

CHAPTER 9

NONCOMBATANT EVACUATION OPERATIONS (NEO)

REFERENCES

1. 31 U.S.C. § 1535, Agency Agreements.
2. The Foreign Missions Act, Pub. Law 88-885
3. Vienna Convention on Diplomatic Relations, *opened for signature* Apr. 8, 1961, 23 U.S.T. 3227, T.I.A.S. 7502, 500 U.N.T.S. 95 (Pub. L. 95-393, codified at 22 U.S.C. § 254a et seq.)
4. Executive Order No. 12656, Assignment of Emergency Preparedness Responsibilities, 53 Fed. Reg. 47491, 3 C.F.R. 585 ('88 Compilation), sections 502 and 1301 (18 Nov. 1988), as amended by Executive Order Nos. 13074 (9 Feb. 1998); 13228 (8 Oct. 2001); 13286 (28 Feb. 2003); and 13603 (16 Mar. 2012).
5. Executive Order No. 11850, Renunciation of Certain Uses in War of Chemical Herbicides and Riot Control Agents, 40 Fed. Reg. 16187, 3 C.F.R. 980 ('71-75 Compilation) (8 Apr. 1975, reprinted in FM 27-10 at Change 1, para. 38).
6. Memorandum of Agreement between the DoS and DoD on the Protection and Evacuation of U.S. Citizens and Nationals and Designated Other Persons From Threatened Areas Overseas.
7. U.S. DEP'T OF DEFENSE DIR. 3025.14, PROTECTION AND EVACUATION OF U.S. CITIZENS AND DESIGNATED ALIENS IN DANGER AREAS ABROAD (dated 5 Nov. 1990, incorporating through change 2, 13 July 1992; current as of 8 Dec. 2003).
8. U.S. DEP'T OF DEFENSE INSTR. 2000.11, PROCEDURES FOR HANDLING REQUESTS FOR ASYLUM AND TEMPORARY REFUGE (13 May 2010).
9. U.S. DEP'T OF DEFENSE DIR. 2311.01E, DEPT OF DEFENSE LAW OF WAR PROGRAM (dated 9 May 2006, incorporating through change 1, 15 Nov. 2010; current as of 22 Feb. 2011).
10. U.S. DEP'T OF DEFENSE INSTR. 5515.8, ASSIGNMENT OF CLAIMS RESPONSIBILITY (11 Nov. 2006).
11. CHAIRMAN OF THE JOINT CHIEFS OF STAFF, INSTR. 3121.01B, STANDING RULES OF ENGAGEMENT/STANDING RULES FOR THE USE OF FORCE (SROE/SRUF) FOR U.S. FORCES (13 Jun. 2005) (portions of this document are classified SECRET).
12. JOINT PUB. 3-68, NONCOMBATANT EVACUATION OPERATIONS (23 Dec. 2010).
13. U.S. DEP'T OF ARMY, REG. 550-1, PROCESSING REQUESTS FOR POLITICAL ASYLUM AND TEMPORARY REFUGE (21 Jun. 2004).
14. U.S. DEP'T OF ARMY, FIELD MANUAL 3-05.131, ARMY SPECIAL OPERATIONS FORCES NONCOMBATANT EVACUATION OPERATIONS (16 Nov. 2009).
15. U.S. DEP'T OF ARMY, FIELD MANUAL 3-07, STABILITY OPERATIONS (6 Oct. 2008).
16. JAGINST 5800.7F, MANUAL OF THE JUDGE ADVOCATE GENERAL, Sec. 1011, 26 Jun. 2012.
17. Steven Day, *Legal Considerations in NEO*, 40 NAVAL L. REV. 45 (1992).

I. NATURE AND CHARACTERISTICS OF A NONCOMBATANT EVACUATION OPERATION

A. NEO are operations directed by the Department of State (DoS) or other appropriate authority, in conjunction with the Department of Defense (DoD), to evacuate noncombatants from foreign countries when their lives are endangered by war, civil unrest, or natural disaster to safe havens as designated by the DoS (JP1-02). Recent examples include:

1. Japan: 7,800 U.S. citizens, March-April 2011.
2. Lebanon: 14,000 U.S. citizens, July 2006.
3. Sierra Leone (Nobel Obelisk): 2610 civilians, May-June 1997.
4. Albania (Silver Wake): 900 civilians, March 1997.
5. Liberia (Assured Response): 2200 civilians, April-June 1996.

B. NEO may be conducted as ordered departures or authorized departures. For example, the evacuations from Japan and Lebanon were “authorized departures,” whereby noncombatants (to include military dependents and nonessential DoD civilians and their families) are permitted to depart the areas at government expense in advance of normal rotations when national interests or imminent threat to life require it. In contrast, ordered departures involve situations where the evacuation of U.S. Government personnel and their dependents are directed by the DoS to designated safe havens through the implementation of the combatant commander noncombatant evacuation operations plan. Of note, private U.S. citizens may not be ordered to depart a country, but may be offered evacuation assistance by the U.S. government. Yet regardless of the characterization of the evacuation, judge advocates need to be aware of the law and policy governing the evacuation of American citizens (AMCITS) and other third country nationals (TCN) that may take place at a moment’s notice in response to emergent situations.

II. COMMAND AND CONTROL

A. **U.S. Government (USG) / Interagency Response.** NEO involve whole-of-government efforts to evacuate AMCITS and designated personnel, depending on the particular circumstances surrounding the evacuation. Executive Order (E.O.) 12656 assigns primary responsibility for the safety of U.S. citizens abroad to the Secretary of State (SECSTATE). When the U.S. Ambassador obtains the approval of the Under Secretary of State for Management and authorizes the departure of designated personnel, the following command and control elements will be established.

1. DoS establishes and chairs the “Washington Liaison Group” (WLG) to oversee NEO.
 - a. WLG membership consists of representatives from the DoS and DoD, as well as other appropriate government agencies including, Central Intelligence Agency (CIA), Defense Intelligence Agency (DIA), Department of Homeland Security (DHS), and Department of Health and Human Services (DHHS).
 - b. The WLG ensures national-level coordination of government agencies in effecting a NEO.
 - c. The WLG also serves as coordinator with Regional Liaison Groups (RLG).
2. Regional Liaison Groups (RLG).
 - a. SECSTATE and SecDef have established RLGs collocated with combatant commands as necessary to ensure coordination of emergency and evacuation planning by their departments in the field. Each RLG is chaired by a DoS representative and includes representatives from the appropriate Geographic Combatant Commander (GCC), as well as other USG departments and agencies when appropriate and useful. The chairperson of each RLG receives instructions from the SECSTATE, and the military members receive their instructions from the SecDef through the relevant GCC.
 - b. The RLG performs the following functions:
 - i. Provides support to officials at diplomatic and consular posts (i.e. embassies) and military commands within the relevant region by serving as a liaison between the WLG, military commands, and the relevant diplomatic posts.
 - ii. Assisting diplomatic posts and appropriate military commands in planning for evacuation and/or in-place protection of AMCITS, TCN, Host Nation nationals, and other designated persons in an emergency;
 - iii. Review emergency action plans created by the diplomatic posts and subordinate military commands.
 - iv. Refer to the WLG relevant issues that cannot be resolved.
3. The Chief of Diplomatic Mission, or principal officer of the DoS, **is the lead official in the threat area** responsible for the evacuation of all U.S. noncombatants.
 - a. The Chief of Mission will give the order for the evacuation of civilian noncombatants, except for Defense Attaché System personnel and DIA personnel.
 - b. The evacuation order of military personnel is given by the Combatant Commander.
 - c. The Chief of Mission is responsible for drafting an evacuation plan (this is usually done by the Regional Security Officer (RSO)).

B. Department of Defense Response. The Secretary of Defense (SECDEF) plays a **supporting role** in planning for the protection, evacuation, and repatriation of U.S. citizens in threat areas.

1. Within DoD, the responsibility for NEO is assigned under DoD Directive 3025.14.
 - a. DoD assigns members from Service components and the Joint Staff to the WLG.
 - b. The Department of the Army (DA) is the Executive Agent for repatriation of civilians following evacuation. This is accomplished through establishment of a Joint Reception Center/Repatriation Processing Center.
2. Combatant Commanders are responsible for the following:
 - a. Preparing and maintaining plans for the evacuation of noncombatants from their respective area of operations (AO).
 - b. Accomplishing NEO planning through liaison and cooperation with the Chiefs of Mission in the AO.
 - c. Assisting in preparing local evacuation plan.
3. Rules of Engagement (ROE) guidance for NEO can be found in Enclosure G of Chairman of the Joint Chiefs of Staff (CJCS) Standing Rules of Engagement (SROE).

C. Amendment to E.O. 12656.

1. An amendment to E.O. 12656 and a new Memorandum of Agreement (MOA) between DoD and DoS address the relative roles and responsibilities of the two departments in NEO. DoS retains ultimate responsibility for NEO.
2. On 9 February 1998, the President amended E.O. 12656 to state that DoD is “responsible for the deployment and use of military forces for the protection of U.S. citizens and nationals and in connection therewith, designated other persons or categories of persons, in support of their evacuation from threatened areas overseas.” (E.O. 13074, “Amendment to E.O. 12656) The aforementioned amendment to E.O. 12656 states that it was made in order to “reflect the appropriate allocation of funding responsibilities” for NEO. Moreover, E.O. 13074 amending E.O. 1656 directs “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.

D. Memorandum of Agreement (MOA) between DoS and DoD. On 14 July 98, DoS and DoD entered into a MOA concerning their “respective roles and responsibilities regarding the protection and evacuation of U.S. citizens and nationals and designated other persons from threatened areas overseas.”

1. DoS retains ultimate responsibility for NEO, except that DoD has responsibility for NEO from the U.S. Naval Base at Guantanamo Bay, Cuba (Sections C.2. and C.3.b.).
2. DoD prepares and implements plans for the protection and evacuation of DoD noncombatants worldwide. In appropriate circumstances, SECDEF may authorize the evacuation of DoD noncombatants after consultation with the SECSTATE (Section C.3.c.).
3. “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.).
4. The MOA includes a “Checklist for Increased Interagency Coordination in Crisis/Evacuation Situations” and a DoS/DoD Cost Responsibility Matrix with Definitions. Under the matrix, DoS is responsible for “Evacuation Related Costs” and DoD is responsible for “Protection Related Costs.”

III. LEGAL ISSUES INVOLVED IN NONCOMBATANT EVACUATION OPERATIONS

A. International Law. NEO fall into three categories: **permissive** (where the host country or controlling factions allow the departure of U.S. personnel); **hostile or non-permissive** (where the host country will not permit U.S. personnel to leave); and **uncertain** (where the intent of the host country toward the departure of U.S. personnel

is uncertain). The non-permissive and uncertain categories raise the majority of legal issues because “use of force” becomes a factor.

B. Use of Force. Because hostile or non-permissive NEO intrude into the territorial sovereignty of a nation, a legal basis is required. As a general rule, international law prohibits the threat or use of force against the territorial integrity or political independence of any state. While there is no international consensus on the legal basis to use armed forces for the purpose of NEO, the most common bases are cited below:

1. Custom and Practice of Nations (pre-UN Charter) clearly allowed NEO. In that regard, a nation could intervene to protect its citizens located in other nations when those nations would not or could not protect them.

2. UN Charter.

a. Article 2(4): Under this Article, a nation may not threaten or use force “against the territorial integrity or political independence of any state” A minority view holds that NEO are of such a limited duration and purpose that they do not rise to the level of force contemplated by Article 2(4). The majority view is that NEO must be permissive, authorized by the UN Security Council, or constitute a legitimate act of individual or collective self-defense pursuant to Article 51 of the UN Charter and/or customary international law. See the chapter on the Legal Basis for the Use of Force of this Handbook for more information.

b. Article 51: The U.S. position is that Article 51’s “inherent right of individual or collective self-defense” includes the customary pre-charter practice of intervention to protect citizens. There is no international consensus on this position.

C. Sovereignty Issues. Planners need to know the territorial extent of the countries in the AO. Absent consent, or the need to act in self-defense under Article 51 of the UN Charter, U.S. forces should respect countries’ territorial boundaries when planning NEO ingress and egress routes.

1. Extent of Territorial Seas and Airspace. The Law of the Sea allows claims of up to 12 nautical miles for territorial seas and national airspace. The Chicago Convention limits state aircraft to international airspace, or to domestic airspace with consent. There is a right of innocent passage through the territorial seas. Innocent passage poses no threat to territorial integrity. Airspace, however, is inviolable. There is no right of innocent passage for aircraft. Only “transit passage” allows over-flight over international straits. See the chapter on Law of the Seas, Air, and Space of this Handbook for more information.

2. Rights and Duties of Neutral States. Neighboring states may have concerns that permitting over-flight or staging areas may cause them to lose their “neutrality” with the target state of a hostile or non-permissive NEO. To the extent that the concept of neutrality applies outside of international armed conflict, such action may jeopardize relations between the relevant countries. Establishing “safe havens” for non-combatants, however, does not violate neutrality law. A safe haven is a stopover point where evacuees are initially taken when removed from danger. They are then taken to their ultimate destination.

D. Status of Personnel. In NEO, commanders will face a multitude of legal issues regarding the personnel encountered on the ground.

1. Detainee Treatment. The embassy and chief of mission should determine the disposition of detainees in advance of the deployment of military forces. In the absence of this determination, the US shall treat all detainees humanely in accordance with US law, including the law of war, and applicable US policy. Anyone detained by US forces in the course of deterring or responding to hostile action will be provided with the protections of the Geneva Convention Relative to the Treatment of Prisoners of War of 1949, even though the individual may not be entitled to prisoner of war status, until some other legal status is determined by competent authority. The embassy, with the Host Nation, will negotiate the disposition of the detainee.

2. Civilians Seeking Refuge: Temporary Refuge v. Asylum.

a. U.S. policy: DoD Directive 2000.11 and AR 550-1 set out procedures for Asylum/Temporary Refuge. U.S. commanders may not grant political asylum to foreign nationals, and should refer such requests to the DoS to handle through appropriate channels. U.S. Citizenship and Immigration Services, DHS, is the lead agency for granting asylum requests. U.S. commanders may, however, offer temporary refuge in emergencies.

b. General policy: If the applicant makes a request at a unit or installation located **within** the territorial jurisdiction of a foreign country (to include territorial waters), then:

(1) Asylum may *not* be granted, but the request is forwarded via immediate message to the Assistant Secretary of Defense for International Security Affairs (ASD (ISA)), and the applicant is referred to the appropriate diplomatic mission. The best practice is to immediately forward the issue to the DoS representative at the embassy in the country being evacuated.

(2) Temporary refuge will be granted if the requester is in imminent danger, and ASD (ISA) will be informed. The applicant will not be surrendered without Service Secretary approval.

c. If the applicant makes a request at a unit, installation or vessel in **U.S. territorial waters or on the high seas**, then the applicant is “received” and the request for asylum is forwarded to DHS. Do not surrender the applicant to a foreign power without higher headquarters approval (Service Secretary level).

3. Status of U.S. Embassy Premises and the Grant of Diplomatic Asylum.

a. Usually a NEO will involve actions at the U.S. embassy or consulate. Therefore, it is important to understand the special status of embassy property and the status of persons who request asylum on that property.

b. The status of the premises may depend on whether the mission is an embassy or a consulate; 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 in a foreign country that is a signatory to the convention, the premises of the mission 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 (see below). 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 (in accordance with information from the DoS Legal Counsel’s Office).

4. The Vienna Convention on Diplomatic Relations, April 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95. Article 22 states that “The premises of the [diplomatic] mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of mission . . . the mission shall be immune from search, requisition, attachment or execution.”

5. **The Foreign Missions Act (Pub. Law 88-885, State Department Basic Authorities Act of 1956 Title II, Sections 201-213)**. This legislation establishes procedures for reciprocal agreements to provide for the inviolability of diplomatic missions.

6. **Diplomatic Asylum**. The granting of political asylum by states to foreign persons within their 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 American republics (Gerhard von Glahn, *Law Among Nations*, 6th ed., 309).

E. Law of Armed Conflict Considerations

1. **Targeting – Rule of Thumb**: follow the targeting guidance of the law of armed conflict as contained in, *inter alia*, the Hague Regulations, Geneva Conventions, and applicable articles of the 1977 Protocols regardless of whether the NEO is conducted during “international armed conflict.” Under DoDD 2311.01E, it is U.S. policy that all members of the DoD will comply with the law of war “during all armed conflicts, however such conflicts are characterized and in all other military operations.” Use of Force guidance for NEO is found in Enclosure G of the CJCS SROE (CJCSI 3121.01B). See the chapter on the Law of Armed Conflict in this Handbook for more information.

2. **Riot Control Agents (RCA)**. E.O. 11850 allows the use of RCA in non-armed conflict and defensive situations, to include “rescue of hostages.” But the Chemical Weapons Convention prohibits the use of RCA as a “method of warfare.” Whether the use of RCA in NEO is a “method of warfare” may depend on the circumstances of the NEO. However, under E.O. 11850, Presidential approval is always required prior to RCA use, and this approval may be delegated through the Combatant Commander. Authorization to use RCA would normally be requested as a supplemental ROE under Enclosure J to the CJCS SROE.

3. **Drafting ROE**. Coordinate Combatant Command forces’ ROE with the ROE of the Marine Security Guards who provide internal security at designated U.S. diplomatic and consular facilities (and who work for DoS), Host Nation Security, and other Embassy Security. As always, ensure that the inherent right of self-defense is addressed appropriately.

F. Search Issues.

1. **Search of evacuee's luggage and person.** Baggage of evacuees 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. Even if they are accredited, luggage may be inspected if "serious grounds" exist to suspect that luggage is misused. An "accredited" diplomatic bag retains absolute inviolability.

2. **However, force protection is paramount.** If a commander has a concern regarding the safety of aircraft, vessels, ground transportation, or evacuation force personnel due to the nature of the personnel being evacuated, he or she may order a search of their person and belongings as a condition to evacuation. Diplomatic status is not a guarantee to use U.S. transportation. If a diplomat refuses to be searched (to include their diplomatic bag), the commander may refuse transportation. If this becomes an issue during NEO, immediately contact senior on-scene DoS personnel to assist. In such circumstances, always consider the actual nature of the concerns when considering the solutions and potential impact (i.e., consider whether a diplomat would want to endanger himself on his own flight or may be bringing contraband that, while problematic, is not dangerous to the crew or aircraft).

IV. PLANNING CONSIDERATIONS

Due to the nature of NEO, such operations typically require rapid responses and therefore rely on as much pre-planning as possible. At a minimum, NEO planners should look to Joint Pub 3-68 and its annexes to begin developing plans and requests for products to assist in mission development. Moreover, early connectivity with higher headquarters is necessary for ROE requests. Like all ROE requests for operations of this magnitude, ROE requests for NEO will be subject to much scrutiny and therefore need to begin as early as possible to ensure they complete the decision and approval process in time to execute the mission. Other early coordination efforts within DoD, such as the service components at GCCs and TRANSCOM, will assist planners in spotting issues with legal and operational plans.