completely contrary to those pertaining to traditional HCA. Thus, for purposes of our discussion, it is more logically consistent to categorize § 401 demining as a separate kind of activity rather than associating it with traditional HCA.

Some of the rules pertaining to demining follow. 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 demining must be provided to military or armed forces. Unlike HCA, equipment, services and supplies acquired for demining, including non-lethal, individual, or small-team landmine clearing equipment or supplies may be transferred to the foreign country.

*Humanitarian Assistance, 10 U.S.C. § 2551.*

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 HCA authority should be used. This section primarily allows more flexibility in emergency situations. HCA generally requires pre-planned activities and must promote operational readiness skills of the U.S. participants. Section 2551 does not require the promotion of operational readiness skills of the U.S. military participants.

*Excess non-lethal supplies: humanitarian relief, 10 U.S.C. § 2547.*

Sometimes the provision of troops and transportation alone is not enough. This statute allows DoD to provide excess non-lethal supplies for 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 Management 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. § 2551, above.

*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. 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.

*Foreign Disaster Assistance, 10 U.S.C. § 404.*

[290] 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.

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. 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. Because of the authority provided in 10 U.S.C. § 2551, this authority is rarely used.

*CINC Initiative Funds*, *10 U.S.C. § 166a.*

This authority provides the CINCs 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.

**Funding sources: 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 § 2551, Humanitarian Assistance, and Demining 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 § 2551 authorized activities. "Traditional" HCA (i.e., all activities other than Demining) are separately funded.

## CONCLUSION

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.

**Necessity For the Judge Advocate to Get It Right**

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, and appreciate the significance of, the legal basis for the conduct of the operation, exercise, or activity which benefits a foreign nation.

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 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.

**How the Judge Advocate Can Get It Right—Early Judge Advocate Involvement.**

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.

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.

# CHAPTER 15

# 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, December 4, 1981, 46 F.R. 59941.
6. Executive Order 12863, President's Foreign Intelligence Advisory Board, September 13, 1993, 58 F.R. 48441.
7. DoD Dir. 5240.1, *DoD Intelligence Activities*, 25 April 1988
8. DoD 5240.1-R, *Procedures Governing the Activities of DoD Intelligence Components that Affect United States Persons*, 7 December 1982.
9. DoD Dir. 5240.2, *DoD Counterintelligence*, 22 May 1997.
10. AR 381-10, U*.S. Army Intelligence Activities*, 1 July 1984.
11. AFI 14-104, *Oversight of Intelligence Activities*, 1 Jul 2000.
12. AFI 90-201, *Inspector General Activities*, 26 Oct 2000.
13. SECNAVINST 3820.3D, *Oversight Of Intelligence Activities With The Department Of The Navy*, 26 August 1988.
14. AFI 71-101, Volume 1, *Criminal Investigations*, 1 December 1999.
15. SECNAVINST 3850.2B, *Department Of The Navy Counterintelligence*, 24 February 1991.
16. (S) AR 381-102, *Intelligence Operational Support Activities* (U).
17. (C) AR 381-141, *Provisions for Administration, Supervision, Control and Use of Intelligence Contingency Funds (ICF)* (U).
18. AFI 14-101, *Intelligence Contingency Funds*, 1 November 1998.
19. (C) AR 381-143, *INTELLIGENCE PROPERTY* (U).
20. (C) AR 715-30, *Secured Environment Contracting* (U).
21. (S) AR 381-172, *Counterintelligence Force Protection Source Operations (CFSO) and Low Level Source Operations (LLSO)* (U), 30 December 1994.
22. DEFENSE HUMINT SERVICE, INTELLIGENCE LAW HANDBOOK, September 1995.
23. Military Rules of Evidence, Rule 505.

**Introduction**. Intelligence is information. This information is essential to a commander in conducting operations and in accomplishing his mission. Rudimentary in its early origins, intelligence collection has become a sophisticated and essential operational discipline. Because intelligence is so important to the commander, operational lawyers must understand the basic tenets of 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.

**Statutory Basis**. In general, the statutory basis for Intelligence Law is found in:

1. The National Security Act of 1947, 50 U.S.C. §§ 401- 441d.

2. The Intelligence Oversight Act of 1980, 50 U.S.C. § 413.

3. Executive Order 12333, U.S. Intelligence Activities, Dec. 4 1981, 46 F.R. 59941.

4. Annual Intelligence Authorization Acts.

**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 principle legal advisor in all foreign and domestic intelligence matters.[291] 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 major subordinate units, including the various military intelligence brigades located throughout the world. In consultation with the DCI, the Secretary of Defense must implement policies and resource decisions of the DCI by DoD elements within the National Foreign Intelligence Program, while ensuring that the tactical intelligence activities provide responsive and timely support to operational commanders.[292]

**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.

a. DoD 5240.1-R is the **sole authority** for 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.

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 governs 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.

e. **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 analysis.

[291] 50 U.S.C. § 403-3.

[292] 50 U.S.C. § 403-5.

2. **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.

**3. Counterintelligence.** Counterintelligence is information that is gathered or activities conducted to protect against espionage and other intelligence activities, as well as sabotage or assassination. Such intelligence activities are usually conducted on behalf of foreign powers, organizations, persons or international terrorists. Counterintelligence is concerned with identifying and counteracting that threat 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.[293] Coordination with the FBI will be in accordance with the "Agreement Governing the Conduct of Defense Department Counterintelligence Activities in Conjunction with the Federal Bureau of Investigation," between the Attorney General and the Secretary of Defense, April 5, 1979, as supplemented by later agreements.

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.[294] Procedures for coordinating counterintelligence efforts are found in Director of Central Intelligence Directive 5/1 (DCID 5/1), "Espionage and Counterintelligence Activities Abroad," December 19, 1984.

c. DoD has primary responsibility for conducting military-related counterintelligence world-wide.[295] These activities are typically carried out by Service counterintelligence units. Coordination of effort with the FBI or CIA, as appropriate, is still essential.

4. **Counterintelligence Force Protection Source Operations**. A critical force protection tool available to any deploying commander overseas. The regulation, AR 381-172 (S), is classified. As always, a key aspect of this type of operation is coordination with the Chief of Station of the Country Team via the appropriate Unified Command.

5. **Cover and Cover Support** (AR 381-102) (S). A judge advocate should become familiar with the basics of cover. Cover is a protective guise used by a person, organization, or installation to prevent identification with sensitive activities. All covers have some degree of independent verification, commonly known as backstopping that supports the cover. Backstopping is developed and implemented prior to cover being activated. The National Security Act specifies that elements of the Intelligence Community may not use as an agent or asset for the purposes of collecting intelligence any individual who is authorized by contract or press credentials to represent themselves as a correspondent of a U.S. news media organization, or is officially recognized by a foreign government as a member of a U.S. media organization.[296]

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[293] EO 12333, ¶ 1.14(a).

[294] EO 12333, ¶ 1.8(c) and (d).

[295] EO 12333, ¶ 1.11(b).

[296] 50 U.S.C. § 403-7.

This prohibition can be waived with a written determination by the President or DCI, and does not limit the voluntary cooperation of any person who is aware that they are assisting an element of the U.S. Intelligence Community.

6. **Support Issues Concerning Intelligence Operations.** The rules don't change regarding the support of intelligence operations. Money and property must be accounted for and goods and services still must be procured using appropriate federal acquisition regulations. The following classified regulations cover these important issues:

1. (U) Intelligence funding, *see* AR 381-141 (C).

2. (U) Intelligence property accountability, *see* AR 381-143 (C).

3. (U) Intelligence procurement, *see* AR 715-30 (C).

7. **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 DoD 5240.1-R, Procedure 15, provide the proper regulatory guidance regarding intelligence oversight.

# CHAPTER 16

# INTERNATIONAL AGREEMENTS AND SOFAS

### REFERENCES


1. Case-Zablocki Act, Pub.L. 92-403, 1 U.S.C. § 112b.
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. DoDD 5530.3, *International Agreements*, 11 Jun 87 (CH. 1, 18 Feb 91).
5. CJCSI 2300.01, *International Agreements*, 15 Sep 94 (CH. 1, 19 Aug 96).
6. AR 550-51, *International Agreements*, 15 Apr 98.
7. AFI 51-701, *Negotiating, Concluding, Reporting, and Maintaining International Agreements*, 6 May 94.
8. SECNAVINST 5710.25A, *International Agreements*, 2 Feb 95.
9. DoDD 5525.1, *Status of Forces Policy and Information*, 7 Aug 79.
10. AR 27-50/SECNAVINST 5820.4G, *Status of Forces Policies, Procedures, and Information*, 14 Jan 90.
11. AFI 51-703, *Foreign Criminal Jurisdiction*, 6 May 94.
12. DoDD 5525.3, *Jurisdiction of Service Courts of Friendly Foreign Forces in the United States*, 18 Aug 66.
13. AR 27-51, *Jurisdiction of Service Courts of Friendly Foreign Forces in the United States*, 15 Dec 75.
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.


## 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.

## DETERMINING THE EXISTENCE OF AN AGREEMENT

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.

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.[297] 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.

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.

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.

The Center for Law and Military Operations (CLAMO) maintains a list of Status of Forces Agreements (SOFAs), with text, at http://www.jagcenet.army.mil. Other agreements may be found elsewhere on the Internet. For example, NATO agreements can be found at the NATO site (http://www.nato.int).

**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 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.

- 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: <u>approval</u> and <u>coordination</u>.

<u>Approval</u>. 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. 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 is apparent.

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

[297] 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.).

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, form is not as important as substance.

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. Military units, on their own, 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.

Most agreement 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..

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.

In CJCSI 2300.01A, CJCS has delegated much of his authority in this area to the combatant commanders (CINCs). Redelegation to subordinate commanders is permitted—this will be accomplished by CINC regulation. Similarly, the Service Secretaries have published regulations or instructions, noted in the References section, that delegate some portion of the Secretaries' authority.

The most important authority which has <u>not</u> been delegated (that is, the authority remains at the DoD level) is the authority to negotiate agreements which 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.

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.

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.

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 coordination with the State Department to the authority to which approval of the agreement has been delegated.

In short, a judge advocate at a unit negotiating an international agreement is going to be unable to effect the Department of State coordination on his own. The proposed agreement will have to rise through the chain of command until it gets to a level at which the proper coordination may be made.

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. Note that once an agreement is reached, it may not be signed until approval has been given, by the same procedures discussed above, unless the initial approval was to negotiate and conclude the agreement.

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. If concluding an agreement based on delegated authority, the delegating authority also wants 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.)

**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 or no legal support. Little used agreements, 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, including security assistance programs. For

the deploying judge advocate, status of forces agreements are probably the most important, followed by logistics support agreements.

**Status of Forces Agreements**

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.

Status of Forces Agreement. Resolving the issue of FCJ is often the catalyst of a SOFA, so it will be a rare SOFA that does not address it in detail. 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.

*Exclusive Jurisdiction in the Sending State*. Conduct which 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..

*Exclusive Jurisdiction in the Receiving State.* Conduct which 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.

*Concurrent Jurisdiction*. For all conduct which 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.

*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 which are done in the performance of official duty. For example, a soldier, driving between posts, 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..

*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.

Absence of a SOFA. If no SOFA exists, it is still possible for the United States to retain some criminal jurisdiction over our deployed forces.

*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 (reprinted in the Peace Operations chapter), 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.

*Administrative and Technical Status*. Some Receiving States may consent to granting U.S. personnel the privileges and immunities equivalent to the administrative and technical staff of the U.S. embassy receive. This is often referred to in short-hand manner 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 provides 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. The Combatant Commander should be able to energize the process that results in these notes. Alternatively, the MAAG may be able to do so.

*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.

*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 not to do this, 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. Quite often, however, liaison with the host nation military authorities that invited us into the country may be successful in securing more favorable treatment should the need arise.

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.

Claims. 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. Since the Receiving State benefits from hosting a combined exercise with U.S. forces or from some other form of U.S. presence, 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. As a result, the U.S. is liable only for third party claims caused other than in the performance of official duties. In such a case, the desirable language is that the United States may, at its discretion, handle and pay such claims in accordance with U.S. laws and regulations, *i.e.,* the Foreign Claims Act.[298]

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. 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. This may include a provision allowing military police the authority to apprehend U.S. personnel off the installation. The relative responsibilities of host nation and U.S.

[298] 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.

commanders is a sort of "sliding scale;" forces deployed for combat operations should expect little security from the receiving state.

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.

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 should be exempted from the payment of host nation customs and taxes on goods and services imported into or acquired in the territory of the receiving state for official use.

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 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.

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, 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, the commander's use of frequencies within the electro-magnetic spectrum is governed by host nation law. 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 the commander prefers unencumbered use of the entire electro-magnetic spectrum—as was granted in the Dayton Peace Agreement to IFOR—one should not expect such acquiescence in future operations. Early and close coordination between U.S. and host nation communications assets should be the norm.

**Logistics Agreements**

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.

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.

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[299] 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 value; or cash. In addition, ACSA allows the deletion of several common contractual paragraphs required by the FAR but frequently objectionable to other sovereigns.[300]

For NATO, there is an aggregate ceiling of $200 million per year on the total amount of liabilities the U.S. may accrue under this subchapter, except during a period of active hostilities. The limit is $60 million per year for non-NATO countries. The amount of acquisitions and cross-servicing a component may conduct each year is allocated by the cognizant Combatant Commander.[301]

There are some restrictions on ACSAs. For example, they cannot be used as a substitute for normal sources of supply, nor 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.

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.

**The U.S. as a Receiving State.**

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[299] 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.

[300] *See* 10 U.S.C. § 2343.

[301] *See* 10 U.S.C. § 2347.

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.[302] 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, exclusive jurisdiction would rest with the U.S. The second situation is where the U.S. has 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 which 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 totally 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.

[302] 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.

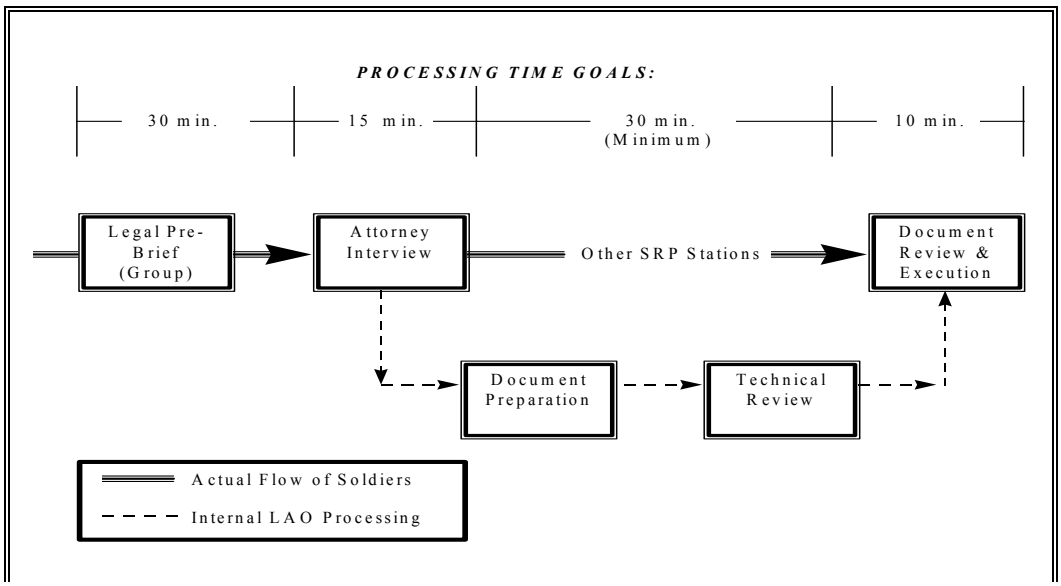
b. Chief, SRPT provides list of non-deployable and reason(s) for this status to Bn S1 for corrective action, with copy furnished to G1/AG and G3 operations.

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 (CD 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.

## VI. DEATH ON ACTIVE DUTY / SURVIVOR BENEFITS

A. Judge Advocates are often asked for advice concerning survivor benefits in situations when a soldier is facing imminent death. Advice may be sought from the command of a soldier or from the family of the soldier. The crucial issue is whether the soldier should die on active duty or medically retire. Generally, the important consideration is a maximization of benefits for the survivors. The Judge Advocate must consider a number of factors before advising the client (command or family members).

B. Careful consideration of applicable survivor benefits is a significant part of the analytical process. Factors favoring medical retirement are the availability of the Survivor Benefit Plan (SBP), availability of Service Disabled Veteran's Life Insurance (SDVI, $20,000), and higher medical retirement pay for soldiers retirement eligible due to longevity. Factors favoring continued active duty are family risks for extensive medical costs, eligibility for the death gratuity (not payable if death occurs more than 120 days after retirement), and additional burial expenses.

C. The Judge Advocate must do more than merely add numbers and determine the current available benefits. The benefits available to surviving family members vary depending on the specific situation. There is no option that is correct for every situation. For many situations, medical retirement is the advisable option because of the availability of the SBP and SDVI. However, the longer the soldier is expected to survive before death the more difficult the decision. The essential component for processing an imminent death case is having the treating physician, the Physical Evaluation Board Liaison Officer (PEBLO), and the Medical Treatment Facility (MTF) coordinate with the U.S. Army Physical Disability Agency before death is announced.

**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.
2. 1963 Tokyo Convention on Offenses and Certain Other Offenses Committed on Board Aircraft, P.L. 91-449; 84 Stat. 921.
3. 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).
4. 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.
5. 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.
6. 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).
7. Convention on the Physical Protection of Nuclear Material, P.L. 97-351 18 U.S.C. § 831.
8. 1979 International Convention Against the Taking of Hostages, P.L. 98-473 18 U.S.C. § 1203.
9. 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.
10. 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
11. 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.
12. 10 U.S.C. § 371-382, Military Support to Law Enforcement
13. 10 U.S.C. §§ 331-334, Insurrections
14. 14 U.S.C. § 712, U.S. Coast Guard
15. 18 U.S.C. § 1385, Posse Comitatus Act
16. 32 U.S.C. § 112, Drug Interdiction and Counter Drug Activities
17. 42 U.S.C. §§ 5121-5204c, Stafford Act
18. 50 U.S.C. §§ 401-441d, National Security Act
19. 50 U.S.C. § 413, Intelligence Oversight Act of 1980
20. 50 U.S.C. §§ 2311- 2367, Weapons of Mass Destruction Act of 1996
21. 50 U.S.C. §§ 2251-2303, Civil Defense Act
22. National Defense Authorization Act for Fiscal Year 1991, P.L. 101-510, Section 1004, Additional Support for Counter Drug Activities
23. National Defense Authorization Act for Fiscal Year 1997, D.L. 104-201, Section 1031, Authority to Provide Additional Support for Counter-Drug Activities of Mexico
24. E.O. 12148, Federal Emergency Management
25. E.O. 12333, U.S. Intelligence Activities

26. E.O. 12472, Assignment of National Security and Emergency Telecommunications Functions
27. E.O. 12656, Assignment of Emergency Preparedness Responsibilities
28. E.O. 13010, Critical Infrastructure Protection
29. NSD 66, Civil Defense
30. PDD 39, U.S. Policy on Counterterrorism (Unclassified Extract)
31. PDD 62, Combating Terrorism
32. PDD 63, Critical Infrastructure Protection
33. DoDD 2000.12, *DoD Combating Terrorism Program*
34. DoDD 2000.14, Draft, *DoD Combating Terrorism Program Procedures*
35. DoDD O-2000.12H, *Protection of DoD Personnel and Activities Against Acts of Terrorism and Political Turbulence*
36. DoDI, O-2000.16, *DoD Combating Terrorism Program Standards*
37. DoDD 3020.26, *Continuity of Operations, Polices and Planning*
38. DoDD 3020.36, *Assignment of National Security*
39. DoDD 3025.1, *Military Support to Civil Authorities*
40. DoDD 3025.12, *Military Support to Civil Disturbances*
41. DoDM 3025.1M, *Manual for Civil Emergencies*
42. DoDD 3150.5, *DoD Response to Improvised Nuclear Device*
43. DoDD 3150.8, *DoD Response to Radiological Incidents*
44. DoDD 4000.19, *Interservice and Intergovernmental Support*
45. DoDM 5100.52M, *Nuclear Weapon Accident Response Procedures*
46. DoDD 5160.54, *DoD Key Asset Protection Plan*
47. DoDM C-5210.41-M, *Nuclear Weapons Safety Manual*
48. DoDD 5210.84, *Security of DoD Personnel at U.S. Missions Abroad*
49. DoDD 5240.1, *DoD Intelligence Activities*
50. DoDD 5240.1-R, *Procedures Governing the Activities of DoD Intelligence Components that Affect United States Persons*
51. DoDD 5240.6, *Counterintelligence Awareness and Briefing Program*
52. DoDD 5525.5, *DoD Cooperation with Law Enforcement Officials*
53. CJCSI 3710.01, *Operational Support to Drug Law Enforcement Agencies*
54. CJCSI 5261.01A, *Combating Terrorism Readiness Initiatives Fund*
55. DoD Civil Disturbance Plan, GARDEN PLOT
56. Joint Pub 2-0, Doctrine for Intelligence Support for Joint Operations
57. Joint Pub 3-05, Doctrine for Joint Operations
58. Joint Pub 3-05.3, Joint Special Operations Operational Procedures
59. Joint Pub 3-07.2, Joint Tactics, Techniques, and Procedures for Antiterrorism
60. Joint Pub 3-07.7, Joint Tactics, Techniques, and Procedures for Domestic Support Operations
61. Joint Pub 3-10.1, Joint Tactics, Techniques, and Procedures for Base Defense
62. Joint Pub 3-54, Joint Doctrine for Operations Security
63. AR 381-10, U.S. Army Intelligence Activities
64. NGR 500-1/ANGI 10-8101, Military Support to Civil Authorities
65. NGB 500-2/ANGI 10-801, National Guard Counterdrug Support to Law Enforcement
66. AR 500-51, Support to Civilian Law Enforcement
67. AR 700-131, Loan and Lease of Army Material
68. SECNAVINST 5820.7B, Cooperation with Civilian Law Enforcement Officials
69. OPNAVINST 3440.1C, Navy Civil Emergency Management
70. AFI 10-801, Air Force Assistance to Civilian Law Enforcement Officials
71. AFI 10-802, Military Support to Civil Authorities
72. AFI 31-202, Working Dog Program
73. FM 100-19, Domestic Support Operations
74. DoD Report to Congress, *Domestic Preparedness Program in the Defense Against Weapons of Mass Destruction,* May 1, 1997.
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## INTRODUCTION

As a result of the United States' superior military strength, foreign nations, non-state foreign organizations, and domestic groups are more likely to resort to terror tactics rather than conventional military strikes. This means that more than ever, civilian as well as military objects at home and abroad are vulnerable to attack. Further complicating the problem is the ever-increasing availability of technology and weapons of mass destruction (WMD) traditionally only within the domain of nation states. Historically, terrorist attacks were politically motivated and did not typically involve mass casualties. However, the face of terrorism is changing. The availability of WMD, coupled with the increasing emergence of religiously motivated terrorist groups and cults creates a volatile mix. Terrorist groups are now actively seeking the maximum carnage possible. Recent publicized examples of terrorist attacks include the attack on the USS Cole, bombings of U.S. Embassies in Africa, the Riyadh and Al Khobar bombings in Saudi Arabia, the downing of Pan Am Flight 103 over Lockerbie Scotland, the Sarin Gas attack in the Tokyo subway, and the domestic bombings of the World Trade Center in New York and the Federal Building in Oklahoma.

As the world moves from the relative stability of the bipolar Cold War era to the era of continuing disintegration and reintegration of states, the use of terror tactics, according to many, will increase. Largely as a result of shifting and weakened political power, world wide media coverage, and weapons availability, loosely organized groups, often motivated by zealous religious or strong anti-government beliefs, see terrorism as a method to achieve their goals. Furthermore, developing nation states that lack the resources to use aggressive traditional military tactics and techniques will continue to sponsor terrorist groups and terrorist attacks. Terrorism provides a means to states without real military power to attempt to influence world politics with force. State sponsored terrorism is appealing to developing nations because of its lower risk. It is often difficult to link a state to a terrorist attack and sponsorship does not typically involve costs equal to conventional attacks. It is often the terror such an attack produces that is the primary goal of a terrorist attack because it is often far more effective than the actual direct harm caused by such an attack.

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 National Command Authority (NCA). 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.

"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.

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 by the NCA. 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 Decision Directives, National Security Directives, contingency plans and other classified documents. Therefore, this subject is beyond the scope of this publication.

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.

## JUDGE ADVOCATE INVOLVEMENT

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.

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."

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 should be reviewed.

## LEAD AGENCIES

DoJ is normally the lead agency for domestic terrorism and the FBI is the lead agency within DoJ for operational responses to terrorist incidents. The DoJ, specifically the FBI, is responsible for all search and recovery operations involving nuclear weapons conducted in the United States, District of Columbia, Commonwealth of Puerto Rico, and U.S. possessions and territories, including those conducted on military installations. DoS is the lead agency for acts not under FBI responsibility

FAA is the lead agency for terrorist incidents that occur aboard an aircraft in flight. It is also responsible for investigating and preventing aircraft piracy and for informing commercial air carriers and their passengers regarding any terrorist threat information.

The U.S. Coast Guard (USCG) is responsible, within the limits of U.S. territorial seas, for reducing the risk of a maritime terrorist incident by diminishing the vulnerability of ships and facilities through implementation of security measures and procedures. USG is the lead agent responding to terrorist actions that occur in maritime areas subject to U.S. jurisdiction. The USCG and FBI have an interagency agreement (Commandant Instruction 16202.3A) to cooperate with each other when coordinating counterterrorism activities.

DoD is the lead agency, at least through 1999, for carrying out a program to provide civilian personnel of Federal, State or local agencies with training and expert advise regarding emergency responses to use or threatened use of a weapon of mass destruction or related materials.

All other Federal agencies possessing resources for responding to terrorism are linked together through agency command centers and crisis management groups to ensure effective coordination of the U.S. response. Formal interagency coordination of national policy and operational issues to combat terrorism occurs through the NSC and in the intelligence community. The Coordinating Sub-Group of the Deputies Committee, made up of representatives from State, Justice, DoD, CJCS, CIA and FBI, deals with and tries to reach consensus on terrorism policy and operational matters and makes recommendations to the Deputies Committee or through the NSA to the President.

## AUTHORITY

**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). Only 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.

**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 tribunal Commander's Authority. 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.

**CONSTITUTIONAL AND STATUTORY GUIDANCE**

The fundamental restriction on the use of the military in law enforcement are 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, discussed in the previous section of this chapter.

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 is the primary statutory exception 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. Statutory exceptions, in addition to some lesser known statutes that 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.

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 right, the command legal adviser has become increasingly important to the commander in planning, training and operational phases of the antiterrorist program.

## JURISDICTION AND AUTHORITY FOR HANDLING TERRORIST INCIDENTS

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 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 Federal and state law respectively. 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.

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.

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 choice between Federal or state action is made by the prosecuting authority. 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.

**FEDERAL AGENCIES AND THE MILITARY**

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).

The National Security Council. The NSC formulates U.S. policy for the President on terrorist threats that endanger U.S. interests.

NSC's Coordinating Sub-Group of the Deputies Committee. This Committee is comprised of representatives from State, Justice, DoD, CJCS, CIA and FBI. The Sub-Group deals with and tries to reach consensus on terrorism policy and operational matters and makes recommendations to the Deputies Committee or through the National Security Advisor to the President.

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.

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 and is 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 cooperates 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.

Department of Defense. DoD Directive 2000.12 now proscribes 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. DoD has technical organizations and tactical units such as the Chemical, Biological Defense Command, the U.S. Army EOD Group, the Defense Technical Response Group and the U.S. Army TEUs, that can assist the FFBI 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.

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 it is accepted by the on-site military commander. 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 endanger, command and control will be promptly returned to the SAC.

**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.

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 case, 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.

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 3121.01, para 1.d.), make it clear that the commander retains the inherent right and obligation of self-defense even in such situations.

The response to 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.

**HOMELAND DEFENSE INITIATIVE**

Due to the increased availability of WMD and the increased threat of terrorist acts at home and abroad, the U.S. Government and its agencies are taking a closer look at how the United States can best protect itself against both traditional and terrorist attacks. Agencies such as DoJ, DoD, Department of Energy (DOE), the Intelligence Community, Federal Emergency Management Agency (FEMA), Department of the Treasury, Department of Transportation (DOT), Department of Health and Human Services (DHHS), Environmental Protection Agency (EPA), and the Federal Aviation Administration, are working together on a project referred to as the Homeland Defense Initiative (HDI). HDI is an integrated and coordinated plan to defend against and respond to attacks against the United States homeland. For the purposes of HDI, attacks include terrorist acts, information warfare, ballistic missile attacks, transnational threats, attacks on critical infrastructure and WMD incidents. HDI participants are working to strengthen the federal, state and local governments' ability to defend the United States territory and citizens from attack, to coordinate crisis and response management of WMD incidents, and to protect critical assets including critical infrastructure and cyber-based systems. HDI may be extended to counterdrug, disaster relief, migrant operations and civil disobedience operations.

With the exception of defending against direct attack, providing direct attack deterrence, and protecting critical national defense assets, DoD's role in HDI primarily involves providing military forces in support of civilian federal, state, and local agencies. However, a simultaneous domestic terrorist attack on critical infrastructure during overseas operations could have a significantly negative affect on the ability of the United States to commit the strategic reserve. Attacks on domestic roadways, airports, communications systems, electrical power plants, and computer networks, would, in many cases, delay or prevent the deployment of United States combat power. Although domestic terrorism is generally viewed as criminal activity, the ramifications of such an attack directly impact force projection capabilities as well as raising force protection issues. This is especially true where the terrorism is state sponsored or where WMD are involved.

The nature of a WMD attack places a burden on the local response community that it may not be able to bear. Conversely, DoD may need the assistance of civilian assets in the event of an attack on or near a military installation. DoD is postured to support local, state and federal government agencies in planning for and responding to domestic emergencies. Active Duty, National Guard, and Reserve forces posses expertise, trained manpower, and equipment that can support response to chemical, biological, radiological attacks at DoD installations and in civilian communities.

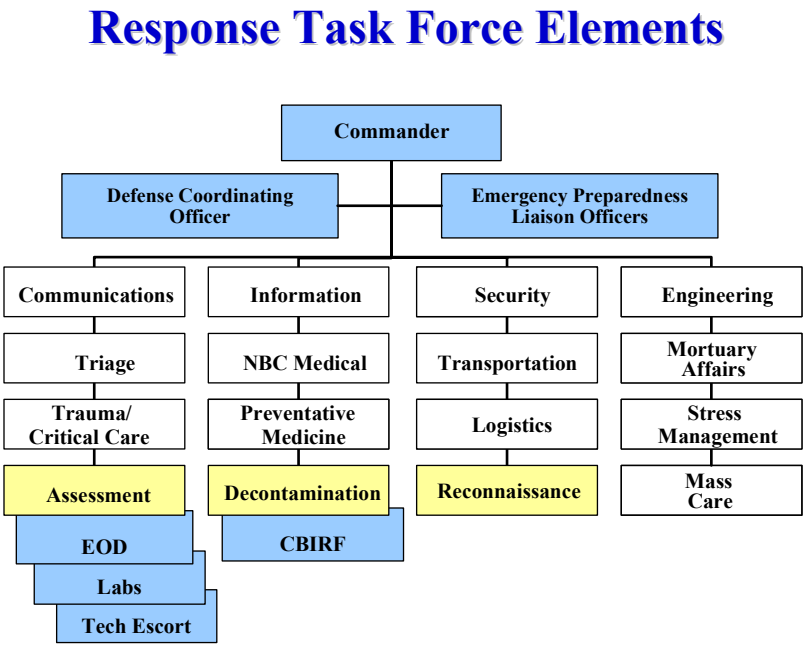
Expert and capable response organizations like Explosive Ordinance Disposal teams, the Army's Technical Escort Unit, and the Marine Corps Chemical Biological Incident Response Force have been involved in the development of response plans and procedures.

For the purpose of HDI, a definition of WMD may include "any weapon or device that has the capability, to cause death or serious bodily injury to a significant number of people through the release, dissemination, or impact of toxic or poisonous chemicals or their precursors; a disease organism; or radiation or radioactivity.[303] Actions with respect to a WMD incident can be divided into two tracks. Crisis Management is the actions taken to prevent WMD attacks, activities taken against the perpetrators and efforts to combat the civil unrest that may follow. Crisis management is within the purview of local, state and federal law enforcement. Within the federal government, the FBI is the lead agency. DoD support in this area is generally provided through the Military Support to Civil Authority and Military Assistance for Civil Disturbances directives described above and in Chapter 19, Domestic Operations. When directed by the NCA, certain Special Operations Forces provide assistance to civilian law enforcement involved in crisis management.

Consequence Management on the other hand is those activities taken in response to reduce or limit the affects of a WMD incident on the population and environment. FEMA is generally the lead agency in Consequence Management operations. DoD expertise and technology is particularly valuable in the area of consequence management.

When directed by the NCA, Joint Forces Command, through FORSCOM, establishes and deploys a Response Task Force (RTF) to the designated Joint Operations Area (JOA) to support the Lead Federal Agency (LFA) in crisis and consequence management during a WMD incident. There are two RTFs under FORSCOM's control; RTF West, composed of Fifth U.S. Army assets, and RTF East, First U.S. Army forces.

Below is a chart depicting the makeup of an RTF broken down by function and element. The RTF is task organized depending on the crisis.




[303] 10 U.S.C. § 2302, Weapons of Mass Destruction.

In addition to the RTFs, National Guard Rapid Assessment and Initial Detection (RAID) teams can be sent to a WMD incident. These RAID teams are Title 32 full-time National Guard soldiers under the command of their respective governors. The governor of a state in which there is a RAID team determines when to commit RAID teams in their state. RAID teams in one state may be dispatched by the governor to another state requesting aid. Eventually, RAID teams will be responsible for incidents within a 150 radius of their location. The goal is to have ten RAID teams mission ready by January 2000, with another five by the year's end and eventually at least one RAID team in every state. While the RAID teams are under state control, Joint Forces Command has oversight responsibility through the 1st and 5th Armies. If a RAID team is federalized, the team is OPCON to the RTF.

RAID teams deploy to an area, assess a suspected nuclear, biological, chemical, or radiological event in support of local leaders, advise civilian responders and facilitate requests for assistance to expedite the arrival of additional state and federal assets. The primary RAID team may consist of approximately 15 full-time National Guard soldiers. Many states are also establishing secondary, or part-time RAID teams units capable of performing RAID type missions. Unless federalized, ARNG forces operating under Title 32 of the U.S. Code and not within the purview of the Posse Comitatus act.

# CHAPTER 19

# DOMESTIC OPERATIONS

## REFERENCES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29. AR 700-131, *Loan and Lease of Army Materiel*, 1 September 1996.
30. FM 19-15, *Civil Disturbances*, 25 November 85.
31. FM 100-19, *Domestic Support Operations*, 01 July 1993.
32. SECNAVINST 5820.7B, *Cooperation With Civilian Law Enforcement Officials*, 28 March 1988.
33. OPNAVINST 3440.16C, *Navy Civil Emergency Management Program*, 10 March 1995

34. OPNAVINST 5585.2B, *Department of the Navy Military Working Dog (MWD) Program*, 25 August 1997.
35. AFI 10-801, *Assistance to Civilian Law Enforcement Agencies*, 15 April 1994.
36. AFI 10-802, *Military Support to Civil Authorities*, 25 February 1994.
37. AFI 31-202, *Military Working Dog Program*, 1 August 1999.
38. MCO 3440.7A, *Support to Civil Authorities*, 13 October 1998.

**OVERVIEW.**

The military's mission is to fight and win the nation's wars. DoD will cooperate with civil authorities, but the relationship is generally one of support—the civilian authorities retain primary responsibility. This chapter will explore the various authorities and restrictions in the area of domestic operations. The chapter will follow the following outline:

Starting point for all DoD support: DoDD 3025.15.

Civil Disasters and Emergencies: Stafford Act, DoDD 3025.1.

Support to Law Enforcement.

Posse Comitatus Act, 18 U.S.C. § 1385.

Who? Applies to persons on active federal military service.

What? Direct enforcement of the civil law, but not activities which are military functions.

Where? Generally, no extraterritorial effect.

Effect? Criminal penalties.

Express exceptions.

Civil Disturbances: Insurrection Act (10 U.S.C. §§ 331-334); DoDD 3025.12.

Sharing Information: 10 U.S.C. § 371, DoDD 5525.5.

Loan of Equipment: 10 U.S.C. § 372, DoDD 5525.5.

Expert Advice and Training: 10 U.S.C. § 373, DoDD 5525.5.

Maintenance and Operation of Equipment: 10 U.S.C. § 374, DoDD 5525.5.

Law Enforcement Detachments: 10 U.S.C. § 379.

Emergencies Involving Chemical or Biological Weapons: 10 U.S.C. § 382.

Miscellaneous Exceptions: DoDD 5525.5

Counterdrug Support.

Detection and Monitoring: 10 U.S.C. § 124.

National Guard: 32 U.S.C. § 112.

Training and other support: Section 1004, FY 91 NDAA; CJCSI 3710.01.

**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).
- 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.

**DODD 3025.15**

A. This directive governs all 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. Approval Authority. 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.

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 CINC-assigned forces are to be used, there must be coordination with the Chairman of the Joint Chiefs of Staff. After coordination with the affected CINC, CJCS will determine whether there is a significant issue requiring SECDEF approval.

3. Immediate response authority in the local commander is not affected.

**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. DoDD 3025.1 and DoD 3025.1-M provide all the information necessary for practitioners in this area.

B. Five mechanisms which trigger involvement of Federal troops.

1. President's **emergency 10-day authority.** 42 U.S.C. § 5170b(c). 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 Director of Military Support (DOMS), located in the Pentagon (703-697-4331).

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.

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 which 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 which 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. **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. § 5170b(c)), 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 CINC-assigned forces (see the discussion of DoDD 3025.15, above).

2. The Director of Military Support (DOMS) is the Secretary of the Army's action agent. DOMS coordinates and monitors the DoD effort through the DCO.

3. USACOM (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 (PCA, discussed below). 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 not by the military, 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 which 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 which 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.

**SUPPORT TO LAW ENFORCEMENT**

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)).

(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).

2. To What the PCA Applies.

a. Prohibits Direct Assistance, including:

(1) Interdiction of a vehicle, vessel, aircraft, or other similar activity;

(2) A search or seizure;

(3) An arrest, apprehension, stop and frisk, or similar activity; and

(4) 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.

b. Analytical framework. There are three separate tests which courts apply to determine whether the use of military personnel has violated the PCA.

(1) 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).

(2) 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);.

(3) THIRD TEST: whether the military personnel subjected citizens to the exercise of military power which was:

(a) Regulatory (a power regulatory in nature is one which controls or directs);

(b) Proscriptive (a power proscriptive in nature is one that prohibits or condemns); or

(c) 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).

c. 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.

(6) Such other 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, were also 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 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? Criminal Sanctions. 2 years imprisonment, fine, or both.

B. Express Exceptions to the PCA.

1. **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).

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). 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 Secretary of the Army, along with DOMS, in coordination with CJCS, direct the required DoD assistance, normally by designating supported and supporting CINCs. The DoD Civil Disturbance Plan GARDEN PLOT will be implemented, with modifications as necessary.

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/CINC 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. See JTF LA ROE below for an example of arming orders.

(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.

## LOS ANGELES CIVIL DISTURBANCE ROE (1992)

**JOINT TASK FORCE, L.A.**
**(AS OF 020100 MAY 1992)**

A. EVERY SERVICEMAN HAS THE RIGHT UNDER LAW TO USE REASONABLE AND NECESSARY FORCE TO DEFEND HIMSELF AGAINST VIOLENT AND DANGEROUS PERSONAL ATTACK. THE LIMITATIONS DESCRIBED BELOW ARE NOT INTENDED TO INFRINGE THIS RIGHT, BUT TO PREVENT THE INDISCRIMINATE USE OF FORCE.

B. FORCE WILL NEVER BE USED UNLESS NECESSARY, AND THEN ONLY THE MINIMUM FORCE NECESSARY WILL BE USED.

1. USE NON-DEADLY FORCE TO:

a. CONTROL THE DISTURBANCE.

b. PREVENT CRIMES.

c. APPREHEND OR DETAIN PERSONS WHO HAVE COMMITTED CRIMES.

2. USE DEADLY FORCE ONLY WHEN:

a. LESSER MEANS OF FORCE EXHAUSTED OR UNAVAILABLE; AND

b. RISK OF DEATH OR SERIOUS BODILY HARM TO INNOCENT PERSONS IS NOT SIGNIFICANTLY INCREASED BY THE USE; AND

c. PURPOSE OF USE

(1) SELF-DEFENSE TO AVOID DEATH OR SERIOUS BODILY HARM;

(2) PREVENTION OF CRIME INVOLVING DEATH OR SERIOUS BODILY HARM;

(3) PREVENTION OF DESTRUCTION OF PUBLIC UTILITIES WHICH HAVE BEEN DETERMINED VITAL BY THE JTF COMMANDER.

(4) DETENTION OR PREVENTION OF ESCAPE OF PERSONS WHO PRESENT A CLEAR THREAT OF LOSS OF LIFE.

3. WHEN POSSIBLE, THE USE OF DEADLY FORCE SHOULD BE PRECEDED BY A CLEAR WARNING THAT SUCH FORCE IS CONTEMPLATED OR IMMINENT.

4. WARNING SHOTS WILL NOT BE USED.

5. WHEN FIRING, SHOTS WILL BE AIMED TO WOUND, IF POSSIBLE, RATHER THAN KILL.

6. WEAPONS WILL NOT BE FIRED ON AUTOMATIC.

7. WHEN POSSIBLE, LET CIVILIAN POLICE ARREST LAWBREAKERS.

8. ALLOW PROPERLY IDENTIFIED NEWS REPORTERS FREEDOM OF MOVEMENT, SO LONG AS THEY DO NOT INTERFERE WITH YOUR MISSION.

9. DO NOT TALK ABOUT THIS OPERATION OR PASS ON INFORMATION OR RUMORS ABOUT IT TO UNAUTHORIZED PERSONS; REFER THEM TO YOUR COMMANDER.

10. JTF COMMANDER WITHHOLDS AUTHORITY FOR USE OF RIOT CONTROL AGENTS AND SNIPER TEAMS.

C. ARMING ORDERS

| Arming Order | Rifle | Bayonet Scabbard | Bayonet | Pistol | Baton | Magazine/ Chamber | Control |
|---|---|---|---|---|---|---|---|
| AO-1 | Sling | On Belt | Scabbard | Holster | Belt | In Pouch / Empty | OIC/NCOIC |
| AO-2 | Port | On Belt | Scabbard | Holster | Belt | In Pouch / Empty | OIC/NCOIC |
| AO-3 | Sling | On Belt | Fixed | Holster | Hand | In Pouch / Empty | OIC/NCOIC |
| AO-4 | Port | On Belt | Fixed | Holster | Hand | In Pouch / Empty | OIC/NCOIC |
| AO-5 | Port | On Belt | Fixed | Holster | Hand | In Weapon /Empty | OIC/NCOIC |
| AO-6 | Port | On Belt | Fixed | In Hand | Belt | In Weapon /Locked & Loaded | OIC |

[NOTE: the above ROE utilized by JTF LA were adapted from the generic ROE contained in DoD's GARDEN PLOT CIVIL DISTURBANCE PLAN, and modified slightly based upon input from Dep't of the Army (7th ID), FORSCOM, and the Joint Staff. See pg. 30, September 1992, *The Army Lawyer.*]

2. **Sharing Information**. 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.

3. **Loan of Equipment and Facilities**.

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** (which may be made only to Federal agencies) and **leases** (which may be made to State and local agencies) 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.

4. **Expert Advice and Training**.

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, USCINCSOC 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) MWDT. 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.

(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 (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.

5. **Maintenance and Operation of Equipment**. 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 statue 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.

6. **Law Enforcement Detachments**. 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.

7. **Emergencies Involving Chemical or Biological Weapons**. 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.

8. **Miscellaneous Exceptions**. DoDD 5525.5, Encl. 4, para. A.2.e., contains a list of federal statutes which 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

C. **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 FY00, Congress appropriated nearly $1 billion 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 <u>not</u> 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 Remote Other 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 which 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 which 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). 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.

D. **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 27 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).

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,[304] 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[305]) 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[306] within or outside the United States or counter-drug activities of a foreign law enforcement agency outside the United States.[307]

(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) [308] 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.

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[304] 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 through 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."

[305] 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."

[306] Section 1021(b)(2) of Public Law 105-261 inserted "of the Department of Defense or any Federal, State, or local law enforcement agency."

[307] Section 1021(b)(3) of Public Law 105-261 inserted "or counter-drug activities of a foreign law enforcement agency outside the United States."

[308] 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).

(7) Construction of roads and fences and installation of lighting to block drug smuggling corridors across international boundaries of the Untied States.

(8) Establishment of command, control, communication, and computer networks for improved integration of law enforcement, active military, and National Guard activities.

(9) [309] The provision of linguist and intelligence analyst services.

(10) [310] Aerial and ground reconnaissance.

(c) [311] 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) [312]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.

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[309] Section 1041(b)(2) of Public Law 102-484 added a new par. (9).

[310] Section 1121(b) of Public Law 103-160 added a new par. (10).

[311] Section 1041(c) of Public Law 102-484 redesignated subsecs. (c) through (g) as (d) through (h), and inserted a new subsec. (c).

[312] 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

# CHAPTER 20

# INFORMATION OPERATIONS

## INTRODUCTION

In the array of challenges that face an operational attorney today, there is perhaps no more misunderstood, misapplied, mysterious task than that of coordinating the legal aspects of information operations (IO). The debate whether IO add a new dimension to our warfighting capability or represent a revolution that will reshape the way the Army accomplishes its strategic objectives remains unsettled. The National Military Strategy lists IO as one of the key capabilities which the U.S. military must provide in order to give the national leadership a range of viable options for promoting and protecting U.S. interests in peacetime, crisis, and war.[313]

Commentators often shake their heads sagely and intone vague phrases such as "Information operations are the wave of the future." Joint Pub. 3-13 admonishes commanders that "the growth in IO-related technology and capabilities and associated legal issues makes it critical for commanders at all levels of command to involve their staff judge advocates in development of IO policy and conduct of IO."

In practice, IO raise many questions and legal issues that cannot be precisely refined and distilled onto a fact sheet for the curious commander or staff officer. Among other areas, the emerging discipline of IO synthesizes laws and policies related to intelligence collection and oversight, space law, computer security, psychological operations, mission planning, law of armed conflict targeting constraints, information security and exploitation, and search and seizure guidelines. There are many areas where current laws contain gaps, which can frustrate lawyers and commanders who seek crystal clear answers for important operational issues. Despite the somewhat shadowy framework of law and practice, IO have a stature and following that will make them integral to future operational planning and execution.

## OLD WINE INTO NEW WINESKINS

In a very real sense, IO is nothing new. No commander in history has willingly communicated his intentions to the enemy, or intentionally followed the enemy deception plan. History is filled with examples of successful IO. The D-Day deception showed the power of giving the enemy a false impression. The Union fortune in finding Lee's plans prior to the Battle of Antietam shows the need to preserve one's own information. The intelligence community as a whole is built around the need for preserving information vital to national security while learning the information crucial to our adversaries.

## FORMAL DEFINITIONS

IO consists of actions taken to affect adversary information and information systems while defending our own information. IO are conducted at all levels of war (strategic, operational, and tactical) and across the full range of military operations (peacetime, conflict, and war). Thus, IO is an umbrella term that includes what used to be regarded as distinct facets of operations into one overarching planning and execution imperative. The operational component of IO has seven elements:

- Operations Security (OPSEC) - The discipline relating to denying valuable tactical and strategic information to the enemy.[314]
- Psychological Operations (PSYOP) - The art of shaping enemy perceptions in order to achieve the objectives of the mission. Current law and policy prohibits PSYOP directed at a U.S. target audience.[315]

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[313] http://www.dtic.mil/jcs/nms.

[314] *See* JOINT PUB. 3-54, JOINT DOCTRINE FOR OPERATIONS SECURITY (27 Jan. 1996).

[315] *See* THE JOINT CHIEFS OF STAFF, JOINT PUB. 3-53, DOCTRINE FOR JOINT PSYCHOLOGICAL OPERATIONS (10 July 1996). PSYOP are operations planned to convey selected information and indicators to foreign audiences to influence their emotions, motives, objective reasoning, and ultimately the behavior of foreign governments, organizations, groups, and individuals.

- Electronic Warfare (EW) - The use of high powered microwaves to jam enemy transmissions or use technology to interfere with the enemy's ability to collect and transmit information. The goal is to degrade, disrupt, deny, and exploit the enemy use of the electromagnetic spectrum.
- Military Deception – A key part of successful operations predating the Trojan Horse. This is an important element in obtaining tactical or operational surprise.
- Physical Destruction – Using kinetic ordinance to target the enemy ability to collect or transmit information. Despite the objections of some journalists who are often using enemy infrastructure for their own commercial purposes, enemy radio towers, communications stations, power grids, etc. are lawful military targets so long as planners and lawyers consider the familiar targeting principles in reviewing the target packet and approving the target. A good example is the destruction of the Serbian television station in Belgrade that was broadcasting propaganda and misinformation to the civilians and military in the Former Republic of Yugoslavia. The key is to articulate the military necessity for attacking the target and do so in a manner that minimizes collateral damage.

Space is used for military communications, command and control, navigation, and weapons guidance. IO planners often encounter questions regarding the legal extent to which satellites can be targeted. Orbital surveillance is legal and common.[316] Many IO activities would clearly be permissible within the parameters of the "peaceful use" required by the relevant treaties. There are several major international agreements that relate to the legality of targeting orbital objects.

1) The Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies.[317] This Treaty mandates that all nations are free to explore and use Outer Space on a basis of equality and in accordance with international law, to include the United Nations Charter. **NOTE**: This allows a wide range of IO activities which are characterized as either under the authority of the Security Council or are taken pursuant to the rights of individual or collective self defense contained in the Charter.

2) The 1971 Agreement Relating to the International Telecommunications Satellite Organization (INTELSAT)[318] and The 1976 Convention on the International Maritime Satellite Organization (INMARSAT)[319] require that space be used for "other than for military purposes" and "peaceful purposes" respectively. State practice has established that these conventions are relevant to IO only because they establish the principle of nondiscrimination among states that use satellites.[320]

**THE BOTTOM LINE**: Satellites that contribute to enemy military action are lawful targets so long as the damage caused by either destroying satellite or interfering with its efficient transmission of information does not cause damage to civilian targets that is excessive in relation to the direct and concrete military advantage to be gained. For example, a GPS satellite that transmits information to a fleet of civilian airliners while they are in flight might not be a lawful target.

- Civil Affairs (CA) – The Civil-Military Commission is one of the most important facets of the complicated operation in Bosnia. The CA function is to spread information to the population, civilian police, local officials, host nations businesses, NGOs, etc. Successful CA gain local acceptance and support for the military goals. The CA effort is a force multiplier because it offers the prospect for accomplishing the military mission without having to apply military power.[321] The nature of the CA mission puts personnel in a very favorable position to collect information. CA activities encompass the entire range of cultural, political, social, and economic issues within the area of operations. The CA unit should be included within the intelligence collection plan and should be of great use in planning the PSYOP campaign themes and target audience.
- Public Affairs (PA) – The media can be a powerful ally in disseminating truthful information regarding U.S. objectives and practices. In particular, the media war can be decisive in determining whether or not the U.S. and its

[316] Glenn H. Reynolds, *International Space Law: Into the Twenty-First Century*, 25 VAND. J. TRANSNAT'L L. 225, 230 (1992).

[317] 18 U.S.T. 2410, T.I.A.S. No. 6347, 610 U.N.T.S. 205 (27 Jan. 1967).

[318] 23 U.S.T. 3813, T.I.A.S. No. 7532 (20 Aug. 1971), *reprinted in* 10 I.L.M. 909 (1971).

[319] 31 U.S.T. 1, T.I.A.S. No. 9605, 1143 U.N.T.S. 105 (3 Sept. 1976).

[320] LAWRENCE T. GREENBERG ET AL, INFORMATION WARFARE AND INTERNATIONAL LAW 22 (1998).

[321] *See* JOINT PUB. 3-57, JOINT DOCTRINE FOR CIVIL AFFAIRS (31 MAY 1996).

allies achieve the objectives of the operation.[322] The role of PA as a component of the broader IO effort is to counter enemy propaganda and protect from misinformation and rumors. PA provides objective reporting which is accurate, truthful, and balanced, yet which is conscious of the OPSEC requirements for protecting vital military information.

At its root, the emerging doctrine and practice of information operations is best understood as an element of combat power which should be focused when and where it best supports the operation. For example, the information campaign to prevent widespread violence following the Brcko decision in Bosnia-Herzegovina began more than a year before the decision was released. In this sense, IO are driven by the planning factors of METT-TC just as any other aspect of combat power (e.g. mission, enemy, terrain, troops, time available, and civilian considerations).

**Offensive IO** are those operations undertaken to influence the human decision making processes of the adversary**.** Offensive IO involves the integration and orchestration of varied activities into a coherent, seamless plan to achieve specific objectives. Offensive IO objectives must be clearly established, support overall national and military objectives, and include identifiable indicators of success.

In order to efficiently attack adversary information and information systems, planners must be able to do the following:

- Understand the adversary's or potential adversary's perspective and how it may be influenced by IO
- Establish IO objectives
- Identify information systems value, use, flow of information, and vulnerabilities
- Identify targets that can help achieve IO objectives
- Determine the target set
- Determine the most effective IO capabilities for affecting the vulnerable portion of the targeted information or information systems
- Predict the consequences of employing specific IO capabilities with a predetermined level of confidence.

**Defensive IO**[323] integrate and coordinate policies and procedures, operations, personnel, and technology to protect information and defend information and information systems. Defensive IO are conducted and assisted through information assurance (IA), OPSEC, physical security, counterdeception, counter- PSYOP propaganda, counterintelligence (CI), EW. Defensive IO ensure timely, accurate, and relevant information access while denying adversaries the opportunity to exploit friendly information and information systems for their own purposes.

**"Special information operations" (SIO)** are information operations that, by their sensitive nature and due to their potential effect or impact, security requirements, or risk to the national security of the United States, require a special review and approval process.[324] This class of IO may require the additional coordination mandated by Title V of the National Security Act.

## THE PROBLEM OF PLANNING

Current doctrine calls for an IO cell which has the responsibility of coordinating, deconflicting, and orchestrating the whole range of discrete functions that together comprise the IO plan. For example, since the PSYOP campaign will transmit information to enemy intelligence systems, it must be coordinated with the CI, deception, and OPSEC planners. Likewise, proper planning will prevent the EW assets from nullifying the efforts of the PA, CA, or PSYOP elements.

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[322] *See* JOINT PUB. 3-67, DOCTRINE FOR PUBLIC AFFAIRS IN JOINT OPERATIONS (14 MAY 1997).

[323] *See generally* CHAIRMAN, JOINT CHIEFS OF STAFF INSTR. 6510.01B, DEFENSIVE INFORMATION OPERATIONS IMPLEMENTATION (22 Aug. 1997).

[324] This class of information operations may, by definition, fall within the realm of covert action as defined in 50 U.S.C. § 413 (any activity or activities of the U.S. government designed to influence political, economic, or military conditions abroad, where it is intended that the role of the U.S. government will not be apparent or acknowledged publicly). 50 U.S.C. § 413b(f) prohibits any covert action which is "intended to influence United States political processes, public opinion, policies, or media." Title V of the National Security Act requires specific presidential findings prior to the initiation of a covert action, and mandates that the President keep the Congressional Intelligence committees "fully and currently informed."

Joint Pub. 3-13 and Army doctrine both call for the IO cell to include the JAG, the signal officer, the EW, deception, PSYOP, and OPSEC representatives, as well as the J-2 and targeting representatives from the J-3. A field support team (FST) from the Land Information Warfare Activity (LIWA) can augment the IO cell (which can be found at all levels of command).[325] A Joint Task Force IO cell may be augmented by a team from the Joint Command and Control Warfare Center. Not surprisingly, given the range of activities that are part of the IO plan, the relevant information is found in various places within the OPLAN.

In a plan following the JOPES format, Appendix 3, to Annex C has recently been redesignated as the IW (Information Warfare) appendix. The IW appendix has the following subsections:

Tab A Military Deception

Tab B Electronic Warfare

Tab C Operations Security

Tab D Psychological Operations

Tab E Physical Destruction

Aside from these specific locations for IO related areas, the Civil Affairs annex (Annex G) is a crucial component of the IO planning. The Public Affairs Annex (Annex F) must be integrated as well. Finally, the two specific references to IO are found in Appendix 2 (IO-D) to Annex K (C3) and Appendix 6 to Annex B (Intel Spt to IO).

**THE IO PLANNING PROCESS USING MILITARY DECISION-MAKING PROCESS (MDMP)**

The members of the IO cell should follow the **MDMP** in preparing an OPLAN. At the ***Receipt of Mission*** phase, the IO team must be focused with the rest of the battle staff on defining a clearly stated mission. The commander's vision should include IO specific guidance on how the IO cell should support the operation. The IO planners should state the mission in finite and measurable terms, and the components of the IO plan should be tied directly to the operational decision points specified in the commander's intent.

During the ***Mission Analysis*** phase of planning, the IO cell should develop a concept that is linked to the overall mission. The IO concept is a who, what, where, when, why, and how articulation of the IO activities that will support the specified and implied tasks developed by the battle staff. Although the initial set of IO objectives is defined during mission analysis, it will be refined further during COA development.

During the ***Course of Action (COA) Development***, the IO cell should coordinate IO actions with the planning scheme. For example, the IO team will succinctly state how IO will support the operation, plan IO execution timelines, and develop IO Target and Protect lists. The ***COA Analysis (Wargame)*** phase of planning will entail comparison of the IO synchronization matrix with the overall battle staff sync matrix. For example, timing a deep Apache attack against a high-value C4I (Command, Control, Communications, Computers, Intelligence) node to coincide with a suppression of enemy air defense (SEAD) mission may significantly aid the IO campaign.

The ***COA Comparison*** will require the IO cell to weigh the strengths and weaknesses of IO support for each of the COA developed by the battle staff. The IO staff will brief the IO aspects of the plan to the commander prior to ***COA Approval.*** The IO annex developed during ***Orders Production*** must focus on providing the relevant information for both offensive and defensive IO. IO input to the base order is generally included in paragraph 3 (operations), but the IO planners must ensure that information is cross-walked between the various annexes that touch on IO related subjects.

[325] To request LIWA assistance, Army organizations should address messages and correspondence to one of the following: DAMO-ODI, (703) 697-1119/3636, DSN 227, HQDA, ATTN: DAMO-ODI, 400 Army Pentagon, Washington, D.C. 20310-0400, GENSER HQDAWASHDC//DAMO-ODI//, NIPRNET fredrib@hqda-aoc.army.pentagon.mil

## THE NEW DIMENSION

The explosion of technology has given military planners an important new dimension for managing and interdicting information. In this new arena, the electrons are the weapons. While the underlying notion of IO is as old as war itself, the speed with which information flows is indeed revolutionary. At the same time, the military is now dependent upon the information stored in computer systems around the world, and relies on the accurate transmission of information.

In the realm of offensive IO, the computer revolution has spawned a new doctrinal term. CNA is a new acronym for **computer network attack. CNA entails** operations to disrupt, deny, degrade, or destroy information resident in computers and computer networks, or the computers and networks themselves. **(**NOTE: This term was promulgated in DoDD S-3600.1 of 9 Dec 96.)

## IO AND THE LAW OF WAR

The revolution in computer technology and the interconnected flow of information between sovereign states presents new challenges for conducting IO as a lawful component of military operations. The principles of the Law of War certainly apply, but with a couple of minor exceptions, the black letter law does not fit cleanly into an IO application.

The interconnected nature of the digital age raises issues relating to the **Law of Neutrality**[326] in any IO campaign. As a general rule, all acts of hostility in neutral territory, including neutral lands, waters, and airspace are prohibited. In theory, using the wires or digital cables of a network associated with a neutral Party as a conduit for information operations would jeopardize that State's neutrality. If the neutral nation is unable or unwilling to affirmatively maintain its neutrality, the belligerents are allowed to take such measures as are necessary to negate the enemy efforts.[327] There are some specific IO related prohibitions with regard to neutral States.

- Hague V, Art. 3 forbids a belligerent from erecting a "wireless telegraphy station or other apparatus for the purpose of communicating" on the territory of the neutral, and forbids belligerents from using "<u>any installation of this kind</u> established by them before the war … for purely military purposes." (emphasis added)

- Art. 5 mandates that the neutral state prevent any belligerent from allowing belligerents to establish communications equipment on its territory, in its airspace, or in its waters.

- Lawful Activities with IO Implications. Hague V, Art. 8 mandates that a neutral power is not required to "forbid or restrict the use on behalf of the belligerents of telegraph or telephone cables or of wireless telegraphy apparatus belonging to it or to companies or private individuals"

## THE PROBLEM OF UNANTICIPATED CONSEQUENCES:[328]

IO planners should consider the problems of discriminating between civilian and military targets when designing a CNA. Protocol I, Art. 48 mandates that Parties to the conflict distinguish between the civilian population and combatants at all times, and between civilian objects and military objectives, and direct operations only against military objectives. An EW objective could likely knock out civilian ambulance radios, for example. Planners must bear in mind the fundamental principles of the Law of War:

- Protocol I, Art. 51(2) "The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited."

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[326] *See* Hague Convention No. V Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, Oct. 18, 1907, 36 Stat. 2310, UST 540.

[327] CENTER FOR OCEANS LAW AND POLICY, ANNOTATED SUPPLEMENT TO THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS ¶ 7.3 (15 Nov. 1997).

[328] *See, e.g.*, Protocol I, Annex I, arts. 7-13.

- Hague IV, Art. 22 "The right of belligerents to adopt means of injuring the enemy is not unlimited."

- Protocol I, Art. 57(2)(a)(ii), those who plan or decide upon attack shall "take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event, to minimizing, incidental loss of civilian life, injury to civilians, and damage to civilian objects."

- Protocol I, Art. 51(5)(b): Where civilian objects are not specifically targeted but nonetheless are at risk because of collateral damage, the collateral damage may not be excessive in relation to the direct and concrete military advantage obtained through the destruction of the intended target.

**Perfidy versus Lawful Deception:** Protocol I, Art. 37 prohibits belligerents from killing, injuring, or capturing an adversary by perfidy. The essence of this offense lies in acts designed to gain advantage by falsely convincing the adversary that applicable rules of international law prevent engaging the target when in fact they do not. The use of enemy codes and signals is a time-honored means of tactical deception. However, misuse of distress signals or of signals exclusively reserved for the use of medical aircraft would be perfidious.[329] 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.

**STATUTORY TOOLS FOR DEFENSIVE IO**

The computer age has spawned many statutes that will be the tools used by the operational lawyer to assist the **IO** cell in conducting defensive IO. Some of these are summarized below.

➔ **Electronic Communications Privacy Act of 1986 (ECPA)**.[330] 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 states that "Nothing contained … constitutes authority for the conduct of any intelligence activity."[331] 18 U.S.C. § 2511 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." **NOTE:** Must distinguish between real-time interception which is governed by 18 U.S.C. § 2511 and stored communications such as e-mail that is governed by 18 U.S.C. § 2703. The ECPA lists 9 Statutory Exceptions, 3 of which are central to IO because they permit monitoring by:
>
> > 1) The 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) "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)

[329] Protocol I, Art. 38(1).

[330] Pub. L. No. 99-508, 100 Stat. 1848 (1986).

[331] The Foreign Intelligence Surveillance Act of 1978 (FISA) is the vehicle for defensive IO aimed at discovering the loss of **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:

Acquisition of a "nonpublic communication" by electronic means without the consent of a person who is a party to an electronic communication or, in the case of a non-electronic communication, without the consent of a person who is visibly present at the place of the communication.

Physical searches seeking to obtain foreign intelligence information.

or 3) 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)

➔Information Operations Warrants for Law Enforcement Purposes.

- 18 U.S.C. § 2703(c): with subpoena, the government can obtain the name, address, local and long distance telephone billing records, telephone number or other subscriber information. The government entity receiving such information is not required to provide notice to the consumer.

- 18 U.S.C. § 2703(d) allows a court to issue an order for disclosure if the government offers specific and articulable facts that there are reasonable grounds to believe that the contents of 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.

- § 270 is the mechanism for obtaining subscriber connection logs, sending IP addresses, receiving IP addresses, times of access and log on, content of saved communications, and more.

**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 the 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."[332] COMSEC monitoring as part of the IO campaign is permitted by revised AR 380-53.[333] Here are some of the key guidelines for conducting COMSEC:

- Information Systems Security Monitoring will be conducted only in support of security objectives.

- Information Systems Security Monitoring will not be performed to support law enforcement or criminal or counterintelligence investigations.

- The results of Information Systems Security Monitoring shall not be used to produce foreign intelligence or counterintelligence, as defined in Executive Order 12333.

The NTISS (as implemented in AR 380-53) requires that the persons conducting Information Systems Monitoring receive formal training in the procedures outlined in AR 380-53, the provisions of AR 381-10, the provisions of AR 381-12, para. 3-1, the provisions of AR 190-53, and the provisions of applicable Federal laws (18 U.S.C. § 2510, etc.)

These are the prerequisites for lawful Information Systems Monitoring:

**NOTIFICATION**: Users of official DOD telecommunications will be given notice that: (1) Passing classified information over non-secure DOD telecommunications systems, other than protected distribution systems or automated

[332] U.S. DEP'T OF DEFENSE, DIR. 5200.28, SECURITY REQUIREMENTS FOR AUTOMATED INFORMATION SYSTEMS (21 Mar. 1998).

[333] 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>

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.

**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. AR 380-53, 2-4 for a specific list of information required prior to certification.

**AUTHORIZATION:** The Deputy Chief of Staff for Intelligence has authorized Information Systems Security Monitoring to be conducted within the MACOM involved.

Notification Guidance for Automated Information Systems

Use of Information Acquired During Information Systems Security Monitoring. See AR 380-53, para. 2-8(c)(3) for required procedures if materials are required as evidence.

The results of Information Systems Security Monitoring may not be used in a criminal prosecution without prior consultation with the OGC and TJAG. (AR 380-53, para. 2-8(5)).

Information obtained through Information Systems Security Monitoring may be used in connection with disciplinary or administrative action against Department of the Army personnel for knowing, willful, or negligent actions that result in the unauthorized disclosure of classified information (*see* AR 380-5, paras 14-101 and 14-102). In this case, the Information Systems Security Monitoring element is authorized to release names, or recorded media, of the telecommunications involved to the supported commander or designated representative for use as evidence. Procedures will be strictly adhered to as follows:

- The supported commander, after having consulted with the servicing judge advocate (JA), will provide the Information Systems Security Monitoring element with a written request, specifically identifying the telecommunications messages or communications required. The request will identify the servicing JA consulted.

- The Information Systems Security Monitoring element will obtain a signed receipt from the supported commander or designated representative for the requested materials. The receipt will include a statement that the commander or representative is familiar with and will comply with the security requirements and privacy restrictions applicable to the material.

- The Information Systems Security Monitoring element will immediately notify its chain of command that the material has been requested .

- The Information Systems Security Monitoring unit commander will notify HQDA (DAMI-CHI), in writing, within 5 working days of providing the material to the supported command.

- Information may be obtained incidental to an authorized Information Systems Security Monitoring mission that relates directly to a serious crime such as sabotage or threats or plans to commit offenses that threaten a life or could cause significant damage to or loss of Government property (this includes data on Government AIS).

When evaluating or assessing the security of U.S. Army AIS, Information Systems Security Monitors may detect computer anomalies that could potentially be unauthorized intrusions into Army AIS . When Information Systems Security Monitors detect such anomalies, they must contact the system administrator and ACERT[334] immediately. The system administrator will then follow the procedures of AR 380-19 by taking measures to ascertain that the anomaly is in

[334] The Army Computer Emergency Response Team (ACERT) conducts command and control protect operations in support of the Army to ensure the availability, integrity, and confidentiality of the information and information systems used in planning, directing, coordinating, and controlling forces in the accomplishment of the mission across the full spectrum of support to military operations. *See* < http://www.acert.belvoir.army.mil/> Contact at COMM 1-888-203-6332/ DSN 235-1113.

fact an unauthorized intrusion, notifying counterintelligence (CI) and criminal investigation division (CID) so that the offices may conduct an investigation of the incident.

Information Systems Security Monitors should not support the process of determining if the investigation is properly a law enforcement or intelligence matter, and must discontinue monitoring the suspected intrusion as soon as the system administrator or ACERT has interceded In no case may the Information System Security Monitors continue monitoring the anomaly for more than 24 hours. Data pertaining to the anomaly or suspected intrusion recorded during the 24-hour period will not be accessed until the appropriate legal authorization is obtained to further investigate the activity.

# 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.


## NATURE AND CHARACTERISTICS OF NEOS

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:

Somalia (Eastern Exit): 300 civilians, U.S. & Soviet Ambassadors extracted, January 1991.

Rwanda (Distant Runner): 230 civilians, April, 1994.

Liberia (Assured Response): 2200 civilians, April-June 1996.

Central African Republic (Quick Response): April 1996.

Albania (Silver Wake): 900 civilians, March-April 1997

## COMMAND AND CONTROL

Executive Order 12656 assigns primary responsibility for safety of U.S. citizens abroad to the Secretary of State.

**Department of State** establishes and chairs the "Washington Liaison Group" (WLG) to oversee NEOs.

- WLG membership consists of representatives from various government agencies. (DoS, DoD, CIA, DIA, DoT, DHHS).

- Function of WLG is to ensure national-level coordination of government agencies in effecting a NEO.

- WLG also serves as coordinator with Regional Liaison Groups (RLGs).

**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.

- Chief of Mission will give order for the evacuation of civilian noncombatants, except for Defense Attaché System personnel and DIA personnel.

- Evacuation order of military personnel is given by CINC, but in reality the call is made by the Chief of Mission.

- Chief of Mission is responsible for drafting evacuation plan (usually done by Regional Security Officer (RSO)).

**Secretary of Defense** plays a supporting role in planning for the protection, evacuation and repatriation of U.S. citizens in threat areas.

- Within Department of Defense, responsibility for NEO assigned under DoD Directive 3025.14.

- DoD assigns members from service components and Joint Staff to WLG.

- 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.

**CINCs**

- Prepare and maintain plans for the evacuation of noncombatants from their respective area of operations (AO).

- Planning accomplished through liaison and cooperation with the Chiefs of Mission in the AO.

- Assist in preparing local evacuation plan.

- Rules of Engagement guidance for NEOs are found in Enclosure A of CJCS SROE.

**Amendment to Executive Order 12656**

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.

On 9 February 1998, the President amended Executive Order 12656 to state that the Defense Department 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.

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."

- 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.)

- 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.)

- "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.)

- 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."

**LEGAL ISSUES INVOLVED IN NEOS**

**1. 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.

**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:

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.

UN Charter

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).

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.

**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.

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.

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.

2. **Status of Personnel**. In NEOs, commanders will face a multitude of legal issues regarding the personnel encountered on the ground.

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.

Civilians seeking refuge: Temporary Refuge v. Asylum.

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.

General policy: If applicant makes request at unit or installation located within territorial jurisdiction of a foreign country (to include territorial waters), then:

**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.

**Temporary refuge** will be granted (if requester is in **imminent danger**), ASD (ISA) informed, and applicant will not be surrendered without Service Secretary approval.

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).

Status of U.S. Embassy Premises and the Grant of Diplomatic Asylum.

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.

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)

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."

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.

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)

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.

3. **Law of War Considerations**

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).

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.

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.

4. **Search Issues**.

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.

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.

# 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.
10. Joint Publication 3-04, Joint Tactics, Techniques, and Procedures (JTTP) for Legal Support to Military Operations (30 June 1998), Draft Copy.
11. Joint Publication 2-0, Doctrine for Intelligence Support to Joint Operations (5 May 1995).
12. Joint Publication 3-05, Doctrine for Joint Special Operations (17 April 1998).
13. Joint Publication 3-05.3, Joint Special Operations Operational Procedures (25 August 1993).
14. Joint Publication 3-05.5, Joint Special Operations Targeting and Mission Planning Procedures (10 August 1993).
15. Joint Publication 3-07.1, JTTP For Foreign Internal Defense (26 June 1996).
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17. Joint Publication, 3-53, Doctrine for Joint Psychological Operations (10 July 1996).
18. Joint Publication 3-57, Joint Doctrine for Civil-Military Operations (3 Feb 2001).
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20. DoDD 2060.2, *Department of Defense Counterproliferation Implementation* (9 July 1996).
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26. FM 31-20, Doctrine For Special Forces Operations (20 April 1990).
27. FM 31-20-3, Foreign Internal Defense Tactics, Techniques, and Procedures For Special Forces (20 September 1994).
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30. FM 33-1-1, Psychological Operations Techniques and Procedures (5 May 1994).
31. FM 41-10, Civil Affairs Operations (14 February 2000).
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33. Colonel Charlie A. Beckwith, DELTA FORCE (1983).
34. John M. Collins, SPECIAL OPERATIONS FORCES (National Univ. Press 1994).
35. Susan L. Marquis, UNCONVENTIONAL WARFARE: REBUILDING U.S. SPECIAL OPERATIONS FORCES (Brookings Institute 1997).
36. Douglas C. Waller, THE COMMANDOS (1994).
37. Rescue Mission Report, August 1980. (Generally known as the Holloway Commission, a group of distinguished retired flag officers commissioned by the Joint Chiefs of Staff examined the Iranian Hostage Rescue Attempt.).

## INTRODUCTION

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.

It should be apparent to the judge advocate supporting SOF that the legal risks associated with SO are often commensurate with the operational risks. "High adventure" 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.

## HISTORY

Special Operations Forces in the United States enjoy a long and illustrious tradition. Time and time again, SOF have contributed to the overall accomplishment of our nation's political and military objectives in ways that far exceed its organic assets. This ability to perform at this exceptionally professional level can largely be attributed to the nature of SOF missions, the highly trained, skilled and motivated operators in SOF, and specialized equipment.

In respect for the SO skills of the early native Americans, the U.S. Army Special Operations Command (USASOC) and the U.S. Army Special Forces unit patches are in the shape of an arrowhead. The Special Forces branch insignia consists of two crossed arrows, representing the craft and stealth of the early American warriors. Numerous "Indian Scouts" distinguished themselves on the battlefield and earned the Congressional Medals of Honor.

During the French and Indian War, Major Robert Rogers successfully lead a group of early American unconventional warriors, known as "Roger's Rangers." His techniques and maxims are studied today by modern SOF personnel. During colonial times, Francis Marion, the "Swamp Fox," conducted significant guerrilla raids on British forces stationed in South Carolina. In the American Civil War, Colonel John Singleton Mosby of Virginia organized a force of 300 volunteers to operate behind enemy lines. COL Mosby's Confederate raiders cut off Union Army lines of communications, destroyed logistics and replacement trains and Union headquarters.

Modern SOF trace their origin to World War II. At the outset of hostilities, a New York Wall Street attorney by the name of William "Wild Bill" Donovan approached his long time friend, President Roosevelt, with a proposition. William Donovan, a Congressional Medal of Honor winner from World War I, was convinced that a small organization of highly trained and motivated individuals would be very successful at the strategic level. The President agreed and the Office of Coordinator of Information (COI) was established with COL Donovan at the helm. In June of 1942, the COI became the Office of Strategic Services (OSS) and participated in sabotage, espionage, subversion, unconventional warfare and propaganda against both Japanese and German forces. The OSS was the forerunner to both the U.S. Army Special Forces and the U.S. Central Intelligence Agency.

In addition to the OSS, the 1st Special Service Force, the "Devil's Brigade," was formed as a combined Canadian and U.S. special warfare unit. The name Special Service Force was an attempt to conceal the combatant nature of the unit. With its name and red guidon, the unit tried to pass itself off as an organization involved in service and support operations. However, the cover did not last long. They were deeply feared by the Germans. The USASOC red unit patch of today is a replica of the 1st Special Service Force insignia.

Similar to the U.S. Army, modern Naval Special Warfare (NAVSPECWAR) finds it genesis in the SO of World War II. Scouts and Raider teams were formed to guide Marines and soldiers ashore during amphibious landings. The Chief of Naval Operations formed the first Underwater Demolitions Teams (UDT) in 1943. UDT were to clear manmade and

natural obstacles from the shoreline before amphibious operations. In the European theater, UDT members approached obstacles from small canoe-like boats rather than by swimming. As a result of the successes in Europe, UDTs were formed in the Pacific as well. However, the Pacific UDTs approached their target by swimming. The first of these teams were known as the "naked warriors" because of their lack of equipment. The earliest teams did not even use fins.

UDT were primarily involved in shoreline reconnaissance and demolition and operated during daylight hours under the cover of Naval Gunfire. The NAVSPECWAR commando missions evolved primarily from the OSS. In fact, it was an Army Lieutenant assigned to OSS who designed the very successful Lambertson Amphibious Respiratory Unit (LARU), a closed circuit breathing apparatus. OSS swimmers were used to mine enemy ships and to support undercover operations on shore.

Air Force Special Operations (AFSOC) Forces also trace their lineage to World War II. The U.S. Army Air Corps 1st Air Commando Group, "Project 9," under the command of General Henry "Hap" Arnold served in Burma. The 1st Air Commando Group was used to reopen the Burma Road. The 801st Bombardment Group, "Carpetbaggers" operated in Europe. The 801st dropped OSS Jedburgh teams, intelligence agents, guerrilla warfare teams, supplies, weapons, and munitions to French resistance groups behind enemy lines.

As a general rule however, SOF was downsized following World War II at a rate higher than that of conventional forces. The OSS was disbanded after World War II. The U.S. Army organized its first Special Forces Group, the 10th Special Forces Group, in 1952. COL Aaron Bank was the Group's first commander. He had been an OSS operative in World War II. In 1953, the 77th Special Forces Group was established and began conducting Mobile Training Team missions into Southeast Asia. Naval Special Warfare all but disappeared after World War II. However, there were a few significant SO during the Korean War. Notably, the heroic small unit activities of U.S. Navy Lieutenant Eugene Clark and his men prior to the Inchon invasion serve as an example of the value of SO. There were some USAF SO in the Korean War as well.

After the Bay of Pigs incident, President Kennedy determined that the United States needed an ability to project flexible military force into situations that were short of war. He directed DoD to expand its unconventional warfare capabilities. UDT were reborn, and the President personally established the Green Beret as the official headgear of the U.S. Army Special Forces. The commander of UDT-21, Bill Hamilton was selected to head up the newly formed U.S. Navy SEAL team. SEAL is an acronym that stands for Sea, Air And Land. SEALS not only conduct hydrographic reconnaissance missions like UDT, but have become involved in special warfare activities inland as well.

The acts of courage displayed during the Vietnam war by SOF are legendary. The American people became enamored with SOF and their capabilities and exploits were celebrated in movies and songs. The war in Southeast Asia seemed particularly suited for SOF. Because of this, some historians suggest that the blame for the "failure" of American efforts in Vietnam was placed on SOF more so than perhaps other units. There was, according to some, a distrust and dislike for SOF by the conventional military establishment. Once again, the military experienced a significant drawdown after the war, but the reductions in SOF were even higher than with conventional units. Being a member of SOF was not generally career enhancing for military officers.

In 1979, SOF was once again in the spotlight as a result of the failed hostage rescue attempt that became known as Desert One. When the U.S. Embassy in Iran was taken over by radical students, President Carter ordered the formation of an SO Task Force to attempt to rescue the American hostages being held in the embassy. A team of Army commandos, lead by U.S. Army COL Charlie Beckwith, were to be carried to a site near the embassy by Navy H-53 Minesweepers, commanded by a Marine. Once the hostages were rescued, these same helicopters were to be used to evacuate the rescued hostages and commandos after the assault on the embassy.

On the fateful night of the operation, eight helicopters left the deck of the USS NIMITZ carrying the commandos. In route, the Task Force hit a dust storm. One helicopter was forced to land because of engine trouble. One lost its ability to navigate because of equipment failure and had to turn back. The plan called for the helicopters to refuel at a site in the desert known as Desert One. Tragically, one of the helicopters collided with a USAF C-130 refueling aircraft at the refueling site. Both the plane and helicopter burst into flames, killing and injuring several task force members. The mission had now reached one of its abort criteria. The Task Force was down to five helicopters, and at least six were needed to be able to effectively evacuate the commandos and hostages.

After Desert One, the Holloway Commission was established to examine the incident. Admiral Holloway and his commission determined that SOF was an appropriate response for several reasons. Since the mission was a humanitarian rescue attempt rather than an aggressive military operation, the use of a small SOF was more consistent with the stated purpose. The use of a large conventional force would have appeared more like an aggressive act of war rather than a purely humanitarian rescue operation. The use of conventional forces would have arguably caused more U.S. and Iranian casualties. Although the commission supported the decision to use SOF, it identified several crucial causes of mission failure.

These problems were generally related to command and control and the possible over-concern with operational security (OPSEC). The helicopter squadron was commanded by a Marine Corps Lieutenant Colonel. However, an Air Force General Officer had also been assigned to the Task Force because of his extensive knowledge of Iran. There were some disputes over who was actually in charge of the air portion of the operation. Because OPSEC was critical, the operation was compartmentalized. Most of the operators only know their part in the operation. In the event of compromise, compartmentalization limits the amount of information that makes it into enemy hands. OPSEC was so tight there was no rehearsal before the mission. Because there was no apparent compromise, the OPSEC activities appear to have worked. However, OPSEC made it very difficult to properly coordinate all the moving parts from each separate service.

The commission recommended the creation of a SOF advisory panel and a standing JTF for counterterrorism. The commission believed that if a standing counterterrorism JTF were established, it could be manned with a core of highly trained individuals who would trust each other and work well together. This would facilitate the integration and synchronization of joint SOF and would allow detailed planning without OPSEC concerns. The commission did not condemn the operators for their concern with OPSEC. After all, it appears that the Iranians had no idea the Commandos were coming, and OPSEC therefore worked. The mission was so sensitive, OPSEC was paramount. However, with a standing JTF, the seemingly competing values of OPSEC and coordination could both be preserved without the expense of the other.

In the mid-eighties, some in Congress became concerned that DoD had not implemented much of the Holloway Commission report. There was a perception by some in Congress that absent Congressional involvement, conventional commanders and civilian leaders in DoD would never bring SOF up to the level it needed to be. Some in Congress advocated the establishment of a sixth service, a new SOF branch of the military. However, most believed a better plan was to put together a joint special operations command using the training and recruiting base of the branches of service already in being. As a result, in 1986, Congress passed Public Law 99-661, the Nunn-Cohen Amendment, codified at 10 U.S.C. § 167. The U.S. Special Operations Command was now a reality.

**SOF COMMAND STRUCTURE**

As a result of 10 U.S.C. § 167, the United States Special Operations Command (USSOCOM) was established. This CINC is unique in that it is the only CINC specifically established by Congress and required by law. DoD could, for example, do away with the Atlantic 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 CINCSOC 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 SOF. Some have observed that USSOCOM is the only CINC with his own "checkbook." This is important for SOF because MFP-11 funds may only be used for articles and programs with an SO basis or nexus.

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 CINCs. It is a supported command in that when directed by the National Command Authority (NCA), 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.

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).

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.

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.

There are no standing Marine Corps SOF. Marine Corps units are not listed in either of the two SOF designation documents cited in 10 U.S.C. § 167(i). Neither DoD nor the Marine Corps have sought to amend those documents, although both have had the opportunity. There are however certain units of the Marine Corps, along with particular conventional elements of the U.S. Navy and U.S. Air Force, that 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.

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.

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 black 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.

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).

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 are typically commanded by a Captain and usually have company grade UCMJ authority.

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" (SFOD C). The operational companies have headquarters detachments (SFOD B). The operational companies are further broken down into operational teams, known as "A" teams or SFOD A's. An A team 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 SFOD A. As a general rule, SFOD A commanders do not have UCMJ jurisdiction over team members because it has been withheld at the company level.

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.

**COMMAND AND CONTROL DURING OPERATIONS**

As noted above, SO are inherently joint. SOF assigned in a theater are under the combatant command (COCOM) of the geographic CINC. 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 warfighting CINC 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 the Commander and Chief of the Pacific is referred to as SOCPAC. Usually these SOCs are commanded by a one star General or Admiral. Recently, judge advocate's have been assigned to some of these SOCs.

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 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 advisor to an Army corps or Marine Expeditionary Force (MEF) with regard to SOF integration. The SOCOORD normally is a staff element within the G3 or J3 staff section.

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 the installation commanders for the installations on which they are tenants 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, she is not however responsible for the success or failure of the missions conducted by SOF tenants. This may cause friction between the post commander and tenant SOF.

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.

SOF units may deploy as an entire unit, or, as is more likely the case, by smaller detachments to support various missions in the warfighting CINC's area. 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 JSOTF or ARSOTF commander.

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 may be willing to move the GJA to the OPCEN.

The FOB will also have an Isolation Facility (ISOFAC). Once an SFOD-A, "A Team," receives a mission, it isolates from the rest of the unit. The team begins to plan, train and rehearse for the mission, outside the view of the outside world. The ISOFAC is where the teams isolate. 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 into the ISOFAC 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.

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.

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. Command and control is maintained through sophisticated communications. Not only are the teams often separated from home station by thousands of miles, there are numerous simultaneous overseas operations being conducted from the home station. It is not the least bit unusual for a SFG to have teams in more than 15 different countries at once. 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.

To prevent legal catastrophes, the judge advocate must learn to create a virtual presence with the deployed detachments. This is accomplished primarily by religiously monitoring message traffic at group and battalion headquarters and by fostering a willingness on the teams part to "phone home" at the first sign of trouble by building trust and confidence prior to deployment. Second, intense planning, training and briefings must take place before each and every mission so the team understands the potential legal issues. Third, the Group and Battalion staffs must be trained to recognize legal issues. Finally, the GJA has no choice but to rely on his or her 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.

## SPECIAL OPERATIONS MISSIONS

### Direct Action (DA).

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. 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 Chapter 5 of this Handbook).

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 an ROE supplemental. 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.

### Special Reconnaissance (SR).

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 have access to 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.

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.

### Foreign Internal Defense (FID).

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 CINC'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.

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 advocate's 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. The "Special Forces Exception" as part of FID.

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, the "Special Forces Exception," 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 (CINCSOC) 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.

The purpose of the SOF exception is to enhance the ability of CINCSOC 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 unified 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.

**Unconventional Warfare (UW).**

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.

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 she conducted herself in such a manner as to be distinguishable from the civilian population before capture. She must either have been a member of the armed forces of one of the parties or she 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.

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).

**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 NCA, 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, of this Handbook.)

**Psychological Operations (PSYOPS).**

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 NCA level. The NCA has delegated PSYOPS approval authority 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.

While PSYOPS elements work closely with Civil Affairs (CA) elements, the G-3 coordinates their activities, not the G-5. Still, CA, PSYOPS, and public affairs actions can dramatically affect the perceived legitimacy of a given operation. When properly utilized, 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.

*Major Legal Considerations/Limitations in PSYOPS:*

a. United States Citizens. U.S. policy is not to 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.

b. 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(1)). 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.

c. 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.

d. 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.

e. 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.

f. 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.

g. 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.

h. 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.

i. 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.

j. 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.

**Civil Affairs (CA) Operations.**

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).

*Terms and Definitions*

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.

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.

CMO are the activities of a commander that establish, maintain, influence, or exploit relations between military forces, government and nongovernment 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).

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).

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.

*Relationship Between CMO and CA Activities*

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.

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.

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.

*CA Activities Supporting CMO*

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.

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.

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.

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.

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.

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.

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.

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.

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.

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).

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.

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* Operation Law Handbook, Chapter 21 and Joint Pub 3-07.5, Joint Tactics, Techniques, and Procedures for Noncombatant Evacuation Operations).

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.

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.

HA operations encompass disaster relief, refugee assistance and humanitarian and civic assistance (H/CA). 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.

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.

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.

Humanitarian and Civic Assistance (H/CA) 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.

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.

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).

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.

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.

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.

After the 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.

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.

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.

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.

*Command and Control*

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.

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.

*Legal Personnel in Support of Civil Affairs*

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.

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.

*Legal Services in Support of Civil Affairs*

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.

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).

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.

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.

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.

**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.

**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.)

## 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.

### 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.

### Combat Search and Rescue (CSAR).

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.

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.

### Counterdrug Activities (CD). (See the chapter on Domestic Operations, this Handbook).

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.

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 FY 99 by § 1121, Nat'l Def. Auth. Act for 1995, Pub. L. 103-337. Most SOF OCONUS CD comes in the form of training foreign troops and is funded by way of 10 U.S.C. § 2011, "The Special Forces Exception."

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 ARNG SOF, acting in a state status, are not affected by the Posse Comitatus Act because they are not federal troops in such a situation.

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.

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.

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.

**Foreign Humanitarian Assistance (HA).**

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.

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 and Security Assistance and Foreign Assistance., this Handbook.)

**Countermine Activities.**

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 99, Congress appropriated $50,000,000 to OHDACA. Of this amount, Congress indicated its legislative intent, that $35,000,000 be used for demining. Congress also appropriated $35,000,000 for the SA demining program for FY 99.

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.

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.

**Security Assistance (SA).**

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 Office, Fort Bragg, North Carolina (DSN: 239-9108/1599/5057/9008.)

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 Security Assistance and Foreign Assistance, this Handbook.)

**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).

**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.

# CHAPTER 23

# 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.
4. FM 100-8, The Army in Multi-National Operations, 24 November 1997.
5. FM 100-23, Peace Operations, 30 December 1994

**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. FM 100-23 contrasts the operational reality of Peace Operations with armed conflicts by declaring that "in peace operations, ***settlement*****,** not victory is the ultimate measure of success, though settlement is rarely achievable through military operations alone."[335] 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.[336] 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.

**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."[337] 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."[338] Peacekeeping is an internationally accepted mode of managing conflicts and giving states a buffer to seek long term, peaceful resolutions.[339] 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 strategy for resolving international disputes in the absence of more comprehensive and lethal collective security operations.

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."[340] Member states of the UN are obligated to "accept and carry" out the decisions of the Security Council.[341] Since 1990, the changing international security environment increased the scope

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[335] Dep't of Army, Field Manual 100-23, Peace Operations (30 December 1994).<http://www.atsc-army.org/cgi-bin/atdl.dll/fm/100-23/fm100-23.htm>

[336] 22 U.S.C. § 3927. For a discussion of the relationship between the CINC'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.

[337] UN Charter, art. 33, para. 1.

[338] UN Charter, art. 1, para. 1.

[339] 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.

[340] UN CHARTER, art. 42.

[341] 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.

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, and Macedonia) as well as some failures (Somalia and Bosnia-Herzegovina before IFOR). At the time of this writing, the UN is continuing its efforts to reform its own operational procedures,[342] and reevaluating the proper role for military deployments under UN authority in maintaining international peace and security.

The number of U.S. Army deployments is up 300% since 1989.[343] 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, Cambodia, the former Yugoslavia, Somalia, Rwanda, and Haiti. 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. The current National Security Strategy states the "America must continue to be an unrelenting force for peace."[344]

**PRESIDENTIAL DECISION DIRECTIVE 25 (May 1994)**[345] 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."[346] 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)." 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)

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

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[342] Such efforts have included the formation (at U.S. urging) of an Operations Center to help coordinate and monitor UN Peacekeeping Missions on a round the clock basis, the establishment of an Under Secretary General for Internal Oversight Services to target fraud and abuse, more efficient management procedures, and a no-growth budget which is expected to result in a 10% reduction in the Secretariat's staffing level. There are currently 69 countries that have officially expressed interest in participating in Standby Force arrangements, to include 15 that have already signed Memorandums of Understanding with the UN for the provision of troops and equipment.

[343] 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).

[344] The White House, A National Security Strategy for a New Century, October 1998.

[345] 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).

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

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).

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).

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.[347] 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 30.4% 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%. The policy also proposes specific steps for the UN to reduce the costs of UN peace operations. The Fiscal Year 1998 DoD Authorization Act outlined a specific set of policy goals to increase allied burdensharing for any nation that has cooperative military relations with the U.S., including basing arrangements, security arrangements, or mutual participation in multinational military organizations or operations.[348] The Fiscal Year 1999 DoD Authorization Act amended 10 U.S.C. § 113 to require the Secretary of Defense to prepare a report detailing the clear and distinct objectives of the United States as well as the set of conditions that define the endpoint of

[347] U.S. CONST. art. 1, sec. 8.

[348] National Defense Authorization Act for Fiscal Year 1998, § 1221, H. Rep. No. 105-340, at 317 (1997).

the operation which must accompany any request for supplemental appropriations in support of a contingency likely to involve more than 500 personnel.[349]

3. Policy regarding the command and control of U.S. forces.

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 CINC 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.

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. UN policy is that once under UN control, soldiers and units 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 or take whatever actions necessary to protect U.S. forces**.

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.[350] **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.**[351] The Command and Control lines between foreign commanders and U.S. forces represent legal boundaries that the lawyer should monitor.

**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.

**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.

**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

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[349] Strom Thurmond National Defense Authorization Act for Fiscal Year 1999, § 1212, H. Rep. No. 105-736, at 237 (1998).

[350] 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).

[351] 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>

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.

**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. DoD will take 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.

**DOCTRINAL FRAMEWORK**

FM 100-23, Peace Operations, is the Army's keystone doctrinal reference on the subject. The key operational variables are **the necessity of using force, degree of impartiality, and relative consent of the parties**. These variables affect every facet of operations and remain fluid throughout any mission. Joint Pub 3-07[352] 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) which directly apply 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.

**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.

**Peace Operations**

Peace Operations is a new and comprehensive term that covers a wide range of activities. Defined in FM 100-23 as: an umbrella term that encompasses three types of activities; activities with predominantly diplomatic lead (preventive diplomacy, peacemaking, peace building) and two complementary, predominately military, activities (peacekeeping and peace enforcement).

Defined in Joint Pub 3-07.3 as: the umbrella term encompassing peacekeeping, peace enforcement, and any other military, paramilitary or non-military action taken in support of a diplomatic peacemaking process. Peace operations' primary objective is to create and sustain conditions conducive to peace. The end game is political settlement, not victory on the battlefield, to create and sustain the conditions in which political and diplomatic activities may proceed.

[352] Joint publications can be found electronically at http://www.dtic.mil/doctrine

Whereas peace operations are authorized under both Chapters VI and VII of the United Nations Charter peace operations (as defined by 100-23) 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).

**Peacekeeping**

FM 100-23 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.

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.

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.

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.

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.

**Peace Enforcement**

FM 100-23: 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.

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.

**Peacemaking**

FM 100-23: 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.

**Preventative Diplomacy**

FM 100-23: Diplomatic actions taken in advance of a predictable crisis and aimed at removing the sources of conflict before violence erupts, or to limit the spread of violence when it occurs. 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.

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.

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.

**Peace-Building**

FM 100-23: Post-conflict actions, predominately diplomatic, 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.

**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[353]
- Aggravated peacekeeping
- Wider peacekeeping
- Expanded peacekeeping
- Protective/humanitarian engagement[354]
- Stability operations[355]

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

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.

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), and IFOR as well as SFOR. The UN must be acting to **maintain or restore international peace and security** before it may undertake or authorize an enforcement action. As the UN becomes more willing and able to use these Chapter VII enforcement powers to impose its will, many Third World states fear a new kind of colonialism. Although the Charter specifically precludes UN involvement in matters "essentially within the domestic jurisdiction" of states, that general legal norm "does not prejudice the application of enforcement measures under Chapter VII."[356]

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

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

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[353] 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.

[354] 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.

[355] This term dates from Special Forces doctrine in the early Vietnam period. The draft version of FM 100-20 adopts the term with reference to Peace Operations as well as the broader range of MOOTW missions. *See* Chapter 13, FM 100-5, Operations (14 June 1993); Chapter V, Joint Pub 3-0, DOCTRINE FOR JOINT OPERATIONS (1 February 1995).

[356] UN CHARTER art. 2, para. 7.

rule of international law, states cannot procure treaties through coercion or the threat of force.[357] 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.[358]

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

- 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).[359] § 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.**[360] 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.

- 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.

- 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.

**JUDGE ADVOCATE LEGAL CONSIDERATIONS:**

**Legal Authority and Mandate**

- 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**

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

[358] Id. at art. 52; Restatement (Third) of the Foreign Relations Law of the United States § 331 cmt. d (1986).

[359] P.L. 72-264, *codified at* 22 U.S.C. § 287.

[360] 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).

**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.

- 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.

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.

**Chain of Command Issues**

- U.S. Commanders may never take oaths of Loyalty to the UN or other organization.[361]

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

- 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.

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.

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

[361] 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.

Resolution 1088, SFOR operates under the authority of, and is subject to, the direction and political control of the North Atlantic Council.

**Mission Creep**

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, and you as Judge Advocate, cannot prevent it, 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).

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.

**Status of Forces/Status of Mission Agreement**

- Know the Status of U.S. Forces in the AO & Train Them Accordingly
- Notify the CINC and State Department before negotiating or beginning discussions with a foreign government as required by State Department Circular 175.
- Watch for Varying Degrees of Status for Supporting Units on the Periphery of the AO
- This is likely the source for determining who is responsible for paying claims.

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.**

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.

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).

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.

**TWO DEFAULT SOURCES OF LEGAL STATUS: (1) "**The Convention on the Safety of United Nations and Associated Personnel." (*see infra*) Current status: 43 signatories, 23 ratifications. 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.**

**<u>Laws of War.</u>**

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.

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.

**Rules of Engagement**

**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. **Peacekeeping forces normally have no mandate to prevent violations of an agreement by the active use of force**. The passive use of force employs physical means that are not intended to harm individuals, installations, or equipment. Examples are the use of vehicles to block the passage of persons or vehicles and the removal of unauthorized persons from peacekeeping force positions. The active use of force employs means that result in physical harm to individuals, installations, or equipment. Examples are the use of batons, rifle butts, and weapons fire.

**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.

**Funding Considerations**

- **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).

- 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."[362]

- Recognize that you can use simplified acquisition procedures for expenditures up to $200,000 outside the U.S. in support of a contingency operation,[363] or a humanitarian or peacekeeping operation (defined for this purpose as operations under Chapter VI or VII).[364]

- 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.

- **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.[365]

**AUTHORITIES FOR EXPENDITURES TO SUPPORT NON-U.S. FORCES DURING PEACE OPERATIONS:**

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[362] § 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.

[363] 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.

[364] 10 U.S.C. § 2302(7).

[365] 10 U.S.C. § 405.

**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) (i.e., 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

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.

**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.

**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[366] (Military Assistance).

1. **Requirement for Use.** Presidential determination and report, in advance to Congress that:

a. An unforeseen emergency exists that requires immediate military assistance to a foreign country or international organization; and

b. The emergency requirement cannot be met under the Arms Export Control Act (AECA) or any other law.

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").**[367]

3. Limitations.

a. **Purpose.** Drawdown must be for a FAA subchapter II purpose. These include: military assistance (CH 2); peacekeeping (CH 6); and anti-terrorism (CH 8).

b. **Ceiling Amount.** Assistance provided under this section is limited to an aggregate value of $100 million in any fiscal year.

B. Section 506(a)(2) Foreign Assistance Act[368] (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 State.

[366] 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)

[367] Foreign Operations Authorization Act, Fiscal Year 1998, 111 Stat. 2433, § 525.

[368] 22 U.S.C. § 2318.

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.

   a. **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.

   b. **Ceiling Amount.** Assistance provided under this section is limited to an aggregate value of $150 million in any fiscal year(of which no more than $75 million can come from DoD).

   c. **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).

C. Section 551 Foreign Assistance Act[369]

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 [370] (Peacekeeping).

1. **Requirement for Use.** Presidential determination that:

   a. 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

   b. An unforeseen emergency requires the immediate provision of assistance; and

   c. 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.**

   a. **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

[369] 22 U.S.C. § 2348.

[370] 22 U.S.C. § 2348a.

taking to provide information concerning the crimes of genocide and other violations of international law.[371]

b. **Ceiling Amount.** Assistance provided under this section is limited to an aggregate value of $25 million in any fiscal year.

E. Miscellaneous Authorities.

1. **Section 451 Foreign Assistance Act "Unanticipated Contingency" Authority.**[372] 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.

2. **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. Such funds may be expended by that agency pursuant to authorities conferred in the FAA or under authorities specific to that agency.

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.

[371] P.L. 105-118, 111 Stat. 2386 § 553 (1997).

[372] 22 U.S.C. § 2261.

# 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

# 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.*

## NATIONAL COMMAND STRUCTURE

The national command structure has evolved from a single Department of War headed by the Secretary of War in 1789 to today's complex structure involving the Department of Defense, Military Departments, and Commanders-in-Chief (CINC's), to name only the major participants. This structure is largely a result of legislation, though administration and defense policy also play a part. This chapter will present materials applicable at the highest levels of command. It is unlikely that the typical operational law judge advocate will be concerned with these matters. Nevertheless, an appreciation for the dynamics that occur at the highest levels will help the judge advocate better understand the commands which eventually affect his unit.

### Combatant Commands

Combatant commands were first recognized in legislation in 1958, though commanders of joint forces with similar powers and responsibilities existed for some time past. The current legislative guidance is as follows:

> With the advice and assistance of the Chairman of the Joint Chiefs of Staff, the President, through the Secretary of Defense, shall establish unified combatant commands and specified combatant commands to perform military missions. 10 U.S.C. §161(a).

"Unified command" is defined as a military command which has broad, continuing missions and which is composed of forces from two or more military departments. "Specified command" is defined similarly, though its forces come from a single military department.

The President carries out this responsibility in his biennial Unified Command Plan (UCP), which details the existence, responsibilities, and force structure of the various combatant commanders. The current UCP describes 9 combatant commands—5 with geographic responsibility, and 4 with functional responsibility. They are:

*Geographic Combatant Commands*

- U.S. Joint Forces Command (USJFCOM, Norfolk, Va.). Forces in the U.S. and portions of the Atlantic Ocean.
- U.S. European Command (USEUCOM, Stuttgart, Germany). NATO, some Middle East, most African countries, and, effective 1 October 2000, the waters off the west and west coast of Africa and the waters off Europe.
- U.S. Pacific Command (USPACOM, Camp Smith, Hawaii). Pacific Ocean, Pacific Rim countries and some along the Indian Ocean.

- U.S. Southern Command (USSOUTHCOM, Miami, FL). Central and Latin America and the Caribbean.

- U.S. Central Command (USCENTCOM, MacDill AFB, FL). Southwest Asia, some eastern African countries, and part of the Indian Ocean.

*Functional Combatant Commands*

- U.S. Transportation Command (USTRANSCOM, Scott AFB, IL). Global air, land, and sea transportation.

- U.S. Special Operations Command (USSOCCOM, MacDill AFB, FL). Trained and equipped special operations forces.

- U.S. Space Command (USSPACECOM, Peterson AFB, CO). Air, missile and space defense.

- U.S. Strategic Command (USSTRATCOM, Offutt AFB, NE). Deters military attack on the U.S. and allies.

There are currently no specified commands.

In an operation, combatant commands are often described as "supported" or "supporting." The "supported" command is typically the geographic combatant command in whose area of responsibility the operation is to occur. The supported command receives the support of all supporting commands. The functional combatant commands, and occasionally other geographic combatant commands (especially USJFCOM, as the primary provider of U.S.-based forces to other combatant commanders), are designated as "supporting" commands based on the supported command's needs, mission, and other factors.

**Military Chain of Command**

> 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).

In discharging his Constitutional duties as Commander-in-Chief, the President receives advice and assistance from a number of sources. The National Security Council, created by the 1947 National Security Act and codified at 50 U.S.C. § 40, advises the President on national security and foreign affairs. It consists of the President, Vice-President, Secretary of Defense, and Secretary of State. The Chairman of the Joint Chiefs of Staff and the Director of Central Intelligence are statutory advisors. Other Cabinet and Cabinet-level officials are often invited to attend. The Assistant to the President for National Security Affairs, often known as the National Security Advisor, provides independent advice to the President. The Chairman of the Joint Chiefs of Staff is the principal military advisor to the President and Secretary of Defense, while the other members of the Joint Chiefs of Staff are military advisors (10 U.S.C. § 151(b))

The President and the Secretary of Defense are collectively known as the "National Command Authorities" or NCA.

Note the officials who are not in the chain of command. Service Secretaries and Service Chiefs do not have an operational role, and are therefore not in the chain of command. The Chairman of the Joint Chiefs of Staff also is not in the chain of command, but communications between the NCA and combatant commanders are transmitted through him. 10 U.S.C. § 163(a).

**Assignment of Forces**

> ". . . The Secretaries of the military departments shall assign all forces under their jurisdiction to unified or specified commands or to the United States element of the North American Aerospace Defense Command to perform missions assigned to those commands. Such assignments shall be made as directed by the Secretary of Defense, including direction as to the command to which forces are to be assigned." 10 U.S.C. §162(a).

A later provision of that statute permits the Military Secretaries to retain those forces necessary to carry out those functions assigned the military departments. The Secretary of Defense assigns forces in his annual "Forces For" memorandum. This classified document assigns all "operational" forces among the CINC's. Those not assigned remain under the control of the military departments. Forces that are assigned to one CINC may only be transferred to another CINC by authority of the Secretary of Defense. Deployment orders (issued by the Chairman at the direction of the Secretary of Defense) are the vehicle used to transfer forces outside of the "Forces For" process.

As a practical matter, most U.S.-based forces are assigned to USJFCOM. Other geographic CINC's are only assigned those forces which are physically stationed in their area of responsibility. To assist those other CINC's in planning, training, and executing operations, the Chairman promulgates an annual classified document called the Joint Strategic Capabilities Plan. Among other things, this document "apportions," or promises the assignment of certain forces to the other geographic CINC's if the operational need arises. Certain critical units, because of their unique capabilities, may be "dual-apportioned" between several CINC's

**Powers of CINC's**

In an attempt to align the authority of combatant commanders with their responsibilities, Congress granted great power to the CINC's. A combatant commander exercises "Combatant Command," or "COCOM," defined as:

> 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.*

10 U.S.C. §164 enumerates specific powers that a combatant commander shall have, to include:

- Giving authoritative direction to subordinate commands, including authoritative direction over all aspects of military operations, joint training, and logistics
- Prescribing the chain of command
- Organizing the command and forces as he considers necessary
- Employing forces as he considers necessary
- Assigning command functions to subordinate commanders
- Coordinating administration and support
- Selecting subordinate commanders, selecting combatant command staff, suspending subordinates, and convening courts-martial.

**The Services**

The military departments (Department of the Army [DA], Department of the Navy [DON], and Department of the Air Force [DAF]) are organized separately under civilian secretaries who are responsible for and have authority to conduct the affairs committed to their departments. The service secretaries and their uniformed chiefs of staff are not in the operational chain of command. These departments are responsible for ensuring that combatant commanders have the forces and material necessary to fulfill their warfighting missions. The military departments may retain forces for their

inherent service functions of recruiting, organizing, supplying, equipping, training, mobilizing, administering, and supporting the military forces.

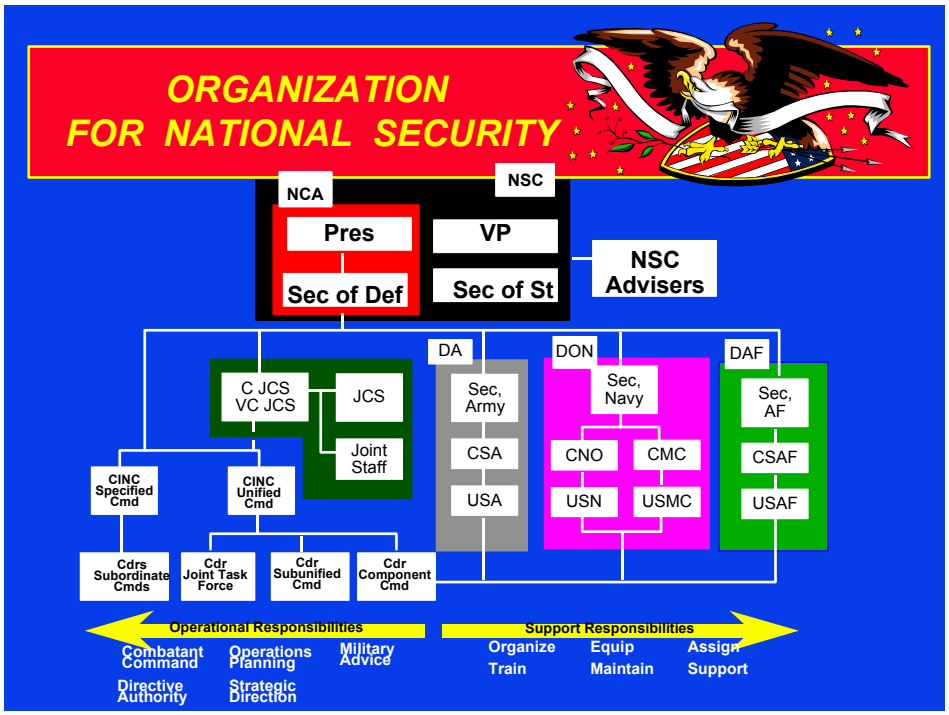



Figure 1. Organization for National Security.

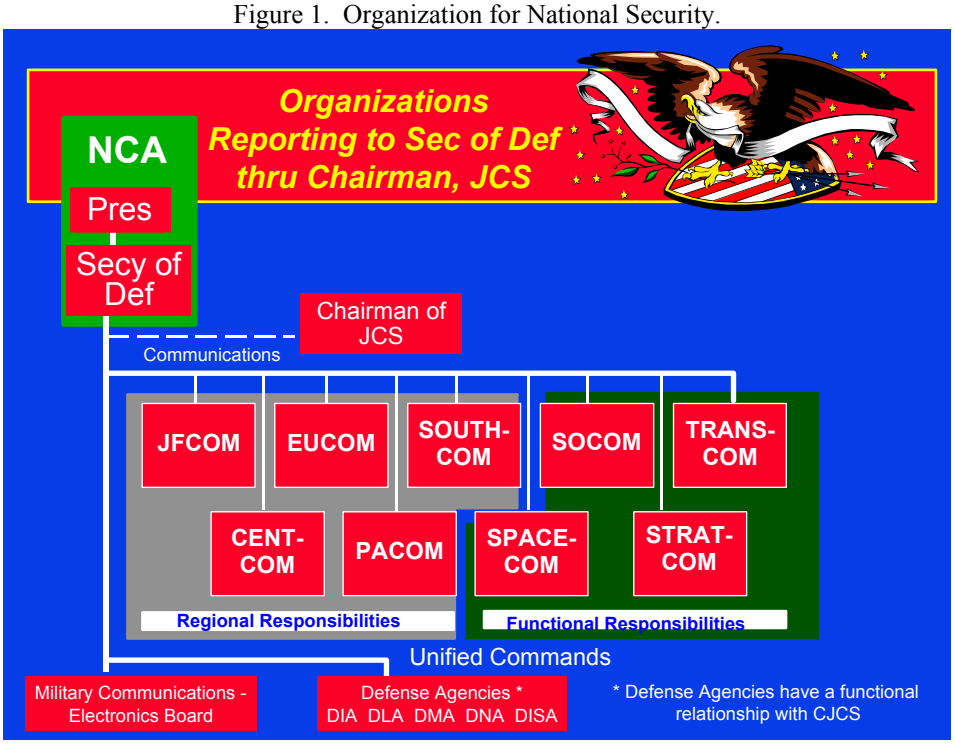



Figure 2. Organizations Reporting to the Secretary of Defense.

## NATIONAL SECURITY STRATEGY

In accordance with section 603 of the Goldwater-Nichols Reorganization Act of 1986, codified at 50 U.S.C. § 404a, the President is required to transmit to Congress each year a "comprehensive report on the national security strategy of the United States." President Clinton last prepared and released such a report in December 1999 entitled "A National Security Strategy for a New Century" (available on the Internet at http://www.whitehouse.gov/WH/EOP/NSC/html/nschome).

The overall goal of a national security strategy is to promote U.S. national interests. The national strategy, recognizing that there are many demands for U.S. action, defines three areas in which action is more likely. **Vital interests** are those affecting the survival, safety, and vitality of the country. **Important national interests** are those which may not affect those interests described as vital, but do affect our national well-being and the character of the world. Examples given include the U.S. response in Haiti and Bosnia. **Humanitarian and other interests** are those which require action because our values demand it, such as responses to emergencies and disasters, human rights violations, and supporting democratization.

The strategy is based on three core objectives: enhancing national security; bolstering America's economic prosperity; and promoting democracy abroad. Within each of these areas the document discusses the challenges and problems to be faced, as well as the means by which the U.S. will respond. Military forces figure prominently throughout the discussion.

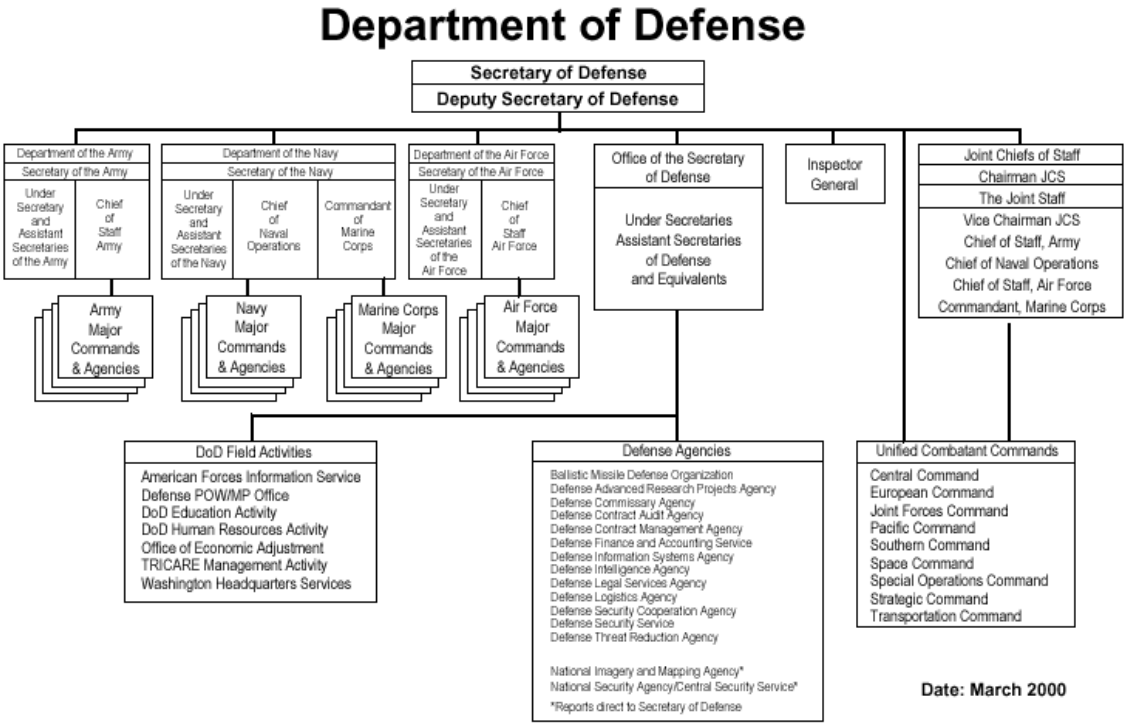
To complement the National Security Strategy, the Chairman of the Joint Chiefs of Staff publishes a National Military Strategy. The latest edition (1997) is entitled "Shape, Respond, Prepare Now—A Military Strategy for a New Era," (available at http://www.dtic.mil/jcs). The overall objective of the military strategy is "[t]o defend and protect U.S. national interests, our national military objectives are to Promote Peace and Stability and, when necessary, to Defeat Adversaries." The elements of the strategy include: (1) Shaping the International Environment—through deterrence, peacetime engagement, and active participation and leadership in alliances; (2) Responding to the Full Spectrum of Crisis—from humanitarian assistance to fighting and winning major theater wars; and (3) Preparing Now for an Uncertain Future—exploiting the Revolution in Military Affairs.

# CHAPTER 25

# JOINT OPERATIONS

## DEPARTMENT OF DEFENSE

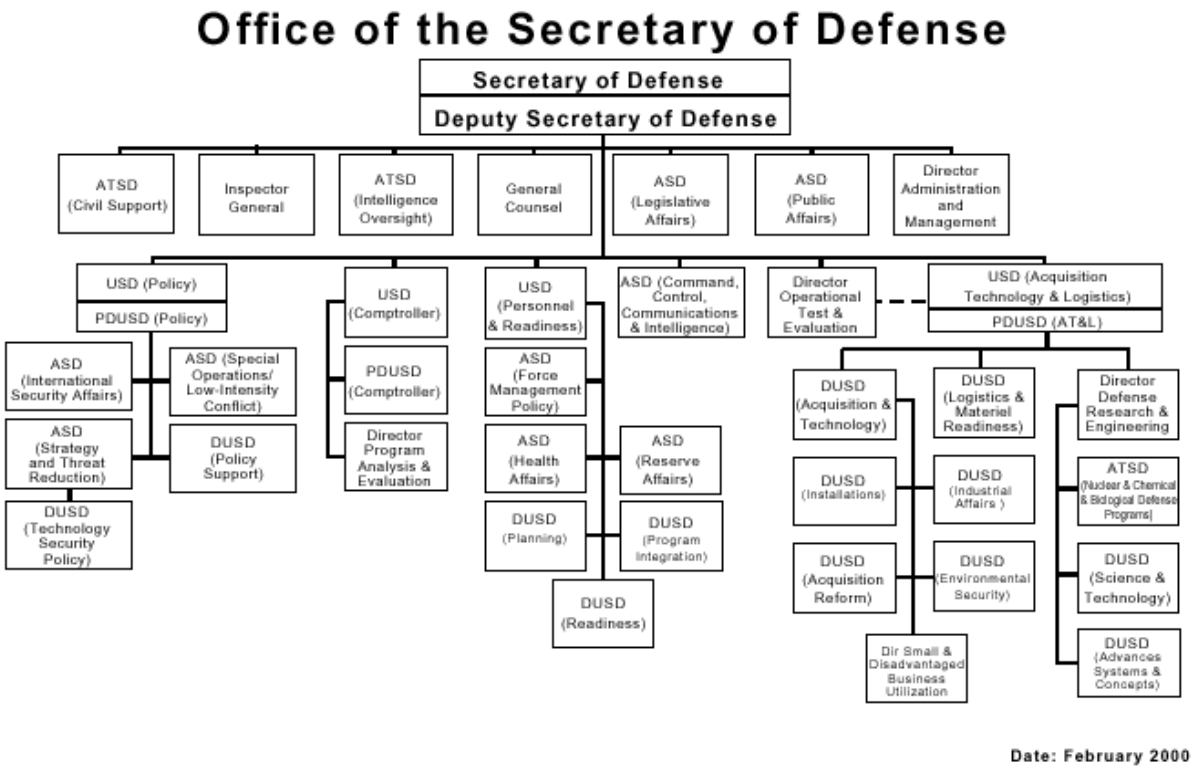
The **Department of Defense** (DoD) is responsible for providing the military forces needed to deter war and protect the security of the United States. The major elements of these forces are the Army, Navy, Air Force, and Marine Corps. Under the President, who is also Commander-in-Chief, the Secretary 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.



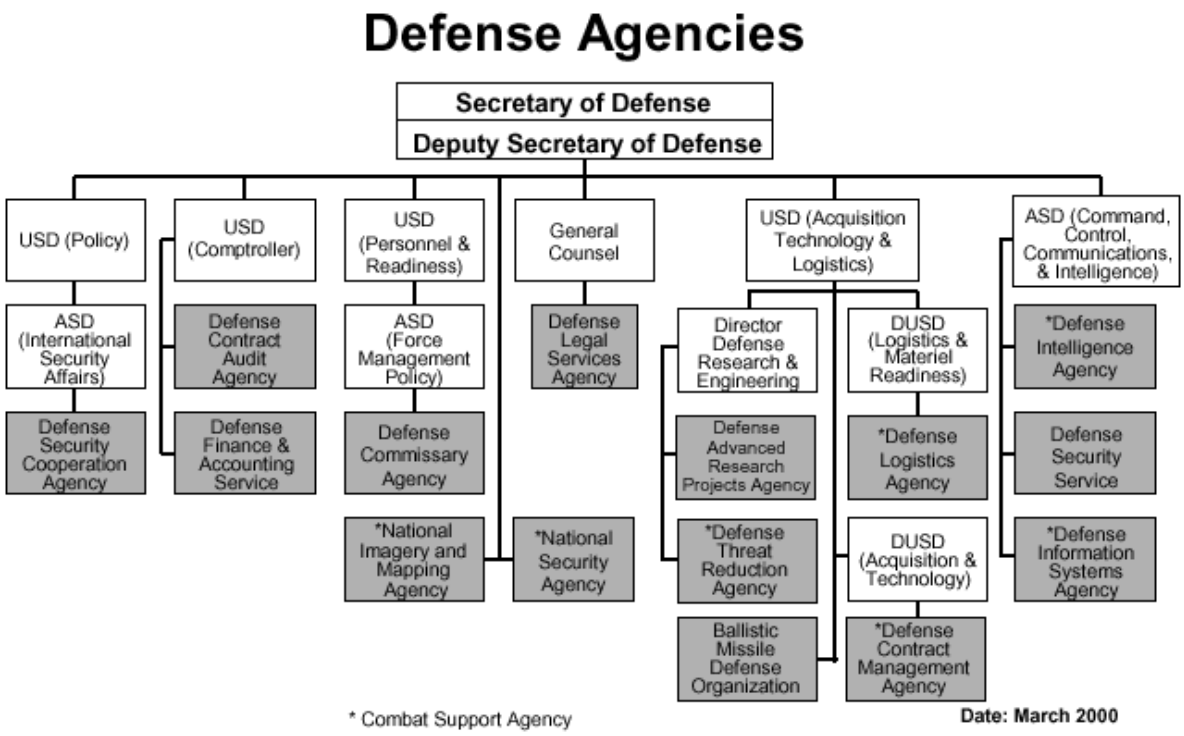

The **Secretary of Defense** is the principal defense policy advisor to the President and is responsible for the formulation of general defense policy and policy related to all matters of direct and primary concern to the DoD, and for the execution of approved policy. Under the direction of the President, the Secretary exercises authority, direction, and control over the Department of Defense.

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.

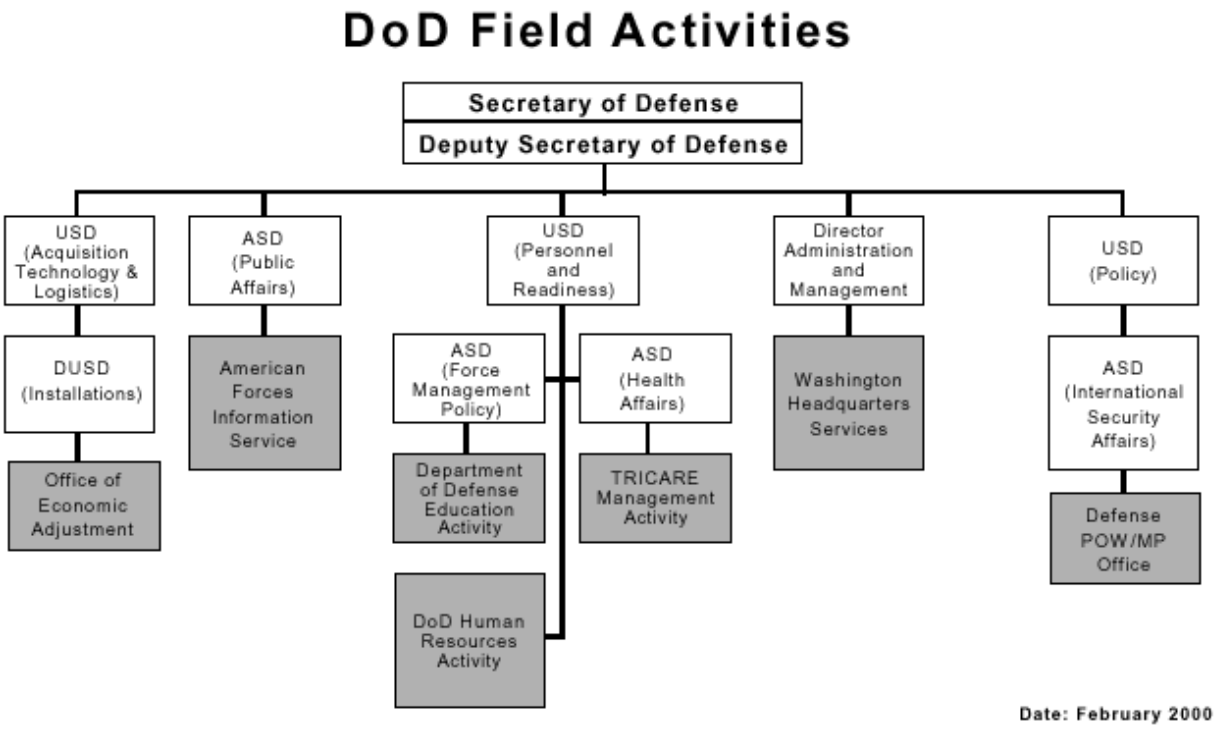
The **Office of the Secretary of Defense** (OSD) is the principal staff element of the Secretary in the exercise of policy development, planning, resource management, fiscal, and program evaluation responsibilities. OSD includes the immediate offices of the Secretary and Deputy Secretary of Defense, 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.




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.




The **DoD Field Activities** are established by the Secretary of Defense, under the provisions of Title 10, United States Code, to perform selected consolidated support and service functions of a more limited scope than Defense Agencies.



# JOINT COMMAND AND STAFF

The Joint Chiefs of Staff consist of the Chairman, the Vice Chairman, the Chief of Staff of the Army, the Chief of Naval Operations, the Chief of Staff of the Air Force, and the Commandant of the Marine Corps. The collective body of the JCS is headed by the Chairman (or the Vice Chairman in the Chairman's absence), who sets the agenda and presides over JCS meetings. Responsibilities as members of the Joint Chiefs of Staff take precedence over duties as the Chiefs of Military Services. The Chairman of the Joint Chiefs of Staff is the principal military adviser to the President, Secretary of Defense, and the National Security Council (NSC), however, all JCS members are by law military advisers, and they may respond to a request or voluntarily submit, through the Chairman, advice or opinions to the President, the Secretary of Defense, or NSC. The executive authority of the Joint Chiefs of Staff has changed. In World War II, the U.S. Joint Chiefs of Staff acted as executive agents in dealing with theater and area commanders, but the original National Security Act of 1947 saw the Joint Chiefs of Staff as planners and advisers, not as commanders of combatant commands. In spite of this, the 1948 Key West Agreement allowed members of the Joint Chiefs of Staff to serve as executive agents for unified commands, a responsibility that allowed the executive agent to originate direct communication with the combatant command. Congress abolished this authority in a 1953 amendment to the National Security Act. Today, the Joint Chiefs of Staff have no executive authority to command combatant forces. The issue of executive authority was clearly resolved by the Goldwater-Nichols DoD Reorganization Act of 1986: "The Secretaries of the Military Departments shall assign all forces under their jurisdiction to unified and specified combatant commands to perform missions assigned to those commands..."; the chain of command "runs from the President to the Secretary of Defense; and from the Secretary of Defense to the commander of the combatant command."

## CHAIRMAN OF THE JOINT CHIEFS OF STAFF (CJCS)

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.

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.

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.

## VICE CHAIRMAN OF THE JOINT CHIEFS OF STAFF

The DoD Reorganization Act of 1986 created the position of Vice Chairman of the Joint Chiefs of Staff, who performs such duties as the Chairman of the Joint Chiefs of Staff may prescribe. By law, he is the second ranking member of the Armed Forces and replaces the Chairman of the Joint Chiefs of Staff in his absence or disability. Though the Vice Chairman was not originally included as a member of the JCS, Section 911 of the National Defense Authorization Act of 1992 made him a full voting member of the JCS.

## 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.

## 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.

## THE JOINT STAFF

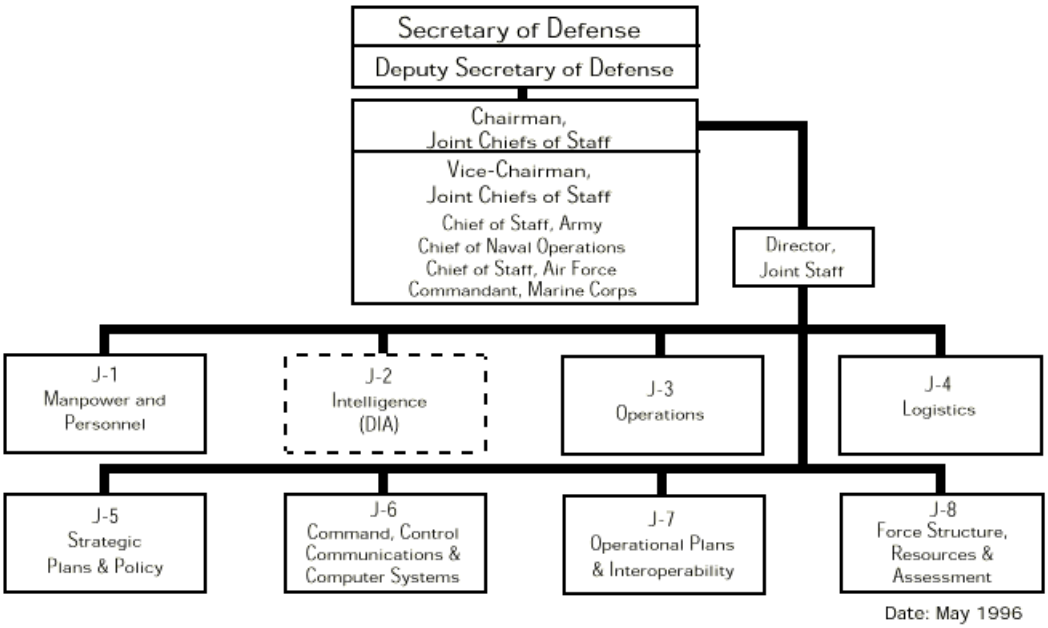
The Joint Staff assists the Chairman of the Joint Chiefs of Staff in accomplishing his responsibilities for: the unified strategic direction of the combatant forces; their operation under unified command; and for their integration into an efficient team of land, naval, and air forces. The "Joint Staff" 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.

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.

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.

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.

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
& Interoperability
J-8
Force Structure,
Resources &
Assessment
Date: May 1996

# 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

## ARMY MISSION

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.

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.

## ARMY FORCE STRUCTURE

The Army's 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.<br>[b] Fifteen will be enhanced separate brigades. | |
| **Civilians 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 | |

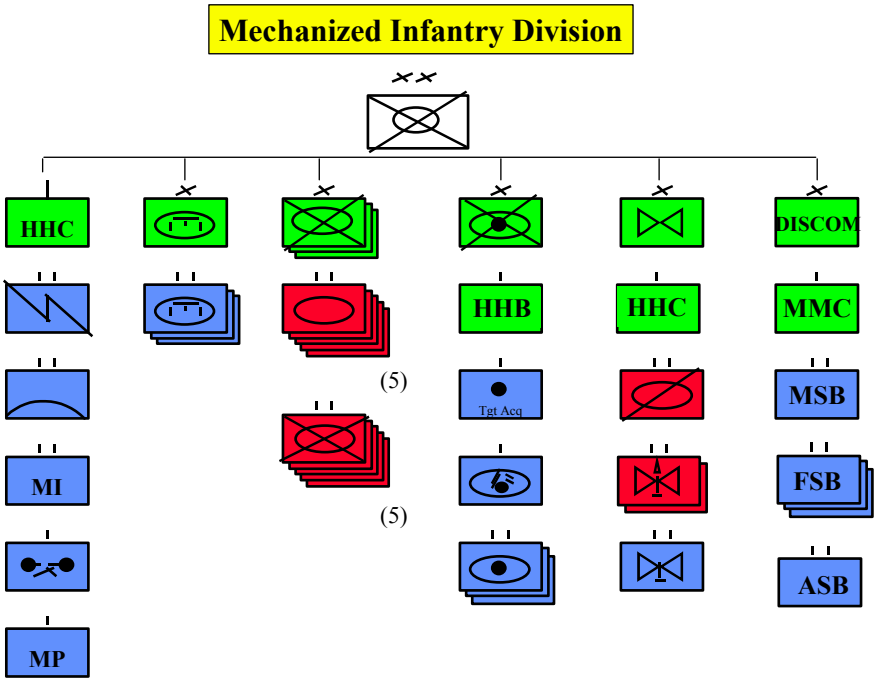
| Conventional Force Structure Summary | | | |
|---|---|---|---|
| | **FY 1997** | **FY 1999** | **QDR** |
| **Army** | | | |
| Active Corps | 4 | 4 | 4 |
| Divisions (Active/National Guard) | 10/8 | 10/8 | 10/8 |
| Active Armored Cavalry Regiments | 2 | 2 | 2 |
| Enhanced Separate Brigades (National Guard) | 15 | 15 | 15 |
| Separate Brigades (National Guard) | 3 | 3 | 3 |

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).

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.

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.

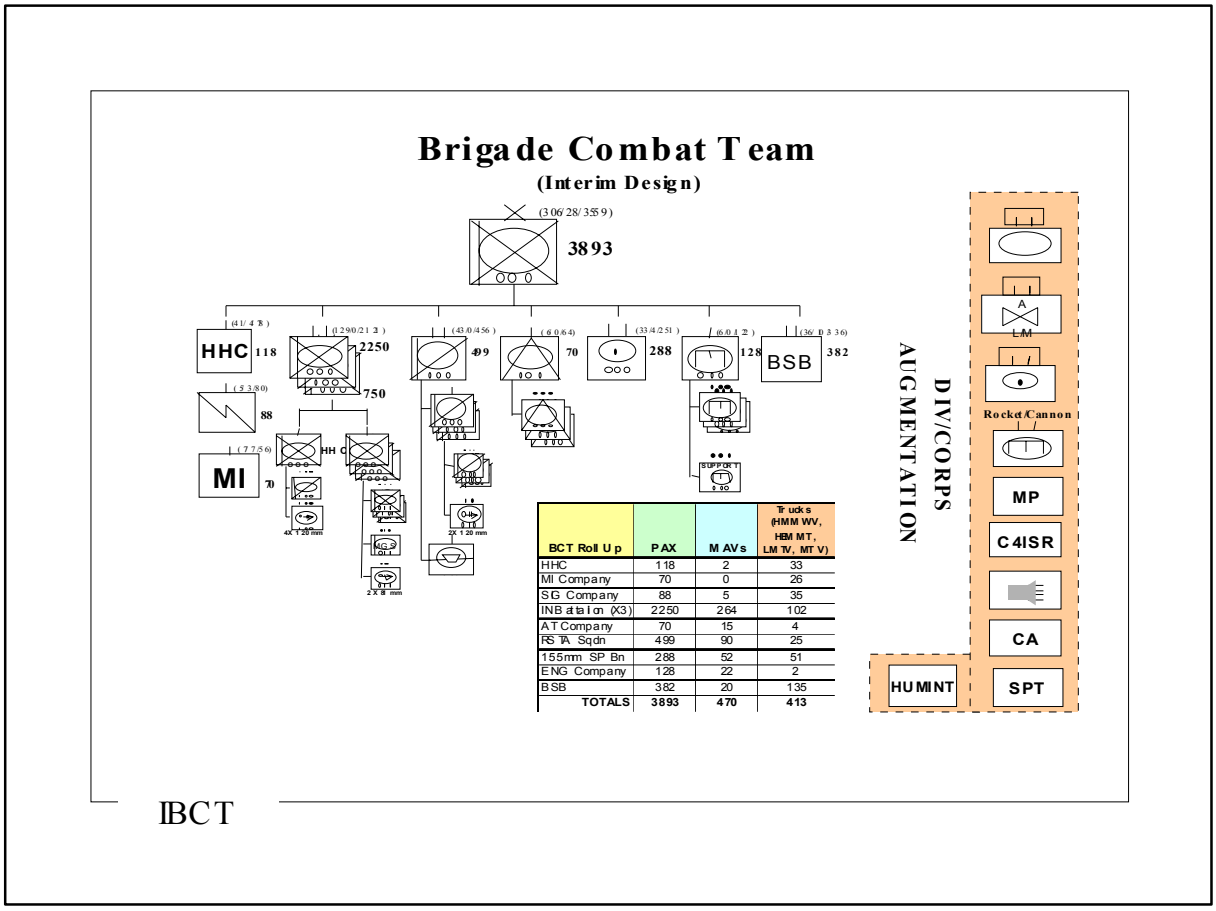



**The Interim Brigade Combat Team (IBCT)**: The high frequency of joint contingency operations in the 1990s—a frequency expected to continue and perhaps rise during the 21st Century - has sharply increased the significance of strategic responsiveness. The faster that a joint contingency force can respond to a crisis, the faster it 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 IBCT to combine the strengths of its light and heavy forces, and thereby provide a strategically responsive force for future contingencies.

The Interim Brigade Combat Team is a ***full spectrum, combat force,*** capable of deploying within 96 hours to wherever it may be needed. The Interim Brigade Combat 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 Interim Brigade Combat 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.

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 |
| INB attalion (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 |

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.

## ROLE OF THE ARMY OPERATIONAL LAWYER

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).

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.

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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## OVERVIEW

This chapter provides an overview of Air Force operational concepts, missions, and organization. This chapter closes with a review of the judge advocate's role in support of operations. This chapter familiarizes the reader with the typical missions of Air Force judge advocates' clients—the operational aviators and commanders of air and space forces.

## 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/JAI, DSN 225-9631, 703-695-9631) establishes Air Force policy in the operations law field.

### 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.

**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.

## 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:

**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.

**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.

**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.

1. 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.

2. 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.

**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.

**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.

**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.

**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.

**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.

**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.

**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.

**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.

**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.

Additional Air Force missions include Countersea, Command and Control (C2), and Special Operations Employment.

## ORGANIZATIONAL STRUCTURE

**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.

**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).

**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.

**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 Brigadier General (O-7) commands a wing.

**Group**. There are several mutually related squadrons within a group. For example, within a support group, there are usually civil engineer (CE), mission support (MS—includes personnel, family support, and education flights), finance, services (formerly morale, welfare and recreation or MWR), and security forces squadrons. Similarly, a logistics group usually contains transportation, maintenance, and supply squadrons. A Colonel (O-6) normally commands a group.

**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 buy a Lieutenant Colonel (O-5).

### Organizing for Air Operations

**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.

**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.

**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.

**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.

**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.

**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.

**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.

**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.

## THE OPERATIONAL LAWYER

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.

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/JAI 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/JAI provides legal advice on problems such as the code of conduct, enemy treatment of our prisoners, and others.

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.

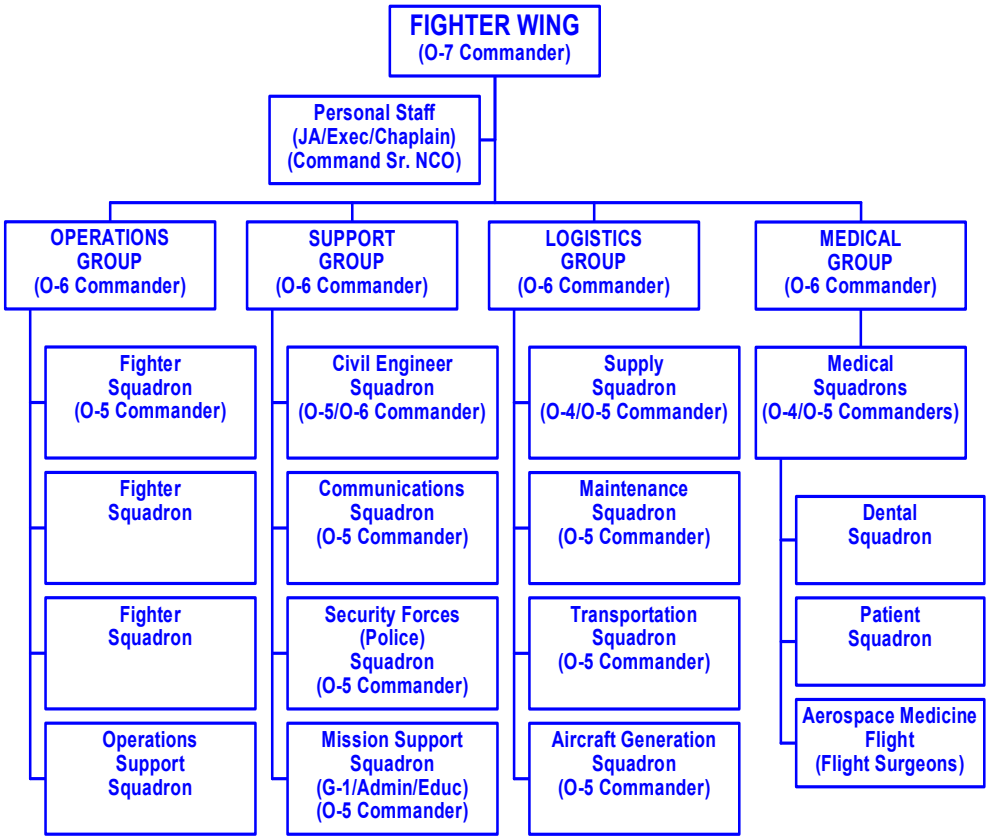
New forms of warfare such as information operations/information warfare are as challenging to the Air Force as to the other services, and pose significant and novel legal issues. The Air Force is now conducting counterdrug operations alone and as components to unified commands. AF/JAI is the principal 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.

In addition to the operations law support given by Air Force judge advocates at AF/JAI 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, and ALLIED FORCE, judge advocates deployed with their unit Commanders and provided that important advice.

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.

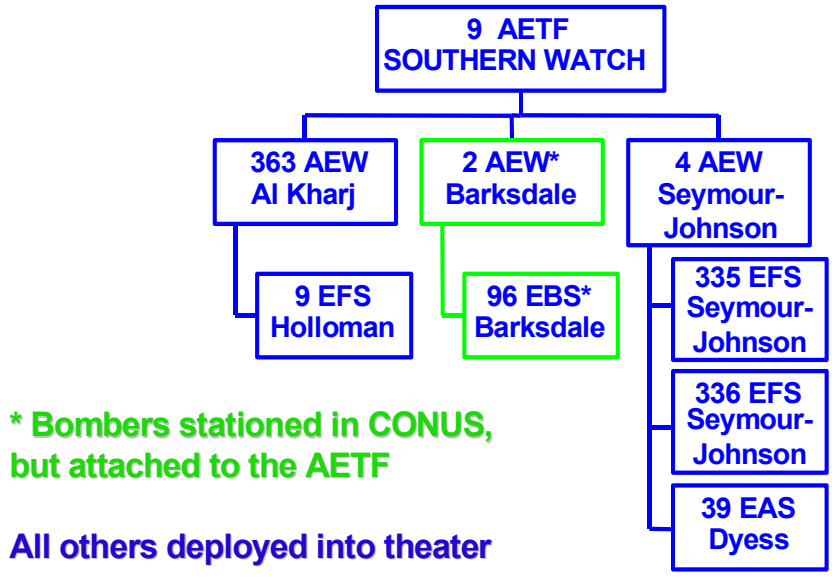
**TYPICAL AF WING (NOTIONAL)**

# Typical Air Force Wing



## 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

## MISSION

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. This broad mission statement translates into a Marine Corps that is many different things to many different people.

Consequently, the ground, air, and supporting forces that make up the Marine Corps are trained and equipped to make available to the National Command Authority (NCA) the capability to react quickly to any military contingency in the world—a "911" force. 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 Desert Storm." 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), or the expeditionary force of choice.

## FORCE STRUCTURE

Structure. The Marine Corps is organized as the nation's "force in readiness" into four broad categories: Headquarters Marine Corps, Operating Forces, Reserves, and the Supporting Establishment. 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 combatant commanders. Major elements include the Marine Forces Atlantic, Marine Forces Pacific, 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. Operating forces are made available from four (3 active, 1 reserve) Divisions, Wings, and Force Service Support Groups (FSSG). According to Title 10, U.S. Code, § 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 172,200 active duty Marines and 39,966 Reserves.

The FSSG 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.

Task Organization. The *"Forces for Unified Commands"* Memorandum assigns Marine operating forces to each of the combatant commands. Although there are five Marine Corps components, there are only two Marine Corps component commands. The Marine Corps has established two combatant command level service component commands: Marine Corps Forces Atlantic and Marine Corps Forces Pacific. The II Marine Expeditionary Force is provided by Commander, Marine Corps Forces Atlantic to the Commander-in-Chief, U.S. Joint Forces Command and the I and III Marine

Expeditionary Forces are provided by the Commander, Marine Corps Forces Pacific to the Commander-in-Chief, U.S. Pacific Command. This assignment reflects the peacetime disposition of Marine Corps Forces (MARFORs). Marine expeditionary 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.

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 principle organization for the conduct of all missions across the range of military operations. The MAGTF provides a combatant commander-in-chief or other operational commanders with 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).

Four types of MAGTFs can be tasked 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).

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 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 MEB is an intermediate size MAGTF that bridges the gap between the MEF and the MEU. 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 for an extended period in order to provide an immediate combat response.

Forward deployed MEU (SOCs) embarked aboard Amphibious Ready Group (ARG) shipping operate continuously in the areas of responsibility of numerous Unified Commanders. These units provide the National Command Authorities and Unified 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.

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 non-combatant evacuation to disaster relief and humanitarian missions.

## CAPABILITIES

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. Naval forces enable the U.S. to secure access to ports, airfields and routes for the sequenced employment of heavier U.S. and allied forces. Moreover, expeditionary forces can deter crises, influence friends and foes, provide humanitarian assistance and fight if required.

For instance, Operation SEA ANGEL in Bangladesh involved the 5th Marine Expeditionary Brigade (MEB) which was diverted from its return to CONUS after 5 months in Desert Shield/Storm. During this disaster relief mission, 5th MEB delivered over 2,000 tons of food, fuel, medicine and equipment. This task force included Army Blackhawk helicopters, Green Beret assessment teams, Air Force C-130 transport aircraft, a Navy Amphibious Group and members of the U.S. Agency for International Development. During Operation Eastern Exit in January 1991, 13th MEU(SOC) helicopters launched from Navy ships at night, from over 400 NM from Mogadishu to conduct a NEO from civil war torn Somalia. The 281 evacuees included diplomats from Britain, Germany, Kenya, Kuwait, Nigeria, Oman, Sudan, Turkey, UAE: 39 Soviets and 61 Americans. The naval units involved, which had to be diverted from Desert Storm, received the order and departed on their mission only 3 days prior from a distance of 2,000 miles.

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 the Maritime Prepositioned Force (MPF) or other prepositioned equipment. The MPF program, which began in 1981, consists of 16 self-sustaining, roll-on/roll-off ships operated by the Military Sealift Command (MSC) and organized into three MPS squadrons (MPSRons). 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.

After a decade of theory, the MPF program got its first real world test in Desert Shield/Desert Storm. On 14 August 1990, the leading elements of 7th MEB arrived in Saudi Arabia from 29 Palms, CA, via strategic airlift, and drew its equipment and supplies from the MPSRon-2, which had deployed from Diego Garcia to the Saudi port of Al Jubayl. Fully deployed, the 7th MEB was comprised of 15,248 Marines, 123 main battle tanks, and 124 fixed and rotary wing aircraft. On 26 August 1990, the leading elements of 1st MEB arrived at Al Jubayl and married up with its equipment off-loaded from MPSRon-3, which had deployed from Guam. The 1st MEB had an equivalent amount of combat power to 7th MEB.

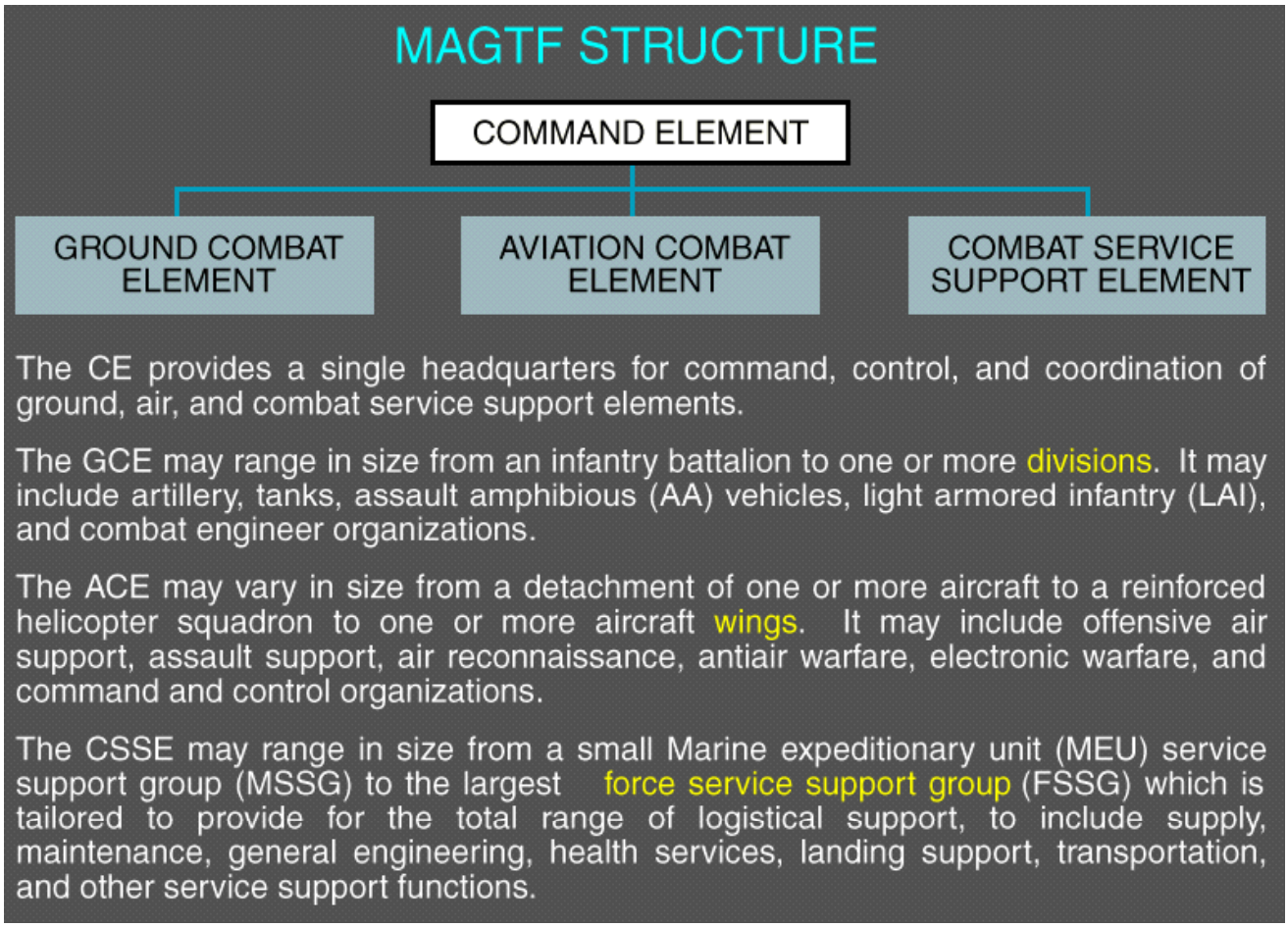
In addition to the 1st and 7th MEBs deployed ashore during Desert Shield/Storm, the Marine Corps also deployed two MEBs and a MEU(SOC) afloat. The 4th MEB deployed from Camp Lejeune, NC, and the 5th MEB deployed from Camp Pendelton, CA. Unlike the airlifted 1st and 7th MEBs, the 4th and 5th MEBs deployed with all weapons, equipment, and supplies embarked on its amphibious assault ships. The 13th MEU(SOC) was already in the Western Pacific on a routine six month deployment when Desert Shield began, and it quickly moved into the Persian Gulf. Together, the 4th and 5th MEBS, and the 13th MEU(SOC), comprised over 18,000 Marines capable of conducting amphibious forcible entry operations anywhere in the Persian Gulf area of operations.

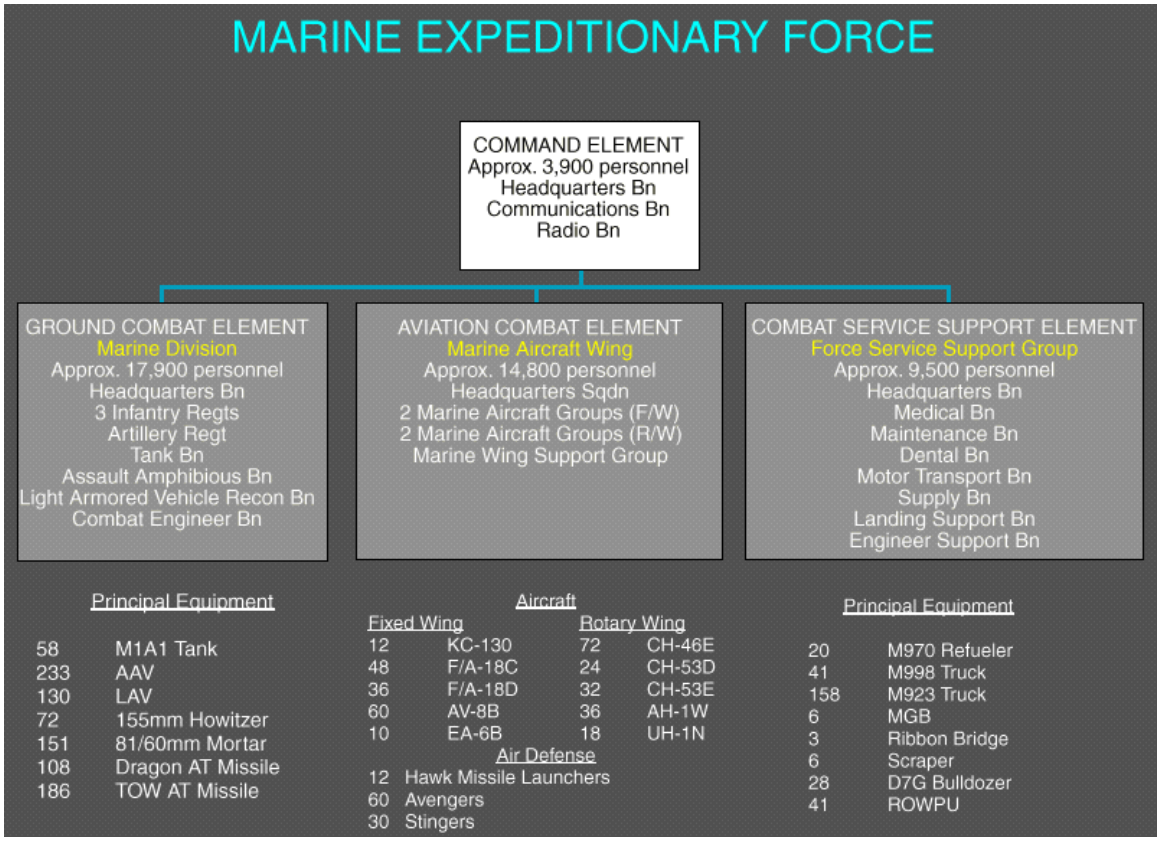
**ROLE OF THE MARINE OPERATIONAL LAWYER**

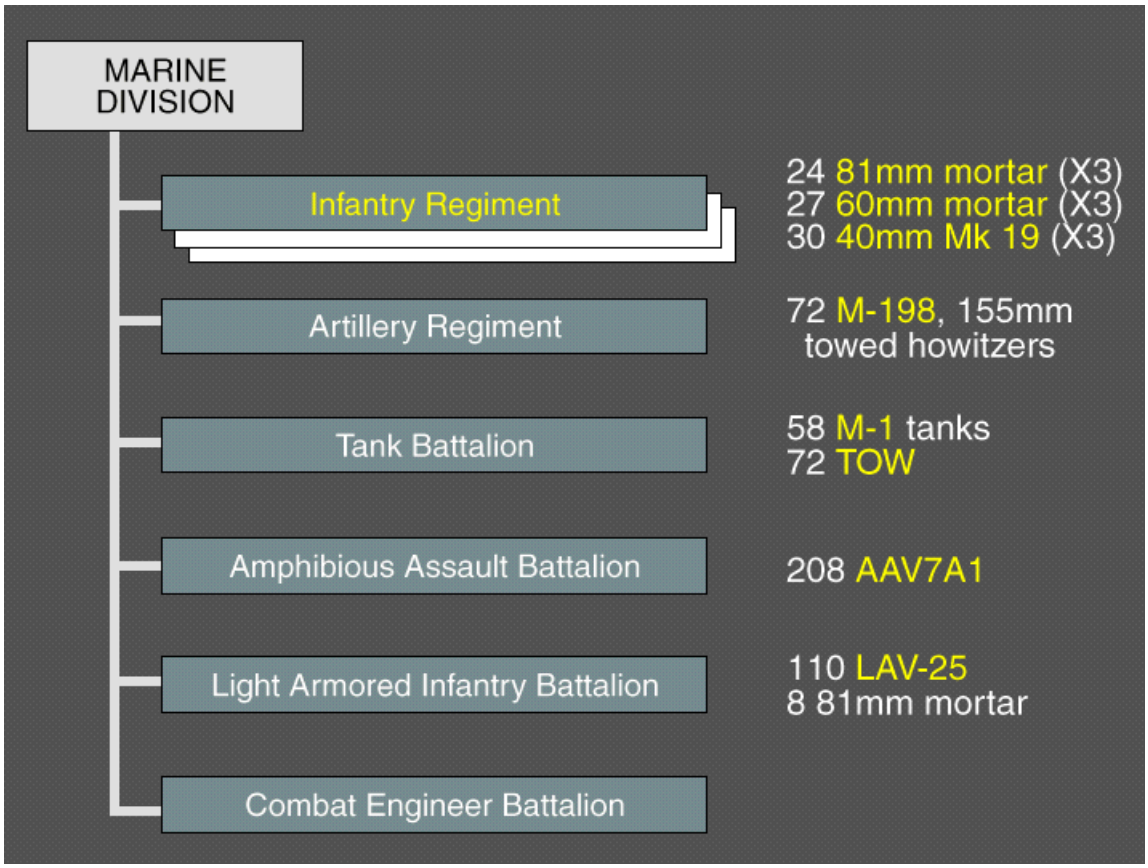
The expeditionary nature of the Marine Corps mission sets the tone for the practice of operational law in the Marine Corps. Because expeditionary operations will necessarily involve ground, air and sea forces, Marine operational lawyers must be familiar with the law of land warfare as well as the law 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.

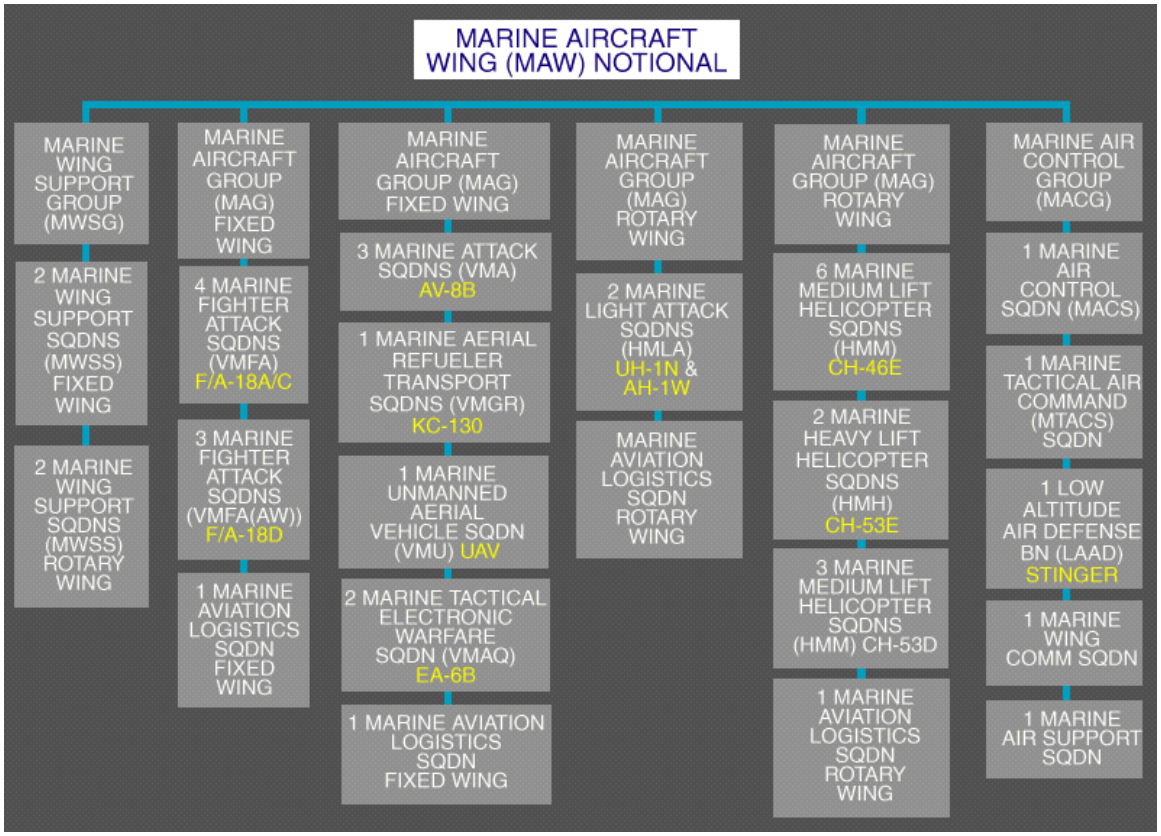
The specific role of the Marine operational lawyer is largely determined by the extent to which the JA gains the confidence of the commander and his staff. Consequently, a Marine operational lawyer must not only be technically proficient, but must continue to acquire and hone those military skills that 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

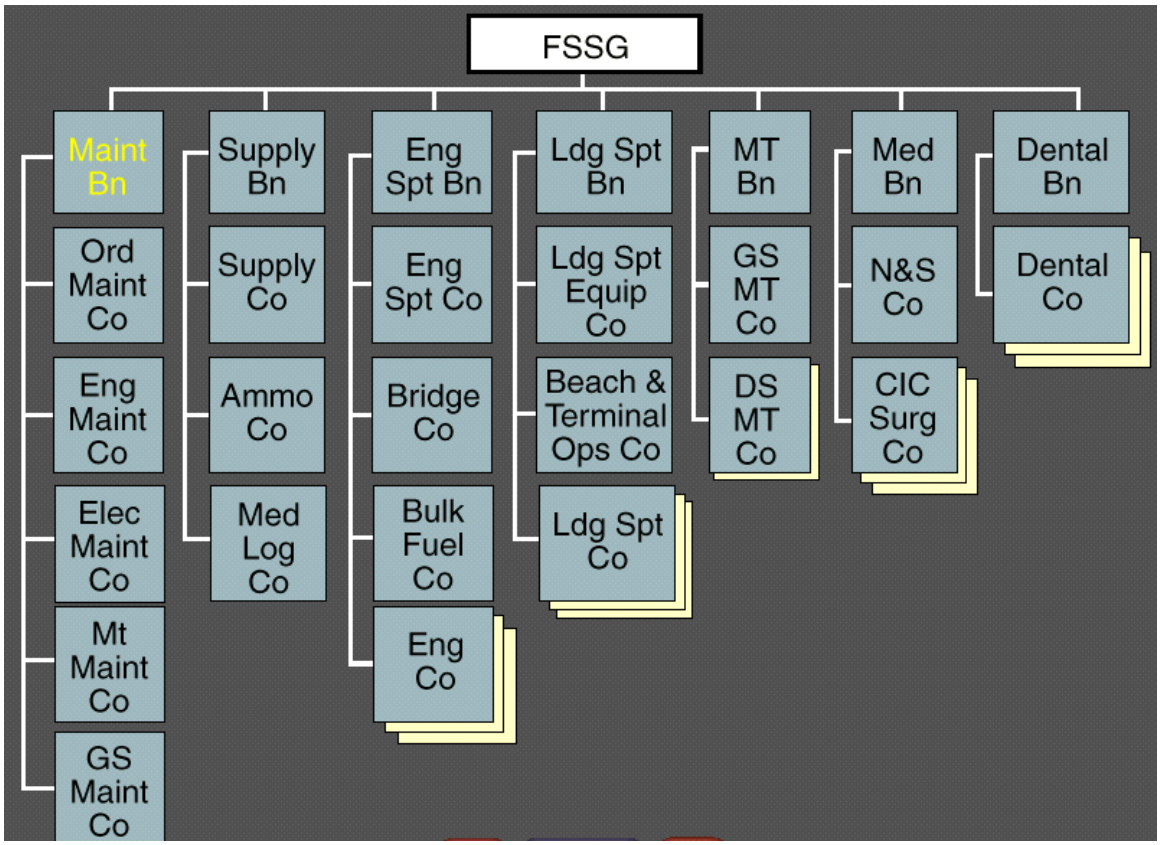
Operations Officer, Landing Force Operations Center watch officer, Staff Secretary, MEU Adjutant, and custodian of classified documents and cryptographic equipment.



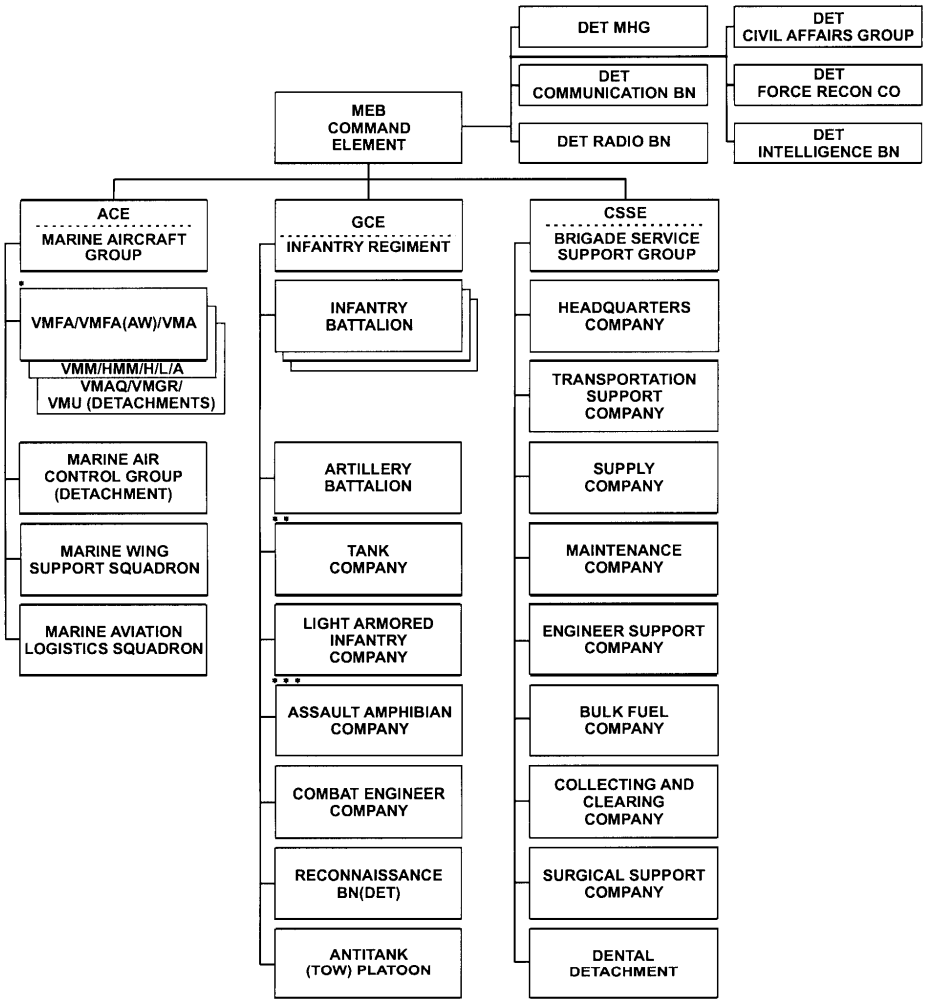

MARINE EXPEDITIONARY FORCE
COMMAND ELEMENT
Approx. 3,900 personnel
Headquarters Bn
Communications Bn
Radio Bn
GROUND COMBAT ELEMENT
Marine Division
Approx. 17,900 personnel
Headquarters Bn
3 Infantry Regts
Artillery Regt
Tank Bn
Assault Amphibious Bn
Light Armored Vehicle Recon Bn
Combat Engineer Bn
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
12 KC-130
48 F/A-18C
36 F/A-18D
60 AV-8B
10 EA-6B
Rotary Wing
72 CH-46E
24 CH-53D
32 CH-53E
36 AH-1W
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
Med Bn
N&S Co
CIC Surg Co
Dental Bn
Dental Co

# Marine Expeditionary Brigade



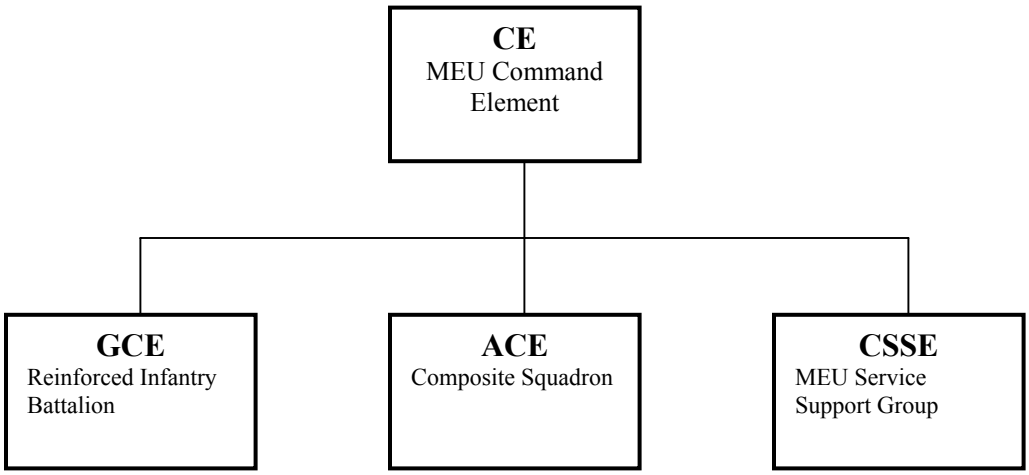

**Legend**

* 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

The 1997 National Military Strategy is based upon an integrated, strategic approach embodied by the terms *Shape, Respond,* and *Prepare Now*.[373] 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.[374]

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." The document represents the Sea Services' analysis of post Cold War strategy. Instead of focusing attention on open ocean warfighting against the Soviet Union, the new strategy emphasizes regional conflicts in the littoral ("near land") regions of the world. "From the Sea" defines the littoral region as consisting of a seaward and landward segments.[375] To accomplish the overall mission, naval forces will emphasize 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.[376] The strategy recognizes that future operations will have a significant joint/combined flavor, on the excellent model of Operation UPHOLD DEMOCRACY (Haiti).[377]

The fundamental building blocks of naval power are 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.[378]

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).[379]

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

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[373] Chairman, Joint Chiefs of Staff, National Military Strategy of the United States of America (1997).

[374] *Id*.

[375] 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).

[376] *Id.* at 7. *See also,* NAVAL DOCTRINE PUBLICATION 1, 28 March 1994.

[377] 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.

[378] 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.

[379] The United States considers the freedom of navigation provisions of UNCLOS III to reflect customary international Law of the Sea. In 1983 President Reagan stated that the U.S. would follow those provisions as part of U.S. Ocean Policy. 19 WEEKLY COMP. PRES. DOC. 877 (Mar. 10, 1983). Furthermore, on 6 October 1994, Following the U.S. signing of an agreement to amend the objectionable part of UNCLOS III dealing with deep seabed mining, President Clinton sent UNCLOS III to the Senate for its advice and consent.

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.

# COAST GUARD

## REFERENCES


1. Title 14, U.S. Code (14 USC 1, 2, 3, 4, 89, 141 and 143, in particular)
2. Commander's Handbook on the Law of Naval Operations, COMDTPUB 5800.7, (NWP 1-14M and Annotated Supplement)
3. Maritime Law Enforcement Manual (MLEM), COMDTINST M16247.1A (FOUO)
4. Maritime Counter Drug and Alien Migrant Interdiction Operations, COMDTINST M16247.4 (NWP 3-07.4)(FOUO)
5. Marine Safety Manual, COMDTINST M16000 (series)
6. Criminal Enforcement of Environmental Laws, COMDTINST M16201.1
7. Coast Guard 2020
8. Commandant's Direction 1998-2002
9. USCG Website - http://www.uscg.mil
10. OPS Law Fast Action Binder – http://cgweb.comdt.uscg.mil/G-OPL/G-OPL.htm
11. Coast Guard Roles and Missions Study – http://www.uscg.mil/news/R&M.html
12. Standing Rules of Engagement for U.S. Forces, CJCSI 3121.01A, dated 15 Jan 2000, CG Application – ALCOAST 214/00, COMDTNOTE 16242
13. Military Justice Manual, COMDTINST M5810.1D


## OVERVIEW

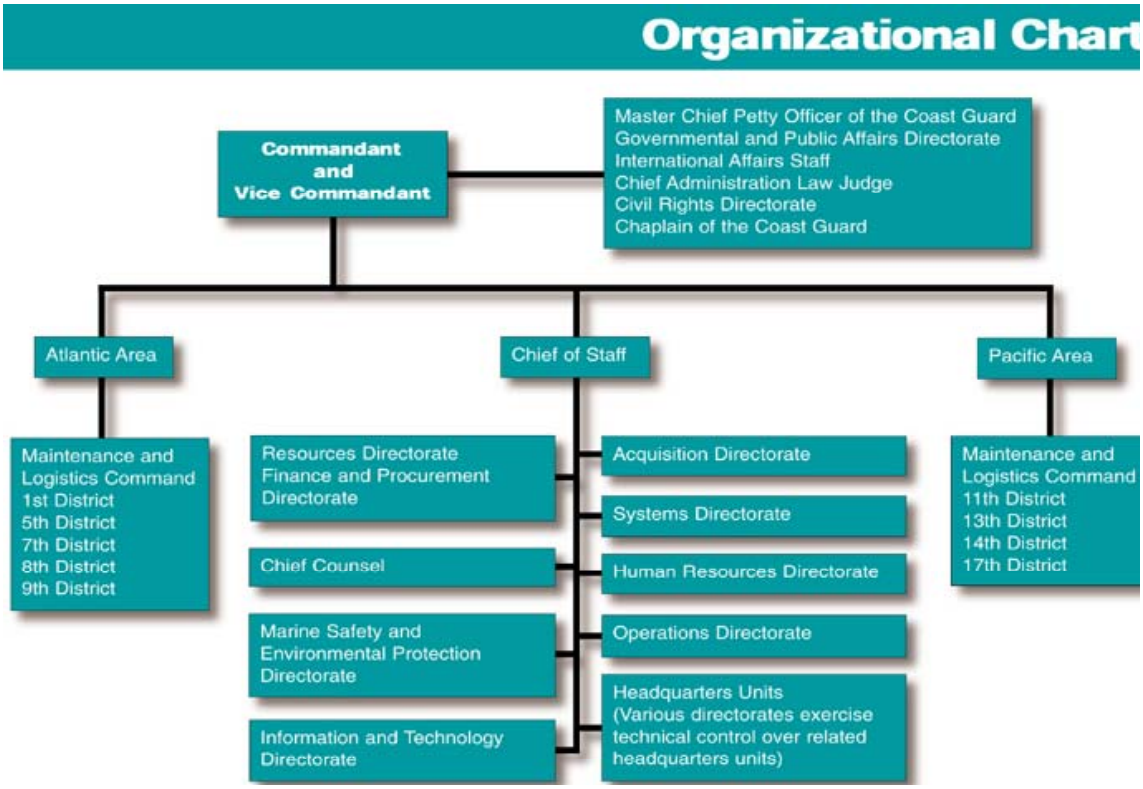
This chapter provides an overview of the unique operational law issues faced by the Coast Guard, with a focus upon the Coast Guard's interaction with the DOD services. As an armed service, the Coast Guard shares many similar roles with the DOD services with regard to OPLAW and national security. However, 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).

## 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).

## 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

**MISSION OVERVIEW**

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.

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).

**LAW ENFORCEMENT**

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.

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.

**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.

**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.

**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.

**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).

**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.

**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.

**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.

**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).

## 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).

## 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)

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.

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 Headquarters is located in Brussels, Belgium.

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.

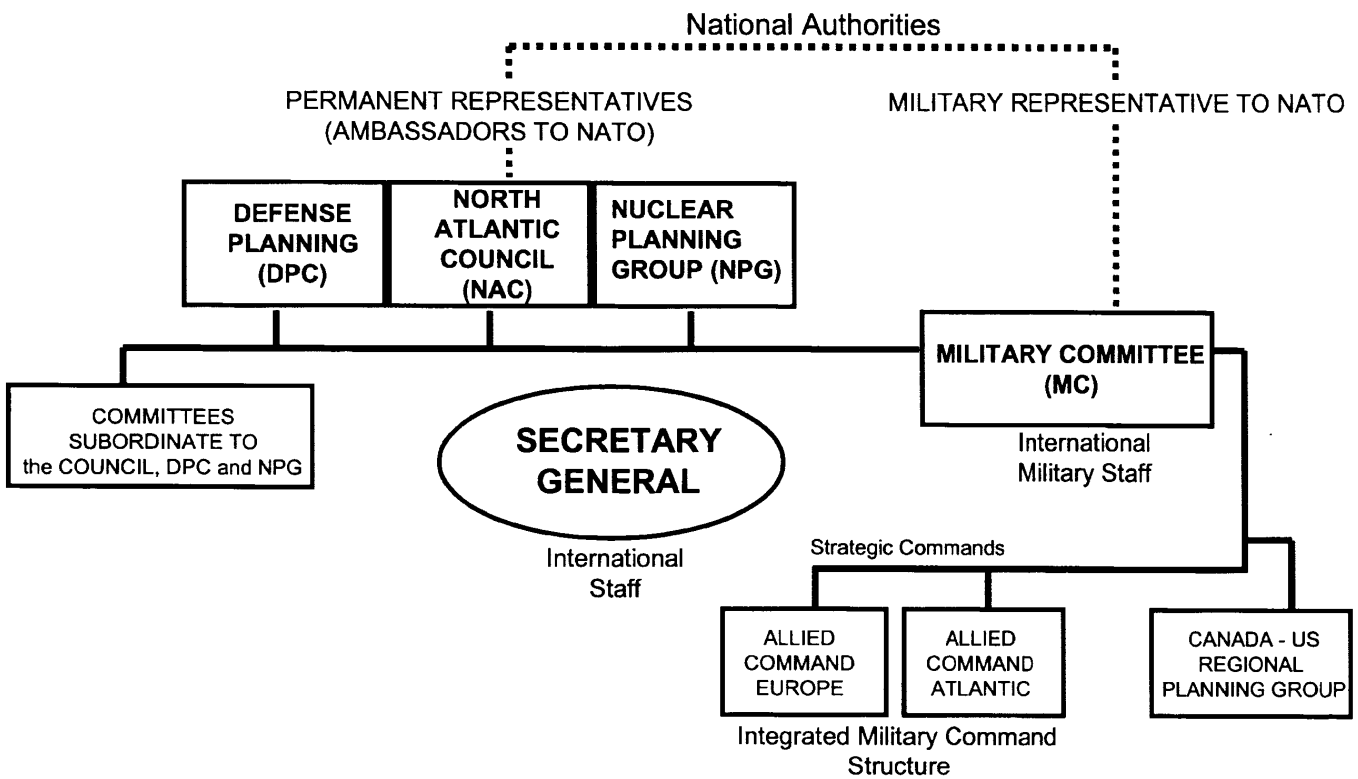
Article 9 also created "such subsidiary bodies as may be necessary," specifically requiring establishment of a defence committee. We know this committee as the "NATO Military Committee." This committee is composed of the Military Representatives (MilReps), usually three star officers, from the members 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), 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.

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.

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.

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 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



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].

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 1995, pursuant to the General Framework Agreement for Peace (GFAP, also known as the Dayton Peace Accord).

NATO has expanded four times and now numbers 19 members. A fifth expansion could occur as early as 2002. 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…."

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

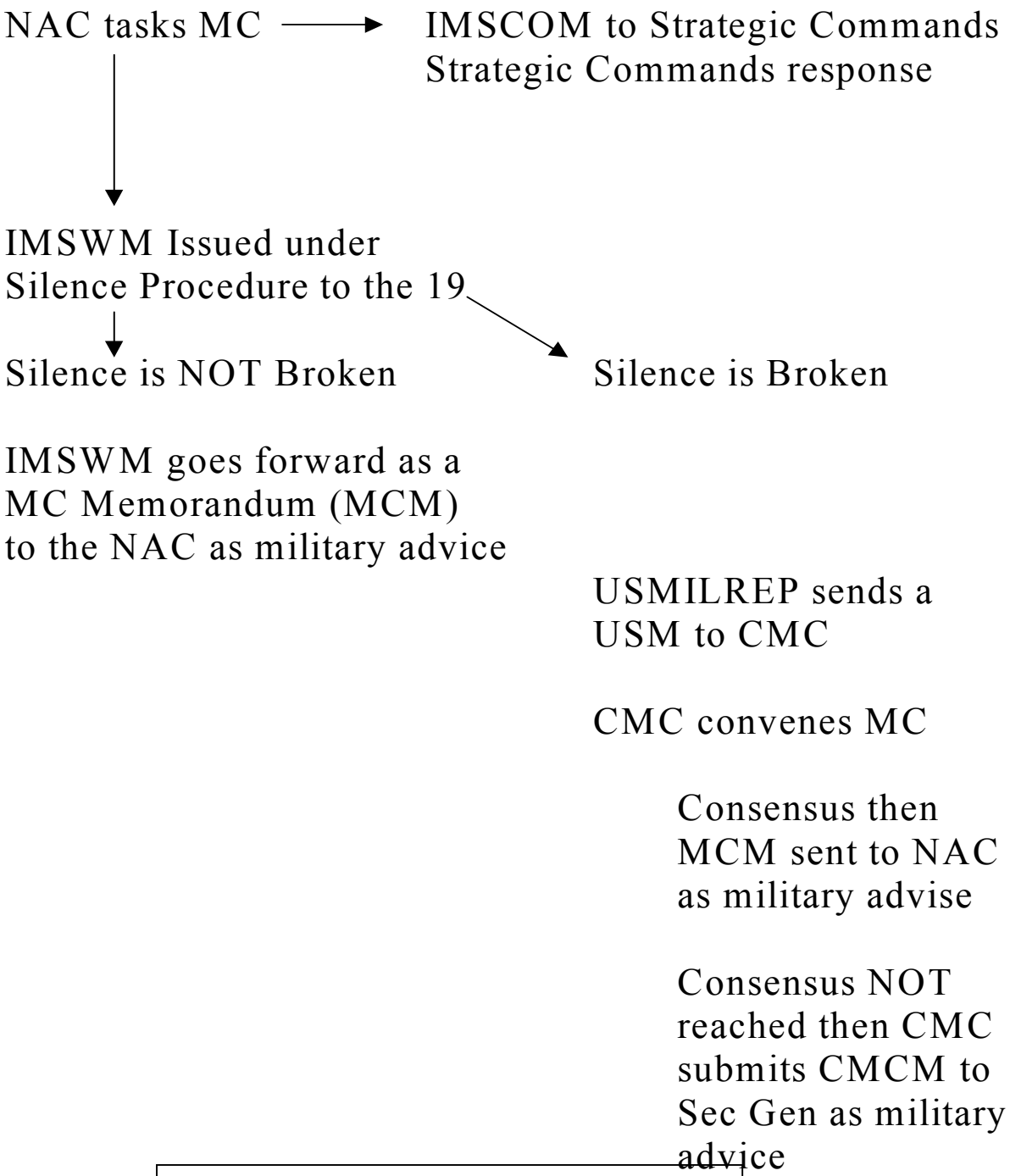



*FIGURE 2: NATO DECISION-MAKING PROCESS*

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.

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.

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.

## THE U.S. DECISION-MAKING PROCESS

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.

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.

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."

## NATO RULES OF ENGAGEMENT

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."

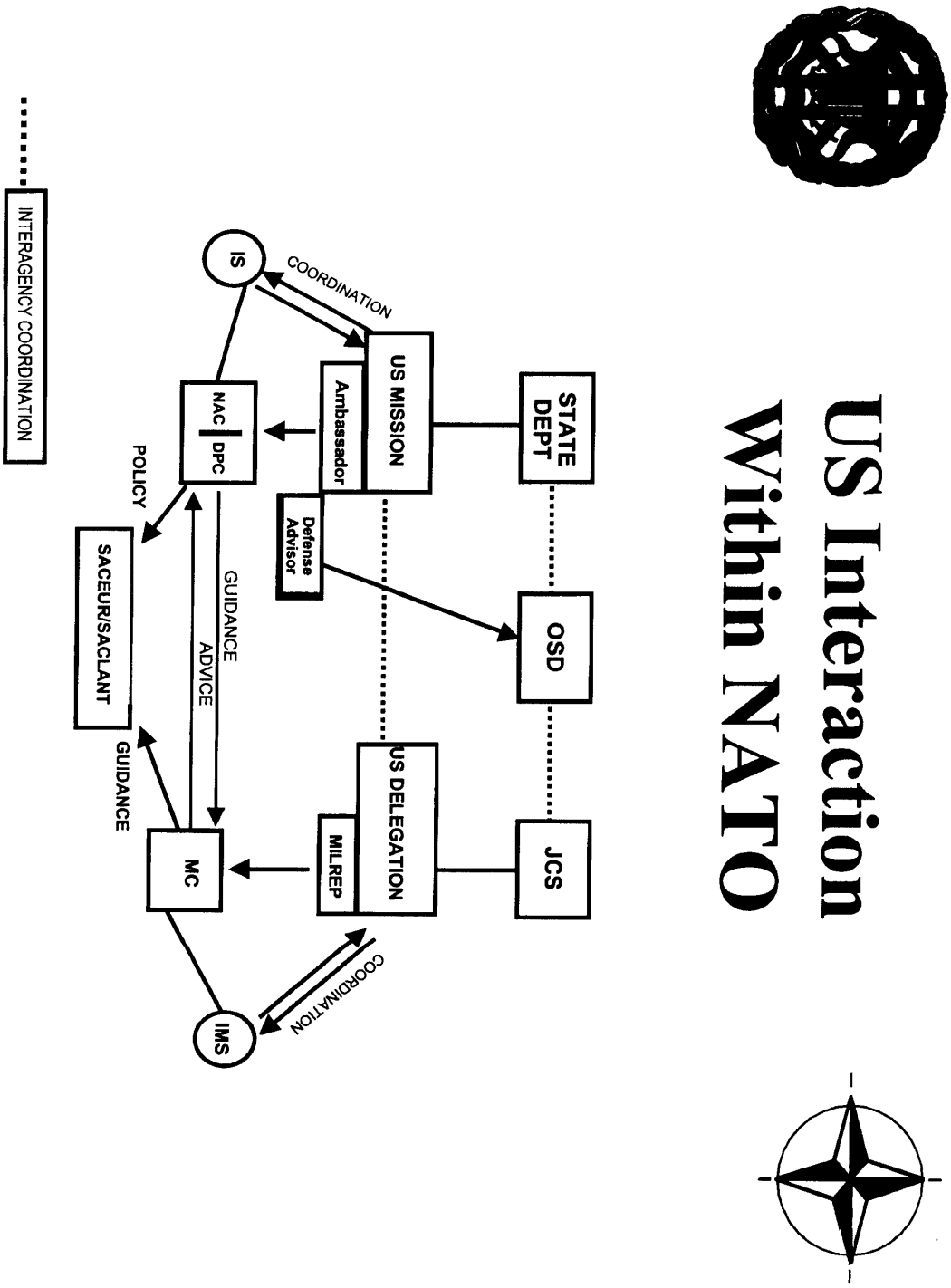



*Figure 3: NATO-U.S. Coordination*

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."

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.

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."

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

# RESERVE COMPONENT SOLDIERS AND OPERATIONS

## TYPES OF OPERATIONALLY DEPLOYED RC SOLDIERS.

The Army includes Reserve Component soldiers or units from either National Guards or the United States Army Reserve.

I. 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).

II. National Guard: Each state and territory has a National Guard. Each state's National Guard consists 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 component 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.

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.

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. The Uniform Code of Military Justice does not apply to soldiers on duty in a state status. Instead, state law provides for military justice. The *posse comitatus* act does not apply to National Guard soldiers in state service, which means they may then legally participate in some law enforcement activities.

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.

## TYPES OF RESERVE/ARNG DUTY IN THE OPERATIONAL ENVIRONMENT

I. Reserve and National Guard soldiers and units may participate in operations under several different authorities. The list below summarizes some of the more likely ones.

A. With consent: RC members may be ordered to active duty at any time with their consent (10 USC § 12301 (d)).

B. 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 RC units normally perform this duty together as Annual Training. (10 USC § 12301 (b)).

C. Selective Mobilization: This authority exists for peacetime domestic mobilization to suppress insurrection, enforce Federal authority, or prevent interference with state or federal law. (10 USC § 331-333).

D. 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. 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. Soldiers may not be retained under this authority for more than 270 days, including time spent on active duty prior to and after deployment. (10 USC § 12304).

E. 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 USC § 12302 (a)).

F. 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)).

II. 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. 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.

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.

**ADVERSE ACTIONS AGAINST DEPLOYED RC SOLDIERS**

Mobilized RC soldiers in Federal service have rights and obligations comparable to an AC soldier. However, the JA advising commanders of these soldiers and units must take care to avoid some RC-specific problem areas.

A. Authority to take UCMJ action: Two points loom large when assessing the implications of UCMJ action against an RC soldier. They are personal jurisdiction over the RC soldier at the time of the offense, and personal 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 (**not** state) duty status at the time of commission of the offense. Proving this can sometimes pose problems. For example, consider urinalysis of a 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 likely need to prove that the soldier was in an active duty status at the time of drug ingestion.

2. Status at the time of the action: In order to take UCMJ action against an RC soldier, the soldier must be in a 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 Component 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. *See generally* AR 27-10, chapter 21.

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.

3. The authority to retain or call back a soldier to AD 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.

B. 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, AC regulations will apply to actions against RC soldiers assigned to an AC command. For example, administrative separation action against a mobilized soldier would proceed under AR 635-200 (the AC regulation) rather than AR 135-178 (the RC regulation). Sometimes the duration of a soldier's remaining active duty dictates the choices in this area. Considering the separation action above, what if the soldier has only a week of active duty left? The AC command may lack sufficient time to complete a separation (and, since there is no court martial contemplated, probably has no authority to extend the soldier on active duty). The better alternative may be to ensure the documentation is forwarded to the soldier's chain of command back home for appropriate action. With other actions, the AC chain of command processes the action to completion even after the RC soldier departs (For example, *see* AR 600-37, paragraph 3.4 (d), which allows completion of the letter of reprimand process after departure of a soldier from the command). Bottom line rule? Check the regulation involved carefully and determine its applicability when an RC soldier is involved.

## CHAPTER 27

# THE MILITARY DECISION MAKING PROCESS AND OPERATION PLANS

### OPERATIONS PLANS AND ORDERS IN THE ARMY ARENA

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. The judge advocate must 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.

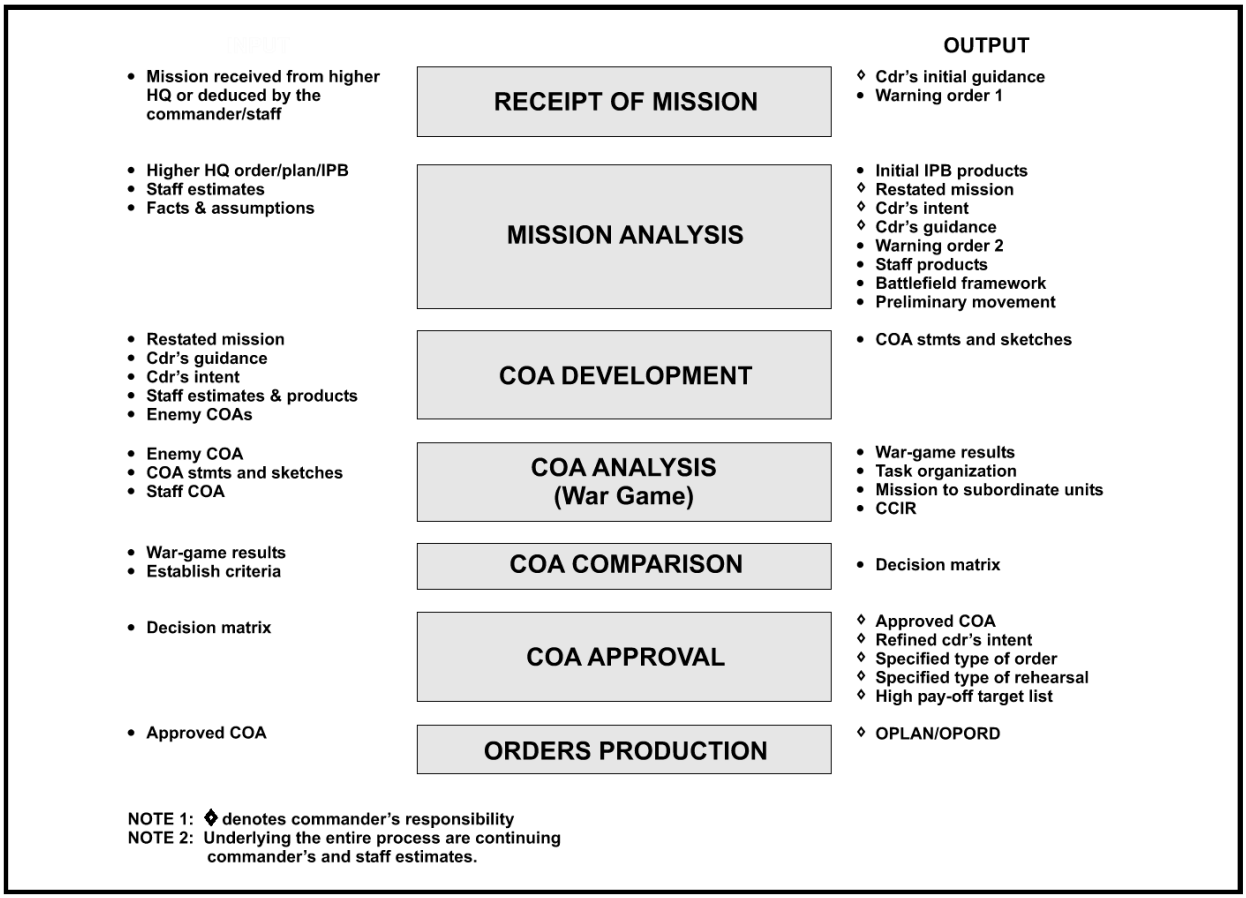



Figure 1. The Military Decision Making Process Model.

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.

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.

**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.

**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.

**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.

**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.

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.

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.

**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.

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.

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.

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.

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.

**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.

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:

1. **Express authority** (e.g., in the Mission Statement).

2. **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.")

3. **Inherent authority** (e.g., authority—always—to protect the force.)

4. 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.

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?

## OPERATIONS PLANS AND ORDERS IN THE JOINT ARENA

### The JTF OPLAN in Context

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.

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.

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).[380] 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.**

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.

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.[381]

## Reviewing Plans and Mission Orders

**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.

**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).

**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 may prefer to

[380] See JOINT PUB. 5-03.2, JOINT OPERATIONS PLANNING AND EXECUTION SYSTEM, VOL. II, PLANNING AND EXECUTION FORMATS AND GUIDANCE (10 Mar 1992) .

[381] See JOINT PUB. 5-0, DOCTRINE FOR PLANNING JOINT OPERATIONS (13 April 1995).

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.

**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).

**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.

**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.

**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, **Rules of Engagement Appendix**)

CLASSIFICATION

HEADQUARTERS,
U.S. EUROPEAN COMMAND APO AE 09128 28
February 1992

APPENDIX 8 TO ANNEX C TO USCINCEUR OPLAN 4999-92 (U) RULES OF ENGAGEMENT (U)

( ) REFERENCES: List DoD Directives, rules of engagement (ROE) issued by the Chairman, Joint Chiefs of Staff, and existing and proposed ROE of the supported commander to be applied during the conduct of operations in support of this OPLAN.

1. ( ) Situation

a. ( ) General. Describe the general situation anticipated at the time implementation of the plan is directed. Provide all information needed to give subordinate units accurate insight concerning the contemplated ROE.

b. ( ) Enemy. Refer to Annex B, Intelligence. Describe enemy capabilities, tactics, techniques, and probable COAs that may affect existing or proposed ROE in relation to accomplishment of the U.S. mission.

c. ( ) Friendly. State in separate subparagraphs the friendly forces that will require individual ROE to accomplish their mission; e.g., air, land, sea, SO, hot pursuit. Where appropriate, state the specific ROE to be applied.

d. ( ) Assumptions. List all assumptions not included in the Basic Plan on which ROE are based.

2. ( ) Mission. State the mission in such a way that ROE will include provisions for conducting military operations in accordance with the Laws of War.

3. ( ) Execution

a.( ) Concept of Operation

(1) ( ) General. Summarize the intended COA and state the general application of ROE in support thereof. Indicate the length of time (hours, days, or event) the ROE will remain in effect.

(2) ( ) U.S. National Policies. Refer to appropriate official U.S. policy statements and documents published by the command pertaining to ROE and the Laws of War. Include reference to ROE for allied forces when their participation can be expected. When desired, specific guidance may be included in a tab. Refer to a separate list of NO STRIKE targets in Appendix 4 to Annex B, which may include facilities afforded special protection under international law.

b. ( ) Tasks. Provide guidance for development and approval of ROE prepared by subordinate units.

c. ( ) Coordinating Instructions. Include, at a minimum:

(1) ( ) Coordination of ROE with adjacent commands, friendly forces, appropriate second-country forces, neutral countries, appropriate civilian agencies, and Department of State elements.

(2) ( ) Dissemination of ROE.

(3) ( ) Provision of ROE to augmentation forces of other commanders.

4. ( ) Administration. Provide requirements for special reports.

5. ( ) Command and Control. Refer to the appropriate section of Annex K. Provide pertinent extracts of information required to support the Basic Plan, including:

a. ( ) Identification, friend or foe, or neutral (IFFN) ROE policy.

b. ( ) Relation of ROE to use of code words.

c. ( ) Specific geographic boundaries or control measures where ROE are applicable.

d. ( ) Special systems and procedures applicable to ROE.

Appendix 8 to Annex C

CLASSIFICATION

(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

CLASSIFICATION

## SAMPLE LEGAL APPENDIX

APPENDIX 4 TO ANNEX E TO USFORHAITI OPORD(U)
LEGAL (U)

(U) **REFERENCES**:

a. UN Charter (U)
b. UN Security Council Resolutions 867 (1993), 905, 917, 933, 940, 949, 964 (1994), 975 (1995)
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.

# 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), 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. Mission

**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 an independent organization located at The Judge Advocate General's School of the Army in Charlottesville, Virginia. **The Center'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:

- It is the central *repository* within The Judge Advocate General's Corps for all-source data/ information, memoranda, after-action materials and lessons learned pertaining to legal support to operations, foreign and domestic.

- 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.

- 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* and their judge advocate observer-controllers, and by creating operational law *training guides.*

- 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.

- In conjunction with The Judge Advocate General's School, it sponsors *conferences and symposia* on topics of interest to operational lawyers.

The Center 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 the Center's initiatives enhance legal support to operations within the Army, the Marine Corps, and throughout the Department of Defense. The Center focuses on the practice of operational law—all domestic, foreign and international law that directly affects the conduct of operations.

### b. Initiatives

**Center Initiatives** include—

- *Law and Military Operations in Haiti 1994-1995: Lessons Learned for Judge Advocates* (1995)
- *Nuremberg and the Rule of Law, A Fifty-Year Verdict (1995)*
- *In the Operations Center: A Judge Advocate's Guide to the Battle Command Training Program (1996)*
- *Tackling the Contingency Deployment: A Judge Advocate's Guide to the Joint Readiness Training Center (1996)*
- *An Introduction to the Combat Training Centers (1998)*
- *Law and Military Operations in the Balkans, 1995-1998: Lessons Learned for Judge Advocates (1998)*
- *Deployed Judge Advocate Resource Library (on CD) (Oct. 1999)*
- *FM 27-100, Legal Support to Operations (With the Combat Developments Department, TJAGSA) (Mar. 2000)*
- *Rules of Engagement Handbook for Judge Advocates (May 2000)*
- *Law and Military Operations in Central America: Hurricane Mitch Relief Efforts, 1998-1999 – Lessons Learned for Judge Advocates (2000)*
- *Deployed Judge Advocate Resource Library 2d Edition (on CD)(Oct. 2000)*
- *Domestic Operational Law Handbook (2001)*

**c. Internet Resource Databases**

In addition to publishing guides for the operational law practitioner, the Center creates and maintains Internet accessible databases. The Center has created over fifteen databases with more than 2,600 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. Topical databases include—

| | |
|---|---|
| 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 |
| Rucksack Deployable Law Office and Library | 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) | |

**To access the databases:**

- If you are a first time user (do not have or have lost your JAGCNet user name and/or password):
  - Go *to* www.jagcnet.army.mil *web site.*
  - *Click the "Enter JAGCNet" button.*
  - *Click the "Register" button.*
  - *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" button.

### d. The Army JAG Corps' JAGCNet Databases

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 or have lost your JAGCNet user name and/or password):*
  - *Go to* www.jagcnet.army.mil *web site.*
  - *Click the "Enter JAGCNet" button.*
  - *Click the "Register" button.*
  - *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" button.*
  - *Click the "Enter" button."*
  - *If the databases* are not already listed, click the "Databases" button.

### e. The Center's Organization

The Director of CLAMO is also the Chief, International and Operational Law Division, Office of The Judge Advocate General. The Deputy Director heads the main office in Charlottesville, Virginia. The Center collects materials from attorneys and paralegals deployed in support of contingency operations around the globe. The Charlottesville office also maintains formal links to the Army's four Combat Training Centers, where judge advocates are assigned full-time to the Operations Groups that train Army, joint, and multinational forces. The Assistant Judge Advocate General for Military Law and Operations approves all of the Center's projects, preserves the independence of its analyses, and ensures that its work remains responsive to the needs of the Army and the joint service community of operational lawyers.

| | |
|---|---|
| Director | COL David E. Graham |
| Deputy Director | LTC Stuart W. Risch |
| Director, Domestic Op. Law | LTC Gordon W. Schukei |
| Director, Training & Support | CPT Alton L. Gwaltney, III |
| Marine Representative | Maj Cody Weston, USMC |
| Automation Technician | Mr. Ben R. Morgan |
| Advanced Operational Law Studies | MAJ Keith E. Puls |
| | MAJ Daniel G. Jordan |

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 71D Observer-Controllers |
| National Training Center (NTC) | 2 JA 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 the Center

The Center 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 the Center at (804) 972-6339/6448, DSN 934-7115 extension 6339/6448. 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. 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)

JRTC is located at Fort Polk, Louisiana. This CTC focuses primarily on training light infantry brigade task forces in low-to-mid-intensity conflict. This is accomplished through the use of tough, realistic training conditions.

Each fiscal year, JRTC conducts eight rotations and two Mission Readiness Exercises (MREs). A single rotation 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").

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 non-MRE 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.

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.

Due to the low-to-mid intensity 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 and civilians may have to be physically cleared from the battlefield. 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.

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.

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 the COBs and issues that will be encountered by the unit in either Balkan location.

There are four observer/controllers (O/Cs) at JRTC, three JAs and one 71D 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 71Ds improve their respective contributions to their unit's mission. These O/Cs also provide O/C coverage to JAs supporting EAD units. After-action reviews (AARs) are conducted after each operational phase and a final exercise review occurs at the exercise conclusion (ENDEX). Later, a Take Home Packet (THP) capturing O/C observations is provided to the BOLT and the unit.

**b. <u>The National Training Center (NTC)</u>**

NTC is located at Fort Irwin, California, in the middle of the Mojave Desert. The NTC focuses primarily on training 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.

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.

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) 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.

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 into the 52$^{nd}$ 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 using MILES equipment. 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.

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 EPWs 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.

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 civilian 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>**

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 recent 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.

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.

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.

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.

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.

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>**

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.

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.

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.

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.

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.

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.

**e. <u>The Joint Warfighting Center (JWFC)</u>**

Located in the Joint Training, Analysis, and Simulation Center (JTASC) in Suffolk, Virginia, the JWFC trains joint force commanders, staffs, and component forces operating as part of a joint or multinational force how best to accomplish joint mission-essential tasks specified by the supported combatant commander. There is one judge advocate at the JWFC, a Navy Lieutenant Commander. The JWFC provides, among other things, extensive replication or role-playing of entities external to the training audience; robust scenarios; Joint Theater-Level Simulation or Joint Training Confederation

architecture; in-depth, focused functional training; senior mentors; experienced observer/trainers; information operations and media play; and in-depth post-exercise analysis, summaries, and lessons learned. For more information, visit the JWFC web site at http://www.jwfc.jfcom.mil/home.html.

## 4. DEPLOYMENT PREPARATION

*Be prepared. Once the order comes, it's too late!*[382]

See the chapter on Checklists of 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 RDL (Rucksack Deployable Law Office and Library) and its supporting equipment, and office supplies.
- 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. Doctrine

General deployment preparation must begin with the Judge Advocate General's Corps' keystone doctrinal publication for legal support to operations, FM 27-100. FM 27-100 explains the role of the 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.

At the joint level, Judge Advocates should consult DRAFT JOINT PUB 1-04, JOINT TACTICS, TECHNIQUES, AND PROCEDURES FOR LEGAL SUPPORT TO MILITARY OPERATIONS, FINAL COORDINATING DRAFT (8 February 2001). Deploying JAs must also be familiar with other Army doctrine, such as DEP'T OF THE ARMY FIELD MANUAL 101-5, STAFF ORGANIZATION AND OPERATIONS (31 May 1997).

[382] 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).

**b. Training**

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).[383] 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.[384] Today's operational environment often requires JAs and their 71Ds to be geographically dispersed and to operate individually. Legal support often sees JAs and their 71Ds dispersed and operating alone. Thus JAs and legal specialists must all train in each of the core legal disciplines. 71Ds 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)[385] 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

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[383] *See, e.g.,* DEP'T OF THE ARMY STP 21-1-SMCT, SOLDIER'S MANUAL OF COMMON TASKS, SKILL LEVEL 1 (October 1994).

[384] *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, 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.

[385] *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).

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 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*.[386] 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).

[386] 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.

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. 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[387] and the Hurricane Mitch relief operations,[388] 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.[389] 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 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.

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[387] *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).

[388] *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).

[389] *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) (for detailed descriptions of the Military Decision Making Process and the Judge Advocate's role therein).

NOTE: Sample Legal Annexes and other sample legal products may be found on several of CLAMO's databases, to include the operations databases and the *Sample Legal Products* database. (See par. 2.C. above for instructions on accessing the CLAMO databases.)

| 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.

## CHAPTER 29

# INTERNET WEB SITES USEFUL FOR OPERATIONAL LAWYERS

***Acquisition Deskbook Homepage*** http://www.deskbook.osd.mil

***Agency for International Development***. http://gaia.info.usaid.gov

***Air Force***

Material Command www.afmc.wpafb.af.mil

Publications http://www.af.mil/lib/pubs.html

***Aerospace Power Journal*** http://www.airpower.maxwell.af.mil

***Army***

***Acquisition*** http://acqnet.sarda.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.adfa.oz.au/

***Automated Historical Archives System*** http://leav-www.army.mil/

***Battle Labs (TRADOC)*** http://battlelabs.monroe.army.mil/pam525/pam525.htm

***Bosnia Link*** http://www.dtic.dla.mil/bosnia/

***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.allpolitics.com/ (CNN/TIME AllPolitics)

***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/

***Central Intelligence Agency*** http://www.cia.gov

***Centre for Strategic Studies*** http://www.vuw.ac.nz/css/

***China News Digest*** http://www.cnd.org

***CNET*** http://www.cnet.com (a news and information service)

***Coast Guard*** www.uscg.mil

***Code of Federal Regulations*** http://www.gpo.gov OR www.law.cornell.edu/regs.html

***College and University Home Pages*** http://www.mit.edu:8001/people/ cdemello/univ.html.

***Combined Arms Research Library*** http://www-cgsc.army.mil/carl/

***Comptroller General Decisions*** http://www.gao.gov/decisions

***Conflict Studies Research Centre*** http://www.ppc.pims.org/

***Congressional E-mail Directory*** http://www2.troa.org/elecmail3.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/alpha/department_of_State_country_studies.html

***Court opinions***

http://www.ca11.uscourts.gov/opinions.htm

http://www.law.emory.edu (includes decisions for 4th, 6th, and 11th Cir.)

http://www.law.vill.edu (includes decisions for 3rd & 9th Cir.)

***Court of Appeals for the Armed Forces*** www.armfor.uscourts.gov

***Criminal Justice sites*** http://broadway.vera.org/

***Defense Federal Acquisition Regulations (DFARS)*** www.dtic.mil/dfars *See also Federal Acquisition Virtual Library, infra. Also* 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://web7.whs.osd.mil/corres.htm

***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

***Early Bird*** http://www.militarycity.com

***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://www.access.gpo.gov/index.html

***FedWorld*** http://www.fedworld.gov/ - FedWorld (a one-stop location to locate/order USG documents)

***Fletcher Forum*** http://fletcher.tufts.edu

***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

***Foreign Policy*** http://www.enews.com

***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

***General Service Administration*** http://www.gsa.gov (contains over 1,400 site links)

***German Information Center*** http://www.germany-info.org

***Government Printing Office (GPO) Access*** http://www.access.gpo.gov/ OR http://gpo.lib.purdue.edu

***Hoover Institution*** http://www-hoover.stanford.edu/

***House National Security Committee*** http://www.house.gov/hasc/

***House of Representatives*** http://www.house.gov/

***Human Rights*** http://www.umn.edu/humanrts (Univ. Of Mn. Human Rights library)

***Industrial College of the Armed Forces*** http://www.ndu.edu/ndu/icaf

***Information Warfare*** http://www.infowar.com

***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.cij.org/

http://www.un.org/icty/

***International Institute for Strategic Studies*** http://www.jaring,my/isis/publicat/publication

***International Laws and Treaties***

http://www.fletcher.tufts.edu/

gopher://gopher.peachnet.edu (Eastern European Info)

http://www.jura.uni-sb.de (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

***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: http://thomas.loc.gov

http://www.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 Spending Working Group*** http://www.fas.org/pub/gen/mswg/

***Ministry of Defense (U.K.)*** http://www.mod.uk/

***Ministry of Foreign Affairs*** http://www.nttls.co.jp

***Multilateral Treaties*** gopher://gopher.law.cornell.edu/

***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/nsaorgan.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

***OMRI (Open Media Research Institute) Daily Digest*** http://gort.ucsd.edu

***Organization of American States*** http://www.oas.org/

***Peacekeeping Institute*** http://carlisle-www.army.mil/usacsl/pki/pki.htm

***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.excite.com

http://www.altavista.digital.com

http://www.yahoo.com

http://www.magellan.excite.com/

http://www.pointcom.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

***Standards of Conduct*** http://www.dtic.mil/

***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

***Web Crawler*** http://webcrawler.com/

***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/

# CHAPTER 30

# 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 (ADS(PA)),* (27 Sep 00)
3. Dept of Def., Dir. 5040.4, *Joint Combat Camera Program* (9 Sep 96)
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).


## INTRODUCTION

In May 1992, DoD and major news organizations reached agreement on guidelines that will apply to media coverage of U.S. military forces engaged in armed conflict. The rules listed below have been endorsed by DoD and most major news organizations, and will govern media coverage of future U.S. armed conflicts:

1. Open and independent reporting will be the principal means of coverage of U.S. military operations.

2. Press pools are not to serve as the standard means of covering U.S. military operations. Pools may sometimes provide the only feasible means of early access to a military operation. Pools should be as large as possible and disbanded at the earliest opportunity (within 24 to 36 hours when possible). The arrival of early access pools will not cancel the principle of independent coverage for journalists already in the area.

3. Even under conditions of open coverage, pools may be appropriate for specific events, such as those at extremely remote locations or where space is limited.

4. Journalists in a combat zone will be given credentials by the U.S. military and will be required to abide by a clear set of military security ground rules that protect U.S. forces and their operations. Violation of the ground rules can result in suspension of credentials and expulsion of the journalist involved from the combat zone. News organizations will make their best efforts to assign experienced journalists to combat operations and to make them familiar with U.S. military operations.

5. Journalists will be provided access to all major military units. Special operations restrictions may limit access in some cases.

6. Military public affairs officers should act as liaisons but should not interfere with the reporting process.

7. Under conditions of open coverage, field commanders should be instructed to permit journalists to ride on military vehicles and aircraft whenever feasible. The military will be responsible for the transportation of pools.

8. Consistent with its capabilities, the military will supply PAOs with facilities to enable timely, secure, compatible transmission of pool material and will make these facilities available whenever possible for filing independent coverage. In cases when government facilities are unavailable, journalists will, as always, file by any other means available. The military will not ban communications systems operated by news organizations, but electromagnetic operational security in battlefield situations may require limited restrictions on the use of such systems.

9. These principles will apply as well to the operations of the standing Department of Defense National Media Pool system.

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).

**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.[390] Once approval has been granted, use the pointers below in talking to the media.

**Why Talk To The Media?**

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.

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 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).

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.

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.

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.

**Preparing to Meet the Media**

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.

**Some preparatory suggestions**:

- Find out who the reporter is.

[390] 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."

- 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.

**The "Five and Five" Rule**

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.

**Specific suggestions if you're going on the air:**

- 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.

- Arrive early to check the setting and your appearance.

- 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.

**You're on!**

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.

*First, your appearance:*

- Check your appearance. (Be vain. Have yourself inspected. Remember, you're representing the entire military.)

- Ask for makeup to help control perspiration and to avoid glare from the lights. (If you have a heavy beard, shave before you go).

- Don't wear sunglasses outdoors, or tinted glasses indoors.

- If seated, keep your jacket buttoned. To remove wrinkles in the front, pull the jacket down in the rear.

If you're in civilian clothes:

- 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.

- Wear light-color shirts. However, avoid whites, since it is difficult for the technical crew to adjust contrasts.

- Avoid bow ties. They have a tendency to bob when you are talking.

- Wear over-the-calf socks. (That way, if you cross your legs, your shins won't outshine your shoes.)

- 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.

*Second, your action. (Or, what do I do with my hands?):*

- 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.

- 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.

- 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.

- 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.

- Don't adopt the questioner's attitude, even on hostile questions. (Remember, the viewer/listener at home may be on your side.)

- 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).

- 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.

- 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!)

- Keep your hands off the mike. Ignore the mike and volume—that's what the sound technician is paid to do.

- 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.

- If possible, don't sit between two questioners. (It's not an inquisition, and your shifting head will make you feel and look guilty.)

- Be yourself! Concentrate on how to get ideas across—not just words.

*Third, how do I say what I want to say?*

- 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.

- Be relaxed, confident; you are the expert.

- Avoid jargon, acronyms and technical terms.

- Phrase your responses with the public in mind rather than bringing out how the military benefited from a decision or action.

- Phrase your answers in terms and experiences your audience will relate to. Talk as though you were talking to your mother or father.

- Minimize the use of "we"; whenever possible, use "I."

- 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.

- Above all, be positive in your answers!

- Use pitch and rate changes for variety.

- Build in a "cut-off" with your answer if you wish to drop the topic.

- Don't be curt (even in response to the dumbest question).

- 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.

- 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.

- 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).

- 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.

- If you're not sure of the facts, say so in you response and promise to get them. (Then be sure to follow up).

- 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.

- Discuss only those activities and policies within the purview of your command or area of responsibility. Don't discuss hypothetical situations. Don't speculate.

- Don't be defensive-take the opportunity and use it to your benefit.

- 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.

- 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.

- Always assume the tape is rolling and the microphone is on! (Even during breaks, commercials, etc.).

- 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.

- Never lie to a reporter. Not only could you get yourself in trouble, you may lessen the credibility of the whole Army.

- 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.

**After It's All Over**

- 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.

- Provide anything you promised you'd get back to them with.

- Be available for follow-up. Reporters often will have points they may want clarified or need additional information on.

- Have your staff available for corroboration and follow-up.

- Clarify any points you think may have been misunderstood, and provide additional information you think may be needed.

- Actively seek other opportunities to tell the military's story.

**A Media Survival Guide**

Rear Admiral Brent Baker, the Navy's 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.

**Summary**

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.

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.

**As a quick recap, remember these points**:

- Prepare—don't "wing it."

- Conversational—treat the mike and the interviewer as friends.

- Concentrate—forget yourself and concentrate on the questions and on your key ideas.

- 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.

- Confidence—you're the expert and you know what you're doing.

- Comfortable—relax and enjoy it. Forget about your hands and the mike and camera, and be natural.

- Concise—get your points across directly, quickly, and in language the audience will understand.

- Care-care about the Army, the audience, the interview, and your subject. If you don't, neither will anyone else.

- Relax. Be Honest. Be Sincere.

- 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.

# CHAPTER 31

# CHECKLISTS

## INTERNATIONAL LAW

### PREPARATION AND PREDEPLOYMENT

- __ Determine the **legal basis** for the military action. Obtain copies of all relevant authorizing documents (i.e., UNSC Resolutions, Executive Orders).

- __ Obtain copies of all Status of Forces and Supplementary Agreements, with maps of countries, where deployment is likely; for classified agreements and Country Law Studies, contact higher HQ, the Unified Command (i.e., SOUTHCOM, CENTCOM, etc.), or OTJAG (International/Operational Law Div).

- __ Determine if any international agreements need to be negotiated prior to deployment of U.S. Forces.

- __ Regularly review operations and contingency plans. Review the actual OPLAN/OPORDER for potential problems. If it has been previously reviewed, look for changes and focus on the mission statement, assumptions, and ROE.

- __ Ensure regular and thorough training in the law of war, Rules of Engagement (ROE) (to include STX lane training), and Code of Conduct is provided to commanders and soldiers.

- __ Include law of war, ROE, and operational law problems in exercises. See AR 350-41. Submit judge advocate portions of upcoming exercise play on time (and ensure they are keyed to the master scenario plan). The Master Scenario Events Lists (MSELs) are usually the way exercise play is keyed to the master plan and are usually submitted 6 months before the exercise.

- __ Determine whether deploying judge advocates will be assisted by Reserve Component support, (e.g., JAGSO Teams) in the area of deployment or Individual Mobilization Augmentees (IMAs) at Home Station. If JAGSO teams are deploying, ensure that this fact is included in the operations order.

- __ Determine potential legal problems in the countries of probable deployment (e.g., unique religious laws that would affect U.S. personnel, limitations on the use of military vehicles in country, unique customs or currency laws, and any significant terrorist threats).

- __ Consider solving recurring issues such as war trophies, ROE, requisitioning of property, contracting, etc. by working them into SOPs, exercises, etc.

- __ Coordinate with the G-5/Civil Affairs office to determine the existence and terms of any Civil Affairs Agreement with the Host Nation (HN).

### DURING COMBAT DEPLOYMENT

- __ Establish contact and become the liaison between the International Committee of the Red Cross (ICRC) and the command. Attempt to determine the identities of the ICRC representatives and whether they have been approved by the State Department prior to their arrival. Once they arrive, identification information concerning the ICRC representatives should be forwarded to the next higher SJA office for verification of authenticity.

- __ Coordinate with provost marshal (PM) and logistics personnel to ensure that provisions have been made for EPWs, to include security, housing, food, religious needs, barbed wire, transfer from other U.S. military services or allies, medical attention, interpreters, separate accommodations for females, if any, and reporting to the ICRC.

- __ Ensure arrangements have been made to recover the enemy's dead when the combat situation permits. Attempts should be made to identify the bodies. This information should be given to the ICRC. If the situation permits, these bodies should be returned to the enemy. Alternatively, the bodies should be promptly buried in a dignified manner, the graves marked and recorded, and this information provided to the ICRC.

- __ Ensure that all combat incidents (e.g., inadvertent bombing of a protected place) and allegations of war crimes (by either side) are promptly reported and investigated. This is a command responsibility. It is absolutely imperative that the evidence be preserved immediately. If necessary, a judge advocate should conduct the preliminary investigation.

- __ Coordinate with other U.S. representatives in country, such as the State Department. Be prepared for sustained involvement with representatives from U.S. Agency for International Development (USAID) and State Department, including Embassy personnel.

- __ Assure close and continuous coordination with the G-5/Civil Affairs office.

- __ Have guidance prepared for the command concerning **War Trophies**. Guidance on War Trophies must be included in any General Order Number 1. If the potential exists for troops to obtain war trophies, publish guidance rapidly! Advise troops of the law concerning theft of private property (Art. 121, UCMJ) and the retention of enemy public property captured on the battlefield (Art. 103, UCMJ). They should also be briefed concerning the category of items that they may request as souvenirs.

- __ Review and coordinate psychological operations and intelligence collection plans/activities.

- __ Establish channels for reporting law of war violations and coordinate with the PM to ensure that credible allegations are investigated. Coordinate with the military justice section and/or claims section to employ court reporters and interpreters to record witness testimony or other statements of witnesses in the country of deployment. Be prepared to use SJA office assets to investigate allegations of law of war violations.

- __ Ensure that, in accordance with the OPLAN/OPORDER and ROE, protected targets, such as churches, hospitals, or charitable, cultural, or historical facilities, are not targeted or bombarded, unless they are being used for a military purpose. If a protected place is being used by the enemy for a military purpose, such use should be documented. Hospitals being misused by the enemy should be warned, unless time does not permit and delay would jeopardize the mission. In all cases of misuse of protected places, incidental/collateral damage should be kept to a minimum.

- __ Determine if war crimes trials will be conducted within the area of deployment. If trials will be held, jurisdiction over EPWs for pre-capture offenses may be established through Art. 18 or Art. 21, UCMJ. For post-capture offenses, PWs will be tried under the same rules and procedures applicable to U.S. soldiers (Art. 2, UCMJ, applies). Always check with the next higher legal office regarding war crimes trials, as the decision to prosecute has significant political implications.

- __ If an occupation is anticipated, coordinate with the G-5/Civil Affairs office in order to review potential legal issues (i.e., occupation ordinances, occupation courts, etc.).

- __ Be prepared to advise command on seizure & requisition of government & private property.

- __ As the hostilities stabilize and the combat phase ends, coordinate with the PM and the ICRC to arrange **repatriation of PWs**.

**MOOTW OR POST-COMBAT**

- __ Coordinate with the G-1 and PM concerning the preparation and issuance of **special ID cards** in the local language. (Useful in a permissive environment for local police assistance purposes.)

- __ In a permissive environment in which U.S. forces are assisting in the stabilization phase, ensure that the HN has granted authority to U.S. MPs' forces to apprehend or arrest local nationals. This will normally be accomplished through an ordinance or executive proclamation.

- __ Coordinate with the judge advocate (and/or Country Civil Affairs Team) of the major theater component/supporting command to arrange HN liaison for soldiers detained by the HN. Negotiation responsibility is normally assigned to the SJA for one of the major component commands in theater. If there is a SOFA, it will usually specify the liaison authority.

- __ In a permissive environment, coordinate with HN national police authorities concerning the status of the U.S. force in country. Ensure members of the HN police force understand the status of U.S. nationals.

- __ As the hostilities stabilize and the combat phase ends, coordinate with the PM and the ICRC to arrange **repatriation of PWs**.

**INTERNATIONAL AND OPERATIONAL LAW REFERENCES**

- All OPLAW Doctrine References listed in Chapter 2, this Handbook.

- AF Pam 110-20, Selected International Agreements.

- AR 27-14, Selected International Agreements (Vol II).

- AR 27-50/SECNAVINST 5820.4G, Status of Forces Policies, Procedures, and Information.

- AR 190-8, PW Employment.

- AR 190-41, Customs Law Enforcement.

- AR 190-XX (1996), War Trophies

- AR 350-30, Code of Conduct Training.

- DA Pam 27-1, Treaties Governing Law Warfare.

- DA Pam 27-1-1, Protocols to the Geneva Conventions of 12 Aug 1949.

- DA Pam 27-24, Selected International Agreements, Vol. II.

- DA Pam 27-161-1, The Law of Peace, Vol. I.

- DA Pam 27-161-2, International Law, Vol. II.

- DoD Dir. 2000.11, Political Asylum and Temporary Refuge

- DoD Dir. 5030.49, Customs

- FM 27-2, Your Conduct in Combat Under the Law of War (formerly TC 27-1).

- FM 27-10, The Law of Land Warfare with change 1 (if you can only take one LOW document, this is it!)
- FM 41-5, Joint Manual for Civil Affairs
- FM 41-10, Civil Affairs.
- NWP 1-14M, The Commander's Handbook on the Law of Naval Operations and Annotated Supplement.
- Manual for Courts-Martial, 1984 (1998 Edition).
- MCO 3460.1A, Training and Education Measures Necessary to Support the Code of Conduct.
- TC 27-10-1, Selected Problems in the Law of War.
- TC 27-10-2, Prisoners of War.
- TC 27-101-3, Instructor's Guide to The Law of War.
- TJAGSA Law of War Deskbook (1998).
- TJAGSA Intelligence Law Deskbook (1998).
- TJAGSA Operational Law Materials (1997).

**CHECKLIST FOR COMPLIANCE WITH THE LAW OF WAR**

This law of war (LOW) checklist is an instructional device to demonstrate the vast range of LOW and related issues that arise during the operational staff planning process. Some of the issues raised obviously will not concern staff officers at the small unit level, others are of universal import and require close attention at all levels, and some would be considered only by the National Command Authorities. The Headquarters Marine Corps Law of War Reserve Augmentation Unit (TDE) prepared the checklist. The checklist has been prepared to assist staff officers and commanders in the development and review of operation plans (OPLANs) and concept plans (CONPLANs). Since these plans are an essential link between the Commander's decision and the initiation of military action, it is important that all plans ensure that U.S. responsibilities under domestic and international law are properly discharged. DoD Directive 5100.77 requires C JCS and the commanders of unified and specified commands to ensure that ROE conform to the LOW. CJCSI 5810.01 requires periodic review of joint documents for consistency with the LOW. Paragraphs 4(c) and 5(b) (5) of Secretary of the Navy Instruction 3300.1A require review of all plans, orders, directives and ROE for conformity with the LOW. Periodic review of operation and concept plans to assure consistency with the LOW is required by para. 10(g) of Marine Corps Order 3300.3, by para. 4(b) (2) of Chief of Naval Operations Instruction 3300.52, and by paragraphs 3(i) and 9 of AF Reg. 110-32.

This checklist assumes, without further emphasis, that all regular members of the force to be deployed (1) are equipped with the ID tags and cards required by the 1949 Geneva Conventions; and (2) have received the required accession level LOW training and the additional training required for commanders and those filling billets requiring specialized LOW training. It further assumes that all non-nuclear weapons to be employed by the force have been reviewed for compliance with the LOW in accordance with DoD Instruction 5000.1. The checklist does not cover normal military law or UCMJ questions except as they might interact with or are affected by the LOW. The Appendix has a list of the abbreviations used in the checklist with the full titles of the references spelled out. Also included in the Appendix are certain treaties and directives, which, while not referred to in this checklist, have possible LOW application to the preparation and review of OPLANs and CONPLANs. An asterisk identifies the latter documents (*).

___ Is Art 2 or 3 applicable to the situation?

___ Have partners and opponents ratified Protocol I and II?

## ANNEXES

### ANNEX A - TASK ORGANIZATION
### Appendix 1 - Time-phased force and deployment list (TPFDL).

Does the task organization include civilians or other non-military personnel accompanying the force in the field (arts. 3 and 13 of Hague IV, arts. 13 of GWS and GWS(Sea), and art. 4 of GPW)? If so:

___ Are they equipped with the proper identification provided for such individuals (see, e.g., art. 40 of GWS, art. 4(A) (4) and Annex IV(A) of GPW, and DoD Instruction 1000.1, "ID Cards Required by the Gen. Convention")?

___ Have they been instructed in their rights, duties and obligations under the LOW?

Does the task organization include personnel of the American Red Cross Society or other U.S. voluntary aid societies assigned exclusively to medical and medical support duties (arts. 24 and 26 of GWS)?:

___ Are they subject to U.S. military laws and regulations?

___ Has their intended assistance been notified to the enemy?

___ Have they been instructed in their rights, duties and obligations under the LOW?

___ Do they have ID cards required by art. 40 of GWS?

Does the task organization include personnel of a recognized national Red Cross society or other voluntary aid societies of a neutral country (art. 27 of GWS)? If so:

___ Are they present with U.S. authorization and the previous consent of their own government?

___ Are they under official U.S. control?

___ Has their intended assistance been notified to the enemy?

___ Have they been instructed in their rights, duties and obligations under the LOW?

___ Have they been furnished the ID cards required by art. 40 of GWS?

Are the medical and religious personnel of the force (art. 24 of GWS) equipped with the protective identification provided for such individuals (art. 40 and Annex II of GWS and art. 42 and the Annex to GWS(Sea))? Are these personnel:

___ Assigned exclusively to medical or religious duties or to the administration of medical or religious organizations?

___ Trained in the special rights, duties and obligations of such personnel under the LOW?

___ In possession of the protective ID card (and has a model of this card for such personnel been communicated to the enemy as required by art. 40 of GWS)?

___ Are auxiliary medical personnel of the force (art. 25 of GWS) equipped with protective emblems (see art. 41 of GWS) and with military ID documents specified by that art.?

Does the task organization include personnel of the American Red Cross Society whose duties are not exclusively medical or medical support? If so:

___ Are they aware of the restrictions on their use of the Red Cross emblem contained in art. 44 of GWS?

___ Are there any theater-specific LOW training requirements or ROE for the area?

## ANNEX B - INTELLIGENCE

### Appendix 1 - Essential Elements of Information

Should the plan call for:

___ collection of information about enemy's policies, attitudes and practices concerning compliance with LOW?

___ collection of information about allied policies, attitudes and practices concerning compliance with LOW?

___ collection of information about enemy and allied protective emblems and insignia?

___ locating enemy PW camps?

___ locating civilian and military hospitals or other medical installations?

___ locating civilian concentrations, including refugee camps?

___ locating civilian artistic, scientific or cultural institutions within the contemplated area of operations?

### Appendix 2 - Signals Intelligence

___ Is plan consistent with the prohibition against the presence or use of cryptographic equipment aboard hospital ships supporting the U.S. forces, as required by art. 34 of GWS(Sea)?

___ Are signals intelligence personnel aware of the prohibition on the enemy's use of cryptographic equipment and encrypted communications on hospital ships?

### Appendix 3 - Counterintelligence

___ Is plan consistent with prohibition on assassination contained in art. 23(b) of Hague IV and para. 2.11 of Exec Order 12333? (NOTE: Lawful targets and combatants may be attacked whenever and wherever found.)

___ Does plan provide guidance on the processing of captured enemy agents and spies consistent with art. 29 of Hague IV and para. 75 to 78 of FM 27-10?

___ Does plan comply with IL concerning the arrest, detention or expulsion of HN or third country nationals (GC generally)?

### Appendix 4 - Target List/Target Intelligence

___ Are any potential targets restricted or prohibited because of an erroneous interpretation of the requirements of the LOW? If so, they should be promptly identified to the issuing authority. (NOTE: Lawful targets and combatants may be attacked whenever and wherever found.)

___ Is target list consistent with IL governing attack of defended places only (paragraphs 39 and 40 of, and Chg I to, FM 27-10 and arts. 25 and 26 of Hague IV)?

___ If plan contemplates bombardment of a defended place containing civilians, does plan provide for the appropriate (i.e., either specific or general) warning (para. 43 of FM 27-10 and art. 26 of Hague IV)?

___ Is the target list consistent with restrictions on intentional attack of buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, hospital zones, safety zones, and places where the sick and wounded are collected (paragraphs 45 and 57 of FM 27-10 and provisions of Hague IV, Hague IX, GC, GWS, GWS(Sea), the Roerich Pact and the Hague Cultural Property Convention)?

___ If plan contemplates the attack of any buildings or zones described in the preceding para. on the grounds that the buildings or zones are being used for military purposes, does plan require the prior authorization of a sufficiently responsible level of command?

___ Does the target list reference or identify appropriate protective symbols (art. 27 of Hague IV, art. V of Hague IX, arts. 23 and 38 and Annex I of GWS, arts. 36, 38 and 40-44 of GWS(Sea), art. 23 of GPW, arts. 14 and 83 and Annex I of GC, arts. I and III of the Roerich Pact, and arts. 6 and 16-17 of the Hague Cultural Property Convention)?

___ Does plan identify the requirement for warnings and the appropriate level of authorizing authority where protective emblems and areas are abused by the enemy (art. 26 of Hague IV, art. 21 of GWS, art. 34 of GWS(Sea), and art. 11 of the Hague Cultural Property Convention)?

___ Is plan consistent with the right of self-defense where protected emblems and areas are misused against our forces?

**Appendix 5 - Human Source Intelligence**

___ Has the right of members of the force to PW status if captured been considered in determining whether modifications to or elimination of their uniforms, or other ruses, will be permitted (arts. 23, 24 and 29 of Hague IV and art. 4 of GPW)?

___ Does the plan include instructions to insure proper treatment of PWs during interrogation? In particular:

___ Is plan consistent with the prohibitions against the killing, torture or mistreatment of PWs effective from the time of their surrender (paragraphs 28, 29, 84 and 85 of PM 27-10 and the provisions of GPW and Hague IV cited therein)?

___ Does the plan recognize limitations on the interrogation of PWs including the requirement that they be interrogated in a language they understand (art. 17 of GPW)?

___ Does the plan provide a procedure for inventorying and safeguarding PW personal property?

___ Does the plan provide guidance on disposition of captured enemy armaments including limitations on the taking of souvenirs? (AR 608-4 of 28 Aug 1969, "Control and Registration of War Trophies and War Trophy Firearms." (Issued by all services as Chief of Naval Operations Instruction 3460.7A, AF Reg. 125-13 and Marine Corps Order 5800.6A).)

**Appendix 6 - Intelligence Support to EW, C3CM**
**Appendix 7 - Imagery Intelligence**
**Appendix 8 - Intelligence Estimate for OPSEC, PSYOPs, Military Deception Plan**
**Appendix 9 - Measurement and Signature Annex**
**Appendix 10 - Planning Guidance - Captured Enemy Equipment**

**ANNEX C - OPERATIONS**
**Appendix I - Nuclear Operations**
Tab A - Nuclear Options
Tab B - Nuclear Option Analysis
Tab C - Reconnaissance Operations to Support Nuclear Options

___ If nuclear weapons are to be deployed with U.S. forces, will any deployment route be over or through foreign countries that prohibit or restrict such weapons?

Tab D - Nuclear Fire Support Table/Target Lists.
Tab E - Nuclear Target Overlay

## Appendix 2 - Chemical Warfare and NBC Defense Operations

___ Does the plan contemplate the use of riot control agents, defoliants, chemical agents or gases of any kind? If so, is the intended use consistent with the Chemical Warfare Convention and Exec Order 11850? (also paragraphs 37 and 38 and Change 1 to FM 27-10 and art. 23(a) of Hague IV).

___ If plan contemplates the use of any of the above, is the prior authorization of a sufficiently responsible level of command required (Exec Order 11850 and Annex F, Joint Strategic Capabilities Plan)?

___ Is the contemplated use consistent with the provisions of the UN Environmental Modification Convention?

## Appendix 3 - Electronic Warfare Operations

## Appendix 4 - Psychological Operations

___ Is plan consistent with the requirement that PSYOPS efforts supporting U.S. forces comply with IL?

___ Do such propaganda operations constitute permissible ruses of war as allowed by art. 24 of Hague IV?

___ Is there sufficient guidance to ensure psyops efforts do not violate restrictions on coercion, compulsion, and force towards civilians in arts. 23 (h), 44 and 45 of Hague IV and arts. 27, 31 and 51 of GC?

## Appendix 5 - Special Operations

___ Does the plan contemplate clandestine operations designed to kill high ranking or key enemy officers or authorities? If so, are such plans compatible with the prohibition against assassination (para. 31 of FM 27-10, art. 23(b) of Hague IV and para. 2.11 of Exec Order 123331? (NOTE: Lawful targets and combatants may be attacked whenever and wherever found.)

___ Does the plan require unconventional warfare personnel to conduct operations in uniform to the extent practicable in order to avoid denial of PW status if captured (art. 29 of Hague IV and art. 4 of GPW)?

## Appendix 6 - Search and Rescue Operations

Is the plan consistent with:

___ the fact that search and rescue personnel and their transport do not enjoy special protection under the LOW (see, e.g., art. 27 of GWS(Sea))?

___ the requirement to take all possible measures to search for and collect shipwrecked, wounded and sick combatants, without delay following an engagement, IAW art. 15 of GWS and art. 18 of GWS(Sea)?

___ common art. 12 of GWS and GWS(Sea) requiring U.S. forces to care for shipwrecked, wounded and sick combatants without adverse distinction other than medical priority?

___ the requirement that enemy wounded, sick and shipwrecked combatants who fall into the hands of U.S. forces be accorded PW status in compliance with art. 14 of GWS, arts. 14 and 16 of GWS(Sea), and art. 4 of GPW?

___ the requirement that enemy wounded, sick and shipwrecked religious and medical personnel who fall into the hands of U.S. forces be accorded retained person status in compliance with, arts. 24, 26 and 28 of GWS and art. 33 of GPW?

## Appendix 7 - Deception

Is the plan consistent with:

___ prohibition against the use of treachery/perfidy to gain advantage over the enemy (art. 23 of Hague IV)?

___ prohibition against the improper use of a flag of truce, and misuse of the protective emblems of the GCs (art. 23(f) of Hague IV, art. 44 of GWS and art. 45 of GWS(Sea)I?

___ prohibition of art. 23(f) of Hague IV against improper use of the enemy's national flag, military insignia and uniform?

___ Are other ruses or deceptions consistent with the LOW (see, e.g., art. 24 of Hague IV)?

___ Does plan designate the appropriate level of command to determine whether medical installations, facilities and personnel will be protected by the protective emblem of the GCs or will rely upon camouflage and camouflage discipline (arts. 39 and 42 of GWS and art. 41 of GWS(Sea))?

**Appendix 8 - ROE**

___ Do any ROE restrict the operational freedom of action of the force because of an erroneous interpretation of the requirements of the LOW? If so, they should be promptly identified to the issuing authority.

___ Do any of the ROE erroneously make avoidance of collateral civilian casualties and/or damage to civilian objects a primary concern? Only intentional attacks of civilians and employment of weapons and tactics that cause excessive collateral civilian casualties are prohibited. Any actions taken to avoid collateral civilian casualties and damage must be consistent with mission accomplishment and force security.

___ Do the ROE recognize the inherent right of self-defense of all persons?

___ Is plan consistent with restrictions on unnecessary killing and the devastation, destruction, or seizure of property (paras. 3, 34, 41, 47, 56, 58, and 59 and Chg 1 to FM 27-10; Arts 27 and 56 of Hague IV and GC Art. 53)?

___ If plan contemplates any military actions which could only be justified as reprisals, is it consistent with the requirement that reprisals may only be conducted with the approval of the National Command Authorities (para. 497 of FM 27-10 and the provisions of the GCs cited therein)?

**Appendix 9 - Reconnaissance**

___ Has the right of members of the force to PW status if captured been considered in determining whether modifications to or elimination of their uniforms, or other ruses, will be permitted (arts. 23, 24 and 29 of Hague IV and art. 4 of GPW)?

**Appendix 10 - Operations Overlay**

**Appendix 11 - Concept of Operations**

___ Does the concept of operations contain any limitations on the operational freedom of action of the force which are erroneously attributed to LOW requirements? If so, they should be promptly identified to the issuing authority.

___ Is plan consistent with the restrictions on unnecessary killing and the devastation, destruction, or seizure of property (paragraphs 3, 41, 47, 56, 58, and 59 of FM 27-10; arts. 27 and 56 of Hague IV; and art. 53 of GC)?

___ If reprisals are contemplated, they may only be conducted with the approval of the National Command Authorities (para. 497 of FM 27-10).

**Appendix 12 - Fire Support**

___ Are fire support plans consistent with IL governing the attack of defended places only (paragraphs 39 and 40 of FM 27-10 and arts. 25 and 26 of Hague IV)?

___ If a fire support plan contemplates the bombardment of a defended place containing a concentration of civilians, does plan provide for the giving of an appropriate (i.e., either specific or general) warning (para. 43 of FM 27-10 and art. 26 of Hague IV)?

___ Are the fire support plans consistent with the restrictions on intentional attack of buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, hospital zones, safety zones, and places where the sick and wounded are collected (paragraphs 45 and 57 of FM 27-10 and provisions of Hague IV, Hague IX, GC, GWS, GWS(Sea), the Roerich Pact and the Hague Cultural Property Convention)?

___ If the fire support plans contemplate the attack or bombardment of any buildings or zones of the type described in the preceding para. on the grounds that the buildings or zones are being used for military purposes, do they require the prior authorization of a sufficiently responsible level of command prior to such attack or bombardment?

___ Do the fire support plans reference or identify appropriate protective symbols (art. 27 of Hague IV, art. V of Hague IX, arts. 23 and 38 and Annex I of GWS, arts. 36, 38 and 40- 44 of GWS(Sea), art. 23 of GPW, arts. 14 and 83 and Annex I of CC, arts. I and III of the Roerich Pact, and arts. 6 and 16-17 of the Hague Cultural Property Convention)?

___ Do the fire support plans identify the requirement for warnings and the appropriate level of authorizing authority where protective emblems and areas are abused (art. 26 of Hague IV, art. 21 of GWS, art. 34 of GWS(Sea), and art. 11 of the Hague Cultural Property Convention)?

___ Are the fire support plans consistent with the fundamental right of self-defense in situations where protective emblems and protected areas are misused against our forces?

___ Do maps and overlays of the AO identify targets entitled to special protection?

___ Are hospital, safety and neutral zones, if any, identified? Are they visibly marked (art. 23 and Annex I of GWS and art. 14 and Annex I of GC)?

___ Are special agreement hospital ship safety zones identified?

___ Are friendly/neutral embassies, consulates and chanceries identified?

___ Are PW and civilian internee and refugee camps identified?

___ Are they visibly marked (art. 23 of GPW and art. 83 of GC)?

___ Are hospitals, schools, & other civilian facilities (orphanages, retirement homes and the like) identified?

___ Are facilities and sites such as nuclear plants, chemical plants and dams, damage to which might be dangerous to the populace, identified?

___ Are important cultural/artistic locations identified? Are they visibly marked in accordance with art. 27 of Hague IV, art. V of Hague IX, art. III of the Roerich Pact, or art. 6 of the Hague Cultural Property Convention?

Tab A - Air Fire Plan
Enclosure 1 - Preplanned Close Air Support
Enclosure 2 - Air Target List
Enclosure 3 - Air Fire Plan Target Overlay

Tab B - Artillery Fire Plan
Enclosure 1 - Target Overlay
Enclosure 2 - Fire Support Table (Preparation Fires)
Enclosure 3 - Fire Support Table (Groups of Fires)

Tab C - Naval Gunfire Plan
Enclosure 1 - Naval Gunfire Support Operations Overlay
Enclosure 2 - Schedule of Fires
Enclosure 3 - Naval Gunfire Reports
Enclosure 4 - Radar Beacon Plan

Tab D - Chemical Fire Plan

___ Does the plan contemplate the use of riot control agents, defoliants, chemical agents or gases of any kind? If so, is the intended use consistent with the Chemical Warfare Convention and Exec Order 11850? (also paragraphs 37 and 38 of, and Chg I to, FM 27-10 and art. 23(a) of Hague IV).

___ If plan contemplates the use of any of the above, if the prior authorization of a sufficiently responsible level of command required (Exec Order 11850 and Annex F, Joint Strategic Capabilities Plan)?

___ Is the contemplated use consistent with the provisions of the UN Environmental Modification Convention?

(1) Enclosure 1 - Chemical Fire Support Table/Target List
(2) Enclosure 2 - Chemical Target Overlay

Tab E - Target List
Tab F - Fire Support Coordination Plan
Tab G - Fire Support Communication Plan
Tab H - Counter-mechanized Fire Plan

**Appendix 13 - Non-combatant Evacuation Operations (NEO)**
**Appendix l4 - Escape and Evasion Operations**
**Appendix 15 - Counterattack Plan Breaching Plan**
**Appendix 16 - Explosives Ordnance Disposal Plan**
**Appendix 17 - Amphibious Operations**

**ANNEX D - LOGISTICS**

___ Will the plan support the logistics requirements for anticipated PWs, refugees and internees?

___ If plan contemplates an occupation can it be supported logistically with respect to the requirements of the civilian population (arts. 47-78 of GC)?

**Appendix 1 - Petroleum, Oils, and Lubricants Supply**
**Appendix 2 - Mortuary Services**

___ Does the plan provide for the collection, care, and accounting for enemy dead in accordance with arts. 16 and 17 of GWS and arts. 19 and 20 of GWS(Sea)?

___ Is plan consistent with the limitations on cremation and the provisions regarding burial at sea of enemy dead (art. 17 of GWS and art. 20 of GWS(Sea))?

**Appendix 3 - Sustainability Operations**
**Appendix 4 - Mobility/Transportation**

___ Is medical transport marked, at the discretion of the Commander, with the protective emblem provided for by art. 39 of GWS and art. 41 of GWS(Sea), and is their intended use restricted exclusively to medical purposes if so marked?

___ Will the plan support the possible requirement for evacuation of PWs, civilian internees, refugees, and the sick and wounded?

___ Have the parties to the conflict been notified of the names and descriptions of all hospital ships been at least ten days before their employment, as required by arts. 22, 24 and 25 of GWS(Sea)?

___ Have all converted hospital ships been stripped of inappropriate armament and cryptographic equipment?

___ Are all hospital ships, rescue craft and lifeboats marked IAW the requirements of art. 43 of GWS(Sea)?

___ If hospital ships of the American Red Cross Society, other recognized U.S. relief societies or private U.S. citizens are employed, have they been given an official commission as required by art. 24 of GWS(Sea)?

___ If hospital ships of a national Red Cross society, other officially recognized relief societies, or private citizens of neutral countries are employed, have they placed themselves under the control of one of the parties to the conflict as required by art. 25 of GWS(Sea)?

___ Are crews and medical personnel of hospital ships aware of their rights, duties and obligations under arts. 29, 32 and 34-37 of GWS(Sea)?

___ If any aircraft are to be exclusively employed for medical and medical support purposes are they marked in accordance with the provisions of art. 36 of GWS and art. 39 of GWS(Sea)?

**Appendix 5 - Civil Engineering Support Plan**

___ Does the plan provide, as far as possible, for the locating of medical establishments and units in such a manner as not to imperil their safety, in accordance with art. 19 of GWS?

___ Does the plan provide for the locating of PW camps in such a manner as not to expose them to the hazards of combat, IAW art. 23 of GPW?

___ Is plan consistent with the possible requirement for construction of PW, internee, and civilian refugee camps?

___ Is the barrier plan consistent with the prohibition against indiscriminate and uncharted mining?

**Appendix 6 - Non-nuclear Ammunition**

___ Does the plan provide guidance on disposition of captured enemy armaments including limitations on the taking of souvenirs? (AR 608-4 of 28 Aug 1969, "Control and Registration of War Trophies and War Trophy Firearms." (Issued by all services as Chief of Naval Operations Instruction 3460.7A, AF Reg 125-13 and Marine Corps Order 5800.6A).

**ANNEX E - PERSONNEL**

___ Are all members of the force subject to the UCMJ for LOW purposes?

___ Is there a judge advocate designated to deal with the ICRC?

___ Is a POC designated to collect evidence on war crimes?

**Appendix 1 - Enemy PWs, Civilian Internees, and Other Detained and Retained Persons**

___ Does the plan designate responsibility to establish PW compounds and arrange for PW visits (by ICRC)?

___ Is plan consistent with the provisions of AR 190-8, Enemy Prisoners of War, Civilian Internees and Detained Persons?

___ Does plan include procedures for ascertaining whether various persons who fall into the hands of U.S. forces are entitled to treatment as PWs or retained personnel, or to be released (arts. 4 and 5 of GPW, arts. 24-32 of GWS, and arts. 36- 37 of GWS (Sea))?

___ Is plan consistent with the requirement that where there is any doubt as to the status of a person who has committed a belligerent act and is in the hands of U.S. forces such person shall be treated as a PW until such time as his status is determined by a competent tribunal (art. 5 of GPW)?

___ Does plan provide procedures for art. 5 (GPW) tribunals?

___ Does the plan include appropriate instructions to insure proper treatment of PWs at the point of capture and during interrogation? In particular:

___ Is plan consistent with the prohibitions against the killing, torture or mistreatment of PWs effective from the time of their surrender (paras. 28, 29, 84 and 85 of FM 27-10 and the provisions of GPW and Hague IV cited therein)?

___ Does plan recognize the limitations on the interrogation of PWs, including the requirement that they be interrogated in a language they understand (art. 17 of GPW)?

___ Does the plan provide a procedure for inventory and safeguarding PW personal property?

___ Are procedures for the evacuation of PWs consistent with arts. 19 and 20 of GPW?

___ Does the plan provide for furnishing ID's to PWs who possess none, consistent with art. 18 of GPW?

___ If plan contemplates transfer of PWs to the custody of allied forces, is it consistent with the requirements of art. 12 of GPW and DoD Directive 5100.69, "DoD Program for Prisoners of War and Other Detainees"?

___ Does the plan assign responsibility to an appropriate component command (usually Army) for the care and handling of PWs? In particular:

___ Internment (arts. 21-24 of GPW);

___ Quarters, food and clothing (arts. 25-28 of GPW);

___ Hygiene and medical care (arts. 29-32 and 112-114 of GPW)

___ Religious, educational and recreational activities (see arts. 34-38 of GPW);

___ Labor and compensation (arts. 49-57 of GPW);

___ Information bureaus, mail service and other communications with the exterior (arts. 69-77 of GPW);

___ Prisoner relations (arts. 79-81 of GPW);

___ Discipline and penal sanctions (arts. 82-108, and 115 of GPW);

___ Release and repatriation (arts. 109-110, and 112-119 of GPW);

___ Care of enemy wounded and sick and graves registration (arts. 109-110, 112-114, and 120-121 of GPW).

___ Is plan consistent with arts. 79-135 concerning the treatment of civilian internees?

**Appendix 2 - Processing of Formerly Captured, Missing or Detained U.S. Personnel**

___ Does plan include appropriate procedures for reporting alleged war crimes and related misconduct committed by the enemy, and alleged misconduct by U.S. and allied PWs, and assign responsibility for the collection and preservation of evidence of all such matters (see, e.g., common art., 49/50/129/146 of the GCs)?

**Appendix 3 - Finance and Disbursement**
**Appendix 4 - Legal [see Appendix for formats and sample]**

**Legal Assistance**
**Military Justice**

___ Are all members of the force subject to the UCMJ for LOW purposes?

___ Are units properly attached for jurisdiction?

**Claims**

**International Law Considerations**

___ Have the various elements of plan been reviewed for LOW considerations by the appropriate staff sections and members of the executive and special staffs?

___ Does the concept of operations contain any limitations on the operational freedom of action of the force which are erroneously attributed to LOW requirements? If so, they should be promptly identified to the issuing authority.

___ Do any of the ROE restrict the operational freedom of action of the force because of an erroneous interpretation of the requirements of the LOW? If so, they should be promptly identified to the issuing authority.

___ Do any of the ROE erroneously make avoidance of collateral civilian casualties and/or damage to civilian objects a primary concern? Only intentional attacks of civilians and employment of weapons and tactics that cause excessive collateral civilian casualties are prohibited. Any actions taken to avoid collateral civilian casualties and damage must be consistent with mission accomplishment and force security.

___ Do ROE recognize the inherent right of self-defense of all persons?

___ Have the requirements for any special LOW training, planning and equipment been met? In particular:

___ Are civilians or other nonmilitary personnel accompanying the force equipped with the proper identification provided for such individuals (see, e.g., art. 40 of GWS, art. 4(A) (4) and Annex IV(A) of GPW, and DoD Instruction 1000 .1, "ID Cards Required by the Geneva Conventions"), and have they been instructed in their LOW rights, duties and obligations?

___ Does the force include personnel of the American Red Cross Society or other U.S. voluntary aid societies assigned exclusively to medical and medical support duties (arts. 24 and 26 of GWS)? If so:

Are they subject to U.S. military laws and regulations?

Has their intended assistance been notified to the enemy?

Have they been instructed in their LOW rights/duties/obligations?

Have they been furnished the ID cards required by art. 40 of GWS?

___ Does the force include personnel of a recognized national Red Cross society or other voluntary aid societies of a neutral country (art. 27 of GWS)? If so:

Are they present with U.S. authorization and the previous consent of their own government?

Are they under official U.S. control?

Has their intended assistance been notified to the enemy?

Have they been instructed in their LOW rights/duties/obligations?

Have they been furnished the ID cards required by art. 40 of GWS?

___ Does the force include personnel of the American Red Cross Society whose duties are not exclusively medical? If so, are they aware of the restrictions on their use of the Red Cross emblem contained in art. 44 of GWS?

___ Are the medical and religious personnel of the force equipped with the protective identification provided for such individuals (art. 40 and Annex II of GWS and art. 42 and the Annex to GWS(Sea)), and have they been trained in their special rights, duties and obligations under the LOW?

___ Has a model of the protective ID card for such personnel been communicated to the enemy as required by art. 40 of GWS?

___ Are there any theater-specific LOW training requirements or ROE for the area into which the force is to be deployed?

Should the plan call for:

___ the collection of information about the enemy's policies, attitudes and practices concerning compliance with the LOW?

___ the collection of information about allied policies, attitudes and practices concerning compliance with the LOW?

___ the collection of information about enemy and allied protective emblems and insignia?

___ Does plan include procedures for ascertaining whether various persons who fall into the hands of U.S. forces are entitled to treatment as PWs or retained personnel, or to be released IAW arts. 4 and 5 of GPW, arts. 24-32 of GWS, and arts. 36- 37 of GWS (Sea))?

___ Is plan consistent with the requirement that where there is any doubt as to the status of a person who has committed a belligerent act and is in the hands of U.S. forces such person shall be treated as a PW until such time as his status is determined by a competent tribunal (art. 5 of GPW)?

___ Does the plan provide procedures for setting up and operating an art. 5 (GPW) tribunal?

___ Does plan include appropriate procedures for reporting alleged war crimes and related misconduct committed by the enemy, and alleged misconduct by U.S. and allied PWs, and assign responsibility for the collection and preservation of evidence of all such matters (see, e.g., common art. 49/50/129/146 of the GCs)?

___ Is plan consistent with the serious incident reporting requirements of higher headquarters as they pertain to alleged war crimes and related misconduct?

___ If plan contemplates an occupation, is it consistent with the obligation of an occupier to restore and preserve public order and safety while respecting, in accordance with art. 43 of Hague IV, the laws in force in that country?

___ If plan includes draft proclamations, laws, or ordinances for use in an occupied territory, do those documents conform to the requirements of IL as set forth in arts. 42-56 of Hague IV and arts. 64-78 of the GC?

**International Agreements and Congressional Enactments**

If plan contemplates deployment of U.S. forces into a foreign territory, the following questions should be answered:

___ Will deployment of U.S. forces into the foreign territory be at the request of or with the consent of the lawfully constituted government? Consider arts. 2 and 51 of the UN Charter, and relevant provisions of any regional defense treaties, SOFAs, or other agreements applicable to the foreign territory involved.

___ Will deployment of U.S. forces into the foreign territory be part of a peacekeeping mission undertaken pursuant to the UN Charter or other international agreements, including regional treaties? Consider arts. 11, 12, 14, 24, 39-49, and 52-54 of the UN Charter, and arts. 24, 25, and 43 of the OAS Charter.

___ Is deployment of U.S. forces into the foreign territory an act of individual or collective self-defense against an armed attack, either direct or indirect?

Consider arts. 51 and 103 of the UN Charter, and any collective defense arrangements involving the foreign territory and the U.S.. Also, consider any Congressional enactment that may be applicable.

___ Is deployment of U.S. forces into the foreign territory to protect or extract U.S. or foreign nationals? Consider the traditional theories of justifiable intervention developed under the customary and codified IL.

___ Is deployment of U.S. forces into the foreign territory to protect or extract sensitive U.S. material or equipment such as nuclear ordnance or cryptographic material or to protect U.S. (as opposed to private installations such as embassies, consulates or military sites)?

Consider the analogy to traditional theories of justifiable intervention under customary and codified IL to protect U.S. nationals and property.

If plan contemplates the deployment of U.S. forces into foreign territory, consider whether the War Powers Resolution is applicable.

___ Does the deployment situation clearly indicate imminent U.S. involvement in hostilities?

___ Will the deployed forces be equipped for combat?

___ Will the deployed forces substantially enlarge U.S. forces already located in the foreign territory?

If plan specifies certain methods and routes of deployment, the following questions should be answered:

___ Does plan contemplate deployment routes which traverse the airspace, territory or territorial seas of any foreign country or the establishment of staging areas or bases within the foreign territory?

___ Does an agreement exist with the foreign country which grants the U.S. such rights? If so, does the plan make reference to the agreement and is it consistent with the terms of the agreement? If such an agreement exists, does it require consultation with and the consent of the foreign country prior to exercising those rights?

If consultation and consent are required, does plan recognize the necessity of securing such consultation or consent through Defense or State Department channels prior to deployment?

If no such agreement exists, does plan recognize the necessity of securing such rights through Defense or State Department channels prior to deployment?

___ Are planned deployment routes, staging areas, en route bases, safe havens, etc., set forth in plan consistent with applicable international agreements?

If nuclear weapons are to be deployed with U.S. forces, will any deployment route be over or through foreign countries that prohibit or restrict such weapons?

Will any staging or en route bases be established in areas recognized as demilitarized zones?

If plan contemplates deployment by sea route through territorial waters, will such passage conform to the requirements of innocent passage as set forth in arts. 1-17 and 23 of the Territorial Sea Convention?

___ Is the foreign state a party to the Territorial Sea Convention?

___ Do we have SOFAs with the countries U.S. forces will pass through or be deployed into? If so:

Do the agreements allow U.S. forces sufficient rights and freedom of action to carry out the mission contemplated by plan?

Do the agreements have any provisions changing the status of U.S. personnel in the event of hostilities?

Do the agreements have any provisions that are either automatically suspended or become subject to review in the event of hostilities?

___ If we have no SOFA with a country through which U.S. forces will pass or be deployed into, or if an existing agreement is inadequate for planned mission:

Does plan recognize need to initiate through Defense or State Dept channels discussions with foreign authorities regarding appropriate arrangements governing the status of U.S. forces?

___ Does the plan assign responsibility to an appropriate command or staff office for maintaining liaison with the U.S. diplomatic mission and local authorities on status of forces matters?

**Appendix 5 - Military Postal Service**

**ANNEX F - PUBLIC AFFAIRS**

___ Is plan consistent with the serious incident reporting requirements of higher headquarters as they pertain to alleged war crimes and related misconduct (the various directives in the Appendix)?

**Appendix 1 - Personnel Requirements**
**Appendix 2 - Equipment Requirements**

**ANNEX G - CIVIL AFFAIRS**

___ Is plan consistent with the guidance contained in FM 41-5 and FM 41-10?

**Appendix 1 - Public Safety**

___ Does the plan provide guidance on requests for asylum and temporary refuge in accordance with DoD Directive 2000.11, "Procedures for Handling Requests for Political Asylum and Temporary Refuge"?

___ If plan contemplates the internment of civilians, does it provide guidance on the establishment and operation of internee camps in accordance with the requirements of arts. 79-135 of GC until such time that the camps can be turned over to other agencies?

___ If plan contemplates occupation of foreign or enemy territory by U.S. forces, does plan provide that civil affairs operations conform to IL relating to occupations as set forth in arts. 42- 56 of Hague IV and arts. 47-78 of GC?

___ Is the plan consistent with the obligation of an occupier to restore and preserve public order and safety while respecting, in accordance with art. 43 of Hague IV, the laws in force in that country?

___ If the plan includes draft proclamations, laws, or ordinances for use in the occupied territory, do those documents conform to requirements of IL as set forth in arts. 42-56 of Hague IV and arts. 64-78 of the GC?

___ Is plan consistent with IL to avoid the unnecessary destruction of public utilities and safety facilities?

___ Does plan comply with IL regarding methods of property control and does it recognize the limitations on the requisitioning, seizure and use of civilian property (see, e.g., arts. 43 and 47-56 of Hague IV and arts. 33, 53, 97 and 108 of GC)?

___ Is plan consistent with IL in affording maximum protection to shrines, buildings, symbols, etc., associated with the religion and culture of the civilian populace?

___ If plan contemplates the utilization of the services and labor of the civilian population, are the procedures consistent with the requirements of Hague IV and GC in addition to U.S. policy as set forth in DA Pam 690-80, Administration of Foreign Labor During Hostilities? Are they consistent with existing alliance agreements and SOFAs?

___ Does the plan allow procedures for civilians to send and receive news of a strictly personal nature to members of their families in accordance with arts. 25 and 26 of GC?

___ Is plan consistent with the prohibition against the improper transfer, deportation or evacuation of civilians in occupied territory contained in art. 49 of GC?

### Appendix 2 - Public Health and Welfare

___ Does plan ensure that all aspects of the civil affairs program conform to the requirements of IL, and in particular to GC, with a view to giving maximum attention to alleviating the human suffering of the civilian population?

___ Does the plan ensure refugee collection points and routes of evacuation are consistent with scheme of maneuver and as remote as practicable from areas where combat can be expected?

___ Does the plan allow, where tactically appropriate, for the evacuation from besieged areas of wounded, sick, infirm, young and aged civilians as set forth in art. l7 of GC?

___ Is plan consistent with the special obligation imposed by art. l6 and other provisions of GC to give particular protection and respect to civilian wounded and sick, aged and infirm, and expectant mothers?

___ Does plan provide that displaced persons, refugees and evacuees be treated in accordance with the requirements of IL?

___ Does the plan comply with the protection required for civilian hospitals and staff set forth in arts. 18-20 and 57 of GC?

___ Does plan provide for or reference draft agreements for the establishment of safety or neutral zones for civilians as permitted in art. 15 of GC?

### Appendix 3 - Information and Education

___ If plan includes draft proclamations, laws, or ordinances for use in the occupied territory, do those documents conform to the requirements of IL as set forth in arts. 42-56 of Hague IV and arts. 64-78 of the GC?

## ANNEX H - ENVIRONMENTAL SERVICES

___ Are the provisions of plan for disposition of enemy dead consistent with both the LOW (art. 17 of GWS and art. 20 of GWS(Sea)) and environmental restrictions?

___ Are the provisions of plan for disposition of captured munitions, fuels, and other toxic and dangerous substances consistent with environmental restrictions such as the UN Environmental Modification Convention?

**ANNEX J - COMMAND RELATIONSHIPS**

___ Are the command relationships consistent with the concept and obligation of command responsibility under the LOW?

**Appendix 1 - Command Relations Diagram**

**ANNEX K - COMMAND, CONTROL, AND COMMUNICATIONS SYSTEMS**

**Appendix 1 - Communications Security**

___ No cryptographic methods and equipment on hospital ships (art. 34 of GWS(Sea)).

___ Does plan provide for medical aircraft to have the communications capability to respond to "every [enemy] summons to alight" during mutually agreed medevac missions as required by art. 36 of GWS and art. 39 of GWS(Sea)?

___ Does the plan provide for the communications capability to communicate with the enemy in furtherance of the various notification, truce and local agreement provisions of the GCs and Hague IV?

**Appendix 2 - C3 Protection**

**Appendix 3 - Communications Planning**

___ Does the plan allow for communications with the enemy for truce and local agreement purposes?

___ If plan contemplates local agreements with the enemy for medical aircraft operations and overflights, do medical aircraft have the communications capability to respond to "every [enemy] summons to alight" required by art. 36 of GWS and art. 39 of GWS(Sea)?

**Appendix 4 - Defense Courier Service**

**ANNEX L - OPERATIONS SECURITY**

**Appendix 1 - Operations Security Estimate**

**Appendix 2 - Operations Security Measures**

___ Should the plan call for the collection of information about allied policies, attitudes and practices concerning compliance with the LOW?

___ Should the plan call for the collection of information about enemy and allied protective emblems and insignia?

**ANNEX M - MAPPING, CHARTING & GEODESY**

Do maps and overlays of the contemplated area of operations of U.S. forces identify targets that may be entitled to special protection?

___ Are hospital, safety and neutral zones, if any, identified? Are they visibly marked (art. 23 and Annex I of GWS and art. 14 and Annex I of GC)?

___ Are special agreement hospital ship safety zones identified?

___ Are friendly/neutral embassies, consulates and chanceries identified?

___ Are PW and civilian internee and refugee camps identified? Are they visibly marked (art. 23 of GPW and art. 83 of GC)?

___ Are hospitals, schools, and civilian facilities such as orphanages, retirement homes identified?

___ Are facilities and sites such as nuclear plants, chemical plants and dams, damage to which might be dangerous to the populace, identified?

___ Are important cultural and artistic locations identified? Are they visibly marked in accordance with art. 27 of Hague IV, art. V of Hague IX, art. III of the Roerich Pact, or art. 6 of the Hague Cultural Property Convention?

## ANNEX N - SPACE SYSTEMS

## ANNEX P - WARTIME HOST NATIONS SUPPORT

___ Are support agreements consistent with the provisions of DA Pam 660-80, Administration of Foreign Labor During Hostilities (1971) (NAVSO P-1910; AFM 40-8; MCO P 12190.1) and with any relevant alliance agreements, Acquisition and Cross Servicing Agreements or SOFAs? [See Chapter 16]

## ANNEX Q - MEDICAL SERVICES

___ Is plan consistent with the limitations on capture or destruction of enemy medical material, stores and equipment imposed by art. 33 of GWS and art. 38 of GWS(Sea)?

___ Is plan consistent with the qualified requirement of arts. 23 and 56 of GC for the free passage of medical and hospital stores intended only for civilians of the opponent?

___ If plan contemplates an occupation does it provide for medical supplies for the occupied population to the fullest extent of the means available (as required by art. 55 of GC)?

___ Is plan consistent with the limitations on requisition of medical materials and stores of an occupied population contained in art. 57 of GC?

___ Does the plan provide, subject to the Commander's discretion, for the marking with the Red Cross of all U.S. medical vehicles, facilities and stores in accordance with arts. 39 and 42 of GWS and art. 41 of GWS(Sea), and for their use exclusively for medical purposes if so marked?

___ Are medical personnel of the force (art. 24 of GWS) equipped with the protective emblems provided for by art. 38 of GWS and art. 41 of GWS(Sea), and with the special identification cards referenced in those conventions?

___ Are such personnel assigned exclusively to medical duties or to the administration of medical organizations (art. 24 of GWS)?

___ Have such personnel been trained in their special rights, duties and obligations under the LOW?

___ Are auxiliary medical personnel (art. 25 of GWS) equipped with protective emblems provided for by art. 41 of GWS and with military ID documents specified by that art.?

___ Does the plan reference or identify appropriate protective symbols (art. 38 of GWS and art. 41 of GWS(Sea)?

___ Does the plan provide for a command determination as to whether medical personnel and facilities will display the protective emblem or will rely upon camouflage and camouflage discipline?

___ Does the plan provide, subject to the Commander's discretion, for the marking with the Red Cross of all U.S. medical vehicles, facilities and stores in accordance with arts. 39 and 42 of GWS and art. 41 of GWS(Sea), and for their use exclusively for medical purposes if so marked?

___ Does the plan provide, as far as possible, for the locating of medical establishments and units in such a manner as not to imperil their safety, in accordance with art. 19 of GWS?

___ Have the names and descriptions of all hospital ships been notified to the parties to the conflict at least ten days before their employment as required by arts. 22, 24 and 25 of GWS(Sea)?

___ Is plan consistent with the prohibition against cryptographic methods and equipment on hospital ships (art. 34 of GWS(Sea))?

___ Have all vessels converted to hospital ships been stripped of inappropriate armament and cryptographic equipment?

___ Are all hospital ships, rescue craft, and lifeboats marked IAW the requirements of art. 43 of GWS(Sea)?

___ If hospital ships of the American Red Cross Society, other recognized U.S. relief societies or private U.S. citizens are employed, have they been given an official commission as required by art. 24 of GWS(Sea)?

___ If hospital ships of a national Red Cross society, other officially recognized relief societies, or private citizens of neutral countries are employed, have they placed themselves under the control of one of the parties to the conflict as required by art. 25 of GWS(Sea)?

___ Are crews and medical personnel of hospital ships aware of their rights, duties and obligations under arts. 29, 32 and 34-37 of GWS(Sea)?

___ If any aircraft are to be exclusively employed for medical and medical support purposes are they marked in accordance with the provisions of art. 36 of GWS and art. 39 of GWS(Sea)?

___ Is plan consistent with the fact that search and rescue personnel and their transport do not enjoy special protection under the LOW (see, e.g., art. 27 of GWS(Sea))?

___ Does the plan contemplate local agreements with the enemy for medical aircraft operations and overflights (art. 36 of GWS and art. 39 of GWS(Sea)?

___ If so, do medical aircraft have the communications capability to respond to "every [enemy] summons to alight" required by art. 36 of GWS and art. 39 of GWS(Sea)?

___ Is plan consistent with the requirement to take all possible measures to search for and collect shipwrecked, wounded and sick combatants, without delay following an engagement, in accordance with art. 15 of GWS and art. 18 of GWS(Sea)?

___ Is plan consistent with common art. 12 of GWS and GWS(Sea) requiring U.S. forces to care for shipwrecked, wounded and sick combatants without adverse distinction other than medical priority?

___ Is plan consistent with the requirement that enemy wounded, sick and shipwrecked combatants who fall into the hands of U.S. forces be accorded PW status in compliance with art. 14 of GWS and arts. 14 and 16 of GWS(Sea)?

___ Is plan consistent with the requirement that enemy wounded, sick and shipwrecked religious and medical personnel who fall into the hands of U.S. forces be accorded retained person status in compliance with arts. 24, 26 and 28 of GWS?

___ Does the plan provide for the care of enemy wounded and sick and graves registration (arts. 109-110, 112-114 and 120-121, GPW).

___ Is plan consistent with the limitations on capture or destruction of enemy medical material, stores and equipment imposed by art. 33 of GWS and art. 38 of GWS(Sea)?

___ Is plan consistent with the special obligation imposed by art. 16 of GC to give particular protection and respect to civilian wounded and sick, aged and infirm, and expectant mothers?

___ Is plan consistent with the qualified requirement of arts. 23 and 56 of GC for the free passage of medical and hospital stores intended only for civilians of the opponent?

___ If plan contemplates an occupation does it provide for medical supplies for the occupied population to the fullest extent of the means available (as required by art. 55 of GC)?

___ Does the plan recognize the limitations on requisition of medical material and stores of an occupied population?

___ Are the provisions of plan for disposition of enemy dead consistent with both the LOW (art. 17 of GWS and art. 20 of GWS(Sea)) and environmental restrictions?

## ANNEX R - CHAPLAIN SERVICES

# INTERNATIONAL AGREEMENTS REVIEW CHECKLIST

1. Agreement being reviewed:

   a. Title: _____

   _____

   (Is this title accurately descriptive of the substance of the agreement?)

   b. Parties: _____

   _____

   c. Type of Agreement: _____

   d. Purpose: _____

   _____

   _____

   e. Is there already another agreement covering this subject? Check TIAS and other resources for redundancy.

2. Procedural authority for negotiation.

   a. Approval authority (Does the agreement have "policy significance?"): _____

   b. Do you have written documentation of authority to negotiate?

   c. How designated: _____

   d. Negotiator: _____

   e. Should there be terms of reference or other written guidance for the negotiator?

   f. Is there a need to limit the negotiator's authority, *e.g.,* should agreements reached at the table be *ad referendum* only?

   g. Does the person representing the other party appear to have proper authority?

3. Substantive authority.

   a. Enumerate each commitment or responsibility the U.S. will assume under the agreement. Look especially for:

      (1) Security commitments.

      (2) Obligations that cost money.

      (3) Obligations that impact on operational flexibility.

      (4) Provisions affecting the privileges, immunities, responsibilities and quality of life of U.S. personnel.

   b. For each commitment or obligation, articulate a corresponding legal authority, *e.g.*:

(1) U.S. Constitution.

(2) Statute.

(3) Regulation.

(4) Existing treaty or other international agreement.

4. Substance of the agreement.

a. Is there language signifying the intent of the parties to be bound under international law?

b. Does the agreement purport to subject the force, as an instrumentality of the U.S. Government, to the jurisdiction of the receiving state?

c. If under the agreement U.S. personnel will be present in foreign territory, is there adequate provision for their status?

d. Does the agreement provide for immunity from taxation by the receiving state for U.S. activities, including contracting and acquisition of goods and services, and import/export of materials?

e. If facilities will be built under the agreement, is there provision for meeting U.S. standards/specifications?

f. If construction or improvement of facilities is funded by the U.S., is there provision for recouping their residual value upon turnover to the host nation?

5. Fiscal matters.

a. Has a funding source been identified?

b. Have funds been budgeted (check out-years) to support all commitments or obligations under the agreement? In the alternative, is there an indication that the budgeting of funds will be requested?

c. Specify budget category data and estimated cost of performance in current/out years.

d. Are planned expenditures consistent with the purpose for which the funds were appropriated?

e. Are any planned expenditures inconsistent with fiscal policies?

f. Does the agreement have a fund availability qualification? If not, has an Obligation been created improperly?

g. Have pertinent agreements concerning claims, security, reciprocal medical care, or reciprocal procurement/ logistics been factored into the agreement and, if necessary, incorporated by reference? If yes, list related supporting agreements.

h. If the agreement provides for reimbursement to the U.S., is there authorization for deposit in a specific account, or does it go into miscellaneous receipts?

6. Security review.

a. Is the agreement properly classified for its substantive content?

b. Has the J2 chopped on the draft agreement?

c. Will classified military information pass from the U.S. to the other party to the agreement?

d. Is there a General Security of Information Agreement with the other prospective party?

e. Even if unclassified, is information susceptible to transfer such that a Technology Assessment/Control Plan is required?

f. Are there provisions in the agreement to safeguard against the unauthorized dissemination of classified information?

g. Does the agreement or any of the information it covers implicate National Disclosure Policy?

h. Does any classified information concern special category information, *e.g.*, "sensitive" technology?

i. Will the agreement result in foreign visitors or liaison officers?

7. Signature page.

a. Are the signers properly identified:

(1) By name: _____

(2) By title: _____

(3) By position: _____

(**NOTE**: This information is frequently left blank until the day of actual signing, then all that is written in are the signatures. Names should be typed to ensure legibility, and the signers should be properly identified. "For the United States of America" is not descriptive of the position of the person signing the agreement and does little to suggest his authority.)

b. Is there a place for dating the agreement?

c. Is the date of entry into force (effective date) indicated? _____

d. Is there a statement regarding the language of the agreement?

e. If there is a version in any language other than English, is there a certificate that they are substantially the same by a qualified U.S. linguist?

8. Miscellaneous.

Is there an indication that the office or command responsible for concluding the agreement is aware of the reporting requirements of the Case Act (1 U.S.C. § 112) and enclosure (6) to DoD Directive 5530.3?

# CONTRACT AND FISCAL LAW

**PREPARATION AND PREDEPLOYMENT**

- __ Review legal studies and materials dealing with the area of operations (AO).
- __ The judge advocate should assist the G-4 in obtaining extended purchase authority, LAW AR 37-21, up to the limit of 10 U.S.C. § 2304 for Ordering Officers and Class A Agents, down to battalion level, if necessary; develop guidance for the use of operations funds; and assist the Class A Agents in distributing such funds.
- __ In the absence of an established organization in the Area of Operations (AO) (i.e., one with contracting officers, civil affairs personnel, and a full complement of combat service support), at what level will CDRs be authorized to contract for necessary supplies and services? This warrant must be obtained from the Head of the Contracting Activity (e.g. CDR, FORSCOM; CDR, Eighth Army, etc.).
- __ The probable need to ratify irregular acquisitions, (i.e., those made by individuals not authorized to commit the U.S.). See AR 37-107, para. 5-25; and applicable sections of the Federal Acquisition Regulations (FARS), DoD Acquisition Regulations (DFARS) and Army Acquisition Regulations (AFARS).
- __ What kinds of funds will be available for acquisition of supplies and services in the AO, and what controls will be placed on the expenditure or obligation of these funds?
- __ How is the furnishing of goods and supplies by the U.S. forces to allied forces to be accomplished.
- __ Review OPLAN/OPORDER to see if overseas procurement will be necessary.

**WHILE DEPLOYED**

- __ Establish immediate contact with the contracting officer and civil affairs element which identity and coordinate acquisition of locally available materials and services.
- __ Provide legal advice and other assistance, as required, on all contract and fiscal law matters.
- __ When procuring legal property by requisition or seizure (as opposed to contracting), ensure that receipts describing the items seized, the location, the owner, and the custodian are prepared.
- __ Coordinate real estate arrangements in the area of operations with engineers accompanying the force. (See AR 405-15).
- __ Ensure that minor and emergency construction comply with applicable law & regulation. (See AR 415-35).
- __ To the extent possible, accompany contracting personnel dealing with the local populace.

**CONTRACT LAW REFERENCES**

- Federal Acquisition Regulation (FAR).
- DoD Federal Acquisition Regulation Supplement (DFARS).
- Department of Army Federal Acquisition Regulation Supplement (AFARS).
- AR 37-20, Administrative Control of Appropriated Funds.

- AR 37-21, Commitments and Obligations.
- AR 37-103-1, Imprest Funds.
- AR 37-107, Processing and Payment of Commercial Accounts.
- AR 405-15, Real Estate Claims Founded Upon Contract.
- AR 415-35, Minor Construction, Emergency Construction, and Replacement of Facilities Damaged or Destroyed.
- DA Pam 27-153, Procurement Law.
- DA Pam 715-xx, Contingency Contracting
- DA Pam 690-80, Use and Administration of Local Civilians in Foreign Areas During Hostilities.
- TM 5-300, Real Estate Operations in Overseas Command.
- Forms: SF 44 Vouchers, DD 1155 Vouchers

# MILITARY JUSTICE (CRIMINAL LAW)

## PREPARATION AND PREDEPLOYMENT

- __ Ensure all deploying soldiers are assigned or attached to a deploying unit for **UCMJ (jurisdiction)** purposes.
- __ Plan for the exercise of criminal and administrative jurisdiction over personnel left behind. Ensure all rear detachment personnel are assigned or attached to a follow-on unit for **UCMJ (jurisdiction)** purposes.
- __ Determine if a **SOFA** exists or arrangements have been made for exclusive jurisdiction over U.S. personnel (Military? Civilians/contractors?). If there is a SOFA, is it expressly applicable during hostilities?

## WHILE DEPLOYED

Plan for continued military justice operations. Depending on the anticipated duration, consider the following:

- __ Ensure that, if Art. 32 investigations and courts-martial will be conducted during the deployment, **courtroom facilities** have been located and equipped.
- __ Should a military judge deploy to try cases at the location?
- __ Have the Trial Judiciary and Circuit Chief Judge been notified?
- __ How will Art. 32 investigations be conducted at location of deployment?
- __ How will pretrial confinement be established?
- __ How will summary court officers be drawn? (line officers, staff officers, or judge advocates).
- __ Will prisoners serving sentences locally be released to deploy with their units?
- __ Ensure deployed judge advocates have access to an interpreter for interviews and/or depositions of local witnesses. The Claims judge advocate interpreter may be able to serve this function.
- __ Ensure that, if cases are to be tried during the duration of the deployment, the pool of officers and enlisted members for court-martial panels contains only deploying personnel.
- __ Ensure personnel are briefed concerning conditions on liberty in their deployment area.
- __ Coordinate with communications, transportation, and aviation elements to establish contact and courier service with the rear detachment.
- __ Ensure that, where necessary, testimony of local witnesses is preserved by deposition. A deployed court reporter and interpreter may be used for this purpose. The country law study or local legal agencies should be consulted to determine whether the HN laws place restrictions on local nationals giving depositions (particularly if they are local officials).
- __ Coordinate with the PM to determine whether: Evidence-handling procedures are adequate. Pretrial confinement facilities, if any, have been established.
- __ Make periodic visits to forward units to meet with CDRs, witnesses, and, in the case of deployed defense counsel, suspects and accused.

- __ If it is a short-term deployment, ensure that, if nonjudicial punishment is to be administered during the deployment, the attendant paperwork is forwarded by courier to the rear detachment for processing.
- __ Ensure that allegations of law of war violations are thoroughly investigated and that evidence has been preserved.
- __ Ensure that orders assigning or attaching soldiers to other than their original units for UCMJ purposes are revoked upon deployment.
- __ If, in an area where a SOFA is applicable, ensure that a waiver of **jurisdiction** is obtained prior to redeployment of an accused.

**REFERENCES**

- Manual for Courts-Martial, current edition.
- AR 15-6, Procedures for Investigating Officers and Boards of Officers.
- AR 27-10, Military Justice, with local supplements (if any).
- AR 27-26, Rules of Professional Conduct.
- AR 27-50, Status of Forces Policies, Procedures, and Information.
- AR 135-178, Guard and Reserve Enlisted Separations.
- AR 190-30, Military Police Investigations.
- AR 190-34, Correctional Custody.
- AR 190-41, Customs Law Enforcement.
- AR 190-47, U.S. Army Correctional System.
- AR 195-2, Army Criminal Investigation Program.
- AR 195-5, Evidence Procedures.
- AR 600-8-2, Suspension of Favorable Actions
- AR 600-8-19, Enlisted Promotions and Reductions
- AR 600-8-24, Officer Transfers and Reductions
- AR 600-37, Unfavorable Information (for GOMORs)
- Enlisted Ranks Update 16
- DA Pam 27-7, Summary Court-Martial Guide
- DA Pam 27-10, Judge's Benchbook
- DA Pam 27-17, Procedural Guide for Article 32(b) Investigations

- DA Pam 27-173, Trial Procedures
- FM 27-1, Legal Guide for Commanders
- Combat Law Library, to include references A-K, DA Pam 27-9 (Military Judges, Benchbook, DA Pam 27-10 Trial Counsel and Defense Counsel , and the Military Justice Digest.

**FORMS.**

- DD Form 457, Investigating Officer's Report
- DD Form 458, Charge Sheet
- DD Form 497, Confinement Order
- DA Form 2627, Report of Proceedings Under Art. 15, UCMJ
- DA Form 2627-1, Summarized Record of Proceedings Under Art. 15, UCMJ
- DA Form 2823, Sworn Statement (100 each).
- DA Form 3169-R, Report of Judicial and Disciplinary Activity in the Army
- DA Form 3881, Rights Warning
- DA Form 4430-R, Report of Results of Trial
- DA Form 4916-R, Certificate of Service/Attempted Service
- DA Form 4917-R, Advice as to Appellate Rights
- DA Form 5110-R, Art. 15 Reconciliation Log
- DA Form 5111-R, Summary Court-Martial Rights Notification/ Waiver Statement
- DA Form 5112-R, Checklist for Pre-Trial Confinement
- Pay Chart
- Punishment Worksheets for Article 15s
- SFs 1156, 1157, Witness Payment Forms
- Local Forms, Form Letters, Disposition Forms Forwarding Charges, Referring Cases to Trial, etc.

## CHAPTER 33

## CHARTER OF THE UNITED NATIONS

# Preamble

WE THE PEOPLES OF THE UNITED NATIONS DETERMINED

to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and

to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and

to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and

to promote social progress and better standards of life in large freedom,

AND FOR THESE ENDS

to practice tolerance and live together in peace with one another as good neighbors, and

to unite our strength to maintain international peace and security, and

to ensure by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest, and

to employ international machinery for the promotion of the economic and social advancement of all peoples,

HAVE RESOLVED TO COMBINE OUR EFFORTS TO ACCOMPLISH THESE AIMS

Accordingly, our respective Governments, through representatives assembled in the city of San Francisco, who have exhibited their full powers found to be in good and due form, have agreed to the present Charter of the United Nations and do hereby establish an international organization to be known as the United Nations.

# CHAPTER I

## *PURPOSES AND PRINCIPLES*

### Article 1

The Purposes of the United Nations are:

1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;

2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;

3. To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and

4. To be a center for harmonizing the actions of nations in the attainment of these common ends.

## Article 2

The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles.

1. The Organization is based on the principle of the sovereign equality of all its Members.

2. All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfill in good faith the obligations assumed by them in accordance with the present Charter.

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.

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, or in any other manner inconsistent with the Purposes of the United Nations.

5. All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action.

6. The Organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security.

7. Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

# CHAPTER II

## *MEMBERSHIP*

## Article 3

The original Members of the United Nations shall be the states which, having participated in the United Nations Conference on International Organization at San Francisco, or having previously signed the Declaration by United Nations of January 1, 1942, sign the present Charter and ratify it in accordance with Article 110.

## Article 4

1. Membership in the United Nations is open to all other peace-loving states which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations .

2. The admission of any such state to membership in the United Nations will be effected by a decision of the General Assembly upon the recommendation of the Security Council.

## Article 5

A member of the United Nations against which preventive or enforcement action has been taken by the Security Council may be suspended from the exercise of the rights and privileges of membership by the General Assembly upon the recommendation of the Security Council. The exercise of these rights and privileges may be restored by the Security Council.

## Article 6

A Member of the United Nations which has persistently violated the Principles contained in the present Charter may be expelled from the Organization by the General Assembly upon the recommendation of the Security Council.

# CHAPTER III

## *ORGANS*

### Article 7

1. There are established as the principal organs of the United Nations: a General Assembly, a Security Council, an Economic and Social Council, a Trusteeship Council, an International Court of Justice, and a Secretariat.
2. Such subsidiary organs as may be found necessary may be established in accordance with the present Charter.

### Article 8

The United Nations shall place no restrictions on the eligibility of men and women to participate in any capacity and under conditions of equality in its principal and subsidiary organs.

# CHAPTER IV

## *THE GENERAL ASSEMBLY*

### Article 9

#### *Composition*

1. The General Assembly shall consist of all the Members of the United Nations.
2. Each member shall have not more than five representatives in the General Assembly.

### Article 10

#### *Functions and Powers*

The General Assembly may discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter, and, except as provided in Article 12, may make recommendations to the Members of the United Nations or to the Security Council or to both on any such questions or matters.

### Article 11

1. The General Assembly may consider the general principles of cooperation in the maintenance of international peace and security, including the principles governing disarmament and the regulation of armaments, and may make recommendations with regard to such principles to the Members or to the Security Council or to both.
2. The General Assembly may discuss any questions relating to the maintenance of international peace and security brought before it by any Member of the United Nations, or by the Security Council, or by a state which is not a Member of the United Nations in accordance with Article 35, paragraph 2, and, except as provided in Article 12, may make recommendations with regard to any such questions to the state or states concerned or to the Security Council or to both. Any such question on which action is necessary shall be referred to the Security Council by the General Assembly either before or after discussion.
3. The General Assembly may call the attention of the Security Council to situations which are likely to endanger international peace and security.
4. The powers of the General Assembly set forth in this Article shall not limit the general scope of Article 10.

## Article 12

1. While the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests.

2. The Secretary-General, with the consent of the Security Council, shall notify the General Assembly at each session of any matters relative to the maintenance of international peace and security which are being dealt with by the Security Council and shall similarly notify the General Assembly, or the Members of the United Nations if the General Assembly is not in session, immediately the Security Council ceases to deal with such matters.

## Article 13

1. The General Assembly shall initiate studies and make recommendations for the purpose of:

a. promoting international cooperation in the political field and encouraging the progressive development of international law and its codification;

b. promoting international cooperation in the economic, social, cultural, educational, and health fields, and assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

2. The further responsibilities, functions and powers of the General Assembly with respect to matters mentioned in paragraph 1(b) above are set forth in Chapters IX and X.

## Article 14

Subject to the provisions of Article 12, the General Assembly may recommend measures for the peaceful adjustment of any situation, regardless of origin, which it deems likely to impair the general welfare or friendly relations among nations, including situations resulting from a violation of the provisions of the present Charter setting forth the Purposes and Principles of the United Nations.

## Article 15

1. The General Assembly shall receive and consider annual and special reports from the Security Council; these reports shall include an account of the measures that the Security Council has decided upon or taken to maintain international peace and security.

2. The General Assembly shall receive and consider reports from the other organs of the United Nations.

## Article 16

The General Assembly shall perform such functions with respect to the international trusteeship system as are assigned to it under Chapters XII and XIII, including the approval of the trusteeship agreements for areas not designated as strategic.

## Article 17

1. The General Assembly shall consider and approve the budget of the Organization.

2. The expenses of the Organization shall be borne by the Members as apportioned by the General Assembly.

3. The General Assembly shall consider and approve any financial and budgetary arrangements with specialized agencies referred to in Article 57 and shall examine the administrative budgets of such specialized agencies with a view to making recommendations to the agencies concerned.

## Article 18

### *Voting*

1. Each member of the General Assembly shall have one vote.

2. Decisions of the General Assembly on important questions shall be made by a two-thirds majority of the members present and voting. These questions shall include: recommendations with respect to the maintenance of international peace and security, the election of the non-permanent members of the Security Council, the election of the members of the Economic and Social Council, the election of members of the Trusteeship Council in accordance with paragraph 1(c) of Article 86, the admission of new Members to the United Nations, the suspension of the rights and privileges of membership, the expulsion of Members, questions relating to the operation of the trusteeship system, and budgetary questions.

3. Decisions on other questions, Composition including the determination of additional categories of questions to be decided by a two-thirds majority, shall be made by a majority of the members present and voting.

## Article 19

A Member of the United Nations which is in arrears in the payment of its financial contributions to the Organization shall have no vote in the General Assembly if the amount of its arrears equals or exceeds the amount of the contributions due from it for the preceding two full years. The General Assembly may, nevertheless, permit such a Member to vote if it is satisfied that the failure to pay is due to conditions beyond the control of the Member.

## Article 20

### *Procedure*

The General Assembly shall meet in regular annual sessions and in such special sessions as occasion may require. Special sessions shall be convoked by the Secretary-General at the request of the Security Council or of a majority of the Members of the United Nations.

## Article 21

The General Assembly shall adopt its own rules of procedure. It shall elect its President for each session.

## Article 22

The General Assembly may establish such subsidiary organs as it deems necessary for the performance of its functions.

# CHAPTER V

# *THE SECURITY COUNCIL*

## Article 23

### *Composition*

1. The Security Council shall consist of fifteen Members of the United Nations. The Republic of China, France, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, and the United States of America shall be permanent members of the Security Council. The General Assembly shall elect ten other Members of the United Nations to be non-permanent members of the Security Council, due regard being specially paid, in the first instance to the contribution of Members of the United Nations to the maintenance of international peace and security and to the other purposes of the Organization, and also to equitable geographical distribution.

2. The non-permanent members of the Security Council shall be elected for a term of two years. In the first election of the non-permanent members after the increase of the membership of the Security Council from eleven to fifteen, two of the four additional members shall be chosen for a term of one year. A retiring member shall not be eligible for immediate re-election.

3. Each member of the Security Council shall have one representative.

## Article 24

### *Functions and Powers*

1. In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.

2. In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations. The specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII, and XII.

3. The Security Council shall submit annual and, when necessary, special reports to the General Assembly for its consideration.

## Article 25

The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.

## Article 26

In order to promote the establishment and maintenance of international peace and security with the least diversion for armaments of the world's human and economic resources, the Security Council shall be responsible for formulating, with the assistance of the Military Staff Committee referred to in Article 47, plans to be submitted to the Members of the United Nations for the establishment of a system for the regulation of armaments.

## Article 27

### *Voting*

1. Each member of the Security Council shall have one vote.

2. Decisions of the Security Council on procedural matters shall be made by an affirmative vote of nine members.

3. Decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members; provided that, in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting.

## Article 28

### *Procedure*

1. The Security Council shall be so organized as to be able to function continuously. Each member of the Security Council shall for this purpose be represented at all times at the seat of the Organization.

2. The Security Council shall hold periodic meetings at which each of its members may, if it so desires, be represented by a member of the government or by some other specially designated representative.

3. The Security Council may hold meetings at such places other than the seat of the Organization as in its judgment will best facilitate its work.

### Article 29

The Security Council may establish such subsidiary organs as it deems necessary for the performance of its functions.

### Article 30

The Security Council shall adopt its own rules of procedure, including the method of selecting its President.

### Article 31

Any Member of the United Nations which is not a member of the Security Council may participate, without vote, in the discussion of any question brought before the Security Council whenever the latter considers that the interests of that Member are specially affected.

### Article 32

Any Member of the United Nations which is not a member of the Security Council or any state which is not a Member of the United Nations, if it is a party to a dispute under consideration by the Security Council, shall be invited to participate, without vote, in the discussion relating to the dispute. The Security Council shall lay down such conditions as it deems just for the participation of a state which is not a Member of the United Nations.

## CHAPTER VI

## *PACIFIC SETTLEMENT OF DISPUTES*

### Article 33

1. The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.
2. The Security Council shall, when it deems necessary, call upon the parties to settle their dispute by such means.

### Article 34

The Security Council may investigate any dispute, or any situation which might lead to international friction or give rise to a dispute, in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security.

### Article 35

1. Any Member of the United Nations may bring any dispute, or any situation of the nature referred to in Article 34, to the attention of the Security Council or of the General Assembly.
2. A state which is not a Member of the United Nations may bring to the attention of the Security Council or of the General Assembly any dispute to which it is a party if it accepts in advance, for the purposes of the dispute, the obligations of pacific settlement provided in the present Charter.
3. The proceedings of the General Assembly in respect of matters brought to its attention under this Article will be subject to the provisions of Articles 11 and 12.

### Article 36

1. The Security Council may, at any stage of a dispute of the nature referred to in Article 33 or of a situation of like nature, recommend appropriate procedures or methods of adjustment.

2. The Security Council should take into consideration any procedures for the settlement of the dispute which have already been adopted by the parties.

3. In making recommendations under this Article the Security Council should also take into consideration that legal disputes should as a general rule be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court.

### Article 37

1. Should the parties to a dispute of the nature referred to in Article 33 fail to settle it by the means indicated in that Article, they shall refer it to the Security Council.

2. If the Security Council deems that the continuance of the dispute is in fact likely to endanger the maintenance of international peace and security, it shall decide whether to take action under Article 36 or to recommend such terms of settlement as it may consider appropriate.

### Article 38

Without prejudice to the provisions of Articles 33 to 37, the Security Council may, if all the parties to any dispute so request, make recommendations to the parties with a view to a pacific settlement of the dispute.

## CHAPTER VII

## *ACTION WITH RESPECT TO THREATS TO THE PEACE, BREACHES OF THE PEACE, AND ACTS OF AGGRESSION*

### Article 39

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

### Article 40

In order to prevent an aggravation of the situation, the Security Council may, before making the recommendations or deciding upon the measures provided for in Article 39, call upon the parties concerned to comply with such provisional measures as it deems necessary or desirable. Such provisional measures shall be without prejudice to the rights, claims, or position of the parties concerned. The Security Council shall duly take account of failure to comply with such provisional measures.

### Article 41

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

## Article 42

Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.

## Article 43

1. All Members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security.

2. Such agreement or agreements shall govern the numbers and types of forces. their degree of readiness and general location, and the nature of the facilities and assistance to be provided.

3. The agreement or agreements shall be negotiated as soon as possible on the initiative of the Security Council. They shall be concluded between the Security Council and Members or between the Security Council and groups of Members and shall be subject to ratification by the signatory states in accordance with their respective constitutional processes.

## Article 44

When the Security Council has decided to use force it shall, before calling upon a Member not represented on it to provide armed forces in fulfillment of the obligations assumed under Article 43, invite that Member, if the Member so desires, to participate in the decisions of the Security Council concerning the employment of contingents of that Member's armed forces.

## Article 45

In order to enable the United Nations to take urgent military measures Members shall hold immediately available national air-force contingents for combined international enforcement action. The strength and degree of readiness of these contingents and plans for their combined action shall be determined, within the limits laid down in the special agreement or agreements referred to in Article 43, by the Security Council with the assistance of the Military Staff Committee.

## Article 46

Plans for the application of armed force shall be made by the Security Council with the assistance of the Military Staff Committee.

## Article 47

1. There shall be established a Military Staff Committee to advise and assist the Security Council on all questions relating to the Security Council's military requirements for the maintenance of international peace and security, the employment and command of forces placed at its disposal, the regulation of armaments, and possible disarmament.

2. The Military Staff Committee shall consist of the Chiefs of Staff of the permanent members of the Security Council or their representatives. Any Member of the United Nations not permanently represented on the Committee shall be invited by the Committee to be associated with it when the efficient discharge of the Committee's responsibilities requires the participation of that Member in its work.

3. The Military Staff Committee shall be responsible under the Security Council for the strategic direction of any armed forces placed at the disposal of the Security Council. Questions relating to the command of such forces shall be worked out subsequently.

4. The Military Staff Committee, with the authorization of the Security Council and after consultation with appropriate regional agencies, may establish regional subcommittees.

### Article 48

1. The action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations or by some of them, as the Security Council may determine.

2. Such decisions shall be carried out by the Members of the United Nations directly and through their action in the appropriate international agencies of which they are members.

### Article 49

The Members of the United Nations shall join in affording mutual assistance in carrying out the measures decided upon by the Security Council.

### Article 50

If preventive or enforcement measures against any state are taken by the Security Council, any other state, whether a Member of the United Nations or not, which finds itself confronted with special economic problems arising from the carrying out of those measures shall have the right to consult the Security Council with regard to a solution of those problems.

### Article 51

Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

## CHAPTER VIII

## *REGIONAL ARRANGEMENTS*

### Article 52

1. Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations.

2. The Members of the United Nations entering into such arrangements or constituting such agencies shall make every effort to achieve pacific settlement of local disputes through such regional arrangements or by such regional agencies before referring them to the Security Council.

3. The Security Council shall encourage the development of pacific settlement of local disputes through such regional arrangements or by such regional agencies either on the initiative of the states concerned or by reference from the Security Council.

4. This Article in no way impairs the application of Articles 34 and 35.

### Article 53

1. The Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council, with the exception of measures against any enemy state, as defined in paragraph 2 of this Article, provided for pursuant to Article 107 or in regional arrangements directed against renewal of aggressive policy on the part of any such state, until such time as the Organization may, on request of the Governments concerned, be charged with the responsibility for preventing further aggression by such a state.

2. The term enemy state as used in paragraph 1 of this Article applies to any state which during the Second World War has been an enemy of any signatory of the present Charter.

### Article 54

The Security Council shall at all times be kept fully informed of activities undertaken or in contemplation under regional arrangements or by regional agencies for the maintenance of international peace and security.

## CHAPTER IX

## *INTERNATIONAL ECONOMIC AND SOCIAL CO-OPERATION*

### Article 55

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

(a) higher standards of living, full employment, and conditions of economic and social progress and development;

(b) solutions of international economic, social, health, and related problems; and international cultural and educational co-operation; and

(c) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

### Article 56

All Members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55.

### Article 57

1. The various specialized agencies, established by intergovernmental agreement and having wide international responsibilities, as defined in their basic instruments, in economic, social, cultural, educational, health, and related fields, shall be brought into relationship with the United Nations in accordance with the provisions of Article 63.

2. Such agencies thus brought into relationship with the United Nations are hereinafter referred to as specialized agencies.

### Article 58

The Organization shall make recommendations for the coordination of the policies and activities of the specialized agencies.

## Article 59

The Organization shall, where appropriate, initiate negotiations among the states concerned for the creation of any new specialized agencies required for the accomplishment of the purposes set forth in Article 55.

## Article 60

Responsibility for the discharge of the functions of the Organization set forth in this Chapter shall be vested in the General Assembly and, under the authority of the General Assembly, in the Economic and Social Council, which shall have for this purpose the powers set forth in Chapter X.

# CHAPTER X

## *THE ECONOMIC AND SOCIAL COUNCIL*

## Article 61

### *Composition*

1. The Economic and Social Council shall consist of fifty-four Members of the United Nations elected by the General Assembly.

2. Subject to the provisions of paragraph 3, eighteen members of the Economic and Social Council shall be elected each year for a term of three years. A retiring member shall be eligible for immediate re-election.

3. At the first election after the increase in the membership of the Economic and Social Council from twenty-seven to fifty-four members, in addition to the members elected in place of the nine members whose term of office expires at the end of that year, twenty-seven additional members shall be elected. Of these twenty-seven additional members, the term of office of nine members so elected shall expire at the end of one year, and of nine other members at the end of two years, in accordance with arrangements made by the General Assembly.

4. Each member of the Economic and Social Council shall have one representative.

## Article 62

### *Functions and Powers*

1. The Economic and Social Council may make or initiate studies and reports with respect to international economic, social, cultural, educational, health, and related matters and may make recommendations with respect to any such matters to the General Assembly, to the Members of the United Nations, and to the specialized agencies concerned.

2. It may make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all.

3. It may prepare draft conventions for submission to the General Assembly, with respect to matters falling within its competence.

4. It may call, in accordance with the rules prescribed by the United Nations, international conferences on matters falling within its competence.

## Article 63

1. The Economic and Social Council may enter into agreements with any of the agencies referred to in Article 57, defining the terms on which the agency concerned shall be brought into relationship with the United Nations. Such agreements shall be subject to approval by the General Assembly.

2. It may coordinate the activities of the specialized agencies through consultation with and recommendations to such agencies and through recommendations to the General Assembly and to the Members of the United Nations.

## Article 64

1. The Economic and Social Council may take appropriate steps to obtain regular reports from the specialized agencies. It may make arrangements with the Members of the United Nations and with the specialized agencies to obtain reports on the steps taken to give effect to its own recommendations and to recommendations on matters falling within its competence made by the General Assembly.

2. It may communicate its observations on these reports to the General Assembly .

## Article 65

The Economic and Social Council may furnish information to the Security Council and shall assist the Security Council upon its request.

## Article 66

1. The Economic and Social Council shall perform such functions as fall within its competence in connection with the carrying out of the recommendations of the General Assembly.

2. It may, with the approval of the General Assembly, perform services at the request of Members of the United Nations and at the request of specialized agencies.

3. It shall perform such other functions as are specified elsewhere in the present Charter or as may be assigned to it by the General Assembly.

## Article 67

### *Voting*

1. Each member of the Economic and Social Council shall have one vote.

2. Decisions of the Economic and Social Council shall be made by a majority of the members present and voting.

## Article 68

### *Procedure*

The Economic and Social Council shall set up commissions in economic and social fields and for the promotion of human rights, and such other commissions as may be required for the performance of its functions.

## Article 69

The Economic and Social Council shall invite any Member of the United Nations to participate, without vote, in its deliberations on any matter of particular concern to that Member.

## Article 70

The Economic and Social Council may make arrangements for representatives of the specialized agencies to participate, without vote, in its deliberations and in those of the commissions established by it, and for its representatives to participate in the deliberations of the specialized agencies.

## Article 71

The Economic and Social Council may make suitable arrangements for consultation with non-governmental organizations which are concerned with matters within its competence. Such arrangements may be made with international organizations and, where appropriate, with national organizations after consultation with the Member of the United Nations concerned.

## Article 72

1. The Economic and Social Council shall adopt its own rules of procedure, including the method of selecting its President.

2. The Economic and Social Council shall meet as required in accordance with its rules, which shall include provision for the convening of meetings on the request of a majority of its members.

# CHAPTER XI

## *DECLARATION REGARDING NON-SELF-GOVERNING TERRITORIES*

## Article 73

Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories, and, to this end:

(a) to ensure, with due respect for the culture of the peoples concerned, their political, economic, social, and educational advancement, their just treatment, and their protection against abuses;

(b) to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement;

(c) to further international peace and security;

(d) to promote constructive measures of development, to encourage research, and to cooperate with one another and, when and where appropriate, with specialized international bodies with a view to the practical achievement of the social, economic, and scientific purposes set forth in this Article; and

(e) to transmit regularly to the Secretary-General for information purposes, subject to such limitation as security and constitutional considerations may require, statistical and other information of a technical nature relating to economic, social, and educational conditions in the territories for which they are respectively responsible other than those territories to which Chapter XII and XIII apply.

## Article 74

Members of the United Nations also agree that their policy in respect of the territories to which this Chapter applies, no less than in respect of their metropolitan areas, must be based on the general principle of good-neighborliness, due account being taken of the interests and well-being of the rest of the world, in social, economic, and commercial matters.

# CHAPTER XII

## *INTERNATIONAL TRUSTEESHIP SYSTEM*

### Article 75

The United Nations shall establish under its authority an international trusteeship system for the administration and supervision of such territories as may be placed thereunder by subsequent individual agreements. These territories are hereinafter referred to as trust territories.

### Article 76

The basic objectives of the trusteeship system, in accordance with the Purposes of the United Nations laid down in Article 1 of the present Charter, shall be:

(a) to further international peace and security;

(b) to promote the political, economic, social, and educational advancement of the inhabitants of the trust territories, and their progressive development towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the peoples concerned, and as may be provided by the terms of each trusteeship agreement;

(c) to encourage respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion, and to encourage recognition of the interdependence of the peoples of the world; and

(d) to ensure equal treatment in social, economic, and commercial matters for all Members of the United Nations and their nationals and also equal treatment for the latter in the administration of justice without prejudice to the attainment of the foregoing objectives and subject to the provisions of Article 80.

### Article 77

1. The trusteeship system shall apply to such territories in the following categories as may be placed thereunder by means of trusteeship agreements:

   a. territories now held under mandate;

   b. territories which may be detached from enemy states as a result of the Second World War, and

   c. territories voluntarily placed under the system by states responsible for their administration.

2. It will be a matter for subsequent agreement as to which territories in the foregoing categories will be brought under the trusteeship system and upon what terms.

### Article 78

The trusteeship system shall not apply to territories which have become Members of the United Nations, relationship among which shall be based on respect for the principle of sovereign equality.

### Article 79

The terms of trusteeship for each territory to be placed under the trusteeship system, including any alteration or amendment, shall be agreed upon by the states directly concerned, including the mandatory power in the case of territories held under mandate by a Member of the United Nations, and shall be approved as provided for in Articles 83 and 85.

## Article 80

1. Except as may be agreed upon in individual trusteeship agreements, made under Articles 77, 79, and 81, placing each territory under the trusteeship system, and until such agreements have been concluded, nothing in this Chapter shall be construed in or of itself to alter in any manner the rights whatsoever of any states or any peoples or the terms of existing international instruments to which Members of the United Nations may respectively be parties.

2. Paragraph 1 of this Article shall not be interpreted as giving grounds for delay or postponement of the negotiation and conclusion of agreements for placing mandated and other territories under the trusteeship system as provided for in Article 77.

## Article 81

The trusteeship agreement shall in each case include the terms under which the trust territory will be administered and designate the authority which will exercise the administration of the trust territory. Such authority, hereinafter called the administering authority, may be one or more states or the Organization itself.

## Article 82

There may be designated, in any trusteeship agreement, a strategic area or areas which may include part or all of the trust territory to which the agreement applies, without prejudice to any special agreement or agreements made under Article 43.

## Article 83

1. All functions of the United Nations relating to strategic areas, including the approval of the terms of the trusteeship agreements and of their alteration or amendment, shall be exercised by the Security Council.

2. The basic objectives set forth in Article 76 shall be applicable to the people of each strategic area.

3. The Security Council shall, subject to the provisions of the trusteeship agreements and without prejudice to security considerations, avail itself of the assistance of the Trusteeship Council to perform those functions of the United Nations under the trusteeship system relating to political. economic, social, and educational matters in the strategic areas.

## Article 84

It shall be the duty of the administering authority to ensure that the trust territory shall play its part in the maintenance of international peace and security. To this end the administering authority may make use of volunteer forces, facilities, and assistance from the trust territory in carrying out the obligations towards the Security Council undertaken in this regard by the administering authority, as well as for local defense and the maintenance of law and order within the trust territory.

## Article 85

1. The functions of the United Nations with regard to trusteeship agreements for all areas not designated as strategic, including the approval of the terms of the trusteeship agreements and of their alteration or amendment, shall be exercised by the General Assembly.

2. The Trusteeship Council, operating under the authority of the General Assembly, shall assist the General Assembly in carrying out these functions.

# CHAPTER XIII

## *THE TRUSTEESHIP COUNCIL*

### Article 86

#### *Composition*

1. The Trusteeship Council shall consist of the following Members of the United Nations:

   a. those Members administering trust territories;

   b. such of those Members mentioned by name in Article 23 as are not administering trust territories; and

   c. as many other Members elected for three-year terms by the General Assembly as may be necessary to ensure that the total number of members of the Trusteeship Council is equally divided between those Members of the United Nations which administer trust territories and those which do not.

2. Each member of the Trusteeship Council shall designate one specially qualified person to represent it therein.

### Article 87

#### *Functions and Powers*

The General Assembly and, under its authority, the Trusteeship Council, in carrying out their functions, may:

(a) consider reports submitted by the administering authority;

(b) accept petitions and examine them in consultation with the administering authority;

(c) provide for periodic visits to the respective trust territories at times agreed upon with the administering authority; and

(d) take these and other actions in conformity with the terms of the trusteeship agreements.

### Article 88

The Trusteeship Council shall formulate a questionnaire on the political, economic, social, and educational advancement of the inhabitants of each trust territory, and the administering authority for each trust territory within the competence of the General Assembly shall make an annual report to the General Assembly upon the basis of such questionnaire.

### Article 89

#### *Voting*

1. Each member of the Trusteeship Council shall have one vote.

2. Decisions of the Trusteeship Council shall be made by a majority of the members present and voting.

### Article 90

#### *Procedure*

1. The Trusteeship Council shall adopt its own rules of procedure, including the method of selecting its President.

2. The Trusteeship Council shall meet as required in accordance with its rules, which shall include provision for the convening of meetings on the request of a majority of its members.

### Article 91

The Trusteeship Council shall, when appropriate, avail itself of the assistance of the Economic and Social Council and of the specialized agencies in regard to matters with which they are respectively concerned.

## CHAPTER XIV

## *THE INTERNATIONAL COURT OF JUSTICE*

### Article 92

The International Court of Justice shall be the principal judicial organ of the United Nations. It shall function in accordance with the annexed Statute which is based upon the Statute of the Permanent Court of International Justice and forms an integral part of the present Charter.

### Article 93

1. All Members of the United Nations are ipso facto parties to the Statute of the International Court of Justice.
2. A state which is not a Member of the United Nations may become a party to the Statute of the International Court of Justice on conditions to be determined in each case by the General Assembly upon the recommendation of the Security Council.

### Article 94

1. Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party.
2. If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.

### Article 95

Nothing in the present Charter shall prevent Members of the United Nations from entrusting the solution of their differences to other tribunals by virtue of agreements already in existence or which may be concluded in the future.

### Article 96

1. The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question.
2. Other organs of the United Nations and specialized agencies, which may at any time be so authorized by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities.

# CHAPTER XV

## *THE SECRETARIAT*

### Article 97

The Secretariat shall comprise a Secretary-General and such staff as the Organization may require. The Secretary-General shall be appointed by the General Assembly upon the recommendation of the Security Council. He shall be the chief administrative officer of the Organization.

### Article 98

The Secretary-General shall act in that capacity in all meetings of the General Assembly, of the Security Council, of the Economic and Social Council, and of the Trusteeship Council, and shall perform such other functions as are entrusted to him by these organs. The Secretary-General shall make an annual report to the General Assembly on the work of the Organization.

### Article 99

The Secretary-General may bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and security.

### Article 100

1. In the performance of their duties the Secretary-General and the staff shall not seek or receive instructions from any government or from any other authority external to the Organization. They shall refrain from any action which might reflect on their position as international officials responsible only to the Organization.
2. Each Member of the United Nations undertakes to respect the exclusively international character of the responsibilities of the Secretary-General and the staff and not to seek to influence them in the discharge of their responsibilities .

### Article 101

1. The staff shall be appointed by the Secretary-General under regulations established by the General Assembly.
2. Appropriate staffs shall be permanently assigned to the Economic and Social Council, the Trusteeship Council, and, as required, to other organs of the United Nations. These staffs shall form a part of the Secretariat.
3. The paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence, and integrity. Due regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible.

# CHAPTER XVI

# MISCELLANEOUS PROVISIONS

### Article 102

1. Every treaty and every international agreement entered into by any Member of the United Nations after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it.

2. No party to any such treaty or international agreement which has not been registered in accordance with the provisions of paragraph I of this Article may invoke that treaty or agreement before any organ of the United Nations.

### Article 103

In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

### Article 104

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.

### Article 105

1. The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfillment of its purposes.

2. 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.

3. The General Assembly may make recommendations with a view to determining the details of the application of paragraphs 1 and 2 of this Article or may propose conventions to the Members of the United Nations for this purpose.

## CHAPTER XVII

## *TRANSITIONAL SECURITY ARRANGEMENTS*

### Article 106

Pending the coming into force of such special agreements referred to in Article 43 as in the opinion of the Security Council enable it to begin the exercise of its responsibilities under Article 42, the parties to the Four-Nation Declaration, signed at Moscow October 30, 1943, and France, shall, in accordance with the provisions of paragraph 5 of that Declaration, consult with one another and as occasion requires with other Members of the United Nations with a view to such joint action on behalf of the Organization as may be necessary for the purpose of maintaining international peace and security.

### Article 107

Nothing in the present Charter shall invalidate or preclude action, in relation to any state which during the Second World War has been an enemy of any signatory to the present Charter, taken or authorized as a result of that war by the Governments having responsibility for such action.

# CHAPTER XVIII

## *AMENDMENTS*

### Article 108

Amendments to the present Charter shall come into force for all Members of the United Nations when they have been adopted by a vote of two thirds of the members of the General Assembly and ratified in accordance with their respective constitutional processes by two thirds of the Members of the United Nations, including all the permanent members of the Security Council.

### Article 109

1. A General Conference of the Members of the United Nations for the purpose of reviewing the present Charter may be held at a date and place to be fixed by a two-thirds vote of the members of the General Assembly and by a vote of any seven members of the Security Council. Each Member of the United Nations shall have one vote in the conference.

2. Any alteration of the present Charter recommended by a two-thirds vote of the conference shall take effect when ratified in accordance with their respective constitutional processes by two thirds of the Members of the United Nations including all the permanent members of the Security Council.

3. If such a conference has not been held before the tenth annual session of the General Assembly following the coming into force of the present Charter, the proposal to call such a conference shall be placed on the agenda of that session of the General Assembly, and the conference shall be held if so decided by a majority vote of the members of the General Assembly and by a vote of any seven members of the Security Council.

# CHAPTER XIX

## *RATIFICATION AND SIGNATURE*

### Article 110

1. The present Charter shall be ratified by the signatory states in accordance with their respective constitutional processes.

2. The ratifications shall be deposited with the Government of the United States of America, which shall notify all the signatory states of each deposit as well as the Secretary-General of the Organization when he has been appointed.

3. The present Charter shall come into force upon the deposit of ratifications by the Republic of China, France, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, and the United States of America, and by a majority of the other signatory states. A protocol of the ratifications deposited shall thereupon be drawn up by the Government of the United States of America which shall communicate copies thereof to all the signatory states.

4. The states signatory to the present Charter which ratify it after it has come into force will become original Members of the United Nations on the date of the deposit of their respective ratifications.

### Article 111

The present Charter, of which the Chinese, French, Russian, English, and Spanish texts are equally authentic, shall remain deposited in the archives of the Government of the United States of America. Duly certified copies thereof shall be transmitted by that Government to the Governments of the other signatory states.

IN FAITH WHEREOF the representatives of the Governments of the United Nations have signed the present Charter.

DONE at the city of San Francisco the twenty-sixth day of June, one thousand nine hundred and forty-five.

# 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 |
| NCA | National Command Authority (President & SECDEF) |
| 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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