OPERATIONAL LAW HANDBOOK

INTERNATIONAL AND OPERATIONAL LAW DEPARTMENT

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OPERATIONAL LAW HANDBOOK
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To all of the faculty who have served before us
and contributed to the literature in the field of
International and 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. 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 problems they will encounter in the operational context. The Handbook does not represent official U.S. policy regarding the binding application of varied sources of law. However, the Handbook may reference source documents that do.

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

The proponent for this publication is the International and Operational Law Department, The Judge Advocate General's Legal Center and School (TJAGLCS). Send comments, suggestions, and work product from the field to TJAGLCS, International and Operational Law Department, Attention: Lieutenant Commander David Lee, 600 Massie Road, Charlottesville, Virginia 22903-1781. To gain more detailed information or to discuss an issue with the author of a particular chapter or appendix call Lieutenant Commander Lee at DSN 521-3383; Commercial (434) 971-3383; or email david.h.lee1.mil@mail.mil.

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

To order copies of the Operational Law Handbook, please call CLAMO at DSN 521-3339; Commercial (434) 971-3339; or email usarmy.pentagon.hqda-tjaglcs.mbx.clamo-tjaglcs@mail.mil.

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CHAPTER 1

LEGAL BASIS FOR THE USE OF FORCE

I. INTRODUCTION

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

A. Policy and Legal Considerations

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

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

3. The JA must also remember 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 is essential to sustaining support at home and gaining acceptance abroad.

B. Article 2(4): The General Prohibition Against the Use of Force

1. The UN Charter mandates that all member States resolve their international disputes peacefully.[1] It also requires that States refrain in their international relations from the *threat or use of force* against the territorial integrity or political independence of any State.[2] The majority of international law experts agree that "use of force" refers to armed force, in contrast to other forms of coercion such as economic sanctions. This ban on aggression, taken from Article 2(4) of the UN Charter, is regarded as the heart of the UN Charter and the basic rule of contemporary public international law.[3] An integral aspect of Article 2(4) is the principle of non-intervention,

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

[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, or in any other manner inconsistent with the Purposes of the United Nations."

[3] During the drafting of the United Nations charter, the delegation from Brazil proposed that economic coercion be included in the definition of force. This proposal was defeated 26-2. This proposal is depicted in the *travails preperatoires* of the UN Charter. *See* 1 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 116–117 (Bruno Simma ed., Oxford Univ. Press 2nd ed., 2002).

which provides that States must refrain from interference in other States' internal affairs.[4] Put simply, non-intervention stands for the proposition that States must respect each other's *sovereignty*.

2. U.S. policy statements have frequently affirmed the principle of non-intervention, which itself has been made an integral part of U.S. law through the ratification of the Charters of the United Nations and the Organization of American States (OAS),[5] as well as other multilateral international agreements which specifically incorporate nonintervention as a basis for mutual cooperation. The emerging concept of **humanitarian intervention**, however, has placed pressure on the principle of non-intervention and respect for State sovereignty in circumstances when a State is unable or unwilling to avert a humanitarian catastrophe, or is itself responsible for massive violations of human rights against its citizens.[6]

II. THE LAWFUL USE OF FORCE

Despite the UN Charter's broad legal prohibitions against the use of force and other forms of intervention, specific exceptions exist to justify a State's recourse to the use of force or armed intervention. While States have made numerous claims, using a wide variety of legal bases to justify uses of force, it is generally agreed that there are only two exceptions to the Article 2(4) ban on the threat or use of force: (1) actions authorized by the UN Security Council under Chapter VII of the UN Charter, and (2) actions that constitute a legitimate act of individual or collective self-defense pursuant to Article 51 of the UN Charter and/or customary international law (CIL).[7]

A. UN Enforcement Action (Chapter VII)

1. **The UN Security Council**. The UN Charter gives the UN Security Council both a powerful role in determining the existence of an illegal threat or use of force and wide discretion in mandating or authorizing a response to such a threat or use of force (enforcement). The unique role is grounded primarily in Chapter VII of the UN Charter, which demonstrates **the Charter's strong preference for collective responses to the illegal use of force over unilateral actions in self-defense**. Chapter V of the UN Charter establishes the composition and powers of the Security Council. The Security Council includes **five permanent members** (China, France, Russia, the United Kingdom, and the United States) and ten non-permanent, elected members. Decisions within the Security Council require nine votes, and in those cases involving a non-procedural (i.e., substantive) matter, they also require the concurring votes of all five permanent members.[8] In practice, anything other than a veto by one of the permanent five members is considered a concurring vote. Article 24 states that UN members "confer on the Security Council primary responsibility for the maintenance of international peace and security" and, in Article 25, members "agree to accept and carry out the decisions of the Security Council in accordance with the present Charter."

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[4] UN Charter, Article 2(7): "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII."

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

[6] *See* Report of the International Commission on Intervention and State Sovereignty, December 2001 ("Where a population is suffering serious harm, as a result of internal war, insurgency, repression or state failure, and the state in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect."). The United States does not accept humanitarian intervention as a separate basis for the use of force; however, the United Kingdom has expressed support for it. *See* Prime Minister's Office, *Guidance: Chemical weapon use by Syrian regime: UK government legal position*, Aug, 29, 2013, available at https://www.gov.uk/governmnet/publications/chemical-weapon-use-by-syrian-regime-uk-government-legal-position/chemical-weapon-use-by-syrian-regime-uk-government-legal-position-html-version.

[7] As stated above, a minority of States would include humanitarian intervention as a separate exception to the rule of Article 2(4). In addition, consent is sometimes stated as a separate exception. However, if a State is using force with the consent of a host State, then there is no violation of the host State's territorial integrity or political independence; thus, there is no need for an exception to the rule as it is not being violated.

[8] Per Article 27 of the UN Charter, non-procedural decisions must include "the concurring votes of the permanent members."

2. **Chapter VII of the UN Charter**, entitled "Action With Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression," gives the UN Security Council authority to label as illegal threats and uses of force, and then to determine what measures should be employed to address the illegal behavior. Before acting, **the Security Council must first, in accordance with Article 39, determine the existence of a threat to the peace, a breach of the peace, or an act of aggression.** Provided the Security Council makes such a determination, the UN Charter gives several courses of action to the Security Council: 1) make recommendations pursuant to Article 39; 2) call upon the parties involved to comply with provisional measures pursuant to Article 40; 3) mandate non-military measures (i.e., diplomatic and economic sanctions) pursuant to Article 41; or 4) authorize military enforcement measures ("action by air, land, or sea forces") pursuant to Article 42.

a. **Article 39**, the same article through which the Security Council performs its "labeling" function, allows the Council to make non-binding recommendations to maintain or restore international peace and security.

b. **Article 40** serves essentially a preliminary injunction function. The security council may call upon the parties to cease action or take some action with respect to the dispute, but the parties compliance with those provisions will not prejudice the claims of the state in later dispute resolution proceedings. Failure to comply with Article 40 measures may have deleterious effects for later claims. The purpose of this Article is to prevent the aggravation of the situation that is causing a threat to international peace and security.

c. **Article 41** lists several non-military enforcement measures designed to restore international peace and security. These 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 41 measures are stated as a *mandate*, binding on all UN members**. Article 42 implies that Article 41 measures must be attempted (or at least considered) before the Security Council adopts any of the military measures available to it.

d. **Article 42** contemplated that the Security Council would be able to mandate military action by forces made available to it under special agreements with UN member States. However, because no Article 43 special agreement has ever been made, Article 42 has not operated as envisioned. This means that the Security Council is unable to mandate military enforcement action in response to illegal threats or uses of force. Consequently, **military measures taken pursuant to Chapter VII are fundamentally permissive, phrased by the Security Council in the form of an *authorization* rather than a mandate**.

3. In the absence of special agreements between member States and the Security Council, UN peacekeeping operations enable the Security Council to carry out limited enforcement actions through member States on an ad hoc, voluntary basis. While these operations were traditionally grounded in Chapter VI of the UN Charter, which deals with peaceful means of settling disputes, today more peace operations are considered peace enforcement operations and carry with them a Chapter VII authorization from the Security Council. The authorization that accompanies these operations is usually narrowly worded to accomplish the specific objective of the peace operation. For example, UN Security Council Resolution (UNSCR) 794 (1992) authorized member States to use "all necessary means to establish, as soon as possible, a secure environment for humanitarian relief operations in Somalia."

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

III. SELF-DEFENSE

A. Generally

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

2. The questions that inevitably arise in conjunction with the UN Charter's "codified" right of self-defense involve the scope of authority found therein. Does this right, as the language of Article 51 suggests, exist only *after* a State has suffered an "armed attack[9]," and then only *until* the Security Council takes effective action? Did the UN Charter thus limit the customary right of self-defense in such a way that eliminated the customary concept of *anticipatory self-defense* (*see infra*) and extinguished a State's authority to act independently of the Security Council in the exercise of self-defense?

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

4. In contrast, some States, including the United States, argue that an **expansive** interpretation of the UN Charter is more appropriate, contending that the customary law right of self-defense (including anticipatory self-defense) is an inherent right of a sovereign State that was not "negotiated" away under the Charter. Arguing that contemporary experience has demonstrated the inability of the Security Council 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. Also note that the UN Charter, and the majority of international law experts agree that the threshold for "armed attack" is higher than that for "use of force." Put another way, a state could conceivably launch an operation that qualified as a use of force but fell below the standard needed for armed attack. Thus, a so-called "gap" exists between the two terms. The size of this gap is unclear. Some writers such as Yoram Dinstein in WAR, AGGRESSION, AND SELF-DEFENSE, argue that this gap is "but a hiatus." In any event, the United States adopts the position that the right of self defense exists against any illegal use of force, even if the use of force does not rise to the level of armed attack. Thus, the United States rejects the view that a "gap" exists between the two terms. This policy was repeated as recently in September 2012, at the USCYBERCOM Legal Conference. Harold Koh, then the State Department Legal Advisor, stated that "the United States has long held the position that the inherent right of self-defense potentially applies against any illegal use of force."

B. **Self-Defense Criteria: Necessity and Proportionality**

1. It is well-accepted that the UN Charter provides the essential framework of authority for the use of force, effectively defining the foundations for a modern *jus ad bellum.* Inherent in modern *jus ad bellum* is the customary requirement that all uses of force satisfy both the ***necessity*** and ***proportionality*** criteria.[10]

2. **Necessity.** To comply with the necessity criterion, States must consider the exhaustion or ineffectiveness of peaceful means of resolution, the nature of coercion applied by the aggressor State, the objectives of each party, and the likelihood of effective community intervention. In other words, force should be viewed as a "last resort."

3. **Proportionality.** To comply with the proportionality criterion, States must limit the magnitude, scope, and duration of any use of force to that level of force which is reasonably necessary to counter a threat or attack. In

[9] The use of the term "armed attack" leads some to interpret article 51 as requiring a state to first suffer a completed attack before responding in self-defense. This is likely the cause of much of the debate between the restrictive approach and the expansive approach. However, the French version of the Charter uses the term *aggression armee,* which translates to "armed aggression" and is amenable to a broader interpretation in terms of authorizing anticipatory self-defense.

[10] YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 234-41 (5th ed. 2011). Yoram Dinstein would include a third criterion called immediacy. *Id.* at 242. "War may not be undertaken in self-defence long after an isolated armed attack." *Id.* In other words, the timeliness of the action in self-defense matters because a delay in response to an attack or the threat of attack attenuates the immediacy of the threat and the necessity to use force in self-defense. It should be noted that necessity and proportionality mean different things in *jus ad bellum* and *jus in bello*. *Jus ad bellum* defines these terms for purposes of using force, whereas j*us in bello* (law of armed conflict) defines these terms for purposes of targeting analysis. For further discussion of jus in bello principles, see *infra* Chapter 2, Law of War.

the context of *jus ad bellum,* proportionality is sometimes referred to as "proportionate force." However, the principle does not require limiting the response to mirror the type of force constituting the threat or attack.[11]

C. **Types of Self-Defense**

1. **Individual Self-Defense.** 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 a nation's *territorial integrity*; 2) protection of a nation's *political independence*; and 3) protection of *nationals* and their property located abroad. Judge Advocates must be familiar with these foundational issues and basic concepts of self-defense as they relate to overseas deployments, responses to State-sponsored terrorism, and the rules of engagement.

a. 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 Article 51 (and customary) right of self-defense.

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

c. Protection of Nationals. Customarily, a State has been afforded the right to protect its citizens abroad if their lives are placed in jeopardy and the host State is either unable or unwilling to protect them. This right is cited as the justification for non-combatant evacuation operations (NEO), discussed in greater detail later in a separate chapter of this handbook.[12]

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

(2) The right to use force to protect citizens abroad also extends to those situations in which a host State is an active participant in the activities posing a threat to another State's citizens (e.g. the government of Iran's participation in the hostage-taking of U.S. embassy personnel in that country in 1979-81; and Ugandan President Idi Amin's support of terrorists who kidnapped Israeli nationals and held them at the airport in Entebbe in 1976).

2. **Collective Self-Defense**. Also referred to in Article 51, the inherent right of collective self-defense allows victim States to receive assistance from other States in responding to and repelling an armed attack. To constitute a legitimate act of collective self-defense, all conditions for the exercise of an individual State's right of self-defense must be met, along with the additional requirement that **assistance must be requested by the victim State**. There is no recognized right of a third-party State to unilaterally intervene in internal conflicts where the issue in question is one of a group's right to self-determination and there is no request by the *de jure* government for assistance.

a. Collective defense treaties, such as that of the North Atlantic Treaty Organization (NATO), the Inter-American Treaty of Reciprocal Assistance (the Rio Treaty), the **Security** Treaty Between Australia, New Zealand, and the United States (ANZUS), and other similar agreements, do not provide an international legal basis for the use of U.S. force abroad, per se. Such agreements simply establish a commitment among the parties to engage in "collective self-defense" as required by specified situations, and provide the framework through which

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[11] The term *Proportionality* in *jus ad bellum* should not be confused with the same term in the *jus in bello* or targeting context. The proportionality analysis in targeting is a balancing test to ensure that the civilian loss is not excessive in relation to the concrete and direct military advantage anticipated. This is not the test for a *proportionate response* in the *jus ad bellum* context.
[12] *See infra* Chapter 9.

such measures are to be taken. From an international law perspective, a legal basis for engaging in measures involving the use of military force abroad must still be established from other sources of international law extrinsic to these collective defense treaties (i.e., there still must be a justifiable need for collective self-defense or a UN Security Council authorization to use force).

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

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

a. Anticipatory self-defense finds its roots in the 1837 Caroline case[13] and subsequent correspondence between then-U.S. Secretary of State Daniel Webster and his British Foreign Office counterpart Lord Ashburton. Secretary Webster posited that a State need not suffer an actual armed attack before taking defensive action, but may engage in anticipatory self-defense if the circumstances leading to the use of force are "instantaneous, overwhelming, and leaving no choice of means and no moment for deliberation." As with any form of self-defense, the principles of necessity and proportionality serve to bind the actions of the offended State.

b. 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 preventive actions (i.e., the use of force before the coalescence of an actual threat) have not been allayed by contemporary use. It is important to note, however, that **anticipatory self-defense serves as a foundational element in the Chairman of the Joint Chiefs of Staff's Standing Rules of Engagement (CJCS SROE), 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.[14]

c. **Preemptive Use of Force**. In the 2002 National Security Strategy (NSS), the U.S. Government took a step toward what some view as a significant expansion of use of force doctrine from anticipatory self-defense to preemption.[15] This position was reinforced in the 2006 NSS, which reaffirmed the doctrine of preemptive self-defense against "rogue states and terrorists" who pose a threat to the United States based on their expressed desire to acquire and use weapons of mass destruction.[16] The "Bush Doctrine" of preemption re-casted the right of anticipatory self-defense based on a different understanding of imminence. Thus, the NSS stated, "We must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries." It concluded: "The greater the threat, the greater is the risk of inaction – and the more compelling the case for taking action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack."[17] The 2010 NSS, however, suggests a possible movement away from the Bush Doctrine, as the Obama Administration declares in the NSS that, "[w]hile the use of force is sometimes necessary, [the United States] will exhaust other options before war whenever [it] can, and [will] carefully weigh the costs and risks of action versus the costs and risks of inaction."[18] Moreover, according to the 2010 NSS, "[w]hen force is necessary . . . [the United States] will seek broad international support, working with such institutions as NATO and the U.N. Security Council."[19] Nevertheless, the

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[13] The Case of the Caroline is not a court case, but rather an international incident in which British forces attacked a U.S. merchant riverboat – the Caroline. The Caroline was ferrying supplies to Canadian rebel forces located on an island above the Niagara Falls. Following the incident, a series of letters between the U.S. Secretary of State and the British Foreign Office established the common international understanding of imminence in the context of anticipatory self-defense.

[14] *See* CHAIRMAN OF THE JOINT CHIEFS OF STAFF, INSTR. 3121.01B, STANDING RULES OF ENGAGEMENT/STANDING RULES FOR THE USE OF FORCE FOR U.S. FORCES, (13 June 2005). A new version of the CJCSI is due for publication in 2014. As of this publishing the new SROE was not available.

[15] THE WHITE HOUSE, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA, (2002).

[16] THE WHITE HOUSE, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA, (2006).

[17] THE WHITE HOUSE, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA, (2002). at 15.

[18] THE WHITE HOUSE, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA, 22 (2010) at 22.

[19] *Id.*

Obama Administration maintains that "[t]he United States must reserve the right to act unilaterally if necessary to defend our nation and our interests, yet we will also seek to adhere to standards that govern the use of force."[20]

d. A modern-day legal test for imminence, consistent with the above, was perhaps best articulated by Professor Michael Schmitt in 2003. He stated that States may legally employ force in advance of an attack, at the point when (1) evidence shows that an aggressor has committed itself to an armed attack, and (2) delaying a response would hinder the defender's ability to mount a meaningful defense.[21]

e. Anticipatory self-defense, whether labeled anticipatory or preemptive, must be distinguished from preventive self-defense. **Preventive self-defense—employed to counter non-imminent threats—is illegal under international law**.

D. **Self-Defense Against Non-State Actors.** Up to now, this handbook has discussed armed attacks launched ***by*** a State. Today, however, States have more reasons to fear armed attacks launched by non-state actors ***from*** a State. The law is still grappling with this reality. While the answer to this question may depend on complicated questions of state responsibility, **many scholars base the legality of cross border attacks against non-state actors on whether the host State is *unwilling or unable* to deal with the non-state actors who are launching armed attacks from within its territory**.[22] Some scholars have posited that a cross border response into a host State requires the victim State to meet a higher burden of proof in demonstrating the criteria that establish the legality of a State's use of force in self-defense.[23]

E. **Operation Enduring Freedom (OEF).** In the wake of the attacks on the World Trade Center on 11 September 2001, the UN Security Council passed, on the very next day, UNSCR 1368. This resolution explicitly recognized the United States' inherent right of individual or collective self-defense pursuant to Article 51 of the UN Charter against the terrorist actors (nonstate actors) who perpetrated the 9/11 attacks. The basis for the United States' use of force in OEF is, therefore, the Article 51 right of individual or collective self-defense. Many writers argue that UNSCR 1368 signals a change where the right of self-defense against nonstate actors is recognized, even if the UN Charter did not originally envision this. United States forces involved in the North Atlantic Treaty Organization (NATO) International Security Assistance Force (ISAF) mission must also, however, be aware of current UNSCRs, the most recent of which is UNSCR 2011 (dated 12 October 2011), which "[a]uthorizes the Member States participating in ISAF to take all necessary measures to fulfill its mandate." The mandate of ISAF per the UNSCR is to assist the Afghan Government in improving "the security situation and build its own security capabilities." Thus, forces operating within the ISAF mission do so legally on the basis of a Security Council resolution, whereas forces operating within the OEF mission do so legally on a self-defense basis.

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

A. In addition to the requirement that a use of force have an *international* legal basis, **there must also be *domestic* legal support.** In every situation involving the possible use of U.S. forces abroad, a legal determination that embraces U.S. Constitutional principles and the 1973 War Powers Resolution must be made.[24]

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

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[20] *Id.*

[21] Michael N. Schmitt, *Preemptive Strategies in International Law*, 24 MICH. J. INT'L L. 513, 535 (2003).

[22] *See* YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 226 (5th ed. 2011); Ashley Deeks, *'Unwilling or Unable': Toward an Normative Framework for Extra-Territorial Self-Defense*, 52 VA. J. INT'L L. 483 (2012).

[23] *See* Michael N. Schmitt, *Responding to Transnational Terrorism Under the* Jus Ad Bellum*: A Normative Framework*, 56 NAVAL L. REV. 1 (2008).

[24] Public Law 93-148, 50 U.S.C. §§ 1541-1548. The Department of Justice, Office of Legal Counsel (OLC) has a series of opinions that address the executive interpretation of the 1973 War Powers Resolution. *See* Deployment of United States Armed Forces into Haiti , 18 Op. O.L.C. 173 (1994); Proposed Deployment of United States Armed Forces into Bosnia, 19 Op. O.L.C. 327 (1995). The most recent addition to this line of OLC opinions concerns the use of United States Armed Forces in the Libya operation in 2011. Authority to Use Military Force in Libya, 35 Op. O.L.C. 1 (2011).

C. Until 1973, a pattern of Executive initiative, Congressional acquiescence, and Judicial deference combined to give the President primacy in decisions to employ U.S. forces. In order to reverse the creeping expansion of Presidential authority and to reassert its status as a full partner in decisions relating to the use of U.S. forces overseas, Congress passed, over Presidential veto, the War Powers Resolution (WPR). **The stated purpose of the WPR is to ensure the "collective judgment" of both the Executive and Legislative branches, in order to commit to the deployment of U.S. forces, by requiring consultation of and reports to Congress** in any of the following circumstances: 1) Introduction of troops into actual hostilities; 2) Introduction of troops, equipped for combat, into a foreign country; or 3) Greatly enlarging the number of troops, equipped for combat, in a foreign country.

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

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

F. Because the WPR was enacted over the President's veto, one of the original purposes of the statute—establishment of a consensual, inter-branch procedure for committing our forces overseas—was undercut. Although the applicability of the WPR to specific operations will not be made at the Corps or Division level, once U.S. forces are committed overseas, a deploying JA must be sensitive to the impact of the WPR on the scope of operations, particularly with respect to the time limitation placed upon deployment under independent Presidential action (i.e., the WPR's 60-90 day clock).

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

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

CHAPTER 2

THE LAW OF ARMED CONFLICT

REFERENCES: FOUNDATIONAL INTERNATIONAL LAW TREATIES (ALSO CONTAINED IN THE LOAC DOCUMENTARY SUPPLEMENT)

1. (Hague) Convention (IV) Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, T.S. 539, 1 Bevans 631, 205 Consol. T.S. 277, 3 Martens Nouveau Recueil (ser. 3) 461, *entered into force and for the United States* Jan. 26, 1910 [hereinafter Hague IV].
2. (Hague) Regulations Respecting the Laws and Customs of War on Land, annex to Hague IV [hereinafter Hague Regulations or HR].
3. (Hague) Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, Oct. 18, 1907, 36 Stat. 2310, T.S. 540, 1 Bevans 654, 205 Consol. T.S. 299, 3 Martens Nouveau Recueil (ser. 3) 504, *entered into force and for the United States* Jan. 26, 1910 [hereinafter Hague V].
4. (Hague) Convention (IX) Concerning Bombardment by Naval Forces in Time of War, Oct. 18, 1907, 36 Stat. 2351, T.S. 542, 1 Bevans 681, 205 Consol. T.S. 345, 3 Martens Nouveau Recueil (ser. 3) 604, *entered into force and for the United States* Jan. 26, 1910 [hereinafter Hague IX].
5. UNITED NATIONS (U.N.) CHARTER, *entry into force and for the United States* Oct. 24, 1945 [hereinafter U.N. Charter]
6. (Geneva) Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, T.I.A.S. 3362, 75 U.N.T.S. 31, *entered into force* Oct. 21, 1950, *for the United States* Feb. 2, 1956 [hereinafter GC I].
7. (Geneva) Convention (II) for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, T.I.A.S. 3363, 75 U.N.T.S. 85, *entered into force* Oct. 21, 1950, *for the United States* Feb. 2, 1956 [hereinafter GC II].
8. (Geneva) Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. 3364, 75 U.N.T.S. 135, *entered into force* Oct. 21, 1950, *for the United States* Feb. 2, 1956 [hereinafter GC III].
9. (Geneva) Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. 3365, 75 U.N.T.S. 287, *entered into force* Oct. 21, 1950, *for the United States* Feb. 2, 1956 [hereinafter GC IV].
10. Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3, *reprinted in* 16 I.L.M. 1391 (1977), *entered into force* Dec. 7, 1978 (signed by the United States Dec. 12, 1977, not transmitted to U.S. Senate, see S. TREATY DOC. NO. 100-2) [hereinafter AP I].
11. Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 609, *reprinted in* 16 I.L.M. 1442 (1977), *entered into force* Dec. 7, 1978 (signed by the United States Dec. 12, 1977, transmitted to the U.S. Senate Jan. 29, 1987, still pending action as S. TREATY DOC. NO. 100-2) [hereinafter AP II].
12. Protocol Additional (III) to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (Protocol III), Dec. 8, 2005, S. TREATY DOC. NO. 109-10, 45 I.L.M. 558 (2006), *entered into force* Jan. 14, 2007, *for the United States* Sept. 8, 2007 [hereinafter AP III].
13. (Hague) Convention for the Protection of Cultural Property in the Event of Armed Conflict, With Regulations for the Execution of the Convention, May 14, 1954, S. TREATY DOC. NO. 106-1, 249 U.N.T.S. 240, *entered into force* Aug. 7, 1956, *for the United States* Mar. 13, 2009 (First Protocol still pending action, see S. TREATY DOC. NO. 106-1) [hereinafter Hague Cultural Property Convention].

SELECT WEAPONS TREATIES (ALSO CONTAINED IN THE LOAC DOCSUPP)

14. (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. 8061, 94 L.N.T.S. 65, *entered into force* Feb. 8, 1928, *for the United States* Apr. 10, 1975 [hereinafter Geneva Gas Protocol].
15. Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, Apr. 10, 1972, 26 U.S.T. 583, T.I.A.S. 8062, 1015 U.N.T.S. 163, *entered into force and for the United States* Mar. 26, 1975 [hereinafter BWC].
16. (Paris) Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Jan. 13, 1993, S. TREATY DOC. NO. 103-21, 1974 U.N.T.S. 3, 32 I.L.M. 800, *entered into force and for the United States* Apr. 29, 1997 [hereinafter CWC].
17. 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, Oct. 10, 1980, S. TREATY DOC. NO. 103-25, 1342 U.N.T.S. 137, 19 I.L.M. 1524, *entered into force* Dec. 2, 1983, *for the United States* Sept. 24, 1995 [hereinafter CCW].

EXECUTIVE ORDERS AND MILITARY REGULATIONS

18. Exec. Order No. 12,333, 3 C.F.R. 200 (1981), as amended by Exec. Order Nos. 13,284 (2003), 13,335 (2004) and 13,470 (2008) [hereinafter E.O. 12333].
19. DEP'T OF DEF. DIRECTIVE 2060.1, IMPLEMENTATION OF, AND COMPLIANCE WITH, ARMS CONTROL AGREEMENTS (9 Jan. 2001) [hereinafter DoDD 2060.1]
20. DEP'T OF DEF. DIRECTIVE 2311.01E, DoD LAW OF WAR PROGRAM (9 May 2006)(Change 1 of 15 Nov. 2010) (canceling DoDD 5100.77, DoD Law of War Program (9 Dec. 1998)) [hereinafter DoDD 2311.01E].
21. DEP'T OF DEF. DIRECTIVE 3000.3, Policy for Non-Lethal Weapons (9 July 1996) [hereinafter DoDD 3000.3].
22. DEP'T OF DEF. DIRECTIVE 5000.01, The Defense Acquisition System (12 May 2003) [hereinafter DoDD 5000.01].
23. CHAIRMAN OF THE JOINT CHIEFS OF STAFF INSTRUCTION 5810.01D, IMPLEMENTATION OF THE DOD LAW OF WAR PROGRAM (30 Apr 2010) [hereinafter CJCSI 5810.01D].
24. U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE (18 July 1956) (Change 1, 15 July 1976) [hereinafter FM 27-10].
25. U.S. DEP'T OF ARMY, ARMY REG. 27-53, REVIEW OF LEGALITY OF WEAPONS UNDER INTERNATIONAL LAW (1 Jan. 1979) [hereinafter AR 27-53].
26. U.S. DEP'T OF NAVY, NAVAL WARFARE PUBLICATION (NWP) 1-14M/U.S. MARINE CORPS WARFIGHTING PUBLICATION (MCWP) 5-12.1/U.S. COAST GUARD COMMANDANT'S PUBLICATION (COMDTPUB) P5800.7A , THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS (July 2007) [hereinafter NWP 1-14M].
27. U.S. DEP'T OF NAVY, DEP'T OF NAVY IMPLEMENTATION AND OPERATION OF THE DEFENSE ACQUISITION SYSTEM AND THE JOINT CAPABILITIES INTEGRATION AND DEVELOPMENT SYSTEM (1 Sept. 2011) [hereinafter SECNAVINST 5000.2E].
28. U.S. DEP'T OF AIR FORCE, AIR FORCE POLICY DIRECTIVE 51-4, COMPLIANCE WITH THE LAW OF ARMED CONFLICT (4 Aug. 1993) [hereinafter AFPD 51-4].

I. INTRODUCTION

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

II. DEFINITION

The law of war (LOW) is "that part of international law that regulates the conduct of armed hostilities."[1] It is often termed the law of armed conflict (LOAC) or international humanitarian law (IHL). The LOAC encompasses all international law for the conduct of hostilities binding on the United States or its individual citizens, including treaties and international agreements to which the United States is a party, and applicable customary international law (CIL).[2] This chapter will use the term LOAC to refer to the LOW or IHL.

III. POLICY

Department of Defense (DoD) policy is to comply with the LOAC "during all armed conflicts, however such conflicts are characterized, and in all other military operations."[3] Every Soldier, Sailor, Airman, Marine, and all others accompanying U.S. forces must comply with the LOAC, particularly its basic principles explained below and its requirements for humane treatment of detainees. The nature and extent of LOAC obligations may differ, however, depending on the laws applicable to the type of armed conflict.

IV. PURPOSES OF THE LAW OF ARMED CONFLICT

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

1. Protecting both combatants and noncombatants from unnecessary suffering;
2. Safeguarding persons who fall into the hands of the enemy; and
3. Facilitating the restoration of peace.

B. The functional purposes include:

1. Ensuring good order and discipline;
2. Fighting in a disciplined manner consistent with national values; and
3. Maintaining domestic and international public support.

V. BASIC PRINCIPLES OF THE LAW OF ARMED CONFLICT

A. **Principle of Military Necessity**. This principle "justifies those measures not forbidden by international law which are indispensable for securing the complete submission of the enemy as soon as possible."[4] Article 23(g) of the Hague Regulations (HR) explicitly recognizes military necessity as valid. It mandates that a belligerent not "destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war." Numerous other provisions in the LOAC also acknowledge this principle explicitly or implicitly. As a principle of *jus ad bellum*, military necessity justifies the use of force required to accomplish a lawful mission.

1. **Military necessity does not authorize acts otherwise prohibited by the LOAC**. This principle must be applied in conjunction with other LOAC principles discussed in this chapter as well as other, more specific, legal constraints set forth in LOAC treaties to which the United States is a party.

2. **Military necessity is not a criminal defense for acts expressly prohibited by law.**

a. The LOAC prohibits the intentional targeting of persons protected under any circumstances. Noncombatant military personnel (e.g., chaplains, prisoners of war, or the wounded) and civilians "enjoy the protection afforded [by this rule] unless and for such time as they take a direct part in hostilities."[5]

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[1] DoDD 2311.01E, para. 3.1.
[2] *Id.*
[3] *Id.*, para. 4.1.
[4] FM 27-10, para. 3a.
[5] AP I, art. 51(3).

b. Civilian objects are generally protected from intentional attack or destruction. However, civilian objects may lose their protections if they are being used for military purposes or if there is a military necessity for their destruction or seizure. Civilian objects may, in such circumstances, become military objectives (as discussed below), and if so, the LOAC permits their destruction.[6] For example, General Lothar Rendulic was German Commander in Norway in late 1944. Fearing a Russian invasion against German-occupied Norway, he adopted a "scorched-earth" policy, destroying anything that could be used by the Russians. The Nuremberg Tribunal convicted General Rendulic of other charges, but found him not guilty of unlawfully destroying civilian property by his "scorched earth" tactics to thwart an enemy invasion that never came.[7] Though the Tribunal expressed doubt as to his judgment, it held that HR, Article 23(g) justified his actions, as "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."[8]

c. **The Rendulic Rule**: The Rendulic case also stands for a broader standard regarding liability for battlefield acts: commanders and personnel should be evaluated based on **information reasonably available at the time of decision**. In recently ratifying several LOAC treaties, the U.S. Senate attached understandings that "any decision by any military commander, military personnel, or any other person responsible for planning, authorizing, or executing military action shall only be judged on the basis of that person's assessment of the information reasonably available to the person at the time the person planned, authorized, or executed the action under review, and shall not be judged on the basis of information that comes to light after the action under review was taken."[9]

d. There may be situations where, because of incomplete intelligence or the failure of the enemy to abide by the LOAC, civilian casualties occur. Example: The Iraqi Al Firdos C3 Bunker. During the first Persian Gulf War (1991), U.S. military planners identified this Baghdad bunker as an Iraqi military command and control center. Barbed wire surrounded the complex, it was camouflaged, armed sentries guarded its entrance and exit points, and electronic intelligence identified its activation. Unknown to coalition planners, some Iraqi civilians used upper levels of the facility as nighttime sleeping quarters. The bunker was bombed, resulting in over 400 civilian deaths. Was there a violation of the LOAC? Not by U.S. forces, but there was a clear violation of the principle of distinction (discussed *infra*) by Iraqi forces. Based upon information gathered by Coalition planners, the commander made an assessment that the target was a military objective. Although the attack may have resulted in unfortunate civilian deaths, there was no LOAC violation because the attackers acted in good faith based upon the information reasonably available at the time the decision to attack was made.

B. **Principle of Distinction**. Sometimes referred to as the principle of *discrimination*, this principle requires that belligerents distinguish combatants from civilians and military objectives from civilian objects (i.e., protected property or places). In keeping with this "grandfather" principle of the LOAC, **parties to a conflict must direct their operations only against combatants and military objectives.**[10]

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

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

b. "employ a method or means of combat the effects of which cannot be directed at a specified military objective," (e.g., this might prohibit area bombing in certain populous areas, such as a bombardment "which

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[6] *See* HR art. 23(g), FM 27-10, paras. 56, 58; *compare* GC IV, art. 147.

[7] *See* "Opinion and Judgment of Military Tribunal V," United States v. Wilhelm List, X TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 1296 (Feb. 19, 1948) (Case 7) [hereinafter *Hostage Case*]. The case consolidated charges against twelve German general officers for their conduct while in command of armies occupying enemy countries, including the alleged taking of civilian hostages.

[8] *Id.* at 1297.

[9] S. XEC. REP. NO. 110–22, at 13 (2008) (CCW Protocols III (incendiary weapons) and IV (blinding laser weapons)); S. EXEC. REP. NO. 106–2, at 20 (2009) (CCW Amended Protocol II (landmines and booby traps)). *See also* S. EXEC. REP. NO. 110-26, at 10 (2008) (Hague Cultural Property Convention). This chapter discusses these treaties in greater detail below.

[10] AP I, art. 48. As stated above, the United States is not a party to AP I, but does accept many of AP I's provisions as a matter of policy and views some of them as CIL. This handbook takes no position on which provisions constitute CIL and which provisions are followed as a matter of policy. *See* the LOAC DocSupp at 232–36 for additional information.

treats as a single military objective a number of clearly separated and distinct military objectives in a city, town, or village . . ." [11]); **or**

c. "employ a method or means of combat the effects of which cannot be limited as required" by the Protocol (e.g., release of dangerous forces[12] or collateral damage excessive in relation to concrete and direct military advantage[13]); **and**

d. "consequently, in each case, are of a nature to strike military objectives and civilians or civilian objects without distinction."[14]

2. AP I defines military objectives as "objects which by their nature, location, purpose or use, make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage."[15] See discussion of Military Objectives *infra*.

3. Distinction applies both offensively and defensively. It requires parties to a conflict to engage only in military operations that distinguish (or discriminate) between combatants and civilians not taking direct part in the hostilities, and direct attacks solely against combatants. Similarly, military force must be directed only against military objectives, not civilian objects. Under the principle of distinction, the civilian population as such, as well as individual civilians, may not be made the object of deliberate attack.[16] Defensively, the principle of distinction requires that military forces "distinguish themselves from the civilian population so as not to place the civilian population at undue risk. This includes not only physical separation of military forces and other military objectives from civilian objects . . . but also other actions, such as wearing uniforms."[17]

C. **Principle of Proportionality.** This principle requires that **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**.[18] Proportionality is not a separate legal standard as such, but provides a method by which military commanders can balance military necessity and civilian loss or damage in circumstances when an attack may cause incidental damage to civilian personnel or property.

1. Collateral Damage. Collateral damage, also called incidental damage, consists of both unavoidable and unintentional damage to civilian personnel and property incurred while attacking a military objective. **Incidental damage is *not* a violation of international law.** While no LOAC treaty defines this concept, its inherent lawfulness is implicit in treaties referencing the concept. For example, AP I, Article 51(5) describes indiscriminate attacks as those causing "*incidental* loss . . . excessive . . . to . . . the military advantage anticipated."[19]

2. Attacks and Military Advantage. The term "attack" is defined in Article 49 of AP I as "acts of violence against the adversary, whether in offence or defence."[20] "Military advantage" is not restricted to tactical gains, but is linked to the full context of one's war strategy. Balancing between incidental damage to civilian objects and incidental civilian casualties may be done on a target-by-target basis, but also may be done in an overall sense against campaign objectives. At the time of its ratification of AP I, the United Kingdom declared that "the military advantage anticipated from an attack is intended to refer to the advantage anticipated from the attack

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[11] AP I, art. 51, para. 4(a).
[12] AP I, art. 56. The United States does not entirely accept this article. *See* the LOAC DocSupp at 232-235.
[13] AP I, art. 51, para. 4(b).
[14] AP I, art. 51, para. 4(c).
[15] AP I. art. 52, para. 2; *see also* CCW Protocol II, art. 2(4); CCW Amended Protocol II, art. 2(6); CCW Protocol III, art. 1(3)
[16] AP I, art. 51, para. 2.
[17] W. Hays Parks, *Special Forces' Wear of Non-Standard Uniforms*, 4 **CHI. J. INT'L L.** 493, 514 (2003). *See also* HR, art. 1(2) (requiring a fixed distinctive insignia); FM 27-10, para. 74 (noting concealment of combat status, by a member of the armed forces, triggers loss of the right to be treated as a POW. Note however, that FM 27-10 conflicts with more recent views, including that of Mr. Parks, who noted that historically members of the regular armed forces always received POW status once they were identified as such, no matter what they were attired in when captured. Even assuming that members of the armed forces (wearing civilian clothes or enemy uniforms) do get POW status, they can still be tried and punished for violations of the law of war, since combatant immunity only applies to lawful acts.
[18] FM 27-10, para. 41, change 1. While the United States is not a party to AP I, this language is derived from the prohibition on indiscriminate attacks contained in Article 51 of the Protocol.
[19] AP I, art. 51, para. 5(b).
[20] AP I, art. 49, para. 1.

considered as a whole and not only from isolated or particular parts of the attack." Proportionality balancing typically involves a variety of considerations, including the security of the attacking force.[21]

D. **Principle of Unnecessary Suffering.** Sometimes referred to as the principle of *superfluous injury* or *humanity*, this principle requires military forces to **avoid inflicting gratuitous violence on the enemy**. It arose originally from humanitarian concerns over the sufferings of wounded soldiers, and was codified as a weapons limitation: "It is especially forbidden . . . to employ arms, projectiles or material calculated to cause unnecessary suffering."[22] More broadly, this principle also encompasses the humanitarian spirit behind the Geneva Conventions to **limit the effects of war on the civilian population and property**, and serves as a counterbalance to the principle of military necessity.

1. Today, this principle underlies three requirements to ensure the legality of weapons and ammunitions themselves, as well as the methods by which such weapons and ammunition are employed. Military personnel may not use arms **that civilized societies recognize as *per se* causing** unnecessary suffering (e.g., projectiles filled with glass, hollow point or soft-point small caliber ammunition, lances with barbed heads), must scrupulously observe **treaty limitations** on weapons use (e.g., CCW Protocol III's prohibition on use of certain incendiary munitions near concentrations of civilians), and must not use otherwise lawful weapons in a manner **calculated to cause** unnecessary suffering (i.e., with deliberate intent to inflict *superfluous or gratuitous* injury to the enemy).

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

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

4. In practice, DoD service TJAGs oversee legal reviews of weapons during the procurement process. JAs should read these legal reviews prior to deployment for all weapons in their unit's inventory, watch for unauthorized modifications or deliberate misuse, and coordinate with higher headquarters legal counsel if it appears that a weapon's normal use or effect appears to violate this principle. See also the discussion of the DoD Weapons Review Program, *infra*.

E. **Chivalry**. Though not usually identified as one of the LOAC's basic legal principles, the concept of chivalry has long been present in the law of armed conflict. Based on notions of honor, trust, good faith, justice, and professionalism, chivalry prohibits armed forces from abusing the law of armed conflict in order to gain an advantage over their adversaries. Chivalry, therefore, demands a degree of fairness in offense and defense and requires mutual respect and trust between opposing forces. It denounces and forbids resort to dishonorable means, expedients, or conduct that would constitute a breach of trust.[23] While chivalry is not based on reciprocity, it nevertheless must be applied at all times regardless of enemy forces' action.

1. The concept of chivalry, as well as distinction, informs the LOAC's express prohibition of treachery and perfidy, defined as "bad faith." AP I, Article 37, states, "[i]t is prohibited to kill, injure or capture an adversary by resort to perfidy. Acts inviting the confidence of an adversary to lead him to believe he is entitled to, or is obligated to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence, shall constitute perfidy." Examples of perfidy include feigning surrender in order to draw the enemy closer, and then firing on the enemy at close range, feigning wounded status, misusing protective emblems, such as the Red Cross, and feigning noncombatant or neutral status. Perfidy, therefore, involves injuring the enemy

[21] *See, e.g.*, DoD FINAL REPORT TO CONGRESS, CONDUCT OF THE PERSIAN GULF WAR (April 1992), p. 611.
[22] HR, art. 23(e).
[23] Hague IV, art. 23; FM 27-10 (1940), para. 4(c).

through his adherence to the LOAC. Perfidious behavior degrades the protections and mutual restraints developed in the interest of all Parties, combatants, and civilians.

2. Chivalry does not forbid ruses or deception, which are "admitted as a just and necessary means of hostility, consistent with honorable warfare."[24] See discussion of Ruses and Deception, *infra*.

VI. APPLICATION OF THE LAW OF ARMED CONFLICT

A. The LOAC applies to all cases of declared war or any other armed conflicts that arise between the United States and other nations, even if the state of war is not recognized by one of them. **This threshold is codified in Common Article 2 of the Geneva Conventions**. Armed conflicts such as the 1982 Falklands War, the Iran-Iraq War of the 1980s, and the first (1991) and second (2003) U.S.-led coalition wars against Iraq were **international armed conflicts (IACs)** to which the full body of LOAC applied. AP I purported to expand the notion of IAC and application of the full Geneva Conventions to certain wars of "national liberation" for its State parties.[25] Though the United States has signed (but not ratified) and accepts several articles of AP I, it has persistently objected to this article. To date, no armed group has successfully invoked this expansion.

B. The LOAC also applies to armed conflicts between one or more States and organized armed groups. **Common Article 3 of the Geneva Conventions** and AP II (signed and largely supported, but not yet ratified by the United States) enumerate specific protections for these **non-international armed conflicts (NIACs)**. State responses to guerrilla warfare, internal rebellions, and transnational terrorist operations could all qualify as NIACs. However, nations experiencing such conflicts (even with significant military response and numerous casualties) rarely formally acknowledge that a NIAC exists. Nevertheless, the legal concept of NIAC remains significant.

C. Not all conflicts between a State and armed actors constitute armed conflicts. For example, Article 1(2) of AP II excludes "situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts." JAs should look primarily to other sources of law for guidance in such circumstances, such as domestic law, but may also be called upon to help commands develop policies that embody the spirit of LOAC and accompanying principles when confronting escalating violence or threats.

D. In peace operations like those in Somalia, Haiti, and Bosnia, questions regarding the applicability of the LOAC arise frequently. The United States, United Nations, and NATO have long required that their forces would apply the LOAC in these operations,[26] but particular treaties often do not specifically mention peace operations and categorization of a conflict as an IAC or NIAC may be uncertain. When facing situations that appear to fall short of the traditional threshold of armed conflict would trigger the LOAC, Judge Advocates (JA) should consult with judge advocates of more senior commands to determine how best to comply with the LOAC and U.S. customary practice.

E. In summary, where the LOAC expressly applies, JAs must advise commanders and U.S. forces to follows its requirements exactly. Even where not directly applicable, U.S. practice has been to comply with the LOAC to the extent "practicable and feasible."[27]. In military operations short of international armed conflict, LOAC treaties provide an invaluable template for military conduct. The Soldier's Rules[28] also provide useful standards for the individual Soldier in the conduct of operations across the conflict spectrum. The military commander, with the JA's assistance and advice, must determine those provisions of LOAC that best fit the mission and situations not covered by formal rules, and train forces accordingly.

VII. SOURCES OF THE LAW OF ARMED CONFLICT.

A. **The Law of The Hague.**[29] "Hague Law," which is typically associated with targeting, regulates the "means and methods" of warfare, including: prohibitions against using certain weapons such as poison; humanitarian concerns such as warning the civilian population before a bombardment; and the law of belligerent

[24] Lieber Code, para. 101.
[25] AP I, art. 1(4).
[26] *See, e.g.*, DoDD 2311.01E, para. 4.
[27] *See* Memorandum of W. Hays Parks to the Judge Advocate General of the Army, 1 October 1990.
[28] Included *infra* in this chapter, Appendix A.
[29] *See* Hague IV and Hague IX (1907).

occupation (particularly with respect to property.) The rules relating to the means and methods of warfare are primarily derived from articles 22 through 41 of the Regulations Respecting the Laws and Customs of War on Land annexed to Hague IV; hence the term "Hague Regulations."[30]

B. **Geneva Conventions of 1949**.[31] As opposed to the "means and methods" approach of Hague Law, the term "Geneva Law" generally refers to a regulatory approach which seeks to protect "victims" of war such as wounded and sick, shipwrecked at sea, prisoners of war, and civilians. Geneva law seeks to ensure humane treatment of the "victims" it aims to "respect and protect."

C. **1977 Additional Protocols to the Geneva Conventions**.[32] AP I illustrates the convergence of "Hague Law" and "Geneva Law" by updating and including both traditions in one document. Although the United States has not ratified either AP I or AP II, many nations have. U.S. commanders must be informed that AP I and AP II bind numerous allied forces, including all members of NATO except Turkey. The United States also believes some provisions of AP I and II to be CIL, and follows others as a matter of policy.[33] Documents outlining the specific provisions of AP I which the US regards as CIL can be found in pages 232 to 235 of the Documentary Supplement. This difference in obligation has not proven to be a major obstacle to U.S. allied or multinational operations. In 2007, the United States ratified AP III to the Geneva Conventions, which recognizes the Red Crystal as a symbol equal to the Red Cross and Red Crescent.

D. Other U.S. Sources. Numerous weapons treaties, such as the CCW and its Protocols, prohibit or regulate weapons use. Many of these are discussed below and reprinted in the LOAC DocSupp. Implementing LOAC guidance for U.S. armed forces is found in DoD, joint, and service regulations, policies, manuals, and doctrine.[34]

VIII. COMBATANTS AND PROTECTED PERSONS

A. General Rules. The LOAC permits intentional attacks against combatants, but not civilians or noncombatants. As such, the civilian population is protected from direct attack. An individual civilian is protected from direct attack unless and for such time as he or she takes a direct part in hostilities (DPH).[35] The phrase "protected persons" is a more narrow legal term of art specific to GC IV, as discussed below. The term noncombatant appears in GC IV, Article 15 but is not precisely defined in the LOAC. It can refer to various categories of military personnel protected from attack, such as military medical personnel and chaplains, plus those out of combat like prisoners of war and the wounded, sick, and shipwrecked, as well as to civilians.

B. Privileges of Lawful Combatants

1. Combatants. Generally, **combatants are military personnel lawfully engaging in hostilities in an armed conflict on behalf of a party to the conflict**. Combatants are lawful targets unless *hors de combat*, that is, out of combat status—captured, wounded, sick or shipwrecked and no longer engaged in hostilities. Combatants also are *privileged* belligerents, i.e., authorized to use force against the enemy on behalf of the State.

a. Under the 1949 Geneva Conventions,[36] **combatants** include:

(1) The regular armed forces of a State Party to the conflict; and

(2) Militia, volunteer corps, and organized resistance movements belonging to a State Party to the conflict that are under responsible command, wear a fixed distinctive sign recognizable at a distance, carry their arms openly, and abide by the laws of war; and members of regular armed forces who profess allegiance to a government not recognized by a detaining authority or occupying power.

b. Lawful Combatants as defined in the LOAC:

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[30] Hague IV, arts. 22-41.
[31] *See generally* GC I; GC II; GC III; GC IV.
[32] *See generally* AP I; AP II; AP III.
[33] *See* Memorandum from Hays Parks, Chief International Law Branch, to Mr. John H. McNeill, Assistance General Counsel (International), OSD, subject: 1977 Protocols Additional to the Geneva Conventions, Customary International Law Implications (9 May 1986), reprinted in the LOAC DocSupp at 234–35.
[34] *See, e.g.*, FM 27-10; NWP 1-14M; FM 1-10; AFPD 51-4; Joint Publication 3-60, *Joint Targeting* (13 April 2007).
[35] AP I, art. 51(3).
[36] GC III, art. 4; GC I, art. 13.

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

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

(3) Have a *combatant's privilege*, i.e., they bear no criminal responsibility for killing or injuring enemy military personnel or civilians taking an active part in hostilities, or for causing damage or destruction to property, provided their acts comply with the LOAC;

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

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

(6) If captured, must be treated humanely and are entitled to prisoner of war (POW) status.

2. **Unprivileged enemy belligerents**, also called unlawful combatants, may include spies, saboteurs, or civilians directly participating in hostilities or who otherwise engage in unauthorized attacks or combatant acts. These individuals do not qualify for GC III POW status and may be prosecuted for their unlawful acts. If directly participating in hostilities (DPH), they may also be attacked as discussed below.

a. Article 44(3) of AP I allows a belligerent to attain combatant status by carrying his arms openly during each military engagement and when visible to an adversary while deploying for an attack. This Article lowers the threshold for obtaining combatant status (and therefore combatant immunity and POW status) by eliminating the classic requirement for "having a fixed distinctive sign recognizable at a distance,"[37] and requiring such guerrilla fighters only to carry arms openly while engaged in hostile acts.

b. The United States rejected AP I in part due to this provision, has long vehemently opposed it, and does *not* accept it as customary law. Encouraging enemy forces to blur the distinction between combatants and civilians undermines a core principle and obligation of the LOAC. Through reservations and/or statements of understanding, other governments such as the United Kingdom have narrowly restricted or virtually eliminated application of AP I, Article 44(3).

C. Protections for the Wounded and Sick in the Field and at Sea. GC I and II provide protections for military wounded, sick, and shipwrecked at sea. This section provides a brief summary of these protections:

1. *Hors de Combat*. A person is *hors de combat* if he is in the power of an adverse party, if he clearly expresses intention to surrender, or is "incapacitated by wounds or sickness."[38] It is prohibited to attack enemy personnel who are "*out of combat*;"[39] they must be treated humanely and, at a minimum, in accordance with the protections set forth in Common Article 3 of the Geneva Conventions.

a. Members of the armed forces who are wounded or sick[40] and who cease to fight are to be respected and protected, as are shipwrecked members of the armed forces at sea.[41] "Shipwrecked persons include those in peril at sea or in other waters as a result of the sinking, grounding, or other damage to a vessel in which they are embarked, or of the downing or distress of an aircraft."[42] The term "shipwrecked" includes both military personnel and civilians.[43]

b. Respect means to spare, not to attack. Protect means to come to someone's defense; to lend help and support. Each belligerent must treat his fallen adversaries as he would the wounded of his own army.[44] The order of treatment is determined solely by urgent medical reasons. No adverse distinctions in treatment may be established based on gender, race, nationality, religion, political opinions, or any other similar criteria.[45] Treatment is accorded using triage principles which provide the greatest medical assets to those with significant injuries who

[37] GC III, art. 4.A.(2)(b).
[38] AP I, art. 41, para. 2(a)–(c).
[39] GC I–IV, art. 3; *see also* AP I, art. 41, para. 1.
[40] GC III, art. 12.
[41] GC II, art. 12.
[42] NWP 1-14M, para. 11.6.
[43] AP I, art. 8, para. 2.
[44] Pictet's Commentaries, GC I, p. 134-137.
[45] GC I, art. 12.

may benefit from treatment. Wounded who will die regardless of treatment and those wounded whose injuries are not life-threatening are given lesser priority.[46]

c. Parties are obligated to search for and collect the wounded, sick, and shipwrecked as conditions permit, and particularly *after* an engagement, in recognition that military operations can make the obligation to search for the fallen impracticable.[47] If compelled to abandon the wounded and sick to the enemy, commanders must leave medical personnel/material to assist in their care, "as far as military considerations permit."[48]

d. Medical units and establishments may not be attacked intentionally.[49] However, incidental damage to medical facilities situated near military objectives is not a violation of the LOAC. Medical units lose their protection if committing "acts harmful to the enemy[50]," and, if after a reasonable time, they fail to heed a warning to desist.[51] A medical unit will not be deprived of protection if unit personnel carry small arms for their own defense and the unit is protected by a picket or sentries. Nor will protection cease if small arms removed from the wounded are present in the unit, or if personnel from the veterinary service are found with the unit, or the unit is providing care to civilian wounded and sick.[52]

e. Permanent medical personnel "exclusively engaged" in medical duties,[53] chaplains,[54] personnel of national Red Cross Societies, and other recognized relief organizations,[55] are considered noncombatants and shall not be intentionally attacked. To enjoy immunity, these noncombatants must abstain from any form of participation – even indirect – in hostile acts.[56] In recognition of the necessity of self-defense, however, medical personnel may be armed with small arms for their own defense or for the protection of the wounded and sick under their charge. They may only employ their weapons if attacked in violation of the LOAC. They may not employ arms against enemy forces acting in conformity with the LOAC and may not use force to prevent the capture of their unit by the enemy (it is, on the other hand, perfectly legitimate for a medical unit to withdraw in the face of the enemy).[57] Upon capture they are "retained personnel," not POWs; however, at a minimum they receive POW protections. While detained, they are to perform only medical or religious duties. They are to be retained as long as required to treat the health and spiritual needs of POWs. If their medical or spiritual services are not required, they are to be repatriated.[58] Personnel of aid societies of neutral countries cannot be retained, and must be returned as soon as possible.

f. Civilian medical care remains the primary responsibility of the civilian authorities. If a civilian is accepted into a military medical facility, care must be offered solely on the basis of medical priority[59]

g. Parties to the conflict shall prevent the dead from being despoiled and shall ensure that burial of the dead is carried out honorably and individually as far as circumstances permit. Bodies shall not be cremated except for imperative reasons of hygiene or for motives based on the religion of the deceased. Prior to burial or cremation, there shall be a careful examination (medical examination if possible) to confirm death and establish identity. Graves shall be respected, maintained and marked. Parties to the conflict shall forward to each other information concerning the dead and, in general, all articles of an intrinsic or sentimental value which are found on the dead.[60]

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[46] FM 4-02.6, para. C-3; FM 8-42, para. J-3.
[47] GC I, art. 15, GC II, art. 18.
[48] GC I, art. 12.
[49] GC I, art. 19.
[50] Such acts include, but are not limited to, utilizing a hospital as a command and control center, ammunition storage facility, or troop billeting, or conducting attacks from the hospital.
[51] GC I, art. 21.
[52] GC I, art. 22.
[53] GC I, art. 24.
[54] *Id.*
[55] GC I, art. 26,
[56] Pictet's Commentaries, GC I, p. 221.
[57] FM 4-02.
[58] GC I, art. 28.
[59] GC I, art. 12. *See also* GC IV, art. 16; FM 4-02.6, para. A-4.
[60] GC I, arts. 15-17.

2. Parachutists vs. paratroopers.[61] Descending *paratroopers* are presumed to be on a military mission and therefore may be targeted. *Parachutists* are crewmen of a disabled aircraft. They are presumed to be out of combat and may not be targeted unless it is apparent they are engaged on a hostile mission or are taking steps to resist or evade capture while descending. Parachutists "shall be given the opportunity to surrender before being made the object of attack."[62]

D. Protections for Prisoners of War.[63] Geneva Convention III sets forth several protections for POWs. This section briefly summarizes some of those protections and related rules:

1. **Detainees**. POW status arises only during international armed conflicts of the kind described in Common Article 2 of the Geneva Conventions.[64] In non-international armed conflict or peacekeeping situations (e.g., Somalia, Haiti, Bosnia, as discussed above), persons who commit hostile acts against U.S. forces or serious criminal acts resulting in their capture would not be entitled to POW protection. These persons may be termed "detainees" instead of POWs. GC III nonetheless provides a useful template for detainee protection and care, and, in keeping with Geneva Convention Common Article 3, it is DOD Policy that all detainees will be treated humanely.[65]

2. **Surrender**. Surrender may be made by any means that communicates the intent to give up the fight. There is no clear-cut rule as to what constitutes surrender. However, most agree surrender constitutes a cessation of resistance and placement of one's self at the discretion of the captor. The onus is on the person or force surrendering to clearly communicate intent to surrender. Captors must *respect* (not attack) and *protect* (care for) those who surrender—reprisals are prohibited.[66] Civilians who are captured accompanying the force also receive POW status.[67]

3. **Identification and Status**. The initial combat phase will likely result in the capture of a wide array of individuals.[68] DoD Directive 2311.01E, the DoD Law of War Program, states that U.S. forces will comply with the LOAC regardless of how the conflict is characterized. In future conflicts, JAs should advise commanders that, regardless of the nature of the conflict, **all enemy personnel should initially be accorded the protections of GC III**, at least until their status has been 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 POWs," not that such persons "will have the status of POW." When doubt exists as to whether captured enemy personnel warrant continued POW status, Article 5 (GC III) Tribunals must be convened. It is important that JAs be prepared for such tribunals. During the Vietnam conflict, a theater directive established procedures for the conduct of Article 5 Tribunals. The combatant commander or Army component commander may promulgate a comparable directive when appropriate.[69]

4. **Treatment**. There is a legal obligation to provide a wide array of rights and protections to POWs, including adequate food,[70] facilities,[71] and medical aid[72] to all POWs. This obligation poses significant logistical

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[61] FM 27-10, para. 30.
[62] AP I, art. 42.
[63] GC III, art. 4; Hague IV, art. 23(c)-(d).
[64] GC III, art. 2.
[65] *See* DoDD 2310.01E for current terminology and application of POW/detainee concepts to the GWOT.
[66] GC III, art. 13.
[67] GC III, art. 4(a)(4).
[68] For example, in two days of fighting in Grenada, Army forces captured approximately 450 Cubans and 500 hostile Grenadian. Panama provided large numbers of detainees, both civilian and "PDF" (Panamanian Defense Force/police force) for the Army to sort out. The surrender of almost overwhelming numbers of Iraqi forces in Desert Storm was well publicized.
[69] 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 Enemy Prisoners of War, who were actually displaced civilians. Subsequent interrogations determined that they had taken no hostile action against Coalition Forces. In some cases, they had surrendered to Coalition Forces to receive food and water. Tribunals were conducted to verify the status of the detainees. Upon determination that they were civilians who had taken no part in hostilities, they were transferred to detainment camps. Whether the tribunals were necessary as a matter of law is open to debate—the civilians had not "committed a belligerent act," nor was their status "in doubt." No Article 5 tribunals were held in Operation Enduring Freedom (OEF) but limited numbers of Article 5 tribunals were held in the opening stages of Operation Iraqi Freedom (OIF).
[70] GC III, art. 26.
[71] GC III, art. 24.

problems in fast-moving tactical situations; thus, JAs must be aware of how to meet this obligation while placing a minimum burden on operational assets.[73] POWs must be protected from physical and mental harm.[74] They must be transported from the combat zone as quickly as circumstances permit. Subject to valid security reasons, POWs must be allowed to retain possession of their personal property, protective gear, valuables, and money. These items must not be taken unless properly receipted for and recorded as required by GC III. In no event can a POW's rank insignia, decorations, personal effects (other than weapons or other weapons that might facilitate escape), or identification cards be taken. These protections continue through all stages of captivity, including interrogation.

E. **Protections for Civilians**. Geneva Convention IV sets forth several protections for civilians, notably augmented by AP I. This section briefly summarizes several of those protections:

1. General Rule. The civilian population, individual civilians, and civilian property are protected as a matter of their *status*, and may not be the object of direct (intentional) attack.[75] Under the Geneva Conventions and AP I, civilians are those whom are not members of a nation's armed forces.[76]

2. Specific Protections.

a. Indiscriminate Attacks. As discussed above in Part V above, AP I protects the civilian population from indiscriminate attacks. An attack may also be indiscriminate if it fails to distinguish between legitimate targets and civilians not taking part in hostilities. Such 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.[77]

b. Civilian Medical and Religious Personnel. Such personnel shall be respected and protected.[78] They receive the benefits of the provisions of the Geneva Conventions and the Protocols concerning the protection and identification of medical personnel so long as they do not engage in acts inconsistent with their protected status.

c. Journalists. Protected as "civilians" provided they take no action inconsistent with their status.[79] This provision has not attained the status of CIL, but historically the United States has supported it. If captured while accompanying military forces in the field, a journalist or war correspondent is entitled to POW status.[80]

d. Personnel Engaged in the Protection of Cultural Property. Article 17 of the Hague Cultural Property Convention established a duty to respect (not directly attack) persons protecting such property. Regulations attached to the Convention provide for identification and filling of specific positions as cultural protectors. As these individuals would likely be civilians, they are entitled to protection from intentional attack due to their civilian status. (To date, the United States has ratified the Convention itself, but not the Regulations).

e. Contractors. Civilians who *accompany* the armed forces in the field in time of armed conflict are protected from direct attack unless and for such time as they take a direct part in hostilities (DPH).[81] They may be at

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[72] GC III, arts. 29–32.

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

[74] GC III, art. 13.

[75] AP I, arts. 48, 51(2).

[76] AP I, art. 50(1) defines civilians as those persons not belonging to one of the categories of persons referred to in Third Geneva Convention, article 4(A)(1), (2), (3) and (6), and Article 43 of AP I. The United States contests the reference to Article 43.

[77] AP I, art. 51(4).

[78] GC IV, art. 20; AP I, art. 15.

[79] AP I, art. 79.

[80] GC III, art. 4(a)(4).

risk of death or injury incident to lawful enemy attacks on military objectives. If captured, they are entitled to POW status, pursuant to GC III, Article 4(4). See the next section for a discussion of DPH.

3. Exception to General Rule: Direct Participation in Hostilities

a. AP I, Article 51(3) states that civilians enjoy protection from direct attack "unless and for such time as they take a direct part in hostilities" (DPH). Those who directly participate in hostilities may be attacked in the same manner as identified members of an opposing armed force.

b. The notion of permitting direct attack on civilians, and the meaning and limits of Article 51(3)'s individual terms remains hotly contested.[82] Many commentators agree that during their commission, some acts meet the definition of DPH and justify a response by deadly force (e.g., personally engaging in potentially lethal acts like firing small arms at Soldiers). Likewise, many agree that extremely remote or indirect acts do not constitute DPH (e.g., contractor factory workers distant from the battlefield, general public support for a nation's war effort). Also, many agree that the mere presence of civilians does not immunize military objectives from direct attack, but rather presents a question of proportionality (not distinction). (E.g., a contractor supply truck driven to the front lines may be attacked, with the civilian driver considered collateral damage).

c. More difficult cases arise as conduct becomes more indirect to actual hostilities, remote in location, or attenuated in time. For the past decade, the United States has faced determined enemies who are not members of nation state forces, but rather transnational organized armed groups in constantly shifting alliances, sometimes in locations where governments are unable or unwilling to respond. These foes deliberately and illegally use the civilian population and civilian objects to conduct or conceal their attacks as a strategy of war. Further complicating the issue, U.S. and other forces increasingly utilize civilian or contractor support in battlefield or targeting roles, and rely on sophisticated technology and intelligence to plan and conduct attacks.

d. Thus far, universally agreed-upon definitions of DPH have proven elusive. The International Committee of the Red Cross (ICRC) proposed a narrow reading of DPH requiring a (1) threshold showing or likelihood of harm, (2) a direct causal link between the act in question and that harm, and (3) a belligerent nexus to the conflict as shown by specific intent to help or harm one or more sides. The ICRC also proposed that those individuals engaged in "continuous combat functions" could be attacked at any time, but suggested that combatants should attempt to capture civilians first and use deadly force as a last resort. These proposals and others remain debated by nations, warfighters, and scholars alike, with some allies moving to implement all or part.[83]

e. To date, the United States has not adopted the complex ICRC position, nor its vocabulary. Instead, the United States relies on a case-by-case approach to both organized armed groups and individuals. U.S. forces use a functional[84] DPH analysis based on the notions of hostile act and hostile intent as defined in the

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[81] *Id.*

[82] This paragraph is based on the editor's best understanding of accepted parameters in an ongoing debate both academic and real world. JAs should be aware that the International Committee of the Red Cross recently published "interpretive guidance" on what constitutes direct participation in hostilities. *See* NILS MELZER, INT'L COMM. OF THE RED CROSS, INTERPRETATIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 78 (2009) *available at* http://www.icrc.org/web/eng/siteeng0.nsf/html/p0990 [hereinafter ICRC Interpretive Guidance]. The guidance was published after six years of expert meetings; however, many experts, including both U.S. experts assigned to those meetings, withdrew their names from the final product in protest over the process by which Melzer reached the conclusions contained in the study. The United States has not officially responded to the guidance but many of the experts, including Michael Schmitt, Col (Ret.) Hays Parks, and Brigadier General (Ret.) Kenneth Watkin, have published independent responses to the ICRC's guidance. *See, e.g.*, Michael N. Schmitt, *The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis*, 1 HARV. NAT'L SEC'Y J. 5 (2010), *available at* http://www.harvardnsj.com/wp-content/uploads/2010/05/Vol.-1_Schmitt_Final.pdf.; and W. Hays Parks, *Part IX of the ICRC "Direct Participation in Hostilities" Study: No Mandate, No Expertise, and Legally Incorrect*, 42 **INT'L L. & POL.** 769, 778–80 (2010) (Mr. Parks, a retired Marine Colonel, was one of the two U.S. experts assigned to the study); and Kenneth Watkin, *Opportunity Lost: Organized Armed Groups and the ICRC "Direct Participation in Hostilities" Interpretive Guidance*, 42 **N.Y.U. J. INT'L L. & POL.** 641 (2010).

[83] See Melzer, ICRC Interpretive Guidance, *supra* note 81, proposed rules IV, V, and IX and related discussion. For a brief discussion of specific examples by the ICRC, see ICRC, Direct Participation in Hostilities: Questions and Answers, Feb. 6, 2009, at http://www.icrc.org/eng/resources/documents/faq/direct-participation-ihl-faq-020609.htm. These examples may prove helpful in facilitating discussion with foreign counterparts regarding their position on the ICRC Interpretive Guidance, but should *not* be read as representative of the U.S. position on DPH.

[84] *See generally* Parks, *supra* note 81; Schmitt, *supra* note 81. *See also* Col W. Hayes Parks, USMCR (Ret), *Memo. of Law, Executive Order 12333 and Assassination*, 2 November 1989, THE ARMY LAWYER, Dec. 1989, at 5–6 (arguing that attacks on

Standing Rules of Engagement, and the criticality of an individual's contribution to enemy war efforts. After considering factors such as intelligence, threat assessments, the conflict's maturity, specific function(s) performed and individual acts and intent, appropriate senior authorities may designate groups or individuals as hostile. Those designated as hostile become status-based targets, subject to attack or capture at any time if operating on active battlefields or in areas where authorities consent or are unwilling or unable to capture or control them.[85] These designations and processes normally remain classified due to the sensitive nature of intelligence sources and technology, the need for operational security in military planning, and classic principles of war such as retaining the element of surprise. JAs should gather the facts and closely consult all available guidance, particularly the Rules of Engagement and theater-specific directives or references, as well as host nation laws and sensitivities.

IX. MILITARY OBJECTIVES AND PROTECTED PLACES

A. **Military Objectives**. AP I and CCW Protocols II and III define military objectives as "objects which by their nature, location, purpose or use, make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage."[86]

1. **Determining Military Objectives Using the AP I Definition/Test.** Military personnel, equipment, units, and bases are always military objectives. Other objects not expressly military become military objectives when they satisfy both elements of the two-part test provided by AP I, Article 52(2).

a. Military objective is a treaty synonym for a potential lawful target. The AP I definition/test sets forth objective, simple criteria establishing when military necessity may exist to consider an object a lawful target that may be seized or attacked. First, the target must by virtue of its nature, location, purpose or use, make an effective contribution to military action. Second, the total or partial destruction, capture or neutralization of the target must, under the circumstances ruling at the time, offer a definite military advantage. The United States now follows this definition, as evidenced by its incorporation in FM 27-10, Change 1, and ratification of several CCW Protocols with identical definitions.

b. A military objective is not limited to military bases, forces, or equipment, but includes other objects that contribute to an opposing state's ability to wage war. AP I does not alter the traditional understanding of military necessity contained in the Lieber Code which permits a commander to take "those measures which are indispensable for securing the ends of war" and not expressly prohibited by the LOAC. This may be accomplished through intentional attack of enemy military forces or other military objectives enabling enemy forces to wage war.

c. Compared to "military objective," the term "military target" is more limited and redundant, and should not be used. In contrast, the term "civilian target" is an oxymoron, inasmuch as a *civilian object* is an object that is not a military objective, and therefore is immune from intentional attack unless and until it loses its protected status through enemy abuse of that status. Consequently, the term "civilian target" is inappropriate and should not be used. If military necessity exists (and the above two-part test can be satisfied) for the seizure or destruction of a civilian object (or a civilian person who is directly participating in hostilities) then that object (or person) has been converted to military use (i.e., become a military objective) and ceased to be a civilian object. Converted objects may regain their civilian status if military use ceases.

2. **Applying the Article 52 Standard.** The AP I military objective definition/test, which FM 27-10 and several weapons treaties[87] ratified by the United States also adopt, contains two main elements: (1) the nature, location, purpose or use makes an effective contribution to military action, *and* (2) total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage. If the

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military objective with civilians present, or civilians participating in efforts vital to the enemy war effort, do not constitute prohibited attacks *per se*); Col W. Hayes Parks, USMCR (Ret), Memorandum of Law, Law of War Status of Civilians Accompanying Military Forces in the Field, 6 May 1999 (unpublished and on file with TJAGLCS International and Operational Law Dep't, pp. 2-4) (advising that, for example, civilians entering a theater of operations in support or operation of sensitive or high value equipment such as a weapon system, may be at risk of intentional attack because of the importance of their duties).

[85] *See, e.g.*, U.S. Dep't of Justice, Attorney General Eric Holder Speaks at Northwestern University School of Law, Mar. 5, 2012, *available at* http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html ("[T]here are instances where [the U.S.] government has the clear authority – and, I would argue, the responsibility – to defend the United States through the appropriate and lawful use of lethal force. . . . [I]t is entirely lawful – under both United States law and applicable law of war principles – to target specific senior operational leaders of al Qaeda and associated forces."). *See also* Chapter 5 *infra* on Rules of Engagement.

[86] AP I. art. 52(2).

[87] FM 27-10, Change 1, para. 40c.; CCW Protocol II, art. 2(4); CCW Amended Protocol II, art. 2(6); CCW Protocol III, art. 1(3).

objective is not enemy military forces and equipment, the second part of the test limits the ability to lethally target the objective. Both parts must apply before an object that is normally a civilian object can be considered a military objective. Recall also that attacks on military objectives which may cause incidental damage to civilian objects or incidental injury to civilians not engaged in DPH are not prohibited, if one complies with the principles of the LOAC (e.g., proportionality).

a. Nature, location, purpose or use as making an effective contribution to military action:

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

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

(3) **Purpose** means the future intended or possible use. Examples of enemy military objectives which by their purpose make an effective contribution to military action include: 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 Autobahn in Germany, etc. While the criterion of purpose is concerned with the intended, suspected, or possible future use of an object, the potential military use of a civilian object, such as a civilian airport, may make it a military objective because of its future intended or potential military use.

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

b. Destruction, capture or neutralization offers a definite military advantage:

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

(2) The words "nature, location, purpose or use" allow wide discretion, but are subject to qualifications stated in the definition/test, such as that the object makes an "effective contribution to military action" and that its destruction, capture, or neutralization offers a "definite military advantage" under the circumstances. No geographical connection between effective contribution and military advantage is required. Attacks on military objectives in the enemy rear, or diversionary attacks away from the area of military operations are lawful.

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

(4) The phrase "in the circumstances ruling at the time" is important. If, for example, enemy military forces take position in a building otherwise regarded as a civilian object (e.g., a school, store, or museum), then the building can become a military objective. The circumstances ruling at the time, that is, military use of the building, permit its attack if its attack offers a definite military advantage. If the enemy military forces permanently abandon the building, this change of circumstances precludes its treatment as a military objective.

B. **Warning Requirement.**[88] The general requirement to warn before a bombardment only applies if civilians are present. Exception: if it is an *assault* (any attack where surprise is a key element), no warning is required. Hospitals always require warnings unless returning fire in self-defense. Warnings need not be specific as to time and location of the attack, but can be general and issued through broadcasts, leaflets, etc.

[88] Hague IV, art. 26.

C. **Defended Places.**[89] As a general rule, any place the enemy chooses to defend makes it subject to attack. Defended places include: a fort or fortified place; a place occupied by a combatant force or through which a force is passing; and a city or town that is surrounded by defensive positions under circumstances where the city or town is indivisible from the defensive positions.

D. **Undefended places**. The attack or bombardment of towns or villages, which are undefended, is prohibited.[90]

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

a. All combatants and mobile military equipment are removed;

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

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

d. No activities in support of military operations shall be undertaken (the presence of enemy medical units, enemy sick and wounded, and enemy police forces are allowed).[91]

2. While the HR, Article 25, prohibits attacking undefended "habitations or buildings," the term was used in the context of intentional bombardment. Given the definition of military objective, such structures remain civilian objects and immune from intentional attack unless (a) used by the enemy for military purposes, and (b) destruction, capture, or neutralization, in the circumstances ruling at the time, offers a definite military advantage.

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

E. **Protected Areas**. Hospital or safety zones may be established for the protection of the wounded and sick or civilians.[92] Such hospital or safety zones require agreement of the Parties to the conflict. Articles 8 and 11 of the Hague Cultural Property Convention allows certain cultural sites to be designated in an "International Register of Cultural Property under Special Protections." For example, the Vatican has qualified for and been registered as "specially protected." Special Protection status requires strict adherence to avoidance of any military use of the property or the area in its immediate vicinity, such as movement of military personnel or materiel, even in transit.

F. **Protected Individuals and Property**.

1. Civilians. As discussed above, individual civilians, the civilian population as such, and civilian objects are protected from intentional attack.[93] A presumption of civilian property attaches to objects traditionally associated with civilian use (dwellings, school, etc.[94]) as contrasted with military objectives. The presence of civilians in a military objective does not alter its status as a military objective.

2. Medical Units and Establishments; Hospitals.[95] 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."[96] A warning is required before attacking a hospital in which individuals are committing "acts harmful to the enemy." The hospital must be given a reasonable time to comply with the warning before an attack.[97] When receiving fire from a hospital, there is no duty to warn before returning fire in self-defense. Example: Richmond Hills Hospital, Grenada.

3. Captured Medical Facilities and Supplies of the Armed Forces.[98] Fixed facilities should be used for the care of the wounded and sick, but they may be used by captors for other than medical care, in cases of urgent military necessity, provided proper arrangements are made for the wounded and sick who are present. Captors may

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[89] FM 27-10, paras. 39-40.
[90] Hague IV, art. 25.
[91] FM 27-10, para. 39b.
[92] GC I, art. 23; GC IV, art. 14.
[93] FM 27-10, para. 246; AP I, art. 51, para. 2.
[94] AP I, art. 52(3).
[95] FM 27-10, paras. 257- 58; GC I, art. 19.; GC IV, arts. 18 & 19.
[96] GC I, art. 21.
[97] AP I, art. 13.
[98] FM 27-10, para. 234.

keep mobile medical facilities, provided they are reserved for care of the wounded and sick. Medical Supplies may not be destroyed.

4. Medical Transport. Transports of the wounded and sick or of medical equipment shall not be attacked.[99] Under GC I, article 36, medical aircraft are protected from direct attack *only if* they fly in accordance with a previous agreement between the parties as to their route, time, and altitude. AP I contains a new regime for medical aircraft protection.[100] To date, there is no State practice with respect to implementation of this regime. As the United States is not a State Party to AP I, it continues to apply the criteria for protection contained in GC I, Article 36. The Distinctive Emblem and other devices set forth in the Amended Annex I to AP I are to facilitate identification, but they do not establish status. However, it is U.S. policy that known medical aircraft shall be respected and protected when performing their humanitarian functions.

5. Cultural Property.[101] The 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 did not ratify the treaty until 2008, it has always regarded the treaty's 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 U.S. military forces during World War II."[102] Cultural property is protected from intentional attack so long as it is not being used for military purposes, or otherwise may be regarded as a military objective. The Convention defines cultural property as "movable or immovable property of great importance to the cultural heritage of every people." Cultural property includes *inter alia* buildings dedicated to religion, art, and historic monuments. Misuse will subject such property to attack. While the enemy has a duty to indicate the presence of such buildings with visible and distinctive signs, state adherence to the marking requirement has been limited. U.S. practice has been to rely on its intelligence collection to identify such objects in order to avoid attacking or damaging them.

G. **Works and Installations Containing Dangerous Forces**.[103] These rules are not United States law but should be *considered* because of pervasive international acceptance of AP I and II. Under the Protocol, dams, dikes, and nuclear electrical generating stations shall not be attacked (even if military objectives) if the attack will cause the release of dangerous forces and cause "severe losses" among the civilian population. Military objectives near these potentially dangerous forces are also immune from attack if the attack may cause release of the dangerous forces (parties also have a duty to avoid locating military objectives near such locations). Works and installations containing dangerous forces may be attacked only if they provide "significant and direct support" to military operations, attack is the only feasible way to terminate support, and only after scrutinizing the attack under the principle of proportionality

H. **Objects Indispensable to the Survival of the Civilian Population**. Article 54 of AP I prohibits starvation as a method of warfare. It is prohibited to attack, destroy, remove, or render useless objects indispensable for survival of the civilian population, such as foodstuffs, crops, livestock, water installations, and irrigation works. The United States rejects, however, broad prohibitions on attacking such objects when used to support enemy forces.

I. **Protective Emblems.**[104] Objects and personnel displaying certain protective emblems are presumed to be protected under the Conventions.[105]

1. Medical and Religious Emblems. The recognized emblems are the Red Cross, Red Crescent, and the newly-ratified Red Crystal.[106] The Red Lion and Sun, though protected by GC I, is no longer used. Also, the Red Star of David was proposed as an additional emblem, and, while never officially recognized by treaty, was protected as a matter of practice during the periods it was used.

2. Cultural Property Emblems. Cultural property is marked with "[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

[99] GC I, art. 35.
[100] AP I, arts. 24-31.
[101] *See generally* 1954 Cultural Property Convention.
[102] President William J. Clinton, Message to the Senate Transmitting the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (Jan. 6, 1999).
[103] AP I, art. 56; AP II, art. 15.
[104] FM 27-10, para. 238.
[105] GC I, art. 38.
[106] AP III.

space on either side being taken up by a white triangle."[107] Examples of cultural property include museums, ancient ruins, and monuments with historical significance.

3. Works and Installations Containing Dangerous Forces. Such works are marked with three bright orange circles, of similar size, placed on the same axis, the distance between each circle being one radius.[108] Works and installations containing dangerous forces include dams, dikes, and nuclear power facilities.

X. MEANS OF WARFARE: WEAPONS

A. Means and Methods: The laws of war guide two related choices in combat: (1) the *means*, that is, the weapons used to fight; and (2) the *methods*, that is, the tactics of fighting. Parties to a conflict must observe the LOAC, or face consequences. "The right of belligerents to adopt means of injuring the enemy is not unlimited."[109] To properly advise war fighters, JAs must be proficient not only in *what* legally may be targeted, but *how* the objective can be targeted.

B. **Legal Review**. All U.S. weapons, weapons systems, and munitions must be reviewed by authorized attorneys within DoD for legality under the LOAC.[110] Per DoDD 5000.01, this review occurs before the award of the engineering and manufacturing development contract and again before the award of the initial production contract. Legal review of new weapons is also required under Article 36 of AP I.

1. **Effect of legal review**. **The weapons review process of the United States entitles commanders and all other personnel to assume that any weapon or munition contained in the U.S. military inventory and issued to military personnel is lawful.** If there are any doubts, questions may be directed to the International and Operational Law Division (HQDA, DAJA-IO), Office of The Judge Advocate General of the Army. The Center for Law and Military Operations (CLAMO) at The Judge Advocate General's Legal Center and School (TJAGLCS) maintains a database of approved weapons reviews.[111]

2. **Illegal Weapons.**

a. Weapons causing unnecessary suffering as determined by the "usage of states," are *per se* illegal. Examples of such illegal weapons include lances with barbed heads and projectiles filled with glass.[112]

b. Other weapons have been rendered illegal by agreement or prohibited by specific treaties. Certain land mines, booby traps, and "blinding laser weapons" are prohibited by Protocols to the CCW. Anti-personnel land mines and booby traps were regulated (and, in some cases, certain types prohibited) in order to provide increased protection for the civilian population. Specific weapons prohibitions are discussed more below.

3. **Improper use of legal weapons.** Any weapon may be used unlawfully; for example, use of an M9 pistol to murder a POW. This may not be a violation of the principle of "unnecessary suffering," but would most likely violate the principles of necessity and distinction. However, use of an M9 pistol to wound a combatant in various parts of his body with the intent to watch that combatant suffer would be a violation of the principle of unnecessary suffering.

C. **Specific Weapons Treaties**. Certain weapons are the subject of specific treaties or other international law instruments of which JAs need to be aware:

1. **Certain Conventional Weapons**.[113] The 1980 United Nations Convention on Certain Conventional Weapons (CCW) is the leading and preferred U.S. framework to restrict, regulate, or prohibit the use of certain otherwise lawful conventional weapons. The United States has ratified the CCW and its five Protocols described below, plus Amended Protocol II. The LOAC DocSupp reprints the CCW and its Protocols. In summary:

a. **Protocol I** prohibits any weapon whose primary effect is to injure by fragments which, when in the human body, escape **detection by x-ray**.

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[107] 1954 Cultural Property Convention, arts. 16, 17.
[108] AP I, annex I, art. 16.
[109] Hague IV, art. 22.
[110] *See generally* DoDD 5000.01; AR 27-53; SECNAVINST 5000.2E; U.S. DEP'T OF AIR FORCE, AIR FORCE INSTRUCTION 51-402, WEAPONS REVIEW (27 Jul 2011) [hereinafter AFI 51-402].
[111] *See* CLAMO website at http://www.jagcnet.army.mil/clamo (contact CLAMO for authorization).
[112] FM 27-10, para. 34.
[113] *See generally* CCW.

b. **Protocol II** regulates use of **mines, booby-traps, and other devices**, while prohibiting certain types of anti-personnel mines to increase protection for the civilian population. Amended Mines Protocol (AMP) II has since replaced the original Protocol II. The United States regards certain land mines (anti-personnel and anti-vehicle) as lawful weapons, subject to the restrictions contained in CCW AMP II and national policy. U.S. military doctrine and mine inventory comply with each, for example, command detonated Claymore mines. The United States also possesses air dropped GATOR mines which comply with CCW Protocol II, as the "minelets" become harmless after the passage of a set period of time. Many nations (but not the United States) are party to a competing (and more comprehensive) treaty, the 1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction (also known as the Ottawa Treaty or Anti-Personnel Mine Ban Convention), an NGO-initiated treaty that bans all anti-personnel landmines, with the exception of limited numbers for training purposes only. Claymore mines utilizing a human operator are still legal under the ottaw treaty..[114] Per a February 2004 U.S. Presidential Memorandum, and after its 2010 deadline, the United States no longer employs anti-personnel landmines that do not automatically self-destruct or self-neutralize (sometimes called "dumb" or "persistent" anti-personnel land (APL) mines).[115] Today, **U.S. forces may no longer employ persistent APL or persistent anti-vehicle land mines**.

c. **Protocol III** regulates the use of **incendiary weapons** to increase civilian population protections. Napalm, flame-throwers, and thermite/thermate type weapons are incendiary weapons. Protocol III, Article 1(b) states that incendiaries *do not include* munitions with *incidental* incendiary effects such as "illuminants, tracers, smoke or signaling systems;" or munitions *designed to combine* "penetration, blast, or fragmentation effects with an additional incendiary effect"—particularly when the munition's primary purpose is not burn injury to persons. Thus, white phosphorous is legal when used as a tracer or illuminant, or in appropriate combined effects munitions. The United States ratified Protocol III with the reservation that incendiary weapons may be used against military objectives in areas of civilian concentrations if such use will cause fewer civilian casualties; for example, against a chemical munitions factory in a city to incinerate escaping poisonous gases.

d. **Protocol IV** prohibits "**blinding laser weapons**," defined as laser weapons specifically designed to cause permanent blindness to unenhanced vision. Other lasers are lawful, even those that may cause injuries including permanent blindness, incidental to their legitimate military use (range-finding, targeting, etc.).

e. **Protocol V** on **explosive remnants of war** requires the parties to an armed conflict, where feasible, to clear or assist the host nation or others in clearance of unexploded ordnance or abandoned explosive ordnance after cessation of active hostilities.

2. **Cluster Bombs or Combined Effects Munitions** (CM). CM constitute effective weapons against a variety of targets, such as air defense radars, armor, artillery, and large enemy personnel concentrations. Since the bomblets or submunitions dispense over a relatively large area and a small percentage typically fail to detonate, this may create an unexploded ordinance (UXO) hazard. **CMs are not mines, are acceptable under the laws of armed conflict, and are not timed to go off as anti-personnel devices**. However, disturbing or disassembling submunitions may explode them and cause civilian casualties.

a. Another NGO-initiated treaty, the 2008 Convention on Cluster Munitions, prohibits development, production, stockpiling, retention or transfer of cluster munitions (CM) between signatory States. Also known as the Oslo Process, this recent treaty binds many U.S. allies, but most nations that manufacture or use CMs still reject it. The United States is not a party as it continues to use CMs for certain targets as described above, but lobbied to preserve interoperability for non-signatory states to use and stockpile CM even during multinational operations.

b. The Secretary of Defense has signed a DoD Cluster Munitions Policy mandating by 2018 a reduction of obsolete CM stocks, improvement of CM UXO standards to 1%, and replacement of existing stocks.[116] From 2008-2011, the United States also sponsored an unsuccessful effort to add a new CCW Protocol regulating—

[114] *See* The International Campaign to Ban Land Mines, at http://www.icbl.org/ (includes treaty history, text, and parties).
[115] U.S. Land Mine Policy can be found at http://www.state.gov/t/pm/wra/.
[116] *See* Robert M. Gates, Memorandum for Secretaries of the Military Dep'ts et. al., SUBJECT: DoD Policy on Cluster Munitions and Unintended Harm to Civilians, 19 June 2008, available at http://www.defense.gov/news/d20080709cmpolicy.pdf.

but not banning—cluster munitions.[117] Current U.S. practice is to mark coordinates and munitions expended for all uses of cluster munitions, and to engage in early and aggressive EOD clearing efforts as soon as practicable.[118]

3. **Small Arms Projectiles**. The 1868 Declaration of St. Petersburg prohibits exploding rounds of less than 400 grams. The United States is not a State Party to this declaration, and does not regard it as CIL. **State practice since 1868 has limited this prohibition to projectiles weighing less than 400 grams specifically designed to detonate in the human body.** The prohibition on projectile weight must be distinguished from overall cartridge weight. Expanding military small arms ammunition—that is, so called 'dum-dum' projectiles, such as soft-nosed (exposed lead core) or hollow point projectiles—are prohibited by the 1899 Hague Declaration Concerning Expanding Bullets. The United States is not a party to this treaty, but has taken the position that it will adhere to its terms in its military operations in international armed conflict to the extent that its application is consistent with the object and purpose of Article 23(e) of Hague IV. **The prohibition on hollow point/soft nosed military projectiles does not prohibit full-metal jacketed projectiles that yaw or fragment, or "open tip" rifle projectiles containing a tiny aperture to increase accuracy.**

4. **Hollow point or soft point ammunition**. Hollow point or soft-point ammunition contain projectiles with either a hollow point that bores into the lead core or an exposed lead core that flattens easily in the human body. These types of ammunition are designed to expand dramatically upon impact at all ranges.

a. There are situations during which use of this ammunition is lawful because its use will significantly reduce the risk of incidental damage to innocent civilians and friendly force personnel, protected property (e.g., during a hostage rescue or for aircraft security), and material containing hazardous materials. Military law enforcement personnel may be authorized to use this ammunition for law enforcement missions outside an active theater of operations.

b. Military units or personnel are not entitled to possess or use small arms ammunition not issued to them or expressly authorized. Private acquisition of small arms ammunition for operational use is prohibited.

c. "MatchKing" ammunition (or similar rifle projectiles produced by other manufacturers) has an open tip, with a tiny aperture not designed to cause expansion. This design enhances accuracy only, and does not function like hollow or soft point projectiles. "MatchKing" ammunition is lawful for use across the conflict spectrum, provided that the ammunition was issued and not personally procured. However, this ammunition may not be modified by soldiers (such as through further opening the tiny aperture to increase the possibility of expansion).

5. **Poison**. Poison has been outlawed for generations, and is prohibited by treaty.[119]

6. **Biological Weapons**.[120] The 1925 Geneva Gas Protocol prohibited only biological (bacteriological) weapon use. The 1972 Biological Weapons Convention (BWC) extended this prohibition, prohibiting development, production, stockpiling, acquisition, or retention of biological agents or toxins, weapons, equipment or means of delivery designed to use such toxins for hostile purposes or in armed conflict.[121] The United States has renounced all use of biological and toxin weapons.

7. **Chemical Weapons**.[122] The 1925 Geneva Gas Protocol prohibits use in war of asphyxiating, poisonous, or other gases (and bacteriological weapons; see below). Initially, the United States reserved the right to respond with chemical weapons to a chemical or biological weapons attack by the enemy. This reservation became moot when the United States in 1997 ratified the Chemical Weapons Convention (CWC), which prohibits production, acquisition, stockpiling, retention, and use of chemical weapons—even in retaliation.

a. **Key Provisions**. There are twenty-four articles in the CWC. Article 1 is the most important, and states Parties agree to never develop, produce, stockpile, transfer, use, or engage in military preparations to use chemical weapons. **It strictly forbids retaliatory (second) use**, which represents a significant departure from the

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[117] *See* U.S. Dep't of State, Statement of the [US] on the Outcome of the Fourth Review Conference of the CCW, Nov. 25, 2011, *at* http://geneva.usmission.gov/2011/11/25/u-s-deeply-disappointed-by-ccws-failure-to-conclude-procotol-on-cluster-munitions/.
[118] *See* U.S. DoD Report to Congress: Kosovo/Operation Allied Force After Action Report. *See also* Thomas Herthel, *On the Chopping Block: Cluster Munitions and the Law of War*, 51 A.F.L. REV. 229 (2001).
[119] Hague IV, art. 23(a).
[120] *See* 1925 Geneva Protocol; BWC.
[121] *See* BWC.
[122] *See generally* Geneva Gas Protocol; CWC.

Geneva Gas Protocol. The CWC requires the destruction of chemical stockpiles. **It also forbids the use of Riot Control Agents (RCA) as a "method of warfare."** Article 3 requires parties to declare stocks of chemical weapons and facilities they possess. Articles 4 and 5 provide procedures for destruction and verification, including routine on-site inspections. Article 8 establishes the Organization for the Prohibition of Chemical Weapons (OPWC). Article 9 establishes the procedures for "challenge inspection," which is a short-notice inspection in response to another party's allegation of non-compliance.

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

(1) Executive Order 11850.[123] The order renounces first use of RCA in international armed conflicts *except* in defensive military modes to save lives. Such defensive lifesaving measures include: controlling riots in areas under direct and distinct U.S. military control, to include rioting prisoners of war; dispersing civilians where the enemy uses them to mask or screen an attack; rescue missions for downed pilots/passengers and escaping POWs in remote or isolated areas; and, in our rear echelon areas outside the zone of immediate combat, to protect convoys from civil disturbances, terrorists, and paramilitary organizations.

(2) The CWC prohibits RCA use as a "method of warfare." "Method of warfare" is undefined. The Senate's resolution of advice and consent for ratification to the CWC[124] required that the President must certify that the United States is not restricted by the CWC in its use of riot control agents, including the use against "combatants" in any of the following cases: when the U.S. is not a party to the conflict, in consensual peacekeeping operations, and in Chapter VII (UN Charter) peace enforcement operations.[125]

(3) The implementation section of the Senate resolution requires that the President not modify E.O. 11850. The President's certification document of 25 April 1997 states that "the United States is not restricted by the convention in its use of riot control agents in various peacetime and peacekeeping operations. These are situations in which the United States is not engaged in the use of force of a scope, duration, and intensity that would trigger the laws of war with respect to U.S. forces." Thus, in essence, the authority to use RCA is potentially easier to obtain when the United States in not involved in a "war" – an international armed conflict to which the US is a party.

(4) Oleoresin Capsicum Pepper Spray (OC), or Cayenne Pepper Spray. The United States classifies OC as a Riot Control Agent.[126]

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

8. **Nuclear Weapons**. Nuclear weapons are not prohibited by international law. On 8 July 1996, the International Court of Justice (ICJ) issued an *advisory* opinion that "[t]here is in neither customary nor international law any comprehensive and universal prohibition of the threat or use of nuclear weapons." However, by a split vote, the ICJ also found that "[t]he threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict." The Court stated that it could not definitively conclude whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defense, in which the very survival of the state would be at stake.[127] Though the United States is party to numerous bilateral and other agreements regulating nuclear weapons, they remain a part of the U.S. weapons inventory.

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[123] Exec. Order No. 11850, 3 C.F.R., 1971-1975 Comp, p. 980 (1975).
[124] U.S. Senate Consent to Ratification of the CWC, S. Exec. Res. 75 sec. (2)(26), 105th Cong. (1997).
[125] U.N. Charter ch. VI.
[126] *See* 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.
[127] *See* Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, paras. 90-97 (July 8).

XI. MEANS OF WARFARE: STRATAGEMS AND TACTICS

A. **Ruses.**[128] A ruse is "a trick of war designed to deceive the adversary, usually involving the deliberate exposure of false information to the adversary's intelligence collection system,"[129] and involves injuring the enemy by **legitimate deception**.[130] Ruses of war are permissible.[131] Examples of ruses include the following:

1. Land Warfare. Creation of fictitious units by planting false information, putting up dummy installations, false radio transmissions, using a small force to simulate a large unit, feints, etc.[132]

EXAMPLE: 1991 Gulf War: Coalition forces, specifically XVIII Airborne Corps and VII Corps, used deception cells to create the impression that they were going to attack near the Kuwaiti boot heel, as opposed to the "left hook" strategy actually implemented. XVIII Airborne Corps set up "Forward Operating Base Weasel" near the boot heel, consisting of a phony network of camps manned by several dozen soldiers. Using portable radio equipment, cued by computers, phony radio messages were passed between fictitious headquarters. In addition, smoke generators and loudspeakers playing tape-recorded tank and truck noises were used, as were inflatable Humvees and helicopters.[133] Perhaps the most famous example of a ruse is the D-Day landings in Normandy. Before the invasion, the Allies deployed huge numbers of dummy weapons across the English Channel from the French town of Calais, to convince the Germans that the Allies planned to land there.

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

a. Uniforms.[134] **Combatants may wear enemy uniforms but cannot fight in them with the intent to deceive.** An escaping POW may wear an enemy uniform or civilian clothing to affect his escape.[135] Military personnel captured in enemy uniform or civilian clothing risk being treated as spies.[136]

b. Colors. The U.S. position regarding the use of enemy flags is consistent with its practice regarding uniforms, i.e., the United States interprets the "improper use" of a national flag[137] to permit the use of national colors and insignia of the enemy as a ruse as long as they are not employed during actual combat.[138]

c. Equipment. Forces must remove all enemy insignia in order to fight with the equipment. Captured supplies may be seized and used if state property. Private transportation, arms, and ammunition may be seized, but must be restored and compensation fixed when peace is made.[139]

d. AP I, Article 39(2), prohibits the use in international armed conflict of enemy flags, emblems, uniforms, or insignia while engaging in attacks or "to shield, favor, protect or impede military operations." The United States does not consider this article reflective of customary law. This article, however, expressly does not apply to naval warfare.[140] The U.S. position is that under the customary international law of naval warfare, it is permissible for a belligerent warship (both surface and subsurface) to fly false colors (including neutral and enemy colors) and display neutral or enemy markings or otherwise disguise its outward appearance in ways to deceive the enemy into believing the warship is of neutral or enemy nationality or is other than a warship. However, a warship must display her true colors prior to an actual armed engagement.[141]

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[128] FM 27-10, para. 48.
[129] *See* **JOINT CHIEFS OF STAFF, JOINT PUB. 1-02, DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS** 317 (8 Nov. 2010, as amended through 31 Dec. 2010) (citation omitted).
[130] Deception is defined as "[t]hose measures designed to mislead the enemy by manipulation, distortion, or falsification of evidence to induce the enemy to react in a manner prejudicial to the enemy's interests." *Id.* at 97.
[131] Hague IV, art. 24.
[132] FM 27-10, para. 51.
[133] RICK ATKINSON, CRUSADE 331-33 (1993).
[134] For detailed discussion of uniform requirements for U.S. forces, *see* W. Hays Parks, *Special Forces' Wear of Non-Standard Uniforms*, 44 **CHI. J. INT'L L.** 494 (2003).
[135] GC III, art. 93.
[136] FM 27-10, paras. 54, 74; NWP 1-14M, para. 12.5.3; U.S. DEP'T OF THE AIR FORCE, AIR FORCE PAMPHLET 110-31, THE CONDUCT OF ARMED CONFLICT AND AIR OPERATIONS (Nov. 1976), paras. 8-6.
[137] Hague IV, art. 23(f).
[138] FM 27-10, para. 54; NWP 1-14M, para 12.5. AP I, article 39(2) outlaws such use, but the United States objects to this term.
[139] Hague IV, art. 53.
[140] AP I, art. 39(3).
[141] NWP 1-14M, paras. 12.3.1 & 12.5.1.

B. **Military Information Support Operations (MISO)**. Formerly known as psychological operations (PSYOP), MISO are lawful. In the 1991 Gulf War, U.S. PSYOP units distributed over 29 million leaflets to Iraqi forces. The themes of the leaflets were the "futility of resistance; inevitability of defeat; surrender; desertion and defection; abandonment of equipment; and blaming the war on Saddam Hussein." It was estimated that nearly 98% of all Iraqi prisoners acknowledged having seen a leaflet; 88% said they believed the message; and 70% said the leaflets affected their decision to surrender.[142]

C. **Treachery and Perfidy.** Treachery and perfidy are prohibited under the LOAC.[143] The HR forbid killing or wounding treacherously individuals belonging to the hostile nation or armed forces.[144] Perfidy involves injuring the enemy by his adherence to the LOAC (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 LOAC to gain a military advantage.[145]

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

2. Other prohibited acts include:

a. Use of a flag of truce to gain time for retreats or reinforcements.[146]

b. Feigning incapacitation by wounds/sickness.[147]

c. Feigning surrender or the intent to negotiate under a flag of truce.[148]

d. Misuse of the Red Cross, Red Crescent, Red Crystal and cultural property symbols. This provision is designed to reinforce/reaffirm the protections those symbols provide.[149] GC I requires that military wounded and sick, military medical personnel (including chaplains), hospitals, medical vehicles, and in some cases, medical aircraft be respected and protected from intentional attack.

e. Declaring that no quarter will be given or killing/injuring enemy personnel who surrender.[150]

f. Compelling nationals of the enemy state to take part in hostilities against their own country.[151]

D. **Espionage.**[152] Espionage involves clandestine action (under false pretenses) to obtain information for transmission back to one's own side. Gathering intelligence while in uniform is not espionage. **Espionage is not a LOAC violation; however, the Geneva Conventions do not protect acts of espionage.** If captured, a spy may be tried under the laws of the capturing nation.[153] Reaching friendly lines immunizes the spy for past espionage activities; therefore, upon later capture as a lawful combatant, the alleged "spy" cannot be tried for past espionage.

E. **Assassination**. Hiring assassins, putting a price on the enemy's head, and offering rewards for an enemy "dead or alive" are prohibited as treacherous conduct.[154] Offering rewards for information leading to capture of an individual, or attacking military command and control or personnel is not assassination, nor prohibited.[155]

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[142] *See* R. B. Adolph, *PSYOP: The Gulf War Force Multiplier*, Army Magazine 16 (Dec. 1992).
[143] Hague IV. art. 23(b).
[144] *Id.*
[145] FM 27-10, para. 50.
[146] Hague IV, art 23(f).
[147] AP I, art. 37(1)(b).
[148] AP I, art 37(1)(a).
[149] Hague IV, art. 23(f).
[150] Hague IV, art. 23.
[151] *Id.*
[152] FM 27-10, para. 75; AP I, art. 46.
[153] *See* UCMJ art. 106.
[154] FM 27-10, para 31; E.O. 12333.

F. **Reprisals.** Reprisals are conduct which otherwise would be unlawful, resorted to by one belligerent against enemy personnel or property in response to acts of warfare committed by the other belligerent in violation of the LOAC, for the sole purpose of enforcing future compliance with the LOAC.[156] Individual U.S. military personnel, commanders and units do not have the authority to conduct a reprisal. That authority is retained at the national level.

G. **War Trophies/Souvenirs**. The LOAC authorizes the confiscation of enemy military property. War trophies or souvenirs taken from enemy military property are legal under the LOAC. War trophy personal retention by an individual soldier is restricted under U.S. domestic law. Confiscated enemy military property is property of the United States. The property becomes a war trophy, and capable of legal retention by an individual Soldier as a souvenir, only as authorized by higher authority. Pillage, that is, the unauthorized taking of private or personal property for personal gain or use, is expressly prohibited.[157]

1. War Trophy Policy. 10 U.S.C. § 2579 requires that all enemy material captured or found abandoned shall be turned in to "appropriate" personnel. The law, which directs the promulgation of an implementing directive and service regulations, contemplates that members of the armed forces may request enemy items as souvenirs. The request would be reviewed by an officer who shall act on the request "consistent with military customs, traditions, and regulations." The law authorizes the retention of captured weapons as souvenirs if rendered unserviceable and approved jointly by DoD and the Bureau of Alcohol, Tobacco, and Firearms (BATF). Implementing directives have not been promulgated.[158]

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

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

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

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

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

(4) The guidance defines "War Souvenir" as any item of enemy public or private property utilized as war material (i.e., military accouterments) acquired in the Iraqi area of operations during OIF and authorized to be retained by an individual pursuant to this memorandum. War souvenirs are limited to the following items: (1) helmets and head coverings; (2) uniforms and uniform items such as insignia and patches; (3) canteens, compasses, rucksacks, pouches, and load-bearing equipment; (4) flags (not otherwise prohibited by 10 U.S.C. 4714 and 7216); (5) knives or bayonets, other than those defined as weaponry [in paragraph 3 below]; (6) military training manuals, books, and pamphlets; (7) posters, placards, and photographs; (8) currency of the former regime; or (9)

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[155] *See* W. Hays Parks, *Memorandum of Law: Executive Order 12333 and Assassination*, ARMY LAW, Dec. 1989, at 4.
[156] FM 27-10, para. 49.
[157] Hague IV, art. 47; GC I, art. 15; GC II, art. 18; GC IV, art. 33.
[158] The Marine Corps still lists as active Marine Corps Order (MCO) 5800.6A dtd 28 Aug. 1969 (Personal Affairs Control and Registration of War Trophies and War Trophy Firearms). This is a joint order (AR 608–4; OPNAVINST 3460.7A, and AFR 125–13).

other similar items that clearly pose no safety or health risk, and are not otherwise prohibited by law or regulation. Under this interim guidance, a war souvenir does not include weaponry.

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

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

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

b. See also U.S. CENTCOM General Order Number 1B, contained as an appendix to the Criminal Law chapter.

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

a. COMMON SENSE—does the policy make sense?

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

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

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

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

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

XII. MILITARY OCCUPATION

A. **The Nature of Military Occupation.** Territory is considered occupied when it is actually placed under the authority of the hostile armed forces. The occupation extends only to territory where such authority has been established and can effectively be exercised.[159] 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.[160] 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.[161] It is also forbidden

[159] Hague IV, art. 42.
[160] FM 27-10, para. 352.
[161] *See* GC IV, art. 47.

to compel the inhabitants of occupied territory to swear allegiance to the hostile occupying power.[162] Occupation is thus provisional in nature, and is terminated if the occupying power is driven out or voluntarily ends the occupation.

B. **Administration of Occupied Territory**. Occupied territory is administered by military government, due to the inability of the legitimate government to exercise its functions, or the undesirability of allowing it to do so. The occupying power therefore bears a legal duty to restore and maintain public order and safety, while respecting, "unless absolutely prevented," the laws of the occupied nation.[163] 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 LOAC.[164]

1. In restoring public order and safety, the occupant is required to continue in force the normal civil and criminal laws of the occupied nation, unless they would jeopardize the security of the occupying force or create obstacles to application of the GC IV.[165] However, the military and civilian personnel of the occupying power remain immune from the jurisdiction of local law enforcement.

2. Articles 46-63 of the GC IV establish important fundamental protections and benefits for the civilian population in occupied territory. Family honor, life, property, and religious convictions must be respected. Individual or mass forcible deportations of protected persons from the occupied territory to the territory of the occupying power or to a third state are prohibited.[166] 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.[167] 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.[168]

3. The occupying power is forbidden from destroying or seizing enemy property unless such action is "imperatively demanded by the necessities of war,"[169] or "rendered absolutely necessary by military operations."[170] Pillage, that is, the unauthorized taking of private or personal property for personal gain or use, is expressly prohibited.[171] 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.[172]

4. The occupying power may not compel protected persons to serve in its armed forces, nor may it compel them to work unless they are over eighteen years old, and then only on work that: (1) is necessary for the needs of the occupying force; (2) is necessary for public utility services; or (3) for the feeding, sheltering, clothing, transportation or health of the populace of the occupied country. The occupied country's labor laws regarding such matters as wages, hours, and compensation for occupational accidents and diseases remain applicable to the protected persons assigned to work by the occupant.[173]

5. The occupying power is specifically prohibited from forcing the inhabitants to take part in military operations against their own country, and this precludes requiring their services in work directly promoting the military efforts of the occupying force, such as construction of fortifications, entrenchments, and military airfields.[174] However, the inhabitants may be employed voluntarily in such activities.

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[162] Hague IV, art. 45.
[163] Hague IV, art. 43.
[164] *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.
[165] *See* GC IV art. 64.
[166] GC IV, art. 49.
[167] GC IV, art. 55.
[168] GC IV, art. 50.
[169] Hague IV, art. 23.
[170] GC IV, art. 53.
[171] Hague IV, art. 47; GC I, art. 15; GC II, art. 18; GC IV, art. 33.
[172] Hague IV, art. 52; FM 27-10, para. 412.
[173] GC IV, art. 51.
[174] *See* GC IV, art. 51.

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

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

2. If the occupant considers it necessary, as a matter of imperative security needs, it may assign protected persons to specific residences or internment camps.[175] Security detainees should not be subjected to "prolonged arbitrary detention."[176] 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.[177]

3. The occupying power's tribunals may not impose sentences for violation of penal laws until after a regular trial. The accused person must be informed in writing in his own language of the charges against him, and is entitled to the assistance of counsel at trial, to present evidence and call witnesses, and to be assisted by an interpreter. The occupying power shall notify the protecting power of all penal proceedings it institutes in occupied territory. Sentences shall be proportionate to the offense committed. The accused, if convicted, shall have a right to appeal under the provisions of the tribunal's procedures or, if no appeal is provided for, he is entitled to petition against his conviction and sentence to the competent authority of the occupying power.[178]

4. Under the provisions of the GC IV, 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.[179] 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.[180]

5. The occupying power must promptly notify the protecting power of any sentence of death or imprisonment for two years or more, and no death sentence may be carried out until at least six months after such notification.[181]

6. The occupying power is prohibited from imposing mass (collective) punishments on the populace for individual offenses. That is, "[n]o general penalty, pecuniary or otherwise, shall be inflicted upon the populations on account of the acts of individuals for which they cannot be regarded as jointly and severally responsible."[182]

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

XIII. NEUTRALITY

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

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[175] GC IV, art. 78.
[176] In OIF, for example, the cases of security detainees were reviewed periodically by the MNF I Combined Review and Release Board and various other administrative boards, and detainees may have been also referred to the Central Criminal Court of Iraq for prosecution. Periodic status review procedures were also adopted by multi-national forces in Haiti, Bosnia, and Kosovo.
[177] GC IV, art. 65.
[178] GC IV, arts. 72, 73.
[179] GC IV, art. 68.
[180] GC IV, art. 68.
[181] GC IV, arts. 74, 75.
[182] Hague, IV, art. 50; GC IV, art. 33.

1. The territory of the neutral state is inviolable.[183] 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.[184] 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.[185] However, if the neutral is unable, or fails to prevent such violations of its neutrality by the troops of one belligerent, that belligerent's enemy may be justified in attacking those troops in neutral territory.

2. Belligerents are also prohibited from establishing radio communications stations in neutral territory to communicate with their armed forces, or from using such facilities previously established before the outbreak of hostilities for that purpose.[186] However, a neutral state may permit the use of its own communications facilities to transmit messages on behalf of the belligerents, so long as such usage does not lend assistance to the forces of only one side of the conflict. Indeed, the neutral must ensure that the measure it takes in its status as a neutral state is impartial, as applied to all belligerents.[187]

3. While a neutral state is under no obligation to allow passage of convoys or aircraft carrying the sick and wounded of belligerents through its territory or airspace, it may do so without forfeiting its neutral status. However, the neutral must exercise necessary control or restrictive measures concerning the convoys or medical aircraft, must ensure that neither personnel nor material other than that necessary for the care of the sick and wounded is carried, and must accord the belligerents impartial treatment.[188] 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.[189]

4. The nationals of a neutral state are also considered as neutrals.[190] However, if such neutrals reside in occupied territory during the conflict, they are not entitled to claim different treatment, in general, from that accorded the other inhabitants; the law presumes that they will be treated under the law of nations pertaining to foreign visitors, as long as there is an open and functioning diplomatic presence of their State.[191] They are likewise obliged to refrain from participation in hostilities, and must observe the rules of the occupying power. Moreover, such neutral residents of occupied territory may be punished by the occupying power for penal offenses to the same extent as nationals of the occupied nation.

5. A national of a neutral state forfeits his neutral status if he commits hostile acts against a belligerent, or commits acts in favor of a belligerent, such as enlisting in its armed forces. However, he is not to be more severely treated by the belligerent against whom he acted, than would be a national of the enemy state for the same acts.[192]

6. The United States has supplemented the above-described rules of international law concerning neutrality by enacting federal criminal statutes that define offenses and prescribe penalties for violations against U.S. neutrality. Some of these statutes are effective only during a war in which the United States is a declared neutral, while others are in full force and effect at all times.[193]

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

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

2. For a UN member nation, 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

[183] Hague V, art. 1.
[184] Hague V, art. 2.
[185] Hague V, art. 10.
[186] Hague V, art. 3.
[187] Hague V, art. 9.
[188] Hague V, art. 14; *see* GC I, art. 37.
[189] GC I, art. 37.
[190] Hague V, art. 16.
[191] *See* GC IV, art. 4.
[192] Hague V, art. 17.
[193] *See* 18 U.S.C. 956-68; 22 U.S.C. 441-57, 461-65.

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.

XIV. COMPLIANCE WITH THE LAW OF ARMED CONFLICT

A. The Role of Protecting Powers and the ICRC

1. The System of Protecting Powers. During international armed conflicts, Common Articles 8-11 of the Geneva Conventions authorize "the cooperation and . . . 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 LOAC, enables a neutral sovereign state, through its designated diplomatic representatives, to safeguard 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.[194]

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

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

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

1. The role of the ICRC as an impartial humanitarian organization is formally recognized in GC III, Common Articles 9-11 and Article 125, and GC IV, Article 63. Since World War II, the Protecting Power system has not been widely used, and the ICRC has stepped into the breach as a substitute for government Protecting Powers in international armed conflicts, subject to the consent of the Parties to the conflict.

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

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

a. Subject to essential security needs, mission requirements and other legitimate, practical limitations, the ICRC must be permitted to visit POWs and provide them certain types of relief. Typically, the United States will invite the ICRC to observe POW, civilian internee or detainee conditions as soon as circumstances permit. The invitation to the ICRC for its assistance is made by the U.S. Government (Department of State, in coordination with the Department of Defense), and not by the Combatant Commander. As a consequence, there is SECDEF guidance on reporting of all ICRC contacts, inspections, or meetings through operational channels.[195]

b. Given a JA's professional qualifications and specialized training in the LOAC, he or she should be integrated into the command's interaction with the ICRC.[196] The JA can quickly identify and resolve many LOAC

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[194] Geneva Convention Relative to the Treatment of Prisoners of War of 27 July 1929 (47 Stat. 2021; Treaty Series 846). This treaty was replaced, as to the contracting parties, with the Geneva Conventions of 1949.

[195] Memorandum, Sec'y of Def, SUBJECT: Handling of Reports from the [ICRC] (14 July 2004).

[196] 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

issues before they become a problem for the commander. For those LOAC matters requiring command decision, the JA is best suited to provide advice to the commander and obtain timely responses. These same skills are essential in dealing with ICRC observers. The JA can best serve as the commander's skilled advocate in discussions with the ICRC concerning the LOAC.

c. It is important to note that the ICRC has a vital role as an impartial humanitarian organization. While the ICRC's views may not always align with U.S. policy, the organization is capable of providing assistance in a variety of ways. In recent conflicts, the ICRC assisted in making arrangements for the transportation of the remains of dead enemy combatants and for repatriating POWs and civilian detainees. Maintaining a close working relationship with ICRC representatives can assist the JA in identifying potential LOAC issues in the command's area of operations and the organization can serve as an additional resource to resolve various legal and humanitarian matters.

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

XV. REMEDIES FOR VIOLATIONS OF THE LAW OF ARMED CONFLICT

A. U.S. Military and Civilian Criminal Jurisdiction

1. The historic practice of the military services is to charge members of the U.S. military who commit offenses regarded as a "war crime" under existing, enumerated articles of the UCMJ.[197]

2. In the case of other persons subject to trial by general courts-martial for violating the laws of war[198] the charge shall be "Violation of the Laws of War" rather than a specific UCMJ article.

3. The War Crimes Act of 1997[199] provides federal courts with jurisdiction to prosecute any person inside or outside the U.S. for war crimes where a U.S. national or member of the armed forces is involved as an accused or as a victim.

4. The Act defines "war crimes" 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 the 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 and the violator willfully kills or causes serious injury to civilians.

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

B. **Command Responsibility.**

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

a. The commander ordered the commission of the act;

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

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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.

[197] FM 27-10, para. 507.

[198] UCMJ, art. 18.

[199] 18 U.S.C. § 2441.

c. The commander should have known, "through reports received by him or through other means, that troops or other persons subject to his control [were] about to commit or [had] committed a war crime and he fail[ed] to take the necessary and reasonable steps to ensure compliance with the LOAC or to punish violators thereof."[200] While this principle has long been recognized in the Army Field Manual, recent initiatives by the ICRC have concluded that this principle of command responsibility also operates as a matter of customary international law.[201]

2. JAs 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. "At all appropriate levels of command and during all stages of operational planning and execution of joint and combined operations, legal advisors will provide advice concerning law of armed conflict compliance."[202] JAs should also help ensure that LOAC investigating and reporting requirements are integrated into all appropriate policies, directives, and operation and concept plans.

3. Investigative Assets. Several assets are available to assist commanders investigating suspected violations of the LOAC. The primary responsibility for an investigation of a suspected, alleged, or possible war crime resides in the U.S. Army Criminal Investigation Command (CID) or, for other military services, CID Command's equivalent offices. For minor offenses, investigations can be conducted with organic assets and legal support, using AR 15-6 or RCM 303 commander's inquiry procedures.[203] (Command regulations, drafted in accordance with DoD Directive 2311.01E, should prescribe the manner and level of unit investigation.) CID has investigative jurisdiction over suspected war crimes in two instances. The first is when the suspected offense is one of the violations of the UCMJ listed in Appendix B to AR 195-2, Criminal Investigation Activities (generally felony-level offenses). The second is when the investigation is directed by HQDA.[204]

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

C. **Reports**. WHEN IN DOUBT, REPORT. **Report a "reportable incident" by the fastest means possible, through command channels, to the responsible combatant commander**. A "reportable incident" is a possible, suspected, or alleged violation of the LOAC for which there is credible information. 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 LOAC, whether committed by or against U.S. or enemy personnel, are to be promptly reported, thoroughly investigated, and, where appropriate, remedied by corrective action.

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

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

a. High friendly losses.

b. High turnover rate in the chain of command.

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[200] FM 27-10, para. 501.
[201] **JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW** 211 (2005).
[202] CJCSI 5801.01C para. 4b.
[203] U.S. DEP'T OF ARMY, ARMY REGULATIONS 15-6, PROCEDURES FOR INVESTIGATING OFFICERS AND BOARDS OF OFFICERS (2006); Rules for Courts Martial (RCM) 303.
[204] U.S. DEP'T OF ARMY, ARMY REGULATIONS 195-2, CRIMINAL INVESTIGATIVE ACTIVITIES para. 3-3a(7) (1985).

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

d. Poorly trained or inexperienced troops.

e. The lack of a clearly defined enemy.

f. Unclear orders.

g. High frustration level among the troops.

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

E. **International Criminal Tribunals**

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

APPENDIX A

TROOP INFORMATION

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

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

B. Compliance enhances public support of our military mission. Violations of the LOAC reduce support at home and abroad, undermine the mission, and place fellow Soldiers at risk by turning the public against them.

C. Compliance encourages reciprocal conduct by enemy soldiers. Mistreatment of EPWs by our Soldiers may encourage enemy soldiers to retaliate and 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. LOAC arises in large part from treaties that are part of our national law. Violation of the LOAC is a serious crime punishable by death in some cases.

II. SOLDIER'S GENERAL RESPONSIBILITIES IN WARTIME

A. Carry out all lawful orders promptly and aggressively.

B. In rare cases when an order seems unlawful, do not carry it out right away, but do not ignore it either. Instead, immediately and respectfully seek clarification of that order. "Sir/Ma'am, are you ordering me to _____?"

1. Soldiers may be held criminally responsible for unlawful acts they personally commit in time of war. There is no "statute of limitations" on prosecution of war crimes, so Soldiers may be prosecuted years later.

2. If a Soldier is court-martialed for carrying out an obviously unlawful order, the "I just followed orders" defense usually fails. By training and common sense, Soldiers must recognize unlawful orders and act appropriately.

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 LOAC violations.

III. THE SOLDIER'S RULES

A. Fight only enemy combatants.

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

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

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

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

F. Destroy no more than the mission requires.

G. Treat all civilians humanely.

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

I. Do your best to prevent violations of the law of armed conflict

J. Report all violations to your superior.

IV. RULES REGARDING CAPTURED SOLDIERS

A. Handling Surrender of Enemy Soldiers.

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

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

3. Enemy soldiers must be allowed to surrender if they clearly indicate a desire to—weapons dropped, hands up, etc. Any order not to accept a clear surrender and continue killing the enemy is unlawful.

B. Treatment of Captured Soldiers on the Battlefield.

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

2. Treat EPWs humanely. The willful killing, torture, or other inhumane treatment of an EPW is a very serious LOAC violation—a "grave breach." Other LOAC violations are referred to as "simple breaches."

3. Do not take EPW personal property except to keep it safe pending release or movement elsewhere.

4. Protect and otherwise care for EPWs in your custody. Because this is often difficult in combat, forces must move EPWs to the rear as soon as possible.

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

C. Your Rights and Responsibilities If Captured.

1. In General. Follow training on Code of Conduct, SERE, etc., which provides additional guidance.

2. Rights as a Prisoner of War (POW). POWs are entitled to certain mandatory protections and other care from their captors, including food, housing, medical care, mail delivery, and retention of most personal property with a person when captured. Generally, the POW cannot waive such rights.

3. Responsibilities as a POW.

a. POWs must obey reasonable camp regulations.

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

c. Work. In addition, junior enlisted POWs may be compelled to work provided the work does not support the enemy's war effort. NCOs may be tasked to supervise. POWs are entitled to payment for their work. Commissioned officer POWs may volunteer to work or supervise, but may not be compelled to do so.

V. OBLIGATIONS TO PREVENT AND REPORT LOAC VIOLATIONS

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

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

APPENDIX B

LAW OF ARMED CONFLICT CONSIDERATIONS IN THE ACQUISITION OF SUPPLIES AND SERVICES DURING MILITARY OPERATIONS

We cannot rely only on the laws of armed conflict (LOAC) for the acquisition of supplies and services to support military operations. Limitations under the LOAC make it imperative that we normally acquire supplies and services using U.S. acquisition laws. (See Chapter 15, Contingency and Deployment Contracting, in this Handbook). Nevertheless, battlefield acquisition techniques (confiscation, seizure, and requisition) may prove a valuable means of supporting some needs of a deployed force when active combat or actual occupation of hostile territory occurs.

I. U.S. RIGHTS AND OBLIGATIONS UNDER THE LAW OF ARMED CONFLICT RELATING TO BATTLEFIELD PROCUREMENT OF GOODS

A. 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).

B. **Acquisition of Enemy Property in Combat**.

1. **Confiscation** is the permanent taking or destruction of enemy *public* property found on the battlefield. (Hague IV, art. 23(g) and 53; FM 27-10 paras. 59, 393-424). When required by military necessity, confiscated property becomes the property of the capturing state. The concept of state ownership includes the requirement to preserve property. Confiscation is a taking without compensation to the owner. Thus, a commander may acquire the supplies of an enemy armed force and its government. Public buildings may also be used for military purposes. When military necessity requires it, if ownership is not known, a commander may treat the property as public property until ownership is determined.

2. **Seizure** is the temporary taking of private or state property. When the use of private real property on the battlefield is required by military necessity, military forces may temporarily use it without compensation. (Use of private real property is discouraged; try to use public real property [firehouses or abandoned palaces make excellent CPs]. Anything other than a transient use of private real property will require a lease [typically retroactive] concluded by the Corps of Engineers.) Private personal property, if taken, must be returned when no longer required, or else the user must compensate the owner. (Hague IV, art. 53; FM 27-10, para. 406-10). Examples of property which might be seized include arms and ammunition in contractor factories; radio, TV, and other communication equipment and facilities; construction equipment; privately owned vehicles, aircraft, ships, etc.

3. 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 Chapter 16. 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.

C. **Acquisition of Enemy Property in Occupied Territories**

1. An occupation is the control of territory by an invading army. (Hague IV, art. 42; FM 27-10, para. 351). Public personal property that has some military use may be confiscated without compensation. (FM 27-10, para. 403). The occupying military force may use public real property, if it has some military use or is necessary to prosecute the war. (FM 27-10, para. 401). However, no ownership rights transfer.

2. 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).

3. 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. 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.

4. **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.

5. **Common 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. The LOAC and the property rules therein have not been triggered. The Host Nation may agree to provide for some 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).

II. U.S. RIGHTS AND OBLIGATIONS UNDER THE LAW OF ARMED CONFLICT RELATING TO BATTLEFIELD PROCUREMENT OF SERVICES

The LOAC also regulates use of prisoners of war (POW) and the local populace as a source of services for military forces. POWs and civilians may not be compelled to perform services of a military character or purpose.

A. **Use of POWs as Source for Services in Time of War**. POWs may be used as a source of labor; however, the work that POWs may perform is very limited. (GC III, art. 49; FM 27-10, para. 125-33). POWs may not be used as a source of labor for work of a military character or purpose. (GC III, art. 49; FM 27-10, para. 126). The regulation governing POW labor is AR 190-8, which requires a legal review (with copy to OTJAG) of proposed POW labor in case of doubt concerning whether the labor is authorized under the LOAC. Note that POWs may be used to construct and support (food preparation, e.g.) POW camps.

B. **Use of Civilian Persons as Source for Services in Time of War**.

1. Civilian persons may not be compelled to work unless they are over 18, and then only on work necessary either for the needs of the army of occupation, for public utility services, or for the feeding, sheltering, clothing, transportation, or health of the population of the occupied country. (GC IV art. 51; FM 27-10, para. 418-24). Civilians considered protected persons may not be compelled to take part in military operations against their own country. (GC IV, art. 51; FM 27-10, para. 418).

2. 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).

III. CONCLUSION

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).

CHAPTER 3

INTERNATIONAL HUMAN RIGHTS LAW

REFERENCES

1. United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. GAOR, Supp. No. 51, at 197, U.N. Doc. A/RES/39/708 (1984), reprinted in 23 I.L.M. 1027 (1984), modified in 24 I.L.M. 535 (1985).
2. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171.
3. International Convention on the Elimination of All Forms of Racial Discrimination, adopted by the U.N. General Assembly Dec. 21, 1965, 660 U.N.T.S. 195.
4. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 6 U.S.T. 3516.
5. Executive Order No. 13107, Implementation of Human Rights Treaties, 63 Fed. Reg. 68991 (10 December 1998).
6. Restatement (Third) of the Foreign Relations Law of the United States (1987).
7. Universal Declaration of Human Rights, G.A. Res. 217 A (III), UN Doc. A/810 at 71 (1948).

I. INTRODUCTION

A. International human rights law (IHRL) focuses on the State's obligation to protect the "inherent dignity" and "inalienable rights" of individual human beings.[1] In contrast to most international law, IHRL recognizes rights based on an individual's personhood rather than on one's status as a citizen or subject of a State party to a treaty. International human rights law was designed to protect the individual from being abused by his or her own government, as opposed to a foreign government.

B. International human rights law exists primarily in two forms: treaty law and customary international law (CIL).[2] IHRL treaties vary in the scope of their application. Whether or not many key IHRL treaties govern signatory States both inside the States' territory as well as outside the States' territory is unsettled, internationally. Customary IHRL's scope of application depends on the type of customary IHRL at issue.[3]

II. HISTORY AND DEVELOPMENT OF HUMAN RIGHTS LAW

A. As a field of international law, IHRL did not fully develop until the years following World War II. The systematic abuse and near-extermination of entire populations by States during the first half of the 20th Century served to aid the acceptance of IHRL into the field of international law. Prior to modern IHRL, how States treated their own citizens inside their own borders was regarded largely as a purely domestic matter. International law regulated State conduct vis-à-vis other States and chiefly protected individuals as representatives of their parent States (e.g., diplomatic immunity). As sovereigns in the international system, States could expect other States not to interfere in their internal affairs. IHRL, however, 'pierced the veil' of sovereignty by seeking to directly regulate how States treated their own people within their own borders.[4]

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

2. Human rights occupied a central place in the newly formed United Nations. The Charter of the United Nations contains several provisions dealing directly with human rights. One of the earliest General Assembly

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[1] Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., U.N. Doc. A/810 (Dec. 10, 1948), pmbl.
[2] *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 701 (1987) [hereinafter Restatement].
[3] *See id.* at § 702.
[4] *See* LOUIS HENKIN, THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS, 13–16 (Henkin ed., 1981) ("International human rights law and institutions are designed to induce states to remedy the inadequacies of their national law and institutions so that human rights will be respected and vindicated.").

resolutions, the Universal Declaration of Human Rights (UDHR), became the foundational international human rights law instrument.

3. Following the adoption of the 1949 Geneva Conventions, law of armed conflict (LOAC) development began to slow. The so-called Geneva Tradition had introduced an approach to regulating armed conflict that focused on protecting and respecting individuals. By the mid-1950s, however, LOAC development stalled. The international community largely rejected the 1956 Draft Rules for Limitation of Dangers Incurred by Civilian Populations in Time of War as a fusion of the Geneva and Hague Traditions.[5] In fact, the LOAC would not see a significant development in humanitarian protections until the 1977 Additional Protocols.[6]

4. DURING THE SAME TIME PERIOD, HOWEVER, IHRL EXPERIENCED SIGNIFICANT GROWTH. TWO OF THE MOST SIGNIFICANT INTERNATIONAL HUMAN RIGHTS TREATIES, THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS[7] (ICCPR) AND THE INTERNATIONAL COVENANT ON ECONOMIC SOCIAL AND CULTURAL RIGHTS[8] WERE ADOPTED AND OPENED FOR SIGNATURE IN 1966, THEN CAME INTO FORCE IN 1976. SINCE THE 1970S, NEWS MEDIA, PRIVATE ACTIVISM, PUBLIC DIPLOMACY, AND LEGAL INSTITUTIONS INCREASINGLY MONITOR AND REPORT ON HUMAN RIGHTS CONDITIONS WORLDWIDE. HUMAN RIGHTS PROMOTION REMAINS A CORE PART OF BOTH THE U.S. NATIONAL SECURITY STRATEGY AND U.S. PUBLIC DIPLOMACY.[9] HUMAN RIGHTS IS A GROWTH AREA OF THE LAW.III. HUMAN RIGHTS TREATIES

A. **Major Human Rights Treaties**. Human rights treaties cover a wide range of subjects. The United States did not ratify any major international human rights treaties until 1988. Table 1 lists ten treaties that the United Nations considers core human rights treaties.[10] Each is administered by a separate treaty-monitoring international body.[11]

Table 1. Core United Nations Human Rights Treaties[12]

TREATY	SUBJECT	OPEN	MONITOR	U.S. STATUS[13]
CPPCG	Genocide	1948	Various	Ratified 1988

[5] Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War, *reproduced in* DIETRICH SCHINDLER & JIŘÍ TOMAN, THE LAWS OF ARMED CONFLICT, 339 (2004).
[6] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, Jun. 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I].
[7] Int'l Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR]
[8] Int'l Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3.
[9] *See generally* 22 U.S.C. § 2304(a)(1) (2006) ("The United States shall . . . promote and encourage increased respect for human rights and fundamental freedoms throughout the world . . . a principal goal of the foreign policy of the United States shall be to promote the increased observance of internationally recognized human rights by all countries."); U.S. GOV'T, NATIONAL SECURITY STRATEGY (May 2010) (prominently embracing promotion of democracy and human rights as part of the U.S. national security strategy); U.S. Dep't of State, Bureau of Democracy, Human Rights, and Labor, Human Rights homepage, at http://www.state.gov/j/drl/hr/ (discussing State Dep't initiatives to promote human rights)
[10] *See also* the UN online database of multi-lateral treaties deposited with the Secretary-General, chapter IV on Human Rights, *available at* http://treaties.un.org/pages/ParticipationStatus.aspx (last visited May 25, 2012).
[11] THOMAS BUERGENTHAL ET. AL., INTERNATIONAL HUMAN RIGHTS IN A NUTSHELL 350 (2002).
[12] Convention on the Prevention and Punishment of the Crime of Genocide (CPPCG); International Convention on the Elimination of All Forms of Racial Discrimination (ICERD); International Covenant on Civil and Political Rights (ICCPR); International Covenant on Economic, Social and Cultural Rights (ICESCR); Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW); Convention Against Torture, Inhuman or Degrading Treatment, or Punishment (CAT); Convention on the Rights of the Child (CRC); International Convention on the Protection of the Rights of All Migrant Workers, and Members of Their Families (ICRMW); International Convention for the Protection of All People from Enforced Disappearance (CPED); Convention on the Rights of Persons with Disabilities (CPRD).
[13] Current as of May 4, 2014.

ICERD	Racial Discrimination	1965	CERD	Ratified 1994
ICCPR**	Civil & Political Rights	1966	UNHRC	Ratified 1992
ICESCR*	Economic, Social & Cultural Rights	1966	CECSR	Signed 1977
CEDAW*	Discrimination Against Women	1979	CEDAW	Signed 1980
CAT*	Torture, Inhumane Punishment	1984	CAT	Ratified 1994
CRC**	Rights of the Child	1989	CRC	Signed 1995‡
ICRMW	Migrant Worker & Family Rights	1990	CMW	No action
CPED	Enforced Disappearances	2006	CED	No action
CPRD*	Persons with Disabilities	2006	CPRD	Signed 2009

Table Notes: * Treaty has one related Optional Protocol ** Treaty has two related Optional Protocols
‡ In 2002, the United States ratified CRC Optional Protocols on Child Soldiers and Child Pornography, but not the CRC. The United States has not ratified any other Optional Protocols noted in Table 1.

B. When examining IHRL treaties, it is important to remember that the original focus of IHRL was protecting individuals from the harmful acts of their own governments.[14] This focus of IHRL was groundbreaking when it emerged after World War II. Previously, such protections have been viewed as a function of domestic law. International law regarding protection of individuals focused on fair treatment at the hands of foreign nations, not an individual's own government.[15] The remainder of this section briefly describes several of the treaties in Table 1 and the body that administers each one.[16]

1. **International Covenant on Civil and Political Rights** (ICCPR) (U.S. ratification in 1992).

a. Administered by the UN Human Rights Committee (UNHRC). Parties must submit reports in accordance with Committee guidelines for review by UNHRC. The UNHRC may question state representatives on the substance of their reports, issue general comments, and report to the UN Secretary General. As the treaty limits the UNHRC's role primarily to commentary, the UNHRC has limited ability to enforce the provisions of the ICCPR.

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

c. The ICCPR is expressly non-extraterritorial. Article 2, clause 1 limits a Party's obligations under the Covenant to "all individuals within its territory and subject to its jurisdiction . . ." Although some commentators and human rights bodies have argued for a disjunctive reading of "and," such that the ICCPR would cover any person under the control of a Party, [17] the United States interprets the extraterritoriality provision narrowly.[18]

d. The First Optional Protocol empowers private parties to file "communications" with the UNHRC. Communications have evolved to operate as a basis for individual causes of action under the ICCPR where domestic remedies have been exhausted. The United States is not a party to the First Optional Protocol.

e. The Second Optional Protocol seeks to abolish the death penalty. The United States is not a party.

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[14] *See* RESTATEMENT, *supra* note 2.
[15] *See id.* at Part VII, Introductory Note.
[16] According to the Restatement, as of 1987, eighteen treaties fell under the category of "Protection of Persons" as human rights treaties. This list did not include the Universal Declaration of Human Rights, or those provisions of the United Nations Charter that relate to human rights, which are considered expressions of principles, and not obligatory. Several treaties and optional protocols, for example on rights of children, migrant workers, and persons with disabilities, came into being after 1987.
[17] Human Rights Committee, General Comment No. 31, U.N. Doc. HRI/GEN/1/Rev.6 (2004).
[18] Matthew Waxman, Head of U.S. Delegation, Principal Deputy Director of Policy Planning, Dep't of State, Opening Statement to the U.N. Human Rights Committee (July 17, 2006), http://www.state.gov/g/drl/rls/70392.htm, ("[I]t is the longstanding view of the United States that the Covenant by its very terms does not apply outside the territory of a State Party. . . . This has been the U.S. position for more than 55 years.").

2. **International Covenant on Economic, Social, and Cultural Rights** (ICESCR) (U.S. signature in 1977, no ratification).

a. The ICESCR does not establish a standing committee; reports go to the Committee on Economic, Social, and Cultural Rights, which is composed of eighteen elected members. There is no procedure for individual complaint. The Committee may make general comments to States Party to highlight and encourage compliance.

b. The ICESCR addresses so-called "second generation human rights."[19] These include the right to self-determination (art. 1), right to work (art. 6), right to adequate standard of living (art. 11), and right to education (art. 13). States that are party to this treaty undertake "to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of [their] available resources, with a view to achieving progressively the full realization of the rights recognized in the . . . Covenant." (art. 2).

3. **Convention on the Prevention and Punishment of the Crime of Genocide**[20] (1948). The United States signed in 1948, transmitted to Senate in 1949, and ratified in 1988.

4. **Convention Against Torture and Other Cruel, Inhuman, and Degrading Treatment** (1984) (CAT). The United States ratified in 1994. The Torture Victim Protection Act of 1991 implements it.[21]

a. The CAT is administered by the UN Committee on Torture, composed of ten elected experts. The committee is informed by a periodic reporting system and inter-state and individual complaint procedures.

b. Unlike the ICCPR, the CAT applies to U.S. activities worldwide, including military operations. Article 2(1) requires each state party "to take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction." Article 2(2) expressly applies the CAT to situations of armed conflict, and requires that "[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture."

c. For detainee transfers, Article 3(1) forbids states party from expelling, returning (French: "refouler") or extraditing a person to another State "where there are substantial grounds for believing that he would be in danger of being subjected to torture." This provision is often called the "non-refoulement" rule. In January 2013, the United States stopped detainee transfers to thirty-four Afghan units and Afghan facilities following reports from the United Nations Assistance Mission in Afghanistan (UNAMA) of detainee abuse.

d. Article 3(2) states, "[f]or the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights."

e. Article 20 empowers the Committee to conduct independent investigations but it must have cooperation of the State Party that is the subject of the investigation.

5. **Convention on the Elimination of All Forms of Racial Discrimination**[22] (1965) (CERD). The United States signed in 1966, transmitted to the Senate in 1978, and ratified in 1994.

a. The southern congressional delegation's concern over the international community's view of Jim Crow laws in the South delayed U.S. ratification of this treaty, which was implemented by the Genocide Convention Implementation Act of 1987.[23]

b. The CERD is administered by United Nations Committee on the Elimination of Racial Discrimination, composed of eighteen members elected by parties to the Convention. The committee reviews reports and may hear inter-state or individual complaints. Unlike the ICCPR, the interstate complaint system is not optional like that of the ICCPR. The system, however, has never been used in its interstate form.

c. The CERD prohibits and defines racial discrimination as "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin" to "nullify[] or impair[] the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic,

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[19] MANFRED NOWAK, INTRODUCTION TO THE INTERNATIONAL HUMAN RIGHTS REGIME 2 (2003) [hereinafter Nowak] at 80.
[20] Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9,1948, 102 Stat. 3045, 78 U.N.T.S. 277.
[21] Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992), reprinted in 28 U.S.C. § 1350 (2000).
[22] International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195, 5 I.L.M. 352 (entered into force Jan. 4, 1969).
[23] Genocide Convention Implementation Act of 1987, 18 U.S.C. §§ 1091-93 (2000).

social, cultural or any other field of public life."[24] Parties agree to eliminate racial discrimination and apply rights set out in the Universal Declaration of Human Rights and the two Covenants.

C. **The United States Treaty Process**

1. Article VI of the United States Constitution establishes ratified treaties as "the supreme Law of the Land." Consequently, these treaties enjoy the same force as statutes.

2. Article II, Section 2, clause 2 of the United States Constitution enumerates that the President has the power to make treaties. After receiving the advice and consent of two-thirds of the Senate, the President may ratify a treaty. In practice, this means some treaties may take years to be fully debated and voted upon.[25]

3. Reservations, Understandings and Declarations (RUDs). The United States policy regarding international human rights treaties relies heavily on RUDs to specifically delineate U.S. concerns, interpretations, and policies at the time of treaty ratification. RUDs have been essential to mustering political support for ratification of human rights treaties in the U.S. Senate. When conducting treaty research, judge advocates should always check whether RUDs accompany a particular treaty.

a. **Reservations** modify treaty obligations with respect to relevant provisions between parties that accept the reservation; reservations do not modify provisions for other parties; if a State refuses a reservation but does not oppose entry into force between the reserving State and itself, the provision proposed for reservation does not operate between the two States.[26] An example of a reservation would be the United States' reservation to the ICCPR whereby it "reserves the right, subject to its Constitutional constraints, to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crimes committed by persons below eighteen years of age."[27]

b. **Understandings** are statements intended to clarify or explain matters incidental to the operation of the treaty. For instance, a State might elaborate on or define a term applicable to the treaty. Understandings frequently clarify the scope of application. An example of an understanding would be the United States' understanding to the ICCPR whereby it stated "[t]hat the United States understands that this Covenant shall be implemented by the Federal Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered therein, and otherwise by the state and local governments."[28]

c. **Declarations** give notice of certain matters of policy or principle. For instance, a State might declare that it regards a treaty to be non-self-executing under its domestic law.[29]

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

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

1. **Non-extraterritoriality:** The United States interprets the scope of application of its IHRL treaty obligations based on the language in the various treaties. Perhaps most significantly, the United States interprets its obligations under the preeminent human rights treaty, the ICCPR, as applying to persons who are both within the territory of the United States and within its jurisdiction, consistent with the treaty's language.[30] The United States

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

[25] For a list of treaties pending advice and consent of the U.S. Senate, see the U.S. State Dep't Treaty Affairs website at http://www.state.gov/s/l/treaty/pending/ (regularly updated).

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

[27] S. EXEC. REP. NO. 102–23, at 11–12 (1992).

[28] *Id.*

[29] *See e.g.*, *id.* ("[T]he United States declares that the provisions of Articles 1 through 27 of the Covenant are not self-executing.").

[30] While the actual language used in the scope provisions of such treaties usually makes such treaties applicable to "all individuals subject to [a state's] jurisdiction" the United States interprets such scope provisions as referring to the United States and its territories and possessions, and not any area under the functional control of United States armed forces. This is consistent with the general interpretation that such treaties do not apply outside the territory of the United States. *See* RESTATEMENT, *supra* note 2, at § 322(2) and Reporters' Note 3; *see also* CLAIBORNE PELL REPORT ON THE INTERNATIONAL COVENANT ON CIVIL AND

reaffirmed its position regarding the non-extraterritorial nature of the ICCPR in March 2014.[31] This theory of treaty interpretation is referred to as "non-extraterritoriality."[32] Not all human rights treaties contain non-extraterritorial scope language. For example, the Convention Against Torture (CAT) expressly contains no geographic limitation on its application. Other treaties, such as the International Covenant on Economic, Social, and Cultural Rights (ICESCR) do not squarely address territorial or jurisdictional limitations on the treaty's application. Treaties interpreted as being non-extraterritorial do not create treaty-based obligations for U.S. forces operating outside U.S. territory. Many States do not share the U.S. non-extraterritoriality view with regard to the ICCPR. They interpret the IHRL obligations within the ICCPR as applying to state actions toward individuals over whom the State has jurisdiction, both within their territory and beyond their territories. Judge advocates working with other nations should recognize that a State's interpretation of the application of IHRL treaties such as the ICCPR can impact that nation's military operations, which can in turn affect U.S. operations.[33]

2. **Non-self execution:** While the non-extraterritorial interpretation of human rights treaties is the primary basis for the conclusion that these treaties do not bind U.S. forces outside the territory of the United States, judge advocates should also be familiar with the concept of treaty execution. According to this treaty interpretation doctrine, although treaties entered into by the United States become part of the "supreme law of the land," [34] some are not enforceable in U.S. courts absent subsequent legislation or executive order to "execute" the obligations created by such treaties.

a. This "self-execution" doctrine relates primarily to the ability of a litigant to secure enforcement for a treaty provision in U.S. courts.[35] However, whether or not a treaty creates a binding obligation on U.S. forces can potentially affect an operational judge advocate's work. There is an argument that if a treaty is considered non-self-executing, it should not be regarded as creating such an obligation.[36] More significantly, once a treaty is executed, it is the subsequent executing legislation or executive order, and not the treaty provisions, which is given effect by U.S. courts and therefore defines the scope of U.S. obligations under our law.[37]

b. The U.S. position regarding the human rights treaties discussed above is that "the intention of the United States determines whether an agreement is to be self-executing or should await implementing legislation."[38] The U.S. position is that its unilateral statement of intent, made through the vehicle of a declaration during the

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POLITICAL RIGHTS, S. EXEC. COC. NO. 102-23 (Cost Estimate) (This Congressional Budget Office Report indicated that the Covenant was designed to guarantee rights and protections to people living within the territory of the nations that ratified it).

[31] *See* Statement of Mary McLeod, Acting Legal Advisor, United States Department of State, to the U.N. Human Rights Committee, March 13, 2014, http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=14383&LangID=E.

[32] *See* Theodor Meron, *Extraterritoriality of Human Rights Treaties*, 89 Am. J. Int'l L. 78-82 (1995).

[33] For example, the European Court of Human Rights recently embraced an expansive reading of the European Convention on Human Rights, now binding on all members of the Council of Europe. See United Kingdom v. al Skeini et. al. (2011), United Kingdom v. al Jedda (2011).

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

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

[36] There are several difficulties with this argument. First, it assumes that a U.S. court has declared the treaty non-self-executing. Absent such a ruling, the non-self-executing conclusion is questionable: "[I]f the Executive Branch has not requested implementing legislation and Congress has not enacted such legislation, there is a strong presumption that the treaty has been considered self-executing by the political branches, and should be considered self-executing by the courts." RESTATEMENT, *supra* note 2, at § 111, Reporter's 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.*

[37] "[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).

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

ratification process, is determinative of the intent of the parties. Thus, if the U.S. adds such a declaration to a treaty, the declaration determines the interpretation the U.S. will apply when determining the nature of the obligation.[39]

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

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

(1) Right to life,

(2) Prohibition on torture,

(3) Prohibition on slavery,

(4) Prohibition on *ex post* punishment[40];

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

b. With very few exceptions (e.g., GC IV, Article 5, Derogations), the LOAC does not permit derogation. Its provisions already contemplate a balance between military necessity and humanity.

IV. CUSTOMARY INTERNATIONAL HUMAN RIGHTS LAW

A. Customary international law (CIL) results from consistent state practice done out of a sense of legal obligation (*opinio juris*).[41] There are no specific rules on how long a custom must exist before it becomes CIL. Determinations as to what constitutes CIL are fact-specific. CIL is considered part of U.S. law,[42] however there exists no definitive list of those human rights the United States considers to be CIL. Therefore, judge advocates rely on a variety of sources in order to determine what constitutes customary IHRL. These sources may include, but are not limited to, the UDHR,[43] the Restatement (Third) of The Foreign Relations Law of the United States, Common Article III of the Geneva Conventions, and authoritative pronouncements[44] of U.S. policy by ranking government officials. Customary IHRL and treaty law are often interrelated. IHRL treaties can codify existing customary IHRL. Conversely, practices established in treaties can ripen into customary IHRL. Customary international law and treaty law are equal in stature, with the later in time controlling.[45]

B. Customary IHRL is not all created equal; its scope of application depends on the type of customary IHRL at issue. Customary IHRL can be divided into two general types: Customary IHRL that is considered *jus cogens*

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

[40] *See supra*, note 8.

[41] *See* RESTATEMENT, *supra* note 2, **§ 102(2)** cmt c. (**1987)** (from the Latin *opinio juris sive necessitates*, a practice undertaken by a State out of a sense of legal obligation).

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

[43] The United States views the UDHR as aspirational, not obligatory. It has not taken the position that the UDHR is CIL.

[44] *See* RESTATEMENT, *supra* note 2, at § 702. *See also, e.g.*, Office of the Press Secretary, The White House, Fact Sheet: New Actions on Guantanamo and Detainee Policy 3 (Mar. 7, 2011), *available at* http://www.whitehouse.gov/sites/default/files/Fact_Sheet_--_Guantanamo_and_Detainee_Policy.pdf. The Fact Sheet, issued in conjunction with an Executive Order for periodic review of Guantanamo detainee cases, stated:

> Although the Administration continues to have significant concerns with Additional Protocol I [to the Geneva Conventions], Article 75 is a provision of the treaty that is consistent with our current policies and practice and is one that the United States has historically supported. Our adherence to these principles is also an important safeguard against the mistreatment of captured U.S. military personnel. The U.S. Government will therefore choose out of a sense of legal obligation to treat the principles set forth in Article 75 as applicable to any individual it detains in an international armed conflict, and expects all other nations to adhere to these principles as well.

[45] *See* Vienna Convention on the Law of Treaties, art. 64 (the emergence of a new *jus cogens* peremptory norm which conflicts with existing treaty obligations voids the conflicting treaty provisions).

("fundamental human rights") and customary IHRL that is not considered to be *jus cogens* ("non-fundamental human rights").[46]

1. Fundamental Human Rights. Customary IHRL determined to be *jus cogens* consists of peremptory norms so fundamental and universally accepted that they do not permit any derogation, even by treaty. The prohibition against genocide, slavery, murder/causing disappearance of individuals, torture/cruel, inhuman degrading treatment, prolonged arbitrary detention, and systematic racial discrimination are considered to be *jus cogens.*[47] In contrast to much of human rights **treaty** law, fundamental customary IHRL binds a State's forces during all operations, both inside and outside the State's territory. But not all customary IHRL is considered to be fundamental.

2. Non-Fundamental Human Rights. Non-fundamental IHRL encompasses all customary IHRL that is not considered to be *jus cogens*. In contrast to fundamental human rights, these **non-**fundamental human rights do not necessarily bind States during all operations inside and outside a State's territory. Judge advocates trying to determine whether a non-fundamental customary IHRL provision applies to a given situation must look at state practice and *opinio juris* in order to determine if and how that provision is customarily applied under the circumstances at issue. Non-fundamental human rights law binds States to the extent and under the particular circumstances those IHRL tenets are customarily applied.

V. IHRL and the LOAC.

A. If judge advocates determine that IHRL treaty law and/or customary IHRL could apply to a particular armed conflict, they must then determine how the applicable IHRL interacts with LOAC in that situation. Scholars and States disagree over the interaction between non-fundamental IHRL and the LOAC. Positions range from arguments that they are entirely separate systems, to a view that makes LOAC a completely integrated component of IHRL.[48] In the late 1960s, the United Nations General Assembly considered the application of human rights during armed conflict in two different resolutions.[49] Ultimately, however, the resolutions produced few useful pronouncements and many ambiguous references to humanitarian principles. There are two primary views regarding how IHRL and LOAC interact with each other when arguments can be made that both apply to armed conflict.

1. **The Displacement View.** Traditionally, IHRL and the LOAC have been viewed as separate systems of protection, where one wholly displaces the other. The displacement view is an all-or-nothing approach that results in either IHRL **or** LOAC setting the rules that govern the armed conflict at issue. This view applies IHRL and LOAC to distinct situations and relationships. The United States embraced this view[50] until very recently.

a. The displacement view adheres to the legal maxim *lex specialis derogat lex generalis*, or the more specific rule displaces the more general rule. LOAC is cited as the *lex specialis* in relation to situations of armed conflict and therefore governs during armed conflict, displacing peacetime laws such as IHRL.[51] The LOAC includes restrictive triggering mechanisms which limit its application to specific circumstances.[52] This view also notes that the LOAC largely predates IHRL and therefore was never intended to comprise a sub-category of IHRL.

b. Law of Armed Conflict, under the displacement view, regulates wartime relations between belligerents and protected persons such as civilians, usually not a state's own citizens or nationals. For example, the

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[46] *See* RESTATEMENT, *supra* note 2, **§ 702,** arguably divides customary IHRL into three categories (internationally recognized rights, fundamental rights, and rights that are *jus cogens).* This above two-part division is a simplified version of the RESTATEMENT'S three-part division.

[47] Barcelona Traction, Light and Power Company, Limited, Judgment, 1970 I.C.J. 3, ¶ 34 (Feb. 5); *see also See* RESTATEMENT, *supra* note 2, § 702.

[48] *See* RENE PROVOST, INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW (2002).

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

[50] *See, e.g.*, Michael J. Dennis, *Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation*, 99 AM. J. INT'L L. 119 (2005).

[51] Christopher Greenwood, *Rights at the Frontier - Protecting the Individual in Time of War, in* LAW AT THE CENTRE, THE INSTITUTE OF ADVANCED LEGAL STUDIES AT FIFTY (1999); Schindler, *supra* note 5, at 397.

[52] *See* Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 ICJ REP. 226, para.25 (July 8).

1949 Geneva Conventions largely do not apply to a state's own nationals. Most of the Fourth Convention applies to "protected persons," a group characterized as civilians in the hands of their nation's enemy.[53]

c. Under the displacement view, IHRL, as the *lex specialis* during peacetime, regulates the relationship between States and individuals within their territory and under their jurisdiction during peace. This reflects the original focus of IHRL—to protect individuals from the harmful acts of their own governments.

2. **Complementarity view.** An expanding group of scholars and States view the application of IHRL and the LOAC as complementary and overlapping. Under the complementarity view, LOAC does not necessarily displace IHRL during armed conflict. According to complementarity, IHRL can regulate a sovereign's conduct towards individuals on distant battlefields during armed conflict if its rules are a better fit than LOAC's for a given situation. The International Court of Justice adopted this view in two different Advisory Opinions,[54] though without clear explanation. Most international scholars accept that the LOAC constitutes a *lex specialis* for situations of armed conflict, particularly international armed conflict. However, opinions differ as to when and how much IHRL displaces LOAC in armed conflict, particularly during non-international armed conflict.

3. **Most recent Periodic Report.** In the United States Fourth Periodic Report to the UNHRC, the U.S. State Dep't stated that "a time of war does not suspend the operation of the [ICCPR] to matters within its scope of application."[55] The Report also noted that:

> "Under the doctrine of lex specialis, the applicable rules for the protection of individuals and conduct of hostilities in armed conflict are typically found in [LOAC] . . . [IHRL] and [LOAC] are in many respects complementary and mutually reinforcing [and] contain many similar protections. . . Determining the international law rule that applies to a particular action taken by a government in the context of an armed conflict is a fact-specific determination, which cannot be easily generalized, and raises especially complex issues in the context of non-international armed conflicts . . ."[56]

These statement suggest that while the United States has not changed its position on the ICCPR's scope of application (the "traditional" vs. "emerging" views of the geographic applicability of treaty law issue discussed above), and it will consider rule-by-rule whether the LOAC displaces applicable provisions of IHRL when IHRL has been determined to apply geographically. In situations of armed conflict, where the LOAC provides specific guidance, LOAC will likely set the rules, not IHRL, and provide authoritative guidance for military action. However, where LOAC is silent or its guidance inadequate, specific provisions of applicable human rights law may supplement the LOAC.

D. **Modern Challenges**. As human rights are asserted on a global scale, many governments regard them as "a system of values imposed upon them."[57] States in Asia and the Islamic world sometimes question the universality of human rights as a neo-colonialist attitude of western states.[58]

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[53] *See, e.g.*, Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 4, Aug. 12, 1949, 6 U.S.T. 3516 [hereinafter GC IV].

[54] *See* Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 226, *supra* note 52, ("The Court observes that the protection of the International Covenant on Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency."). Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004, I.C.J. Rep. 36. The Advisory Opinion in the *Wall* case explained the operation of this "emerging view" as follows:

> As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law.

[55] *See* U.S. Dep't of State, United States Fourth Periodic Report to the United Nations Committee on Human Rights para. 506, 30 Dec 11, at http://www.state.gov/g/drl/rls/179781.htm.

[56] *Id.* at para. 507.

[57] NOWAK, *supra* note 19.

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

V. INTERNATIONAL HUMAN RIGHTS SYSTEMS

International human rights are developed and implemented through a layered structure of complementary and coextensive systems. "The principle of universality does not in any way rule out regional or national differences and peculiarities."[59] As the United States participates in combined operations, judge advocates will find that allies may have very different conceptions of and obligations under IHRL. In addition to the global system of the United Nations, regional human rights systems, such as the European, Inter-American, and African systems, have developed and progressed in complexity and scope. Judge advocates will benefit from an appreciation of the basic features of these systems as they relate to allies' willingness to participate in and desire to shape operations.[60] Moreover, in an occupation setting, judge advocates must understand the human rights obligations, both international and domestic, that may bind the host nation as well as how that host nation interprets those obligations. This understanding begins with the primary human rights system -- the UN system -- the foundation of which is the Universal Declaration of Human Rights.

A. **The Universal Declaration of Human Rights (UDHR)** – The UDHR was a UN General Assembly Resolution passed on December 10, 1948. The UDHR is not a treaty but many of its provisions reflect CIL. The UDHR was adopted as "a common standard of achievement for all peoples and nations."

B. **The UN Human Rights Committee** (UNHRC) – The UNHRC was established by the ICCPR as a committee of independent human rights experts who oversee implementation of the treaty. In this role, the HRC reviews the periodic reports submitted by states party to the ICCPR. The UNHRC may also hear "communications" from individuals in states party to the (First) Optional Protocol to the ICCPR. As mentioned earlier, the United States is not a party to the First Protocol to the ICCPR.

C. **The UN Human Rights Council** – The Human Rights Council is an inter-governmental body within the UN system made up of forty-seven States responsible for strengthening the promotion and protection of human rights around the globe. The UN General Assembly created the Council in March of 2006 with the main purpose of addressing situations of human rights violations and making recommendations on them. The Council replaced the UN Commission on Human Rights, another General Assembly-created body designed to monitor and strengthen international human rights practices.[61] The United States is a member of the UN Human Rights Council and submitted its first report to the Council as part of the Universal Periodic Review process in the fall of 2010.

D. **The European Human Rights System** – The European Human Rights System was the first regional human rights system and is widely regarded as the most robust. The European System is based on the 1950 European Convention of Human Rights (ECHR), a seminal document that created one of the most powerful human rights bodies in the world, the European Court of Human Rights. Presently, all 47 members of the Council of Europe are party to the ECHR. In recent years, this European Court has taken an extraordinarily expansive interpretation of the Convention's obligations, even limiting actions normally permitted by LOAC such as battlefield detention. Though the United States is not a party to the ECHR, judge advocates working with European allies should become familiar with the treaty's basic terms[62] and recent case law that may impact allied operations.

E. **The Inter-American Human Rights System** – The Inter-American System is based on the Organization of the American States (OAS) Charter and the American Convention on Human Rights. The OAS Charter created the Inter-American Commission on Human Rights. The American Convention on Human Rights, to which the United States is not a party, created the Inter-American Court of Human Rights. As the United States is not a party to this Convention, it is not subject to that court's jurisdiction. However, the United States does respond to the comments and criticisms of the Inter-American Commission on Human Rights.[63]

F. **The African Human Rights System** – The African System falls under the African Union, which was established in 2001. It is the most recently established regional human rights system. The African system is based primarily on the African Charter on Human and Peoples' Rights which entered into force in 1986. The Charter created the African Commission on Human and People's Rights. A later protocol created an African Court of

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[59] NOWAK, *supra* note 19, at 2.
[60] Sei Fujii v. California, 38 Cal.2d 718, 242 P.2d 617 (1952).
[61] G.A. Res. 60/251, U.N. Doc A/Res/60/251 (3 Apr. 2006).
[62] The ECHR's text and copies of the court's decisions can be accessed at http://www.echr.coe.int/ECHR/Homepage_EN. The Council of Europe's Treaty Office is the depositary for the ECHR, and maintains a website at http://conventions.coe.int/.
[63] *See e.g.*, U.S. Additional Response to the Request for Precautionary Measures: Detention of Enemy Combatants at Guantanamo Bay, Cuba, (July 15, 2002), *available at* http://www.state.gov/s/l/38642.htm.

Human and People's Rights, designed to complement the work of the Commission. The court came into being as a treaty body in 2004 and published its first judgment on 15 December 2009.[64]

G. There are no current regional human rights treaties for Asia or the Middle East. However, the 53-member Organization of Islamic States recently created an Independent Permanent Human Rights Commission.

VI. FISCAL ASPECTS OF HUMAN RIGHTS LAW

A. Training Foreign Security Forces – Department of Defense Appropriations Act (2014) prohibits funding the "training, equipment, or other assistance" of foreign security forces if the Secretary of Defense has credible information that the security forces to be trained have committed any gross human rights violations.[65] Implementing guidance on this issue is expected to be released soon, and should be monitored closely, as this statutory provision has the potential to involve significant legal issues regarding some U.S. military operations.

B. Human Rights and Security Assistance – For a discussion of the "Leahy Amendment," refer to Chapter 14, Fiscal Law. **VII. REMEDIES FOR HUMAN RIGHTS VIOLATIONS**

A. **Human Rights Treaty-Based Causes of Action** – U.S. courts have generally held human rights treaties to be non-self-executing and therefore not bases for causes of action in domestic courts. In *Sei Fuji v. California*,[66] the California Supreme Court heard a claim that UN Charter Articles 55 and 56 invalidated the California Alien Land Law. The land law had varied land owner rights according to alien status. The court struck down the law on equal protection grounds but overruled the lower court's recognition of causes of action under the UN Charter. The court stated, "The provisions in the [C]harter pledging cooperation in promoting observance of fundamental freedoms lack the mandatory quality and definiteness which would indicate an intent to create justiciable rights in private persons immediately upon ratification."[67] Federal and state courts have largely followed *Sei Fuji's* lead.

B. **Statutory Causes of Action** – The greatest activity in domestic remedies for human rights violations has occurred through the Alien Tort Statute.[68] The statute provides jurisdiction for U.S. District Court to hear "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[69]

1. In *Filartiga v. Peña-Irala*, the Second Circuit recognized a right to be free from torture actionable under the statute.[70] The court's analysis includes a detailed exploration of CIL and the level of proof required to establish an actionable provision of CIL.

2. The United States Supreme Court addressed the Alien Tort Statute (ATS) in *Sosa v. Alvarez-Machain*.[71] Refining and tightening the standard for establishing torts "in violation of the law of nations," the Court characterized the statute essentially as a jurisdictional statute.[72] The Court declined to go so far as categorically requiring separate legislation to establish causes of action under the statute; however, the Court set a very high burden of proof to establish actionable causes.

3. In April 2013, the U.S. Supreme Court found in *Kiobel v. Royal Dutch Petroleum Company* that there is a presumption against extra-territorial application of the ATS. However, Justice Breyer's concurring opinion addressed how that presumption may be overcome when a matter "touches and concerns" the United States with "sufficient force."[73]

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[64] *See* Judgment in the matter of Michelot Yogogombaye versus the Republic of Senegal, application No. 001/2008, http://www.african-court.org/en/cases/latest-judgments/ (last visited Apr. 13, 2010).
[65] *See* Department of Defense Appropriations Act, 2014 (H.R. 3547-115), SEC. 8057.
[66] 38 Cal.2d, 718, 242 P.2d 617 (1952).
[67] 242 P.2d at 621-22.
[68] 28 U.S.C. § 1350 (2004).
[69] *Id.*
[70] 630 F.2d 876 (2d Cir.1980).
[71] 542 U.S. 692 (2004)
[72] *Id.*
[73] 133 S.Ct. 1659 (2013); http://www.supremecourt.gov/opinions/12pdf/10-1491_l6gn.pdf

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CHAPTER 4

THE LAW OF ARMED CONFLICT ACROSS THE CONFLICT SPECTRUM

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I. INTRODUCTION

The law of armed conflict (LOAC) consists of that body of law – found in treaties as well as customary international law (CIL) – which governs the conduct of hostilities among the parties to a conflict. As noted elsewhere in this volume and its appendices, different treaties and legal norms will apply depending on the characterization of the conflict as international or non-international and that different categories exist within the LOAC framework for international and non-international armed conflicts. The threshold for an international (or inter-State) armed conflict is codified in Common Article 2 of the Geneva Conventions, which provides, in relevant part, that "the present Convention shall apply to all cases of declared war or any other armed conflict which may arise between two or more High Contracting Parties[.]" Non-international (or intra-State) armed conflicts, in turn, are regulated by a separate regime of law which is expressed in Common Article 3 of the Geneva Conventions and Additional Protocol IIof 1977.

Not all conflicts, however, are sufficient to trigger the relevant set or subset of LOAC as they fail to meet the threshold requirements for that law to be applicable – such as limited border skirmishes, isolated acts of violence, riots, or banditry. Military operations, in this regard, are increasingly difficult to categorize[1] or are conducted in conditions not amounting to armed conflict, whether international or non-international. Conflicts which are neither international armed conflicts nor non-international armed conflicts not regulated by LOAC but are, instead, be regulated by the more restrictive rules governing law enforcement activity, international human rights law, and the international law governing the exercise of extraterritorial enforcement jurisdiction.[2] Judge Advocates must consider what law governs the conduct of military operations regardless of the conflict categorization.

II. DOCTRINAL TYPES OF OPERATIONS

A. Military operations are divided into three major categories: 1) Major Operations and Campaigns; 2) Crisis Response and Limited Contingency Operations; and 3) Military Engagement, Security Cooperation, and Deterrence.[3] Joint Publication 3-0 further lists the following types of operations: Stability Operations; Civil Support, Foreign Humanitarian Assistance; Recovery; Noncombatant Evacuation; Peace Operations; Combating Weapons of Mass Destruction; Chemical, Biological, Radiological, and Nuclear Consequence Management; Foreign Internal Defense; Counterdrug Operations; Combating Terrorism; Counterinsurgency; and Homeland Defense.

B. Major Operations and Campaigns will frequently involve the triggering of Common Article 2 of the Geneva Conventions. Other types of operations, however, such as Peace Operations, may not – even though Peace Operations frequently involve large numbers of military forces, including Judge Advocates and paralegals.

III. PEACE OPERATIONS

According to Joint Publication 3-07.3 (Peace Operations), the range of military operations called "Peace Operations" are "crisis response and limited contingency operations, and normally include international efforts and military missions to contain conflict, redress the peace, and shape the environment to support reconciliation and rebuilding and to facilitate the transition to legitimate governance." Such operations fall within four principal subsets: peacekeeping operations (PKO), peace building (PB) post-conflict actions, peacemaking (PM) processes, conflict prevention, and military peace enforcement operations (PEO). Any of these may be conducted under the sponsorship of the United Nations (UN), another intergovernmental organization (IGO), or within the framework of a coalition of agreeing nations. Such operations may also take place unilaterally.[4]

The fundamental concepts of peace operations are: consent, impartiality, transparency, credibility, freedom of movement, flexibility and adaptability, civil-military harmonization and cooperation, restraint and minimum force, objective/end state, perseverance, unity of effort, legitimacy, security, mutual respect and cultural awareness, and current and sufficient intelligence.[5] These concepts affect every facet of operations and remain fluid throughout any mission. While not a doctrinal source, the Joint Task Force Commander's Handbook for Peace Operations (16 June 1997) is a widely disseminated source of lessons learned and operational issues. Chapters V, Section D of Joint Publication 3-0 contains an excellent summary of the operational considerations and principles that apply directly to Peace Operations. The principles for joint operations, in addition to the nine principles of war,[6] are restraint,

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[1] Difficulty in categorizing armed conflicts is due in large part to the emergence of non-state actors in contemporary warfare. These conflicts between state actors and non-state actors are defined as "irregular warfare." S*ee* U.S. DEP'T OF DEFENSE DIR. 3000.07, IRREGULAR WARFARE (1 Dec. 2008) (defining irregular warfare as "[a] violent struggle among state and non-state actors for legitimacy and influence over the relevant populations(s)").

[2] For further reading on the limits of extraterritorial activity outside the LOAC framework, *see* Dan E. Stigall, *Ungoverned Spaces, Transnational Crime, and the Prohibition on Extraterritorial Enforcement Jurisdiction in International Law*, 3 Notre Dame J. Int'l & Comp. L. 1 (2013).

[3] CHAIRMAN OF THE JOINT CHIEFS OF STAFF, JOINT PUB. 3-0, JOINT OPERATIONS (11 Aug. 2011) [hereinafter JOINT PUB. 3-0]. Joint Publication 3-0 is quoted or cited extensively in this outline. For brevity's sake, citations to Joint Publication 3-0 will be omitted. Military operations were previously described as War or Military Operations Other Than War (MOOTW). The term and acronym MOOTW was discontinued by Joint Publication 3-0, Joint Operations (17 Sept. 2006).

[4] CHAIRMAN OF THE JOINT CHIEFS OF STAFF, JOINT PUB. 3-07.3, PEACE OPERATIONS pg. vii-viii (1 Aug. 2012) [hereinafter JOINT PUB. 3-07.3].

[5] *Id.*

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

perseverance, and legitimacy. The Judge Advocate and paralegal can play a significant role in establishing and maintaining these principles.

A. **Peacekeeping**

1. Joint Publication 3-07.3 defines peacekeeping operations as "[m]ilitary operations undertaken with the **consent** of all major parties to a dispute, designed to monitor and facilitate implementation of an **agreement** (cease fire, truce, or other such agreement) and support diplomatic efforts to reach a long-term political settlement."[7]

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

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

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

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

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

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

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

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

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

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

5. United Nations Security Council Resolution 690 (1991)[8] concerning the Western Sahara is a good example of the implementation of a peacekeeping force.

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

B. **Peace Building**

1. Joint Publication 3-07.3: Stability actions, predominately diplomatic and economic, that strengthen and rebuild governmental infrastructure and institutions in order to avoid a relapse into conflict.

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

[7] JOINT PUB. 3-07.3, *supra* note 5, at x (emphasis added).
[8] *See* S.C. Res. 690 U.N. Doc. S/RES/690 *available at* http://www.un.org/Docs/scres/1991/scres91.htm.

assistance for democratic development (including electoral assistance and support for free media); and promoting conflict solution and reconciliation techniques.

3. Peace building activities may generate additional tasks for units earlier engaged in peacekeeping or peace enforcement. You will typically find post conflict peace building taking place to some degree in all Peace Operations.

C. **Peace Making**

1. Joint Publication 3-07.3: A process of diplomacy, mediation, negotiation, or other forms of peaceful settlement that arranges an end to a dispute and resolves issues that led to it.

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

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

D. **Peace Enforcement**

1. Joint Publication 3-07.3 discusses peace enforcement in terms of 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.[9]

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

a. Protection of humanitarian assistance.

b. Restoration and maintenance of order and stability.

c. Enforcement of sanctions.

d. Guarantee or denial of movement.

e. Establishment and supervision of protected zones.

f. Forcible separation of belligerents.

3. UNSCR 1031 concerning Bosnia is a good example of the Security Council using Chapter VII to enforce the peace, even when based on an agreement.[10]

E. **Conflict Prevention**

1. Joint Publication 3-07.3: A peace operation employing complementary diplomatic, civil, and, when necessary, military means, to monitor and identify the causes of conflict, and take timely action to prevent the occurrence, escalation, or resumption of hostilities.

2. Conflict prevention is generally of a short-term focus designed to avert an immediate crisis. It includes confidence building measures and could involve a preventive deployment as a show of force.

3. Whereas peacekeeping and conflict prevention have many of the same characteristics (i.e., similar rules of engagement and no or very limited enforcement powers), conflict prevention usually will not have the consent of all the parties to the conflict.

F. **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

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[9] JOINT PUB. 3-07.3, *supra* note 5, at x.
[10] *See generally* S.C. Res. 1031, U.N. Doc. S/RES/1031 *available at* http://www.un.org/Docs/scres/1995/scres95.htm.

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

1. Second generation peacekeeping[11]
2. Protective/humanitarian engagement[12]
3. Stability Operations and/or Support Operations (SOSO or SASO)
4. Stability and Reconstruction Operations (S&RO)
5. Stability Operations

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

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

B. Enforcement actions are authorized under Chapter VII of the UN Charter. The authorizing Security Council resolution will typically refer to Chapter VII in the text and authorize **"**all necessary means/measures" (allowing for the force) to accomplish the mission. 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."[13]

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

D. As a corollary to normal UN authorization for an operation, international agreements provide legal authorization for some Peace Operations. As a general rule of international law, states cannot procure treaties through coercion or the threat of force.[14] 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.[15]

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

1. Participation **in** United Nations Chapter VI Operations. This type of operation must comply with the restraints of the United Nations Participation Act (UNPA).[16] Section 7 of the UNPA (22 U.S.C. § 287d-1) allows

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[11] 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.

[12] 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.

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

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

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

[16] 22 U.S.C. § 287.

the President to detail armed forces personnel to the United Nations to serve as observers, guards, or in any other noncombat capacity. Section 628 of the Foreign Assistance Act (22 U.S.C. § 2388) is another authority which allows the head of any agency of the U.S. government to detail, assign, or otherwise make available any officer to serve with the staff of any international organization or to render any technical, scientific, or professional advice or service to or in cooperation with such organization.[17] This authority cannot be exercised by direct coordination from the organization to the unit. Personnel may only be tasked following DoD approval channels. No more than 1,000 personnel worldwide may be assigned under the authority of § 7 at any one time, while § 628 is not similarly limited.

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

3. Operations **supporting enforcement of** UN Security Council Resolutions: These operations are generally pursuant to Chapter VII mandates, and are rooted in the President's constitutional authority as the Commander in Chief.

V. JUDGE ADVOCATE LEGAL CONSIDERATIONS:

A. Legal Authority and Mandate

1. It is critical that Judge Advocates understand the relationship between the mandate and the 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 (1993 humanitarian assistance mission in Somalia), one commander commented that the lawyer is the "High Priest of the mission statement." This will define the parameters of the operation, force composition, ROE, status, governing fiscal authorities, etc. The first place to start is to assemble the various Security Council resolutions that authorize the establishment of the peace operation and form the mandate for the Force. The mandate, by nature, is political and often imprecise, resulting from diplomatic negotiation and compromise. A mandate of "maintain a secure and stable environment" can often pose difficulties when defining tasks and measuring success. The mandate should describe the mission of the Force and the manner in which the Force will operate. The CJCS Execute Order for the Operation is the primary source for defining the mission, but it will usually reflect the underlying UN mandate. The mandate may also:

a. Include the tasks of functions to be performed.

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

c. State the size and organization of the Force.

d. List those States that may provide contingents.

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

f. Set the initial time limit for the operation.

g. Set arrangements for financing the operations.

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

2. Aside from helping commanders define the specified and implied tasks, the mandate outlines the parameters of the authorized mission. Thus, the mandate helps the Judge Advocate 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.

3. **Presidential Decision Directive (PDD) 25 (May 1994).**[18] 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."[19] The Clinton Administration defined its policy towards supporting Peace Operations in Presidential Decision Directive 25, "The Clinton Administration's Policy on Reforming Multilateral Peace Operations (May 1994)." Presumably, this policy remains in effect for the Obama Administration unless revoked or superseded by a subsequent directive.[20] 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, and the extent of U.S. support for other nations, to name a few. The six areas highlighted by PDD-25 follow:

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

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

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

(b) There is a threat to or breach of international peace and security, defined as one or a combination of the following: international aggression, urgent humanitarian disaster coupled with violence, or sudden interruption of established democracy or gross violation of human rights along with violence or the threat thereof;

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

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

(e) Whether there is a significant threat to international peace and security for Chapter VII missions;

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

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

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

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[18] 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).
[19] Madeleine K. Albright, The UN, The U.S. and the World, 7 Dep't of State Dispatch 474 (1996).
[20] See Marjorie Ann Browne, CONG. RESEARCH SERV., RL 33700, UNITED NATIONS PEACEKEEPING: ISSUES FOR CONGRESS (Feb. 11, 2011).

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

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

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

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

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

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

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

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

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

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

(c) There is a commitment to reassess and continually adjust the objectives and composition of the force to meet changing security and operational requirements.

b. *Reducing U.S. costs for UN peace operations.* This is the area of greatest Congressional power regarding control of military operations.[21] 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. In Chapter VII peace operations, participating States normally pay their own costs of participation.

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

(1) Command and control of U.S. forces sometimes causes more debate than the questions surrounding U.S. participation. The policy reinforces the fact that U.S. authorities will relinquish only "operational control" of U.S. forces when doing so serves U.S. security interests. The greater the U.S. military role, the less likely we will give control of U.S. forces to UN or foreign command. Any large-scale participation of U.S. forces likely to involve combat should ordinarily be conducted under U.S. command and operational control or through competent regional organizations such as North Atlantic Treaty Organization (NATO) or ad hoc coalitions.

(2) PDD-25 forcefully states that the President will never relinquish command of U.S. forces. However, the President retains the authority to release designated U.S. forces to the Operational Control (OPCON) of a foreign commander for designated missions. When U.S. forces are under the operational control of a UN commander, they will always maintain the capability to report separately to higher U.S. military authorities. This particular provision is in direct contravention to UN policy. Under UN policy, Soldiers and units under UN control will only report to and seek orders and guidance through the UN command channels. The policy also provides that commanders of U.S. units participating in UN operations will refer to higher U.S. authority if given an order construed as illegal under U.S. or international law, if the order is outside the mandate of the mission to which the U.S. agreed with the UN, or if the U.S. commander is unable to resolve the matter with the UN commander. As a practical matter, this means that deployed units are restricted to the mission limits prescribed in the CJCS Execute Order for the mission. The U.S. reserves the right to terminate participation at any time and/or take whatever actions necessary to protect U.S. forces.

(3) The 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

[21] U.S. CONST. art. 1, § 8.

command and control arrangements of the CJCS execute order.[22] NOTE: NATO has its own doctrinal definitions of command relationships which are similar to the U.S. definitions. Field Manual 100-8 summarizes the NATO doctrine as it relates to U.S. doctrinal terms.[23] The Command and Control lines between foreign commanders and U.S. forces represent legal boundaries that the lawyer should monitor.

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

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

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

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

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

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

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

B. **Chain of Command Issues**

1. U.S. Commanders may never take oaths of loyalty to the UN or other organization.[24]

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

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[22] The precise definitions of the degrees of command authority are contained in CHAIRMAN OF THE JOINT CHIEFS OF STAFF, JOINT PUB. 3-0, JOINT OPERATIONS (11 Aug. 2011).
[23] DEP'T OF ARMY, FIELD MANUAL 100-8, THE ARMY IN MULTINATIONAL OPERATIONS (24 Nov. 1997).
[24] *See* 22 U.S.C. § 2387.

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

4. In a 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 SRSG and the military Force Commander depends on the operation, and the Force Commander may be subordinate to the SRSG. In some cases the military Force Commander may be dual-hatted and also serve as the Head of Mission.

5. In most Chapter VII enforcement operations, the Security Council will authorize member states or a regional organization to conduct the enforcement operation. The authorizing Security Council Resolution provides policy direction, but military command and control remains with member states or a regional organization.

C. **Mission Creep**

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

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

D. Status of Forces/Status of Mission Agreement

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

2. Notify the Combatant Commander and State Department before negotiating or beginning discussions with a foreign government as required by State Department Circular 175.[25]

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

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

5. The necessity for a Status of Forces Agreement (SOFA) [termed a Statue of Mission Agreement (SOMA) in Chapter VI operations commanded by the UN] depends on the type of operation. Enforcement operations do not depend on, and may not have the consent of the host authorities, and therefore will not normally have a SOFA. Most other operations **should** have a SOFA/diplomatic note/or other international agreement to gain some protection for military forces from host nation jurisdiction. Agreements should include language which protects civilians who are employed by or accompany U.S. forces.

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

7. The SOFA/SOMA may also include:

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

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

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

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

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

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

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

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

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

i. Postal regulations.

j. The flying of UN and national flags.

k. Uniform, regulations.

l. Permissions to operate UN vehicles without special registration.

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

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

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

9. Two Default Sources of Legal Status.

a. The Convention on the Safety of United Nations and Associated Personnel.[26] The treaty entered into force on 15 January 1999. The convention requires States to release captured personnel, to treat them in accordance with the 1949 Geneva Convention of Prisoners of War (GC IV while in custody), and imposes criminal liability on those who attack peacekeepers or other personnel acting in support of UN authorized operations. The Convention will apply in UN operations authorized under Chapter VI or VII. The Convention will not apply in enforcement operations under Chapter VII **in which** any of the UN personnel are engaged as combatants against organized armed forces **and to which** the law of international armed conflict applies.

b. The Convention on the Privileges and Immunities of the United Nations[27], 1946. Article VI § 22 defines and explains the legal rights of United Nations personnel as "Experts on Mission." In particular, Experts on Mission are NOT prisoners of war and therefore cannot lawfully be detained or have their mission interfered with by any party.

E. Laws of Armed Conflict.

1. It is the UN and U.S. position that Chapter VI operations are not international armed conflict (requiring the application of the Geneva Conventions) as between the peacekeepers and any of the belligerent parties. The Geneva Conventions may of course apply between the belligerent parties. In Chapter VII operations, the applicability of the Geneva Conventions will depend on the situation. Are the UN personnel engaged as combatants against organized armed forces? If the answer is No, then the Geneva Conventions do **not** apply as between the UN Forces and the belligerent parties. Whether the Geneva Conventions do or do apply as a matter of law, as a matter of policy the minimum humanitarian protections contained within Common Article 3 of the Geneva Conventions will apply.

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

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[26] *Available at* http://www.un.org/law/cod/safety.htm.
[27] *Available at* http://www.un.org/en/ethics/pdf/convention.pdf.

3. If participating in UN operations, Judge Advocate s should be aware of "the UN ROE." Any "UN ROE" must be read in light of limitations on multinational ROE contained in the U.S. SROE.

F. **Rules of Engagement**

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

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

G. **Funding Considerations**

1. It is critical that Judge Advocates find positive authority for each fiscal obligation and appropriate funds to allocate against the statutory authority. All the same rules that apply to the funding of military operations continue to apply.

2. During a Chapter VI mission, 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 Letter of Assist (LOA) in order to receive reimbursement under § 7 of the UNPA. The unit can lawfully expend its own O&M funds for mission essential goods or services which the UN refuses to allow (no LOA issued).

H. The Law Enforcement Paradigm

As noted, if an operation occurring outside the territory of the United States does not meet the criteria (or occur within a context) which would allow for the applicability of LOAC, then the applicable legal framework is the ordinary legal regime regulating extraterritorial enforcement jurisdiction, the relevant provisions of international human rights law, and the absence of any *lex specialis* to offer State actors greater latitude.

Outside of the LOAC framework, international law greatly restricts the extraterritorial activity of State actors. In 1927, the Permanent Court of International Justice (PCIJ) noted that "the first and foremost restriction imposed by international law on a State is that – failing the existence of a permissive rule to the contrary, it may not exercise its power in any form in the territory of another State."[28] Article 2(7) of the United Nations Charter provides that, aside from the application of enforcement measures under Chapter VII, nothing in the Charter "shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state[.]'"[29] Similarly, the International Court of Justice, in *Nicaragua v. United States*, noted that "the principle forbids all States or groups of States to intervene directly or indirectly in internal or external affairs of other States.[30]

[28] PCIJ, *SS Lotus* (France v. Turkey), PCIJ Reports, Series A, No. 10, p. 18-19 (1927).
[29] UN Charter 2(7).
[30] Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Merits, 1986 ICJ REP. 14 (Judgment of June 27).

Likewise, the UN General Assembly's Declaration on Principles of International Law Concerning Friendly Relations and Cooperation states that "[n]o 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[.]"[31] Contemporary international law, therefore, tightly constrains the exercise of extraterritorial enforcement jurisdiction in most contexts.[32]

VI. STRUCTURE FOR ANALYSIS

These diverse operations do not always trigger the application of the traditional LOAC regimes because of a lack of the legally requisite armed conflict needed to trigger such regimes.[33] This has led Judge Advocate s to resort to other sources of law for the resolution of issues during operations not amounting to armed conflict. These sources start with binding CIL-based human rights which must be respected by United States Forces at all times. Other sources include host nation law, conventional law, and law drawn by analogy from various applicable sources. The sources of law that can be relied on in these various types of military operations depend on the nature of the operation.

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

1. Define the nature of the issue;
2. Ascertain what binding legal obligations, if any, apply;
3. Identify any "gaps" remaining in the resolution of the issue after application of binding authority;
4. Consider filling these "gaps" by application of non-binding sources of law as a matter of policy.[34]

B. When attempting to determine what laws apply to U.S. conduct in an area of operations, a specific knowledge of the exact nature of the operation becomes immediately necessary.[35]

C. In the absence of well-defined mission statements, the JA must gain insight into the nature of the mission by turning to other sources of information.

D. This information might become available by answering several important questions that shed light on the United States' intent regarding any specific operation. These include: (1) what has the President (or his representative) said to the American People regarding the operation;[36] (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,[37] what statement or directives have been made by that organization?

E. After gaining the best possible understanding of the mission's objective, it is important to determine what bodies of law should be relied upon to respond to various issues. The 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

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[31] General Assembly RES/20/2131 , Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, 21 December 1965

[32] *See* Stigall, *supra* note 3.

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

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

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

[36] 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).

[37] Regional organizations such as North Atlantic Treaty Organization (NATO), Organization of American States (OAS), and the African Union (AU).

applicability. Finally, after considering the application of the regimes found within each of the four tiers, the JA must realize that as the operation changes, the potential application of the regulation within each of the four tiers must be constantly reassessed.

VIII. SOURCES OF LAW

A. Fundamental Human Rights

1. Fundamental human rights are CIL-based rights, obligatory in nature, and therefore binding on the conduct of State actors at all times. These protections represent the evolution of natural or universal law recognized and commented upon by leaders and scholars.[38] The principle behind this body of law is that these laws are so fundamental in nature that all human beings are entitled to receive recognition and respect of them when in the hands of State actors.

2. Besides applying to all people, the most critical aspect of these rights is that they are said to be non-derogable, that is, they cannot be suspended under any circumstances. As the "minimum yardstick"[39] of protections to which all persons are entitled, this baseline tier of protections never changes. For an extensive discussion of the United States position on the scope and nature of fundamental human rights obligations, see the Human Rights Chapter of this Handbook.

B. Host Nation Law

1. After considering the type of baseline protections represented by fundamental human rights law, the military leader must be advised in regard to the other bodies of law that he should integrate into his planning and execution phases. This leads to consideration of host nation law. Because of the nature of most non-armed conflict missions, Judge Advocates must understand the technical and pragmatic significance of host nation law within the area of operations. Although in theory understanding the application of host nation law during military operations is perhaps the simplest component, in practice it is perhaps the most difficult.

2. Judge Advocates must recognize the difference between understanding the technical applicability of host nation law, and the application of that law to control the conduct of U.S. forces during the course of operations. In short, the significance of this law declines in proportion to the movement of the operation toward the characterization of "conflict." Judge Advocates should understand that U.S. forces enter other nations with a legal status that exists anywhere along a notional legal spectrum. The right end of that spectrum is represented by invasion followed by occupation. The left end of the spectrum is represented by the utter lack of any legal protection.[40]

3. When the entrance can be described as invasion, the legal obligations and privileges of the invading force are based upon the list of straightforward rules found within LOAC. 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. Accordingly, early decisions regarding the type of things that could be done to maintain order[41] 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.

4. Weapons search and confiscation policy are examples of this type of deference to host nation law.

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[38] *See* RESTATEMENT, *supra* note 15 at § 701, cmt.

[39] 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.

[40] In essence, stability operations frequently place our military forces in a law enforcement-type role. Yet, they must execute this role without the immunity from local law that traditional armed conflict grants. In fact, in many cases, their authority may be analogous to the authority of United States law enforcement officers in the territory of another state. "When operating within another state's territory, it is well settled that law enforcement officers of the United States may exercise their functions only (a) with the consent of the other state ... and (b) if in compliance with the laws of the other state...." *See* RESTATEMENT, *supra* note 15, at §§ 433 and 441.

[41] 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 is balanced with host nation law.

5. It is important to note that Public International Law assumes a default setting.[42] 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."[43] However, the modern rule, is that in the absence of some type of immunity, forces that find themselves in another nation's territory must comply with that nation's law.[44] This makes the circumstances that move military forces away from this default setting of extreme importance. Historically, military commentators have stated that U.S. forces are immune from host nation laws in any one of three possible scenarios:[45]

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

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

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

6. The exception represented by the first scenario is well recognized and the least problematic form of immunity. Yet, most status of forces and stationing agreements deal with granting *members of the force* immunity from host nation criminal and civil jurisdiction. Although this type of immunity is important, it is not the variety of immunity that is the subject of this section. Our discussion revolves around the grant of immunity to the intervention (or sending) force nation itself. This form of immunity benefits the nation directly,[46] providing it with immunity from laws that protect host nation civilians.

7. Although not as common as a status of forces agreement, the United States has entered into other forms of jurisdictional arrangements. The Carter-Jonassaint Agreement[47] is an example of such an agreement. The agreement demonstrated deference for the Haitian government by conditioning its acceptance upon the government's approval. It further demonstrated deference by providing that all multi-national force activities would be coordinated with the "Haitian military high command." This required a number of additional agreements, arrangements, and understandings to define the extent of host nation law application in regard to specific events and activities.

8. The exception represented by the second scenario is probably the most obvious. When engaged in traditional armed conflict with another national power, military forces may, to an extent, disregard the domestic law of that nation. For example, during the initial phase of OPERATION IRAQI FREEDOM, the coalition invasion force did not bother to stop at Iraqi traffic lights. The domestic law of Iraq did not bind the invasion force in that regard.[48] This exception is based on the classical application of the Law of the Flag theory.

9. The Law of the Flag has two prongs. The first prong is referred to as the combat exception, described above, and is exemplified by the lawful disregard for host nation law exercised during such military operations as OPERATION IRAQI FREEDOM. This prong is still in favor and represents the state of the law.[49] The second

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

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

[44] 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 42, at 11-1.

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

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

[47] The entry agreement for OPERATION UPHOLD DEMOCRACY.

[48] 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.

[49] *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

prong is referred to as the consent exception, described by the excerpt from the United States Supreme Court in *Coleman v. Tennessee*[50] quoted above, and is exemplified by situations that range from the consensual stationing of North Atlantic Treaty 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.

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

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

12. The third exception, although based upon the United Nations Charter, is a variation of the Law of the Flag's combat exception. 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,[52] but the same immunity is available to the extent it is necessary when combat is not contemplated.

13. The bottom line is that Judge Advocates should understand what events impact the immunity (or lack thereof) 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. Morevover, in order to competently advise a commander, Judge Advocates must gain a basic understanding of host nation legal systems in order to avoid running afoul of host nation law when it applies. For a primer on comparative legal systems, please review the Comparative Law chapter of the Law of Armed Conflict Deskbook.

C. **Conventional Law**

This group of protections is perhaps the most familiar to practitioners and contains the protections that are bestowed by virtue of international law conventions. This source of law may be characterized as the "hard law" that must be triggered by some event, circumstance, or status in order to bestow protection upon any particular class of persons. Examples include LOAC 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.

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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...."

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

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

[52] UN Charter, art. 42.

D. **Law By Analogy**[53]

1. If the primary body of law intended to guide during military operations (LOAC) is not triggered, 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 can persist in certain situations, Judge Advocates need a mechanism to employ to provide the command with "specific" legal guidance in the absence of controlling "specifics."

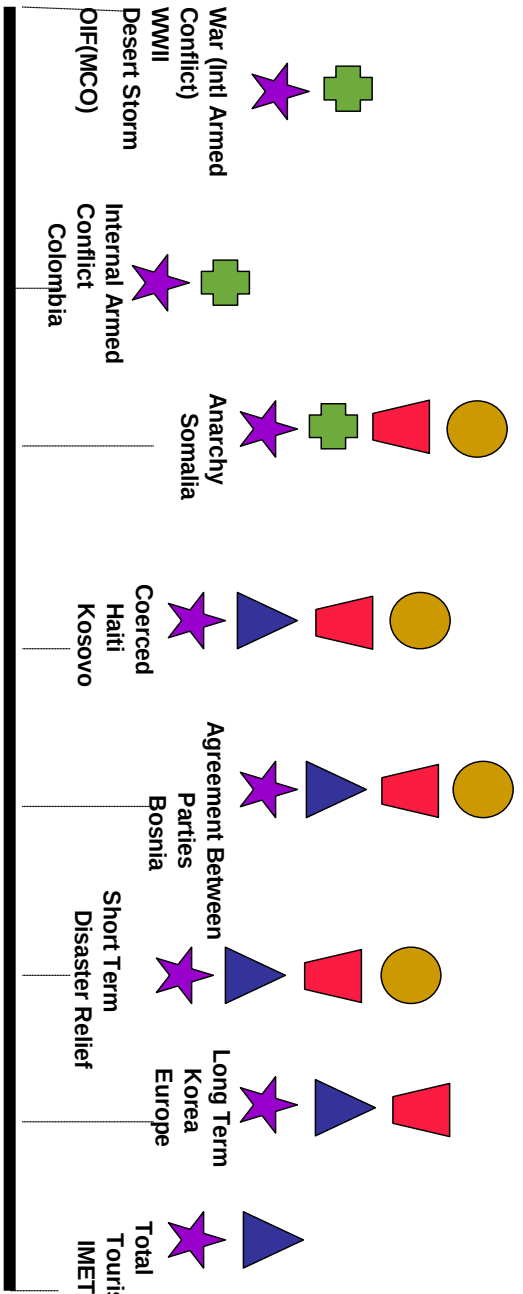
2. The license and mandate for utilizing non-binding sources of authority to fill this legal vacuum is established by the Department of Defense's Law of War Program Directive (DoD Directive 2311.01E). This authority directs the armed forces of the United States to apply LOAC during all armed conflicts, no matter how characterized, and in all other military operations. Because of the nature of non-armed conflict operations, sources of law relied upon to resolve various issues extend beyond LOAC. These sources include, but are not limited to, tenants and principles from LOAC, United States statutory and regulatory law, and peacetime treaties. The fit is not always exact, but more often than not, a disciplined review of the international conventional and customary law or any number of bodies of domestic law will provide rules that, with moderate adjustment, serve well.

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

4. The logical start point for this law by analogy process is LOAC. For example, when dealing with treatment of civilians, a logical starting point is the LOAC 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 Advocate s 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. 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. Finally, Judge Advocates should be prepared to draw upon relevant principles from the host nation legal system where appropriate.

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

[53] Some might argue that due to potential changes in how U.S. forces apply the law of armed conflict as a result of DoDD 2311.01E, that this section is duplicative and/or confusing. This chapter, and particularly this section, must be read in light of DoDD 2311.01E.


War (Intl Armed Conflict)
WWII
Desert Storm
OIF(MCO)
Internal Armed Conflict
Colombia
Anarchy
Somalia
Coerced
Haiti
Kosovo
Agreement Between Parties
Bosnia
Short Term
Disaster Relief
Long Term
Korea
Europe
Total
Tourist
IMET
Fundamental Human Rights
Conventional Law
Host Nation Law
Authorizing Document
Law by Analogy

APPENDIX

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.

d. 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**.

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

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

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

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

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

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

1. *U.S. Policy*.

a. Political Asylum.

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

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

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

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

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

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

H. **Impact Of Where Candidate Is Located**.

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

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

b. Applicants will be afforded every reasonable protection.

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

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

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

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

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

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

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

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

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

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

2. *In Foreign Territories*:

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

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

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

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

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

I. International Legal Developments and Other Considerations

As there is no comprehensive treaty setting forth all the rights and obligations owed by states vis-à-vis displaced persons, legal advisors must look to numerous other instruments such as relevant human rights instruments and the Geneva Conventions for a fulsome understanding of legal rights and obligations in this regard. Two nonbinding

instruments, however, have been promulgated to assist international actors in identifying rights and duties regarding displaced persons: the Guiding Principles on Internal Displacement (Guiding Principles) and the Principles on Housing and Property Restitution for Refugees and Displaced Persons (Pinheiro Principles).[1] Judge Advocates should familiarize themselves with these documents when faced with issues related to displaced persons. In addition, host nation property law may also become relevant in addressing issues relating to displacement. Accordingly, Judge Advocates should also familiarize themselves with the host nation legal system to avoid unnecessary violations of domestic law when advising on such issues.

[1] For further reading on these instruments and the legal regime governing displaced persons in a post-conflict setting, *see* Dan E. Stigall, *Refugees and Legal Reform in Iraq: The Iraqi Civil Code, International Standards for the Treatment of Displaced Persons, and the Art of Attainable Solutions*, 34 Rutgers L. Rec. 1, 1 (2009).

CHAPTER 5

RULES OF ENGAGEMENT

REFERENCE

1. CHAIRMAN OF THE JOINT CHIEFS OF STAFF INSTR. 3121.01B, STANDING RULES OF ENGAGEMENT (SROE)/STANDING RULES FOR THE USE OF FORCE (SRUF) FOR U.S. FORCES (13 June 2005).
*** **NOTE: The current SROE are under revision and JAs should obtain the latest version.** ***

I. INTRODUCTION

A. Rules of Engagement (ROE) are the commanders' tools for regulating the use of force, making them a cornerstone of the Operational Law discipline. The legal sources that provide the foundation for ROE are complex and include customary and treaty law principles from the laws of war. As a result, Judge Advocates (JA) participate significantly in the preparation, dissemination, and training of ROE; however, international law is not the sole basis for ROE. Political objectives and military mission limitations are necessary to the construction and application of ROE. Therefore, despite the important role of the JA, commanders bear ultimate responsibility for the ROE

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

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

NOTE: This chapter is NOT a substitute for the SROE. The SROE are classified SECRET, and as such, important concepts within it may not be reproduced in this handbook. The operational lawyer must ensure that he or she has ready access to the complete SROE and study it thoroughly until he or she understands the key concepts and provisions. JAs play an important role in the ROE process because of our expertise in the laws of war, but one cannot gain ROE knowledge without a solid understanding of the actual SROE.

II. OVERVIEW

A. **Definition of ROE**. Joint Pub 1-02, *Dictionary of Military and Associated Terms*: "ROE are directives issued by competent military authority that delineate the circumstances and limitations under which U.S. [naval, ground, and air] forces will initiate and/or continue combat engagement with other forces encountered."

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

1. **Political Purposes**. ROE ensure that national policies and objectives are reflected in the actions of commanders in the field, particularly under circumstances in which communication with higher authority may not be possible. For example, in reflecting national political and diplomatic purposes, ROE may restrict the engagement of certain targets, or the use of particular weapons systems, out of a desire to tilt world opinion in a particular direction, place a positive limit on the escalation of hostilities, or avoid antagonizing the enemy. Falling within the

array of political concerns are issues such as the influence of international public opinion (particularly how it is affected by media coverage of a specific operation), the effect of host country law, and the content of status of forces agreements (SOFA) with the United States.

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

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

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

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

3. **Legal Purposes**. ROE provide restraints on a commander's actions, consistent with both domestic and international laws, and may, under certain circumstances, impose greater restrictions than those required by the law. For many missions, particularly peace operations, the mission is stated in a document such as a UN Security Council Resolution (UNSCR), e.g., UNSCR 940 in Haiti, UNSCR 1031 in Bosnia, or UNSCR 1973 in Libya. These Security Council Resolutions also detail the scope of force authorized to accomplish the purpose stated therein. Mission limits or constraints may also be contained in mission warning or execute orders. Accordingly, commanders must be intimately familiar with the legal basis for their mission. Commanders may also issue ROE to reinforce certain principles of the Law of Armed Conflict (LOAC), such as prohibitions on the destruction of religious or cultural property or minimization of injury to civilians and civilian property.

III. CJCS STANDING RULES OF ENGAGEMENT

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

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

C. **Responsibility**. The SECDEF approves the SROE, and through the CJCS may issue supplemental theater-, mission-, or operation-specific ROE. The J-3 is responsible for SROE maintenance. Subordinate commanders may also issue supplemental theater, mission, or operation ROE, but must notify the SECDEF through command channels if SECDEF-approved ROE are restricted.

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

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

[2] Commanders may use supplemental measures for various purposes, including limiting individual self-defense by members of their unit within the context of exercising the inherent right and obligation of unit self-defense.

E. The SROE are divided as follows:

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

2. **Key Definitions/Issues**. The 2005 SROE refined the Definitions section, combining the definitions of "unit" and "individual" self-defense into the more general definition of "inherent right of self-defense" to make clear that individual self-defense is not absolute. Note, however, that if a subordinate commander imposes more restrictive ROE, he or she must send a notification through command channels to the SECDEF.

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

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

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

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

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

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

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

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

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

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

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

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

5. **Enclosure I (Supplemental Measures)**.

a. Supplemental measures found in this enclosure (partially reprinted in Appendix A to this chapter) enable a commander to obtain or grant those additional authorities necessary to accomplish an assigned mission. Tables of supplemental measures are divided into those actions requiring President or SECDEF approval; those that require either President or SECDEF approval or Combatant Commander approval; and those that are delegated to subordinate commanders (though the delegation may be withheld by higher authority).

(1) The current SROE recognizes a fundamental difference between the two sets of supplemental measures. Measures that are reserved to the President or SECDEF or Combatant Commander are generally **permissive;** that is, the particular operation, tactic, or weapon is generally restricted, and the President, SECDEF, or Combatant Commander implements the supplemental measure to specifically permit the particular operation, tactic, or weapon. Contrast this with the remainder of the supplemental measures, those delegated to subordinate commanders. These measures are all **restrictive** in nature.

(2) Absent implementation of supplemental measures, commanders are generally allowed to use any weapon or tactic available and to employ reasonable force to accomplish his or her mission, without having to get permission first. Only when enacted will these supplemental measures restrict a particular operation, tactic, or weapon. Finally, note that supplemental ROE relate to mission accomplishment, not self-defense, and never limit a Commander's inherent right and obligation of self-defense. However, as noted above, supplemental measures may be used to limit individual self-defense.

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

6. **Enclosure J (Rules of Engagement Process)**. The current, unclassified enclosure (reprinted in Appendix A to this chapter) provides guidelines for incorporating ROE development into military planning processes. It introduces the ROE Planning Cell, which may be utilized during the development process. It also names the JA as the "principal assistant" to the J-3 or J-5 in developing and integrating ROE into operational planning.

7. **Combatant Commanders' Theater-Specific ROE**. The SROE no longer provide a separate Enclosure for specific ROE submitted by Combatant Commanders for use within their Area of Responsibility (AOR). Combatant Commanders may augment the SROE as necessary by implementing supplemental measures or by submitting supplemental measures for approval, as appropriate. Theater-specific ROE documents can be found on the Combatant Command's SIPR website, often within or linked to by the SJA portion of the site. If you anticipate an exercise or deployment into any geographic Combatant Commander's AOR, check with the Combatant Commander's SJA for ROE guidance.

8. **Enclosures L-Q (SRUF)**. Much like Enclosure A does for SROE, Enclosure L sets out the basic self-defense posture under the SRUF. Enclosures M-O provide classified guidance on Maritime Operations Within U.S. Territory, Land Contingency and Security-Related Operations Within U.S. Territory, and Counterdrug Support Operations Within U.S. Territory. Enclosures P and Q provide a message process for RUF, as well as RUF references. JAs utilizing RUF are encouraged to consult the Domestic Operational Law 2011 Handbook for Judge Advocates, Chapters 11 (Rules for the Use of Force for Federal Forces) and 12 (Rules for the Use of Force for the National Guard), available at https://www.jagcnet.army.mil/clamo under "Publications."

IV. MULTINATIONAL ROE

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

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

V. ROLE OF THE JUDGE ADVOCATE

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

B. Determining the current ROE.

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

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

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

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

d. The base-line ROE for this particular mission as provided in the OPLAN, as promulgated by separate message, or as it exists for a particular mission. For current examples of mission-specific ROE, as well as superseded, rescinded, or cancelled ROE, visit the CENTCOM portal.

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

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

C. Requesting Supplemental ROE.

1. The SROE provides that commanders *at any level* may request supplemental ROE. Commanders must look to their mission tasking and existing ROE when determining courses of action for the mission. The commander

may decide that the existing ROE are unclear, too restrictive, or otherwise unsuitable for his or her particular mission. In that case, he or she may request additional ROE.

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

3. Some considerations for drafting an ROE request message.

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

b. In the request message, justify why the command requires the supplemental measure(s). 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 explain otherwise. For example, your unit may have a mission that earlier ROE planners could not have foreseen, and that the ROE do not adequately address. If the JA and staff can clearly explain this circumstance, the approval authority is more likely to approve the request.

c. Remember that the policy of the basic SROE (i.e., self defense) is that the SROE is generally permissive in nature from the perspective of the tactical level commander. In other words, it is not necessary for the on-scene commander to request authority to use every weapon and tactic available at the tactical unit level unless a higher commander has previously imposed a restriction by a supplemental measure. See the discussion in Enclosure I of the SROE for more details.

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

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

D. Disseminating ROE to Subordinate Units.

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

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

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

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

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

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

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

3. Promulgation of ROE. ROE are often sent via formatted messages as found at Appendix F to Enclosure J of the SROE (discussed above). Mission-specific ROE also may be promulgated at Appendix 6, Annex C, of JOPES-formatted (joint) Operational Orders, or in Paragraph 3j(6) (Coordinating Instructions) or Appendix 6, Annex C (Rules of Engagement) of Army operations orders (*see* FM 5-0, Army Planning and Orders Production (with Change 1), formerly FM 101-5, Staff Organizations and Operations).

E. Training ROE.

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

2. It is the commander, not the JA, who is responsible for training the Soldiers assigned to the unit on the ROE and every other mission essential task. The commander normally turns to the staff principal for training, the G-3 or S-3, to plan and coordinate all unit training. A JA's first task may be to help the commander see the value in organized ROE training. If the commander considers ROE training to be a "battle task," that is, a task that a subordinate command must accomplish in order for the command to accomplish its mission, it is more likely that junior leaders will see the advantages of ROE training. The G-3 or S-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. The task for the JA is to help the commander and staff realize that ROE are not contained in a discrete subject, but one that pervades all military operations and is best trained in conjunction with other skill training. Situational training exercises and other collective training events are opportune times to train ROE along with other training tasks. It is only through integrated training, where Soldiers are practicing their skills in an ROE-sensitive environment that true training on ROE issues will occur.

3. There is little specific U.S. Army doctrine detailing how to train Soldiers on the SROE or mission-specific ROE. However, given that ROE are intended to be a control mechanism for operations in the field, there is no substitute for individual and collective training programs. Realistic scenario- or vignette-driven training exercises are much more effective than classroom instruction. Commanders and NCO's should conduct ROE training as they have the best understanding of the mission, their objectives, and how to apply ROE in a specific tactical environment. The JA must be willing to assist in drafting realistic training, and be present when able to observe training and answer questions regarding ROE application. If Soldiers at the squad and platoon level study and train to the ROE, they will better apply them as a team in actual missions.

4. Training should begin with individual discussions between Soldiers and NCOs on a one-on-one or small group basis. Soldiers should be able to articulate the meaning of the terms "declared hostile force," "hostile act," "hostile intent," and other key basic ROE principles. Once each Soldier in the squad is capable of doing this, the squad should be put through an "ROE lane," or Situational Training Exercise (STX). The ROE training should

not be done in a vacuum. For the greatest value, the STX lane should be centered on a task that Soldiers will perform during the mission or exercise. This involves the creation of a plausible scenario that a Soldier and his or her squad may face related to the SROE or the relevant mission-specific ROE. Soldiers move through the lane as a squad and confront role players acting out the scenario. For example, if the Soldiers are preparing to deploy on a peacekeeping mission, the STX scenario may call for them to operate a roadblock or checkpoint. A group of paramilitary role players could approach the checkpoint in a non-threatening manner. As the scenario progresses, the role players may become more agitated and eventually they may begin shooting at the peacekeepers.

5. The primary goal in STX training is to help Soldiers recognize hostile acts and hostile intent, and become comfortable with applying the appropriate level of force in response. These concepts can usually best be taught by exposing Soldiers to varying degrees of threats of force. For example, in some lanes, the threat may be verbal abuse only. It may then progress to spitting, or physical attacks short of a threat to life or limb. Finally, significant threats of death or grievous bodily harm may be incorporated, such as an attack on the Soldier with a knife or club, or with a firearm. Although not specifically in the ROE, the Soldiers might be taught that an immediate threat of force likely to result in death, or grievous bodily harm (such as the loss of limb or vital organs, or broken bones) is the type of hostile intent justifying a response with deadly force. Soldiers must understand that, even where deadly force is not authorized, they may use force short of deadly force in self-defense.

6. In most military operations other than war, *deadly* force is not authorized to protect property that is not mission-essential. However, *some* degree of force is authorized to protect property that is not mission-essential. A lane may be established in which a role player attempts to steal some MREs. The Soldier must understand that non-deadly force is authorized to protect the property. Moreover, if the role player suddenly threatens the Soldier with deadly force to take the non-essential property, the Soldier must understand that deadly force is authorized in response, not to prevent theft, but to defend himself from the threat by the role player. Once Soldiers 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 collective self-defense.

7. In addition to training Soldiers on the ROE, the staff and war-fighting elements must receive ROE training as well. This is best accomplished in Field Training Exercises (FTX) and Command Post Exercises (CPX). Prior to a real-world deployment, ROE integration and synchronization must be conducted to ensure that all elements understand the ROE and how each system will apply the rules. The JA should ensure that the planned course of action, in terms of the application of the ROE, is consistent with the ROE.

F. Pocket Cards.

1. ROE cards are a summary or extract of **mission-specific** ROE. Developed as a clear, concise, and UNCLASSIFIED distillation of the ROE, they serve as both a training and memory tool; however, ROE CARDS ARE NOT A SUBSTITUTE FOR ACTUAL KNOWLEDGE OF THE ROE. In fact, the most effective distribution plan for the ROE card is probably as a diploma from attending ROE training. When confronted with a crisis in the field, the Soldier, Sailor, Airman, or Marine will not be able to consult his pocket card—he must depend upon principles of ROE internalized during the training process. Notwithstanding that limitation, ROE cards are a particularly useful tool when they conform to certain parameters:

a. *Maintain brevity and clarity*. Use short sentences and words found in the common vocabulary. Avoid using unusual acronyms or abbreviations. Express only one idea in each sentence, communicating the idea in an active, imperative format. Although such an approach—the classic "bullet" format—may not be possible in every case, it should be used whenever feasible.

b. *Avoid qualified language*. ROE are directives, advising subordinates of the commander's desires and mission plan. They should, therefore, be as direct as any other order issued by the commander. However, while qualifying language may obscure meaning, its use is often necessary to convey the proper guidance. In such a case, the drafter should use separate sentences or subparagraphs to assure clarity of expression. At the same time, subtle differences in language or the organization of a card can convey a certain message or tone, or ensure that the tone set by the card reflects the commander's intent for the operation.

c. *Tailor the cards to the audience*. ROE cards are intended for the widest distribution possible. Ultimately, they will be put in the hands of an individual Soldier, Sailor, Airman, or Marine. Be aware of the sophistication level of the audience and draft the card accordingly. ALWAYS REMEMBER that ROE are written for commanders, their subordinates, and the individual service member charged with executing the mission on the ground. They are not an exercise in lawyering.

d. *Keep the ROE card mission-specific*. Though the commander may want to reinforce a few LOAC principles in conjunction with ROE, the purpose of the card is to remind Soldiers of mission-specific issues that are not part of the regular ROE training plan, but are specific to a particular mission. For example, items which are normally on the ROE card include: (1) any forces that are declared hostile; (2) any persons or property that should or may be protected with up to deadly force; and (3) detention issues, including circumstances authorizing detention and the procedures to follow once someone is detained. Be aware that such information may be classified.

e. *Anticipate changing rules*. If the ROE change during an operation, two possible ways to disseminate the information are: (1) change the color of the card stock used to produce the new ROE card (and collect the old ones and destroy them); or (2) ensure every card produced has an "as of" date on it. Combined with an aggressive training and refresher training program, this will help ensure Soldiers are operating with the current ROE. ROE for a multi-phased operation, where the ROE are known in advance, should be published on a single card so as to minimize confusion.

NOTE: Examples of ROE cards employed in various missions—from peacekeeping to combat—are found at Appendix B of this chapter. These are not "go-bys" and cannot be "cut-and-pasted" for any given operation, but are intended to provide a frame of reference for the command/operations/JA team as they develop similar tools for specific assigned operations.

G. **Escalation of Force (EOF).** Currently, one of the most important topics related to ROE is the concept of Escalation of Force (EOF). EOF is not integral to the SROE,[4] and has been developed and emphasized during recent operations. EOF can take several different forms.

1. On one level, EOF is simply the modern variant of what used to be called "graduated force measures." When time and circumstances permit, Soldiers should attempt to use lesser means of force to respond to a threat.

2. In the last several years, EOF measures have been used as a "threat assessment process"[5] that provide Soldiers better information on whether an approaching person or vehicle is demonstrating hostile intent. For example, the proper configuration of a Traffic Control Point (TCP) will allow Soldiers to slow vehicles down using warnings (e.g., visual signs, loudspeakers, barricades, tire strips, laser pointers, laser dazzlers, warning shots, etc.). An approaching vehicle's response to both the physical layout of the TCP and the Soldiers' actions can yield valuable clues as to the driver's intent, such that Soldiers can make more accurate determinations of whether hostile acts or hostile intent are present.

3. Soldiers can apply EOF concepts at TCPs, during convoy operations or dismounted patrols. However, the development of specific tactics, techniques, and procedures (TTPs) for use during convoy operations or dismounted patrols is much more challenging, as it is difficult or impossible to configure the battlespace in the manner that might be possible at a fixed, permanent TCP.

4. EOF concepts can be incorporated into the MDMP process.

5. References. The best reference for EOF is the Center for Army Lessons Learned (CALL) website (https://www.call.army.mil), which contains valuable lessons learned regarding EOF, including the Escalation of Force Handbook and the TCP Operations Handbook. EOF scenarios are currently available for Engagement Skills Trainer 2000 (EST-2000), a video-based training system in use at many Army installations.

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[4] Arguably, EOF is inherent in the principle of proportionality, while similar concepts may be referenced in Enclosure D.
[5] Randy Bagwell, *The Threat Assessment Process (TAP): The Evolution of Escalation of Force*, ARMY LAW., Apr. 2008, at 5.

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STANDING RULES OF ENGAGEMENT/STANDING RULES FOR THE USE OF FORCE FOR U.S. FORCES

References: Enclosures K and Q.

1. Purpose. To provide guidance on the standing rules of engagement (SROE) and establish standing rules for the use of force (SRUF) for DoD operations worldwide. Use of force guidance contained in this instruction supersedes that contained in DoD Directive 5210.56.

2. Cancellation. CJCSI3121.01A. 15 January 2000, CJCSI 3121.02, 31 May 2000 and CJCSI 3123.01B, 01 March 2002 are canceled.

3. Applicability.

a. The SROE (enclosures A through K) establish fundamental policies and procedures governing the actions to be taken by U.S. commanders and their forces during all military operations and contingencies and routine Military Department functions occurring outside U.S. territory (which includes the 50 states, the Commonwealths of Puerto Rico and Northern Marianas, U.S. possessions, protectorates and territories) and outside U.S. territorial seas. Routine Military Department functions include AT/FP duties, but exclude law enforcement and security duties on DoD installations, and off installation while conducting official DoD security functions, outside U.S. territory and territorial seas. SROE also apply to air and maritime homeland defense missions conducted within U.S. territory or territorial seas, unless otherwise directed by the Secretary of Defense (SecDef).

b. The SRUF (Enclosures L through Q) establish fundamental policies and procedures governing the actions to be taken by U.S. commanders and their forces during all DoD civil support (e.g., military assistance to civil authorities) and routine Military Department functions (including AT/FP duties) occurring within U.S. territory or U.S. territorial seas. SRUF also apply to land homeland defense missions occurring within U.S. territory and to DoD forces, civilians and contractors performing law enforcement and security duties at all DoD installations (and off-installation while conducting official DoD security functions, within or outside U.S. territory, unless otherwise directed by the SecDef). Host nation laws and international agreements may limit U.S. forces' means of accomplishing their law enforcement or security duties.

APPENDIX A

4. Policy. IAW Enclosures A (SROE) and L (SRUF).

5. Definitions. Definitions are contained in Joint Pub 1-02 and the enclosures. Enclosures K and G list ROE/RUF references that provide additional specific operational guidance.

6. Responsibilities. The SecDef approves and the Chairman of the Joint Chiefs of Staff (CJCS) promulgates SROE and SRUF for U.S. forces. The Joint Staff, Operations Directorate (J-3), is responsible for the maintenance of this instruction, in coordination with OSD.

a. Commanders at all levels are responsible for establishing ROE/RUF for mission accomplishment that comply with ROE/RUF of senior commanders, the Law of Armed Conflict, applicable international and domestic law and this instruction.

b. Standing Rules of Engagement (SROE).

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

(2) Mission Specific ROE.

(a) Supplemental measures allow commanders to tailor ROE for mission accomplishment during the conduct of DoD operations. There are two types of supplemental measures:

1. Those supplemental measures that specify certain actions that require SecDef approval (001-099 in Enclosure I).

2. Those supplemental measures that allow commanders to place limits on the use of force during the conduct of certain actions (100-599 in Enclosure I). Enclosure I provides ROE supplemental measures guidance.

(b) Supplemental measures may also be used by unit commanders to limit individual self-defense by members of their unit, when in the context of exercising the right and obligation of unit self-defense.

(c) Commanders at all levels may use supplemental measures to restrict SecDef-approved ROE, when appropriate. U.S. commanders shall notify the SecDef, through the CJCS, as soon as practicable, of restrictions (at all levels) placed on Secretary of Defense-approved ROE/RUF. In time critical situations, make SecDef notification concurrently to the CJCS. When concurrent notification is not possible, notify the CJCS as soon as practicable after SecDef notification.

(3) SROE are designed to be permissive in nature. Therefore, unless a specific weapon or tactic requires Secretary of Defense or combatant commander approval, or unless a specific weapon or tactic is restricted by an approved supplemental measure, commanders may use any lawful weapon or tactic available for mission accomplishment.

c. Standing Rules for the Use of Force (SRUF).

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

(2) Mission Specific RUF.

(a) Commanders may submit requests to the SecDef, through the CJCS, for mission-specific RUF, as required.

(b) Commanders at all levels may restrict SecDef-approved RUF, when appropriate. U.S. commanders shall notify the SecDef, through the CJCS, as soon as practicable, of restrictions (at all levels) placed on Secretary of Defense-approved ROE/RUF. In time critical situations, make SecDef notification concurrently to the CJCS. When concurrent notification is not possible, notify the CJCS as soon as practicable after SecDef notification.

(3) Unlike SROE, specific weapons and tactics not approved within these SRUF require SecDef approval.

7. Summary of Changes. This instruction is a comprehensive update and replacement of the existing SROE and addresses SecDef guidance, USNORTHCOM establishment and USSTRATCOM/USSPACECOM reorganization. In addition, SRUF guidance is added to allow this single instruction to provide guidance for worldwide U.S. military operations. Existing combatant commander standing ROE/RUF guidance should be reviewed for consistency. Existing SecDef-approved mission-specific ROE/RUF remain in effect, unless otherwise noted.

8. Procedures.

a. Guidance for the use of force for self-defense and mission accomplishment is set forth in this document. Enclosure A (less appendixes) is UNCLASSIFIED and is intended to be used as a ROE coordination tool in developing combined or multi-national ROE, if necessary. Enclosure L is UNCLASSIFIED and intended to be used with U.S. law enforcement agencies and organizations as a RUF coordination tool in developing combined RUF, if necessary.

b. Combatant commander requests for ROE supplemental measures and combatant commander requests for mission-specific RUF will be submitted to the SecDef, through the CJCS, for approval.

c. Combatant commanders will also provide the following, when applicable:

(1) Notification to the SecDef, through the CJCS, as soon as practicable, of restrictions (at all levels) placed on Secretary of Defense-approved ROE/RUF. In time critical situations, make SecDef notification concurrently to the CJCS. When concurrent notification is not possible, notify the CJCS as soon as practicable after SecDef notification.

(2) Notification of all supplemental measures, not requiring SecDef approval, to the SecDef through the CJCS, as soon as practicable.

d. Geographic combatant commanders may augment these SROE/SRUF, as necessary, through theater-specific ROE/RUF in order to reflect changing political and military policies, threats and missions specific to their respective areas of operations.

e. Ensure that operational ROE/RUF currently in effect are made available on appropriately classified command web sites.

9. Releasability. This instruction is approved for limited release. DoD components, including the combatant commands and other Federal agencies may obtain this instruction through controlled Internet access at http://www.js.smil.mil/masterfile/sjsimd/jel/Index.htm. Joint Staff activities may access or obtain copies of this instruction from the Joint Staff local area network.

10. Effective Date. This instruction is effective upon receipt for all U.S. commanders and supersedes all other nonconforming guidance. It is to be used as the basis for all subsequent mission-specific ROE/RUF requests to SecDef and guidance promulgated by combatant commanders.

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

//signed//

RICHARD B. MYERS

Chairman of the Joint Chiefs of Staff

Enclosures:

A -- Standing Rules of Engagement for U.S. Forces
Appendix A -- Self-Defense Policies and Procedures
B -- Maritime Operations
Appendix A -- 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 Control of U.S. Forces
C -- Air Operations
D -- Land Operations
E -- Space Operations
Appendix A -- Hostile Acts and Hostile Intent Indicators in Space Operations
F -- Information Operations
G -- Noncombatant Evacuation Operations
H -- Counterdrug Support Operations Outside U.S. Territory
I -- Supplemental Measures
Appendix A -- General Supplemental Measures
Appendix B -- Supplemental Measures for Maritime Operations
Appendix C -- Supplemental Measures for Air Operations
Appendix D -- Supplemental Measures for Land Operations
Appendix E -- Supplemental Measures for Space Operations
Appendix F -- Message Formats and Examples
J -- Rules of Engagement Process
K -- ROE References
L -- Standing Rules for the Use of Force for U.S. Forces
M -- Maritime Operations Within U.S. Territory
N -- Land Contingency and Security-Related Operations Within U.S. Territory
O -- Counterdrug Support Operations Within U.S. Territory
P -- RUF Message Process
Q -- RUF References

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

1. Purpose and Scope.

a. The purpose of the SROE is to provide implementation guidance on the application of force for mission accomplishment and the exercise of self-defense. The SROE establish fundamental policies and procedures governing the actions to be taken by U.S. commanders during all military operations and contingencies and routine Military Department functions. This last category includes Antiterrorism/Force Protection (AT/FP) duties, but excludes law enforcement and security duties on DoD installations, and off-installation while conducting official DoD security functions, outside U.S. territory and territorial seas. SROE also apply to air and maritime homeland defense missions conducted within U.S. territory or territorial seas, unless otherwise directed by the SecDef.

b. Unit commanders at all levels shall ensure that individuals within their respective units understand and are trained on when and how to use force in self-defense. To provide uniform training and planning capabilities, this document is authorized for distribution to commanders at all levels and is to be used as fundamental guidance for training and directing of forces.

c. The policies and procedures in this instruction are in effect until rescinded. Supplemental measures may be used to augment these SROE.

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

e. U.S. forces performing missions under direct control of heads of other USG departments or agencies (e.g., Marine Corps Embassy Security Guards and other special security forces), operate under use of force policies or ROE promulgated by those departments or agencies, when authorized by the SecDef. U.S. forces always retain the right of self-defense.

f. 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 SecDef order. U.S. forces retain the right of self-defense. Apparent inconsistencies between the right of self-defense contained in U.S. ROE and the ROE of the multinational force will be submitted through the U.S. chain of command for resolution. While a final resolution is pending, U.S. forces will continue to operate under U.S. ROE.

(2) When U.S. forces, under U.S. OPCON or TACON, operate in conjunction with a multinational force, reasonable efforts will be made to develop common ROE. If common ROE cannot be developed, U.S. forces will operate under U.S. ROE. The multinational forces will be informed prior to U.S. participation in the operation that U.S. forces intend to operate under U.S. ROE.

(3) U.S. forces remain bound by international agreements to which the U.S. is a party even though other coalition members may not be bound by them.

g. International agreements (e.g., status-of-forces agreements) may never be interpreted to limit U.S. forces' right of self-defense.

2. Policy.

a. Unit commanders always retain the inherent right and obligation to exercise unit self-defense in response to a hostile act or demonstrated hostile intent.

b. Once a force is declared hostile by appropriate authority, U.S. forces need not observe a hostile act or demonstrated hostile intent before engaging the declared hostile force. Policy and procedures regarding the authority to declare forces hostile are provided in Appendix A to Enclosure A, paragraph 3.

c. The goal of U.S. national security policy is to ensure 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 U.S., including U.S. forces, and, in certain circumstances, U.S. persons and their property, U.S. commercial assets, persons in U.S. custody, designated non-U.S. military forces, and designated foreign persons and their property.

d. Combatant Commander Theater-Specific ROE.

(1) Combatant commanders may augment these SROE as necessary by implementing supplemental measures or by submitting supplemental measures requiring SecDef approval to the CJCS. The mechanism for requesting and disseminating ROE supplemental measures is contained in Enclosure I.

(2) U.S. commanders shall notify the SecDef, through the CJCS, as soon as practicable, of restrictions (at all levels) placed on Secretary of Defense-approved ROE/RUF. In time-critical situations, make SecDef notification concurrently to the CJCS. When concurrent notification is not possible, notify the CJCS as soon as practicable after SecDef notification.

3. Definitions and Authorities.

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

b. National Self-Defense. Defense of the United States, U.S. forces, and, in certain circumstances, U.S. persons and their property, and/or U.S. commercial assets from a hostile act or demonstration of hostile intent. Unit commanders may exercise National Self-Defense, as authorized in Appendix A to Enclosure A, paragraph 3.

c. Collective Self-Defense. Defense of designated non-U.S. military forces and/or designated foreign nationals and their property from a hostile act or demonstrated hostile intent. Only the President or SecDef may authorize collective self-defense.

d. Declared Hostile Force. Any civilian, paramilitary or military force or terrorist(s) that has been declared hostile by appropriate U.S. authority. Policy and procedures regarding the authority to declare forces hostile are provided in Appendix A to Enclosure A, paragraph 3.

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

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

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

4. Procedures.

a. Principles of Self-Defense. All necessary means available and all appropriate actions may be used in self-defense. The following guidelines apply:

(1) De-escalation. When time and circumstances permit, the forces committing hostile acts or demonstrating hostile intent should be warned and given the opportunity to withdraw or cease threatening actions.

(2) Necessity. Exists when a hostile act occurs or when a force demonstrates hostile intent. When such conditions exist, use of force in self-defense is authorized while the force continues to commit hostile acts or exhibit hostile intent.

(3) Proportionality. The use of force in self-defense should be sufficient to respond decisively to hostile acts or demonstrations of hostile intent. Such use of force may exceed the means and intensity of the hostile act or hostile intent, but the nature, duration and scope of force used should not exceed what is required. The concept of proportionality in self-defense should not be confused with attempts to minimize collateral damage during offensive operations.

b. Pursuit. Self-defense includes the authority to pursue and engage forces that have committed a hostile act or demonstrated hostile intent, if those forces continue to commit hostile acts or demonstrate hostile intent.

c. Defense of U.S. Persons and Their Property, and Designated Foreign Persons.

(1) Within a Foreign Nation's U.S.-Recognized Territory, Airspace or Seas. The foreign nation has the principal responsibility for defending U.S. persons and property within its territory, airspace or seas. Detailed guidance is contained in Enclosures B, C and D.

(2) Outside territorial seas. Nation of registry has the principal responsibility for protecting civilian vessels outside territorial seas. Detailed guidance is contained in Appendix A to Enclosure B (Maritime Operations).

(3) In International Airspace. Nation of registry has the principal responsibility for protecting civil aircraft in international airspace. Detailed guidance is contained in Enclosure C (Air Operations).

(4) In Space. Detailed guidance is contained in Enclosure E (Space Operations).

d. Piracy. 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. For ship and aircraft commanders repressing an act of piracy, the right and obligation of unit self-defense extend to the persons, vessels or aircraft assisted. Every effort should be made to obtain the consent of the coastal state prior to continuation of the pursuit if a fleeing pirate vessel or aircraft proceeds into the territorial sea, archipelagic waters or airspace of that country.

e. Operations Within or in the Vicinity of Hostile Fire or Combat Zones Not Involving the United States. U.S. forces should not enter or remain in areas in which hostilities (not involving the United States) are imminent or occurring between foreign forces, unless directed by proper U.S. authority.

f. Right of Assistance Entry.

(1) Ships and, under certain circumstances, aircraft have the right to enter a foreign territorial sea or archipelagic waters and corresponding airspace without the permission of the coastal state when rendering emergency assistance to those in danger or distress from perils of the sea.

(2) Right of Assistance Entry extends only to rescues where the location of those in danger is reasonably well known. It does not extend to entering the territorial sea, archipelagic waters or territorial airspace to conduct a search.

(3) For ships and aircraft rendering assistance on scene, the right and obligation of unit commanders to exercise unit self-defense extends to and includes persons, vessels or aircraft being assisted. The extension of self-defense in such circumstances does not include interference with legitimate law enforcement actions of a coastal nation. Once received on board the assisting ship or aircraft, however, persons assisted will not be surrendered to foreign authority unless directed by the SecDef.

ENCLOSURE I
SUPPLEMENTAL MEASURES

1. Purpose and Scope. Supplemental measures enable commanders to tailor ROE for specific missions. This enclosure establishes the procedures for formulation of, request for, and approval of supplemental measures. Appendices A through E to Enclosure I list supplemental measures for commanders to use when requesting and authorizing supplemental ROE measures.

2. Policy. IAW Enclosure A.

a. The goal in formulating ROE is to ensure they allow maximum flexibility for mission accomplishment while providing clear, unambiguous guidance to the forces affected. ROE must be properly crafted and commanders properly trained to avoid any hesitation when determining whether and how to use force.

b. Operational ROE supplemental measures are primarily used to define limits or grant authority for the use of force for mission accomplishment. However, unit commanders may issue supplemental measures to limit individual self-defense by members of their units. The use of force for mission accomplishment may sometimes be restricted by specific political and military goals that are often unique to the situation. Developing and implementing ROE is a dynamic process that must be flexible enough to meet changes in the operational situation. In addition to ROE, a commander must take into account the assigned mission, the current situation, the higher commander's intent and all other available guidance in determining how to use force for mission accomplishment.

c. The SROE are fundamentally permissive in that a commander may use any lawful weapon or tactic available for mission accomplishment, unless specifically restricted by approved supplemental measures or unless the weapon/tactic requires prior approval of the SecDef or a combatant commander. Thus, other commanders are authorized to employ the full range of supplemental measures set forth in measures 200 through 699 for mission accomplishment, unless specifically constrained by more restrictive measures promulgated by higher authority.

d. Although normally used to place limits on the use of force for mission accomplishment, supplemental measures may also be used specifically to authorize a certain action if clarity is required or requested.

3. Objectives. This enclosure establishes the procedures for formulation of, request for, and approval of supplemental measures. Supplemental measures are intended to:

a. Provide enough of the framework underlying the policy and military guidance to enable the commanders to appropriately address unforeseen situations when immediate decisions and reactions are required. Commanders must never forget that ROE are a tool to guide them through their decision-making process and can never substitute for their sound judgment.

b. Provide clear and tactically realistic military policy and guidance to commanders on the circumstances in which use of force can be used for mission accomplishment.

c. Enable subordinate commanders to request additional measures needed to carry out their mission.

ENCLOSURE J
RULES OF ENGAGEMENT PROCESS

1. Purpose and Scope. Developing and implementing effective ROE are critical to mission accomplishment. This enclosure provides guidelines for incorporating ROE development into the crisis action planning (CAP) and deliberate planning processes by commanders and staff at all levels. All supplemental measures not specifically requiring Presidential, SecDef or combatant commander approval (001-199) are available for use by commanders unless expressly withheld by higher authority.

2. ROE Development.

a. General Guidelines.

(1) ROE are an operational issue and must directly support the operational concept. Once assigned a mission, the commander and staff must incorporate ROE considerations into mission planning. Operations planning and ROE development are parallel and collaborative processes that require extensive integration.

(2) As missions develop and requirements emerge, it is natural to need to request supplemental measures from higher headquarters for mission accomplishment. The issues addressed throughout the planning process will form the basis for supplemental ROE requests requiring SecDef or combatant commander approval in support of a selected course of action (COA). ROE development is a continuous process that plays a critical role in every step of crisis action and deliberate planning.

(3) Due to the operational nature of ROE, the Director for Operations (J-3) and his staff are responsible for developing ROE during crisis action planning. Likewise, the Director for Strategic Plans and Policies (J-5) should play a large role in ROE development for deliberate planning.

(4) As an expert in the law of military operations and international law, the Staff Judge Advocate (SJA) plays a significant role, with the J-3 and J-5, in developing and integrating ROE into operational planning.

(5) ROE should be classified at the lowest level possible to ensure widest distribution to U.S. forces.

b. Task Steps. The following steps can be used to assist staffs in developing and implementing ROE during planning.

(1) Mission Analysis.

(a) Review the SROE, including any current combatant commander theater-specific ROE.

(b) Review supplemental ROE measures already approved for the mission by higher headquarters, and determine the need for existing authorizations.

(c) Review higher headquarters planning documents for political, military and legal considerations that affect ROE. Consider tactical or strategic limitations on the use of force imposed by:

1. Higher headquarters in the initial planning documents.

2. U.S. law and policy.

3. International law, including the UN Charter.

4. HN law, policy and agreements.

5. For multinational or coalition operations:

a. Foreign forces ROE, NATO ROE, NORAD ROE and other RUF policies.

b. UN Security Council resolutions or other mission authority.

(d) Internal review of developed ROE by command ROE review team prior to submission for execution or approval, as appropriate.

(e) Desired End State. Assess ROE requirements throughout pre-conflict, deterrence, conflict and post -conflict phases of an operation. ROE should support achieving the desired end state.

(2) Planning Guidance.

(a) Review commander's planning guidance for considerations affecting ROE development.

(b) Ensure ROE considerations derived from commander's planning guidance are consistent with those derived from initial planning documents.

(3) Warning Orders. Incorporate instructions for developing ROE in warning orders, as required. Contact counterparts at higher, lower and adjacent headquarters, and establish the basis for concurrent planning.

(4) Course of Action (COA) Development. Determine ROE requirements to support the operational concept of each proposed COA.

(5) COA Analysis.

(a) Analyze ROE during the wargaming process. In particular, assess each COA to identify any ROE normally retained by a higher headquarters that must be delegated to subordinate commanders. Identify ROE required by decision and decisive points.

(b) Refine ROE to support synchronizing each phase of proposed COAs.

(6) COA Comparison and Selection. Consider ROE during the COA comparison process, including affects if ROE supplements are not authorized as requested.

(7) Commander's Estimate. Identify Presidential or SecDef-level ROE required to support recommended COA.

(8) Preparation of Operations Order (OPORD).

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

(b) Prepare the ROE appendix of the OPORD IAW CJCSM 3122.03 (JOPES Volume II: Planning Formats and Guidance). The ROE appendix may include supplemental ROE measures that are already approved.

(c) Include guidance for disseminating approved ROE that is consistent with SecDef-approved guidance. Consider:

1. Developing "plain language" ROE.

2. Creating ROE cards.

3. Issuing special instructions (SPINS).

4. Distributing ROE to multinational forces or coalitions.

5. Issuing ROE translations (for coalitions).

(9) ROE Request and Authorization Process. Commanders will request and authorize ROE, as applicable, IAW Enclosure A.

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

(a) Ensure that only the most current ROE serial is in use throughout the force.

(b) Catalog all supplemental ROE requests and approvals for ease of reference.

(c) Monitor ROE training.

(d) Modify ROE as required. Ensure that a timely, efficient staff process exists to respond to requests for and authorizations of ROE changes.

3. Establish ROE Planning Cell. Commanders may use a ROE planning cell to assist in developing ROE. The following guidelines apply:

a. The J-3 is responsible for the ROE planning cell and, assisted by the SJA, develops supplemental ROE.

b. ROE are developed as an integrated facet of crisis action and deliberate planning and are a product of the Operations Planning Group (OPG) or Joint Planning Group (JPG), or equivalent staff mechanism.

c. An ROE planning cell can be established at any echelon to refine ROE derived from the OPG or JPG planning and to produce the most effective ROE requests and/or authorizations possible.

APPENDIX B

Sample ROE Cards[1]

PEACE ENFORCEMENT: KFOR (Albania, April 1999)

TASK FORCE HAWK ROE CARD
(The contents of this card are unclassified for dissemination to Soldiers)

NOTHING IN THESE RULES PROHIBITS OUR FORCES FROM EXERCISING THEIR INHERENT RIGHT OF SELF DEFENSE.

1. **AT ALL TIMES, USE NECESSARY FORCE, UP TO AND INCLUDING DEADLY FORCE:**
   a. **In response to an immediate threat of serious bodily injury or death against yourself, other NATO Forces, or the Friendly Forces of other nations.**
   b. **To prevent the immediate theft, damage, or destruction of: firearms, ammunition, explosives or property designated as vital to national security.**

2. **AT ALL TIMES, USE FORCE LESS THAN DEADLY FORCE:**
   a. **In response to a threat less than serious bodily injury or death against yourself, other NATO Forces, or the Friendly Forces of other nations.**
   b. **To prevent the immediate theft, damage, or destruction of any NATO military property.**

3. **WHEN THE SITUATION PERMITS, USE A GRADUATED ESCALATION OF FORCE, TO INCLUDE:**
   a. **Verbal warnings to "Halt" or "ndalOHnee"**
   b. **Show your weapons.**
   c. **Show of force to include riot control formations.**
   d. **Non-lethal physical force.**
   e. **If necessary to stop an immediate threat of serious bodily harm or death, engage the threat with deliberately aimed shots until it is no longer a threat.**

4. **SOLDIERS MAY SEARCH, DISARM, AND DETAIN PERSONS AS REQUIRED TO PROTECT THE FORCE. DETAINEES WILL BE TURNED OVER TO APPROPRIATE HOST NATION AUTHORITIES ASAP.**

5. **WARNING SHOTS ARE STRICTLY PROHIBITED.**

6. **TREAT ALL EPWs WITH DIGNITY AND RESPECT. RESPECT THE CULTURAL AND RELIGIOUS BELIEFS OF ALL EPWs.**

7. **DO NOT RETAIN WAR TROPHIES OR ENEMY SOUVENIRS FOR YOUR PERSONAL USE.**

8. **DO NOT ENTER ANY MOSQUE, OR OTHER ISLAMIC RELIGIOUS SITE UNLESS NECESSARY FOR MISSION ACCOMPLISHMENT AND DIRECTED BY YOUR COMMANDER.**

9. **IMMEDIATELY REPORT ANY VIOLATIONS OF THE LAW OF WAR, OR THE RULES OF ENGAGEMENT TO YOUR CHAIN OF COMMAND, MPs, CHAPLAIN, IG, OR JAG OFFICER REGARDLESS OF WHETHER FRIENDLY FORCES OR ENEMY FORCES COMMITTED THE SUSPECTED VIOLATION.**

10. **THE AMOUNT OF FORCE AND TYPE OF WEAPONS USED SHOULD NOT SURPASS THAT AMOUNT CONSIDERED NECESSARY FOR MISSION ACCOMPLISHMENT. MINIMIZE ANY COLLATERAL DAMAGE.**

[1] For additional examples of ROE cards from past operations, see www.jagcnet.army.mil/clamo.

Front Side

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.

Reverse Side

OPENING FIRE.

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

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

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

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

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

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

MINIMUM FORCE.

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

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

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.

CFLCC ROE Card

1. On order, enemy military and paramilitary forces are declared hostile and may be attacked subject to the following instructions:

a. Positive identification (PID) is required prior to engagement. PID is a reasonable certainty that the proposed target is a legitimate military target. If not PID, contact your next higher command for decision.

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

c. Do not target or strike any of the following except in self defense to protect yourself, your unit, friendly forces, and designated persons or property under your control:

- Civilians
- Hospitals, mosques, churches, shrines, schools, museums, national monuments, and any other historical and cultural sites.

d. Do not fire into civilian populated areas or buildings unless the enemy is using them for military purposes or if necessary for your self-defense. Minimize collateral damage.

e. Do not target enemy infrastructure (public works, commercial communication facilities, dams). Lines of communication (roads, highways, tunnels, bridges, railways), and economic objectives (commercial storage facilities, pipelines) unless necessary for self defense or if ordered by your commander. If you must fire on these objects to engage a hostile force, disable and disrupt, but avoid destruction of these objects if possible.

2. The use of force, including deadly force, is authorized to protect the following:

- Yourself, your unit, and friendly forces.
- Enemy prisoners of war.
- Civilians from crimes that are likely to cause death or serious bodily harm, such as murder or rape.
- Designated civilians and/or property, such as personnel of the Red Cross/Red Crescent, UN, and U.S./UN supported organizations.

3. Treat all civilians and their property with respect and dignity. Do not seize civilian property, including vehicles, unless you have permission of a company level commander and you give a receipt to the property's owner.

4. Detain civilians if they interfere with mission accomplishment or if required for self defense.

5. CENTCOM General Order No. 1A remains in effect. Looting and the taking of war trophies are prohibited.

<u>REMEMBER</u>

- Attack enemy forces and military targets
- Spare civilians and civilian property, if possible.
- Conduct yourself with dignity and honor.
- Comply with the Law of War. If you see a violation, report it.

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

As of 311334Z JAN 03

MNC-I ROE CARD

YOU ALWAYS HAVE THE RIGHT TO USE NECESSARY AND PROPORTIONAL FORCE TO DEFEND YOURSELF

1. **You may engage the following individuals based on their conduct**:
   - **Persons who are committing hostile acts against CF**.
   - **Persons who are exhibiting hostile intent toward CF**.

2. **Positive Identification (PID) is required prior to engagement**. PID is a reasonable certainty that the proposed target is a legitimate military target.

3. **Escalation of force Measures (EOF)**. When time and circumstances permit, EOF Measures assist CF to determine whether hostile act/intent exists in a particular situation. When you are confronted with a hostile act or demonstration of hostile intent that threatens death or serious bodily injury, you may use deadly force without proceeding through EOF measures.

4. **Warning Shots**. In general, CF may only use warning shots in situations where deadly force is authorized or in EOF situations.

5. **The use of force, including deadly force, is authorized to protect the following**: (1) yourself, your unit, and other friendly forces; (2) detainees; (3) civilians from crimes that are likely to cause death or serious bodily harm, such as murder or rape; (4) personnel or property **designated by the OSC** when such actions are necessary to restore order and security.

6. **You may DETAIN civilians based on a reasonable belief that the person**: (1) is interfering with CF mission accomplishment; (2) is on a list of persons wanted for questioning, arrest, or detention; (3) is or was engaged in criminal activity; or (4) must be detained for imperative reasons of security. **Anyone you detain MUST be protected**. You MUST fill out a detainee apprehension card for EVERY person you detain.

Law of Armed Conflict Principles:

a. **Use of Force**. The use of force will be necessary and proportional to comply with the LOAC.

b. **Only Attack Legitimate Military Targets**. All personnel must ensure that, prior to any engagement, non-combatants and civilian structures are distinguished from proper military targets.

c. **Minimize Collateral Damage**. Military operations will, in so far as possible, minimize incidental injury, loss of life, and collateral damage.

d. **Do not target or strike** anyone who has surrendered or is out of combat due to sickness or wounds.

e. **Do not target or strike** hospitals, mosques, churches, shrines, schools, museums, national monuments, and any other historical and cultural sites, civilian populated areas or buildings **UNLESS** the enemy is using them for military purposes or if necessary for your self-defense.

f. **Do not target or strike** Iraqi infrastructure (public works, commercial communication facilities, dams), Lines of Communication (roads, highways, tunnels, bridges, railways) and Economic Objects (commercial storage facilities, pipelines) **UNLESS** necessary for self-defense or is ordered by your commander. If you must fire on these objects, fire to disable and disrupt rather than destroy.

g. **Treat all civilians and their property with respect and dignity**. Do not seize civilian property, including vehicles, unless the property presents a security threat. When possible, give a receipt to the property's owner.

- **MNC-I General Order No. 1 is in effect.** Looting and the taking of war trophies are prohibited.
- **ALL personnel MUST report any suspected violations of the Law of War committed by any U.S., friendly, or enemy force**. Notify your chain of command, Judge Advocate, IG, Chaplain, or appropriate service-related investigative branch (e.g., CID, NCIS).

These ROE are in effect as of 27 Mar 07

CHAPTER 6

INTELLIGENCE LAW AND INTERROGATION OPERATIONS

REFERENCES

1. National Security Act of 1947, 50 U.S.C. §§ 401-441d.
2. Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. §§ 1801-1885c.
3. Classified Information Procedures Act of 1980, 18 U.S.C. App. 3 §§ 1-13.
4. Congressional Oversight Act, 50 U.S.C. § 413.
5. Executive Order No. 12333, United States Intelligence Activities, 46 FR 59941 (4 Dec. 1981), as amended by Executive Order 13284 (2003), Executive Order 13355 (2004) and Executive Order 13470 (2008).
6. Intelligence Reform and Terrorism Prevention Act of 2004 (codified in scattered sections of 50 U.S.C.).
7. Detainee Treatment Act of 2005, Pub. L. 109-148, Div. A, Title X, SEC. 1002-1006; and 42 U.S.C. § 2000dd-2000dd-1.
8. DEP'T OF DEFENSE, DIR. 2310.01E, THE DEPARTMENT OF DEFENSE DETAINEE PROGRAM (5 Sept. 2006).
9. DEP'T OF DEFENSE, DIR. 2311.01E, DOD LAW OF WAR PROGRAM (9 May 2006, incorporating Change 1, 15 Nov. 2010).
10. DEP'T OF DEFENSE, DIR. 3115.09, DOD INTELLIGENCE INTERROGATIONS, DETAINEE DEBRIEFINGS, AND TACTICAL QUESTIONING (11 Oct. 2012)
11. DEP'T OF DEFENSE, REG. 5240.1-R, PROCEDURES GOVERNING THE ACTIVITIES OF DOD INTELLIGENCE COMPONENTS THAT AFFECT UNITED STATES PERSONS (Dec. 1982).
12. U.S. DEP'T OF ARMY, REG. 381-10, U.S. ARMY INTELLIGENCE ACTIVITIES (3 May 2007).
13. U.S. DEP'T OF ARMY, FIELD MANUAL 2-22.3, HUMAN INTELLIGENCE COLLECTOR OPERATIONS (6 Sept. 2006).
14. U.S. DEP'T OF ARMY, FIELD MANUAL 3-24, COUNTERINSURGENCY (15 Dec. 2006).
15. Executive Order No. 13491, Ensuring Lawful Interrogations (22 Jan. 2009).
16. U.S. DEPT' OF DEF., INSTR. 1100.22, POLICY AND PROCEDURES FOR DETERMINING WORK FORCE MIX (12 Apr. 2010).

I. INTRODUCTION

A. **Overview**. Intelligence is information and knowledge about an adversary obtained through observation, investigation, analysis, or understanding. Information superiority is essential to a commander in conducting operations and in accomplishing his or her mission. Intelligence collection activities, to include intelligence interrogations, have become a sophisticated and essential element of mission command. Intelligence collection activities involve the collection of military and military-related foreign intelligence and counterintelligence, based on collection requirements. Because intelligence is so important to the commander, operational lawyers must understand the basics of intelligence law, including how law and policy pertain to the collection of human intelligence (HUMINT).. The importance of the role of intelligence in current operations worldwide cannot be overstated, particularly with respect to counterinsurgency (COIN) and counterterrorism (CT) operations, where—as discussed in detail in chapter 3 of FM 3-24 (Counterinsurgency)—interrogation operations and HUMINT are essential.

B. **Intelligence in General**. Intelligence can be either strategic or tactical. *Strategic intelligence* is information required for the formation of policy and military plans at the national and international levels. This intelligence is normally nonperishable and is collected and analyzed for the consumer on a long-term basis. *Tactical intelligence*, on the other hand, is information required for the planning and conduct of tactical operations. It is usually perishable and temporary in nature. In all, there are seven intelligence disciplines: human intelligence (HUMINT); imagery intelligence (IMINT); signals intelligence (SIGINT); measurement and signature intelligence (MASINT); open-source intelligence (OSINT); technical intelligence (TECHINT); and counterintelligence (CI).

C. **Legal Basis**. The statutory and policy authorities for intelligence law are listed under References above.

D. **The Intelligence Community**. The U.S. intelligence community is made up of 16 intelligence agencies. The Department of Defense (DoD) has eight of these intelligence agencies: Defense Intelligence Agency (DIA); National Security Agency (NSA); National Geospatial-Intelligence Agency (NGA); National Reconnaissance Office (NRO); and the intelligence commands of the Army, Navy, Air Force, and Marine Corps. In December 2004, the Intelligence Reform and Terrorism Prevention Act separated the head of the U.S. intelligence community from the head of the Central Intelligence Agency. Today, the head of the U.S. intelligence community and principal advisor to the President on all foreign and domestic intelligence matters is the Director of National Intelligence (DNI). In addition to creating the DNI and its corresponding office (ODNI), the 2004 legislation also reprioritized national intelligence collection efforts. Rather than collecting intelligence based upon geographic regions, ODNI coordinates collection efforts based upon the type of threat, such as terrorism or nuclear proliferation. Various centers within ODNI coordinate and prioritize national collection efforts within the established threat areas. Intelligence activities within DoD include responding to collection taskings from the ODNI as well as: collecting, producing, and disseminating military and military-related foreign intelligence and counterintelligence; and protecting DoD installations, activities, and employees.

II. OPERATIONAL ISSUES

A. **Scope**. Aspects of intelligence law exist in all operations. It is imperative that operational lawyers consider intelligence law when planning and reviewing both operations in general and intelligence operations in particular. The Adaptive Planning and Execution (APEX) Planning Formats and Guidance format puts the intelligence section at Annex B of the operations plan (OPLAN) / concept plan (CONPLAN). (See this Handbook's chapter on Military Decision Making Process and OPLANs, which includes the APEX format and each annex and appendix.) Annex B is the starting point for the Judge Advocate (JA) to participate in the intelligence aspects of operational development.

B. **Intelligence collection**. The authority for and restrictions on collection of intelligence against U.S. persons stems from Executive Order (E.O.) 12333, as amended, which requires all government agencies to implement guidance consistent with the Order. The Department of Defense's implementation of E.O. 12333 is contained 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. Army Regulation (AR) 381-10 is the Army guidance. It is important to recognize that certain portions of DoD 5240.1-R, as well as the complementary service guidance, also apply to intelligence activities relating to non-U.S. persons.

1. DoD 5240.1-R sets forth procedures governing the collection, retention, and dissemination of information concerning U.S. persons by DoD Intelligence Components. Most importantly, this Regulation requires that information identifying a U.S. person be collected by a DoD intelligence component only if it is necessary in the conduct of a function assigned to the collecting component. Army Regulation 381-10 further refines this requirement by mandating that a military intelligence element may only collect information concerning U.S. persons if it has the mission and authority to conduct an intelligence activity, and there is a link between the U.S. person information to be collected and the element's assigned mission and function.

2. Two threshold questions regarding intelligence collection must be addressed. The first of these questions involves whether information has been "collected." Information is collected when it has been received, in intelligible form (as opposed to raw data), for use by an employee of an intelligence component in the course of his or her official duties.[1] The second question involves whether the information collected is about a "U.S. person." A "U.S. person" is generally defined as a U.S. citizen; permanent resident alien; a corporation incorporated in the U.S.; or an association substantially composed of U.S. citizens or permanent resident aliens. A person or organization outside the United States and aliens inside the United States shall be presumed not to be a U.S. person unless specific information to the contrary is obtained. However, if it cannot be established whether an individual in the United States is a U.S. person or alien, then the individual will be presumed to be a U.S. person. Military intelligence elements must exercise great caution in using the non-U.S. person presumption. Any information that indicates an individual who appears to be an alien might possess U.S. citizenship (or be a permanent resident alien) must be resolved prior to relying on the presumption in making a collection decision.

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[1] Army Regulation 381-10 adds to this threshold question. *See* U.S. DEP'T OF ARMY, REG. 381-10, U.S. ARMY INTELLIGENCE ACTIVITIES (3 May 2007). According to AR 381-10, for information to be collected it must also be "intended for intelligence use." *Id.* However, Judge Advocates must keep in mind that when there is a conflict between DoD 5240.1-R and AR 381-10, the DoD regulation controls.

3. **Collection**. Once it has been determined that a collection will be against a U.S. person, the analysis then turns to whether the information may be properly collected. Procedure 2[2] of DoD 5240.1-R governs this area. In that regard, the intelligence component must have a mission to collect the information, the information must fit within one of thirteen categories presented in Procedure 2, and the information must be collected by the least intrusive means.[3]

4. **Retention**. Once collected, the component should determine whether the information may be retained (Procedure 3 of DoD 5240.1-R). In short, properly collected information may be retained. If the information was incidentally collected (that is, collected without a Procedure 2 analysis), it may be retained if post-collection analysis indicates that it could have been properly collected. Information may be temporarily retained for up to ninety days solely for the purpose of determining its proper retainability.

5. **Dissemination**. Procedure 4 of DoD 5240.1-R governs dissemination of U.S. person information outside of the intelligence component that collected and retained it. In general, there must be a reasonable belief the recipient agency or organization has a need to receive such information to perform a lawful government function. However, if disseminating to another intelligence component, this determination need not be made by the disseminating military intelligence element, because the recipient component is required to do so.

C. **Special Collection Techniques**. DoD 5240.1-R addresses special means of collecting intelligence in subsequent Procedures. These Procedures describe the permissible techniques, the permissible targets, and the approval authority for special collection techniques. The JA confronting any of these techniques must consult the detailed provisions of DoD 5240.1-R and AR 381-10, and should seek clarifying guidance from the Operational Law Branch of the Office of the Staff Judge Advocate, U.S. Army Intelligence and Security Command (INSCOM).

1. Electronic Surveillance – Procedure 5.
2. Concealed Monitoring – Procedure 6.
3. Physical Searches – Procedure 7.
4. Searches and Examinations of Mail – Procedure 8.
5. Physical Surveillance – Procedure 9.
6. Undisclosed Participation in Organizations – Procedure 10.

According to AR 381-10, paragraph 1-6(a), a legal advisor must review all activities conducted pursuant to Procedures 5-13. Both INSCOM and the U.S. Army Intelligence Center (USAIC) offer assistance with conducting these legal reviews as well as training in special collection techniques. The OTJAG International and Operational Law Division may also be contacted for assistance in interpretations of DoD 5240.1-R and AR 381-10, as well as questions concerning legal reviews of intelligence operations.

D. **Counterintelligence**. Counterintelligence is information that is gathered or activities conducted to protect against espionage and other intelligence activities, as well as international terrorism. Such intelligence activities are conducted in connection with foreign powers, hostile organizations, or international terrorists. Counterintelligence is concerned with identifying and counteracting threats to our national security.

1. Within the United States, the FBI has primary responsibility for conducting counterintelligence and coordinating the counterintelligence efforts of all other U.S. government agencies.[4] Coordination with the FBI will be in accordance with the *Agreement Governing the Conduct of Defense Department Counterintelligence Activities in Conjunction with the Federal Bureau of Investigation*, between the Attorney General and the Secretary of Defense, April 5, 1979, as supplemented by later agreements.

2. Outside the United States, the CIA has primary responsibility for conducting counterintelligence and coordinating the counterintelligence efforts of all other U.S. government agencies.[5] Procedures for coordinating

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[2] The chapters of DoD 5240.1-R are referred to as procedures. Executive 12333 states, "Elements of the Intelligence Community are authorized to collect, retain or disseminate…only in accordance with *procedures* established by [the Secretary of Defense]." Emphasis added.

[3] Again, consider AR 381-10, *supra* note 1, para. 1-5.a., which requires Army elements to have a mission and authority outside of AR 381-10.

[4] E.O. 12333, ¶ 1.14(a).

[5] E.O. 12333, ¶ 1.8(c) and (d).

counterintelligence efforts are found in Director of Central Intelligence Directive 5/1 (DCID 5/1), and subsequent Intelligence Community Directives (ICD).

3. The Department of Defense has primary responsibility for conducting military-related counterintelligence worldwide.[6] These activities are typically carried out by Service counterintelligence units. Coordination of effort with the FBI or CIA is still required in most cases.

E. **Military Source Operations (MSO)**. MSO refer to the collection of foreign military and military-related intelligence by humans from humans. MSO is but one aspect of HUMINT. Only specially trained and qualified personnel may conduct MSO. Field Manual 2-22.3, chapter 5, discusses MSO in general. Typically, MSO operations are classified, but help with providing necessary legal support is available from INSCOM, OTJAG, and USAIC. Key considerations for the Judge Advocate include knowing the different types of source operations, knowing what training is required to conduct those operations and knowing the necessary approval authorities.

F. **Support Issues Concerning Intelligence Operations**. Sound fiscal law principles apply to the support of intelligence operations. Money and property must be accounted for, and goods and services must be procured using appropriate federal acquisition regulations. Judge Advocates dealing with expenditures in support of intelligence operations should be familiar with the regulations regarding contingency funding, property accountability, secure environment contracting, and the annual intelligence appropriations acts. Intelligence Contingency Funds (ICF) are appropriated funds to be used for intelligence activities when the use of other funds is not applicable or would either jeopardize or impede the mission of the intelligence unit. Most publications concerning ICF are classified; however, AFI 14-101[7] is an unclassified publication that provides a basic understanding of ICF.

G. **Intelligence Oversight**. A critical aspect of all intelligence operations and activities is overseeing their proper execution, particularly when they relate to collection of intelligence against U.S. persons. A JA may be called upon to advise an intelligence oversight officer of an intelligence unit. Executive Order 12333, the Intelligence Oversight Act (50 U.S.C. § 413), DoD 5240.1-R, and AR 381-10 provide the proper statutory, Presidential directive, or regulatory guidance regarding intelligence oversight, to include detailed requirements for reporting violations of intelligence procedures.

III. HUMAN INTELLIGENCE COLLECTOR OPERATIONS [ARMY FIELD MANUAL (FM) 2-22.3]

A. Army Field Manual (FM) 2-22.3 is a September 2006 manual that provides doctrinal guidance, techniques, and procedures for interrogators[8] to support a commander's intelligence needs. Field Manual 2-22.3 was effectively incorporated into federal law through the **Detainee Treatment Act of 2005 (DTA 2005)**. Operational JAs working with units involved in HUMINT collection, particularly interrogations, must be familiar with DTA 2005; Chapters 5 and 8, and Appendices K and M, of FM 2-22.3; Department of Defense Directive (DoDD) 3115.09, Department of Defense Intelligence Interrogations, Detainee Debriefings, and Tactical Questioning, dated 3 November 2005; and DoDD 2310.01E, DoD Detainee Program, dated 5 September 2006, which requires that all detainees be treated humanely. All persons subject to the directive shall apply "the standards articulated in Common Article 3 to the Geneva Conventions of 1949."

1. **Interrogation**. Defined by FM 2-22.3 as "the systematic effort to procure information to answer specific collection requirements by direct and indirect questioning techniques of a person who is in the custody of the forces conducting the questioning." The **ONLY** personnel who may conduct interrogations are trained and certified interrogators. There are specific courses that train and certify interrogators. These courses are run exclusively by USAIC or the Navy-Marine Corps Intelligence Training Center, and are approved by DIA.

2. **Tactical Interrogation at Brigade and Below**. Tactical Interrogations are interrogations conducted at the point of capture. Such interrogations are only authorized pursuant to theater specific requirements and approvals. As with interrogations conducted at a fixed interrogation facility, only trained and certified interrogators may conduct tactical **interrogations** . DoD personnel not trained and certified to interrogate may only conduct "tactical questioning."

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[6] E.O. 12333, ¶ 1.11(b).

[7] U.S. DEP'T OF AIR FORCE, INSTR. 14-101, Intelligence Contingency Funds (30 Apr. 2009).

[8] In this chapter, the term interrogator is used generically, but the reader should realize that there are HUMINT collectors and interrogators. A trained and certified interrogator may conduct interrogations, but may not conduct other HUMINT collector tasks, whereas a trained and certified HUMINT collector may conduct all HUMINT collector tasks including interrogations.

3. **Tactical Questioning**. According to FM 2-22.3, tactical questioning (often times referred to as "TQ") is "the expedient initial questioning for information of immediate tactical value." DoDD 3115.09 defines TQ as "direct questioning by any DoD personnel of a captured or detained person to obtain time-sensitive tactical intelligence, at or near the point of capture or detention." This is the only type of questioning that a non-trained, non-certified person may conduct with a detainee (note that DoDD 3115.09 requires "DoD personnel who conduct, support, po participate in tactical questioning shall be trained, at a minimum in the law of war and humane treatment standards").

4. **Detainee Treatment Act of 2005** (DTA of 2005) (part of the 2006 Department of Defense Appropriations Act, Pub. Law No. 109-163 and PL 109-148).

a. § 1002(a): No person in the custody or under the effective control of the Department of Defense or under detention in a Department of Defense facility shall be subject to any treatment or technique of interrogation not authorized by and listed in the United States Army Field Manual on Intelligence Interrogation.

b. § 1003(a): No individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment.

c. § 1005: Includes provisions for status review of detainees outside the U.S.

d. Based on enactment of the DTA of 2005, only those approach techniques contained in Chapter 8 and Appendix M of FM 2-22.3 are legal. Unlike most doctrine, this is not merely a recommendation for how to conduct operations; rather, FM 2-22.3 literally defines the legal limits of interrogation operations.

e. The DTA of 2005 applies to all DoD personnel, both military and civilian, at all times, in all locations, and to all others conducting interrogation operations in DoD facilities.

5. **Field Manual 2-22.3** offers two tests that an interrogator should consider before submitting an interrogation plan for approval:

a. If the proposed approach technique were used by the enemy against one of your fellow Soldiers, would you believe the Soldier had been abused?

b. Could your conduct in carrying out the proposed technique violate a law or regulation? Keep in mind that even if you personally would not consider your actions to constitute abuse, the law may be more restrictive.

c. If you answer yes to either of these tests, the contemplated action should not be conducted.

B. Training provides interrogators with the basic standards for interrogations in detainee operations. This is the "THINK" model:

1. **T**reat all detainees with the same standard.

a. DoDD 2311.01E, DoD Law of War Program, 9 May 2006 (incorporating Change 1 of November 15, 2010): DoD personnel will "comply with the Law of War during all armed conflicts, however such conflicts are characterized, and in all other military operations."

b. DoDD 2310.01E, DoD Detainee Program, 5 September 2006: "All detainees shall be treated humanely, and in accordance with U.S. Law, the Law of War, and applicable U.S. policy."

c. From an interrogator's perspective, status may matter in the following situations:

(1) Use of the separation approach technique: not authorized for use against individuals protected by GC III (POW's)[9]; and

(2) Use of the incentive approach: may not deny the detainee anything entitled by law (there is a difference in entitlements between a civilian internee, lawful enemy combatant, unlawful enemy combatant, and a retained person).

[9] FM 2-22.3 authorizes separation against "unlawful enemy combatants". However, that term has been replaced by "unprivileged enemy belligerents" in official references. Regardless of the term used, the key legal principle is that the separation approach is not an authorized approach against individuals protected by GC III.

2. **H**umane treatment is the standard. Enclosure 4 of DoDD 2310.01E is called the detainee treatment policy. It provides the minimum standards of humane treatment for all detainees and applies to detainees from the point of capture on. This policy requires that:

a. Adequate food, drinking water, shelter, clothing, and medical treatment be given;

b. Free exercise of religion, consistent with the requirements for detention, be allowed;

c. All detainees be respected as human beings. They will be protected against threats or acts of violence including rape, forced prostitution, assault, theft, public curiosity, bodily injury, and reprisals. They will not be subjected to medical or scientific experiments. They will not be subjected to sensory deprivation. This list is not exclusive.

3. **I**nterrogators interrogate.

a. Pursuant to DoDD 3115.09:

(1) Only trained and certified interrogators may interrogate;

(2) Non-interrogators and non-trained/non-certified interrogators may only ask direct questions, may not use any other approach/technique, and may not "set the conditions" for an interrogation.

b. Non-interrogators and non-trained/certified interrogators may provide passively obtained information to trained and certified interrogators for use during interrogations. For example, an MP may tell the interrogator about leaders in the facility, habits of a detainee, groups that have formed in the facility, and other information that the MP has observed during the normal performance of his/her duties.

4. **N**eed to report abuses.

a. Pursuant to DoDD 3115.09, all DoD personnel (including contractors) must report any "suspected or alleged violation of DoD policy, procedures, or applicable law relating to intelligence interrogations, detainee debriefings or tactical questioning, for which there is credible information."

b. FM 2-22.3 requires "all persons who have knowledge of suspected or alleged violations of the Geneva Conventions . . . to report such matters."

c. Reports should be made to the chain of command unless the chain of command is involved, in which case the report should be made to one of the following: SJA, IG, Chaplain, or Provost Marshal.

d. Failure to report may be a UCMJ violation (either Article 92, dereliction of duty, or Article 134, misprision of a serious offense).

e. Individuals must report violations by anyone, including, but not limited to: another interrogator, interpreter, host nation personnel, coalition personnel, or representatives of other government agencies (OGAs).

5. **K**now the approved techniques. Only those techniques listed in Chapter 8 (and appendix M) of FM 2-22.3 are approved, and therefore lawful, techniques pursuant to the Detainee Treatment Act of 2005.

a. Approved Techniques.

(1) *Direct Approach*. Interrogator asks direct questions, which are basic questions generally beginning with an interrogative (who, what, where, when, how, or why) and requiring a narrative answer. These questions are brief, concise, and simply worded to avoid confusion.

(2) *Incentive Approach*. Interrogator trades something that the detainee wants in exchange for information. Incentives do not include anything to which a detainee is already entitled by law or policy.

(3) *Emotional Love Approach.* In this approach, the interrogator focuses on the anxiety felt by the detainee about the circumstances in which he finds himself, his isolation from those he loves, and his feelings of helplessness. The interrogator directs that love towards the appropriate object, focusing the detainee on what he can do to help himself, such as being able to see his family sooner, helping his comrades, helping his ethnic group, or helping his country.

(4) *Emotional Hate Approach.* The emotional hate approach focuses on any genuine hate, or possibly a desire for revenge, the detainee may feel.

(5) *Emotional Fear-Up Approach*. In the fear-up approach, the interrogator identifies a preexisting fear or creates a fear within the detainee. He then links the elimination or reduction of the fear to cooperation on the part of the detainee.

(6) *Emotional Fear-Down Approach*. In the fear-down approach, the interrogator mitigates existing fear in exchange for cooperation on the part of the detainee.

(7) *Emotional-Pride and Ego-Up Approach*. This approach exploits a detainee's low self-esteem. The detainee is flattered into providing certain information in order to gain credit and build his ego.

(8) *Emotional-Pride and Ego-Down Approach*. The emotional pride and ego-down approach is based on attacking the detainee's ego or self-image. The detainee, in defending his ego, reveals information to justify or rationalize his actions.

(9) *Emotional-Futility*. In the emotional-futility approach, the interrogator convinces the detainee that resistance to questioning is futile. This engenders a feeling of hopelessness and helplessness on the part of the detainee.

(10) *We Know All*. With this technique, the interrogator subtly convinces the detainee that his questioning of the detainee is perfunctory because any information that the detainee has is already known. When the detainee hesitates, refuses to answer, or provides an incorrect or incomplete reply, the interrogator provides the detailed answer himself. When the detainee begins to give accurate and complete information, the interrogator interjects pertinent questions.

(11) *File and Dossier*. In this approach, the interrogator prepares a dossier containing all available information concerning the detainee or his organization. The information is carefully arranged within a file to give the illusion that it contains more data than is actually there. The interrogator proceeds as in the "we know all" approach, referring to the dossier from time to time for answers. As the detainee becomes convinced that all the information that he knows is contained within the dossier, the interrogator proceeds to topics on which he in fact has little or no information.

(12) *Establish Your Identity*. Using this technique, the interrogator insists the detainee has been correctly identified as an infamous individual wanted by higher authorities on serious charges, and that the detainee is not the person he purports to be. In an effort to clear himself of this allegation, the detainee makes a genuine and detailed effort to establish or substantiate his true identity.

(13) *Repetition*. The repetition approach is used to induce cooperation from a hostile detainee. In one variation of this approach, the interrogator listens carefully to a detainee's answer to a question, and then repeats the question and answer several times. The interrogator does this with each succeeding question until the detainee becomes so thoroughly bored with the procedure that he answers questions fully and candidly to satisfy the interrogator and gain relief from the monotony of this method.

(14) *Rapid Fire Approach*. In this approach, the interrogator asks a series of questions in such a manner that the detainee does not have time to answer a question completely before the next one is asked. This confuses the detainee, who will tend to contradict himself as he has little time to formulate his answers. The interrogator then confronts the detainee with the inconsistencies, causing further contradictions. More than one interrogator may be used for this approach.

(15) *Silent*. The silent technique may be successful when used against either a nervous or confident detainee. When employing this technique the interrogator says nothing to the detainee, but looks him squarely in the eye, preferably with a slight smile on his face. It is important for the interrogator to not look away from the detainee but, rather, force the detainee to break eye contact first.

(16) *Change of Scenery*. Using this technique, the interrogator removes the detainee from an intimidating atmosphere such as an "interrogation" room type of setting and places him in a setting where he feels more comfortable speaking. Change of scenery is not environmental manipulation.

(17) *Mutt and Jeff*. This technique is also known as "Good Cop, Bad Cop." The goal of this technique is to make the detainee identify with one of the interrogators and thereby establish rapport and cooperation with that individual. Use of this technique requires two experienced interrogators who are convincing actors. The two interrogators will display opposing personalities and attitudes toward the detainee. NOTE:

(a) This technique must be approved by first O-6 in chain of command.

(b) No violence, threats, or impermissible or unlawful physical contact are allowed.

(c) No threatening the removal of protections afforded by law is allowed.

(d) This technique requires regular monitoring.

(18) *False Flag*. The goal of this technique is to convince the detainee that individuals from a country other than the U.S. are interrogating him, thus tricking the detainee into cooperating with U.S. forces. NOTE:

(a) This technique must be coordinated with the SJA and C/J/G/S-2X (primary staff advisor on Human Intelligence and Counterintelligence, subordinate to C/J/G/S-2).

(b) This technique must be approved by first O-6 in chain of command.

(c) Interrogator must identify the country to be used in the interrogation plan.

(d) Interrogator may not imply or explicitly threaten that non-compliance will result in harsh interrogation by non-U.S. entities.

(e) Interrogator cannot pose or portray one's self as a protected person (i.e., doctor, chaplain, etc.).

b. Restricted Technique.

(1) *Separation*. This is an approved technique, but the use is restricted by limitations outlined in Appendix M, FM 2-22.3. The purpose of separation is to deny the detainee the opportunity to communicate with other detainees in order to keep him from learning counter-resistance techniques or gathering new information to support a cover story and/or decrease the detainee's resistance to interrogation. NOTE:

(a) Combatant Commander must approve (after SJA review) the use of the separation technique in the theater.

(b) First General Officer/Flag Officer (GO/FO) in the chain of command must approve each specific use of separation.

(c) Interrogation plan shall have an SJA review before submitting to the first GO/FO in the chain of command.

(d) This technique may only be used on unlawful combatants (unprivileged enemy belligerents) . According to FM 2-22.3, an unlawful enemy combatant is a person not entitled to combatant immunity, who engages in acts against the U.S. or its coalition partners in violation of the laws and customs of war during an armed conflict. For the purposes of the war on terrorism, the term "unlawful enemy combatant" is defined to include, but is not limited to, an individual who was part of, or supported, the Taliban, al Qaeda forces, or associated forces that are engaged in hostilities against the U.S. or its coalition partners. Such an individual may also be referred to as an "unprivileged enemy belligerent."

(e) Applied on a case-by-case approach when the detainee may possess important intelligence and other techniques are insufficient.

(f) Only DoD interrogators trained and certified on separation may use this technique.

(g) Sensory deprivation is prohibited, even for field expedient separation.[10]

(h) There is a thirty-day limit on use of this technique (12 hours if field-expedient use). This time limit may only be extended with SJA review and GO/FO approval.

(i) Separation must not be confused with quarantine, confinement, or segregation:

[10] When physical separation is not feasible, goggles or blindfolds and earmuffs may be utilized as a field expedient method to generate a perception of separation (*see* FM 2-22.3, Appendix M, para. M-27). However, JAs must realize that use of other methods such as tape over the eyes, ears, nose, or mouth, or the use of burlap bags over a detainee's head, may be considered inhumane and pose a danger to the detainee.

(i) Separation is an interrogation technique, subject to the limitations described above.

(ii) Quarantine is directed by medical personnel in response to a detainee with a contagious medical condition, such as tuberculosis or HIV.

(iii) Confinement is punishment, generally for offenses against camp rules, directed by the camp commander following some sort of due process proceeding.

(iv) Segregation is an administrative and security provision. Segregation is part of the "5 Ss and T" (search, silence, safeguard, segregate, speed to the rear, and tag) technique that capturing units must use to aid in controlling, sorting, and securing detainees at the point of capture. Military Police or guards also practice segregation in detention facilities when dealing with detainees who represent an increased security risk or who need additional oversight beyond that applied to detainees in the general population. An interrogator cannot request segregation in order to "set the conditions" for an interrogation.

C. Recent Developments.

1. **Department of Defense Directive 3115.09, (DoD Intelligence Interrogations, Detainee Debriefings, and Tactical Questioning)** was updated and released on 11 Oct. 2012. This update of the 2008 version incorporates the requirements for videotaping strategic level interrogations previously directed through DTM 09-031. The updated DoD Directive also incorporates the guidance prohibiting the use of contractor interrogators contained in DODI 1100.22 (Policy and Procedures for Determining Work Force Mix) and provides methods and approval processes for exceptions to the Instruction.

2. **Executive Order (E.O.) 13491 (Ensuring Lawful Interrogations)**. This E.O., issued by President Obama on 22 January 2009, extends the requirement to follow FM 2-22.3 to *all U.S. Government agencies* (not just DoD). Further, the E.O. reiterates Common Article 3 as the minimum standard for treatment of individuals under the effective control of the U.S. Government, and requires all CIA detention facilities to be closed expeditiously and not operated in the future.

3. **Department of Defense Instruction 1100.22 (Policy and Procedures for Determining Work Force Mix).** This DoDI, published on 12 April, 2010 places significant restrictions on the use of contractors as interrogators. In general, the use of contractors to conduct interrogations is prohibited without a Secretary of Defense level approved waiver for reasons vital to national security.

4. **Directive-Type Memorandum (DTM) 09-031 (Videotaping of Interrogations of Persons in DoD Custody)**. This DTM, Change 2, dated December 2011, establishes procedures for the videotaping of interrogations, as required by the FY-10 National Defense Authorization Act (NDAA). The DTM specifically requires all strategic-level interrogations (those occurring at Theater Internment Facility (TIF)-level or higher) to be recorded and preserved. NOTE: The DTM does not require videotaping by individuals "engaged in direct combat operations" or by those DoD personnel conducting Tactical Questioning.

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CHAPTER 7

INTERNATIONAL AGREEMENTS AND SOFAS

REFERENCES

1. 1 U.S.C. § 112a. United States treaties and other international agreements; contents; admissibility in evidence.
2. The Case-Zablocki Act, Pub. L. 92-403, 1 U.S.C. § 112b. United States international agreements; transmission to Congress.
3. Coordination, Reporting, and Publication of International Agreements, 22 C.F.R. Part 181.
4. 11 FAM 720 (Circular 175 Procedure). Negotiation and Conclusion.
5. Status of Forces Policies and Information, 32 C.F.R. Part 151.
6. U.S. DEP'T OF DEFENSE, DIR. 2010.9, ACQUISITION AND CROSS-SERVICING AGREEMENTS (28 Apr. 2003; certified current as of 24 Nov. 2003).
7. U.S. DEP'T OF DEFENSE, DIR. 5525.1, STATUS OF FORCES POLICY AND INFORMATION (7 Aug. 1979; incorporating through change 2, 2 July 1997; certified current as of 21 Nov. 2003).
8. U.S. DEP'T OF DEFENSE, INSTR. 5525.03, CRIMINAL JURISDICTION OF SERVICE COURTS OF FRIENDLY FOREIGN FORCES AND SENDING STATES IN THE UNITED STATES (30 Mar. 2006; certified current as of 3 Dec. 2010).
9. U.S. DEP'T OF DEFENSE, DIR. 5530.3, INTERNATIONAL AGREEMENTS (11 June 1987; incorporating change 1, 18 Feb. 1991; certified current as of 21 Nov. 2003).
10. CHAIRMAN OF THE JOINT CHIEFS OF STAFF, INSTR. 2300.01D, INTERNATIONAL AGREEMENTS (5 Oct. 2007; current as of 27 Sep. 2013).
11. U.S. DEP'T OF ARMY, REG. 27-50 STATUS OF FORCES POLICIES, PROCEDURES, AND INFORMATION (15 Dec. 1989).
12. U.S. DEP'T OF ARMY, REG. 550-51, INTERNATIONAL AGREEMENTS (2 May 2008).
13. U.S. DEP'T OF AIR FORCE, POLICY DIR. 51-7, INTERNATIONAL LAW (5 Feb. 2009; certified current 27 Mar. 2012).
14. U.S. DEP'T OF AIR FORCE, INSTR. 51-701, NEGOTIATING, CONCLUDING, REPORTING, AND MAINTAINING INTERNATIONAL AGREEMENTS (16 Aug. 2011).
15. U.S. DEP'T OF AIR FORCE, INSTR. 51-703, FOREIGN CRIMINAL JURISDICTION (6 May 1994; supplemented 22 Nov. 2002).
16. U.S. DEP'T OF AIR FORCE, INSTR. 51-705, JURISDICTION OF SERVICE COURTS OF FRIENDLY FOREIGN FORCES IN THE UNITED STATES (5 Feb. 2009).
17. U.S. DEP'T OF AIR FORCE, J. INSTR. 51-706, STATUS OF FORCES POLICIES, PROCEDURES, AND INFORMATION (15 Dec. 1989; supplemented 6 Oct. 1997; certified current 21 Dec. 2010).
18. U.S. DEP'T OF NAVY, OFF. OF THE CHIEF OF NAVAL OPERATIONS INSTR. 5710.25A, INTERNATIONAL AGREEMENTS (13 Aug. 2007).
19. U.S. DEP'T OF NAVY, SEC'Y OF THE NAVY INSTR. 5710.25B, INTERNATIONAL AGREEMENTS (23 Dec. 2005).

I. INTRODUCTION

A. This chapter does not attempt to discuss specific international agreements that may affect military operations. There are simply too many agreements, and numerous agreements are classified. Instead, this chapter focuses on the role of the judge advocate (JA) in this area. The operational JA may face the following tasks relating to international agreements: determining the existence of an agreement, assisting in drafting a request for authority to negotiate and conclude an agreement, assisting in the negotiation and conclusion of an agreement, and implementing or ensuring compliance with an agreement.

B. Under domestic law, the United States divides international agreements into two general categories (1) "Treaties" and (2) "International Agreements Other Than Treaties". "Treaties" are international agreements whose entry into force for the United States takes place only after two-thirds of Senate gives advice and consent and the President submits the required ratification documents. "International Agreements Other Than Treaties" includes agreements that *may* enter into force upon signature and do not require the advice and consent of the Senate. The

executive branch has the constitutional authority to negotiate and conclude an international agreement under one of three bases: (1) an existing treaty authorizes the agreement; (2) legislation authorizes the agreement; or (3) the agreement falls under the President's constitutional authority ("sole executive agreements").[1]

II. DETERMINING THE EXISTENCE OF AN INTERNATIONAL AGREEMENT

A. Determining the existence of an international agreement is more challenging than one might think. Unfortunately, a JA must comb multiple databases and conduct extensive research to determine (1) whether an agreement exists and (2) how to locate the actual text of the agreement. The sources discussed below may help.

B. The U.S. Department of State (DoS) is the domestic repository for all international agreements to which the United States is a party.[2] Federal law (1 U.S.C. § 112a) requires DoS to publish annually a document entitled *Treaties in Force* (TIF), which contains a list of all treaties and other international agreements in force as of 1 January of that year.[3] Note, however, that TIF is merely a list of treaties and other international agreements. It does not include the full text of each agreement listed in it. Practitioners must locate the full text of an agreement listed in TIF using the citation(s) found within the TIF entry for each agreement.[4] The TIF may include citations to the United States Treaties and Other International Agreements (UST),[5] the Treaties and Other International Agreements (TIAS) series,[6] or the United Nations Treaty Series (UNTS).[7] However, many agreements in the TIF have no citations. A lack of a citation indicates that the agreement is not yet published in one of the treaty series or it may have an "NP" cite which indicates that the Department of State determined that it will not publish that particular agreement. Also keep in mind that the TIF and TIAS are unclassified series and do not contain classified agreements. Consequently, while TIF and the TIAS are a good place to start when looking for an international agreement, they often fail to offer a complete solution. Here is an excerpt from a TIF:[8]

TIMOR-LESTE

DEFENSE

Agreement regarding grants under the Foreign Assistance Act of 1961, as amended, and the furnishing of defense articles, related training to include training related to defense articles under the International Military and Education Training program, and other defense services from the United States of America to the Government of the Democratic Republic of East Timor.
Exchange of notes at Dili July 8 and 10, 2002.
Entered into force July 10, 2002.
TIAS 02-710.

Status of forces agreement.
Signed at Washington October 1, 2002.
Entered into force October 1, 2002.
TIAS 02-1001.

DEFENSE

Agreement concerning the loan of U.S. Government equipment and provision of logistic support services to the Economic Community of West African States (ECOWAS) and its members in support of the ECOFORCE peacekeeping operation in Cote d'Ivoire.
Exchange of notes at Lome January 22 and February 5, 2003.
Entered into force February 5, 2003.
TIAS 03-205.

Agreement regarding grants under the Foreign Assistance Act of 1961, as amended, or successor legislation, and the furnishing of defense articles, defense services and related training, including pursuant to the United States International Military Education and Training (IMET) Program.

INTERNATIONAL CRIMINAL COURT

Agreement regarding the surrender of persons to the International Criminal Court.
Signed at Lome June 13, 2003.
Entered into force January 15, 2004.
TIAS 04-115.

JUDICIAL ASSISTANCE

Procedures for mutual assistance in connection with matters relating to the Gulfstream American Corporation, formerly known as Grumman American Aviation Corporation.
Signed at Washington January 30, 1979.
Entered into force January 30, 1979.
30 UST 3477; TIAS 9401; 1180 UNTS 199.

PEACE CORPS

Agreement relating to the establishment of a

C. Within DoS, the Country Desk responsible for the country to which the unit is set to deploy may be able to help. You can find a complete list of phone numbers for each Country Office at http://www.state.gov/documents/organization/115480.pdf. Since these offices are located in Washington, D.C., they are usually easily accessible. Somewhat less accessible, but equally knowledgeable, is the Military Group for the

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[1] Volume 11, Foreign Affairs Manual, Chapter 720, *Negotiation and Conclusion*. (Sep. 25, 2006).
[2] 1 U.S.C. § 112a.
[3] The U.S. Department of State also maintains an online chronological list of U.S. treaty actions. *Treaty Actions*, U.S. DEP'T OF STATE, http://www.state.gov/s/l/treaty/c3428.htm (last visited Apr. 28, 2014).
[4] A good place to start looking for the official text of an international agreement to which the U.S. is a party is the Department of State website. *Texts of International Agreements to which the US is a Party (TIAS)*, U.S. DEP'T OF STATE, http://www.state.gov/s/l/treaty/tias/index.htm (last visited Apr. 28, 2014).
[5] The United States Treaties and Other International Agreements (UST) is a bound compilation that was published between 1950-1982 and is since discontinued. We are not aware of an on-line repository for the UST. You can find old publications of the UST in federal depositary libraries, U.S. DEP'T OF STATE, https://www.state.gov/s/l/treaty/text/index.html (last visited Apr. 28, 2014).
[6] *See Treaties and Other International Acts Series (TIAS)*, U.S. DEP'T OF STATE, http://www.state.gov/s/l/treaty/tias/index.htm (last visited Apr. 28, 2014).
[7] *See United Nations Treaty Collection*, UNITED NATIONS, https://treaties.un.org/Home.aspx (last visited Mar. 28, 2014).
[8] U.S. DEP'T OF STATE, TREATIES IN FORCE (2013), *available at* http://www.state.gov/s/l/treaty/tif/index.htm.

country. A listing for these overseas phone numbers can be found at http://www.usembassy.gov. Either the Country Desk or the Military Group should have the most current information about any agreements with "their" country.

D. Within the DoD, JAs have a number of other options. First, start with your operational chain of command, and work your way to the legal office for the combatant command covering the country at issue. Combatant commands are responsible for maintaining a list of agreements with countries within their area of responsibility. These lists often are posted on the classified SIPRNET. Other options are the International and Operational Law Divisions of each service. For example, the Army Office of the Judge Advocate General, International & Operational Law Division, has an online document library that contains many unclassified international agreements.[9] You may also find international agreements elsewhere on the Internet, such as on the United Nations or NATO websites.

III. AUTHORITIES

A. General. An international agreement binds the U.S. under international law. The President has Constitutional powers that authorize the executive branch to negotiate and conclude certain international agreements. In comparison, Congress has the power to provide advice and consent to the President prior to the ratification of treaties and the power to regulate international agreements through legislation. Accordingly, any power the Department of Defense has to negotiate or conclude international agreements is delegated from the President's executive power or provided by legislation from Congress. Judge advocates should look for a specific grant of authority authorizing the Department of Defense to enter into an international agreement.

B. Delegation of Authority.

1. Most international agreements related to DoD interests flow from authority possessed by the Secretary of Defense (SECDEF) through executive branch delegation or direct Congressional authorization. For example, 22 U.S.C. § 2770a, Exchange of Training and Related 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 13637, the President delegated his agreement authority under 22 U.S.C. § 2770a to the SECDEF.[10] Cross-Servicing Agreements pursuant to 10 U.S.C. § 2342 authorizes SECDEF to enter into certain agreements with specified countries for logistics support, supplies, and services.

2. In DoDD 5530.3, SECDEF delegated much of his power to enter into international agreements to the Under Secretary of Defense for Policy (USD(P)), and delegated specific powers further. Matters that are predominately the concern of a single Service are delegated to the Service Secretaries. SECDEF delegated agreements concerning the operational command of joint forces to the Chairman, Joint Chiefs of Staff (CJCS). Additional special authorities are delegated to various defense agencies.

3. In CJCSI 2300.01D, CJCS delegated much of his authority in this area to the Combatant Commanders. Re-delegation to subordinate commanders is permitted and as directed by a Combatant Commander's regulation. Similarly, the Service Secretaries have published regulations or instructions that delegate some portion of the Secretaries' authority.

4. The Department of Defense retains the authority to negotiate agreements which have "policy significance". The term "policy significance" is interpreted very broadly. The DoDD 5530.3 provides the following non-inclusive list of examples of agreements which are considered to have "policy significance".

> 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 USD(P) before any negotiation thereof, and again before they are concluded.
>
> 8.4.1. Agreements "having policy significance" include those agreements that:
>
> 8.4.1.1. Specify national disclosure, technology-sharing or work-sharing arrangements, co-production of military equipment or offset commitments as part of an agreement for

[9] The Office of the Judge Advocate General, International & Operational Law Division Document Library, *available* at https://www.jagcnet2.army.mil/Sites/io.nsf/homeLibrary.xsp (last visited May 1, 2014).
[10] Exec. Order No. 13,637, 78 Fed. Reg. 16, 127 (Mar. 8, 2013), *available at* https://www.federalregister.gov/articles/2013/03/13/2013-05967/administration-of-reformed-export-controls (last visited Apr.28, 2014).

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 that would increase U.S. obligations with respect to the defense of a foreign government or area.

5. In general, *delegations are to be construed narrowly*. Generally, judge advocates should refer questions about whether an authority has been delegated through their technical chain to the higher authority for resolution.

C. Seeking Authority: The Circular 175 Procedure[11].

1. Department of Defense strictly prohibits personnel from negotiating or concluding an international agreement without the prior written approval of the responsible DoD official.[12] All approvals must be in writing.

2. There is a specific procedure for requesting authority to negotiate or conclude an international agreement. The DoD component will send the request to the USD(P). The request must include a draft of the proposed agreement, a legal memorandum, and a fiscal memorandum. The legal memorandum must trace the Constitutional or statutory authority to execute each of the proposed obligations and address any other legal considerations.[13] When USD(P) does not have the blanket authority to negotiate and conclude an agreement, the Department of the Defense will submit a Circular 175 packet to the Department of State, Treaties Affairs Office in accordance with the procedures set forth in Volume 11, Foreign Affairs Manual, Chapter 720.

D. Coordination. In addition to the approval requirements summarized above, Congress created coordinating and reporting requirements through the Case-Zablocki Act.[14] Section (c) of that Act 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 published procedures to implement the Case-Zablocki Act in 22 C.F.R. Part 181[15] and Volume 11, Foreign Affairs Manual, Chapter 720 (11 FAM 720). 22 C.F.R. Part 181.4(a) specifically deals with the consultation requirement. It initially refers the reader to Circular 175 procedures, but those procedures are largely digested in the remainder of Part 181.4. Unless otherwise delegated within DoDD 5530.3, USD(P) has the responsibility to coordinate with DoS. Such coordination is generally not below the Secretariat or Combatant Commander level.

IV. NEGOTIATING AND CONCLUDING INTERNATIONAL AGREEMENTS

A. Although judge advocates may be involved in the negotiation and conclusion of an international agreement, it is likely that the State Department will lead the negotiation team. Accordingly, this section is rather summary, but still important for the following reasons:

1. The international agreement negotiations process is governed by very detailed rules that require significant interagency coordination.

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[11] The term "Circular 175 procedures" refers to Department of State Circular No. 175, Dec. 13, 1955 governing the proper process for concluding international agreements that bind the United States government. "Circular 175" or "C175" refers to the State Department's procedures for prior coordination and approval of treaties and other international agreements. Although the current procedures have been codified at 22 C.F.R. 181.4 and 11 FAM 720, the "C175" reference remains as the descriptor for those procedures. *See generally Circular 175 Procedure,* U.S. DEP'T OF STATE, http://www.state.gov/s/l/treaty/index.htm (last visited Apr. 29, 2014).

[12] U.S. DEP'T OF DEFENSE, DIRECTIVE 5530.3, INTERNATIONAL AGREEMENTS para. 8.2; 8.4 (11 Jun. 1987) [hereinafter DODD 5530.3].

[13] *Id.* at para. 9.3.

[14] 1 U.S.C. § 112b, reprinted as enclosure 4 to DoDD 5530.3.

[15] Reprinted as enclosure 3 to DoDD 5530.3.

2. It is essential for judge advocates to know what constitutes an international agreement and what constitutes the "negotiation" or "conclusion" of an international agreement to help commanders and staff avoid inadvertently action without the proper authority.

B. The elements of an international agreement are: (1) an agreement with one or more foreign government (including their agencies, instrumentalities, or political subdivisions) or international organizations; (2) is signed or agreed to by representatives of any Department or Agency within the U.S. Government; and (3) signifies the intention of the parties to be bound under international law. Generally, if a document satisfies the requirements listed above, it is an international agreement. Oral agreements are also international agreements; however they must be subsequently reduced to writing. Similarly, the actual status or position of the signer is not as important as the representation that the signer speaks for his government.

C. The title or form of the agreement is of little consequence. International agreements may take the form of a memorandum of understanding or memorandum of agreement, an exchange of letters, an exchange of diplomatic notes ("Dip Notes"), a technical arrangement, a protocol, a *note verbale*, an *aide memoire*, etc. Forms that usually are not regarded as international agreements include contracts made under the FAR, credit arrangements, standardization agreements (STANAG), leases, agreements solely to establish administrative procedures, and Foreign Military Sales (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 generally not an international agreement, while a "lease" that includes status provisions would likely rise to the level of an international agreement. Form is not as important as substance.

D. Negotiation.

1. It is important for judge advocates and their commands to understand that the negotiation of an international agreement cannot begin without first completing the proper approval and coordination processes described above. Consequently, it is also important for judge advocates and their commands to understand what constitutes negotiation. DoDD 5530.3 defines "negotiation" as:

> Communication by any means of a position or an offer, on behalf of the United States, the Department of Defense, or on behalf of any officer or organizational element thereof, to an agent or representative of a foreign government, including an agency, instrumentality, or political subdivision thereof, or of an international organization, in such detail that the acceptance in substance of such position or offer would result in an international agreement. The term "negotiation" includes any such communication even though conditioned on later approval by the responsible authority. The term "negotiation" also includes provision of a draft agreement or other document, the acceptance of which would constitute an agreement, as well as discussions concerning any U.S. or foreign government or international organization draft document whether or not titled "agreement." The term "negotiation" does not include preliminary or exploratory discussions or routine meetings where no draft documents are discussed so long as such discussions or meetings are conducted with the understanding that the views communicated do not and shall not bind or commit any side, legally or otherwise.[16]

2. If the proposed agreement has been approved and coordinated, the authorized official may begin negotiating the agreement with foreign authorities. At this point, the process is much like negotiating any contract. The objectives of the parties, the relative strengths of their positions, and bargaining skills all play a part. Once the parties finalize the negotiations, the DoD official may not sign or otherwise concluded the agreement unless they received the specific approval to do so. The official can request the approval to conclude the agreement through the same procedures discussed above in Section III, unless the initial written approval included the authority to both negotiate and conclude the agreement.

E. Reporting Requirements.

[16] DODD 5530.3, *supra* note 12 at encl. 2, para. E2.1.2.

1. Once an international agreement is concluded, The Department of Defense must comply with procedural reporting requirements under the Case-Zablocki Act (as implemented in 22 C.F.R. Part 181). The Case-Zablocki Act requires an agency to transmit the text of a concluded international agreement to the Office of the Assistant Legal Adviser for Treaty Affairs as soon as possible, but no later than twenty days after the agreement was signed.[17]

2. To comply with the Case-Zablocki Act, DoDD 5530.3 requires the DoD component responsible for the agreement to send the original or a certified copy to the Assistant Legal Adviser for Treaty Affairs and to the DoD General Counsel Office no later than 20 days after the agreement enters into force. If the agreement is concluded using delegated authority, the delegating authority must also receive a copy of the agreement.[18] For example, CJCSI 2300.01D requires the concluding authority to forward a copy of the agreement to the Secretary, Joint Staff. On the other hand, if the agreement was negotiated and concluded using delegated authority from the Secretary of the Army, the organizational element is required to forward four copies to HQDA (DAJA-IO) within ten days of signing the agreement.[19] Judge advocates should also consult applicable Combatant Commander regulations to ensure compliance with any additional reporting requirements.

IV. IMPLEMENTING & ENSURING COMPLIANCE WITH AN INTERNATIONAL AGREEMENT

A. The judge advocate on a staff can expect to be the principal player when implementing or ensuring compliance with international agreements. Some areas, such as foreign criminal jurisdiction (FCJ), will fall within the JA's ambit anyway. Others, such as logistics agreements, are handled by experts in other staff sections with JA support. In areas in which the United States has been exercising an agreement for a long time, such as the NATO Acquisition and Cross-Servicing Agreement, the subject-matter experts will require little legal support. Infrequently-used or newly-concluded agreements may require substantial JA involvement.

B. Common subjects of international agreements include: SOFAs, logistics support, pre-positioning, cryptological support, personnel exchange programs, and defense assistance programs (to include security assistance). Deploying judge advocates will most frequently reference SOFAs, or other agreements establishing jurisdictional protections.[20] However, judge advocates will also find logistics support agreements, such as acquisition and cross-servicing agreements (ACSAs) of critical importance.

1. *SOFAs.*

a. *Historical Background.* There is very little historical international law governing the stationing of friendly forces on a host nation's territory. Most frequently the countries applied the law of the flag. Since the friendly forces were transiting a territory with host nation permission, it was understood that the nation of the visiting forces retained jurisdiction over its members. After World War II there was a large increase in the number of forces stationed in friendly countries. Accordingly, countries had an increased need for more formal agreements to address the anticipated legal issues and to clarify the relationships between the countries and their forces. Today SOFAs vary in format and length. They range from complex multi-lateral agreements, such as the NATO SOFA and its accompanying country supplements, to very limited, smaller-scale Diplomatic Notes. In addition to criminal jurisdiction, SOFAs also typically cover a large variety of topics.[21]

b. *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

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[17] *Id.* at encl. 2, para. E4.a.1; 10 U.S.C. § 112b (a).
[18] DoDD 5530.3, *supra* note 12, at para. 7.2.
[19] U.S. DEP'T OF THE ARMY, REG. 550-51, INTERNATIONAL AGREEMENTS para. 9.a. (2 May 2008) [hereinafter AR 550-51].
[20] For example, JAs deploying to the Office of Security Cooperation – Iraq (OSC-I) in Iraq, or to a unit in Afghanistan should be aware of the status of forces arrangements provided in those respective countries. In both countries, through different arrangements, American servicemembers enjoy complete immunity from foreign criminal jurisdiction. The United States Department of Defense General Counsel's Office understands servicemembers deployed to the OSC-I receive Administrative & Techinical Status (A&T Status), which is covered *infra* Part IV.B.1.d.(3). *See* Memorandum from Jeh Charles Johnson, Dep't of Defense Gen. Counsel, for The Record on OSC-I Personnel in Iraq (Dec. 31, 2011) (on file with the International and Operational Law Department, TJAGLCS).
[21] Standard SOFA provisions typically address the following topics: entry and exit, import and export, taxes, licenses or permits, jurisdiction, claims, property ownership, use of facilities and areas, positioning and storage of defense equipment, movement of vehicles, vessels, and aircraft, contracting procedures, services and communications, carrying weapons and wearing uniforms, official and military vehicles, support activities services, currency and foreign exchange.

state (the host nation). Therefore, in the absence of an agreement, personnel of the sending state (the state sending forces into the host nation) are subject to the criminal jurisdiction of the receiving state. It is DoD's policy to protect to the maximum extent possible, the rights of United States personnel who may be subject to criminal trial by foreign courts and imprisonment in foreign prisons.[22]

c. *Exception.* Combat deployments are an exception to the general rule that unless waived, the receiving state has jurisdiction over personnel within its territory. U.S. forces are generally subject to exclusive U.S. jurisdiction during a combat deployment. As the exigencies of combat subside, however, the primary right to exercise criminal jurisdiction may revert to the receiving state or fall under another jurisdictional structure pursuant to a negotiated agreement.

d. *Types of Criminal Jurisdiction Arrangements.* Beyond a complete waiver of jurisdiction by the receiving state, there are four possible types of arrangements that a deploying judge advocate should understand: Administrative and Technical Status (A&T status); the NATO formula of Shared Jurisdiction; Visiting Forces Acts; and the prospect of deploying without any status protections.

(1) Administrative and Technical Status (A&T Status). Some receiving states may consent to granting U.S. personnel status protections equivalent to those given to the administrative and technical staff of the U.S. embassy, as defined in the Vienna Convention on Diplomatic Relations. This is often referred to as "A&T status". In many cases, the United States can obtain such status by incorporating through reference the status protections already granted to U.S. military personnel under another agreement. For example, the United States may seek to expand a defense assistance agreement that includes personnel assigned to the U.S. embassy or to a Military Assistance Advisory Group (MAAG). A&T status is rarely granted for large-scale and/or long-term deployments.[23] The receiving state typically recognizes the A&T status of the deploying forces through an exchange of diplomatic notes or the like.

(2) Shared Jurisdiction. Article VII of the NATO SOFA provides a scheme of shared jurisdiction between the receiving state and the sending state. This scheme is the model for many other SOFAs as well. All examples below assume a U.S. Soldier committing an offense while stationed in Germany.

(a) *Exclusive Jurisdiction in the Sending State*. Conduct that constitutes an offense under the law of the sending state, but **not** the receiving state, is tried exclusively by the sending state. For example, dereliction of duty is an offense under the UCMJ, but not under German law, so exclusive jurisdiction rests with the United States.

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[22] U.S. DEP'T OF DEFENSE, DIR. 5525.1, STATUS OF FORCES POLICY AND INFORMATION, para. 3 (7 Aug. 1979; incorporating through change 2, 2 July 1997; certified current as of 21 Nov. 2003).

[23] A significant exception to this is the case of U.S. forces in Afghanistan under OEF authority. In 2002, the U.S. Government and the Islamic Transitional Government of Afghanistan (ITGA) reached an agreement on the status of U.S. military and DoD civilians present in Afghanistan. *See* R. CHUCK MASON, CONG. RESEARCH SERV. RL34531, STATUS OF FORCES AGREEMENT (SOFA): WHAT IS IT, AND HOW HAS IT BEEN UTILIZED?, 7-10 (Mar. 15, 2012), *available at* http://www.fas.org/sgp/crs/natsec/RL34531.pdf. The agreement covers "cooperative efforts in response to terrorism, humanitarian and civic assistance, military training and exercises, and other activities," and accorded designated U.S. personnel "a status equivalent to that accorded to the administrative and technical staff" of the U.S. Embassy under the Vienna Convention on Diplomatic Relations of 1961. *Id.* Consequently, such U.S. personnel are immune from Afghan criminal prosecutions, and are also immune from Afghan civil and administrative jurisdiction for acts conducted in the line of duty (note that the agreement does not appear to immunize contractors). *Id.* The agreement explicitly authorizes the U.S. government to exercise criminal jurisdiction over designated U.S. personnel, and prohibits the government of Afghanistan from surrendering such personnel to the custody of another state, international tribunal, or any other entity without consent of the U.S. government. *Id.* The fully elected Government of the Islamic Republic of Afghanistan has replaced the ITGA and has assumed its legal obligations under this agreement, which remains in force. *Id.* American forces in Afghanistan under International Security Assistance Force (ISAF) authority fall under a different arrangement. The U.N. Security Council-authorized ISAF has its own agreement with the Afghan government. That arrangement is detailed in a Military Technical Agreement annex entitled "Arrangements Regarding the Status of the International Security Assistance Force." *See* MASON, at n. 52. The agreement subjects "all ISAF and supporting personnel" to the "exclusive jurisdiction of their respective national elements for criminal or disciplinary matters," and immunizes such personnel "from arrest or detention by Afghan authorities." *Id.* Furthermore, Afghan authorities may not turn over any such designated ISAF personnel "to any international tribunal or any other entity or State without the express consent of the contributing nation." *Id.*

(b) *Exclusive Jurisdiction in the Receiving State*. Conduct that constitutes an offense under the law of the receiving state, but **not** the sending state, is tried exclusively by the receiving state. For example, a given traffic offense may violate German law, but not U.S. law, so Germany has exclusive jurisdiction.

(c) *Concurrent Jurisdiction*. For conduct that constitutes an offense under the laws of both the receiving and sending states, there is concurrent jurisdiction, with primary jurisdiction assigned to one party:

(i) Primary Concurrent Jurisdiction in the Sending State. The sending state has primary jurisdiction in two instances. First, the sending state has primary jurisdictions when 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 U.S. Soldier assaults another U.S. Soldier, it violates both U.S. and German law, but primary jurisdiction rests with the United States because the victim is from the sending state. Second, the sending state has primary jurisdictions when the acts or omissions are committed in the performance of official duty. For example, if a U.S. Soldier hits and kills a pedestrian while driving to another post for a meeting, he or she could be charged with a form of homicide by both the United States and Germany. However, since the offense was committed while in the performance of official duty, the United States retains primary jurisdiction.

(ii) Primary Concurrent Jurisdiction in the Receiving State. In all other cases, primary jurisdiction rests with the receiving state. However, it is possible for the receiving state to waive its primary jurisdiction in favor of the sending state, and they often do. The NATO SOFA provides that "sympathetic considerations" shall be given to requests to waive jurisdiction. For example, if a U.S. Soldier assaults a German national, it violates both U.S. and German law, and Germany has primary jurisdiction. Upon request, Germany may waive its jurisdiction, in which case the U.S. may court-martial the Soldier. Supplemental agreements may provide further detail regarding a waiver of jurisdiction.

(3) Visiting Forces Acts. If the United States does not have an agreement with a host nation, some nations still extend protections to visiting forces through domestic statutes commonly called Visiting Forces Acts. Commonwealth nations are those most likely to have Visiting Forces Acts (e.g., Jamaica and Belize). In general, these statutes provide a two-part test. First, Visiting Forces Acts require that the domestic law of the receiving state list the sending state in accordance with its domestic law. Second, the jurisdictional methodology is one of two types: a jurisdictional model similar to the NATO SOFA, or protections equivalent to A&T status. In any case, it is essential that the judge advocate acquire a copy of the host nation's Visiting Forces Act before deploying into that country.

(4) No Protection. U.S. forces may also deploy into a country where they are completely subject to the host nation's jurisdiction. While it is U.S. policy to maximize U.S. jurisdiction over its personnel, jurisdictional protections may not be feasible. However, if a Solider allegedly commits a crime in such a country, diplomatic negotiations may successfully secure a more favorable treatment for the servicemember. Judge advocates should remember that a lack of status protections is merely a planning factor for commanders, not a legal objection.

e. *The United States as a Receiving State*.

(1) Traditionally, the SOFA issues judge advocates face involve U.S. servicemembers deployed to other countries. In the post-Cold War era, however, foreign forces began coming to the U.S. for training on a routine basis. In fact, some NATO nations have units permanently stationed in the United States.[24] The status of these foreign forces in the United States depends on the agreements we have with the sending state. Almost all U.S. SOFAs are non-reciprocal in nature. For example, the Korean SOFA only applies to U.S. armed forces in the Republic of Korea (ROK). Therefore, if ROK soldiers are present in the United States, exclusive jurisdiction would rest with the United States. On the other hand, the United States may have entered into a SOFA that is reciprocal, such as the NATO SOFA and the Partnership for Peace (PFP) SOFA.

(2) There are a number of complicated issues in the area of jurisdiction over foreign forces in the United States. Based on our federal system, if the international agreement under which foreign forces are seeking protection is a treaty, the provisions of the agreement are the supreme law of the land and are binding on both the Federal and State jurisdictions. Conversely, international agreements that are not treaties (executive agreements) are

[24] For example, German Tornado Fighters are permanently assigned at Holloman Air Force Base, New Mexico. *See, e.g.*, David Burge, *German Air Force operations leaving Fort Bliss for Holloman*, Alamogordo Daily News, Mar. 11, 2013, *available at* http://www.alamogordonews.com/news/ci_22768935/german-air-force-operations-leaving-fort-bliss-holloman.

binding on the Federal government, but not generally on the states. Absent additional legislation, a state prosecutor is free to charge a visiting service member for a crime under state law, regardless of the provisions of the executive agreement. State prosecutors are typically willing to defer a prosecution as a matter of national interest, but it is a delicate diplomatic situation. Judge advocates must also become familiar with the option of a foreign force to impose discipline on members of their force within the United States. Just as the United States conducts courts-martial in host nation countries, reciprocal countries may wish to do the same in the United States. DoDI 5525.03 addresses some of these issues.

f. *Exercise of FCJ by the Receiving State*. If U.S. military personnel are subjected to FCJ under any of situations described above, the United States must take steps to ensure that the servicemember receives a fair trial. Detailed provisions are set out in DoDD 5525.1 and implementing service regulations.

g. *United Nations Missions*. Personnel participating in a United Nations (UN) mission typically will have status protections. In some cases, the receiving state may grant UN forces "expert on mission" status. This refers to Article VI of the Convention on the Privileges and Immunities of the United Nations, and grants complete criminal immunity. Alternatively, the UN may negotiate a Status of Mission Agreement (SOMA). The UN "Model" SOMA provides the sending state exclusive criminal jurisdiction.

h. *Article 98 Agreements and the International Criminal Court (ICC).* After the entry into force of the Rome Statute of the ICC in July 2002, the U.S. began negotiating Article 98 Agreements with other nations.[25] These agreements are so named after Article 98 of the ICC Statute, which provides:

(1) The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.

(2) The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.[26]

The United States negotiated and concluded many Article 98 Agreements to protect U.S. servicemembers and other U.S. nationals from being handed over to the ICC. Article 98-type language may be integrated into a SOFA, diplomatic note, etc. to temporarily protect U.S. troops. However, if a SOFA or other international agreement grants the United States exclusive or primary jurisdiction for offenses committed in the course of official duties, U.S. service members are protected from ICC jurisdiction. For example, if the United States has a SOFA with country X that grants A&T Status to U.S. Soldiers (but no Article 98 Agreement exists), the host nation is required to recognize the United States' jurisdiction over the offense. Well before deployment, judge advocates should check with their technical chain of command regarding the existence of any applicable Article 98 Agreements and the impact of existing SOFAs on potential ICC jurisdiction.

i. *Claims and Civil Liability*. Claims for damages almost always follow deployments of U.S. forces. Absent an agreement to the contrary (or a combat claims exclusion), the United States is normally obligated to pay for damages caused by our forces. It is generally desirable for state parties to waive claims against each other. In addition, it is not uncommon for a receiving state to agree to pay third party claims caused by U.S. forces in the performance of official duties, and release Soldiers from any form of civil liability resulting from such acts. For third party claims not caused in the performance of official duties, the United States may typically pay at its discretion such claims in accordance with U.S. laws and regulations, i.e., the Foreign Claims Act[27] (FCA). However, the Soldier may remain subject to host nation civil jurisdiction, which can be mitigated by payments made under the FCA.

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[25] Although it is not an official U.S. government resource reflective of official U.S. policy, the Georgetown Law Library maintains a useful online guide to Article 98 agreements. Georgetown Law Library, *International Criminal Court - Article 98 Agreements Research Guide*, http://www.ll.georgetown.edu/guides/article_98.cfm (current as of Dec. 2009) (last visited Apr. 29, 2014). Official U.S. status regarding an Article 98 agreement is reflected in DoS's *Treaties in Force* and *Treaty Actions*. *See supra* Part II.

[26] Rome Statute of the International Criminal Court, art. 98, 17 July 1998, *available at* http://www.un.org/law/icc/.

[27] 10 U.S.C. § 2734-2736. Keep in mind that the payment of claims under the FCA is based not on legal liability, but on the maintenance of good foreign relations.

j. *Force Protection/Use of Deadly Force.* The general rule of international law is that a sovereign is responsible for the security of persons within its territory. This does not, however, relieve the U.S. commander of his or her responsibility for the safety (i.e., self-defense) of the unit. As part of pre-deployment preparation, the judge advocate should determine whether the applicable agreement includes provisions regarding force protection and review the applicable rules of engagement. While the host nation is generally responsible for the security of persons in its territory, it is common for the United States to be responsible for security internal to the areas and facilities it uses. For example, Article III of the Korean SOFA provides that, in the event of an emergency, the U.S. armed forces shall be authorized to take such measures *in the vicinity of* its facilities and areas as may be necessary to provide for their safeguarding and control.[28] The SOFA may also include a provision allowing military police the authority to apprehend U.S. personnel off the installation.

k. *Entry/Exit Requirements.* Passports and visas are the normal instruments for identifying a person's nationality and verifying that the receiving state authorized their entry. But the issuance of passports and visa to large numbers of military personnel is expensive, time consuming, and often impractical in an emergency. The time it takes to process visa requests has a significant impact on operational flexibility. As a result, most SOFAs authorize U.S. personnel to enter and exit the territory of the receiving state with their military identification cards and orders, or provide other expedited procedures.

l. *Customs and Taxes.* While U.S. forces must pay for goods and services requested and received, sovereigns generally do not tax other sovereigns. U.S. forces are normally exempt from paying host nation customs, duties, and taxes on goods and services imported to or acquired in the territory of the receiving state for official use. Likewise, receiving states often exempt Soldiers from paying customs or duties for personal items.

m. *Contracting.* SOFAs will also typically provide U.S. forces the authority to contract on the local economy for procurement of supplies and services which are not available from the host nation government. As noted above, the SOFA should also ideally exempt goods and services brought to or acquired in the host country from import duties, taxes, and other fees. This provision is designed to allow for the local purchase of some or all items needed, but does not alter or obviate other U.S. fiscal and contracting legal requirements.

n. *Vehicle Registration/Insurance/Drivers' Licenses.* SOFAs or other agreements should exempt the U.S. from third party liability insurance requirements and any requirements for U.S. drivers to receive a license under the law of the receiving state.

(1) The U.S. Government is "self-insured." That is, it bears the financial burden of risks of claims for damages, and the FCA provides specific authority for the payment of claims. As a result, negotiation of any agreement should emphasize that the United States does not need to insure its vehicles.

(2) Although official vehicles may require marking for identification purposes, receiving states should not require the United States to register its vehicles. In many countries, vehicle registration is expensive. Privately-owned vehicles, however, may be required to register with the receiving state upon payment of only nominal fees to cover the actual costs of administration.

(3) A provision for U.S. personnel to drive official U.S. vehicles with official U.S. drivers' licenses expedites the conduct of official business. In the alternative to honoring U.S. drivers' licenses, receiving states may agree to issue a license based on the possession of a valid U.S. license without requiring additional examination.

o. *Communications Support.* When U.S. forces deploy, commanders rely heavily upon communications to exercise command and control. Absent an agreement to the contrary, host nation law governs the commander's use of frequencies within the electro-magnetic spectrum. This includes not only tactical communications, but also commercial radio and television airwaves. This can greatly impact operations, and should be addressed early in the planning process.

2. Logistics Agreements.

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[28] *See* Agreed Minutes, Agreed Understandings, and Exchange of Letters, Facilities and Areas and the Status of United States Armed Forces in Korea, art. III, 17 U.S.T. 1677; T.I.A.S. 6127; 674 U.N.T.S. 163. Signed at Seoul July 9, 1966. Entered into force Feb. 9, 1967. *available at* http://www.usfk.mil/usfk/Uploads/130/US-ROKStatusofForcesAgreement_1966-67.pdf (last visited Apr. 30, 2014).

a. *Pre-Positioning of Materiel.* If the U.S. needs to pre-position equipment or materiel in a foreign country, an international agreement should contain the following provisions:

(1) Host nation permission for the United States to store stocks there.

(2) Unimpeded United States access to those stocks.

(3) Right of removal, without restriction on subsequent use.

(4) Adequate security for the stocks.

(5) The host nation must promise not to convert the stocks to its own use, nor to allow any third party to do so (i.e., legal title remains vested in the United States).

(6) Appropriate status protections for U.S. personnel associated with storage, maintenance, or removal of the stocks.

b. *Negotiation.* In some cases, the DoD General Counsel has allowed some leeway in negotiating pre-positioning agreements, provided that host government permission for U.S. storage in its territory and unequivocal acknowledgment of the U.S. right of removal are explicit. "Legal title" need not be addressed *per se*, if it is clear the host government has no ownership rights in the stocks, only custodial interests, and that pre-positioned stocks are solely for U.S. use. "Access" to the pre-positioned stocks need not be addressed explicitly, unless U.S. access is necessary to safeguard them. There can be no express restrictions on U.S. use. Prior "consultation" for U.S. removal of pre-positioned stocks is not favored, and prior "approval" is not acceptable. "Conversion" need not be specifically addressed, if it is clear that the pre-positioned stocks' sole purpose is to meet U.S. requirements. "Security" must be specifically addressed only when stores are at risk due to their value. "Privileges and immunities" are required only when it is necessary for U.S. personnel to spend significant amounts of time in the host country to administer, maintain, guard, or remove the stocks.

c. *Host Nation Support.* When a unit deploys overseas, some of its logistical requirements may be provided by the host nation. If so, it is desirable to have an international agreement specifying the material the host nation will provide and on what conditions, such as whether it is provided on a reimbursable basis.

d. *ACSA.* Chapter 138 of Subtitle A of Title 10, U.S.C. also provides authority for government-to-government ACSAs for mutual logistics support. Under 10 U.S.C. § 2341-2350, U.S. forces and those of an eligible country[29] may provide logistics support, supplies, and services on a reciprocal basis. Such support, supplies, and services are reimbursed through: replacement in kind; trade of support, supplies, or services of equal value; or cash. There are limits on the total amount of liabilities the United States may accrue under this subchapter, except during a period of active hostilities.[30] In addition, units cannot use ACSAs as a substitute for normal sources of supply, or as a substitute for foreign military sales procedures. Prohibited items are those designated as significant military equipment on the U.S. Munitions List. For additional guidance on ACSAs, *see* DoD Directive 2010.9, *Acquisition and Cross-Servicing Agreements* and the Fiscal Law Chapter of this Handbook.

e. *Cryptologic Support.* 10 U.S.C. § 421 authorizes SECDEF to use funds appropriated for intelligence and communications purposes to pay the expenses of arrangements with foreign countries for cryptologic support. This authority has been frequently used as the basis for agreements to loan communications security (COMSEC) equipment, such as message processors or secure telephones, to allied forces. Judge advocates should be prepared to provide advice on related technology transfer issues and issues surrounding the disclosure of classified information. One of 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 6510.01F, *Information Assurance (IA) and Support to Computer Network Defense (CND)*, 9 Feb. 2011, for guidance.

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[29] 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; hosting exercises; or staging U.S. military operations.

[30] *See* 10 U.S.C. § 2347.

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CHAPTER 8

INFORMATION OPERATIONS AND CYBERSPACE OPERRATIONS

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I. INTRODUCTION

A. **Overview**: Information Operations (IO) and Cyberspace Operations (CO), integrate specific capabilities to affect the decision making of target audiences, while protecting our own decision processes. According to Joint Pub. 3-13, information is a strategic resource, vital to national security. Military operations depend on information and information systems for many simultaneous and integrated activities. Success on the battlefield, both immediate and lasting, often depends on success in the information environment. To understand and provide legal advice in this complex area, legal advisors must be familiar with basic IO terminology (section II); capabilities and legal issues raised (section III); and significant international legal authorities (section IV). This chapter addresses these topics.

B. **Sources of Law**: As joint doctrine recognizes, "IO planners deal with legal considerations of an extremely diverse and complex nature."[1] These include international law, domestic law and policy, military operational plans and directives, and even foreign jurisdiction law. As IO can be conducted across the full spectrum of operations, legal advisors must know not only the authorities governing particular capabilities, but also how to apply them in armed conflict and peacetime situations. When preparing legal advice, take note of two important caveats:

1. **Changing Guidance**: Unlike more established areas of law such as Geneva Conventions obligations, IO/CO legal guidance is constantly changing. New forums such as cyberspace and social media overlap between military and diplomatic missions, and individual tactical decisions can become front-page news and cause strategic effects. In 2010, the Secretary of Defense ordered a Front-End Assessment of strategic communication and

[1] JOINT CHIEFS OF STAFF, JOINT PUB. 3-13, INFORMATION OPERATIONS at III-3 (27 Nov. 2012) [hereinafter JOINT PUB. 3-13]. Unless otherwise noted, all references to Joint Pub. 3-13 refer to the 27 Nov. 2012 version thereof.

information operations, resulting in significant changes to both doctrine and organization.[2] The Joint Staff subsequently coordinated rewrites of all IO joint doctrine publications, including changes to definitions and accepted terminology for nearly every IO capability. The Department of Defense (DoD) is also updating its IO directives and instructions. Some sources may remain outdated or appear to conflict, and service, theater, or operational guidance may require update. Legal advisors must make a special effort to collate and sensibly apply these sources.

2. **Classified Sources**: Many specific sources of operational guidance remain classified (for example, several Chairman of the Joint Chiefs (CJCS) Instructions specific to IO capabilities). This chapter cites to, but does not discuss, some of these sources.[3] Legal advisors are strongly encouraged to seek out, consult, and safeguard classified sources applicable to particular capabilities, commands, and operations. Chances are several will apply.

3. **Operational Guidance**: Specific guidance on IO is found in standard military planning documents, particularly in the Operational Plan (OPLAN), Operational Order (OPORD), and/or Execute Order (EXORD). These documents have standardized formats and annexes, several of which apply directly to IO, and are usually classified to protect military decision-making and strategies. Legal advisors must have a firm grasp of the planning process and standard document formats, and of the roles and responsibilities of varying levels of command to provide input to, promulgate, and execute such orders.[4] For most IO questions, legal advisors should start their research by looking at existing operational guidance for specific operations and information-related capabilities.[5]

4. **Service-Specific Guidance**: Finally, legal advisors should be sensitive to differences in service-specific guidance. For example, FM 3-13 and ADRP 3-0 both discuss IO and its related capabilities in terms of "inform and influence activities"—a scheme long used by the Army, but not by joint doctrine. Legal advisors may frequently be called on in joint settings to advise other services, and should become familiar with their guidance in order to facilitate communication.

II. BASIC IO/CO TERMINOLOGY

A. **Overview**: This section defines several basic terms related to IO generally. The primary source for definitions is recently published joint doctrine.[6] Older sources may employ slightly different terms and definitions.

B. **Information Operations**: "[T]he integrated employment, during military operations, of information-related capabilities in concert with other lines of operation designed to influence, disrupt, corrupt, or usurp the decision making of adversaries and potential adversaries while protecting our own."[7]

C. **Information Environment**: "[T]he aggregate of individuals, organizations, and systems that collect, process, disseminate, or act on information. This environment consists of three interrelated dimensions which continuously interact with individuals, organizations, and systems. These dimensions are the physical, informational, and cognitive . . ."[8] The information environment forms part of the overall operational environment, which includes "the composite of the conditions, circumstances, and influences that affect employment of capabilities and bear on the decisions of the commander . . ."[9]

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[2] *See generally* Memorandum from The Secretary of Defense, subject: Strategic Communication and Information Operations in the DoD (25 Jan. 2011) [hereinafter SECDEF 25 Jan 11 Memo].

[3] All sources cited herein are unclassified (U) and unrestricted unless otherwise noted. Some sources restrict access to .mil or .gov network domains; others are Unclassified//For Official Use Only (U//FOUO) or classified (e.g., SECRET). This chapter discusses in detail only unrestricted, publicly available and/or previously released information, including unclassified titles and publication numbers of classified documents.

[4] *See* JOINT CHIEFS OF STAFF, JOINT PUB. 5-0, JOINT OPERATION PLANNING (11 Aug. 2011). This document describes the joint planning process and its plans and orders. Appendix A lists the standard operational plan format and annexes.

[5] *See* JOINT PUB. 3-13, *supra* note 1, ch. 4 (describing how IO and IRCs are integrated into the joint planning process).

[6] Due to the myriad disciplines comprising IRCs, each with its own governing directives, this chapter focuses discussion on joint doctrine and regulations. It does not cite service-specific guidance, other than general references listed in references above. Lawyers advising service-specific entities will need to seek out and consult applicable service-specific guidance for specific IRCs and functional communities.

[7] JOINT PUB. 3-13, *supra* note 1, at I-1.

[8] *Id.*

[9] *Id.* at I-1 to I-2. Chapter I of Joint Pub. 3-13 discusses the information environment and its domains, and the application of IO within that environment, in greater detail.

D. **Information-Related Capabilities (IRCs)**: "[T]he tools, techniques, or activities that affect any of the three dimensions of the information environment. They affect the ability of the target audience (TA) to collect, process, or disseminate information before and after decisions are made."[10]

E. **Cyberspace**: "A global domain within the information environment consisting of the interdependent network if information technology infrastructures, including the internet, telecommunications networks, computer systems, and embedded processors and controllers. (See Deputy Secretary of Defense Memo of March 12, 2008)

1. Information operations focus on the integrated application of IRCs as force multipliers to achieve desired effects, not who owns particular capabilities.[11] While some IRCs are technology-based, others are not. Different organizations control individual capabilities, at multiple levels of command, and must come together to integrate IO efforts. Legal advisors should have a firm grasp of command and control for IO (i.e., approval and coordinating authorities and lead/supporting organizations for particular capabilities), and should reach out to other lawyers advising these groups and levels to ensure consistent advice across the legal community.

2. Joint Pub. 3-13 eliminates the former[12] hierarchy of core, related, and supporting capabilities and instead lists[13] the following fourteen IRCs. Note that Cyberspace Operations are often placed into a separate category, due to its emerging importance. This list is representative, not exhaustive, of capabilities:

- Strategic Communication (SC)
- Joint Interagency Coordination Group (JIACG)
- Public Affairs (PA)
- Civil-Military Operations (CMO)
- Cyberspace Operations (CO)
- Information Assurance (IA)
- Space Operations (Space Ops)
- Military Information Support Operations (MISO)
- Intelligence (Intel)
- Military Deception (MILDEC)
- Operations Security (OPSEC)
- Special Technical Operations (STO)
- Joint Electromagnetic Spectrum Operations (JEMSO)
- Key Leader Engagement (KLE)

3. Joint Pub. 3-13 also introduces, eliminates, renames, or reorganizes several capabilities. SC and the JIACG include defense support to public diplomacy and take a whole-of-government approach to IO. CO and MISO introduce new terms for the former capabilities of computer network operations (CNO) and psychological operations (PSYOP), respectively. Intel includes counterintelligence (CI), and recognizes the broader intersection between IO and Intel efforts. JEMSO, a new term, includes both electronic warfare (EW) and joint electromagnetic spectrum management operations (JEMSMO). Finally, Joint Pub. 3-13 now recognizes Space Ops, STO, and KLE IRCs, while it omits physical security, physical attack, and combat camera as these are ends and means.[14] The next section discusses each IRC and its specific sources of guidance.

4. Finally, though joint doctrine provides general guidelines on employing IRCs effectively, legal advisors should always consult operational and tactical guidance contained in approved military plans, orders, and rules of engagement. These sources specify theater-specific criteria and approval authorities for use of IRCs.

III. SIGNIFICANT LEGAL CONSIDERATIONS IN INFORMATION/CYBERSPACE OPERATIONS

A. **Joint Pub. 3-13 warns that**:

> IO planners deal with legal considerations of an *extremely diverse and complex nature*. Legal interpretations can occasionally differ, given the complexity of technologies involved, the significance of legal interests potentially affected, and the challenges inherent for law and policy to keep pace with the technological changes and implementation of IRCs. Additionally, policies are regularly added, amended, and rescinded in an effort to provide clarity. As a result, IO remains *a dynamic arena*, which can be further complicated by multinational operations, as each nation has its own laws, policies, and processes for approving plans. . . .[15] The nature of IO is such that the

[10] *Id.* at I-3.
[11] See *id.* at I-5, II-5; SECDEF 25 Jan 11 Memo, *supra* note 2, at 2.
[12] *See* JOINT CHIEFS OF STAFF, JOINT PUB. 3-13, INFORMATION OPERATIONS at III-3 (13 Feb. 2006). The 27 Nov. 2012 edition of Joint Pub. 3-13 substantially updates the 13 Feb. 2006 version.
[13] *See* JOINT PUB. 3-13, *supra* note 1, at I-1.
[14] *Compare id.*, ch. II (27 Nov. 2012) *with* JOINT PUB. 3-13, *supra* note 10, ch. II (13 Feb. 2006).
[15] JOINT PUB. 3-13, *supra* note 1, at III-3 (emphasis added).

exercise of operational authorities requires a detailed and rigorous legal interpretation of authority and/or legality of specific actions.[16]

Section IV deals with specific authorities for particular IO capabilities. This section elaborates in greater detail on the legal authorities for IO under the United Nations Charter and the Law of Armed Conflict. Regarding the law generally, the best consolidated assessment is an IO assessment prepared by the DoD Office of General Counsel in 1999.[17] Though dated, many of the issues raised remain the same or similar to those faced by legal advisors today.

B. **Authorities and responsibilities**:

The authority to employ IRCs, to include Cyberspace Operations, is rooted foremost in Title 10, United States Code (USC). While Title 10, USC, does not specify IO separately, it does provide the legal basis for the roles, missions, and organization of DOD and the Services. Title 10, USC, Section 164, gives command authority over assigned forces to the Combatant Commander (CCDR), which provides that individual with the authority to organize and employ commands and forces, assign tasks, designate objectives, and provide authoritative direction over all aspects of military operations. Cyberspace operations also form an increasing part of the United States intelligence gathering capability. When used for the primary purpose of gathering intelligence (collecting information), the authorities include Executive Order 12333 and National Security Council Intelligence Directive 6. Finally, the rise of cyberspace operations has given added emphasis to the issue of "convergence" between Title 10 and Title 50 operations, and the debate on whether cyberspace operations qualify as "traditional military activities."

DoD and [CJCS] directives delegate authorities to DoD components. Among these directives, DODD 3600.01, Information Operations, is the principal IO policy document. Its joint counterpart, Chairman of the Joint Chiefs of Staff Instruction (CJCSI) 3210.01, Joint Information Operations Policy, provides joint policy regarding the use of IRCs, professional qualifications for the joint IO force, as well as joint IO education and training requirements. Based upon the contents of these two documents, authority to conduct joint IO is vested in the CCDR, who in turn can delegate operational authority to a subordinate JFC, as appropriate.[18]

C. **General considerations for legal advice**:[19]

1. "Could the execution of a particular IRC be considered a hostile act by an adversary or potential adversary?" (*jus ad bellum* issues under the United Nations Charter).

2. "Do any non-US laws concerning national security, privacy, or information exchange, criminal and/or civil issues apply? (foreign domestic law, or host nation or coalition partner bilateral agreements)

3. "What are the international treaties, agreements, or customary laws recognized by an adversary or potential adversary that apply to IRCs?" (international law)

4. "How is the joint force interacting with or being supported by US intelligence organizations and other interagency entities?" (domestic law, including intelligence and national security law)

5. Is it "directed at or intended to manipulate audiences, public actions, or opinions in the United States?" (2013 DoDD 3600.01, para. 3.k. requirement)

D. **IO/CO and *Jus ad Bellum***: The primary *jus ad bellum* document is the United Nations (UN) Charter, and the ultimate question, based on UN Charter Articles 2(4), 39, and 51, is whether a particular application of IO equates to a "use of force" or an "armed attack."[20]

1. To determine the legality of any pre-hostilities action under the UN Charter, it is necessary to determine where that action would fit along the spectrum of force: below the threshold of a use of force under

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[16] *Id.* at III-1.
[17] U.S. Dep't of Def. Office of Gen. Counsel, *An Assessment of International Legal Issues in Information Operations* (2d. ed. Nov. 1999), 76 Int'l Legal Stud. 459 (2002)(Naval War College Int'l Law Dep't 'Bluebook' series, vol. 76 app.) [hereinafter DoD OGC Assessment].
[18] *Id.*
[19] *Id.* at III-3 (listing these four considerations).
[20] *See* THOMAS C. WINGFIELD, THE LAW OF INFORMATION CONFLICT pt. II (2000).

Article 2(4), a use of force under Article 2(4) but shy of an armed attack under Article 51, or an armed attack under Article 51, giving the victim State the right to respond in self-defense.[21] Note that the United States position is different from the UN Charter in the sense that the United States will invoke its right to self-defense against any illegal use of force, not just an armed attack. On September 23, 2012, at the USCYBERCOM Legal Conference, Mr. Harold Koh, then the legal advisor for the Secretary of State, repeated the United States position.

2. Use of force is commonly understood to include a kinetic military attack by one State against the territory, property, or citizens of another State, i.e., an armed attack, some State activities falling short of an armed attack may also cross the threshold of the Article 2(4) use of force. For example, some States and scholars consider the use of economic or political force to be a use of force prohibited by Article 2(4).[22] "The Article 2(4) prohibition on the use of force also covers physical force of a non-military nature committed by any state agency."[23] This economic or political force may cross the use of force threshold, but not the Article 51 armed attack threshold.

3. Some aspects of IO/CO crossing the use of force threshold under Article 2(4) may go one step further, becoming an armed attack and triggering a State's right to Article 51 self-defense (unlike the economic or political force mentioned above). "The dilemma lies in the fact that [CO and IO] span the spectrum of consequentiality. [Their] effects freely range from mere inconvenience (e.g., shutting down an academic network temporarily) to physical destruction (e.g., as in creating a hammering phenomenon in oil pipelines so as to cause them to burst) to death (e.g., shutting down power to a hospital with no back-up generators)."[24]

4. Determining when an IO/CO amounts to a use of force or an armed attack is difficult at best. However, if the deliberate actions of one belligerent cause injury, death, damage, and destruction to the military forces, citizens, and property of another belligerent, those actions may be considered a use of force, to which the victim state may be able to respond legally in self-defense.

5. Professor Michael Schmitt back in 1999, offered seven factors to determine whether an IO/CO amounts to a use of force under the UN Charter.[25] Professor Schmitt was attempting to differentiate military force from economic coercion when creating these factors. He repeated these factors when publishing the 2013 TALLINN MANUAL ON THE INTERNATIONAL LAW APPLICABLE TO CYBER WARFARE, a statement of what the author believed was current customary international law in cyberspace. According to Schmitt, the best approach to analyze an IO *jus ad bellum* issue is to apply a consequence-based analysis, rather than an instrument-based analysis, using the following factors:

a. ***Severity***: Armed attacks threaten physical injury or destruction of property to a much greater degree than other forms of coercion.

b. ***Immediacy***: The negative consequences of armed coercion, or threat thereof, usually occur with great immediacy, while the consequences of other forms of coercion develop more slowly. Thus, the opportunity for the target State or the international community to seek peaceful accommodation is hampered in the former case.

c. ***Directness***: The consequences of armed coercion are more directly tied to the *actus reus* than in other forms of coercion, which often depend on numerous contributory factors to operate. Thus, the prohibition on force precludes negative consequences with greater certainty.

d. ***Invasiveness***: In armed coercion, the act causing the harm usually crosses into the target state, whereas in economic warfare the acts generally occur beyond the target's borders. As a result, even though armed and economic acts may have roughly similar consequences, the former represents a greater intrusion on the rights of the target state and, therefore, is more likely to disrupt international stability.

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[21] *See id.* at 128.

[22] *See* THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 118-19 (Bruno Simma ed., 2002). This is the minority view; the prevailing view and U.S. view is Article 2(4) does not extend to economic and political force. *See id.* Some scholars suggest that Article 2(4) prohibits physical force of a non-military nature, e.g., "the cross-frontier expulsion of populations, the diversion of a river by an up-stream State, the release of large quantities of water down a valley, and the spreading of fire across a frontier." *Id.*

[23] W. G. Sharp, *Critical Infrastructure Protections: A New Era of National Security*, 12 THE FEDERALIST SOC'Y INT'L AND NAT'L SECURITY L. NEWS 1, 101 (1998).

[24] Michael N. Schmitt, *Computer Network Attack and the Use of Force in International Law: Thoughts on a Normative Framework*, 37 COLUM. J. TRANSNAT'L L. 885, 912 (1999) [hereinafter Schmitt, *Thoughts*].

[25] Michael N. Schmitt, *The Sixteenth Waldemar A. Solf Lecture in International Law*, 176 MIL. L. REV. 364, 417 (2003) [hereinafter Schmitt, *Solf Lecture*]; Schmitt, *Thoughts*, *supra* note 25, at 914-15.

e. ***Measurability***: While the consequences of armed coercion are usually easy to ascertain (e.g., a certain level of destruction), the actual negative consequences of other forms of coercion are harder to measure. This renders the appropriateness and vehemence of community condemnation less suspect in cases of armed force.

f. ***Presumptive Legitimacy***: In most cases, whether under domestic or international law, the application of violence is deemed illegitimate, absent a specific exception such as self-defense. By contrast, most other forms of coercion—again in the domestic and international sphere—are presumptively lawful, absent a prohibition to the contrary. Thus, the consequences of armed coercion are presumptively impermissible, whereas those of other coercive acts are not (as a very generalized rule).

g. ***Responsibility***: The extent to which the State is responsible for the attack.

6. Professor Schmitt describes an approach to determine whether an IO/CO amounts to an armed attack. "First, a cyber or [IO] attack is an armed attack justifying a forceful response in self-defense if it causes physical damage or human injury or is part of a larger operation that constitutes an armed attack. Second, self-defense is justified when a cyber [or IO] attack is an irrevocable step in an imminent (near-term) and unavoidable attack (preparing the battlefield). Finally, a State may react defensively during the last possible window of opportunity available to effectively counter an armed attack when no reasonable doubt exists that the attack is forthcoming."[26] Thus, Schmitt recognized the need to anticipatory self-defense in cyberspace, though the definition of "imminent" in this realm is up for debate. Note that while the seven factors themselves are not widely used today, they formed the basis for the so-called "effects test" which is in wide use. In fact, during his September 2012 speech to USCYBERCOM, Harold Koh used aspects of the "effects test" when he stated that a cyber operation was a use of force when it was the proximate and foreseeable cause of death, injury, or physical damage. Koh also noted that intent of the attacker and the specific target were also factors. Finally, in his speech, Koh also recognized that the United States reserved the right to use anticipatory self-defense in cyberspace if the circumstances warranted.

7. Thomas Wingfield provides one approach to determine whether an IO amounts to an armed attack, arguing that "an armed attack may occur when a use of force or an activity not traditionally considered an armed attack is used in such a way that it becomes tantamount in effect to an armed attack."[27] He suggests three factors to consider when looking at whether an activity is tantamount to an armed attack: scope, duration, and intensity.

8. **IO/CO on the Offense**. Any offensive IO /CO prior to hostilities must comply with the UN Charter. While the principles are similar to any other aspect of IO, the areas of electronic warfare (EW) and cyberspace operations (CO) are probably the most likely to create significant legal issues.

a. How these principles of international law will be applied to EW and CO by the international community is unclear. Much will depend on how nations and international institutions react to the particular circumstances in which the issues are raised for the first time. It seems likely that the international community will be more interested in the **consequences** of EW or a CO than in the means used. An EW or a CO can cause significant property and economic damage, as well as human fatalities. For instance, a State could use a CO to cause: "(1) flooding by opening the flood gates of a dam; (2) train wrecks by switching tracks for oncoming trains; (3) plane crashes by shutting down or manipulating air traffic control systems; (4) large chemical explosions and fires by readjusting the mix of volatile chemicals at an industrial complex; (5) a run on banks or a massive economic crisis by crashing stock exchanges; and any number of other examples that are limited only by the imagination of the actors. . . . The effect can be the same, if not more severe, as if the destruction was caused by conventional kinetic means of warfare."[28]

b. Though there is little State practice to help determine how the international community will view offensive IO, "it seems likely that the international community will be more interested in the consequences of a computer network attack [or other means of IO] than in its mechanism."[29] At this point, the method of IO is less important than the effects of a particular IO when establishing the legality of an action.

9. **IO/CO on the Defense**. As with offensive IO/CO, legal issues with regard to defensive IO/CO are most likely to occur in the areas of EW and CO. Because equipment necessary for attacks is readily available and inexpensive, and access to many computer systems can be obtained through the Internet, CO poses a particularly

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[26] Schmitt, *Solf Lecture*, *supra* note 26, at 420.
[27] WINGFIELD, *supra* note 21, at 113.
[28] *See* Sharp, *supra* note 24, at 101-02.
[29] DoD OGC Assessment, *supra* note 18, at 483.

important defensive challenge. As a result, many U.S. military and non-military information systems are subject to attack anywhere and anytime. The actor may be a foreign State, an agent of a foreign State, an agent of a non-governmental entity or group, or an individual acting for purely private purposes. Use of force also applies to all agencies and agents of a State, such as the organized military, militia, security forces, police forces, intelligence personnel, or mercenaries. When determining lawful actions in response to EW or CO, attribution, characterization, and the doctrine of neutrals should guide any U.S. military response.

a. **Attribution** of attack is very important in determining an appropriate response. However, identification of an electronic attack or cyberspace operation originator has often been a difficult problem. This is especially true for a CNA when the intruder has used a number of intermediate relay points, when he has used an anonymous bulletin board whose function is to strip away all information about the origin of messages it relays, or when he has used a device that generates false origin information. Locating an originating computer does not entirely resolve attribution problems, since a computer may have been used by an unauthorized user, or by an authorized user for an unauthorized purpose.[30] To summarize, two facts of attribution exist. The first is the technical side, or finding out the physical source (server for example) of the adversary cyberspace operation. The second aspect of attribution is the legal aspect, determining if a state can held liable for the operation if the source is not a government actor.

b. **Characterization** of the intent and motive underlying an attack may also be very difficult, though equally important when determining an appropriate response. However, factors such as persistence, sophistication of methods used, targeting of especially sensitive systems, and actual damage done may persuasively indicate both the intruder's intentions and the dangers to the system in a manner that would justify an action in defense.[31]

c. **Neutrality**. As a general rule, all acts of hostility in neutral territory, including neutral lands, waters, and airspace, are prohibited. A belligerent nation has a right to demand that a neutral nation prevent belligerents from using its information systems in a manner that violates the nation's neutrality. If the neutral nation is unable or unwilling to do so, other belligerent(s) may have a limited right of self-defense to take necessary and proportionate action against the neutral nation (e.g., jamming) to prevent such use by the enemy.

- A limited exception exists for communications relay systems. Articles 8 and 9 of 1907 Hague Convention Respecting Rights and Duties of Neutral Powers and Persons in Case of War on Land (to which the U.S. is a party) provides that "[a] neutral Power is not called upon to forbid or restrict the use on behalf of belligerents of telegraph or telephone cables or of wireless telegraph apparatus belonging to it or to Companies or private individuals," so long as such facilities are provided equally to both belligerents.
- International consortia (an association or institution for engaging in a joint venture) present special problems. Where an international communications system is developed by a military alliance, such as the North Atlantic Treaty Organization (NATO), few neutrality issues are likely to arise. Other international consortia provide satellite communications and weather data used for both civilian and military purposes. The membership of these consortia virtually guarantees that not all members of a consortium will be allies in future conflicts. Consortia such as the International Communications Satellite Organization (INTELSAT), the International Maritime Satellite Organization (INMARSAT), the Arab Satellite Communications Organization (ARABSAT), the European Telecommunications Satellite Organization (EUTELSAT), and the European Organization for the Exploitation of Meteorological Satellites (EUMETSAT) have attempted to deal with this possibility by limiting system uses during armed conflict. However, INMARSAT nations have determined that the communications relay provision permits use by UN Security Council authorized forces, even while engaged in armed conflict.
- As stated above, if EW or CO results in widespread civilian deaths and property damage, it may well be that the international community would not challenge the victim nation if it concluded that it was the victim of an armed attack, or an equivalent of an armed attack.[32] Even if the systems attacked were unclassified military logistics systems, an attack upon such systems might seriously threaten a nation's security.

d. If a particular EW or CO were considered an armed attack or its equivalent, it would seem to follow that the victim nation would be entitled to respond in self-defense by EW, CO or by conventional military

[30] *Id* at 19.
[31] *Id.*
[32] *Id* at 16.

means. For example, a State might respond in self-defense to disable the equipment and personnel used to mount the offending attack.

e. In some circumstances, it may be impossible or inappropriate to attack the specific means used where, for example, the personnel and equipment cannot reliably be identified, an attack would not be effective, or an effective attack might result in disproportionate collateral damage. In such cases, any legitimate military target could be attacked, as long as the purpose of the attack is to dissuade the enemy from further attacks or to degrade the enemy's ability to undertake them (i.e., not in retaliation or reprisal).[33]

f. It seems beyond doubt that any unauthorized intrusion into a nation's computer systems would justify that nation in taking self-help action to expel the intruder and to secure the system against reentry. Though the issue has yet to be addressed in the international community, unauthorized electronic intrusion may be regarded as a violation of the victim's sovereignty, or even as equivalent to a physical trespass into that nation's territory. Such intrusions create vulnerability, since the intruder may have access to information and may corrupt data or degrade the system.

g. At a minimum, a victim nation of an unauthorized computer intrusion has the right to protest such actions if it can reliably characterize the act as intentional and attribute it to agents of another nation.

h. It is far from clear the extent to which the world community will regard an EW or a CO as an armed attack or use of force, and how the doctrine of self-defense will be applied to either. The most likely result is an acceptance that a nation subjected to a state-sponsored EA or CO can lawfully respond in kind, and that in some circumstances it may be justified in using conventional military means in self-defense. Unless nations decide to negotiate a treaty addressing EW and/or CO, international law in this area will develop through the actions of nations and through the positions that nations adopt publicly as events unfold.

E. **IO/CO and *Jus in Bello.***

1. While some have termed IO, and particularly CO, as a revolution in military affairs,[34] use of various forms of IO generally require the same legal analysis as any other method or means of warfare.

2. However, IO pose an interesting dilemma; they potentially could run the gamut from mere inconvenience to actual death and destruction in the physical realm. This wide disparity in effects from IO creates a threshold issue that one must examine before applying the *jus in bello* principles.[35] Does the IO cause injury, death, damage, or destruction? If so, one must apply *jus in bello* principles; if not, the principles need not be applied to the IO.

3. Applying *jus in bello* principles to IO.

a. Military Necessity/Military Objective.

(1) Article 14 of the Lieber Code defines military necessity as "those measures which are indispensable for securing the ends of war, and which are lawful according to the modern laws and usages of war." Once a commander determines he or she has a military necessity to take a certain action or strike a certain target, then he or she must determine that the target is a valid military objective. The current definition of a military objective is found in Additional Protocol (AP) I[36] to the Geneva Conventions, Article 52(2): "those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture, or neutralization, in the circumstances ruling at the time, offers a definite military advantage."

(2) The U.S. defines definite military advantage very broadly to include "economic targets of the enemy that indirectly but effectively support and sustain the enemy's warfighting capability."[37] This broad

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[33] *Id.* at 17.
[34] Michael N. Schmitt, *Wired Warfare: Computer Network Attack and Jus in Bello*, 846 INT'L REVIEW OF THE RED CROSS 365, 365 (2002) [hereinafter Schmitt, *Wired Warfare*]
[35] *Id.* at 381.
[36] PROTOCOL ADDITIONAL TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, AND RELATING TO THE PROTECTION OF VICTIMS OF INTERNATIONAL ARMED CONFLICTS (PROTOCOL I), June 8, 1977, 1125 U.N.T.S. 3 (1977), *entered into force* Dec. 7, 1978 (signed by the United States Dec. 12, 1977, not transmitted to U.S. Senate, see S. Treaty Doc. No. 100-2).
[37] U.S. NAVAL WAR COLLEGE, ANNOTATED SUPPLEMENT TO THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS 8-3 (1997). The United States considers this customary international law. Letter from J. Fred Buzhardt, General Counsel, Department of Defense, to Edward Kennedy, Senator, U.S. Congress (Sept. 22, 1972), *quoted in* Arthur W. Rovine,

definition is important in IO because most financial institutions rely heavily on information technology and, under this expansive definition, these economic institutions may become targets for IO.[38] For example, a nation's stock market will generally rely heavily upon information technology like computer systems.

(3) There are specifically protected objects that a force may not target in spite of the fact that they may be military objectives. For example, one may by unable to conduct an IO against a food storage or distribution center.[39]

b. Distinction/Discrimination.

(1) AP I, Article 48, sets out the rule: "[p]arties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives." Additional Protocol I further defines indiscriminate attacks under Article 51(4) as those attacks that:

(a) are "not directed against a specific military objective" (e.g. Desert Storm SCUD missiles);

(b) "employ a method or means of combat, the effects of which cannot be directed at a specified military objective" (e.g., area bombing);

(c) "employ a method or means of combat, the effects of which cannot be limited as required" (use of bacteriological weapons); and

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

(2) Article 51(2) of AP I requires that "[t]he civilian population as such, as well as individual civilians, shall not be the object of attack."

(3) According to the commentary to AP I, "[t]he immunity afforded individual civilians is subject to an overriding condition, namely, on their abstaining from all hostile acts. Hostile acts should be understood to be acts which by their nature and purpose are intended to cause actual harm to the personnel and equipment of the armed forces."[40] According to AP I, Article 51(3), civilians enjoy the protection against targeting "unless and for such time as they take a direct part in hostilities." The ICRC Commentary to AP I, Article 51(3), defines direct participation as "acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces."[41] The United States takes a more expansive and functional view of what constitutes direct participation in hostilities. For a more in-depth explanation, consult Chapter 2 of this Handbook.

(4) Government agencies other than the U.S. military have the ability to conduct IO. However, if a civilian takes direct part (defined differently by AP I and the U.S.) in an IO, that civilian becomes an unlawful enemy combatant and loses the protections afforded to civilians under Geneva Convention IV.

(5) Dual-use objects pose another dilemma. A dual-use object is one that is used for both military and civilian purposes. If the object does serve or may serve a military purpose, it may be a valid military target in spite of its civilian purpose. However, the civilian purpose will weigh heavily in the proportionality analysis that must be done for a dual-use target.

(6) Indiscriminate attacks are prohibited by Article 51(4), AP I. This could become an issue for a CO. For instance, if the CO will release a virus, chances are the spread of that virus cannot be controlled, resulting

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Contemporary Practice of the United States Relating to International Law, 67 AM. J. INT'L L. 118, 123 (1973). *But see* CLAUDE PILLOUD ET AL., COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, 636 (Yves Sandoz et al. eds., 1987) [hereinafter COMMENTARY] (stating that "it is not legitimate to launch an attack which only offers potential or indeterminate advantages").

[38] Schmitt, *Wired Warfare*, *supra* note 35, at 381.

[39] *See id.* at 385-86. Article 54(2), AP I, prohibits attacks on "objects indispensable to the survival of the civilian population, such as food-stuffs." The U.S. believes that starvation of civilians shall not be used as a method of warfare, however the U.S. does not subscribe to the belief that starvation of the military would be prohibited. *See* Michael Matheson, Deputy Legal Advisor, U.S. Dep't of State, Address at the Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions (1987) *in* 2 AM. U.J. INT'L L. & POLICY 419 (1987).

[40] COMMENTARY, *supra* note 38, at 618.

[41] *Id.* at 619.

in an indiscriminate attack prohibited by Article 51(4).[42] Keep in mind the threshold question: this only applies to a CO—in this case a virus—that may cause injury, death, damage, or destruction.

(7) A means or method of warfare that is not directed at a specific military objective violates Article 51(4) as well. For instance, a CO that can be directed at a specific military objective, but is not and rather affects civilian objects, would be prohibited.[43] Again one must keep in mind the threshold question.

c. Proportionality.

(1) The test to determine if an attack is proportional is found in AP I, Article 51(5)(b): "[a]n attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated" violates the principle of proportionality. Note: this principle is only applicable when an attack has the possibility of affecting civilians. If the target is purely military with no known civilian personnel or property in jeopardy, no proportionality analysis need be conducted.

(2) One difficulty in applying the proportionality principle to an IO is determining the proper valuation system for the balancing test.[44] For instance, how does one value an IO that shuts off basic services such as electricity, water, and/or natural gas?

(3) Another very difficult issue for IO relates to the knock-on effects from an operation. Knock-on effects are "those effects not directly and immediately caused by the attack, but nevertheless the product thereof."[45] These knock-on effects are much harder to calculate for IO than kinetic operations and must be considered in the proportionality analysis. For example, an IO that shuts down an electrical grid may have the intended effect of degrading the command and control of the military, but may also have the effect of shutting down electricity for civilian facilities with follow-on effects such as: unsanitary water and therefore death of civilians and the spread of disease because the water purification facilities and sewer systems do not work; death of civilians because the life support systems at emergency medical facilities fail; or death of civilians because traffic accidents increase due to a failure of traffic signals.

d. Unnecessary Suffering.

(1) Hague Regulation, Article 22, states that the right of belligerents to adopt means of injuring the enemy is not unlimited. Furthermore, Article 23(e) states that "it is especially forbidden . . . to employ arms, projectiles or material calculated to cause unnecessary suffering."

e. Treachery or Perfidy. AP I, Article 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. Deception measures that thwart precision-guided munitions would be allowed, while falsely convincing the enemy not to attack a military target by electronic evidence that it was a hospital would be perfidious. Morphing techniques, while not a violation of the law of armed conflict generally, if used to create an image of the enemy's Head of State falsely informing troops that an armistice or cease-fire agreement exists would be considered perfidy and would constitute a war crime.[46]

IV. INFORMATION-RELATED CAPABILITIES

A. **Overview**: This section discusses each IRC in greater detail. It lists common legal issues, lead proponents, and capability-specific guidance sources applicable to each capability (in addition to general references listed at the beginning of this chapter). Given the substantial recent changes in IO doctrine and organization discussed in section I.B.1 above, older sources may employ different vocabularies, but remain persuasive until updated or canceled.

B. **Information-Related Capabilities** enumerated in Joint Pub. 3-13:

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[42] *See* Schmitt, *Wired Warfare*, *supra* note 35, at 389; DoD OGC Assessment, *supra* note 18, at 472–73.
[43] *See* Schmitt, *Wired Warfare*, *supra* note 35, at 390.
[44] *See id.* at 392.
[45] *Id.* at 392.
[46] *See* DoD OGC Assessment, *supra* note 18, at 472–73.

1. **Strategic Communication (SC)**: "Focused United States Government [USG] efforts to understand and engage key audiences to create, strengthen, or preserve conditions favorable for the advancement of [USG] interests, policies, and objectives through the use of coordinated programs, plans, themes, messages, and products synchronized with the actions of all instruments of national power."[47]

a. Discussion: "SC is a whole-of-government approach, driven by interagency processes and integration that are focused upon effectively communicating national strategy." SC focuses on IO's strategic impact, i.e., coordinating and synchronizing efforts to ensure IO objectives complement overall USG objectives.[48] "SC planning must be integrated into military planning and operations, documented in operation plans (OPLANs) or operation orders (OPORDs), and coordinated and synchronized with [interagency] and multinational partners."[49] A principal interagency partner is the U.S. Department of State, which is responsible for the related mission to coordinate public diplomacy.[50] Though not without controversy,[51] SC remains an important IRC.

b. Common Legal Issue(s): Information fratricide,[52] i.e. inappropriate messages; Mission overlap with other agencies, e.g. Department of State public diplomacy. At operational and tactical levels, legal advisors must ensure IO support and do not undercut USG and command objectives, as defined in theater or operational orders, plans, and other guidance. They must also ensure DoD uses its appropriated funds for the correct missions.

c. Proponents: Undersecretary of Defense for Policy (USD(P)) and the Assistant Secretary of Defense for Public Affairs (ASD(PA)) jointly;[53] JIACG representatives on joint staffs.

d. Operational Guidance: Annex Y to the OPLAN addresses Strategic Communications.

e. Sources: NATIONAL FRAMEWORK FOR STRATEGIC COMMUNICATION (2010); UPDATE TO CONGRESS ON NATIONAL FRAMEWORK FOR STRATEGIC COMMUNICATION (2012); JOINT PUB. 3-61, PUBLIC AFFAIRS (25 Aug. 2010); JOINT PUB. 5-0, JOINT OPERATION PLANNING (11 Aug. 2011) (Unclassified); JOINT WARFIGHTING CTR.,[54] COMMANDER'S HANDBOOK FOR STRATEGIC COMMUNICATION AND COMM. STRATEGY (24 Jun. 2010).

2. **Joint Interagency Coordination Group (JIACG)**: "A staff group that establishes regular, timely, and collaborative working relationships between civilian and military operational planners."[55]

a. Discussion: Interagency coordination occurs between DoD and numerous USG and private entities. Several combatant command (CCMD) staffs include JIACGs to accomplish this coordination, and though IO is not a JIACG's primary focus, "the group's linkage to the IO cell and the rest of the interagency is an important enabler for synchronization of guidance and IO."[56]

b. Common Legal Issues: Same as SC, discussed in para. III.B.1.a. above.

c. Proponents: Combatant Commands (CCMDs).

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[47] JOINT CHIEFS OF STAFF, JOINT PUB. 5-0, JOINT OPERATION PLANNING at II-9 (11 Aug. 2011).
[48] *See* JOINT PUB. 3-13 at II-5 to II-6.
[49] JOINT CHIEFS OF STAFF, JOINT PUB. 3-61, PUBLIC AFFAIRS at I-9 (25 Aug. 2010).
[50] *See* 22 U.S.C. § 2732(b)(1) (requiring the Secretary of State to make every effort to "coordinate, subject to the direction of the President, the public diplomacy activities of Federal agencies"). Joint Pub. 3-13 mentions public diplomacy, but notes without explanation that the former doctrinal phrase "defense support to public diplomacy" was approved for removal from joint doctrine.
[51] *See, e.g.*, Memorandum from George E. Little, Assistant to the Secretary of Defense for Public Affairs, subject: Communications Synchronization – A Local Coordination Process (28 Nov. 2012)(critiquing SC as duplicative and purporting to replace the term with 'communications synchronization'); Admiral Michael G. Mullen, *Strategic Communication: Getting Back to Basics*, 55 JOINT FORCES Q. 2, 4 (4th Q. 2009)(writing as then-Chairman of the Joint Chiefs of Staff, criticizing SC as "arrogant" and arguing it should "integrate and coordinate").
[52] "Information fratricide is the result of employing information-related capabilities in a way that causes effects in the information environment that impede the conduct of friendly operations or adversely affect friendly forces." U.S. DEP'T OF ARMY, FIELD MANUAL 3-13, INFORM AND INFLUENCE ACTIVITIES, para. 1-4 (25 Jan. 2013) [hereinafter FM 3-13].
[53] *See* SECDEF 25 Jan 11 Memo, *supra* note 2, at 2. The memo designates these two offices as "SC co-leads" and tasks USD(P) to publish a new DoD directive on SC. The directive remains unpublished as of this writing, as does a proposed new joint doctrine publication on the commander's communication strategy.
[54] When U.S. Joint Forces Command stood down, the Joint Warfighting Center merged with other organizations and transitioned to supervision by the Joint Staff J7. It is now known as the Joint and Coalition Warfighting Center.
[55] JOINT CHIEFS OF STAFF, JOINT PUB. 3-08, INTERORGANIZATIONAL COORDINATION DURING JOINT OPERATIONS app. D-1 (24 June 2011).
[56] JOINT PUB. 3-13, *supra* note 1, at II-7.

d. Operational Guidance: Annex V to the OPLAN addresses Interagency Coordination.

e. Source: Joint Pub. 3-08, Interorganizational Coordination During Joint Operations (24 June 2011).

3. **Public Affairs (PA)**: "Those public information, command information, and community engagement activities directed toward both the external and internal publics with interest in the Department of Defense."[57]

a. Discussion: "PA and IO activities directly support military objectives; counter adversary propaganda, misinformation and disinformation; and deter adversary actions. Although both PA and IO plan and execute public information activities and conduct media analysis, IO may differ with respect to audience, scope, and intent."[58] PA provides timely, truthful, and accurate information regarding U.S. intentions and actions both to U.S. and foreign audiences.[59] Its aims lie in tension with OPSEC (restrict disclosure), MILDEC (deceive the adversary), and to an extent MISO (provide select information to influence, not merely inform). Thus, planners must closely cooperate and deconflict efforts, particularly when both PA and IO target overlapping foreign audiences.[60] At the same time, PA and IO must maintain sufficient distance within the staff to avoid any appearance of propagandizing U.S. audiences or undermining the command's credibility.[61]

b. Common Legal Issues: Requirement that information be truthful; Prohibitions on use of funds for publicity or propaganda purposes within the United States or to influence U.S. public opinion.

c. Proponents: ASD(PA); Joint Staff and service public affairs representatives and staffs.

d. Operational Guidance: Annex F to the OPLAN addresses Public Affairs.

e. Sources: 10 U.S.C. § 2241a[62] (Supp. 2010) (prohibiting DoD use of funds for publicity or propaganda purposes within the United States); 22 U.S.C. § 1461 and 1461-1a (2006)(similar prohibition, commonly referred to as the 'Smith-Mundt Act', for the Dep't of State); U.S. DEP'T OF DEF., INSTR. 5400.13, PUBLIC AFFAIRS (PA) OPERATIONS (15 Oct. 2008)(Unclassified); U.S. DEP'T OF DEF., INSTR. 5400.14, PROCEDURES FOR JOINT PUBLIC AFFAIRS OPERATIONS (22 Jan. 1996)(Unclassified); U.S. DEP'T OF DEF., DIR. S-3321.1, OVERT PSYCHOLOGICAL OPERATIONS CONDUCTED BY THE MILITARY SERVICES IN PEACETIME AND IN CONTINGENCIES SHORT OF DECLARED WAR (U) (26 July 1984)(Classified Secret); JOINT CHIEFS OF STAFF, JOINT PUB. 3-61, PUBLIC AFFAIRS (25 Aug. 2010)(Unclassified).

4. **Civil-Military Operations (CMO)**: "The activities of a commander that establish, maintain, influence, or exploit relations between military forces, governmental and nongovernmental civilian organizations and authorities, and the civilian populace in a friendly, neutral, or hostile operational area in order to facilitate military operations, to consolidate and achieve operational US objectives. Civil-military operations may include performance by military forces of activities and functions normally the responsibility of the local, regional, or national government. These activities may occur prior to, during, or subsequent to other military actions. They may also occur, if directed, in the absence of other military operations. Civil-military operations may be performed by designated civil affairs, by other military forces, or by a combination of civil affairs and other forces."[63]

a. Discussion: CMO interact directly with and benefit the local population. CMO representatives can "assist in identifying [target audiences]; synchronizing communications media, assets, and messages; and providing news and information to the local population." However, CMO remain distinct from IO in that CMO target friendly and neutral populations, with potential secondary impacts to adversary audiences. IO works in the opposite manner, targeting adversaries with potential secondary impacts to friendly and neutral populations. Thus, CMO can yield critical information and goodwill, enabling other IRCs and IO, and should closely coordinate with IO and other IRC planners.[64]

b. Common Legal Issues: Same as SC, discussed in para. III.B.1.a. above (at a tactical, local level).

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[57] JOINT PUB. 3-61, *supra* note 51, at GL-6 (GL refers to Glossary).
[58] *Id.* at II-9.
[59] *See id.* at I-7 to I-9.
[60] *See* JOINT PUB. 3-13, *supra* note 1, at II-7.
[61] *See* JOINT PUB. 3-61, *supra* note 51, at II-9 (noting PA and IO "are separate functional areas.").
[62] Added by National Defense Authorization Act for Fiscal Year 2010, Pub. L. 111-84 § 1031(a)(1) (Oct. 28, 2009), 123 Stat. 2190, 2448. In its entirety, the statute mandates: "Funds available to the Department of Defense may not be obligated or expended for publicity or propaganda purposes within the United States not otherwise specifically authorized by law." *Id.*
[63] JOINT CHIEFS OF STAFF, JOINT PUB. 3-57, CIVIL-MILITARY OPERATIONS at GL-6 (8 July 2008)(GL is Glossary).
[64] *See* JOINT PUB. 3-13, *supra* note 1, at II-8 to II-9.

c. Proponents: Assistant Secretary of Defense for Special Operations and Low Intensity Conflict (ASD(SO/LIC), frequently ASD(SOLIC)); U.S. Special Operations Command (USSOCOM)

d. Operational Guidance: Annex G to the OPLAN addresses Civil-Military Operations.

e. Sources: Humanitarian assistance[65] fiscal authorities, e.g., 10 U.S.C. § 401 (2006); U.S. DEP'T OF DEF., INSTR. 2205.02, HUMANITARIAN AND CIVIC ASSISTANCE (HCA) ACTIVITIES (2 Dec. 2008); U.S. DEP'T OF DEF., INSTR. 3000.05, STABILITY OPERATIONS (16 Sep. 2009); CHAIRMAN OF THE JOINT CHIEFS OF STAFF, INSTR. 3110.12D, CIVIL AFFAIRS SUPPLEMENT TO THE JOINT STRATEGIC CAPABILITIES PLAN FOR FY 2006 (JSCP FY 06) (U) (15 Apr. 2007)(Classified Secret); JCS, JOINT PUB. 3-57, CIVIL-MILITARY OPERATIONS (8 July 2008).

5. **Cyberspace Operations (CO)**: "The employment of cyberspace capabilities where the primary purpose is to achieve objectives in or through cyberspace."[66] This term replaces the former doctrinal category of computer network operations (CNO), and any references to CNO should be interpreted as applying to CO. Presidential Policy Directive 20, signed in November 2012, defines Cyberspace Operations in terms of categories. Under PPD 20, cyberspace operations include Cyber Collection, Defensive Cyber Effects Operations (DCEO), and Offensive Cyber Effects Operations (OCEO). PPD 20 defines "cyber effects" as "the manipulation, disruption, denial, degradation, or destruction of computers, information or communications systems, networks, physical or virtual infrastructure controlled by computers or information systems, or information resident thereon." Note that PPD 20 is still classified TOP SECRET, and full definitions of OCEO and DCEO are also classified SECRET. JP 3-12, Cyberspace Operations, dated February 2013 and classified SECRET/REL FVEY, uses a different series of terms. JP 3-12 uses different terminology than PPD 20 because PPD 20 applies to Government agencies outside DoD as well. JP 3-12 uses Offensive Cyberspace Operations (OCO), Defensive Cyberspace Operations (DCO), and Cyberspace Intelligence, Surveillance, and Reconnaissance (ISR). Unclassified versions of JP 3-12 definitions are listed in Joint Publication 1-02.

a. Discussion: In the past decade, cyberspace operations have received significant attention, culminating in promulgation of several new strategies and initiatives.[67] These documents discuss the growing cyberspace threat, which a former Secretary of Defense warned could collectively result in a "cyber Pearl Harbor,"[68] and which the Director of National Intelligence recently listed[69] as the top concern facing the United States. To combat these threats, the United States continues to develop cyberspace capabilities and policies.[70] This subsection summarizes several authorities applicable to military CO for national security. It does not discuss in detail how the Internet or computing devices work, or the types of threats faced in cyberspace, though both subjects are immensely helpful for those advising on CO.[71] Though no international treaty or domestic statute comprehensively governs

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[65] For a description of DoD Humanitarian Assistance (HA) programs, see the Office of Humanitarian Assistance, Disaster Relief, and Mine Action (HDM) website, Defense Security Cooperation Agency (last revised 10 Apr. 2013). For more information on HA fiscal constraints, see the Fiscal Law chapter in this Handbook.

[66] JOINT CHIEFS OF STAFF, JOINT PUB. 3-0, JOINT OPERATIONS at GL-8 (11 Aug. 2011)(GL is Glossary).

[67] *See generally* THE WHITE HOUSE, NATIONAL STRATEGY TO SECURE CYBERSPACE (Feb. 2003); CHAIRMAN OF THE JOINT CHIEFS OF STAFF, THE NATIONAL MILITARY STRATEGY FOR OPERATING IN CYBERSPACE (U) (Dec. 2006)(Classified Secret, redacted unclassified version publicly released under FOIA) [hereinafter NMS-CO]; EXECUTIVE OFFICE OF THE PRESIDENT, THE COMPREHENSIVE NATIONAL CYBERSECURITY INITIATIVE (Mar. 2, 2010)(Classified; unclassified summary publicly released); THE WHITE HOUSE, INTERNATIONAL STRATEGY FOR CYBERSPACE: PROSPERITY, SECURITY AND OPENNESS IN A NETWORKED WORLD (May 2011); U.S. DEP'T OF DEF., STRATEGY FOR OPERATING IN CYBERSPACE (July 2011).

[68] Secretary of Defense Leon Panetta, *Remarks by Secretary Panetta on Cybersecurity to the Business Executives for National Security*, New York City (Oct. 11, 2012)(discussing the cyber threat and Department of Defense initiatives in response).

[69] *See Open Hearing: Current and Projected National Security Threats to the United States: Hearing Before the Select Committee on Intelligence, United States Senate*, 113th Cong. (Mar. 12, 2013) (Statement for the Record of James R. Clapper, Director of National Intelligence, Worldwide Threat Assessment of the US Intelligence Community, at 1–3).

[70] *See* U.S. GOV'T ACCOUNTABILITY OFFICE, RPT. NO. GAO-11-75, DEFENSE DEPARTMENT CYBER EFFORTS: DOD FACES CHALLENGES IN ITS CYBER ACTIVITIES (July 2011) (detailing the evolution of DoD's cyberspace efforts [pre-JOINT PUB. 3-12]).

[71] Numerous sources address both systems and vulnerabilities. *See, e.g., id.* (discussing threats and incidents), *The Cybersecurity Partnership Between the Private Sector and Our Government: Protecting Our National and Economic Security: Hearing Before the Committee on Commerce, Science, and Transportation and the Committee on Homeland Security and Governmental Affairs, United States Senate*, 113th Cong. (Mar. 7, 2013) (Statement of Gregory C. Wilshusen, Director Information Security Issues), in U.S. GOV'T ACCOUNTABILITY OFFICE, RPT. NO. GAO-13-462T, CYBERSECURITY: A BETTER DEFINED AND IMPLEMENTED NATIONAL STRATEGY IS NEEDED TO ADDRESS PERSISTENT CHALLENGES (Mar. 7, 2013)(discussing systems and threats); U.S. GOV'T ACCOUNTABILITY OFFICE, RPT. NO. GAO-13-187, CYBERSECURITY: NATIONAL STRATEGY, ROLES, AND RESPONSIBILITIES NEED TO BE BETTER DEFINED AND MORE EFFECTIVELY IMPLEMENTED (Feb. 14, 2013)(discussing systems, threats, and strategies).

U.S. military activities in cyberspace, a number of policy and regulatory documents—both classified and unclassified—provide guidance to legal advisors on applying existing laws to CO.

b. Mission: As part of a whole-of-government approach to cyber security, DoD performs three limited yet critical missions. The *National Military Strategy for Cyberspace Operations* states:

> US law and national policy assign DOD three main roles: defense of the Nation, national incident response, and critical infrastructure protection. These missions may be performed simultaneously. Although partner departments and agencies have responsibilities to secure portions of cyberspace, only DOD conducts *military operations* to defend cyberspace, the critical infrastructure, the homeland, or other vital US interests.[72]

c. Strategy: The DoD Strategy for Operating in Cyberspace outlines five strategic initiatives to fulfill this mission[73]—

- Treat cyberspace as an operational domain to organize, train, and equip so that DoD can take full advantage of cyberspace's potential.
- Employ new defense operating concepts to protect DoD networks and systems.
- Partner with other U.S. government departments and agencies and the private sector to enable a whole-of-government cybersecurity strategy.
- Build robust relationships with U.S. allies and international partners to strengthen collective cybersecurity.
- Leverage the nation's ingenuity through an exceptional cyber workforce and rapid technological innovation.

d. Legal Position: In addition to the strategies and initiatives discussed above, two recent unclassified statements of U.S. policy stand out regarding cyberspace: a 2011 DoD report to Congress on cyberspace policy,[74] and the September 2012 speech[75] by then-U.S. Department of State Legal Advisor Harold Koh at a U.S. Cyber Command legal conference. Both references make clear that the United States accepts the application of established international law of armed conflict legal authorities to CO, though the precise function of some rules remains to be worked out.

e. Joint Doctrine: Recent joint doctrine rewrites formally separated CO from IO. Joint Pub. 3-13 deletes the term computer network operations (CNO) and its three subcategories of attack (CNA), defense (CND), and exploitation (CNE) from joint doctrine.[76] This terminology has been superseded by the definitions used in PPD 20 and JP 3-12. The new classified Joint Pub. 3-12, Cyberspace Operations, sets forth a comprehensive doctrinal framework for CO.[77] Unclassified definitions of key terms appear in Joint Pub. 1-02:

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[72] NMS-CO, *supra* note 69, at 1 (emphasis added). Though DoD published a second strategy statement in 2011 (*see generally* U.S. DEP'T OF DEF., STRATEGY FOR OPERATING IN CYBERSPACE, *supra* note 69) the NMS-CO has not formally been rescinded as of this writing. The NMS-CO further states, "DoD will execute the full range of military operations (ROMO) in and through cyberspace to defeat, dissuade, and deter threats against US interests." *Id.* at 2. The U.S. Cyber Command mission statement is: "USCYBERCOM plans, coordinates, integrates, synchronizes, and conducts activities to: direct the operations and defense of specified [DoD] information networks and; [sic] prepare to, and when directed, conduct full-spectrum military cyberspace operations in order to enable actions in all domains, ensure US/Allied freedom of action in cyberspace and deny the same to our adversaries." U.S. Dep't of Def., Cyber Command Fact Sheet (Oct. 13, 2010).

[73] *See generally* U.S. DEP'T OF DEF., STRATEGY FOR OPERATING IN CYBERSPACE, *supra* note 69 (outlining initiatives).

[74] U.S. DEP'T OF DEF., CYBERSPACE POLICY REPORT: A REPORT TO CONGRESS PURSUANT TO THE NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2011, SECTION 934 (Nov. 2011)(answering thirteen questions for Congress on DoD's cyber policies and legal positions—one of the best quick primers for military legal advisors on cyberspace).

[75] Harold Hongju Koh, Legal Advisor, U.S. Dep't of State, *International Law in Cyberspace: Remarks as Prepared for Delivery by Harold Hongju Koh to the USCYBERCOM Inter-Agency Legal Conference Ft. Meade, MD, Sept. 18, 2012*, 54 HARV. INT'L L.J. ONLINE 1 (Dec. 2012)(footnoted version of original remarks, with citations to supporting sources).

[76] *See* JOINT PUB. 3-13, *supra* note 1, at GL-3 (deleting terms); *see generally* JOINT PUB. 3-12, *supra* note 69.

[77] *See generally* JOINT CHIEFS OF STAFF, JOINT PUB. 3-12, CYBERSPACE OPERATIONS (5 Feb. 2013)(Classified Secret) [hereinafter JOINT PUB. 3-12].

- **Cyberspace**: "A global domain within the information environment consisting of the interdependent network of information technology infrastructures and resident data, including the Internet, telecommunications networks, computer systems, and embedded processors and controllers."[78]
- **Cyberspace superiority**: "The degree of dominance in cyberspace by one force that permits the secure, reliable conduct of operations by that force, and its related land, air, maritime, and space forces at a given time and place without prohibitive interference by an adversary."[79]
- **Offensive cyberspace operations (OCO)**: "Cyberspace operations intended to project power by the application of force in or through cyberspace."[80]
- **Defensive cyberspace operations (DCO)**: "Passive and active cyberspace operations intended to preserve the ability to utilize friendly cyberspace capabilities and protect data, networks, net-centric capabilities, and other designated systems."[81]
- **Defensive cyberspace operation response action (DCO-RA)**: Deliberate, authorized defensive measures or activities taken *outside* of the defended network to protect and defend Department of Defense cyberspace capabilities or other designated systems."[82] (emphasis added)
- **Department of Defense information networks (DODIN)**: "The globally interconnected, end-to-end set of information capabilities, and associated processes for collecting, processing, storing, disseminating, and managing information on-demand to warfighters, policy makers, and support personnel, including owned and leased communications and computing systems and services, software (including applications), data, and security."[83]
- **Department of Defense information network (DODIN) operations**: "Operations to design, build, configure, secure, operate, maintain, and sustain [DoD] networks to create and preserve information assurance on the [DoD] information networks."[84]

f. Relation to IO: Joint Pub. 3-13 states—

> CO are the employment of cyberspace capabilities where the primary purpose is to achieve objectives in or through cyberspace. Cyberspace capabilities, when in support of IO, deny or manipulate adversary or potential adversary decision making, through targeting an information medium (such as a wireless access point in the physical dimension), the message itself (an encrypted message in the information dimension), or a cyber-persona (an online identity that facilitates communication, decision making, and the influencing of audiences in the cognitive dimension). When employed in support of IO, CO generally focus on the integration of offensive and defensive capabilities exercised in and through cyberspace, in concert with other IRCs, and coordination across multiple lines of operation and lines of effort.[85]

g. Common Legal Issues: U.N. Charter (*jus ad bellum* analysis whether a cyberspace act constitutes a threat or use of force under Article 2(4), or an armed attack under Article 51 that justifies actions in self-defense); Law of Armed Conflict (*jus in bello* compliance with treaties and customary norms governing weapons, tactics, targeting, and protection of civilians and civilian property); Neutrality Law (including both a sovereign nation's right to remain neutral in armed conflicts and its obligation to prevent use of its territory to stage attacks); Communications Law (requiring, in peacetime, non-interference with certain state infrastructures and broadcasts); Intelligence, Privacy, and Free Speech Laws (primarily domestic, restricting the state's use of certain methods, targets, or actors to gather information and preserving freedom of expression); Criminal Law (prohibiting certain activities in cyberspace and encouraging state cooperation in prosecuting hackers); and National Security Law

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[78] *See* JOINT CHIEFS OF STAFF, JOINT PUB. 1-02, DICTIONARY OF MILITARY AND ASSOCIATED TERMS at 70 (8 Nov. 2010)(as amended through 15 Apr. 2013) [hereinafter JOINT PUB. 1-02] (*citing* JOINT PUB. 3-12).
[79] *Id.* at 70 (*citing* JOINT PUB. 3-12). JP 1-02 prefers the adjective 'cyberspace' to 'cyber.' *Id.* at B-4.
[80] *Id.* at 204 (*citing* JOINT PUB. 3-12).
[81] *Id.* at 76 (*citing* JOINT PUB. 3-12).
[82] *Id.* at 75 (*citing* JOINT PUB. 3-12).
[83] *Id.* at 78 (*citing* JOINT PUB. 3-12). JP 1-02 prefers this term over 'Global Information Grid.' *Id.* at B-4.
[84] *Id.* at 78 (*citing* JOINT PUB. 3-12).
[85] JOINT PUB. 3-13, *supra* note 1, at II-9.

(protection of critical infrastructure and assets, including cooperation with other agencies and private entities). Coordination and deconfliction with other domestic authorities governing use of related capabilities is also critical.

h. Proponents: DoD Chief Information Officer (CIO);[86] U.S. Strategic Command (USSTRATCOM), including its sub-unified command, U.S. Cyber Command (USCYBERCOM, whose Commander is dual-hatted as Director of the National Security Agency) and four component cyber commands: U.S. Army Cyber Command (ARCYBER), U.S. 2d Army; U.S. Fleet Cyber Command, U.S. 10th Fleet; U.S. Marine Corps Force Cyberspace Command (MARFORCYBER); U.S. Air Force Cyber Command (AFCYBER), 24th Air Force; the National Security Agency and Central Security Service (NSA/CSS); and other agencies as appropriate to their particular missions and capabilities.

i. Operational Guidance: No specific annex is currently dedicated to CO, though Annex K, Communication Systems, may discuss aspects of CO.

j. Sources: The recently-codified 10 U.S.C. § 111 note on "Military Activities in Cyberspace" recognizes DoD's capability to conduct offensive operations in cyberspace, as directed by the President.[87] It requires that CO comply with the same policy and legal authorities applicable to kinetic capabilities, and with the War Powers Resolution. In practice, this requires legal review of both capabilities (analogous to weapons reviews under the law of armed conflict) and training of forces on the appropriate use of those capabilities. In addition to those sources and areas of law cited above, the following authorities also apply to cyberspace: Executive and DoD orders, directives, and instructions on protecting critical functions,[88] infrastructure,[89] and networks;[90] DoD policy memoranda establishing U.S. Cyber Command[91] and governing Interactive Internet Activities;[92] and other classified directives, orders, and rules of engagement.

k. International Legal Developments: Three recent developments are important sources for legal advisors to consult to understand the United States and other nations' approaches to cyberspace. First, the United States participates as part of a 15-nation Group of Government Experts, studying existing and potential threats from cyberspace and possible cooperative measures to address them.[93] Second, in December 2012, the International Telecommunications Union, of which the United States is a member, recently adopted a new set of International

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[86] *See* U.S. DEP'T OF DEF., DIR. 5144.02, DOD CHIEF INFORMATION OFFICER (DOD CIO) (22 Apr. 2013).

[87] Added by National Defense Authorization Act (NDAA) for Fiscal Year 2012, Pub. L. 12–81, div. A, title IX, § 954 (Dec. 31, 2011) (2012 Supp.),125 Stat. 1551. The codified note states in full:

> Congress affirms that the Department of Defense has the capability, and upon direction by the President may conduct offensive operations in cyberspace to defend our Nation, Allies and interests, subject to—
> (1) the policy principles and legal regimes that the Department follows for kinetic capabilities, including the law of armed conflict; and
> (2) the War Powers Resolution (50 U.S.C. 1541 et seq.).

Id.; *see also* H.R. Rep. No. 112-329 pt. 1, at 686 (Dec. 12, 2011)(Conference Report discussion of § 954's purpose).

[88] *See, e.g.*, DEP'T OF DEF., INSTR. 5200.44, PROTECTION OF MISSION CRITICAL FUNCTIONS TO ACHIEVE TRUSTED SYSTEMS AND NETWORKS (5 Nov. 2012).

[89] *See, e.g.*, Federal Information Security Management Act (FISMA), 44 U.S.C. § 3541 *et seq*. (2006); THE WHITE HOUSE, PRESIDENTIAL POLICY DIRECTIVE [21] -- CRITICAL INFRASTRUCTURE SECURITY AND RESILIENCE (Feb. 12, 2013); EXEC. ORDER. NO. 13,636, FEB. 12, 2013, IMPROVING CRITICAL INFRASTRUCTURE CYBERSECURITY, 78 F.R. 11739 (Feb 19, 2013); DEP'T OF DEF., DIR. 3020.40, DOD POLICIES AND RESPONSIBILITIES FOR CRITICAL INFRASTRUCTURE (14 Jan. 2010) (C2, 21 Sep. 2012); DEP'T OF DEF., INSTR. 3020.45, DEFENSE CRITICAL INFRASTRUCTURE PROGRAM (DCIP) MANAGEMENT (21 Apr. 2008).

[90] *See, e.g.*, U.S. DEP'T OF DEF., DIR. 8000.01, MANAGEMENT OF THE [DOD] INFORMATION ENTERPRISE (10 Feb. 2009); U.S. DEP'T OF DEF., DIR. O-8530.1, COMPUTER NETWORK DEFENSE (CND) (8 Jan. 2001)(U//FOUO); U.S. DEP'T OF DEF., INSTR. O-8530.2, SUPPORT TO COMPUTER NETWORK DEFENSE (CND) (9 Mar. 2001)(U//FOUO); U.S. DEP'T OF DEF., INSTR. 8410.02, NETOPS FOR THE GLOBAL INFORMATION GRID (GIG) (19 Dec. 2008); U.S. DEP'T OF DEF., INSTR. 8410.03, NETWORK MANAGEMENT (NM) (29 Aug. 2012); CHAIRMAN OF THE JOINT CHIEFS OF STAFF, MAN. 6510.01B, CYBER INCIDENT HANDLING PROGRAM (10 July 2010).

[91] *See* Memorandum from The Secretary of Defense, subject: Establishment of a Subordinate Unified U.S. Cyber Command Under U.S. Strategic Command for Military Cyberspace Operations (23 June 2009).

[92] Directive-Type Memorandum 08-037, Memorandum from the Deputy Secretary of Defense, subject: Policy for Department of Defense (DoD) Interactive Internet Activities (8 June 2007)(two-way internet communications) [hereinafter DTM 08-037].

[93] For a sense of the international dialogue regarding cyberspace, and reports and additional information on the Group, see the United Nations Office for Disarmament Affairs information security website. *See also* U.N. Secretary-General, *Developments in the Field of Information and Telecommunications in the Context of Information Security*, *Rep. of the Secretary-General*, 14–21, U.N. Doc A/66/152 (July 15, 2011)(submission of United States of America regarding cyberspace).

Telecommunications Regulations and five legally nonbinding resolutions.[94] The United States vigorously opposed these resolutions, in part motivated by differences of opinion on Internet freedom of expression and governance.[95] Third, in 2013, a group of international legal scholars and practitioners, at the invitation of the North Atlantic Treaty Organization (NATO) Cooperative Cyber Defence Centre of Excellence published their opinions in a manual on the law governing cyber warfare.[96] Legal advisors should continue to monitor international discussions on cyberspace.

l. U.S. Developments/Issues: PPD 20 represents our current policy in cyberspace, and represents a change from prior policies. Most of the documents implementing PPD 20 to DoD are classified Top SECRET. Numerous classified OPORDs and EXORDs exist in this realm as well that remain US policy. As stated previously in this chapter, an emerging debate exists on the status of cyberspace operations as "traditional military activities," and the issue of convergence between Title 10 and Title 50. In addition, the lines between cyber effects operations and cyber intelligence have become increasingly blurred in recent years, as many intelligence operations may nonetheless carry cyber effects. Again, the key factor for determining whether LOAC or Intelligence Law applies is to look at the primary purpose of the cyberspace operation. Finally, a debate continues in the cyberspace community over the distinction between cyberspace operations and traditional electronic warfare. Operators often prefer to have their missions characterized as EW, since the authority levels for traditional EW are far lower than for cyberspace operations.

m. Other resources: Numerous additional documents and current news stories can be found on the following, regularly updated unclassified portals on cyber security—the National Security Council (NSC); DoD; the U.S. Department of Homeland Security (DHS); the U.S. Computer Emergency Readiness Team (US-CERT); and the NATO LibGuide on Cyberspace Security. The Tallinn Manual is also a useful source for determining the current status of CIL in this field. Finally, the Harold Koh Speech of September 2012 is an excellent source for looking at United States policy at an UNCLASSIFIED level.

6. **Information Assurance (IA)**: "Actions that protect and defend information systems by ensuring availability, integrity, authentication, confidentiality, and nonrepudiation."[97]

a. Discussion: IA ensures the reliability of information on DoD information networks and other means of communication, thereby protecting friendly decision-making. IA is the primary objective of DODIN operations (defined above in para. III.B.5.d) and a core focus of other communications equipment operations. "IA is necessary to gain and maintain information superiority. The [Joint Forces commander] relies on IA to protect infrastructure to ensure its availability, to position information for influence, and for delivery of information to the adversary. Furthermore, IA and CO are interrelated and rely on each other to support IO."[98]

b. Common Legal Issues: Communications Law (compliance with international treaties and agreements, and domestic statutes and regulations regarding operation of communications systems); Intelligence, Privacy, and Free Speech Laws (primarily domestic, restricting the state's ability to gather information and preserving freedom of expression); Criminal Law (prohibiting certain activities in cyberspace and encouraging state cooperation in prosecuting hackers); and National Security Law (protection of critical infrastructure and assets, including cooperation with other agencies and private entities).

c. Proponents: DoD Chief Information Officer (CIO).

d. Operational Guidance: No specific annex is currently dedicated to IA, though Annex K, Communications Systems, may discuss aspects of IA.

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[94] *See* INT'L. TELECOMM. UNION, FINAL ACTS OF THE WORLD CONFERENCE ON INTERNATIONAL TELECOMMUNICATIONS [WCIT] (DUBAI, 2012) (Dec. 14, 2012)(text of new regulations and resolutions, proposed to replace the existing 1988 regulations).
[95] *See* U.S. Dep't of State, Media Note: U.S. Intervention at the [WCIT], Dec. 13, 2012 (text of formal U.S. intervention requested at WCIT); U.S. Dep't of State, Transcript of Remarks by Terry Kramer, Ambassador, U.S. Head of Delegation, on the [WCIT] (via Teleconference from Dubai, United Arab Emirates), Dec. 13, 2012 (further explaining U.S. objections).
[96] *See* TALLINN MANUAL ON THE INTERNATIONAL LAW APPLICABLE TO CYBER WARFARE (Michael N. Schmitt gen. ed. 2013) (proposing 95 rules with commentaries). Though not an official publication, and reflecting only the personal opinions of participants (not their respective nations), the Tallinn Manual included both U.S. experts and an observer from USCYBERCOM. *See id*. at x–xiii, 9–10. As of this writing, the United States has neither officially endorsed nor rejected the Manual.
[97] *See* JOINT PUB. 1-02, *supra* note 80, at 135 (*citing* JOINT PUB. 3-12).
[98] JOINT PUB. 3-13, *supra* note 1, at II-9.

e. Sources: 10 U.S.C. § 2224 (2006), the Defense IA Program;[99] U.S. DEP'T OF DEF., DIR. 8000.01, MANAGEMENT OF THE DEPARTMENT OF DEFENSE INFORMATION ENTERPRISE (10 Feb. 2009) (Unclassified); U.S. DEP'T OF DEF., DIR. 8500.01E, INFORMATION ASSURANCE (IA) (24 Oct. 2002) (Unclassified); U.S. DEP'T OF DEF., DIR. O-8530.1, COMPUTER NETWORK DEFENSE (CND) (8 Jan. 2001)(Unclassified//For Official Use Only (FOUO)); U.S. DEP'T OF DEF., INSTR. 8410.02, NETOPS FOR THE GLOBAL INFORMATION GRID (GIG) (19 Dec. 2008) (Unclassified); U.S. DEP'T OF DEF., INSTR. 8500.2, INFORMATION ASSURANCE (IA) IMPLEMENTATION (6 Feb. 2003) (Unclassified); U.S. DEP'T OF DEF., INSTR. 8510.01, DOD INFORMATION ASSURANCE CERTIFICATION AND ACCREDITATION PROCESS (DIACAP) (28 Nov. 2007)(Unclassified); U.S. DEP'T OF DEF., INSTR. 8580.1, INFORMATION ASSURANCE (IA) IN THE DEFENSE ACQUISITION SYSTEM (9 July 2004)(Unclassified); U.S. DEP'T OF DEF., INSTR. 8581.01, INFORMATION ASSURANCE (IA) POLICY FOR SPACE SYSTEMS USED BY [DOD] (8 June 2010) (Unclassified); CHAIRMAN OF THE JOINT CHIEFS OF STAFF, INSTR. 6510.01F, INFORMATION ASSURANCE (IA) AND SUPPORT TO COMPUTER NETWORK DEFENSE (CND) (9 Feb. 2011)(Unclassified); JOINT PUB. 3-12.

7. **Space Operations (Space Ops)**: "US space operations are comprised of four mission areas: space force enhancement; space support; space control; and space force application."[100]

a. Discussion: Regarding IO, "[s]pace capabilities are a significant force multiplier when integrated with joint operations. Space operations support IO through the space force enhancement functions of intelligence, surveillance, and reconnaissance; missile warning; environmental monitoring; satellite communications; and space-based positioning, navigation, and timing."[101]

b. Common Legal Issues: Space Law (see Chapter 10 on Sea, Air, and Space Law in this Handbook); may also raise issues similar to CO as discussed above.

c. Proponent: U.S. Strategic Command and its subordinate command, the Joint Functional Component Command for Space.

d. Operational Guidance: Annex N to the OPLAN addresses Space Operations.

e. Sources: U.S. DEP'T OF DEF., DIR. 3100.10, SPACE POLICY (18 Oct. 2012)(Unclassified); U.S. DEP'T OF DEF., DIR. 5101.02E, DOD EXECUTIVE AGENT (EA) FOR SPACE (25 Jan. 2013)(Unclassified); U.S. DEP'T OF DEF., DIR. S-3100.13, SPACE FORCE APPLICATION (14 Sept. 2000)(Classified Secret); U.S. DEP'T OF DEF., DIR. S-3100.14, SPACE FORCE ENHANCEMENT (14 Sept. 2000)(Classified Secret); CHAIRMAN OF THE JOINT CHIEFS OF STAFF (CJCS), JOINT PUB. 3-14, SPACE OPERATIONS (6 Jan. 2009)(Unclassified). *See also* Chapter 10 on Sea, Air, and Space Law of this Handbook.

8. **Military Information Support Operations (MISO)**: "Planned operations 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 in a manner favorable to the originator's objectives."[102]

a. Discussion: MISO, formerly known as psychological operations (PSYOP), "focuses on the cognitive dimension of the information environment where its [target audience] includes not just potential and actual adversaries, but also friendly and neutral populations."[103] MISO may be conducted across the full spectrum of military operations, "such as stability operations, security cooperation, maritime interdiction, noncombatant evacuation, foreign humanitarian operations, counterdrug, force protection, and counter-trafficking."[104]

b. Common Legal Issues: U.N. Charter (*jus ad bellum* analysis whether an action or message constitutes a threat of force under Article 2(4)); Law of Armed Conflict (*jus in bello* compliance with treaties and

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[99] The NDAA for FY13 added two new requirements to be codified as notes to this section. *See* National Defense Authorization Act for Fiscal Year 2013, Public Law 112-239 §§ 933, 941 (Jan. 2, 2013) 126 Stat. 1632, 1884–85, 1889–90 (tasking DoD to implement a baseline software assurance policy, criteria for cleared defense contractors to report penetration of their networks).
[100] CHAIRMAN OF THE JOINT CHIEFS OF STAFF (CJCS), JOINT PUB. 3-14, SPACE OPERATIONS at ix (6 Jan. 2009).
[101] JOINT PUB. 3-13, *supra* note 1, at II-9.
[102] JOINT PUB. 3-13, *supra* note 1, at II-9 to II-10.
[103] *See* Memorandum from The Secretary of Defense, subject: Changing the Term Psychological Operations (PSYOP) to Military Information Support Operations (MISO) (3 Dec. 2010)(describing name change rationale); *Id*. at II-10 (quotation).
[104] *Id.*

customary norms, e.g., rules on treachery and perfidy,[105] as well as prisoner of war and detainee treatment[106]); Communications Law (international law prohibiting harmful interference with radio broadcasts, and domestic or foreign laws regulating broadcasting); Law of the Sea (restricting pirate radio broadcasts and delineating territorial boundaries); Intelligence, Privacy, and Free Speech Laws (primarily domestic, restricting the state's use of certain methods, targets, or actors to gather information, and preserving freedom of expression); Other U.S. domestic law restrictions (e.g., attribution vs. covert action,[107] copyright and trademark restrictions, and prohibition on propaganda directed at U.S. audiences,[108] State Department public diplomacy mission); and international agreements (e.g., on status of forces) or foreign domestic law, which may place limits on activities of military information support units.

c. Proponents: USD(P) (normally overseen by ASD(SOL/IC)); USSOCOM.[109]

d. Operational Guidance: Generally contained in Appendix 3 to Annex C of the OPORD or OPLAN. MISO generally proceed according to a specific IO plan. In creating a MISO plan, one must conduct research and analysis of critical information, develop themes and actions, and produce and disseminate the MISO product. In planning the dissemination phase, one must consider the most effective type of MISO product for a particular area; for example, leaflets, radio broadcasts, TV broadcasts, and/or internet-based products may each work better as delivery platforms in certain areas of the world than they would in others. Furthermore, **MISO products must not be directed at domestic (i.e. U.S.) audiences**. Approved trans-regional or theater-specific plans provide guidance and parameters for individual products addressing these requirements. Legal advisors assist both in developing plans and in ensuring products comply therewith.

e. Sources: U.S. DEP'T OF DEF., DIR. S-3321.1, OVERT PSYCHOLOGICAL OPERATIONS CONDUCTED BY THE MILITARY SERVICES IN PEACETIME AND IN CONTINGENCIES SHORT OF DECLARED WAR (U) (26 July 1984) (Classified Secret); Directive-Type Memorandum (DTM) 08-037, Memorandum from the Deputy Secretary of Defense, subject: Policy for Department of Defense (DoD) Interactive Internet Activities (8 June 2007)(two-way internet communications); CHAIRMAN OF THE JOINT CHIEFS OF STAFF, INSTR. 3110.05E, MILITARY INFORMATION SUPPORT OPERATIONS SUPPLEMENT TO THE JOINT STRATEGIC CAPABILITIES PLAN (30 Sep. 2011)(U//FOUO); JOINT

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[105] Examples of MISO-related conduct violating the prohibitions on treachery and perfidy include advertising a bounty for an enemy's death, broadcasting to an enemy that an armistice has been agreed upon when such is not the case, feigning surrender to facilitate an attack, or threatening an enemy that no survivors will be taken. *See* CONVENTION RESPECTING THE LAWS AND CUSTOMS OF WAR ON LAND AND ITS ANNEX: REGULATIONS RESPECTING THE LAWS AND CUSTOMS OF WAR ON LAND, arts. 23–24, Oct. 18, 1907, 36 Stat. 2277, 205 Consol. T.S. 277, *entered into force and for the United States* Jan. 26, 1910 (permitting ruses of war but forbidding treacherous conduct or improper use of the Red Cross emblem) [hereinafter Hague IV for the Convention, Hague Regulations for the Annex]; U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE, paras. 48–55, 467 (18 July 1956) (C1, 15 July 1976) (discussing examples of ruses, treachery, and perfidy) [hereinafter FM 27-10]; *see also* AP I, arts. 37–38, 40 (expanding the rules on perfidy, improper use, and threatening an enemy); Matheson, *supra* note 40, at 422–24 (stating the U.S. position on AP I, including that individual combatants shall not kill, injure, or capture enemy personnel by resort to perfidy; internationally recognized protective emblems, e.g., the Red Cross, shall not be improperly used; and no order shall be given to permit no survivors nor may an adversary be threatened with such an order or hostilities conducted on that basis).

[106] The Geneva Conventions and Army Regulation 190-8 forbid publishing photographic images of enemy prisoners of war, or subjecting prisoners of war or others (including detainees or internees) to outrages upon personal dignity, such as humiliating or degrading treatment. *See* CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR, arts. 3, 13, Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. 3364, 75 U.N.T.S. 135, *entered into force* Oct. 21, 1950, *for the United States* Feb. 2, 1956 (forbidding outrages upon personal dignity, including humiliation or degrading treatment; protecting prisoners of war against insults and public curiosity; art. 3 is common to all four Geneva Conventions); AP I, *supra* note 37, art. 75 (similar protection for civilian detainees); U.S. DEP'T OF ARMY, REG. 190-8, ENEMY PRISONERS OF WAR, RETAINED PERSONNEL, CIVILIAN INTERNEES AND OTHER DETAINEES, paras. 1.5.d., 1.9 (1 Oct. 1997)(restricting photographing, filming, and video taping of such persons).

[107] *See* 50 U.S.C. § 413b (2006)(defining covert action as "activity or activities of the [USG] to influence political, economic, or military conditions abroad, where it is intended that the role of the [USG] will not be apparent or acknowledged publicly", and requiring Presidential approval for such actions, unless one of four exceptions applies, including "traditional . . . military activities [TMA] or routine support to such activities"). Legal advisors should consult operational guidance governing attribution, and ensure MISO (arguably TMA) are military operations, distinct from U.S. State Department public diplomacy efforts.

[108] Previously, U.S. military forces observed this restriction by policy, motivated by a statute applicable to the U.S. State Department public diplomacy mission (22 U.S.C § 1461-1a, part of the Smith-Mundt Act). A new statute directed at DoD, recently codified at 10 U.S.C. 2241a (2010 Supp.), directs: "Funds available to the [DoD] may not be obligated or expended for publicity or propaganda purposes within the United States not otherwise specifically authorized by law."

[109] *See* SECDEF 25 Jan 11 Memo, *supra* note 2, at 2.

CHIEFS OF STAFF, JOINT PUB. 3-13.2, MILITARY INFORMATION SUPPORT OPERATIONS (7 Jan. 2010) (C1, 20 Dec. 2011) (available via JDEIS, access restricted to .mil or .gov network).

9. **Intelligence (Intel)**: "The product resulting from the collection, processing, integration, evaluation, analysis, and interpretation of available information concerning foreign nations, hostile or potentially hostile forces or elements, or areas of actual or potential operations. The term is also applied to the activity which results in the product and to the organizations engaged in such activity."[110] JP 2-0, 1-02 139

a. Discussion: "Intelligence is a vital military capability that supports IO. The utilization of information operations intelligence integration (IOII) greatly facilitates understanding the interrelationship between the physical, informational, and cognitive dimensions of the information environment," and a greater understanding of peoples, cultures, societies, networks, and the flow of information, as well as the predicted and actual reaction of audiences to particular messages.[111]

b. Common Legal Issues: The rules governing intelligence operations are extremely complex and require careful study. In particular, intelligence laws and regulations may limit the use of certain sources or methods for analysis or dissemination of IO products. For example, DoDD 3600.01, para. *l* now requires that "DoD IO information gathering programs and activities . . . coordinated and deconflicted with DoD intelligence activities as set forth in DoD Directive S-5200.37 . . . and DoD 5240.1-R" and that human-derived information gathering activities in support of IO "remain separate from authorized HUMINT and related intelligence activities." For an overview of intelligence law, and notably the restrictions on collections on U.S. persons by members of the Intelligence Community, see Chapter 6 of this Handbook.

c. Proponents: Undersecretary of Defense for Intelligence (USD(I)); various organizations in the Intelligence Community as detailed in Executive Order 12,333.

d. Operational Guidance: Annex B to the OPLAN addresses Intelligence.

e. Sources: OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE, INTELLIGENCE COMMUNITY LEGAL REFERENCE BOOK (2012) (listing numerous statutes, orders, and other resources); Chapter 6, Intelligence Law and Interrogation Operations, of this Handbook (listing several military-specific sources).

10. **Military Deception (MILDEC)**: "Actions executed to deliberately mislead adversary military, paramilitary, or violent extremist organization decision makers, thereby causing the adversary to take specific actions (or inactions) that will contribute to the accomplishment of the friendly mission."[112]

a. Discussion: "One of the oldest IRCs used to influence an adversary's perceptions is MILDEC." Military Deception operations have been used throughout history. Famous examples include the Trojan Horse and World War II efforts to divert attention from Normandy for the D-Day invasion. The focus of MILDEC is desired behavior—not merely to mislead, but to cause adversaries or potential adversaries "to behave in a manner advantageous to the friendly mission, such as misallocation of resources, attacking at a time and place advantageous to friendly forces, or avoid taking action at all." In several ways, MILDEC differs from other IRCs, and is controlled on a strict need-to-know basis due to the sensitive nature of its plans, goals, and objectives.[113]

b. Means and Techniques: There are three means by which a force may conduct MILDEC: physical (i.e. dummy and decoy equipment), technical (i.e. the emission of biological or chemical odors or nuclear particles), and administrative (i.e. the conveyance or denial of oral, pictorial, documentary, or other physical evidence). There are four different deception techniques a force may employ: feints (offensive actions to deceive the enemy about actual offensive actions), demonstrations (a show of force to cause the enemy to select an unfavorable course of action), ruses (cunning tricks to deceive the enemy for a friendly advantage), and displays (the simulation, disguising, and/or portrayal of friendly objects, units, or capabilities).

c. Common Legal Issues: U.N. Charter (*jus ad bellum* analysis whether actions constitute a threat or use of force under Article 2(4), or an armed attack under Article 51 that justifies actions in self-defense); Law of Armed Conflict (*jus in bello* compliance with treaties and customary norms, particularly those governing ruses and

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[110] JOINT PUB. 2-0, JOINT INTELLIGENCE, at GL-11 (22 June 2007)(GL refers to Glossary).
[111] *See* JOINT PUB. 3-13, *supra* note 1, at II-10.
[112] JOINT PUB. 1-02, *supra* note 80, at 179 (citing JOINT CHIEFS OF STAFF, JOINT PUB. 3-13.4, MILITARY DECEPTION (26 Jan. 2012))
[113] *See* JOINT PUB. 3-13, *supra* note 1, at II-10 to II-12.

perfidy and protection of civilians and civilian property);[114] Neutrality Law (including both a sovereign nation's right to remain neutral in armed conflicts and its obligation to prevent use of its territory to stage attacks); Communications Law (requiring, in peacetime, non-interference with certain state infrastructures and broadcasts); Intelligence, Privacy, and Free Speech Laws (primarily domestic, restricting the state's use of certain methods, targets, or actors to gather information and preserving freedom of expression). For purposes of 50 U.S.C. § 413b, military deception techniques constitute a traditional military activity. Military Deception actions cannot *intentionally* target or mislead the U.S. public, Congress, or the U.S. media.

d. Proponents: USD(P), Joint Staff.[115]

e. Operational Guidance: Generally contained in Appendix 3 to Annex C of the OPORD or OPLAN.

f. Sources: U.S. DEP'T OF DEF., INSTR. S-3604.1, (U) [DOD] MILITARY DECEPTION (11 Mar. 2013) (Classified Secret); CHAIRMAN OF THE JOINT CHIEFS OF STAFF, INSTR. 3211.01E, JOINT POLICY FOR MILITARY DECEPTION (U) (25 Oct. 2010)(Classified Secret); JOINT CHIEFS OF STAFF, JOINT PUB. 3-13.4, MILITARY DECEPTION (26 Jan. 2012) (available via JDEIS, access restricted to .mil or .gov network)

11. **Operations Security (OPSEC)**: "A process of identifying critical information and subsequently analyzing friendly actions attendant to military operations and other activities."[116]

a. Discussion: OPSEC facilitates IO's mission to 'protect our own' information and decision-making. "OPSEC is a standardized process designed to meet operational needs by mitigating risks associated with specific vulnerabilities in order to deny adversaries critical information and observable indicators. OPSEC identifies critical information and actions attendant to friendly military operations to deny observables to adversary intelligence systems." Beyond information, the OPSEC process also serves to protect personnel and physical assets. Other IRCs and non-IO communities frequently satisfy OPSEC requirements to mitigate vulnerabilities.[117]

b. Common Legal Issues: Securing critical infrastructure (see discussion of IA, para. III.B.6 above); Freedom of Information Act (FOIA); Unauthorized disclosures of information. "OPSEC practices must balance the responsibility to account to the American public with the need to protect critical information. The need to practice OPSEC should not be used as an excuse to deny noncritical information to the public."[118]

c. Proponents: USD(P); Joint Staff. OPSEC is also an obligation at all levels of command.

d. Operational Guidance: May be contained in Appendix 3 to Annex C of the OPORD or OPLAN, though other sections or annexes of the OPLAN may also discuss OPSEC.

e. Sources: U.S. DEP'T OF DEF., DIR. 5205.02E, DOD OPERATIONS SECURITY (OPSEC) PROGRAM (20 June 2012); U.S. DEP'T OF DEF., MAN. 5205.02-M, DOD OPERATIONS SECURITY (OPSEC) PROGRAM MANUAL (3 Nov 2008); JOINT CHIEFS OF STAFF, JOINT PUB. 3-13.3, OPERATIONS SECURITY (4 Jan. 2012).

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[114] Per JOINT PUB. 3-13.4, "Certain deception techniques may amount to 'perfidious acts' due to their treacherous nature. Perfidious acts are prohibited under the law of armed conflict (LOAC) because they undermine the effectiveness of the law of war and thereby jeopardize the safety of civilians and noncombatants and/or the immunity of protected structures and activities. Acts of perfidy are deceptions designed to invite the confidence of the enemy to lead him to believe that he is entitled to, or is obliged to accord, protected status under the LOAC, with the intent to betray that confidence. Under this deception technique, the deceiving unit intends to use the enemy's compliance with the law of war to gain an advantage with respect to the enemy. Acts of perfidy include, but are not limited to, feigning surrender or waving a white flag in order to lure the enemy into a trap; misuse of protective signs, signals, and symbols in order to injure, kill, or capture the enemy; and using an ambulance or medical aircraft marked with the Red Cross, Red Crescent, or Red Crystal to carry armed combatants, weapons, or ammunition in order to attack or elude enemy forces." The United States does not support the prohibition on the use of enemy emblems and uniforms during military operations contained in AP I, Article 39. *See* Matheson, *supra* note 40, at 422–24. However, U.S. forces do not kill, wound, or capture the enemy while wearing such uniforms or emblems, and must remove enemy markings from enemy weapons before using them in combat. U.S. forces also must apply the principles of necessity, distinction, proportionality, and unnecessary suffering to MILDEC activities, including the obligation to take steps to minimize civilian death, injury, or property damage.
[115] *See* SECDEF 25 Jan 11 Memo, *supra* note 2, at 2.
[116] JOINT PUB. 1-02, *supra* note 80, at 179 (citing JOINT CHIEFS OF STAFF, JOINT PUB. 3-13.4, OPERATIONS SECURITY (4 Jan. 2012))
[117] *See* JOINT PUB. 3-13, *supra* note 1, at II-12.
[118] *Id.*

12. **Special Technical Operations (STO)**: Specialized operations utilizing classified technical tactics, techniques, and procedures.

a. Discussion: "IO need to be deconflicted and synchronized with STO. Detailed information related to STO and its contribution to IO can be obtained from the STO planners at [Combatant Command] or Service component headquarters. IO and STO are separate, but have potential crossover . . ." so coordination is critical.[119]

b. Common Legal Issues, Proponents, and Sources: Various.

c. Operational Guidance: Annex S to the OPLAN addresses Special Technical Operations.

13. **Joint Electromagnetic Spectrum Operations (JEMSO)**: "Those activities consisting of electronic warfare [EW] and joint electromagnetic spectrum management operations [JEMSMO] used to exploit, attack, protect, and manage the electromagnetic operational environment to achieve the commander's objectives."[120]

a. Discussion: "All information-related mission areas increasingly depend on the electromagnetic spectrum (EMS). JEMSO, consisting of EW and joint EMS management operations, enable EMS-dependent systems to function in their intended operational environment. EW is the mission area ultimately responsible for securing and maintaining freedom of action in the EMS for friendly forces while exploiting or denying it to adversaries. JEMSO therefore supports IO by enabling successful mission area operations."[121] EW may utilize technologies such as jamming equipment that have an effect in the physical domain, and JEMSMO must consider international, foreign, and domestic rules allocating and protecting frequencies in the EMS.

b. **Electronic Warfare**: EW refers to any military action involving the use of electromagnetic (EM) and directed energy to control the EM spectrum or to attack the adversary. It includes three major subdivisions: Electronic Attack (EA), Electronic Protection (EP), and Electronic Warfare Support (ES). EW contributes to the success of IO by using offensive and defensive tactics and techniques in a variety of combinations to shape, disrupt, and exploit adversarial use of the EM spectrum while protecting friendly freedom of action in that spectrum.[122]

- **Electronic Attack (EA)**: The use of EM energy, directed energy, or anti-radiation weapons to attack personnel, facilities, or equipment with the intent of degrading, neutralizing, or destroying adversary combat capability. It is considered a form of fires.
- **Electronic Protection (EP)**: Actions taken to protect personnel, facilities, and equipment from any effects of friendly or enemy use of EM spectrum that degrade, neutralize, or destroy friendly combat capability.
- **Electronic Warfare Support (EWS)**: Actions tasked by, or under direct control of, an operational commander to search for, intercept, identify, and locate or localize sources of intentional and unintentional radiated EM energy for the purpose of immediate threat recognition, targeting, planning, and conduct of future operations.

c. Common Legal Issues: Particularly for EW, U.N. Charter (*jus ad bellum* analysis whether act constitutes a threat or use of force under Article 2(4), or an armed attack under Article 51 that justifies actions in self-defense); Law of Armed Conflict (*jus in bello* compliance with treaties and customary norms governing weapons, tactics, targeting, and protection of civilians and civilian property); Neutrality Law (including both a sovereign nation's right to remain neutral in armed conflicts and its obligation to prevent use of its territory to stage attacks). For all aspects of JEMSO, Communications Law (international, foreign, and domestic, regulating the EMS and requiring, in peacetime, no harmful interference with certain state infrastructures and broadcasts); Law of the Sea (delineating territorial boundaries); Free Speech Laws (primarily domestic, preserving freedom of expression); Criminal Law (primarily domestic or foreign, prohibiting certain interferences with broadcasts); and National Security Law (attribution vs. covert action, discussed earlier). Due to the continued expansion of wireless networking and the integration of computers and radio frequency communications, there will be operations and

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[119] *Id.*
[120] JOINT CHIEFS OF STAFF, JOINT PUB. 6-01, JOINT ELECTROMAGNETIC SPECTRUM MANAGEMENT OPERATIONS (JEMSO), at GL-5 (20 Mar. 2012);
[121] JOINT PUB. 3-13, *supra* note 1, at II-12.
[122] *See generally* JOINT CHIEFS OF STAFF, JOINT PUB. 3-13.1, ELECTRONIC WARFARE (8 Feb. 2012)(discussing EW and its three sub-divisions in greater detail).

capabilities that blur the line between CO and EW and that may require case-by-case determination when EW and CO are assigned separate release authorities.

d. Proponents: USD(P) [IO]; USD for Acquisition, Technology, and Logistics (AT&L) [JEMSO]; USSTRATCOM.

e. Operational Guidance: Generally contained in Appendix 3 to Annex C of the OPORD or OPLAN.

f. Sources: U.S. DEP'T OF DEF., DIR. 3600.01, INFORMATION OPERATIONS (IO) (2 May 2013); U.S. DEP'T OF DEF., DIR. 3222.4, ELECTRONIC WARFARE (EW) AND COMMAND AND CONTROL WARFARE (C2W) COUNTERMEASURES (31 July 1992) (C1, 28 Jan. 1994); CHAIRMAN OF THE JOINT CHIEFS OF STAFF, INSTR. 3210.04A, JOINT ELECTRONIC WARFARE REPROGRAMMING POLICY (U) (10 Feb. 2011)(Classified Secret); CHAIRMAN OF THE JOINT CHIEFS OF STAFF, INSTR. 3210.04A, JOINT ELECTRONIC WARFARE REPROGRAMMING POLICY (U) (10 Feb. 2011)(Classified Secret); CHAIRMAN OF THE JOINT CHIEFS OF STAFF, MAN. 3212.02C, PERFORMING ELECTRONIC ATTACK IN THE UNITED STATES AND CANADA FOR TESTS, TRAINING, AND EXERCISES (U) (20 Mar. 2011)(U//FOUO); CHAIRMAN OF THE JOINT CHIEFS OF STAFF, MAN. 3320.04, ELECTRONIC WARFARE IN SUPPORT OF JOINT ELECTROMAGNETIC SPECTRUM OPERATIONS (U) (10 Feb. 2011)(Classified Secret); JOINT CHIEFS OF STAFF, JOINT PUB. 3-13.1, ELECTRONIC WARFARE (8 Feb. 2012)(available via JDEIS, access restricted to .mil or .gov network).

14. **Key Leader Engagement (KLE)**: "KLEs are deliberate, planned engagements between US military leaders and the leaders of foreign audiences that have defined objectives, such as a change in policy or supporting the JFC's objectives."[123]

a. Discussion: "These engagements can be used to shape and influence foreign leaders at the strategic, operational, and tactical levels, and may also be directed toward specific groups such as religious leaders, academic leaders, and tribal leaders; e.g., to solidify trust and confidence in US forces. KLEs may be applicable to a wide range of operations such as stability operations, counterinsurgency operations, noncombatant evacuation operations, security cooperation activities, and humanitarian operations."

b. Common Legal Issues: Vary according to the engagement. Watch for overpromising or making promises that cannot legally, ethically, or fiscally be fulfilled; or accidentally concluding international agreements without authorization. Consult the relevant chapters in this Handbook on these subjects. Regarding IO specifically, U.S. forces must observe the U.N. Charter and Law of Armed Conflict obligations, including those regarding threats, ruses, and perfidy.

c. Proponents: Vary according to the engagement.

d. Operational Guidance: No specific annex is currently dedicated to key leader engagements.

e. Sources: Vary according to the engagement. KLE is a relatively new doctrinal term, though the concept is as old as warfare. Admiral Mullen's admonishment to align messages with actions is apropos. Legal advisors must ensure that commanders know the legal limitations for issues likely to arise in a KLE.[124]

[123] *Id.* at II-13.
[124] *See* Mullen, *supra* note 20, at 4.

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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.

CHAPTER 10

SEA, AIR, AND SPACE LAW

REFERENCES

1. United Nations Convention on the Law of the Sea (UNCLOS III) (1982).
2. Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea Of 10 December 1982 (28 July 1994), A/RES/48/263 (33 I.L.M. 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. Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (1988).
18. Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf (1988).
19. Protocol of 2005 to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (2005).
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24. NWP 1-14M, Annotated Supplement to the Commander's Handbook on the Law of Naval Operations (1997).
25. CHAIRMAN OF THE JOINT CHIEFS OF STAFF, INSTR. 2410.01D, GUIDANCE FOR THE EXERCISE OF RIGHT-OF-ASSISTANCE ENTRY (31 Aug. 2010, *current as of 24 Aug. 2012*).
26. R. R. CHURCHILL & A. V. LOWE, THE LAW OF THE SEA (3d ed. 1999).

I. INTRODUCTION

A. Unlike many other topics of instruction in international and operational law, which focus on questions of "What" is permitted or prohibited, or "How" to legally obtain a certain result, this topic centers around the question

of "Where." In other words, what an individual or State may do depends on where the action is to take place (i.e., land, sea, air, or space).

B. This chapter will first discuss the various legal divisions of the land, sea, air, and outer space. Next, it will turn to the navigational regimes within each of those divisions. Finally, it will present the competencies of coastal States over navigators within the divisions.

C. There are many sources of Sea, Air, and Space Law, but three are particularly noteworthy:

1. 1982 United Nations Convention on the Law of the Sea (UNCLOS III).

a. Opened for signature on December 10, 1982, UNCLOS III entered into force on November 16, 1994 (with 60 State ratifications).[1] Previous conventions on the law of the sea had been concluded, but none were as comprehensive as UNCLOS III. UNCLOS I (1958) was a series of four conventions (Territorial Sea/Contiguous Zone; High Seas; Continental Shelf; and Fisheries/Conservation). The 1958 Conventions' major defect was their failure to define the breadth of the territorial sea.[2] UNCLOS II (1960) attempted to resolve this issue, but "failed, by only one vote, to adopt a compromise formula providing for a six-mile territorial sea plus a six-mile fishery zone."[3] UNCLOS III, which was negotiated over a period of nine years from 1973 to 1982, created a structure for the governance and protection of the seas, including the airspace above and the seabed and subsoil below. In particular, it provided a framework for the allocation of *reciprocal rights and responsibilities* between States—including jurisdiction, as well as navigational rights and duties—that carefully balances the interests of coastal States in controlling coastal activities with the interests of all States in protecting the freedom to use ocean spaces without undue interference (a.k.a. "freedom of the seas").[4] The resources of the deep sea bed beyond the limits of national jurisdiction are declared to be "the common heritage of mankind."[5] The high seas are reserved for peaceful purposes.[6] This is generally interpreted to mean that such use is in compliance with the *jus ad bellum* principles of the UN Charter.

b. On July 9, 1982, the United States announced that it would not sign the Convention, objecting to provisions related to deep seabed mining[7] (Part XI of the Convention).[8] In a March 10, 1983, Presidential Policy Statement, the United States reaffirmed that it would not ratify UNCLOS III because of the deep seabed mining provisions, which it characterized as wealth redistribution and forced technology transfer.[9] Nevertheless, the United States considers the navigational articles to be generally reflective of customary international law, and therefore binding upon all nations.[10] In 1994, the UN General Assembly proposed amendments to the mining provisions.[11] On October 7, 1994, President Clinton submitted the Convention, as amended, to the Senate for its advice and

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[1] As of Jan. 2013, 165 States have ratified UNCLOS III (http://www.un.org/Depts/los/reference_files/status2010.pdf). *See also* NWP 1-14M, Annotated Supplement to the Commander's Handbook on the Law of Naval Operations 1-71 to 1-73 (1997) [hereinafter Annotated NWP 1-14M],*available* at http://www.usnwc.edu/getattachment/a9b8e92d-2c8d-4779-9925-0defea93325c/1-14M_(Jul_2007)_(NWP). **Practitioner's Note**: The Annotated Supplement to the Commander's Handbook on the Law of Naval Operations has not been updated since 1997; however, in July 2007, the latest version of NWP 1-14M, The Commander's Handbook on the Law of Naval Operations, was promulgated. The revision "expands the treatment of neutrality, targeting, and weapons; addresses land mines, maritime law enforcement, and land warfare. This revision also responds to the Navy Strategy set forth in '…From the Sea' and its focus on littoral warfare." NWP 1-14M. The Annotated Supplement is a valuable resource for judge advocates and will be cited in this Chapter of the Handbook; however, the updated NWP must also be consulted by practitioners to facilitate accurate advice.

[2] The four 1958 law of the sea conventions (UNCLOS I) are the only law of the sea treaties to which the United States is presently a State party. Annotated NWP 1-14M, *supra* note 1, at 1-74 to 1-76. The breadth of the territorial sea under customary international law was 3 nautical miles (one nautical mile is approximately 1.15 miles, 2025 yards, or 1852 meters). R.R. CHURCHILL & A. V. LOWE, THE LAW OF THE SEA, 78 (3d ed. 1999) [hereinafter Churchill & Lowe].

[3] Churchill & Lowe, *supra* note 2, at 15.

[4] UNCLOS III, art. 87. *See also* Churchill & Lowe, *supra* note 2, at 205-08.

[5] UNCLOS III, Pmbl. para. 6 and art. 136.

[6] *Id.* at arts. 88 and 301. *See also* Churchill & Lowe, *supra* note 2, at 208, 421-30.

[7] Since it is not a party to UNCLOS III, the United States maintains that it may mine the deep sea-bed without being bound by any limitations contained in UNCLOS III. Annotated NWP 1-14M, *supra* note 1, at 1-25 to 1-26, 1-39.

[8] *See generally id.* at 1-30, 1-38.

[9] *Id.* at 1-1 to 1-2, 1-38 to 1-39, 1-65 to 1-67.

[10] *Id.* at 1-25, 2-59, 2-63.

[11] *Id.* at 1-2.

consent.[12] On February 25, 2004, and again on October 31, 2007, the Senate Foreign Relations Committee voted to send the treaty to the full Senate with a favorable recommendation for ratification. The most recent effort to send the treaty to the full Senate for advice and consent stalled in June 2012 after 34 Senators voiced opposition to the treaty. To date, no action has been taken by the full Senate on UNCLOS III. [13]

2. 1944 Convention on International Civil Aviation (Chicago Convention). This Convention was intended to encourage the safe and orderly development of the then-rapidly growing civil aviation industry. It does not apply to State (i.e., military, police, or customs) aircraft. While recognizing the absolute sovereignty of the State within its national airspace, the Convention provided some additional freedom of movement for aircraft flying over and refueling within the national territory of a foreign state. The Convention also attempted to regulate various aspects of aircraft operations and procedures. This regulation is a continuing responsibility of the International Civil Aviation Organization (ICAO), which was created by the Convention.

3. 1967 Outer Space Treaty. This treaty limited State sovereignty over outer space. Outer space was declared to be the common heritage of mankind. This treaty prohibited certain military operations in outer space and upon celestial bodies, including the placing in orbit of any nuclear weapons or other weapons of mass destruction, and the installation of such weapons on celestial bodies. Outer space was otherwise to be reserved for peaceful uses.[14] The United States and a majority of other nations have consistently interpreted that the phrase "peaceful purposes" does not exclude the use or emplacement of weapons in outer space (other than WMD) as long as such use is in compliance with the *jus ad bellum* principles of the UN Charter. Current U.S. space policy reflects this view that the U.S. will take an aggressive stance against nations, groups, or individuals who would threaten the numerous space assets the U.S. currently relies upon for military operations and national security.[15] Various other international conventions, such as the Registration and Liability Treaties, expand upon provisions found in the Outer Space Treaty.

II. LEGAL DIVISIONS

A. The Earth's surface, sub-surface, and atmosphere are broadly divided into National and International areas.[16] For operational purposes, international waters and airspace (waters outside the 12 NM territorial sea and the corresponding airspace) include all areas not subject to the territorial sovereignty of any nation. All waters and airspace seaward of the territorial sea are international areas in which the high seas freedoms of navigation and overflight are preserved to the international community. These international areas include the water and airspace over contiguous zones, exclusive economic zones, and high seas.[17]

B. National Areas.

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

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[12] *Id.* at 1-2, 1-29 to 1-30. In his submission, President Clinton noted that "[s]ince the late 1960s, the basic U.S. strategy has been to conclude a comprehensive treaty on the law of the sea that will be respected by all countries. Each succeeding U.S. Administration has recognized this as the cornerstone of U.S. oceans policy." *Id.* at 1-29.

[13] There is strong bipartisan support in favor of U.S. accession to the Convention and ratification of the 1994 Agreement. As with former President Clinton, former President Bush expressed his support for the Convention during his administration. During the 2007 Foreign Relations Committee hearings, support for the Convention was offered by the National Security Adviser, the Joint Chiefs of Staff, the Secretaries of Homeland Security, Commerce and the Interior, four former Commandants of the U.S. Coast Guard, every living Chief of Naval Operations, former Secretaries of State Shultz, Haig, Baker and Albright, and every living Legal Adviser to the U.S. Department of State. The Committee also received letters in support of U.S. accession to the Convention and ratification of the 1994 Agreement from affected industry groups, environmental groups, other affected associations, and from the U.S. Commission on Oceans Policy (an official body established by Congress). *See, e.g.*, Brief History of U.S. Efforts Relating to the Law of the Sea, *available at* http://www.state.gov/e/oes/lawofthesea/179798.htm.

[14] *See* Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space Including the Moon and Other Celestial Bodies, pmbl., art.III, art. IV, and art. XI (1967) [hereinafter Outer Space Treaty]. *See also* Annotated NWP 1-14M, *supra* note 1, at 2-38.

[15] Former President Bush authorized a new national space policy on August 31, 2006, that establishes overarching national policy that governs the conduct of U.S. space activities. This policy supersedes Presidential Decision Directive/NSC-49/NSTC-8, National Space Policy, dated September 14, 1996. *See* U.S. National Space Policy (2006), *available at* http://www.ostp.gov/galleries/default-file/Unclassified%20National%20Space%20Policy%20--%20FINAL.pdf.

[16] *See* schematic *infra* at para. II.B.6.; Annotated NWP 1-14M, *supra* note 1, at 1-69 to 1-70.

[17] NWP 1-14M (2007), *supra* note 1, at para. 1.6 and 1.9.

2. *Internal Waters*. These are all waters landward of the baseline,[18] over which the coastal State "exercise[s] the same jurisdiction and control … as they do over their land territory."[19] The baseline is an artificial line generally corresponding to the low-water mark along the coast.[20] The coastal State has the responsibility for determining and publishing its baselines. The legitimacy of these baselines is determined by international acceptance or rejection of the claims through state practice and declarations.[21] UNCLOS III recognizes several exceptions to the general rule:

a. *Straight Baselines*. A coastal State may draw straight baselines when its coastline has fringing islands or is deeply indented (e.g., Norway with its fjords).[22] 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[23] and across the furthest extent of river deltas or other unstable coastline features.[24] Straight baselines are overused,[25] and the United States strictly interprets the few instances when straight baselines may be properly drawn.[26]

b. *Bays*. Depending on the shape, size, and historical usage, the coastal State may draw a baseline across the mouth of a bay, making the bay internal waters. The bay must be a "well-marked indentation," and "more than a mere curvature" in the coastline.[27] A *juridical bay* (i.e., one legally defined by UNCLOS III) must have a water area equal to or 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 nautical miles (NM).[28] *Historic bays* (i.e., bodies of water with closures of greater than 24 NM, but which historically have been treated as bays) may be claimed as internal waters when the following criteria are met: the claim of sovereignty is an "open, effective, continuous and long-term exercise of authority, coupled with acquiescence (as opposed to mere absence of opposition) by foreign States."[29] The United States does not recognize many claims to historic bay status,[30] such as Libya's claim to the Gulf of Sidra[31] (closure line in excess of 300 NM) or Canada's claim to Hudson Bay (closure line in excess of 50 NM).[32]

c. *Archipelagic Baselines*. UNCLOS III allows archipelagic States (i.e., those consisting solely of groups of islands,[33] such as Indonesia[34]) to draw baselines around their outermost islands, subject to certain restrictions.[35] The waters within are given special status as archipelagic waters, which are more akin to territorial waters than to internal waters.

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[18] UNCLOS III, art. 8; Annotated NWP 1-14M, *supra* note 1, at 1-14.
[19] Annotated NWP 1-14M, *supra* note 1, at 2-6.
[20] UNCLOS III, art. 5; Annotated NWP 1-14M, *supra* note 1, at 1-4, 1-46. The "low-water line" is inherently ambiguous, and may correspond to "the mean low-water spring tide, the lowest astronomical tide or some other low-water line." Churchill & Lowe, *supra* note 2, at 33 n.4.
[21] For a full list of U.S. declarations and state practices challenging excessive claims, *see* DoD 2005.1-M, Maritime Claims Reference Manual (June 2005) *available at* http://www.dtic.mil/whs/directives/corres/ html/ 20051m.htm
[22] UNCLOS III, art. 7(1); Annotated NWP 1-14M, *supra* note 1, at 1-5.
[23] UNCLOS III, art. 9; Annotated NWP 1-14M, *supra* note 1, at 1-12.
[24] UNCLOS III, art. 7(2); Churchill & Lowe, *supra* note 2, at 37-38.
[25] Churchill & Lowe, *supra* note 2, at 38-40; Annotated NWP 1-14M, *supra* note 1, at 1-77 to 1-79.
[26] Annotated NWP 1-14M, *supra* note 1, at 1-6.
[27] *Id.* at 1-8, 1-47.
[28] UNCLOS III, art. 10; Annotated NWP 1-14M, *supra* note 1, at 1-8 to 1-11; Churchill & Lowe, *supra* note 2, at 41-43. *See* note 2 for the definition of a nautical mile.
[29] UNCLOS III, art. 10(6); Annotated NWP 1-14M, *supra* note 1, at 1-11; Churchill & Lowe, *supra* note 2, at 43-45.
[30] Annotated NWP 1-14M, *supra* note 1, at 1-80.
[31] *Id.* at 2-70, 2-82; Churchill & Lowe, *supra* note 2, at 45. Beginning in 1973, Libya began claiming the entire Gulf of Sidra (Sirte), marked by a line 32 degrees and 32 minutes north, as its territorial sea, based on the historic bays concept. This line was colloquially known as the "line of death." Beginning in the early 1980's the United States began challenging Libya's claim with operational assertions by warships and aircraft, leading to clashes between United States and Libyan forces in 1981, 1986, and 1989.
[32] Annotated NWP 1-14M, *supra* note 1, at 1-11 to 1-12 n.23.
[33] *Id.* at 1-17 to 1-18, 1-85 to 1-88.
[34] Seventeen States have claimed archipelagic status, including the Bahamas, Indonesia, Jamaica, and the Philippines. Churchill & Lowe, *supra* note 2, at 121-22.
[35] UNCLOS III, art. 47; Annotated NWP 1-14M, *supra* note 1, at 1-17 to 1-18; Churchill & Lowe, *supra* note 2, at 123-25.

d. *Maritime Claims Reference Manual*. This DoD publication[36] sets out in detail the maritime claims (excessive and otherwise) of all States, including specific points of latitude and longitude, and the U.S. position with regard to those maritime claims.

3. *Territorial Sea*. This is the zone lying immediately seaward of the baseline.[37] States must actively claim a territorial sea, to include its breadth (i.e., it does not exist until claimed by the coastal State). The maximum breadth is 12 NM.[38] 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 greater than 12 NM.[39]

4. *Off-Shore Elevations*.

a. *Low-tide Elevations*. These are "naturally formed area[s] of land which [are] surrounded by and above water at low tide, but submerged at high tide."[40] Low-tide elevations do not generate any maritime zones. However, if they are located within the territorial sea, they may be used to extend the baseline,[41] which is used for measuring the territorial sea and other zones. Straight baselines may also be drawn out to the low-tide elevation if "a lighthouse or similar installation, which is permanently above sea level" is erected upon such areas of land.[42]

b. *Rocks*. These are naturally formed areas of land which are surrounded by and always above water (i.e., even at high-tide). A rock is similar to an island, except that the former is not capable of sustaining human habitation or economic life.[43] Rocks are entitled to a territorial sea and a contiguous zone (*see infra*), but not to an exclusive economic zone (EEZ—*see infra*) or a continental shelf,[44] which may have serious economic consequences. Consequently, various coastal States have sought to classify reefs or rocks as islands in order to assert jurisdiction over fishing and petroleum resources out to 200 NM and beyond. [45].

c. *Islands*. These are naturally formed areas of land which are surrounded by and always above water (i.e., even at high-tide), and are capable of sustaining human habitation and economic life. Islands are entitled to all types of maritime zones (i.e., territorial sea, contiguous zone, EEZ, and a continental shelf).[46]

5. *National Airspace*. This area includes all airspace over the land territory, internal waters, and territorial sea.[47]

C. International Areas.

1. *Contiguous Zone*. This zone is immediately seaward of the territorial sea and extends no more than 24 NM from the baseline.[48]

2. *Exclusive Economic Zone (EEZ)*. This zone is immediately seaward of the territorial sea and extends no more than 200 NM from the baseline.[49]

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[36] Maritime Claims Reference Manual, *supra* note 22. One noteworthy excessive claim is North Korea's declaration of a "Security Zone" extending 50 NM off its east coast, and 200 NM off its west coast, matching its EEZ. Exact coordinates are detailed in page 347 of the above reference manual.
[37] UNCLOS III, art. 2; Annotated NWP 1-14M, *supra* note 1, at 1-14 to 1-15, 1-62.
[38] UNCLOS III, art. 3; Annotated NWP 1-14M, *supra* note 1, at 1-15.
[39] Annotated NWP 1-14M, *supra* note 1, at 1-81 to 1-84. *See* DoD Maritime Claims Reference Manual for claims of specific States, or the Annotated NWP 1-14M for a synopsis of State claims.
[40] *Id.* at 1-54.
[41] UNCLOS III, art. 13; Annotated NWP 1-14M, *supra* note 1, at 1-15 to 1-16.
[42] UNCLOS III, art. 7(4); Annotated NWP 1-14M, *supra* note 1, at 1-6 to 1-8.
[43] Annotated NWP 1-14M, *supra* note 1, at 1-15 to 1-16.
[44] The continental shelf is the seabed and subsoil, which may extend beyond the 200 NM EEZ, but generally not more than 350 NM from the baseline, over which the coastal State exercises sovereignty for exploration and exploitation of natural resources. UNCLOS III, arts. 76 and 77; Annotated NWP 1-14M, *supra* note 1, at 1-22 to 1-23, 1-27.
[45] *See, e.g.*, Martin Flacker, A Reef or a Rock? Question Puts Japan in a Hard Place, Wall Street Journal (Feb. 16, 2005) *available at* http://online.wsj.com/article/0,,SB110849423897755487,00.html. China and other Pacific nations have exploited the distinction between rock and island in the South China Sea., placing soldiers on numerous small parcels of land in an attempt to gain legal status as islands for these parcels, and consequently possess an EEZ, which would greatly expand their legal control over the hydrocarbon resources in the South China Sea. Trefor Moss, *Why China and the Philippines are Battling Over Rocks, Reefs*, THE WALL STREET JOURNAL, January 25, 2014, http://blogs.wsj.com/searealtime/2014/01/25/why-china-and-the-philippines-are battling-over-rocks-reefs/
[46] Annotated NWP 1-14M, *supra* note 1, at 1-15 to 1-16.
[47] UNCLOS III, art. 2; Annotated NWP 1-14M, *supra* note 1, at 1-18, 1-24, 2-28 to 2-29.
[48] UNCLOS III, art. 33; Annotated NWP 1-14M, *supra* note 1, at 1-89; Churchill & Lowe, *supra* note 2, at 132-39.

3. *High Seas*. This zone includes all areas beyond the exclusive economic zone.[50]

4. *International Airspace*. This area includes all airspace beyond the furthest extent of the territorial sea.[51]

5. *Outer Space*. The Outer Space Treaty and subsequent treaties do not define the point where national airspace ends and outer space begins, nor is there any international consensus on the line of delimitation.[52] NASA awards astronaut status to anyone who flies above 50 miles (264,000 feet) in altitude. Many space flight engineers, dealing with the effects of friction and heating of spacecraft due to atmospheric particles, define the boundary to be at 400,000 feet (75.76 miles). They call this the "re-entry interface," the point at which heating on re-entry becomes observable. Many in the international community recognize the edge of space as 100 kilometers (62 miles) above mean sea level. Others argue that space begins where orbit can be maintained. The closest orbital perigee is approximately 93 NM (107 miles) for highly elliptical orbits (HEO). The United States has consistently opposed establishing such a boundary in the absence of a showing that one is needed. A primary rationale for not accepting a predetermined boundary is that once such a boundary is established, it might work to prevent the United States from taking advantage of evolving space technologies and capabilities.

6. *Polar Regions*

a. *Antarctica*. The Antarctic Treaty of 1959 applies to the area south of 60 degrees South Latitude, reserving that area for peaceful purposes only. Specifically, "any measures of a military nature, such as the establishment of military bases and fortifications, the carrying out of military maneuvers, as well as the testing of any type of weapon," are prohibited.[53] However, the Treaty does not prejudice the exercise of rights on the high seas within that area.[54] "Antarctica has no territorial sea or territorial airspace."[55]

b. *Arctic region*. The United States considers that the waters, ice pack, and airspace of the Arctic region beyond the lawfully claimed territorial seas of littoral nations have international status and are open to navigation. All ships and aircraft enjoy the freedoms of high seas navigation and overflight on, over, and under the waters and ice pack of the Arctic region beyond the lawfully claimed territorial seas of littoral states.[56]

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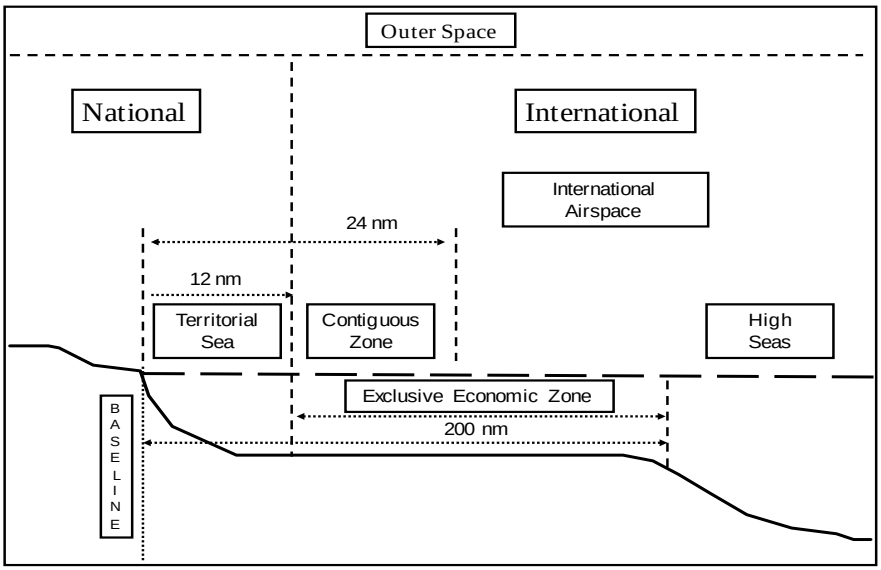
[49] UNCLOS III, arts. 55, 57; Churchill & Lowe, *supra* note 2, at 160-79.
[50] UNCLOS III, art. 86; Annotated NWP 1-14M, *supra* note 1, at 1-21.
[51] Annotated NWP 1-14M, *supra* note 1, at 1-24, 2-29 to 2-30.
[52] *Id.* at 1-24, 2-38.
[53] The Antarctic Treaty (1959), art. I. *See also* Annotated NWP 1-14M, *supra* note 1, at 2-25. All stations and installations, and all ships and aircraft at points of discharging or embarking cargo or personnel in Antarctica, are subject to inspection by designated foreign observers. *See* The Antarctic Treaty (1959), art. VII.3. Therefore, classified activities are not conducted by the United States in Antarctica, and all classified material is removed from U.S. ships and aircraft prior to visits to the continent. *See* Annotated NWP 1-14M, *supra* note 1, at 2-25.
[54] *See* Annotated NWP 1-14M, *supra* note 1, at 2-25.
[55] *Id.*
[56] *See* NWP 1-14M (2007), *supra* note 1, at para. 2.6.5.1.



III. NAVIGATIONAL REGIMES

A. Having presented the various legal divisions, it is now necessary to discuss the navigational regimes within those zones. The freedom of navigation within any zone is inversely proportional to the powers that may be exercised by the coastal State (see the following sections on State Competencies). Where a State's powers are at their greatest (i.e., land territory, internal waters), the navigational regime is most restrictive. Where a State's powers are at their lowest ebb (i.e., high seas, international airspace), the navigational regime is most permissive.

B. National Areas.

1. With limited exceptions that are discussed below, States exercise full sovereignty within their national areas, which include land, internal waters, territorial seas, and the airspace above these features.[57] Therefore, the navigational regime is "consent of the State."[58] Although the State's consent may be granted based on individual requests, it may also be manifested generally in international agreements such as:

a. *Status of Forces Agreements.* These agreements typically grant reciprocal rights, without the need for securing individual consent, to members of each State party. Such rights may include the right-of-entry and travel within the State.

b. *Friendship, Commerce and Navigation (FCN) Treaties.* These treaties typically grant reciprocal rights to the commercial shipping lines of each State party to call at ports of the other party.

c. *Chicago Convention.* State parties to the Chicago Convention have granted limited consent to civil aircraft of other State parties to enter and land within their territory.[59] The Chicago Convention "does *not* apply to military aircraft … other than to require that they operate with 'due regard for the safety of navigation of civil aircraft.'"[60]

[57] *Id.* at 2-6 to 2-7.
[58] *Id.* at 1-14, 1-24, 2-6 to 2-7. The only exceptions are when entry into internal waters is "rendered necessary by *force majeure* or by distress."
[59] *Id.* at 2-30.
[60] *Id. See also* Chicago Convention, art. 3(d).

2. The DoD Foreign Clearance Manual[61] sets out the entry and clearance requirements for both aircraft and personnel, and overflight rights where applicable, for every State.

3. *Exceptions in the Territorial Sea*. Although the territorial sea is considered a national area, the need for greater freedom of navigation than consent of the coastal State has convinced the international community to recognize the four exceptions specified below. Note that these exceptions do not apply to *internal* waters, for which consent of the State remains the navigational regime. The only exception to the requirement of state consent in internal waters is distress as described in NWP 1-14 M Section 2-6.

a. *Innocent Passage*. Innocent passage refers to a vessel's right to *continuous* and *expeditious* transit through a coastal State's territorial sea for the purpose of traversing the seas (without entering a State's internal waters, such as a port).[62] Stopping and anchoring are permitted when incident to ordinary navigation or made necessary by *force majeure* (e.g., mechanical casualty, bad weather, or other distress).[63] "Passage is *innocent* so long as it is not prejudicial to the peace, good order, or security of the coastal nation."[64] There is no provision in international law that would permit a coastal State to require prior notification or authorization in order to exercise the right of innocent passage.[65] Moreover, UNCLOS III contains **no** requirement that passage through a State's territorial sea be *necessary* in order for it to be innocent; it does, however, enunciate a list of twelve activities deemed <u>not</u> to be innocent, including any threat or use of force, any weapons exercise or practice, any intelligence collection or act of propaganda, the launching or recovery of aircraft or any military device (e.g., landing craft or Unmanned Aerial Vehicles), any willful act of serious pollution, any fishing, research or survey activities, any intentional interference with communications systems, or "any other activity not having a direct bearing on passage."[66]

(1) The United States takes the position that UNCLOS III's list of prohibitions on innocent passage is exhaustive and intended to eliminate subjective determinations of innocent passage. If a vessel is not engaged in the above listed activities, its passage is deemed innocent according to the U.S. view.[67]

(2) The U.S. view is that innocent passage extends to all shipping, and is not limited by cargoes, armament, or type of propulsion (e.g., nuclear). Note that UNCLOS III prohibits coastal State laws from having the practical effect of denying innocent passage.[68]

(3) Innocent Passage does <u>not</u> apply to aircraft (i.e., the airspace above the territorial sea is considered "national airspace," which aircraft can generally only enter with the consent of the coastal State, e.g., in accordance with the Chicago Convention).[69]

(4) A submarine in innocent passage must transit on the surface, showing its flag.[70]

(5) *Challenges to Innocent Passage.*

(a) Merchant ships must be informed of the basis for the challenge and provided an opportunity to clarify intentions or to correct the conduct at issue. Where no corrective action is taken by the vessel, the coastal State may require it to leave or may, in limited circumstances, arrest the vessel.[71]

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[61] Department of Defense Foreign Clearance Manual (Feb. 26, 2013) (Regular updates available at https://www.fcg.pentagon.mil/fcg.cfm.).
[62] UNCLOS III, art. 18; Annotated NWP 1-14M, *supra* note 1, at 2-7 to 2-9.
[63] UNCLOS III, art. 18(3); Annotated NWP 1-14M, *supra* note 1, at 2-7, 3-3.
[64] Annotated NWP 1-14M, *supra* note 1, at 2-7.
[65] *Id.* at 1-26. Nevertheless, many States seek to require either prior notification or authorization, particularly for warships, before innocent passage through their territorial sea. The United States consistently rejects such requirements. *See generally id.* at 2-83; Maritime Claims Reference Manual, *supra* at note 22.
[66] UNCLOS III, art. 19(2). *See also* Annotated NWP 1-14M, *supra* note 1, at 2-8; Churchill & Lowe, *supra* note 2, at 84-87.
[67] United States – U.S.S.R. Uniform Interpretation of the Rules of International Law Governing Innocent Passage through the Territorial Sea, para. 3 (Sept. 23, 1989). *See also* U.S. Department of State, Bureau of Oceans and International Environmental and Scientific Affairs, Limits in the Seas No. 112, U.S. Responses to Excessive National Maritime Claims, 52 (Mar. 9, 1992)
[68] *Id.* at para. 2.
[69] Annotated NWP 1-14M, *supra* note 1, at 2-7, 2-9, 2-28.
[70] UNCLOS III, art. 20; Annotated NWP 1-14M, *supra* note 1, at 2-11; Churchill & Lowe, *supra* note 2, at 88-92.
[71] Annotated NWP 1-14M, *supra* note 1 at 2.9.

(b) A warship/State vessel must be challenged and informed of the violation that is the basis for the challenge. Where no corrective action is taken, the coastal State may require the vessel to leave its territorial sea and may use necessary force to enforce the ejection.[72]

(6) *Suspension of Innocent Passage*. A coastal State may temporarily suspend innocent passage if such an act is essential for the protection of security. Such a suspension must be: (1) non-discriminatory; (2) temporary; (3) applied to a specified geographic area; and (4) imposed only after due publication/notification.[73]

b. *Right-of-Assistance Entry*. Based on the long-standing obligation of mariners to aid those in distress from perils of the sea, the right-of-assistance entry gives limited permission to enter into the territorial sea to render assistance to "those in danger of being lost at sea."[74] The location of the persons in danger must be reasonably well-known—the right does not permit a search.[75] Aircraft may be used to render assistance, though this right is not as well-recognized as that for ships rendering assistance.[76]

c. *Transit Passage*. Transit passage applies to passage through *International Straits,*[77] which are defined as: (1) routes between the high seas or exclusive economic zone (EEZ) and another part of the high seas or exclusive economic zone;[78] (2) overlapped by the territorial sea of one or more coastal States;[79] (3) with no other high seas or exclusive economic zone route of similar convenience;[80] (4) natural, not constructed (e.g., not the Suez Canal);[81] and (5) must actually be used for international navigation.[82] The U.S. position is that the strait must only be *susceptible* to use, and not necessarily *actually* be used for international navigation.[83] Transit passage is the exercise of the freedoms of navigation and overflight solely for the purpose of continuous and expeditious transit through the strait in the normal modes of operation utilized by ships and aircraft for such passage.[84] In the normal mode of transit, ships may steam in formation, launch and recover aircraft and unmanned aerial vehicles if that is normally done during their navigation (e.g., for force protection purposes), and submarines may transit submerged.[85] Unlike innocent passage, aircraft may also exercise transit passage (i.e., aircraft may fly in the airspace above international straits without consent of the coastal States).[86] Transit passage may not be suspended by the coastal

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[72] UNCLOS III, art. 30. *See also* Annotated NWP 1-14M, *supra* note 1, at 2-9, 2-11; Churchill & Lowe, *supra* note 2, at 99.

[73] UNCLOS III, art. 25(3); Annotated NWP 1-14M, *supra* note 1, at 2-9 to 2-10; Churchill & Lowe, *supra* note 2, at 87-88. Note that the temporary suspension of innocent passage is different from the establishment of security zones, which are not recognized either by international law or by the United States. Annotated NWP 1-14M, *supra* note 1, at 1-21 to 1-22, 1-90, 2-22 to 2-23. *See also* NWP 1-14M (2007), *supra* note 1, at para. 1.6.4. However "[c]oastal nations may establish safety zones to protect artificial islands, installations, and structures located in their internal waters, archipelagic waters, territorial seas, and exclusive economic zones, and on their continental shelves." *Id.* at 1-24. Safety zones were established in the immediate vicinity of the two Iraqi oil platforms in the northern Arabian Gulf to protect against terrorist attacks. States may also "declare a temporary warning area in international waters and airspace to advise other nations of the conduct of activities that, although lawful, are hazardous to navigation and/or overflight. The U.S. and other nations routinely declare such areas for missile testing, gunnery exercises, space vehicle recovery operations, and other purposes entailing some danger to other lawful uses of the high seas by others." *Id.* at 2-22.

[74] *See* NWP 1-14M (2007), *supra* note 1, at paras. 2.5.2.6 and 3.2.1. *See also* Annotated NWP 1-14M, *supra* note 1, at 2-12, 2-48 to 2-58, and 3-1 to 3-2.

[75] *See* NWP 1-14M (2007), *supra* note 1, at para. 2.5.2.6. *See also* Annotated NWP 1-14M, *supra* note 1, at 2-12.

[76] *See* CJCSI 2410.01D (31 Aug. 2010) for further guidance on the exercise of the right-of-assistance entry.

[77] *See generally* Annotated NWP 1-14M, *supra* note 1, at 2-71 to 2-76 for large-scale charts of popular international straits.

[78] UNCLOS III, art. 37. Note that each side of the strait must involve either the high seas or EEZ for a strait to be considered an international strait. Other straits may connect the high seas/EEZ to the territorial sea of a coastal state. In this case of straits that are not international straits, the navigational regime is innocent passage. An example of this would be the Strait of Juan de Fuca, which connects the high seas to the territorial sea of the United States and Canada.

[79] For example, Japan only claims a territorial sea of 3 NM in some areas in order to leave a "high seas corridor," rather than creating an international strait through which transit passage may theoretically occur "coastline to coastline." Annotated NWP 1-14M, *supra* note 1, at 2-12 to 2-15, 2-17.

[80] UNCLOS III, art. 36; Churchill & Lowe, *supra* note 2, at 105.

[81] Annotated NWP 1-14M, *supra* note 1 at 2-12 & n. 36.

[82] UNCLOS III, art. 37.

[83] Annotated NWP 1-14M, *supra* note 1 at 2-12 & n. 36.

[84] UNCLOS III, arts. 38 and 39(1)(c). *See* Churchill & Lowe, *supra* note 2, at 109-13; NWP 1-14M (2007), *supra* note 1, at para. 2.5.3.1.

[85] *See* NWP 1-14M (2007), *supra* note 1, at para. 2.5.3.1; Annotated NWP 1-14M, *supra* note 1, at 2-15.

[86] Annotated NWP 1-14M, *supra* note 1, at 1-24, 2-29.

States during peacetime.[87] The U.S. view is that unlike Archipelagic Sea Lanes Passage (see below), the right of transit passage exists from coastline to coastline of the strait, and of the approaches to the strait.[88]

(1) Straits regulated by long-standing international conventions existing prior to UNCLOS III remain governed by the terms of their respective treaty (e.g., the Bosporus and Dardanelles Straits are governed by the Montreux Convention of July 20, 1936, and the Straits of Magellan are governed by article V of the Boundary Treaty between Argentina and Chile) rather than by the regime of transit passage.[89]

d. Archipelagic Sea Lanes Passage (ASLP).

(1) Archipelagic Sea Lanes Passage (ASLP) is the exercise of the rights of navigation and overflight, in the normal mode of navigation, solely for the purpose of continuous, expeditious, and unobstructed transit between one part of the high seas/exclusive economic zone and another part of the high seas/exclusive economic zone *through archipelagic waters*.[90] ASLP "is substantially identical to the right of transit passage through international straits."[91]

(2) Qualified archipelagic States may designate Archipelagic Sea Lanes (ASLs) for the purpose of establishing the ASLP regime within their Archipelagic Waters. States must designate *all normal passage routes used as routes for international navigation or overflight through or over archipelagic waters*,[92] and the designation must be referred to the International Maritime Organization (IMO) for review and adoption. In the absence of designation by the archipelagic state, the right of ASLP may be exercised through all routes normally used for international navigation.[93] Once ASLs are designated, transiting ships and aircraft[94] may not deviate more than 25 NM from the ASL axis, and must stand off the coastline no less than 10% of the distance between the nearest points of land on the islands bordering the ASL (unlike transit passage, which arguably exists coastline to coastline—see above).[95] Upon ASL designation, the regime of innocent passage applies to Archipelagic Waters outside ASL.[96] ASLP may not be hampered or suspended;[97] however, if ASLs are designated, innocent passage outside the lanes—but within Archipelagic Waters—may be suspended in accordance with UNCLOS III (see discussion of Suspension of Innocent Passage above).

C. International Areas Including International Waters. In all international areas/waters (areas outside the 12 NM territorial sea/airspace), the navigational regime is "due regard for the rights of other nations and the safe conduct and operation of other ships and aircraft."[98] Although reserved for peaceful purposes,[99] military operations, such as surveillance and military exercises, are permissible in international areas, to include the EEZs of coastal states. The U.S. position is that military operations which are consistent with the provisions of the United Nations Charter are "peaceful." The United States has fought to maintain high seas freedoms in international waters through its Freedom of Navigation Program [100]

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[87] UNCLOS III, art. 44; Annotated NWP 1-14M, *supra* note 1, at 2-15. *See also* The Corfu Channel Case, International Court of Justice 1947 *available at* http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=cd&case=1&code=cc&p3=4; Churchill & Lowe, *supra* note 2, at 103-04.

[88] Annotated NWP 1-14M, *supra* note 1, at 2-12 to 2-15, 2-59 to 2-60, 2-62, 2-65, 2-66, 2-67; NWP 1-14M (2007), *supra* note 1, at para. 2.5.3.1. Note that some states, notably Iran regarding the Strait of Hormuz, have argued that a state must be a signatory of UNCLOS to enjoy the right of transit passage. The United States consistently rejects this view.

[89] UNCLOS III, art. 35(c); Annotated NWP 1-14M, *supra* note 1, at 2-13, 2-61, 2-63, 2-85; Churchill & Lowe, *supra* note 2, at 114-15.

[90] UNCLOS III, art. 53; Annotated NWP 1-14M, *supra* note 1, at 2-17 to 2-18; Churchill & Lowe, *supra* note 2, at 127.

[91] Annotated NWP 1-14M, *supra* note 1, at 2-17.

[92] *Id.* at 1-18. "If the archipelagic nation does not designate such [normal passage routes as] sea lanes, the right of archipelagic sea lanes passage may nonetheless be exercised by all nations through routes normally used for international navigation and overflight." *Id. See also* UNCLOS III, art. 53(12); Churchill & Lowe, *supra* note 2, at 128.

[93] UNCLOS III, art. 53(12); Annotated NWP 1-14M, *supra* note 1, at 1-28; Churchill & Lowe, *supra* note 2, at 128. As an example, the United States is currently in dispute with Indonesia over the number of ASLs drawn through its archipelagic waters.

[94] Annotated NWP 1-14M, *supra* note 1, at 1-24, 2-29.

[95] I*d.* at 2-18 to 2-19.

[96] *Id.* at 2-18.

[97] *Id.*

[98] *Id.* at 2-21. *See also* UNCLOS III, arts. 58 and 87.

[99] UNCLOS III, arts. 88 and 301. *See also* Churchill & Lowe, *supra* note 2, at 208, 421-30.

[100] *See, e.g.*, Annotated NWP 1-14M, *supra* note 1, at 2-38 & n.114. The United States is currently involved with a dispute with China over the legal status of military operations in the EEZ. China argues that the text of UNCLOS does not explicitly state that

IV. STATE COMPETENCIES

A. General. The general rule is that the Flag State exercises full and complete jurisdiction over ships and vessels that fly its flag. The United States has defined the "special maritime and territorial jurisdiction" of the United States as including registered vessels, U.S. aircraft and U.S. space craft.[101] Various Federal criminal statutes are specifically made applicable to acts within this special jurisdiction. The power of a State over non-Flag vessels and aircraft depends upon the zone in which the craft is navigating (discussed below), and whether the craft is considered State or civil.

1. *State Craft*. State ships include warships[102] and ships owned or operated by a State and used only for government non-commercial service. State aircraft are those used in military, customs, and police services.[103] By policy, the U.S. has incorporated unmanned vehicles (surface, underwater, and aerial – USVs, UUVs, and UAVs respectively) that are either autonomous or remotely navigated into the definition of State craft.[104] State craft enjoy complete sovereign immunity (see below).[105]

2. *Civil Craft*. These are any craft other than State craft. States must set conditions for the granting of nationality to ships and aircraft. Craft may be registered to only one State at a time.

B. National Areas.

1. *Land Territory and Internal Waters*. Within these areas, the State exercises complete sovereignty, subject to limited concessions based on international agreements (e.g., SOFAs).

2. *Territorial Sea*. As noted above, the navigational regime in the territorial sea permits greater navigational freedom than that available within the land territory or inland waters of the coastal State. Therefore, the State competency within the territorial sea is somewhat less than full sovereignty.

a. Innocent Passage.

(1) *Civil Craft*. The State's power is limited to:

(a) Safety of navigation, conservation of resources, control of pollution, and prevention of infringements of the customs, fiscal, immigration, or sanitary laws;

(b) Criminal enforcement, but only when the alleged criminal act occurred within internal waters, or the act occurred while in innocent passage through the territorial sea and it affects the coastal State;[106]

(c) Civil process, but the coastal State may not stop ships in innocent passage to serve process, and may not arrest ships unless the ship is leaving internal waters, lying in the territorial sea (i.e., not in passage), or incurs a liability while in innocent passage (e.g., pollution).[107]

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nations can conduct military operations in a foreign EEZ, and thus such operations are not allowed. The United States position is that customary international law, as well as a contextual reading and the drafting history of UNCLOS III, support this right. This has led to numerous incidents between United States and Chinese military units over the years, specifically the EP-3 incident near Hainan Island on April 1, 2001. Since 1979, the United States has continued a "Freedom of Navigation" Program, challenging excessive maritime claims by many nations, in order to prevent these claims from hardening into customary international law. This program includes both diplomatic protests and operational assertions by military forces. Some of these operational assertions have been directed against China, most recently the flight of two B-52H bombers over a new Air Defense Identification Zone claimed by China over the disputed Senkaku/Diaoyu islands on November 26, 2013. RONALD O'ROURKE, CONG. RESEARCH SERV., R42784, MARITIME TERRITORIAL AND EXCLUSIVE ECONOMIC ZONE (EEZ) DISPUTES INVOLVING CHINA 4 (2013). *See also* WHITE HOUSE, NATIONAL SECURITY DIRECTIVE 49, SUBJ: FREEDOM OF NAVIGATION OPERATIONS (October 12, 1990, declassified November 22, 1996). *See also* Thom Shanker, *U.S. Sends Two B-52 Bombers Into Air Zone Claimed by China*. THE NEW YORK TIMES, November 26, 2013 at A1.

[101] 18 U.S.C. § 7 (2007).

[102] "For the purposes of this Convention, "warship" means a ship belonging to the armed forces of a State bearing the external marks distinguishing such ships of its nationality, under the command of an officer duly commissioned by the government of the State and whose name appears in the appropriate service list or its equivalent, and manned by a crew which is under regular armed forces discipline." UNCLOS III, art. 29; Annotated NWP 1-14M, *supra* note 1, at 2-1.

[103] Chicago Convention, art. 3.

[104] See NWP 1-14M (2007), *supra* note 1, at paras. 2.3.4 to 2.3.6, and 2.4.4.

[105] UNCLOS III, art. 30; Annotated NWP 1-14M, *supra* note 1, at 2-1. FOOTNOTE.

[106] UNCLOS III, art. 27; Churchill & Lowe, *supra* note 2, at 98, 268.

[107] UNCLOS III, art. 28; Churchill & Lowe, *supra* note 2, at 98, 461.

(2) *State Craft*. State vessels enjoy complete sovereign immunity.[108] However, the Flag State bears liability for any costs that arise from a State vessel's violation of any of the laws that would otherwise be applicable to civil vessels.[109] The coastal State's only power over State vessels not complying with its rules is to require them to leave the territorial sea immediately,[110] arguably by using "any force necessary to compel them to do so."[111]

b. Transit Passage and Archipelagic Sea Lane Passage.

(1) *Civil Craft*. The coastal State retains almost no State competencies over civil craft in transit passage or ASL passage, other than the competencies applicable within the contiguous zone and exclusive economic zone. These include customs, fiscal, immigration, and sanitary laws, and prohibitions on exploitation of resources (e.g., fishing). Additionally, the coastal State may propose a traffic separation scheme, but it must be approved by the International Maritime Organization (IMO).[112]

(2) *State Craft*. State vessels enjoy complete sovereign immunity. The Flag State bears liability for any costs that arise from a State vessel's violation of any of the laws that would otherwise be applicable to civil vessels.

C. International Areas/International Waters.

1. *Contiguous Zone*. The contiguous zone was created by UNCLOS III solely to allow the coastal State to prevent and punish infringement of its customs, fiscal, immigration, and sanitary laws "*within its territory or territorial sea*."[113] Thus, the contiguous zone serves as a buffer to prevent or punish violations of coastal State law that occurred *on land, within internal waters, or within the territorial sea*, and arguably not for purported violations *within the contiguous zone itself* (unless the deleterious effects extend to the territorial sea). Thus, a vessel polluting while engaged in innocent passage in the territorial sea could be stopped and arrested in the contiguous zone. However, all nations continue to enjoy the right to exercise the traditional high seas freedoms of navigation and overflight in the contiguous zone.

2. *Exclusive Economic Zone*. Within this area, the coastal State's jurisdiction and control is limited to matters concerning the exploration, exploitation, management, and conservation of the resources of this international area.[114] Although coastal State consent is required to conduct marine scientific research in its EEZ,[115] the coastal State cannot regulate hydrographic surveys or military surveys conducted beyond its territorial sea, nor can it require notification of such activities.[116] "[I]n the EEZ all nations enjoy the right to exercise the traditional high seas freedoms of navigation and overflight … and of all other traditional high seas uses by ships and aircraft which are not resource related." The United States position is that nations can also conduct military activities, such as surveillance, in a coastal state's EEZ. This is based on customary international law, as well as the contextual reading and drafting history of UNCLOS III. Some coastal states, specifically China, oppose this view.[117]

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[108] UNCLOS III, art. 30; Annotated NWP 1-14M, *supra* note 1, at 2-1. For an interesting 1994 Naval message on the sovereign immunity policy, including examples of situations raising the issue of sovereign immunity, *see id.* at 2-43 to 2-46. *See also* NWP 1-14M (2007), *supra* note 1, at para. 2.1 (stating this immunity arises as a matter of customary international law.).
[109] UNCLOS III, art. 31; Churchill & Lowe, *supra* note 2, at 99.
[110] UNCLOS III, art. 30; Annotated NWP 1-14M, *supra* note 1, at 1-18 to 1-19, 2-2.
[111] Churchill & Lowe, *supra* note 2, at 99.
[112] *See generally* http://www.imo.org/.
[113] UNCLOS III, art. 33(1)(a) and (b); Annotated NWP 1-14M, *supra* note 1, at 1-18 to 1-19, 1-48; Churchill & Lowe, *supra* note 2, at 132-39. Note that the Annotated NWP 1-14M's assertion that "[t]he U.S. claims a contiguous zone extending 12 nautical miles from the baselines used to measure the territorial sea" is no longer correct. Presidential Proclamation No. 7219 of Aug 2, 1999 extended the U.S. contiguous zone out to 24 NM from the baseline. *See also* NWP 1-14M (2007), *supra* note 1, at para. 1.6.1.
[114] NWP 1-14M (2007), *supra* note 1, at para. 2.6.2. *See also* UNCLOS III, art. 56; Annotated NWP 1-14M, *supra* note 1, at 1-19 to 1-21; Churchill & Lowe, *supra* note 2, at 166-69.
[115] UNCLOS III, art. 246; Churchill & Lowe, *supra* note 2, at 405-12. Note there is no exception to this requirement for State vessels, but such consent should normally be given by the coastal state. UNCLOS III, art. 246(3).
[116] NWP 1-14M (2007), *supra* note 1, at para. 2.6.2.2.
[117] Annotated NWP 1-14M, *supra* note 1, at 1-20. *See also* UNCLOS III, art. 58(1); Annotated NWP 1-14M, *supra* note 1, at 1-26, 1-39; Churchill & Lowe, *supra* note 2, at 170-74. This EEZ dispute is one of 3 current maritime disputes that China is currently involved in. The other two disputes include: (1) specific island disputes with its neighbors, and (2) a claim that the

3. *High Seas.*

a. *Civil Craft*. On the high seas, the general rule is Flag State jurisdiction only.[118] Non-Flag States have almost no competencies over civil craft on the high seas, with the following exceptions:

(1) *Ships engaged in the slave trade*.[119] Every State is required to take measures to suppress the slave trade by its flagged vessels. If any other State stops a slave vessel, the slaves are automatically freed.

(2) *Ships or aircraft engaged in piracy*.[120] Piracy is an international crime consisting of illegal acts of violence, detention, or depredation committed for private ends by the crew or passenger of a private ship or aircraft in or over international waters against another ship or aircraft or persons and property on board. This act must occur on the high seas or outside the territorial jurisdiction of a state.[121] Note that both sides must be located onboard an aircraft or vessel. As such, events such as the 1985 *Achille Lauro* incident do not meet the strict definition of piracy. Terrorist acts committed for purely political motives, vice private gain, have not generally been considered piracy.[122] International law has long recognized a general duty of all nations to cooperate in the repression of piracy. Under the authority of customary international law and the provisions of UNCLOS III, any State craft may seize and arrest pirates[123] and any State may prosecute pirates under a theory of universal jurisdiction, provided the State has domestic laws criminalizing such behavior. Piracy remains a problem in many areas of the world, particularly in confined waters.[124]

(3) *Ship or installation (aircraft not mentioned), engaged in unauthorized broadcasting.*[125] Any State which receives such broadcasts, or is otherwise subject to radio interference, may seize and arrest the vessel and persons on board.

(4) *Right of approach and visit.*[126] The right of approach and visit, which is similar to an automobile traffic stop to check license and registration, may only be conducted by State ships and aircraft. Under international law, an authorized ship or aircraft may *approach* any vessel in international waters to verify its nationality. Unless the vessel encountered is itself a warship or government vessel of another nation, it may be stopped, boarded, and the ship's documents examined, ***provided there is reasonable ground*** for suspecting that: (1)

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entire South China Sea is Chinese territorial sea based on the so-called "Nine Dash Line," a 1947 map (from then Nationalist China) which outlines the South China sea as Chinese territory. *See* O'Rourke, *supra* note 100 at 13.

[118] UNCLOS III, art. 92; Churchill & Lowe, *supra* note 2, at 461. *See also* UNCLOS III, art. 217; Churchill & Lowe, *supra* note 2, at 348.

[119] UNCLOS III, art. 99.

[120] *Id.* at arts. 101-107.

[121] NWP 1-14M (2007), *supra* note 1, at para. 3.5.2; UNCLOS III, art. 101. Private ends includes, but is not limited to, monetary gain. Most nations have interpreted Art. 111 of UNCLOS to mean that piracy can exist anywhere outside the territorial sea of a coastal state. *See* Yoshifumi Tanaka, THE INTERNATIONAL LAW OF THE SEA 357 (2012). However, in the specific case of Somalia, ships are allowed to enter that coastal state's territorial sea under the authority of United Nations Security Council Resolutions 1816 and 1976.

[122] *See* Tanaka at 357. The actions by environmental groups such as Greenpeace against foreign vessels has sometimes been argued as piracy. *Also see* Institute of Cetacean Research v. Sea Shepherd Conservation Society, No. 12-35266 (9th Cir. Feb. 25, 2013) (holding that actions motivated by political motives may still constitute piracy for purposes of civil injunctive relief and Alien Tort Statute litigation). Many scholars believe this case was wrongly decided and subject to reversal following en banc review or certiorari to the U.S. Supreme Court.

[123] NWP 1-14M (2007), *supra* note 1, at para. 3.5.3.1; UNCLOS III, arts. 105 and 107. Note that current United States policy is to arrest pirates and not use deadly force unless in self-defense or defense of another vessel currently subject to attack. However, the language of U.N.S.C.R 1816, authorizing states to "use all necessary means" to stop piracy, has led some commentators to argue that deadly force is allowed. This is not the majority view however.

[124] In recent years, pirate attacks have remained a problem off the east and west coasts of Africa, particular off of Somalia. International naval forces have worked together and separately to combat this increase. In the case of Somalia, the United Nations Security Council has passed resolutions granting increased authorization for the international community to take an active part in the fight against piracy. *See, e.g.*, S.C. Res. 1846, U.N. Doc. S/RES/1846 (Dec. 2, 2008) (broadening the international political support and legal capabilities to combat piracy off the Somali coast). S.C. Res. 1851, U.N. Doc. S/RES/1851 (Dec. 16, 2008) (authorizing states to take action against piracy safe havens on the shore in Somalia). However, pirate attacks declined sharply in 2013, due somewhat to the increased use of armed private security contractors by shipping companies.

[125] UNCLOS III, art. 109.

[126] *Id.* at art. 110. *See also* NWP 1-14M (2007), *supra* note 1, at para. 3.4.

the vessel visited is engaged in slave trade,[127] piracy,[128] or unauthorized broadcasting;[129] (2) the vessel is either stateless (i.e., without nationality, under the premise that a vessel that belongs to no State belongs to all States) or quasi-stateless (e.g., flying under more than one flag);[130] or (3) the vessel, although flying a foreign flag, actually is of the same nationality of the visiting State ship or aircraft.[131] The visiting State ship may ask to see the visited vessel's documents. If the documents raise the level of suspicion of illicit activity, this may serve as the basis for a further search of the vessel.

(5) *Hot Pursuit.*[132] Like the right of visit, hot pursuit may be conducted only by State ships and aircraft. A craft suspected of committing a prohibited act inside the territorial sea or contiguous zone of a coastal state may be pursued and captured outside the territorial sea or contiguous zone. The pursued ship must have violated a law or regulation of the coastal State in any area in which those laws or regulations are effective. For example, the ship must have violated a customs rule within the territorial sea, or a fishing regulation within the exclusive economic zone (EEZ). The pursuit must commence in the area where the violation was committed, and must be continuous. Pursuit must end once the ship enters the territorial sea of another State. Regarding piracy, the international nature of the crime of piracy may allow continuation of pursuit if contact cannot be established in a timely manner with the coastal State to obtain its consent. In such a case, pursuit must be broken off immediately upon request of the coastal State.[133]

(6) *Terrorism/Nonproliferation.* Over the past 30 years, nations have attempted to combat the problem of criminal interference with aircraft and vessels. To deter terrorists, these legal strategies are supported by strengthened security, commitment to prosecute terrorists, and sanctions against States that harbor terrorists. Nations have entered into multilateral agreements to define the terrorism offenses. These conventions include the Tokyo Convention, Hague Convention, Montreal Convention, and the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (the SUA Convention) and its related Protocols. Specifically, the 2005 Protocol to the SUA Convention provides legal authority for the interception of vessels suspected of transporting Weapons of Mass Destruction. United Nations Security Council Resolutions 1540, 1874 (North Korea) and 1929 (Iran) also provide additional legal authority.

b. *State Craft.* State vessels are absolutely immune on the high seas.[134]

c. *Maritime Interception Operations (MIO).*[135] Nations may desire to intercept vessels at sea in order to protect their national security interests. As discussed above, vessels in international waters are generally subject to the exclusive jurisdiction of their flag state. However, there are several legal bases available to conduct MIO, none of which are exclusive. Judge Advocates should be aware of the legal bases underlying the authorization of a MIO when advising a commander about such operations. Depending on the circumstances, one or a combination of the following bases can be used to justify permissive and non-permissive interference with suspect vessels:

(1) MIO pursuant to a United Nations Security Council Resolution;[136]

(2) Flag state consent; [137]

(3) Vessel Master's consent;[138]

(4) Right of approach and visit;[139]

(5) Stateless vessels;[140]

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[127] Annotated NWP 1-14M, *supra* note 1, at 3-13.
[128] *Id.* at 3-9 to 3-13.
[129] *Id.* at 3-13 to 3-14.
[130] *Id.* at 3-25.
[131] *Id.* at 3-8.
[132] UNCLOS III, art. 111; Annotated NWP 1-14M, *supra* note 1, at 3-21 to 3-23.
[133] NWP 1-14M (2007), *supra* note 1, at para. 3.5.3.2.
[134] UNCLOS III, art. 95.
[135] *See* NWP 1-14M (2007), *supra* note 1, at para. 4.4.4.
[136] *Id.* at para. 4.4.4.1.1.
[137] *Id.* at para. 4.4.4.1.2.
[138] *Id.* at paras. 4.4.4.1.1 and 3.11.2.5.2 (noting some nations do not recognize a master's authority to assent to a consensual boarding).
[139] *Id.* at para. 4.4.4.1.4. *See also supra* Part IV.C.3.a.(4).

(6) Condition of port entry;[141]

(7) Bilateral/Multilateral agreements;[142]

(8) Belligerent rights under the law of armed conflict;[143]

(9) Inherent right of self-defense.[144]

Legal Division	Navigational Regime	State Competency
Land Territory	Consent of coastal State	Full sovereignty
Internal Waters	Consent of coastal State	Full sovereignty
Territorial Sea (maximum breadth = 12 NM from baseline)	Innocent Passage (ships and submarines only, ***not*** aircraft)	Limited navigational, criminal, and civil
International Straits	Transit Passage (normal mode of operation)	Fiscal, customs, immigration, and sanitary
Archipelagic Sea Lanes	Archipelagic Sea Lanes Passage (normal mode of operation)	Fiscal, customs, immigration, and sanitary
Contiguous Zone (maximum breadth = 24 NM from baseline)	Due Regard for the rights of others / High Seas Freedoms	Fiscal, customs, immigration, and sanitary
Exclusive Economic Zone (EEZ) (maximum breadth = 200 NM from baseline)	Due Regard for the rights of others / High Seas Freedoms	Limited resource-related jurisdiction
High Seas	Due Regard for the rights of others / High Seas Freedoms	Almost none, other than over vessels of Flag State

V. THE LAW OF NAVAL WARFARE

The information above has focused on the law of peacetime operations. Given the complexity of the legal, political, and diplomatic considerations that may arise in connection with use of naval forces at sea, the standing rules of engagement (SROE) promulgated by the operational chain of command must be considered in any legal analysis.[145] Additionally, in the event of armed conflict at sea, any legal analysis must also include the law of armed conflict. It is the policy of the United States to comply with the law of war during all armed conflicts, no matter how characterized, and in all other military operations.[146] Part II of NWP 1-14M, The Commander's Handbook on the Law of Naval Operations (July 2007), should be consulted for an overview of the rules of international law concerned with the conduct of naval warfare. Specific areas of discussion include such topics as: neutral water and territory, neutral commerce and vessels, acquiring enemy character, belligerent right to visit and search, blockade, exclusion zones and war zones, submarine warfare, naval mines and torpedoes, and deception during armed conflict at sea.[147]

[140] NWP 1-14M (2007), *supra* note 1, at para. 4.4.4.1.5.
[141] *Id.* at para. 4.4.4.1.6.
[142] *Id.* at para. 4.4.4.1.7.
[143] *Id.* at paras. 4.4.4.1.8 and 7.6.
[144] *Id.* at para. 4.4.4.1.9.
[145] *See generally* chapter 5 of this Handbook.
[146] DoD Directive 2311.01E DoD Law of War Program, para. 4.1 (May 9, 2006, incorporating Change 1 Nov. 15, 2010)
[147] *See generally* NWP 1-14M (2007), *supra* note 1, at ch. 5 to 12.

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CHAPTER 11

DETAINEE OPERATIONS

REFERENCES

1. Geneva Convention (III) Relative to the Treatment of Prisoners of War of August 12, 1949.
2. Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War of August 12, 1949.
3. Detainee Treatment Act of 2005, Pub. L. 109-148, Div. A, Title X, SEC. 1002-1006; and 42 U.S.C. § 2000dd-2000dd-1.
4. U.S. DEP'T OF ARMY, ARMY REG. 190-8, ENEMY PRISONERS OF WAR, RETAINED PERSONNEL, CIVILIAN INTERNEES AND OTHER DETAINEES (1 Oct. 97) (also published as a multi service regulation as MCO 3461.1, OPNAVINST 3461.6, AFJI 31-304).
5. U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE (July 1956)(incorporating Change No. 1 of 15 July 1976).
6. U.S. DEP'T OF DEFENSE DIR. 2310.01E, DOD DETAINEE PROGRAM (5 Sept. 2006).
7. Memorandum for Secretaries of the Military Departments, et al, Subject: Application of Common Article 3 of the Geneva Conventions to the Treatment of Detainees in the Department of Defense, dtd. 7 Jul. 2006, available at http://www.defense.gov/pubs/pdfs/DepSecDef%20memo%20on%20common%20article%203.pdf.
8. U.S. DEP'T OF DEFENSE DIR. 2311.01E, DOD LAW OF WAR PROGRAM (9 May 2006), Incorporating Change 1 (15 Nov. 2010)
9. U.S. DEP'T OF THE ARMY, FIELD MANUAL 2-22.3. HUMAN INTELLIGENCE COLLECTOR OPERATIONS (6 Sept. 2006)
10. U.S. DEP'T OF DEFENSE INSTR. 2310.08E MEDICAL PROGRAM SUPPORT FOR DETAINEE OPERATIONS (6 June 2006).
11. CHAIRMAN OF THE JOINT CHIEFS OF STAFF, JOINT PUB. 3-63, DETENTION OPERATIONS (30 May 2008)
12. Jennifer Elsea, Treatment of "Battlefield Detainees" in the War on Terrorism, Congressional Research Service Report, (15 Nov. 05), *available at* http://fpc.state.gov/documents/organization/58279.pdf.
13. U.S. DEP'T OF THE ARMY, FIELD MANUAL 3-39.40, INTERNMENT AND RESETTLEMENT OPERATIONS (12 Feb. 2010).

I. FRAMEWORK

A. Throughout the 20th century, American forces have engaged adversaries in numerous conflicts across the spectrum of conflict. From the Banana Wars of the middle 1920s to World War II and Operation Desert Storm, American forces have captured personnel and treated them as criminals, insurgents, and prisoners of war (POWs). Following the attacks of September 11, 2001, American forces continued to detain individuals during conflicts.

B. The United States has been at the forefront of legally defining and treating its enemies since the inception of the Lieber Code in 1863.[1] The Hague Conventions of 1907 provided the first international attempt to codify treatment of captured individuals.[2] The first substantive treatment of captured personnel, however, was codified in the 1929 Geneva Conventions Relative to Prisoners of War.[3] Following World War II, the international community

[1] Instructions for the Government of Armies of the United States in the Field, General Orders No. 100, (Apr. 24, 1863), reprinted in The Laws of Armed Conflicts 3 (Dietrich Schindler & Jiri Tomas eds., 3d ed., 1988) [hereinafter Lieber Code].
[2] *See* Hague Convention IV Respecting Laws & Customs of War on Land, Oct. 18, 1907, art. 4-20, 36 Stat. 2227 [hereinafter Hague IV].
[3] Convention Relative to the Treatment of Prisoners of War, July 27, 1929, 47 Stat. 2021, 2 Bevans 932.

came together to improve the 1929 POW Conventions to address significant shortcomings that arose during World War II. The 1949 Geneva Conventions became the preeminent international standard for treatment of POWs.[4]

1. The full body of customary international law, as well as the Geneva Conventions of 1949, is triggered when an international armed conflict arises between two high contracting parties to the convention.[5] Referred to as Common Article 2 conflicts, international armed conflict occurs during declared war or *de facto* conflicts between two contracting states. The easiest example to describe a recent international armed conflict is Operation Iraqi Freedom in which the United States and its coalition partners fought against the country of Iraq.

2. Partial or total occupation of the territory of a high contracting party also triggers the full body of customary international law as well as the Geneva Conventions of 1949.[6]

C. The United States has also participated in various non-international armed conflicts.[7] Common Article 3 of the Geneva Conventions defines this type of conflict as an "[a]rmed conflict not of an international character occurring in the territory of one of the High Contracting Parties . . . ."[8] These types of conflicts make up the vast bulk of ongoing conflicts. Whereas the existence of an international armed conflict triggers the entire body of the law of armed conflict, the existence of a non-international armed conflict only triggers application of Common Article 3's "mini convention" protections.

1. Non-international armed conflicts are traditionally known as civil wars. They do not involve two belligerent states fighting each other. Rather, they involve one nation fighting indigenous forces, and may involve another state assisting the current government's attempt to retain its sovereignty. Recently, however, the scope of these conflicts has expanded to include conflicts not contained within the boundaries of a single state.[9] Non-international armed conflicts are deemed to be those armed conflicts between a state and an organized armed group that is not a recognized state (i.e any armed conflict that is not between nations). [10]

2. Non-international armed conflicts have significantly less international protections for its combatants than are provided by international law to combatants in international armed conflicts; the primary protections afforded to those involved in internal armed conflict derive from domestic law. Common Article 3 of the Geneva Conventions affords a minimal amount of protections for combatants involved in internal armed conflicts.[11] These protections are generally accepted as so basic to fundamental human rights that their universality is rarely questioned. The United States' ongoing operations against Al Qaeda and the past American assistance to Columbia in its fight against the Revolutionary Armed Forces of Colombia (Fuerzas Armadas Revolucionarios de Colombia) (FARC) are examples of American forces in non-international armed conflicts.

D. Within the framework of the Global War on Terrorism (GWOT), are examples of both international and internal armed conflicts.

1. The United States characterized military operations conducted against the Taliban in Afghanistan during Operation Enduring Freedom (OEF) as international armed conflict, even though there was some question as to whether the Taliban constituted a government of that nation or was more appropriately characterized as one of a number of warring factions in a failed state. The United States also characterized military operations against the armed forces of Iraq in Operation Iraqi Freedom (OIF) as an international armed conflict.

2. The nature of the conflicts in both Afghanistan and Iraq evolved over time. In both cases, the continued U.S. / Coalition presence is/was based on our status as an invitee to the country as reflected in the either respective United Nations Security Council Resolutions (UNSCR) or the Security Agreement with Iraq.

3. Other coalition partners, nations, international organizations, and commentators have asserted that while U.S. forces were engaged in international armed conflict initially in Afghanistan and Iraq, U.S. forces became

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[4] *See* Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC III], Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC IV**]**.
[5] GC III, *supra* note 4, art. 2.
[6] *Id.*
[7] *See id.* art. 3.
[8] *Id.*
[9] Hamdan v. Rumsfeld, 548 U.S. 557, 631 (2006).
[10] *See id.*
[11] GC III, *supra* note 4, art. 3.

engaged in internal armed conflicts in support of the nascent Afghan and Iraqi governments as they endeavored to defeat opposition groups. For U.S. legal advisors, this required analysis of applicable policy related to the conduct of military operations —specifically DOD policy related to compliance with the law of war is established in DOD Directive 2311.01E.[12] The clear policy mandate of that directive is that the armed forces of the United States will comply with the law of war during all armed conflicts, however such conflicts are characterized, and in all other military operations.[13] The Army doctrine for specific treatment of detainees and the internment or resettlement of civilians is contained in AR 190-8 and JP 3-63[14], both of which are drafted with Geneva Conventions III and IV as the standard. These standards of treatment are the default standards for detainee operations, unless directed otherwise by competent authority (usually the Combatant Commander or higher).

4. The main take-away for legal advisors involved in detainee operations is that there will likely be some uncertainty related to the nature of armed conflicts. Even when the nature of the conflict seems relatively apparent, each conflict will likely include new policy changes. With respect to detainee issues, it is essential to emphasize the basic mandate to treat all detainees humanely; to treat captured personnel consistently with the GC III until a more precise determination is made regarding status; and to raise specific issues on a case-by-case basis when resort to the policy mandate is insufficient to provide effective guidance to the operational decision-makers.

II. LEGALLY PROTECTED PERSONS

A. Under international law, JAs must analyze both the type of conflict and the type of person to determine the protections afforded to an individual by law. Since this is an evolving area of law and policy, JAs must be familiar with the doctrinal terminology. Military doctrine is grounded in the United States international treaties and judge advocates must be familiar with the terms found in the Geneva Conventions.

1. The following definitions are found in DoDD 2310.01E, Department of Defense Detainee Program. [15]

a. *Detainee*. Any person captured, detained, held, or otherwise under the control of DoD personnel (military, civilian, or contractor employee). It does not include persons being held primarily for law enforcement purposes, except where the United States is the Occupying Power.

b. *Enemy Combatant*.[16] In general, a person engaged in hostilities against the United States or its coalition partners during armed conflict. The term "enemy combatant" includes both "lawful enemy combatants" and "unlawful enemy combatants."

(1) *Lawful Enemy Combatant*.[17] Lawful enemy combatants, who are entitled to protections under the Geneva Conventions, include members of the regular armed forces of a State party to the conflict; militia, volunteer corps, and organized resistance movements belonging to a State party to the conflict, which are under responsible command, wear a fixed distinctive sign recognizable at a distance, carry their arms openly, and abide by the laws of war; and members of regular armed forces who profess allegiance to a government or an authority not recognized by the detaining power.[18]

(2) *Unlawful Enemy Combatant*.[19] Unlawful enemy combatants are persons not entitled to combatant immunity, who engage in acts against the United States or its coalition partners in violation of the laws and customs of war during an armed conflict. For purposes of the war on terrorism, the term Unlawful Enemy

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[12] U.S. DEP'T OF DEFENSE, DIR. 2311.01E, DOD LAW OF WAR PROGRAM, (9 May 2005), incorporating Change 1 (15 Nov. 2010) [hereinafter DoD Dir. 2311.01E].
[13] *Id.* para. 4.1.
[14] Joint Publication 3-63 is the joint level doctrine for detention operations. Army detention operations doctrine will be captured in FM 3-63. As of this publishing, the Army manual is in its final phases of review, but not yet available for distribution.
[15] U.S. DEP'T OF DEFENSE, DIR. 2310.01E, THE DEPARTMENT OF DEFENSE DETAINEE PROGRAM, para. E2.1. (5 Sept. 2006) [hereinafter DOD DIR. 2310.01E].
[16] *Id.* , para. E.2.1.1.
[17] *Id.* para. E.2.1.1.1.
[18] This language mirrors the requirements found in article 4(a)(2) of the Third Geneva Convention (GC III). *See* GC III, *supra* note 4, art. 4. Therefore, in cases where additional guidance may be required, look to the law surrounding the development of GC III, article 4. This definition of lawful enemy combatant is narrower than the definition of enemy prisoner of war. The definition of lawful enemy combatant is limited to GC III, art. 4(a)(1) & (2); whereas, the definition of enemy prisoner of war includes all six categories of potential prisoner of war found in GC III, art. 4(a)(1)-(6). GC III, *supra* note 4, art. 4.
[19] DOD DIR. 2310.01E, *supra* note 15, para. E.2.1.1.2.

Combatant is defined to include, but is not limited to, an individual who is or was part of or supporting Taliban or al Qaeda forces or associated forces that are engaged in hostilities against the United States or its coalition partners.

c. *Enemy Prisoner of War*.[20] Individuals under the custody and/or control of the Department of Defense according to GC III, Articles 4 and 5.

d. *Retained Person*.[21] Individuals under the custody and/or control of the Department of Defense according to GC III, Article 33.

e. *Civilian Internee*.[22] Individuals under the custody and/or control of the Department of Defense according to GC IV, Article 4.[23]

2. The following are defined persons found in Geneva Conventions III (GC III) and IV (GC IV).

a. *Prisoner of War (POW)*. A detained person as defined in Article 4 of GC III. Traditionally these are members of the armed forces of a party or militias forming a part of an armed force who comply with criteria set out in Article 4(a)(2) of GC III. The term Enemy Prisoner of War (EPW) is also used by U.S. forces.[24] There is no legal difference between POWs and EPWs. As a matter of practice, EPW refers to POWs that Americans capture in international armed conflict. POW is the term for US service members captured by our enemy. POW is also the international name of choice for armed forces captured on the battlefield.

b. *Protected Person*. A person protected under GC IV is any person who at a given moment and in any manner whatsoever finds himself in case of conflict or occupation, in the hands of a Party to the conflict or Occupying Power, of which he is not a national.[25] Furthermore, if an individual falls into one of the following four categories, they are excluded from the protections given to a "protected person" under the GC IV: a) nationals of a State not bound by the GC; b) nationals of a neutral State with normal diplomatic relations with the Detaining Power; c) nationals of a co-belligerent State with normal diplomatic relations with the Detaining Power; or d) individuals covered by another Geneva Convention.[26]

c. *Detainee*. This term is not specifically defined in the Geneva Conventions.[27] However, this term is used in some articles discussing the due process rights of civilians being held by an Occupying Power.

d. *Civilian Internee*. A civilian internee is a civilian who is interned during international armed conflict or occupation for imperative reasons of security or for committing an offense against the detaining power.[28]

3. Other terms for Detainees. The following names have been used to describe persons detained by U.S. forces in the GWOT. Some of the terms have no legal background while others are used to describe persons who did not appear to fit neatly into the recognized framework of the Geneva Conventions. Since the adoption of various definitions in DoD Directive 2310.01E, JAs should work to categorizing detainees in accordance with the DoD Detainee Program or Geneva Conventions at the lowest possible level.

a. Unlawful Combatant / Belligerent

b. Person of Interest / Person Under US Control (PUC)

c. Terrorist

d. Security Detainee

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[20] *Id.* para. E.2.1.2.
[21] *Id.* para. E.2.1.3.
[22] *Id.* para. E.2.1.4.
[23] These individuals qualify as "protected persons" under the Fourth Geneva Convention (GC IV). *See* GC IV, *supra* note 4, art. 4. Protected persons are entitled to various protections in Part II and Part III of GC IV. *Id.* Refer to the GC IV outline for additional details.
[24] DoD DIR. 2310.01E, *supra* note 15, para. E2.1.2.
[25] GC IV, *supra* note 4, art. 4.
[26] *Id.* In practice, few individuals would fall outside the protected person status since virtually all nations today consider themselves bound by the Conventions and any individual meeting the criteria of exclusion b and c should already receive some level of protection based upon the bilateral relationship between their State and the detaining powers. Thus, in current operations in and OEF, almost all persons would be "protected persons" in some way.
[27] GC IV, *supra* note 4, art. 76.
[28] *See generally*, GC IV, *supra* note 4, art. 79-135 (discussing the protections afforded to civilian internees).

e. Unprivileged Belligerent – this term is specifically defined in the Military Commissions Act of 2009 and is in many ways, synonymous with the term "Unlawful Combatant."

B. **Status v. Treatment.** The key for JAs is to ensure that servicemembers treat all detainees humanely.[29] Judge Advocates can look to Common Article 3 as a minimum yardstick for humane treatment.[30] Although individuals defined as a person protected in the Geneva Conventions during international armed conflict may be entitled to greater protections as a matter of law, all individuals initially are entitled to humane treatment.

C. **Detainee Treatment Act.** On December 30, 2005, President Bush signed the Department of Defense Appropriations Act of 2006 that included the "Detainee Treatment Act of 2005."[31]

1. Section 1002 directly relates to the treatment of detainees under DoD custody or effective control. No detainee in custody shall be subject to any treatment not authorized by the Army Field Manual on Intelligence Interrogation. The FM was recently re-released as FM 2-22.3. By Executive Order, President Obama extended the coverage of section 1002 to ALL agencies in the US Government. After January 22, 2009, "any individual in the custody or under the effective control of an officer, employee, or other agent of the United States Government, or detained within a facility owned, operated, or controlled by a department or agency of the United States, in any armed conflict, shall not be subjected to any interrogation technique or approach, or any treatment related to interrogation, that is not authorized by and listed in Army Field Manual 2-22.3 (Manual)."[32]

2. Section 1003 states that no individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhumane, or degrading treatment or punishment.[33] Note this section goes beyond DoD to the entire USG. This should be of special emphasis to JAs when dealing with agencies and personnel outside of DoD.

D. The Detainee Treatment Act, along with numerous DoD publications recently published or revised, will be the guidance for commanders and JAs as we continue to prosecute the GWOT.

III. DETAINEE OPERATIONS IN GWOT

A. Operation Enduring Freedom (OEF)[34]

1. Following the attacks on the United States on September 11, 2001, the United States prepared a myriad of potential responses against the attackers. Once al Qaida was identified as the entity responsible for the attack, the United States attacked the al Qaida leadership and their Taliban allies in Afghanistan. In an Order dated 13 November 2001, the President authorized the Secretary of Defense (SECDEF) to detain individual subjects captured by American forces.[35] The order listed the basic protections that the individuals would receive,

a. Humane treatment without distinction based on race, color, religion, gender, birth, wealth, or similar criteria;[36]

b. Adequate food, drinking water, shelter, clothing, and medical treatment;[37]

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[29] DoD Dir. 2310.01E, *supra* note 15, para. 4.1.
[30] Exec. Order 13,491, Ensuring Lawful Interrogations, 74 Fed. Reg. 4,893, 4,894 (Jan. 27, 2009).
[31] Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2680 (also commonly referred to as the McCain Amendment); Detainee Treatment Act of 2005, Pub. L. No. 109-148. This law was passed twice, with identical language, in both the 2005 National Defense Appropriations Act and the National Defense Authorization Act. For purposes of this outline, all references to the Detainee Treatment Act will be as published in Public Law 109-148.
[32] Exec. Order 13,491, Ensuring Lawful Interrogations, 74 Fed. Reg. 4,893, 4,894 (Jan. 27, 2009).
[33] "[C]ruel, inhuman, or degrading treatment or punishment means the cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States, as defined in the United States Reservations, Declarations and Understandings to the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment done at New York, December 10, 1984." Detainee Treatment Act § 1003(d).
[34] For a full discussion of the historical treatment of both Al Qaida and the Taliban during the Global War on Terror see Congressional Research Service Report, *Treatment of "Battlefield Detainees" in the War on Terrorism*, Jennifer Elsea, updated 27 March 06 at http://fpc.state.gov/documents/organization/58279.pdf
[35] 66 Fed. Reg. 57833, 57834.
[36] *Id.*
[37] *Id.*

c. Free exercise of religion consistent with requirements for detention;[38] and

d. In accordance with other such conditions as the SECDEF may proscribe.[39]

2. The protections afforded captured individuals were not as broad as those found in Common Article 3 of the Geneva Conventions and were subject to criticism from domestic and international commentators.

3. On July 7, 2006, the Deputy Secretary of Defense issued new guidance to DoD in regards to individuals detained in the GWOT.[40] Following the U.S. Supreme Court's decision in Hamdan v. Rumsfeld,[41] the official DoD position is that Common Article 3 of the 1949 Geneva Conventions applies as a matter of law to the conflict with al Qaida.[42] The status of al Qaida, as an organization, has not changed. They remain a non-party to Geneva Conventions and therefore do not qualify for protection under the full body of the Geneva Conventions and customary international law. However, all individuals detained during Operation Enduring Freedom are entitled to humane treatment.

4. Two separate lines of command are operating in Afghanistan under United Nations Security Council Resolutions: International Security Assistance Forces (ISAF) and Operation Enduring Freedom (OEF) forces. U.S. forces assigned to ISAF will comply with ISAF rules regarding detainee operations. U.S. forces assigned to OEF will follow OEF rules regarding detainee operations. In both cases, the minimal standard of care owed to any individual captured by either ISAF or OEF forces is humane treatment. The specifics regarding the processing of an individual from point of capture (POC) to final disposition (release, continued detention, or prosecution) are guided by theater specific Standard Operating Procedures (SOPs).

B. Operation Iraqi Freedom (OIF)

1. American forces with their coalition allies began combat operations against Iraq in March 2003.[43] The USG announced that the entire body of the law of war, including the Geneva Conventions, would apply to American forces during OIF.

2. Immediately after combat operations began, American and allied coalition Soldiers captured Iraqi soldiers who were dressed in civilian clothes. Allied forces also were engaged by Saddam Fedayeen[44] forces wearing civilian clothes. The majority of Iraqi forces captured in the opening days of the war were taken to Camp Bucca in southeastern Iraq. Some of these individuals qualified for protection under GC III as POWs. However, other individuals who were detained were civilians who took a direct part in hostilities or posed a threat to security, but who would not qualify as a POW under GC III, art. 4.

3. President Bush declared an end to major combat activities on May 1, 2003.[45] This ostensibly began the occupation of Iraq by American and allied forces. The American occupation ended on June 28, 2004 with the

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[38] *Id.*
[39] *Id.*
[40] Memorandum, Deputy Secretary of Defense, to Secretaries of the Military Departments, subject: Application of Common Article 3 of the Geneva Conventions to the Treatment of Detainees in the Department of Defense (7 July 2006) *available at* http://www.defenselink.mil/news/Aug2006/d20060814comm3.pdf (last visited July 31, 2007) [hereinafter England Memorandum].
[41] Hamdan v. Rumsfeld, 344 F.Supp. 2d 152, 162 (D.D.C. 2004), *rev'd* 413 F.3d 33 (D.C. Cir. 2005), *rev'd* 548 U.S. 557 (2006).
[42] DoD Dir. 2310.01E, *supra* note 15, para. 4.2.
[43] George W. Bush, President, President Bush Addresses the Nation (Mar. 19, 2003) *available at* http://georgewbush-whitehouse.archives.gov/news/releases/2003/03/20030319-17.html. (last visited Mar. 14, 2013)
[44] The paramilitary Fedayeen Saddam (Saddam's `Men of Sacrifice') was founded by Saddam's son Uday in 1995. Saddam's Martyrs "Men of Sacrifice" *Fedayeen* Saddam, http://www.globalsecurity.org/intell/world/iraq/fedayeen.htm (last visited Aug. 6, 2007 – website no longer available). The Fedayeen, with a total strength reportedly between 18,000 and 40,000 troops, was composed of young soldiers recruited from regions loyal to Saddam. *Id.* The unit reported directly to the Presidential Palace, rather than through the army command, and was responsible for patrol and anti-smuggling duties. *Id.* Though at times improperly termed an "elite" unit, the Fedayeen was a politically reliable force that could be counted on to support Saddam against domestic opponents. *Id.*
[45] George W. Bush, President, President Bush Announces Major Combat Operations in Iraq Have Ended, Remarks by the President from the USS Abraham Lincoln At Sea Off the Coast of San Diego, California, (May 1, 2003) *available at* http://georgewbush-whitehouse.archives.gov/news/releases/2003/05/20030501-15.html. (last visited Mar. 14, 2013).

transfer of sovereignty to the interim Iraqi government.[46] During major combat operations as well as during the occupation, individual detainees, who met the criteria of GC III, art. 4, could have qualified as a POW.

4. After January 1, 2009, U.S. forces were supporting the Government of Iraq and were conducting operations in accordance with a security agreement.[47] Under the security agreement, "no detention or arrest may be carried out by the United States Forces (except with respect to detention or arrest of members of the United States forces and of the civilian component) except through an Iraqi decision issued in accordance with Iraqi Law and pursuant to Article 4."[48] Article 4 allowed U.S. forces to conduct military operations that were coordinated with Iraqi authorities and conducted in accordance with Iraqi law.[49] "In the event the United States Forces detain or arrest persons as authorized by . . . [the] agreement or Iraqi law, such persons must be handed over to competent Iraqi authorities within twenty-four hours from the time of their detention or arrest."[50] Therefore, the detention regime in Iraq changed from one based on international law, where detention was necessary for imperative reasons of security, to a law enforcement detention regime grounded in Iraq's domestic criminal law.

IV. PRACTICAL CONSIDERATION OF DETAINEE OPERATIONS

A. In any operation, there should be a system in place "for the capture, evidence collection, processing, questioning, tracking, internment, prosecution, and subsequent release of captured individuals".[51] While some of the specific details and procedures will be classified, the basic requirements for compiling a detainee packet are likely to remain the same.

B. The JA must be familiar with the specific authority authorizing detention of the individual. Detention authority may come from the Geneva Conventions, a United Nations Security Council Resolution, or the host nation domestic criminal law. The specific authority to detain individuals will likely impact some of the due process owed to an individual detainee. However, at a minimum, all detainees should receive humane treatment.

C. To ensure that an individual is properly detained, the unit must complete the correct administrative paperwork, provide evidence linking the detainee to the reason for detention (e.g. attack on US Forces), and provide evidence linking the detainee to the witnesses.[52] Evidence linking the detainee to the basis for detention includes photographs, sworn statements, diagrams, and physical evidence.[53] However, the legal basis for which you are detaining the individual will play a significant role in what type of evidence is collected and how much risk and time will be allocated to the evidence collection effort. For example, if the detainee is a prisoner of war captured with the rest of his unit, the on-scene commander will likely be more concerned with properly completing the capture tag than with collecting evidence for use in a criminal trial. Conversely, if the theater of operations has evolved to evidence based targeting operations, the collection of evidence at the point of capture may be the decisive point of the operation.

1. Photographs. Units should use photographs to connect the individual detained to the basis for detention. These photographs can be and frequently are presented to host nation judges or magistrates who review

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[46] S. C. Res. 1546, ¶ 1, U.N. Doc. S/RES/1546 (June 8, 2004).
[47] Agreement Between the United States of America and the Republic of Iraq On the Withdrawal of United States Forces from Iraq and the Organization of Their Activities during Their Temporary Presence in Iraq (Nov. 17, 2008) [hereinafter Security Agreement].
[48] *Id.* art. 22.
[49] *Id.* art. 4. After January 1, 2009, U.S. forces are conducting detention operations under the Iraqi criminal procedure code and the Security Agreement between the United States and Iraq. *Id.* Iraq follows the civil law legal tradition. Major W. James Annexstad, *The Detention and Prosecution of Insurgents and Other Non-Traditional Combatants—A Look at the Task Force 134 Process and the Future of Detainee Prosecutions* ARMY LAW., July 2007, at 72, 73. The Iraqi Code of Criminal Proceedings does not appear to specify any evidentiary standards for either an arrest warrant or a search warrant. *See id.* at 73-75; *see also* Chapter 4, Section 2, of the Iraqi Law on Criminal Proceedings detailing how witnesses are heard and their testimony recorded under Iraqi law.
[50] *Id.* art. 22.
[51] CENTER FOR MILITARY LAW AND OPERATIONS, THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER & SCHOOL, U.S. ARMY, FORGED IN THE FIRE, LEGAL LESSONS LEARNED DURING MILITARY OPERATION 1994-2006 33 (Sept. 2006).
[52] PowerPoint Presentation, Detainee Operations, Joint Readiness Training Center (2006) [hereinafter JRTC PowerPoint].
[53] TASK FORCE 134, MULTI-NATIONAL FORCE – IRAQ, SOLDIER'S INVESTIGATION GUIDE AND CRIME TIP MANUAL 3 (2006) [hereinafter TF 134 Guide].

files to determine if continued detention is appropriate.[54] Individuals from the unit should take photographs of all potentially relevant evidence, such as weapons, ammunition, money, detonators, etc.[55] Taking photographs helps maintain the integrity of the evidence. "In documenting your evidence at the site, you have not only shown the evidence exists, but what it looked like when you found it and where it was when you found it."[56] Therefore, take photographs before the evidence is moved.[57] Attempt to capture photographs covering 360 degrees around the site.[58] Furthermore, the photographs should include any notable landmarks or reference points which may be helpful to put the scene into context for the judge or other reviewer.[59] A series of photographs of the site, building, or area will help establish the view so that the judge can formulate an idea of what the site looked like to Soldiers on the day of the operation.[60] It is important to mark the photographs with a date time stamp.

2. Statements. At least two, preferably three, Soldiers who were at the scene must write a detailed account of why the individual is being detained.[61] Each sworn statement should cover the who, what, when, where, why and how of the detention.[62] These statements provide much of the information used to conduct the initial magistrate's review and should support the potentially higher legal standard applied during the potential future criminal prosecution. Operational concerns make it is unlikely that the unit will make an additional trip to the point of detention to collect additional information. It is important to collect as much information in the initial sworn statements as possible to fully describe the circumstances of detention. Remember, it is the content of the statement that is key. Therefore, even if the Soldiers do not have a DA Form 2823 (Sworn Statement) available at the point of capture, they should record the information on any piece of paper and transfer the information to a DA Form 2823 as soon as the security situation permits. A common mistake is that a Soldier without firsthand knowledge relates a statement about what they heard happened leading to the detention. Often, the statement is written down by a detainee escort who had no involvement in the actual detention of the individual. These statements are unreliable and lack credibility when presented to host nation judges or magistrates.

a. Who: Clearly identify the detainee by name and capture tag number. If multiple individuals are detained in the same operation, list all individuals who are detained together. It is important to link potential co-defendants together in both the sworn statement and on the apprehension form.[63] Furthermore, the statement should also identify other members of the unit who were present for the operation by full name and rank.[64]

b. What: Explain what happened and the events leading up to the detainee's capture.[65] This description should include what the overall mission of the unit was that day, such as, patrol, convoy, or raid. Furthermore, this explanation should include what the unit found in terms of contraband, if anything.

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[54] Although the Central Criminal Court of Iraq (CCCI) originally worked out of the Green Zone, it now has ten panels throughout Iraq located in Baghdad, Kut, Hillah, Baquba, Tikrit, Najaf, Karbala, Basrah. JRTC PowerPoint, *supra* note 73, at slide 12.
[55] TF 134 GUIDE, *supra* note 53, at 4.
[56] PowerPoint Presentation, The All Army Evidence Awareness Training Support Package (3 Aug. 2007) (information contained in the notes section of slide 22) [hereinafter Evidence PowerPoint Presentation].
[57] *Id.* If time permits, take multiple photographs of the evidence. *Id.* One set should contain a measuring device to give the judge perspective. *Id.* If possible, take photographs from a ninety degree angle (from overhead) to capture the most accurate dimension. *Id.*
[58] *Id.*
[59] *Id.*
[60] Evidence PowerPoint Presentation, *supra* note 56, slide 22.
[61] *See* U.S. DEP'T OF ARMY, FIELD MANUAL 3-90.6, THE BRIGADE COMBAT TEAM Table G-1(4 Aug. 2006). Documenting the reason for detention is part of a common task trained to all Soldiers. Writing a sworn statement is part of the Tag requirement from the 5Ss and T (Silence, Segregate, Safeguard, Speed to a Safe Area / Rear and Tag) training for detainees at the point of capture. *Id.* This is not a task imposed by the prosecutors.
[62] *Id.*
[63] If one of the potential co-defendants is released and others are forwarded to the theater internment facility (TIF), annotate the reason for the release in the files of all remaining co-defendants. Do not allow the detainees to "blame the crime on the guy who was released" when they are tried before the Central Criminal Court of Iraq.
[64] TF 134 GUIDE, *supra* note 53, at 4. Ideally, you should list at least five Soldiers who were actual witnesses to the detention. *Id.* Remember that the individuals prosecuting this case are likely not assigned to your unit. The prosecutors are likely assigned to another service. The case may not go to trial for six to twelve months. Add as much contact information as possible to help make future witness production easier.
[65] TF 134 GUIDE, *supra* note 53, at 5.

c. When: Record the date and time of the incident.[66] Include the time and location of all significant events that occurred during the mission. For example, if the unit took small arms fire before detaining the individual, include the time and location for both the small arms fire and the detention.

d. Where: The statement should include both a grid location and physical description of where the individual was detained. While other members of the military can relate to the grid location, local judges are better able to relate to a physical description that refers to local landmarks. Therefore, the where section of the statement should identify the nearest town, street name (local not the Main Supply Route (MSR) name given by US forces), mosque, or other notable landmark.[67]

e. Why: Explain what the events and / or unclassified information that led the unit to the search or to the detention. Furthermore, annotate whether or not the detainee made a confession or admission at the point of capture.[68]

f. How: Explain how the unit accomplished the mission and how the items or detainees were found.

g. Classification: Attempt to ensure that the content of each statement is unclassified. While the detainee packet itself may contain information from classified target folders, intelligence debriefings, or other classified information, the statements should contain only information that is releasable to the host nation.

3. Diagrams. Diagrams or sketches are essential to put the operation into context for the judge. The diagram relates the location of the physical evidence seized by US forces to the location of the detainee in the house, on the street, or in the field. The diagram, or sketch, "is the quickest and easiest way to document and exhibit the layout of a site."[69] Ideally, Soldiers should complete the diagram "before the evidence is collected and it should be used to reaffirm the location of evidence, and the location of your site."[70] The diagram should also correspond to the photographs taken at the site.[71] The diagram can help relate the location of landmarks or other significant points of interest to where the evidence was found. Make sure that the diagram has a key or legend, as required. Ensure that distances are properly marked. Estimates of sizes and distances are acceptable if taking exact measurements is not feasible.

D. The contents of the detainee packet supplement the physical evidence taken from the objective. The unit may and should seize items that connect the detainee to the basis for detention.[72] Examples of evidence seized by U.S. forces could include the following: weapons, scopes, ammunition, cell phones, pagers, documents, computers, thumb drives, fake identification documents, passports, bomb making material (such as wiring, circuit boards, blasting caps, plastic explosives, artillery rounds, copper, batteries, car alarms, garage door openers, and timers.[73]

1. Evidence Handling: Attempt to maintain evidence consistent with chain of custody requirements for evidence presented in U.S. courts. While the evidence may not be presented before a judge, the chain of custody is still important from an operational, intelligence, and legal perspective.

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[66] *Id.* The time date group should be consistent with the information presented on the apprehension form. If there is any inconsistency between the date time group in the sworn statement and that in the apprehension form, then the Combined Review and Release Board will use the information on the apprehension form. Interview with Lieutenant Commander David D. Furry, Student 55th Judge Advocate Officer Advanced Course, in Charlottesville, VA (Nov. 16, 2006) (discussing his previous assignment with Task Force 134 working on the Combined Review and Release Board).
[67] TF 134 GUIDE, *supra* note 53, at 5.
[68] *Id.* Furthermore, the statement should refer to whether or not the detainee signed the evidence inventory form.
[69] Evidence PowerPoint Presentation, *supra* note 56, slide 23.
[70] *Id.*
[71] Clearly label the diagram so that the link to various photographs is as clear as possible.
[72] The general rule regarding property is that "it is especially forbidden to destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war." Hague IV, *supra* note 2, art. 23(g). Any property seized by members of the United States armed forces is property of the United States and not property of the individual conducting the seizure. U.S. DEP'T OF ARMY, FIELD MANUAL 27-10 THE LAW OF LAND WARFARE para. 396 (18 July 1956) [hereinafter FM 27-10].
[73] PowerPoint Presentation, The All Army Evidence Awareness Training Support Package (3 Aug. 2007).

2. It is important to document all property seizures with either a DD Form 2745 (Enemy Prisoner of War [EPW] Capture Tag) or DA Form 4137 (Evidence Property/Custody Document).[74] Make sure that the documentation clearly ties the item to one individual if multiple individuals are detained during the same operation. If neither the DD Form 2745 nor the DA Form 4137 is available on the objective, capture the content of the information to be transferred to the proper form later in a more secure location.

3. Note that only a Commander can order the seizure of funds. If the unit seizes any money, account for each piece of currency by amount. Furthermore, United States currency must be accounted for by serial number. Thus, a key element of unit level planning is also obtaining a safe to ensure the evidence custodian has a means to secure cash and other high value items. Such funds may be turned over to finance, but all evidence custodians should be trained and maintain records of such transactions just as would a Class A agent or armorer.

E. Some common forms required in previous operations include:

1. Capture Tag or Theater Specific Apprehension Form

2. DA Form 2823 (Sworn Statement) (times two)

3. DA Form 4137 (Evidence Property / Custody Document)

4. DD Form 2708 Receipt for Inmate or Detained Person

5. Theater Specific Evidence Accountability and Tracking Forms

F. Some common errors in detainee evidence packet development include:[75]

1. Statements with insufficient detail.

2. Explosive Residue test results as the sole basis for detention.

3. Detaining groups without investigating the culpability of each member of the group (this results in insufficient evidentiary packets; without evidence substantiating the reason for detention, detainees must be released)

4. Enemy propaganda as the sole basis for detention.

5. Statement written by Soldier without actual knowledge of content of the statement – relaying hearsay.

6. Identical statements provided by multiple witnesses.

7. Detainee engaged in suspicious activity (lying to or fleeing from Coalition Forces) as the sole basis for continued confinement.

8. Only evidence supporting detention is guilt by association (phone activity with known bad guys)

9. Lack of photos or diagrams.

10. Failure to corroborate times with events.

G. The Role of the Judge Advocate may include the following:

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[74] *See* FM 27-10, *supra* note 72, para 409. The information contained on the DA Form 4137 may be used to support or refute future claims by detainees. Therefore, the content should be as thorough and accurate as possible.
[75] 4th Infantry Division (OIF 05-07) After Action Review, 11-12 (1 Feb. 2007) (covering lessons learned by the Office of the Staff Judge Advocate).

1. Participate in targeting meetings and assist in target folder development. In some cases, the unclassified evidence in the target folder will form the basis for a host nation arrest or search warrant. The JA may be called upon to serve as the liaison with the host nation judge to obtain warrants for unit targets.

2. Review the initial packet for completeness and conduct a magistrate's review.

3. Ensure accuracy of the forms submitted in the packet and assist the unit in identifying relevant evidence or information that could support continued detention.

4. Be the counselor who is willing to advise the Commander when the evidence does not support continued detention.

5. Be prepared to answer requests for assistance from higher headquarters prosecuting the detainee in the host nation legal system.

6. Provide an advocacy memorandum for select detainees being processed for early release.

7. Participate in regular inspections of detention facilities.

8. Help prepare unit witnesses to testify before a host nation court.

APPENDIX

DETAINEE OPERATIONS AT THE POINT OF CAPTURE ("FIVE S'S AND T")

Search	Search each detainee for weapons, items of intelligence value, and items that would make escape easier or compromise US security interests. Confiscate these items. Prepare a receipt when taking property DA Form 4137 (Evidence/Property Custody Document). ***Note.*** When possible, conduct same gender searches. When not possible, perform mixed gender searches in a respectful manner. Leaders must carefully supervise Soldiers to prevent allegations of sexual misconduct. Detainees may keep the following items found in a search: Protective clothing and equipment that cannot be used as a weapon (such as helmets, protective masks and clothing) for use during evacuation from the combat zone. Retained property, once cleared by military intelligence personnel or other authority, may consist of identification (ID) cards or tags, personal property having no intelligence value and no potential value to others (such as photos, mementos, etc.), clothing, mess equipment (except knives and forks), badges of rank and nationality, decorations, religious literature, and jewelry. (Personal items, such as diaries, letters, and family pictures may be taken by MI teams for review, but are later returned to the proper owner). ***Note.*** Initially all property is taken into custody. Confiscate currency only on the order of a commissioned officer (AR 190-8) and provide a receipt and establish a chain of custody using DA Form 4137 or any other field expedient substitute.
Silence	Silence the detainees by directing them not to talk. Muffle may be employed if necessary (ensure detainee can breathe after application).
Segregate	Segregate detainees based on perceived status and positions of authority. Segregate leaders from the remainder for the population. Segregate hostile elements such as religious, political, or ethnic groups hostile to one another. For their protection, segregate minor and female detainees from adult male detainees whenever possible.
Safeguard	Safeguard the detainees. Ensure detainees are provided adequate food, potable water, clothing, shelter, and medical attention. Ensure detainees are not exposed to unnecessary danger and are protected (afforded the same protective measures as the capturing force) while awaiting evacuation. Do not use coercion to obtain information from the captives. Provide medical care to wounded and/or sick detainees equal in quality to that provided to US forces. Report acts or allegations of abuse through command channels, to the supporting judge advocate, and to the US Army Criminal Investigation Command.
Speed to Safe Area / Rear	Evacuate detainees from the battlefield as quickly as possible, ideally to a Detainee Control Point (DCP) or detainee holding area where MPs take custody of the detainees. Transfer custody of all captured documents and other property to the US forces assuming responsibility for the detainees.
Tag	Use DD Form 2745 (Enemy Prisoner of War [EPW] Capture Tag). Include the following information: (1) Date and time of the capture; (2) Location of the capture (grid coordinates); (3) Capturing unit; and (4) Circumstances of capture. Indicate specifically why the person has been detained. Use additional documentation when necessary and feasible to elaborate on the details of capture: Documentation should answer five Ws – who, what, where, why, and witnesses. Use a form, such as a DA Form 2823 (Sworn Statement) or an appropriate field expedient method, to document this information. List all documents and items of significance found on the detainee. Attach Part A, DD Form 2745, to the detainee's clothing with wire, string, or another type of durable material. Instruct the captive not to remove or alter the tag. Maintain a written record of the date, time, location, and personal data related to the detention. Attach a separate identification tag to confiscated property that clearly links the property with the detainee from whom it was seized.[1]

[1] U.S. DEP'T OF ARMY, FIELD MANUAL 3-90.6, THE BRIGADE COMBAT TEAM, Table G-1(4 Aug. 2006).

CHAPTER 12

DOMESTIC OPERATIONS

REFERENCES

1. Posse Comitatus Act, 18 U.S.C. § 1385
2. Military Support for Civilian Law Enforcement Agencies, 10 U.S.C. §§ 371-382
3. Insurrection Statutes, 10 U.S.C. §§ 331-334
4. Stafford Act, 42 U.S.C. § 5121, *et seq.*, as amended
5. Defense Against Weapons of Mass Destruction Act of 1996, Pub. L. No. 104-201
6. Drug Interdiction and Counter-Drug Activities, 32 U.S.C. § 112
7. Response to Threats of Terrorist Use of Weapons of Mass Destruction, 50 U.S.C. § 2311
8. Operations Relating to Defense Against Weapons of Mass Destruction and Terrorist Attacks, 10 U.S.C. § 12310(c)
9. Homeland Security Act of 2002, Pub. L. No. 107-296 (2002).
10. National Response Framework, January 2008
11. Homeland Security Presidential Directive (HSPD)-5 (28 Feb. 2003)
12. U.S. DEP'T OF DEFENSE, DIR. 3025.18, DEFENSE SUPPORT OF CIVIL AUTHORITIES (DSCA) (29 Dec. 2010, Incorporating Change 1, 21 Sep. 2012)
13. U.S. DEP'T OF DEFENSE, INSTR. 3025.21, DEFENSE SUPPORT OF CIVILIAN LAW ENFORCEMENT AGENCIES (27 Feb. 2013)
14. U.S. DEP'T OF DEFENSE, INSTR. 3025.22, THE USE OF THE NATIONAL GUARD FOR DEFENSE SUPPORT OF CIVIL AUTHORITIES (26 July 2013)
15. U.S. DEP'T OF DEFENSE, DIR. 5210.56, CARRYING OF FIREARMS AND THE USE OF FORCE BY DOD PERSONNEL ENGAGED IN SECURITY, LAW AND ORDER, OR COUNTERINTELLIGENCE ACTIVITIES (1 APR. 2011)
16. U.S. DEP'T OF DEFENSE, DIR. 5200.31E, DOD MILITARY WORKING DOG (MWD) PROGRAM (10 AUG. 2011)
17. U.S. DEP'T OF DEFENSE, INSTR. 6055.06, DOD FIRE AND EMERGENCY SERVICES (F&ES) PROGRAM (21 Dec. 2006)
18. JOINT CHIEFS OF STAFF, INSTR. 3710.01B, DOD COUNTERDRUG SUPPORT (26 Jan. 2007)
19. U.S. DEP'T OF ARMY, REG. 190-14, CARRYING OF FIREARMS AND USE OF FORCE FOR LAW ENFORCEMENT AND SECURITY DUTIES (12 Mar. 1993)
20. U .S. DEP'T OF ARMY, REG. 700-131, LOAN, LEASE, AND DONATION OF ARMY MATERIEL (23 Aug. 2004)
21. U.S. DEP'T OF ARMY, FIELD MANUAL 3-07, STABILITY OPERATIONS (Oct. 2008)
22. U.S. NATIONAL GUARD BUREAU, REG. 500-1/ANGI 10-8101, NATIONAL GUARD DOMESTIC OPERATIONS (13 Jun. 2008)
23. U.S. NATIONAL GUARD BUREAU, REG. 500-2/ANGI 10-801, NATIONAL GUARD COUNTERDRUG SUPPORT (29 Aug. 2008)
24. U.S. DEP'T OF NAVY, SECNAV INSTR. 5820.7C, COOPERATION WITH CIVILIAN LAW ENFORCEMENT OFFICIALS (26 Jan. 2006)
25. U.S. DEP'T OF NAVY, OPNAV INSTR. 3440.16D, NAVY DEFENSE SUPPORT OF CIVIL AUTHORITIES PROGRAM (29 Jun. 2009)
26. U.S. DEP'T OF AIR FORCE, INSTR. 10-801, DEFENSE SUPPORT OF CIVIL AUTHORITIES (DSCA) (19 SEP. 2012)

I. OVERVIEW

The military's primary mission has been fighting and winning the nation's wars. After the tragic events of September 11, 2001, military involvement in domestic operations has expanded. Today's military leaders still need to be ready to protect the United States from direct attack from both state and non-state actors. But they also need to be prepared to provide support to civil authorities in a variety of areas, from disaster relief, to suppressing insurrections, to responding to chemical, biological, radiological, nuclear and explosive events. This chapter will

outline the increasingly complex legal framework for the use of the military within the United States for both homeland defense and support to civil authorities.

II. DEFINITIONS: HOMELAND DEFENSE AND CIVIL SUPPORT

Today's Military must be prepared for both homeland defense and civil support missions. "Defending U.S. territory and the people of the United States is the highest priority of the Department of Defense (DoD), and providing appropriate defense support of civil authorities (DSCA) is one of the Department's primary missions." DEPARTMENT OF DEFENSE, STRATEGY FOR HOMELAND DEFENSE AND DEFENSE SUPPORT OF CIVIL AUTHORITIES 1 (Feb. 2013), *available at http://www.defense.gov/news/Homelanddefensestrategy.pdf*.

A. The DoD has defined Homeland Defense (HD) as the "protection of U.S. sovereignty, territory, domestic population, and critical defense infrastructure against external threats and aggression, or other threats as directed by the President." It is generally considered to consist of war-fighting missions led by the DoD. Examples include combat air patrols and maritime defense operations.

B. The DoD has defined Civil Support (CS) as support to civil authorities for domestic emergencies and other designated activities. Examples include disaster response, counterdrug (CD) support, and support to civilian law enforcement agencies.

III. CIVIL SUPPORT (AKA DEFENSE SUPPORT OF CIVIL AUTHORITIES (DSCA))

A. The Deputy Secretary of Defense (DEPSECDEF) directed the Assistant Secretary of Homeland Defense and Americas' Security Affairs (ASD (HD&ASA)) to "update and streamline" DoDDs 3025.15, 3025.1 and 3025.12, and "other related issuances." As a result, DoDD 3025.18, Defense Support of Civil Authorities (DSCA), was released on 29 December 2010, incorporating and canceling DoDDs 3025.15 and 3025.1. In addition, on February 27, 2013, DoD issued DoDI 3025.21, Defense Support of Civilian Law Enforcement Agencies, which incorporates and cancels DoDDs 3025.12, 5525,5, and 5030.46.

B. It is DoD's policy that DoD shall cooperate with and provide defense support of civil authorities as directed by and consistent with applicable law, Presidential Directives, Executive Orders, and DoDD 3025.18. Assistance is generally one of support; the civilian authorities retain primary responsibility.

C. DoDD 3025.18**.**

1. DoDD 3025.18 provides guidance for the execution and oversight of DSCA when requested by civil authorities or by qualifying entities and approved by the appropriate DoD official, or as directed by the President, within the United States, including the District of Columbia, the Commonwealth of Puerto Rico, the U.S. Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and any territory or possession of the United States or any political subdivision thereof. The directive 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 these criteria in providing a recommendation up the chain of command.

a. *Legality*: compliance with the law.

b. *Lethality*: potential use of lethal force by or against DoD forces.

c. *Risk*: safety of DoD forces.

d. *Cost*: who pays, impact on DoD budget.

e. *Appropriateness*: whether the requested mission is in the interest of DoD to conduct.

f. *Readiness*: impact on DoD's ability to perform its primary mission.

2. *Approval Authority*. DoDD 3025.18 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, DoDD 3025.18 should always be the first directive consulted.

3. The directive states, "[u]nless approval authority is otherwise delegated by the Secretary of Defense, all DSCA requests shall be submitted to the office of the Executive Secretary of the Department of Defense."

4. SECDEF is the approval authority for:

a. Civil disturbances (DoDD 3025.18, para. 4.j.(1)).

b. Responses to Chemical, Biological, Radiological, Nuclear, and High-Yield Explosives (CBRNE) events (DoDD 3025.18, para. 4.j.(2)).

c. Defense assistance to civilian law enforcement organizations except as authorized by DoDI 3025.21 (DoDD 3025.18, para. 4.j.(3)).

d. Assistance in responding with assets with potential for lethality (DoDD 3025.18, para. 4.j.(4)).

e. Use of DoD unmanned aerial systems (DoDD 3025.18, para. 4.o).

5. Support for Civil Disasters. Follow DoDD 3025.18.

6. When Combatant Command-assigned forces are to be used, there must be coordination with the Chairman of the Joint Chiefs of Staff (CJCS). CJCS will determine whether there is a significant issue requiring SECDEF approval, after coordination with the affected Combatant Command (DoDD 3025.18, para. 4.5).

IV. RESTRICTIONS ON CIVIL SUPPORT: THE POSSE COMITATUS ACT (PCA)

A. Although the Armed Forces must be ready to provide assistance to civil authorities, there are significant restrictions on the use of the military for law enforcement activities within the United States. The Posse Comitatus Act is one of the limitations. The PCA criminalizes the use of the military for certain law enforcement activities. To advise commanders properly, especially in the area of CS, Judge Advocates (JAs) must understand the limitations created by the PCA, and the constitutional and statutory exceptions to the PCA. The PCA states:

> Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both. 18 U.S.C. § 1385.

B. Definition and History.

1. *Posse comitatus*: 'The force of the county'; the body of men above the age of fifteen in a county (exclusive of peers, clergymen, and infirm persons), whom the sheriff may summon or 'raise' to repress a riot or for other purposes; also, a body of men actually so raised and commanded by the sheriff. Oxford English Dictionary Online.

2. Prior to 1878, the U.S. military was used extensively as a posse comitatus to enforce various laws as diverse as the Fugitive Slave Act and Reconstruction-era laws. Over time, the authority level necessary for local law enforcement to call on the military as a posse comitatus devolved down to the lowest level. For several reasons (e.g., the Army's increasingly vocal objection to "commandeering of its troops" and Southerners' complaints that the Northern-based Federal military was unfairly enforcing laws against them), Congress sought to terminate the prevalent use of Federal Soldiers in civilian law enforcement roles. Accordingly, Congress passed the PCA in 1878 as a rider to an Army Appropriations Act, limiting the circumstances under which the Army could be used as a posse comitatus to "execute the laws."

C. To Whom the Posse Comitatus Act (PCA) Applies.

1. Active duty personnel in the Army and Air Force.

a. Most courts interpreting the Posse Comitatus Act have refused to extend its terms to the Navy and Marine Corps (*United States v. Yunis*, 924 F.2d 1086 (D.C. Cir. 1991); *United States v. Roberts*, 779 F.2d 565 (9th Cir. 1986), *cert. denied*, 479 U.S. 839 (1986); *United States v. Mendoza-Cecelia*, 736 F.2d. 1467 (11th Cir. 1992); *United States v. Acosta-Cartegena*, 128 F. Supp. 2d 69 (D.P.R. 2000)).

b. In 10 U.S.C. § 375, Congress directed the Secretary of Defense (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*." These regulations appear in DoDI 3025.21. Therefore, the proscription against direct participation in civilian law enforcement activities by active duty military members has been extended by regulation to the Navy and Marine Corps. However, SECDEF and the Secretary of the Navy (SECNAV) may still grant exceptions to this proscription on a case-by-case basis (DoDI 3025.21).

2. Army Reserve, Air Force Reserve, Navy Reserve and Marine Corps Reserve when they are in a drilling status (on active duty, active duty for training, or inactive duty for training).

3. National Guard personnel only when they are in Federal service (i.e., a Title 10 status).

4. Civilian employees of DoD when under the direct command and control of a military officer (DoDI 3025.21).

D. To Whom the PCA does NOT Apply.

1. A member of a military service when *off duty* and acting in a *private capacity*. A member is not acting in a private capacity when assistance to law enforcement officials is not rendered under the direction or control of DoD authorities (DoDI 3025.21).

2. A member of the National Guard when not in Federal service (i.e., while serving under state control in Title 32 or State Active Duty status).

3. A member of a Reserve Component when not on active duty, active duty for training, or inactive duty for training.

4. Members of the Coast Guard (14 U.S.C. § 2) (*Jackson v. Alaska*, 572 P.2d 87 (Alaska 1977)).

5. Members of the armed forces who are not a "part of the Army or Air Force." In a 1970 Department of Justice opinion, then-Assistant Attorney General William Rehnquist addressed the assignment of Army personnel to the Department of Transportation (DoT) to act as U.S. Marshals. He determined that this was not a violation of the PCA since: (a) a statute (49 U.S.C. § 1657) expressly authorized the detailing of military members to DoT; (b) under the statute, the assigned members were not charged against statutory limits on grade or end strength; and (c) the members were not subject to direct or indirect command of their military department of any officer thereof. He determined, therefore, that they were DoT employees for the duration of the detail. Therefore, they were not "part of the Army or Air Force" (Memorandum for Benjamin Forman, Assistant General Counsel, Department of Defense, from William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, *Re: Legality of deputizing military personnel assigned to the Department of Transportation* (Sept. 30, 1970) ("Transportation Opinion")).

E. To What Actions the PCA Applies.

1. When determining what actions are covered by the PCA (i.e., what constitutes "execut[ing] the law" under the statute), one must consider both directives and case law, as they are not identical. In fact, case law prohibits a much broader range of activities as "execut[ing] the law." Some of these issues have been addressed in various Service Judge Advocate General opinions, but other instances will require one to apply the court tests described below.

a. Directive/Regulation (DoDI 3025.21).

(1) Prohibits direct law enforcement assistance, including:

(a) Interdiction of a vehicle, vessel, aircraft, or other similar activity.

(b) Search or seizure.

(c) Arrest, apprehension, stop and frisk, or similar activity.

(d) Use of military personnel for surveillance or pursuit of individuals, or as undercover agents, informants, investigators, or interrogators (DoDI 3025.21).

b. Case Law.

(1) *Analytical framework*. There are three separate tests that courts apply to determine whether the use of military personnel has violated the PCA (*United States v. Kahn*, 35 F.3d 426 (9th Cir. 1994); *United States v. Hitchcock*, 103 F.Supp. 2d 1226 (D. Haw. 1999)).

(a) FIRST TEST: whether the action of the military personnel was "active" or "passive" (*United States v. Red Feather*, 392 F. Supp. 916, 921 (W.D.S.D 1975); *United States v. Yunis*, 681 F. Supp. 891, 892 (D.D.C. 1988); *United States v. Rasheed*, 802 F. Supp. 312 (D. Haw. 1992)).

(b) SECOND TEST: whether use of the armed forces pervaded the activities of civilian law enforcement officials (*United States v. Hartley*, 678 F.2d 961, 978 (11th Cir. 1982*) cert. denied* 459 U.S. 1170 (1983); *United States v. Hartley*, 796 F.2d 112 (5th Cir. 1986); *United States v. Bacon*, 851 F.2d 1312 (11th Cir. 1988); *Hayes v. Hawes*, 921 F.2d 100 (7th Cir. 1990)).

(c) THIRD TEST: whether the military personnel subjected citizens to the exercise of military power that was: *Regulatory* (a power that controls or directs); *Proscriptive* (a power that prohibits or condemns); or *Compulsory* (a power that exerts some coercive force) *(United States v. McArthur*, 419 F. Supp. 186 (D.N.D. 1975); *United States v. Casper*, 541 F.2d 1274 (8th Cir. 1976), *cert. denied*, 30 U.S. 970 (1977); *United States v. Yunis*, 681 F. Supp. 891, 895-6 (D.D.C. 1988); *United States v. Kahn*, 35 F.3d 426 (9th Cir. 1994)).

2. *Military Purpose Activities* (DoDI 3025.21). 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." To qualify as such an action, its primary purpose must be to further a military interest, and civilians may receive an incidental benefit. Such military purposes include:

a. Investigations and other actions related to enforcement of the UCMJ (United States v. Thompson, 33 M.J. 218 (CMA 1991), *cert. denied*. 502 U.S. 1074 (1992) (DoDI 3025.21)).

b. Investigations and other actions that are likely to result in administrative proceedings by DoD, regardless of whether there is a related civil or criminal proceeding (DoDI 3025.21).

c. Investigations and other actions related to the commander's inherent authority to maintain law and order on a military installation or facility (Harker v. State, 663 P.2d 932 (Alaska 1983); Anchorage v. King, 754 P.2d 283 (Alaska Ct. App. 1988); Eggleston v. Department of Revenue, 895 P.2d 1169 (Colo. App 1995)). Civilians may be detained for an on-base violation long enough to determine whether the civilian authorities are interested in assuming the prosecution (Applewhite v. United States, 995 F.2d 997 (10th Cir. 1993), *cert. denied*, 510 U.S. 1190 (1994)).

d. Protection of classified military information or equipment (DoDI 3025.21).

e. Protection of DoD personnel, DoD equipment, and official guests of the DoD (United States v. Chon, 210 F.3d 990 (9th Cir. 2000), *cert. denied*, 531 U.S. 910 (2000) (NCIS investigation of civilians undertaken for independent purpose of recovering military equipment was permissible) (DoDI 3025.21).

f. Other actions undertaken primarily for a military or foreign affairs purpose (DoDI 3025.21).

F. Where the PCA Applies – Extraterritorial Effect of the PCA.

1. A 1989 Department of Justice Office of Legal Counsel opinion concluded that the PCA does not have extraterritorial application (Memorandum, Office Legal Counsel for General Brent Scowcroft, 3 Nov. 1989). This opinion also states that the restrictions of 10 U.S.C. §§ 371-381 (specifically, 10 U.S.C. § 375), were also not intended to have extraterritorial effect.

2. Some courts have also adopted the view that the PCA imposes no restriction on use of U.S. Armed Forces abroad, noting that Congress intended to preclude military intervention in <u>domestic</u> <u>affairs</u> (United States v. Cotton, 471 F.2d 744 (9th Cir. 1973); Chandler v. United States, 171 F.2d 921 (1st Cir. 1948), *cert. denied*, 336 U.S. 918 (1949); D'Aquino v. United States, 192 F.2d 338 (9th Cir. 1951), *cert. denied*, 343 U.S. 935 (1952); United States v. Marcos, No. SSSS 87 Cr. 598, 1990 U.S. Dist. LEXIS 2049 (S.D.N.Y. Feb. 28, 1990)). (Note: both Chandler and D'Aquino involved law enforcement in an area of military occupation.). *But see* United States v. Kahn, 35 F.3d 426, 431 n. 6 (9th Cir. 1994) (In a case involving the applicability of the PCA to Navy activities in support of maritime interdiction of a drug-smuggling ship, the government maintained the PCA had no extraterritorial effect. While the court stated that the issue had not been definitively resolved, it did state that 10 U.S.C. §§ 371-381 did "impose limits on the use of American armed forces abroad.").

3. Note, however, that DoD policy, as reflected in DoDI 3025.21 (which incorporates the restrictions of 10 U.S.C. § 375), applies to all U.S. forces wherever they may be located. Two weeks after the promulgation of the Department of Justice (DoJ) memo, then-Secretary of Defense 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 (DoDI 3025.21).

G. The Effects of Violating the PCA.

1. *Criminal Sanctions.* Two years imprisonment, fine, or both.

a. To date, no direct criminal action has been brought for violations of the PCA. The issue of the PCA has arisen instead as a "collateral" issue, whether as a defense to a charge by a criminal defendant (*see* Padilla v. Bush, 233 F. Supp. 2d 564 (S.D.N.Y. 2002); United States v. Red Feather, 392 F. Supp. 916 (W.D.S.D. 1975)), or in support of an argument for exclusion of evidence.

b. *Exclusionary rule*. In general, courts have not applied the exclusionary rule to cases in which the PCA was violated, using the following rationales:

(1) The PCA is itself a criminal statute, thus there is little need to use the deterrent of the exclusionary rule. Also, because there have been no prosecutions under the PCA, its deterrent effect is questionable (State v. Pattioay, 896 P.2d 911 (Hawaii 1995); Colorado v. Tyler, 854 P.2d 1366 (Colo. Ct. App. 1993), *rev'd on other grounds*, 874 P.2d 1037 (Colo. 1994); Taylor v. State, 645 P.2d 522 (Okla. 1982)).

(2) The PCA is designed to protect the rights of all civilians, not the personal rights of the defendant (United States v. Walden, 490 F.2d 372 (4th Cir. 1974), *cert. denied* 416 U.S. 983 (1974)).

(3) Violations of the PCA are neither widespread nor repeated, so the remedy of the exclusionary rule is not needed. Courts will apply the exclusionary rule when the need to deter future violations is demonstrated (United States v. Roberts, 779 F.2d 565 (9th Cir. 1986), *cert. denied* 479 U.S. 839 (1986); United States v. Wolffs, 594 F.2d 77 (5th Cir. 1979); United States v. Thompson, 30 M.J. 570 (A.F.C.M.R. 1990)).

(4) Failure to prove an element. Where the offense requires that law enforcement officials act lawfully, violation of the PCA would negate that element (United States v. Banks, 383 F. Supp. 368 (1974)).

(5) Dismissal of charges. Not likely to be considered an appropriate remedy (United States v. Rasheed, 802 F. Supp 312 (D. Haw. 1992); United States v. Hitchcock, 103 F. Supp 2d. 1226 (D. Haw. 1999)).

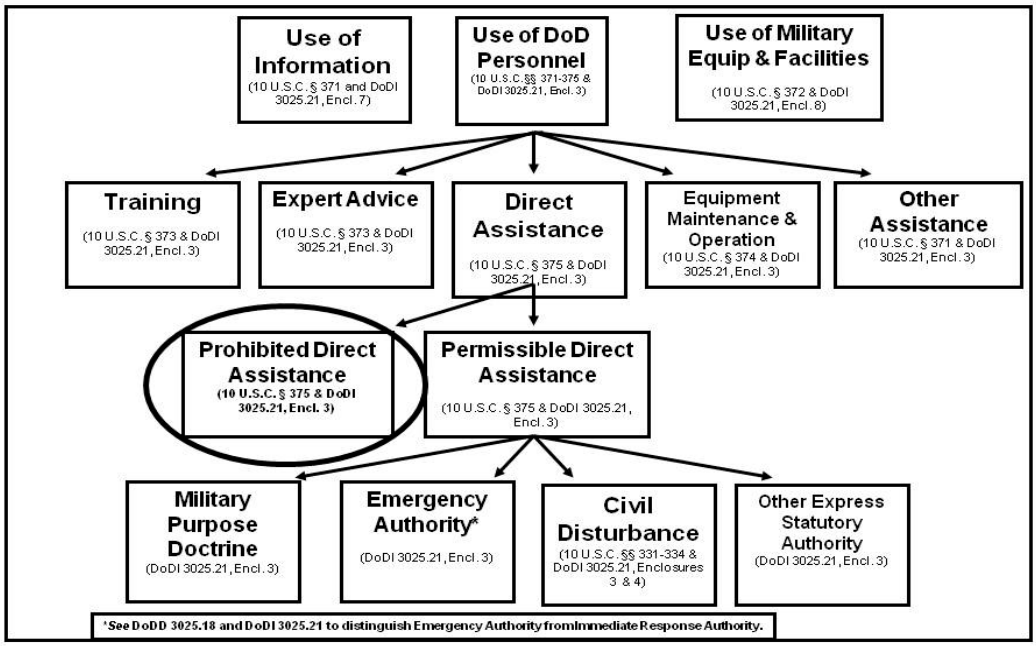
2. Civil Liability.

a. PCA violation as a private cause of action? No. The PCA is a criminal statute and does not provide a private cause of action (Robinson v. Overseas Military Sales Corp., 21 F. 3d 502, 511 (2nd Cir. 1994) *citing* Lamont v. Haig, 539 F. Supp. 552 (W.D.S.D. 1982)).

b. PCA violation as a constitutional tort—a "Bivens suit" (Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971), where the U.S. Supreme Court announced that Federal officials can be sued personally for money damages for the alleged violation of constitutional rights stemming from official acts)? This is an evolving area (Applewhite v. United States Air Force, 995 F.2d. 997 (10th Cir. 1993), *cert. denied*, 510 U.S. 1190 (1994) (finding PCA not violated, and conduct of military personnel did not otherwise violate 4th or 5th Amendment rights); Bissonette v. Haig, 800 F.2d 812 (8th Cir. 1986), *aff'd*, 485 U.S. 264 (1988) (finding a private right of action under the 4th Amendment)).

c. Federal Tort Claims Act (FTCA) (28 U.S.C. §§ 1346(b), 2671-2680)? Possibly. With exceptions, the FTCA allows suits against the United States for injuries caused by the negligent or wrongful acts or omissions of any Federal employee acting within the scope of his employment, in accordance with the law of the state where the act or omission occurred. Consequently, an FTCA claim against a Soldier allegedly violating the PCA would be a civil action (likely in Federal District Court after substitution and removal from a state court, if necessary) and the court would apply the state law in the analogous tort action, and Federal law.

PCA RESTRICTIONS UNDER 10 U.S.C. §§ 371-375 AND DODI 3025.21



V. SUPPORT TO CIVILIAN LAW ENFORCEMENT (EXCEPTIONS TO THE PCA)

A. When providing support to civilian law enforcement, there is always a concern that such actions may run afoul of the PCA. The chart above illustrates permissible and non-permissible activities (non-permissible activities are circled).

B. Although the activities discussed below can be considered law enforcement-type activities, they do not violate the PCA since the military personnel do not provide direct assistance. In addition, many of them are statutorily directed, and therefore could be considered "exceptions" to the PCA. This section is broken down into three functional areas of support: (1) loan of equipment and facilities; (2) expert advice and training; and (3) sharing information. Material otherwise not covered in one of these three areas can be found in DoDI 3025.21.

1. *Loan of Equipment and Facilities.*

a. Key References.

(1) Law. 10 U.S.C. §§ 372 and 374.

(2) Directives. DoDD 3025.18 and DoDI 3025.21.

b. With proper approval, DoD activities may make equipment (including associated supplies and spare parts), base facilities, or research facilities available to Federal, state, or local law enforcement officials for law enforcement purposes.

c. There must be no adverse impact on national security or military preparedness.

d. *Approval authority*.

(1) SECDEF is the approval authority for requests for assistance with the potential for confrontation between DoD personnel and civilian individual groups, as well as any requests for potentially lethal support, including loans of:

(a) Arms.

(b) Combat and tactical vehicles, vessels, or aircraft.

(c) Ammunition. (DoDD 3025.18, para. 4.j.(4)).

(2) Requests for loans of equipment, facilities, or personnel made by law enforcement agencies, including the Coast Guard when not acting as part of the Navy, shall be made and approved in accordance with DoDI 3025.21, but at a level no lower than a flag or general officer, or equivalent civilian, with the exceptions discussed in the following authorities:

(a) AR 700-131.

(b) SECNAVINST 5820.7C.

(c) AFI 10-801.

2. *Expert Advice and Training.*

a. Key References.

(1) Law. 10 U.S.C. §§ 373, 375, 377; and 50 U.S.C. §§ 2312, 2315.

(2) Directives. DoDI 3025.21 and DoDD 5200.31E.

b. Military personnel may be used to **train** civilian law enforcement personnel in the use of equipment that the DoD provides. Large scale or elaborate training programs are prohibited, as is regular or direct involvement of military personnel in activities that are fundamentally civilian law enforcement operations.

(1) Note that the DEPSECDEF has provided policy guidance in this area, via memorandum, which limits the types of training U.S. forces may provide. The policy is based on prudent concerns that advanced training could be misapplied or misused by civilian law enforcement agencies, resulting in death or injury to non-hostile persons. The memorandum permits basic military training, such as basic marksmanship; patrolling; medical/combat lifesaver; mission planning; and survival skills. It prohibits what it terms "advance military training," which is defined as "high intensity training which focuses on the tactics, techniques, and procedures (TTP) required to apprehend, arrest, detain, search for, or seize a criminal suspect when the potential for a violent confrontation exists." Examples of such training include: sniper training; military operations in urban terrain (MOUT); advanced MOUT; and close quarter battle/close quarter combat (CQB/CQC) training. (Appendix A.)

(2) A single general exception exists to provide this advanced training at the U.S. Army Military Police School. In addition, the Commander, United States Special Operations Command (USSOCOM), may approve this training, on an exceptional basis, by special operations forces personnel. (Appendix A.)

c. Military personnel may also be called upon to provide **expert advice** to civilian law enforcement personnel. However, regular or direct involvement in activities that are fundamentally civilian law enforcement operations is prohibited.

A specific example of this type of support (advice) is the military working dog team's (MWDT) support to civilian law enforcement. The military working dog (MWD) has been analogized to equipment, and its handler provides expert advice. (*See* DoDD 5200.31E, Military Working Dog (MWD) Program, 10 Aug. 2011).

(a) Pursuant to 10 U.S.C. § 372, the Secretary of Defense may make available equipment to any Federal, state, or local law enforcement agencies (LEA) for law enforcement purposes. So, upon request, an MWD (viewed by the DoD as a piece of equipment) may be loaned to law enforcement officials. Moreover, MWD handlers may be made available to assist and advise law enforcement personnel in the use of the MWD under 10 U.S.C. § 373. If a MWD is loaned to an LEA, its military handlers will be provided to work with the particular MWD. An MWD is always loaned with its handler since they work as a team.

(b) In all cases, MWDT support may be provided only under circumstances that preclude any confrontation between MWDTs and civilian subjects of search. In addition, MWDTs shall not be used to pursue, track, attack, or hold for apprehension purposes and MWD handlers shall not engage in the execution of a warrant, search, seizure, arrest, or any other activity when such actions would violate the PCA.

d. *Weapons of Mass Destruction (WMD).* Congress has directed DoD to provide certain expert advice to Federal, state and local agencies with regard to WMD. This training is non-reimbursable because Congress has appropriated specific funds for these purposes.

(1) 50 U.S.C. § 2312. Training in emergency response to the use or threat of use of WMD.

(2) 50 U.S.C. § 2315. Program of testing and improving the response of civil agencies to biological and chemical emergencies. The Department of Energy runs the program for responses to nuclear emergencies.

3. *Sharing Information*.

a. Key References.

(1) Law. 10 U.S.C. § 371.

(2) Instruction. DoDI 3025.21.

b. Military Departments and Defense Agencies are encouraged to provide to federal, state, or local civilian law enforcement officials any information collected during the **normal course of military operations** that may be relevant to a violation of any Federal or state law within the jurisdiction of such officials. (DoDD 3025.21).

c. Collection must be compatible with military training and planning. To the maximum extent practicable, the needs of civilian law enforcement officials **shall** be taken into account in the planning and execution of military training and operations. (10 U.S.C. § 371(b)).

d. However, the planning and/or creation of missions or training for the primary purpose of aiding civilian law enforcement officials are prohibited. (DoDI 3025.21).

VI. CIVIL DISTURBANCES

A. Key References.

1. Law.

a. Constitution. Article 4, Section 4: "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened), against domestic violence."

b. The Insurrection Act (10 U.S.C. §§ 331–335).

2. Instruction. DoDI 3025.21.

B. The primary responsibility for protecting life and property and maintaining law and order in the civilian community is vested in the state and local government (DoDI 3025.21). Involvement of military forces will only be appropriate in extraordinary circumstances. Use of the military under these authorities to conduct law enforcement activities is a specific exception to the PCA. The probable order of employment of forces in response to a certain situation will be:

1. Local and state police.

2. National Guard in their state status.

3. Federal civilian law enforcement officials.

4. Federal military troops (to include National Guard called to active Federal service).

C. The insurrection statutes permit the President to use the armed forces in the following circumstances, subject to certain limitations:

1. An insurrection within a state. The legislature or governor must request assistance from the President (10 U.S.C. § 331).

2. A rebellion making it impracticable to enforce the laws of the United States (i.e., Federal law) by the ordinary course of judicial proceedings (10 U.S.C. § 332).

3. To suppress in any state, any insurrection, domestic violence, unlawful combination or conspiracy, if it:

a. Hinders execution of state and U.S. law protecting Constitutional rights and the state is unable, fails, or refuses to protect those rights (the state is considered to have denied equal protection under the Constitution)., or;

b. Opposes or obstructs execution of U.S. law or justice (10 U.S.C. § 333).

4. If the President considers it necessary to use the armed forces, he must first issue a proclamation directing the insurgents to disperse and retire peacefully (10 U.S.C. § 334).

D. The Federal Response.

1. Responsibility for the management of the Federal response to civil disturbances rests with the Attorney General of the United States.

2. As discussed above, if the President decides to respond to the situation, he must first issue a proclamation to the persons responsible for the insurrection, prepared by the Attorney General, directing them to disperse within a limited time. At the end of that time period, the President may issue an execute order directing the use of armed forces.

3. The Attorney General appoints a Senior Civilian Representative of the Attorney General (SCRAG) as his action agent.

E. The DoD Response.

1. SECDEF has reserved to himself the authority to approve support in response to civil disturbances (DoDD 3025.18, para. 4.j.(1)).

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 (DoDI 3025.21).

F. **Emergency Employment of Military Forces** (DoDI 3025.21).

1. Military forces shall not be used for civil disturbances unless specifically directed by the President, pursuant to 10 U.S.C. §§ 331-334. There is a very limited exception to this rule, when:

a. In extraordinary emergency circumstances where prior authorization by the President is impossible and duly constituted local authorities are unable to control the situation, to engage temporarily in activities that are necessary to quell large-scale unexpected civil disturbances. Federal military action is permitted only when:

b. Such activities are necessary to prevent significant loss of life or wanton destruction of property, and are necessary to restore governmental functioning and public order. (DoDI 3025.21), or

c. When duly-constituted federal, state or local authorities are unable or decline to provide adequate protection for Federal property or fundamental Federal functions, Federal action is authorized when necessary to protect the Federal property and functions (DoDI 3025.21).

2. Note that this authority is extremely limited.

3. Other Considerations. Although employment under these authorities permits direct enforcement of the law by military forces, the military's role in law enforcement should be minimized as much as possible. The military's role is to support the civilian authorities, not replace them.

VII. DISASTER AND EMERGENCY RELIEF (NON-LAW ENFORCEMENT DSCA)

A. Key References.

1. Law. Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. § 5121, *et seq.*, as amended.

2. Directives. DoDD 3025.18 and the National Response Framework (NRF).

B. The Stafford Act is not a statutory exception to the PCA; therefore, all missions performed during a disaster relief response must comply with the restrictions of the PCA.

C. The overarching purpose of the Stafford Act is to provide an orderly and continuing means of assistance by the Federal government to state and local governments in carrying out their responsibilities to alleviate suffering and damage resulting from a disaster. The Act provides four means by which the Federal government may become involved in a relief effort:

1. President may declare the area a **major disaster** (42 U.S.C. § 5170).

a. "Major disaster" means any natural catastrophe (including any hurricane; tornado; storm; high water; wind-driven water; tidal wave; tsunami; earthquake; volcanic eruption; landslide; mudslide; snowstorm; or drought) or, regardless of cause, any fire, flood, or explosion, in any part of the United States, which, in the President's determination, causes damage of sufficient severity and magnitude to warrant major disaster assistance under this chapter to supplement the efforts and available resources of states, local governments, and disaster relief organizations in alleviating the damage, loss, hardship, or suffering caused thereby (42 U.S.C. § 5121).

b. Requires a request for the declaration from the governor.

c. State must have executed its own emergency plan and require supplemental help.

d. State certifies that it will comply with cost sharing provisions under this Act.

2. President may declare the area an **emergency** (42 U.S.C. § 5191).

a. "Emergency" means any occasion or instance for which, in the determination of the President, Federal assistance is needed to supplement state and local efforts and capabilities to save lives and to protect property and public health and safety, or to lessen or avert the threat of a catastrophe in any part of the United States (42 U.S.C. § 5122).

b. Same criteria as for a major disaster, except also requires that the governor define the type and amount of Federal aid required. Total Federal assistance may not exceed 5 million dollars.

c. Operationally, there is no significant distinction between an emergency and a major disaster.

3. **President's 10-day Emergency Authority.** President may send in DoD assets on an **emergency** basis to "preserve life and property" (42 U.S.C. § 5170b(c)).

a. "During the immediate aftermath of an incident which may ultimately qualify for assistance under this subchapter or subchapter IV-A of this chapter, the Governor of the State in which such incident occurred may request the President to direct the Secretary of Defense to utilize the resources of the Department of Defense for the purpose of performing on public and private lands any emergency work which is made necessary by such incident and which is essential for the preservation of life and property. If the President determines that such work is essential for the preservation of life and property, the President shall grant such requests to the extent the President determines practicable. Such emergency work may only be carried out for a period not to exceed 10 days." (42 U.S.C. § 5170b(c)).

b. Done before any Presidential declaration, but still requires a governor's request.

c. Lasts not more than 10 days.

d. Used to clear debris and wreckage and to temporarily restore essential public facilities and services. Very limited authority.

4. The President may send in Federal assets where an emergency occurs in an area over which the Federal government exercises **primary responsibility** by virtue of the Constitution or Federal statute (42 U.S.C. § 5191(b)).

a. Does not require a governor's request, although the statute directs consultation with the governor, if practicable.

b. Results in a Presidential declaration of an emergency regarding a situation for which the primary responsibility for a response rests with the United States.

c. President Clinton exercised this authority on April 19, 1995, in the case of the bombing of the Murrah Federal Building in Oklahoma City, Oklahoma.

5. Types of support authorized under the Stafford Act.

a. Personnel, equipment, supplies, facilities, and managerial, technical, and advisory services in support of relief authorized under the Act (42 U.S.C. §§ 5170a(1) and 5192(a)).

b. Distribution of medicine, food, and other consumable supplies, and emergency assistance (42 U.S.C. §§ 5140a(4) and 5192(a)(7)).

c. Utilizing, lending or donating Federal equipment, supplies, facilities, personnel, and other resources to state and local governments (42 U.S.C. §§ 5170b(a)(1) and 5192(b)).

d. Performing on public or private lands or waters any work or services essential to saving lives and protecting and preserving property, public health, and safety, including:

(1) Debris removal.

(2) Search and rescue; emergency medical care; emergency mass care; emergency shelter; and provision of food, water, medicine and other essential needs, including movement of supplies and persons.

(3) Clearance of roads and construction of temporary bridges necessary to the performance of emergency tasks and essential community services.

(4) Provision of temporary facilities for schools and other essential community services.

(5) Demolition of unsafe structures that endanger the public.

(6) Warning of further risks and hazards.

(7) Dissemination of public information and assistance regarding health and safety measures.

(8) Provision of technical advice to state and local governments regarding disaster management and control.

(9) Reduction of immediate threats to life, property, and public health and safety (42 U.S.C. § 5170b(a)(3)).

D. The Federal Response**.**

1. The Federal Emergency Management Agency (FEMA), which is part of the Department of Homeland Security (DHS), directs and coordinates the Federal response on behalf of the President.

2. In Homeland Security Presidential Directive (HSPD)-5, the President directed the development of a National Response Plan (superseding the Federal Response Plan) to align Federal coordinating structures, capabilities, and resources into a unified, all-disciplined, and all-hazards approach to domestic incident management. The DHS published the National Response Plan (NRP) in December, 2004 and updated the NRP on May 25, 2006. The National Response Framework subsequently superseded the NRP.

3. The **National Response Framework** (NRF) (73 Fed. Reg. 4887-4888 (Jan. 22, 2008)), effective March 22, 2008, supersedes the NRP and "is now more in keeping with its intended purpose, specifically, simplifying the language, presentation and content; clarifying its national focus; articulating the five principles of response doctrine; and methodically describing the who, what and how of emergency preparedness and response." The NRF is a guide to how the nation conducts all-hazards response. It is built upon scalable, flexible, and adaptable coordinating structures to align key roles and responsibilities across the Nation, linking all levels of government, nongovernmental organizations, and the private sector. It is intended to capture specific authorities and best practices for managing incidents that range from the serious but purely local, to large-scale terrorist attacks or catastrophic natural disasters.

a. The NRF consists of the following components:

(1) The **core document** describes the doctrine that guides the national response, roles and responsibilities, response actions, response organizations, and planning requirements to achieve an effective national response to any incident that occurs.

(2) The **Emergency Support Function (ESF) Annexes** group Federal resources and capabilities into functional areas that are most frequently needed in a national response (e.g., Transportation, Firefighting, and Mass Care).

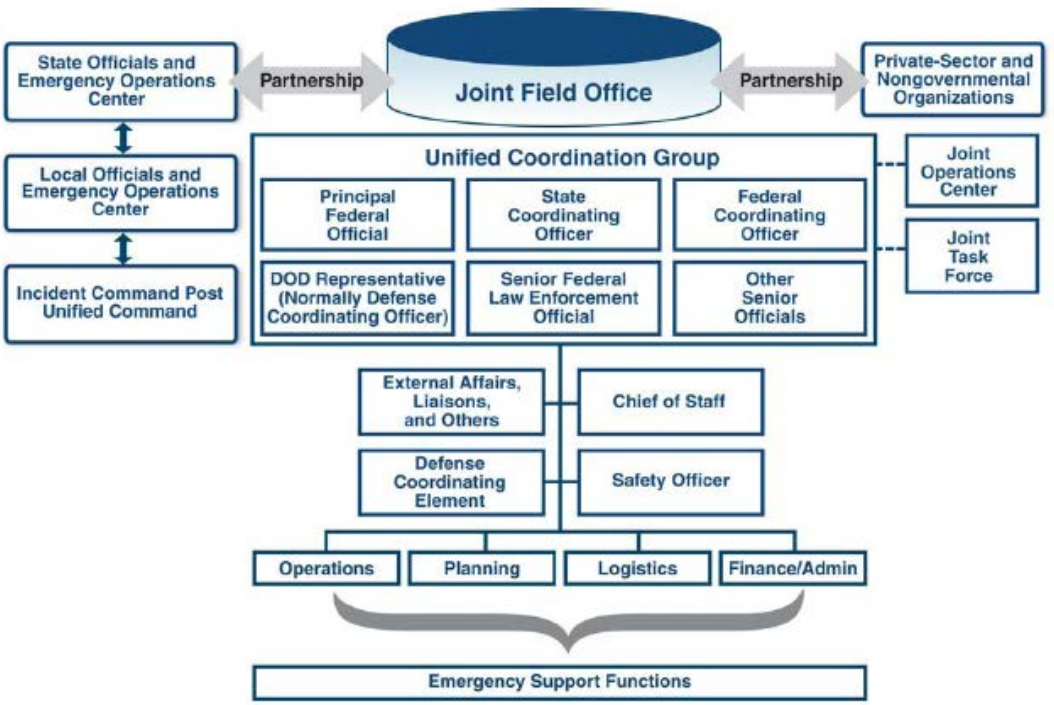
(3) The **Support Annexes** describe essential supporting aspects that are common to all incidents (e.g., Financial Management, Volunteer and Donations Management, Private-Sector coordination).

(4) The **Incident Annexes** address the unique aspects of how to respond to seven broad incident categories (e.g., Biological, Nuclear/Radiological, Cyber, and Mass Evacuation).

(5) The **Partner Guides** provide ready references describing the key roles and actions for local, tribal, State, Federal and private-sector response partners.

b. The NRF applies a functional approach that groups the capabilities of Federal departments and agencies and the American Red Cross into Emergency Support Functions (ESFs) to provide the planning, support, resources, program implementation, and emergency services that are most likely to be needed during actual or potential incidents where a coordinated Federal response is required. The NRF contains 15 ESFs for which certain Federal agencies are the coordinator, a primary agency, or a support agency or serve in two or all of the capacities. For example, the DoD/U.S. Army Corps of Engineers is the Coordinator and a Primary Agency for ESF #3 (Public Works and Engineering), and DoD is a Primary Agency for ESF #9 (Search and Rescue). DoD serves as a support agency for all 15 ESFs.

c. **Joint Field Office** (JFO). The JFO is the primary Federal incident management field structure. It is a temporary Federal facility that provides a central location for the coordination of Federal, state, tribal, and local government and private-sector and nongovernmental organizations with primary responsibility for response and recovery.



(1) The Principal Federal Official (PFO). By law and Presidential directive, the Secretary of Homeland Security is the PFO responsible for coordination of all domestic incidents requiring multiagency Federal response. The Secretary may elect to designate a single individual to serve as his or her primary representative who serves as the PFO in the field.

(2) The Federal Coordinating Officer (FCO). For Stafford Act incidents, upon the recommendation of the FEMA administrator and the Secretary of Homeland Security, the President appoints an FCO. The FCO is a senior FEMA official trained, certified, and well-experienced in emergency management, and specifically appointed to coordinate Federal support in the response to and recovery from emergencies and major disasters.

(3) Defense Coordinating Officer (DCO). The DCO is the DoD's single point of contact at the JFO. DoD has appointed ten DCOs and assigned one to each FEMA region. The DCO coordinates requests for DSCA with the exception of requests for U.S. Army Corps of Engineers support, National Guard forces operating in

State Active Duty or Title 32 status (i.e., in a state, not Federal status), or, in some circumstances, DoD forces in support of the FBI. Specific responsibilities of the DCO (subject to modification based on the situation) include processing requirements for military support, forwarding mission assignments to the appropriate military organizations through DoD-designated channels, and assigning military liaisons, as appropriate, to activated ESFs.

E. The DoD Response.

1. Regulation. DoDD 3025.18, Defense Support of Civil Authorities (DSCA), governs all planning and response by DoD components for defense support of civil authorities, with the exception of military support to law enforcement operations under DoDI 3025.21, Defense Support of Civilian Law Enforcement Agencies and contingency war plans.

2. DSCA Policy. DSCA shall include, but is not limited to, support similar to that described in para 2(c) of DoDD 3025.18, including military assistance for civilian law enforcement operations (DoDD 3025.18, para. 2(c)(5)).

3. The ASD(HD&ASA) is responsible for policy oversight (legality, cost, lethality, appropriateness, risk, readiness impact), supervises HD activities, and serves as the liaison between DoD and lead Federal agencies (LFAs).

4. The Joint Director of Military Support (JDOMS) is the ASD(HD&ASA)'s action agent. The JDOMS designates the Supported Combatant Commander (CCDR), and serves as the focal point for that CCDR and the National Guard, while coordinating and monitoring the DoD effort through the DCO. The JDOMS also deconflicts any DOMOPS mission(s) with other worldwide demands on the DoD, and also keeps the SECDEF and CJCS informed of the status of the ongoing DOMOPS mission(s).

5. Supported CCDRs. The United States Northern Command (USNORTHCOM) DSCA area of responsibility (AOR) includes air, land, and sea approaches and encompasses the continental United States, Alaska, Canada, Mexico, the Bahamas, Puerto Rico, the Virgin Islands, the Gulf of Mexico, the Straits of Florida, and the surrounding water out to approximately 500 nautical miles. The United States Pacific Command (USPACOM) DSCA AOR includes Hawaii and U.S. territories and possessions in the Pacific.

6. Supporting CCDRs. Within its geographic AOR, the United States Southern Command (USSOUTHCOM) is responsible for foreign humanitarian assistance / disaster relief (FHA/DR), which is similar to, but not the same as, DSCA. USSOUTHCOM is therefore a supporting CCDR for DSCA.

7. **Immediate Response Authority** (DoDD 3025.18, para. 4.g).

a. In response to a request for assistance from a civil authority, under imminently serious conditions and if time does not permit approval from higher authority, DoD officials may provide an immediate response by temporarily employing the resources under their control, subject to any supplemental direction provided by higher headquarters, to save lives, prevent human suffering, or mitigate great property damage within the United States. Immediate response authority does not permit actions that would subject civilians to the use of military power that is regulatory, prescriptive, proscriptive, or compulsory. (DoDD 3025.18, para. 4.g).

b. Types of support authorized include:

(1) Rescue, evacuation, and emergency treatment of casualties; maintenance or restoration of emergency medical capabilities; and safeguarding the public health.

(2) Emergency restoration of essential public services (such as fire-fighting, water, communication, transportation, power and fuel).

(3) Emergency removal of debris and explosive ordnance.

(4) Recovery and disposal of the dead.

c. This type of support is provided on a cost-reimbursable basis, but assistance should not be denied because the requester is unable or unwilling to commit to reimbursement (para. 4.g.(3)).

d. **NOTE**: This is a very limited authority, and should only be invoked in bona fide emergencies. Contemporaneous coordination with higher headquarters should always occur in these scenarios, and in any other case potentially involving this type of assistance to civil authorities.

8. Disaster Support Involving Law Enforcement Activities.

a. The Stafford Act is not an exception to the PCA. Therefore, any support that involves direct involvement in the enforcement of civilian law must undergo the PCA analysis discussed above. Typical areas of concern include:

(1) Directing traffic.

(2) Guarding supply depots.

(3) Patrolling.

b. National Guard personnel acting under state authority (either State Active Duty or under Title 32, U.S. Code) should be the organization of choice in these areas.

c. Law enforcement duties that involve military functions may be permissible (e.g., guarding a military supply depot).

VIII. DUAL STATUS COMMAND AUTHORITIES

Unity of Command and Unity of Effort are significant concerns during a DSCA event. Disaster responses involve federal, state and local civilians, non-profit organizations and the military all responding. The military response may include both the National Guard, operating in a state capacity under the direction of their Governor, and the federal military, operating under the direction of the President. To unify the military response, federal law permits a "dual-status commander" to command both federal military in a Title 10 status and the National Guard in a Title 32 or State Active Duty status. This dual-status commander simultaneously holds two commissions, a state commission and a federal commission. The commander can then direct both state and federal forces to coordinate the military response and provide a unity of effort.

A dual-status commander operates two chains of command simultaneously. The commander receives orders from both superior and separate Federal and state chains of command. These two distinct, separate chains of command flow through different sovereigns that recognize and respect a dual-status commander's duty to exercise these two separate authorities in a mutually exclusive manner. As such, a dual-status commander typically establishes his or her own subordinate Federal and state chains of command, having both a Title 10 staff and Title 32 or State Active Duty staff. The subordinate officers operate in only one status, either state or federal.

A. **National Guard Dual-Status Commander.** Title 32 U.S.C. § 325(a)(2), however, provides limited authority for a National Guard officer to serve simultaneously in both state and Federal statuses. The dual-status commander can concurrently command both Federal (Title 10) and state (Title 32, State Active Duty) forces. This dual status requires the authority of the President (currently delegated to the SECDEF) and the consent of the officer's Governor to serve in both duty statuses.

1. The National Guard dual-status command authority has been used during recent **National Special Security Events** (NSSEs), Superstorm Sandy, the 2014 Superbowl in New Jersey and elsewhere. An NSSE is a highly visible, well-attended event that, if attacked by terrorists, would have significant impact on our country because of physical and psychological damage. Examples include the G8 Summit, the Republican and Democratic National Conventions, and the Super Bowl.

2.

B. **Active Component Dual-Status Commander.** Pursuant to 32 U.S.C. § 315, the Secretaries of the Army or Air Force may detail regular officers to duty with the National Guard, and with the permission of the President, the detailed officer may accept a commission in the National Guard without vacating his or her regular appointment. The state or territory would have to commission the officer in its National Guard for him or her to command its National Guard forces serving under state authority. State law will dictate the requirements and procedures for such appointment and would typically require the Governor's consent.

IX. COUNTERDRUG SUPPORT

A. Key References**.**

1. Law.

a. 10 U.S.C. § 124.

b. 32 U.S.C. § 112.

c. Section 1004, FY-91 NDAA, as amended by FY-02 NDAA.

d. Section 1031, FY-97 NDAA.

e. Section 1033, FY-98 NDAA.

2. Directives.

a. CJCSI 3710.01B, 26 Jan. 2007.

b. NGR 500-2/ANGI 10-801.

B. Detection and Monitoring (D&M)**.**

1. Pursuant to 10 U.S.C. § 124, DoD is the lead Federal agency for D&M of aerial and maritime transit of illegal drugs into the United States. Accordingly, D&M is a DoD mission.

2. Although it is a DoD mission, D&M is to be carried out in support of Federal, state, and local law enforcement authorities.

3. Note that the statute does not extend to D&M missions covering land transit (e.g., the Mexican border).

4. Interception of vessels or aircraft is permissible outside the land area of the United States to identify and direct the vessel or aircraft to a location designated by the supported civilian authorities.

5. D&M missions involve airborne (AWACs, aerostats), seaborne (primarily U.S. Navy vessels), and land-based radar (to include Remote Over The Horizon Radar (ROTHR)) sites.

6. Note: this mission is not covered by CJCSI 3710.01B.

C. National Guard (NG)**.**

1. Pursuant to 32 U.S.C. § 112, SECDEF may make Federal funding available for NG drug interdiction and counterdrug activities, to include pay, allowances, travel expenses, and operations and maintenance expenses.

2. The state must prepare a drug interdiction and counterdrug activities plan. DoD's Office of Drug Enforcement Policy and Support (DEP&S) reviews each state's implementation plan and disburses funds.

3. It is important to note that although the NG is performing counterdrug support operations using Federal funds and under Federal guidance, it remains a state militia force and is not to be considered a Federal force for purposes of the PCA.

4. Although the NG is not subject to the restrictions of the PCA while not in Federal status, the National Guard Bureau (NGB) has imposed a number of policy restrictions on counterdrug operations. *See* NGR 500-2 for more information.

D. Additional Support to Counterdrug (CD) Agencies.

1. General. In addition to the authorities contained in 10 U.S.C. §§ 371-377 (discussed above), Congress has given DoD additional authorities to support Federal, state, local, and foreign entities that have counterdrug responsibilities. Congress has not chosen to codify these authorities, however, so it is necessary to refer to the Public Laws instead. Many of them are reproduced in the notes following 10 U.S.C. § 374 in the annotated codes.

2. Section 1004 (Appendix B).

a. Section 1004 is the primary authority for counterdrug operations. The statute permits broad support to the following law enforcement agencies that have counterdrug responsibilities:

(1) Federal, state, and local.

(2) Foreign, when requested by a Federal counterdrug agency (typically, the Drug Enforcement Agency or member of the State Department Country Team that has counterdrug responsibilities within the country).

b. Types of support (*see* CJCSI 3710.01B):

(1) Equipment maintenance.

(2) Transportation of personnel (U.S. & foreign), equipment and supplies CONUS/OCONUS.

(3) Establishment of bases of operations CONUS/OCONUS.

(4) Counterdrug-related training of law enforcement personnel, including associated support and training expenses.

(5) Detection and monitoring of air, sea and surface traffic outside the United States, and within 25 miles of the border if the detection occurred outside the United States.

(6) Engineer support (e.g., construction of roads, fences and lights) along the U.S. border.

(7) Command, control, communication, and intelligence and network support.

(8) Linguist and intelligence analyst services.

(9) Aerial and ground reconnaissance.

(10) Diver support.

(11) Tunnel detection support.

(12) Use of military vessels for law enforcement agencies operating bases by Coast Guard personnel.

(13) Technology demonstrations.

3. Training of law enforcement personnel.

a. Geographic Combatant Commanders (GCCs) may approve counterdrug-related training of foreign law enforcement personnel requiring no more than 50 theater-assigned personnel for no more than 45 days with host nation (HN) and Country Team approval and notification.

b. GCCs may approve counterdrug-related technical and administrative support team deployments requiring no more than 25 personnel for no more than 179 days with HN and Country Team approval and notification.

4. Approval Authorities. *See* CJCSI 3710.01B.

X. MISCELLANEOUS SUPPORT

A. Sensitive support – DoDD S-5210.36.

B. Law Enforcement Detachments (LEDETs)**.**

1. Law. 10 U.S.C. § 379.

2. U.S. Coast Guard personnel shall be assigned to naval vessels operating in drug interdiction areas. Such personnel have law enforcement powers, and are known as LEDETs.

3. When approaching a contact of interest, tactical control (TACON) of the vessel shifts to the Coast Guard. As a "constructive" Coast Guard vessel, the ship and its crew are permitted to participate in direct law enforcement. However, to the maximum extent possible, law enforcement duties should be left to Coast Guard personnel. Military members should offer necessary support.

C. Emergencies Involving Chemical or Biological Weapons**.** The Secretary of Defense, upon request of the Attorney General, may provide assistance in support of Department of Justice activities during an emergency situation involving a biological or chemical weapon of mass destruction. 10 U.S.C. § 382.

1. Department of Defense Rapid Response Team. The SECDEF shall develop and maintain at least one domestic terrorism rapid response team composed of members of the Armed Forces and employees of the DoD who are capable of aiding Federal, state, and local officials in the detection, neutralization, containment, dismantlement,

and disposal of weapons of mass destruction containing chemical, biological, radiological, nuclear, and high-yield explosives (CBRNE). 50 U.S.C. § 2314(a) (LEXIS 2006). The U.S. Marine Corps Chemical Biological Incident Response Force (CBIRF) has the mission to, when directed, forward-deploy and /or respond to a credible threat of a CBRNE incident in order to assist local, state, or Federal agencies and Combatant Commanders in the conduct of consequence management operations. CBIRF accomplishes this mission by providing capabilities for agent detection and identification; casualty search, rescue, and personnel decontamination; and emergency medical care and stabilization of contaminated personnel.

2. National Guard Weapons of Mass Destruction Civil Support Teams (WMD-CSTs). 10 U.S.C. § 12310(c). Each team consists of twenty-two highly skilled, full-time Army and Air National Guard members who are state controlled, Federally resourced, trained, and exercised, employing Federally-approved response doctrine. In 2002, Congress required the establishment of fifty-five teams, providing at least one team is established in each state (two in California) and territory (U.S. Virgin Islands, Puerto Rico, Guam) and Washington, D.C. Their missions primarily fall under the command and control of state or territory officials; however, if the teams are Federalized, they would likely fall under the command and control of Joint Task Force, Civil Support (JTF-CS).

D. Miscellaneous Exceptions. DoDI 3025.21 contains a list of statutes that provide express authorization for the use of military forces to enforce the civil law. Among them are:

1. Protection of the President, Vice President and other dignitaries.

2. Assistance in the case of crimes against members of Congress or foreign officials, or involving nuclear materials.

X. CONCLUSION

The Military will always be called to defend the Homeland from attack. It must also continue to be prepared to assist civil authorities in a variety of missions from disaster relief to suppressing insurrections. The law and guidance pertaining to the use of DoD for domestic operations is dynamic and continues to evolve. The terrorist attacks of September 11, 2001, and recent significant disasters such as Hurricane Katrina, the 2010 Gulf of Mexico oil spill, and Superstorm Sandy have resulted in (or will likely result in) changes in Federal response law, philosophy, guidance, structure and capabilities. Consequently, it is imperative that judge advocates practicing domestic operations stay abreast of these changes to ensure that U.S. military involvement in such operations complies with all applicable laws, regulations, and DoD guidance.

APPENDIX A

THE DEPUTY SECRETARY OF DEFENSE WASHINGTON D.C. 20301-1000

29 JUN 1996

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS
CHAIRMAN OF THE JOINT CHIEFS OF STAFF
UNDER SECRETARIES OF DEFENSE
COMMANDERS-IN-CHIEF OF THE UNIFIED COMBATANT COMMANDS
ASSISTANT SECRETARIES OF DEFENSE
GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
INSPECTOR GENERAL OF THE DEPARTMENT OF DEFENSE
DIRECTOR OF ADMINISTRATION AND MANAGEMENT
CHIEF, NATIONAL GUARD BUREAU

SUBJECT: DoD Training Support to U.S. Civilian Law Enforcement Agencies

This directive-type memorandum provides the DoD policy for providing advanced military training to U.S. civilian law enforcement agencies.

It is DoD policy that no advanced military training will be provided to U.S. civilian law enforcement agency (CLEA) personnel, except as noted below. "Advanced military training," in the context of this policy, is defined as high intensity training which focuses on the tactics, techniques, and procedures (TTPs) required to apprehend, arrest, detain, search for, or seize a criminal suspect when the potential for a violent confrontation exists. "Advanced military training" includes advanced marksmanship (including sniper training), military operations in urban terrain (MOUT), advanced MOUT, close quarters battle/close quarters combat (CQB/CQC), and similar specialized training. It does not include basic military skills such as basic marksmanship, patrolling, mission planning, medical, and survival skills.

As a single general exception to this policy, the U.S. Army Military Police School is authorized to continue training CLEA personnel in the Counterdrug Special Reaction Team Course, the Counterdrug Tactical Police Operations Course, and the Counterdrug Marksman/Observer Course. Additionally, on an exceptional basis, the Commander-in-Chief, U.S. Special Operations Command (USCINCSOC) may approve such training by special operations forces. In such cases, USCINCSOC will inform the Executive Secretary to the Secretary of Defense of the training support provided. Similarly, the U.S. Army MP School will continue to report training performed in accordance with existing procedures.

Those portions of applicable DoD directives and instructions relating only to the procedures for coordination and approval of CLEA requests for DoD support are not affected by this memorandum. Those portions of such directives that address the substance of training that may be provided to CLEAs will be revised to reflect this change in policy within 90 days.

The Under Secretary of Defense for Policy will notify civilian law enforcement agencies through appropriate means of this change in policy

/s/ JOHN P. WHITE

APPENDIX B

NATIONAL DEFENSE AUTHORIZATION ACT FOR FY2002

107 PUB. L. 107; 115 Stat. 1012; 2001 Enacted S. 1438; 107 Enacted S. 1438

Sec. 1021. EXTENSION AND RESTATEMENT OF AUTHORITY TO PROVIDE DEPARTMENT OF DEFENSE SUPPORT FOR COUNTER-DRUG ACTIVITIES OF OTHER GOVERNMENTAL AGENCIES.

Section 1004 of the National Defense Authorization Act for Fiscal Year 1991 (Public Law 101-510; 10 U.S.C. 374 note) is amended to read as follows:

Sec. 1004. ADDITIONAL SUPPORT FOR COUNTER-DRUG ACTIVITIES.

(a) Support to Other Agencies.--During fiscal years 2002 through 2006, the Secretary of Defense may provide support for the counter-drug activities of any other department or agency of the Federal Government or of any State, local, or foreign law enforcement agency for any of the purposes set forth in subsection (b) if such support is requested—

(1) by the official who has responsibility for the counter-drug activities of the department or agency of the Federal Government, in the case of support for other departments or agencies of the Federal Government;

(2) by the appropriate official of a State or local government, in the case of support for State or local law enforcement agencies; or

(3) by an appropriate official of a department or agency of the Federal Government that has counter-drug responsibilities, in the case of support for foreign law enforcement agencies.

(b) Types of Support.--The purposes for which the Secretary of Defense may provide support under subsection (a) are the following:

(1) The maintenance and repair of equipment that has been made available to any department or agency of the Federal Government or to any State or local government by the Department of Defense for the purposes of—

(A) preserving the potential future utility of such equipment for the Department of Defense; and

(B) upgrading such equipment to ensure compatibility of that equipment with other equipment used by the Department of Defense.

(2) The maintenance, repair, or upgrading of equipment (including computer software), other than equipment referred to in paragraph (1) for the purpose of—

(A) ensuring that the equipment being maintained or repaired is compatible with equipment used by the Department of Defense; and

(B) upgrading such equipment to ensure the compatibility of that equipment with equipment used by the Department of Defense.

(3) The transportation of personnel of the United States and foreign countries (including per diem expenses associated with such transportation), and the transportation of supplies and equipment, for the purpose of facilitating counter-drug activities within or outside the United States.

(4) The establishment (including an unspecified minor military construction project) and operation of bases of operations or training facilities for the purpose of facilitating counter-drug activities of the Department of Defense or any Federal, State, or local law enforcement agency within or outside the United States or counter-drug activities of a foreign law enforcement agency outside the United States.

(5) Counter-drug related training of law enforcement personnel of the Federal Government, of State and local governments, and of foreign countries, including associated support expenses for trainees and the provision of materials necessary to carry out such training.

(6) The detection, monitoring, and communication of the movement of—

(A) air and sea traffic within 25 miles of and outside the geographic boundaries of the United States; and

(B) surface traffic outside the geographic boundary of the United States and within the United States not to exceed 25 miles of the boundary if the initial detection occurred outside of the boundary.

(7) Construction of roads and fences and installation of lighting to block drug smuggling corridors across international boundaries of the United States.

(8) Establishment of command, control, communications, and computer networks for improved integration of law enforcement, active military, and National Guard activities.

(9) The provision of linguist and intelligence analysis services.

(10) Aerial and ground reconnaissance.

(c) Limitation on Counter-Drug Requirements.--The Secretary of Defense may not limit the requirements for which support may be provided under subsection (a) only to critical, emergent, or unanticipated requirements.

(d) Contract Authority.--In carrying out subsection (a), the Secretary of Defense may acquire services or equipment by contract for support provided under that subsection if the Department of Defense would normally acquire such services or equipment by contract for the purpose of conducting a similar activity for the Department of Defense.

(e) Limited Waiver of Prohibition.--Notwithstanding section 376 of title 10, United States Code, the Secretary of Defense may provide support pursuant to subsection (a) in any case in which the Secretary determines that the provision of such support would adversely affect the military preparedness of the United States in the short term if the Secretary determines that the importance of providing such support outweighs such short-term adverse effect.

(f) Conduct of Training or Operation To Aid Civilian Agencies.--In providing support pursuant to subsection (a), the Secretary of Defense may plan and execute otherwise valid military training or operations (including training exercises undertaken pursuant to section 1206(a) of the National Defense Authorization Act for Fiscal Years 1990 and 1991 (Public Law 101-189; 103 Stat. 1564)) for the purpose of aiding civilian law enforcement agencies.

(g) Relationship to Other Laws. —

(1) The authority provided in this section for the support of counter-drug activities by the Department of Defense is in addition to, and except as provided in paragraph (2), not subject to the requirements of chapter 18 of title 10, United States Code.

(2) Support under this section shall be subject to the provisions of section 375 and, except as provided in subsection (e), section 376 of title 10, United States Code.

(h) Congressional Notification of Facilities Projects. —

(1) When a decision is made to carry out a military construction project described in paragraph (2), the Secretary of Defense shall submit to the congressional defense committees written notice of the decision, including the justification for the project and the estimated cost of the project. The project may be commenced only after the end of the 21-day period beginning on the date on which the written notice is received by Congress.

(2) Paragraph (1) applies to an unspecified minor military construction project that—

(A) is intended for the modification or repair of a Department of Defense facility for the purpose set forth in subsection (b)(4); and

(B) has an estimated cost of more than $ 500,000.

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CHAPTER 13

RESERVE COMPONENT SOLDIERS AND OPERATIONS

I. TYPES OF OPERATIONALLY DEPLOYED RESERVE COMPONENT SOLDIERS

A. **Overview**. The Army's Reserve Components (RC) consist of the U.S. Army Reserve (USAR) and the Army National Guard of the United States (ARNGUS).[1] USAR units are combat service or combat service support type units, whereas ARNGUS units are typically combat or combat support type units.

B. **USAR**. The USAR consists of Soldiers assigned to units called Troop Program Units (TPUs), and various individual Soldiers not assigned to units. Typically, USAR units and Soldiers serve under the U.S. Army Reserve Command (USARC). Most of the individuals who are not assigned to units belong to a manpower pool known as the Individual Ready Reserve (IRR).[2]

C. **ARNGUS**. The ARNGUS is the RC consisting of federally recognized units and organizations of the Army National Guard (ARNG) and members of the ARNG who are also Reserves of the Army.[3] Members of the ARNGUS/ARNG serve in a "dual status" in that they may serve as members of the ARNGUS under the command of the President, or as members of their individual state's ARNG under the command of their governor.[4]

1. **Federal (ARNGUS) Status**. Soldiers serve in their ARNGUS (RC) status when in Federal (Title 10, U.S. Code) status. In this federal status, ARNGUS Soldiers are commanded and controlled by a federal chain of command, are subject to the UCMJ, and are typically subject to Army regulations applying to the Army Reserve and active component. Judge Advocates (JA's) should look to the "applicability" paragraph of a regulation in determining whether the regulation applies to Soldiers serving in an ARNGUS status. Consequently, National Guard Soldiers serving outside the Continental United States (OCONUS) performing their federal mission must serve in their ARNGUS, Title 10 status.[5]

2. **State (ARNG) status**. Unless ordered into service in a federal ARNGUS status, ARNG Soldiers serve under a state chain of command, with the governor as commander-in-chief. Soldiers serving in this ARNG status can generally either serve under Title 32, U.S. Code, or State Active Duty (SAD).

a. Service under Title 32, U.S. Code. National Guard Soldiers serving under Title 32, U.S. Code, are federally funded yet remain commanded and controlled by state authorities. ARNG Soldiers serving under Title 32 are regulated by various, but not all, Army regulations. Judge Advocates should look to the "applicability" paragraph of the regulation in determining whether the regulation applies to Soldiers serving in an ARNG status, for example the Army National Guard of Nevada.

(1) Training status. ARNG soldiers serving under Title 32 are generally, and historically, in a "training" status. ARNG soldiers typically attend drill periods and annual training in this "training" status as they train for their federal mission if federalized in their ARNGUS status.[6]

(2) Operational status. Limited and specific statutory authorities also exist for ARNG personnel to conduct operational missions under Title 32, U.S. Code. Examples include Drug Interdiction and Counterdrug

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[1] *See* 10 U.S.C. § 3062(c)(1)(2013). The other RC's are the Air National Guard of the United States, the Air Force Reserve, the Navy Reserve, the Marine Corps Reserve, and the Coast Guard Reserve. *Id.* § 10101.

[2] Like the Selected Reserve, the IRR is a part of the broader Ready Reserve. *See id.* Although individuals who belong to the IRR "are available for mobilization in time of war or national emergency," they should not be confused with those who serve as drilling individual mobilization augmentees (DIMAs). As a technical matter, DIMAs belong to the Selected Reserve. U.S. DEP'T OF ARMY, REG. 140-10, para. 2-4a(2) (15 Aug. 05). *See also* U.S. DEP'T OF ARMY, REG. 140-145, ARMY RESERVE: INDIVIDUAL MOBILIZATION AUGMENTATION (IMA) PROGRAM (22 Mar. 2007).

[3] 10 U.S.C. § 10105.

[4] *See* Lieutenant Colonel Steven B. Rich, *The National Guard, Drug Interdiction and Counterdrug Activities, and Posse Comitatus: The Meaning and Implications of "In Federal Service,"* ARMY LAW., June 1994, at 35, 35-40 (detailed discussion of the various types of status for National Guardsmen).

[5] U.S. DEP'T OF ARMY, REG. 350-9, OVERSEAS DEPLOYMENT TRAINING, para. 4-2a (8 Nov. 2004) [hereinafter AR 350-9]. *See also* U.S. DEP'T OF ARMY, NATIONAL GUARD, REG. (AR) 350-1, NATIONAL GUARD TRAINING tbl. 3-2 (4 Aug. 2009) [hereinafter NGB 350-1].

[6] 32 U.S.C. § 502(a)(2013).

(CD) Missions,[7] Weapons of Mass Destruction Civil Support Teams (WMD CSTs),[8] Homeland Defense Activities,[9] and recent statutory authority to support operations or missions undertaken by the member's unit at the request of the President or Secretary of Defense.[10]

b. Service in SAD. National Guard Soldiers serving in their home state (or other state pursuant to the Emergency Management Assistance Compact (EMAC))[11] in such roles as disaster relief or control of civil disturbances typically serve in SAD.[12] Service in this status is completely governed by state law and regulations, is state funded, and commanded and controlled by state authorities. For example, any injuries suffered by ARNG Soldiers are process through their state's workman's compensations system. In SAD, ARNG members serve in a pure "militia" status.

3. **Legal Considerations for ARNGUS / ARNG Service**. The distinction between federal and state status often assumes critical legal importance. The UCMJ does not apply to ARNG Soldiers when serving under Title 32, U.S. Code, or in SAD.[13] Instead, state law provides for military justice.[14] Further, the *Posse Comitatus Act*[15] does not apply to National Guard Soldiers when serving under Title 32, U.S. Code, or SAD. Thus, they may legally participate in law enforcement activities if authorized by state law.

II. STATUTORY AUTHORITY TO ORDER THE USAR AND ARNGUS TO ACTIVE DUTY TO TRAIN OR PERFORM OPERATIONS

A. Reserve and National Guard Soldiers and units may be ordered to perform annual training under statutory authority, and may be mobilized to participate in operations under several different statutory authorities.[16] The list below summarizes some of the more important ones.

1. **Annual Training**. Members of the USAR serve fourteen days of annual, active duty training and forty-eight periods of inactive duty training (IDT).[17] Members of the National Guard, however, perform fifteen days of annual training and forty-eight periods of IDT per year, typically in a Title 32 status.[18] If training is conducted OCONUS, ARNG members serve in their ARNGUS, Title 10 status.[19]

2. **15 Days Without Consent**. Service Secretaries may bring members of the RC to active duty for not more than fifteen days per year without the member's consent.[20] This type of secretarial authority is useful for training and processing in advance or anticipation of a longer mobilization period. It is distinct from those authorities that require performance of duty during weekend drills and a two week period of annual training.[21]

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[7] *Id.* § 112 (2013).
[8] 10 U.S.C. § 12310(c) (2013).
[9] 32 U.S.C. § 901 (2013).
[10] *Id.* § 502(f)(2)(A) (2013).
[11] *See* Emergency Management Assistance Compact, Pub. L. No. 104-321, 110 Stat. 3877 (1996).
[12] *See, e.g.*, N.Y. MIL. LAW § 6 (WESTLAW 2010); GA. CODE ANN. § 38-2-6 (WESTLAW 2010); W. VA. CODE § 15-1D-1 (WESTLAW 2010).
[13] The UCMJ is specific on this point, indicating that it is applicable to "members of the Army National Guard of the United States or the Air National Guard of the United States only when in Federal service." UCMJ, art. 2(a)(3) (2008). *See also* U.S. DEP'T OF ARMY, REG. 135-200, ACTIVE DUTY FOR MISSIONS, PROJECTS, AND TRAINING FOR RESERVE COMPONENT SOLDIERS para. 1-11g(9) (30 June 1999) [hereinafter AR 135-200]; U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE para. 21-2b (16 Nov. 2005) [hereinafter AR 27-10].
[14] *See, e.g.*, COLO. REV. STAT. §§ 28-3.1-101 to -607 (WESTLAW 2010); CONN. GEN. STAT. §§ 27-145 to -274 (WESTLAW 2010); MISS. CODE ANN. § 33-13-1 to -627 (WESTLAW 2010); TEX. GOV'T CODE §§ 432.001 to 432.048 (WESTLAW 2010).
[15] 18 U.S.C. § 1385 (2006).
[16] For an alternative discussion of the mobilization continuum, *See* U.S. FORCES COMMAND, REG. 500-3-1, FORSCOM MOBILIZATION AND DEPLOYMENT PLANNING SYSTEM (FORMDEPS): FORSCOM Mobilization Plan para. 3 (15 Apr. 1998).
[17] 10 U.S.C. § 10147 (2006) (USAR battle assembly and annual training provision). Soldiers typically perform two IDT periods per day (minimum of four hours each), four IDT periods per weekend. *See* U.S. DEP'T OF ARMY, REG.140-1, MISSION, ORGANIZATION, AND TRAINING (2004).
[18] 32 U.S.C. § 502(a)(2013).
[19] AR 350-9, *supra* note 5, para. 4-2a; *see also* NGB 350-1, tbl. 3-2.
[20] 10 U.S.C. § 12301(b)(2013 Members of the National Guard can only be brought to active duty under this authority with the consent of their governor. *Id.*
[21] *Id.*

3. **With Consent**. RC members may be ordered to active duty at any time with their consent under 10 U.S.C. § 12301(d). There is no limit to the duration of this duty aside from normal mandatory retirement dates and the expiration of enlistment contracts. Other than budgetary constraints, there is no cap on the number of reservists who may be on active duty.[22] Active duty for operational support (ADOS) orders fall within this category.[23] If the purpose of ADOS orders is to support a contingency operation, such orders are referred to as CO-ADOS orders.[24] If the purpose of ADOS orders is a RC related special project and the orders are funded from COMPO 2/3 funds, the orders are referred to as ADOS-RC orders.[25] If the purpose of the ADOS orders is an AC related special project and the funding for the orders comes from COMPO 1 funds, the orders are referred to as ADOS-AC orders.[26]

4. Selective Mobilization. This authority exists for peacetime domestic mobilization to suppress insurrection, enforce Federal authority, or prevent interference with state or Federal law.[27]

5. **Presidential Reserve Call-Up (PRC)**. Up to 200,000 reservists from the Selected Reserve and IRR may be involuntarily called to active duty for up to 365 days, for purposes related to external threats to U.S. security.[28] Soldiers may not be retained under this authority for more than 365 days, including time spent on active duty prior to and after deployment. The statute allows for the activation of units or individual Soldiers not assigned to a unit. Sometimes, special units (referred to as "derivative UICs") may be created to mobilize individual or groups of unit members without mobilizing entire units. These derivative units can be comprised of particular skill sets needed in theater.

6. **Partial Mobilization**. Upon presidential proclamation of a national emergency, up to one million Reserve Soldiers may be involuntarily called to duty for not more than twenty-four consecutive months.[29] Partial mobilization authority has been the primary means by which RC members have been mobilized and deployed in support of contingency operations since 11 September 2001.

7. Full Mobilization. Under public law or Congressional resolution, all reservists may be involuntarily ordered to active duty for the duration of the war or emergency, plus six months.[30]

8. Response to Major Disaster or Emergency. The National Defense Authorization Act for Fiscal Year 2012 (NDAA 2012) provides a new authority under which the Secretary of Defense may involuntarily mobilize members of the federal reserve to active duty for up to 120 days, based upon a state Governor's request for federal assistance.[31]

9. Preplanned Missions in Support of the Combatant Commands. The NDAA 2012 provides a new authority under which the Secretary of a military department may involuntarily mobilize up to 60,000 members who are assigned to units of the Selected Reserve to active duty for not more than 365 days.[32] To utilize this authority, the costs must be specifically included in defense budget materials.[33]

B. Determining when a Soldier's active duty service terminates can be critically important. Some types of duty end by operation of law. For example, no authority exists to extend a 365-day PRC. Therefore, the command must either complete actions pertaining to such a Soldier or initiate the Soldier's continuation under other authority.

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[22] *Id.* § 12301(d)(WESTLAW 2010). National Guard Soldiers activated under this authority come to active duty with their governor's consent. Those who have volunteered to serve through the active guard reserve (AGR) program with the USAR are on active duty pursuant to this authority. Congress does establish an upper limit on the number of AGR Soldiers who may be on duty at any time. *See, e.g.*, Department of Defense Authorization Act, 2006, Pub. L. No. 109-163, § 412, 119 Stat. 3136. *See also* U.S. DEP'T OF ARMY, REG. 135-18, THE ACTIVE GUARD RESERVE (AGR) PROGRAM (1 Nov. 2004).
[23] *See generally* AR 135-200, *supra* note 13.
[24] *See* Memorandum by Assistant Secretary of Army for Manpower and Reserve Affairs, to Deputy Chief of Staff G-1, subject: Policy for Management of Reserve Component Soldiers on Active Duty for Operational Support and Full-Time National Guard Duty for Operational Support (21 Feb. 2008).
[25] *Id.*
[26] *Id.*
[27] *See* 10 U.S.C. §§ 331-333.
[28] *Id.* § 12304. No more than 30,000 may come from the IRR. *Id.*
[29] 10 U.S.C. § 12302(a) (2006).
[30] *Id.* § 12301(a).
[31] The NDAA 2012, § 515, 10 U.S.C. § 12304a.
[32] The NDAA 2012, § 516, 10 U.S.C. § 12304b.
[33] 10 U.S.C. § 12304b(b)(1).

Similarly, a unit present on a 15-day annual training tour cannot be retained involuntarily, even if its continued presence is essential to the success of a mission.

C. Continuation of duty beyond the limits of the authorization to active duty is one matter. It is another for a Soldier to be continued on active duty pursuant to some other authorization. Servicemembers ordered to active duty under a PRC, for instance, may be ordered to perform a consecutive period of active duty pursuant to a partial mobilization. Individuals may also volunteer to extend their activation.[34] This latter option not only works to extend the period, but can also work to avoid the strength limitations in the event the mobilization calls for more personnel than authorized.

III. ADVERSE ACTIONS AGAINST DEPLOYED RC SOLDIERS

A. **Overview**. Mobilized RC Soldiers in Federal service have rights and obligations comparable to Active Army Soldiers. However, the JA advising commanders of these Soldiers and units must take care to avoid some RC-specific problem areas.

B. **Authority to take UCMJ action**. Two points loom large when assessing the implications of UCMJ action against RC Soldiers. They are (1) jurisdiction over the RC Soldier at the time of the offense and (2) jurisdiction over the RC Soldier at the time of the UCMJ action.

1. **Status at the time of the offense**. In order to be subject to UCMJ liability, a Soldier has to be in a Federal[35] duty status at the time of commission of the offense. Proving this can sometimes present problems. For example, consider the case where a Soldier submits a urine sample shortly after beginning a tour of active duty. It may show ingestion of an illegal drug, but the command will need to prove that the Soldier was in a duty status at the time of drug ingestion.[36]

2. **Status at the time of the action**. In order to take UCMJ action against a RC Soldier, the Soldier must be in a duty status. This makes it critically important that the command know when the Soldier's duty concludes. An RC Soldier may be retained on active duty for court-martial if action with a view toward court-martial is taken prior to the normal end of the Soldier's period of active duty. An Active Army General Court-Martial Convening Authority (GCMCA) can also order an RC Soldier back to active duty for court-martial or Article 15 punishment under this authority.[37]

3. **Assignment or attachment**. In addition to determining duty status, these situations also call for a careful review of the RC Soldier's orders. If a Soldier is officially assigned to a command, there should be no issues. However, if the orders specify that a Soldier is attached to a command, counsel must ensure that the terms of the attachment vest UCMJ jurisdiction in the command. If they do not, the attachment command may contact the assigning command to request any necessary amendments.

4. **Witnesses**. The authority to retain or call back a Soldier to active duty for court-martial does not apply to witnesses. In cases where RC Soldiers will be needed as witnesses after their release from active duty, the command may contact the Reserve Soldier's chain of command to secure the witness' presence under other authorities.

5. **State jurisdiction over UCMJ violations**. Many State Codes of Military Justice lose jurisdiction over its National Guard Soldiers when serving in or mobilized into Title 10 (ARNGUS) status.[38] Consequently, when the Soldier is demobilized and returns to his ARNG status, the State is unable to prosecute the Soldier under its State Code of Military Justice for crimes committed when in Title 10 status. If the Federal authorities wish to court-martial the Soldier, he must be recalled to active duty. Otherwise, the State is likely only authorized to pursue administrative action against the Soldier.

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[34] U.S. DEP'T OF ARMY, REG. 135-18, THE ACTIVE GUARD RESERVE (AGR) PROGRAM, para. 4.1.1 (1 Nov. 2004). *See also* 10 U.S.C.A. § 12301(d).
[35] The UCMJ is inapplicable to members of the National Guard serving in State Active Duty status or Title 32 status. UCMJ art. 2(a)(3) (2008). *See also* AR 135-200, *surpa* note 13, para. 1-11g(9); AR 27-10, *supra* note 13, para. 21-2b.
[36] *See, e.g.* United States v. Chodara, 29 M.J. 943 (ACMR, 1990).
[37] *See generally* AR 27-10, *supra* note 13, chapter 21.
[38] *See, e.g.*, W. Va. Code § 15-1-3 (WESTLAW 2010) ("This [code] applies to all members of the state military forces who are not in federal service.").

C. **Administrative Actions**. Administrative actions against a deployed RC Soldier pose fewer jurisdictional issues than UCMJ actions, but must still be approached carefully.

1. Unlike UCMJ jurisdictional requirements, a Soldier need not be in a duty status when committing misconduct subject to administrative action. However, the command must have authority to take the action. Here again, the RC Soldier's orders require careful examination. Assigned RC Soldiers generally fall under the command's administrative authority like any other Soldier, but attachment orders may reserve authority for administrative actions to the Soldier's reserve chain of command.

2. Generally, Active Army regulations will apply to mobilized RC Soldiers. For example, an administrative separation action against a mobilized Soldier would proceed under AR 635-200[39] rather than AR 135-178.[40] Practical considerations are also a factor. It is imperative to check the applicable regulation carefully and to determine its effect when a RC Soldier is involved. Often, the duration of a Soldier's remaining active duty may be important. For example, what if a Soldier has only a week of active duty remaining? The Active Army command may determine an administrative separation is appropriate, but it may lack sufficient time to complete a separation. Because a court-martial is not contemplated, there is no authority to extend the Soldier on active duty. The better alternative may be to ensure the documentation is forwarded to the Soldier's RC chain of command for appropriate action. In such a case, coordination with the RC unit is critical. With other actions, the Active Army chain of command processes the action to completion even after the RC Soldier departs.[41]

IV. JUDGE ADVOCATES IN THE RESERVE COMPONENTS[42]

A. This chapter has outlined some key terminology relevant to the RC. It has also discussed some of the important authorities for and issues related to the mobilization of RC Soldiers. Assistance with those matters and the fuller spectrum of RC legal issues is available from JA's who serve in the RC.

B. JA's are "embedded" as command JA's in some brigades and other brigade-level units in the USAR and ARNG. Legal Operational Detachments (LODs) are USAR units comprised solely of JA's and paralegal specialists. All LODs are assigned to the USAR's Legal Command. Within the USAR, if JA's are not part of the Legal Command, they may serve in brigade or division headquarters, at certain higher echelon commands, such as a theater support command or a theater signal command, and at functional command headquarters. National Guard JA's are typically found at the fifty-four state and territorial Joint Force Headquarters and at divisions in the National Guard.

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[39] U.S. DEP'T OF ARMY, REG. 635-200, ACTIVE DUTY ENLISTED ADMINISTRATIVE SEPARATIONS (6 Sep. 2011).
[40] U.S. DEP'T OF ARMY, REG. 135-178, ENLISTED ADMINISTRATIVE SEPARATIONS (13 Mar. 2007/RAR 13 Sep. 2011).
[41] *See, e.g.*, U.S. DEP'T OF ARMY, REG. 600-37, UNFAVORABLE INFORMATION para. 3-4d (19 Dec. 1986) (providing for the completion of the memorandum of reprimand process following the departure of a Soldier from the command).
[42] For a further discussion of the roles of ARNG / ARNGUS and USAR JA's and their organizations, see U.S. DEP'T OF ARMY, FIELD MANUAL 1-04, LEGAL SUPPORT TO OPERATIONS paras. 2.1.5 and 2.1.6 (15 Apr. 2009). *See also* U.S. DEP'T OF ARMY, REG. 27-1, JUDGE ADVOCATE LEGAL SERVICES ch. 11 (30 Sept. 1996).

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CHAPTER 14

FISCAL LAW

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12. DEP'T OF DEFENSE, MANUAL 4160.21-M, DEFENSE MATERIAL DISPOSITION MANUAL (18 Aug. 1997) (see Chapter 9, Disposal of Foreign Excess Personal Property).
13. DEP'T OF DEFENSE, FIN. MGMT. REG., VOL. 12, SPECIAL ACCOUNTS FUNDS AND PROGRAMS (Dec. 2012) (see Chapter 27, Commanders' Emergency Response Program (CERP)(Jan. 2009)).

I. INTRODUCTION

A. **Fiscal Law and the Deployed Judge Advocate**. Fiscal law touches everything we do, whether in garrison or in contingency operations. Behind every operation or daily requirement, an expenditure of funds is required to pay for goods, services, and the salaries of those performing duties. Your ability to scrutinize fiscal aspects of the mission will help the unit meet the commander's intent and keep the unit within the boundaries of the law.

Article II, Section 2 of the U.S. Constitution, makes the President Commander in Chief of the Armed Services. However, the Constitution grants Congress the power to authorize the use of funds and makes clear that no money may be spent without a specific appropriation (See Art. I, § 9, cl. 7, U.S. Constitution). While commanders recognize the importance of having funds to accomplish their mission, they oftentimes do not appreciate the underlying law that requires affirmative authority to spend money in the manner the commander intends. It is your mission to make sure commands use funds for the purpose for which they are appropriated.

If there was ever any doubt about commanders' recognition of the strategic effect that money can have on an operation, the recent experiences in Iraq and Afghanistan provide clear evidence that commanders appreciate how funds can, and do, shape their overall success. The challenge for Judge Advocates (JA) lies in the requirement for affirmative authority in order to expend funds. When it comes to Fiscal Law, the question is not "show me where the law says I can't do this" but rather, "*show me where the law says I can do this*."

Congress appropriates money for military programs, and military departments, in turn, allocate money to commands. Therefore, 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, Joint Task Force (JTF) staff members managing a peacekeeping operation may not readily appreciate the subtle differences between

operational necessity and mission creep nation building and humanitarian and civic assistance, or construction versus maintenance and repair. Deployed JAs 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.

This chapter affords a basic, quick reference to common spending authorities. However, because fiscal matters are so highly legislated, regulated, audited, and disputed, this chapter is not a substitute for thorough research and sound application of the law to specific facts. The Center for Law and Military Operations' (CLAMO) collection of After Action Reviews is one source for examples of prior applications of the law to specific facts in past operations.

B. **Constitutional Framework:** Pursuant to Article I, Section 8 of the Constitution, Congress raises revenue and appropriates funds for the Federal Government's operations and programs. Courts interpret this constitutional authority to mean that Executive Branch officials, including commanders and staff officers, must find affirmative authority for the obligation and expenditure of appropriated funds. [1] *See, e.g., U.S. v. MacCollom*, 426 U.S. 317, at 321 (1976) ("The established rule is that the expenditure of public funds is proper only when authorized by Congress, not that public funds may be expended unless prohibited by Congress."). In many cases, Congress has granted or limited the ability of the Executive to obligate and expend funds through annual authorization or appropriations acts or in permanent legislation.

C. **Legislative Framework:** The principles of Federal appropriations law permeate all Federal activity, both within the United States, as well as overseas. Thus, there are no "deployment" exceptions to the fiscal principles discussed throughout this chapter. However, Congress has provided DoD with special appropriations and/or authorizations for use during contingency operations.

Fiscal issues arise frequently during contingency operations. Failure to understand the nuances of special appropriations or authorizations during contingency operations may lead to the improper expenditure of funds and possible administrative or criminal consequences. Moreover, early and continuous JA involvement in mission planning and execution is essential. JAs who participate actively and have situational awareness will have a clearer view of the command's activities and an understanding of what type of appropriated funds, if any, are available for a particular need.

JAs should consider several sources that define fund obligation and expenditure authority: (1) Title 10, U.S. Code; (2) Title 22, U.S. Code; (3) Title 31, U.S. Code; (4) DoD authorization acts; (5) DoD appropriations acts; (6) supplemental appropriations acts; (7) agency regulations; and (8) Comptroller General decisions. In the absence of clear legal authority, the legal advisor should be prepared to articulate a rationale for an expenditure which is "necessary and incident" to an existing authority.

D. **Roadmap for this Chapter.** This Chapter is divided into 11 sections. Sections II through V provide an overview of the basic fiscal law controls – Purpose, Time, and Amount/Antideficiency Act. Section VI explores military construction appropriations, authorizations, and regulatory policies (including special authorities for contingency operations). Section VII provides the fiscal law legislative framework that regulates Operational Funding. The focus of Operational Funding is funding of Foreign Assistance operations (i.e., operations whose primary purpose is to assist foreign governments, militaries, and populations). Section VIII analyzes the Department of State appropriations and/or authorizations to fund Foreign Assistance, with a focus on those authorities that DoD commonly executes with or on behalf of DoS via mechanisms such as interagency acquisitions. Section IX details DoD's appropriations and/or authorizations to fund Foreign Assistance operations. Section X identifies and explains some authorities that permit the DoD to transfer property to foreign entities, a function that is otherwise the purview of the DoS. Section XI provides some concluding thoughts for JAs.

[1] An obligation arises when the government incurs a legal liability to pay for its requirements such as supplies, services, or construction. A contract award normally triggers a fiscal obligation. Commands also incur obligations when they obtain goods and services from other U.S. agencies or from a host nation. An expenditure is an outlay of funds to satisfy a legal obligation. Both obligations and expenditures are critical fiscal events.

II. BASIC FISCAL CONTROLS[2]

A. Congress imposes legislative fiscal controls through three basic mechanisms, each implemented by one or more statutes. The three basic fiscal controls are as follows:

1. Obligations and expenditures must be for a proper **purpose**;

2. Obligations must occur within the **time** limits (or the "period of availability") applicable to the appropriation (e.g., operation and maintenance (O&M) funds are available for obligation for one fiscal year); and

3. Obligations must be within the **amounts** authorized by Congress.

III. THE PURPOSE STATUTE—GENERALLY

A. 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." 31 U.S.C. § 1301(a). Thus, expenditures must be authorized by law or be "reasonably related" to the purpose of an appropriation. In determining whether expenditures conform to the purpose of an appropriation, JAs should apply the Necessary Expense Doctrine, which allows for the use of an appropriation if:

1. An expenditure is specifically authorized in the statute, *or* is for a purpose that is "necessary and incident" to the general purpose of an appropriation;

2. The expenditure is not prohibited by law; and

3. The expenditure is not provided for otherwise, i.e., it does not fall within the scope of another more specific appropriation.

B. General Prohibition on Retaining Miscellaneous Receipts and Augmenting Appropriations

1. Absent a statutory exception, a federal agency that receives any funds other than the funds appropriated by Congress for that agency must deposit those funds into the U.S. Treasury. Therefore, if any agency retains funds from a source outside the normal appropriated fund process, the agency violates the Miscellaneous Receipts Statute, 31 U.S.C. § 3302(b). A corollary to the prohibition on retaining Miscellaneous Receipts is the prohibition against augmentation. An augmentation effectively increases the amount available in an agency's appropriation, which is contrary to the legal premise that only Congress funds an agency's activities. Congress has enacted limited statutory exceptions to the Miscellaneous Receipts and augmentation prohibitions.

2. Exceptions.

a. *Interagency acquisition* authorities 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). 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.

b. Congress also has authorized certain expenditures for military support to civil law enforcement agencies (CLEA) in counterdrug operations. See the Domestic Operations chapter of this handbook 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, reprinted in the Notes to 10 U.S.C. § 374. In 10 U.S.C. § 124, Congress assigned DoD the operational mission of detecting and monitoring international drug traffic (a traditional CLEA function). By authorizing DoD support to CLEAs at essentially no cost, Congress has authorized augmentation of CLEA appropriations.

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[2] For a more in-depth review of fiscal law issues, *see*, CONTRACT & FISCAL L. DEP'T, THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER AND SCHOOL, U.S. ARMY, FISCAL LAW DESKBOOK, current edition, *available at* https://www.jagcnet.army.mil/8525736A005BC8F9/0/F4F01C63D6ABD0BF85257353006B31C5?opendocument&noly=1; *also available at* http://www.loc.gov/rr/frd/Military_Law/Contract-Fiscal-Law-Department.html. The annual CONTRACT ATTORNEY'S DESKBOOK, providing detailed coverage of related acquisition law topics, can also be found at these websites.

C. Purpose Statute Violations.

1. **Violations of the Purpose Statute**. Violations of the Purpose Statute commonly occur in two ways. The first category of Purpose violations involve an agency using an improper funding source to carry out a program for which a more specific appropriation exists. In the second category of violations, an agency makes an expenditure for which there is no proper funding source.

2. **Correcting Violations of the Purpose Statute**. If a suspected Purpose violation involving obligation of the "wrong pot" of money occurs, a correction is possible if the proper funds were available: (1) at the time of the original obligation (e.g., contract award) and (2) at the time the adjustment is made. *See* discussion of the Anti-Deficiency Act (ADA), below. If a command uses funds for a purpose for which there is no proper appropriation, it violates the Purpose Statute, and may result in a violation of the ADA. Officials must report ADA violations in accordance with the Department of Defense Financial Management Regulation (DoD FMR) and current service policy (*see* Section V below).

IV. AVAILABILITY OF FUNDS AS TO TIME

A. **Overview**. The "Time" control includes two major elements:

1. Appropriations have a definite life span; and

2. Appropriations normally must be used for the needs that arise during their period of availability.

B. **Period of availability**. Most appropriations are available for a finite period. For example, O&M funds (the appropriation most prevalent in an operational setting) are available for one year; Procurement appropriations are available for three years; and Military 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 in-scope changes to an existing contract).

C. **The "Bona Fide Needs Rule."** Government agencies may not purchase goods or services they do not require. The bona fide need is the point in time when a government agency becomes authorized to acquire a particular good or service based on a currently existing requirement. The Bona Fide Needs Rule is a timing rule that requires both the timing of the obligation and the bona fide need to be within the appropriated fund's period of availability. *See* 31 U.S.C. § 1502(a). In other words, current year funds should be used for current year needs. Time issues often arise when commands try to address future year needs with current year funds.

1. **Supplies**. The bona fide need for supplies normally exists when the government actually will be able to use the items. Thus, a command would use a currently available appropriation for office supplies needed and purchased in the current fiscal year. Conversely, commands may not use current year funds for office supplies that are not needed until the next fiscal year. Year-end spending for supplies that will be delivered within a reasonable time after the new fiscal year begins is proper, however, as long as a *current need* is documented and the amount purchased does not amount to "stockpiling." Note that there are lead-time and stock-level exceptions to the general rule governing purchases of supplies. The lead-time exception allows the purchase of supplies with current funds at the end of a fiscal year even though the time period required for manufacturing or delivery of the supplies may extend over into the next fiscal year. The stock-level exception allows agencies to purchase sufficient supplies to maintain adequate and normal stock levels even though some supply inventory may be used in the subsequent fiscal year. *See* Defense Finance and Accounting Service Reg.--Indianapolis 37-1 [DFAS-IN 37-1], Chapter 8; or DoD Financial Management Regulation 7000.14-R, vol. 3, para. 080303. In any event, "stockpiling" items is prohibited.

2. **Services**. Normally, *severable* services are bona fide needs of the period in which they are performed. Grounds maintenance, custodial services, vehicle/equipment maintenance, and other services that address recurring, "day-today" needs, are examples of severable services because the services can be severed into components that independently meet the needs of the government. Use current year funds for severable services performed in the current fiscal year. As an exception, however, 10 U.S.C. § 2410a permits DoD agencies to obligate funds current at the time of award for a severable services contract (or other agreement) with a period of performance that does not exceed one year. Even if some services will be performed in the subsequent fiscal year, current fiscal year funds can be used to fund the full year of severable services. Conversely, *nonseverable* services are bona fide needs of the year in which a contract (or other agreement) is executed. Nonseverable services are those that contemplate a single undertaking, e.g., studies, reports, overhaul of an engine, painting a building, etc. Fund the entire undertaking with

appropriations current when the contract (or agreement) is executed, even if performance extends into a subsequent fiscal year. *See* DFAS-IN 37-1, ch. 8; DoD Financial Management Regulation 7000.14-R, vol. 3, para. 080303.

V. AVAILABILITY OF APPROPRIATIONS AS TO AMOUNT

A. **The Anti-Deficiency Act** (31 U.S.C. §§ 1341(a), 1342, & 1517(a)). The Anti-Deficiency Act prohibits any government officer or employee from:

1. Making or authorizing an expenditure or obligation *in advance of* or *in excess of* an appropriation. (31 U.S.C. § 1341).

2. Making or authorizing an expenditure or incurring an obligation *in excess of* an apportionment or *in excess of* a formal subdivision of funds. (31 U.S.C. § 1517).

3. Accepting voluntary services, unless authorized by law. (31 U.S.C. § 1342).

B. **Informal and Formal Subdivisions**. Commanders must ensure that fund obligations and expenditures do not exceed amounts provided by their higher headquarters. Although over-obligation of an installation O&M account normally does not trigger a reportable ADA violation, an over-obligation locally *may* lead to a breach of a formal O&M subdivision at the Major Command level. *See* 31 U.S.C. § 1514(a) (requiring agencies to subdivide and control appropriations by establishing administrative subdivisions); 31 U.S.C. § 1517; DoD Financial Management Regulation, vol. 14, Ch. 1, 2; DFAS-IN 37-1, ch. 4. Similarly, as described in the Purpose section, above, an obligation in excess of a statutory limit, e.g., the $750,000 O&M threshold for construction or the $250,000 expense/investment threshold, may lead to an ADA violation.

C. **Requirements when an ADA is suspected**. Commanders must investigate suspected violations to establish responsibility and discipline violators. Regulations require "flash reporting" of possible ADA violations. DoD 7000.14-R, Financial Management Regulation, vol. 14, chs. 3-7; DFAS-IN 37-1, ch. 4, para. 040204. If a violation is confirmed, the command must identify the cause of the violation and the senior responsible individual. Investigators file reports through finance channels to the office of the Assistant Secretary of the Army, Financial Management & Comptroller (ASA (FM&C)). Further reporting through the Secretary of Defense and the President to Congress is also required if ASA (FM&C) concurs with a finding of violation. By regulation, commanders must impose administrative sanctions on responsible individuals. Criminal action also may be taken if a violation was knowing and willful, 31 U.S.C. § 1349, § 1350. Lawyers, commanders, contracting officers, and resource managers all have been found to be responsible for violations. Common problems that have triggered ADA violations include the following:

1. Obligating current year funds for the bona fide needs of a subsequent fiscal year without statutory authority. This may occur when activities stockpile supply items in excess of those required to maintain normal inventory levels. The impending expiration of funds that occurs at the end of each fiscal year does not provide justification to violate the bona fide needs rule.

2. Exceeding a statutory limit (e.g., funding a construction project in excess of $750,000 with O&M or using O&M instead of procurement funds to fund an investment item that exceeds the $250,000 expense/investment threshold).

3. Obligating funds for purposes prohibited by law.

4. Obligating funds for a purpose for which Congress has not appropriated funds, e.g., personal expenses or gifts, where there is no regulatory or case law support for the purchase. Common violations in this area include purchase of food, clothing, bottled water, gifts, or mementos, absent a statutory, regulatory, or case law-created exception.

VI. MILITARY CONSTRUCTION (MILCON) -- A SPECIAL PROBLEM AREA

A. **Introduction.** Military Construction represents a special area of concern for commands. Misinterpretation and misapplication of the rules is one of the leading causes of Anti-Deficiency Act violations. These violations consume massive amounts of man-hours (investigations, etc.) and can have professional ramifications on the officers involved. Great care should be taken to properly define the scope of the project. Most commands would prefer to use O&M funds for any and all construction projects, though the ability to use these funds is limited.

B. **Definitions.** How you define a project oftentimes determines what type of funds may be used on the project. Congress appropriates funds for military construction projects and, based upon the cost of the project, may or may not specifically authorize projects. Other types of work, such as maintenance and repair, are not construction, and therefore military construction funds are not required to perform maintenance and repair.

1. "Military Construction" includes any construction, development, conversion, or extension carried out with respect to a military installation ***whether to satisfy temporary or permanent requirements***. It includes "all military construction work…necessary to produce a complete and usable facility or a complete and usable improvement to an existing facility…." 10 U.S.C. § 2801. The definition of a military installation is very broad and includes foreign real estate under the operational control of the U.S. military. As defined further in AR 420-1, para. 4-17, construction includes the following:

a. The erection, installation, or assembly of a *new* facility;

b. The addition, expansion, extension, alteration, functional conversion, or replacement of an *existing facility*;

c. The *relocation* of a facility from one site to another;

d. *Installed equipment* (e.g., built-in furniture, elevators, and heating and air conditioning equipment); and

e. Related real property requirements, including land acquisitions, site preparation, excavation, filling, landscaping, and other land improvements.

2. "Military Construction Project" includes all work necessary to produce a "complete and usable facility, or a complete and usable improvement to an existing facility." 10 U.S.C. § 2801(b). Splitting projects into separate parts in order to stay under a statutory threshold is strictly prohibited.[3] *See* summary of construction funding thresholds in paragraph VI.C. below.

3. "Maintenance" and "Repair" are combined into a single category of work. DA PAM 420-11, para. 2-2 (18 Mar. 2010).

a. "Maintenance" is "work required to preserve or maintain a real property facility in such condition that it may be used effectively for its designated purpose." AR 420-1, Glossary, sec. II. It includes work required to prevent damage and to sustain components (e.g., replacing disposable filters, painting; caulking, refastening loose siding, and sealing bituminous pavements). *See* DA Pam 420-11, para. 1-6a.

b. "Repair" means the restoration of a real property facility to such conditions that it may be used effectively for its designated functional purpose; or correction of deficiencies in failed or failing components of existing facilities or systems to meet current Army standards and codes where such work, for reasons of economy, should be done concurrently with restoration of failed or failing components; or a utility system or component may be considered "failing" if it is energy inefficient or technologically obsolete. AR 420-1, Glossary, sec. II.

4. Relocatable Buildings (RLB). An arrangement of components and systems designed to be transported over public roads with a minimum of assembly upon arrival and a minimum of disassembly for relocation. A relocatable building is designed to be moved and reassembled without major damage to the floor, roof, walls, or other significant structural modification.[4] AR 420-1, para. 6-14, further defines relocatables as personal property used as a structure that would have a building category code if it was real property, designed to be readily moved, erected, disassembled, stored, reused, and meets the 20 percent rule. In accordance with Department of the Army guidance, the costs for disassembly, repackaging, any exterior or interior work (e.g., electrical or fire suppression systems), labor, and non-recoverable building components, including foundations, may not exceed 20 percent of the purchase price of the relocatable building.[5] If these costs exceed 20 percent of the cost of the relocatable building project, the RLB project is treated as real property and is funded under the construction funding guidelines. In

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[3] *See The Honorable Michael B. Donley*, B-234326.15, Dec. 24, 1991 (unpub.) (prohibiting project splitting to avoid statutory thresholds); AR 420-1, para. 2-15a(2), DA Pam 420-11, Glossary, sec. II; AFI 32-1021, para 4.2; OPNAVINST 11010.20G, para. 4.2.1.

[4] *See* Memorandum, Office of the Assistant Secretary of the Army (Installations and Environment), Delegation of Authority – Relocatable Buildings (22 Feb. 2011). *See also* U.S. DEP'T OF DEFENSE, INSTR. 4165.56,RELOCATABLE BUILDINGS (7 Jan. 2013).

[5] *See* Memorandum, Office of the Assistant Secretary of the Army (Installations and Environment), Delegation of Authority – Relocatable Buildings (22 Feb. 2011).

contingency operation areas, the cost of establishing a foundation for relocatable buildings shall be excluded from the 20 percent calculation when force protection requirements warrant that concrete slabs are used.[6]

5. Funded Costs. Costs which are charged to the appropriation designated to pay for a project. AR 420-1, Glossary. They are the "out-of-pocket" expenses of a project, such as contract costs, TDY costs, materials, etc. Funded Costs do 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. Maintenance and repair costs which can be segregated are not funded costs. *See* DA Pam 420-11,para. 2-9. Only *funded costs* count against the $750,000 O&M threshold.

C. **Funds for Construction.** The chart below summarizes construction funding thresholds:

Construction Fiscal Law Basics		
Amount	**Type Funds**	**Approval**
>$2 Mil	**MILCON**	**Congress**
$750K-$2 Mil*	**Unspecified Minor MILCON (UMMC)**	**(Under or Dep) Sec Level**
Under $750K	**O&M**	**Commander**
*** Upper limit increases to $3 million if project is intended solely to correct a deficiency that threatens life, health, or safety.**		

1. Generally, funding for construction is appropriated for the specific projects under the Military Construction Appropriation. However, there are some exceptions. 10 U.S.C. § 2805(c) authorizes the use of O&M funds for unspecified minor military construction up to $750,000 per project. Military Construction projects between $750,000 and $2 million may use Unspecified Minor Military Construction funds (UMMC). 10 U.S.C. § 2805(a)(2). The threshold for UMMC is increased to $3 million if the project is "solely to correct a deficiency that threatens life, health, or safety."[7] Military Construction projects above $2 million must be funded with Military Construction Funds.

2. DoD also must notify Congress if commanders intend to undertake construction (temporary or permanent) during any exercise where the cost is expected to exceed $100,000. *See* Military Construction Appropriation Act, 2004, Pub. L. No. 108-132, 117 Stat. 1374, (2003) § 113.

3. Commanders also must use UMMC funds for all permanent construction during CJCS-coordinated or directed OCONUS exercises. *See* AR 415-32, c.(2). The authority for exercise-related construction is limited to no more than $5 million per military department per fiscal year. *See* AR 415-32, 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 exercise-related construction in excess of $100,000. *See* Military Construction Appropriation Act, 2000, Pub. L. No. 106-52, § 113, 113 Stat. 264 (1999); AR 415-32, 3-11d.

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[6] *See* Memorandum, Office of the Assistant Secretary of the Army (Installations and Environment), Additional Guidance to the Deputy Assistant Secretary of the Army (Installations and Housing), 8 Feb. 2008; Memorandum, Delegation of Authority – Relocatable Buildings (13 May 2009).

[7] Note that while the statute allows for an increase in the threshold to $3 million to remedy life, health, or safety deficiencies, there is no statutory guidance as to what constitutes "a deficiency that threatens life, health, or safety." Further, DoD and Army Regulations do not assist in defining this criteria. At least one Army MACOM has issued limited guidance. The Air Force requires prior approval of SAF/MII and Congressional notification for projects solely to correct a life, health, or safety deficiency that exceed $500,000. AFI 32-1032, para 5.1.2.1.]

D. **Methodology for analyzing construction funding issues:**

1. Define the scope of the project (i.e., What is the complete and usable facility? How many projects are there?);

2. Classify the work as construction, repair, or maintenance;

3. Determine the funded and unfunded costs of the project;

4. Select the proper appropriation using only the funded costs (O&M <$750,000; UMMC < $2 mil; MILCON > $2 mil); and

5. Identify the proper approval authority.

E. **Construction Using O&M Funds During Combat or Declared Contingency Operations**. As stated in the introduction, there is no "deployment exception" to Fiscal Law, whether in construction funding or other types of funding. However, Congress has provided special funding authorities for contingency operations. The following additional authorities are available to DoD to fund combat and contingency-related construction projects. Of the authorities listed below, only the Contingency Construction Authority is frequently used. The remainder of the authorities are rarely used because their requirements include Congressional notification, and in the case of 10 U.S.C. § 2808 and 10 U.S.C. § 2803, the reprogramming of unobligated military construction funds, which are normally limited in amount.[8]

1. **Contingency Construction Authority (CCA)**. Within the last several years, significant changes have taken place in the funding of combat and contingency-related construction. Section 2808 of the Military Construction Authorization Act for FY 2004 (Pub. L. No. 108-136, 117 Stat. 1723 (2003)) (which should not be confused with 10 U.S.C. § 2808) authorized what is now known as "Contingency Construction Authority."

a. Section 2801 of the 2008 NDAA extended the original authority of Section 2808 of the FY-04 Military Construction Authorization Act not to exceed $200 million for one year (through FY-08). Now, however, BEFORE using this authority, Congress must be notified and the unit must wait 10 days (or 7 days if the notice is delivered to Congress electronically).

b. The Deputy Secretary of Defense issued implementing guidance for Section 2808 of the FY-04 Military Construction Authorization Act on 1 April 2004, which still applies. *See* Memorandum, Deputy Secretary of Defense, Subject: Use of Operation and Maintenance Appropriations for Construction During Fiscal Year 2004 (1 April 2004).[9] Military Departments or Defense Agencies are to submit candidate construction projects exceeding $750,000 to the Under Secretary of Defense (Comptroller). The request will include a description and the estimated cost of the project, as well as a certification by the Secretary of the Military Department or Director of the Defense Agency that the project meets the conditions stated in Section 2808 of the FY-04 Military Construction Authorization Act. The Under Secretary of Defense (Comptroller) will review the candidate projects in coordination with the Under Secretary of Defense (Acquisition, Technology, and Logistics), and the Under Secretary of Defense (Comptroller) will notify the Military Department or Defense Agency when to proceed with the construction project.

c. Recently, Section 2808 was amended by Section 2804 of the 2012 NDAA, which extended CCA authority to the Combined Task Force-Horn of Africa and modified the quarterly reporting requirements. The 2013 NDAA extended the authority for another year.

2. **Projects Resulting from a Declaration of War or National Emergency**. Upon a Presidential declaration of war or national emergency, 10 U.S.C. § 2808 (not to be confused with Section 2808 of the 2004 NDAA which permits the Secretary of Defense (SECDEF) to undertake construction projects not otherwise authorized by law that are necessary to support the armed forces. These projects are funded with unobligated military construction and family housing appropriations, and the SECDEF must notify the appropriate committees of Congress of (a) the decision to use this authority; and (b) the estimated costs of the construction project. On 16

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[8] For a discussion of O&M and contingency construction and potential project splitting in Afghanistan, *see* Major Teresa G. Love, USAF, "Living in the Gray: Legal Facts and Fictions of Contingency Construction Contracting and Project Splitting in the Combat Zone," The Reporter, Vol. 37, no. 3 (2010).

[9] http://www.acq.osd.mil/dpap/Docs/policy/use%20of%20operation%20and%20maintenance%20appropriations%20for%20construction%20during%20fy2004.pdf

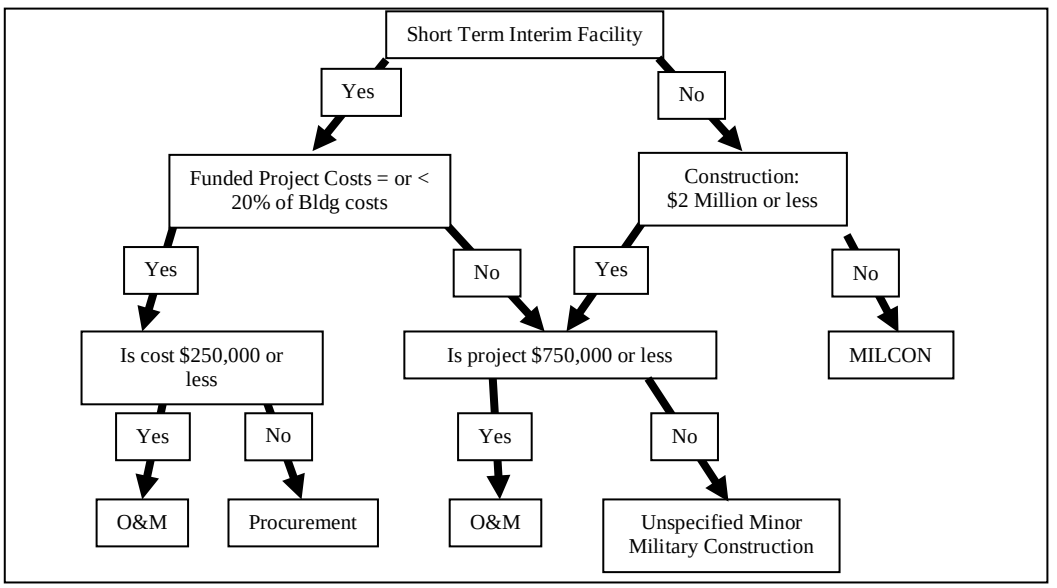
November 2001 President Bush invoked this authority in support of the Global War on Terrorism. *See* Executive Order 13235, Nov. 16, 2001, 66 Fed. Reg. 58343.

a. Emergency Construction, 10 U.S.C. § 2803. Limitations: (a) a determination by the Service Secretary concerned that the project is vital to national defense; (b) a 7-day Congressional notice and wait period; (c) a $50 million cap per fiscal year; and (d) a requirement that the funds come from reprogrammed, unobligated military construction appropriations.

b. Contingency Construction, 10 U.S.C. § 2804. Limitations similar to those under 10 U.S.C. § 2803 apply; however, Congress specifically appropriates funds for this authority. In 2003, Congress dramatically increased the amount of funding potentially available to the DoD under this authority. *See* Emergency Wartime Supplemental Appropriations for the Fiscal Year 2003, Pub. L. No. 108-11, 117 Stat. 587 (2003). Section 1901 of the supplemental appropriation authorized the SECDEF to transfer up to $150 million of funds appropriated in the supplemental appropriation for the purpose of carrying out military construction projects not otherwise authorized by law. The conference report accompanying the supplemental appropriation directed that projects that previously had been funded under the authority of the DoD Deputy General Counsel (Fiscal) 27 February 2003 memorandum, must be funded pursuant to 10 U.S.C. § 2804 in the future. However, because the 2004 and 2005 NDAAs authorized the DoD to spend up to $200 million per fiscal year on such construction projects, DoD's authority to fund projects pursuant to 10 U.S.C. § 2804 was later significantly reduced. *See* Pub. L. 108-767, 118 Stat. 1811, Section 2404(a)(4) (limiting funding under this authority to $10 million for fiscal year 2005).

F. Recurring Construction Funding Issues – Relocatable Buildings and the Logistics Civil Augmentation Program (LOGCAP)

1. **Relocatable Buildings**. Department of the Army issued new guidance regarding Relocatable Buildings and the delegation authority in February 2011. *See* Memorandum, Office of the Assistant Secretary of the Army (Installations and Environment), Delegation of Authority – Relocatable Buildings (22 Feb. 2011); Memorandum, Assistant Chief of Staff for Installation Management, Interim Policy Change on Relocatable Buildings (10 Feb. 2008); Memorandum, Office of the Assistant Secretary of the Army (Installations and Environment), Additional Guidance to the Deputy Assistant Secretary of the Army (Installations and Housing), 8 Feb. 2008 Memorandum, Delegation of Authority – Relocatable Buildings (13 May 2009). Depending on the purpose of the relocatable, it may be construction or procurement. The flow diagram below shows the analysis for



selecting the proper funds for the use of relocatable buildings.

As a general rule, a "relocatable building" must be funded as a construction project IF the estimated funded and unfunded costs for average building disassembly, repackaging (including normal repair and refurbishment of components, but not transportation), and nonrecoverable building components, including typical foundations, exceed

20% of the acquisition cost of the relocatable building itself. (AR 420-1, 6-14). The Army clarified the 20% rule in its Interim Policy published in February 2008. The policy states "[t]he costs for disassembly, repackaging, any exterior refinishing (e.g., brick façade, etc.) and any interior work (e.g., electrical systems, fire suppression systems, walls, or ceilings, etc.) including labor applied to the building after site delivery to make the relocatable building usable, and non-recoverable building components, including foundations, may not exceed 20% of the purchase price of the relocatable building. (Foundations include blocking, footing, bearing plates, ring walls, and concrete slabs. When concrete slabs are used as relocatable building foundations or floors, the entire cost of the slab will be included in the foundation cost)." As previously noted, under the 2009 ASA(I&E) memorandum, in contingency operation areas, the cost of establishing a foundation for relocatable buildings shall be excluded from the 20 percent calculation when force protection requirements warrant that concrete slabs are used. Under the interim policy, relocatable buildings may be used for no more than 6 years.

2. If multiple relocatable buildings are assembled and configured to satisfy a Command's requirement, a systems analysis should be conducted. All costs necessary to erect the RLB structure will be considered together when compared to the expense and investment threshold that is normally $250,000. Remember, however, this amount has been increased for CENTCOM to $500,000. *See* Consolidated Appropriations Act 2012, Section 9011.

3. **LOGCAP**. The rules concerning construction ordered under LOGCAP are the same as if the unit was funding the construction contract through normal contracting procedures. For years, units ordered things through the LOGCAP service contract through a task order and, because the LOGCAP contract is funded with O&M, assumed O&M funds were appropriate for all contracted items under the contract. In March 2006, the DoD OGC clarified the fiscal rules concerning the LOGCAP contract, stating "there are no special fiscal rules when using LOGCAP." Thus, if the task order's terms calls for construction, then the rules concerning construction funding apply.

VII. THE LEGISLATIVE FRAMEWORK REGULATING OPERATIONAL FUNDING.

A. **Fiscal Legislative Controls**. There is NO "deployment exception" to the Fiscal Law Framework! Therefore, the same fiscal limitations regulating the obligation and expenditure of funds apply to operational funding (*see supra*, Purpose, Time, and Amount/ADA; Fiscal Law Deskbook, chapters 2-4). The focus of operational funding is how to fund operations whose primary purpose is to benefit foreign militaries, foreign governments, and foreign populations. Generally, these operations are Foreign Assistance, and are normally funded by the Department of State (DoS). However, Congress does provide DoD with special appropriations and/or authorizations to fund Foreign Assistance. Of the three general limitations—Purpose, Time, and Amount/ADA—the Purpose Statute is the fiscal control that is generally the primary focus for the fiscal law practitioner in a military operational setting.

B. **Operations & Maintenance (O&M) Recurring Issues**. To understand whether O&M funds may be used for Foreign Assistance, it is important to understand the primary purpose of O&M appropriations. The primary purpose of O&M is "[f]or expenses, not otherwise provided for, necessary for the operation and maintenance of the [Army, Air Force, or Navy] as authorized by law…." *See* Consolidated Appropriations Act, Pub.L. 113-76, div. C, (2014).

1. *"For expenses"* – Expenses are non-durable end items that are not expected to last more than one year. Therefore, O&M may generally not be used for capital investments (i.e., durable goods whose expected usable life exceeds one year), or centrally-managed items. Capital investments and centrally-managed items are generally funded with Procurement appropriations. In the annual DoD appropriation, Congress generally provides DoD with the authority to use O&M funds for capital investments whose cost is $250,000 or less. *See* § 8030, Consolidated Appropriations Act, Pub.L. 113-76, div. C, (2014). For several years during the contingency operations in Iraq and Afghanistan, Congress has also permitted the expense/investment threshold to extend to $500,000. Section 9010 of the 2014 Consolidated Appropriations Act (CAA) provides for an increase in the threshold to $500,000 upon determination by the Secretary of Defense that such action is necessary to meet operational requirements of commanders engaged in contingency operations overseas.

2. *"not otherwise provided for"* – O&M is not for Weapons, Ammunition, or Vehicles, since these are investment items. Additionally, Congress appropriates funds separately for each military department for weapons, ammunition, and vehicles. For example, vehicles are purchased with Procurement, Army Other Funds (OPA): "For construction, procurement, production, and modification of vehicles, including tactical, support, and non-tracked combat vehicles; the purchase of passenger motor vehicles for replacement only," *See* Consolidated Appropriations

Act, Pub.L. 113-76, div. C, (2014). Therefore, O&M may not be used to procure these types of "investment" items (even if the cost is $250,000 or less), since more specific appropriations exist for the purchase of Weapons, Ammunition, and Vehicles (i.e., the various Procurement appropriations). Notably though, Congress has granted limited authority for the purchase of certain vehicles in CENTCOM's area of responsibility in section 9004 of the 2014 CAA.

3. *"necessary for the operation"* – Military Construction (MILCON) presents a special problem area. 10 U.S.C. § 2805(c), a "codified" or "permanent" authorization (see *infra*, VI.C.), authorizes the use of O&M funds, as opposed to UMMC or MILCON funds, for a military construction project costing not more than $750,000. Absent this authorization, DoD units would fund all construction projects that cost $750,000 or less with UMMC or MILCON funds. There are, however, some statutory exceptions to the general limitation on the use of O&M funds for construction projects that exceed $750,000, such as the Contingency Construction Authority.

a. Another recurring issue related to the use of O&M for construction projects is the use of LOGCAP to issue task orders for construction projects. LOGCAP is a multi-year contingency indefinite delivery-indefinite quantity (ID/IQ) contract originally designed for the provision of contractor services to the U.S. Army, but it also allows the Army to contract for the provision of goods and construction in wartime and other contingency operations. Contractors perform the procured services to support U.S. Army units in support of the operational missions. Use of contractors in a theater of operations allows the release of military units for other missions or to fill support shortfalls. This program provides the Army with additional means to adequately support the current and programmed forces.

b. When OEF and OIF began, the Army used LOGCAP to contract for services, goods, and construction. The Army, however, initially paid for all LOGCAP ID/IQ task orders, including construction, with O&M funds. The Army's rationale for doing this was that the goods and construction were really a LOGCAP service allowed under the LOGCAP ID/IQ (e.g., the Army needs food service for its Soldiers; if the contractor needs to construct a Dining Facility to provide those services, that is their decision; it is still a service to us, which is expended within the current fiscal year, so the Army can use O&M funds to reimburse the contractor for constructing the facility, since what the Army really procured were dining facility "services"). This rationale is no longer legally valid. O&M is no longer the "exclusive" source of funding for LOGCAP. All LOGCAP projects should be financed with the proper purpose funds, depending on what the Army is procuring.

C. **Appropriations vs. Authorizations**. In layman's terms, an appropriation draws a "pot of money" from the U.S. Treasury, while an authorization may provide additional purposes for which a "pot of money" may be used.

D. **Appropriations and Authorization Statutes**. Traditionally, Congress appropriates funds and authorizes purposes for those funds in three annual public laws:

a. Department of Defense Appropriations Act (DoDAA): appropriates funds for the yearly expenses and investment activities of DoD. These activities are colloquially referred to as "baseline operations," funded with "baseline funds." The current administration also requests and receives funds for overseas contingency operations in the DoDDA, though many appropriations for operations occur in "wartime supplemental" appropriations.

b. Military Construction and Veterans Affairs Appropriation Act (MILCON/VA AA): typically, Title I appropriates Unspecified Minor Military Construction (UMMC) and Specified Military Construction (MILCON) funds for DoD. The Department of Veterans Affairs (VA) is a separate agency.

c. National Defense Authorization Act (NDAA): provides maximum amounts that may be appropriated, and additional authorizations (purposes) for which the appropriated funds drawn may be used.

d. Congressional Committees: The Congressional appropriations committees (House and Senate Appropriations Committees) draft the federal appropriations acts for consideration and passage by Congress. The Congressional authorizations committees (House and Senate Armed Services Committees) draft the DoD authorization acts for consideration and passage by Congress.

E. **"Codified" (or "Permanent") vs. "Uncodified" (or "Temporary") Authorizations**. "Codified" (or "permanent") means that Congress inserts a respective authorization into the actual U.S. Code (e.g., Title 10 for DoD and Title 22 for DoS). The significance of this is that Congress need not "re-authorize" the authorization on a yearly basis. Notably, Congress must still provide funds for a codified authority—recall that there must be both an appropriation *and* an authorization. In contrast, "uncodified" (or "temporary") authorizations are not inserted into the U.S. Code (although they remain an enacted Public Law). As a result, they automatically cease to exist once the

period of availability is complete, unless Congress states that the authority extends into future years or subsequently re-authorizes the provision in later legislation.

1. **Operational Funding General Rule**. The general rule in operational funding is that the Department of State (DoS), and not DoD, funds Foreign Assistance to foreign nations and their populations. Section VIII discusses the Title 22 DoS funds available for operational funding. Foreign Assistance includes Security Assistance to a foreign military or government, Development Assistance for major infrastructure projects, and Humanitarian Assistance directly to a foreign population.

2. **Two Exceptions**. There are two exceptions to the operational funding general rule.

a. **Interoperability, Safety, and Familiarization Training**. DoD may fund the training of foreign militaries with O&M only when the purpose of the training is to promote interoperability, safety, and familiarization, with U.S. Forces. This exception, frequently referred to as "little 't' training" ultimately benefits U.S. Forces and therefore is not Security Assistance Training. This exception applies only to training.[10]

b. **Congressional Appropriation and/or Authorization to conduct Foreign Assistance**. DoD may fund Foreign Assistance operations if Congress has provided a specific authorization and appropriated funds to execute the mission. Section VIII, *infra*, discusses the most frequently used appropriations and authorizations that Congress has enacted for DoD to execute operations that directly benefit a foreign entity.

VIII. DEPARTMENT OF STATE AUTHORIZATIONS AND APPROPRIATIONS

A. **Introduction.** The United States military has engaged in operations and activities that benefit foreign nations for many decades. The authorities and funding sources for these operations and activities have evolved into a complex set of statutes, annual appropriations, regulations, directives, messages, and policy statements. The key issue for the practitioner is determining whether DoS authorizations and/or appropriations (under Title 22 of the U.S. Code, occasional Foreign Relations Authorization Acts, and the annual Department of State, Foreign Operations, and Related Programs Appropriations Act (FOAA)), or DoD authorizations and/or appropriations (under Title 10 of the U.S. Code, and the annual DoD appropriations and authorizations) should be used to accomplish a particular objective. If there are non-DoD appropriations and/or authorizations that may be used to fund a Foreign Assistance mission, then DoD may still be able to execute the mission, but with DoS funds (as long as DoS approves their use under an appropriate authority).

1. **Operational Funding General Rule**. The general rule in operational funding is that the Department of State (DoS) has the primary responsibility, authority, and funding to conduct Foreign Assistance on behalf of the USG. Foreign assistance encompasses any and all assistance to a foreign nation, including Security Assistance (assistance to the internal police forces and military forces of the foreign nation), Development Assistance (assistance to the foreign government in projects that will assist the development of the foreign economy or their political institutions), and Humanitarian Assistance (direct assistance to the population of a foreign nation). The legal authority for the DoS to conduct Foreign Assistance is found in the Foreign Assistance Act of 1961, 22 U.S.C. § 2151 et seq.

2. **Human Rights and Security Assistance**. The "Leahy Amendment," first enacted in the 1997 FOAA, prohibits the USG from providing funds to the security forces of a foreign country if the DoS has credible evidence that the foreign country or its agents have committed gross violations of human rights, unless the Secretary of State determines and reports that the government of such country is taking effective measures to bring the responsible members of the security forces unit to justice. 22 U.S.C. § 2378d. This language is also found in annual DoD Appropriations Acts, prohibiting the DoD from funding any training program involving a unit of the security forces of a foreign country if the DoS has credible information that the unit has committed a gross violation of human rights, unless all necessary corrective steps have been taken or the Secretary of Defense, in consultation with the Secretary of State, decides to waive the prohibition due to extraordinary circumstances. *See* 2014 CAA , § 8057.

B. **Legal Framework for Foreign Assistance**.

1. The Foreign Assistance Act.

[10] *See* CONTRACT & FISCAL L. DEP'T, THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER AND SCHOOL, U.S. ARMY, FISCAL LAW DESKBOOK, current edition, Chapter 10: Operational Funding, discussing The Honorable Bill Alexander, B-213137, 63 Comp. Gen. 422 (1984).

a. The Foreign Assistance Act of 1961 (FAA).[11] The FAA constituted landmark legislation providing a key blueprint for a grand strategy of engagement with friendly nations. Congress codified the 1961 FAA in Title 22 of the U.S. Code. The FAA intended to support friendly foreign nations against communism on twin pillars:

(1) Provide supplies, training, and equipment to friendly foreign militaries; and

(2) Provide education, nutrition, agriculture, family planning, health care, environment, and other programs designed to alleviate the root causes of internal political unrest and poverty faced by foreign populations.

(3) The first pillar is commonly referred to as "security assistance" and is embodied in Subchapter II of the FAA. The second pillar is generally known as "development assistance" and it is found in Subchapter I of the FAA.

b. The FAA charged DoS with the responsibility to provide policy guidance and supervision for the programs created by the FAA. Each year Congress appropriates a specific amount of money to be used by agencies subordinate to the DoS to execute the FAA programs. [12]

c. The FAA treats the security assistance and development assistance 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 the security assistance section of the FAA are essentially the same as those described for the Arms Export Control Act (*see* 22 U.S.C. § 2751), but under the FAA, the recipient is more likely to receive the defense articles or services free of charge.

d. Congress imposes fewer restraints on non-military support (foreign assistance) to developing countries. The primary purposes for providing foreign assistance under Subchapter I of the FAA are to alleviate poverty; promote self-sustaining economic growth; encourage civil and economic rights; integrate developing countries into an open and equitable international economic system; and promote good governance. *See* 22 U.S.C. §§ 2151, 2151-1. In addition to these broadly-defined purposes, the FAA contains numerous other specific authorizations for providing aid and assistance to foreign countries. *See* 22 U.S.C. §§ 2292-2292q (disaster relief); 22 U.S.C. § 2293 (development assistance for Sub-Saharan Africa).

e. Even though Congress charged DoS with the primary responsibility for the FAA programs, the U.S. military plays a very important and substantial supporting role in the execution of the FAA's first pillar, Security Assistance. The U.S. military provides most of the training, education, supplies, and equipment to friendly foreign militaries under Security Assistance authority. DoS retains ultimate strategic policy responsibility and funding authority for the program, but the "subcontractor" that actually performs the work is often the U.S. military. It should be noted that Congress requires by statute that DoS conduct human rights vetting of any foreign recipient of any kind of military training. *See* Sec. 8058, DoD Appropriations Act for FY 2012, Pub. L. No. 112-74 (2012).

f. With regard to the second pillar of the FAA, Development Assistance, USAID, the Office for Foreign Disaster Assistance (OFDA) within DoS, and embassies often call on the U.S. military to assist with disaster relief and other humanitarian activities. Again, the legal authority to conduct these programs often emanates from the FAA, the funding flows from DoS's annual Foreign Operations Appropriations, and the policy supervision also rests on DoS. The U.S. military plays a relatively small role in DoS Development Assistance programs.

2. DoD Agencies that Participate in Executing DoS Foreign Assistance:

a. **Defense Security Cooperation Agency (DSCA)**. DSCA is established under DoD Directive 5105.65 as a separate defense agency under the direction, authority, and control of the Under Secretary of Defense for Policy. Among other duties, DSCA is responsible for administering and supervising DoD security assistance planning and programs.

b. **Defense Institute of Security Assistance Management (DISAM)**. DISAM is a schoolhouse operating under the guidance and direction of the Director, DSCA. The mission of DISAM is as follows: the DISAM "provides professional education, research, and support to advance U.S. foreign policy through Security

[11] 22 U.S.C. §§ 2151 *et seq*.
[12] Annual Foreign Operations Appropriations Acts, *available at* http://thomas.loc.gov/.

Assistance and Security Cooperation." *See* Defense Institute of Security Assistance Management, http://www.disam.dsca.mil/pages/disam/mission.aspx (last visited Apr. 16, 2014). In addition to resident courses, DISAM prepares a valuable publication entitled "The Management of Security Cooperation," and the periodical "DISAM Journal." DISAM is located at Wright-Patterson AFB, Ohio.

c. The Military Departments.

(1) *Secretaries of the Military Departments.* Advise the SECDEF on all Security Assistance matters related to their Departments. Functions include conducting training and acquiring defense articles.

(2) *Department of the Army.* Consolidates its plans and policy functions under the Deputy Undersecretary of the Army (International Affairs). Operational aspects are assigned to Army Materiel Command. The executive agent is the U.S. Army Security Assistance Command, Security Assistance Training Field Activity (SATFA) and Security Assistance Training Management Office (SATMO). These offices coordinate with force providers to provide mobile training teams (MTT) to conduct the requested training commonly referred to as a "train and equip" mission.

(3) *Department of the Navy.* The principal organization is the Navy International Programs Office (Navy IPO). Detailed management occurs at the systems commands located in the Washington, D.C. area and the Naval Education and Training Security Assistance Field Activity in Pensacola, Florida.

(4) *Department of the Air Force.* Office of the Secretary of the Air Force, Deputy Under Secretary for International Affairs (SAF/IA) performs central management and oversight functions. The Air Force Security Assistance Center oversees applicable FMS cases, while the Air Force Security Assistance Training Group (part of the Air Education Training Group) manages training cases.

(5) *Security Assistance Organizations (SAO).* The term encompasses all DoD elements located in a foreign country with assigned responsibilities for carrying out security assistance management functions. It includes military missions, military groups, offices of defense cooperation, liaison groups, and designated defense attaché personnel. The primary functions of the SAO are logistics management, fiscal management, and contract administration of country security assistance programs. The Chief of the SAO answers to the Ambassador, the Commander of the Combatant Command (who is the senior rater for efficiency and performance reports), and the Director, DSCA. The SAO should not be confused with the Defense Attachés who report to the Defense Intelligence Agency.

3. DoD Support to DoS Foreign Assistance Programs Through Interagency Funding.

a. The overall tension in the FAA between achieving national security through mutual military security, and achieving it by encouraging democratic traditions and open markets, is also reflected in the interagency transaction authorities of the act. *Compare* 22 U.S.C. § 2392(c) *with* 22 U.S.C. § 2392(d) (discussed below). DoD support of the military assistance goals of the FAA is generally accomplished on a full cost recovery basis; DoD support of the foreign assistance and humanitarian assistance goals of the FAA is accomplished on a flexible cost recovery basis.

b. By authorizing flexibility in the amount of funds recovered for some DoD assistance under the FAA, Congress permits some contribution from one agency's appropriations to another agency's appropriations. That is, an authorized augmentation of accounts occurs whenever Congress authorizes recovery of less than the full cost of goods or services provided.

c. DoS reimbursements for DoD or other agencies' efforts under the FAA are governed by 22 U.S.C. § 2392(d). Except under emergency Presidential drawdown authority (22 U.S.C. § 2318), reimbursement to any government agency supporting DoS objectives under "subchapter II of this chapter" (Part II of the FAA (military or security assistance)) is computed as follows:

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

d. This reimbursement standard is essentially the "full reimbursement" standard of the Economy Act. Pursuant to FAA § 632 (22 U.S.C. § 2392), DoS may provide funds to other executive departments to assist DoS in accomplishing its assigned missions (usually implemented through "632 Agreements" between DoD and DoS).

Procedures for determining the value of articles and services provided as security assistance under the Arms Export Control Act and the FAA are described in the Security Assistance Management Manual (DoD Manual 5105.38-M) and the references therein.

e. In addition to the above, Congress has authorized another form of DoD contribution to the DoS's counterdrug activities by providing that when DoD furnishes services in support of this program, it is reimbursed only for its "additional costs" in providing the services (i.e., its costs over and above its normal operating costs), not its full costs.

f. The flexible standard of reimbursement under the FAA mentioned above for efforts under Part I of the FAA is described in 22 U.S.C. § 2392(c). This standard is applicable when any other Federal agency supports DoS foreign assistance (*not* military or security assistance) objectives for developing countries under the FAA.

> [A]ny commodity, service, or facility procured . . . to carry out subchapter I of this chapter [Part I] [foreign assistance] . . . shall be (reimbursed) at replacement cost, or, if required by law, at actual cost, or, in the case of services procured from the DoD to carry out part VIII of subchapter I of this chapter [International Narcotics Control, 22 U.S.C. § 2291(a)-2291(h)], the amount of the additional costs incurred by the DoD in providing such services, or at any other price authorized by law and agreed to by the owning or disposing agency.

g. Note the specific reference to DoD services in support of DoS counterdrug activities. "Additional costs incurred" is the lowest acceptable interagency reimbursement standard. If Congress wishes to authorize more DoD contribution (that is, less reimbursement to DoD appropriations), Congress authorizes the actual expenditure of DoD funds for or on the behalf of other agencies. *See* National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, §§ 1001-11, 104 Stat. 1485, 1628-34 (1990) [codified at 10 U.S.C. § 374 note] (providing general authority for DoD to engage in counterdrug operations); *see also* section 1014 of the National Defense Authorization Act for Fiscal Year 2011, Pub. L. No. 111-383, which extended DoD's counterdrug authority for certain foreign governments through 30 September 2012.

h. The DoD reimbursement standards for 22 U.S.C. § 2392(c) are implemented by DoD 7000.14-R, vol. 11A (Reimbursable Operations, Policies and Procedures), ch. 1 (General) and ch. 7 (International Narcotics Control Program). When DoD provides services in support of DoS counterdrug activities, the regulation permits "no cost" recovery when the services are incidental to DoD missions requirements. The regulation also authorizes pro rata and other cost sharing arrangements. *See* DoD 7000.14-R, vol. 11A, ch. 7.

4. **Presidential Decision Directive 25 – Reimbursable Support vs. Non-Reimbursable Support**. On 6 May 1994, President Bill Clinton signed PDD 25, which remains in effect today. PDD 25 set the U.S. policy for all USG agencies (including DoD) with regards to the financing of combined exercises and operations with foreign nations. USG agencies should seek reimbursement for their activities in combined exercises and operations prior to accessing non-reimbursable Congressional appropriations to fund those activities. PDD 25 affects all USG funding policy decisions, including both DoS and DoD. *See* Presidential Decision Directive 25, Section IV.B., http://www.fas.org/irp/offdocs/pdd25.htm.

a. As previously discussed, Foreign Assistance can take two forms – Security Assistance to a foreign nation's military/security forces, and Development/Humanitarian Assistance. Although DoD's role in Development/Humanitarian Assistance has traditionally been small, DoD plays a primary role in executing Security Assistance on behalf of the DoS. When DoD executes Security Assistance programs on behalf of the DoS, the DoS generally reimburses DoD for all its costs. When the DoS approves the use of a reimbursable authorization and/or appropriation, the benefitting foreign nation reimburses DoS for all its costs (including the costs that DoD charges DoS to provide the requested assistance).

b. PDD 25 provides a policy overlay to Security Assistance provided by DoS or DoD on behalf of DoS. Before obligating and expending appropriated funds from non-reimbursable appropriations and/or authorizations, the DoS and the DoD should seek to use its reimbursable authorizations during Foreign Assistance operations. The DoS appropriations and/or authorizations are divided into three categories: Reimbursable Security Assistance; Non-Reimbursable (U.S.-Financed) Security Assistance; and Development Assistance (in which DoD traditionally has a small or no role, except for Disaster Relief).

C. **Reimbursable DoS Security Assistance Programs**.

1. **Foreign Military Sales (FMS) Program, 22 U.S.C. § 2761**. Foreign countries and the U.S. may enter standard FMS contracts with DoD for the sale of defense articles, services, and training from existing stocks or new procurements at no cost to the U.S. government.[13]

a. FMS is a "Revolving Fund," with the intent of being self-funded. DoS charges a 3.5% administrative fee to the foreign purchasing nation for each "case" (sale), to reimburse the U.S. for administrative costs. The administrative fee allows DoS to generate the funds necessary to reimburse the DoD MILPER account via an Economy Act transaction.

b. FMS cases can be used for support to multilateral operations, logistics support during a military exercise, training, purchase of equipment, weapons, and ammunition. The military equipment, weapons, ammunition, and logistics services, supplies, and other support must conform with the restrictions of the DoS International Traffic in Arms Regulations (ITARs).

c. The FMS program, like many of the DoS Security Assistance programs, is operated by DoD on behalf of DoS via the Defense Security Cooperation Agency (DSCA). DoS reimburses DoD for the use of military personnel by reimbursing the DoD Military Personnel (MILPER) appropriation via an Economy Act transaction.

d. DSCA-designated Significant Military Equipment (SME) may only be purchased via the FMS, and may not be purchased via the Direct Commercial Sales (DCS) program.

e. In conjunction with both FMS cases and Direct Commercial Sales (DCS), the U.S. may provide foreign nations loans and/or grants via the DoS Foreign Military Financing Program, a separate authorization for which Congress provides yearly appropriations.

f. To enter into an FMS case for the purchase of military equipment, DSCA (on behalf of the USG) and the foreign nation enter into a Letter of Agreement (LOA). The LOA outlines the items that the foreign nation will purchase via FMS. DSCA may provide the items from existing stock, or it may enter into a new contract with a defense contractor to produce the item. The foreign nation, however, does not have any third party beneficiary rights against the contractor, and has no cause of action against the contractor for any disputes that may arise between the contractor and the receiving foreign nation.[14]

2. **Foreign Military Lease Program, AECA §§ 61-62, 22 U.S.C. § 2796-2796a**. Authorizes leases of Defense articles to foreign countries or international organizations. The leases generally occur on a reimbursable basis. The U.S. may, however, provide foreign nations loans and/or grants via the DoS Foreign Military Financing Program.

3. Economy Act Security Assistance, 31 U.S.C. § 1535. Authorizes the provision of defense articles and services indirectly to third countries, the UN, and international organizations on a reimbursable basis for another federal agency (e.g., Department of State).

4. USG Commodities and Services (C&S) Program, 22 U.S.C. §. 2357. USG agencies may provide C&S to friendly nations and international organizations. DoS approval is required.

5. Direct Commercial Sales (DCS) Program, 22 U.S.C. § 2778. Authorizes eligible governments to purchase defense articles or services directly from defense contractors. A DoS review and DoS-issued "license" is required before the contractor may provide the products to the foreign nation. DoD is not involved in the management of the sale from the contractor to the foreign nation.

D. U.S.-Financed DoS Security Assistance.

1. **Foreign Military Financing (FMF) Program, 22 U.S.C. § 2763**. Congressionally-approved grants or loans. The FY14 Consolidated Appropriations Act provided over $5.3 billion to finance grants and loans to buy equipment, services, or training from U.S. suppliers through the FMS/FML or DCS programs.

2. **Presidential Drawdowns**. Presidential Drawdowns are directives by the President for DoD to access its current stock of equipment and services, and to provide the identified equipment to a foreign country, their military or security services, or the foreign civilian population. The items need not be "surplus" or "excess."

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[13] For a detailed discussion of the FMS process, *see* U.S. DEP'T OF DEF., 5105.38-M, SECURITY ASSISTANCE MANAGEMENT MANUAL, C4-C6 (30 April 2012).
[14] Secretary of State for Defense v. Trimble Navigation Limited, 484 F.3d 700 (4th Cir. 2007).

a. Foreign Assistance Act (FAA) § 506(a)(1), 22 U.S.C. § 2318(a)(1) - Authorizes the President to direct the drawdown of defense articles and services having an aggregate value of up to $100,000,000 in any fiscal year for unforeseen military emergencies requiring immediate military assistance to a foreign country or international organization. Requires Presidential determination and prior Congressional notification.[15]

b. FAA § 506(a)(2), 22 U.S.C. § 2318(a)(2) - Authorizes the President to direct the drawdown of articles and services having an aggregate value of up to $200,000,000 from any agency of the U.S. in any fiscal year for other emergencies including (among other things) counterdrug activities, disaster relief, non-proliferation, anti-terrorism, and migrant and refugee assistance. The Security Assistance Act of 2000 increased the amount from $150M to $200M and added anti-terrorism and non-proliferation to the permissible uses of this authority. Of that amount, not more than $75M may come from DoD resources; not more than $75M may be provided for counternarcotics; and not more than $15M to Vietnam, Cambodia and Laos for POW accounting. Drawdowns supporting counternarcotics and refugee or migration assistance require a Presidential determination and 15-day prior Congressional notification.[16]

c. FAA § 552(c)(2), 22 U.S.C. § 2348a(c)(2) - Authorizes the President to direct the drawdown of up to $25,000,000 in any fiscal year of commodities and services from any federal agency for unforeseen emergencies related to peacekeeping operations and other programs in the interest of national security. Requires a Presidential determination and prior Congressional notification

d. Iraq Liberation Act of 1998, Pub. L. No. 105-338, 112 Stat. 3178 (31 Oct. 1998*)* – Authorizes the President to direct the drawdown of defense articles from the stocks of DoD, defense services of DoD, and military education and training for Iraqi democratic opposition organizations. This assistance may not exceed $97 million and requires fifteen days notice to Congress. President Bush subsequently directed $92 million in drawdown assistance in 2002. *See*, Presidential Determination No. 03-06, 67 Fed. Reg. 78,123 (23 Dec. 2002). Congress subsequently appropriated $63.5M reimbursement for IFSA drawdown support. *See* Sec. 1309 of the FY-03 Emergency Wartime Supplemental Appropriation.

e. Afghanistan Freedom Support Act of 2002, Pub. L. No. 107-327, 116 Stat. 2797 (4 Dec. 2002, codified at 22 U.S.C. § 7532 – Authorizes the President to direct the drawdown of up to $300 million of defense articles, defense services, and military education and training for the Government of Afghanistan, eligible foreign countries, and eligible international organizations. This authority is carried out under section 506 (22 U.S.C. § 2318(a)(1)) of the Foreign Assistance Act. The assistance may also be provided by contract. Section 9008 of the FY-05 Defense Appropriations Act, Pub. L. No. 108-287 (2004) increased this Afghan drawdown authority to $550 million. Much as it did for the Iraq drawdown authority, Congress provided $165M reimbursement for the AFSA Drawdown. *See* Sec. 1307 of the FY-03 Emergency Wartime Supplemental Appropriation.

3. **Excess Defense Articles (EDA)**. EDA is a "subprogram" of FMS. "Excess" Defense articles no longer needed by the DoD may be made available to third countries for sale (sometimes financed with FMF), or on a grant basis. Prior to sale, FMS/EDA has the authority to depreciate the value of the item. EDA are priced on the basis of their condition, with pricing ranging from 5 to 50 percent of the items' original value. "Excess" items are no longer required by DoD, even though that type of item may still be regularly used by DoD units. *See* Security Assistance Management Manual (SAMM). EDA may be purchased by foreign nations, and they may be purchased by foreign nations with funds loaned or granted by the United States under the DoS FMF program. *See* Foreign Military Financing, *supra* VII.C.1. FMS receives EDA from the Defense Logistics Agency (DLA) Disposition Services (formerly known as the Defense Reutilization and Marketing Service, or DRMS). Only countries that are justified in the annual Congressional Presentation Document (CPD) by the DoS or separately justified in the FOAA during a fiscal year are eligible to receive EDA. EDA must be drawn from existing stocks. Congress requires fifteen days notice prior to issuance of a letter of offer if the USG sells EDA. However, most EDA are transferred on a grant basis. No DoD procurement funds may be expended in connection with an EDA transfer. The transfer of these items must not adversely impact U.S. military readiness.

a. FAA § 516, 22 U.S.C. § 2321(j). This statute authorizes both lethal and non-lethal EDA (including Coast Guard equipment) support to any country for which receipt was justified in the annual Congressional Presentation Document (CPD). It continues to accord priority of delivery to NATO, non-NATO Southern-flank allies, and the Philippines, as well as continuing the 7:10 EDA grant split between Greece & Turkey.

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[15] Defense and Security Assistance Improvements Act, Pub. L. 104-164 (1996) (increase from $75M to $100M).
[16] *See id*; *see also* Security Assistance Act, Pub. L. 106-280, 114 Stat. 850 (2000).

See Defense and Security Assistance Improvements Act, Pub. L. 104-164 (1996) (consolidation of EDA authorities into § 516 and repeal of §§ 518-520); Security Assistance Act of 1999, Pub. L. 106-113, § 1211(b) (1999).

b. Transportation. No-cost, space-available transportation of EDA is authorized for countries receiving less than $10M FMF or IMET in any fiscal year, as long as DoS makes the determination that it is in the national interest of the United States to pay for the transportation.

4. **International Military Education & Training (IMET)**. U.S.-funded program for the military training of foreign soldiers at U.S. military schools.

a. FAA §§ 541-545 (22 U.S.C. §§ 2347-2347(d). Security assistance program to provide training to foreign militaries, including the proper role of the military in civilian-led democratic governments and human rights.

b. *See also*, Section 1222 of FY-07 NDAA, which deletes the IMET program from the sanctions of the American Servicemembers' Protection Act.

5. Personnel Details.

a. FAA § 627, 22 U.S.C. § 2387. When the President determines it furthers the FAA's purposes, the statute permits a federal agency head to detail officers or employees to foreign governments or foreign government agencies, where the detail does not entail an oath of allegiance to or compensation from the foreign countries. Details may be with or without reimbursement. FAA § 630, 22 U.S.C. § 2390.

b. FAA § 628, 22 U.S.C. § 2388. When the President determines it furthers the FAA's purposes, the statute permits federal agency heads to detail, assign, or otherwise make their officers and employees available to serve with international organizations, or serve as members of the international staff of such organizations, or to render any technical, scientific, or professional advice or service to the organizations. May be authorized with or without reimbursement. FAA § 630, 22 U.S.C. § 2390.

c. 22 U.S.C. § 1451. Authorizes the Director, United States Information Agency, to assign U.S. employees to provide scientific, technical, or professional advice to other countries. Details may be on reimbursable or nonreimbursable basis. Does not authorize details related to the organization, training, operation, development, or combat equipment of a country's armed forces.

E. Development Assistance.

1. **Overview**. DoS and USAID finance a number of development assistance programs, including: Agriculture and Nutrition, Population Control, Health, Education, Energy, and Environment Improvement. Most of these projects are financed with direct grants or loans from DoS or USAID to the developing country. These are large-scale projects and normally do not involve DoD.

2. **Foreign Disaster Relief (not the same as Foreign Disaster Assistance)**. Statutory authority for the President to grant disaster relief aid for natural or manmade disasters is found in the Foreign Assistance Act, 22 U.S.C. § 492. Primary implementing tool for this program is USAID. USAID may request DoD assistance and must reimburse DoD for its costs via an Economy Act transaction.

3. **Military Role**. The military's role in the provision of development assistance through the FAA is relatively limited when compared to its role in the provision of security assistance. Nevertheless, from time to time, agencies charged with the primary responsibility to carry out activities under this authority, call upon the U.S. military to render assistance. An example of participation by the U.S. military would be action taken in response to a request for disaster assistance from the Office for Foreign Disaster Assistance (OFDA). OFDA often asks the U.S. military for help in responding to natural and man-made disasters overseas. Key point: generally, costs incurred by the U.S. military pursuant to performing missions requested by other Federal agencies under the FAA, Development Assistance provisions, must be reimbursed to the military pursuant to FAA § 632 or pursuant to an order under the Economy Act.

4. Foreign Disaster Relief In Support of OFDA.

a. The United States has a long and distinguished history of aiding other nations suffering from natural or manmade disasters. In fact, the very first appropriation to assist a foreign government was for disaster

relief.[17] The current statutory authority continuing this tradition is located in the Foreign Assistance Act.[18] 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."[19] The President's primary implementing tool in carrying out this mandate is USAID.

b. USAID is the primary response agency for the U.S. government to any international disaster.[20] 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.[21] The Administrator of USAID controls these funds because the President has designated that person as the Special Coordinator for International Disaster Assistance.[22] In addition, the President has designated USAID as the lead agency in coordinating the U.S. response for foreign disaster.[23] Normally these funds support NGO and PVO efforts in the disaster area. However, certain disasters can overwhelm NGO and PVO capabilities, or the military may possess unique skills and equipment to accomplish the needed assistance.[24] In these situations, DoS, through OFDA, may ask for DoD assistance. Primary funding in these cases is supposed to come 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. However, DoD also has access to Overseas Humanitarian, Disaster and Civic Aid (OHDACA) funds that are specifically appropriated for DoD use in worldwide humanitarian assistance and disaster relief (see Section E. below).[25]

F. Accessing the DoS Appropriations and Authorizations. For the deployed unit, properly coordinating for access to the DoS appropriations and authorizations becomes critical. In a non-deployed environment, a DoD unit would normally coordinate with the Defense Security and Cooperation Agency (DSCA) and follow the procedures of the Security Assistance Management Manual (SAMM).

1. Due to the dramatically increased Operational Tempo (OPTEMPO), the deployed unit normally requires the appropriate funds much more quickly than in a non-deployed situation. As a result, the unit should coordinate with the deployed DoS Political Advisor (POLAD) located at the Combined Joint Task Force (CJTF), or division, level. The unit may also coordinate with the DoS Foreign Officers located at the local Provincial Reconstruction Teams (PRTs). PRTs will likely be disbanded after calendar year 2014,

2. The DoD legal advisor should be aware of the cultural, structural, and procedural differences between DoD and DoS, and plan accordingly.[26] DoD has the cultural and structural capability to plan for operations far in advance via the Military Decision-Making Process (MDMP). DoS generally has neither the structural capability nor the organizational culture that would allow it to plan for operations as far in advance as DoD. These structural differences between DoD and DoS will need to be overcome by the deployed unit.

G. Conclusion. The general rule for operational funding is that the DoS (and not DoD) funds foreign assistance. Section VIII, *supra*, discussed the most frequently used DoS appropriations and authorizations impacting DoD operations. Section IX, *infra*, will discuss the DoD appropriations and authorizations for operational

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[17] 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.
[18] FAA § 492 (10 U.S.C. § 2292) (International Disaster Assistance). The President may furnish foreign disaster assistance under such terms and conditions determined appropriate pursuant to the FAA §§ 491-496 (22 U.S.C. §§ 2292-2292q). *See, e.g.,* Foreign Operations Appropriations Act for FY-03, Pub. L. 108-7, (2003) ($230M appropriated to DoS for international disaster assistance under this authority).
[19] 22 U.S.C. § 2292(b).
[20] E.O. 12966, 60 Fed. R. 36949 (14 July 1995).
[21] FAA §§ 491 - 495K, 22 U.S.C. §§ 2292 - 2292q.
[22] *See* FAA § 493, 22 U.S.C. § 2292b and E.O. 12966, Sec. 3, 60 Fed. R. 36949 (14 July 1995). *See also* E.O. 12163, section 1-102(a)(1), 44 Fed. R. 56673 (Sept. 29, 1979), *reprinted as amended in* 22 U.S.C.A. § 2381 (West Supp. 1996).
[23] *See generally*, E.O. 12966, 60 Fed. R. 36949 (July 14, 1995).
[24] *See generally*, JOINT CHIEFS OF STAFF, JOINT PUB. 3-29, FOREIGN HUMANITARIAN ASSISTANCE (17 Mar. 2009).
[25] The OHDACA appropriation funds several different statutorily authorized OHDACA Programs: 10 U.S.C. 401, Humanitarian and Civic Assistance, 10 U.S.C. 402, 10 U.S.C. 404, Foreign Disaster Assistance, Denton Transportation of Humanitarian Relief Supplies for NGOs, 10 U.S.C. 407, Humanitarian Demining Assistance, 10 U.S.C. 2557, Excess Nonlethal Supplies for Humanitarian Relief, and 10 U.S.C. 2561, Humanitarian Assistance.
[26] *See* Rosemary Hansen, "Defense is from Mars, State is from Venus: Improving Communications and Promoting National Security," U.S. Army War College Strategy Research Project (1998).

funding that Congress has enacted for DoD to fund Security Assistance outside of DoS appropriations and authorizations. All of the DoD appropriations and authorizations discussed in Section IX constitute statutory exceptions to the general rule that DoS funds Foreign Assistance.

IX. DEPARTMENT OF DEFENSE APPROPRIATIONS AND AUTHORIZATIONS

A. **Introduction**. The general rule in operational funding is that DoS has the primary responsibility, authority, and funding to conduct Foreign Assistance on behalf of the USG. The legal authority for the DoS security assistance and development assistance mission is found in the Foreign Assistance Act of 1961, 22 U.S.C. § 2151.

1. **Two Exceptions**. As previously indicated, there are two exceptions to the general rule that foreign assistance is funded with DoS authorizations and appropriations. The first exception is based on historical Government Accountability Office (GAO) opinions which allow for the use of O&M to train foreign forces, as long as the purpose of the training is Interoperability, Safety, and Familiarization of the foreign forces operating with U.S. forces. The second group of exceptions occur when Congress enacts a DoD appropriation and/or authorization to conduct foreign assistance (security assistance, development assistance, and/or humanitarian assistance):

a. **Exception 1 - Security Assistance Training ("Big T training") vs. Interoperability Training ("Little t training")**. Security Assistance Training is funded with DoS authorizations and appropriations. Interoperability training is generally funded with DoD O&M funds.

(1) If the primary purpose of the training of foreign forces is to improve the operational readiness of the foreign forces, then this is Security Assistance Training ("Big T") and should be funded with DoS authorizations and appropriations. On the other hand, if the primary purpose of the training of foreign forces is for interoperability, safety, and/or familiarization, then this is Interoperability Training ("Little t") and is NOT security assistance training. *See* Hon. Bill Alexander U.S. House of Representatives, 63 Comp. Gen. 422 (1984).

(2) In most circumstances, the training effect for DoD in providing the training, along with the factual support for the stated DoD intent, will guide the advising attorney in determining whether a training event is Security Assistance Training or Interoperability, Safety, and Familiarization Training. In classifying the type of training of foreign troops by DoD (Security Assistance vs. Interoperability), the advising attorney should consider such factors as the cost of the training, the current level of training of the foreign troops before the training vs. the expected level of training of the foreign troops after the training is complete, and the amount of time and resources that DoD will need to expend to provide the training. As these factors increase, it becomes more likely that the training envisioned is Security Assistance Training, as opposed to Interoperability Training.

(3) For example, in a month-long Combined Airborne Parachute Exercise with other countries, whose participating troops are all airborne qualified in their own countries, a 2-hour block of instruction on C-130 entry and egress safety procedures would be Interoperability Training ("Little t" training), since the primary purpose is safety and interoperability of the foreign troops. Additionally, it is a short duration (2 hours) training event, the cost is not significant, and their level of training is not significantly enhanced (since the foreign troops are already airborne qualified). Therefore, this would likely be classified as Interoperability, Safety, and Familiarization Training, and DoD may fund this training with its own O&M funds.

(4) On the other hand, training foreign troops on airborne operations, including the provision of DoD trainers for a month-long airborne school to qualify all the individual foreign troops in airborne jumps, would likely be classified as Security Assistance Training ("Big T" training). In this case, the duration of the training is long (one month), the cost is likely significant, and most importantly, the level of training of the foreign troops is significantly increased. As a result, the primary purpose of the training is not the Interoperability, Familiarization, and Safety of the foreign troops, and this training should be classified as Security Assistance training.

b. **Exception 2 - Statutory Appropriation or Authorization**. Congress may appropriate funds, or authorize the use of funds, for DoD to provide Foreign Assistance outside of Title 22 DoS appropriations and authorizations. The remainder of this section discusses the DoD statutory authorizations and appropriations to conduct Foreign Assistance.

2. **Grouping the Statutory Appropriations and Authorizations**. There are no formal Congressionally-designed categories of operational funding for DoD-funded foreign assistance. Categories for funding can often depend on the nature of a mission and the sentiments of Congress. Currently, there are three general categories of appropriations and/or authorizations: (1) Building and Funding Foreign Partners; and (2) DoD Aid and Assistance to

Foreign Civilians; and (3) Authorities that are tailored for Conducting Counterinsurgency, Counterterrorism & Overseas Contingency Operations (OCO). Judge Advocates will find both permanent and temporary authorizations in all of these general categories.

B. Building and Funding Foreign Partners

1. **Acquisition & Cross-Servicing Agreements (ACSA), 10 U.S.C. §§ 2341-2350**. ACSAs are bilateral agreements for the reimbursable mutual exchange of Logistics Supplies, Services, and Support (LSSS) (*see* DoD Directive 2010.9, 28 Apr. 2003; Chairman of the Joint Chiefs of Staff, Instruction (CJCSI) 2120.01B, 20 Sep. 2010). The ACSA authorization allows DoD (as opposed to DoS) to enter into mutual logistics support agreements with the defense departments of foreign nations. The ACSA authorizes DoD to acquire logistic support, without resorting to commercial contracting procedures (i.e., DoD does not need to follow the competition in contracting requirements of the Federal Acquisition Regulation) and to transfer limited support outside of Title 22 the Arms Export Control Act (AECA). Under the ACSA statutes, after consulting with the State Department, DoD (i.e., the affected Combatant Commander) may enter into agreements with NATO countries, NATO subsidiary bodies, other eligible countries, the UN, and international regional organizations of which the U.S. is a member for the reciprocal provision of LSSS.[27]

a. Two different ACSA Authorities/methods exist:

(1) Acquisition and Cross-Servicing Agreements (ACSAs), 10 U.S.C. § 2342 (full ACSA authority), allows the DoD to both purchase LSSS from the foreign military department, as well as to provide LSSS, on a reimbursable basis, to the foreign military department.

(2) Acquisition Only Authority (AoAs), 10 U.S.C. § 2341, provides limited authority allowing DoD to acquire LSSS for our deployed forces use from that host country if it has a defense alliance with the U.S., allows stationing of U.S. Forces, prepositioning of U.S. materiel, or allows U.S. military exercises or operations in the country. No specific formal agreement is required. The DoD, however, may NOT provide LSSS to the foreign nation if it has not entered into an approved ACSA with that foreign nation.

b. LSSS definition, 10 U.S.C. § 2350. Congress defines LSSS as: food, billeting, transportation, POL, clothing, communication services, medical services, ammunition (generally limited to small arms ammunition like 5.56 mm rifle rounds), base operations support, storage services, use of facilities, training services, spare parts and components, repair and maintenance services, calibration services, and port services. Prohibited items are those designated as significant military equipment on the U.S. Munitions List promulgated under the AECA.

c. Special equipment transfer authority. In Section 1202 of the FY-07 NDAA, Pub. L. 109-364, (17 Oct 2006), Congress granted SECDEF specific authority to transfer, via ACSA, personnel survivability equipment to coalition forces in Iraq and Afghanistan. Section 1252 of the FY-08 NDAA and Section 1204 of the FY-09 NDAA expanded it to include the use of military equipment by the military forces of one or more nations participating in both combined operations and as part of a peacekeeping operation under the Charter of the United Nations or another international agreement. Section 1203 of the FY-11 NDAA further expanded the authority to permit loaning equipment for forces training to be deployed to Iraq, Afghanistan, or peacekeeping operations as well. This authority is for a lend period not to exceed one year, and it requires a Combatant Commander to make a finding of "no unfilled requirements" for U.S. personnel. It is most recently implemented by memorandum from the Deputy Secretary of Defense, Approval and Delegation of Authority to Transfer Personnel Protection Equipment and Other Personnel Survivability Significant Military Equipment to Certain Foreign Forces Using Acquisition and Cross-Servicing Agreement Authority, 30 April 2009. The FY-12 NDAA (sec. 1202) extended this special "ACSA-*lend*" authority through FY-14.

d. ACSA Transaction Approval Authority. The approval authority for ACSA transactions is delegated from the SECDEF to "ACSA Warranted Officers" within the Combatant Commands. The ACSA Warranted Officers receive a warrant, or authorization, to approve the transactions. Prior to executing any ACSA transaction, an ACSA Warranted Officer must approve the reimbursable transaction.

e. ACSA Reimbursement. Acquisitions and transfers executed under an ACSA may be reimbursed under three methods: Payment-In-Kind (PIK), Replacement-In-Kind (RIK), or Equal Value Exchange (EVE). *See*

[27] Most current ACSAs and a wealth of additional information is available online at a restricted-access website https://www.intelink.gov/wiki/Acquisition_and_Cross-Servicing_Agreements_%28ACSA%29.

U.S. DEP'T OF DEF., DIR. 2010.9, ACQUISITION AND CROSS-SERVICING AGREEMENTS (Apr. 28, 2003); *see also* Joint CHIEFS OF STAFF, INSTR. 2120.01B, ACQUISITION AND CROSS-SERVICING AGREEMENTS, (Feb. 13, 2013).

(1) Payment-In-Kind (PIK). This reimbursement option requires that the receiving defense department reimburse the providing defense department the full value of the LSSS in currency. For example, if the DoD provides $10,000 worth of tents to a foreign defense department, they reimburse us with $10,000 in currency. In accordance with the DoD FMR, the reimbursement must occur within 90 days of the initial provision of the LSSS.

(2) Replacement-In Kind (RIK). This reimbursement option requires that the receiving defense department reimburse the providing defense department by providing the same type of LSSS. For example, if the DoD provides 10 tents to a foreign defense department, the foreign defense department provides the exact same type of tents to the DoD in return. This often occurs when a foreign nation has the LSSS required in their inventory, but does not have the logistical capability to deliver the LSSS to their own troops in a contingency operation. In that situation, DoD may provide the LSSS to the foreign troops in the contingency location, and the foreign government provides the same type of LSSS to the DoD at another location. In accordance with the DoD FMR, the reimbursement must occur within one year of the initial provision of the LSSS.

(3) Equal Value Exchange (EVE). This reimbursement option requires that the receiving defense department reimburse the providing defense department by providing LSSS that has the same value as the LSSS initially provided. For example, the DoD may provide $10,000 in tents to the foreign nation via the ACSA, and the foreign nation may provide $10,000 worth of fuel as reimbursement. In accordance with the DoD FMR, the reimbursement must occur within one year of the initial provision of the LSSS.

f. ACSAs and Presidential Decision Directive (PDD) 25:

(1) Presidential Decision Directive (PDD) 25. On 6 May 1994, President Bill Clinton signed PDD 25, which remains in effect today. PDD 25 set the U.S. policy for all USG agencies (including DoD) with regards to the financing of combined exercises and operations with foreign nations. USG agencies should seek reimbursement for their activities in combined exercises and operations prior to accessing Congressional appropriations to fund those activities.[28]

(2) ACSA/AoA authority is the only Congressional authorization for DoD to receive direct reimbursement from foreign nations (through their defense ministries) for the costs of DoD-provided support in combined exercises and operations. As such, prior to accessing DoD appropriations to finance a foreign nation's LSSS in a combined exercise or operation, units should determine whether the foreign nation defense ministry has an ACSA/AoA with DoD, and if so, whether the foreign nation has the capability to reimburse DoD under the existing ACSA for any LSSS support that DoD provides.

(3) The fact that a foreign nation defense ministry has an ACSA in place with DoD does not create a requirement that all transactions with that foreign nation be reimbursable. The size and scope of the support should be considered in relation to that nation's capability to reimburse the U.S. for the required LSSS. Generally, developing nations with little reimbursement capability will not be required to reimburse the U.S. for LSSS (assuming that there is a U.S.-financed appropriation or authorization available to fund the requested LSSS). On the other hand, developed nations should normally reimburse the U.S. for any LSSS via an ACSA.

2. **Personnel Details, 10 U.S.C. § 712**. Authorizes the President to detail members of the armed forces to assist in military matters in any foreign nation of North, Central, or South America; the Republics of Haiti and Santo Domingo; or—during a war or a declared national emergency—in any other country. Personnel Details may be on a reimbursable or non-reimbursable basis.

3. **Global Lift and Sustain, 10 U.S.C. § 127d**. In Section 1201 of FY-07 NDAA, Congress codified this drawdown-like authority to use up to $100 million of DoD O&M per fiscal year to provide logistic supplies, services, and support (LSSS), including air-lift and sea-lift support, to partner nation forces worldwide in support of the GWOT. In section 1202 of the FY-11 NDAA, Congress expanded the authority to provide LSSS to enhance interoperability of logistical support systems, and also permitted the provision of LSSS to nonmilitary logistics, security, or similar agencies of allied governments if such provision would directly benefit U.S. forces. The approval authority for Global Lift and Sustain remains at the SECDEF level. Other limitations include:

[28] *See* Presidential Decision Directive 25, http://www.fas.org/irp/offdocs/pdd25.htm.

a. Prior to the use of this authority, the Secretary of State must concur with its use.

b. May only be used for a combined operation with U.S. forces carried out during active hostilities or as part of contingency operation or noncombat operation (i.e. humanitarian assistance, foreign disaster assistance, country stabilization, or peacekeeping operation). In essence, this authority may not be used to support training exercises, but may be used to provide assistance to allied forces supporting combined operations.

c. May not be used in Iraq and Afghanistan. The Necessary Expense Doctrine pre-empts the use of Global Lift and Sustain authority in Iraq and Afghanistan, since Iraq/Afghanistan Lift and Sustain is the more specific authorization.

4. **Emergency & Extraordinary Expenses ("EEE," or "Triple E"),** 10 U.S.C. § 127.

a. General. The SECDEF, the Inspector General (TIG), and the secretaries of the military departments may receive EEE funds for use of any type of emergency or extraordinary expenditure that cannot be anticipated or classified. The SECDEF, TIG, and the secretaries of the military departments may obligate the funds appropriated for such purposes as they deem proper; such determination is final and conclusive upon the accounting officers of the U.S. The SECDEF, TIG, and the secretaries of the military departments may delegate (and redelegate) the authority to obligate EEE funds. One of the common uses of "Triple E" authority is for Official Representation Funds, which are for official courtesies (including to foreign dignitaries) and other representation. They are regulated by DoDI 7250.13 and Army Regulation 37-47.

b. Congressional Notification. DoD Authorization Act for FY 1996 revised § 127 to require that SECDEF provide the Congressional defense and appropriations committees 15 days advance notice before expending or obligating funds in excess of $1 million, and five days advance notice for expenditures or obligations between $500,000 and $1 million. Pub. L. No. 104-106, § 915, 110 Stat. 413 (1996).

c. While the purposes these funds can be used for is broad, they are highly regulated and the amount appropriated is very small. The FY14 CAA authorized the following amounts for EEE:

(1) SECDEF: Authorization for the SECDEF to obligate up to $36M in DoD O&M for EEE purposes.

(2) Secretary of the Army: Authorization of $12.478M for Secretary of the Army EEE.

(3) Secretary of the Navy: Authorization of $15.055M for Secretary of the Navy EEE.

(4) Secretary of the Air Force: Authorization of $7.699M for Secretary of the Air Force EEE.

5. **Combatant Commander Initiative Funds (CCIF)**. 10 U.S.C. § 166a.

a. Purpose. CJCS may provide to Combatant Commanders (and NORAD) sums appropriated for the following activities: (1) Force training; (2) Contingencies; (3) Selected operations; (4) Command and control; (5) Joint exercises (including the participating expenses of foreign countries); (6) Humanitarian and Civil Assistance; (7) Military education and training to military and related civilian personnel of foreign countries (including transportation, translation, and administrative expenses); (8) Personnel expenses of defense personnel for bilateral or regional cooperation programs; and (9) Force protection. Section 902 of the FY-07 NDAA also codified "civic assistance, to include urgent and unanticipated humanitarian relief and reconstruction assistance" as a proper purpose for the use of CCIF.

b. Relationship to Other Funding. Any amount provided as CCIF for an authorized activity are "in addition to amounts otherwise available for that activity during the fiscal year."

c. Of $25M in DoD O&M funds made available for CCIF in FY14, no more than $20 million may be used to buy end items with a cost greater than $250,000; no more than $10 million may be used to pay the expenses of foreign countries participating in joint exercises; no more than $5 million may be used for education and training to military and related civilian personnel of foreign countries; and no funds may be used for any activity for which Congress has denied authorization.

6. **Emergency Contingency Operations Funding Authority**. This authority, under 10 U.S.C. § 127a (amended by DoD Authorization Act for FY 1996, Pub. L. No. 104-106, § 1003 (1996)), applies to certain "emergency" contingency operations for which Congress has not appropriated funds. The intent of the statute is to provide standing authority to fund DoD contingency operations for which DoD has not had the opportunity to

request funding. The statute authorizes SECDEF to transfer up to $200 million in any fiscal year to reimburse accounts used to fund operations for incremental expenses incurred for designated emergency contingency operations. This transfer authority funding is regulated by volume 12, chapter 23 of the DoD Financial Management Regulation, DoD 7000.14-R. Due to provisions requiring Congressional notification and GAO compliance reviews, this authority is rarely used.

a. This authority applies to deployments, other than for training, and humanitarian assistance, disaster relief, or support to law enforcement operations (including immigration control) for which:

(1) Funds have not been provided;

(2) Operations are expected to exceed $50 million; or

(3) The incremental costs of which, when added to other operations currently ongoing, are expected to result in a cumulative incremental cost in excess of $100 million.

b. This authority does *not* apply to operations with incremental costs not expected to exceed $10 million. The authority provides for the waiver of Working Capital Fund (WCF) reimbursements. Units participating in applicable operations receiving services from WCF activities may not be required to reimburse for the incremental costs incurred in providing such services. This statute restricts SECDEF's authority to reimburse WCF activities from O&M accounts. (In addition, if any activity director determines that absorbing these costs could cause an ADA violation, reimbursement is required.)

C. **DoD Overseas Contingency Operation (OCO) and Coalition Support Authorizations**. These uncodified, or "temporary" appropriations and authorizations consist primarily of logistical support for coalition allies. The general rule for foreign military training is that security assistance training of foreign militaries is authorized under Title 22 and funded by DoS from the annual Foreign Operations, Export Financing and Related Programs Appropriations Act (FOAA). Exceptions to this rule occur when there are specific statutory authorizations (Title 10) or when the training is incident to U.S. military training. The general rule for foreign police training is that no funds shall be used to provide training or advice to police, prisons, or other law enforcement forces for any foreign government. Exceptions include Iraq Security Forces Fund (ISFF)/Afghanistan Security Force Fund (ASFF) and Pakistan Counterinsurgency Fund (PFC), assistance for sanctions monitoring and enforcement, and assistance for reconstitution of civilian police authority and capability in post-conflict restoration.

1. **Coalition Support Fund (CSF)**. The current authorization of $1.5B for the CSF is found in Section 1213 of the FY14 NDAA. Originally enacted in section 1223 of the FY-10 NDAA, the amount and authority has been modified and extended numerous times. This fund was established to reimburse Pakistan, Jordan, and other key cooperating nations for logistical and military support provided to U.S. military operations in connection with military action in Iraq and Afghanistan. Notably, this appropriation now includes "access" and specialized training as additional purposes. DSCA administers this fund.

2. **Afghanistan Lift and Sustain**. This authority is currently authorized under Section 1217 of the FY14 NDAA. Its purpose is to "provide supplies, services, transportation, including airlift and sealift, and other logistical support to coalition forces supporting military and stability operations in Afghanistan" from DoD O&M. This authority is similar to "global lift and sustain," except that it is geographically limited to Afghanistan . Practitioners should note that:

a. Section 1234 of the 2008 NDAA limited the amount of DoD O&M that the SECDEF may obligate for Afghanistan Lift and Sustain to $400 Million for that fiscal year; however , this limitation was increased to $450,000,000 by section 1211 of the FY-12 NDAA.

b. Note: The key distinction between lift & sustain and the Coalition Support Fund (CSF) is that the CSF is used to reimburse countries for costs they incur, and the lift & sustain authority is for military departments to fund costs incurred for services provided to support eligible countries.

3. **Afghanistan Security Forces Fund (ASFF)**. In 2005, Congress created two appropriations, the Afghanistan Security Forces Fund and the Iraq Security Forces Fund, to enable the DOD to "train and equip" the security forces of Afghanistan and Iraq, respectively. Congress initially appropriated $1.285 billion for the ASFF and $5.7 billion for the ISFF, to remain available for new obligations until Sept. 30, 2006. Since fiscal year 2005, Congress has generally appropriated ISFF/ASFF funds on a yearly basis with a period of availability of two years. Most recently, in the FY-12 DoDAA, Congress appropriated an additional $11.2 billion for the ASFF, and removed

the ISFF from the appropriation. The ASFF is available to the SECDEF "for the purpose of allowing the Commander, Combined Security Transition Command-Afghanistan, or the Secretary's designee, to provide assistance, with the concurrence of the Secretary of State, to the security forces of Afghanistan, including the provision of equipment, supplies, services, training, facility and infrastructure repair, renovation, and construction, and funding[.]" Note, the security forces must be under the control of the government of Afghanistan (GIRoA). Further, the Afghanistan Resources Oversight Council (AROC) must approve all service requirements over $50 million and all non-standard equipment requests over $100 million.

4. **Building Partner Capacity (BCP) or "Train and Equip" Authority (introduced in 2006 NDAA § 1206; current authorization at 2014 NDAA § 1201).** Section 1206 of the FY06 NDAA, as amended most recently by section 1201 of the FY14 NDAA, provides DoD with the authority to "build the capacity" of foreign military forces in support of Overseas Contingency Operations.

a. § 1206 "Train and Equip" (T&E) authority allows DoD to build the capacity of a foreign country's national military forces in order for that country to—

(1) conduct counterterrorist operations; or

(2) to participate in or support military and stability operations in which the United States Armed Forces are a participant.

(3) the 2009 NDAA expanded this authority to include building the capacity of maritime security forces conducting counterinsurgency operations.

b. Authorizes the SECDEF to approve the use of $100 million annually in DoD O&M until FY17. This authority is available for military forces and not security/police forces (other than certain maritime forces). It is also not available in nations where DoS assistance is prohibited by other laws.

c. Section 1201 of the FY-13 NDAA added small-scale military construction to the scope of permissible funding activities. It went on to establish a $750,000 per project limit and to establish a $25 million cumulative total for construction projects.

d. Requires concurrence of the Secretary of State and 15-day prior Congressional notification. This program is available for new obligations until 30 September 2013.

5. The Special Operations Forces (SOF) fund equivalent for "**§** 1206 BCP" was originally authorized in § 1208 of the 2006 NDAA. It is currently authorized in § 1203 of the 2012 NDAA, though it is still often called "§ 1208 funds." The FY-12 NDAA authorized $50 million annually and extended the authorization through FY-15.

6. **Building Capacity of Certain Counterterrorism (CT) forces in Yemen and East Africa**. In § 1203 of the 2013 NDAA, Congress authorized not more than $75 million annually, of which $10 million can be used for minor construction, to enhance Yemen, Djibouti, Kenya, and Ethiopia's CT forces and ops against Al Qaeda, Al Qaeda affiliates, and al Shabaab. Use of this authority requires SECSTATE concurrence, and the authority currently expires 30 Sep 2014.

7. **Training o Foreign Forces by General Purpose Forces.** In § 1203 of the 2014 NDAA, Congress provided DoD with the authority to conduct training with friendly foreign forces. General purpose forces are those forces that do not fall under the special operations authority or command structure. Congress provided the following limitations to this particular type of training:

a. Requires SECDEF approval prior to executing any training under this authority.

b. Requires concurrence of the Secretary of State and 15-day prior Congressional notification.

c. The type of training authorized by this provision is limited to training that supports the mission essential tasks for the training unit, be with a friendly foreign force that has similar organization and equipment, observes respect for human rights, and respects the legitimate civilian authority within the foreign country concerned.

d. A Service Secretary may approve payment for incremental expenses incurred by the friendly foreign country; however, Congress limited the amount of incremental expenses in any fiscal year to $10 million.

D. **DoD Assistance to Allies, Title 10 Training Authorizations and Appropriations**. In determining if we are training foreign forces primarily for their benefit, Congress defines "training" very broadly: "[T]raining includes

formal or informal instruction of foreign students in the United States or overseas by officers or employees of the United States, contract technicians, or contractors (including instruction at civilian institutions), or by correspondence courses, technical, educational, or information publications and media of all kinds, training aid, orientation, training exercise, and military advice to foreign military units and forces." AECA § 47(5) (22 U.S.C. § 2794(5). The FAA § 644 (22 U.S.C. § 2403) contains a substantially similar definition, though "training exercises" is omitted. The default setting for training with foreign forces is that it is Security Assistance that must be completed by FMS or IMET or other DoS authority. Although the following authorizations provide DoD with the appropriations and/or authorizations to conduct Security Assistance training that would normally be conducted by the Department of State, most of these DoD Security Assistance training authorizations may require a program to be forwarded for approval to the SECDEF, and may also require Secretary of State concurrence, and/or prior notification to Congress.

1. **Special Operations Forces (SOF) Training**. 10 U.S.C. § 2011, SOF Training as Joint Combined Exchange Training (JCET).

a. Scope. The Commander of U.S. Special Operations Command and the commander of any other Combatant Command may pay any of the following expenses relating to the training of SOF of the combatant command: (1) expenses of training the SOF assigned to the command in conjunction with training with the armed forces and other security forces of a friendly foreign country; (2) expenses of deploying SOF for the training; and (3) incremental expenses incurred by the friendly developing foreign country incurred as the result of the training.

b. Definitions. SOF includes civil affairs and psychological operations forces. Incremental Expenses include the reasonable and proper cost of goods and services consumed by a developing country as a direct result of the country's participation in a bilateral or multilateral exercise, including rations, fuel, training, ammunition, and transportation. The term does not include pay, allowances, and other normal costs of the country's personnel.

2. **Multilateral Conferences, Seminars, and Meetings**.

a. The Need for Express Authority. 31 U.S.C. § 1345: "Except as specifically provided by law, an appropriation may not be used for travel, transportation, and subsistence expenses for a meeting." 62 Comp. Gen. 531 (1983): "[T]here is a statutory prohibition against paying the travel, transportation, and subsistence expenses of non-Government attendees at a meeting. . . . By using the word 'specifically' Congress indicated that authority to pay travel and lodging expenses of non-Government employees should not be inferred but rather that there should be a definite indication in the enactment that the payment of such expenses was contemplated." See also B-251921 (14 Apr. 1993); 55 Comp. Gen. 750 (1976).

b. General Authorities. U.S. Civilian Employees & Military Personnel. *See, e.g.*, 5 U.S.C. §§ 4109-4110; 31 U.S.C. § 1345(1); 37 U.S.C. § 412. Individuals Performing Direct Services for the Government. GAO, I Principals of Federal Appropriations Law 4-44 to 4-51 (3d ed. 2004); *see also* B-242880 (27 Mar. 1991); 8 Comp. Gen. 465 (1929); Joint Travel Regulations ¶ C.6000.3.

c. Military Cooperative Authorities for Conferences, Meetings, and Threat Reduction

(1) **Latin American Cooperation (LATAM COOP)**, 10 U.S.C. § 1050. Authorizes the service secretaries to fund the travel, subsistence, and special compensation of officers and students of Latin American countries and other expenses the secretaries consider necessary for Latin American cooperation.

(2) **African Cooperation**, 10 U.S.C. § 1050a. Originally created in section 1204 of the 2011 NDAA, this authorizes the service secretaries to fund the travel, subsistence, and special compensation of officers and students of African countries and other expenses the secretaries consider necessary.

(3) **Bilateral or Regional Cooperation Programs**, 10 U.S.C. § 1051.

(a) Travel Expenses. The SECDEF may authorize the payment of travel, subsistence, and similar personal expenses of defense personnel of developing countries "to and within the area of responsibility in which the bilateral or regional conference…is located…," if the SECDEF deems attendance in U.S. national security interest.

(b) Other Expenses. The SECDEF may pay such other expenses in connection with the conference, seminar, or meeting, as he considers in the national interest.

(c) Additional Funding Authority. The authority to pay expenses under section 1051 is in addition to the authority under LATAM COOP, 10 U.S.C. § 1050. *See* DoD Authorization Act for FY-97, Pub. L. 104-201 § 1065 (1996) (10 U.S.C. § 113 note) for Marshall Center Participants.

(4) **Regional Centers for Security Studies**. 10 U.S.C. § 184. The SECDEF may waive reimbursement of the cost of activities of the Regional Centers for Security Studies for foreign military officers and foreign defense and security civilian government officials from a developing country if in U.S. national security interest.

(5) **Cooperative Threat Reduction (CTR) with States of the Former Soviet Union (FSU)**. Congress appropriates funds for assistance to the republics of the former Soviet Union and other countries to facilitate a variety of programs aimed at reducing the threat from nuclear, chemical, and other weapons. In the FY14 CAA, Congress provided $500,455,000.00 in three-year funds (available until September 30, 2016).

3. **Multinational Military Centers of Excellence (MCOE)**. 10 U.S.C. § 2350m. This authority permits the SECDEF, with concurrence of the Secretary of State, to authorize the participation of members of the armed forces and DOD civilians in any multinational military center of excellence for specific purposes, and makes O&M funding available for operating expenses and the costs of participation.

4. **Bilateral & Multilateral Exercise Programs, Developing Countries Combined Exercise Program (DCCEP)**, 10 U.S.C. § 2010.

a. Scope. After consulting with the Secretary of State, the SECDEF may pay the incremental expenses of a developing country incurred by the country's participation in a bilateral or multilateral exercise, if —

(1) the exercise is undertaken primarily to enhance U.S. security interests; and

(2) SECDEF determines the participation of the participating country is necessary to achieve the "fundamental objectives of the exercise and those objectives cannot be achieved unless the U.S. pays the incremental expenses . . . ."

b. Definition of Incremental Expenses. "Incremental expenses" are reasonable and proper costs of goods and services consumed by a developing country as a direct result of the country's participation in exercises, including rations, fuel, training, ammunition, and transportation. The term does not include pay, allowances, and other normal costs of the country's personnel.

E. **Title 10 Humanitarian Assistance (HA) Authorizations and Appropriations**.

1. Introduction to DoD Humanitarian Assistance.

a. In the Honorable Bill Alexander opinion, the GAO established the limitations on DoD's ability to conduct humanitarian assistance. "[I]t is our conclusion that DoD's use of O&M funds to finance civic/humanitarian activities during combined exercises in Honduras, in the absence of an interagency order or agreement under the Economy Act, was an improper use of funds, in violation of 31 U.S.C. § 1301(a)." Generally, Humanitarian Assistance is "ordinarily carried out through health, education, and development programs under the Foreign Assistance Act of 1961, 22 U.S.C. § 2151 *et seq*." *See*, The Honorable Bill Alexander, B-213137, 63 Comp. Gen. 422 (1984).

b. Humanitarian assistance is authorized by 10 U.S.C. § 2561. This authority is funded by the Overseas Humanitarian Disaster and Civic Aid (OHDACA) appropriation. It is regulated by the Defense Security Cooperation Agency (DSCA), and policy guidance for its use in found at chapter 12 of the Security Assistance Management Manual (SAMM), DoD 5105.38-M.

2. Immediate Response Authority

a. **Immediate Foreign Disaster Relief**. DoD Directive 5100.46 outlines various responsibilities for DoD components in undertaking foreign disaster relief operations in response to a Department of State request. However, paragraph 4.f. provides that the Directive does not prevent "a military commander with assigned forces near the immediate scene of a foreign disaster from taking prompt action to save human lives." *See* DoD Directive 5100.46, Foreign Disaster Relief (July 6, 2012).

b. **Immediate Response Authority for Domestic Emergencies**. DoD Directive 3025.18 outlines various responsibilities for DoD components in undertaking domestic disasters or emergencies in accordance with

the Stafford Act, 42 U.S.C. § 5121. Similar to the foreign disaster immediate response authority, military commanders, heads of DoD Components, and responsible DoD civilian officials have "immediate response authority…. under imminently serious conditions and if time does not permit approval from higher authority… to save lives, prevent human suffering, or mitigate great property damage within the United States." *See* DoD Directive 3025.18, Defense Support of Civil Authorities (DSCA) (29 Dec. 2010). *See also* OPNAVINST 3440.16D, and MCO 3440.7A.

c. **Emergency Medical Care**. AR 40-400 authorizes the commander to provide medical care to any person in an emergency "to prevent undue suffering or loss of life." AR 40-400, Patient Administration, ¶ 3-55 (15 Sep. 2011).

3. **Overseas Humanitarian, Disaster, and Civic Aid (OHDACA)**. The primary purpose of the OHDACA appropriation is for DoD to conduct Overseas Humanitarian, Disaster, and Civic Aid programs under the following permanent title 10 authorities: 401, 402, 404, 407, 2557, and 2561.

a. **Transportation of Humanitarian Relief Supplies for NGOs**, 10 U.S.C. § 402.

(1) Scope of Authority. SECDEF may transport to any country, without charge, supplies furnished by NGOs intended for humanitarian assistance. Transport permitted only on a space-available basis. Supplies may be distributed by U.S. agencies, foreign governments, international organizations, or non-profit relief organizations.

(2) Preconditions. Before transporting supplies, SECDEF must determine —

(a) the transportation of the supplies is consistent with U.S. foreign policy;

(b) the supplies to be transported are suitable for humanitarian purposes and are in usable condition;

(c) a legitimate humanitarian need exists for the supplies by the people for whom the supplies are intended;

(d) the supplies will, in fact, be used for humanitarian purposes; and

(e) adequate arrangements have been made for the distribution of the supplies in the destination country.

(3) **Limits**. Supplies transported may not be distributed (directly or indirectly) to any individual, group, or organization engaged in military or paramilitary activities.

b. **Foreign Disaster Assistance**, 10 U.S.C. § 404. The President may direct the SECDEF to provide disaster assistance outside the U.S., to respond to manmade or natural disasters when necessary to prevent the loss of life. Amounts appropriated to DoD for Overseas Humanitarian, Disaster, and Civic Aid (OHDACA) are available for organizing general policies and programs for disaster relief programs.

(1) Delegation of Authority. The President delegated to the SECDEF the authority to provide disaster relief, with the Secretary of State's concurrence. In emergencies when there is insufficient time to seek the concurrence of the Secretary of State, the SECDEF may authorize the disaster relief and begin execution, provided the SECDEF seeks Secretary of State concurrence as soon as practicable thereafter. See E.O. 12966, 60 Fed. Reg. 36949 (14 Jul. 1995).

(2) Types of Assistance. Transportation, supplies, services, and equipment.

(3) Notice to Congress. Within 48 hours of commencing relief activities, President must transmit a report to Congress. All costs related to these disaster relief operations are funded from the OHDACA appropriation.

c. **Humanitarian Demining Assistance**, 10 U.S.C. § 407. Under SECDEF regulations, the Service Secretaries may carry out humanitarian demining assistance in a country if it will promote either the security interests of both the U.S. and the country in which the activities are to be carried out, or the specific operational readiness skills of the members of the armed forces participating in the activities.

d. **Excess Nonlethal Supplies for Humanitarian Relief**, 10 U.S.C. § 2557.

(1) The SECDEF may make available for humanitarian relief purposes any DoD nonlethal excess supplies. Excess supplies furnished under this authority are transferred to DoS, which is responsible for distributing the supplies. "Nonlethal excess supplies" means property that is excess under DoD regulations and is not a weapon, ammunition, or other equipment or material designed to inflict serious bodily harm or death. If the required property is in the excess property inventory, it is transferred to the Secretary of State for distribution to the target nation. This statute does not contain the authority to transport the items, though it may be provided under authority of 10 U.S.C. § 2561, below.

(2) In § 1074 of the FY-11 NDAA, Congress expanded this authority by adding support for domestic emergency assistance activities as a proper purpose. Excess supplies made available for such purposes are to be transferred to the Secretary of Homeland Security instead of USAID, although DoD may still provide assistance in the distribution of such supplies.

e. **Humanitarian Assistance**, 10 U.S.C. § 2561.

(1) Scope of Authority. To the extent provided in authorization acts, funds appropriated to DoD for humanitarian assistance shall be used for providing transportation of humanitarian relief and other humanitarian purposes worldwide.

(2) Funds. Funded from OHDACA appropriations, which usually remain available for two years.

(3) General. This authority is often used to transport U.S. Government donated goods to a country in need. (10 U.S.C. § 402 applies when relief supplies are supplied by non-governmental and private voluntary organizations.) "Other humanitarian purposes worldwide" is not defined in the statute. Generally, if the contemplated activity falls within the parameters of HCA under 10 U.S.C. § 401, then the more specific HCA authority should be used (s*ee* HCA authority below). 10 U.S.C. § 2561 primarily allows more flexibility in emergency situations such as disasters (natural or man-made), and it allows contracts if necessary for mission execution. While HCA under 10 U.S.C. § 401 generally requires pre-planned activities and must promote operational readiness skills of the U.S. participants, section 2561 does not require the promotion of operational readiness skills of the U.S. military participants. Also, unlike HCA, which must be conducted in conjunction with an exercise or on-going military operation, humanitarian assistance (HA) can be conducted as a stand-alone project. Section 312 of the FY04 NDAA Act amended 10 U.S.C. § 2561 to allow SECDEF to use this authority to transport supplies intended for use to respond to, or mitigate the effects of, an event or condition that threatens serious harm to the environment (such as an oil spill) if other sources of transportation are not readily available. The SECDEF may require reimbursement for the costs incurred by DoD to transport such supplies. Judge Advocates must obtain and review for implementation purposes the DoD message on current guidance for Humanitarian Assistance Activities.

4. **Humanitarian & Civic Assistance (HCA)**, 10 U.S.C. § 401. There are three funding sources for HCA: OHDACA; O&M; and for "minimal cost" HCA, unit O&M funds may be available, depending on DoD and Combatant Commander's policy guidance.

a. **Pre-Planned (or "Budgeted") HCA**.

(1) Scope of Authority. Secretary concerned may carry out HCA in conjunction with authorized military operations of the armed forces in a country if the Secretary determines the activities will: (1) promote the security interests of the U.S. and the country where the activities will be carried out; and (2) the specific operational readiness skills of the servicemembers who will participate in the activities.

(2) Definition. Pre-Planned HCA under 10 U.S.C. § 401 means:

(a) medical, dental, surgical, or veterinary care in rural or underserved areas;

(b) construction of rudimentary surface transportation systems;

(c) well drilling and construction of rudimentary sanitation facilities;

(d) rudimentary construction and repair of public facilities; and

(e) detection and clearance of landmines, including education, training, and technical assistance.

(3) Limits. (1) May not duplicate other forms of U.S. economic assistance; (2) May not be provided (directly or indirectly) to any individual, group, or organization engaged in military or paramilitary

activities; (3) SECSTATE must specifically approve assistance; (4) Must be paid out of funds budgeted for HCA as part of the service O&M appropriations; (5) U.S. personnel may not engage in the physical detection, lifting, or destroying of landmines (except concurrent with U.S. military operation), or provide such assistance as part of a military operation not involving U.S. forces; and (6) Expenses funded as HCA shall include the costs of consumable materials, supplies, and services reasonably necessary to provide the HCA. They shall not include costs associated with the military operation (e.g., transportation, personnel expenses, POL) that likely would have been incurred whether or not the HCA was provided. *See* DoD Instruction 2205.2, "Humanitarian and Civic Assistance (HCA) Activities" (2 Dec. 2008).

b. "**Minimal Cost" HCA**. 10 U.S.C. § 401(c)(4) Based on language in the authorizing statute (10 U.S.C. 401), and also by language in the yearly DoDAA, certain costs associated with HCA may be funded from O&M other that the "pot" of O&M specifically appropriated for HCA projects. O&M is authorized for "costs incidental to authorized [HCA] operations." Judge Advocates should consult COCOM policy guidance on the use of both "budgeted" and incidental cost HCA associated with O&M funded projects.

5. HCA vs. OHDACA from a funding perspective. 10 U.S.C. § 401 "Pre-planned" or "budgeted" HCA is funded from DoD O&M. 10 U.S.C. § 401 de minimus HCA is funded from the unit's O&M account. All the other Humanitarian Assistance authorizations are funded from the OHDACA appropriation.

6. § 2561 "HA," § 401 "Pre-planned HCA," and the Election Doctrine. If the assistance fits § 401 in every respect, and satisfies all the requirements for the use of § 401 HCA, then the unit should use § 401 HCA. If the assistance does not satisfy the requirements for the use of § 401 HCA, but still has a humanitarian purpose, then the unit should use the § 2561 HA authorization.

F. **Special Authorities in Counterinsurgency**

1. **Commander's Emergency Response Program (CERP)**. CERP is a statutory authorization to obligate funds from the DOD O&M appropriation for the primary purpose of authorizing U.S. military commanders "to carry out small-scale projects designed to meet urgent humanitarian relief requirements or urgent reconstruction requirements within their areas of responsibility" that provide an "immediate and direct benefit to the people of Afghanistan." The CERP authority is found at § 1211 of the FY14 NDAA. CERP is an important authority to commanders in Afghanistan. It is essential that Judge Advocates study the relevant CERP laws, policy guidance from DoD, and theater regulations, as CERP requirements and management controls are frequently changing. The Money As A Weapon System – Afghanistan (MAAWS-A) is important theater policy guide for the use of CERP. Judge Advocates can find the most recent editions on the CLAMO website.

a. **CERP Appropriated Funding**. Section 1211 of the FY14 NDAA authorized $60M for CERP for FY14. Section 9005 of the FY14 CAA made available up to $30M in OMA funds for CERP.

(1) Section 1201 of the FY12 NDAA includes "waiver authority." The language in the Authorization Act states that, "[f]or purposes of the exercise of the authority provided by this section or any other provision of law making funding available for the Commanders' Emergency Response Program...the Secretary may waive any provision of law not contained in this section that would (but for the waiver) prohibit, restrict, limit, or otherwise constrain the exercise of that authority."

(2) Based on prior authorizations, the SECDEF has periodically waived the Competition in Contracting Act requirements for CERP-funded projects. *See, e.g.*, Memorandum from the Honorable William J. Lynn, Deputy Secretary of Defense, to the Secretaries of the Military Departments, et. al, subject: Waiver of Limiting Legislation for Commander's Emergency Response Program (CERP) for FY 2010 (May 24, 2010). As a result, CERP-funded projects did not need to follow the competition requirements of the Federal Acquisition Regulation (FAR). Judge Advocates should look for the most recent waiver memorandum to ensure proper application in the use of CERP.

(3) The SECDEF has also periodically waived the Foreign Claims Act (FCA). As a result, CERP may fund condolence payments and battle damage claims that are normally barred by the FCA.

b. **DoD Guidance for CERP**. DoD regulates CERP through the DoD Financial Management Regulation (DoD FMR) Volume 12, Chapter 27 (last update January 2009). While this guidance is somewhat out-of-date, having not been updated to reflect significant statutory changes to CERP made since 2009, it is still mandatory reading for anyone intending to use CERP funds and is available as an appendix to this chapter.

(1) **Battle Damage Claims**. CERP appropriated funds may be used to repair property damage to that results from U.S., coalition, or supporting military operations that are not otherwise compensable under the Foreign Claims Act.

(2) **"Solatia-like" or "condolence" payments**. CERP appropriated funds may be used for condolence payments to individual civilians for the death or physical injury resulting from U.S., coalition, or supporting military operations that are not compensable under the Foreign Claims Act. Condolence payments may also include payments ("martyr payments") to surviving spouse or kin of defense or police personnel killed as a result of U.S., coalition, or supporting military operations.

(3) **Reward/microrewards and Weapons Buy-Back Programs**. CERP appropriated funds *may not* be used to pay rewards or fund any type of weapon buy-back program. Title 10, U.S.C. § 127b, provides the authority for the Rewards Program.

2. **Rewards Program**, 10 U.S.C. § 127b. Allows the military to pay monetary rewards to foreign individuals for providing USG personnel with information or nonlethal assistance that is beneficial to:

a. An operation or activity of the armed forces conducted outside the U.S. against international terrorism; or

b. Force protection of the armed forces.

c. Although NOT a weapons buy-back program (DoD currently has no program for a buy-back program), rewards can be paid for information leading to the recovery of enemy weapons.

d. Though a "permanent" Title 10 authority, the NDAA or DoDAA must authorize O&M funding for this program. § 1021 of the FY23 NDAA authorizes O&M funding for this program until 30 September 2014.

e. Congress set specific statutory approval authorities and amounts for the rewards program. SECDEF may approve individual rewards up to $5M, though DoS concurrence is required for rewards over $2M.

f. The statute permits delegation of approval authority to lower echelon commanders for individual reward amounts not to exceed $10,000. Theater policies, such as those found in the Money As A Weapon System (MAAWS) guides, provide pre-approved "micro-reward" authority. These programs permit Company-level commanders to pay out individual rewards in "pre-approved" amounts when certain criteria are met. Judge Advocates should become familiar with policy limitations on the micro-reward program, while also reminding commanders that Congress has set specific dollar limits on the approval authority levels for reward payouts.

G. **Afghanistan Infrastructure Fund (AIF).** The AIF was established under § 1217 of the FY-11 NDAA with $400M in funding appropriated by the FY-11 DoDAA. It is intended to fund infrastructure projects in Afghanistan in support of the counterinsurgency strategy, including but not limited to water, power, transportation projects, and related maintenance and sustainment costs. The AIF is currently authorized in section 1215 of the FY14 NDAA with $250 million authorized for FY14.

1. The AIF provides an interesting lesson regarding the level of Congressional scrutiny for special foreign assistance authorities provided to DoD, like CERP, and the importance of ensuring that such authorities are used appropriately and in accordance with Congressional intent. In July 2010, then-Chairman Ike Skelton of the House Armed Services Committee sent a letter to the SECDEF objecting to proposed large-scale ($225M) CERP projects that were, in his view, not proper or well-advised uses of CERP. Lo and behold, § 1212 of the FY-11 NDAA (a law which was actually named for Chairman Skelton) imposed new limitations on the use of CERP, barring any project exceeding $20M and establishing new notification requirements for projects in Afghanistan with a total anticipated cost of $5M or more. While Congress established the new AIF in the same Act, showing that they did not object to all large-scale projects, this example made clear that Congress will act swiftly and decisively to change or limit DoD foreign assistance authorities when they view DoD actions as inconsistent with congressional intent.

2. AIF projects are to be jointly formulated by the Secretary of State and the SECDEF, and undertaken by the Secretary of State, unless jointly determined that DoD should undertake the project itself.

H. Conclusion. Between the DoS and DoD appropriations and authorizations discussed *infra*, Congress has provided the funds necessary for DoD to fund the vast majority of contingency operations. The key for the legal practitioner is to identify the proper appropriation and/or authorization that would allow DoD to legally fund the

mission. Once the proper fund(s) are identified and the unit makes the policy decision to access an appropriation or authorization to fund a mission, the legal practitioner should assist the unit in requesting, and receiving, the identified funds from the proper approval levels.

X. DOD PROPERTY DISPOSAL AUTHORITIES

A. **Property Disposal Introduction**. As with foreign assistance, the DoS, under the current statutory framework, has the primary responsibility for the disposal of U.S.-taxpayer purchased property to any foreign entity. However, in overseas theaters, and especially in contingency operations, DoD uses some existing authorities to dispose of property, including military property. Practitioners should consult with DSCA, the traditional executive agent for the DoD's role in property disposal and/ or selling property to a foreign government or entity. Even with relatively new special authorities, the processes developed in DSCA's regulations are often the foundation for processes that are implementing new legislation for property disposal.

B. **FEPP Introduction**. Title 40, chapter 7 of the United States Code, authorizes the head of an executive agency to "dispose of foreign excess property in a manner that conforms to the foreign policy of the United States." See 40 U.S.C. § 701(b)(2)(B). This authority comes from the Federal Property and Administrative Services Act of 1949 (41 U.S.C. § 251, *et seq.*).

1. DoD 4160.21-M, Defense Materiel Disposition Manual, sets forth the policy and process for Disposing of Foreign Excess Personal Property. Practitioners should note that "foreign excess personal property" is a term of art defined in the statute and regulations. It is distinct from "excess and surplus," which applies to the DLA Disposition Services process (the baseline process to dispose of U.S.-DoD property while overseas).

2. A series of memoranda provide transfer authority to lower echelon commanders in Afghanistan. The memoranda describe the nature and type of property that can be transferred, as well as the approval authority limits for certain commanders and the locations eligible for FEPP transfers to entities within Iraq. These memoranda affect the statutory requirement that a head of an agency make a determination that the property is not required to meet the agency's needs or responsibilities.

3. Section 1222 of the FY13 NDAA provides authority to transfer defense articles to the Afghanistan military and security services. Under this authority, DoD may transfer non-excess defense articles for DoD stock without reimbursement. This authority is in addition to the transfer authority provided for in the Foreign Assistance Act (§ 516, Authority to Transfer Excess Defense Articles) discussed *supra*. Authority currently expires on 31 Dec 2014, is limited to $250 million per fiscal year, and requires concurrence of SECSTATE.

C. **DLA Disposition Services Introduction**. The DLA Disposition Services (formerly the Defense Reutilization and Marketing Service, or DRMS) is the "baseline" authority for DoD to dispose of durable (investment item) DoD property (including all military equipment) purchased with appropriated funds. It has the authority to use business judgment in determining the most appropriate and economical manner of disposal. The disposal procedure that DLA Disposition Services chooses for a specific piece of government property, however, must conform to all DoD and USG statutory and regulatory restrictions (e.g., although DLA Disposition Services may "abandon" some types of government property, it may not "abandon" a nuclear warhead, because this would violate statutory and regulatory procedures for the disposal of such items). DLA Disposition Services co-locates its subordinate offices (still often referred to under their former name of Defense Reutilization and Marketing Offices (DRMOs)) with DoD units world-wide, usually at the post/installation level or the CJTF (Division) level in contingency environments.

D. **DLA Disposition Services Statutory Authority to Dispose of DoD equipment**. DLA Disposition Services derives its statutory authority from a delegation of disposal authority by the General Services Administration (GSA). DLA Disposition Services is a field activity of DLA.

1. 40 U.S.C. § 101 authorizes the GSA to dispose of federal government property (both real and personal property).

2. 40 U.S.C. § 121(d) authorizes the GSA to delegate disposal authority to the head of another agency.

3. DLA Disposition Services Disposal Authority. In 1972, DRMS was created as a subordinate element to DLA. That year, GSA delegated the authority to dispose of DoD equipment to DRMS via DoD and DLA. Prior to the creation of DRMS, disposal authority of DoD property resided at DLA. In 2010, DRMS changed its name to DLA Disposition Services.

E. **DLA Disposition Services Disposal Process**. Generally, DLA Disposition Services has the authority to dispose of DoD property through reutilization, transfer, donation, usable sales, scrap sales, abandonment, and destruction, in order of disposal priority. Once DLA Disposition Services advertises the government property to be disposed of, multiple government entities may have a need for the property. Therefore, DLA Disposition Services assigns the following four priorities to government elements requesting DLA Disposition Services -owned property (*see* DRMS-I 4160.14):

1. **Priority 1, Reutilization**. DoD property that is turned in to DLA Disposition Services and is requisitioned by another DoD component.

a. After DoD property is turned in to DLA Disposition Services and is ready for reuse, for the first 14-day window, the DLA Disposition Services property may be requisitioned only by DoD components and "Special Programs."

b. "Special Programs": Designated non-DoD USG programs that also receive Priority 1 status and rights. Special Programs include: Foreign Military Sales (DoS), Computers for Schools (Dept. of Ed.), and Equipment for Law Enforcement (FBI, ICE, DHS).

2. **Priority 2, Transfer**. DoD property that is turned in to DLA Disposition Services and is not needed within DoD, but is needed by another USG agency.

a. After the first 14-day window with no Priority 1 requisition requests, the property enters a 21-day window in which non-DoD USG agencies may requisition the property.

b. During the 21-day Priority 2 window, the property may be requisitioned only by Priority 2 USG components.

3. **Priority 3, Donation**. DoD property that is turned in to DLA Disposition Services and is not needed by any USG agency.

a. After the Priority 2 requisition window closes with no USG requisition requests, the property enters the Priority 3 five-day window where DLA Disposition Services may donate the property to approved state governments and organizations.

b. Priority 1-3 "Final Screening": If no approved state government agencies and organizations wish to receive donation of the property, then the property receives a 2-day final screening and "last chance" requisition window for Priority 1-3 components, agencies, and approved governments and organizations.

4. **Priority 4, Sales**. DoD property that is turned in to DLA Disposition Services and is not needed by any USG agency nor may be donated to approved state agencies and organizations may now be sold to the general public. Normally, these sales occur via public auctions.

a. All DoD property with military capabilities must be demilitarized prior to sale to the general public. If an item cannot be demilitarized, it cannot be sold and must be destroyed.

b. DoD property that has been demilitarized may be sold as either "usable sales" or "scrap sales." Usable sales occur when an item, although demilitarized, may still be used by the general public for the originally intended purpose of the item. For example, a WW II Jeep that is in a significantly usable state of operation may be a usable sale. Scrap sales, on the other hand, occur when the item is sold simply for the scrap value of the materials with which it was created.

5. **Abandonment or Destruction**. DoD property that is turned in to DLA Disposition Services and cannot be disposed of by any other method may be abandoned or destroyed. Additionally, DoD military equipment that cannot be demilitarized may not be sold or abandoned, and must be destroyed.

6. General DLA Disposition Services Guidelines applicable to all DLA Disposition Services disposal procedures.

a. Components, agencies, state government agencies, approved organizations, and private individuals may generally requisition or purchase DLA Disposition Services property on an "as is/where is" basis. See DRMS-I 4160.14.

b. Receiving agencies, organizations, and/or public individuals that requisition or purchase DLA Disposition Services equipment must pay for all costs related to Packaging, Crating, Handling, and Transportation (PCH&T) of the DLA Disposition Services property from the local office where the equipment was originally turned in to the receiver's location. PCH&T costs include the costs of inspection of the items by other USG agencies whenever the items re-enter the United States from their OCONUS locations.

F. **Conclusion**. Contact DLA Disposition Services immediately if you are considering the disposal of DoD property. DLA Disposition Services is the only DoD element with statutory authority to dispose of durable (investment item) DoD property (including military equipment) purchased with appropriated funds. Disposal of DoD government property outside of DLA Disposition Services-authorized channels may lead to potential ADA violations, as well as criminal and/or regulatory violations.

XI. CONCLUSION

A. Congress limits the authority of DoD and other executive agencies to use appropriated funds. The principal fiscal controls imposed by statute, regulation, and case law are Purpose, Time and Amount. These controls apply both to CONUS activity and OCONUS operations and exercises. The Comptroller General, service audit agencies, and inspectors general monitor compliance with rules governing the obligation and expenditure of appropriated funds. Commanders and staff rely heavily on JAs for fiscal advice. Active participation by JAs in mission planning and execution, as well as responsive and well-reasoned legal advice, will help ensure that commands use appropriated funds properly. B. Necessity for the JA to Get It Right.

1. Military commanders and staffs often plan for complex, multi-faceted, joint and combined operations, exercises, and activities overseas. Not only do foreign allies participate in these activities, but other U.S. government agencies, international non-governmental organizations, and U.S. Guard and Reserve components do as well. Not surprisingly, these operations, exercises, and activities are conducted under the bright light of the U.S. and international press, and thus precise and probing questions concerning the legal authority for the activity are certain to surface. Congress will often have an interest in the location, participants, scope, and duration of the activity. Few operations the U.S. military conducts overseas escape Congressional interest. Thus, it is imperative that the commander and his or her staff be fully aware of the legal basis for the conduct of the operation, exercise, or activity that benefits a foreign nation.

2. Judge Advocates bear the primary responsibility for ensuring that all players involved, and especially the U.S. commander and his or her staff, understand and appreciate the significance of having a proper legal basis for the activity. This fundamental understanding will shape all aspects of the activity, especially a determination of where the money will come from to pay for the activity. Misunderstandings concerning the source and limits of legal authority and the execution of activities may lead to a great deal of wasted time and effort to correct the error, and embarrassment for the command in the eyes of the press and the Congress. At worst, such misunderstandings may lead to violations of the ADA, and possible reprimands or criminal sanctions for the responsible commanders and officials.

C. How the JA Can Get It Right—Early JA Involvement.

1. Judge Advocates must be part of the planning team from the inception of the concept, through all planning meetings, and through execution of the operation or activity. It is too late for the JA to review the operations plan the week, or even the month, before the scheduled event. Funding, manpower, logistics, transportation, and diplomatic decisions have long been made, and actions based on those decisions have already been executed weeks in advance of the activity.

2. In short, the JA must understand the statutory, regulatory, and policy framework that applies to military operations and activities that benefit foreign nations. More importantly, the JA must ensure that the commander understands what that legal authority is and what limits apply to the legal authority. The JA must then ensure that the commander complies with such authorities.

CHAPTER 15

CONTINGENCY AND DEPLOYMENT CONTRACTING

REFERENCES

1. GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. (Jan. 2014) [hereinafter FAR].
2. U.S. DEP'T OF DEFENSE, DEFENSE FEDERAL ACQUISITION REG. SUPP. (Mar. 2014) [hereinafter DFARS].
3. U.S. DEP'T OF DEFENSE INSTRUCTION 3020.41, OPERATIONAL CONTRACT SUPPORT (20 Dec. 2011)[Hereinafter DODI 3020.41].
4. UNDER SECRETARY OF DEFENSE, ACQUISITION, TECHNOLOGY, AND LOGISTICS, DEFENSE PROCUREMENT AND ACQUISITION POLICY, CONTINGENCY CONTRACTING, DEFENSE CONTINGENCY CONTRACTING HANDBOOK: ESSENTIAL TOOLS, INFORMATION, AND TRAINING TO MEET CONTINGENCY CONTRACTING NEEDS FOR THE 21ST CENTURY (Oct. 2012).
5. JOINT CHIEFS OF STAFF, JOINT PUB. 4-0, JOINT LOGISTICS (16 Oct. 2013) [hereinafter JP 4-0].
6. JOINT CHIEFS OF STAFF, JOINT PUB. 4-10, OPERATIONAL CONTRACT SUPPORT (17 Oct. 2008) [hereinafter JP 4-10].
7. U.S. DEP'T OF ARMY, REG. 700-137, LOGISTICS CIVIL AUGMENTATION PROGRAM (LOGCAP) (12 Dec. 2012) [hereinafter AR 700-137].U.S. DEP'T OF ARMY, REG. 715-9, OPERATIONAL CONTRACT SUPPORT PLANNING AND MANAGEMENT (20 Jun. 2011) [hereinafter AR 715-9].
8. U.S. DEP'T OF ARMY, FIELD MANUAL 1-04, LEGAL SUPPORT TO THE OPERATIONAL ARMY (18 Mar. 2013) [hereinafter FM 1-04].
9. U.S. DEP'T OF ARMY, FIELD MANUAL 1-06, FINANCIAL MANAGEMENT OPERATIONS (4 Apr. 2011) [hereinafter FM 1-06].
10. U.S. DEP'T OF ARMY, FIELD MANUAL 4-92, CONTRACTING SUPPORT BRIGADE (12 Feb. 2010) [hereinafter FM 4-92].U.S. DEP'T OF ARMY, ARMY TACTICS, TECHNIQUES, and PROCEDURE 5-0.1, COMMANDER AND STAFF OFFICER GUIDE (14 Sep. 2011) [hereinafter ATTP 5-0.1].
11. Army Sustainment Command (ASC), Contractor on the Battlefield Resource Library, available at http://www.aschq.army.mil/home/BattlefieldResourceLibrary.aspx (containing links to contingency contractor personnel related materials and websites).
12. CENTCOM Contracting Command (C3) Training and Policy Webpage, https://www2.centcom.mil/sites/contracts/SiteAssets/Contracting.aspx (containing training materials, checklists, policy documents, acquisition instructions, and contract clauses).

I. INTRODUCTION

A. General. The past twelve years of combat operations, as well as humanitarian operations in poorly developed areas, have demonstrated the importance of contingency contracting as a force multiplier. Many of the goods and services required to successfully engage in extended deployment operations cannot be provided by current uniformed forces. To meet those needs, the Department of Defense relies increasingly on contracted support. The apparatus for competing, awarding, and supervising contractors in deployed or contingency environments is called "contingency contracting." The Joint Chiefs of Staff, in Joint Publication (JP) 4-10, define Contingency Contracting as:

> "[T]he process of obtaining goods, services and construction from commercial sources via contracting means in support of contingency operations. It is a subset of contract support integration and does not include the requirements development, prioritization and budgeting processes. Contracts used in a contingency include theater support, systems support, and external support contracts." JP 4-10, vi.

B. Legal Support to Operations. Doctrine addressing legal support to operations provides that the Staff Judge Advocate's "contract law responsibilities include furnishing legal advice and assistance to procurement officials during all phases of the contracting process and overseeing an effective procurement fraud abatement program." FM 1-04, para. 5-39. Specifically, Judge Advocates (JA) are to provide "legal advice to the command concerning battlefield acquisition, contingency contracting, use of logistics civil augmentation program, acquisition and cross-servicing agreements . . . and overseas real estate and construction." Id.

1. Scope of Duties. Depending on their assigned duties, JAs should participate fully in the acquisition process by participating as a member of the contracting officer's team, providing legal advice to commanders and their staff, and by communicating closely with procurement officials and contract attorneys in the technical supervision chain. Id. para. 5-40; *see also* AFARS 5101.602-2(c) (describing contracting officers' use of legal counsel).

2. Pre-Deployment. Judge Advocates should take the lead in advocating expeditionary contracting preparation. FM 1-04, para. 13-8. This could involve holding contract/fiscal law classes for supply and logistics personnel, reviewing acquisition and logistics plans as part of the OPLAN, and advising on best practices to obtain goods and services while deployed.

3. Operational Support. To provide contract law support in operations, JAs with contract law experience or training should be assigned to division and corps levels main and tactical command posts, TSC headquarters, theater army headquarters, and each joint and multinational headquarters. Depending on mission requirements, command structure, and the dollar value and/or complexity of contracting actions, contract law support may be required at various command levels including brigade or battalion. Id. paras. 5-40 to 5-41.

4. Contract-Specific Roles. Judge Advocates may be assigned as Command Judge Advocate or Deputy Command Judge Advocate for a Contract Support Brigade (CSB). These JAs serve as the primary legal advisors to CSB commanders, staff, and contracting officials on the full spectrum of legal and policy issues affecting the CSBs peacetime and operational missions. FM 4-92, para. 1-13. Judge Advocates at sustainment brigades, theater sustainment brigades, and expeditionary sustainment brigades perform similar functions. FM 1-04, para. 5-41. Judge Advocates assigned to these and other contracting organizations should have contract law training. Id.

5. Demonstrated Importance. After action reports (AAR) from Iraq and Afghanistan consistently indicate that JAs throughout both theaters, regardless of the position to which they are assigned (including brigade judge advocates), practiced fiscal law daily. These same AARs indicated that while most JAs encountered contract law issues less frequently, they needed an understanding of basic contract law principles to intelligibly conduct fiscal law analyses. For JAs assigned to contracting or logistics heavy units, knowledge of contract law was a prerequisite to their daily duties.

C. Applicable Law During a Deployment. Contracting during a deployment involves two main bodies of law: international law and U.S. contract and fiscal law. FM 1-04, para. 5-38. Attorneys must understand the authorities and limitations imposed by these two bodies of law.

1. International Law.

a. The Law of Armed Conflict—Combat. The Law of Armed Conflict (LOAC) applies during combat operations, which for instance imposes limitations on the use of prisoners of war (PW) for labor. LOAC also grants PW status to contractors who are authorized to accompany the force (CAAF), should they be captured. *See* GCIII, ART 4(A)(4).

b. The Law of Armed Conflict—Occupation. The Law of Armed Conflict also applies during occupation and should be followed as a guide when no other body of law clearly applies, such as Operation Restore Hope in Somalia. However, the rules for occupation may cease to apply if the US Forces in an area become subject to newly formed local or national governments.

c. International Agreements. A variety of international agreements, such as treaties and status of forces agreements (SOFA) may apply. These agreements can have substantial affect on contingency contracting. For example, SOFAs may limit the ability of foreign corporations to operate inside the local nation, place limits and tariffs on imports, and govern the criminal and taxation jurisdiction over contractors and their personnel.

(1) Example: The Diplomatic Note executed between the United States and the Transitional Government of the Islamic State of Afghanistan (12 December 2002) covers many of the duties and rights of the United States and its contractors operating in Afghanistan. The agreement states that "[t]he Government of the United States, its military and civilian personnel, contractors and contractor personnel shall not be liable for any kind of tax or other similar fees assessed within Afghanistan." This type of provision has a profound effect on contract pricing and contractor performance. Legal Counsel must be aware of and understand these agreements in order to properly advise their clients when facing contingency contracting.

(2) International Agreements may also include choice of law provisions relating to contingency contracting. For example, the Diplomatic Note cited above also provides that all contracts awarded by the United states to "acquire materials and services, including construction . . . should be awarded in accordance with the law and regulations of the Government of the United States."

2. U.S. Contract and Fiscal Law. **There is no "deployment exception" to Contract or Fiscal Law.** Judge Advocates in contingency operations must apply the same standards applicable during garrison operations. However, local regulations, policies, and authorities that are not normally available may exist in contingency operations and provide greater flexibility for commanders in those areas.

a. FAR and agency supplements. The FAR fully applies to contingency contracting. However, the following Parts are most relevant during contingency operations:

(1) FAR Part 6 details the competition requirements for all acquisitions. Subpart 6.3 explains when acquisition personnel may award contracts using less than full-and-open competition if certain conditions exist. In any case where less than full-and-open competition is sought, specific findings must be made.

(2) FAR Part 13 allows the use of simplified acquisitions procedures when the value of the good or service falls below the simplified acquisition threshold (FAR Section 2.101). Approximately 95% of all contracting actions in contingency operations will utilize simplified acquisitions procedures.

(3) FAR Part 18 provides a listing of the various FAR provisions allowing expedient and relaxed procedures that may be useful in a contingency situation.

(4) FAR Part 25 and DFARS Part 225 govern foreign acquisitions, including the "Buy American" Act (41 U.S.C. § 10a-10d) and other requirements.

(5) FAR Part 50 outlines extraordinary contractual actions available in emergency situations. These are rarely used due to their low dollar threshold and high approval authority.

b. Fiscal Law. In addition to familiarity with expeditionary acquisitions authority, deploying Judge Advocates must develop a sound understanding of fiscal law. To that end, key resources include: Title 31, U.S. Code; Department of Defense (DOD) Financial Management Regulation FMR (DOD FMR); DFAS-IN 37-1; DFAS Manual 37-100-XX (XX=current fiscal year (FY)); and the Contract & Fiscal Law Dep't, The Judge Advocate General's School, U.S. Army, Fiscal Law Deskbook (available online at http://www.loc.gov/rr/frd/Military_Law/ Contract-Fiscal-Law-Department.html).

c. Contingency Funding and Contract Authorizations. Generally, ordinary fiscal and acquisition rules apply during contingency operations. There is no blanket "wartime" or "contingency" exception to these rules. The fact that an operation is ongoing, however, may:

(1) Make the use of existing authorities easier to justify. For example, the operational situation in a contingency operation will likely create circumstances that will make it easier to develop a written "Justification and Approval" (J&A) to support the use of the unusual and compelling urgency exception to full and open competition located at FAR Section 6.302-2.

(2) Appropriation and authorization acts may contain temporary, extraordinary fiscal and contract authorities specific to a particular operation. Operations Afghanistan contained numerous examples of these extraordinary authorities, including the expenditure of Commander Emergency Response Funds (CERP), and the Afghanistan First program.

d. Permanent Extraordinary Contract Authority. During a national emergency declared by Congress or the President and for six months after the termination thereof, the President and his designees may initiate or amend contracts notwithstanding any other provision of law whenever it is deemed necessary to facilitate the national defense. Pub. L. No. 85-804, codified at 50 U.S.C. §§1431-1435; Executive Order 10789 (14 Nov. 1958); FAR Part 50; DFARS Part 250. These powers are broad, but the statute and implementing regulations contain a number of limitations. For example, these powers do not allow waiving the requirement for full and open competition, and the authority to obligate funds greater than $65,000 may not be delegated lower than the Secretariat level. This authority is rarely used. Additionally, despite this grant of authority, Congress still must provide the money to pay for obligations.

II. DEPLOYMENT CONTRACTING AUTHORITY, PLANNING, PERSONNEL, AND ORGANIZATION

A. Contract vs. Command Authority. Commanders have broad authority to direct operations as required. However, they do not have the authority to obligate the U.S. Government to expend funds.

1. Command Authority. Prescribed by 10 U.S.C. § 164. Command authority includes the authority to perform functions involving organizing and employing commands and forces, assigning tasks and designating objectives, and giving authoritative direction over all aspects of an operation. In a contingency operation, command authority runs from the President thru the Secretary of Defense to the Geographic Combatant Commanders (GCC) and ultimately to the commander on the ground. Command authority does NOT include the ability to make binding contracts for the U.S. Government. FM 4-92, para. 1-20; *see also* JP 4-10, para. III-2.

2. Contract Authority. Premised on the U.S. Constitution, statute, and regulatory authority (FAR, DFAR, Service supplements). Contracting authority in the operational area flows from the President, then to the Secretary of Defense, through the Service/Agency Head, to the Head of Contracting Activity (HCA), then to the Senior Contracting Official (SCO) or Principal Assistant Responsible for Contracting (PARC), and finally to the contracting officer. Only the contracting officer, by virtue of their contracting warrant, has the authority to obligate the U.S. Government on contractual matters. Any binding contract attempt made by anyone other than a contracting officer will result in an unauthorized commitment. FAR 1.6; JP 4-10, para. III-2; FM 4-92, para. 1-20.

B. Planning. The type of organization to which a JA is assigned will dictate the degree to which they must become involved in planning for contract support. However, at a minimum, JAs should be familiar with how Joint and Army doctrine incorporate planning for contract and contractor personnel support through the Contract Support Integration Plan and Contractor Management Plan.

1. Contract Support Integration Plan (CSIP).

a. In all operations where there will be a significant use of contracted support, the supported GCC and their subordinate commanders and staffs must ensure that this support is properly addressed in the appropriate OPLAN/OPORD. To achieve this integration, a CSIP must be developed by logistics staff contracting personnel, assisted by the lead Service contracting element (if a lead Service is designated). Annex W to the GCC OPLAN/OPORD contains the CSIP. See JP 4-10, para. III-8.b and DODI 3020.41., Encl. 2, para. 2a.

b. The CSIP is a planning mechanism to ensure effective and efficient contract support to a particular operation. The CSIP development process is intended to ensure the operational commander and supporting contracting personnel conduct advanced planning, preparation, and coordination to support deployed forces. Also to ensure contract support integration and contractor management related guidance and procedures are identified and included in the overall plan. FM 4-92, para. 2-4.

c. At a minimum, the CSIP must include: theater support contracting organization responsibilities; boards and/or center information; operational specific contracting policies and procedures to include Service civil augmentation program/external contract, multi-national, and host-nation support coordination guidance; and, contract administration services delegations. Other elements may include but are not limited to the identification of major requiring activities and information on commercial support capabilities to satisfy requirements. JP 4-10, figure III-3.

d. Each Service component should also publish its own CSIP seeking integration and unity of effort with the supported GCC's CSIP. JP 4-10, III-8.b. For the Army, the CSIP is located in Tab G, Appendix 1, of Annex F, Sustainment of the standard Army OPORD. *See* ATTP 5-0.1, Table 12-2.

2. Contractor Management Plan (CMP).

a. The CMP is related to, but not the same as, the CSIP. While the CSIP is focused on *how* we will acquire and manage contracted support, the CMP is focused on *government obligations* under contracts to provide support to contractor personnel. JP 4-10, para. IV-3.b. *See also* DODI 3020.41, Encl. 2, para. 2b.

b. Contractor management is accomplished through a myriad of different requiring activities, contracting officer representatives, supported units, contracting organizations, and contractor company management personnel. JP 4-10, para. IV-1.b. Therefore, the GCC and subordinate joint forces commander must establish clear, enforceable, and well understood theater entrance, accountability, force protection, and general contractor management procedures early in the planning stages of any military contingency. JP 4-10, para. IV-1.b(1). To accomplish this task, the GCC should publish a CMP. JP 4-10, para. IV-3.b(1).

c. The CMP should specify operational specific contractor personnel and equipment requirements in order for the Joint Forces Commander, Service components, theater support contracting command, special operations forces, external support contracts, and Defense Logistics Agency to incorporate these into applicable contracts. These requirements may include, but are not limited to: restrictions imposed by applicable international and host-nation support agreements; contractor related deployment, theater reception, accountability, and strength reporting; operations security plans and restrictions; force protection; personnel recovery; contractor personnel services support; medical support; and redeployment requirements. JP 4-10, para. IV-3.b(1).

d. The Joint Forces Command and Service components should prepare supporting CMPs that support the GCC's CMP but provide more specific details. JP 4-10, para. IV-3.b(1) and FM 4-92, paras. 2-13 to 2-14.

e. For more detailed information on contingency contractor personnel, see Contract & Fiscal Law Dep't, The Judge Advocate General's School, U.S. Army, Contract Law Deskbook chapter 31, Contingency Contractor Personnel (updated annually and available online at http://www.loc.gov/rr/frd/Military_Law/Contract-Fiscal-Law-Department.html).

3. In a developed theater, JAs should familiarize themselves with theater business clearance procedures, theater specific contract clauses and policies, contract and acquisition review boards, as well as resource management policies and standard operating procedures (e.g. Money as a Weapons System—Afghanistan (MAAWS-A)). AARs from Afghanistan indicate that familiarity with MAAWS-A is foundational to anyone who will be providing fiscal or contract law advice in a deployed environment.

C. Deployment Contracting Personnel. Contracting authority runs from the Secretary of Defense to the Heads of Contracting Activities (HCA). The HCA appoints a Senior Contracting Official (SCO) or Principal Assistant Responsible for Contracting (PARC). The HCA and SCO/PARC warrant contracting officers (KO) at various levels and with varying levels of authority. AFARS 5101.603-1. The chief of a contracting office, a KO, may appoint field ordering officers (FOOs) to conduct relatively low dollar value purchases. FOOs are authorized to obligate the government to pay for goods or services in accordance with their appointment letters, but FOOs do not normally handle money. Finance Soldiers and Soldiers or Department of Defense (DOD) civilians, known as Class A agents or paying agents, handle money and pay merchants for purchases made by the FOOs.

1. Head of Contracting Activity (HCA). The HCA is a Flag Officer or equivalent senior executive service (SES) civilian who has overall responsibility for managing a contracting activity. JP 4-10, Ch. 1, para. 2c(1); FM 4-92, para. 1-4; FAR 2.101.

a. The HCA serves as the approving authority for contracting as stipulated in regulatory contracting guidance.

b. DOD Contracting Activities are listed in the DFARS, and include, among others, Headquarters, U.S. Army Contracting Command, U.S. Army Sustainment Command, U.S. Army Expeditionary Contracting Command, U.S. Army Mission and Installation Contracting Command, U.S. Army Corps of Engineers, U.S. Transportation Command, U.S. Special Operations Command, and the CENTCOM Contracting Command (C3) (formerly the Joint Contracting Command – Iraq / Afghanistan (JCC-I/A). The head of each contracting activity is a HCA. DFARS 202.101; AFARS 5101.601(1).

c. See generally AFARS 5101.601 for a discussion on the responsibilities of HCAs.

2. Senior Contract Official (SCO) (i.e. Principal Assistant Responsible for Contracting (PARC)). The SCO is a lead service or joint command designated contracting official who has direct managerial responsibility over theater support contracting.

a. There may be multiple SCOs in the same operational area based on mission or regional focus. For example, at one time during Operation Iraqi Freedom (OIF), there were two SCOs, one for support to forces and one for reconstruction support. JP 4-10, para. I-2c(2).

b. In the Army, SCOs are known as PARCs. AFARS 5101.601; cf. JP 4-10, para. I-2c(2).

(1) HCAs appoint PARCs. AFARS 5101.601(4)(ii).

(2) The PARC serves as the senior Army contracting advisor responsible for planning and managing all Army contracting functions which the FAR, DFARS, PGI, AFARS, and other directives does not require the HCA to perform personally (except when the HCA elects to exercise selected authorities). AFARS 5101.601(5).

(3) For example, the Commander of the Army Expeditionary Contracting Command is an HCA. The HCA generally appoints each commander of a Contracting Support Brigade as a PARC. FM 4-92, para. 1-4.

3. Contracting Officer (KO). The KO is the government official (military officer, enlisted, or civilian) with the authority to legally bind the government by entering into, administering, or terminating contracts. JP 4-10, para. I-2c(3), FAR 1.602.

a. The HCA or SCO appoint KOs in writing through a warrant (Standard Form 1402). JP 4-10, para. I-2c(3).

b. Only duly warranted KOs are authorized to obligate (i.e. legally bind) the U.S. Government. JP 4-10, para. I-2c(3).

c. There are three main types of contracting officers: procuring KOs (i.e. enter into contracts), administrative KOs (i.e. administer contracts), and terminating KOs (i.e. settle terminated contracts). Significantly, a single KO may be responsible for duties in all of these areas. JP 4-10, para. I-2c(3) and FAR 2.101.

4. Contracting Officer's Representative (COR). CORs operate as the KO's eyes and ears regarding contract performance, and provide the critical link between the command and the KO regarding the command's needs. CORs are organic members of the requiring unit and are assigned to be a COR as an additional duty. CORs are necessary because KOs are normally not located at the site of contract performance. In many cases, contracts will already be in place before the unit deploys, and the KO for the contract is in CONUS or at geographically remote Regional Contracting Center. Commanders must consider whether to request that the KO appoint at least one COR for each contract affecting the unit. The COR can only be appointed by the KO. CORs do NOT exercise any contract authority - they lack the authority to modify contracts. Significantly, any issues with the contractor must still be resolved by the KO, rather than the COR. See DFARS 201.602-2; JP 4-10, para. I-2c(4).

a. A properly trained COR shall be designated in writing prior to contract award. FAR 1.602-2(d). CORs must be a U.S. Government employee, unless authorized by agency-specific regulations. For instance, DFARS 201-602-2 authorizes officers of foreign governments to act as CORs as well.

b. By way of historic example, HQDA EXORD 048-10: Pre-Deployment Training for Contracting Officer's Representative and Commander's Emergency Response Program (CERP) Personnel, dated 5 Dec. 2009, required brigades and smaller units deploying in support of OEF or OIF to do the following:

(1) Determine the number of CORs needed to meet theater contracting requirements no later than (NLT) 180 days before the latest arrival date (LAD). Specifically, units should verify COR requirements with the CENTCOM Contracting Command, servicing Regional Contracting Center within the deployed area of responsibility, and with the Defense Contract Management Agency representatives administering the Logistics Civil Augmentation Program (LOGCAP) contract and other support contracts in the unit's deployed location.

(2) If unable to determine specific COR requirements during the Pre-Deployment Site Survey or from other pre-deployment communications, each deploying brigade must train 80 COR candidates. Separate battalions must train 25 COR candidates, and separate companies must train 15 COR candidates.

(3) NLT 90 days before the LAD, units must ensure COR candidates complete all required online training.

(4) CORs must receive supplemental training from the KO that appointed them.

c. For more detailed information on COR responsibilities, see Center for Army Lessons Learned, Handbook 08-47, Deployed COR (Sep. 2008); see also DFARS 201.602-2(2); DFARS Class Deviation 2011-O0008, Designation of Contracting Officer's Representative (21 Mar. 2011) (appointment requirements for CORs).

5. Field Ordering Officer (FOO).

a. A FOO is a service member or DOD civilian appointed in writing and trained by a KO. FOOs are not warranted KOs. FOO duties are considered an extra or collateral duty. AFARS 5101.602-2-90 and JP 4-10, para. I-2c(5).

b. FOOs are usually not part of the contracting element, but are a part of the forward units.

c. FOOs may be authorized to make purchases with SF44s up to the micro-purchase threshold, place orders against certain indefinite delivery contracts established by KOs, make calls under Blanket Purchase Agreements

(BPAs) established by KOs, and make purchases using imprest funds. AFARS 5101.602-2-90. FOOs may also hold a government purchase card. AFARS 5113.2. FOOs are subject to limitations in their appointment letters, procurement statutes and regulations, and fiscal law. Contracting authority may be limited by dollar amount, subject matter, purpose, time, etc. Typical limitations are restrictions on the types of items that may be purchased and on per purchase dollar amounts. A sample appointment letter is available at AFARS 5153.9002.

d. AFARS 5101.602-2-90 contains guidance on the appointment, training, surveillance, and termination of FOOs. Additionally, contracting activities publish additional FOO guidance applicable to FOOs appointed under the authority of the contracting activity. For an example, see https://www2.centcom.mil/_Layouts/Accept Agreement.aspx?src=/sites/contracts/Pages/Default.aspx and the theater- produced Money as a Weapon System – Afghanistan (MAAWS-A).

6. Paying Agents. A Pay Agent is a U.S. military member or DoD civilian employee appointed by the commander to act as an agent of a disbursing officer. When FOOs or KOs make purchases using SF44s, the merchant will forward a form to the paying agent for payment. However, in an immature theater, the paying agent will often accompany the FOO or KO. Once the FOO/KO completes the transactions, the paying agent will pay the merchant. The deployed contracting process is improved when, prior to deployment, coordination is made with finance to identify paying agents and their deployed locations. Significantly, paying agents may not also serve as FOOs. *See also* DOD FMR, vol. 5, para. 020604 (discussing the appointment and responsibilities of paying agents).

D. Sources of Contracted Support in a Contingency Operation. Three different sources of contract support are generally used in support of contingency operations: Theater Support Contracts, Systems Support Contracts, and External Support Contracts.

1. Theater Support Contracts. Commonly referred to as "contingency contracts," these contracts are awarded by KOs in support of a designated contingency operation serving under the direct contracting authority of the Service component, special operations forces command, or designated joint HCA. JP 4-10, paras. I-2(b)(1) and III-6. For example, theater support contracts in Afghanistan included contracts awarded by the CENTCOM Contracting Command or their Regional Contracting Centers.

2. Systems Support Contracts. These contracts are awarded by a Service acquisition program management office to support, maintain, and, repair certain military weapon systems. Generally, systems support contracts are leveraged to support new weapons systems including air, land, and C2 platforms. These contracts are most frequently prearranged – they are awarded well before, and are not related to, any specific contingency operation. Significantly, the authority to modify or terminate the contract is limited to the contracting activity that issued the contract. JP 4-10, paras. I-2(b)(2), III-4, and app. A.

3. External Support Contracts. These contracts are generally awarded by contracting organizations prior to any specific contingency operation. External support contracts provide logistic and other noncombat related services and supply support (e.g. LOGCAP). Significantly, the Service components retain authority over these contracts – as opposed to the geographical contracting command's operational contract support. JP 4-10, paras. I-2(b)(3) and III-5.

a. Types of Support.

(1) Logistic support includes base operating support, transportation, port and terminal services, warehousing and other supply support functions, facilities construction and management, prime power, and material maintenance. JP 4-10, Figure III-2.

(2) Non-logistic support may include communication services, interpreters, commercial computers, and information management. Subject to congressional as well as DOD policy limitations, this type of support may also include interrogation and physical security service support. JP 4-10, Figure III-2.

b. External support contracting authority does not come as a direct result of the contingency operation. Generally, these contracts are issued during peacetime for use during contingencies by the Service Components. Contracting authority, and therefore the ability to modify contracts, remains with the Service Component. For example, requirements for the Army's Logistics Civil Augmentation Program (LOGCAP) contract are managed by the Army Sustainment Command and the contracts are awarded and managed by the Army Contracting Command, both of which fall under the Army Materiel Command (AMC). Only AMC has the authority to change the LOGCAP contract. JP 4-10, para. III-5(b).

c. Major External Support Contracts include each Service's civil augmentation program (CAP) contracts (the Army LOGCAP , the Air Force Contract Augmentation Program (AFCAP), and the U.S. Navy Global Contingency Construction Contract (GCCC) and Global Contingency Service Contract (GCSC)); fuel contracts awarded by the Defense Energy Support Center; construction contracts awarded by the U.S. Army Corps of Engineers and Air Force Center for Engineering and Environmental Excellence; and translator contracts awarded by the Army Intelligence and Security Command. JP 4-10, para. III-5(a).

d. Civil Augmentation Program (CAP) Contracts provide the supported GCC and subordinate Joint Forces Commander an alternative source for meeting logistic services and general engineering shortfalls when military, host-nation support, multinational, and theater support contract sources are not available or adequate to meet the force's needs. Because these contracts are generally more expensive than theater support contracts, every effort should be made to transition to theater support contracts as soon as possible. JP 4-10, para. III-5 and app. B.

(1) Service CAP similarities. JP 4-10, app. B.

(a) Augment organic military capabilities.

(b) Long term (four to nine years depending on the program) competitively awarded contracts.

(c) Use, or can opt to use, cost-plus award fee ID/IQ task orders.

(d) Potentially compete for the same general commercial support base.

(2) Service CAP differences. JP 4-10, app. B.

(a) Authorized expenditure limit and planning and management capabilities.

(b) Support focus:

i. LOGCAP focuses on general logistic support and minor construction support. The program utilizes separate support (planning and program support) and performance (task order execution) contracts.

ii. AFCAP focuses on both construction & general logistic support; can also do supply support.

iii. Navy GCCC focuses exclusively on construction; Navy GSCS focuses on facilities support.

E. Theater Contracting Support Organizational Options.

1. The Geographic Combatant Commander (GCC), in coordination with the subordinate Joint Force Command and Service Components, determines the contracting support organization based on mission requirements and operational factors (e.g. size, scope, complexity, etc). Although there is no single preferred contracting organization, there are three main options: service component support, lead Service, and joint theater support contracting command. Within the Army, outside of the theater contracting organization options discussed herein, corps, divisions, and brigades do not have any organic contracting officers or authority (beyond FOOs, Government Purchase Cardholders, etc). JP 4-10, para. III-7a and FM 4-92, para. 1-1.

a. Service Component Support to Own Forces.

(1) The GCC generally allows Service component commanders to maintain control over their own theater support contracting authority and organizations for small scale operations of limited duration. This option also applies to operations where the majority of units are operating in different locations throughout the joint area of operations. JP 4-10, para. III-7b.

(2) Army. The Army established the Expeditionary Contracting Command (ECC) to provide theater support contracting in support of deployed Army forces worldwide and garrison contracting support for Army installations outside the Continental United States. The ECC Commander is an HCA. The commanders of each of six regionally focused contracting support brigades (CSB) are PARCs or SCOs. FM 4-92, paras. 1-1 to 1-4. In turn, each brigade has a number of contingency contracting battalions, contingency contracting teams, and senior contingency contracting teams. Id. para. 1-5. CSB units are deployed as necessary to meet mission contracting requirements. Id. paras. 1-22 to 1-23. Specifically, the CSB may be organized to provide Service component support to Army forces. Id. para. 1-24.

b. Lead Service Responsible for Theater Support Contracting.

(1) The GCC may designate a specific Service component responsible to provide consolidated theater contracting support (generally Army or Air Force). JP 4-10, para. III-7c.

(2) This option is most appropriate for major, long-term operations where the supported GCC and supported joint force commander desire to ensure that there is a consolidated contracting effort within the operational area, but without the need to stand-up an entirely new joint contracting command. JP 4-10, para. III-7c(1).

(3) The lead service often has command and control over designated component theater contracting organizations from other Services and may have its staff augmented by contingency contracting personnel from other Services. JP 4-10, para. III-7c(1).

(4) Within the Army, the CSB may be designated as the lead Service contracting organization (with or without command and control of other Service contracting elements). FM 4-92, para. 1-24.

c. Joint Theater Support Contracting Command.

(1) Established by GCC. The joint theater support contracting command is a joint functional command that has a specified level of command and control authority over designated Service component theater support contracting organizations and personnel within a designated support area. JP 4-10, para. III-7d. For Afghanistan, the CENTCOM Contracting Command (C3) has been established and organized as a Joint Theater Support Contracting Command.

(2) The joint theater support contracting command's HCA authority flows from one of the Service component's to the operational area because GCCs do not have their own contracting authority. In this option, the joint theater support contracting command headquarters should be established by a Joint Manning Document (JMD). For example, C3 falls beneath the Army. JP 4-10, para. III-7d and DFARS 202.101.

(3) Within the Army, the CSB may serve as the building block for the formation of a joint theater support contracting command. FM 4-92, para. 1-24.

2. While there is no established model for lead Service theater support or the joint theater support contracting command organization, JP 4-10, app. G provides a general model for each type of organization. Generally, each of these organizational options will include the following subordinate activities:

a. Regional Contracting Centers (RCC). Typically consists of 10-25 warranted contracting officers, enlisted members, and/or DOD civilians often aligned with major land force (division, corps, Marine expeditionary force) headquarters or Air Force wings. JP 4-10, app. G, paras. 2.g, 3.k(1).

b. Regional Contracting Offices (RCO). Organization under the command and control of an RCO head composed of 2 thru 8 warranted contracting officers, enlisted members, and/or DOD civilians. Typically provide area support to specific forward operating bases and or designated areas within the joint operating area. JP 4-10, app. G, paras. 2.h and 3.k(2).

c. Specialty Contracts Division. May be used to provide contracting support for common, joint operations area-wide services or supplies OR to perform complex contracting actions that exceed the RCC and RCO capabilities. JP 4-10, app. G, paras. 2.h and 3.k(3).

III. Requirements Generation, Approval, and the Contracting Process

A. General. Financial management (finance operations and resource management), contracting personnel, and the judge advocate (the "Fiscal Triad") must work in concert to actually acquire and pay for the good or service once its requirement is identified and approved by a requiring activity. FM 1-04, para. 13-1; FM 1-06, at vii; and FM 4-92, para. 2-17.

1. Requiring Activity. Units are requiring activities, regardless of their organizational level. For example, whether a company or a corps requires fuel or base support services, each is a requiring activity. The unit is responsible for developing the requirement, to include clearly defining the requirement. JP 4-10, app. H.

a. Timely and accurate requirements determinations are essential to quality contract support – all remaining steps in the acquisitions process are dependent on a sound description of the required good or service. Significantly, requiring activities, not CSBs, are responsible for developing requirements that accurately describe

what is required in order to satisfy the minimum acceptable government standard. This information allows the contracting activity to create a solicitation so that commercial vendors can submit a bid or proposal, and ultimately perform, in satisfaction of the government's requirement. FM 4-92, para. 2-18 and JP 4-10, app. H.

b. Specifically, the requiring activity, in coordination with the supporting contracting office, must conduct basic market research, develop an independent government estimate, develop a performance work statement or statement of work, and obtain certified funding from the requiring activity's resource manager. FM 4-92, para. 2-18 and JP 4-10, app. H. Judge Advocates conducting fiscal and contract reviews must carefully review each of these documents. For example, requirements which superficially appear to be services and therefore properly funded with operations and maintenance appropriations may actually include requirements for construction or the procurement of investment items that may require the use of a different appropriation.

2. Resource Management (RM).

a. RMs serve as the commander's representative to lead requirement validation, prioritization, and approval effort. FM 1-06, para. 1-2 and FM 4-92, para. 2-17.

b. RMs certify the availability of funds and commit those funds by executing a purchase, request, and commitment (PR&C); provide accounting support; and provide cost management. FM 1-06, para. 1-2 and FM 4-92, para. 2-17.

c. RMs neither create requirements nor possess acquisition authority. FM 1-06, para. 1-2 and FM 4-92, para. 2-17.

3. Contracting Officers (KOs).

a. KOs are the only government officials (military officer, enlisted, or civilian) with the legal authority (i.e. a valid appointment) to enter into, administer, and terminate contracts. JP 4-10, para. I-2c(3) and FAR 1.602.

b. Upon receipt of certified funding (i.e. PR&C) and a properly developed requirement, the KO is able to contract on behalf of the U.S. Government to obtain required the good or service. FM 4-92, para. 2-21.

c. KOs are also responsible for appointing and training field ordering officers. JP 4-10, para. I-2c(5)

4. Finance Operations.

a. As the government's banker, finance is the only member of the triad with the authority to disburse funds. Once a contract has been awarded, finance operations provide vendor payments through cash, check, government purchase card, or electronic funds transfer. FM 1-06, para. 1-3; FM 4-92, para. 2-17.

b. Finance personnel also train, fund, and clear paying agents. FM 4-92, para. 2-17.

B. Requirements Approval Process.

1. This process ensures the appropriate functional staffs coordinate, prioritize, approve, and certify funding for "the acquisition ready requirements package before it is forwarded to the appropriate contracting authority." These staff reviews can include, but are not limited to: Legal, Supply, Engineer, Medical, Signal, and Resource Management. FM 4-92, para. 2-19.

2. In major operations, common user logistics (CUL) are coordinated by the GCC and subordinate Joint Forces Commander among the functional staffs through the use of three important contracting related review boards. JP 4-10, para. III-3 and FM 4-92, para. 2-19.

a. Combatant Commander Logistic Procurement Support Board (CLPSB). Ensures that contracting and other related logistics efforts are properly coordinated across the entire AOR. JP 4-10, para. III-3.b. The CLPSB focuses on general policies and AOR-wide issues related to contracting support at the GCC level, to include:

(1) Identifying contracting and related issues that may require Joint Staff Office of Primary Responsibility, J-4, and/or Office of the Secretary of Defense action;

(2) Establishing AOR-wide contracting and contractor management policies and procedures; and

(3) Determining theater support contracting organization structure. JP 4-10, fig. III-1.

b. Joint Acquisition Review Board (JARB). JP 4-10, para. III-3.c and fig. III-1.

(1) The JARB manages the creation and prioritization of the CUL supplies and services that are required to support the operational mission.

(2) Generally, the JARB is chaired by the Joint Forces Commander or Deputy Commander with participation by the functional staff (to include JAs) as well as theater, external, and system support contracting members.

(3) The JARBs primary role is to make approval, prioritization, and funding recommendations for all GCC directed, subordinated Joint Forces Commander controlled, high-value and/or high visibility CUL requirements.

(4) Theater support and external support contracting members advise the other JARB members which contracting mechanisms are readily available for a particular acquisition.

(5) Once a requirement is validated and approved by the JARB, the resource manager certifies funding and forwards the action to a contracting activity.

(6) Judge Advocates should review local authority and processes prior to deploying. For example, the MAAWS-A contained detailed guidance on the JARB (and related, subordinate, and superior ARBs) and the requirements approval process.

c. Joint Contracting Support Board (JCSB). JP 4-10, para. III-3.d and figure III-1.

(1) The JCSB focuses on how contracting will procure support in the Joint Operations Area.

(2) The JCSB also reviews contract support requirements forwarded by the JARB and makes recommendations on which specific contracting organizations/venues (e.g., theater v. external) are best suited to fulfill the requirement.

(3) This board establishes theater support contracting procedures.

(4) The JCSB is chaired by SCO/PARC or subordinate J-4 acquisition officer.

C. Theater Business Clearance / Contract Administration Delegation.

1. During operations, the need may arise to ensure that all contracts performed in the joint operating area are visible, contain certain minimum clauses and requirements, and are being effectively administered.

2. To enable this uniformity of effort, the Deputy Under Secretary of Defense, Acquisition, Technology, and Logistics and the Director of Defense Procurement and Acquisition Policy may issue guidance. For example, a series of memoranda were published in Iraq and Afghanistan directing CENTCOM Contracting Command (C3) to develop TBC procedures, to include procedures on contract administration delegation. *See* Headquarters, Joint Contracting Command – Iraq / Afghanistan, subj.: Theater Business Clearance (TBC) Authority, Procedures, and Requirements for Iraq and Afghanistan, available at https://www2.centcom.mil/sites/contracts/Pages/Theater%20Business%20Clearance%20%28TBC%29.aspx.

3. CENTCOM Contracting Command uses the TBC review process to ensure that contracting officers outside C3 (e.g., external and system support contracting officers) insert mandatory language and clauses in contracts. As an example, such clauses include:

a. C3 952.225-0001, Arming Requirements and Procedures for Personal Security Services Contractors and Requests for Personal Protection.

b. C3 952.225-0005, Monthly Contractor Census Reporting.

c. C3 952.225-0009, Medical Screening and Vaccination Requirements for Third Country Nationals and Locally Hired Employees Operating in the CENTCOM Area of Responsibility.

d. DFARS 252.225-7040, Contractor Personnel Authorized to Accompany U.S. Forces Deployed Outside the U.S., and DFARS Class Deviation 2007-O0010, Contractor Personnel in the U.S. Central Command Area of Responsibility.

4. The TBC review process also addresses whether in-theater contract administration will be delegated to Defense Contract Management Agency-I/A or whether administration will be re-delegated to the procuring contracting officer.

IV. CONTRACTING DURING A DEPLOYMENT

A. General. This section discusses various methods used to acquire supplies and services. It begins with a general discussion of seeking competition and then discusses specific alternatives to acquiring supplies and services pursuant to a new or existing contract to meet the needs of a deploying force.

B. Competition Requirements. The Competition in Contracting Act (CICA), 10 U.S.C. § 2304, requires the government to seek competition for its requirements. In general, the government must seek full and open competition by providing all responsible sources an opportunity to compete. Significantly, there is no automatic exception for contracting operations during deployments. FAR Part 6 and Far 2.101.

1. For contracts awarded and performed within CONUS, the statutory requirement of full and open competition for purchases over the simplified acquisition threshold creates a 45-day minimum procurement administrative lead time (PALT). This lead time is due to a requirement to publish notice of the proposed acquisition 15 days before issuance of the solicitation by synopsis of the contract action in the Government-wide Point of Entry (GPE) at FedBizOpps.gov; and a requirement to provide a minimum of 30 days for offerors to submit bids or proposals. FAR Section 5.203. Three additional time periods further extend this 45-day lead-time: 1) time needed for the unit to define the requirement and push it through the requirement generation and approval process; 2) time needed for the contracting office to prepare the solicitation, evaluate offers and award the contract; and 3) time needed after contract award for delivery of supplies or performance of services.

2. There are seven statutory exceptions that permit contracting without full and open competition, which are set forth in 10 U.S.C. § 2304(c) and FAR Subpart 6.3:

a. Only one responsible source and no other supplies or services will satisfy agency requirements. FAR 6.302-1. The contracting officer may award a contract without full and open competition if the required supplies or services can only be provided by one or a limited number of sources. For example, it may be necessary to award a contract to a particular source where that source has exclusive control of necessary raw materials or patent rights. FAR 6.302-1 provides additional examples of circumstances where use of this exception may be appropriate. This exception allows the KO to limit the competition to those sources that can meet the Government's need. For also Smith and Wesson, Inc., B-400479, Nov., 20, 2008, 2008 CPD ¶ 215.

b. Unusual and compelling urgency. FAR 6.302-2. This exception applies where the need for the supplies or services is of such an unusual or compelling urgency that delay in awarding the contract would result in serious injury to the government. Use of this exception enables the contracting officer to limit the procurement to the only firm(s) he reasonably believes can properly satisfy the requirement in the limited time available. Because of the urgency, the contracting officer is permitted to award the contract even before the written "Justification and Approval" (see paragraph 3 below) is completed. Similarly, the urgency requiring use of this exception can allow the contracting officer to dispense with the 15-day publication requirement. FAR 5.202(a)(2).

(1) This exception is particularly applicable to meet urgent critical needs relating to human safety and which affects military operations. For example, this exception was used to procure sandbags in support of Operation Iraqi Freedom (Total Industrial & Packaging Corporation, B-295434, 2005 U.S. Comp. Gen. Proc. Dec. ¶ 38 (Feb. 22, 2005)) and to procure automatic fire suppression systems for U.S. Marine Corps's light armored vehicles (Meggitt Safety Systems, Inc., B-297378, B-297378.2, 2006 U.S. Comp. Gen. LEXIS 27 (Jan. 12, 2006)).

c. Industrial mobilization, engineering, developmental, or research capability; or expert services for litigation. FAR 6.302-3. This exception is used when it is necessary to keep vital facilities or suppliers in business, to prevent insufficient availability of critical supplies or employee skills in the event of a national emergency.

d. International agreement. FAR 6.302-4. This exception is used where supplies or services will be used in another country, and the terms of a SOFA or other international agreement or treaty with that country specify or limit the sources. This exception also applies when the acquisition is for a foreign country who will reimburse the acquisition costs (e.g., pursuant to a foreign military sales agreement) directs that the product be obtained from a particular source.

e. Authorized or required by statute. FAR 6.302-5. Full and open competition is not required if a statute expressly authorizes or requires the agency to procure the supplies or services from a specified source, or if the need is for a brand name commercial item for authorized resale.

f. National security. FAR 6.302-6. This exception applies if disclosure of the government's needs would compromise national security. Mere classification of specifications generally is not sufficient to restrict the competition, but it may require potential contractors to possess or qualify for appropriate security clearances. FAR 6.302-6.

g. Public interest. FAR 6.302-7. Full and open competition is not required if the agency head determines that it is not in the public interest for the particular acquisition. Though broadly written, this exception is rarely used because only the head of the agency can invoke it—it requires a written determination by the Secretary of Defense. DFARS 206.302-7.

h. Lack of advance planning is NOT an exception to full and open competition and may not be used to justify the use of noncompetitive procedures. FAR 6.301(c)(1). See, for example, World Wide Language Resources, Inc.; SOS International Ltd., B-296984, 2005 U.S. Comp. Gen. Proc. Dec. ¶ 206 (Nov. 14, 2005) (protest of sole-source contract award for bilingual-bicultural advisor/subject matter experts in support of Multinational Forces-Iraq sustained where the urgency—the immediate need for the services prior to the January 2005 elections in Iraq—was the direct result of unreasonable actions and acquisition planning by the government 2-3 months earlier).

3. Use of any of these exceptions to full and open competition requires a written "Justification and Approval" (J&A). FAR 6.303. For the contents and format of a J&A, refer to AFARS 5106.303, 5153.9004, and 5153.9005. The approving authority is responsible for the J&A, but attorney involvement and assistance is critical to successful defense of the decision to avoid full and open competition. Limiting competition in any way invites protests which may interrupt the procurement process. Approval levels for justifications, as listed in FAR 6.304, are:

a. Actions under $650,000: the contracting officer.

b. Actions from $650,000 to $12.5 million: the competition advocate designated pursuant to FAR 6.501.

c. Actions from $12.5 million to $62.5 million (or $85.5 million for DOD, NASA, and the Coast Guard): the HCA or designee.

4. Actions above $62.5 million (or above $85.5 million for DOD, NASA, and the Coast Guard): the agency acquisition executive. For the Army, this is the Assistant Secretary of the Army for Acquisition, Logistics, and Technology (ASA(ALT)).

5. Contract actions awarded and performed outside the United States, its possessions and Puerto Rico, for which only local sources will be solicited, are generally exempt from compliance with the requirement to synopsize the acquisition in the GPE. Accordingly, these actions may be accomplished with less than the normal minimum 45-day PALT. However, but they are <u>not</u> 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 procurement 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 in support of other than full and open competition. Full and open competition under these circumstances is attained 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. See, FAR 5.101(a)(2) & (b) and AFARS Manual No. 2, para.4-3.e.

6. Temporary Exceptions. During contingency operations, Congress may authorize temporary exceptions to normal contracting and competition rules through authorization acts or annual or supplemental appropriations acts. Historic examples from Iraq and Afghanistan include the CERP (Afghanistan only), Iraq/Afghan First Program, and the SC-CASA Program (allowing preferences and set-asides for certain acquisitions from vendors in certain countries along major supply routes to Afghanistan).

C. Methods of Acquisition

1. Sealed Bidding. This is the appropriate acquisition method when award is based solely on price and price-related factors, and is made to the lowest, responsive, responsible bidder. See FAR Part 14.

a. Sealed bidding procedures must be used if the four conditions enumerated in the Competition in Contracting Act exist. These four conditions, commonly known as the "Racal factors," are:

(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.

10 U.S.C. § 2304(a)(2)(A); FAR 6.401; see also, Racal Filter Technologies, Inc., B-240579, Dec. 4, 1990, 70 Comp. Gen. 127, 90-2 CPD ¶ 453.

b. Practitioners should note the use of sealed bidding allows little discretion in the selection of a source. Bids are solicited using Invitations for Bids (IFB) under procedures that do not allow for pre-bid discussions with potential sources. Consequently, a clear understanding and description of the requirement is essential. Sealed bidding requires more sophisticated contractors because errors in bid preparation may result in a non-responsive bid preventing the government from accepting the offer. Only fixed-price type contracts are awarded using this method of acquisition. Sealed bidding procedures are rarely used during active military operations in foreign countries because, generally, discussions with responding offerors are required to ensure their understanding of, and capability to meet, our requirement.

2. Negotiations (also called "competitive proposals").

a. With this acquisition method, the award is based on stated evaluation criteria—one criterion must be cost—and is made to the responsible offeror whose proposal offers the "best value" to the government. The contracting officer informs potential offerors up front whether best value will be based upon an offeror submitting the "lowest cost, technically acceptable" solution to the government's requirement, or whether best value will be determined on a "cost-technical tradeoff" basis, which allows the government to accept a higher-priced offer if the perceived benefits of the higher-priced proposal outweigh the additional cost. The basis for award (low-cost, technically-acceptable or cost-technical tradeoff) and a description of all factors and major sub-factors that the contracting officer will consider in making this determination must be stated in the solicitation. See FAR Part 15.

b. This method of acquisition is used when the use of sealed bids is not appropriate. 10 U.S.C. § 2304(a)(2)(B). Negotiations permit greater discretion in the selection of a source and allow consideration of non-price factors in the evaluation of offers, such as technical capabilities of the offerors, past performance history, etc. Offers are solicited by use of a Request for Proposals (RFP). Proposals are submitted by offerors and are evaluated in the manner stated in the solicitation. Consistent with the solicitation, the contracting officer may establish a competitive range comprised of the most highly-rated proposals and conduct discussions with only those offerors. Following discussions, the offerors may submit revised proposals for evaluation. Finally, award is made to the offeror whose proposal represents the best value to the government. Of note, negotiations permit the use of any contract type.

D. Simplified Acquisition Procedures.

1. Thresholds. Simplified procedures may be used for procurements below certain dollar amounts. These amounts are specified in FAR Part 2. However, on October 28, 2004, the thresholds for procurements in support of contingency operations (defined in 10 U.S.C. § 101(a)(13)) or to facilitate defense against or recovery from NBC or radiological attack were increased. Section 822 of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375. Presently, the base thresholds and the increased contingency thresholds are as follows:

a. Simplified Acquisition Threshold (SAT). Simplified acquisition procedures can be used to procure goods and services up to the "simplified acquisition threshold" (SAT), which is normally $150,000. For purchases supporting a contingency operation but made (or awarded and performed) *inside* the United States, the SAT is $300,000. For purchases supporting a contingency operation made (awarded and performed) *outside* the United States, the SAT is $1,000,000. 41 U.S.C. § 428a(b)(2); FAR 2.101 (restating SAT and defining contingency operation). DFARS Class Deviation 2011-O0009, Simplified Acquisition Threshold for Humanitarian or Peacekeeping Operations (28 Mar. 2011), sets the SAT at $300,000 when soliciting or awarding contracts to be awarded and performed outside the United States to support a humanitarian or peacekeeping operation. See FAR 2.101 (defining humanitarian or peacekeeping operation). DFARS Class Deviation 2013-O0003, Definition of Contingency Operation (26 Nov. 2012), directs use of a new definition for "contingency operation" when making acquisitions in support of a major disaster, when the Secretary of Defense mobilizes Reserve forces in response to a

Governor's request for assistance. In that case, the definition from 10 U.S.C. § 101(a)(13) should be used in lieu of the definition outlined in FAR 2.101.

b. Micro-Purchase Threshold. The "micro-purchase threshold" is $3,000. Below this threshold purchases may be made without competition. However, for purchases of construction subject to the Davis-Bacon Act the micro-purchase threshold is $2,000 and for acquisitions of services subject to the Service Contract Act the micro-purchase threshold is $2,500. For purchases supporting a contingency operation made (or awarded and performed) *inside* the United States, the micro-purchase threshold is $15,000. For purchases supporting a contingency operation made (or awarded and performed) *outside* the United States, the micro-purchase threshold is $30,000. 41 U.S.C. § 428a(b)(1); FAR 2.101.

c. Commercial Items. Commercial Item Test Program (CITP) allows agencies to use simplified acquisition procedures to purchase commercial item supplies and services for amounts greater than the simplified acquisition threshold but not greater than $6,500,000. National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 4202(a) (1) (A) (codified at 10 U.S.C. § 2304(g)(1)(B)) and FAR 13.5. For contingency operations or to facilitate the defense against or recovery from nuclear, biological, chemical, or radiological attack against the United States, the $6,500,000 commercial item test program threshold increases to $12,000,000. *See* National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, § 1443. Congress created this authority to promote efficiency and economy in contracting and to avoid unnecessary burdens for agencies and contractors. 10 U.S.C. § 2304(g)(1). For the period of the CITP test, contracting activities are to use simplified acquisition procedures to the maximum extent practicable. FAR 13.500(b). (Authority for the CITP lapsed on 1 Jan 2012, but was reauthorized by section 822 of the 2013 NDAA.)

2. Methods under Simplified Acquisition Procedures. About 95% of the contracting activity conducted in a deployment setting will be simplified acquisitions. The following are various methods of making or paying for these simplified purchases. Most of these purchases can be solicited orally, except for construction projects exceeding $2,000 and complex requirements. See FAR 13.106-1(d). The types of simplified acquisition procedures likely to be used during a deployment are: Purchase Orders; Blanket Purchase Agreements (BPA); Imprest Fund Purchases; Government Purchase Card Purchases; and Accommodation checks/government purchase card convenience checks.

a. Purchase Orders. A purchase order is an offer to buy supplies or services, including construction. Purchase orders are usually 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 three different forms. FAR Subpart 13.302; DFARS Subpart 213.302; AFARS Subpart 5113.302 and 5113.306 (for use of the SF 44).

(1) DD Form 1155 or SF 1449. These are multi-purpose forms which can be used as a purchase order, blanket purchase agreement, receiving/inspection report, property voucher, or public voucher. They contain some contract clauses, but users must incorporate all other applicable clauses. FAR 13.307; DFARS 213.307; DFARS PGI 213.307. See clause matrix in FAR Part 52.301. When used as a purchase order, the KO may make purchases up to the simplified acquisition threshold. Only KOs have the authority to use these forms.

(2) Standard Form (SF) 44. This is a pocket-sized form intended for over-the-counter or *on-the-spot* purchases. Use this form Ordering officers and KOs may use this form for "cash and carry" type purchases. Practitioners should note that clauses are not incorporated. Reserve unit commanders may use the SF 44 for purchases not exceeding the micro-purchase threshold when a Federal Mobilization Order requires unit movement to a Mobilization Station or site, or where procurement support is not readily available from a supporting installation. FAR 13.306; DFARS 213.306; AFARS 5113.306. The SF 44 may be use only if *all* of the following conditions are satisfied:

(a) The amount of the purchase is at or below the micro-purchase threshold;

(b) The goods or services are immediately available;

(c) One delivery and one payment will be made; AND

(d) It is determined to be more economical and efficient that use of other simplified acquisition procedures.

(3) Ordering officers may use SF 44s for purchases up to the micro-purchase threshold for supplies or services. However, during a contingency operation, a contracting officer may make purchases up to the simplified acquisition threshold. *See* DFARS 213.306(a)(1).

b. Blanket Purchase Agreements (BPA). 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. FAR Subpart 13.303; DFARS Subpart 213.303; AFARS Subpart 5113.303.

(1) BPAs are prepared and issued on DD Form 1155 or SF 1449 and must contain certain terms/conditions. FAR 13.303-3:

(a) Description of agreement.

(b) Extent of obligation.

(c) Pricing.

(d) Purchase limitations.

(e) Notice of individuals authorized to place purchase orders under the BPA and dollar limitation by title of position or name.

(f) Delivery ticket requirements.

(g) Invoicing requirements.

(2) KOs may authorize ordering officers and other individuals to place calls (orders) under BPAs. FAR 13.303, AFARS 5113.303-2. Existence of a BPA does not per se justify sole-source procurements. FAR 13.303-5(c). Requiring activities must consider BPAs with multiple sources. If insufficient BPAs exist, requiring activities must solicit additional quotations for some purchases and make awards through separate purchase orders.

c. Imprest Fund Purchases. 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. Authorized individuals (ordering officers and contracting officers) make purchases and provide the receipts to the cashier. When documented expenditures deplete the amount of cash in the imprest fund, the cashier may request to have the fund replenished. FAR 13.305; DFARS 213.305; DOD FMR vol. 5, para. 0209.

(1) DOD activities are not authorized to use imprest funds unless the Under Secretary of Defense (Comptroller) approves an exception to policy for a contingency or classified operation. DOD FMR, vol. 5, para. 020902.

(2) Imprest funds may not exceed $10,000 and a single transaction may not exceed $500. During contingency operations, the designated area commander may increase the ceiling on cash holdings to $100,000 and the single transaction limit to $3,000. DOD FMR vol. 5, para. 020903.

(3) DOD FMR vol. 5, para. 0209, contains detailed guidance on the appointment, training, and procedures governing the use of imprest funds, to include permissible and prohibited expenditures. Imprest fund cashiers should receive training in their duties, liabilities, and the operation of an imprest fund prior to deployment.

d. Government Purchase Card Purchases. Authorized GPC holders may use the cards to purchase goods and services up to the micro-purchase threshold. FAR 13.301(c). In a contingency operation, KOs may use the cards for purchases up to the SAT. DFARS 213.301(3). Overseas, even if not in a designated contingency operation, authorized GPC holders may make purchases up to $30,000 for certain commercial items/services for use outside the U.S., but not for work to be performed by workers recruited within the United States. See DFARS 213.301(2) (containing additional limitations on this authority). The GPC can also be used as a payment instrument for orders made against Federal Supply Schedule contracts, calls made against a BPA, and orders placed against Indefinite Delivery/Indefinite Quantity (IDIQ) contracts that contain a provision authorizing payment by purchase card. FAR 13.301(c); AFARS 5113.202-90. Of note, funds must be available to cover the purchases. Special

training for cardholders and billing/certifying officials is required. AFARS 5113.201(c). Issuance of these cards to deploying units should be coordinated prior to deployment, because there may be insufficient time to request and receive the cards once the unit receives notice of deployment. FAR 13.301; DFARS 213.279, 213.301; AFARS Subpart 5113.2.

e. Accommodation checks/government purchase card convenience checks. Commands which are deployed may utilize accommodation checks and/or GPC convenience checks in the same manner as they are used during routine operations. Checks should only be used when Electronic Funds Transfer (EFT) or the use of the government purchase card is not possible. *See* DoD FMR, vol. 5, para. 0210. Government purchase card convenience checks may not be issued for purchases exceeding the micro-purchase threshold. See DoD FMR, vol. 5, para. 021001.B.1.; see also DFARS 213.270(c)(6).

3. Commercial Items Acquisitions. FAR Part 12. Much of our deployment contracting involves purchases of commercial items. The KO may use any simplified acquisition method to acquire commercial items, or may use one of the other two acquisition methods (sealed bidding or negotiations). All three acquisition methods are streamlined when procuring commercial items. FAR Part 12 sets out a series of special simplified rules, to include a special form, simplified clauses, and streamlined procedures that may be used in acquiring commercial items. (NOTE: The increased thresholds for commercial items acquisition are no longer available.) However, any contract for commercial items must be firm-fixed-price or fixed-price with economic price adjustment. FAR 12.207.

4. Simplified Acquisition Competition Requirements. The requirement for full and open competition does not apply to simplified acquisitions. However, for simplified acquisitions above the micro-purchase threshold, there is still a requirement to obtain competition "to the maximum extent practicable," which ordinarily means soliciting at least 3 quotes from sources within the local trade area. FAR 13.104(b). For purchases at or below the micro-purchase threshold, there is no competition requirement at all, and obtaining just one oral quotation will suffice so long as the price is fair and reasonable. FAR 13.202(a)(2). Additional simplified acquisition competition considerations:

a. Micro-purchases. While there is no competition requirement, micro-purchases shall be distributed equitably among qualified sources to the extent practicable. FAR 13.202(a)(1). If practicable, the requiring activity should solicit a quotation from a supplier different than the previous supplier before placing a repeat order. Additionally, the requiring activity should use oral solicitations as much as possible. However, a written solicitation must be used for construction requirements over $2,000. FAR 13.106-1(d).

b. Simplified acquisitions above the micro-purchase threshold. Because there is still a requirement to promote competition "to the maximum extent practicable," KOs may not sole-source a requirement above the micro-purchase threshold unless the need to do so is justified in writing and approved at the appropriate level. FAR 13.501. Soliciting at least three sources is a good rule of thumb to promote competition to the maximum extent practicable. Whenever practicable, request quotes from two sources not included in the previous solicitation. FAR 13.104(b). Generally, the requiring activity should also solicit the incumbent contractor. J. Sledge Janitorial Serv., B-241843, Feb. 27, 1991, 91-1 CPD ¶ 225.

c. Requirements that exceed the SAT or the micro-purchase threshold may <u>not</u> be broken down into several purchases to avoid procedures that apply to purchases exceeding those thresholds. FAR 13.003(c).

5. Publication (Notice) Requirements. Normally, contracting officers are required to publish a synopsis of proposed contract actions over $25,000 on the Government-wide point of entry (GPE) at FedBizOpps.gov. 15 U.S.C. § 637(e); 41 U.S.C. § 416(a)(1); FAR 5.101(a)(1) and FAR 5.203. For actions estimated to be between $15,000 and $25,000, public posting (displaying notice in a public place) of the proposed contract action for 10 days is normally required. 15 U.S.C. § 637(e); 41 U.S.C. § 416(a)(1)(B); FAR 5.101(a)(2). None of these notice requirements exist if the disclosure of the agency's needs would compromise national security. 15 U.S.C. § 637(g)(1)(B); 41 U.S.C. § 416(c)(1)(B); FAR 5.101(a)(2)(ii) and FAR 5.202(a)(1). Practitioners should note, disclosure of most needs in a deployment would <u>not</u> compromise national security. Still, the requirement to publish notice in FedBizOpps.gov is often not required in deployment contracting because there are other exemptions listed at FAR 5.202 that will often apply. For example, publication is not required for contracts that will be made and performed outside the United States, and for which only local sources will be solicited. FAR 5.202(a)(12). Accordingly, notice of proposed contract actions overseas is accomplished primarily through public posting at the local equivalent of a Chamber of Commerce, bulletin boards outside the deployed contracting office, or other locations readily accessible by the local vendor community. See FAR 5.101(a)(2) & (b)

E. Use of Existing Contracts to Satisfy Requirements.

1. Existing ordering agreements, indefinite delivery contracts, and requirements contracts may be available to meet recurring requirements, such as fuel, subsistence items, and base support services. Investigate the existence of such contracts with external and theater support contracting activities. For a discussion of theater and external support contracts, see supra subpart III.C.

2. Theater Support Contracts. In developed theaters, the theater contracting activity (regardless of organizational type) may have existing IDIQ contracts, BPAs, or requirements contracts available to efficiently satisfy a unit's needs. For example, C3 may have multiple award IDIQ contracts for base support services and security services. If a unit has a requirement for either of these services, C3 may expeditiously award the task order to one of the awardees of the underlying IDIQ contract utilizing the "fair opportunity" to be considered procedures in FAR 16.5.

F. 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 that may be used to meet critical requirements that cannot be fulfilled using normal contracting procedures.

1. Host nation support and acquisition and cross-servicing agreements provide a critical means of fulfilling the needs of deployed U.S. forces and are addressed in 10 U.S.C. § 2341-2350; governed by U.S. Dep't of Defense, Dir. 2010.9, Acquisition and Cross-Servicing Agreements (28 Apr. 2003); and implemented by Joint Chiefs of Staff, Instr. 2120.01A, Acquisition and Cross-Servicing Agreements (27 Nov. 2006). Army guidance is located in U.S. Dep't of Army, Reg. 12-1, Security Assistance and International Logistics, Security Assistance, Training and Export Policy (23 Aug. 2010). 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. For further information, see Contract & Fiscal Law Dep't, The Judge Advocate General's School, U.S. Army, Fiscal Law Deskbook, ch. 10, Operational Funding (available online at http://www.loc.gov/rr/frd/Military_Law/ Contract-Fiscal-Law-Department.html).

2. The Economy Act (31 U.S.C. § 1535) provides another alternative means of fulfilling requirements. An executive agency may transfer funds to another agency and order goods and services to be provided from existing stocks or by contract. For example, the Air Force could have construction performed by the Army Corps of Engineers, and the Army might have Department 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 17.5; DFARS 217.5; U.S. Dep't of Defense, Instr. 4000.19, Interservice and Intragovernmental Support (9 Aug. 1995); and DFAS-IN 37-1. For further information, see Contract & Fiscal Law Dep't, The Judge Advocate General's School, U.S. Army, Contract Law Deskbook, ch. 11, Interagency Acquisitions (available online at http://www.loc.gov/rr/frd/Military_Law/ Contract-Fiscal-Law-Department.html).

3. Extraordinary contractual actions under Public Law 85-804. During a national emergency declared by Congress or the President and for six months after the termination thereof, the President and his designee may initiate or amend contracts notwithstanding any other provision of law whenever it is deemed necessary to facilitate the national defense. *See supra* subpart I.C.2.e. for further detail.

G. Leases of Real Property. The Army is authorized to lease foreign real estate for military purposes. 10 U.S.C. § 2675. True leases normally are accomplished by the Army Corps of Engineers using Contingency Real Estate Support Teams (CREST).

V. POLICING THE CONTRACTING BATTLEFIELD

A. Ratification of Contracts Executed by Unauthorized Government Personnel. Only warranted KOs can legally bind the government in contract. However, sometimes other government officials purport to bind the

government. For example, this may occur when a commander directs a contractor to take actions beyond the scope of an existing contract or in the absence of a contract. An "unauthorized commitment" is an agreement that is not binding on the government solely because it was made by someone who did not have authority to bind the government. (FAR 1.602-3).

1. Because the person making the unauthorized commitment had no authority to bind the government, the government has no obligation to pay the unauthorized commitment. However, someone with actual authority to bind the government may choose to subsequently ratify the unauthorized commitment.

2. Based upon the dollar amount of the unauthorized commitment, the following officials have the authority to ratify the unauthorized commitment (See FAR 1.602-3; AFARS 5101.602-3):

a. Up to $10,000: Chief of Contracting Office

b. $10,000 - $100,000: PARC or SCO

c. Over $100,000: HCA

3. These officials may ratify only when (FAR 1.602-3(c)):

a. The government has received the goods or services;

b. The ratifying official has the authority to enter into a contractual commitment;

c. The resulting contract would have otherwise been proper if made by an appropriate contracting officer;

d. The price is fair and reasonable;

e. The contracting officer recommends payment and legal counsel concurs, unless agency procedures do not require such concurrence; and

f. Proper funds are available and were available at the time the unauthorized commitment was made.

B. Extraordinary Contractual Actions. If ratification is not appropriate, for example, where no agreement was reached with the supplier, the taking may be compensated as an informal commitment. FAR 50.102-3; 50.103-2(c). Alternatively, the supplier may be compensated using service secretary residual powers. FAR Subpart 50.104.

1. Requests to formalize informal commitments must be based on a request for payment made within six 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 50.102-3(d).

2. These procedures have been used to reimburse owners of property taken during the Korean War (AFCAB 188, 2 ECR § 16 (1966)); in the Dominican Republic (Elias Then, Dept. of Army Memorandum, 4 Aug. 1966); in Jaragua S.A., ACAB No. 1087, 10 Apr. 1968; and in Panama (Anthony Gamboa, Dep't of Army Memorandum, Jan. 1990).

C. Quantum Meruit.

1. Prior to 1995-1996, the Comptroller General had authority under 31 U.S.C. § 3702 to authorize reimbursement on a quantum meruit or quantum valebant basis to a firm that performed work for the government without a valid written contract.

2. Under quantum meruit, the government pays the reasonable value of services it actually received on an implied, quasi-contractual basis. Maintenance Svc. & Sales Corp., 70 Comp. Gen. 664 (5 Aug. 1991).

3. The GAO used the following criteria to determine justification for payment:

a. The goods or services for which the payment is sought would have been a permissible procurement had proper procedures been followed;

b. The government received and accepted a benefit;

c. The firm acted in good faith; and

d. The amount to be paid did not exceed the reasonable value of the benefit received. Maintenance Svc. & Sales Corp., 70 Comp. Gen. 664 (1991).

4. Congress transferred the claims settlement functions of the GAO to the Office of Management and Budget, which further delegated the authority. *See* The Legislative Branch Appropriations Act, 1996, Pub. L. 104-53, 109 Stat. 514, 535 (1995); 31 U.S.C. 3702.

5. The Claims Division at the Defense Office of Hearings and Appeals (DOHA) settles these types of claims for the Department of Defense. DOHA decisions can be found at http://www.dod.mil/dodgc/doha/.

D. Contract Disputes Act (CDA) claims. If the contractor believes it can meet its burden in proving an implied-in-fact contract, it can appeal a contracting officer's final decision to the United States Court of Federal Claims or the cognizant board of contract appeals. *See* 41 U.S.C. §§ 601-613; FAR Subpart 33.2.

E. Contracting With the Enemy.

1. Section 831 of the 2014 National Defense Authorization Act (NDAA) authorizes the HCA to restrict award, terminate contracts already awarded, or void contracts to contractors who directly or indirectly fund the insurgency or forces opposing the United States. Further, the Combatant Commander can use battlefield intelligence to make this determination and does not have to disclose that intelligence to the affected contractor. This authority applies to all contracts exceeding more than $50,000.

VI. CONCLUSION

Sound contingency contracting requires Judge Advocates who are able to advise the key players (commanders, contracting officers, field ordering officers, etc) on how to legally meet the needs of the requiring activity. This is particularly true when many of the key players have limited contracting experience and staggering sums of money are available to accomplish their mission. The most important thing to remember when spending appropriated funds, whatever the vehicle or mechanism, is that each decision carries significant consequences. Judge Advocates should spend the time and effort to become familiar with the major contracts laws, policies, and regulations prior to deploying. Equally as important, Judge Advocates are encouraged to develop reach-back relationships prior to deployment; both within their command and throughout their technical chain of command, so difficult questions can be answered accurately and quickly.

CHAPTER 16

CONTINGENCY CONTRACTOR PERSONNEL

REFERENCES

1. U.S. DEP'T OF DEFENSE, DEFENSE FEDERAL ACQUISITION REG. SUPP. 225.74 [hereinafter DFARS], *with its accompanying clause at* DFARS 252.225-7040; U.S. DEP'T OF DEFENSE, DEFENSE PROCEDURES, GUIDANCE, AND INFORMATION 225.74 [hereinafter DFARS PGI]; DFARS Class Deviation 2011-O0004, *Contractor Personnel Performing in the United States Central Command Area of Responsibility*, 25 Apr. 2011, *available at* http://www.acq.osd.mil/dpap/policy/policyvault/USA001267-11-DPAP.pdf [hereinafter DFARS Class Deviation 2011-O0004).
2. U.S. DEP'T OF DEFENSE, INSTR. 3020.41, OPERATIONAL CONTRACT SUPPORT (20 Dec. 2011) [hereinafter DoDI 3020.41].
3. U.S. DEP'T OF DEFENSE, INSTR. 3020.50, PRIVATE SECURITY CONTRACTORS (PSCS) OPERATING IN CONTINGENCY OPERATIONS, HUMANITARIAN OR PEACE OPERATIONS, OR OTHER MILITARY OPERATIONS OR EXERCISES (1 Aug. 2011) [hereinafter DoDI 3020.50].
4. U.S. DEP'T OF DEFENSE, INSTR. 5525.11, CRIMINAL JURISDICTION OVER CIVILIANS EMPLOYED BY OR ACCOMPANYING THE ARMED FORCES OUTSIDE THE UNITED STATES, CERTAIN SERVICE MEMBERS, AND FORMER SERVICE MEMBERS (3 Mar. 2005) [hereinafter DoDI 5525.11].
5. Army Sustainment Command Contractors on the Battlefield Webpage, *located at* http://www.aschq.army.mil/home/BattlefieldResourceLibrary.aspx (containing links to contingency contractor personnel related materials and websites).
6. Assistant Sec'y of the Army (Acquisition, Logistics and Tech.), Contingency Contracting and Contractor on the Battlefield Library, *available at* https://www.alt.army.mil/portal/page/portal/oasaalt/SAAL-ZP-Contingency-Contracting (containing links to materials relevant to contingency contracting; deployments; contingency contractor personnel; suggested contracting clauses; contingency contracting articles; etc.).
7. CENTCOM Contracting Command website, *located at* https://www2.centcom.mil/sites/contracts/Pages/Default.aspx (containing training materials, checklists, policy documents, acquisition instructions, and contract clauses).
8. U.S. DEP'T OF ARMY, REG. 715-9, OPERATIONAL CONTRACT SUPPORT PLANNING AND MANAGEMENT (20 Jun. 2011) [hereinafter AR 715-9].
9. U.S. DEP'T OF ARMY, REG. 700-137, LOGISTICS CIVIL AUGMENTATION PROGRAM (LOGCAP) (28 Dec. 2012) [hereinafter AR 700-137].
10. See Section IX below for additional references.

I. INTRODUCTION

Throughout the history of U.S. military operations, contractors have provided goods and services that multiply the effectiveness of our fighting force. By taking on responsibilities that would otherwise distract soldiers from the main effort, they free up uniformed personnel to focus on fighting and supporting the troops in combat. However, this reliance has grown over the years to the extent that there are often as many contractors on the battlefield as there are uniformed personnel. Contractor roles have also expanded, now including such tasks as personnel and static security. No matter what type of unit a deploying Judge Advocate is advising, it is almost certain that the unit will rely on contracted support for at least some functions. Accordingly, it is paramount that Judge Advocates understand the relationship between DoD and contractor personnel while conducting contingency operations.

II. TYPES OF CONTRACTS THAT SUPPORT CONTINGENCY OPERATIONS.

A. General. Contingency operations require many contracts to support full operations. These may be let with local contracting personnel (for smaller requirements). However, many of the contracts required are too large and complicated to be executed within theater. Accordingly, some contracts are awarded by CONUS activities to support operations overseas. Still others are awarded based on the requirement to support specific systems (weapons or otherwise) wherever they may be used. All of these contracts may support a contingency operation, but they are

grouped into three main categories for purposes of understanding the contracting authorities used to procure the various services.

B. External Support Contracts.[1]

1. External Support Contracts are prearranged contracts let by authorities outside the contingency operating area, but which support the effort. They are called "external" because the authority used to enter into these contracts is derived from authorities other than those present in theater. Examples include the Army Logistics Civil Augmentation Program (LOGCAP), the Air Force Contract Augmentation Program, the Navy Construction Capabilities Contract, Civil Reserve Air Fleet contracts, and war reserve materiel contracts. Support under external support contracts is often designated as "essential contractor services" under the contract.[2]

2. Contract personnel under external support contracts are primarily either US Citizens or TCNs. However, external support contractors often hire local national personnel under subcontracts.

C. Systems Support Contracts. [3]

1. Systems Support Contracts are awarded by acquisition program management (PM) offices to support specific weapons or other systems. For example, a system support contract for Mine Resistant Ambush Protected (MRAP) vehicles would be awarded when the vehicles are purchased and would support maintenance, modification, troubleshooting, and operation requirements. They provide essential support to specific systems throughout the system's life cycle (including spare parts and maintenance for key weapons systems, command and control infrastructure, and communications systems) across the range of military operations.

2. Contract personnel under systems support contracts normally have high levels of technical expertise, and are hired to support specific military systems. These are often U.S. Citizens and are Contractors Authorized to Accompany the Force (CAAF) in most cases. Support under systems support contracts is often designated as "essential contractor services" under the contract.[4]

D. Theater Support Contracts.[5] Contracts awarded within the contingency operations area to support deployed operational forces are called Theater Support Contracts. Military contracting personnel with the deployed force, working under the contracting authority of the theater, component, or joint forces command contracting chief, normally award and administer these contracts. Theater support contracts provide goods, services, and minor construction, usually from the local vendor base, to meet the immediate needs of operational commanders. Most of these contracts do not provide essential contractor services; however, there are exceptions such as fuel and transportation support.[6]

E. Restrictions.

1. Functions and duties that are inherently governmental are barred from private sector performance.[7] Inherently governmental functions are those that involve the exercise of governmental discretion, including decisions to use offensive force, commit or expend government funds or equipment, or issue grants. Such discretion must be exercised by government personnel only.

2. Contractor personnel shall not be supervised or directed by military or government civilian personnel.[8] Contractor employees should be supervised by the contractor's supervisors and should perform pursuant to the statement of work in the contract. If military or government personnel are directing the contractor's work, it may be a prohibited personal services contract.

III. CATEGORIES OF CONTRACTORS

A. General.

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[1] DEPARTMENT OF DEFENSE INSTRUCTION 3020.41, OPERATIONAL CONTRACT SUPPORT (2011), Glossary, at 48.
[2] *See Id.*, encl. 2, para 2(c).
[3] *Id.*, Glossary, at 50.
[4] *See Id.*, encl. 2, para 2(c)..
[5] *Id.*, Glossary, at 50.
[6] *See Id.*, encl. 2, para 2(c).
[7] *Id.* at encl. 2, para. 1(e).
[8] *Id.*; *See also* FAR Subpart 37.104, Personal Services Contracts.

1. The contract is the only legal basis for the relationship between a contractor and the U.S. Government.[9] As such, the contract is the primary resource one should consult on issues relating to contractor support and operations in theater. Known generally as "contingency contractor personnel," these are individual contractors, individual subcontractors at all tiers, contractor employees, and sub-contractor employees at all tiers under all contracts supporting the Military Services during contingency Operations. See DODI 3020.41, Glossary, Part II (definitions). However, they are not all afforded the same legal status, access to government-provided benefits, and access to government property (installations, housing, etc.).

2. Types of contingency contractors. A contract may generally characterize a contractor's relationship to the U.S. government into one of four broad categories, based on the terms included in their respective contracts: (1) Contractors Authorized to Accompany the Force (CAAF); (2) DoD contractors not accompanying the U.S. Armed Forces in the CENTCOM AOR; (3) DoD contractors not accompanying the U.S. Armed Forces outside the CENTCOM AOR; and (4) Non-DoD contractors (e.g., Department of State, U.S. Agency for International Development, etc.).

B. **Contractors Authorized to Accompany the Force (CAAF).** CAAF are afforded the highest amount of access to government furnished benefits and resources, and carry the most protected legal status possible for civilians. These contractors are imbedded in units, live in government housing on the compound or camp, and perform duties often alongside uniformed personnel. They are often highly skilled, and many are former members of the military. Though most CAAF contractors accompany the force into the CENTCOM AOR, they may also accompany the U.S. Military on other contingency operations, such as Haiti.

C. **DoD Contractors Not Accompanying the Armed Forces in the CENTCOM AOR**. Not all contractor personnel in a designated operational area are or will be CAAF, even though they are operating in the CENTCOM AOR and often alongside DOD employees. As an example, the PGI states that contractor personnel performing reconstruction contracts generally are not authorized to accompany the U.S. Armed Forces.[10]

D. **DoD Contractors Not Accompanying the Armed Forces Outside CENTCOM AOR**. Some contractors may be hired to perform work outside the United States in support of a contingency operation, but will not actually go into the CENTCOM AOR (for example, to support operations in Haiti). DFARS 225.301-4 requires use of the clause at FAR 52.225-19 when defense contractors will (a) not accompany the Armed Forces and (b) perform in a designated operational area or support a diplomatic or consular mission outside the United States and outside the CENTCOM AOR.

E. **Non-DoD Contractors in a Contingency Environment**. Contractors of other government agencies, such as the Department of State, are governed by the FAR Part 25.3 and its accompanying clause at FAR 52.225-19 as well as other agency specific regulations and directives.

F. **Summary**.

IF A CONTRACTOR IS A:	THEN INSERT THE CLAUSE AT:
Contractor Authorized to Accompany the Force (CAAF)	DFARS 252.225-7040
DoD Contractor Not Accompanying the Armed Forces in the CENTCOM AOR	DFARS Class Deviation 2011-O0004
DoD Contractor Not Accompanying the Armed Forces Outside the U.S. and Outside the CENTCOM AOR	FAR 52.225-19
Non-DoD Contractor	FAR 52.225-19

IV. LEGAL STATUS.

A. CAAF vs. Non-CAAF. Civilians accompanying the force are generally defined as persons who accompany the Armed Forces without actually being members thereof, and are responsible for the welfare of the

[9] *Id*., encl. 2, para. 1(d).
[10] DFARS PGI 225.7402(2).

armed forces.[11] CAAF status is conferred by including DFARS Clause 252.225-7040 in their contracts. The contractors authorized to accompany the force (CAAF) must be provided a DD Form 489 (Geneva Conventions Identity Card for Persons who Accompany the Armed Forces) to identify themselves as CAAF.[12] These individuals are usually U.S. citizens, but may be third-country nationals (TCNs) or local nationals (LNs). If captured during armed conflict, CAAF are entitled to POW status. Non-CAAF will not qualify for POW status under GPW.

B. Contractors may support operations through indirect participation, such as by providing communications support, transporting munitions and other supplies, performing maintenance on military equipment, and other logistic services.[13] Contractors who "engage in hostilities" risk being treated as combatants (and thus being targeted, etc.). Further, they risk being treated as "unprivileged belligerents" (and thus as war criminals).[14]

C. Use of Deadly Force. All contingency contractors are entitled to utilize deadly force in self-defense. All security contractors are authorized to use whatever force is necessary to fulfill their contracts. However, any improper use of force could expose contractor employees to host-nation criminal or civil liability.

D. Status of Forces Agreements (SOFAs). SOFAs are international agreements between two or more governments that provide various privileges, immunities, and responsibilities and enumerate the rights and responsibilities of individual members of the deployed force. The United States does not have SOFA arrangements with every country, and some SOFAs do not adequately cover all contingencies. As such, it is possible that CAAF, other contractors, and Soldiers will be treated differently by a local government.[15]

1. 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. Under the generally accepted view of the NATO SOFA, contractor employees are not considered members of the "civilian component" recognized therein. Accordingly, special technical arrangements or international agreements generally must be concluded to afford contractor employees the rights and privileges associated with SOFA status.

2. If there is any contradiction between a SOFA and an employer's contract, the terms of the SOFA will take precedence.

3. The following websites may help determine if the U.S. has a SOFA agreement with a particular country: http://www.jagcnet.army.mil (CLAMO section); https://aflsa.jag.af.mil/INTERNATIONAL (site requires FLITE registration and password); http://www.state.gov (this webpage also contains country studies, a quick way to learn about a country to which personnel are deploying).

E. Criminal Jurisdiction.

1. Generally. All contractors are subject to their home nation's laws. Additionally, CAAF are subject to the laws of the United States via the Military Extraterritorial Jurisdiction Act (MEJA) for felonies,

2. Afghanistan - **Operation Enduring Freedom**.

a. Authority. United States relations with the Islamic Republic of Afghanistan and immunities are discussed in the Agreement Regarding the Status of United States Military and Civilian Personnel of the U.S. Department of Defense Present in Afghanistan in Connection with Cooperative Efforts in Response to Terrorism, Humanitarian and Civic Assistance, Military Training and Exercises, and Other Activities. This Agreement, drafted as a Diplomatic Note, entered into force on 28 May 2003, as effected by exchanges of notes on 26 September 2002 (Note 202), 12 December 2002 (Note 791), and 28 May 2003 (Note 93).

(1) The Agreement affirms U.S. criminal jurisdiction over contractor personnel. However, the agreement also provides that contractors remain subject to the criminal jurisdiction of the Islamic Republic of Afghanistan. The Agreement does not state which country has primary jurisdiction.

(2) The Agreement precludes the transfer or surrender of contractor and other U.S. personnel to an international tribunal or any other entity or state without the express consent of the United States.

3. Afghanistan - **International Security Assistance Force (ISAF) Contractors**.

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[11] Geneva Convention Relative to the Treatment of Prisoners of War, art. 4A(4), Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.
[12] DoDI 3020.41, *supra* note 1, encl. 2, para. 3(f).
[13] ARMY REGULATION 715-9: OPERATIONAL CONTRACT SUPPORT PLANNING AND MANAGEMENT (20 JUNE 2011), para. 4-2(a).
[14] Rebecca Rafferty Vernon, *Battlefield Contractors: Facing the Tough Issues***,** 33 PUB. CONT. L.J. 369, 404-21 (2004).
[15] AR 715-9, *supra* note 13, para. 4-2.

a. Contracts with ISAF forces are governed by a 2002 Military Technical Agreement negotiated with the Afghan Interim Authority.[16]

b. This agreement provides that "all ISAF and supporting personnel are subject to the exclusive jurisdiction of their own governments. ISAF personnel are immune from arrest or detention by Afghan authorities, and may not be turned over to any international tribunal or any other entity or State without the express consent of the contributing nation."[17]

V. GOVERNMENT-PROVIDED SUPPORT

A. General.

1. Most contractors will be required to provide whatever logistical and security support they require in order to perform the contract.[18] The major exceptions fall into two categories: support authorized pursuant to DFARS Clause 252.225-7040 (for CAAF), and specific contract terms placed in the contract in consideration of specific contract objectives and requirements. The latter category requires a review of each individual contract to determine what support is available to a given contractor. However, initial levels of support provided to CAAF are spelled out in the specific contract clause authorizing them to accompany the force.

2. Letter of Authorization (LOA). Any support provided under the contract will be listed on an LOA generated by the Synchronized Predeployment and Operational Tracker (SPOT) system, which will include a detailed list of benefits/support to which that contractor employee is entitled. All DOD contractors that receive any government support at all are required to carry the LOA on their person at all times.

B. Support to CAAF. DoDI 3020.41 establishes and implements policy and guidance, assigns responsibilities, and serves as a comprehensive source of DoD policy and procedures concerning requirements for management and interaction with CAAF.[19] This regulation should be read along with DFARS Clause 252.225-7040 to ascertain what support is due to a contractor carrying CAAF status. However, the specific contract is the definitive expression of what is owed to the contractor.

1. Security. CAAF may benefit from government-provided security (including security by military means, in some cases) if the Combatant Commander decides it is in the interests of the Government based on a lack of legitimate civil authority in the location, and:

(a) the contractor cannot obtain effective security services;

(b) effective security services are unavailable at a reasonable cost; or

(c) threat conditions necessitate security through military means.

2. Medical Care. CAAF are authorized to receive (on a reimbursable basis) resuscitative care, stabilization, hospitalization at level III military treatment facilities, and assistance with patient movement in emergencies where loss of life, limb, or eyesight could occur.

C. **Individual Protective Equipment (IPE)**. All contractors may wear individual protective equipment as required to provide for safety and security. The Combatant Commander may direct the contracting officer to include contract language authorizing CAAF, and certain non-CAAF contractors, to be issued IPE including body armor and other equipment. The decision of contractor personnel to wear any issued protective equipment is voluntary; however, the Combatant Commander, subordinate JFC and/or ARFOR Commander may require contractor employees to be prepared to wear Chemical, Biological, and Radiological Element (CBRE) and High-Yield Explosive defensive equipment.[20]

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[16] Jennifer K. Elsea, CONGRESSIONAL RESEARCH SERVICE, RL40991, PRIVATE SECURITY CONTRACTORS IN IRAQ AND AFGHANISTAN: LEGAL ISSUES, at 13-14 (7 Jan. 2010).
[17] DODI 3020.41, *supra* note 1, encl. 2, para. 3(c)(2)(d).
[18] *See* DFARS Class Deviation 2011-O0004, para. (c); FAR 52.225-19, para. (c).
[19] *Id.* para. 1(b).
[20] DODI 3020.41, *supra* note 1, encl. 2, para. 3(i).

D. **Clothing**. Generally, commanders SHALL NOT issue military clothing to contractor personnel, nor allow contractor personnel to wear military or military look-alike uniforms.[21] Individual contractor personnel are ordinarily responsible to provide their own clothing. Combatant Commanders may authorize certain contractor personnel to wear military uniforms for operational reasons. This authorization shall be in writing and be carried at all times by subject contractor personnel. Care must be taken to ensure contractor personnel are distinguishable from military personnel.[22]

E. **Government Furnished Equipment (GFE)**. Based on the contract, the government may provide certain equipment, to include protective equipment, clothing, or other equipment necessary for contract performance. In such cases, the contract will specify how the contractor is to service and maintain GFE.[23] Contractor employees will be responsible for maintaining all issued items and must return them to the issuer upon redeployment.[24]

F. **Legal Assistance**. Generally, contractor personnel are NOT entitled to military legal assistance with personal legal affairs, either in theater or at the deployment center. Any authorization should be contained within the LOA, which should be carried by the contractor employee and be presented to the legal office to show entitlement.[25]

IV. ADMINISTRATIVE ACCOUNTABILITY AND PROCESSING

A. **General**. Combatant Commanders are responsible, with assistance from their Component Commanders, for overall contractor visibility within their AOR.

B. The Synchronized Predeployment and Operational Tracker (SPOT).

1. DoD, DoS, and USAID executed a memorandum of Understanding in April 2010 that designated SPOT as the system of record for required contract and contractor personnel information. Under the MOA, the agencies must include in the database information on contacts with more than 30 days of performance or valued at more than $100,000.[26]

2. All defense contractors awarded contracts that support contingency operations are required, per contract, to register their employees in the SPOT system. Registration in SPOT is now a prerequisite to receive a Letter of Authorization (LOA).[27] See below for a discussion of LOAs.

3. SPOT relationship to CENTCOM CENSUS. United States Central Command "initiated a quarterly census of contractor personnel in June 2007, as an interim measure until SPOT is fully implemented. The census relies on contractor firms to self-report their personnel data to DoD components, which then aggregate the data and report them to CENTCOM at the end of each quarter."[28] The census remains in use as an alternate means of providing more complete information on contractor personnel in Iraq and Afghanistan pending full implementation of the SPOT database.[29]

4. SPOT may be accessed at http://www.resource.spot-es.net/Default.aspx

C. **Contractor Responsibilities**.

1. **Accountability**. External support and systems support contractors shall input employee data and maintain by-name accountability of CAAF in the joint database specified in the contract. These contractors are

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[21] *Id.* at encl. 2, para. 3(j).
[22] *Id. See also* DFARS 252.225-7040(i); DFARS Class Deviation 2011-O0004(k).
[23] AR 715-9, *supra* note 13, para. 4-5(d).
[24] DODI 3020.41, *supra* note 1, encl 2, para. 5(c)(2); DFARS Clause 252.225-7040(i)(4).
[25] DODI 3020.41, *supra* note 1, encl. 2, para 3(m); *But see* U.S. DEP'T OF ARMY, REG. 27-3, THE ARMY LEGAL ASSISTANCE PROGRAM para. 2-5a(7) (21 Feb. 96) [hereinafter AR 27-3] (authorizing legal assistance if specified in a given contract).
[26] Memorandum of Understanding (MOU) Between the U.S. Department of State (DOS) and the U.S. Department of Defense (DOD) and the U.S. Agency for International Development (USAID) Relating to Contracting in Iraq and Afghanistan (7 April 2010), available at http://www.acq.osd.mil/log/PS/p_vault/DOD_DOS_USAID_signature_20Apr2010.pdf.
[27] DODI 3020.41, *supra* note 1, encl. 2, para. 3(d).
[28] *Available at* http://www.acq.osd.mil/log/PS/CENTCOM_reports.html.
[29] *See* The Synchronized Predeployment and Operational Tracker (SPOT) Plus CENTCOM Quarterly Census User Guide (8 August 2010), available at https://www2.centcom.mil/sites/contracts/Synchronized%20Predeployment%20and%20Operational%20Tracker/Forms/AllItems.aspx

responsible for knowing the general location of their employees and shall keep the database updated.[30] The clauses at DFARS 252.225-7040(g), DFARS Class Deviation 2011-O0004(g), and DFARS 225.301-4(2) (which references the Clause at FAR 52.225-19) impose this same requirement on all defense contractors in any contingency environment covered by the clauses.

2. **Personnel Requirements**.

a. **Medical**. Contractors are responsible for providing medically and physically qualified personnel. Any contractor employee deemed unsuitable to deploy during the deployment process, due to medical or dental reasons, will not be authorized to deploy with the military force.[31] The clauses at DFARS 252.225-7040(e)(ii), DFARS Class Deviation 2011-O0004(e)(2)(ii), and FAR 52.225-19(e)(2)(ii) impose this same requirement on all defense contractors in any contingency environment covered by the clauses. Further, the SECDEF may direct mandatory immunizations for CAAF performing DoD-essential services.[32] Contracts must stipulate that employees must provide medical, dental and DNA reference specimens, and make available medical and dental records.[33]

b. Contracting officers may authorize contractor-performed deployment processing. Contracting officers shall coordinate with and obtain approval from the military departments for contractor-performed processing.[34]

D. **CONUS Replacement Centers (CRCs) and Individual Deployment Sites (IDS)**. All CAAF and some designated non-CAAF contractors, as specified in their contracts, shall report to the deployment center designated in the contract before deploying to a contingency operation.[35] Actions at the deployment center include:

1. Validate accountability information in the joint database; verify: security background checks completed, possession of required vehicle licenses, passports, visas, next of kin/emergency data card;

2. Issue/validate proper ID card;

3. Issue applicable government-furnished equipment;

4. Provide medical/dental screenings and required immunizations. Screening will include HIV testing, pre- and post-deployment evaluations, dental screenings, and TB skin test. A military physician will determine if the contract employee is qualified for deployment to the AO and will consider factors such as age, medical condition, job description, medications, and requirement for follow-up care.[36]

5. Validate/complete required training (e.g., law of war, detainee treatment, Geneva Conventions, General Orders, standards of conduct, force protection, nuclear/biological/chemical, etc);

6. All CAAF shall receive deployment processing certification (annotated in the letter of authorization (LOA) or separate certification letter) and shall bring this certification to the JRC and carry it with them at all times;

7. Waivers. For less than 30-day deployments, the Combatant Commander may waive some of the formal deployment processing requirements, including processing through a deployment center. Non-waivable requirements include possession of proper ID card, proper accountability, medical requirements (unless prior approval of qualified medical personnel). Personnel with waivers shall carry the waiver with them at all times.[37]

8. **Contractor Personnel Other than CAAF**. Non-CAAF have similar deployment requirements to all contractors unless otherwise directed by the contracting officer. Contractors not accompanying the Armed Forces and who are arriving from outside the area of performance must also process through the theater entrance/departure center specified in the contract or complete another process as directed by the contracting officer to ensure minimum theater admission requirements are satisfied.[38]

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[30] DODI 3020.41, *supra* note 1, encl. 2, para. 3(c).
[31] *Id.*, encl. 2, para. 3(h)(1).
[32] *Id.*
[33] *Id.*, encl. 2, para. 3(h)(3).
[34] *Id.* at encl. 2, para. 2(b).
[35] *Id.* at encl. 2, para. 3(h); DFARS 252.225-7040(e).
[36] DFARS 252.225-7040(e), (f).
[37] DODI 3020.41, encl. 2, para. 3(o).
[38] DFARS Class Deviation 2011-O0004(f); FAR Clause 52.225-19.

E. Theater Entry Locations. CAAF shall process through a theater entry location (reception center) upon arrival at the deployed location. The reception center will validate personnel accountability, ensure theater-specific requirements are met, and brief personnel on theater-specific policies and procedures.[39] DFARS 252.225-7040(f) subjects other contractors to similar procedures. Contractors not accompanying the Armed Forces arriving from outside the area of performance must process through a reception center as designated by the contracting officer upon arrival at the place of performance.[40]

VI. SECURITY, WEAPONS, AND USE OF FORCE

A. **Arming for Self-Defense**.

1. All contractors are authorized to use deadly force in self-defense.[41] Security contractors may also use deadly force if it appears reasonably necessary to carry out their security mission.[42] However, any improper use of force could expose contractors to host nation criminal and civil liability, as well as potential violations of the laws of war (if applicable based on status – i.e. to CAAF).

2. Although all contractors may use deadly force in self-defense, they must be authorized to be armed. Arming requests are approved by the Combatant Commander (CCDR). Contractors must voluntarily accept arms, and cannot be prohibited by U.S. law to carry firearms (i.e. Lautenberg Amendment).

B. **Security Services**. DOD often uses contractors to provide security for static sites, convoys, and other assets. The key issues with such services include ensuring such activities are not inherently governmental.

1. Inherently governmental services are prohibited from performance by the private sector. Army Regulation 715-9, Appx. B(2)(b), states, "[s]ecurity is inherently governmental if it involves unpredictable international or uncontrolled, high-threat situations where success depends on how operations are handled and there is a potential of binding the United States to a course of action when alternative courses of action exist." Thus, security must be restricted to operations that do not involve plan-altering implications.[43]

2. Private Security Company (PSC). Private Security Companies are employed by the DoD to perform "private security functions" under a "covered contract" in a contingency operation. In an area of "combat operations" as designated by the Secretary of Defense, the term PSC expands to include all companies employed by U.S. Government agencies that are performing "private security functions" under a "covered contract."[44] The definition of PSC similarly expands in areas designated as "other significant military operations" by both the Secretary of Defense and Secretary of State.[45]

3. Requests for permission to arm contingency contractors to provide security services shall include:[46]

a. A description of where such contract security personnel will operate, the anticipated threat, and what property, or personnel such personnel are intended to protect;

b. A description of how the movement of contractor security personnel will be coordinated through areas of increased risk or planned or ongoing military operations including how the contractor security personnel will be rapidly identified by members of the Armed Forces;

c. A communication plan to include a description of how relevant threat information will be shared between contractor security personnel and U.S. military forces, including how appropriate assistance will be provided to contractor security personnel who become engaged in hostile situations;

d. Documentation of individual training covering weapons familiarization, rules for the use of deadly force, limits on the use of force including whether defense of others is consistent with HN law, the distinction between the rules of engagement applicable to military forces and the prescribed rules for the use of deadly force that control the use of weapons by civilians, and the Law of Armed Conflict;

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[39] DoDI 3020.41, *supra* note 1, encl. 2, para. 3(a); DFARS 252.225-7040(f).
[40] DFARS Class Deviation 2011-O0004(f)(3).
[41] *See* DFARS Clause 252.225-7040(b); Class Deviation 2011-O0004(b); FAR Clause 52.225-19(b).
[42] *Id.*
[43] AR 715-9, *supra* note 13, appx. B(2)(b).
[44] DoDI 3020.50, Glossary.
[45] *Id.*
[46] *Id.* at encl. 3, para. 1(a).

e. DD Form 2760, “Qualification to Possess Firearms and Ammunitions,” certifying the individual is not prohibited under U.S. law from possessing a weapon or ammunition due to conviction in any court of a crime of domestic violence, whether a felony or misdemeanor;

f. Written acknowledgement by the defense contractor and individual contractor security personnel, after investigation of background and qualifications of contractor security personnel and organizations, certifying such personnel are not prohibited under U.S. law to possess firearms; and

g. Written acknowledgement by the defense contractor and individual contractor security personnel that: potential civil and criminal liability exists under U.S. and HN law for the use of weapons; proof of authorization to be armed must be carried; PSC personnel may possess ONLY U.S. Government-issued and/or approved weapons and ammunition for which they have been qualified; contract security personnel were briefed and understand limitations on the use of force; authorization to possess weapons and ammunition may be revoked for non-compliance with established rules for the use of force; and PSC personnel are prohibited from consuming alcoholic beverages or being under the influence of alcohol while armed..

4. Upon approval of the request, the Combatant Commander will issue written authorization to the defense contractor identifying who is authorized to be armed and the limits on the use of force.

5. DoDI 3020.50, Enclosure 3, tasks Combatant Commanders to develop and implement guidance and procedures to maintain accountability of PSC personnel. In addition to the requirements described above for approving arming requests, Combatant Commanders must develop procedures to implement and identify the organization responsible for:

a. Registering, processing, accounting for and keeping appropriate records of PSCs and PSC personnel IAW DoDI 3020.50.

b. Verifying PSC personnel meet all legal, training, and qualification requirements for authorization to carry a weapon IAW their contract and host country law, to include the establishment of weapons accountability procedures.

c. Approving arming requests as described above.

d. Registering and identifying in SPOT armored vehicles, helicopters, and other vehicles operated by PSC personnel.

e. Reporting alleged criminal activity or other incidents involving PSCs or PSC personnel by another company or any other person, to include a weapon discharge; death or injury of any person occurring in the performance of duties or as a result of conduct by PSC personnel; property destruction by PSC personnel; any incident in which PSC personnel come under attack; and any incident in which non-lethal countermeasures are employed by PSC personnel in response to a perceived immediate threat during an incident that could significantly affect U.S. objectives.

f. The independent review and, if practicable, investigation of incidents reported IAW subsection e. immediately above.

g. Identification of ultimate criminal and investigative jurisdiction where the conduct of PSCs and PSC personnel are in question;

h. A mechanism for subordinate commanders to request the removal of non-compliant PSC personnel from the operational area;

i. The interagency coordination of administrative penalties or removal, as appropriate, of non-DoD PSC personnel who fail to comply with the terms of their contract;

j. Implementation of the training requirements that must be accomplished before PSC personnel may be armed.

6. DFARS Class Deviation 2011-O0004(i) requires contractors not authorized to accompany the Armed Forces to comply with all United States, DoD, and other rules and regulations as applicable, to include guidance and orders issued by the CENTCOM Commander regarding possession, use, safety, and accountability of weapons and ammunition.

7. CENTCOM Contracting Command Clauses 952.225-0001, Arming Requirements and Procedures for Personal Security Services Contractors and for Requests for Personal Protection (Aug. 2010) and 952.225-0002, Armed Personnel Incident Reports, implement many of these requirements.

VII. COMMAND, CONTROL AND DISCIPLINE

A. General. Command and control, including direction, supervision, and discipline, of contractor personnel is significantly different than that of military personnel or even government civilian employees.

1. The contract is the only legal basis for the relationship between DoD and the contractor. The contract shall specify the terms and conditions under which the contractor is to perform.[47]

3. Contractor personnel are not under the direct supervision of military personnel in the chain of command.[48] Contractor personnel shall not be supervised or directed by military or government civilian personnel.[49]

4. The Contracting Officer is the designated liaison for implementing contractor performance requirements. The Contracting Officer is the only government official with the authority to increase, decrease, or materially alter a contract scope of work or statement of objectives.[50] The contract officer's representative (COR) is the operational commander's primary oversight point of contact to ensure that the contracted support is being executed as required in the contract.[51]

5. Contractor personnel cannot command, supervise, or control military or government civilian personnel.[52]

B. Orders and Policies.

1. All contingency contracts include provisions requiring contractor personnel to comply with: U.S. and HN laws; applicable international agreements; applicable U.S. regulations, directives, instructions, policies, and procedures; orders, directives, and instructions issued by the Combatant Commander relating to force protection, security, health, safety, or relations and interaction with local nationals.[53]

2. Commanders and legal advisers must be aware that interaction with contractor personnel may lead to unauthorized commitments and possible Anti-Deficiency Act (ADA) violations. While Contracting Officers are the only government officials authorized to change contracts, actions by other government officials, including commanders, CORs, etc., may bind the government under alternative theories of recovery.

3. Contract changes.

a. The DFARS maintains the general rule that only Contracting Officers may change a contract, even in emergency situations. The clauses for contingency contracts do expand the scope of the standard Changes Clause by authorizing the Contracting Officer to make changes at any time to Government-furnished facilities, equipment, material, services, or site.[54]

b. DOD Instruction 3020.41 states that the ranking military commander may, in emergency situations (e.g., enemy or terrorist actions or natural disaster), "urgently recommend or issue warnings or messages urging" CAAF and some non-CAAF, as determined by that commander, to take emergency actions as long as those actions do not require them to assume inherently governmental responsibilities.[55]

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[47] DoDI 3020.41,*supra* note 1, encl. 2, para. 1(d).
[48] AR 715-9, *supra* note 13, para. 4-1(d).
[49] *Id.*; *See also* FAR Subpart 37.104, Personal Services Contracts.
[50] AR 715-9, *supra* note 13, para. 4-1(a); *see also* FAR Part 43; AR 700-137.
[51] AR 715-9, *supra* note 13, paras. 4-1(c);), 3-3(b).
[52] *Id.* para. 4-4; AR 700-137.
[53]DoDI 3020.41, *supra* note 1, encl. 2(1)(b); DFARS 252.225-7040(d); DFARS Class Deviation 2011-O0004(d); DFARS Class Deviation 2011-O0004(d) reminds the contractor that notwithstanding the obligation to abide by CENTCOM Commander issued orders, only the contracting officer is authorized to modify the terms and conditions of the contract.
[54] DFARS 252.225-7040(p); DFARS Class Deviation 2011-O0004(o).
[55] DoDI 3020.41, *supra* note 1, encl. 2, para. 4(e).

C. Discipline. The contractor is responsible for disciplining contractor personnel; commanders have LIMITED authority to take disciplinary action against contractor personnel.[56]

1. Commander's Options.

a. Revoke or suspend security access or impose restriction from installations or facilities.

b. Request that the contracting officer direct removal of the individual.

2. Contracting Officer Options. The Contracting Officer may direct the contractor, at its own expense, to remove and replace any contractor personnel who jeopardize or interfere with mission accomplishment or who fail to comply with or violate applicable requirements of the contract. The contractor shall have on file a plan showing how the contractor would replace CAAF who are so removed.[57]

3. Specific jurisdiction for criminal misconduct is subject to the application of international agreements. Application of HN and TCN law is discussed above in Section III.

4. Military Extraterritorial Jurisdiction Act of 2000, *as amended by* § 1088 of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005 (MEJA).[58]

a. Background. Since the 1950s, the military has been prohibited from prosecuting by courts-martial civilians accompanying the Armed Forces overseas in peacetime who commit criminal offenses. Many Federal criminal statutes lack extraterritorial application, including those penalizing rape, robbery, burglary, and child sexual abuse. In addition, many foreign countries decline to prosecute crimes committed within their nation, particularly those involving U.S. property or another U.S. person as a victim. Furthermore, military members who commit crimes while overseas, but whose crimes are not discovered or fully investigated prior to their discharge from the Armed Forces are no longer subject to court-martial jurisdiction. The result is jurisdictional gaps where crimes go unpunished.[59]

b. Solution. The MEJA closes the jurisdictional gaps by extending Federal criminal jurisdiction to certain civilians overseas and former military members.[60]

c. Covered Conduct:[61]

(1) Conduct committed outside the United States, that

(2) Would be a crime under U.S. law if committed within U.S. special maritime and territorial jurisdiction, that is

(3) Punishable by imprisonment for more than one year.

d. Covered persons include:[62]

(1) Members of the Armed Forces who, by Federal indictment or information, are charged with committing an offense with one or more defendants, at least one of whom is not subject to the UCMJ;

(2) Members of a Reserve component who commit an offense when they are not on active duty or inactive duty for training;

(3) Former members of the Armed Forces who were subject to the UCMJ at the time the alleged offense was committed, but are no longer subject to the UCMJ;

(4) Civilians employed by the Armed Forces outside the United States, who are not a national of or resident in the HN, who commit an offense while outside the United States in connection with such employment. Such civilian employees include:

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[56] *Id.* encl. 2, para. 4(d)(2).
[57] DFARS 252.225-7040(h). DFARS Class Deviation 2011-O0004(h) contains a similar requirement but does not expressly require the contractor to have a similar personnel replacement plan on file.
[58] 18 U.S.C. §§ 3261-3267.
[59] DoDI 5525.11 (implementing the Military Extraterritorial Jurisdiction Act of 2000, 18 U.S.C. § 3261).
[60] *Id.* para. 2.5.
[61] *Id.* para. 6.1.1
[62] *Id.* paras. 6.1.2 to 6.1.9

(a) Persons employed by DoD, including NAFIs;

(b) Persons employed as a DoD contractor, including subcontractors at any tier;

(c) Employees of a DoD contractor, including subcontractors at any tier;

(d) Civilian employees, contractors (including subcontractors at any tier), and civilian employees of a contractor (including subcontractors at any tier) of any other Federal agency, or any provisional authority, to the extent such employment relates to supporting the mission of the DoD overseas.

(5) Civilians accompanying the Armed Forces: Dependents of anyone covered above if the dependent resides with the person, allegedly committed the offense while outside the United States, and is not a national of or ordinarily resident in the HN. Command sponsorship is not required for the MEJA to apply.

(6) The MEJA does not apply to persons whose presence outside the United States at the time the offense is committed is solely that of a tourist, student, or is otherwise not accompanying the Armed Forces.

(7) Foreign Criminal Jurisdiction. If a foreign government, in accordance with jurisdiction recognized by the U.S., has prosecuted or is prosecuting the person, the U.S. will not prosecute the person for the same offense, absent approval by the Attorney General or Deputy Attorney General.

(8) TCNs who might meet the requirements above for MEJA jurisdiction may have a nexus to the United States that is so tenuous that it places into question whether the Act should be applied. The DOS should be notified of any potential investigation or arrest of a TCN.

e. DoDI 5525.11 contains detailed guidance regarding the procedures required for MEJA use, including investigation, arrest, detention, representation, initial proceedings, and removal of persons to the United States or other countries. Further, much authority is delegated to Combatant Commanders, so local policies must be researched and followed.

5. Uniform Code of Military Justice (UCMJ).

a. Retired military members who are also CAAF are subject to the UCMJ. Art. 2(a)(4), UCMJ. DA policy provides that retired Soldiers subject to the UCMJ will not be tried for any offense by any courts-martial unless extraordinary circumstances are present. Prior to referral of courts-martial charges against retired Soldiers, approval will be obtained from Criminal Law Division, ATTN: DAJA–CL, Office of The Judge Advocate General, HQDA.[63]

b. In section 552 of the 2007 NDAA, Congress changed Article 2(a)(10), addressing UCMJ jurisdiction over civilians accompanying the Armed Forces, from "time of war" to "time of declared war or contingency operation." This change now subjects CAAF and other civilians accompanying the Armed Forces to the UCMJ in contingency operations.

c. It is not clear whether this congressional attempt at expanding UCMJ jurisdiction over civilians in less-than Congressionally declared war is constitutional. Prior Congressional attempts at expanding UCMJ jurisdiction have been rejected by the courts as unconstitutional.

d. The Secretary of Defense published guidance on the exercise of this expanded UCMJ jurisdiction in March 2008. Office of the Secretary of Defense memorandum, Subject: UCMJ Jurisdiction Over DoD Civilian Employees, DoD Contractor Personnel, and Other Persons Serving With or Accompanying the Armed Forces Overseas During Declared War and in Contingency Operations, dated March 10, 2008. This guidance requires, among other things, that the Department of Justice be notified and afforded an opportunity to pursue U.S. federal criminal prosecution under the MEJA or other federal laws before disciplinary action pursuant to the UCMJ authority is initiated.

VIII. OTHER ISSUES

A. Living Conditions.

[63] U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE, para. 5-2b(3) (3 Oct. 2011).

1. Generally, when provided by the government, CAAF living conditions, privileges, and limitations will be equivalent to those of the units supported unless the contract with the Government specifically mandates or prohibits certain living conditions.

2. Tours of Duty. CAAF tours of duty are established by the contractor and the terms and conditions of the contract between the contractor and the government. Emergency-based on-call requirements, if any, will be included as special terms and conditions of the contract.

3. Hours of Work. Contractors must comply with local laws, regulations, and labor union agreements governing work hours.[64] Federal labor laws that govern work hours and minimum rates of pay do not apply to overseas locations. FAR 22.103.1 allows for longer workweeks if such a workweek is established by local custom, tradition, or law. SOFAs or other status agreements may impact work hours issues.

B. Life and Health Insurance.

1. Unless the contract states otherwise, the Army is not statutorily obligated to provide health and/or life insurance to a contractor employee. Policies that cover war time deployments are usually available from commercial insurers.

2. Contractors and their employees bear the responsibility to ascertain how a deployment may affect their life and health insurance policies and to remedy whatever shortcomings a deployment may cause.

C. Workers' Compensation-Type Benefits.

1. Several programs are available to ensure "worker's comp" type insurance cover contractor employees while deployed and working on government contracts.[65]

2. Defense Base Act (DBA) Insurance. [66]

a. Requires contractors to obtain worker's compensation insurance coverage or to self-insure with respect to injury or death incurred in the scope of employment for government contracts performed outside the United States.

b. FAR Clause 52.228-3, Workers' Compensation Insurance (Defense Base Act), is required in all DoD service contracts performed, entirely or in part, outside the U.S. and in all supply contracts that require the performance of employee services overseas.[67]

3. Longshoreman and Harbor Worker's Compensation Act (LHWCA) 33 U.S.C. §§ 901-950, DA Pamphlet 715-16, paragraphs 10-5c to 10-5d. Applicable by operation of the DBA. The LHWCA provides compensation for partial or total disability, personal injuries, necessary medical services/supplies, death benefits, loss of pay and burial expenses for covered persons. Statute does not focus on fault.[68]

4. War Hazards Compensation Act (WHCA) 42 U.S.C. §§ 1701-17, FAR 52.228-4, DFARS 228.370(a). The WHCA provides that any contractor employee who is killed in a "war risk hazard" will be compensated in some respects as if the CAAF were a full time government civilian employee. WHCA benefits apply regardless of whether the injury or death is related to the employee's scope of employment.[69]

F. Continued Performance During a Crisis.

1. During non-mandatory evacuation times, Contractors shall maintain personnel on location sufficient to meet contractual obligations.[70]

2. Contractors must use all means available to continue to provide services deemed essential by DoD, as specified in their contracts.[71] Contracts involving essential contractor services that support mission essential

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[64] DFARS 252.222-7002.
[65] *See generally* FAR 28.305.
[66] 42 U.S.C. §§ 1651 *et seq.*; FAR 28.305 and 52.228-3; DFARS 228.305, 228.370(a), and 252.228-7000.
[67] Office of the Under Secretary of Defense Memo, 8 Dec. 2003.
[68] 33 U.S.C. §§ 901-950, DA Pamphlet 715-16, paragraphs 10-5c to 10-5d.
[69] 42 U.S.C. §§ 1701-17, FAR 52.228-4, DFARS 228.370(a).
[70] DFARS 252.225-7040(m).
[71] DoDI 3020.41, *supra* note 1, encl. 2, para. 2(c).

functions may contain the clause at DFARS Class Deviation 2009-O0010, Continuation of Essential Contractor Services.[72]

3. There is no "desertion" offense for contractor personnel. Commanders should plan for interruptions in services if the contractor appears to be unable to continue support.

IX. ADDITIONAL REFERENCES

11. Geneva Conventions of 1949 and Additional Protocol of 1977.
12. 18 U.S.C. § 922(d), Unlawful Acts (providing firearms to certain persons).
13. 22 U.S.C. § 3261 *et seq.*, Responsibility of the Secretary of State (for U.S. citizens abroad).
14. AR 700-4 (Logistics Assistance).
15. AR 570-9 (Host Nation Support).
16. FM 4-92, Contracting Support Brigade
17. DA PAM 27-1 (Treaties Governing Land Warfare)
18. DoDI 4161.02 (Accountability and Management of Government Contract Property).
19. DoDI 1300.23 (Isolated Training for DoD Civilian and Contractors).
20. DoDI 1000.1 (Identification Cards Required by the Geneva Conventions).
21. DoDI 1100.22 (Policy and Procedures for Determining Workforce Mix).
22. DoDD 5000.02 (Operation of the Defense Acquisition System).
23. Joint Pub 1-02 (DOD Dictionary of Military and Associated Terms).
24. Joint Pub 4-0 (Joint Logistics).
25. Joint Pub 4-10 (Operational Contract Support).

CHAPTER 17

EMERGENCY ESSENTIAL CIVILIANS SUPPORTING MILITARY OPERATIONS

REFERENCES

1. Criteria for Designating Emergency Essential Employees, 10 U.S.C. § 1580.
2. Anthrax Notification Requirements, 10 U.S.C. § 1580a.
3. U.S. DEP'T OF DEFENSE DIR. 1404.10, DOD CIVILIAN EXPEDITIONARY WORKFORCE (23 Jan. 2009).
4. U.S. DEP'T OF DEFENSE DIR. 1400.31, DOD CIVILIAN WORK FORCE CONTINGENCY AND EMERGENCY PLANNING AND EXECUTION (28 Apr. 1995).
5. U.S. DEP'T OF DEFENSE INSTR. 1400.32, DOD CIVILIAN WORK FORCE CONTINGENCY AND EMERGENCY PLANNING GUIDELINES AND PROCEDURES (24 Apr. 1995).
6. U.S. DEP'T OF DEFENSE INSTR. 1000.13, IDENTIFICATION CARDS FOR MEMBERS OF THE UNIFORMED SERVICES, THEIR DEPENDENTS, AND OTHER ELIGIBLE INDIVIDUALS (23 Jan. 2014).
7. U.S. DEP'T OF DEFENSE INSTR. 5525.11, CRIMINAL JURISDICTION OVER CIVILIANS EMPLOYED BY OR ACCOMPANYING THE ARMED FORCES OUTSIDE THE UNITED STATES, CERTAIN SERVICE MEMBERS, AND FORMER SERVICE MEMBERS (3 Mar. 2005).
8. U.S. DEP'T OF ARMY, REG. 690-11, USE AND MANAGEMENT OF CIVILIAN PERSONNEL IN SUPPORT OF MILITARY CONTINGENCY OPERATIONS (26 May 2004).
9. U.S. DEP'T OF AIR FORCE, INSTR. 36-3026_IP (AR 600-8-14), IDENTIFICATION CARDS FOR MEMBERS OF THE UNIFORMED SERVICES, THEIR ELIGIBLE FAMILY MEMBERS, AND OTHER ELIGIBLE PERSONNEL (17June 2009) (Joint Instruction Adopted by Order of the Secretaries of the Air Force, Army, Navy, Marine Corps and Coast Guard).
10. U.S. DEP'T OF ARMY, PAM. 690-47, DA CIVILIAN EMPLOYEE DEPLOYMENT GUIDE (1 Nov. 1995).
11. Army Civilian Personnel Online (CPOL) "Civilian Deployment/Mobilization" guidance, *available at* http://cpol.army.mil/library/mobil/civ-mobil.html.
12. Army Civilian Personnel Online (CPOL) "Anthrax Immunization and Emergency Essential Civilians (EECs) Policy", *available at* http://cpol.army.mil/library/permiss/114dd.html
13. Office of Personnel Management, "Pay & Leave: Pay Administration" *available at http://www.opm.gov/policy-data-oversight/pay-leave/pay-administration/#url=Combat-Zone-Employees*
14. Department of State Office of Allowances (Foreign Post Differential and Danger Pay Allowance), *available at* http://www.state.gov/m/a/als.
15. Limitation on Premium Pay, 5 U.S.C. § 5547 (2000).
16. Federal Employees' Compensation Act (FECA), 5 U.S.C. § 8101 (2000).
17. Hours of Duty, 5 C.F.R. § 610.
18. Military Extraterritorial Jurisdiction Act (MEJA) of 2000, 18 U.S.C. § 3261.

I. INTRODUCTION

A. Throughout our history, civilians have accompanied the force during operations. Recent operations highlight civilian employees' importance to the military mission. Civilian employees perform a number of jobs formerly held by Soldiers, in areas as diverse as recreation specialists and intelligence analysts. Civilian employees' importance is reflected in the following Department of Defense (DoD) Directive:

> DoD civilian employees are an integral part of the Total Force. They serve in a variety of positions, provide essential capabilities and, where appropriate for civilians to do so, support mission requirements . . ."[1]

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

[1] U.S. DEP'T OF DEFENSE DIR. 1404.10, DOD CIVILIAN EXPEDITIONARY WORKFORCE para. 4.a (23 Jan. 2009).

II. DESIGNATING EMERGENCY-ESSENTIAL POSITIONS

A. An EE employee is one in a position that is designated to support the success of combat operations or the availability of combat-essential systems in accordance with 10 U.S.C. § 1580. EE civilians are not contractor employees. DoD officials should identify a subset of the DoD civilian workforce as the DoD Civilian Expeditionary Workforce. These civilian employees are organized, ready, trained, cleared, and equipped in a manner that enhances their availability to mobilize and respond urgently to expeditionary requirements. [2] The timeframes during which the DoD Civilian Expeditionary Workforce is susceptible to expeditionary assignments will be designated in six-month rotational periods. Individual deployment tours shall not exceed two years. Consecutive deployments should generally not be approved without at least a 90-day period of reintegration between deployments and assurance that medical clearance requirements are met. Civilian manpower requirements are determined based on DoD Instruction 1100.22.

B. The specific crisis situation duties, responsibilities, and physical requirements of each EE position must be identified and documented to ensure that EE employees know what is expected. Documentation can include annotation of EE duties in the existing peacetime position descriptions, a brief statement of crisis situation duties attached to position descriptions if materially different than peacetime duties, or separate EE position descriptions.

C. DoD Civilian Expeditionary Workforce positions should be pre-identified whenever practicable. Applicants for vacant EE and noncombat essential (NCE) positions must sign DD Form 2365 as a condition of employment. Job announcements and position descriptions must contain a statement that the position is designated EE or NCE, that it is part of the DoD Civilian Expeditionary Workforce, and that signing the form is a condition of employment. [3]

D. Management must give DoD civilian employees whose positions are identified as EE or NCE as much notice as possible. Generally at least 90 calendar days advance notice of the EE or NCE designation is provided to the employee. The incumbents shall be asked to accept the new designation of the position as an EE or NCE position and to sign the DD Form 2365 as a condition of continued employment. If an incumbent employee is unable or unwilling to accept such requirements, then every effort will be undertaken to reassign the employee to a different position, consistent with the needs of the DoD mission and approval of management. [4]

E. DoD civilian employees in E-E or NCE positions may be directed to accept deployment requirements of the position. However, whenever possible, the DoD Civilian Expeditionary Workforce will be asked to serve expeditionary requirements voluntarily. [5]

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

> This position is emergency-essential. In the event of a crisis situation, the incumbent, or designated alternate, must continue to perform the EE duties until relieved by proper authority. The incumbent, or designated alternate, may be required to take part in readiness exercises. This position cannot be vacated during a national emergency or mobilization without seriously impairing the capability of the organization to function effectively; therefore, the position is designated "key," which requires the incumbent, or designated alternate, to be screened from military recall status.

G. **DoD Civilian Expeditionary Workforce**. Members of the DoD Civilian Expeditionary Workforce shall be organized, trained, cleared, equipped, and ready to deploy in support of combat operations by the military; contingencies; emergency operations; humanitarian missions; disaster relief; restoration of order; drug interdiction; and stability operations of the DoD in accordance with DoDD 3000.05. [6] DoD Civilian Expeditionary Workforce will be coded as: [7]

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[2] *Id.* para. 4.b.
[3] *Id.* para. 4.e.
[4] *Id.*
[5] *Id.* para. 4.d.
[6] *Id.* para. 1.a.
[7] *Id.* para. 4.d.

a. **Emergency Essential (EE)**. A position-based designation to support the success of combat operations or the availability of combat-essential systems, in accordance with section 1580 of title 10, United States Code, and will be designated as Key.

b. **Non-Combat Essential (NCE)**. A position-based designation to support the expeditionary requirements in other than combat or combat support situations and will be designated as Key.

c. **Capability-Based Volunteer (CBV)**. An employee who may be asked to volunteer for deployment, to remain behind after other civilians have evacuated, or to backfill other DoD civilians who have deployed to meet expeditionary requirements in order to ensure that critical expeditionary requirements that may fall outside or within the scope of an individual's position are fulfilled.

d. **Capability-Based Former Employee Volunteer Corps**. A collective group of former (including retired) DoD civilian employees who have agreed to be listed in a database as individuals who may be interested in returning to Federal service as a time-limited employee to serve expeditionary requirements or who can backfill for those serving other expeditionary requirements. When these individuals are re-employed, they shall be deemed CBV employees.

e. **Key Employees**. DoD civilian employees in positions designated as E-E and/or NCE will be designated Key in accordance with DoDD 1200.7. [8]

H. The FY 2001 National Defense Authorization Act amended Title 10, U.S. Code, to require that EE civilians be notified of anthrax immunization requirements. The most recent guidance on the Anthrax Vaccine Immunization Program can be found at http://www.anthrax.mil. The notification requirement applies to both current and new EE employees. The notice must be written, and the employee must sign to acknowledge receipt. File a copy of the notice and acknowledgement with the signed DD Form 2365. A sample notice follows:

> This is to notify you that your position has been designated as emergency essential. You may be required, as a condition of employment, to take the series of anthrax vaccine immunizations, to include annual boosters. This may also include other immunizations that may in the future be required for this position, or for a position you may fill as an emergency-essential alternate. Failure to take the immunizations may lead to your removal from this position or separation from Federal service. [Acknowledgement: This is to acknowledge that I have read and fully understand the potential impact of the above statement. (employee signature and date)].

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

J. Personnel selected for, or occupying, EE and alternate positions will meet the medical fitness and physical requirements of the job, as determined by the combatant or major command commander. Any special medical fitness requirements must be job-related and/or theater-specific.

K. By memorandum dated March 30, 1999, the Under Secretary of Defense made it mandatory for all military personnel and Department of Defense emergency essential civilian employees and contractor personnel assigned, deployed or on temporary duty in high threat areas and contiguous waters of Southwest Asia for one day or more, to be vaccinated against anthrax. Countries included are Kuwait, Saudi Arabia, Bahrain, Jordan, Qatar, Oman, United Arab Emirates (UAE), YEMEN, Israel and the Korean Peninsula. In those situations where existing EECs refuse to be vaccinated, Army policy requires that management first consider taking a non-adverse action, such as a reassignment to a non-EEC position; identification of an alternate employee who is willing to be immunized and serve as an EEC; curtailment of tour, etc. If none of these are possible, the EEC could be subject to adverse actions, up to and including, removal from the federal service for failure to meet a condition of employment. This is very similar to the position that Army has taken on applying drug testing and the Lautenberg Amendment to employees already in covered positions. [9]

L. Future job announcements for new EEC recruitment actions in high threat areas should specifically identify that the anthrax vaccination is a condition of employment of the position. Newly hired EECs should also be required

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[8] *Id.*

[9] Army Civilian Personnel Online (CPOL) "Anthrax Immunization and Emergency Essential Civilians (EECs) Policy", *available at* http://cpol.army.mil/library/permiss/114dd.html

to acknowledge and accept this requirement in writing prior to entry on duty. This requirement is currently being incorporated in the new version of Army Regulation 690-11, Planning For and Management of Civilian Personnel in Support of Military Contingency Operations. [10]

III. DEPLOYMENT PREPARATIONS

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

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

C. **Clothing and Equipment Issue**. All deploying Department of the Army (DA) civilians are expected to wear the appropriate military uniform, as determined and directed by the theater commander. Department of the Army Pamphlet 690-47 and AR 670-1 contain more details on the issuance and wear of military uniforms and equipment. Maintenance and accountability of military uniforms and equipment is the employee's responsibility. Personal clothing and care items are also the responsibility of the individual. Civilian employees should bring work clothing required by their particular job.

D. **Training Requirements**. Training for civilian employees who are part of the DoD Civilian Expeditionary Workforce shall consist of initial orientation upon becoming part of the DoD Civilian Expeditionary Workforce, annual refresher training, pre-deployment (including theater-specific) training, as well as on the job training, and post-deployment reintegration training, as appropriate and practicable. Training shall also cover topics, to include, but not limited to, the use of any required specialized equipment needed for their specific missions such as vehicles and communication systems, obtaining medical treatment, and on recognizing stress-related conditions that may result from serving expeditionary requirements. Of particular interest to Judge Advocates, members of the DoD Civilian Expeditionary Workforce shall receive training on their legal status under the Uniform Code of Military Justice in accordance with Public Law 109-364 (2006), the Military Extraterritorial Jurisdiction Act under DoDI 5522.11, SECDEF Memorandum, and implementing regulations. [11]

E. **Medical and Dental Care**. All DoD civilian employees who encumber an E-E or NCE position are required to have an annual health assessment to determine whether the employee is available for worldwide deployment. DoD civilian employees designated as CBVs and former DoD employees will undergo a health assessment to determine whether they can meet a specific expeditionary requirement. Force health protection pre- and post-health assessments shall be conducted for DoD civilian employees in accordance with DoDI 6490.03. DoD civilian employees who become ill, contract diseases, or who are injured or wounded while deployed in support of U.S. military forces engaged in hostilities are eligible for medical evacuation and health care treatment and services in military treatment facilities (MTFs) at no cost to the civilian employee and at the same level and scope provided to military personnel. Deployed DoD civilian employees who were treated in theater continue to be eligible for treatment in an MTF or civilian medical facility for compensable illnesses, diseases, wounds, or injuries under the Department of Labor Office of Workers' Compensation Program (DOL OWCP) (5 U.S.C. §§ 8101-8173) upon their return at no cost to the civilian employee. DoD civilian employees who deployed and are subsequently determined to have compensable illnesses, diseases, wounds, or injuries under the DOL OWCP programs also are eligible for treatment in an MTF or civilian sector medical facility at no cost to the civilian employee. [12]

F. **Administrative Preparedness**. Members of the DoD Civilian Expeditionary Workforce receive a valid Official Passport, Common Access Card, Geneva Conventions Identification Card, and required security clearances, when appropriate. DoD civilian employees who are part of the DoD Civilian Expeditionary Workforce are required to maintain current and valid administrative documents and clearances and current Family Care Plans. [13]

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[10] *Id.*
[11] DoDD 1404.10, *supra* note 1, para. 4.g (23 Jan. 2009).
[12] *Id.*
[13] *Id.*

G. **Legal Assistance**. Legal assistance, including wills and any necessary powers of attorney relating to deployments, is available to EE civilians notified of deployment, as well as their families, and will be available throughout the deployment. It is limited to deployment-related matters as determined by the on-site supervising attorney. DoD civilian employees who are serving with the Armed Forces of the United States in a foreign country (and their family members who accompany them) are eligible to receive legal assistance (without limitation) (see AR 27-3, para. 2-5a(6)(b)).

H. **Weapons Certification and Training**. Under certain conditions, and subject to weapons familiarization training in the proper use and safe handling of firearms, EE employees may be issued a personal military weapon for personal self-defense. Acceptance of a personal weapon is voluntary. Authority to carry a weapon for personal self-defense is contingent upon the approval and guidance of the Combatant Commander. Only Government-issued weapons/ammunition are authorized. Civilians may not be assigned to guard duty or perimeter defense or to engage in offensive combat operations. [14]

IV. COMMAND AND CONTROL DURING DEPLOYMENTS

A. During deployments, EE civilians are under the direct command and control of the on-site supervisory chain, which will perform the normal supervisory functions, such as performance evaluations, task assignments and instructions, and disciplinary actions.

B. On-site commanders may impose special rules, policies, directives, and orders based on mission necessity, safety, and unit cohesion. These restrictions need only be considered reasonable to be enforceable.

V. COMMON ISSUES DURING DEPLOYMENTS

A. **Accountability**. The Army has developed an automated civilian tracking system called Civilian Tracking System (CIVTRACKS) to account for civilian employees supporting unclassified military contingencies and mobilization exercises. CIVTRACKS is a web-based tracking system designed to allow input of tracking data from any location with Internet access; its use is required. It is the employee's responsibility to input his/her data into CIVTRACKS, and data should be entered each time there is a change in duty location while deployed, to include the initial move from home station. The employee's home station is responsible for providing the employee a deployment card with user identification and password for access to CIVTRACKS (https://cpolrhp.belvoir.army.mil/civtracks/default.asp).

B. **Tour of Duty**. The administrative workweek constitutes the regularly-scheduled hours for which an EE civilian must receive basic and premium pay. Under some conditions, hours worked beyond the administrative workweek may be considered to be irregular and occasional, and compensatory time may be authorized in lieu of overtime/premium pay. The in-theater commander or his/her representative has the authority for establishing and changing EE tours of duty. The in-theater commander will establish the duration of the change.

C. **On-Call Employees**. Emergencies or administrative requirements that might occur outside the established work hours may make it necessary to have employees "on-call." On-site commanders may designate employees to be available for such a call during off-duty times. Designation will follow these guidelines: (1) a definite possibility that the designated employee's services might be required; (2) required on-call duties will be brought to the attention of all employees concerned; (3) if more than one employee could be used for on-call service, the designation should be made on a rotating basis; and (4) the designation of employees to be "on-call" or in an "alert" posture will not, in itself, serve as a basis for additional compensation (i.e., overtime or compensatory time). If an employee is called in, the employee must be compensated for a minimum of two hours.

D. **Leave Accumulation**. Any annual leave in excess of the maximum permissible carry-over is automatically forfeited at the end of the leave year. Annual leave that was forfeited during a combat or crisis situation determined by appropriate authority to constitute an exigency of the public business may be temporarily restored. However, the employee must file for carry-over. Normally, the employee has up to two years to use restored annual leave.

[14] Army Civilian Personnel Online (CPOL) "Requirements for Emergency Essential (E-E) Employees", *available at* http://cpol.army.mil/library/permiss/114c.html

E. **Pay and allowances during deployments**. Special pay and benefits apply to eligible civilian Federal employees assigned to duty in certain combat zones such as Iraq and Afghanistan. DoD administers many of the pay and benefits programs provided to Federal civilian employees working in overseas locations, including combat zones. Pay and benefits may vary depending on the employee's pay system, assignment location, scope and nature of duties, and nature of assignment. Effective January 1, 2012, section 1104 of Public Law 112-81, December 31, 2011, extends to calendar year 2012 the authority provided in section 1101(a) of Public Law 110-417, October 14, 2008, as amended by section 1103 of Public Law 111-383, January 7, 2011, for the head of an agency to waive the premium pay cap provisions under 5 U.S.C. 5547. [15]

F. The Federal Employees' Compensation Act (FECA), 5 U.S.C. 8101 et seq, provides comprehensive workers' compensation coverage for deployed employees in zones where armed conflict may take place. (See also 20 C.F.R Part 10, Federal (FECA) Procedure Manual and related guidance available from the website identified below.) A wide variety of benefits are available under FECA including medical and wage loss benefits, schedule awards for permanent impairment due to loss of hearing, vision or certain organs, vocational rehabilitation for injured employees; survivor benefits are available if an employee is killed in performance of duty or if an employee later dies from a covered injury. The Department of Labor's Office of Workers' Compensation Programs is authorized to pay an additional death gratuity of $100,000 to the survivor(s) of an "employee who dies of injuries incurred in connection with the employee's service with an Armed Force in a contingency operation."

G. Foreign Duty Pay (**FPD)**. Employees assigned to work in foreign areas where the environmental conditions either differ substantially from CONUS conditions or warrant added compensation as a recruiting and retention incentive, are eligible for FPD after being stationed in the area in excess of forty-one days. FPD is exempt from the pay cap and is paid as a percentage of the basic pay rate, not to exceed 25% of basic pay. The Department of State (DoS) determines which areas are entitled to receive FPD, the FPD rate for the area, and the length of time the rate is in effect. Different areas in the same country can have different rates.

H. Danger Pay Allowance (**DPA)**. Civilian employees serving at or assigned to foreign areas designated for danger pay by the Secretary of State (SECSTATE) because of civil insurrection, civil war, terrorism, or wartime conditions which threaten physical harm or imminent danger to the health or well being of a majority of employees stationed or detailed to that area, will receive DPA. The allowance will be a percentage of the employee's basic compensation at the rates of 15, 20, or 25 percent, as determined by the SECSTATE. This allowance is in addition to any FPD prescribed for the area, but in lieu of any special incentive differential authorized the post prior to its designation as a DPA area. For employees already in the area, DPA starts on the date of the area's designation for DPA. For employees later assigned or detailed to the area, DPA starts upon their arrival in the area. For employees returning to the post after a temporary absence, it starts on the date of return. DPA will terminate with the close of business on the date the Secretary of State removes the danger pay designation for the area, or on the day the employee leaves the post, for any reason, for an area not designated for DPA. DPA paid to Federal civilian employees should not be confused with Imminent Danger Pay (IDP) paid to the military. IDP is triggered by different circumstances, and is not controlled by the SECSTATE.

I. **Life Insurance**. Going to a combat zone can be considered "a life event" that allows employees an opportunity to elect different health insurance coverage or enhanced life insurance coverage. Federal civilian employees are eligible for coverage under the Federal Employees Group Life Insurance (FEGLI) program. Death benefits (under basic and all forms of optional coverage) are payable regardless of cause of death. Civilians who are deployed with the military to combat support roles during times of crises are not "in actual combat" and are entitled to accidental death and dismemberment benefits under FEGLI in the event of death. Similarly, civilians carrying firearms for personal protection are not "in actual combat."

J. **Discipline**. For information regarding MEJA, see the chapter on "Contingency Contractor Personnel" in this handbook.

VI. CONTRACTOR EMPLOYEES

For contractor issues during deployment, see the chapter entitled "Contingency Contractor Personnel."

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[15] Office of Personnel Management "Pay & Leave: Pay Administration" *available at* http://www.opm.gov/policy-data-oversight/pay-leave/pay-administration/#url=Combat-Zone-Employees.

CHAPTER 18

FOREIGN AND DEPLOYMENT CLAIMS

REFERENCES

1. U.S. DEP'T OF ARMY, REG. 27-20, CLAIMS (8 Feb. 2008).
2. U.S. DEP'T OF ARMY, REG. 27-40, LITIGATION (19 Sept. 1994).
3. U.S. DEP'T OF ARMY, PAM. 27-162, CLAIMS (21 Mar. 2008).
4. USARCS Federal Tort Claims Handbook (May 2012 Web Edition).
5. Milsuite Claims Forum.
6. JAGINST 5890.1A, Administrative Processing and Consideration of Claims on Behalf of and Against the United States (18 June 2005), JAGINST 5800.7E, Manual of the Judge Advocate General (JAGMAN), Chapter VIII (26 June 2012). url: jag.navy.mil/library
7. U.S. DEP'T OF AIR FORCE, INSTR. 51-501, TORT CLAIMS (15 Dec. 2005).
8. U.S. DEP'T OF AIR FORCE, INSTR. 51-502, PERSONNEL AND GOVERNMENT RECOVERY CLAIMS (1 Mar. 1997, IC-1, 31 July 2008, and IC-2, 10 November 2008).
9. DEP'T OF DEFENSE, INSTR. 5515.08, ASSIGNMENT OF CLAIMS RESPONSIBILITY (11 Nov. 2006).
10. DEP'T OF DEFENSE, DIR. 5515.8, SINGLE-SERVICE ASSIGNMENT OF RESPONSIBILITY FOR PROCESSING OF CLAIMS (9 June 1990). (CANCELLED)
11. Memorandum, Under Secretary of Defense for Secretaries of the Military Departments, et al., subject: Commanders' Emergency Response Program (CERP) Guidance (Jan 2009).
12. ALARACT Message, 210236Z Jul 06, Headquarters, U.S. Dep't of Army, subject: Policies and Procedures for the Handling of Personal Effects and Government Property.

I. INTRODUCTION

A. Most deployments, mobilizations, disaster relief operations, or routine field exercises involve the movement of large amounts of equipment and personnel. Careful planning and execution can reduce the amount of property damage or loss and personal injuries that occur during such operations. However, some damage, loss, and injuries are unavoidable, and claims will definitely result.

B. Claimants will include local residents, host nation governments, allied forces, and even U.S. service members. To ensure friendly relations with the local population and maintain the morale of our own troops, deploying Judge Advocates (JA) must be prepared to investigate thoroughly, adjudicate impartially, and settle promptly all meritorious claims.

II. SINGLE SERVICE RESPONSIBILITY

A. Department of Defense Instruction (DoDI) 5515.08, Assignment of Claims Responsibility (11 Nov. 2006)[1] assigns to each service exclusive geographical responsibility for settling tort claims against and on behalf of all of the Department of Defense (DoD). However, this Instruction can be and has been amended by the DoD General Counsel. When processing tort claims, JAs must use the rules and regulations of the service that has single-service responsibility for the country in which the claim arose. If a non-Army country, JAs must coordinate investigation with the responsible Service's Foreign Claims Commission with jurisdiction over the claim.

B. The current single-service responsibility assignments are listed in Appendix A. Before deploying, JAs should check with the U.S. Army Claims Service (USARCS) for the most current single-service list. For JAs deploying to an area where single-service responsibility has not yet been established, it may be appropriate to seek an interim assignment of responsibility from the responsible Unified or Specified Commander. This is accomplished through the command claims service responsible for the area of operations.

[1] This instruction cancels DoDD 5515.8, Single-Service Assignment of Responsibility for Processing of Claims (9 June 1990).

III. POTENTIAL CLAIMS

A. The statutes and regulations that provide relief for damages resulting from deployments often overlap. To determine the proper claims statutes and regulations to apply, always take into account the status of the claimant, as well as the location and type of incident that gave rise to the claim.

B. Although JAs may encounter some of the same types of claims while deployed as seen at their home station, most deployment claims operations will differ in several respects from those conducted in garrison. Additionally, not all "claims" for payment (for example, claims arising out of a contract) are cognizable under the military tort claims system.

IV. TYPES OF CLAIMS APPLICABLE DURING A DEPLOYMENT

A. **Claims Cognizable Under the Federal Tort Claims Act (FTCA).**[2] The FTCA provides a limited waiver of sovereign immunity for the negligent or wrongful acts or omissions of government employees acting within the scope of employment. In other words, a person who is harmed by the tortious conduct of one of our service members or employees may file a claim. If the FTCA claim is not settled satisfactorily, the claimant may sue in Federal court. The FTCA is an exclusive remedy when applicable. However, the FTCA does not apply to tortious conduct occurring outside the United States (OCONUS). Therefore you will not use the FTCA in most deployments, unless the deployment is within the United States (for example, U.S.-based disaster relief operations).[3]

B. **Claims Cognizable Under the Personnel Claims Act (PCA).**[4] The PCA applies worldwide. It is limited to claims for loss, damage, or destruction of personal property of military personnel and DoD civilian employees that occurs incident to service. Judge Advocates must first consider all claims under the PCA; only if not compensable under the PCA claim may the claim be considered under a tort claims statute. Valid PCA claims commonly arising in deployment situations include: loss of equipment and personal items during transportation; certain losses while in garrison quarters; losses suffered in an emergency evacuation; losses due to terrorism directed against the United States; and the loss of clothing and articles worn while performing military duties. No claim may be approved under the PCA when the claimant's negligence contributed to the loss. Prompt payment of service members' and civilians' PCA claims is essential to maintenance of positive morale in the unit. Unit claims officers (UCO) must be prepared to comply fully with small claims procedures immediately upon arrival at the deployment or exercise site.[5]

1. Contractor Claims. In deployed environments, Soldiers work side by side with contractor employees. However, when it comes to claims, contractors and Soldiers are treated much differently. First, contractors are not proper claimants under the PCA IAW DA PAM 27-162, para. 11-4j(1), although they may be able to recover under other claims provisions. In addition, if a Soldier files a claim under the PCA for contractor-caused damages (not related to storage or shipment of household goods), the Soldier should first attempt to recover directly from the contractor. However, if the contractor does not resolve the claim, then a PCA claim may be filed and paid.[6] The Army is generally not liable in tort for claims arising from acts or omissions of contractors.

2. Wounded Warrior Personal Effects Processing. (ALARACT Message 139/2006). Over the last several years, CENTCOM has experienced difficulty with processing of the personal effects of Soldiers evacuated from theater. This loss of property results in numerous claims and decreased morale. Once a Soldier is killed in action (KIA), missing in action (MIA), or medically evacuated due to combat injuries from CENTCOM theater of operations, commanders are responsible for processing the Soldier's personal effects in accordance with the following procedures:

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[2] 28 U.S.C. §§ 2671 – 2680.
[3] For more information on disaster relief operations, *see* Noncombat Deployment Operations, *infra.*
[4] 31 U.S.C. § 3721.
[5] Under the small claims procedures set forth in DA PAM 27-162, para. 11-10, personnel claims that can be paid for $500 or less should be settled or paid within one working day of receipt. In addition, small claims procedures allow for relaxed evidentiary procedures. *See* U.S. DEP'T OF ARMY, PAM. 27-162, CLAIMS para. 11-10b (21 Mar. 2008) [hereinafter DA PAM 27-162]. Therefore, substantiation of the value of the property may be accomplished through telephone calls and Internet searches, rather than requiring more complex substantiation. Although the claims officer cannot ensure payment of these claims, early coordination with the finance and accounting office and the designated Class A agent will also speed up the payment process.
[6] DA PAM 27-162, *supra* note 5, para. 11-5a.

a. Commander appoints summary court-martial officer (SCMO) immediately upon notification. Summary court-martial officer will safeguard, inventory, and package all personal effects. Please note that recent implementation guidance allows for NCOs in the rank of Staff Sergeant or above to serve as medically-evacuated inventory officials, but officers must still serve as SCMO for KIA and MIA Soldiers.

b. If Soldier is declared KIA, MIA, or medically-evacuated because of combat-related injuries and will not return to the unit, then SCMO will process personal effects through the mortuary affairs collection point (MACP).

c. The MACP will send the property to the Joint Personal Effects Depot (JPED), who will then process the property and send it to the Soldier or next of kin.[7]

C. **Claims Cognizable Under the Military Claims Act (MCA).**[8] The MCA applies worldwide. However, the claimant must be a U.S. resident in order to recover. CONUS tort claims must first be considered under the FTCA. Overseas, the MCA will apply only when the claim cannot be paid under the PCA or the Foreign Claims Act (FCA) (discussed below). These limitations generally restrict application of the MCA overseas to claims made by family members accompanying the force or by contractors and reporters during a deployment. There are two bases of liability under the MCA. The first requires damage or injury caused by an "act or omission determined to be negligent, wrongful, or otherwise involving fault of military personnel . . . acting within the scope of their employment." The second permits a form of absolute liability for damage or injury caused by "noncombat activities." "Noncombat activities" are defined as an activity "essentially military in nature, having little parallel in civilian pursuits . . . ."[9] Examples include maneuver damage caused by the administrative movement of troops and equipment to and from military operations and exercises, and military training.

D. **Claims Cognizable Under the Foreign Claims Act (FCA).**[10] The FCA is the most widely-used claims statute in foreign deployments. Since the FCA applies only overseas and, therefore, is not used routinely by CONUS-based claims offices, JAs and UCOs must familiarize themselves with its provisions and compile as much supporting information (e.g., country law summaries) as possible before deployment. Under the FCA, meritorious claims for property losses, injury, or death caused by service members or the civilian component of the U.S. forces may be settled "[t]o promote and maintain friendly relations" with the receiving state. Claims that result from "noncombat activities" or negligent or wrongful acts or omissions are also compensable.[11] Categories of claims that may not be allowed include: losses from combat; contractual matters; domestic obligations; and claims that either are not in the best interest of the U.S. to pay, or are contrary to public policy.[12]

1. Similar to the MCA, claims under the FCA may be based on either the negligent or wrongful acts or omissions of U.S. military personnel, or on the noncombat activities of U.S. forces. Unlike the MCA, however, there generally is no scope of employment requirement. The only actors required to be "in scope" for the U.S. to have liability are foreign nationals, hired in the country where the incident occurred, 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 unless barred by treaty. These are proper claimants.[13] 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.[14]

2. FCA claims should be presented in writing to U.S. or other authorized officials within two years of accrual. Oral claims may be accepted, but they must later be reduced to writing.[15] 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

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[7] ALARACT Message, 210236Z Jul 06, Headquarters, U.S. Dep't of Army, subject: Policies and Procedures for the Handling of Personal Effects and Government Property.
[8] 10 U.S.C. § 2733.
[9] U.S. DEP'T OF ARMY, REG. 27-20, CLAIMS , Glossary, sec. II (8 Feb. 2008) [hereinafter AR 27-20].
[10] 10 U.S.C. § 2734.
[11] AR 27-20, *supra* note 9, para. 10-3.
[12] AR 27-20, *supra* note 9, para. 10-4.
[13] AR 27-20, *supra* note 9, para. 10-2*a.*
[14] AR 27-20, *supra* note 9, paras. 10-4*h* and *i*.
[15] AR 27-20, *supra* note 9, para. 2-5.

was an inhabitant at the time of loss.[16] In order to promote access to the claims program, many units distribute claims cards when a potential claim arises. The cards usually contain instructions for the Soldier in English, with instructions for the claimant in the native language on the reverse. The cards have lines for the date, time, location, and unit involved in the incident. An example of a claims card may be found in the Deployment Claims SOP (Appendix D).

3. FCA claims are investigated and adjudicated by Foreign Claims Commissions (FCC). Foreign Claims Commissions may have one or three voting members. They are usually comprised of JA claims officers, although other commissioned officers often serve as single-member commissions, as well, as do members of other US military Services. At least two members of three-member FCCs must be JAs or claims attorneys. Regardless of their composition, proper authority must appoint FCCs.[17] The Commander of USARCS, TJAG, and DJAG are the only appointing authorities for FCCs in Afghanistan and Iraq. These appointments should take place before deployment, if possible. All legal offices subject to mobilization or deployment should identify FCC members and alternates as a part of their predeployment planning. Then, the Foreign Claims Commissioner should contact the Foreign Torts Branch (FTB) of USARCS (usarmy.meade.hqda-otjag.mbx.foreign-claims@mail.mil or (301) 677-9490/9498 [DSN 633])) for additional information regarding how to obtain a written appointment memorandum. Foreign Claims Commissioners should request permission to join the FCC restricted forum on Milsuite and the Claims Community of Practice, where there are invaluable training tools and guidance. In addition, prior to being appointed, FCCs must complete on-line training available on JAGCNET. USARCS will not appoint FCCs until they are deployed and confirmed as requiring appointment; while a JA make take and pass the examination prior to deployment, JAs should not submit appointment request memoranda until deployed.

4. In adjudicating claims under the FCA, the FCC applies the law of the country in which the claim arose to determine both liability and damages, unless the claimant is only transient in the country in which the claim arose and resides elsewhere; then, the law of the country of residence determines damages. This includes the local law or custom pertaining to contributory or comparative negligence and joint tortfeasors. Payments for punitive damages, court costs, filing costs, attorneys' fees and bailment are not allowed under the FCA. Before deploying, JAs should become familiar with the application of foreign law, and should attempt to compile local law summaries for all countries in which the unit is likely to conduct operations.[18] After deployment, claims personnel may contact local attorneys for assistance, obtain information on local law and custom from the U.S. Consulate or Embassy located in-country, or contact USARCS FTB.[19]

5. Once the FCC issues its final decision and the claimant signs the settlement form, the FCC then certifies the claim to the local Defense Finance and Accounting Office for payment in local currency, if possible. If an FCC intends to "deny a claim, award less than the amount claimed, or recommend an award less than claimed but in excess of its authority," it must notify the claimant. This notice will give the claimant an opportunity to submit additional information for consideration before a final decision is made. When the FCC proposes an award to a claimant, it also forwards a settlement agreement that the claimant may either sign or return with a request for reconsideration.

E. **Claims Cognizable Under International Agreements (SOFA Claims).**[20]

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[16] AR 27-20, *supra* note 9, para. 10-9*b*.

[17] In the Army, normally the USARCS Commander appoints FCCs. USARCS has developed an "off-the shelf" appointment package and can assist in the speedy appointment of FCCs. Unless otherwise limited in an appointment letter, a one-member FCC who is either a JA or a claims attorney may pay or deny claims up to $15,000. Line-officer commissioners may pay and deny claims up to $5,000,. A three-member FCC may deny claims of any amount, and settle claims up to $50,000. Two members of a three-member FCC constitute a quorum, and decision is by majority vote. USARCS is the settlement authority for claims in excess of $50,000. The Secretary of the Army or his designee will approve payments in excess of $100,000. All payments must be in full satisfaction of the claim against the United States, and all appropriate contributions from joint tortfeasors, applicable insurance, or Article 139, UCMJ proceedings must be deducted before payment. Advance payments may be authorized in certain cases. *See* AR 27-20, *supra* note 9, paras. 10-5 to 10-9.

[18] Before deploying, Army JAs responsible for unit claims management should contact the Chief of Claims in the SJA office of the Unified Command responsible for that particular country and the USARCS Tort Claims Division, Foreign Torts Branch, Fort Meade, Maryland 20755-5360 (Commercial 301-677-7009(DSN 923) for further information and guidance.

[19] Although the Army claims regulation does not specifically set out conflict of law provisions, general principles applicable to tort claims are set out in AR 27-20, *supra* note 9, para. 3-5. These principles may be used in situations where local law and custom are inapplicable because of policy reasons, or where there is a gap in local law coverage.

[20] 10 U.S.C. § 2734a (commonly referred to as the International Agreement Claims Act).

1. As a general rule, the FCA will not apply in foreign countries where the U.S. has an agreement that "provides for the settlement or adjudication and cost sharing of claims against the United States arising out of the acts or omissions of a member or civilian employee of an armed force of the United States."[21] For example, if a unit deploys to Korea, Japan, or any NATO or Partnership for Peace country, claims matters will be managed by a command claims service under provisions outlined in the applicable status of forces agreement (SOFA).[22] It is important to note that for out-of-scope acts, the FCA is generally used to settle claims, as SOFAs generally only cover in-scope acts.

2. Deployment to a SOFA country places additional pre-deployment responsibilities on JAs. First, knowledge of the claims provisions contained in the applicable SOFA is mandatory. Second, JAs must be aware of receiving state procedures for the settlement of claims. The SJA element of the deploying unit may legitimately expect and plan for technical assistance from the servicing command claims service and should coordinate with that service prior to deployment.

F. **Claims Cognizable Under the Public Vessels Act (PVA) and Suits in Admiralty Act (SAA)**. The PVA and SAA provide broad waivers of sovereign immunity for property damage and personal injury claims arising from maritime torts caused by an agent or employee of the government, or by a vessel or other property in the service of the government. Such claims typically arise from the negligent maintenance or operation of government vessels or aircraft. Claims may also take the form of demands for compensation for towage and salvage services, including contract salvage, rendered to a government vessel or to other property owned by the government.[23]

1. Both the PVA and SAA contain two-year statutes of limitations, which run from the date of the event upon which a claim is based. No administrative claim is required under the PVA and SAA. However, when a claim arises under the Admiralty Jurisdiction Extension Act, 46 U.S.C. app. § 740, a claim is required. Unlike FTCA claims, no particular form is needed to assert an admiralty tort claim. However, a claimant will bear the burden of providing evidence from which government liability and the full measure of damages can be determined with a reasonable degree of certainty. Filing a claim does not toll the two-year limitations period. If an admiralty tort claim is denied, a claimant's only recourse is to file suit in Federal district court within the two-year limitations period.

2. Unlike the FTCA, waiver of immunity under the PVA and SAA includes admiralty tort claims arising in international waters or in the territorial waters of a foreign country. While the PVA and SAA contain no express exceptions to their broad waivers, as does the FTCA, most Federal courts have incorporated, by implication, the discretionary function exception into the PVA/SAA.

G. **Applicability of International Agreements to Admiralty Claims**. Admiralty claims may or may not fall under the applicable SOFA. All personal injury or death claims arising from the operation of a U.S. government vessel or the actions of government personnel in a host country's territorial waters are adjudicated by the host country under the SOFA's claims provisions. However, property damage claims arising from the navigation or operation of a ship usually fall outside the terms of the SOFA.

1. In some instances, supplementary agreements may further modify the provisions of a SOFA. In Japan, for example, certain small fishing vessel and net damage claims were brought within the scope of SOFA adjudication by the 1960 *note verbale* to the SOFA, even for damage caused by a U.S. warship.

2. Separately, government-to-government admiralty claims for damage are waived by parties to a SOFA under the so-called "knock for knock" provisions. Even when you suspect that a knock-for-knock agreement may apply, it is still important to investigate and document all admiralty incidents and to contact your claims branch for guidance.

H. **Claims Cognizable Under UN or NATO Claims Procedures**. In special circumstances, U.S. personnel may be assigned to a UN or NATO headquarters unit and may cause damage or injury to a third party. In such cases, special UN or NATO claims procedures may apply, and the UN or NATO may actually pay the claim. If

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[21] *Id.*

[22] *See* Claims Community of Practice that the reader can link to from the USARCS portion of JAGCNET.

[23] 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).

faced with such a situation, JAs should contact their command claims service for guidance. ISAF currently has such procedures in Afghanistan.

I. **Article 139 Claims**.[24] UCMJ Article 139 authorizes collection of damages directly from a servicemember's pay for willful damage to or wrongful taking of property by military personnel acting outside the scope of their employment. For example, if a Soldier steals property from another Soldier or a civilian and refuses to return it, the victim may file an Article 139 claim in an effort to recover the value of the loss. During deployments, Article 139 claims are handled just as they are at the installation. The processing of these claims overseas, however, presents unique logistical challenges. Special Court-Martial Convening Authorities (SPCMCA), who function as appointing and final action authorities for Article 139 claims, may be geographically separated from the investigating officer and the reviewing claims JA. Every unit must prepare for these challenges and contingencies during pre-deployment planning.

J. **Real Estate Claims.** Corps of Engineers Real Property Teams (CREST) will assist in settling the majority of claims arising from the use of real estate. These claims are based upon contract principles and are paid by the occupying unit from O&M funds, not claims expenditure allowances.

1. Coordination and regular communication between the JA and the engineers after deployment is essential. Judge Advocates should also be aware that not all claims for damage/use of real estate are based on contract. Some are based on tort law and may be considered as claims under the FCA or MCA, such as claims for damage/use of real estate for a period of thirty days or less. If the claim is for a period of thirty-one days or more, it is normally considered a real estate claim.[25] Claims for physical damage to property should be handled within the lease for those longer than thirty days.

2. During lengthy deployments, rapid turnover of real estate officers is common. In OPERATION JOINT ENDEAVOR/GUARD/FORGE in Bosnia and Herzegovina, for instance, the Corps of Engineers rotated civilian real estate officers into the area of operations on sixty-day tours. In addition, in the first years of OIF and OEF, Corps of Engineers personnel were frequently rotated in and out of theater, making relationship building extremely difficult. However, currently the Corps of Engineers has significantly increased its presence and largely remedied many of these difficulties.[26]

3. All Claims JAs deploying to Iraq or Afghanistan should be familiar with the Gulf Region Corps of Engineers SOP located at Appendix E of this chapter.

K. **Claims Involving Non-appropriated Fund Instrumentalities (NAFI)**. Frequently, FCCs will receive claims involving NAFIs. Although FCCs may adjudicate such claims, the FCC will not actually pay the claimant unless the damage was "caused" by the U.S. Forces or a DoD appropriated fund employee. Therefore, the FCC should coordinate with the local manager of the NAFI prior to investigating the claim. Some NAFI managers have independent authority to settle small claims. For example, Army and Air Force Exchange Service store managers have authority to settle claims up to $2,500. If the NAFI has the authority, it may settle the claim. If not, the FCC will investigate and adjudicate the claim, as it would for any other FCA claim. However, instead of making payment, the FCC will forward the adjudicated claim to the NAFI for payment.

L. **Affirmative Claims.** An affirmative claim is a claim asserted by the United States against a tortfeasor or a tortfeasor's insurance company. If claims personnel believe the possibility exists for an affirmative claim, and they can identify a party against whom the claim can be asserted, this should be reported to the responsible claims service. In countries where the Department of the Army has single-service claims responsibility, the responsible claims service may appoint a recovery JA to assert and collect payment. Recovery JAs should keep in mind that, after assertion, they may not have the authority to terminate or settle the claim for less than the full amount. This authority may rest with the responsible claims service or higher depending on the amount of the claim. In addition, claims against foreign governmental entities have to be coordinated with USARCS and approved by TJAG.

M. **Alternatives to Claims.** In addition to the many claims provisions listed above, deployed units must also be aware of alternative sources for payments. Primarily, solatia and Commander's Emergency Response Program (CERP) funds may be used to make payments under certain circumstances in which a claim is not cognizable.

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[24] 10 U.S.C. § 939. *See generally*, AR 27-20, *supra* note 9, ch. 9; DA PAM 27-162 ch. 9.
[25] DA PAM 27-162, *supra* note 5, para2-15m.
[26] For an example of implementing guidance for real property claims, *see* Appendix D, Enclosure 4, *infra*.

Although these payment sources are NOT a part of the claims program, they may be a suitable alternative to claims in certain circumstances.

1. **Solatia Payments**.[27] If a unit deploys to the Far East, or other parts of the world where payments in sympathy or recognition of loss are common, JAs should explore the possibility of making solatia payments to accident victims. Solatia payments are **not** claims payments. They are payments in money or in-kind to a victim or to a victim's family as an expression of sympathy or condolence. These payments are immediate and, generally, nominal. The individual or unit involved in the damage has no **legal** obligation to pay; compensation is simply offered as an expression of sympathy in accordance with local custom. Solatia payments are **not** paid from claims funds but, rather, from unit operation and maintenance (O&M) budgets. An individual should not receive both solatia and a claims settlement, as the two remedies are mutually exclusive. If a solatia payment is erroneously paid in a tort claim, the solatia payment is deducted from the tort claim payment. Prompt payment of solatia ensures the goodwill of local national populations, thus allowing the U.S. to maintain positive relations with the host nation. Solatia payments should not be made without prior coordination with the highest levels of command for the deployment area. On 26 November 2004, the DoD General Counsel issued an opinion that solatia is a custom in Iraq and Afghanistan. [28] Before deploying to one of these theatres, JAs should read the DoD GC's memo, which can be found in the FCC forum on JAGCNET.

2. CERP Condolence Payments. The Commanders' Emergency Response Program was originally created to respond to "urgent humanitarian relief and reconstruction requirements," but not for payments to individuals. However, in 2005, the guidance was changed to allow for payment of:

a. "Repair of damage that results from U.S., coalition, or supporting military operations and is not compensable under the Foreign Claims Act";

b. "Condolence payments to individual civilians for death, injury, or property damage resulting from U.S., coalition, or supporting military operations." [29]

c. Judge Advocates should pay particular attention to the qualifying language for the "repair of damage" provision that requires, prior to payment, a determination that the damage is not payable under the FCA.

d. Judge Advocates deploying to Afghanistan should be mindful of the timeline for CERP payments. Prior Department of Defense guidance dictated that CERP payments should only be made after a complete investigation. However, this policy resulted in significant delays in making "amends" for the loss of innocent life and injuries to innocent civilians. In accordance with recent guidance from the Secretary of Defense, units are now directed to "immediately and publicly express our regret for the loss of—or injury to—innocent life; make appropriate amends according to the dictates of law and cultural norms; and then launch an investigation."[30]

V. PRE-DEPLOYMENT PLANNING

A. **General Considerations**. Many factors must be considered during pre-deployment planning. All personnel involved in the claims mission must be properly trained. Principal players must be properly appointed. International agreements with the host nation, compilations of local law, and/or other references that will impact on the claims operation, must be located. These agreements, and the application of local law to determine liability and damages under certain claims statutes, can give rise to unique ethical and conceptual challenges. All of these aspects of the claims operation must be considered.[31]

B. **Training**. The initial step in any successful claims operation is the establishment of education and prevention programs. The primary aspect of these programs is training. Claims JAs must ensure that all parties to the claims operation are properly trained, not only on legal requirements, but also on required military skills for potential deployed environments (e.g., weapons training, vehicle licensing, combat lifesaver training, etc.). This

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[27] *See, e.g.*, AR 27-20, *supra* note 9, para. 10-10 a; DA PAM 27-162, *supra* note 5, para. 10-10.
[28] Memorandum, Deputy General Counsel (International Affairs), Department of Defense to Chairman, Joint Chiefs of Staff, subject: Solatia (26 Nov. 2004).
[29] Memorandum, Under Secretary of Defense for Secretaries of the Military Departments, et al., subject: Commanders' Emergency Response Program (CERP) Guidance (27 Jul 2009).
[30] Memorandum, Secretary of Defense for Chairman of the Joint Chiefs of Staff, Subject: Response Posture for Noncombatant Civilian Casualty Incidents in Afghanistan (29 Oct 2008).
[31] *See also* Appendices C and D to this chapter.

should be an ongoing part of the daily mission, whether or not deployment is contemplated. Claims JAs, attorneys, and legal NCOs and specialists must know the procedures for serving as FCCs and Foreign Claims NCOICs, and for operating Special Claims Processing Offices. FCCs must certify completion of the training support packages in the FCC forum on JAGCNET prior to being appointed as FCCs. In addition to web-based training, USARCS will provide live training to legal offices upon request.

Claims personnel must also brief service members and UCOs on how to avoid property damage, property loss, and personal injuries. These briefings should also address procedures for documenting and reporting preexisting damage. Finally, claims personnel should ensure that Unit Claims Officers (UCO) and Maneuver Damage Claims Officers (MDCO) know and understand the proper procedures for investigating claims, compiling evidence, and completing reports and forms. Claims avoidance, reporting, and investigation procedures must be addressed long before the unit begins actual operations.

C. **The Tort and Special Claims Application (TSCA) Training.** The Tort and Special Claims Application is a web-based application for tracking tort claims. This program is intended to provide USARCS with visibility on the claims being paid in deployed areas, as well as to provide all FCCs with access to a central repository of previously-paid claims. This information is invaluable for FCCs as they attempt to identify duplicate or fraudulent claims. In addition to FCC training, all FCCs and claims NCOs must participate in TSCA training, which is available under the Foreign Claims Commission Resources on the USARCS homepage.

D. **Appointment Orders**. Principal players in deployment claims operations include UCOs, MDCOs and FCCs. Prior to deployment, each company- or battalion-sized unit should appoint a UCO and, depending upon the equipment and mission of the unit, an MDCO. These individuals document and investigate every incident that may result in a claim either against or on behalf of the United States. UCOs and MDCOs coordinate their investigations with either servicing JAs or FCCs. Recognition and documentation of possible claims, and initial contact with claimants, often rests with UCOs and MDCOs. They are, therefore, very important assets to the claims operation.

VI. NONCOMBAT DEPLOYMENT OPERATIONS

A. The operation of deployment claims offices varies depending upon the type and location of the mission. Flexibility, therefore, is essential. An overseas location may present language barriers and logistical challenges, such as where to locate claims offices and how to coordinate the investigation, adjudication, and payment phases of the claims process. Nevertheless, some aspects of the operations, such as the need for a cooperative environment and consistent procedures for payment and processing, remain constant.

B. **Disaster Relief and CONUS Deployment Claims**. Generally, when we think of deployments, we think of overseas operations in preparation for combat, peace enforcement, or peacekeeping operations. However, these are not our only deployment operations. Consider the aftermath of Hurricanes Andrew and Katrina. The military is called to react to these types of disasters both within and outside the United States. These operations place a great demand on claims personnel.[32] Claims offices must have operational claims disaster plans to execute claims contingencies when called upon to compensate persons harmed by military activities that cause the disasters, as well as military disaster relief activities that cause further harm. Additionally, the Army is DoD's executive agent for tort claims arising from chemical disasters under the purview of the Chemical and Biological Defense Command, and has other significant responsibilities for the resolution of tort, maneuver damage, and personnel claims arising from such disasters.

C. **Logistical Support**. Proper logistical planning and coordination is essential to effective deployment claims operations. During most deployments, claims processing is a complex, full-time job requiring dedication of substantial personnel and equipment assets. Claims investigators will have to travel frequently to visit areas where damages, losses, and injuries are alleged to have occurred. Depending on the security and force protection orders in effect during a given operation, claims personnel may have to deal with a variety of issues and planning factors that are not directly related to the adjudication and payment of claims. For example, claims personnel in OPERATION IRAQI FREEDOM were subject to force protection rules that prohibited them from leaving their base camps except

[32] In November 1998, USARCS published a Disaster Claims Handbook designed to be a stand-alone guide for use in providing claims services during a disaster. This handbook consolidates the provisions from AR 27-20, DA Pam. 27-162, and other publications that are relevant to disaster claims. It also contains additional materials and forms necessary to provide disaster claims relief, including a model disaster claims plan and suggested annexes. This handbook will be updated periodically and is available on the JAGCNet. *See* DISASTER CLAIMS SOPS on JAGCNet for more information on disaster claims operations.

in four-vehicle convoys with crew-served weapons. Unfortunately, many Brigade Legal Teams did not have the vehicles or weapons (e.g., crew-served weapons) necessary to comply with applicable force protection orders, so extensive coordination with supported units and other staff sections was critical.

1. Claimant forms and correspondence naturally must be in the native language of the claimants to be effective. Therefore, FCCs must request a translator for initial drafting of claim forms and settlement/rejection letters. In addition, FCCs must coordinate for translator support during claims processing hours. Because translation services are in high demand during a deployment, the FCC must coordinate this support immediately upon arrival in theater.

2. Every unit's claims deployment plan must address three areas: claims investigation; payment of claims; and the projected location of the claims office. The initial steps in an effective deployment claims operation are the establishment of a central location for the receipt of claims, and publication of this location to the local population. During the early stages of a deployment, this may mean simply erecting a tent. As the operation progresses, however, it is wise to establish a more substantial and permanent facility, if possible. The G-5 and Public Affairs Offices can publish the claims office's location and hours of operation. The local embassy and civil affairs personnel, if available, may also be helpful in disseminating information on the claims operation.

3. Transportation assets will be limited in any deployment. However, JAs and other claims investigators must be able to travel to claims sites. This requires the exclusive use of some type of vehicle(s). Claims personnel should be licensed and trained on how to properly operate and maintain dedicated vehicles. If claims offices are unable to procure sufficient vehicles to support their operations, they may also seek assistance in investigating claims from embassy and civil affairs personnel, as well as UCOs. Local national insurance adjusters may serve as additional sources of information and assistance in the investigation and adjudication of claims.

4. After claims personnel have adjudicated a claim, they must be able to pay it. Payment requires the presence of a Class A agent and a sufficient amount of local currency. Do not assume that finance offices will supply you with Class A agents. You may have to train unit or legal personnel to be certified to act in this capacity. Likewise, you should not assume that the Finance Office certification process is an easy one. After action reports from Iraq have related that Claims personnel received their FCC appointments and were designated as pay agents well before leaving home station. However, claims operations were still significantly delayed because after arrival into theater, the local finance offices had its own lengthy procedures for certifying pay agents. Security is always a concern. In Somalia, claimants often walked away from the claims office only to be robbed or shot to death within minutes. Still another issue is the "type" of money used to fund the operation. The money used to pay for claims filed under the FCA comes from the claims expenditure allowance. Not only must claims be paid from claims funds, they must be charged to the proper fund cite, which is tied to the payment authority for the claim (MCA, PCA, FCA, etc.). These issues must be resolved during pre-deployment planning through extensive coordination with unit comptroller personnel and higher level claims offices with claims appropriations.

VII. COMBAT CLAIMS

A. **Effect of International Agreements**. Provisions in international agreements between the U.S. and host nation governments regarding claims processing and adjudication generally do not affect combat claims. Most bilateral Military Assistance Agreements to which the U.S. is a party have no claims provisions. If there is a SOFA or other agreement that addresses claims issues, it may be suspended in time of armed conflict.[33] The agreement may also exclude claims arising from "war damage." However, one option the JA should investigate is preparing an agreement under which the host nation assumes responsibility for paying all claims that result from any combat activity.[34]

B. **Noncombat Claims Arising on Conventional Combat Deployments**. A basic principle embodied in U.S. claims statutes is that damage resulting directly from combat activities[35] 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

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

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

[35] Combat activities are defined as "[a]ctivities resulting directly or indirectly from action by the enemy, or by the U.S. Armed Forces engaged in, or in immediate preparation for, impending armed conflict." AR 27-20,Glossary, sec. II.

United States in combat" are not payable under the FCA.[36] Claims personnel must, however, distinguish between combat-related claims and noncombat claims that arise in a combat setting. Claims unrelated to combat activities will arise under the FCA, the MCA,[37] and the PCA.[38] Solatia[39] payments are not barred by the combat activities rule, and will commonly be based on injury or death resulting from combat activities. Real estate claims and claims under UCMJ Article 139[40] also arise in combat deployments. The JA must be prepared to process all of these claims, and a Class A agent must be present to pay claims in the local currency for FCA claims, and in U.S. dollars for PCA and MCA claims.

C. Combat Claims Arising on Conventional Combat Deployments. The combat-related claims exclusion often directly interferes with the principal goal of low-intensity conflict/foreign internal defense: obtaining and maintaining the support of the local populace. Our recent combat deployments offer insight into how we can maintain the support of the local population while observing the legal restrictions on combat-related damages. Each of our substantial combat scenarios over the last thirty years has been unique. Three major deployments—Vietnam, Grenada, and Panama—provide historical precedent of the various methodologies used to deal with combat claims.

1. In Vietnam, the South Vietnamese government agreed to pay all claims generated by military units of the Republic of Vietnam, the United States, and the Free World forces.[41]

2. After OPERATION URGENT FURY in Grenada in 1983, the U.S. Department of State initiated a program to pay for combat-related death, injury, and property damage as an exception to the restrictions imposed by the combat activities exclusion.[42]

3. Following OPERATION JUST CAUSE (OJC) in Panama, the United States provided funds to the government of Panama both to stimulate the Panamanian economy and to help Panama recover from the effects of OJC. These funds were used for emergency needs, economic recovery, and development assistance. The U.S. also provided Panama with credit guarantees, trade benefits, and other economic assistance programs.[43]

D. **Requisitions under the Law of Armed Conflict**.

1. The impact of lawful requisitions of private property on the battlefield is an often overlooked area of deployment claims. Under the law of armed conflict, a Soldier may requisition any type of property whenever there is a valid military necessity.[44] 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.[45] To ensure proper documentation of requisition claims, the servicing JA must implement a procedure to document and describe

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[36] 10 U.S.C. § 2734.
[37] 10 U.S.C. § 2733.
[38] 31 U.S.C. § 3721 (which provides compensation to service members for property losses due to enemy action).
[39] *See* notes 20 and 22 and accompanying text.
[40] 10 U.S.C. § 939.
[41] Dep't of the Army, Vietnam Studies, Law of War: Vietnam 1964-1073, Prugh, George S., Major General; Wash. D.C. 1975.
[42] At the conclusion of combat in Grenada, it quickly became apparent that the U.S. could not refuse to pay for combat-related damage if it wanted to maintain the support of the Grenadian citizens. With claims statutes providing no means to make such payments, the Department of State entered a Participating Agency Servicing Agreement between the U.S. Agency for Internal Development (USAID) and the USARCS that allowed for payment of combat claims. This agreement established a nonstatutory, gratuitous payment program outside of the combat activities exclusion using USAID funds. USARCS provided personnel to staff FCCs to process requests, investigate and recommend payment or denial of claims.
[43] This was done in Panama to support the Endara government and help to establish its legitimacy. Our mission was to support the legitimate government, not to act in place of it. The U.S. and Panama agreed to a Letter of Instruction (LOI) that established the procedures to be followed, listed categories of claims deemed not compensable, and set monetary limits for claims under the FCA that were not barred by the combat claims exclusion. These commissions proceeded to adjudicate and recommend payment on the combat-related claims, essentially using the same procedures already established for the payment of claims under the FCA and incorporating the special requirement of the LOI. $1.8 million of USAID money was made available: $200,000 to support the claims office and personnel, and the remainder to pay claims.
[44] A common example is the taking of private vehicles for tactical transportation. U.S. forces took vehicles in OPERATIONS URGENT FURY, JUST CAUSE, DESERT STORM, and OPERATION IRAQI FREEDOM. Other lawful examples would be the taking of food to feed service members who cannot be resupplied because of the tactical situation, or the billeting of service members in private dwellings if other suitable shelter is not available.
[45] AR 27-20, *supra* note 9, para. 10-3*c*(2).

all requisitioned items. A system using bilingual property receipts distributed down to the UCOs might prove effective, for example.

2. Judge Advocates should warn units about unauthorized requisitioning of property in a more mature theater. For instance, five years into OPERATION IRAQI FREEDOM, several claims were filed by local national store owners who stated that Soldiers had come to their store and taken merchandise for an upcoming operation. In exchange, the Soldiers gave the store owners claims cards and told them to file a claim for the merchandise. Such practices are not cognizable claims, and are not proper requisitions because there was no valid military necessity to obtain these items through requisition. Instead, the Soldiers should have procured the property through the unit logistics officer.

APPENDICES

A. Single Service Claims Responsibility Assignments

B. Unit Claims Officer Deployment Guide

C. Deployment Claims Office Operation Outline

D. Sample Claim Card

E. Gulf Region Corps of Engineers SOP

APPENDIX A

ASSIGNMENT OF SINGLE SERVICE CLAIMS RESPONSIBILITY FOR TORT CLAIMS

Afghanistan	Army	Kuwait	Army
Albania	Army	Kyrgyzstan	Army
Australia	Air Force	Latvia	Army
Austria	Army	Lithuania	Army
Azores	Air Force	Luxembourg	Air Force
Bahrain	Navy	Macedonia	Army
Belarus	Army	Marshall Islands	Army
Belgium	Army	Moldova	Army
Bosnia-Herzegovina	Army	Montenegro	Army
Bulgaria	Army	Morocco	Air Force
Canada	Air Force	Nepal	Air Force
Croatia	Army	Netherlands	Army
Cyprus	Air Force	Norway	Air Force
Czech Republic	Army	Oman	Air Force
Denmark	Air Force	Pakistan	Air Force
Djibouti	Navy	Poland	Army
Egypt	Air Force	Portugal	Navy
El Salvador	Army	Qatar	Air Force
Eritrea	Army	Romania	Army
Estonia	Army	Rwanda Refugee Crisis Area (except Kenya)	Army
Ethiopia	Army	Saudi Arabia	Air Force
France	Air Force	Serbia	Army
Germany	Army	Seychelles	Army
Greece	Navy	Slovak Republic/Slovakia	Army
Greenland (Denmark)	Air Force	Slovenia	Army
Grenada	Army	Somalia	Army
Honduras	Army	Spain	Navy
Hungary	Army	Sudan	Army
Iceland	Navy	Switzerland	Army
India	Air Force	Tajikistan	Air Force
Iran	Army	Tunisia	Air Force
Iraq	Army	Turkey	Air Force
Israel	Navy	Turkmenistan	Air Force
Italy	Navy	Ukraine	Army
Japan	Air Force	United Arab Emirates	Navy
Jordan	Air Force	United Kingdom	Air Force
Kazakhstan	Air Force	Uzbekistan	Air Force
Kenya	Army	Vietnam (war era claims)	Navy
Korea	Army	Yemen	Army
		Yugoslavia	Army

International Agreement Claims Arising in the United States: Army

Claims Generated by United States Central Command in countries not assigned: Army

Claims Generated by United States Special Operations Command in countries not assigned: Air Force

Claims Generated by DOD entitles: Army

Executive Agencies:

- Agent Orange Air Force
- Gulf War Illness Air Force

APPENDIX B

UNIT CLAIMS OFFICER DEPLOYMENT GUIDE

I. PURPOSE. To provide information regarding the use of Unit Claims Officers (UCO) to investigate and document claims incidents on behalf of Foreign Claims Commissions (FCC) during deployments.

II. INTRODUCTION. Any deployment of U.S. forces into a foreign country (a "receiving state") may cause damage to the personnel and property of either the U.S. or the receiving state and its inhabitants. Willful misconduct or negligent acts and omissions on the part of U.S. or receiving state personnel can cause these damages. Ordinarily, prior to deployment, each company- or battalion-sized unit appoints a UCO to investigate and document every incident that may result in a claim either against or on behalf of the United States.

III. INVESTIGATION REQUIREMENT

A. Prompt and thorough investigations will be conducted on all potential and actual claims against or in favor of the government. Information must be collected and recorded, whether favorable or adverse. The object of the investigation is to gather, with the least possible delay, the best possible evidence without accumulating excessive evidence concerning any particular fact.

B. Occasions upon which immediate investigations are required include when: non-governmental property is lost or damaged by a government employee; an actual claim is filed; a receiving state national is killed or injured 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. Prior to appointment, UCOs must review the UCO materials located on the USARCS Homepage under "FCC Resources."[1] The appointment orders (Enclosure 1) should instruct the UCO to coordinate with a designated Judge Advocate or attorney who services the UCO's unit. Copies of UCO appointment orders should be forwarded to the appropriate command claims service or servicing claims activity.

V. UCO RESPONSIBILITIES

A. **Pre-deployment Prevention Program**. UCOs should coordinate with the servicing judge advocate to advise unit personnel of particular aspects of the pending deployment or the receiving state that could cause particular claims problems. Depending upon the mission and the unit, UCOs should also coordinate with the designated Maneuver Damage Control Officers (MDCOs) to ensure investigative efforts are not duplicated.

B. **Conduct of Investigations**. UCOs will conduct immediate investigations, the duration and scope of which will depend upon the circumstances of the claims incident itself. UCOs will often be required to coordinate their investigations with criminal or safety investigations, which have priority for access to incident sites and witnesses. The reports of such investigations can be extremely useful to UCOs in the completion of their own investigations. In certain cases, UCOs themselves may be doing the bulk of investigation, and are required to safeguard all evidence that may be used in subsequent litigation. To that end, UCOs should interview all possible witnesses and reduce their statements to writing, and secure police reports, statements to insurance companies, hospital records, and even newspaper accounts. It is not necessary that the statements are sworn; claims adjudications are administrative matters in which decisions are based upon a preponderance of the evidence. UCOs must consult with the servicing judge advocate before disposing of any evidence.

C. Claims Reports.

1. Form of the Report. In claims incidents that have, or may have, a potential value in excess of $2,500, UCOs complete DA Form 1208 and attach all available evidence for review by the responsible FCC or Affirmative Claims Authority. Insignificant or simple claims with an actual or potential value of less than $2,500 may require only a cover memorandum explaining the attachments, if any, and the UCO's findings. The servicing judge advocate can provide guidance as to which form is better. In certain cases, such as when an AR 15-6 investigation is

[1] Http://www.jagcnet.army.mil. In order to navigate to the USARCS website, click on the "U.S. Army Claims Service" link, then the "Foreign Claims Commission Resources" link. Also join the Claims Community of Practice on JAGCNET to get access to these materials.

conducted, the claims report may be submitted on DA Form 1574 (Report of Proceedings). The FCCs should upload all reports to the TSCA except those containing classified information.

2. Content of the Report. The factual circumstances surrounding the claims incident must be detailed in the claim report, regardless of the format actually used. In vehicular accidents, for example, the questions found at Enclosure 2 can be used to develop a sufficient factual basis by even an unschooled investigator. UCOs should never make findings or recommendations as to liability or the dollar value of personal injuries in the claims report. These determinations should be left to the responsible judge advocate, but the UCO may note any additional comments in a separate document to accompany the claims report. Specific instructions on how to complete the claims report (DA Form 1208) are at Enclosure 3.

ENCLOSURES

1. Unit Claims Officer Appointment Order
2. Investigator's Interview Checklist for Vehicle Accidents
3. Instructions for Completing DA Form 1208 (Report of Claims Officer)

Enclosure 1 - Unit Claims Officer Appointment Order

DEPARTMENT OF THE ARMY
HEADQUARTERS AND HEADQUARTERS COMPANY
99TH ARMORED DIVISION
UNIT 10000, APO AE 09000

ABCD-EF-HHC 1 September 2011

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Duty Appointment

1. Effective 12 September 2011, 1LT Joe Jones, Unit Mailing Address, DSN phone number, DEROS is assigned the following duty:

UNIT CLAIMS OFFICER

2. Authority: AR 27-20, para 2-3(a)(1).

3. Purpose: As indicated in the applicable directives.

4. Period: 12 September 2011 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 conducted?
      (2) Who conducted 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.

13. (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 (UCO) will complete DA Form 1208 as follows:

General Information.

Date of Report. Self-explanatory.

Headquarters. Enter designation and APO address of unit involved in the incident.

Location. Enter unit location.

1. **Accident or Incident**. Enter date, hour and place of incident in appropriate blocks.

2. **Claimants**. When available, enter claimant's name and address. If not available, leave empty, but complete the rest of the form. Claimants may file with receiving state authorities instead of UCOs or FCCs. In those instances, this report will provide the relevant information about U.S. involvement.

3. **Property and Personnel Involved**.

Government Property. Identify U.S. vehicles involved with vehicle type, bumper markings, and license plate number. Describe the condition of the military vehicle before and after the incident. If the foreign national is at fault (partially or in full) this information will aid in an affirmative claim against that person for damaging U.S. property or injuring U.S. personnel, or at least reduce U.S. liability. If available, attach photographs of damaged property.

Private Property. Provide all available information. Do not delay, however, trying to get information that is not reasonably available or information that the servicing judge advocate can get from other sources. When possible, interview claimants or foreign national(s) involved. Provide a description of the property before and after the incident. If a vehicle is involved, include the model, and license number. If available, attach photographs of damaged property.

U.S. Government Personnel. Enter name, rank or grade, position, social security number, current assignment, DEROS (if overseas), ETS date, and telephone number of U.S. personnel involved.

Civilian and Foreign Nationals. Enter names, nationalities, addresses, and telephone numbers of non-U.S. Forces persons involved.

4. **Scope of Employment**. Leave blank, the servicing judge advocate or FCC will determine this.

5. **Damage to Property**. Fully describe the damage to government and private property involved. Estimate repair costs.

6. **Persons Injured or Killed**. List U.S. Forces and private persons injured or killed. If personnel were hospitalized, indicate where, how long, and transfers to other facilities. Do not delay the investigation if this information is not readily available.

7. **Witnesses**. List names, addresses, and telephone numbers of witnesses not included in block 3.

8. **Police Investigation and Trial**. Try to obtain local police reports. If authorities are reluctant to release the information, do not delay the investigation.

9. **Findings**. Fully describe the incident. Reference to police reports and witness statements (*e.g.* "See attached" statements) is not enough. The UCO must make independent findings of fact taking into account personal observation and all evidence obtained.

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

11. **Recommendations**.

It is Recommended That. Leave this block blank.

Reasons for Recommendations. Leave this block blank.

UCOs will send their recommendations on a separate sheet of paper. This is because local (receiving state) law often determines payment of claims. Claimants who are not satisfied with their settlements may go to court. DA Form 1208 may be made available to the claimant and to the local court for use in the proceedings. Because UCOs are not expected to know local laws, their recommendations about whether or how much to pay on a claim may be erroneous. If they are included on DA Form 1208, they may prejudice the United States' position in court.

Claims Officer. The UCO will include his or her name, and sign and date the forms in the appropriate blocks.

12. **Action of Commanding Officer or Staff Judge Advocate**. Leave this block blank.

Forward the completed form along with all exhibits and attachments and your recommendations to the servicing claims office or FCC.

APPENDIX C

DEPLOYMENT CLAIMS OFFICE OPERATION OUTLINE

I. **PURPOSE**. To outline the planning factors necessary to consider during the pre-deployment and deployment/stationing phases of a deployment of U.S. forces into a foreign country (a "receiving state") in order to operate an effective foreign claims activity.

II. **OVERVIEW: THE AR 27-20 SCHEME**. AR 27-20, Claims (8 February 2008), envisions the following general scheme for deployment claims operations:

A. Unit Claims Officers (UCO) and Maneuver Damage Control Officers (MDCO) are appointed by unit commanders and trained by unit or claims judge advocates or Foreign Claims Commissioners.

B. During the course of deployments, UCOs and MDCOs investigate claims incidents and forward potential claims files, both against and on the behalf of the U.S., to servicing judge advocates. DA Forms 1208 (Report of Claims Officer) are completed and forwarded as well, when appropriate.

C. Unit judge advocates forward potential claims files and completed DA Forms 1208 to the appropriate Foreign Claims Commission (FCC) for further processing and entry into the potential claims database.

D. Potential claims files are transferred to the active claims files system in TSCA and all relevant documents uploaded. The TSCA will assign a claim file number when a claimant actually files a claim. Should access to the TSCA not be available when a claim is filed, FCCs should maintain a log of all claims, assign the next available number manually, and upload the claim to the TSCA in proper claim number order when connection to the TSCA is restored.

E. FCCs investigate actual claims, in cooperation with the UCOs, and adjudicate them. Claimants are notified of the FCC's decisions, and approved claims are processed for payment.

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

III. **PRE-DEPLOYMENT PLANNING AND TRAINING**

A. Ensure that all units have UCOs, and MDCOs if necessary, appointed on orders.

B. Coordinate the training of UCOs and MDCOs in proper investigative techniques and completing accident report forms with MP personnel.

C. Coordinate the training of UCOs in compiling potential claims files and completing DA Forms 1208 with unit or claims judge advocates.

D. Train an NCO to serve as a Foreign Claims NCOIC. Foreign Claims NCOICs maintain the potential claims files and database, the actual claims files and TSCA database, and fiscal accountability. Foreign Claims NCOICs also coordinate the activities of the UCOs and MDCOs.

E. Determine force protection requirements in area of operations. Claims personnel should be licensed to drive available military vehicles, to use required weapons (including crew-served weapons), and to be combat lifesavers whenever possible.

F. To service a division-sized unit, train at least three judge advocates to serve as Foreign Claims Commissioners. Each can serve as a one-member commission to handle claims up to $15,000 for their respective brigades. Together, the three can serve as a three-member commission, which can handle claims up to $50,000 for the division, if necessary.

G. Secure a supply of the forms listed in appendix D for possible use by the FCC.

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

IV. **DEPLOYMENT PLANNING**

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

guidance [(301) 677-9490; DSN 677-9490]. CDR, USARCS has the authority to constitute and appoint FCCs, and to issue fund cites to pay foreign claims. This authority may be delegated to a command claims service or to a Staff Judge Advocate, as necessary.

B. **Planning Factors**. The exact structure and operation of a deployment claims activity depends upon several factors:

1. Type and duration of deployment. Is the operation an evacuation of noncombatants from a hostile area, or will the unit be deployed to the area for a significant period of time?

2. Area to which U.S. forces will be deployed. Logistically, how close is the area to installations where U.S. forces maintain a permanent or significant presence? How isolated will the unit be?

3. Existence of stationing agreements or MOUs governing the presence of U.S. forces. Stationing agreements, like the NATO Status of Forces Agreement (SOFA), may preempt the ordinary application of U.S. foreign claims statutes and regulations. What legal status will members of the force or civilian component have in the area?

4. Single Service Responsibility (SSR). Department of Defense (DoD) Directive 5515.08 (2006) 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. Predominant Service Component. If SSR is not already assigned, which service will be the predominant service component, if any, in the deployment? Under DoD Directive 5515.08, the appropriate unified or specified commander may make an interim designation of SSR. In the absence of such designation, each service component will have Individual Service Responsibility (ISR) for its own claims.

V. **DEPLOYMENT/STATIONING PHASE**. Once the unit has begun deploying into the receiving state, the following factors need to be considered in conducting a deployment claims activity:

A. **Coordination with receiving state authorities**. It is very important to inform host nation authorities of the way in which the deployment claims activity will work. They have an interest in seeing that claims resulting from damages to their citizens and property are properly handled. If a NATO SOFA-style stationing agreement exists, for example, this interest may have significant status as a matter of international law.

B. **Coordination with Civil-Military Affairs personnel**. The CMA activities can provide invaluable help in liaison with both local officials and the local population itself, as well as providing information about the local culture and customs that may have an impact on the adjudication of claims.

C. **Claims activity publicity**. Whether by means of the mass media or even by Soldiers handing out pamphlets to local nationals, the local population must be given basic information about claims procedures. This will expedite the processing of claims in general, and will help resolve meritorious claims before they become a public relations problem. Coordination with PAO and the SJA must occur before claims information is publicized. U.S. State Department officials may also wish to be consulted.

D. **Claims intake procedures**. The deployment claims activity must establish an intake procedure for foreign claims. This may be something as simple as setting aside two days a week for the receipt of claims and dissemination of claims status information to claimants. Particular forms may have to be devised to expedite and simplify the intake process.

E. **Translation capabilities**. Translators should be secured as quickly as possible to help the deployment claims activity. Translators help in the investigation of claims, the translation of intake forms and claimants' submissions, and the translation of correspondence.

F. **Local legal advice**. As interpreted by AR 27-20, local law most often determines liability and the measure of damages under the Foreign Claims Act. A local attorney is often necessary to explain local law, particularly in areas without a Western-style legal system.

G. **Security**. Physical security of the deployment claims activity includes such measures as not making the Foreign Claims Commissioner a Class A agent, and ensuring that crowd control measures are in effect on intake days. Security also includes fiscal security—checking the adjudication of claims to ensure that local organized crime elements are not trying to manipulate the claims system.

H. **Coordination with Military Intelligence personnel**. As was demonstrated in Grenada, claims offices can become very fertile ground for intelligence gathering. Military Intelligence personnel can likewise provide important information for claims investigations.

I. **Coordination with UCOs and MDCOs**. To make the claims activity run smoothly and efficiently, UCOs and MDCOs should be conducting most of the investigation of claims at their level. Because they are just on additional duty orders, and not legally trained, they must often be closely supervised to ensure that claims investigations are done properly.

J. **Coordination with Military Police personnel**. As trained investigators, MPs can provide invaluable assistance to UCOs, both in the course of actual investigations and in the compiling of reports after claims incidents. The Deployment Claims NCOIC should receive copies of the blotter on a daily basis and collect information related to potential claims against the United States.

K. **Coordination with Local Finance Offices**. Ensure that Class A agents are trained, certified, and available for claims missions. Also ensure that local currency will be available to pay claims.

L. **Coordination with Non-Governmental Organizations (NGOs) and Other Governmental Organizations (OGOs)**. Depending upon the area into which the unit deploys, it could find various international and charitable organizations already operating there. Likewise, other agencies of the U.S. government may also be operating in the area. The operation of these NGOs and OGOs may have a direct impact on a deployment claims activity. For example, many of these organizations might pay for claims (in cash or in-kind) that the FCCs cannot under the applicable statutes and regulations.

M. **Coordination with USARCS or command claims services**. Frequent coordination with USARCS or with the responsible command claims service is necessary both to ensure that funds are available to pay claims, and to maintain claims accountability. Both services also provide continuing technical oversight and logistical support.

APPENDIX D

FRONT SIDE OF POCKET CLAIMS CARD

Place unit logo here, if desired

The Army may pay claims to Iraqi civilians for property damage, injury and death caused by US Forces.

If your unit is involved in an incident resulting in damage to property of an Iraqi civilian, or injury or death of an Iraqi civilian:

1. Fill out the required information below.
2. Give this card to the Iraqi civilian, or other appropriate person in the case of death.
3. Direct them to the Iraqi Assistance Center (IAC) located at the Baghdad Convention Center. Do not promise anything.
4. Upon return to your FOB, complete DA Form 2823 describing the incident and forward to the 3rd Brigade Legal Office. *Please note that this information is not an admission of liability by the soldiers involved, it will be used only to substantiate a potential claim against the US Army.

UNIT _____

DATE _____

LOCATION _____

INCIDENT _____

REVERSE SIDE OF POCKET CLAIMS CARD

APPENDIX E

GULF REGION CORPS OF ENGINEERS SOP

DEPARTMENT OF THE ARMY
US ARMY CORPS OF ENGINEERS
GULF REGION DIVISION
BAGHDAD, IRAQ
APO AE 09348

REPLY TO
ATTENTION OF

CEGRD-RE

12 April 2009

MEMORANDUM FOR RECORD

SUBJECT: GRD Real Estate Standard Operating Procedure for Processing Real Estate Claims

1. References:

a. 10 U.S.C. 2675, Leases: Foreign Countries
b. AR 405-10, Acquisition of Real Property and Interests Therein (14 May 70)
c. AR 405-15, Real Estate Claims Founded Upon Contract (1 Feb 80)
d. AR 27-20, Claims (8 Feb 2008)
e. DA PAM 27-162, Claims Procedures (21 Mar 08)
f. FRAGO_176 (1 Aug 07)

2. Summary. This Standard Operating Procedure (SOP) prescribes policy and responsibilities for investigating, processing and settling claims against the United States involving Real Estate within Iraq and is intended to establish a division of responsibility and set forth a method for processing claims involving Real Estate.

3. Background. The US Government is obligated to pay the property owner fair & reasonable compensation for the use of property, even when the property is later occupied by Iraqi Army units accompanying or acting at the direction of US Forces.

4. A Real Estate owner whose Real Estate is or has been occupied for 30 days or more may file a Real Estate claim. US Forces will determine whether they can compensate the actual owner for rent covering the period of occupation, and/or whether any damage to the property is compensable. NOTE: Any claims not involving Real Estate will be handled through the normal claims process.

5. <u>The Claimant shall:</u>

a. Complete SF Form 95 (Claim for Damage or Injury) or equivalent (Encl 1). Provide address or location of the property. Note: Claim must be signed by the Claimant as owner of the property. If claimant is not owner, provide a power of attorney or proof that they possess ownership rights for the property to file a claim.

b. Provide the date of initial occupancy by US Forces or the term of occupancy and requested rental amount. Include any information justifying that this amount is typical rental for the area. Provide itemized list of any damages and/or losses incurred. If damages are claimed, the owner should provide photos of the damages along with receipts or estimates of repair along with a requested dollar amount.

c. Provide recent copy of Deed showing proof of ownership; include a recent letter from the local registry verifying ownership of the property. Deed must be in color with appropriate stamps. Obtain a letter from the Real Estate Directorate (GRD-RE) certifying ownership, if unable to obtain deed. If the property was inherited, provide copy of the death certificate, will and testamentary documents. If the Claimant is filing on behalf of the owner, a power of attorney is required. If person is deceased, provide Probate documents.

d. If there are many claimants for the same property then a Power of Attorney (POA) will be required. The POA must specify the right to represent, negotiate, sign and collect monies on the landowner(s) behalf. This avoids USG having to enter into multiple leases for the same property.

e. Provide proof of Identity (ID). Four different forms of ID in color are required unless waived by the Chief RE for certain minor claims (Claims less than $15,000 require a Gensia and Nationality Card - Claims greater than $15,000 will require all four). The common acceptable forms of ID are as follows: Gensia Card, Nationality Card, Ration Card, and Residency Card. If minors are involved you will need a trustee, conservatorship or guardianship court order document.

f. Complete, sign and provide all required documentation to the Unit's claims officer for submission to GRD-RE.

6. <u>The Unit Claims Officer shall:</u>

a. Handle claims that do not include a demand for rent of property through the normal claims process and for estate owners whose Real Estate has been occupied for 30 days or less.

b. Review and assemble all documents, investigate claim, verify information along with location and dates of occupancy by the units. Verify all scanned document & copies are legible.

c. Prepare SJA Memorandum of Opinion adjudicating claim (Similar to process for preparing Foreign Claims Memorandum of Opinion) (DA PAM 27-162, sec 2-60, dated 21 March 2008).

d. Provide map and accurate grid coordinates of location of claimant's property being utilized and boundary limits of unit's occupancy, including any stand-off requirements.

e. After completion provide all required documents in electronic format to the GRD-RE Office for preparation of "DRAFT LEASE". NOTE: Claim form must be signed by claimant in order to be valid.

f. Upon receipt of "DRAFT LEASE" from GRD-RE, prepare and submit fully executed funding document via a PR&C (DA 3953) or a DD 1149 (USMC). Prepare Voucher of anticipated amount to be charged (if approved for payment) and provide to GRD-RE, who will provide "FINAL LEASE", upon approval.

g. Submit "FINAL LEASE" to claimant for signature. Obtain all signatures of owners and witnesses. Submit "FINAL LEASE" to GRD-RE for execution by the Chief of Real Estate Division (or as delegated). Once the executed lease is received, units will provide payment to owner(s) along with copy of the executed lease. Provide copy of final pay documents and proof of payment to GRD-RE, when complete.

7. GRD- Real Estate Office shall:

a. Review the application and SJA justification memorandum. Request verification or additional information required to complete claim.

b. Finalize any negotiations if required, then prepare "DRAFT LEASE" and forward to Unit for preparation of funding document. Prepare "FINAL LEASE" once unit provides approved funding document. Execute "FINAL LEASE" once signed by owners. Maintain lease documents and copy of unit's final payment.

c. Assist in determining ownership with title searches and/or appraisals to value claimant's property and damages. These services will be provided based upon available funding and the amount of the claim.

d. Title search results when completed are sent to MNC-I C7 Basing and are posted on the MNC-I SIPR Web portal for GRD customers to view at: http://corps.res.s-iraq.centcom.smil.mil/sites/c7/Basing/default.aspx

8. The point of contact for this policy is the GRD Real Estate Division (Encl 2). A copy of this policy statement will be posted by the Chief, GRD Real Estate.

GARY R. DYE
Chief Real Estate, GRD

2 Encls
SF Form 95 (Claim for Damage or Injury)
GRD-RE Points of Contacts

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CHAPTER 19

ENVIRONMENTAL LAW IN OPERATIONS

I. INTRODUCTION

A. Environmental law is a complex thicket of federal and state statutes, regulations, and guidance that is a highly specialized discipline. Since the typical environmental legal practitioner at a U.S. installation is a civilian, uniformed Judge Advocates (JAs) do not always have the opportunity to engage in this challenging field. When a unit deploys, however, an understanding of environmental issues may make the difference in success and failure of a mission. Protecting the environment and instilling an environmental ethic across the operational spectrum is a major international, U.S., and Department of Defense (DoD) concern. Failure to do so can jeopardize Soldiers' health and welfare, impede current and future operations, generate criticism, and create other negative consequences.

B. Domestic environmental laws generally do not apply to the practice of environmental law outside of the United States. United States policy nevertheless imposes a structure that is similar to our domestic laws for overseas operations. This chapter addresses legal environmental considerations during overseas military activities. The approach can differ based on the location and phase of the operation. One set of rules applies to established overseas installations, and another set applies to contingency operations. As units deploy, it is important for the JA to understand the distinction between domestic and international environmental laws, how policy directives interact either in tandem with, or in lieu of, those laws, and how to apply them appropriately.

II. ROLES AND RESPONSIBILITIES

A. Several different players are involved in overseas environmental matters. The staff engineer generally takes the lead in planning and executing environmental operations.[1] The engineer usually chairs the Joint Environmental Management Board (JEMB), if established, to integrate the environmental protection efforts of all participating components under a single authority and to ensure unity of effort for environmental protection activities.[2]

B. Most established theaters of operation will have a designated lead for environmental matters, known as the Lead Environmental Component (LEC).[3] The LEC acts as the regulatory authority for DoD operations in the overseas area and is responsible for publishing, interpreting, revalidating, and updating the Final Governing Standards (FGS).[4] Identifying the LEC, and establishing a communication link with the LEC are key elements to environmental operations.

C. Judge Advocates. While the engineer and LEC play leading roles in operational environmental issues, JAs also have critical responsibilities.

1. Judge Advocates must ensure that leaders are aware of both the rules and the importance of environmental compliance and protection. While JAs can accomplish this through traditional legal counsel methods such as issue spotting, training, and contract formation and review, a JA brings a unique skill set to a contingency operation with respect to environmental considerations with the ability to examine issues across disciplines.

2. Judge Advocates are responsible for advising the command on environmental issues and assisting in the planning process. This includes advising the commander and staff on all environmental legal matters such as identification and interpretation of applicable laws, regulations, treaties, and other requirements; completion of environmental baseline surveys (EBS), and processing claims involving environmental damage.[5]

3. Judge Advocates will assist commanders in ensuring compliance, as far as practicable within the confines of mission accomplishment, with all applicable environmental laws and authorities as outlined in the

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[1] U.S. DEP'T OF DEFENSE, JOINT PUB. 4-04, JOINT DOCTRINE FOR CIVIL ENGINEERING SUPPORT, Ch. VI (27 Sep. 2001) [hereinafter JOINT PUB. 4-04].
[2] *Id.* at ch. VI, para. 2g.
[3] U.S. DEP'T OF DEFENSE, INSTR. 4715.05, ENVIRONMENTAL COMPLIANCE AT INSTALLATIONS OUTSIDE THE UNITED STATES (1 NOV 2013) [hereinafter DoDI 4715.05] (a listing of designated LECs is found in the Appendix to Enclosure 3 of the DoDI).
[4] *Id.* Section IV of this Chapter discusses the rules in established theaters of operation.
[5] U.S. DEP'T OF ARMY, FIELD MANUAL 1-04, LEGAL SUPPORT TO THE OPERATIONAL ARMY, paras. 5-36, 5-45 to 5-54 (26 Jan. 2012) [hereinafter FM 1-04].

OPLAN and OPORD, specifically, Annex L (Environmental Considerations). Judge Advocates are responsible for legal support in the development of Annex L, and must ensure consideration of appropriate and applicable treaties, laws, policy and guidance. During execution, JAs must know how to analyze environmental issues and be able to provide appropriate and credible solutions to commanders. Judge Advocates also must be prepared to advise and train supported commanders and units regarding environmental aspects of overseas operations along the entire operational spectrum.

4. Judge Advocates also should be involved in writing and interpreting contracts that implement Army environmental policy, particularly where there are legal and treaty issues involved with the international shipment of hazardous waste.[6] Contractors play a significant role in this regard as they will likely perform many of the environmental missions during an operation, whether under a Logistics Civilian Augmentation Program (LOGCAP) contract or another contract. During both the planning and contracting processes, JAs must carefully determine whether the various environmental standards and authorities apply to the particular operation and work with logistical planners to establish appropriate contract support and specifically outline contractor responsibilities.

D. JAs should also be aware of non-military organizations whose mission may involve environmental considerations. Organizations such as the State Department, United States Agency for International Development (USAID), United Nations, and non-governmental organizations (NGO) such as the International Committee of the Red Cross, Doctors Without Borders and World Wildlife Fund deal extensively with humanitarian and reconstruction activities, and may be integral players in the mission and information sources.

E. Finally, considerations of host nation governments may be relevant. While U.S. Forces generally do not have any obligation to follow host nation laws unless incorporated in a binding agreement, coordination regarding standards and expectations may be productive.

III. APPLICABILITY OF U.S. DOMESTIC ENVIRONMENTAL LAWS

A. Law. What environmental laws apply to U.S. military activities overseas? As a general rule, domestic environmental statutes have no extraterritorial application, absent language within the statute that makes a clear expression of Congress' intent for extraterritorial application.[7] Courts have examined several of the major environmental media statutory programs regarding the issue of extraterritorial application, with conflicting results.[8] One U.S. court found extraterritorial application of the Endangered Species Act (ESA) when U.S. federal actions outside of the country had significant environmental impacts within the United States, but the case was overturned for a lack of standing.[9] Another court held that § 470a-2 of the National Historic Preservation Act (NHPA) had extraterritorial effect regarding the DoD's effect upon the dugong, a mammal on the Japanese equivalent of the historic register.[10] Practitioners must therefore be mindful that the general rule may be overcome by specific facts.

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[6] *See infra* note 56 discussing Basel Convention.

[7] *See generally, E.E.O.C. v. Arabian American Oil Co.*, 499 U.S. 244 (1991); *NEPA Coalition of Japan v. Defense Department*, 837 F. Supp. 466 (D.D.C. 1993).

[8] *Compare Arc Ecology v. United States Dep't of the Air Force*, 411 F.3d 1092 (9th Cir. 2005) (holding that the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) had no extraterritorial effect) *and Amlon Metals, Inc. v. FMC Corp.*, 775 F. Supp. 668 (S.D.N.Y. 1991) (holding that the Resource Conservation and Recovery Act (RCRA) has no extraterritorial effect) *with Environmental Defense Fund v. Massey*, 986 F.2d 528 (D.C. Cir. 1993) (holding that the National Environmental Policy Act (NEPA) applied extraterritorially to the National Science Foundation's decision to burn food wastes in Antarctica, with great consideration that there is an absence of a sovereign within Antarctica). *Contra 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 reasoning that there is a strong presumption against extraterritorial application, and there could be adverse effects upon existing treaties and U.S. foreign policy).

[9] *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S. Ct. 2130 (1992) (many scholars believe the result would have been the same had the Court reached the extraterritoriality question); *see also* 16 U.S.C. §§ 1531-1544 (2006).

[10] *Okinawa Dugong v. Rumsfeld*, 2005 WL 522106 (N.D.Cal. March 2, 2005)*; see also Okinawa Dugong v. Gates*, 543 F.Supp2d 1082 (2008). Section 470a-2 states , "[p]rior to the approval of any Federal undertaking outside the United States which may directly and adversely affect a property which is on the World Heritage List or on the applicable country's equivalent of the National Register, the head of a Federal agency having direct or indirect jurisdiction over such undertaking *shall* *take into account* the effect of the undertaking on such property for purposes of avoiding or mitigating any adverse effects. National Historic Preservation Act, 16 U.S.C. § 470a-2 (2006)(emphasis added).

B. Policy. Despite the general rule against extraterritoriality, U.S. executive branch policy often requires adherence to U.S. environmental laws, if feasible. Thus, many of the substantive concepts from our domestic environmental laws are adopted in various policy formats. There are several policy references that apply, depending on the location and nature of the action.

C. Overseas Environmental Planning Process. Environmental operations planning should begin with the overarching U.S. policy. Executive Order (E.O.) No. 12114 creates "NEPA-like" rules for overseas operations by requiring environmental impact analysis of major federal actions affecting the environment outside of the United States, even though the National Environmental Policy Act (NEPA) does not generally have extraterritorial effect.[11] Department of Defense Directive (DoDD) 6050.7 implements E.O. 12114 and provides definitions, the review process, and document requirements for environmental analysis.[12] Each Service implements the directive with its own specific regulation.[13] The policies require a "NEPA-like" process when a major Federal action would significantly affect the environment:

1. in the global commons;[14]

2. of a foreign nation that is not participating with the United States and not otherwise involved in the action;[15]

3. of a foreign nation involving:

a. a product, or involving a physical project that produces a principal product, emission, or effluent, that is prohibited or strictly regulated by Federal law in the United States because its toxic effects to the environment create a serious public health risk, or

b. a physical project that is prohibited or strictly regulated in the United States by federal law to protect the environment against radioactive substances;[16] and

4. outside the United States that significantly harms natural or ecological resources of global importance designated by the President or Secretary of State.[17]

D. Participating Nation Exclusion.

1. When considering the applicability of DoDD 6050.7, the least straightforward and most frequently problematic of the four triggering events is determining whether the action involves a "participating nation."[18] The Directive completely excludes and requires no review for federal actions that significantly affect only the environment of a foreign nation that is involved in the action, making it a frequently pursued exclusion. Operational planners may determine whether a nation is participating by the foreign nation's direct or indirect involvement with the United States, or by involvement through a third nation or international organization.[19] There is no requirement for a SOFA or other agreement between the host nation and U.S. Forces in order to document participating nation status. Participation and cooperation, however evidenced, are the only elements required under E.O. 12114 and its implementing directive. The JA should look to the most logical and obvious places for evidence of such

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[11] Exec. Order No. 12114, 44 Fed. Reg. 1957 (1979) *reprinted in* 42 U.S.C. § 4321, at 515 (1982) [hereinafter E.O. 12114].
[12] U.S. DEP'T OF DEFENSE, DIR. 6050.7, ENVIRONMENTAL EFFECTS ABROAD OF MAJOR DEPARTMENT OF DEFENSE ACTIONS (31 Mar. 1979) [hereinafter DoDD 6050.7].
[13] Army, Environmental Analysis of Army Actions, 32 C.F.R. pt 651 (2009)(AR 200-2); Air Force, U.S. DEP'T OF AIR FORCE, INSTR. 32-7001, ENVIRONMENTAL MANAGEMENT (4 Nov. 2011); Navy, U.S. DEP'T OF NAVY, SEC'Y OF THE NAVY INSTR. 5090.1C, ENVIRONMENTAL READINESS PROGRAM MANUAL (18 July 2011); Marine Corps, U.S. MARINE CORPS, ORDER P5090.2A, ENVIRONMENTAL COMPLIANCE AND PROTECTION MANUAL (10 July 1998).
[14] DoDD 6050.7, *supra* note 12, at para. E.1.1 (the Directive sets forth procedures for examining actions within the global commons, adhering more closely to traditional NEPA environmental impact statements (EIS) and environmental assessment (EA) formats).
[15] *Id.* at para. E2.2.1.1; *see also* the participating nation exception discussion in this Chapter, *infra* at Section III.D.
[16] *Id.* at para. E2.2.1.2.
[17] *Id.* para. E2.2.1.3.
[18] *Id.* para. E2.2.2.
[19] *Id.* para. E2.2.1.1.

participation. The United States and its host nation partners may have documented the requisite participation within such agreements.[20]

2. One method 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: forced entry, semi-permissive entry, or permissive entry. A permissive entry typically involves a participating (cooperating) nation. Conversely, U.S. Forces who execute a forced entry would rarely deal with a participating nation. The analysis required for these two types of entries is fairly straightforward. Semi-permissive entry presents a much more complex question. In this case, the JA must look to the actual conduct of the host nation. If the host nation has signed a stationing agreement or Status of Forces Agreement (SOFA), or has in a less formal way agreed to the terms of the U.S. deployment within the host nation's borders, the host nation may be considered to be participating with the United States (at a minimum, in an indirect manner). If the host nation expressly agrees to the entry and to cooperate with the U.S. military forces, the case for concluding that the nation is participating is even stronger.

E. Exemptions. Department of Defense Directive 6050.7 sets forth various exemptions resulting in no further need to perform a formal documented environmental review.

1. Unlike the participating nation exclusion, exemptions often require that the military leader take an affirmative step to gain a variance from the formal documentation requirements.[21] 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.[22]

2. Once an exemption is approved, then the exempted status should be integrated into the OPLAN. If this event occurs after the OPLAN is approved, the exempted status should be added as a fragmentary order (FRAGO) to provide supplemental guidance to the environmental consideration section of the OPLAN.

3. General Exemptions. The E.O. exempts all federal agencies in the case of actions that do not do significant harm to the environment or a designated resource of global importance.[23] Further, actions taken by the

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[20] The United States used the participating nation exclusion in contingency operations in Haiti and Bosnia. United States Forces could not use the exclusion in Somalia, however, because that country did not participate with U.S. forces in OPERATION RESTORE HOPE. Accordingly, the United States had a choice of accepting the formal environmental documentation obligations, or seeking an exemption. In OPERATION SEA SIGNAL (August 1994-February 1996), Navy personnel based at Guantanamo Bay Naval Base, Cuba and Marines from II Marine Expeditionary Force assumed the mission of feeding, housing, clothing, and caring for more than 50,000 Haitian and Cuban migrants seeking asylum in the United States), JAs quickly determined that Cuba was not a participating nation. Consequently, they considered the array of exemptions provided in DoDD 6050.7 and forwarded an exemption request based upon national security concerns.

[21] *See* DoDD 6050.7, *supra* note 12, at para. E2.3.3.2. With the participating nation exclusion, the combatant commander should document this issue when approving the operations plan (OPLAN) that integrates the exclusion into its environmental considerations appendix; an exemption may require higher headquarters or Department of the Army approval. *See, e.g.* para E2.3.3.2.1.2. In the case of OPERATION SEA SIGNAL, the Commander, U.S. Atlantic Command forwarded a written request for exempted status for the construction and operation of temporary camps at Naval Station Guantanamo Bay, Cuba. The request was forwarded through appropriate legal channels and the Joint Staff (through the Chairman's Legal Advisor's Office) to the Under Secretary of Defense (Acquisition and Technology) for approval. The Under Secretary approved the request, citing the importance of OPERATION SEA SIGNAL to national security. *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 Memo]. The decision memorandum integrated into the final action informed the Under Secretary of Defense (Acquisition and Technology), the approval authority, that the CINCUSACOM had determined that Cuba was not a participating nation, and that a significant impact on the host nation environment was likely. The author of the memorandum, therefore, requested that the approval authority grant an exemption based upon the national security interests involved in the operation. *Id.*

[22] *See* Kross Memo discussion, *supra* note 21. The entire written action was only three pages. The memorandum provided: (a) the "general rule," as required by E.O. 12114 and DoDD 6050.7; (b) the explanation of why the operation did not fall within either of the two exceptions (either an action that does not cause a significant environmental impact or involve a host nation that is a "participating" nation); and (c) the four courses of action. The courses of action provided were as follows:

(1) Determine that the migrant camp operation has no significant impact;
(2) Seek application of the national security interest or security exemption;
(3) Seek application of the disaster and emergency relief operation exemption; or
(4) Prepare a "NEPA-like" environmental review.

[23] DoDD 6050.7, *supra* note 12, at para. E2.3.3.1.1. Commands frequently do a cursory examination of the action and determine whether an action will cause significant harm. Once concluded there is no significant effect, the operations order (OPORDER) process should note this conclusion.

President, and actions taken by DoD in advising the President, are exempted.[24] Other important general exemptions apply to actions taken by or pursuant to the direction of the President or cabinet officer in the course of armed conflict,[25] where national security implications are involved,[26] or in disaster or emergency relief actions.[27]

4. Additional Exemptions. The DoD is further authorized to establish additional exemptions on a case-by-case basis involving emergencies or other exceptional situations, and for class exemptions involving groups of related actions.[28]

F. Documentation. For actions that trigger the "NEPA-like" process, the command should direct the production of either a bilateral or multilateral environmental study (ES),[29] or a concise environmental review (ER)[30] of the specific issues involved. Documentation contents and specificity will depend upon the nature of the proposed action.

IV. AUTHORITIES AT ESTABLISHED OVERSEAS INSTALLATIONS

A. If domestic U.S. law does not apply overseas, the practitioner must determine what rules do apply. The answer differs based on whether the action occurs at a fixed installation or in a deployed context, and is typically not found in the "law," but by implementing applicable policy directives. This section briefly addresses management of fixed installations overseas.

B. Compliance.

1. DoDI 4715.05, ENVIRONMENTAL COMPLIANCE AT INSTALLATIONS OUTSIDE THE UNITED STATES (1 NOV 2013), is the authority for compliance matters, such as protection of air, water, natural resources and other environmental categories.[31] The DoDI only applies to established installations under DoD control in foreign countries. It does not apply to off-installation operations and training, operations of military aircraft and vessels, off-installation operational and training deployments, or to contingency locations.

2. The DoDI provides for the designation of a DoD Lead Environmental Component (LEC) for specific countries and overseas geographic locations, and designates which countries require Final Governing Standards (FGS)..[32]

3. The DoDI establishes environmental compliance standards for protecting human health at overseas installations published as the Overseas Environmental Baseline Guidance Document (OEBGD).[33] The OEBGD is a generic document that establishes a set of objective criteria and management practices to protect human health and the environment.[34] As a relationship is established in a particular country, the LEC develops country specific-standards known as Final Governing Standards (FGS), which is a comprehensive set of country-specific substantive

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[24] *Id.* at para. E2.3.3.1.2. Further actions to be taken by DoD to implement the President's actions are not exempted, and require adherence to the Directive.

[25] *Id.* at para. E2.3.3.1.3. The Directive defines armed conflict as "hostilities for which the Congress has declared war or enacted a specific authorization for the use of armed forces; hostilities or situations for which a report is prescribed by section 4(a)(1) of the War Powers Resolution, 50 U.S.C. 1543(a)(1)(Supp. 1978); and other actions by the Armed Forces that involve defensive use or introduction of weapons in situations where hostilities occur or are expected." The third prong of this definition is extremely broad, and can be useful in situations in which there is little reaction time.

[26] *Id.* at para. E2.3.3.1.4 (this exemption requires a determination of national security interest by the Assistant Secretary of Defense (Manpower, Reserve Affairs, and Logistics)).

[27] *Id.* at para. E2.3.3.1.8.

[28] *Id.* at para. E2.3.3.2.1.

[29] *Id.* at para. E2.4. An ES is analogous to an Environmental Impact Statement (EIS) under NEPA; it contains a more in-depth analysis of the likely environmental consequences of the action, including a review of the affected environment, significant actions taken to avoid environmental harm or otherwise better the environment, and significant environmental considerations and actions by other participating entities. The ES can involve public participation and is intended to be a cooperative, rather than unilateral, action, which usually involves coordination and consultation with the foreign government.

[30] *Id.* at para. E2.5. An ER is more analogous to NEPA's Environmental Assessment (EA) process; it is typically a unilateral undertaking and surveys the important environmental issues associated with the action, but it has a less involved evaluation of the issue and does not generally involve the public.

[31] The goal of compliance is to minimize potential adverse impacts on human health and the environment while maximizing readiness and operational effectiveness. Joint Pub. 4-04, *supra* note 1, at Ch. VI-2.

[32] *See* this Chapter, *supra* Section II.B.

[33] DoD Pub 4715.05-G, OVERSEAS ENVIRONMENTAL BASELINE GUIDANCE DOCUMENT (OEBGD) (1 May 2007).

[34] DoDI 4715.05, *supra* note 3, at para. E2.1.5.

provisions. The LEC determines the FGS by using the OEBGD standard unless it is inconsistent with host-nation law and the host-nation law is more protective. If the issue is not addressed in the OEBGD, the LEC must consider host-nation law.

C. Remediation.

1. Cleaning up environmental contamination attributable to our activities on DoD installations outside the territorial jurisdiction of the United States is controlled by DoDI 4715.08.[35] The DoDI specifically prohibits remediation to address:

a. Off installation contamination from any sourse unless remediation is specifically required by applicable international agreement;

b. Environmental contamination at installations approved by OSD for realignment, EXCEPT for remedial measures needed to prevent immediate exposure of US forces and personnel to environmental contamination that poses a substantial impact to human health and safety (SIHS); and

c. Contamination at installations after they are returned to the host nation UNLESS required by applicable international agreement

2. "Installations" means "enduring locations", so the DoDI does not apply to contingency locations. The DoDI does not apply to spill responses governed by DoDI 4715.05.

3. In all cases, DoD will follow applicable international agreements that require remediation. Under the DoDI, remediation is required to address a SIHS due to environmental contamination on a DoD installation that was caused by DoD activities. Remediation of contamination from non-DoD activities on DoD installations may be permissible under limited circumstances.

4. The substantial impact (SI) determination is made by the responsible in-theater Component commander, after consultation with appropriate DoD medical authority and the DoD LEC (if any). SI determination authority may be delegated to a subordinate general officer, but consultation is still required. SIHS is the only justification for remediation other than remediation required by applicable international agreement, absent extraordinary circumstances.

V. NON-ESTABLISHED OVERSEAS INSTALLATIONS.

A. In some countries and in most contingency operations, installations have not been established, and the DoDIs do not apply.[36] Although environmental issues often have a significant impact on operations,[37] there is little guidance available to guide the practitioner in advising the commander in a deployed contingency operation.

B. The Joint Operational Planning Execution System (JOPES) incorporates environmental considerations into operational planning, and devotes Annex L of the OPORDER to these issues.[38] While complete protection of the environment will not always be possible due to its competition with other risks and mission objectives, planners should carefully and continuously address the full range of environmental considerations in joint operations.[39]

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[35] U.S. DEP'T OF DEFENSE INSTR. 4715.08, REMEDIATION OF ENVIRONMENTAL CONTAMINATION OUTSIDE THE UNITED STATES (1 NOV 2013) [hereinafter DoDI 4715.08].

[36] DoDI 4715.5, *supra* note 3, at para. 2.1; DoDI 4715.8, *supra* note 35, at para. 2.1.3.

[37] Environmental issues are undeniably critical for supporting and sustaining U.S. Forces. Often overlooked is how these considerations are instrumental in helping win the "hearts and minds" of the local populace. Commanders are increasingly realizing that by ensuring a decent place to live with safe, reliable infrastructure, resources upon which to secure a livelihood, and other features of a stable society, local civilians are more likely to support the military mission. *See* U.S. DEP'T OF ARMY, FIELD MANUAL 3-34.5, ENVIRONMENTAL CONSIDERATIONS, ch.1 (Feb. 2010) (Supersedes FM 3-100.4/ MCRP 4-11B, 15 June 2000). [hereinafter FM 3-34.5]; *See also* U.S. DEP'T OF ARMY, FIELD MANUAL 3-24, COUNTERINSURGENCY, Appx. A, para. A-26 (15 December 2006).

[38] JOINT CHIEFS OF Staff, STAFF MANUAL 3122.03C, JOINT OPERATION PLANNING AND EXECUTION SYSTEM VOL. II: (PLANNING FORMATS AND GUIDANCE), Enclosure C (17 Aug. 2007) (when not using JOPES, Army OPLANs/OPORDs will contain an Appendix 2 (Environmental Considerations) to Annex F (Engineer)).

[39] U.S. DEP'T OF DEFENSE, JOINT PUB. 3-34, JOINT ENGINEER OPERATIONS, Appx. D, Environmental Considerations (30 June 2011) [hereinafter Joint Pub. 3-34].

C. While the engineer has responsibility for development of Annex L, there is a shared responsibility with other staff elements, and the JA is a critical participant in this process.[40] To begin this effort, the JA should gather all the relevant resources and authorities that might apply in that theater of operation.[41] The JA should contact the combatant command's legal advisor to determine DoD's position relative to whether any host nation law applies, obtain copies of relevant treaties or international agreements, and have a firm understanding of the Law of Armed Conflict (LOAC).[42] If the command wishes to contact foreign governments to discuss environmental agreements or issues, the command should obtain higher headquarter permission before engaging in "formal" communications, and must coordinate with the State Department.[43]

D. The goal of the OPORD planning process is to plan an operation that achieves mission objectives while minimizing the environmental effects and observing environmental requirements.[44] Environmental considerations are relevant in all phases of an operation, and the considerations often shift during the lifecycle of a conflict, from the pre-conflict stage, through the conflict and post-conflict stages, ending with site closure.[45] United States policy is to always conduct a good faith environmental audit to reduce potential adverse consequences to the host nation's environment.[46] Accordingly, from the planning to execution phase, the environment is an important aspect of U.S. operations.

1. Pre-Conflict Stage. During pre-deployment planning, environmental considerations are generally addressed as functions of risk, much like the application of safety considerations. The operational planning model incorporates environmental issues into each stage of the military decision-making process. The OPORD will want to reflect considerations regarding geology, hydrology, climate, environmentally sensitive ecosystems, waste management, environmental hazards, and other characteristics of the battlefield which can in turn shape the development of courses of action. Once risks are identified, they can be balanced against mission accomplishment goals, and help the commander determine how to proceed.[47]

2. Conflict Stage. As the mission progresses towards operations, the level of environmental protection will vary depending on the focus of the operation. Combat operations involve less environmental protection than humanitarian operations because commanders generally weigh strategic objectives and force protection more heavily than environmental concerns.[48] All operations should implement strategies to prevent unnecessarily complicating the post-conflict phase by creating extreme environmental problems. Probably the most important consideration of environmental factors during the conflict stage involves LOAC[49] principles. While all phases of operations have LOAC concerns, this phase is perhaps the most relevant because of the targeting implications. In

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[40] *Id.*

[41] There are many resources to assist the JA draft and review Annex L. *See, e.g.* Air Force Handbook, 10-222, Volume 4, *Environmental Guide for Contingency* Operation, and the Defense Environmental Network and Information Exchange (DENIX) at www.denix.osd.mil (the "international" subject area within the DoD section of DENIX contains many of the references cited in this chapter and requires registration for full access).

[42] *See* this Chapter, *infra* Sec. VI.

[43] DoDD 6050.7, *supra* note 12, at para. 4.4.

[44] Joint Pub. 4-04, *supra* note 1, at Ch. III, para. 4.

[45] In many operations, checklists were used to construct an environmental compliance model that took into account relevant considerations. *See e.g.*, TRAINING CIRCULAR 3-34.489, THE SOLDIER AND THE ENVIRONMENT, Appx. A (26 Oct. 2001) (Appendix A contains a practical checklist for environmental considerations during operations; however, this is not related to a specific military operation). During OPERATION JOINT ENDEAVOR, JAs worked in conjunction with the civil engineering support elements and medical personnel to establish concise standards for the protection of host nation water sources and the management of waste. HEADQUARTERS, UNITED STATES EUROPEAN COMMAND, OFFICE OF THE LEGAL ADVISOR, INTERIM REPORT OF LEGAL LESSONS LEARNED: WORKING GROUP REPORT 3 (18 Apr. 1996).

[46] Joint Pub. 3-34, *supra* note 39, at D-1. This policy may result in U.S. Forces adhering "to U.S. domestic law standards for environmental actions where such procedures do not interfere with mission accomplishment." *See* CENTER FOR LAW & MILITARY OPERATIONS, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, AFTER ACTION REPORT, UNITED STATES ARMY LEGAL LESSONS LEARNED, OPERATION RESTORE HOPE, 5 DECEMBER 1992 - 5 MAY 1993 (30 Mar. 1995). During OPERATION RESTORE HOPE in Somalia, the multi-national force (under U.S. leadership) determined that the actions of U.S. forces in that operation were exempted from E.O. 12114 formal review or study requirements, but the force adhered to U.S. domestic law to the greatest extent possible (defined as the extent to which such adherence did not frustrate operational success). *Id.*

[47] *See* FM 3-34.5, *supra* note 37, at Ch. 2 (Appendix B provides an example of a compliant Annex L).

[48] For example, a commander measures the military value of destroying an enemy's petroleum, oil, and lubricants (POL) distribution facility against the potential for polluting water supplies.

[49] U.S. DEP'T OF DEFENSE, JOINT PUB. 3-60, JOINT TARGETING, Appx. A (13 Apr. 2007) (including the LOAC principles of military necessity, unnecessary suffering, proportionality, and distinction).

general, it is lawful to cause collateral damage to the environment during an attack on a legitimate military target, but a commander has an affirmative obligation to avoid unnecessary damage to the environment to the extent that it is practical to do so consistent with mission accomplishment.[50] Given this legal duty, mission planners should consider ways to prevent or mitigate adverse environmental effects.

3. Post-Conflict Stage. Once hostilities abate, the commander's attention turns to base camp, force protection and sustainment type issues. While the U.S. domestic environmental laws and policy directives likely do not apply in this situation, they often provide valuable models for commands to follow. This stage is full of environmental issues and considerations for the JA. Mission aims and humanitarian goals may be aided by environmental improvements designed to convince the populace to support the host nation government, participate in securing their community, and contribute to reconstruction efforts.

a. Base Camp Site Selection. An early critical decision is selecting the base camp location. Troops require a safe and hazard-free location. The Environmental Baseline Survey (EBS)[51] is an important tool in this selection process. The primary purpose of an EBS is to identify environmental, health, and safety conditions that pose a potential health threat to military personnel and civilians who occupy properties used by the United States. The secondary purpose is to document environmental conditions at the initial occupancy of property to prevent the United States from receiving unfounded claims for past environmental damages.[52] Judge Advocates must also integrate a directive for documentation of initial environmental conditions into the OPLAN.[53]

b. Environmental protection strategies apply in four broad areas of base operations (BASOPS), and should be incorporated into planning:[54]

(1) Hazardous substance control.

(i) This area applies to such issues as the management of hazardous materials and oil products, disposal of hazardous waste (including pesticides, medical and infectious waste, etc.), spill prevention, containment, and response, and air emissions (e.g., burning).[55]

(ii) 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.[56] The lead agency for DoD with respect to the Basel Convention is the Defense Logistics Agency (DLA). Should an operation involve potential Basel Convention issues, contact DLA.

(2) Natural habitat and wildlife protection. This can include issues regarding forests, croplands, waterways, fisheries and endangered or threatened species.

(3) Resource conservation. This includes issues such as water certification and wastewater management; pollution prevention and recycling efforts to reduce waste generation and logistic efforts; energy efficiency considerations, and noise abatement.

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[50] *Id* at Appx. A, para. 8; *see also*, this Chapter, *infra* Section VI.

[51] *See* FM 3-34.5, *supra* note 37, at Appx. E (listing items that should be included in an EBS and describing contents and preparation of an EBS to be placed in the OPORD); *see also* U.S. ARMY IN EUROPE REG. 200-2, ENVIRONMENTAL GUIDANCE FOR MILITARY EXERCISES (4 July 2007).

[52] *See* Chapter 18 (Claims, Foreign & Deployment) of this Handbook.

[53] This was done in OPERATION JOINT ENDEAVOR and, pursuant to this directive, unit commanders took photographs and made notes regarding the status of land that came under their unit's control. As a result of this planning and execution, U.S. Forces were protected against dozens of fraudulent claims filed by local nationals. 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 Environmental Law of Operational Law Handbook (4 Dec. 1996) (stating that the number of claims alleging environmental damage was "fairly high, and very difficult to adjudicate in the absence of photographs taken prior to the occupation of the area by U.S. forces," and that such pictures repeatedly "saved the day when fraudulent claims were presented by local nationals").

[54] FM 3-34.5, *supra* note 37, ch. 2.

[55] *See* DoDI 4715.19, Use of Open-Air Burn Pits in Contingency Operations (15 Feb. 2011).

[56] Basel Convention on the Control of Transboundary Movements of Hazardous Waste and Their Disposal, Mar. 22, 1989, 28 I.L.M. 657. This issue presented problems for operations in the Balkans, particularly with respect to Germany and Macedonia, as well as Afghanistan. Nationaldefensemagazine.org, Hazardous Waste Disposal Complicates U.S. Deployments (July 2001), http://www.nationaldefensemagazine.org/ARCHIVE/2001/JULY/Pages/Hazardous_Waste4229.aspx.

(4) Cultural resource protection. United States Forces should respect and preserve cultural and religious resources such as buildings, religious structures, monuments, and archaeological sites whenever possible.[57]

4. Base/Site Closure. Annex L of relevant OPLANs should contain guidance on environmental remediation required prior to closure or turnover of U.S.-used facilities in a deployed environment.[58] A closure survey will provide a measurement of change of the environmental conditions against an EBS, if one was completed. This process will assist in the potential adjudication of claims.[59]

VI. TRADITIONAL LAW OF ARMED CONFLICT (LOAC) APPLICATION

A. During all phases of conflict and planning efforts, the JA must consider a number of LOAC treaties that impact operations and their effect upon the environment. For a more in-depth discussion of the LOAC, see Chapters 2 and 4 of this Handbook.

1. Hague Convention No. IV (Hague IV).[60] Hague IV and the regulations attached to it represent the first time that environmental principles were codified into treaty law. Hague IV restated the customary principle that methods of warfare are not unlimited (serving as the baseline statement for environmental war principles).[61] Hague IV environmental protections enjoy the widest spectrum of application of any of the LOAC conventions; they apply to all property, wherever located, and by whomever owned.

a. Article 23e forbids the use or release of force calculated to cause unnecessary suffering or destruction.[62] Judge Advocates should analyze the application of these principles to environmental issues in the same manner they would address the possible destruction or suffering associated with any other weapon use or targeting decision.

b. Article 23g prohibits destruction or damage of property in the absence of military necessity.[63] When performing the analysis required for the foregoing test, the JA should pay particular attention to the geographical extent (i.e., how widespread the damage will be), longevity, and severity of the damage upon the target area's environment.

2. The 1925 Geneva Gas Protocol.[64] The Geneva Gas Protocol bans the use of "asphyxiating, poisonous, or other gases, and all analogous liquids, materials, and devices . . ." during war.[65] This treaty is important because many chemicals (especially herbicides) are extremely persistent, cause devastating damage to the environment, and even demonstrate the ability to multiply their destructive force by working their way up the food chain. During the ratification of the Geneva Gas Protocol, the United States reserved its right to use both herbicides and riot control agents (RCA) in certain circumstances.[66]

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[57] Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 36 Stat. 2279, 249 U.N.T.S. 240 [hereinafter Cultural Property Convention]; *see also* 154 Cong. Rec. S9439, 9555 (daily ed. Sep. 25, 2008) (containing understandings and declarations of the United States).

[58] CENTER FOR LAW AND MILITARY OPERATIONS, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, LEGAL LESSONS LEARNED FROM AFGHANISTAN AND IRAQ: Volume II, FULL SPECTRUM OPERATIONS 2 (MAY 2003 - 30 JUNE 2004), 177-79, *available at* http://www.fas.org/irp/doddir/army/clamo-v2.pdf.

[59] USCENTCOM REG. 200-2, CENTCOM CONTINGENCY ENVIRONMENTAL GUIDANCE, para. 3-2f (Appendix F contains a sample checklist for base closure).

[60] Hague Convention No. IV, Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 205 Consol. T.S. 277, including the regulations thereto [hereinafter Hague IV].

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

[62] *Id.* at art. 23e.

[63] *Id.* at art. 23g. Most nations and scholars agree that Iraq's release of oil into the Persian Gulf while retreating from Kuwait during OPERATION DESERT STORM violated this principle. Iraq failed to satisfy the traditional balancing test between military necessity, proportionality, and unnecessary suffering/destruction. *See* Lieutenant Colonel Michael N. Schmitt, *Green War: An Assessment Of The Environmental Law Of International Armed Conflict*, 22 YALE J. INT'L L. 1 (1991).

[64] 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].

[65] *Id.*

[66] *Id.* (the U.S. position is that neither agent meets the definition of a chemical under the treaty's provisions).

3. The 1993 Chemical Weapons Convention (CWC).[67] The CWC complements the Geneva Gas Protocol. Executive Order 11850[68] specifies U.S. policy relative to the use of chemicals, herbicides, and RCA, and sets out several clear rules regarding the CWC.[69] As a general rule, the United States follows the CWC's restrictions on the use of both herbicides and RCA against combatants, for example, the prohibition on use in offensive operations "in war," and requires national command authority (NCA) authorization for most other uses by armed forces.[70] In regard to herbicides, the E.O. sets out two uses that are expressly permitted, even without NCA authorization: domestic use and control of vegetation within and around the "immediate defensive perimeters" of U.S. installations.[71]

4. 1980 Certain Conventional Weapons Treaty (CCW).[72] Only Amended Protocol II has environmental significance because it places restrictions on the use of mines, booby traps, and other devices. The significance of this treaty lies in the fundamental right to a safe human environment as the CCW bans the indiscriminate use of these devices.[73]

5. The Fourth Geneva Convention (GC IV).[74] The GC IV is a powerful environmental convention, but it does not have the wide application enjoyed by Hague IV. Article 53 protects the environment of an occupied territory by prohibiting the destruction or damage of property (including the environment) only in the absence of "absolute military necessity."[75] Article 147 provides the enforcement mechanism; under its provisions, "extensive" damage or destruction of property, not justified by military necessity, is a "grave breach" of the conventions.[76] 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 either prosecute or extradite persons suspected of committing a grave breach.[77] A simple breach only requires parties to take measures necessary for the suppression of the type of conduct that caused the breach.[78] United States policy requires the prompt reporting and investigation of all alleged war crimes (including environmental violations), as well as taking appropriate corrective action as a remedy when necessary.[79] These obligations potentially subject Soldiers to adverse actions if they are not well-trained relative to their responsibilities under environmental operational provisions.

6. Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (ENMOD).[80] Unlike all the other LOAC treaties, which ban the effect of various weapon systems upon the environment, ENMOD bans the manipulation or use of the environment itself as a weapon. Any use or manipulation of the environment that is widespread, long-lasting or severe violates ENMOD (a single element

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[67] Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Preamble, Jan. 13, 1993, 32 I.L.M. 800 [hereinafter CWC] (where the CWC is more rigorous than the Gas Protocol, the provision of the CWC should be followed).
[68] Exec. Order No. 11850, 40 Fed. Reg. 16187 (1975) [hereinafter E.O. 11850].
[69] *Id.*
[70] *Id.* (for example the CWC's restrictions do not apply relative to uses that are not methods of warfare).
[71] *Id.* (the depth of an "immediate defensive perimeter" will be controlled by the type of terrain, foreseeable tactics of enemy forces, and weapons routinely used in the area).
[72] Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Excessively Injurious or Have Indiscriminate Effects, Oct. 10, 1980, 19 I.L.M. 1525 [hereinafter CCW].
[73] *Id.* Indiscriminate use is defined as use that: is not directed against a military objective; employs a method or means of delivery that cannot be directed at a specific military objective; or may be expected to cause incidental loss of civilian life or injury to civilian objects, which would be excessive in relation to the concrete and direct military advantage to be gained. *Id.*
[74] The Geneva Convention relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GCIV].
[75] *Id.* at art. 53.
[76] *Id.* at art. 147.
[77] *Id.* at art. 146, cl. 2.
[78] *Id.* at art. 146, cl. 3.
[79] U.S. DEP'T OF DEFENSE, DIR. 2311.01E, DoD LAW OF WAR PROGRAM, para. 4.4 (9 May 2006)(Change 1, 15 Nov. 2010; certified current as of 22 Feb. 2011).
[80] 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].

requirement).[81] Another distinction between ENMOD and other treaties is that ENMOD only prohibits environmental modifications that cause damage to another party to ENMOD.[82]

a. The application of ENMOD is limited, as it only bans efforts to manipulate the environment with extremely advanced technology. It is likely that 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 ENMOD. Instead, the technology must alter the "natural processes, dynamics, composition or structure of the earth . . . ."[83] Examples of this type of manipulation are: alteration of atmospheric conditions to alter weather patterns, earthquake modification, and ocean current modification (tidal waves, etc.).

b. The drafters incorporated the distinction between high versus low technological modification into ENMOD to prevent its unrealistic extension. For example, if ENMOD reached low technological activities, then actions such as cutting down trees to build a defensive position or an airfield, diverting water to create a barrier, or bulldozing earth might all be violations. Judge Advocates should understand that none of these activities or similar low technological activities is controlled by ENMOD.

c. The treaty does not regulate the use of chemicals to destroy water supplies or poison the atmosphere.[84] As before, ENMOD probably does not reach this application of a relatively low technology.[85] Although the relevance of ENMOD appears to be minimal given the current state of military technology, JAs should become familiar with the basic tenets of ENMOD. This degree of expertise is important because some nations argue for a more pervasive application of this treaty. Judge Advocates serving as part of a multinational force must be ready to provide advice relative to ENMOD, even if this advice amounts only to an explanation as to why ENMOD has no application, despite the position of other coalition states.[86]

7. The 1977 Protocols Additional to the Geneva Conventions (AP I & AP II).[87] The United States has not ratified AP I or AP II; accordingly, the United States is ostensibly bound only by the provisions that reflect customary international law. To some extent, AP I, Articles 35, 54, 55, and 56 (the environmental protection provisions within AP I) merely restate Hague IV and GC IV environmental protections, and are therefore enforceable. However, the main focus of AP I protections go far beyond the previous baseline protections. AP I is much more specific relative to the declaration of these environmental protections. In fact, AP I is the first LOAC treaty that specifically provides protections for the environment by name.

a. The primary difference between AP I and the protections found with the Hague IV or GC IV is that once the degree of damage to the environment reaches a certain level, AP I does not employ the traditional balancing of military necessity against the quantum of expected destruction. Instead, it establishes this level as an absolute ceiling of permissible destruction. Any act that exceeds that ceiling, despite the importance of the military mission or objective, is a violation of the LOAC. 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."[88] The individual meanings of the terms "widespread," "long-term" and "severe" damage have been debated at length. The ceiling is only reached when all three elements are satisfied (unlike the single-element requirement of ENMOD). The United States does not accept an absolute ceiling except as contemplated by ENMOD, instead preferring to employ traditional proportionality analysis.

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[81] *Id.* For a discussion of the meaning of these three elements (similar elements are found in Articles 35 and 55 of the 1977 Protocol I Additional to the Geneva Conventions of 1949 (AP I)), see this Chapter, *infra* Section VI.7.a & b.
[82] *Id.* at Art. I.
[83] *Id.* at Art. II.
[84] *Id.* However, these types of activities would violate Hague IV and the Gas Protocol.
[85] Environmental Modification Treaty: Hearings Before the Committee on Foreign Relations, U.S. Senate, 95th Cong., 2nd Sess. 83 (1978) (Environmental Assessment).
[86] *See e.g.*, AUSTRALIAN DEFENCE FORCE PUB. 37, THE LAW OF ARMED CONFLICT at 4-5 (1996) (Discussing general prohibition against "means and methods of warfare causing unnecessary suffering or injury, which cause widespread, long-term and severe damage to the natural environment.")
[87] *See* Protocol I Additional to the Geneva Conventions, Dec. 12, 1977, 16 I.L.M. 1391, 1125 U.N.T.S. 3 [hereinafter AP I]. As mentioned in the ext above, the United States has signed but not ratified AP I, and in addition has not submitted it to the Senate for advice and consent, and continues to oppose several provisions thereof. The United States embraces to varying degrees, however, a number of AP I's articles. See Chapters 2 and 4 of this Handbook, and the LOAC DocSupp for information on the U.S. position on AP I.
[88] *Id.* at Art. 33, 55.

b. Most experts and the Commentary to AP I state that "long-term" should be measured in decades (twenty to thirty years). Although the other two terms remain largely subject to interpretation, a number of credible interpretations have been forwarded.[89] Within AP I, the term "widespread" probably means several hundred square kilometers, as it does in ENMOD. "Severe" can be explained by Article 55's reference to any act that "prejudices the health or survival of the population."[90] Because the general protections found in Articles 35 and 55 require the presence of all three of these elements, the threshold is set very high.[91] 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.[92]

c. Specific AP I protections include Article 55's absolute ban on reprisals against the environment; Article 54's absolute prohibition on the destruction of agricultural areas and other areas that are indispensable to the survival of the civilian population, and Article 56's absolute ban on targeting works on installations containing dangerous forces (dams, dikes, nuclear plants, etc.), if such targeting would result in substantial harm to civilian persons or property.[93] The United States opposes the absolute bans contemplated by each of these articles, but recognizes that many coalition allies are party to AP I and must observe their interpretations of this standard, and continues to prosecute conflicts in a way sensitive to the humanitarian an environmental concerns behind these articles—in many cases, well beyond any others' efforts.

d. 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.[94] A knowing violation of Article 56 is a grave breach. Additionally, with respect to the three-element threshold set out in Articles 35 and 55, the standard is so high that a violation of these provisions may also be a grave breach, because the amount of damage required would seem to satisfy the "extensive" damage test set out by GC IV, Article 147.[95]

8. Convention for the Protection of Cultural Property in the Event of Armed Conflict.[96] Cultural property falls within the broad spectrum of environmental law, and the United States ratified this 1954 Convention in September 2008. The Convention protects both movable and immovable objects, to include: monuments, art, archaeological sites, manuscripts, books, and scientific collections from theft, pillage, misappropriation, vandalism, requisitioning, and the export of such objects as an occupying power.[97] The Convention also requires contracting States to import protected objects, and return them upon cessation of the armed conflict, to affect the intent of the Convention.[98] Occupying powers also assume the obligations of protection just as the party State had prior to the armed conflict.[99] Judge Advocates should be aware that parties to the Convention must develop inventories of

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[89] C. Pilloud, et al., International Committee of the Red Cross, Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 Aug. 1949, at 410 to 420 (1987) [hereinafter Pilloud].
[90] *Id.* (Article 55 language has roughly the same meaning as the meaning of "severe" within the ENMOD Convention).
[91] G. Roberts, *The New Rules for Waging War: The Case Against Ratification of Additional Protocol I*, 26 VA. J. INT'L L. 109, 146-47 (1985). Some experts have argued, however, that this seemingly high threshold might not be as high as many assert. The "may be expected" language of Articles 35 and 55 appears to open the door to an allegation of war crimes any time damage to the environment is substantial and receives ample media coverage. The proponents of this complaint allege that this wording is far too vague and places unworkable and impractical requirements upon the commander. *Id.*
[92] *See* Pilloud, *supra* note 97, at 417.
[93] AP I, *supra* note 87, art. 54-56. *Id.*
[94] *Id.* at 652-3. However, if the food center is shared by both enemy military and enemy civilian population (a likely situation), then Article 54 permits no attack that "may be expected to leave the civilian population with such inadequate food or water as to cause starvation or force its movement." *Id.*
[95] 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) (the experts who compiled the Secretary General's report felt that the AP I should be changed to make this point clear, that a violation of either Article 35 or Article 55, at a minimum, is a grave breach—however, this opinion did not meet with general support).
[96] Cultural Property Convention, *supra* note 57.
[97] *Id.* at Art. 1.
[98] *Id.*
[99] *Id.* at Art. 5.

protected items and have emergency plans in place in the event of an armed conflict, and also be able to recognize the symbol of the International Register indicating such protected status.[100]

VIII. CONCLUSION.

As the forgoing discussion indicates, it is necessary to integrate environmental planning and stewardship into all phases of overseas operations. The Army JAG Corps' doctrinal source for legal operations recognizes that environmental law comprises a part of our core legal disciplines such that environmental considerations must play a role in the planning and execution of operations.[101] In addition, environmental law issues cut across many other core legal disciplines, particularly in a deployed setting. Judge Advocates, must be aware of changes in doctrine, law, and policy in this area. Due to the specialized nature of this discipline, JA's should not hesitate to establish "reach-back" capabilities with subject matter experts (e.g. the Army's Environmental Law Division). In the end, legal advice should be based upon a complete understanding of the applicable law and policy, the client's mission, and common sense.

[100] *Id.* at Art. 16 ("The distinctive emblem of the Convention shall take the form of a shield, pointed below, per saltire blue and white (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.)").
[101] FM 1-04, *supra* note 5, at paras. 5-35 to 5-36 (Jan. 2012).

APPENDIX

LAWS AND REGULATIONS

I. SUMMARIES OF SOME OF THE MAJOR DOMESTIC (U.S.) ENVIRONMENTAL LAWS

ACT TO PREVENT POLLUTION FROM SHIPS - 33 U.S.C. §§ 1901-1912. This act provides the enabling legislation that implements the protocol of 1978 relating to the International Convention for the Prevention of Pollution from Ships, 1973. The protocol is specifically designed to decrease the potential for accidental oil spills and eliminate operational oil discharges from ships at sea and in coastal waters. It contains many 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.

ANTARCTIC PROTECTION ACT - 16 U.S.C. §§ 2461-2466. This legislation prohibits prospecting, exploration and development of Antarctic mineral resources by persons under U.S. jurisdiction.

CLEAN AIR ACT - 42 U.S.C. §§ 7401 *et seq*. This legislation is broken down into six subchapters, each of which outlines a particular strategy to control air pollution. Subchapter I: Control of Criteria and Hazardous Pollutants from Stationary Sources; and Enforcement of the Act; Subchapter II: Mobile Source Control; Subchapter III: Administrative Provisions; Subchapter IV: Acid Rain Control; Subchapter V: Operating Permits; and Subchapter VI: Protection of Stratospheric Ozone.

DEEPWATER PORT ACT - 33 U.S.C. §§ 1501 *et seq*. (INTERNATIONAL APPLICATION THROUGH 33 U.S.C. § 1510). This legislation regulates construction, ownership and operation of deepwater ports beyond the territorial limits of the United States, thereby protecting indigenous marine life and the coastal environment.

ENDANGERED SPECIES ACT OF 1973 - 16 U.S.C. §§ 1531 *et seq*. The purpose of this act is to protect threatened and endangered fish, wildlife, and plant species, as well as the "critical habitat" of such species.

FEDERAL WATER POLLUTION CONTROL ACT (CLEAN WATER ACT) - 33 U.S.C. §§ 1251-1376. This act controls domestic water pollution in the United States (primarily through the use of the National Pollution Discharge Elimination System (NPDES)) and also regulates wetlands.

FOREIGN ASSISTANCE ACT - 22 U.S.C. §§ 2151p-2152d. This subsection requires environmental accounting procedures for projects that fall under the act and significantly affect the global commons or environment of any foreign country.

FOREIGN CLAIMS ACT - 10 U.S.C. §§ 2734-2736. This legislation prescribes the standards, procedures and amounts payable for claims arising out of noncombat activities of the U.S. Armed Forces outside the United States.

MARINE MAMMAL PROTECTION ACT - 16 U.S.C. §§ 1361-1421h. This legislation establishes a moratorium on the taking and importation of marine mammals and marine mammal products, during which time no permit may be issued for the taking of any marine mammals nor may marine mammal products be imported into the U.S. without a permit.

MARINE PROTECTION, RESEARCH AND SANCTUARIES ACT - 16 U.S.C. §§ 1431-1445, 33 U.S.C. §§ 1401-1445. This major Federal legislation sets out the procedures for designation of marine sanctuaries and the enforcement procedures for their protection. It also addresses application to non-U.S. citizens.

MIGRATORY BIRD TREATY ACT - 16 U.S.C. §§ 703-712. This legislation makes it illegal to "take" migratory birds, their eggs, nests, or feathers. Take includes hunting, killing, pursuing, wounding, possessing, and transporting.

NATIONAL ENVIRONMENTAL POLICY ACT (NEPA) - 42 U.S.C. §§ 4321-4345. Pursuant to this act, environmental impacts must be considered before conducting any major Federal action significantly affecting the quality of the human environment.

NATIONAL HISTORIC PRESERVATION ACT - 16 U.S.C. §§ 470 *et seq*. This act provides for the nomination, identification (through listing on the National Register) and protection of historical and cultural properties of

significance. Specific procedures are established for compliance, including rules for consulting the World Heritage List or equivalent national register prior to approval of any OCONUS undertaking.

OCEAN DUMPING ACT - 33 U.S.C. §§ 1401-1445, 16 U.S.C. 1431–1447f, and 33 U.S.C. 2801–2805. This legislation regulates the dumping into ocean waters of any material that would adversely affect human health, welfare or amenities, or the marine environment or its economic potential.

OIL POLLUTION ACT - 33 U.S.C. §§ 2701 *et seq*. This act implements the provisions of the International Convention for the Prevention of the Pollution of the Sea by Oil, 1954, and amends the Federal Water Pollution Control Act. Specifically, it implements the 1969 and 1971 amendment to the International Convention.

PRE-COLUMBIAN MONUMENTS, TITLE II - REGULATION OF IMPORTATION OF PRE-COLUMBIAN MONUMENTAL OR ARCHITECTURAL SCULPTURE OR MURALS – 19 U.S.C. §§ 2091-2095. This public law prohibits the importation into the United States of pre-Columbian monumental or architectural sculptures or murals that are the product of the pre-Columbian Indian culture of Mexico, Central America, South America, or the Caribbean Islands without a certificate from the country of origin certifying that the exportation was not in violation of law.

RESOURCE CONSERVATION AND RECOVERY ACT (RCRA) - 42 U.S.C. §§ 6901 *et seq*. This act (§ 6938) prohibits the export of hazardous waste without the consent of the receiving country and notification to the appropriate U.S. authorities.

II. EXECUTIVE BRANCH MATERIALS

Executive Order 12088, Federal Compliance with Pollution Control Standards, 43 Fed. Reg. 47707 (1978). The E.O. directs federal agencies to ensure that construction and operation of federal facilities overseas comply with host nation pollution control standards of general applicability.

Executive Order 12114, Environmental Effects Abroad of Major Federal Actions, 44 Fed. Reg. 1957 (1979). The document requires Federal agencies to complete an environmental analysis upon undertaking major federal actions that significantly affect the environment outside the national boundaries of the United States.

III. DEPARTMENT OF DEFENSE DIRECTIVES/ INSTRUCTIONS/ PUBLICATIONS

DoDD 6050.7, Environmental Effects Abroad of Major Department of Defense Actions (Mar. 31, 1979, certified 5 Mar. 2004). This directive implements E.O. 12114.

DoDD 4715.12 Environmental and Explosives Safety Management on Operational Ranges Outside the United States (12 Jul. 2004) (certified current as of April 24, 2007 update). This Directive establishes policies for sustainable use and management of operational ranges located outside the United States.

DoDI 4715.4, Pollution Prevention (18 Jun. 1996) (Administrative Reissuance Incorporating Change 1, July 6, 1998). This Instruction requires all DoD components to comply with all applicable environmental laws, regulations, and standards at locations in the United States, and with applicable Executive Orders, international statutes, and Federal statutes with extraterritorial effect in the case of installations located outside the United States. Section 6.2.3 sets forth mandatory programs applicable at all DoD installations worldwide.

DoDI 4715.05, Environmental Compliance at Installations Outside the United States (1 NOV 2013). This Instruction designates a Lead Environmental Component (LEC) for specific countries/overseas geographic locations and designates which countries require Final Governing Standards. DOD establishes the parameters of the Overseas Environmental Baseline Guidance Document (OEBGD) which are used by LECs to develop FGS.and the Final Governing Standards. DoD LECs are listed in Appendix to Enclosure 3.

DoD Pub 4715.05-G, Overseas Environmental Baseline Guidance Document (OEBGD) (1 May 2007). This DoD publication is issued under the authority and requirements of DoDI 4715.05. It provides criteria, standards, and management practices for environmental compliance at DoD installations overseas.

DoDI 4715.08, Remediation of Environmental Contamination Outside the United States (1 NOV 2013). This Instruction contains the procedures for remediation of environmental contamination caused by DoD activities overseas at enduring locations. It does not apply to combat or hostilities, peacekeeping missions, security assistance, relief missions, or other contingency locations.

DoDI 4715.19, Use of Open-Air Burn Pits in Contingency Operations (15 Feb. 2011). This Instruction established policy and provides procedures regarding the use of open-air burn pits during contingency operations, except in circumstances in which no alternative disposal method is feasible

DoD Joint Publication 3-34, Joint Engineer Operations (30 June 2011). This publication provides for the planning, command and control, execution, and assessment of joint engineering operations. Appendix D helpfully identifies all JOPES Annexes and Appendices with significant environmental considerations.

DoD Joint Publication 4-04, Joint Doctrine for Civil Engineering Support (27 Sept. 2001). This publication provides the guidance and procedures necessary to plan, coordinate, and conduct timely and tailored joint civil engineering support across the range of military operations. Chapter VI discusses environmental considerations, including roles and responsibilities, requirements, planning, and contingencies.

IV. ARMY REGULATIONS, PUBLICATIONS, AND FIELD MANUALS

AR 27-20, Claims (8 Feb. 2008). Chapter 10 of AR 27-20 implements the Foreign Claims Act, thereby making claims for loss of or damage to property payable in foreign states. NOTE: Foreign states are divided among the services for claims settlement authority; thus, the Army may not be the claims settlement authority in the area of operations. The claims regulation to be followed is the service-specific claims regulation for the responsible service.

AR 200-1, Environmental Protection and Enhancement (13 Dec. 2007). This document regulates compliance with environmental standards set out in host nation law or SOFAs and supplies regulatory standards for OCONUS commanders at locations where there is an absence of host nation law or SOFA requirements.

FM 1-04, Legal Support to the Operational Army (Jan. 2012). The Army's manual for operational legal doctrine.

FM 3-34.5, Environmental Considerations (Feb. 2010) (Supersedes FM 3-100.4/ MCRP 4-11B, 15 June 2000). This Field Manual establishes and explains the principles of environmental support in full spectrum operations. Appendix B lists typical environmental considerations for the Environmental Annex to Joint OPLANs and OPORDs. Appendix C lists typical environmental considerations for the Environmental Appendix to the Engineering Annex for Army OPLANs and OPORDs.

United States Army Corps of Engineers, European District, Installation Management Agency, Europe Region Office, "You Spill, You Dig II:" An Environmental Handbook for Sustained Deployment Operations (2000). This handbook contains practical planning and environmental contamination response guidance for deployed operations.

V. NAVY REGULATIONS

OPNAVINST 5090.1C, Environmental Readiness Program Manual (30 Oct. 2007). The 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 12114 and DoDD 6050.7, and sets out the factors that require environmental review for OCONUS actions.

VI. MARINE CORPS ORDERS AND REFERENCE PUBLICATIONS

MCO P5090.2A, Environmental Compliance and Protection Manual (10 July 1998) (Change 1, 22 Jan. 2008). This codification of Marine Corps environmental policies and rules instructs the deployed commander to adhere to SOFA guidance and host nation laws that establish and implement host nation pollution standards.

MCRP 4-111B. Environmental Considerations (Feb. 2010) (Supersedes FM 3-100.4/ MCRP 4-11B, 15 June 2000). *See* FM 3-34.5, *supra*.

VII. AIR FORCE INSTRUCTIONS

AFI 32-7006, Environmental Program in Foreign Countries (29 Apr. 1994). This Instruction contains a complete overview of the overseas environmental program for the Air Force, including cleanup, compliance, and reporting.

AFI 32-7061, The Environmental Impact Analysis Process (EIAP) (12 Mar. 2003). Now published as 32 C.F.R. 989, this regulation is the Air Force's implementing guidance for E.O. 12114 and DoDD 6050.7. It sets out service activities that require environmental documentation and the type of documentation required. For overseas EIAP, see subpart 989.37.

CHAPTER 20

ADMINISTRATIVE LAW IN OPERATIONS

REFERENCES

I. ETHICS COUNSELOR FUNDAMENTALS.

1. 5 U.S.C. App. § 101 et. seq., Ethics in Government Act of 1978.
2. STANDARDS OF ETHICAL CONDUCT FOR THE EXECUTIVE BRANCH 5 C.F.R. 2635, et seq.
3. Executive Order 12674, "Principles of Ethical Conduct for Government Officers and Employees," April 12, 1989, as amended. (2001) § 5 C.F.R. 2635.
4. U.S. DEP'T OF DEF., DIR. 5500.07-R, JOINT ETHICS REGULATION (JER) (2011).

II. GIFTS.

5. 10 U.S.C. § 2601, General Gift Funds.
6. 10 U.S.C. § 2608, Acceptance of Contributions for Defense Programs, Projects, and Activities.
7. 5 U.S.C. § 7342, Receipt and Disposition of Foreign Gifts and Decorations.
8. 5 U.S.C. § 7351, Gifts to Superiors.
9. STANDARDS OF ETHICAL CONDUCT FOR THE EXECUTIVE BRANCH 5 C.F.R. 2635, et. seq.
10. U.S. DEP'T OF DEF., DIR. 5500.07-R, JOINT ETHICS REGULATION (JER) (2011).
11. U.S. DEP'T OF DEF., DIR. 1005.13, GIFTS AND DECORATIONS FROM FOREIGN GOVERNMENTS (19 Feb. 2002) (c1, 6 Dec. 2002).
12. U.S. DEP'T OF DEF., REG. 7000.14-R, FINANCIAL MANAGEMENT REGULATION, vol. 12, ch. 3 (Dec. 2008).
13. U.S. DEP'T OF ARMY, REG. 1-100, GIFTS AND DONATIONS (15 Nov. 1983).
14. U.S. DEP'T OF ARMY, REG. 1-101, GIFTS FOR DISTRIBUTION TO INDIVIDUALS (1 May 1981).
15. U.S. DEP'T OF ARMY, REG. 215-1, MORALE, WELFARE AND RECREATION ACTIVITIES AND NON-APPROPRIATED FUND INSTRUMENTALITIES (24 Sept. 2010)
16. U.S. DEP'T OF ARMY, REG. 600-8-22, MILITARY AWARDS, ch. 9 (RAR 002, Rapid Action Revision (RAR) 28 June 2013).
17. U.S. DEP'T OF ARMY, DIR. 2007-01, SECRETARY OF THE ARMY POLICY FOR TRAVEL BY DEPARTMENT OF THE ARMY OFFICIALS (25 Jan. 2007).
18. U.S. DEP'T OF AIR FORCE, INSTR. 51-601, GIFTS TO THE DEPARTMENT OF THE AIR FORCE (26 Nov. 2003) (supp. 1 Dec. 2003).
19. U.S. DEP'T OF AIR FORCE, INSTR. 51-901, GIFTS FROM FOREIGN GOVERNMENTS (16 Feb. 2005).
20. U.S. DEP'T OF AIR FORCE, INSTR. 34-201, USE OF NONAPPROPRIATED FUNDS (NAFs) (17 June 2002).
21. U.S. DEP'T OF NAVY, SEC'Y OF THE NAVY, INSTR. 4001.2J, ACCEPTANCE OF GIFTS (12 Aug. 2009).
22. OPNAVINST 4001.1F, ACCEPTANCE OF GIFTS (2 Jul. 2010)
23. U.S. DEP'T OF NAVY, SEC'Y OF THE NAVY, INSTR. 1650.1H, NAVY AND MARINE CORPS AWARDS MANUAL (22 Aug. 2006).
24. U.S. MARINE CORPS, ORDER P5800.16A , MARINE CORPS MANUAL FOR LEGAL ADMINISTRATION (31 Aug. 1999) (c1-5, 28 Nov. 2005)

III. FINANCIAL DISCLOSURES IN A COMBAT ZONE

25. 5 C.F.R. § 2634.101 TO 805 (1 JAN. 2009).
26. 5 C.F.R. § 2634.901 TO 909 (1 JAN. 2009).
27. U.S. DEP'T OF DEF., DIR. 5500.07-R, JOINT ETHICS REGULATION (JER) (2011).

28. Helpful Resources for Public Financial Disclosure Filers: www.oge.gov/Financial-Disclosure/Public-Financial-Disclosure-278/Helpful-Resources/Helpful-Resources-for-Public-Financial-Disclosure/)
29. Helpful Resources for Confidential Financial Disclosure Filers: www.oge.gov/Financial-Disclosure/Confidential-Financial-Disclosure-450/Helpful-Resources/Helpful-Resources-for-Confidential-Financial-Disclosure/)
30. FDM: HTTPS://WWW.FDM.ARMY.MIL

IV. MORALE, WELFARE AND RECREATION (MWR)

31. U.S. DEP'T OF DEF., INSTR. 1015.10, MILITARY MORALE, WELFARE AND RECREATION (MWR) Programs (July 6, 2009)(incorporating Change 1, 6 May 2011).
32. U.S. Dep't of Army, Reg. 215-1, Morale, Welfare and Recreation Activities and Non-Appropriated Fund Instrumentalities (24 Sep. 2010).
33. U.S. Dep't of Army, Reg. 700-135, Soldier Support in the Field (20 Feb. 2009).
34. U.S. Dep't of Navy, Sec'y of the Navy, Instr. 1700.12A, Operation of Morale, Welfare and Recreation (MWR) Activities (15 July 2005).
35. U.S. Dep't of Air Force, Instr. 34-262, Services Programs and Use Eligibility (27 June 2002).
36. U.S. Marine Corps, Order P1700.27B, Marine Corps Community Services Policy Manual (9 Mar. 2007).

V. COMMAND INVESTIGATIONS

37. U.S. DEP'T OF DEF., INSTR. 6055.07, MISHAP NOTIFICATION, INVESTIGATION, REPORTING, AND RECORD KEEPING (6 Jun. 2011).
38. U.S. DEP'T OF DEF., INSTR. 2310.05, ACCOUNTING FOR MISSING PERSONS—BOARDS OF INQUIRY (31 Jan. 2000, incorporating change 1, 14 March 2008).
39. U.S. DEP'T OF DEF., INSTR. 3002.03, DOD PERSONNEL RECOVERY – REINTEGRATION OF RECOVERED PERSONNEL (15 Jul. 2013).
40. U.S. DEP'T OF DEF., INSTR. 1300.06, CONSCIENTIOUS OBJECTORS (5 May 2007).
41. U.S. DEP'T OF ARMY, REG. 15-6, PROCEDURE FOR INVESTIGATING OFFICERS AND BOARDS OF OFFICERS (2 Oct. 2006).
42. U.S. DEP'T OF ARMY, REG. 385-10, THE ARMY SAFETY PROGRAM (27 Nov. 2013).
43. U.S. DEP'T OF ARMY, REG. 600-34, FATAL TRAINING/OPERATIONAL ACCIDENT PRESENTATIONS TO THE NEXT OF KIN (2 Jan. 2003).
44. U.S. DEP'T OF ARMY, REG. 600-8-1, ARMY CASUALTY PROGRAM (30 Apr. 2007)
45. ARMY DIRECTIVE 2009-02, THE ARMY CASUALTY PROGRAM (DOVER MEDIA ACCESS AND FAMILY TRAVEL) (3 Apr. 2009) [this directive supplements AR 600-8-1].
46. U.S. DEP'T OF ARMY, REG. 600-8-4, LINE OF DUTY POLICY, PROCEDURES, AND INVESTIGATIONS (4 Sep. 08).
47. U.S. DEP'T OF ARMY, REG. 600-43, CONSCIENTIOUS OBJECTION (21 Aug. 2006).
48. U.S. DEP'T OF ARMY, REG. 735-5, POLICIES AND PROCEDURES FOR PROPERTY ACCOUNTABILITY (10 May 2013, incorporating RAR, 22 Aug. 2013).
49. U.S. DEP'T OF ARMY, REG. 380-5, DEPARTMENT OF THE ARMY INFORMATION SECURITY PROGRAM (29 Sept. 2000).
50. U.S. DEP'T OF ARMY DIR. 2010-01, CONDUCT OF AR 15-6 INVESTIGATIONS INTO SUSPECTED SUICIDES AND REQUIREMENTS FOR SUICIDE INCIDENT FAMILY BRIEFS (26 Mar. 2010).
51. U.S. DEP'T OF ARMY DIR. 2010-02, GUIDANCE FOR REPORTING REQUIREMENTS AND REDACTING INVESTIGATION REPORTS OF DEATHS AND FATALITIES (26 Mar. 2010).
52. U.S. DEP'T OF AIR FORCE, INSTR. 51-503, AEROSPACE ACCIDENT INVESTIGATIONS (1 Jul. 2010).
53. U.S. DEP'T OF AIR FORCE, INSTR. 91-204, SAFETY INVESTIGATIONS REPORTS (12 Feb. 2014).
54. U.S. DEP'T OF AIR FORCE, INSTR. 31-401, INFORMATION SECURITY PROGRAM MANAGEMENT (1 Nov. 2005, incorporating change 1, 19 Aug. 2009, and Air Force Guidance Memorandum, 30 Jan. 2013).

55. U.S. DEP'T OF AIR FORCE, INSTR. 36-2910, LINE OF DUTY (MISCONDUCT) DETERMINATION (4 Oct. 2002, incorporating change 2, 5 Apr. 2010).
56. U.S. DEP'T OF AIR FORCE, MANUAL 23-220, REPORTS OF SURVEY FOR AIR FORCE PROPERTY (1 Jul. 1996).
57. U.S. DEP'T OF AIR FORCE, INSTR. 36-3204, PROCEDURES FOR APPLYING AS A CONSCIENTIOUS OBJECTOR (15 Jul. 1994).
58. U.S. DEP'T OF AIR FORCE, INSTR. 90-301, INSPECTOR GENERAL COMPLAINTS RESOLUTION (23 Aug. 2011, incorporating change 1, 6 Jun. 2012).
59. The Air Force Commander-Directed Investigation Guide (26 Apr. 2010).
60. U.S. DEP'T OF NAVY, SEC'Y OF THE NAVY INSTR. 3750.6-R, NAVAL AVIATION SAFETY PROGRAM (dated 1 Mar. 2001, incorporating change 4, 8 Apr. 09).
61. U.S. DEP'T OF NAVY, OPNAV (CNO) INSTR. 5100.19E, NAVY SAFETY AND OCCUPATIONAL HEALTH (SOH) PROGRAM MANUAL FOR FORCES AFLOAT (30 May 07).
62. U.S. DEP'T OF NAVY, OPNAV (CNO) INSTR. 5100.23G, NAVY SAFETY AND OCCUPATIONAL HEALTH (SOH) PROGRAM MANUAL (30 Dec. 2005, incorporating change 1, 21 Jul 2011).
63. U.S. DEP'T OF NAVY, OPNAV INSTR. 5102.1D AND U.S. MARINE CORPS, ORDER P5102.1B, NAVY AND MARINE CORPS MISHAP AND SAFETY INVESTIGATION REPORTING AND RECORD KEEPING MANUAL (7 Jan. 2005, incorporating change 1, 17 Dec. 09).
64. JAGINST 5800.7F, MANUAL OF THE JUDGE ADVOCATE GENERAL (JAGMAN), Chapter 2 (26 June 2012).

VI. FREEDOM OF INFORMATION ACT (FOIA)

65. U.S. DEP'T OF DEF, REG. 5400.7-R, DOD FREEDOM OF INFORMATION ACT PROGRAM (11 April 2006, Change 1).
66. U.S. DEP'T OF ARMY, REG. 25-55, THE DEPARTMENT OF THE ARMY FREEDOM OF INFORMATION ACT PROGRAM (1 Nov. 1997) (does not include 1996 amendments to the Freedom of Information Act).
67. AIR FORCE MANUAL, DOD 5400.7-R_AFMAN 33-302, FREEDOM OF INFORMATION ACT PROGRAM (21 October 2010).
68. U.S. DEP'T OF NAVY, SEC'Y OF THE NAVY INSTR 5720.42F, DEPARTMENT OF THE NAVY FREEDOM OF INFORMATION ACT PROGRAM (6 January 1999); U.S. MARINE CORPS ORDER 5720.63, Publication in the Federal Register, Indexing, and Public Inspection of Marine Corps Directives (22 August 1983) (w/Ch. 1, 2 August 1991).
69. Coast Guard: COMMANDANT'S INSTRUCTION M5260.3 – The Coast Guard FOIA/Privacy Act Manual (14 Jun 96) w/change 5 (6 Apr 05).
70. U.S Department of Justice, FOIA Reference Guide, updated March 2013 (available at http://www.justice.gov/oip/foia-guide.html).

VII. FINANCIAL LIABILITY INVESTIGATIONS

71. U.S. DEP'T OF ARMY, REG. 600-4, REMISSION OR CANCELLATION OF INDEBTEDNESS (7 Dec. 2007, incorporating rapid action revision, 29 Apr. 09).
72. U.S. DEP'T OF ARMY, REG. 735-5, POLICIES AND PROCEDURES FOR PROPERTY ACCOUNTABILITY (10 May 2013, incorporating RAR, 22 Aug. 2013).
73. U.S. DEP'T OF ARMY, PAM. 735-5, FINANCIAL LIABILITY OFFICER'S GUIDE (9 Apr. 2007).
74. U.S. DEP'T OF AIR FORCE, MANUAL 23-220, REPORTS OF SURVEY OF AIR FORCE PROPERTY (1 July 1996).
75. JAGINST 5800.7F, MANUAL OF THE JUDGE ADVOCATE GENERAL (JAGMAN), Chapter 2 (26 June 2012).
76. U.S. MARINE CORPS, ORDER 5530.14A, MARINE CORPS PHYSICAL SECURITY PROGRAM, Ch. 8 & 10, APP. L & M, (5 Jun. 2009).

VIII. CONSCIENTIOUS OBJECTORS

77. U.S. DEP'T OF DEF, INSTR. 1300.06, CONSCIENTIOUS OBJECTORS (31 May 2007).
78. U.S. DEP'T OF ARMY, REG. 600-43, CONSCIENTIOUS OBJECTION (21 Aug. 2006).

IX. FAMILY PRESENTATIONS

79. U.S. DEP'T OF DEF, INSTR. 1300.18, DEPARTMENT OF DEFENSE (DOD) PERSONNEL CASUALTY MATTERS, POLICIES, AND PROCEDURES (8 Jan. 2008, incorporating change 1, 14 Aug. 2009).
80. DEP'T OF ARMY, REG. 600-34, FATAL TRAINING/OPERATIONAL ACCIDENT PRESENTATIONS TO THE NEXT OF KIN (2 Jan. 2003).

I. ETHICS COUNSELOR FUNDAMENTALS

A. 14 Basic Principles of ethical conduct

1. Public Service is a public trust, requiring employees to place loyalty to the Constitution, the laws, and ethical principles above private gain.

2. Employees shall not hold financial interests that conflict with the conscientious performance of duty.

3. Employees shall not engage in financial transactions using nonpublic Government information or allow the improper use of such information to further any private interest.

4. An employee shall not, except as [provided for by regulation], solicit or accept any gift or other item of monetary value from any person or entity seeking official action from, doing business with, or conducting activities regulated by the employee's agency, or whose interests may be substantially affected by the performance or nonperformance of the employee's duties.

5. Employees shall put forth honest effort in the performance of their duties.

6. Employees shall not knowingly make unauthorized commitments or promises of any kind purporting to bind the Government.

7. Employees shall not use public office for private gain.

8. Employees shall act impartially and not give preferential treatment to any private organization or individual.

9. Employees shall protect and conserve Federal property and shall not use it for other than authorized activities.

10. Employees shall not engage in outside employment or activities, including seeking or negotiating for employment, that conflict with official Government duties and responsibilities.

11. Employees shall disclose waste, fraud, abuse, and corruption to appropriate authorities.

12. Employees shall satisfy in good faith their obligations as citizens, including all just financial obligations, especially those—such as Federal, State, or local taxes—that are imposed by law.

13. Employees shall adhere to all laws and regulations that provide equal opportunity for all Americans regardless of race, color, religion, sex, national origin, age, or handicap.

14. Employees shall endeavor to avoid any actions creating the appearance that they are violating the law or ethical standards. Whether particular circumstances create an appearance that the law or these standards have been violated shall be determined from the perspective or a reasonable person with knowledge of the relevant facts.

B. Key Definitions under the JER.

1. <u>DoD Employee (JER § 1-209).</u> The JER applies the Executive Branch Standards of Conduct rules to "DoD Employees." The definition essentially includes everyone in DoD:

a. Any DoD Civilian officer or employee (including special Government employees) of any DoD Component (including any nonappropriated fund activity).

b. Any active duty Regular or Reserve military officer, including warrant officers.

c. Any active duty enlisted member of the Army, Navy, Air Force, or Marine Corps.

d. Any Reserve or National Guard member on active duty under orders issued pursuant to Title 10, United States Code.

e. Any Reserve or National Guard member while performing official duties or functions under the authority of either Title 10 or 32, United States Code, or while engaged in any activity related to the performance of such duties or functions, including any time the member uses his Reserve or National Guard of the United States title or position, or any authority derived therefrom. [Changed from a status to an action analysis.]

f. Foreign national employees if consistent with labor agreements and international treaties and agreement, and host country laws, e.g., local national employees in Germany and Japan are not subject to JER; but Korean national employees are.

g. Employees from outside the U.S. Government, who are working in DoD under authority of the Intergovernmental Personnel Act, are not included in the definition of "DoD employee." However, personnel assigned to DoD (appointed or detailed) are covered by the Ethics in Government Act, Standards of Ethical Conduct for Employees of the Executive Branch, and the Conflict of Interest laws.

2. Designated Agency Ethics Official (DAEO) (JER § 1-207): A DoD employee appointed, in writing, by the head of a DoD Agency to administer the provisions of the Ethics in Government Act of 1978 and the JER. (*See also* JER §§ 1-203, 1-206). DAEO is responsible for the implementation and administration of the component's ethics program.

3. Ethics Counselor (EC) (JER § 1-212).

a. A DoD employee (must be attorney) appointed in writing by DAEO or designee to assist generally in implementing and administering the command's or organization's ethics program and to provide ethics advice to DoD employees in accordance with the JER. It is vital that DoD employees understand that communications to an EC are not protected by any attorney-client privilege while communications received in a legal assistance capacity usually are. Attorneys who serve as ECs must advise individuals being counseled as to the status of that privilege prior to any communications. ECs advise and assist on issues, such as: acceptance of gifts and gratuities; business visitors (e.g., product demonstrations and capabilities briefings); ethics training; participation in or dealings with private and professional associations, such as AUSA; review of public (OGE 278) and confidential (OGE 450) financial disclosure reports, and resolving conflicts of interests; post-Government employment restrictions; and use of Government resources and time.

b. The Ethics Counselor as "Ethics Magistrate:" 5 C.F.R. § 2635.107 gives the EC authority to make factual determinations and render decisions on matters falling under the OGE Rules. Advice may be oral, but written is preferred often and sometimes required (see below under specific duties). EC's advice generally precludes disciplinary action against an employee who follows EC's advice. *De facto* but not *de jure* immunity under 5 C.F.R. § 2635.107(b).

4. Agency Designee (JER § 1-202): The first supervisor who is a commissioned military officer or a Civilian above GS/GM-11 in the chain of command or supervision of the DoD employee concerned. Except in remote locations, the Agency Designee may act only after consultation with his local Ethics Counselor. For any military officer in grade O7 or above who is in command and any Civilian Presidential appointee confirmed by the Senate, the Agency Designee is his Ethics Counselor.

C. Authority and Appointment of Ethics Counselors.

1. *Army*. Secretary of the Army appointed General Counsel (GC) as DAEO; GC appointed The Judge Advocate General of the Army as Alternate DAEO; DAEO appointed Deputy DAEOs and delegated authority: Principal Deputy General Counsel; Deputy General Counsel (Ethics and Fiscal); TJAG; DJAG, Chief Counsel, USACE; Command Counsel, USAMC; Chief, SOCO. Deputy DAEOs appointed senior ECs and delegated authority. Senior ECs appoint ECs and delegate authority.

2. *Air Force*: Secretary of the Air Force appointed the Air Force General Counsel Office (SAD/GC) as the DAEO; GC appointed Principal Deputy as Alternate DAEO; GC appointed Deputy GCA as Deputy DAEO; GC appointed other Associate GCs as Ethics Officials; GC appointed MAJCOM and Field Operating Agency (FOA) Staff Judge Advocates as Ethics Counselors (with authority to re-delegate to installation staff judge advocates).

3. *Navy*: Secretary of the Navy appointed GC as DAEO and TJAG as the Alternate DAEO; DAEO appointed Deputy DAEOs: Principal Deputy General Counsel; Deputy General Counsel; Deputy Judge Advocate

General; Director, Judge Advocate Division, HQ Marine Corps; Counsel, Commandant of the Marine Corps; Assistant General Counsel (Ethics). DAEO also appointed EC's: Associate General Counsels; Assistant General Counsels; SJAs to Flag Officers; Counsel in Charge of OGC Field and Branch Offices. (*See* General Counsel memorandum, dated 25 January 1996, for entire list.)

D. Required Reports.

1. OGE Form 450 - Confidential Financial Disclosure Reports (**or the DoD version of OGE Optional Form 450-A, Confidential Certificate of No New Interests**) (Due 15 February). See below chapter on Financial Disclosures for combat zone extensions.

2. OGE 278 - Public Financial Disclosure Reports (Due 15 May). See below chapter on Financial Disclosures for combat zone extensions.

3. Gifts of Travel - (31 U.S.C. 1353). (Due within 30 days of travel) (Agency submits semi-annual reports to OGE through OTJAG Adlaw NLT 31 May & 30 Nov).

4. Annual Ethics Training Plan. (5 C.F.R. § 2638.702) (Chapter 11, JER § 11-302). Due December each year. (Note: In the Air Force, only the Air Force General Counsel's Office is required to have a written training plan. For all other Air Force legal offices, it is recommended that they have a written training plan, but it is not required. See HQ USAF/JAG Ethics Update pamphlet, December 2000, page 13.) (Note: In the Navy, the AGC(E) prepares the written Annual Agency Ethics Training Plan.).

5. Annual Ethics Program Survey. (5 C.F.R. § 2638.602(a)). (Due Feb each year).

6. Enforcement of the Joint Ethics Regulation - (Chapter 10, JER). (As needed for serious criminal misconduct. Matters referred to DOJ or U.S. Attorney are reported on OGE Form 202, "Notification of Conflict of Interest Referral," July 1998. See Appendix C, JER).

E. Resources

1. GAO Principle of Federal Appropriations Law (Redbook) for Fiscal Law Related Issues, http://www.gao.gov/.

2. OGE Material see: http://www.usoge.gov/.

3. DoD SOCO website: http://www.defenselink.mil/dodgc/defense_ethics/.

4. Your MACOM/MAJCOM/higher command EC.

5. Navy JAG (Code 13); Navy Assistant General Counsel (Ethics); AF/JAG General Law Division; Army SOCO.

6. Army Ethics website: http://www.jagcnet.army.mil/. Ethics Forum and SOC Database.

7. Navy Ethics website: http://www.ethics.navy.mil.

8. AFMC website: http://www.afmc-pub.wpafb.af.mil/HQ-AFMC/JA/lo/lojaf.

9. Milsuite: https://www.milsuite.mil/book/groups/jagconnect-army-administrative-law.

II. GIFTS

A. **Definition of a Gift. The term "gift" is broadly defined and includes any gratuity, favor, discount, entertainment, hospitality, loan, forbearance, or other item having monetary value**. It includes services as well as training, transportation, local travel, lodging, and meals. The following are considered to be "non-gifts" and may be accepted without limitation (however, see paragraph 4(c)(3) below):

1. Coffee, donuts, and similar modest items of food and refreshments when offered other than as a meal.

2. Greeting cards and items of little intrinsic value such as personalized plaques, certificates, trophies, intended solely for presentation.

3. Rewards and prizes in contests open to the public. Contest must be "open to the public" and employee's entry into the contest must not be part of his/her official duties.

4. Commercial discounts available to the general public or to all Government or military personnel so long as the discount does not apply solely to subgroups based on rank, position or organization.

5. Loans from banks and other financial institutions (entities in the business of loaning money) on terms generally available to the public;

6. Anything paid for by the Government or secured by the Government under Government contract.

7. Anything for which the employee pays market value (i.e., retail cost employee would incur to purchase the gift).

B. Sources and Recipients of Gifts. To analyze whether a gift to a DoD organization or a DoD employee may be accepted, the source of the gift and the intended recipient of the gift must be considered.

1. *Gifts to DoD and the Army*.

a. Gifts to the Services are governed by statute and implementing regulations. The two primary gift statutes that authorize the Army to accept gifts are 10 U.S.C. §§ 2601 & 2608. For the Army, AR 1-100 implements § 2601 and allows acceptance of gifts to be used for a school, hospital, library, museum, 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. The point of contact for such gifts is Mr. George Cannizzaro, Army Gift Program Coordinator, Office of the Administrative Assistant to the Secretary of the Army, (703) 697-3067. In addition, AR 1-101 addresses gifts (specifically limited to gifts that promote health, comfort, convenience and morale, i.e., reading materials and writing paper) 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 the Department of the Air Force. *See also* SECNAVINST 4001.2J, Acceptance of Gifts.

b. The broadest gift acceptance authority for the Army is 10 U.S.C. § 2608. It applies to all of DoD. The Army has not implemented it by regulation. Department of Defense 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. The Department of Defense has delegated authority to accept gifts of property to Service Secretaries for use by their organizations. All donations of assets must be reported quarterly to the Defense Finance and Accounting Service (DFAS), Indianapolis, 8899 East 56th Street, ATTN: Trust Fund Accounting Division, Column 203L, Indianapolis, Indiana 46249-1500 (*see* DoD 7000.14-R, Volume 12, Chapter 3). All gifts of money must be processed through the DoD Comptroller. Additionally, all gifts of money must be reported to the Trust Fund Accounting Division (DFAS) and deposited in the Defense Cooperation Account (DCA). The monetary contributions cannot be expended until re-appropriated by Congress. The Air Force has implemented this statute in AFI 51-601, Gifts to the Department of the Air Force, Chapter 4.

c. The accepting authority may pay all necessary expenses in connection with the conveyance or transfer of a contribution. However, a contribution should not be accepted if acceptance would result in substantial expenditures, administrative efforts, or maintenance disproportionate to the value or benefit of the contribution.

d. Department of Defense personnel shall not solicit, fundraise for or otherwise request or encourage the offer of a contribution.

e. Army commanders have more local gift acceptance authority if the command accepts the gift for its Non-Appropriated Fund Instrumentalities (NAFI). Army Regulation 215-1, paragraph 13-14, authorizes MWR Directors to accept gifts to MWR up to $15,000; garrison commanders up to $50,000; IMCOM regional directors up to $100,000; and, United States Army Family and Morale, Welfare, and Recreation Command (USAFMWRC) up to $250,000. However, Commander, U.S. Army Installation Management Command, in a memorandum dated 1 August 2008, recently increased these gift acceptance limits. The MWR Directors/fund managers may accept gifts up to $50,000 when delegated by the garrison commander; garrison commanders up to $100,000 (except United Way contributions which may be accepted in any amount); IMCOM regional directors up to $250,000; and, USAFMWRC up to $250,000. All gifts over $250,000 must be submitted to the USAFMWRC for processing to the

Secretary of the Army for approval. Military personnel may not solicit gifts for the NAFI, but may make the NAFI's needs known in response to inquiries from prospective donors. *See also* AFI 34-201 and SECNAVINST 4001.2H.

2. *Gifts to Individuals*.

a. The Joint Ethics Regulation (JER), DoD 5500.07-R, is applicable to all DoD employees including enlisted personnel. The JER may not be supplemented. **Chapter 2 of the JER generally governs the acceptance of gifts by individuals in their personal capacities**. (The JER and The Judge Advocate General's Legal Center and School's Ethics Counselor's Deskbook may be found at the DoD SOCO website: http://www.defenselink.mil/dodgc/defense_ethics/.).

b. **Gift acceptance analysis is contingent upon the status of the gift giver as well as the source of funds used to purchase the gift**. Different rules apply depending upon whether the gift is from a foreign government, an outside or prohibited source, or fellow Soldiers or DoD/DA Civilians (i.e., between Federal employees). The Ethics Counselor should be consulted in advance of the gift-giving occasion if possible under the circumstances, or if not possible, then shortly after gift acceptance to ensure receipt of the gift complies with the JER.

3. *Gifts to an Individual from Foreign Governments.*

a. **There must be an initial determination as to whether the gift was to an individual or to a unit**. If it is a gift to the unit, the gift may be carried on the property book of the unit welfare fund subject to the procedures of AR 1-100. If the gift is to an individual, the United States Constitution prohibits Federal employees from accepting gifts from a foreign government or its representatives unless authorized by Congress. A gift from a foreign government includes a gift from a national, state, or local governmental entity. **Congress has authorized Federal employees to accept a gift (or combination of gifts) of "minimal value." A gift of "minimal value" is defined as a gift having a retail value in the United States at the time of receipt of $375 or less**. "Minimal value" is established by the U.S. General Services Administration (GSA) and is adjusted every three years based on the Consumer Price Index. Current minimal value is set at $375.

b. A Federal employee may personally accept a gift from a representative of a foreign government if the gift has a retail value in the United States of $375 or less in U.S. dollars. Fair market value can be determined by comparison to like items sold at AAFES, estimates from the Claims Office, or formal appraisals (which may be funded by the command). It is the recipient's burden to establish the value of the gift. **For purposes of determining the $375 limit, employees must aggregate the value of gifts at the same presentation from the same source**. If more than one gift is provided from the same level of government at one presentation, the gift values from that source are aggregated. If there are multiple gifts from various levels of government at one presentation, each distinct level of the foreign government (separate sovereigns) has a $375 limit. If the aggregate value of multiple gifts from a single source during the same presentation exceeds the minimal value, all gifts from that source are considered to be a single gift to DoD and not the individual under DoDD 1005.13 which supersedes JER provision 2-300.b.2. Do not aggregate the value of gifts provided by a single source if provided at a different presentation, even if on the same day. Keep in mind that a gift from the spouse of a foreign official is deemed to be a gift from the foreign official/government. A gift to a spouse or Family member of a Federal employee is deemed to be a gift to the employee. These rules apply to foreign gifts received in foreign countries or in the United States. **To determine what is a "gift," look to 5 U.S.C. § 7342 and the DoD Directive on foreign gifts, DoDD 1005.13. Do not use the gift definitions contained in the Standards of Conduct rules found in the JER.** For the Army's rules on acceptance of foreign awards and decorations, see AR 600-8-22, Chapter 9; Air Force rules are at AFI 51-901; Navy/USMC, see SECNAVINST 1650.1G, Chapter 7.

c. The source of funds used to purchase a gift must be considered when analyzing a gift received by a Federal employee based on a personal relationship with a representative of a foreign government, to include members of the foreign military. If the gift from a foreign government representative was purchased with a foreign official's personal funds, then the gift may require analysis as a gift from an outside source or as a gift between employees as discussed in paragraph B5 below. If the gift was purchased with the official funds of the foreign government, despite the personal relationship between the giver and recipient, the gift must undergo analysis as a gift from a foreign government. For example, if a foreign employee gives a Federal employee a gift as an act of personal friendship and the foreign employee paid for the cost of the gift with personal funds, then the foreign gift rules do not apply. However, the rules regarding gifts from outside sources or gifts between employees may apply.

d. If a gift is valued under the $375 limit, the gift does not need to be reported on public or confidential financial disclosure reports. Employees should maintain a memorandum for record concerning the receipt of a foreign gift.

e. Gifts exceeding the "minimal value" may be accepted when the gift is in the nature of an educational scholarship or medical treatment or when it appears that refusal is likely to cause offense or embarrassment or adversely affect foreign relations. Such gifts must be accepted on behalf of the United States. These gifts become the property of the United States upon receipt and must be reported to and deposited with the agency for official use or disposal (return to donor or forward to GSA). For Army, within sixty days of receipt, report to and deposit gifts with Mr. George Cannizzaro, Army Gift Program Coordinator, Office of the Administrative Assistant to the Secretary of the Army, (703) 697-3067, the same POC as for Gifts to the Army. For Air Force, report gifts in accordance with AFI 51-901. For Navy and USMC, report to and deposit gifts in accordance with SECNAVINST 1650.1H, Chapter 7.

f. If the agency or unit would like to request to retain the gift, the report can be forwarded without the gift and include a request that the gift be retained on permanent display at the employee's agency or unit. Prior to making the request, the gift should be listed on the unit or agency's property books as U.S. Government property. If the request is disapproved, the gift must be forwarded to the GSA for proper disposition. If an employee wishes to personally retain a gift worth more than the "minimal value," in some circumstances, the recipient may purchase the gift from GSA for its full U.S. retail value.

g. It is always appropriate to accept a gift from a foreign government, even one valued at more than $375, when refusal could embarrass the United States or could adversely affect foreign relations. In such cases, the employee should accept the gift on behalf of the United States and then report the gift as discussed above.

4. *Gifts to Individuals from an Outside Source*.

a. Government employees may not, directly or indirectly, solicit or accept a gift: (1) from a prohibited source (someone who has an interest in the performance of official Army missions) or who seeks to do business with the Army; or (2) given because of the employee's official position (the gift would not have been offered but for the status, authority or duties associated with the employee's Federal position).

b. "Indirect gifts" are gifts imputed to the Federal employee based upon a relationship with the recipient of the gift. Such gifts include gifts (1) given with the employee's knowledge and acquiescence to a parent, sibling, spouse, child, or dependent relative or (2) given to any other person, including a charity, on the basis of designation, recommendation, or other specification by the employee.

c. Determining whether a gift from an outside source can be accepted:

(1) First, determine whether the gift is actually a gift. 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 if they are intended by the provider to be a snack. The following are also not considered gifts: greeting cards; plaques; trophies; prizes in contests open to the public; commercial discounts open to all; anything paid for by the Government; anything for which fair market value is paid; and other similar items.

(2) Second, several exceptions allow acceptance of otherwise prohibited gifts. The most common exception allows acceptance of unsolicited gifts with a market value of $20 or less per source, per occasion. The cumulative value from any single source may not exceed $50 during a calendar year (does not apply to gifts of cash or investment interests). Employees may decline gifts to keep aggregate value at $20 or less, but may not pay differential over $20 on a single occasion or $50 per calendar year to bring the value of the gift within permissible limits (i.e., no "buy down"). Other exceptions that allow the acceptance of gifts include: gifts based upon a bona fide personal relationship (such as family or personal friendship); certain broadly-available discounts and awards; free attendance at certain widely-attended gatherings; and gifts of food or entertainment in foreign areas. The last exception allows an employee to accept food, refreshments, or entertainment while in a foreign area when offered at a meal or a meeting when: (*a*) the value does not exceed the Department of State per diem rate (in U.S. dollars) for the locale; (*b*) foreign officials are in attendance; (*c*) attendance at the meal or meeting is part of the official duties of the employee and will further a U.S. mission; and (*d*) the gift is paid for by a person other than a foreign government.

(3) Third, if the above analysis allows acceptance, employees must nonetheless refuse gifts if acceptance would undermine Government integrity (e.g., gifts accepted on too frequent a basis) or creates an

appearance of an ethical violation. 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*). It is never inappropriate and frequently prudent to decline a gift offered by an outside source or given because of one's official position.

d. The JER now allows service members, who have sustained injuries or illness while serving in designated combat zones, and their Family members to accept unsolicited gifts from non-Federal entities (does not include gifts from foreign governments and their agents). The following limitations apply: the gifts cannot have been given in return for influencing performance of an official act; the gift(s) cannot have been solicited or coerced; and the gifts cannot have been accepted in violation of any other statute, including 18 U.S.C. 201(b) (bribes) and 209 ("dual compensation"). For gifts with an aggregate market value in excess of "minimal value" (currently $375) per source per occasion, or with an aggregate market value exceeding $1000 received from any one source in a calendar year, an agency ethics official must make a written determination that the gift(s) is/are not offered in a manner that specifically discriminates among Soldiers or Family members merely on the basis of type of official responsibility or of favoring those of higher rank or rate of pay; the donor does not have interests that may be affected substantially by the performance or non-performance of the Soldier or Family member's official duties; and acceptance would not cause a reasonable person with knowledge of the relevant facts to question the integrity of DoD programs or operations. For more information, see JER 3-400 to 3-500. This exception is retroactive to September 11, 2001.

5. *Gifts to Individuals from Other Federal Employees.*

a. An employee shall not, directly or indirectly: (1) give a gift, make a donation toward a gift, or solicit a contribution for a gift to an official superior, or (2) accept a gift from a lower-paid employee, unless the donor and recipient are personal friends who are not in a superior-subordinate relationship.

b. There are two exceptions to the general prohibition. Unsolicited gifts may be given to and an official superior may accept a gift from a subordinate given on (1) special infrequent occasions (e.g., marriage, PCS, retirement, etc.), and (2) an occasional basis (e.g., birthdays and holidays).

(1) Special Infrequent Occasions. A subordinate may voluntarily give or donate toward a gift for a superior on a special infrequent occasion such as an event of personal significance (*e.*g., marriage, illness, or birth of a child (does not include promotion)) or upon an occasion that terminates the official superior-subordinate relationship (e.g., transfer, resignation, or retirement). Gifts are limited to $300 in value per donating group. No member of a donating group may be a member of another donating group. If one employee contributes to two or more donating groups, the value of the gifts, from the groups with a common contributor, are aggregated for the purposes of the $300 limit. A recipient may not "buy down" a gift. The most junior ranking member of the group should be the one to solicit other members for donations. The person collecting may not solicit fellow senior employees for more than $10 though an employee may voluntarily contribute more (contractor employees may not be solicited). All donations must be voluntary and employees must be free to give less than the amount requested or nothing at all. Gifts may not exceed $300. The "Perry Exception" which once allowed gifts to exceed $300 when the superior-subordinate relationship ended (e.g., retirement, resignation, transfer outside of the chain of command), if the gift was appropriate to the occasion and uniquely linked to the departing employee's position or tour of duty, is NOT valid. All gifts are capped at $300 without exception.

(2) Occasional Basis. Unsolicited gifts may be given on an occasional basis (not routine) including traditional gift-giving occasions, such as birthdays and holidays. This includes gifts with an aggregate value of $10 or less per occasion, food and refreshment shared within office, meals at an employee's home, and customary host/hostess gifts (e.g., flowers and wine).

C. **Handling Improper Gifts to Individuals**. If a gift has been improperly accepted, the employee may pay the donor its fair market value or return the gift. With approval, perishable items may be donated to charity, shared within the office, or destroyed. The Ethics Counselor should be consulted as necessary.

III. FINANCIAL DISCLOSURES IN A COMBAT ZONE

A. Conflicts of Interest**.** The purpose of financial disclosure reports is to identify and avoid potential conflicts of interest. When potential conflicts are identified, action must be taken to avoid a conflict from arising. Typically, the filer's duties will be adjusted so that official actions that may trigger a conflict will be avoided. This adjustment is recorded in a disqualification statement.

B. Army is the Executive Agent to operate Financial Disclosure Management (FDM), https://www.fdm.army.mil, for DoD personnel to electronically file, review, and manage the OGE 278, Public Financial Disclosure Report, and the OGE 450, Confidential Financial Disclosure Report.

1. Army policy requires those Army personnel who are required to file to do so online in FDM. Army personnel deployed to a combat zone (CZ) on the due date of the report may obtain an extension to file.

a. For OGE 278 filers, there is a statutory CZ extension that runs 180 days from last day in the CZ, if in the CZ on 15 May (or later) for incumbent/annual OGE 278.

b. In accordance with 5 U.S.C. App. § 101(g)(2)(A), an individual serving with or in support of the Armed Forces automatically qualifies for a 180-day extension if serving in a combat zone on the applicable due date. When applicable, this extension replaces all other extensions. This extension dates from the later of the last day of: (1) the individual's service in the combat zone or (2) the last day of the individual's hospitalization resulting from that service.

2. For OGE 450 filers in a CZ on the due date, 5 C.F.R. Sec. 2634.903, provides a discretionary extension for up to 90 days after the filer departs the CZ. The agency reviewing official may, for good cause, grant to any employee or class of employees a filing extension or several extensions totaling not more than 90 days.

3. The agency reviewing officer may also grant an extension for certain service during a period of national emergency. In the case of an active duty military officer or enlisted member of the Armed Forces, a Reserve or National Guard member on active duty under orders issued pursuant to title 10 or title 32 of the United States Code, a commissioned officer of the Uniformed Services (as defined in 10 U.S.C. 101), or any other employee, who is deployed or sent to a CZ or required to perform services away from his permanent duty station in support of the Armed Forces or other governmental entities following a declaration by the President of a national emergency, the agency reviewing official may grant such individual a filing extension to last no longer than 90 days after the last day of: (a) the individual's service in the CZ or away from his permanent duty station; or (b) the individual's hospitalization as a result of injury received or disease contracted while serving during the national emergency.

C. Filers desiring to file while deployed may use FDM. For additional information on FDM visit the FDM website, https://www.fdm.army.mil, or contact the FDM Webmaster, email: FDMWebmaster2@conus.army.mil.

D. Redeployment briefings should remind those filers with CZ extensions of the limits on the extension and the need to file at their home station. Encourage them to consult their local Ethics Counselor

IV. MWR OPERATIONS

A. **General**.

1. MWR activities during mobilization, contingency and wartime operations are “necessary to maintain physical fitness and to alleviate combat stress by temporarily diverting Soldier’s focus from combat situations” (AR 215-1, para. 9-1).

2. This section focuses on the responsibilities of command and staff to provide MWR support, describes permissible MWR activities, and discusses the resources available to implement MWR support and activities.

B. **Responsibilities**.

1. For the Army, IMCOM G-9 is the key policy-making organization for all MWR operations. In deployed environments, the theater Army DCSPER and Corps G-1 are the primary coordinating bodies with IMCOM G-9 for developing MWR programs. Consult Department of the Army Field Manual 1-0, Human Resources Support, for detailed guidance on MWR responsibilities for battalion, brigade, division, corps, theater, and installation/garrison operations.

2. Unit commanders are responsible for designating a unit athletic and recreation (A&R) officer or NCO. The A&R officer/NCO assists the commander in acquiring, assembling, and shipping their own initial 30-day supply of A&R and library book kits (obtained from installation MWR libraries), as well as operating athletic activities, recreation programs, unit lounges and AAFES Imprest Fund Activities (AIFA).

C. **Training**.

1. Commanders may designate Soldiers to execute MWR operations. Civilian MWR specialists may also be available to assist. These specialists train the Unit A&R officers/NCOs.

2. Training covers recreation programming, operation of unit lounges and establishment/maintenance of corps/division/brigade packages and unit A&R kits. Local AAFES managers provide AIFA materials and training for coordinators and specialists.

D. **Kits and Other Supplies**.

1. MWR A&R kit equipment tailored to unit needs are procured and maintained locally.

2. Items that can be deployed with the unit to support unit self-directed recreation activities include, but are not limited to: music listening equipment, cards, board games, and balls and athletic equipment available through normal Army supply channels. USAFMWRC also provides unit kits for extended operations.

E. **Funding**.

1. MWR support is mission-funded during war and other conditions (e.g., mobilization/contingency operations). See AR 215-1, para. 9-1.

2. All MWR kits are authorized appropriated fund (APF) expenditures (AR 215-1, para. 9-4a). All categories of MWR activities shall be mission-funded with APFs per FM 12-6, chapter 7. See AR 215-1, para. 9-6.

F. **Authorized MWR Activities in Contingency and Combat Operations**.

1. *USO/Armed Forces Entertainment (AFE).* Unit Commanders may request, through the senior Army component commander in the area of responsibility or the Joint Task Force Commander, civilian entertainment. Requests are forwarded to the AFE.

2. *Military Clubs*. Existing military clubs in theater will continue operations if conditions warrant. New clubs may be established in secure areas (e.g., rest areas and R&R areas) after an MWR program is established. Services will include food, beverages (alcohol if theater commander approves), entertainment and other recreation, and check cashing and currency conversion.

3. *Unit Lounges*. Unit lounges may be established in active theaters or areas of operation during mobilization, contingency operations, and wartime. Theater commanders may authorize "unit lounges," which are recreation centers that provide food and beverages as well as activities normally offered in clubs. SOPs provided by the parent installation will be used in the absence of theater guidelines.

4. *Rest Centers (in secure areas), pursuant to AR 215-1, para. 9-5*.

a. *General*. Rest centers in theater or corps areas, established by commanders, give Soldiers a short respite from combat or combat support duties. Rotation, including transportation, is normally less than one week. Soldiers will receive as many services as the commander can logistically secure and support. Assets to establish and operate a rest area come from unit resources.

b. *DoD Rest and Recuperation (R&R) Centers*. Centers are established based on theater needs. Theater commanders may designate resorts and other suitable facilities located at a reasonable distance from combat areas, outside the theater of operation, as R&R destination sites. After obtaining DoD approval, the theater executes the program.

c. *Armed Forces Recreation Centers (AFRC).* Both within and outside the theater of operation, AFRCs may be designated R&R centers. IMCOM G-9 equips AFRCs to support R&R requirements to include billeting, food and beverages, and Western-style recreational opportunities.

5. *Army Recreation Machine Program (ARMP) or "Slot machines*." ARMP may continue service within authorized theaters of operation if resources are available. If Civilian employees are evacuated from the area, local commanders may assume operations for machines and operations once a modified ARMP SOP is provided by IMCOM G-9.

6. *Tactical Field Exchanges (TFE).* TFEs are established to provide AAFES-type merchandise (class VI). Initial establishment of TFEs is normally accomplished by military personnel; AAFES is responsible for training military personnel to operate the facilities. Once the theater is stabilized, or mission, enemy, terrain, troops, time, civilians (METT-TC) allows, AAFES Civilian personnel may be brought into the theater to operate AAFES

facilities as far forward as the brigade support area if the tactical situation permits. However, the use of AAFES personnel in theater is based on availability of volunteers. The provision of equipment and facilities is a responsibility shared between AAFES and the Army. AAFES is responsible for training military personnel to operate the facilities. Mobile TFE will support Soldiers in forward areas and a fixed TFE facility will support Soldiers in secure areas. Commanders may establish AIFA with borrowed military labor after weighing the effects of the Soldier's diversion from his primary duty position on the unit's mission against the added convenience provided by operating an AIFA. TFE facilities are managed by a TFE officer (TFEO), who is a commissioned, warrant, or non-commissioned officer. (*See* AR 700-135, Para. 2-5.)

7. *American Red Cross (ARC).* All requests for ARC personnel to accompany U.S. forces into a theater of operations during war or operations other than war (OOTW) must be forwarded to IMCOM G-9. IMCOM G-9 is responsible for coordinating and securing support for ARC personnel to support military operations, and managing and monitoring military support to ARC, including funding travel. Once in the theater of operations, ARC support is coordinated through the theater G-1.

G. **Redeployment/Demobilization**.

1. *General.* Upon redeployment/demobilization, NAF accounts will be closed, NAFIs disestablished as necessary, and MWR equipment accounted for. MWR equipment issued to units in theater will revert to the theater MWR.

2. *Funds.* Unit funds revert to the theater NAFI upon unit redeployment. Theater NAFI funds revert to IMCOM G-9 or remain in theater if there is an established and continuing installation MWR fund.

H. **Lessons Learned**. As required, after-action MWR reports are forwarded to Commander, IMCOM, ATTN: G-9 MWR (Lessons Learned), 2405 Gun Shed Road Fort Sam Houston, TX 78234-1223.

V. COMMAND INVESTIGATIONS

A. **Introduction**.

1. Each Service has specific procedures for various types of administrative investigations. In the absence of more specific regulatory guidance, the Army uses AR 15-6, Procedures for Investigating Officers and Boards of Officers. AR 15-6 contains the basic rules for Army regulatory boards. If an investigation is appointed under a specific regulation, that regulation will control the proceedings. Often, that specific regulation will have a provision that makes AR 15-6 applicable to the proceedings. Consequently, you may have to look to both the specific regulation involved and to AR 15-6 for the proper board procedures. If the two regulations conflict on a particular point, the provisions of the specific regulation authorizing the board will override the provisions of AR 15-6.

2. Some of the more likely types of investigations that Army judge advocates (JA) may encounter during deployments include: accident investigations, which may require both a Safety Accident Investigation and a Legal Accident Investigation under AR 385-10 and AR 600-34 (if death results, a family brief may be triggered under AR 600-34); Hostile death Investigations required by AR 600-8-1; Suicide death investigations required by AR 600-63; Line of Duty Investigations under AR 600-8-4; Conscientious Objector Investigations under AR 600-43; and Boards of Inquiry for missing persons under AR 600-8-1.

3. The Air Force has no single regulation or instruction governing non-IG investigations. Some types of investigations may be specifically authorized by instruction (*e.g.*, AFI 36-3208, Administrative Separation of Airmen). In any event, the ability to initiate a command-directed investigation flows from the commander's inherent authority.

4. In the Navy and Marine Corps, the main reference for administrative investigations is JAGINST 5800.7F (June 2012), The Manual of the Judge Advocate General, also known as the "JAGMAN." It divides administrative investigations into more specific types than does AR 15-6, to include litigation report investigations, courts and boards of inquiry, and command investigations.

5. Investigations in all services follow similar basic concepts. In the joint environment, the goal is to prepare an investigation that meets the substantive standards of all the Services involved. Detailed analysis of Air Force and Navy Investigation requirements is beyond the scope of this chapter. Reference to those Services' policies is for clarification only. Legal advisors should turn to the appropriate Service authorities for detailed guidance.

6. There is currently no joint publication governing investigations. In the event an investigation is required in a joint environment, JAs should determine which Service's regulation is most applicable and then recommend an investigation under that regulation. When determining which Service's regulation is most applicable consider the possible uses of the investigation, whether a particular Service requires a certain investigation, which Service has the most at stake in the outcome of the investigation, any local or command guidance regarding joint investigations, and other matters that would contribute to an informed decision. Since investigations in all services follow similar basic concepts and will result in a thorough investigation if conducted properly, the regulation ultimately used is not as important as is choosing and following a particular authorized regulation. Under no circumstances should regulations be combined to create a "hybrid" investigation. Pick a regulation and follow it! The Services are shown great deference in regards to administrative matters as long as regulations are followed correctly.

B. **Command Investigations, Generally**.

1. *Function and Purpose*. The primary purpose of an investigation or board of officers is to look into and report on the matters that the appointing authority has designated for inquiry. The report will include findings of fact and recommendations. Often, when criminal misconduct is suspected, it may be more appropriate to conduct an RCM 303 preliminary inquiry ("Commander's Inquiry)" or to have either the Military Police (MP), Criminal Investigation Division (CID), or other appropriate law enforcement authorities conduct the investigation.

2. *Methods*. An administrative fact-finding procedure under AR 15-6 may be designated an investigation or a board of officers. The proceedings may be informal or formal. Proceedings that involve a single officer using the informal procedures are designated investigations. Proceedings that involve more than one Investigating Officer (IO) using formal or informal procedures, or a single investigating officer using formal procedures, are normally designated boards of officers. The Navy term for informal investigations is "command investigation" (CI). The Air Force term is "Command Directed Investigations" (CDI).

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

4. *Types of Investigations*. The appointing authority must determine, based on the seriousness and complexity of the issues and the purpose of the inquiry, whether to designate an <u>investigation</u> or a <u>board of officers</u> to conduct the inquiry.

a. *Investigation*. Conducted by a single IO using informal procedures. An investigation designated under AR 15-6 can be used to investigate almost any matter. However, an assistant investigating officer can be appointed if circumstances require (to assist in interviews, gathering of evidence, or expert analysis).

b. *Board of Officers*. When multiple fact-finders are appointed, whether formal or informal procedures are used, they will be designated as a board of officers. Multiple fact-finders using informal procedures may be appropriate for investigations into large-scale events or investigations where there are a large number of witnesses and other evidence to collect and consider. A single fact-finder will also be designated a board when formal procedures are used.

c. *Informal Procedures*. An informal investigation or board may use whatever method it finds most efficient and effective for acquiring information. For example, the board may divide witnesses, issues or evidentiary aspects of the inquiry among its members for individual investigation and development, holding no collective meeting until ready to review all of the information collected. Evidence may be taken telephonically, by mail, video teleconference or in whatever way the board deems appropriate. A respondent shall not be designated when informal procedures are used, and no one is entitled to the rights of a respondent. Before beginning an informal investigation, an IO reviews all written materials provided by the appointing authority and consults with a servicing staff judge advocate (SJA) or command judge advocate (CJA) to obtain appropriate legal guidance *before beginning the investigation*! Some of the most important services a JA can perform include assisting the IO in developing an investigative plan and providing advice during the conduct of the investigation such as what the evidence establishes, what areas might be fruitful to pursue, and the necessity for rights warnings.

d. *Formal Procedures*. This type of board meets in full session to take evidence. Definite rules of procedure will govern the proceedings. Depending on the subject matter under investigation, these procedural rules are found in AR 15-6 (Chapter 5), the specific regulation governing the investigation, or both. The Air Force presents guidance for formal investigations in AFI 51-602, Boards of Officers. The Navy's guidance appears in JAGINST 5830.1, Procedures Applicable to Courts of Inquiry and Administrative Fact-Finding Bodies that Require a Hearing.

5. *Due Process*. When a respondent is designated, a hearing must be held. A respondent may be designated when the appointing authority desires to provide (or other regulations require) a hearing for a person with a direct interest in the proceeding. AR 15-6 bestows important rights to a respondent, such as the right to be present at board sessions, representation by counsel, and the opportunity to present witnesses and cross-examine Government witnesses. The mere fact that an adverse finding may be made or adverse action recommended against a person, however, does not mean that he or she should be designated a respondent. If a respondent is designated, formal procedures must be used. For example, a board of officers considering an enlisted Soldier for separation under AR 635-200 must use formal procedures. Due to the considerable administrative burden of using formal procedures, they are rarely used as a general investigative tool unless required by other regulations. Proper conduct of formal investigations depends on the purpose of the investigation, and is beyond the scope of this chapter.

C. **Friendly Fire.**

1. DoDI 6055.7 requires that for all incidents falling within the definition of Friendly Fire, the Combatant Commander will convene a legal investigation (an AR 15-6 investigation in the Army, a command investigation in the Navy, or a command directed investigation in the Air Force) to determine the facts of the incident and guide further actions. In practice, Combatant Commanders typically delegate this authority to the GCMCA of the unit involved. Regardless of who appoints the investigation, the Combatant Commander must approve all friendly fire investigations.

2. Friendly fire is defined in DoDI 6055.7 as a circumstance in which members of a U.S. or friendly military force are mistakenly or accidentally **killed or injured** in action by U.S. or friendly forces actively engaged with an enemy or who are directing fire at a hostile force or what is thought to be a hostile force.

3. In addition to the legal investigation, commanders must also convene a safety investigation.

4. In May 2007, the Army Vice Chief of Staff published detailed guidance regarding the reporting and investigation requirements for all incidents of friendly fire. Units must follow these procedures for all friendly fire incidents, whether resulting in death or injury, as soon as personnel on the ground *suspect* that a friendly fire incident has occurred.

a. The unit must provide immediate telephonic notice through the Casualty Assistance Center to the Army Casualty and Mortuary Affairs Operation Center (CMAOC). For time sensitive assistance contact the CMAOC Operations Center at 1-800-325-4988 COMM: 502-613-9025. DSN: 983-9025. OCONUS dial country code 001 or OCONUS DSN code (312).

b. Generate an initial casualty report IAW AR 600-8-1, approved by a field grade officer, through command channels to the Combatant Commander.

c. Initiate an AR 15-6 investigation (Appointed by GCMCA; approved by Combatant Commander).

d. Contact the Combat Readiness Center (COMM: (334) 255-2660/3410, DSN: 558) and initiate safety investigation based upon CRC guidance.

e. Contact the local Criminal Investigation Division. They will provide forensics assistance to the AR 15-6 Officer or conduct investigation if criminal action or negligence is suspected or substantiated.

f. Submit supplemental casualty report when there is a substantial change to the initial report (i.e., when inflicting force is discovered).

g. Once approved by the Combatant Commander, submit the AR 15-6 proceedings to the CMAOC.

h. Continue coordination with the CMAOC to provide an AR 600-34 family presentation for fatality cases.

5. The 2013 CENTCOM friendly fire reporting, investigation, and dissemination policy requires units to report suspected friendly fire incidents within **2 hours**. Judge advocates must remain aware of local command and/or installation policies regarding reporting and investigation requirements.

D. **Authority to Appoint an Investigation**.

1. *Formal*. After consultation with the servicing JA or legal advisor, the following individuals may appoint a formal board of officers in the Army:

a. Any General Court-Martial Convening Authority (GCMCA) or Special Court-Martial Convening Authority (SPCMCA), including those who exercise that authority for administrative purposes only.

b. Any General Officer.

c. Any commander or principal staff officer in the grade of colonel or above at the installation, activity or unit level.

d. Any State Adjutant General.

e. A Department of the Army Civilian supervisor permanently assigned to a position graded as a GS/GM-14 or above and who is assigned as the head of an Army agency or activity or as a division or department chief.

f. In the Air Force, the appointment authority for boards of officers varies with the regulatory authority for convening the board. In the Navy, an officer in command may convene a board. The GCMCA takes charge in case of a "major incident."

2. *Informal*. Informal investigations or boards may be appointed by:

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

b. A commander at any level. In the Air Force, the commander must be on "G" series orders granting UCMJ authority over the command. In the Navy, a commanding officer or an officer in charge may convene a CI.

c. In the Army, a principal staff officer or supervisor in the grade of major or above.

3. *Selection of Members.*

a. In the Army, if the appointing authority is a General Officer. He or she may delegate the selection of board members to members of his or her staff.

b. However, in investigations under AR 15-6, only a GCMCA may appoint an investigation or board for incidents resulting in property damage of $1 million or more, the loss/destruction of an Army aircraft or missile, or an injury/illness resulting in or likely to result in death or permanent total disability.

c. For investigations of a death or deaths involving a deployed force(s), from what is believed to be hostile fire, the GCMCA may delegate, in writing, appointing/approval authority to a subordinate commander exercising special court-martial convening authority. If evidence is discovered during the investigation, however, that indicates that the death(s) may have been the result of fratricide/friendly fire, the investigating officer will immediately suspend the investigation and inform the appointing authority and legal advisor. At this time, the general court-martial convening authority will appoint a new investigation into the fratricide/friendly fire incident. Any evidence from the hostile fire investigation may be provided to the investigating officer or board conducting the fratricide/friendly fire investigation. The general court-martial convening authority may also appoint the same investigating officer if the investigating officer is still best qualified to perform the duty.

E. **Choosing the AR 15-6 IO**.

1. The AR 15-6 IO must be the best qualified by reason of age, education, training, experience, length of service and temperament. In the Army, the IO must be a commissioned or warrant officer, or a Civilian GS-13 or above and senior to any likely subjects of the investigation. In the Naval services, most CIs are conducted by a commissioned officer. However, a warrant officer, senior enlisted person, or Civilian employee may be used when the convening authority deems it appropriate. The Air Force specifies no minimum grade for CDI investigators.

2. Both the Army and the Air Force require the IO to consult with a JA for guidance before beginning an informal investigation. The Naval services only require such consultation when the investigation is intended as a litigation report, or when directed by the appointing authority. This consultation offers a good opportunity to provide a written investigative guide to the IO. An Army AR 15-6 Informal Investigating Officer's Guide is included here as an appendix. The Naval Justice School has a similar publication, the JAGMAN Investigations Handbook (2012). The Air Force publishes the Air Force Commander-Directed Investigations Guide.

F. **Methods of Appointment**.

1. Informal Army investigations and boards may be appointed either orally or in writing. Air Force CDIs and Navy CIs must be appointed in writing. Formal boards must be appointed in writing but, when necessary, may be appointed orally and later confirmed in writing. Whether oral or written, the appointment should clearly specify the purpose and scope of the investigation or board, and the nature of the findings and recommendations required. The appointing memorandum should specify the governing regulation and provide any special instructions.

2. If the board or investigation is appointed in writing, the appointing authority should use a Memorandum of Appointment. Note that the Memorandum of Appointment should 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 required findings and recommendations. The scope of the board's power is very important because a board has no power beyond that vested in it by the appointing authority. A deficiency in the memorandum may nullify the proceedings for lack of jurisdiction. If this occurs, consult AR 15-6, para. 2-3c. It may be possible for the appointing authority to ratify the board's action.

3. The Memorandum of Appointment also names the parties to the board and designates their roles in the board proceeding. If the board were appointed specifically to investigate one or more known respondents, the respondent(s) also would be named in the Memorandum of Appointment.

G. **Conducting the Informal Investigation**.

1. The IO, with the assistance of the JA advisor, should formulate an investigation plan that takes into account both legal concerns and tactical effectiveness. Each investigation will be different, but the following factors should be considered:

a. Purpose of the investigation. Need to carefully consider the guidance of the Memorandum of Appointment with regard to purpose and timeline.

b. Facts known.

c. Potential witnesses.

d. Securing physical and documentary evidence.

e. Possible criminal implications (including need for Article 31, UCMJ warnings).

f. Civilian witness considerations (e.g., securing non-military witness information and giving appropriate rights to collective bargaining unit members).

g. Regulations and statutes involved.

h. Order of witness interviews.

i. Chronology.

2. Continued meetings between the IO and the legal advisor will allow for proper adjustments to the investigative plan as the investigation progresses, as well as proper ongoing coordination with the appointing authority.

H. **Findings and Recommendations**.

1. *Report Structure*. Army informal investigations normally begin with DA Form 1574, which provides a "fill in the box" guide to procedures followed during the investigation. Navy CI and Air Force CDI reports begin with narrative information from the IO.

a. Navy CI reports of investigation begin with a preliminary statement. It tells how all reasonably available evidence was collected or is forthcoming; whether each directive of the convening authority has been met;

what, if any, difficulties were encountered; and any other information necessary for a complete understanding of the case.

b. Air Force CDI reports of investigation begin with a discussion of the authority and scope of the investigation. They continue with an introduction providing background, a description of the allegations, and a "bottom line up front" conclusion regarding whether or not the allegations were substantiated.

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

a. *Findings*. A finding is a clear, concise statement of fact readily deduced from evidence in the record. Findings may include negative findings (i.e., that an event did not occur). Findings should refer to specific supporting evidence with citations to the record of investigation. Findings must be supported by a preponderance of the evidence. The IO may consider factors such as demeanor, imputed knowledge, and ability to recall. Finally, findings must also address the issues raised in the appointment memorandum.

b. *Recommendations*. Recommendations must be consistent with the findings, and must thus be supported by the record of investigation. Air Force CDIs and Navy CIs will not contain recommendations unless specifically requested by the convening authority.

I. **Legal Review**.

1. AR 15-6 requires legal review of Army investigations if: adverse administrative action may result; the report will be relied upon by higher headquarters; death or serious bodily injury resulted; or any case involving serious or complex matters. The Air Force requires legal review of CDIs that are not simply "diagnostic" to ensure compliance with applicable regulations and law. The Navy neither requires nor precludes legal review. As a practical matter, most investigations should receive a legal review whether required by regulation or not.

2. There is no prohibition against the advisor to the investigating officer also conducting the legal review. However, it is recommended that a different attorney conduct the legal review for complex cases, high profile cases, or cases in which the legal advisor's involvement in the case prevents him or her from conducting an independent legal review. In the Army, the legal review focuses on: whether the proceedings complied with legal requirements; what affects any errors would have; whether sufficient evidence supports the findings; and whether the recommendations are consistent with the findings.

J. **Appointing Authority Action**.

1. After reviewing the report of investigation, the appointing authority has four options.

a. Approve the report as is;

b. Disapprove the report as is;

c. Return the report for additional investigation, either with the same IO or a new one; or

d. Except or Substitute findings and recommendations.

2. The record must support any substituted findings and recommendations. Unless otherwise provided in other regulations, the appointing authority is not bound by the IO's findings or recommendations. The appointing authority may also consider information outside the report of investigation in making personnel, disciplinary or other decisions.

K. **Maintaining and Releasing the Investigation.**

1. The release authority for AR 15-6 investigations is the appointing authority. No part of a report should be released (unless specifically authorized by law or regulation such as a valid Freedom of Information Act (FOIA) request) without the approval of the appointing authority.

2. Investigations must be retained by the approving authority for five years, and then destroyed or shipped for permanent storage IAW the Army Records Information Management System (ARIMS) and Record Retention Schedule – Army (RRS-A) (See www.arims.army.mil. & AR 25-400-2, The Army Records Information Management System (ARMIS), 2 October 2007).

VI. FREEDOM OF INFORMATION ACT (FOIA) (5 USC § 552)

A. Deployed units should anticipate requests under the FOIA for records they maintain. The FOIA is a release statute. As such, it is presumed that if a proper FOIA request is received the requested records will be released.

B. Unit judge advocates must be prepared to respond to FOIA requests in a timely manner. The FOIA requires DoD to respond to FOIA requests within 20 working days of receipt of a proper request. This requires units to gather, analyze, and redact requested records rather quickly. Judge advocates must have general knowledge regarding the FOIA and the appropriate regulations.

C. Records requested must ordinarily be released unless they are exempted or excluded from release by one of nine exemptions or three exclusions. Even though an exemption may apply, however, current governmental policy encourages the discretionary release of exempted information. **In March 2009, Attorney General Holder, implementing guidance from President Obama, established the "reasonably foreseeable harm" standard regarding the utilization of FOIA exemptions to withhold information pursuant to a valid FOIA request**. Under the reasonably foreseeable harm standard, before withholding a record the agency must reasonably foresee that disclosure would harm an interest protected by one of the exemptions or disclosure must be prohibited by law. Mere speculation or abstract fears are not a sufficient basis for withholding. Instead, the agency must reasonably foresee that disclosure would cause harm. Under this new standard, discretionary releases are strongly encouraged even when an exemption may apply. The new standard, however, has the most impact on Exemption 5 discussed below.

D. A principle concept of the FOIA is **the rule of segregability**. If a FOIA request is received and a responsive record found, units must segregate (redact) exempted information from non-exempt information and release non-exempt information to the requestor. Units may withhold release; however, they may not deny a request. Within DoD the authority to deny a FOIA request rests solely with designated Initial Denial Authorities (IDA). While units are responsible for addressing the initial FOIA request, redacted information must be forwarded to an appropriate IDA for final decision to deny the redacted information. The type of record requested determines who the IDA will be for the particular record. For example, TJAG is the IDA for most administrative investigations, the Surgeon General is the IDA for medical records, and the Provost Marshal General is the IDA for CID records. When operating as part of a Combatant Command, however, units must utilize the Combatant Command's FOIA regulations and IDAs in accordance with their guidance. For example, the CENTCOM Chief of Staff is the initial denial authority for CENTCOM records. At times, it may require some analysis to determine the correct IDA.

E. The most common FOIA request received by deployed units are requests for investigations and related material. Below are the most frequently relied upon FOIA exemptions applicable to such records (NOT an exhaustive list).

1. **Exemption 1: Classified Information.** This exemption permits the withholding of records that are *substantively and procedurally* properly classified IAW Executive Order 13526, (Classified National Security Information, 75 Fed. Reg. 707 (Jan. 5, 2010). Classified documents responsive to a valid FOIA request must undergo a declassification review to ensure they are substantively and procedurally properly classified at the time of the FOIA request. Documents that have undergone a declassification review within two years prior to the FOIA request need not undergo another declassification review. Executive Order 13526 only authorizes Top Secret, Secret, and Confidential security classifications. All other security markings (i.e., FOUO) are insufficient to protect a document from release utilizing Exemption 1; however, if used correctly, they should signal that another FOIA exemption likely applies. Also, post request classification is authorized as long as the criteria of E.O. 13526 are followed. The "reasonably foreseeable harm" standard has no impact on Exemption 1 material since classified information must be withheld from release pursuant to law. A discretionary release of classified information is not appropriate.

2. **Exemption 2: Internal Personnel Rules and Practices.** This exemption permits the withholding of records that deal with matters that are related **solely to the internal personnel rules and practices of the agency**. In March 2011, the Supreme Court ruled in *Milner v. Dep't of the Navy*, and significantly limited the 30 year precedent of using Exemption 2 to withhold what was previously withheld as trivial internal matters in which there was little or no public interest and significant internal matters the release of which will allow the requester to circumvent an agency regulation or frustrate an agency function or mission (previously referred to as Low 2 and High-2). Since *Milner*, Exemption 2 is limited to internal personnel and human resource documents. The Supreme Court looked at the plain language of the statute and held that Exemption 2 encompasses only records relating to

issues of employee relations and human resources. The Court noted that the Government has other tools at hand to shield national security information and other sensitive materials, specifically looking to Exemption 1, 3 and 7 as alternatives to withhold information where Exemption 2 had previously been invoked.

3. **Exemption 3: Other Federal Withholding Statutes.** This exemption permits the withholding of information that Congress exempted from disclosure via a federal statute. In order for a federal statute to qualify as an Exemption 3 statute, the statute must either require that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or establish particular criteria for withholding or refer to particular types of matters to be withheld. For example, 10 U.S.C. § 130b, allows withholding of information on personnel of overseas, sensitive, or routinely deployable units. This statute establishes particular criteria for withholding (information on personnel of overseas, sensitive, or routinely deployable units). NOTE: While the language of 10 U.S.C. § 130b suggests there is discretion on whether to withhold or release this information, it is DoD policy that personal information about service members are not released [See Exemption 6 below]. This requires the redaction of personal information about DoD personnel, to include names, from most investigations. [Do not redact the name of the requester if included in the investigation]. If material is to be withheld by an Exemption 3 statute, the protection afforded by that statute should be applied, therefore, a discretionary release is not appropriate. Additionally, 10 U.S.C. § 130e responded to the ruling in *Milner* (Exemption 2) allowing for certain information to be withheld to protect security vulnerabilities related to DoD critical infrastructure.

4. **Exemption 5: Privileged Memoranda & Internal Agency Communication.** This exemption permits the withholding of records that are inter-agency or intra-agency memorandums or letters that would not be available by law to a party in litigation with the agency. Exemption 5 incorporates most common law discovery privileges. Legal advice and investigation legal reviews can be routinely withheld under exemption 5 utilizing the attorney-client privilege and/or the attorney work-product privilege. Recommendations not approved by the approval authority should be withheld under the deliberative process privilege. Once approved however, recommendations become final agency decisions, no longer qualifying for protection under the deliberative process privilege. Exemption 5 is greatly impacted by the "reasonably foreseeable harm" standard. Since the interest protected by Exemption 5 is a governmental interest and not a private interest, it is ripe for discretionary release. Before Exemption 5 can be invoked, an agency must be able to articulate an actual harm that will result if the records are released. In addition to the age of the record and the sensitivity of the content, the nature of the decision at issue, the status of the decision, and the personnel involved, are all factors that should be analyzed in determining whether a discretionary release is appropriate.

5. **Exemption 6: Protection of Personal Privacy.** This exemption permits the withholding of personal information about an individual the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. When determining whether withholding is appropriate, the individuals' privacy interest in the information must be balanced with the public's interest in disclosure. Since 9/11 members of DoD, both Civilian and military, have a heightened privacy interest in their personal information that most often outweighs the public's interest in disclosure. As such, most personal information about members of DoD should be redacted from records before they are released. IAW DoD policy, "release of information on DoD personnel will be limited to the names, official titles, organizations, and telephone numbers for personnel only at the office director level or above, provided a determination is made that disclosure does not raise security or privacy concerns" (Memorandum, Office of the Secretary of Defense, Subject: Withholding of Information that Personally Identifies DoD Personnel, 1 September 2005). As a matter of practice, personal information about enlisted personnel and officers below the rank of brigadier general should not be released IAW the DoD policy. If release of the information would constitute a clearly unwarranted invasion of personal privacy, subsequent release of that information would be deemed to cause reasonably foreseeable harm to the personal privacy of the individual involved. As a result, Exemption 6 information is not suitable for discretionary release under the "reasonably foreseeable harm" standard.

6. **Exemption 7: Law Enforcement Records.** This exemption permits the withholding of records or information *compiled for law enforcement purposes* if the disclosure could reasonably be expected to result in any of six specified harms. The two most common harms cited involving the release of an investigation is that release "could reasonably be expected to interfere with enforcement proceedings" (7.A.) or "release could reasonably be expected to constitute an unwarranted invasion of personal privacy" (7.C.). Use of Exemption 7 is limited to investigations that involve the enforcement of a statute or regulation (law enforcement) and lasts only so long as the potential harm exists. For example, the first harm mentioned above could be cited to prevent the release of an unfinished investigation or during the pendency of a resultant adverse administrative action but could not be used

once that adverse administrative action has been completed. Since a specific harm must be identified prior to the applicability of the exemption itself, Exemption 7.A. and 7.B. information should not be the subject of a discretionary release under the new standard.

VII. FINANCIAL LIABILITY INVESTIGATIONS

A. **Introduction**.

1. Financial Liability Investigations of Property Loss (FLIPL), formerly known as Reports of Survey, serve multiple purposes. They document circumstances surrounding loss, damage, destruction, or theft (LDDT) to government property; serve as a voucher for adjusting property records; and document a charge of financial liability, or provide for relief of financial liability. Imposition of liability is a purely administrative process that is designed to promote a high degree of care for Army property through deterrence.

2. ***It is not a punitive program***. Commanders should consider other administrative, nonjudicial, or judicial sanctions if damage or loss of property involves acts of misconduct.

3. The investigation is completed on DD Form 200 and guided by DA Form 7531, Checklist and Tracking Document for Financial Liability Investigations of Property Loss.

B. **Alternatives to Financial Liability Investigations**.

1. Statement of Charges/Cash Collection Voucher (consolidated on DD Form 362) when liability is admitted and the charge does not exceed one month's base pay.

2. Cash sales of hand tools and organizational clothing and individual equipment.

3. Unit-level commanders may adjust losses of durable hand tools up to $100 per incident, if no negligence or misconduct is involved.

4. Abandonment orders may be used in combat, large-scale field exercises simulating combat, military advisor activities, or to meet other military requirements.

5. If the commander determines that no negligence was involved in the damage to the property, no financial liability investigation is required as long as the approving authority concurs.

C. **The Financial Liability Investigation System**.

1. *Initiating a Financial Liability Investigation.*

a. Active Army commanders will initiate the investigation within 15 calendar days of discovering the loss or damage.

b. Mandatory financial liability investigations:

(1) When an individual refuses to admit liability by signing a statement of charges, cash collection voucher or other accountability document, and negligence or misconduct is suspected.

(2) Anytime a higher authority or other DA regulations directs a financial liability investigation.

(3) The LDDT involves a controlled item.

(4) When property is lost by an outgoing accountable officer, unless voluntary reimbursement is made for the full value of the loss.

(5) When the amount of loss or damage exceeds an individual's monthly base pay, even if liability is admitted.

(6) When damage to government quarters or furnishings exceeds one month's base pay.

(7) When the loss involves certain bulk petroleum products.

(8) When the loss results from fire, theft, or natural disaster.

(9) Additional circumstances as outlined in AR 735-5.

c. Joint Financial Liability Investigations.

(1) Absent a loan agreement stating otherwise, the regulation of the Service that owns the property (property is located on that service's property account) is the appropriate regulation to apply.

(2) The Army and Air Force have a reciprocal agreement outlined in paragraph 14-36 of AR 735-5 that explains the process for processing financial liability investigations that find Air Force personnel liable for the loss, damage, or destruction of Army property. Upon completion of the investigation, it should be forwarded to the appropriate Air Force approval authority for final action and possible collection.

(3) For all other situations where non-Army personnel are found to be liable for the loss, damage, or destruction of Army property, the procedures of AR 735-5, paragraph 14-35 should be followed. Upon completion of the investigation, the respondent will be formally notified and requested to make payment in full. If after 60 days, the respondent fails to pay, the investigation should be sent to the respondent's servicing finance office for processing.

(4) Financial liability investigations that find contractors liable should be investigated by the contracting office and processed IAW the applicable contract.

2. *Processing Times.*

a. In the Active Army, financial liability investigations will normally be processed within 75 days.

b. Financial liability investigations in the National Guard and U.S. Army Reserves will normally be processed within 240 days.

3. *Approving Authority*.

a. In accordance with AR 735-5, officers in the grade of O5 may approve a FLIPL with a total loss value up to $5,000 if delegated in writing by the O6 commander and the item(s) is not classified as COMSEC, sensitive items, or equipment that contains personal identification information. Commanders in the grade of O6 or GS-15 supervisors may approve a FLIPL with a total loss value up to $100,000 if the item(s) is not classified as a controlled item. For losses of $100,000 or greater, or losses involving a controlled item, the approval authority is the first GO or SES Civilian in the rating chain. The approving authority does not have to be a court-martial convening authority.

b. If negligence or willful misconduct is clearly established from the facts and circumstances known at the time the LDDT is discovered, the approving authority may recommend liability without appointing an IO. The approving authority is then responsible for ensuring that the value of loss is properly computed and that the individual against whom liability is recommended is properly notified and given an opportunity to respond.

4. *Appointing Authority*. The appointing authority is an officer or Civilian employee designated by the approving authority with responsibility for appointing financial liability investigation investigating officers. The approving authority may designate, in writing, a Lieutenant Colonel (O5) (or major in a lieutenant colonel billet) or DoD Civilian employee in the grade of GS-13 (or a GS-12 in a GS-13 billet) or above as an appointing authority. When a GO or SES is the approving authority (FLIPL involving controlled item or $100,000 or greater) the appointing authority will be the first O6 in the chain.

5. *Financial Liability Officer (IO).*

a. The IO will be senior to the person subject to possible financial liability, "except when impractical due to military exigencies."

b. The IO can be an Army commissioned officer; warrant officer; or noncommissioned officer in the rank of Sergeant First Class (E7) or higher; a Civilian employee GS-07 or above; a commissioned officer of another service; or a Wage Leader (WL) or Wage Supervisor (WS) employee. In joint activities, DoD commissioned or warrant officers, or noncommissioned officers in the grade of E-7 or above, qualify for appointment as IOs. (*See* AR 735-5, table 13-1, for the grade equivalency between military personnel and Civilian employees.)

c. The investigation is the IO's primary duty.

d. The IO must get an appropriate briefing before beginning the investigation. This briefing does not have to be from a JA but can be from another appropriate official, often the S4 (Supply/Logistics)

D. **Legal Considerations for Imposing Liability**. Individuals may be held financially liable for the LDDT of Government property if they were negligent or have committed willful misconduct, and their negligence or willful

misconduct is the proximate cause of that LDDT. In order to be held financially liable, the respondent must have: (1) been responsible for the property; (2) been negligent or committed willful misconduct; and (3) that negligence or willful misconduct must be the proximate cause of the loss.

1. *Responsibility for property*. The type of responsibility a person has for property determines the obligations incurred by that person for the property

a. *Command responsibility*.

(1) The commander has an obligation to ensure proper use, care, custody and safekeeping of government property within his or her command.

(2) Command responsibility is inherent in command and cannot be delegated. It is evidenced by assignment to command at *any* level.

b. *Direct responsibility*.

(1) An obligation of a person to ensure the proper use, care, custody and safekeeping of all government property for which the person is receipted.

(2) Direct responsibility is closely related to supervisory responsibility, which is discussed below.

c. *Personal responsibility:* the obligation of an individual for the proper use, care and safekeeping of government property in his possession, with or without a receipt.

d. *Supervisory responsibility*.

(1) The obligation of a supervisor for the proper use, care and safekeeping of government property issued to, or used by, subordinates. It is inherent in all supervisory positions and is not contingent upon signed receipts or responsibility statements.

(2) If supervisory responsibility is involved, consider the following additional factors:

(a) The nature and complexity of the activity and how that affected the ability to maintain close supervision.

(b) The adequacy of supervisory measures used to monitor the activity of subordinates.

(c) The extent supervisory duties were hampered by other duties or the lack of qualified assistants.

e. *Custodial responsibility*.

(1) The obligation of an individual to exercise reasonable and prudent actions in properly caring for and ensuring proper custody and safekeeping of property in storage, awaiting issue or turn-in. Custodial responsibility results from assignment as a supply sergeant, supply custodian,
supply clerk, or warehouse person.

(2) When unable to enforce security, they must report the problem to their immediate supervisor.

2. Negligence or Culpability. **Before a person can be held liable, the facts must show that he or she, through negligence or willful misconduct, violated a particular duty involving the care of the property.**

a. *Simple negligence*: the failure to act as a reasonably prudent person would have acted under similar circumstances. A reasonably prudent person is an average person, not a perfect person. Consider also the person's age, experience, and special qualifications; the type of responsibility involved; the type and nature of the property (more complex or sensitive property normally requires a greater degree of care.)

b. *Gross negligence*: an extreme departure from the course of action expected of a reasonably prudent person, all circumstances being considered, and accompanied by a reckless, deliberate or wanton disregard for the foreseeable consequences of the act.

c. *Willful misconduct*: any intentional wrongful or unlawful act.

3. Proximate cause: the cause which, in a natural and continuous sequence, unbroken by a new cause, produces the loss or damage, and without which the loss or damage would not have occurred. It is the primary

moving cause, or the predominate cause, from which the loss follows as a natural, direct and immediate consequence, and without which the loss would not have occurred.

4. Loss. Before a person may be held liable, the facts must show that a loss to the Government occurred. There are two types of losses that can result in financial liability.

a. *Actual loss.* Physical loss, damage or destruction of the property.

b. *Loss of accountability*. Due to the circumstances of the loss, it is impossible to determine if there has been actual physical loss, damage or destruction because it is impossible to account for the property.

E. **Determining the Amount of Loss**.

1. If possible, determine the actual cost of repair or actual value at the time of the loss. The preferred method is a qualified technician's two-step appraisal of fair market value. The first step involves a determination of the item's condition. The second step is to determine the commercial value of the item, given its condition.

2. If other means of valuation are not possible, consider depreciation. Compute the value according to AR 735-5, Appendix B.

F. **Limits on Financial Liability**.

1. The general rule is that an individual will not be charged more than one month's base pay.

a. Charge is based upon the Soldier's base pay at the time of the loss.

b. For ARNG and USAR personnel, base pay is the amount they would receive if they were on active duty.

c. As exceptions to the general rule, the following personnel are liable for the full amount (less depreciation) of the loss:

(1) Soldiers who lose personal arms or equipment ("personal arms and equipment" is defined at the end of AR 735-5).

(2) Persons losing public funds.

(3) Accountable officers.

(4) Persons assigned government quarters are liable for the full amount of the loss to the quarters, furnishings or equipment as a result of specific finding of gross negligence or willful misconduct.

(5) States and territories of the United States.

(6) Contractors and contractor employees.

(7) Nonappropriated fund activities.

2. *Involuntary Withholding of Current Pay*.

a. Members of the Armed Forces may have charges involuntarily withheld. (See 37 U.S.C. § 1007.)

b. Involuntary withholding for Civilian employees. (See 5 U.S.C. § 5512, DoD FMR Volume 8, DFAS-IN 37-1.)

c. No involuntary withholding for the loss of NATO property. (See DAJA-AL 1978/2184.)

G. **Rights of Individual for Whom Financial Liability is Recommended**.

1. The financial liability investigation form (DD Form 200) contains a limited rights notice. However, to adequately inform an individual of his or her rights, see AR 735-5, para 13-42 and figures 13-15.

2. If financial liability is recommended, the IO must take the following actions:

a. Give the person an opportunity to examine the report of investigation.

b. Ensure that the person is aware of his/her rights.

c. Fully consider and attach any statement the individual desires to submit.

d. Carefully consider any new or added evidence and note that the added evidence has been considered.

e. Explain the consequences of a finding of gross negligence for an investigation involving government quarters, furnishings and equipment.

H. **Duties of the Approving Authority**.

1. If the IO recommends liability, a JA must review the adequacy of the evidence and the propriety of the findings and recommendations before the approving authority takes action.

2. The approving authority is not bound by the IO's or JA's recommendations.

3. If the approving authority decides to assess financial liability contrary to the recommendations of the IO or JA, that decision and its rationale must be in writing.

4. If considering new evidence, the approving authority must notify the individual and provide an opportunity to rebut.

5. Ensure that the individual was advised of his or her rights.

6. May reduce the assessed liability, in whole or in part, if "warranted by the circumstances" (per para 13-41*b*, AR 735-5). This gives approving authorities significant latitude to reduce or eliminate liability even if the legal standard for assessing liability is met.

7. Initiate collection action by sending documentation to the servicing finance office.

I. **Relief from Financial Liability Investigations**.

1. *Appeals*.

a. The appeal authority is the next higher commander above the approving authority (*see* AR 735-5, para. 13-52, for delegation authority).

b. The respondent has 30 days to appeal unless he or she shows good cause for an extension.

c. The appeal is submitted to the approving authority for reconsideration before action by the appeal authority.

d. If the approving authority denies reconsideration, the following actions are required:

(1) Prepare a memorandum giving the basis for denying the requested relief.

(2) The approving authority must personally sign the denial.

(3) Forward the action to the appeal authority within 15 days.

e. Action by the appeal authority is final.

2. *Re-opening Financial Liability Investigations*.

a. Authority to reopen rests with the approval authority.

b. Not an appeal, but may occur as part of an appeal. Re-opening is proper when:

(1) A response is submitted to the IO from the person charged subsequent to the approving authority having assessed liability.

(2) A subordinate headquarters recommends reopening based upon new evidence.

(3) The property is recovered.

(4) The approving authority becomes aware that an injustice has been perpetrated against the government or an individual.

3. *Remission of Indebtedness (See AR 735-5; AR 600-4).*

a. Available to both Officers and Enlisted Soldiers. Note that the applicable provisions in AR 735-5 indicate that only Enlisted Soldiers may apply for remission of indebtedness, but this is because these provisions cite an outdated version of AR 600-4. AR 600-4 no longer limits such applications to the Enlisted ranks.

b. Only to avoid extreme hardship.

c. Only unpaid portions can be remitted. Suspend collection action long enough for the Soldier to submit his request for remission of the debt.

4. Army Board for the Correction of Military Records (ABCMR) (*See* AR 15-185).

5. Civilian employees may avail themselves of grievance/arbitration procedures (*See* paragraph AR 735-5, para. 13-45).

J. **SJA Review**.

1. *For the Approving Authority*: adequacy of evidence and propriety of findings and recommendations.

2. *For the Appeal Authority*: evidence is adequate and findings are proper.

3. *Caveat*: the same attorney cannot perform both legal reviews (*See* paragraph 13-52b(1)).

4. CONCLUSION: Commanders must ensure that the financial liability investigation process is fair and uniform in its treatment of agency members. Liability of individuals responsible for property (whether based on command, supervisory, direct, custodial, or personal responsibility) should be fully considered. Legal advisors should get involved early in the process to help commanders and IOs focus their investigations, and to ensure that individual rights are addressed before imposition of liability.

VIII. CONSCIENTIOUS OBJECTORS

A. **Introduction**.

1. Definition. **Members of the Armed Forces who have "a firm, fixed and sincere objection to participation in war in any form or the bearing of arms, by reason of religious training and belief" may apply for Conscientious Objector (CO) status.** Supreme Court decisions have expanded "religious training and belief" to include any moral or ethical belief system held with the strength of conventional religious convictions. *See Welsh v. U.S.*, 398 U.S. 333 (1970).

2. Classification.

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

b. *Class 1-A-O*: A service member who, by reason of conscientious objection, sincerely objects to participation as a combatant in war in any form, but whose convictions permit military service in a noncombatant status.

3. What is NOT a category of CO status:

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

b. Objection based solely upon policy, pragmatism or expediency.

c. Objection to a certain war.

d. Objection based upon insincere beliefs.

e. Objection based solely on a claim already denied by the Selective Service System.

B. **Burden of Proof and Standards**.

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

a. the basis of the claim satisfies the definition and criteria for CO; and

b. the claimant's belief is honest, sincere and deeply held.

2. An applicant for CO status must choose either 1-O (war in any form) or 1-A-O (noncombatant). An applicant choosing 1-O will not be granted 1-A-O as a compromise.

3. The unit will not use the CO process to eliminate those who do not qualify as COs. Nor will the unit use the CO process in lieu of adverse administrative separation procedures for unsatisfactory performance, substandard duty or misconduct.

C. **Application Procedures**.

1. Form. Military personnel seeking either a discharge (1-O) or noncombatant duties (1-A-O) must submit an application on a DA Form 4187 (Personnel Action) to their immediate commander. The individual will include all of the personal information required by Appendix B, AR 600-43.

2. Suspense.

a. *Active Duty Suspense*: Active Army units will process the application and forward it to HQDA within 90 days from the date submitted.

b. *Reserve Component Suspense*: Reserve Army units will process the application and forward it HQDA within 180 days from the date submitted.

3. Immediate Commander Responsibilities.

a. Counsel Soldier.

b. Coordinate interview with Chaplain.

c. Coordinate interview with psychiatrist or medical officer.

d. Forward completed interviews, application and recommendation to SPCMCA.

4. SPCMCA Responsibilities.

a. Appoint IO in the grade of O-3 or higher.

b. Ensure IO conducts a proper investigation.

5. IO Responsibilities.

a. Conduct a hearing at which the applicant may appear and present evidence.

b. Prepare a written report, and forward it to the GCMCA.

6. GCMCA Responsibilities.

a. Army GCMCAs may approve 1-A-O status. Once approved, the servicemember is eligible only for deployment to areas where duties normally do not involve handling weapons.

b. Additionally, Army GCMCAs must forward to HQDA any applications for 1-O status and any applications for 1-A-O status upon which he or she recommends disapproval. Approval authorities for other services vary.

D. **Use, Assignment and Training of CO Applicants**.

1. Persons who have submitted a CO application will be retained in their units and assigned duties providing minimum practicable conflict with their asserted beliefs, pending a final decision on their application.

2. An Active Army Soldier who receives **individual** orders for reassignment, or who has departed the unit in compliance with **individual** reassignment orders, may not apply for CO status until arriving at the new duty station. This policy does not apply to Soldiers who are TDY en route for a period in excess of 8 weeks. These Soldiers may apply at their TDY duty station.

3. On the other hand, an Active Army Soldier who is assigned or attached to a unit that has unit reassignment order instructions (i.e., the unit is deploying) may submit an application for CO status. The unit must process the application as operational and mission requirements permit. The Soldier must continue to prepare for deployment, and will deploy with the unit unless his or her application has been approved. If the Soldier's

application has been forwarded to the DA Conscientious Objector Review Board (DACORB), the GCMCA **may** excuse the Soldier from deployment. Contact the DACORB and determine the status of the application before the GCMCA excuses the Soldier (DACORB: DSN 221-8671 / 8672 or commercial (703) 325-8672).

4. In the case of RC Soldiers not on active duty, the submission of an application after publication of orders to report for AD or ADT will not serve as a basis to delay reporting (*see* AR 600-43, para. 2-10). If the Soldier applies for CO status before AD or ADT orders are issued, and the Soldier's application cannot be processed before the Soldier's reporting date, the Soldier must comply with the orders (the application must, however, be sent to the proper Active Army GCMCA for processing). Members of the IRR may submit CO applications at their mobilization stations. Submission will not preclude further assignment or deployment during processing of the application.

IX. FAMILY PRESENTATIONS

A. **Congressional Requirement**.

1. Pub. L. 102-484, div. A, title X, § 1072, Oct. 23, 1992, 106 Stat. 2508 (10 U.S.C. § 113, note).

2. Requires the Service Secretaries to ensure that fatality reports and records pertaining to members of the Armed Forces who die in the line of duty are made available to Family members.

3. Within a reasonable period of time after the Family members are notified of the death, but not more than 30 days after the date of notification, the Secretary must:

a. in any case under investigation, inform the Family members of the names of the agencies conducting the investigation and of the existence of any reports by such agencies that have been or will be issued; and

b. furnish, if the Family members desire, a copy of any completed investigative report to the extent such reports may be furnished consistent with the Privacy Act and the Freedom of Information Act.

B. **Army Implementation**.

1. Resources:

a. AR 600-34, Fatal Training/Operational Accident Presentations to the Next of Kin (2 January 2003).

b. Army Dir. 2010-01, Conduct of AR 15-6 Investigations Into Suspected Suicides and Requirements for Suicide Incident Family Briefs (26 March 2010).

c. Army Dir. 2010-02, Guidance for Reporting Requirements and Redacting Investigation Reports of Deaths and Fatalities (26 March 2010).

2. Key Definitions.

a. *Fatal training accidents* include those accidents associated with non-combat military exercises or training activities that are designed to develop a Soldier's physical ability or to maintain or increase individual/collective combat and/or peacekeeping skills.

b. *Fatal operational accidents* are those deaths associated with active duty military exercises or activities occurring in a designated war zone or toward designated missions related to current war operations or Military Operations Other Than War, contributing directly or indirectly to the death.

c. *Primary Next of Kin PNOK).* The legal next of kin. That person of any age most closely related to the individual according to the line of succession. Seniority, as determined by age, will control when the persons are of equal relationship.

d. *Family member*:

(1) Spouse.

(2) Unmarried child of a sponsor, including an adopted child, step child, foster child or ward, who either: (a) has not passed his or her 21st birthday; (b) is incapable of self-support because of a mental or physical incapacity that existed before that birthday and is (or was at the time of the member's or former member's death) in

fact dependent on the sponsor for over one-half of his or her support; or (c) has not passed his or her 23rd birthday, is enrolled in a full-time course of study in an institution of higher learning and is in fact dependent on the sponsor for over one-half of his or her support.

(3) A parent or parent-in-law of a sponsor who is in fact dependent on the sponsor for one-half of his or her support and residing in the sponsor's household.

3. *Presentations Required for:*

a. All fatal training/operational accidents investigated under AR 15-6, AR 385-10 and AR 600-34.

b. Special interest cases or cases in which there is probable high public interest, as determined by The Adjutant General (TAG).

c. All suspected cases of friendly fire.

d. In general, fatal accidents that are hostile, but do not occur as a result of engagement with the enemy.

(1) "Hostile deaths" are defined as a death caused by terrorist activity or "in action."

(2) "In action" characterizes death as having been the direct result of hostile action, sustained in combat or related thereto, or sustained going to or returning from a combat mission, provided that the occurrence was directly related to hostile action.

e. Cases of confirmed suicide (IAW Army Directive 2010-01).

C. **Preparing the Presentation to the PNOK**.

1. Once the investigation is complete, the CMAOC contacts the collateral investigation appointing/approval authority to coordinate appointment of the briefer who is "most often the deceased Soldier's colonel or brigade level commander."

2. Within 24-hours of completion of the investigation, the CAO must inform the PNOK that the Army is prepared to discuss the results of the investigation with the Family. Presentations are offered to adult PNOK (18 years of age or older); for PNOK under 18, the adult custodian must decide the PNOK's ability to receive a face-to-face briefing.

3. Briefing Team.

a. At a minimum, the briefing team must consist of the briefer (O6 or higher), the Family's CAO and a chaplain from the mishap unit.

b. The briefer must consider including the SJA/legal advisor or PAO representative when it is apparent that a Family has invited (or may invite) the local media, or if a Family legal representative will attend the presentation.

(1) The CAO must work with the PNOK to obtain a list of people the PNOK intends to invite to the presentation to enable the presentation team to determine the Family's intent to invite media or legal representation.

(2) **NOTE**: The Army is prohibited from putting conditions or limitations upon those whom the Family wishes to invite to the presentation.

(3) The briefer must also consider including an interpreter if the PNOK or other attending Family members do not understand English.

D. **Conducting the Family Presentation**.

1. The briefer's primary responsibility is to meet personally with the PNOK and deliver a thorough, open explanation of the releasable facts and circumstances surrounding the accident. At a minimum, the briefer must provide the following:

a. An explanation of the unit's mission, highlighting the Soldier's significant contributions to the mission and the Army.

b. An accurate account of the facts and circumstances leading up to the accident; the sequence of events that caused the accident; and a very clear explanation of primary and contributing factors causing the accident, as determined by the collateral investigation.

c. Actions taken at the unit level to correct any deficiencies.

2. The most favored choice for the presentation is the PNOK's home.

3. Style of Presentation.

a. *Dialogue with no notes, but with maps and diagrams of training areas*. This works best for a briefer who is intimately familiar with the accident and investigation.

b. *Bullet briefing charts*. These work well as they tend to help the briefer stay focused. Charts must be reviewed and approved in advance by the SJA.

c. *Simple notes and an executive summary*. Written materials must be reviewed and approved by the SJA, and copies should be left with the PNOK, if requested.

4. If a Family presentation must proceed with a legal representative present, but without Army legal advice, the briefer must inform the PNOK that the presentation is strictly intended to provide information to the Family. If the attorney has a list of questions for the Family to ask, the briefer must offer to take the questions back to the servicing SJA to obtain complete answers. The SJA may then follow up directly with the PNOK.

E. **Completion of Family Presentation**. Within two weeks of the presentation, the briefer must submit an AAR through the appointing authority and MACOM to TAG.

F. **SJA Requirements**.

1. The SJA is required to review the presentation to ensure that it contains no admission of liability; no waiver of any defense; no offer of compensation; or any other statement that might jeopardize the Army's litigation posture. This may include a review of briefing charts, notes and executive summaries.

2. The SJA or legal advisor must provide a non-redacted copy of the collateral investigation report to CMAOC.

3. The regulation is not intended to provide the PNOK with information not otherwise releasable under the Privacy Act or the Freedom of Information Act.

a. The SJA must redact the collateral investigation report and prepare the required number of copies. At a minimum, the briefer, each team member and each PNOK will be given a redacted copy.

b. The SJA also must prepare a letter to accompany the redacted version of the report delivered to the Family explaining, in general terms, the reasons for the redactions.

G. **Release of the Legal Accident Investigation**. The legal accident investigation will be released in the following order:

1. PNOK and other Family members designated by the PNOK.

2. Members of Congress, upon request.

3. Members of the public and media.

H. **Navy and Marine Corps, JAGMAN, paras. 0233 & 0234**. Generally requires the Casualty Assistance Calls Officer to deliver the report of investigation to the next of kin, unless there is a reason for another individual to be assigned (e.g., technical subject-matter, personal friendship, etc.).

I. **Air Force, AFI 51-503, CH 9 (16 July 2004).**

1. Results of Accident Investigation Boards (AIB) must be briefed to the next of kin of deceased persons and seriously injured personnel.

2. Usually, the board president serves as the briefing officer. The briefing serves to:

a. Personally express the condolences of the Department of the Air Force.

b. Personally deliver a copy of the AIB report.

c. Provide a basic briefing on the investigation results, including the cause or factors contributing to the accident, and to answer questions.

APPENDIX

ARMY REGULATION 15-6
INVESTIGATION GUIDE
FOR
INFORMAL INVESTIGATIONS

INTRODUCTION

1. **PURPOSE**:

a. This guide is intended to assist investigating officers, who have been appointed under the provisions of Army Regulation (AR) 15-6, in conducting timely, thorough, and legally sufficient investigations. It is designed specifically for informal investigations, but some provisions are also applicable to formal investigations. It may also be used by legal advisors responsible for advising investigating officers. A brief checklist is included at the end of the guide as an enclosure. The checklist is designed as a quick reference to be consulted during each stage of the investigation. The questions in the checklist will ensure that the investigating officer has covered all the basic elements necessary for a sound investigation.

b. Investigating officers are encouraged to use this guide for general guidance regarding informal investigations. Investigating officers must consult their legal advisor for detailed guidance and assistance before commencing with the investigation.

c. This guide is based upon the 2 October 2006 version of AR 15-6.

2. **DUTIES OF AN INVESTIGATING OFFICER:** The primary duties of an investigating officer are:

a. to ascertain and consider the evidence on all sides of an issue;

b. to be thorough and impartial;

c. to make findings and recommendations warranted by the facts and comply with the instructions of the appointing authority; and

d. to report the findings and recommendations to the appointing authority.

3. **AUTHORITY**:

a. AR 15-6 sets forth procedures for the conduct of informal and formal investigations. Only informal investigations will be discussed here. Informal investigations are those that most often have a single investigating officer who conducts interviews and collects evidence. In contrast, formal investigations normally involve due process hearings for a designated respondent. Formal procedures are required whenever a respondent is specifically designated by the appointing authority.

b. Informal procedures are not intended to provide a hearing for persons who may have an interest in the subject of the investigation. Since no respondents are designated in informal procedures, no one is entitled to the rights of a respondent, such as notice of the proceedings, an opportunity to participate, representation by counsel, or the right to call and cross-examine witnesses. The investigating officer may, however, make any relevant findings or recommendations concerning individuals, even where those findings or recommendations are adverse to the individual or individuals concerned. If the appropriate authority decides to take action against an individual based upon an AR 15-6 investigation, that individual will then be afforded certain due process rights before adverse action is taken.

c. AR 15-6 is used as the basis for many investigations requiring the detailed gathering and analyzing of facts, and the making of recommendations based on those facts. AR 15-6 procedures may be used on their own, such as in an investigation to determine facts and circumstances, or the procedures may be incorporated by reference into directives governing specific types of investigations, such as financial liability investigations and line of duty investigations. If such directives contain guidance that is more specific than that set forth in AR 15-6, the more specific guidance will control. For example, AR 15-6 does not contain time limits for completion of investigations; however, if another directive that incorporates AR 15-6 procedures contain time limits, that requirement will apply.

d. Only commissioned officers, warrant officers, or DA Civilian employees paid under the General Schedule, Level 13 (GS 13), or above may be investigating officers. The investigating officer must, with very few exceptions, 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 must purposely select the best qualified person for the duty based on their **education, training, experience, length of service, and temperament**. If during the investigation, the investigating officer begins to suspect that adverse

findings will be made against someone senior to the investigating officer, the investigating officer must contact the legal advisor immediately.

PRELIMINARY MATTERS

1. **Appointing authority**.

a. Under AR 15-6, the following persons may appoint investigating officers for informal investigations: any general court-martial convening authority, including those who have such authority for administrative purposes only; any general officer; a commander at any level; a principal staff officer or supervisor in the grade of major or above; any state adjutant general; and a DA Civilian supervisor paid under the Executive Schedule, SES, or GS/GM 14 or above, provided the supervisor is the head of an agency or activity or the chief of a division or department.

b. Only a general court-martial convening authority may appoint an investigation for incidents resulting in property damage of $1M or more; loss or destruction of Army aircraft or missile; injury or illness likely to result in death or permanent total disability; death of one or more persons; or death of one or more persons by fratricide/friendly fire. If the investigating officer is conducting an investigation that involves one of these situations, and the investigation was not appointed by a general court-martial convening authority, the investigating officer must contact the legal advisor immediately. Errors in appointing authority nullify the investigation unless later ratified by an appropriate appointing authority.

c. For investigations of a death or deaths involving a deployed force(s), from what is believed to be hostile fire, the general court-martial convening authority may delegate, in writing, appointing/approval authority to a subordinate commander exercising special court-martial convening authority. If appointing/approval authority has been delegated and evidence is discovered during the investigation that indicates that the death(s) may have been the result of fratricide/friendly fire, the investigating officer **will immediately suspend the investigation and inform the appointing authority and legal advisor**. At this time the general court-martial convening authority will appoint a new investigation into the fratricide/friendly fire incident. Any evidence from the hostile fire investigation may be provided to the investigating officer or board conducting the fratricide/friendly fire investigation. The general court-martial convening authority may also appoint the same investigating officer if the investigating officer is still best qualified to perform the duty.

2. **Appointment procedures.** Informal investigation appointments may be made orally or in writing. If written, the appointment orders are usually issued as a memorandum signed by the appointing authority or by a subordinate with the appropriate authority line. Whether oral or written, the appointment should specify clearly the purpose and scope of the investigation and the nature of the findings and recommendations required. If the orders are unclear, the investigating officer should seek clarification. The primary purpose of an investigation is to report on matters that the appointing authority has designated for inquiry. The appointment orders may also contain specific guidance from the appointing authority, which, even though not required by AR 15-6, nevertheless must be followed. For example, AR 15-6 does not require that witness statements be sworn for informal investigations; however, if the appointing authority requires this, all witness statements must be sworn.

3. **Obtaining assistance.** The servicing Judge Advocate office can provide assistance to an investigating officer at the beginning of and at any time during the investigation. Investigating officers must 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 to first meet with the legal advisor 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 must be part of the final case file.

5. **Concurrent investigations.** An informal investigation may be conducted before, concurrently with, or after an investigation into the same or related matters by another command or agency. Appointing authorities and investigating officers must ensure that investigations do not hinder or interfere with criminal investigations or investigations directed by higher headquarters. In cases of concurrent investigations, investigating officers should coordinate with the other command or agency and other investigating officers to avoid duplication of investigative effort wherever possible. Information from other investigations may be incorporated into the AR 15-6 investigation and considered by the investigating officer but safety investigation information may not be shareable and severely limited to AR 15-6 investigating officers (AR 385-10). Likewise, a 15-6 investigating officer may be asked to share information with a concurrent investigation. The legal advisor should be consulted for guidance. Also, an investigating officer should immediately coordinate with the legal advisor if he or she discovers evidence of serious criminal misconduct. Criminal investigations by MPI or CID may take precedence.

CONDUCTING THE INVESTIGATION

1. **Developing an investigative plan.**

a. The investigating officer's primary duty is to gather evidence and make findings of fact and appropriate recommendations to the appointing authority. Before obtaining information, however, the investigating officer should develop an investigative plan that consists of: (1) an understanding of the facts required to reach a conclusion; and (2) a strategy for obtaining evidence. This should include a list of potential witnesses and a plan for when each witness will be interviewed. The order in which witnesses are interviewed may be important. An effective, efficient method is to interview principal witnesses last. This best prepares the investigating officer to ask all relevant questions and minimizes the need to re-interview 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, if gathered early, can save much valuable time and effort. Accordingly, the investigating officer should obtain this information at the beginning of the investigation. In some cases, the information will not be readily available, so the request should be made early so the investigating officer may continue to work on other aspects of the investigation while the request is being processed. The investigating officer should, if possible and appropriate, personally inspect the location of the events being investigated and take photographs if they will assist the appointing authority.

b. Investigating officers are limited to what physical evidence (i.e., photos, clothing, vehicles, house) they may examine (potentially a search) or take custody of (potentially a seizure) for purpose of their investigation. The investigating officer must first attempt to obtain the rightful owner’s permission to examine or take custody of privately-owned items. The investigating officer’s authority to search and seize privately-owned property is limited by the U.S. Constitution and Army regulation. Deliberately circumventing these limits may impact the investigation and the investigating officer. **Consult with your legal advisor if you need to examine or take custody of privately-owned property.**

c. A recurring problem that must be avoided is lack of documentation in investigations with findings of no fault, no loss, or no wrongdoing. It is just as important to support these findings with 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 and likely makes the investigation legally insufficient. Every conclusion the investigating officer makes must be supported by evidence. The report of investigation must include sufficient documentation to convince the appointing authority and others who may review the investigation that the finding of no fault, no loss, or no wrongdoing is supported by the evidence.

3. **Obtaining witness testimony.**

a. In most cases, witness testimony will be required. Clearly, the best interviews occur face-to-face; but, if necessary, interviews may be conducted by telephone or mail. Because of the preference for face-to-face interviews, telephone and mail interviews should be used only in unusual circumstances. Information obtained telephonically or by Video Teleconference or otherwise should be documented in a memorandum for record.

b. DA Form 2823.

(1) Statements should be taken on DA Form 2823. Although there is a box for the witness's social security number on the November 2006 version of DA 2823, there is no valid reason to require that information in an overwhelming majority of situations for privacy reasons. If a situation arises where a social security number is relevant and material to the investigation and thus must be collected, the information obtained must be properly safeguarded. Also, home addresses and phone numbers should not be recorded on the DA Form 2823 unless absolutely necessary.

(2) Legible handwritten statements and/or questions and answers are ordinarily sufficient. If the witness testimony involves technical terms that are not generally known outside the witness's field of expertise, the witness should be asked to define the terms the first time they are used.

c. Although AR 15-6 does not require that statements be sworn for informal investigations, the appointing authority, or other applicable regulation, may require sworn statements, or the investigating officer may, at his or her own discretion, ask for sworn statements, even where not specifically required. Under Article 136, UCMJ, military officers are authorized to administer the oath required to provide a sworn statement; 5 U.S.C. 303 provides this authority for Civilian employees. (Statements taken out of the presence of the investigating officer may be sworn before an official authorized to administer oaths at the witness's location.) Additionally, the statements must be properly sworn—that is proper raising of the hand, appropriate witnesses, etc.

d. Military personnel and Federal Civilian employees. Commanders and supervisors have the authority to order military personnel and to direct Federal employees to appear and testify. Some Civilian employees are members of unions, and may be subject to collective bargaining agreements that may impose conditions or limits on interviews of collective bargaining unit members. Prior to interviewing Civilian employees, the Investigating Officer should discuss potential limitations with the legal advisor.

e. Non-military affiliated civilians. Investigating officers do not have the authority to subpoena witnesses. Civilian witnesses who are not Federal employees may agree to appear, however, and, if necessary, be issued invitational travel orders. This authority should be used only if the information cannot be otherwise obtained (via telephone, Email, etc.) and only after coordinating with the legal advisor or appointing authority.

4. **Rights Advisement.**

a. All Soldiers suspected of criminal misconduct must first be advised of their rights. A DA Form 3881 should be used to record that the witness understands his or her rights and elects to waive those rights and make a statement or elects to invoke those rights and remain silent. It may be necessary to provide the rights warning at the outset of the interview. In some cases, however, an investigating officer will become aware of the witness's involvement in criminal activity only after the interview has started and incriminating evidence is uncovered. In such case, rights warnings must be provided as soon as the investigating officer suspects that a witness may have been involved in criminal activity. If a witness elects to assert his or her rights and requests an attorney, all questioning must cease immediately. Questioning may only resume in the presence of the witness's attorney, if the witness consents to being interviewed. The investigating officer should immediately consult with the legal advisor whenever a witness invokes the right to remain silent.

b. Note that these rights apply only to information that might be used to incriminate the witness. They cannot be invoked to avoid questioning on matters that do not involve violations of criminal law. Finally, these rights may be asserted only by the individual who would be accused of the crime. The rights cannot be asserted to avoid incriminating other individuals. The following example highlights this distinction.

c. Example: A witness who is suspected of stealing government property must be advised of his or her rights prior to being interviewed. However, if a witness merely is being interviewed concerning lost or destroyed government property in connection with a financial liability investigation, a rights warning would not be necessary unless evidence is developed that leads the investigating officer to believe the individual has committed a criminal

offense. If it is clear that the witness did not steal the property but has information about who did, the witness may not assert rights on behalf of the other individual.

5. **Scheduling witness interviews.** The investigating officer will need to determine which witnesses should be interviewed and in what order. Often, information provided by one witness can raise issues that should be discussed with another. Organizing the witness interviews will save time and effort that would otherwise be spent "backtracking" to re-interview prior witnesses concerning information provided by subsequent witnesses. While re-interviewing may be unavoidable in some circumstances, it should be kept to a minimum. The following suggests an approach to organizing witness interviews, but it is not mandatory.

a. When planning who to interview, identify the people who are likely to provide the best information. When conducting the interviews, start with witnesses that will provide all relevant background information and frame the issues. This will allow the later interviews of principal witnesses to be as complete as possible, avoiding the "backtracking" described above.

b. Concentrate on those witnesses who would have the most direct knowledge about the events in question. Without unnecessarily disclosing the evidence obtained, attempt to seek information that would support or refute information already obtained from others. In closing an interview, it is appropriate to ask if the witness knows of any other persons who might have useful information or any other information the witness believes may be relevant and material to the inquiry. It is also often prudent to ask one final open-ended question of each witness: “is there anything else you think I should know or anything else you want to say?”

c. Any information that is relevant and material should be collected regardless of the source. However, investigating officers should collect the best information available from the most direct source.

d. It may be necessary or advisable to interview experts having specialized understanding of the subject matter of the investigation.

e. At some point, there will be no more witnesses available with relevant and material information. It is not necessary to interview every member of a unit, for example, if only a few people have information relevant to the inquiry. Also, all relevant witnesses do not need to be interviewed if the facts are clearly established and not in dispute. However, the investigating officer must be careful not to prematurely terminate an investigation because a few witnesses give consistent testimony.

6. **Conducting witness interviews.** Before conducting witness interviews, investigating officers may consult Inspector General officials or law enforcement personnel such as Military Police officers or Criminal Investigation Division agents for guidance on interview techniques. The key for the investigating officer is to gather all the evidence necessary to answer the appointment order’s charge. If the investigating officer doesn’t gather proper evidence, the investigating officer’s job becomes infinitely more complicated. The following suggestions may be helpful:

a. <u>Prepare for the interview</u>. While there is no need to develop scripts for the witness interviews, investigating officers may wish to review the information required and prepare a list of questions or key issues to be covered. This will prevent the investigating officer from missing issues and will maximize the use of the officer's and witness's time. Generally, it is helpful to begin with open-ended questions such as "Can you tell me what happened?" After a general outline of events is developed, follow up with narrow, probing questions, such as "Did you see SGT X leave the bar before or after SGT Y?" Weaknesses or inconsistencies in testimony can generally be better explored once the general sequence of events has been provided.

b. <u>Ensure the witness's privacy</u>. Investigating officers should conduct the interview in a place that will be free from interruptions and will permit the witness to speak candidly without fear of being overheard. Witnesses should not be subjected to improper questions, unnecessarily harsh and insulting treatment, or unnecessary inquiry into private affairs.

c. <u>Focus on relevant and material information</u>. Unless precluded for some reason, the investigating officer should begin the interview by telling the witness about the subject matter of the investigation. Generally, any evidence that is relevant and material to the investigation is permissible. The investigating officer should not permit the witness to get off track on other issues, no matter how important the subject may be to the witness. Information should be relevant and material to the matter being investigated. Relevancy depends on the circumstances in each case. Compare the following examples:

(1) Example 1: In an investigation of a loss of government property, the witness's opinions concerning the company commander's leadership style normally would not be relevant.

(2) Example 2: In an investigation of alleged sexual harassment in the unit, information on the commander's leadership style might be relevant.

(3) Example 3: In an investigation of allegations that a commander has abused command authority, the witness's observation of the commander's leadership style would be highly relevant.

d. Let the witness testify in his or her own words. Investigating officers must avoid coaching the witness or suggesting the existence or non-existence of material facts. After the testimony is completed, the investigating officer should assist the witness in preparing a written statement that includes all relevant information, and presents the testimony in a clear and logical fashion. Written testimony also should reflect the witness's own words and be natural. Stilted "police blotter" language is not helpful and detracts from the substance of the testimony. A tape recorder may be used, but the witness should be advised of its use (and the legal advisor should be consulted before interviews are recorded) Additionally, the tape should be safeguarded, even after the investigation is completed.

e. Protect the interview process. In appropriate cases, an investigating officer may direct witnesses not to discuss their statement or testimony with other witnesses or with persons who have no official interest in the proceedings until the investigation is complete. This precaution is recommended to eliminate possible influence on testimony of witnesses still to be heard. Witnesses, however, are not precluded from discussing matters with counsel.7. **Rules of Evidence**: Because an AR 15-6 investigation is an administrative and not a judicial action, the rules of evidence normally used in court proceedings do not apply. Therefore, the evidence that may be used is limited by only a few rules. The investigating officer should consult the legal advisor if he or she has any questions concerning the applicability of any of these rules.

a. The information must be relevant and material to the matter or matters under investigation. Irrelevant information must not be included in the investigation.

b. Information obtained in violation of an individual's Article 31, UCMJ, or 5th Amendment rights *may* be used in administrative proceedings unless obtained by unlawful coercion or inducement likely to affect the truthfulness of the statement.

c. Evidence of the results, taking, or refusal of a polygraph examination will not be considered without the consent of the person involved in such test.

d. Privileged communications between husband and wife, priest and penitent, attorney and client may not be considered, and present or former inspector general personnel will not be required to disclose the contents of inspector general reports, investigations, inspections, action requests, or other memoranda without appropriate approval.

e. "Off-the-record" statements will not be considered for their substance but can be relied upon to help find additional evidence.

f. An involuntary statement by a member of the Armed Forces regarding the origin, incurrence, or aggravation of a disease or injury may not be admitted.

8. **Standard of Proof.** Since an investigation is not a criminal proceeding, there is no requirement that facts and findings be proven beyond a reasonable doubt. Instead, unless another specific directive states otherwise, AR 15-6 provides that findings must be supported by "a greater weight of evidence than supports a contrary conclusion." That is, findings should be based on evidence which, after considering all evidence presented, points to a particular conclusion as being more credible and probable than any other conclusion. This is also known as the preponderance of the evidence.

CONCLUDING THE INVESTIGATION

1. **Preparing Findings and Recommendations.** After all the evidence is collected, the investigating officer must review it and make findings. The investigating officer should consider the evidence thoroughly and impartially, and make findings of fact and recommendations that are supported by the facts and comply with the instructions of the appointing authority.

a. Facts: To the extent possible, the investigating officer should fix dates, places, persons, and events, definitely and accurately. The investigating officer should be able to answer questions such as: What occurred? When did it occur? How did it occur? Why did it occur? Who was involved, and to what extent?

b. Findings: A finding is a clear and concise statement that can be deduced from the evidence in the record. In developing findings, investigating officers are permitted to rely on the facts and any reasonable inferences that may be drawn from those facts. In stating findings, investigating officers should refer to the exhibit or exhibits relied upon in making each finding. Findings (including findings of no fault, no loss, or no wrongdoing) must be supported by the documented evidence that must become part of the report. Exhibits should be numbered in the order they are discussed in the findings.

c. Recommendations: Recommendations should take the form of proposed courses of action consistent with the findings, such as disciplinary action, imposition of financial liability, or corrective action. Recommendations must be supported by the facts and consistent with the findings. Each recommendation should cite the specific findings that support the recommendation.

d. Facts, findings, and recommendations may be provided in a separate memorandum attached to the DA 1574. In that event, the DA 1574 should be appropriately annotated to accurately identify the memorandum.

2. **Preparing the Submission to the Appointing Authority.** After developing the findings and recommendations, the investigating officer should complete DA Form 1574 and assemble the packet.

a. All administrative documents, such as the memorandum of appointment, rights warning statements, Privacy Act statements, and chronology, will be marked as enclosures.

b. Every item of evidence offered or received by the investigating officer (with index) will be marked as exhibits.

c. Care should be taken to organize the investigation in a logical, coherent, useful manner.

3. **LEGAL REVIEW**:

a. AR 15-6 does not require that all informal investigations receive a legal review. The appointing authority, however, must get a legal review of all cases involving serious or complex matters, such as where the incident being investigated has resulted in death or serious bodily injury, or where the findings and recommendations may result in adverse administrative action, or will be relied on in actions by higher headquarters. Nonetheless, appointing authorities are encouraged to obtain legal review of all investigations and most do seek out such legal reviews. Other specific directives may also require a legal review. Generally, the legal review will determine:

(1) whether the investigation complies with requirements in the appointing order and other legal requirements;

(2) the effects of any errors in the investigation;

(3) whether the findings (including findings of no fault, no loss, or no wrongdoing) and recommendations are supported by sufficient evidence; and

(4) whether the recommendations are consistent with the findings.

b. If a legal review is requested or required, it is required before the appointing authority approves the findings and recommendations. After receiving a completed AR 15-6 investigation, the appointing authority may approve, disapprove, or modify the findings and recommendations, or may direct further action, such as the taking of additional evidence, or making additional findings.

CHECKLIST FOR INVESTIGATING OFFICERS

1. **Preliminary Matters:**

a. Has an appropriate level appointing authority appointed a proper investigating officer based on seniority, availability, experience, and expertise?

b. Does the appointment memorandum clearly state the purpose and scope of the investigation, the points of contact for assistance (if appropriate), and the nature of the findings and recommendations required?

c. Has the initial legal briefing been accomplished?

2. **Investigative Plan.**

a. Does the investigative plan outline the background information that must be gathered, identify the witnesses who must be interviewed, and order the interviews in the most effective manner?

b. Does the plan identify witnesses no longer in the command and address alternative ways of interviewing them?

c. Does the plan identify information not immediately available and outline steps to quickly obtain the information?

3. **Conducting the Investigation.**

a. Is the chronology being maintained in sufficient detail to identify causes for unusual delays?

b. Is the information collected (witness statements, MFR's of phone conversations, photographs, etc.) being retained and organized?

c. Is routine coordination with the legal advisor being accomplished?

d. Is all evidence relevant and material to an issue being investigated?

4. **Preparing Findings and Recommendations.**

a. Is the evidence assembled in a logical, coherent, and useful fashion?

b. Are the findings (including findings of no fault, no loss, or no wrongdoing) supported by the evidence? Does each finding cite the exhibits that support it?

c. Are the recommendations supported by the findings?

d. Are the findings and recommendations responsive to the tasking in the appointment memorandum?

e. Did the investigation address all the issues (including systemic breakdowns; failures in supervision, oversight, or leadership; program weaknesses; accountability for errors; and other relevant areas of inquiry) raised directly or indirectly by the appointment?

5. **Final Action.**

a. Was an appropriate legal review conducted?

b. Is the investigation being turned in on time?

CHAPTER 21

LEGAL ASSISTANCE IN OPERATIONS

REFERENCES

1. U.S. DEP'T OF ARMY, REG. 27-3, THE ARMY LEGAL ASSISTANCE PROGRAM (21 Feb. 1996) (RAR 13 Sept. 2011).
2. U.S. DEP'T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS (1 May 1992).
3. U.S. DEP'T OF ARMY, REG. 600-8-101, PERSONNEL PROCESSING (IN-OUT-, SOLDIER READINESS MOBILIZATION, AND DEPLOYMENT PROCESSING) (18 July 2003).
4. U.S. DEP'T OF ARMY, PAM. 600-8-101, PERSONNEL PROCESSING (IN-OUT-, SOLDIER READINESS MOBILIZATION, AND DEPLOYMENT PROCESSING) (28 May 2003).
5. U.S. DEP'T OF AIR FORCE, INSTR. 51-504, LEGAL ASSISTANCE, NOTARY, AND PREVENTIVE LAW PROGRAMS (27 Oct. 2003, incorporating through change 2, 24 May 2012).
6. JAGINST 5801.2A, NAVY-MARINE CORPS LEGAL ASSISTANCE PROGRAM (26 Oct 2005).
7. COMDTINST 5801.4E, LEGAL ASSISTANCE PROGRAM (26 Oct. 2005).
8. U.S. DEP'T OF ARMY, FIELD MANUAL 1-04, LEGAL SUPPORT TO THE OPERATIONAL ARMY (26 Jan. 2012).
9. CENTER FOR LAW AND MILITARY OPERATIONS (CLAMO), FORGED IN THE FIRE: LESSONS LEARNED DURING MILITARY OPERATIONS (1994–2008).
10. https://www.milsuite.mil/book/groups/army-legal-assistance.

I. INTRODUCTION

A. Personal legal problems can affect Soldiers' combat efficiency and detract from their ability to concentrate on the military mission at hand. One objective of the Army Legal Assistance Program is to enhance combat efficiency by assisting Soldiers with their personal legal issues.

B. From an operational standpoint, servicing Judge Advocates (JAs) must ensure that Soldiers' personal legal affairs are in order prior to deployment. Once deployed, JAs assist Soldiers in resolving their problems quickly and efficiently. The broad nature of the legal assistance mission makes it impossible to summarize all of the laws and resources a practitioner may need during a deployment. This chapter outlines certain situations, identifies resources and highlights some recurring substantive issues that may arise.

II. PREPARATION FOR EXERCISES, MOBILIZATION, AND DEPLOYMENT

A. Aggressive pre-deployment preventive law efforts can often eliminate or reduce legal assistance problems that arise during deployment.

B. The Office of the Staff Judge Advocate (OSJA) and Brigade Judge Advocate (BJA) must ensure Soldiers' legal affairs are reviewed and updated at least annually, and more frequently as expected deployments near. Judge Advocates should look for opportunities to raise awareness of frequently encountered issues to deploying Soldiers. Prior to deployment, both the Soldier and the Soldier's family must be prepared. For the Soldier, this preparation is an ongoing effort that should begin upon arrival at the unit and end only upon transfer.

III. SOLDIER READINESS PROGRAM (SRP)

A. AR 600-8-101 establishes the SRP and mandates that Soldiers of the Active Army (AA), the Army National Guard (ARNG), and those who serve with units in the United States Army Reserves (USAR) undergo a comprehensive SRP annually and within thirty days of a deployment.[1]

[1] *See* U.S. DEP'T OF ARMY, REG. 600-8-101, PERSONNEL PROCESSING (IN-, OUT-, SOLDIER READINESS, MOBILIZATION, AND DEPLOYMENT PROCESSING) (18 July 2003).

1. Ten functional areas comprise the SRP: deployment validation; personnel; finance; legal; logistics; training; security; medical; dental; and vision. Accordingly, the legal portion of the SRP is part of a broader assessment of a Soldier's readiness and availability for deployment.

2. DA Form 7425 serves as a checklist and the focal point for the SRP.[2] JAs must ensure the most current edition of the DA From 7425 is being used by the SRP, as previous editions created the foundation for a violation of client confidence with the Lautenberg Amendment check.

B. At a minimum, the SRP requires Soldiers receive counseling about wills and powers of attorney (POA).[3] DA Form 7425 requires a determination of whether or not the Soldier has a domestic violence investigation pending. This latter requirement is important to the command because Servicemembers with "a qualifying crime of domestic violence are non-deployable for missions that require possession of firearms or ammunition."[4] Legal Assistance Attorneys (LAAs) may counsel individual Servicemembers regarding domestic violence matters; however, LAAs must be aware of the potential for creating a confidentiality issue under AR 27-26.[5] At the SRP, DA Form 7425 requires the G-1 to confirm whether there is a domestic violence issue. If there is a problem, personnel from that section report it to the command and should send the Soldier to the LAA for help. Finally, in the area of training, the SRP requires a check on whether Soldiers have received certain briefings. Depending on the nature of the deployment and the unit, these briefings could cover the UCMJ, the Geneva Conventions, the law of land warfare, the Servicemembers Civil Relief Act (SCRA), and the Uniformed Services Employment and Reemployment Rights Act (USERRA). An SRP standardized training packet is available on JAGCNet.

IV. OSJA, BCT, AND LAO PREPARATION AND PLANNING FOR THE SRP AND DEPLOYMENT

A. In broad terms, effective legal support for deployment depends on the following factors:

1. Familiarity with the general legal support needed during mobilization and deployment, so that legal services at the BCT or OSJA, are organized.

2. Knowledge of the requirements in each substantive area of the law (including tax law) so that all legal personnel are properly trained and proper references and forms are available.

3. Opportunities to participate in predeployment exercises to test deployment plans and training.

4. Effective utilization of RC legal personnel wherever feasible.

5. Establishment of good working relationships with key Corps, Division, and installation personnel.

B. LAOs and BCT JAs should aggressively sponsor preventive law programs to educate Soldiers and their families before deployment occurs. At a minimum, topics covered should include:

1. <u>Eligibility for legal assistance</u>.

2. <u>SGLI designations</u>.

a. Ensure proper designation and coordination with will and other estate planning documents.

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[2] Similar to DA Form 5123. U.S. Dep't of Army, DA Form 5123, In- and Out-Processing Records Checklist (April 2010). Like DA Form 7425, DA Form 5123 can be an indicator of the Soldier's individual readiness posture. *See* U.S. DEP'T OF ARMY, REG. 600-8-101, PERSONNEL PROCESSING (IN-, OUT-, SOLDIER READINESS MOBILIZATION, AND DEPLOYMENT PROCESSING) (18 July 2003).

[3] The instructions for DA Form 7425 on this point are as follows:

> All deployees will be encouraged to attend the Premobilization Legal Briefing and take care of all their legal needs at Home Station. This includes the need for a will (wills if married), power(s) of attorney and other legal issues. If required, deployees will be afforded the opportunity to obtain legal advice regarding all legal issues. Certification will be made by a judge advocate or other qualified personnel who are supervised by a judge advocate (paralegal or NCO/Specialist . . . .

U.S. Dep't of Army, DA Form 7425, Readiness and Deployment Checklist at Instruction Section V, Item 1 (Sep. 2010).

[4] *Id.* at Sec. II, Item 22.

[5] U.S. DEP'T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS (1 May 1992).

b. If the Servicemember has or wants a testamentary pre residuary life insurance trust that is to be funded using SGLI proceeds, then the Servicemember needs to ensure that the SGLV 8286 (i.e., the life insurance beneficiary designation form) lists the beneficiary as follows: "To my trustee to fund a trust established for the benefit of my children under my will."

c. If the Servicemember prefers to put his SGLI proceeds in a custodial account for the benefit of his minor children rather than in a trust, then the Servicemember needs to ensure that the SGLV 8286 (i.e., the life insurance beneficiary designation form) lists the beneficiary as follows: "To X, as custodian for each of my children pursuant to UGMA / UTMA of State Y with distribution to each minor when that minor reaches age … (e.g., 18 or 21)."

3. Wills.

a. Educate clients on the need for comprehensive estate planning. Provide them information about other ancillary documents they may need, such as living wills (i.e., advanced medical directives), health care POAs (i.e., health care proxies), durable POAs, and mortuary planning.

b. Educate clients on the need and the best way to provide for minor children using such means as testamentary trusts, custodial accounts (e.g., UGMA/UTMA), and guardianships.

c. Provide information to clients regarding possible estate tax savings provisions that may be used in their estate plan, such as credit shelter and marital deduction trusts (e.g., QTIP and QDOTs), and gifting property.

d. Educate clients on the need for their spouses to create wills, advanced medical directives, and POAs.

e. Educate clients on the need for executors to file estate tax returns in a timely manner in the event of a spouse's death. By timely filing an estate tax return and making the requisite election, the surviving spouse may be able to use the unused portion of the decedent spouse's unified credit (i.e., portability).

f. Visit http://www.loc.gov/rr/frd/Military_Law/Admin-Law-Department.html for more information.

4. POAs.

a. Due to possibly long durations of deployments, Servicemembers should anticipate the likelihood that a POA might expire prior to their return and be briefed on the availability of obtaining POA services in theater.

b. Although valid without raised seals, a raised notary seal often promotes broader acceptance of the POA by businesses.

c. No business or other entity is required to accept a POA. Soldiers should confirm with businesses at which the POAs might be used whether the businesses will accept a POA issued by the military, or whether the business requires the use of a POA that the business, itself, has created. Some business may require a special, or limited, POA.

5. SCRA.

a. Soldiers should be briefed on the SCRA's provisions governing a Soldier's ability—or inability—to change or delay court dates now or while deployed.

b. Soldiers should be briefed on the SCRA's applicability to residential lease terminations, car lease terminations, cell phone contract terminations, and other applicable provisions.

c. Soldiers should be briefed on the SCRA's 6% interest protection for pre-active duty obligations. Please note that 6% interest rate protections frequently change, often expanding in applicability. Legal Assistance Attorneys must keep current on all SCRA updates.

6. Family law issues.

a. Soldiers must understand that a Family Care Plan (FCP) that proposes to place the Servicemember's child with some person other than the other biological parent of that child (unless the child remains with the child's new adoptive parent) may be subject to challenge in court. Soldiers should be briefed on prophylactic measures that may help head off later challenges to a FCP by a non-military parent. Some measures may include the desirability of obtaining written consent from the other biological parent, or a court order in the event the Soldier plans to place the child in the custody of a third party, non-biological, and non-adoptive parent.

b. Servicemembers must understand that their support obligations under applicable service family support regulations are not relieved by deployment. They must plan for the continued support of family members during the period of deployment.

c. Soldiers must understand that the SCRA will afford little relief, in the form of continuances or delays, in family law actions in which the well-being of a child (e.g., child support or custody) is at issue.

d. Soldiers sometimes seek to be married by proxy while deployed. Four states (Colorado, Montana, Texas, and solely for Servicemembers abroad, California) allow marriages by proxy or by VTC. Montana permits double proxy marriages.

7. Consumer law issues.

a. Be aware of and inform Soldiers of the current consumer scams in the local area, and warn them that dependents may be targeted by unscrupulous businesses during the deployment.

b. Single Soldiers should forward mail to a trusted family member or friend to look for bills.

c. Advise Soldiers not to purchase high-priced items during deployments so they do not lay the foundation for a lifestyle beyond their means upon redeployment.

d. Provide information to Soldiers on the common pitfalls involved with purchasing a car. Educate Soldiers on the proper way to purchase a car, which includes negotiating for not only the cost of the car, but also the cost of the credit to purchase the car, as well as the insurance.

e. Provide information on how to properly manage the additional income that comes with a deployment.

d. Educate Soldiers on the Consumer Financial Protection Bureau's (CFPB) Office of Servicemember Affairs[6], and the resources provided by this government agency to our Soldiers.

8. Tax issues.

a. Provide information to Servicemembers regarding whether the area is designated a Qualified Hazardous Duty Area (QHDA) or Combat Zone (CZ) for income tax purposes. Servicemembers who are deployed in a QHDA or CZ are eligible for tax relief.

b. Provide information to Servicemembers regarding extensions of time to file taxes and other delays of tax actions. In general, Servicemembers have 180 days after the later of the Servicemember's return from deployment to a CZ or the last day of any continuous qualified hospitalization for injury from service in a CZ, plus the number of days that were left for the Soldier to take the action with the IRS when the Soldier entered the CZ. For example, generally, a taxpayer has 3 ½ months (i.e., until April 15) to file his tax return. Any days of this 3 ½ month period that were left when a Soldier entered the CZ are added to the 180 days when determining the last day allowed for filing the Soldier's tax return. See IRS Pub 3, Armed Forces' Tax Guide at www.irs.gov.

c. If the IRS sends a notice of examination before learning that the taxpayer qualifies for a deadline extension, the taxpayer should return the notice with "COMBAT ZONE" written across the top. No penalties or interest will be imposed for failure to file a return or pay taxes during the extension period.

d. For more information, visit http://www.loc.gov/rr/frd/Military_Law/Admin-Law-Department.html or milBook at https://www.milsuite.mil/book/groups/army-tax-professionals.

9. Reemployment rights issues (USAR and ARNG).

C. BCT JAs and Chiefs of Legal Assistance should ensure that their offices have an SRP SOP. To tailor the SOP, BCT JAs and Chiefs of Legal Assistance need to be familiar with the installation/unit SRP SOP or operations plan and should coordinate, in advance, with other staff elements. A key issue will be to ensure that the installation/unit plans to conduct the SRP in a suitable location; that is, a location conducive to the delivery of competent and confidential legal services. Some issues to address in the SOP might include:

1. Establishing the simultaneous administration of the SRP site and the LAO.

2. Designating the teams of attorneys and paralegal specialists who will staff the SRP site.

[6] http://www.consumerfinance.gov/servicemembers/

3. Designating the teams of attorneys and paralegal specialists who will staff the LAO during the SRP.

4. Anticipating whether and how to reschedule LAO hours of operation.

5. Anticipating whether it will be necessary to suspend the delivery of certain routine legal assistance services during the SRP.

6. Considering whether RC JAs and paralegal specialists are available for rotations at the SRP site.[7]

7. Considering whether RC JAs and paralegal specialists are available for rotations at the LAO.

V. DEPLOYMENT

A. Legal Assistance occurs during deployment. Brigade Judge Advocates must plan ahead for the delivery of this service. They must determine in advance what resources will be available in theater, what the supported unit will provide, and what appropriated or contingency funds will be available.

B. The nature of combat causes legal assistance services to become more urgent in Soldiers' minds. Legal issues take on significant immediate importance to the client, the command, and the servicing attorney. The provision of legal assistance during combat deployments may occur anywhere within the theater, and JAs should expect to respond to inquiries from Soldiers in-country. All deployed attorneys should anticipate being requested to provide assistance to Soldiers.

C. Deployed JAs should expect to:

1. Handle the same legal assistance problems seen in garrison.

2. Establish liaison with communication, transportation, and aviation elements for contact and courier service with JAs in the rear detachment (the installation from which the deployment took place) and for service throughout the theater.

3. Establish liaison with the U.S. Consulate at the deployment location for overseas marriage and adoption coordination, and the implementation of emergency leave procedures.

4. Establish a client tracking system, perhaps in coordination with the rear detachment.

5. Find a dedicated area to work, with a phone and unclassified internet access. Try to locate an area that allows for confidential discussion.

6. Answer questions regarding marriage to, or adoption of, foreign nationals.

7. Handle a high volume of family law issues, including the need to obtain CONUS civilian counsel for clients.

8. Help Servicemembers apply for citizenship.

9. Establish a plan to handle client conflicts during the deployment.

10. Coordinate travel to other locations to provide legal assistance support throughout the area of operations (AO).

11. Determine which civilian contractors in the AO are eligible to receive legal assistance by reviewing the applicable DoD contracts.

12. Coordinate for legal assistance coverage when potential conflicts of interest arise within the office providing legal assistance.

13. Beginning on 1 November 2013, the Army instituted a Special Victims Counsel (SVC) Program through TJAG Policy Letter 14-01. The manpower for the SVC Program is currently being drawn from the JAs in Legal Assistance Offices around the world. When planning for a deployment, SJAs must forecast that the Legal

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[7] Before and during large operations, local civilian attorneys may contact SJAs offering to volunteer in the LAO or at SRPs. SJAs in the grade of Lieutenant Colonel or higher may accept voluntary legal services. The services accepted must be within the scope of the Army Legal Assistance Program, and the volunteer attorneys must be licensed in the jurisdiction where they provide the legal assistance services. *See* Memorandum, Office of the Judge Advocate General, U.S. Army, Legal Assistance Policy Division, subject: Acceptance of Voluntary Service (29 Apr. 2003).

Assistance Attorney assigned to an SVC position could be called at any time to conduct the responsibilities of that position, and therefore not be available for pre-deployment operations, nor possibly standard legal assistance duties while deployed. An SVC JA's primary duty is to conduct the duties of the SVC, over other legal assistance duties.

D. Deployed JAs should plan on delivering tax assistance in theater. Although family members can file tax returns at the home station with POAs, JAs in theater will probably need to produce an information paper addressing basic tax issues, including a discussion of filing extensions. Both JAs and paralegals should obtain tax training before deployment. They will also want to consider opening a tax center.

VI. RECURRING SUBSTANTIVE DEPLOYMENT LEGAL ASSISTANCE ISSUES

A. **Family Care Plans (FCP)**.[8]

1. Army Regulation 600-20 requires single parent Soldiers and dual military couples with minor children to implement a FCP to provide for the care of their family members when military duties prevent the Soldier from doing so.[9] Plans must be made to ensure dependent family members are properly and adequately cared for when the Soldier is deployed, on TDY or otherwise not available due to military requirements. Commanders have the responsibility to ensure Soldiers complete FCPs.

2. Significant problems have arisen when the caretaker designated in the FCP is not the other biological parent of the minor children. A biological parent has, absent other considerations, superior custodial rights over others the Soldier-parent may wish to designate in a FCP. There have been several cases where a non-custodial biological parent has sought to exercise parental rights while the Soldier is deployed. Soldiers have unsuccessfully attempted to defend against such lawsuits by invoking the SCRA. Several states have passed laws protecting a Soldier-parent's custodial rights when a deployment disrupts them.

3. Family care plans are not effective in preventing judicial scrutiny of the Servicemember's proposed custodial arrangement. If deploying Soldiers wish to place their children in the custody of someone other than the other biological or the adoptive parent of the child, this should be accomplished by executing an agreement that is judicially reviewed for appropriateness, or by securing a court order to that effect. Recognizing these problems and resolving them before deployment is critical to success with this issue.

B. **Naturalization and Immigration**.

1. <u>Naturalization: Becoming a U.S. Citizen</u>.

a. Expedited Naturalization of Non-U.S. Citizen Servicemembers.

(1) Eligibility. Waivers of age, lawful permanent resident status, and physical presence requirements are available for non-citizens who wish to apply for U.S. citizenship and who served honorably during WWI, WWII, the Korean War, Vietnam,[10] Operations Desert Shield/Desert Storm,[11] or any subsequent period of armed conflict designated by presidential executive order.[12] This benefit is currently in effect for servicemembers on active duty for any period since 11 September 2001[13]; however, judge advocates should be aware that this benefit will expire upon mission completion of current hostilities. Upon expiration, servicemembers can still obtain a waiver for physical presence requirement of the naturalization, provided he served honorably for one year and applies for naturalization while in service or within six months of separation.[14]

(2) Process. To begin the naturalization process, with service designated representative's assistance, a servicemember must complete naturalization forms N-400 and N-426, have fingerprints[15] and photos taken, prepare

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[8] *See* U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY (18 Mar. 2008) (RAR 20 Sept. 2012).
[9] *Id.* para. 5-5.
[10] Exec. Order No. 12,081, 43 Fed. Reg. 42237 (Sept. 18, 1978) (designating the period from Feb. 28, 1961 to Oct. 15, 1978).
[11] Exec. Order No. 12,939, 59 Fed. Reg. 61231 (Nov. 22, 1994) (designating the period from Aug. 2, 1990 to Apr. 11, 1991).
[12] 8 U.S.C.A. § 1440 (West 2012); *see also* 8 C.F.R. pt. 329 (2012).
[13] Exec. Order No. 13,269, 67 Fed. Reg. 45287 (July 3, 2002).
[14] 8 U.S.C.A. § 1439; *see also* 8 C.F.R. pt. 328.
[15] For servicemembers within the United States and its territories, fingerprints must be taken at U.S. Citizenship and Naturalization Services (USCIS) Application Support Center, and for those outside of U.S. territories, USCIS will accept fingerprints taken by MP or security manager. U.S. HUMAN RES. COMMAND, THE SOLDIER'S GUIDE TO CITIZENSHIP APPLICATION 9─10 (Sept. 2011)[hereinafter SOLDIER'S NATURALIZATION GUIDE], *available at* https://www.hrc.army.mil/site/ASSETS/PDF/SoldierGuideCit.pdf

supporting documents, and submit the packet to the U.S. Citizenship and Immigration Services (USCIS) Nebraska Service Center.[16] Deploying or overseas servicemembers may request overseas processing of naturalization.[17]

b. Naturalization of Deceased Servicemembers. A non-citizen servicemember who served during a designated period of armed hostilities[18] and died due to service-related injury or disease qualifies for posthumous U.S. citizenship.[19] The next of kin or Secretary of Defense (or the service designee to the USCIS) with next of kin's consent must apply within two years of servicemember's death by filing naturalization form N-644 to the California Service Center.[20] Posthumous citizenship will provide surviving non-citizen spouse or dependents with a special immigration or naturalization benefit.[21]

c. Naturalization of Servicemember's Non-U.S. Citizen Spouse and Dependents.

(1) A spouse of U.S. citizen servicemember who will deploy or be stationed overseas will be eligible for an expedited naturalization process, waiving period of residence and physical presence requirements.[22]

(2) A surviving spouse, child, or parent of a U.S. citizen servicemember (including posthumous naturalized citizen) who served honorably during a designated period of armed hostilities and died due to service-related injury or disease is eligible for naturalization process, waiving period of residence and physical requirements.[23]

(3) Since 2008, a lawful permanent resident spouse who resides with the servicemember-spouse abroad under official orders is eligible for overseas naturalization processing.[24]

(4) A foreign born, biological or adopted child of U.S. citizen servicemember is eligible for U.S. citizenship automatically when the child is a lawful permanent resident of the United States, is under the age of eighteen, and resides in the United States.[25] If the foreign born child resides abroad, such child is eligible for overseas naturalization when the child is under the age of eighteen and the U.S. citizen parent meet certain physical presence requirement in the United States.[26] These benefits do not apply to a step child of a U.S. citizen servicemember.[27]

2. Immigration: Becoming a Lawful Permanent Resident ("Green Card Holder").

a. Servicemember's Marriage to a Foreign Citizen. Provided service policy[28] on marrying a foreign citizen abroad is met, a servicemember may sponsor a foreign fiancé(e) for K-1 nonimmigrant visa[29] before marriage in the United States or may sponsor a foreign spouse for immigrant visa[30] after marriage abroad. Both

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[16] *See id.*; U.S. DEP'T OF NAVY, U.S. NAVY GUIDE TO NATURALIZATION APPLICATIONS BASED ON QUALIFYING MILITARY SERVICE (8 U.S.C. 1439 and 1440) (22 June 2011), *available at* http://www.jag.navy.mil/organization/documents/Navy_Immigration_Guide.pdf; U.S. MARINE CORPS, MARINE CORPS ORDER (MCO) P5800.16A, MARINE CORPS MANUAL FOR LEGAL ADMINISTRATION 14-10 to -24 (31 Aug. 1999) (C5, 28 Nov. 2005) [hereinafter LEGADMINMAN], *available at* http://www.donsapro.navy.mil/PolicyandInsturctions/MCO%20P5800.16A%20CH%201-5.pdf; U.S. AIR FORCE PERS. CTR., PERSONNEL SERVICE DELIVERY GUIDE: TOTAL FORCE U.S. CITIZENSHIP (1 Nov. 2011), *available at* http://www.jber.af.mil/shared/media/document/AFD-110209-045.pdf.

[17] SOLDIER'S NATURALIZATION GUIDE, *supra* note 15, at 12─14.

[18] *See supra* notes 8─12 and accompanying text.

[19] 8 U.S.C.A. § 1440-1 (West 2012); *see also* 8 C.F.R. pt. 392 (2012).

[20] U.S. CITIZENSHIP & IMMIGR. SERVS., USCIS POLICY MANUAL ch. 8 (2013) [hereinafter USCIS POLICY MANUAL], *available at* http://www.uscis.gov/policymanual/HTML/PolicyManual-Volume12-PartI-Chapter8.html#S-B; *see also* LEGADMINMAN, *supra* note 15, at 14-24 to -25.

[21] 8 U.S.C.A. § 1430(d); 8 C.F.R. § 319.3; USCIS POLICY MANUAL, *supra* note 20, ch. 9, para. D.

[22] 8 U.S.C.A. § 1430(b); 8 C.F.R. § 319.2; USCIS POLICY MANUAL, *supra* note 20, ch. 9, para. B.

[23] 8 U.S.C.A. § 1430(d); 8 C.F.R. § 319.3; USCIS POLICY MANUAL, *supra* note 20, ch. 9, para. D.

[24] 8 U.S.C.A. § 1430(e)(2); USCIS POLICY MANUAL, *supra* note 20, ch. 9, para. D.

[25] 8 U.S.C.A. § 1431; 8 C.F.R. pt. 320; USCIS POLICY MANUAL, *supra* note 20, ch. 9, para.C.

[26] 8 U.S.C.A. § 1433; 8 C.F.R. pt. 322; USCIS POLICY MANUAL, *supra* note 20, ch. 9, para.C.

[27] USCIS POLICY MANUAL, *supra* note 20, ch. 9, para.C.

[28] *See, e.g.*, U.S. Navy, NAVPERS 15560D, NAVY MILITARY PERSONNEL MANUAL 5352-030 (22 Aug. 2002) (C22, 17 Mar. 2008).

[29] *Family of U.S. Citizens*, U.S. CITIZENSHIP & IMMIGR. SERVS., http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=1d383e4d77d73210VgnVCM100000082ca60aRCRD&vgnextchannel=1d383e4d77d73210VgnVCM100000082ca60aRCRD (last updated on Apr. 4, 2012) (follow "Fiancé(e) Visa" hyperlink).

[30] *Id.* (follow "Spouse" hyperlink).

situations will require USCIS approval of the visa petition and the servicing consular office's issuance of the visa.[31] If the foreign spouse is in the United States and the servicemember is a U.S. citizen, the servicemember can apply for an immigrant visa and the foreign spouse can apply for lawful permanent resident status simultaneously through USCIS.[32] The foreign spouse of a non-citizen servicemember has similar benefit, but is of a lower preference.[33]

b. Servicemember Sponsoring Foreign Relatives. Servicemembers may sponsor most foreign relatives for immigrant visa or adjustment of status; however, the processing time is dictated by servicemember's citizenship status, visa numbers available to the foreign relative's country, and degree of family relationship.[34]

c. Deferred Action for Childhood Arrivals (DACA). This benefit is a prosecutorial discretion exercised by U.S. Department of Homeland Security to defer eligible illegal immigrants from being removed (deported) for a period of two years, which is renewable: it does not provide lawful status in the United States but provides the eligible illegal immigrants work authorization.[35] The benefit contemplates servicemembers who may not have lawful status and provides a specific category of eligibility for having served in armed services.[36]

C. **Casualty Assistance and Survivor Benefits**.

1. Casualties may occur on deployment and at home station. When casualties occur, the SJA elements, both on the exercise/deployment and with the rear detachment, must assist the Soldier's next of kin, the command, and the Casualty Assistance Officer (CAO).

2. Among the many issues that attend the death of a Soldier are: reporting the casualty; notifying the next of kin; appointing an CAO and providing legal advice to that officer; disposing of the remains, including a possible autopsy; advising the next of kin concerning their legal rights and benefits; appointing a summary court officer; and conducting a line of duty investigation. Accordingly, pre-deployment preparation is essential.

a. Familiarity with the Army's casualty regulation, AR 600-8-1,[37] is vital.

b. Judge Advocates will become involved in helping the next of kin of Soldiers missing in action or taken prisoner. The DoD pay manual is something that the judge advocate must understand.[38] Judge Advocates should also be prepared to brief surviving family members on Survivor Benefits. For a Survivor Benefits video presentation and other helpful benefits materials such as legal outlines, Judge Advocates should visit The Judge Advocate General's Leader Professional Development Program on JAG University at https://jag.ellc.learn.army.mil/bbcswebdav/institution/JAG2%20Institution/TJAG%20LPDP/Update/2012.html.

c. Prior to deployment, Soldiers should be encouraged to review their DD Form 93 (Record of Emergency Data) closely. This Form designates beneficiaries of pay and allowances, might designate the Death Gratuity beneficiary (Block 9a; if no spouse or children), and designates the Person Authorized to Direct Disposition (PADD) of remains (Block 13, Continuation/Remarks block).

D. **Servicemembers Civil Relief Act (SCRA)**.[39]

1. Overview. The SCRA provides a number of substantive benefits and procedural protections to members of the Armed Forces on active duty. Some of these benefits and protections are extremely important during exercises,

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[31] *Id.* (follow "Fiancé(e) Visa" and "Spouse" hyperlink).
[32] *Id.* (follow "Spouse" hyperlink).
[33] *Family of Green Card Holders (Permanent Residents)*, U.S. CITIZENSHIP & IMMIGR. SERVS., http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=75783e4d77d73210VgnVCM100000082ca60aRCRD&vgnextchannel=75783e4d77d73210VgnVCM100000082ca60aRCRD (last updated on Apr. 1, 2011).
[34] *See supra* notes 29─34 and accompanying text.
[35] *Consideration of Deferred Action for Childhood Arrivals Process*, U.S. CITIZENSHIP & IMMIGR. SERVS., http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=f2ef2f19470f7310VgnVCM100000082ca60aRCRD&vgnextchannel=f2ef2f19470f7310VgnVCM100000082ca60aRCRD (last updated on Jan. 18, 2013).
[36] *Id.*
[37] U.S. DEP'T OF ARMY, REG. 600-8-1, ARMY CASUALTY PROGRAM (30 Apr. 2007) (Note – see the published change: Army Directive 2009-02).
[38] U.S. DEP'T OF DEFENSE INST., 7000.14-R, DEPARTMENT OF DEFENSE FINANCIAL MANAGEMENT REGULATIONS, VOLUME 7A, MILITARY PAY POLICY AND PROCEDURES – ACTIVE DUTY AND RESERVE PAY, Chap. 36 (Jan. 2012).
[39] Pub. L. No. 108-189, 117 Stat. 2835 (2003) (codified at 50 U.S.C. App. §§ 501–596 (Westlaw 2011).

deployments, and times of mobilization. LAAs must familiarize themselves with the following SCRA issues, at a minimum, and be prepared to assist Servicemembers in resolving those issues.

2. Interest rate reduction.[40]

a. Soldiers who are mobilized from the RC, and those who join the Army from civilian life, may reduce to six percent the interest on liabilities incurred prior to entry on active duty.

b. Creditors may obtain relief in certain circumstances.

3. Rental property protections.

a. Eviction.[41]

(1) Soldiers and dependents may not be evicted from rented housing except pursuant to a court order.

(2) This protection is available when the amount of rent does not exceed $3,139.35 per month.[42]

(3) When a Soldier's military service affects his or her ability to pay rent, and the Soldier applies for a stay, the court must stay the eviction proceedings for a period of 90 days.

b. Lease termination.[43]

(1) The SCRA allows Soldiers upon entry to active duty to terminate their "residential, professional, business, [and] agricultural" leases executed prior to entry to active duty.

(2) Soldiers also may terminate their leases when they undergo a permanent change of station or when they are deployed "for a period of not less than 90 days."

4. Automobile leases. [44]

a. Soldiers may terminate their automobile leases when they are transferred outside the continental United States (OCONUS) or from OCONUS states and territories back to CONUS.

b. Soldiers also may terminate their automobile leases when they "deploy with a military unit for a period of not less than 180 days."

5. Cell phone contract termination/suspension. [45]

a. Soldiers may terminate or suspend a cell phone contract when they relocate for a period of not less than 90 days to a location that does not support the contract.

b. Soldiers must have entered into a contract prior to receiving orders. Family plans are contemplated. Legal assistance attorneys must analyze each situation.

6. Stays of proceedings. [46]

a. Soldiers may seek to have litigation before civil judicial and administrative proceedings stayed when their military service materially affects their ability to participate in the litigation.

b. The stay may be granted on the court's own motion, and shall be granted for a period of 90 days upon a motion by the Soldier.

c. The application for the stay must include a letter from the Soldier establishing that the current military service materially affects the Soldier's ability to participate in the litigation. The Soldier must also provide a date when he or she will be able to appear in court.

d. The application must also include a statement from the Soldier's commander stating that the Soldier's military service precludes attendance, and that leave is currently not authorized for the Soldier.

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[40] 50 U.S.C. app. § 527.
[41] *Id.* app. § 531.
[42] This amount is subject to annual adjustment. *Id.* app. § 531(a). The figure listed is for 2013.
[43] *Id.* app. § 535.
[44] *Id.*
[45] *Id.* app. § 535a.
[46] *Id.* § 522.

7. Mortgage Protections[47]

a. Applies to purchases of real or personal property that a Servicemember makes prior to entry on active duty that are secured by a mortgage or trust deed.

b. Court order required for foreclosure: If a Servicemember breaches the obligation, a sale, foreclosure, or repossession action is not valid unless there is a court order or a waiver from the Servicemember.

c. As of 3 Feb 13 the protection extends for one year beyond the period of active duty. (From 30 Jul 08 – 2 Feb 13 the period of protection was increased from 90 days to 9 months.) The additional one year beyond the period of active duty protection is in effect until 31 December 2014, after which the protection period following active duty will be revert to 90 days, absent additional legislation.

E. **USERRA**.

1. USERRA[48] protects the rights of Guardsmen and Reservists to return to their civilian employment following periods of military service and provides major benefits to these Servicemembers.[49] Judge Advocates should be acquainted with its major tenets.

2. To take advantage of the law, the Servicemember must provide his or her employer with notice of the pending absence.[50] Periods of absence, per employer, must not exceed five years,[51] and the service must be characterized as "honorable" or "under honorable conditions."[52] For a typical weekend drill or "battle assembly," the Servicemember must report back "not later than the beginning of the first full regularly-scheduled work period on the first full calendar day following the completion of the period of service and the expiration of eight hours after a period allowing for the safe transportation of the person from the place of that service to the person's residence."[53] If the absence is for a longer period, the Servicemember must make an application for reemployment within specified times.[54]

3. Although there are a number of protections, the law provides that employers must promptly reinstate their returning Servicemembers to the same, or like, position that they left, and with accrued seniority.[55] They also must attempt to qualify the Servicemember for the return to the position, if such re-qualification is necessary as a result of the person's absence for military service.[56]

4. Servicemembers who experience difficulties with employers may find that the volunteer services of local ombudsmen from the National Committee for Employer Support of the Guard and Reserve (ESGR) will prove useful.[57] While those with more serious problems may file suit with a private attorney, assistance also is available through the Secretary of Labor.[58]

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[47] *Id.* § 533.
[48] Pub. L. No. 103-353, 108 Stat. 3149 (1994), codified as amended at 38 U.S.C.S. §§ 4301–4334 (LexisNexis 2008).
[49] In fact, the Act's protections are much broader, and the law works as any anti-discriminatory legislation. As the law states, it "prohibit[s] discrimination against persons because of their service in the uniformed services." 38 U.S.C. § 4301(a)(3) (2008). In a more complete sense, the law tells employers that "[a] person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation." *Id.* § 4311(a).
[50] *Id.* § 4312(a)(1).
[51] *Id.* § 4312(a)(2). There are a number of exceptions to the five-year provision. In fact, most types of service, such as regularly-scheduled drills, mobilizations under the Presidential call-up and the partial mobilization, qualify as exceptions and do not count toward the five-year cap.
[52] *Id.* § 4304.
[53] *Id.* § 4312(e)(1)(A)(i).
[54] *See id.* § 4312(e)(1)(C), (D).
[55] *Id.* § 4313(a).
[56] *Id.*
[57] Information from the ESGR on USERRA and its own programs is available at http://www.esgr.org.
[58] *See* 38 U.S.C. § 4322(a); *see also id.* § 4321 (providing for preliminary assistance from the Department of Labor through its Veterans' Employment and Training Service). Federal employees receive an assessment and assistance through the Office of Special Counsel. *Id.* § 4324.

5. LAAs must be cautious when providing assistance on such matters. The Department of Labor and Department of Justice may not undertake a Servicemember's representation if that Servicemember has been previously represented by counsel. Notwithstanding the limits of the Legal Assistance Program, a client could encounter problems later when seeking in-court representation from the Departments of Labor or Justice.[59] However, giving briefings to groups of Soldiers regarding USERRA, referring clients to the Department of Labor's Veterans' Employment and Training Service (VETS) or the ESGR, and following up with VETS should not present a problem for a Servicemember who later decides to seek in-court representation.[60]

VII. CONCLUSION

A. Legal Assistance is an essential JA mission. It becomes critical during exercises, deployments, and combat operations. This chapter has examined some of the issues relevant to the successful delivery of this important service.

B. Checklists for supplies and other resources follow.

C. Several resources exist for deployed JAs who require expertise from civilian practitioners with expertise in a particular area of the law or jurisdiction. Many civilian practitioners will assist Servicemembers on a reduced fee or pro bono basis.

1. The services jointly maintain a legal assistance database with a wealth of substantive and timely information at information at: http://legalassistance.law.af.mil/

2. The American Bar Association (ABA)'s Standing Committee on Legal Assistance for Military Personnel (LAMP) has two initiatives aimed at assisting deployed Servicemembers, through military legal assistance counsel, with legal problems. Operation Enduring LAMP and the ABA's Military Pro Bono Project are both available at: http://www.abanet.org/legalservices/lamp/.

3. The George Mason University School of Law runs the Clinic for Legal Assistance to Servicemembers and accepts applications from military members. Information is at http://www.law.gmu.edu/academics/clinics/clas.

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[59] *See* U.S. DEP'T OF ARMY, REG. 27-3, THE ARMY LEGAL ASSISTANCE PROGRAM para. 3-5e(2)(a) (21 Feb. 1996) (RAR 13 Sept. 2011).
[60] *Id.* para. 3-5e(2)(b).

Table 1: Sample Ready Box

Item	*Quantity*	*O/H*
Notebook computer/printer	4	
DL Wills Version 10 with latest supplement update		
QuickScribe program		
Client Information System (CIS) program		
TaxWise Program		
Printer toner cartridges	5	
Manual typewriter/ribbons/correction tape	1	
Client Interview Cards	200	
Electrical extension cords	6	
Will Cover Sheets	200	
Envelopes, 4” x 9 ½” (DA)	150	
Envelopes, 4” x 9 ½” (plain)	150	
Markers, red	10	
Masking tape, rolls	5	
Scotch Tape, rolls	5	
Paper, Printer (Ream)	12	
Paper, tablets	14	
Pens, boxes	5	
Regulations & References if on-line resources are unavailable		
Seals (authority of 10 U.S.C. § 1044a)*	2	
Signs (Legal Assistance)	2	
Staple removers	2	
Stapler w/extra staples	4	
3 inch Binders	20	
3 hole punch	1	
Will Interview Worksheets	150	

* 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.
** In addition to the above, it is advisable to bring local reference material to deployed locations, such as a local telephone book. Clients oftentimes simply seek information about the local area, attorneys and other experts.

Table 2: Deployment Legal Assistance References	
Regulation	***Title***
AR 27-3	The Army Legal Assistance Program (21 Feb. 96)
AR 27-55	Notarial Services (17 Nov. 03)
AR 600-8-1	Army Casualty Programs (7 Apr. 07)
AR 600-8-101	Personnel Processing (In- and Out- and Mobilization Processing) (18 July 03)
(AR 600-15 was rescinded)	
AR 600-20	Army Command Policy (18 Mar. 08) (RAR 20 Sep 12)
AR 608-99	Family Support, Child Custody, and Paternity (29 Oct. 03)

Table 3: TJAGLCS Publications on the JAGCNet & CD ROM	
Publication	***Title***
JA 260	Servicemembers Civil Relief Act
JA 265	Consumer Law Guide
JA 274	Uniformed Services Former Spouses' Protection Act Guide
JA 275	Tax Assistance Program Management Guide

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CHAPTER 22

MILITARY JUSTICE IN OPERATIONS

REFERENCES

1. MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012) [hereinafter, MCM].
2. U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE, 3 October 2011.
3. U.S. DEP'T OF AIR FORCE, INSTR. 51-201, ADMINISTRATION OF MILITARY JUSTICE, 6 June 2013. (See: Air Force Guidance Memorandum 51-201 dated 25 November 2013.)
4. U.S. DEP'T OF AIR FORCE, INSTR. 51-202, NONJUDICIAL PUNISHMENT, 7 Nov. 2003. (See: Air Force Guidance Memorandum 51-202 dated 22 October 2013.)
5. JAGINST 5800.7E, Manual of the Judge Advocate General (JAGMAN), 26 June 2012.
6. THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCHOOL, PRACTICING MILITARY JUSTICE (APRIL 2013), available at https://www.jagcnet.army.mil/tjaglcscrimlaw [hereinafter, PRACTICING MILITARY JUSTICE].
7. OFFICE OF THE JUDGE ADVOCATE GENERAL, DEPLOYING JUSTICE: A HANDBOOK FOR THE CHIEF OF MILITARY JUSTICE (June 2008) [hereinafter, DEPLOYING JUSTICE].

I. INTRODUCTION

A. Our military justice system was designed to be portable. It was designed with combat in mind. That is good news for military justice practitioners: when you deploy, you use the same exact system that you have been using in garrison. Over the last decade of conflict we have seen that our system functions downrange, although our system has seen criticism. For a good argument and counter-argument on how our system performs in a deployed environment, see Major E. John Gregory, *The Deployed Court-Martial Experience in Iraq 2010: A Model for Success*, Army Law., Jan. 2012, at 6, and Major Franklin D. Rosenblatt, *Non-Deployable: The Court-Martial System in Combat from 2001 to 2009*, Army Law., Sep. 2010, at 12. You should read both of these articles before you deploy.

B. The other good news is that you will generally have the time in a deployed environment to solve military justice problems by turning to your standard resources – the MCM, your service regulations, the Military Judge's Benchbook, etc. You should not use this chapter to try to solve complex problems. Use this chapter to familiarize yourself with some of the unique issues related to deployed environments and then go to the primary sources to work your way to the right answer.

C. Before you deploy, review this chapter. Then, download a copy of DEPLOYING JUSTICE. You need to use this resource when creating your jurisdiction documents. Last, you must read the military justice sections of the most recent CLAMO AARs. Within those, you will find expanded discussions of many of the points that are mentioned in this chapter.

II. ESTABLISHING THE JURISDICTIONAL SCHEME

A. The term "jurisdiction" is used here to describe GCMCA scheme, not to describe a court-martial's legal authority to render a binding verdict and sentence. *Getting your jurisdictional scheme right may be the most important "deployed justice" thing that you do!* Command and control relationships can be very complex in a deployed environment. The person who is commander of both a division and an installation may deploy, which creates the issue of who is the GCMCA forward (the division commander?) and who is the GCMCA in the rear (a new installation commander?). You will have to decide what to do with cases that have already been referred – take them forward, or transfer them to a different commander. Brigade combat teams may deploy in whole or in part, supported by slice elements and personnel, who may be supplied by sister units or even sister services. This is an area where attention to detail is critical. If you do not get the jurisdictional paperwork correct, you may have all of your courts-martial invalidated. Whether you are the Chief of Justice for an OSJA that supports a GCMCA, a brigade judge advocate (BJA), or a command judge advocate advising a battalion, you should start this planning as soon as you learn of the upcoming deployment.

B. Your primary resource for solving this problem is DEPLOYING JUSTICE. This publication was written by the Office of the Judge Advocate General, Criminal Law Division. If you need assistance, contact that office. They will help you to ensure that your jurisdictional schemes are properly created.

C. Under the UCMJ, any convening authority may refer any case to trial. As a general matter, the convening authority with administrative control (ADCON)[1] over the accused service member exercises primary UCMJ authority. However, your command may want to set up area jurisdiction. 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. For the Army, AR 27-10, para. 3-8, lists specific language that should be included in attachment orders to indicate a Soldier is attached to a unit for the purpose of Article 15.

D. 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 G-1/S-1 staff elements. For units, it is useful to keep track of the tactical task organization (usually stated upfront in mission orders) in order to keep track of which subordinate units are operating under the control of which parent units. Consider creating a "jurisdiction chart" for all of the commands in your area of operations. Although the jurisdictional alignment for UCMJ actions may not directly track the tactical task organization, the task organization provides a good starting point.

E. Once the jurisdictional scheme is created, you will need to select panels for those GCMCAs. Again, reference DEPLOYING JUSTICE as well as other traditional resources like PRACTICING MILITARY JUSTICE to guide you through this process. This is a standard business practice – do it here just like you would do it in garrison. Remember, the system was designed to be portable. If you have a GCMCA with area jurisdiction that covers small, remote outposts, that GCMCA (or even a SPCMCA) can create a panel out of the Soldiers that are on that outpost and try the case right there.

F. Recognize that the commanders and senior non-commissioned officers of provisional units may not have much military justice training, and the commanders and leaders of Reserve and National Guard units may not have much experience in military justice. Arrange for them to receive training.

III. LEGAL NONDEPLOYABLES AND PENDING ACTIONS

A. You will encounter a tension as your unit prepares to deploy – the tension between processing your legal nondeployable Soldiers quickly so that a replacement will arrive (which usually means a lower disposition), versus ensuring that serious offenses are resolved at the appropriate level (which usually means more processing time). Ultimately, the commanders own the system and they are the ones that resolve this tension. You should provide sound advice based on your experience with the system, to include understanding the norms that prevailed in our system before the current period of conflict, so that your commanders can strike the correct balance.

B. BJAs and trial counsel (TC) 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 may not necessarily be a bar to deployment for actual combat operations. BJAs 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

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[1] Administrative control (ADCON) as opposed to operational control (OPCON) is defined in JP 1-02 and FM 27-100 as follows:

> JP 1-02 — Direction or exercise of authority over subordinate or other organizations in respect to administration and support, including organization of Service forces, control of resources and equipment, personnel management, unit logistics, individual and unit training, readiness, mobilization, demobilization, discipline, and other matters not included in the operational missions of the subordinate or other organizations.
>
> FM 27-100 — Administrative Control (ADCON) is the direction or exercise of authority necessary to fulfill military department statutory responsibilities for administration and support. ADCON may be delegated to and exercised by service commanders at any echelon at or below the service component command. The secretaries of military departments are responsible for the administration and support of their forces assigned or attached to unified commands. The secretaries fulfill this responsibility by exercising ADCON through the service component commander of the unified command. ADCON is subject to the command authority of the combatant commander.

court or board members). The Commander, usually after coordination with the BJA, decides whether these Soldiers will deploy.

C. In the Army, personnel status is tracked using a Unit Status Report (USR). *See* U.S. DEP'T OF ARMY, REG. 220-1, UNIT STATUS REPORTING (15 Apr. 2010). Preparation of the USR at the battalion and brigade level is typically an additional duty for a staff officer. In practice, this means the USR officer may be prone to declaring any Soldier remotely connected with "JAG" as "nondeployable for legal" reasons. Judge Advocates should get directly involved in preparation of the USR to the extent necessary to prevent overcounting of "nondeployable for legal" Soldiers.

D. 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 stay in the garrison. Similarly, Soldiers pending administrative separation normally should remain in garrison pending separation. NJP actions often go forward with the deploying force.

IV. PERSONNEL AND EQUIPMENT

A. Deploying personnel. Successful management of military justice actions during a deployment requires planning and training of key personnel. The size of the deployment will often dictate who deploys from a legal office. Deployed settings present difficult supervisory challenges, primarily caused by increased distances between JAs, communication and transportation limitations, and "imported" counsel (JAs crossing over from legal assistance, administrative law, operational law, or claims) who may be inexperienced with common military justice actions. Supervisors must therefore attempt to identify and train potentially deployable JAs before deployment to ensure they are knowledgeable about investigations, NJP procedures, court-martial procedures, and administrative separations.

B. Non-deploying personnel. A military justice supervisor in the rear detachment should prepare for military justice challenges in the rear because of fewer resources available. Also the supervisor should expect that rear detachment commanders have little to no experience in military justice actions and will need training and guidance, particularly in areas such as unlawful command influence. Rear detachment military justice supervisors must plan for and prepare legal briefings for all new OICs/commanders in the rear detachment and additional training as necessary.

C. Office equipment. Resources, to include electricity, phone lines, internet, e-mail, and fax capability, are ordinarily limited in deployed settings. Judge Advocates must deploy with relevant regulations and legal forms in electronic format and hard copy. Computers may help to eliminate the need for some hard copy resources. However, given the potential unreliability of computers in the harsh environment of a deployment, JAs must plan for the worst. Past Army deployments have demonstrated the need to deploy with a hardbound set of essential publications, including the Manual for Courts-Martial, AR 27-10 (with any relevant supplements), the Military Judges' Benchbook, AR 15-6, AR 635–200, a Military Rules of Evidence (MRE) hornbook, a Military Evidentiary Foundations book, DEPLOYING JUSTICE, and PRACTICING MILITARY JUSTICE.

V. TAKING STOCK OF OUTSIDE RESOURCES AND BUILDING RELATIONSHIPS

A. One of the most important things you can do to have a successful deployment is to build relationships with the other people that work within the system: trial defense attorneys; military judges; magistrates; law enforcement; Victim Advocates (VA) and Sexual Assault Response Coordinators (SARC); Victim-Witness Liaisons (VWL); Unit Prevention Leaders (UPLs); confinement facility commanders, etc. Find out who these people are or who they are going to be and start communicating with them now.

B. Trial defense and trial judiciary. Deployment support from trial defense and the trial judiciary should be coordinated early. Depending on the deployment, your OSJA may be responsible for the care and feeding of these Soldiers. If you intend to hold courts-martial at forward operating bases, you will need to coordinate early with the trial judiciary. Talk with the trial judiciary about their plan for part-time military magistrates and if they intend to limit their role or otherwise intend to create new SOPs for their use while deployed.

C. Law enforcement. Identify who will be providing law enforcement services (CID and MPI) in your area of operations and reach out to them. Find out how they plan to secure evidence while they are downrange and where they plan to have the evidence locker.

D. SHARP personnel. Likewise, reach out to the deployed VAs and deployed SARCs that will be working in your area of operations. Check on their training – they may not have received much before the deployment. Conduct battle drills for how you will respond to an allegation of serious misconduct, to include sexual assault allegations.

E. VWLs The rules still apply while you are downrange. Your VWL in garrison may be a civilian and so will not be going with you. Identify who your VWL will be IAW AR 27-10 and start training him or her. Plan now for how you are going to keep your defense and prosecution witnesses separate when you might be trying cases out of tents. You may even need to arrange for separate Porta-potties.

F. Confinement facilities. With the exception of the Vietnam War, Army forces have typically not maintained confinement facilities in theater for U.S. personnel. Although jails run by U.S. or U.N. forces may exist for local nationals, they are not intended, and generally should not be used, for holding U.S. military personnel.[2] When the Soldier first goes into confinement, the unit may need to set up a holding area, separate from enemy prisoners of war, that does not have unduly harsh conditions. The Soldier is normally then shipped to the rear (Mannheim, Germany or CONUS). In mature theaters, confinement facilities may be created in theater. In OEF/OIF, a confinement facility was established at Camp Arifjan in Kuwait for pre-trial confinement and sentences of 30 days or less. Before deploying, learn the process for transporting inmates from the site of initial confinement to the local confinement facility to a rear confinement facility. You do not want to send a Soldier and his or her escorts on a week-long trip only to find out that you cannot check the Soldier into the facility.

G. Urinalysis. Based upon mission requirements and command guidance, you should ensure your units have the ability to conduct urinalysis testing in theater. Steroid use was a serious problem in Iraq and drugs have been a serious problem in Afghanistan. Some commanders will be resistant to conducting urinalysis screenings because of the length of time it takes to get results back – sometimes three or four months. However, testing is critical to both detecting criminal behavior and preventing it. Coordination should be made with unit Alcohol and Drug Control Officers (ADCOs), the Installation Biochemical Testing Coordinator and the relevant stateside lab prior to deployment to find ways to make the process more efficient. The unit needs to bring enough supplies (bottles, etc.) for the deployment because they may not be able to get the supplies downrange.

H. The outgoing MJ shop. Contact the outgoing MJ shop to find out what cases you may be inheriting. Get copies of the files now.

I. Gaining GCMCA or subordinate units. Start building relationships with the gaining command and units that may be subordinate to your GCMCA. You need to start building trust so that you can each provide each other with the necessary support and ensure that everyone has visibility on important actions.

VI. GENERAL ORDERS

A. Consider the need for or the existence of a General Order (GO) for the operation**.** A GO is a commander's tool to promote mission accomplishment and protect deployed forces. Much like the Rules of Engagement (ROE), GOs are a flexible way for the command to centrally plan, but de-centrally execute the commander's intent. General orders include prohibitions on the use of privately owned weapons, alcohol, or entry into local religious or cultural buildings. GOs can be used to quickly get after unexpected misconduct, like the poaching of local wildlife or the introduction of designer drugs. A common area of concern is visitation by Soldiers of the opposite sex in housing units. See examples at the end of this chapter (GOs for operations in Desert Shield, Haiti, and Allied Force).

B. Based upon mission requirements and command guidance, military justice supervisors and TCs must draft the general order (GO) for the operation and have it ready for publication as soon as possible. The GO must be published and disseminated to all Soldiers prior to deployment. Violations of a properly published GO may be punished under Article 92, UCMJ. Even though the government need not prove knowledge of a lawful GO as an element of the offense, the contents of the GO should be aggressively briefed to all deploying Soldiers. Consider including the GO as part of the predeployment briefing and having each Soldier sign a copy of the GO.

C. A common problem with GOs is conflicting GOs. Before attempting to draft a GO, you must determine if the higher headquarters already published a mission or theater-specific GO. You should also see what GOs subordinate commanders have issued. Judge advocates must also be aware that the higher headquarters may also prohibit or limit the ability of lower headquarters to promulgate general orders. This often happens when different

[2] *See* U.S. v. Wise, 64 M.J. 468 (C.A.A.F. 2007).

commands that occupy a single large base issue different regulations on things like housing visitation. To clear things up, the highest commander issues a policy and restricts lower commanders from making any more restrictive policies.

VII. THE UCMJ DURING COMBAT OPERATIONS

A. **"**Time of War" under the MCM**.**

1. The phrase "time of war" is a legal term of art. The phrase is not defined by Congress in the UCMJ, although Congress has defined it in other statutes. The President has defined it 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." (RCM 103(19)). For a complete discussion of "time of war," see the analysis to RCM 103(19).

2. The definition applies only to the following portions of the MCM (It does not apply to statute of limitations and/or jurisdiction over civilians):

a. Offenses that can only occur during time of war: Improper use of a countersign (UCMJ art. 101), Misconduct as a prisoner (UCMJ art. 105), & Spying (UCMJ art. 106).

b. Offenses that may be punished by the death penalty only in time of war: Desertion (UCMJ art. 85), Assaulting or Willfully Disobeying a Superior Commissioned Officer (UCMJ art. 90), & Misbehavior of Sentinel or Lookout (UCMJ art. 113).

c. Aggravating Factor for some offenses: The maximum penalty that may be imposed by court-martial is increased in time of war for drug offenses, malingering, and loitering/wrongfully sitting on post by sentinel/lookout. The maximum period of confinement *may* be suspended in time of war for solicitation to desert, mutiny, misbehavior before the enemy, or sedition.

d. 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).

e. Statute of Limitations. UCMJ art. 43 extends the statute of limitations for certain offenses committed in time of war. There is no limitation on the prosecution of Desertion, Absence Without Leave, Aiding the Enemy, or Mutiny when these offenses occur in a time of war. Persons accused of these crimes may be tried and punished anytime. (UCMJ art. 43(a)). Also, murder, rape or sexual assault, and rape or sexual assault of a child, as well as any other offense punishable by death, may be punished at any time. 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)). 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.[3]

B. Article 134, UCMJ. The three clauses of Article 134 have considerable utility for misconduct while deployed that is not addressed by the other enumerated articles in the UCMJ or those offenses the President has listed under Article 134. However, Clause 3 of Article 134 should be exercised with extreme caution, if at all, while deployed. In order to use Clause 3 of Article 134 in a location outside of the United States, the statute must either (1) apply in the location where the conduct occurred, or (2) apply to the misconduct regardless of where it occurs. Practitioners must look to the specific language in the statute to determine which category of federal crime they are dealing with. In the first category, practitioners must determine where the conduct occurred and whether the statute applies in that location. The second category is very narrow. The two examples of federal crimes of unlimited application that are provided in the MCM are counterfeiting (18 U.S.C. § 471) and frauds against the Government not otherwise covered by Article 132.[4] In cases where the MCM or UCMJ do not address the alleged misconduct at issue, clauses 1 and 2 of Article 134 (as well as Article 133 where applicable) generally provide an adequate means of punishing misconduct without resorting to Clause 3.

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[3] UCMJ art. 43(f). The date hostilities end is proclaimed by the President or established by a joint resolution in Congress.
[4] MCM, pt. IV, para. 60(c)(4); *see also* United States v. Martinelli, 62 M.J. 52 (C.A.A.F. 2005).

E. Violations of the Law of War. While the UCMJ and the MCM empowers courts-martial to try violations of the law of war in certain circumstances, persons subject to the UCMJ should ordinarily be charged with a specific violation of the UCMJ, rather than an offense under the law of war. *See* RCM 307(c)(2) discussion.

F. 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. Understand that these offenses may attract both political and media attention when charged. This warning is not provided either to encourage or to discourage charging these offenses, but to alert the practitioner that a strategy for prosecuting one of these offenses must necessarily address political and media concerns. 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:

1. Misbehavior Before the Enemy (UCMJ, art. 99).
2. Wrongful Destruction of Private Property (UCMJ, art. 109).
3. Wrongful Taking of Private Property (UCMJ, art. 121).
4. Mutiny or Sedition (UCMJ art. 94).
5. Subordinate Compelling Surrender (UCMJ art. 100).
6. Improper Use of Countersign (UCMJ art. 101).
7. Forcing a Safeguard (UCMJ art. 102).
8. Aiding the Enemy (UCMJ art. 104).
9. Spying (UCMJ art. 106).
10. Misbehavior of a Sentinel (UCMJ art. 113).
11. Malingering (UCMJ art. 115).
12. Offenses by a Sentinel (UCMJ art. 134).
13. Straggling (UCMJ art. 134).

VIII. COMMON DEPLOYMENT ISSUES

A. Joint Military Justice.

1. The key for working in a joint environment is to build relationships. You need to understand the discipline culture of the other services and work closely with them to solve discipline problems. Even if your command clearly has the command discipline responsibility for the servicemember involved, you should closely coordinate your actions with the legal representative of the other service. In many cases, senior joint commanders set up subordinate sister-service commands to handle discipline issues that arise out of each service.

2. Commanders may refer court-martial cases on personnel of other services assigned or attached to their units, however they must take care to follow the service regulations of the accused.[5] Commanders may also impose NJP on personnel of other services assigned or attached to their units; however, commanders must do so IAW the accused servicemember's service regulation.[6]

B. Civilian misconduct.

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[5] *See* UCMJ art. 17 (2000) and RCM 201(e); United States v. Egan, 53 M.J. 570 (A. Ct. Crim. App. 2000).

[6] JOINT CHIEFS OF STAFF, JOINT PUB. 1, DOCTRINE FOR THE ARMED FORCES OF THE UNITED STATES, para. 14c (14 May 2007). Service regulations provide service-specific procedures for non-judicial punishment (AFI 51-202, para 2, 2.2.1; Navy and Marine JAGMAN 0106d; Coast Guard MJM, Art 1-A-3(c); AR 27-10, para 3-8c). JAs must note certain differences in procedures. For AF personnel, a joint commander may only impose NJP on AF personnel if the offense "arises from a joint origin or has joint forces implications." Other service procedures must also be followed. For example, the AF provides 72 hours to consult with counsel. The Navy/Marine burden of proof is a preponderance of the evidence. Also, appeals typically proceed through the servicemember's parent service. Coordination, therefore, must be made with the servicing Judge Advocate. This list of procedural differences is not exhaustive. JAs should consider consultation with other service JAs to understand the impact of NJP on other service personnel.

1. Civilian misconduct can come from several angles: US government employees that accompany the force; contractors that accompany the force; host-country nationals that commit misconduct; and even third country nationals that commit misconduct. With US citizens, a common problem is that some of them may not follow the General Order and may consume alcohol or drugs or have relations with the opposite sex.

2. Your commander has some powerful tools short of prosecuting civilians. Your commander can bar the person from the base, and if the civilian is a contractor, your commander can work with the contracted company (the Contracting Officer Representative) to seek discipline.

3. There are three jurisdictional "hooks" available for prosecuting civilians who commit crimes while employed by, accompanying, or serving with the armed forces: The Military Extraterritorial Jurisdiction Act of 2000 (MEJA), Art. 2(a)(10), UCMJ, and the U.S. Government "missions or entities in foreign States" provision[7] of the Special Maritime and Territorial Jurisdiction (SMTJ) statute. MEJA provides for federal (not military) jurisdiction, and Art. 2(a)(10) provides for court-martial jurisdiction. Commanders seeking to prosecute civilians or have DoJ prosecute civilians are required to follow certain procedures. This is another area where you want to build relationships early, this time with the Department of Justice. Get a copy of the most recent DoJ SOP for handling MEJA cases, and get a copy of the current DoJ/DoD MOA, if one exists. These problems are not rapid fire drills and often have high-visibility – find the correct resource and work the problems carefully if they arise.[8]

C. Conducting courts-martial. Trying cases downrange can be difficult, but it can be done. As a sample of the issues that arise, consider: witness travel; for that matter, any travel; judge availability; translators; witnesses from the armed forces of our partners; pretrial confinement issues; post-trial confinement issues; funding civilian witness travel; providing for experts; getting country clearances; getting security clearances for civilian defense counsel; keeping prosecuting and defense witnesses separate while you are operating out of tents. The list goes on and on – but that is why we joined the JAG Corps. Not everyone can do these things. You can. Read the CLAMO AARs to see how others have dealt with these issues and read Major E. John Gregory, *The Deployed Court-Martial Experience in Iraq 2010: A Model for Success*, Army Law., Jan. 2012, at 6. For some cases, it may not make sense to try them downrange – but be an advocate to your commander for trying the appropriate cases downrange.

D. Handling sexual assault cases. You must be prepared to deal with allegations of sexual assault in theater. These investigations necessarily involve many players to include the command, CID, Deployed Sexual Assault Response Coordinator, Deployed Victim Advocates, and the legal office. Handling all of the procedural hurdles associated with these allegations requires close coordination. Prior to deployment, you should run through battle drills for responding to an allegation of sexual assault.

E. Deployment-related misconduct. You will see misconduct downrange that you don't normally see in garrison or to the same degree. You will see a lot of crimes where the evidence is stored in a digital medium – and when that happens, you may see a significant delay in processing that evidence. You will also see drug use, in particular, steroids, prescription drugs, designer drugs, marijuana and hashish, and even alcohol consumption. You need an active urinalysis program to get after that problem, and also recognize that if the accused does not plead guilty and you want to try that case downrange, you will need to bring in some lab techs as witnesses. You will also see a lot of negligent discharge cases.

F. Summary courts-martial. Summary courts-martial are a great tool for the commander to use downrange – but for them to be effective, you need a confinement facility. If you plan to use this tool, work out the confinement piece before you get there.

G. Training downrange. Military justice training cannot stop just because you are downrange. Very often, you will have junior trial counsel working these actions and trying these cases in a very difficult environment. Find ways to train, even if that only involves watching TJAGLCS videos online. One enterprising judge advocate was even able to run a four-day trial advocacy course in Iraq.

H. Synchronization calls. Many successful units in Iraq and Afghanistan set up weekly MJ synchronization calls among the different MJ shops in theater. By doing so, they could quickly see the current issues and could shift resources among themselves to run an efficient system.

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[7] 18 U.S.C. § 7(9) (2001); United States v. Passaro, 577 F.3d 207 (2009).

[8] *Also see*, Major Aimee M. Bateman, *A Military Practitioner's Guide to the Military Extraterritorial Jurisdiction Act in Contingency Operations*, ARMY LAW., Dec. 2012, at 4

I. Searches and seizures, and, health and welfare inspections.

1. Commanders downrange do (and should) conduct a lot of health and welfare inspections. Some may move aggressively against certain problems. For example, contraband like alcohol and designer drugs often come through the mail; therefore, commanders may want to open incoming mail. However, a commander may only inspect mail containers, and shall not, through inspection procedures open individual parcels. See DoD 4525.6-M paras. C10.7.6.1.2 and C10.7.9. This does not prevent commanders who are conducting inspections from using reasonable technological or natural aids (such as drug detection dogs) during the inspection of mail containers.

2. One of the other big issues that arises is whether the commander can conduct a health and welfare inspection or a search of a contractor's living quarters or a business that is operating within the fence line. Generally, the garrison or base commander has the inherent authority to conduct inspections and searches within the fence line; however, that power may have been limited by contract or policy. Find out what the policy is for where you are going. In addition, in some jurisdictions, the military judge may limit the magistrate's ability to issue search and seizure authorizations when civilians are involved. You need to know if any restrictions are in place.

IX. REDEPLOYMENT

A. One of the key decisions is what to do with cases that are referred downrange. One option is to transfer the accused and the case to the incoming unit; the other is to take the accused and the case back to garrison. This decision will likely be based on such factors as the complexity of the case, the length of time until trial, the availability of witnesses (are they in the redeploying unit or are they from the local population), etc. If you hold the trial in theater, you also need to be prepared to extend the deployments of key witnesses.

B. Upon redeployment/demobilization, the military justice supervisor must ensure the following is accomplished: return to the original convening authority structure; end provisional units; units and personnel are assigned/attached back to appropriate organizations for administration of military justice; designations of home station convening authorities are revoked; individual cases are transferred to the appropriate CA for referral or initial action;[9] and the general order for the operation is rescinded.

APPENDIX

Sample General Orders Number 1

[9] *See* U.S. v. Newlove, 59 M.J. 540 (A. Ct. Crim. App. 2003).

Appendix

GENERAL ORDERS

UNITED STATES CENTRAL COMMAND
OFFICE OF THE COMMANDER
7115 SOUTH BOUNDARY BOULEVARD
MACDILL AIR FORCE BASE, FLORIDA 33621-5101

CCJA MAR 13 2006

GENERAL ORDER NUMBER 1B (GO-1B)[1122]

TITLE: Prohibited Activities for U.S. Department of Defense Personnel Present within the United States Central Command (USCENTCOM) Area of Responsibility (AOR).

PURPOSE: To identify and regulate conduct that is prejudicial to the maintenance of good order and discipline of forces in the USCENTCOM AOR.

AUTHORITY: Title 10, United States Code, Section 164(c) and the Uniform Code of Military Justice (UCMJ), Title 10, United States Code, Sections 801-940.

APPLICABILITY: This General Order is applicable to all United States military personnel, and to all civilians, including contingency contractor personnel (as defined in DoD Instruction 3020.41, dated October 3, 2005), serving with, employed by, or accompanying the Armed Forces of the United States, while present in the USCENTCOM AOR except for personnel assigned to: Defense Attaché Offices; United States Marine Corps Security Detachments; sensitive intelligence and counterintelligence activities that are conducted under the direction and control of the Chief of Mission/Chief of Station; or other United States Government agencies and departments.

1. **STATEMENT OF MILITARY PURPOSE AND NECESSITY**: Current operations and deployments place United States Armed Forces within USCENTCOM AOR countries whose local laws and customs may prohibit or restrict various activities which are generally permissible in western societies. Adhering to restrictions upon such activities is essential to preserving U.S./host nation relations and ensuring the success of combined operations between U.S. and friendly forces. In addition, the high operational tempo combined with often-hazardous duty faced by U.S. forces in the region make it prudent to restrict certain activities in order to maintain good order and discipline and ensure optimum force readiness.

2. **PROHIBITED ACTIVITIES**:

a. Purchase, possession, use, or sale of privately owned firearms, ammunition, explosives, or the introduction of these items into the USCENTCOM AOR.

b. Entrance into a Mosque or other site of Islamic religious significance by non-Moslems unless directed to do so by military authorities, required by military necessity, or as part of an official tour conducted with the approval of military authorities and the host nation. This provision may be made more restrictive by Commanders when the local security situation warrants.

c. Introduction, purchase, possession, sale, transfer, manufacture or consumption of any alcoholic beverage within the countries of Kuwait, Saudi Arabia, Afghanistan, Pakistan, and Iraq. In all other countries of the USCENTCOM AOR, U.S. military and civilian personnel will conform to their respective component restrictions on alcohol, and maintain appropriate deportment by respecting host-nation laws and customs. In order to maintain good order and discipline and ensure optimum readiness, in all locations where alcohol is not prohibited by this General Order, Commanders and unit chiefs are directed to exercise discretion and good judgment in promulgating and enforcing appropriate guidelines and restrictions. Guidelines should recognize

[1122] This General Order supersedes General Order Number 1A, dated 19 December 2000 (See Paragraph 7).

that in some countries although alcohol consumption may be legal within certain facilities such as hotels, personnel, upon any consumption, may be presumed to be under the influence upon leaving the facility or upon operating a motor vehicle (e.g., Qatar, UAE). Alcohol consumption guidelines and restrictions should be regularly reviewed to ensure that they are commensurate with current or foreseen operations, threats and host country actions.

d. Introduction, purchase, possession, use, sale, transfer, manufacture, or consumption of any controlled substances. Prescription drugs must be accompanied by the original prescription label which identifies the prescribing medical facility or authority.

e. Introduction, purchase, possession, transfer, sale, creation, or display of any pornographic or sexually explicit photograph, video tapes or CDs, movie, drawing, book, magazine, or similar representation. The prohibitions contained in this subparagraph shall not apply to AFRTS broadcasts and commercial videotapes distributed and/or displayed through AAFES or MWR outlets located within the USCENTCOM AOR. This prohibition also shall not apply within the areas exclusively under the jurisdiction of the United States, such as aboard United States Government vessels and aircraft, which shall remain subject to service rules.

f. Photographing or filming detainees or human casualties, as well as the possession, distribution, transfer, or posting, whether electronically or physically, of visual images depicting detainees or human casualties, except as required for official duties. "Human Casualties" are defined as dead, wounded or injured human beings, to include separated body parts, organs and biological material, resulting from either combat or noncombat activities. This prohibition does not apply to the possession of such visual images acquired from open media sources (e.g., magazines and newspapers), nor is the distribution of these unaltered images, subject to copyright markings or notices. Additionally, possession and distribution of open media source images is not prohibited if required for official duties. Finally, with their express consent, the photographing and possession of images of wounded personnel while within medical facilities and during periods of recovery is also not prohibited.

g. Gambling of any kind, including sports pools, lotteries and raffles, unless permitted by host-nation laws and applicable service component regulations.

h. Removing, possessing, selling, defacing or destroying archeological artifacts or national treasures. (See also 2.l.(3) below).

i. Selling, bartering or exchanging any currency other than at the official host-nation exchange rate.

j. Adopting as pets or mascots, caring for, or feeding any type of domestic or wild animal.

k. Proselytizing of any religion, faith or practice.

l. Taking or retaining of public or private property of an enemy or former enemy, except as granted by applicable USCENTCOM waivers and as noted below:

(1) Individual War Souvenirs may only be acquired if specifically authorized by USCENTCOM. Absent such express authorization, no weapon, munitions, or military article of equipment obtained or acquired by any means other than official issue may be retained for personal use or shipped out of the USCENTCOM AOR for personal retention.

(2) Private or public property may be seized during exercises or operations only on order of the Commander, when based on military necessity.

(a) Private property will be collected, processed, secured and stored for later return to the lawful owner. The wrongful taking of private property, even temporarily, is a violation of Article 121, Uniform Code of Military Justice.

(b) Public property lawfully seized by U.S. Armed Forces is the property of the United States. The wrongful retention of such property is a violation of Article 108, Uniform Code of Military Justice. Unit retention of historical artifacts must be specifically approved by USCENTCOM.

(3) This prohibition on acquiring the property of an enemy or former enemy applies to enemy war materiel even if such materiel could be lawfully purchased through commercial or private means. Such items can only be acquired as Individual War Souvenirs and then only to the extent specifically authorized. This

prohibition does not preclude the lawful acquisition of other items as tourist souvenirs if such items can be legally imported into the United States.

3. **PUNITIVE ORDER**: Paragraph 2 of this General Order is punitive. Persons subject to the UCMJ may be punished thereunder. Civilians serving with, employed by, or accompanying the Armed forces of the United States in the USCENTCOM AOR may face criminal prosecution or adverse administrative action for violation of this General Order. In the case of contingency contractors, DoD Instruction 3020.41, dated October 3, 2005, provides guidance on administrative actions.

4. **INDIVIDUAL DUTY**: All persons to whom this General Order is applicable are charged with the individual responsibility to know and understand the prohibitions contained herein. All such persons are further charged with the responsibility to become familiar with and respect the laws, regulations, and customs of their host nation insofar as they do not interfere with the execution of their official duties. Acts of disrespect or violations of host nation laws, regulations and customs may be punished under applicable criminal statutes and administrative regulations.

5. **UNIT COMMANDER RESPONSIBILITY:** Commanders, Security Assistance Office Chiefs, and military and civilian supervisors are charged with ensuring that ALL PERSONNEL are briefed on the prohibitions and requirements of this General Order. Commanders may further restrict their forces as they deem necessary.

6. **CONFISCATION OF OFFENDING ARTICLES**: Items determined to violate this General Order may be considered contraband by command or law enforcement authorities if found in the USCENTCOM AOR. Before destruction of contraband, Commanders or law enforcement personnel will coordinate with their servicing judge advocate. Military customs and other pre-clearance officials will enforce this General Order in their inspections of personnel prior to departure from the AOR and return to CONUS.

7. **EFFECTIVE DATE**: This General Order is effective immediately. GO-1A, dated 19 Dec 00, as amended on 30 Nov 01 and 9 Aug 03, and all waivers granted pursuant to GO-1A, are hereby rescinded and superseded. USCENTCOM Policy Memo Prohibiting Photographing or Filming Detainees or Human Casualties or Possessing, Distributing, or Posting Visual Images Depicting Human Casualties, dated 21 Oct 2005, is hereby rescinded and superseded.

8. **EXPIRATION**: This General Order will expire when rescinded by the Commander, USCENTCOM, or higher authority.

9. **WAIVER AUTHORITY**: Authority to waive or modify the prohibitions of Paragraph 2 of this General Order is hereby delegated to the Deputy Commander, USCENTCOM and to the Chief of Staff, USCENTCOM. No further delegation is authorized.

//signed//
JOHN P. ABIZAID
General, USA

DISTRIBUTION:
A

HEADQUARTERS
MULTI-NATIONAL CORPS-IRAQ
BAGHDAD, IRAQ
APO AE 09342

FICI-CG 04 APR 2009

GENERAL ORDER NUMBER I (GO-1)

TITLE: Prohibited Activities for U.S. Department of Defense Personnel Assigned to the Multi-National Corps-Iraq (MNC-I) or Present Within the MNC-I Area of Responsibility (AOR).

PURPOSE: To identify conduct that is prejudicial to the maintenance of good order and discipline of all forces and select civilians assigned to MNC-I or present within the MNC-I AOR.

AUTHORITY: The Uniform Code of Military Justice (UCMJ); Title 10, United States Code (U.S.C.) Sections 801-940; and United States Central Command (USCENTCOM), General Order 1B (GO-1B), dated 13 March 2006.

APPLICABILITY: This General Order is applicable to all United States military personnel while assigned to MNC-L while present in the MNC-I AOR, and while under operational control of the Commander, MNC-I in Iraq or Kuwait performing such duties to include, but not limited to, pre-deployment site surveys, leader recons, and advance party deployments. This General Order is also applicable to all civilians serving with, employed by, or accompanying the Armed Forces of the United States in the capacity stated above. This General Order does not apply to the following personnel expressly excluded under USCENTCOM GO-1B: "Defense Attaché Offices, United States Marine Corps Security Detachments; sensitive intelligence and counter intelligence activities that are conducted under the control of the Chief of Mission/Chief of Station; or other United States Government agencies and departments." This General Order is not applicable to any personnel located outside the USCENTCOM AOR.

1. **STATEMENT OF MILITARY PURPOSE AND NECESSITY**: Current Operations and deployments place the United States Armed Forces into areas where local laws and customs prohibit or restrict certain activities that are generally permissible in western societies. Restrictions upon these activities are essential to fostering U.S./host nation relations and combined operations of U.S. and friendly forces. In addition, the high operational tempo combined with the hazardous duty faced by MNC-I Soldiers and other U.S. forces in the MNC-I AOR make it necessary to restrict certain activities in order to maintain good order and discipline and to ensure optimal readiness.

2. **PUNITIVE ORDER**: Paragraph 3 of this General Order is punitive. Persons subject to the Uniform Code of Military Justice (UCMJ) may face administrative, nonjudicial, or judicial action under the UCMJ for violating this Order. Civilians serving with, employed by, or accompanying the Armed Forces of the United States in the USCENTCOM AOR may face criminal prosecution, adverse administrative action, termination of employment, or redeployment for a violation of this General Order. In the case of contingency contractors, DoD Instruction 3020.41, dated 3 October 2005, provides guidance on administrative actions.

3. **PROHIBITED ACTIVITIES**: In accordance with, and in addition to, USCENTCOM GO-1B, the following activities are prohibited:

a. Purchase, possession, use, or sale of privately owned firearms, ammunition. explosives, or the introduction of these items into the USCENTCOM AOR. See Rule for Courts-Martial 103, Manual for Courts-Martial 2008.

b. Entry into a Mosque or other site of Islamic religious significance by non-Moslems unless lawfully directed to do so by military authorities, required by military necessity, or as part of an official tour conducted with the approval of proper military authorities and the host nation.

c. Introduction, purchase, possession, sale, transfer, manufacture, or consumption of any alcoholic beverage within the MNC-I AOR. This prohibition also includes the introduction, possession, sale, transfer, manufacture, or consumption of any alcoholic beverages by military personnel or civilians serving with,

employed by, or accompanying the Armed Forces of the United States, while assigned to or under the operational control of the Commander, MNC-I and present for duty in Kuwait or Iraq. This prohibition does not apply to the intended use of personal hygiene items (e.g., mouthwash) commercially available for sale by AAFES in the MNC-I AOR, nor does it apply to the use of alcohol for authorized religious ceremonies.

d. Controlled substances, drug paraphernalia, and prescription medication:

(1) Introducing, purchasing, possessing, using, selling, transferring, manufacturing, or consuming any controlled substances, or drug paraphernalia. "Drug paraphernalia" is defined as any device possessed for the purpose of consuming illegal controlled substances or the residue or remnants of illegal controlled substances.

(2) Introducing, purchasing, possessing, using, selling, transferring, manufacturing, or consuming any prescription medication without a valid current prescription. For purposes of this order, "prescription medication" includes substances for which U.S. state or federal law requires a valid prescription for dispensing. This Order does not apply to acts performed in the execution of official duties.

(3) Consuming, inhaling, ingesting, sniffing, or otherwise taking into the body any substance that could prove harmful and is not used for its intended purpose, such as, but not limited to: substances in aerosol containers, compressed air, glue and glue-like products, solvents, adhesives, nitrates, cleaning agents, and other gases.

e. Introducing, purchasing, possessing, transferring, selling, creating. or displaying any pornographic or sexually explicit material contained on any electronic media storage device, photograph, poster, drawing, book, or magazine. The prohibitions contained in this subparagraph shall not apply to American Forces Radio & Television Service Broadcasts or commercial magazines, CD/DVD or other videotapes distributed and/or displayed through AAFES or MWR outlets within the MNC-I AOR.

f. Photographing or filming detainees or human casualties, as well as the possession, distribution, transfer, copying, or posting, whether electronically or physically, of visual images depicting detainees or human casualties, except as required for official duties such as: unit casualty reporting, battle damage assessments, law enforcement purposes, and/or investigations. "Human Casualties" are defined as dead, wounded, or injured human beings, to include: disconnected human body parts, organs, and biological matter, regardless of cause. Subject to applicable copyright markings or notices, this prohibition does not apply to the possession or distribution of such visual images acquired from open-source media (e.g., magazines and newspapers). Photographing and maintaining images of wounded personnel admitted to medical treatment facilities is not prohibited provided the images are for treatment purposes and the facility obtains the express consent of the wounded individual.

g. Photographing or filming of military installation access points, gates, guard towers, checkpoints, or any security measures, as well as possessing, distributing, transferring, copying, or posting, whether electronically or physically, visual images depicting the same, except as required for official duties and/or with the express permission of the person responsible for security.

h. Gambling of any kind, including sports pools, lotteries, and raffles, unless permitted by host nation laws and applicable service component regulations. This prohibition does not apply to MWR sponsored activities.

i. Removing, possessing, selling, defacing, or destroying archeological artifacts or national treasures.

j. Selling, bartering or exchanging any currency other than at the official host nation exchange rate.

k. Adopting as pets or mascots, caring for, or feeding any type of domestic or wild animal.

l. Proselytizing of any religion, faith, or practice.

m. Taking or retaining of public or private property of an enemy or former enemy, except as granted by applicable USCENTCOM waivers and as noted below:

(1) Individual war souvenirs may only be acquired if specifically authorized by USCENTCOM. Absent such express authorization, no weapon, munitions, or military article of equipment, obtained or acquired by any means other than official issue may be retained for personal use or shipped out of the MNC-I AOR for personal retention.

(2) Private or public property may be seized during exercises or operations only on order of the Commander, MNC-I, or his designated representative, when based on military necessity and in accordance with the rules of engagement.

(a) Private property will be collected, processed, secured, and stored for later return to the lawful owner. The wrongful taking of private property, even temporarily, is a violation of Article 121, UCMJ.

(b) Public property lawfully seized by U.S. Armed Forces is the property of the United States. Wrongful retention of such property is a violation of Article 108, UCMJ. Unit retention of historical artifacts must be specifically approved by USCENTCOM.

(3) This prohibition on acquiring the property of an enemy or former enemy applies to enemy war materiel even if such materiel could be lawfully purchased through commercial or private means. Such items can only be acquired as individual war souvenirs and then only to the extent specifically authorized.

(4) This prohibition does not preclude the lawful acquisition of souvenirs that can be legally imported into the United States. The following items have been approved as authorized souvenirs: helmets and head coverings; bayonets; uniforms and uniform items such as insignia and patches; canteens; compasses; rucksacks; pouches: load bearing equipment; flags; military training manuals; books and pamphlets; posters; placards; photographs; or other items that clearly pose no health or safety risk, and are not otherwise prohibited by law or regulation. All acquired items are subject to the war souvenir retention process and must be approved by the appropriate reviewing officer. In accordance with MNC-I FRAGO 076, dated 9 January 2005, each company commander or person in the rank of Lieutenant Colonel (O-5) or above is designated as a reviewing officer.

n. Taking or retaining any found or seized currency for personal use. Such currency will be identified, collected, recorded, secured, and stored until it can be delivered to the appropriate authority.

o. Possessing, operating, purchasing, using, selling, or introducing into the MNC-I AOR of any motor vehicle not owned or leased by the U.S. Government or any company or agency engaged in contracting with the U.S. Government.

p. Possessing, touching, or using without legal authority unexploded ordnance of any kind. "Ordnance" is defined as any destructive or explosive material, including, but not limited to, bombs, rockets, missiles, grenades, mines, blasting caps, detonating cord, booby traps, flares, and ammunition of any caliber.

q. Sexual contact of any kind with Iraqi nationals, foreign nationals, or local nationals who are not members of coalition forces.

r. Cohabitation, residing, or spending the night in living quarters of any kind with a member of the opposite sex. The following exceptions apply:

(1) Subject to the availability of adequate accommodations, lawfully married spouses are permitted to reside in the same living quarters; and

(2) In situations of military exigency, mixed residency may be required (e.g., transient housing at air terminals).

4. **INDIVIDUAL DUTY**: All persons subject to this General Order are charged with the individual responsibility to know and understand the prohibitions contained herein. All such persons are further charged with the responsibility to become familiar with and respect the laws, regulations, and customs of their host nation insofar as they do not interfere with the execution of official duties. Those disrespecting or violating host nation laws, regulations, and customs may be punished under applicable criminal statutes and/or administrative regulations.

5. **UNIT COMMANDER RESPONSIBILITY**: Commanders, Security Assistance Office Chiefs, and military and civilian supervisors are charged with ensuring that all personnel are briefed on the prohibitions and requirements of this General Order. Commanders may further restrict their forces as they deem necessary.

6. **CONFISCATION OF OFFENDING ARTICLES**: Items determined to violate this General Order may be considered contraband by command or law enforcement authorities if found in the USCENTCOM AOR. Before destruction of contraband, Commanders or law enforcement personnel will coordinate with their

servicing judge advocate. Military customs and other pre-clearance officials will enforce this General Order in their inspections of personnel prior to departure from the USCENTCOM AOR and return to CONUS.

7. **EFFECTIVE DATE**: This General Order is effective immediately. MNC-I General Order Number 1 (GO-l), dated 14 February 2008, is superseded and hereby rescinded.

8. **EXPIRATION**: This General Order will expire when rescinded by the Commander, Multi-National Corps-Iraq, or higher authority.

//signed//
CHARLES H. JACOBY, JR.
Lieutenant General, USA

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CHAPTER 23

JOINT OPERATIONS

U.S. Department Of Defense

I. INTRODUCTION

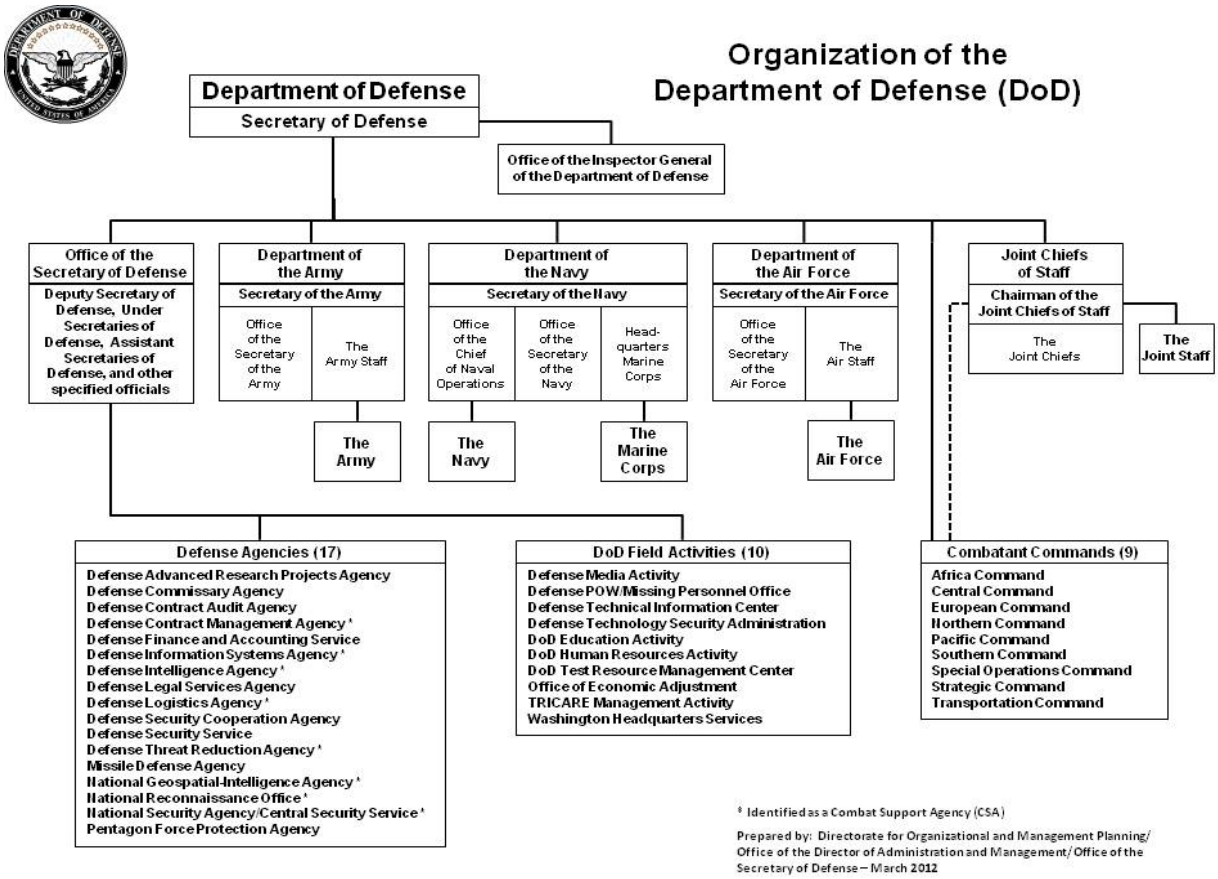
The U.S. Department of Defense (DoD), the oldest U.S. government agency, is the agency in charge of the U.S. military. With over 1.4 million men and women on active duty, and 718,000 civilian personnel, DoD is also the nation's largest employer. Another 1.1 million personnel serve in the National Guard and Reserve forces. In addition, more than 2 million military retirees and their family members receive benefits administered by DoD.[1]

II. MISSION

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. The President is the Commander-in-Chief of the Armed Forces, while the Secretary of Defense exercises authority, direction, and control over the Department. This includes the Office of the Secretary of Defense, organization of the Chairman of the Joint Chiefs of Staff, the three Military Departments, the Combatant Commands, the Office of the Inspector General, seventeen Defense Agencies, ten DoD Field Activities, and other organizations such as the National Guard Bureau (NGB).[2]

[1] U.S. Department of Defense, http://www.defense.gov/about/ (last visited May 2, 2014).
[2] Organization and Functions of the Department of Defense, http://odam.defense.gov/OMP/Functions/OrganizationalPortfolios/OrganizationandFunctionsGuidebook.aspx (last visited May 2, 2014).

III. ORGANIZATION



IV. OPERATIONS

A. The Secretary of Defense

The Secretary of Defense is the principal defense policy adviser to the President and is responsible for the formulation of general defense policy and policy related to all matters of direct concern to the Department of Defense, 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 Secretary of Defense is a member of the President's Cabinet and the National Security Council.[1]

B. The Deputy Secretary 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.[2]

C. The Office of the Secretary of Defense

The Office of the Secretary of Defense (OSD) is the principal staff element of the Secretary of Defense 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 Secretaries of Defense, 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.[3]

D. The Defense Agencies

Defense Agencies are established as DoD Components by law, the President, or the Secretary of Defense to provide for the performance, on a DoD-wide basis, of a supply or service activity that is common to more than one Military Department when it is determined to be more effective, economical, or efficient to do so. Each Defense Agency operates under the authority, direction, and control of the Secretary of Defense. The Defense Agencies assigned combat support or combat service support functions are designated as Combat Support Agencies (CSAs), which fulfill combat support or combat service support functions for joint operating forces across the range of military operations, and in support of the Commanders of the Combatant Commands executing military operations.[4]

E. The DoD Field Activities

DoD Field Activities are established as DoD Components by law, the President, or the Secretary of Defense to provide for the performance, on a DoD-wide basis, of a supply or service activity that is common to more than one Military Department when it is determined to be more effective, economical, or efficient to do so. Each DoD Field Activity operates under the authority, direction, and control of the Secretary of Defense. The Secretary or Deputy Secretary issues a chartering DoD Directive for each DoD Field Activity to prescribe its mission, organization and management, responsibilities and functions, relationships, and delegated authorities.[5]

V. CONCLUSION

The Department of Defense is the agency in charge of the U.S. military. It bears the responsibility of providing the military forces (Army, Navy, Air Force, and Marine Corps) needed to deter war and to protect the security of the United States. It is the key agency for joint operations in the U.S. government structure.

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[1] Top Civilian and Military Leaders, http://www.defense.gov/home/top-leaders/ (last visited May 2, 2014)
[2] *Id.*
[3] Office of the Secretary of Defense, http://www.defense.gov/osd/ (last visited May 2, 2014)
[4] DoDD 5100.01, Enclosure 7, December 21, 2010.
[5] DoDD 5100.01, Enclosure 8, December 21, 2010.

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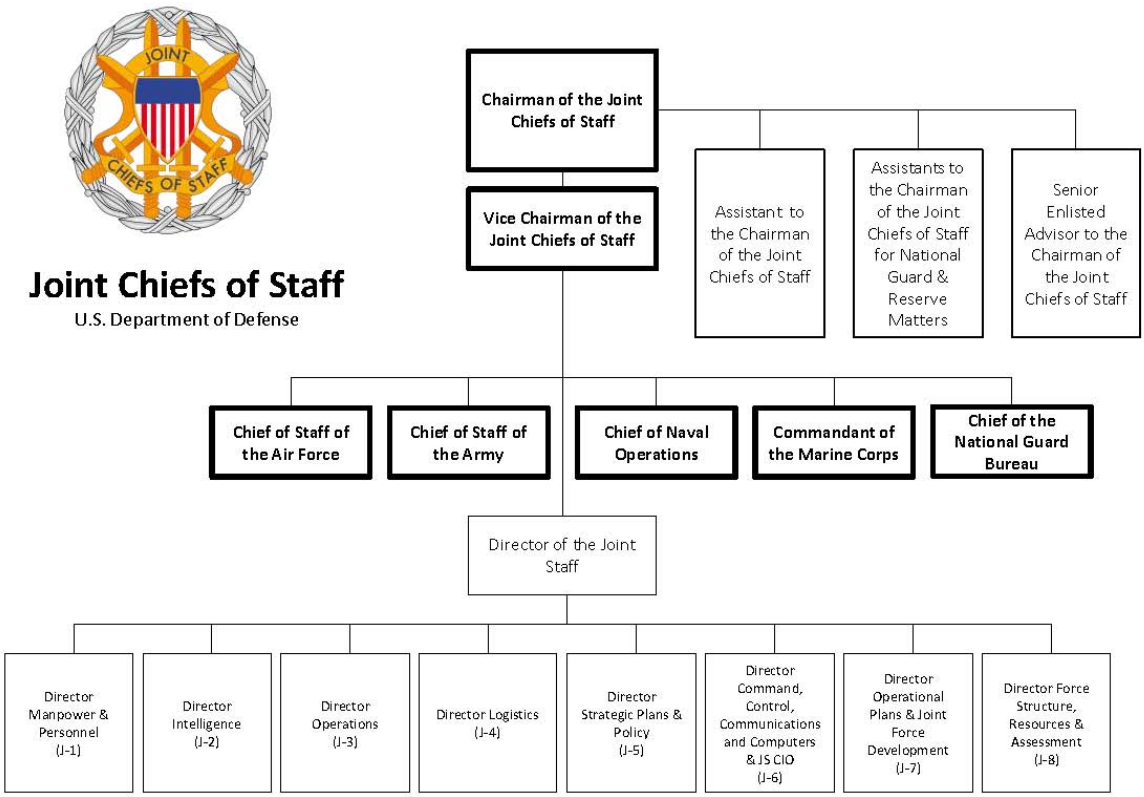
THE JOINT CHIEFS OF STAFF AND JOINT STAFF

I. INTRODUCTION The Joint Chiefs of Staff (JCS) consists 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, the Commandant of the Marine Corps and the Chief of the National Guard Bureau. 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 pr8624ecedence over duties as the Chiefs of Military Services. The Chairman of the Joint Chiefs of Staff is the principal military adviser to the President, the Secretary of Defense, and the National Security Council (NSC); all JCS members are by law military advisers, however, and they may respond to a request or voluntarily submit—through the Chairman—advice or opinions to the President, the Secretary of Defense, or the NSC. The Joint Chiefs of Staff have no executive authority to command combatant forces. As set forth in 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."[1]

[1] http://www.jcs.mil/About.aspx (last visited May 2, 2014).

II. ORGANIZATION



III. OPERATIONS

A. Chairman of the Joint Chiefs of Staff

The Chairman of the Joint Chiefs of Staff (CJCS) is 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.

The Secretaries of the Military Departments assign all forces to combatant commands except those assigned to carry out the mission of the Services: to 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.[2]

[2] http://www.jcs.mil/About.aspx (last visited May 2, 2014).

B. Vice Chairman of the Joint Chiefs of Staff

The CJCS is assisted by the Vice Chairman of the Joint Chiefs of Staff, performs such duties as the Chairman 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.[3]

C. Assistant to the Chairman

The Assistant to the Chairman of the Joint Chiefs of Staff, a three-star position, oversees matters requiring close personal control by the Chairman with particular focus on international relations and politico-military concerns.[4]

D. Assistants to the Chairman for National Guard and Reserve Matters

These two major generals are the Chairman's subject matter experts concerning Reserve Component issues and as such provide advice and work initiatives to insure that the National Guard and Reserve effectively support the National Military Strategy.[5]

E. Military Service Chiefs

The military Service Chiefs are often said to "wear two hats." As members of the JCS, they offer advice to the President, the SECDEF, 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 four 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 JCS take precedence over all their other duties.

F. 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; for 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, the Navy and Marine Corps, and the Air Force. In practice, the Marines make up about twenty 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 (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.

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[3] *Id.*
[4] *Id.*
[5] *Id.*

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.[6]

V. CONCLUSION

The Joint Chiefs of Staff are central to the U.S. defense establishment. Today, the Joint Chiefs of Staff have no executive authority to command combatant forces. The Chairman of the Joint Chiefs of Staff is the principal military adviser to the President and presents the range of advice and opinions he has received, along with any individual comments of the other JCS members. 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; for their operation under unified command; and for their integration into an efficient team of land, naval, and air forces. These important roles mean that the Joint Chiefs of Staff are central to the conduct and coordination of joint operations.

[6] *Id.*

U.S. ARMY

Battles are won by the infantry, the armor, the artillery, and air teams, by soldiers living in the rains and huddling in the snow. But wars are won by the great strength of a nation—the soldier and the civilian working together. *~General of the Army Omar N. Bradley*

I. INTRODUCTION

A. The Army is the primary landpower arm of our Nation's Armed Forces.[1] It exists to serve the American people, to protect enduring national interests, and to fulfill the Nation's military responsibilities.

B. The joint nature of modern warfare will drive the Army to "depend more on the other Services and vice versa." The Army has transformed the force to meet the demands of this joint, contingency environment by making the close combat units more sustainable and expeditionary.

II. MISSION

A. The Army's mission is to fight and win our Nation's wars by providing prompt, sustained land dominance across the full range of military operations and spectrum of conflict in support of Combatant Commanders. "The Army exists to serve the American people, protect enduring national interests, and fulfill the Nation's military responsibilities."[2]

B. The Army accomplishes its mission by: (1) executing Title 10 and Title 32 United States Code directives, to include organizing, equipping, and training forces for the conduct of prompt and sustained combat operations on land; and (2) accomplishing missions assigned by the President, Secretary of Defense, and Combatant Commanders, and transforming for the future.[3]

III. ORGANIZATION

A. Force Structure. The major warfighting elements of the operational Army are the modular corps, modular divisions, brigade combat teams (BCT) and support brigades. Operational units are task-organized to make the most effective use of the functional skills and specialized equipment. In addition to conventional organizations, the Army maintains a number of Special Operations units. Major modular force organizations include:

1. Army Service Component Command (ASCC), or Theater Army. Armies are commanded by three- or four-star Generals. Of the nine ASCCs, six are focused on geographic regions, while three are focused on functional areas.[4]

2. Corps. Lieutenant Generals (three-star) command Corps. There are currently three modular corps headquarters: I Corps (Fort Lewis, WA); III Corps (Fort Hood, TX);; and XVIII Airborne Corps (Fort Bragg, NC).[5]

3. Divisions. Divisions are commanded by Major Generals (two-star). The Army has eighteen division headquarters (ten modular Active Component, one Integrated, and eight National Guard).[6] These modular division

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[1] U.S. DEP'T OF ARMY, FIELD MANUAL 1, THE ARMY para. 2-26 (14 June 2005).
[2] *Id.*
[3] The Official Homepage of the United States Army, http://www.army.mil/info/organization/ (last visited April 30, 2014).
[4] *Id.* The nine ASCCs are: U.S. Army Africa (USARAF); U.S. Army Central (USARCENT); U.S. Army North (USARNORTH); U.S. Army South (USARSO); U.S. Army Europe (USAREUR); U.S. Army Pacific (USARPAC);; U.S. Army Special Operations Command (USASOC); Military Surface Deployment and Distribution Command (SDDC); and U.S. Army Space and Missile Defense Command/Army Strategic Command (USASMDC/ARSTRAT). The first six are geographic commands and the last three are functional commands. *Id*.
[5] *Id.*

headquarters will remain as currently designated (*e.g.*, light, armored, airborne, and air assault); however, these headquarters will routinely have all types of brigades task-organized to them for operations.

4. Brigade Combat Teams (BCT). Commanded by Colonels, BCTs are the Army's combat power building blocks for maneuver, and the smallest combined arms units that can be committed independently.[7] BCTs conduct offensive, defensive, stability and civil support operations and may contain artillery, engineer, and combat service support units. The BCT staff includes a brigade judge advocate (O-4), a trial counsel (O-3), and a senior paralegal NCO (E-7), who are responsible for providing legal services across all six core legal disciplines: military justice, international and operational law, administrative and civil law, contract and fiscal law, legal assistance, and claims. The brigade judge advocate serves as the legal advisor to the BCT commander. However, the BJA is under the technical supervision of the staff judge advocate[8] There are three types of maneuver BCTs: Infantry, Heavy, and Stryker.

a. Infantry BCT (IBCT). Infantry battalions serve as the primary maneuver force for the brigade, and are organized with a HHC, three rifle companies, and a weapons company. Each rifle company has three rifle platoons, a weapons squad, and a 60mm mortar section.[9] IBCTs are primarily light infantry units. Some specialized IBCTs are designated as airborne or air assault.

b. Heavy BCT (HBCT). The HBCT battalion is organized in a "two-by-two" design, consisting of two tank companies and two rifle companies.[10] HBCTs utilize large, heavily armored, tracked vehicles such as the M1 Abrams tank, the M2/M3 Bradley Fighting Vehicle, and the M109 Paladin howitzer.

c. Stryker BCT (SBCT). The Army developed the SBCT to combine the strengths of its light and heavy forces and their technological advantages, providing a strategically responsive force for future contingencies. The SBCT is centered on the Stryker vehicle, a wheeled light armored vehicle. SBCT Infantry battalions are organized "three-by-three"; that is, three rifle companies, each with three rifle platoons. Each rifle company has a section of organic 120mm Stryker mortar carrier vehicles with 60mm dismounted mortar capability, a mobile gun system (MGS) platoon with three MGS vehicles, and a sniper team.[11]

5. Combat Support Brigades. Five types of modular support brigades complement the BCTs: battlefield surveillance brigade, fires brigade, combat aviation brigade, maneuver enhancement brigade, and sustainment brigade. These brigades provide multifunctional capabilities to deployed forces. More than one type of support brigade may be task-organized to a division or corps, but a division headquarters does not routinely have a command relationship with supporting sustainment brigades.[12] A Division headquarters typically controls CSBs.

Army Units

Unit	Commander/Leader	Approx. Size	Unit	Commander/Leader	Approx. Size
Army	General or Lieutenant General	100,000+	Battalion	Lieutenant Colonel	500-1,000
Corps	Lieutenant General	50,000	Company	Captain	100-200
Division	Major General	20,000	Platoon	Lieutenant	40-50
Brigade	Colonel	3,000-4,000	Squad	Staff Sergeant	10-13

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[6] *Id.* The ten active Modular Divisions are: 1st Armored Division (Fort Bliss, TX); 1st Cavalry Division (Fort Hood, TX); 1st Infantry Division (Fort Riley, KS); 2nd Infantry Division (Camp Casey, Korea); 3rd Infantry Division (Fort Stewart, GA); 4th Infantry Division (Fort Carson, CO); 10th Mountain Division (Fort Drum, NY); 25th Infantry Division (Schofield Barracks, HI); 82nd Airborne Division (Fort Bragg, NC); and 101st Airborne Division (Fort Campbell, KY). The one active Integrated Division is 7th Infantry Division (Joint Base Lewis-McChord, Washington). The eight modular National Guard Divisions are: 28th Infantry Division (Harrisburg, PA); 29th Infantry Division (Fort Belvoir, VA); 34th Infantry Division (Saint Paul, MN); 35th Infantry Division (Fort Leavenworth, KS); 38th Infantry Division (Indianapolis, IN); 40th Infantry Division (Los Alamitos, CA); 42nd Infantry Division (Troy, NY); and 49th Armored Division (Austin, TX).
[7] U.S. DEP'T OF ARMY, FIELD MANUAL 3-90.6, THE BRIGADE COMBAT TEAM, para. 1-1 (14 Sep. 2010) [hereinafter FM 3-90.6].
[8] U.S. DEP'T OF ARMY, FIELD MANUAL 1-04, LEGAL SUPPORT TO THE OPERATIONAL ARMY, paras. 3-5–3-6; 4-7 (18 Mar. 2013).
[9] FM 3-90.6, *supra* note 7, para. 1-45.
[10] *Id.* at para. 1-32.
[11] *Id.* at para. 1-57.
[12] *Id.* at paras. 8-91–8-103.

B. Branches. In addition to units, Army personnel are divided into branches[13]:

1. Combat Arms. These branches, which are primarily responsible for engaging in combat operations, include Infantry, Armor, Field Artillery, Air Defense Artillery, Engineers, Aviation, and Special Forces.

2. Combat Support. These branches provide operational assistance to Combat Arms, including engagement in combat when necessary, along with additional responsibilities in providing logistical and administrative support to the Army and include Signal, Chemical, Military Intelligence, Military Police, and Civil Affairs.

3. Combat Service Support. These branches provide logistical and administrative support: Adjutant General, Chaplain, Finance, Quartermaster, Medical, Ordnance, Transportation, and the Judge Advocate General's Corps.

IV. OPERATIONS

The Army prepares leaders and Soldiers for the fluid operational environment. Within an operational environment, an Army leader may conduct major combat, military engagement, and humanitarian assistance simultaneously.[14] The Army has two core competencies, which are combined arms maneuver and wide area security. Army operations are characterized by flexibility, integration, lethality, adaptability, depth, and synchronization.[15] Commanders in these operations leverage the six warfighting functions—mission command, movement and maneuver, intelligence, fires, sustainment, and protection—to accomplish the mission. These warfighting functions are linked fundamentally to joint functions.[16]

V. CONCLUSION

The Army's primary mission is to fight and win our Nation's wars. The Army's structure provides the flexibility and lethality necessary to meet the demands of the fluid operational environment, which includes offensive, defensive and stability operations. The Army forms the key ground force for joint operations.

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[13] Doctrinally, the distinction between Combat Arms, Combat Support, and Combat Service Support is rapidly blurring, and the terms are becoming obsolete as all branches are blended together in the BCT.
[14] U.S. DEP'T OF ARMY DOCTRINE PUBLICATION 3-0, UNIFIED LAND OPERATIONS, para. 9 (10 Oct. 2011).
[15] *Id.* at para. 24.
[16] *Id.* at para. 61.

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U.S. MARINE CORPS

REFERENCES

1. MARINE CORPS DOCTRINAL PUBLICATION (MCDP) 1-0, MARINE CORPS OPERATIONS (Sept 2001).
2. U.S. MARINE CORPS CONCEPTS AND PROGRAMS 2013 *available at:* HTTP://WWW.HQMC.MARINES.MIL/PANDR/CONCEPTSANDPROGRAMS/CONCEPTSANDPROGRAMS2013.ASPX.

I. MISSION

A. Under 10 U.S.C. § 5063, the Marine Corps' primary mission is to be "organized, trained, and equipped to provide fleet marine forces of combined arms, together with supporting air components, for service with the fleet in the seizure or defense of advanced naval bases and for the conduct of such land operations as may be essential to the prosecution of a naval campaign." In addition, the Marine Corps provides detachments and organizations for service on armed Navy vessels, security detachments for the protection of naval property at naval stations and bases, and such other duties as the President may direct.

B. The ground, air, and supporting forces that make up the Marine Corps are trained and equipped to make available to the President and the unified Combatant Commanders the capability to react quickly to any military contingency in the world. As a result, Marine operational forces are "task organized" and deployed to meet whatever contingency mission they may be assigned, ranging from a natural disaster, such as OPERATION UNIFIED RESPONSE, the relief effort following the January 2010 earthquake in Haiti, to sustained ground combat such as in OPERATION IRAQI FREEDOM (OIF) and OPERATION ENDURING FREEDOM (OEF). Because Marine forces often deploy from and are sustained by sea-based platforms, they are referred to as "expeditionary" (being able to operate in areas where there was previously no supporting infrastructure).

II. FORCE STRUCTURE

A. **Introduction**. The Marine Corps is organized as the nation's "force in readiness" into four broad categories: Headquarters, U.S. Marine Corps (the Commandant of the Marine Corps and his advisory staff agencies); the operating forces; Marine Corps Forces Reserve; and the supporting establishment (personnel, bases, and activities that support the operating forces). According to 10 U.S.C. § 5063, "the Marine Corps, within the Department of the Navy, shall be so organized as to include not less than three combat divisions and three air wings, and such other land combat, aviation, and other services as may be organic therein." The Marine Corps present force structure is approximately 195,000 active duty Marines and 39,000 Reservists.

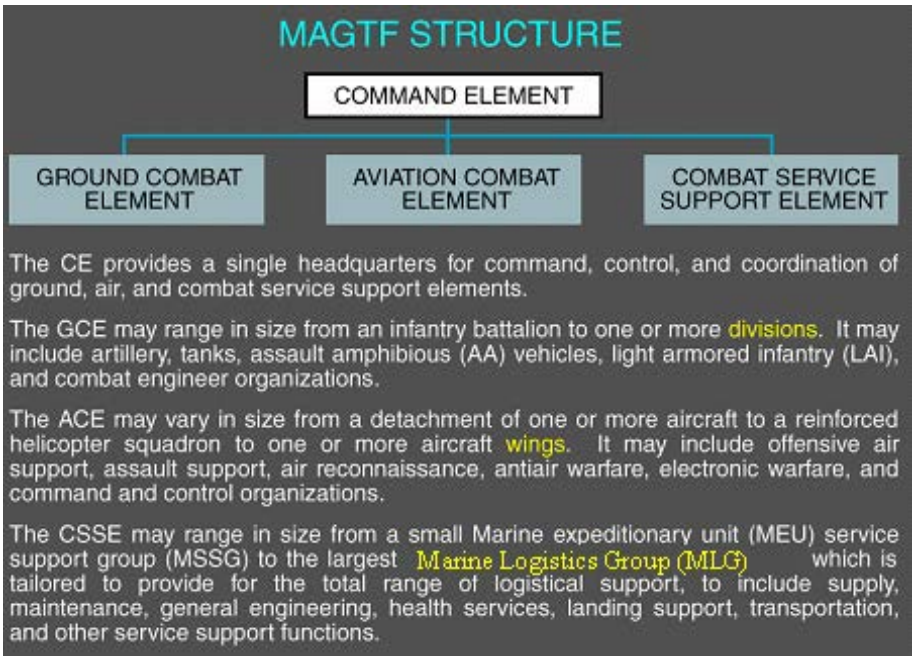
B. **Operating Forces**. The operating forces (as supplemented by the Reserves) are considered the heart of the Marine Corps. They constitute the forward presence, crisis response, and fighting power available to the Combatant Commanders. The Marine Corps has established three permanent combatant-level service components in support of unified commands with significant Marine forces assigned: U.S. Marine Corps Forces Command (MARFORCOM); U.S. Marine Corps Forces, Pacific (MARFORPAC); and U.S. Marine Corps Forces, Special Operations Command (MARSOC). Marine Corps Forces Command (MARFORCOM) is one of three major Marine Corps commands (with U.S. Marine Corps Forces, Pacific (MARFORPAC) and U.S. Marine Corps Forces, Reserve (MARFORRES)) that provide operating forces. About 64 percent of all active duty Marines are assigned to these operating forces. As dictated by 10 U.S.C. § 5063, operating forces are made available from four (3 active, 1 reserve) Divisions,

Wings, and Marine Logistics Groups (MLG). I and II Marine Expeditionary Forces (I and II MEFs) are provided by the Commander, MARFORCOM, to Combatant Commanders. III MEF is provided by the Commander, MARFORPAC, to the Commander, U.S. Pacific Command. This assignment reflects the recently realigned peacetime disposition of Marine Corps Forces (MARFOR). Marine forces are apportioned to the remaining geographic combatant commands for contingency planning and are provided to the Combatant Commands when directed by the Secretary of Defense. The newest Marine Corps Command, U.S. Marine Corps, Cyber (MARFORCYBER) became operational in October of 2010.

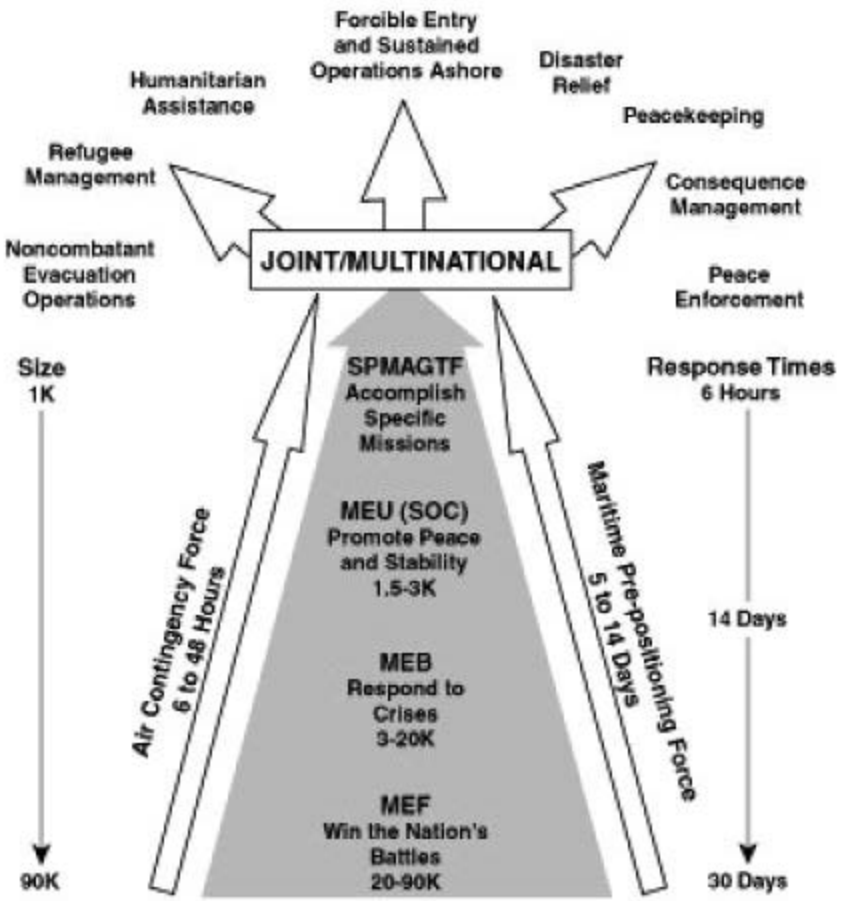
C. **Legal Support**. Command legal advice in the Marine Corps is provided primarily by a command's Staff Judge Advocate (SJA). Four Legal Services Support Sections (LSSS) (located in Camp Pendleton, CA, Camp Lejeune, NC, Camp Butler, HI, and Marine Corps Base Quantico, VA) and nine subordinate Legal Services Support Teams (LSST) provide consolidated legal services in garrison beyond the organic capability of a command's SJA. The LSSS and LSSTs provide support to commands and individual Marines, Sailors, and other eligible recipients within their designated Legal Services Support Area (LSSA). The LSSS and LSSTs provide a full range of legal services in the following functional areas: military justice, civil law, administrative law, ethics, claims, and legal assistance. Each subordinate LSST is comprised of a Trial Services Office, a Defense Service Branch Office, an Administrative Law Office, a Legal Assistance Office, and a Special Assistance U.S. Attorney (if required). Each LSSS is comprised of a regional office geographically co-located with the respective Marine Corps Installation (MCI) headquarters. The Officer-in-Charge (OIC) of each LSSS is responsible to the regional MCI Commanding General (CG) for the provision of legal services in garrison, beyond the organic capability of SJAs, to all operating forces and supporting establishment commands within the LSSS's designated LSSA. The OIC, LSSS also serves as a special staff officer to the regional MCI CG and has exclusive staff cognizance over the legal services support function within the region. While the OIC, LSSS 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 operating forces. That traditional duty remains with the SJA. Each major command (division, wing, logistics group) has an SJA and a small legal staff consisting of a Deputy SJA, several company grade officer staff attorneys, and an enlisted legal support staff. The bulk of the legal assets remain in the LSSS. During OIF and OEF, lawyers were directly assigned to deploying Battalion and Regimental staffs to provide legal counsel to that respective commander. This operational change, however, is not permanently embedded into the USMC Table of Organization (T/O). Marine Judge Advocates are also assigned to Headquarters, U.S. Marine Corps, the supporting establishment, and MARFORRES. These Judge Advocates are often called upon to support the operating forces through deployments as individual augmentees or by providing reach-back support. Legal support to Marine Air Ground Task Forces (MAGTFs) (see section III(A) below) is provided based on mission requirements. Marine Expeditionary Units (MEU) (see section III(E) below) traditionally deploy with one field grade officer JA and an enlisted legal chief. Marine Judge Advocates are unrestricted line officers and may also serve in command billets and various other non-legal billets.

III. TASK ORGANIZATION: THE MARINE AIR-GROUND TASK FORCE (MAGTF)

A. In order to meet mission-oriented expeditionary requirements, the Marine Corps has developed the concept of Marine Air-Ground Task Force (MAGTF) organization. The MAGTF is the Marine Corps principal organization for the conduct of all missions across the range of military operations. The MAGTF provides a combatant commander or other operational commander a versatile expeditionary force for responding to a broad range of crisis and conflict situations. MAGTFs are balanced, combined arms forces with organic command, ground, aviation, and sustainment elements. It is a building block concept: the fleet/joint commander's operational requirement or task is analyzed, and the appropriate units are drawn from a Marine division, aircraft wing, and MLG into an air-ground-logistics team under one commander to meet the task. The resulting MAGTF may be of any size, and the weight and composition of its component elements may vary, depending on the mission and enemy situation. The building block approach also lends itself to rapid expansion into a larger force as a situation demands. 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 logistics combat element (LCE).



B. Four types of MAGTFs can be task organized as follows: the MEF, the Marine Expeditionary Brigade (MEB), the Marine Expeditionary Unit (Special Operations Capable) (MEU (SOC)), and the Special Purpose Marine Air Ground Task Force (SPMAGTF).



C. A MEF is the principal Marine Corps warfighting organization, particularly for a larger crisis or contingency, and is normally commanded by a lieutenant general. A MEF can range in size from 20,000 to 90,000 Marines and sailors, from less than one to multiple divisions and aircraft wings, together with one or more MLGs.

With sixty days of accompanying supplies, MEFs are capable of both amphibious operations and sustained operations ashore in any geographic environment. With appropriate augmentation, the MEF command element is capable of performing as a Joint Task Force (JTF) Headquarters. A MEF will normally deploy in echelon and will designate its lead element as the MEF (Forward). MEFs are the primary "standing MAGTFs," existing in peacetime as well as wartime. The Marine Corps has three standing MEFs: I MEF is based in California and Arizona; II MEF is based in North and South Carolina; and III MEF is forward-based in Okinawa and mainland Japan.

D. A MEB is an intermediate-size MAGTF that bridges the gap between the MEF and the MEU, ranging in size from 3,000 to 20,000 Marines and sailors, and is normally commanded by a brigadier general (normally the deputy commander of the parent MEF). The MEB is not a standing organization; it is a task-organized unit created for a specific mission and is comprised of assets from the MEF. A MEB can operate independently or serve as the MEF's advance echelon. It is normally composed of a reinforced infantry regiment, a composite Marine Air Group (MAG), and a Brigade Service Support Group (BSSG). A MEB is capable of rapid deployment and employment via amphibious shipping, strategic air/sealift, or maritime pre-positioning force assets. With thirty days of supplies, a MEB can conduct amphibious assault operations ashore in any geographic environment. During potential crisis situations, a MEB may be forward deployed afloat (typically aboard fifteen amphibious ships, including five large-deck amphibious assault ships) for an extended period in order to provide an immediate combat response.

E. Forward deployed MEU(SOC)s embarked aboard amphibious shipping (typically three ships) within a larger naval Expeditionary Strike Group (ESG) package, operate continuously in the areas of responsibility of numerous unified combatant commanders. A MEU(SOC) is typically comprised of approximately 2,200 Marines and sailors. These are standing units that provide the President and combatant commanders an effective means of dealing with the uncertainties of future threats by providing a forward-deployed force with unique capabilities for a variety of quick reaction, sea-based, crisis response options in either a conventional amphibious/expeditionary role or in the execution of maritime special operations. MEU(SOC) train for operations to be executed within six hours of receipt of the mission. The forward-deployed MEU(SOC), forged and tested in real-world contingencies, remains the benchmark forward operating Marine force. The MEU is commanded by a colonel and deploys with fifteen days of accompanying supplies. It is composed of a reinforced infantry battalion, a composite squadron, and a combat logistics battalion. The 11th, 13th, and 15th MEUs are drawn from I MEF assets based in Camp Pendleton, CA. The 22nd, 24th, and 26th MEUs are drawn from II MEF assets based in Camp Lejeune, NC and the 31st MEU is drawn from III MEF assets based in Okinawa, mainland Japan, and Hawaii. MEUs present these organic capabilities:

1. Amphibious Operations: Amphibious Assault, Amphibious Raids, Small Boat Raids (31st MEU), and Maritime Interception Operations

2. Expeditionary Support to Other Operations/Crisis Response and Limited-Contingency Operations: Noncombatant Evacuation Operations, Humanitarian Assistance, Stability Operations, Joint and Combined Operations, Aviation Operations from Expeditionary Sites, Theater Security Cooperation Activities, Airport and Port Seizures, Visit/Board/Search and Seizure, and Advance Force Operations

F. A SPMAGTF is task organized to accomplish a specific mission, operation, or regionally focused exercise. As such, SPMAGTFs can be organized, trained, and equipped to conduct a wide variety of expeditionary operations ranging from crisis response to training exercises and peacetime missions. Their duties cover the spectrum from NEOs to disaster relief and humanitarian missions as seen after the Asian Tsunami in the Indian Ocean in 2004. An emerging variant of the SPMAGTF, the SPMAGTF-(Security Cooperation) provides combatant commanders with Marine forces specifically task-organized for security cooperation and civil military operations.

G. **Air Contingency Forces.** All three MEFs maintain Air Contingency MAGTFs (ACM) in a continuous state of readiness. ACMs are on-call, task-organized alert forces, available to the unified combatant commanders for world wide deployment via airlift. An ACM can be deployed within eighteen hours of notification. The size can vary, with a task organization designed to meet the mission, threat, and airlift availability. An example of an ACM deployment occurred during the 2004 rebel uprising in Haiti in support of what would later be called Operation Secure Tomorrow.

H. **Maritime Prepositioning Force.** As is evident from the above, an overriding requirement for MAGTFs, and especially MEU (SOC) MAGTFs, is the ability to plan rapidly and effectively for the execution of real world contingencies with the forces, lift, logistics, and enemy situation at hand. MAGTFs deploy by amphibious shipping and airlift and are sustained on the ground by their own organic assets, as well as by Maritime Prepositioning Force (MPF) or other prepositioned equipment. The MPF program, which began in 1981, consists of sixteen self-

sustaining, roll-on/roll-off ships, civilian-owned and operated under long-term charters to the Military Sealift Command (MSC). The MPF is organized into three Maritime Prepositioning Ships Squadrons (MPSRON): MPSRON-1, based in the Mediterranean; MPSRON-2, based at Diego Garcia in the Indian Ocean; and MPSRON-3, based in the Guam-Saipan area. Each MPSRON provides enough tanks, artillery, vehicles, ammunition, supplies, food, fuel, and water to support a MEB for thirty days of combat. The ships can be used separately or in larger groups to support smaller or larger MAGTFs. A single MPF ship is capable of supporting a MEU for thirty days.

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U.S. NAVY

I. INTRODUCTION

"90% of the world's commerce travels by sea; the vast majority of the world's population lives within a few hundred miles of the oceans; nearly three quarters of the planet is covered by water." [1] Since the founding of the United States Navy on October 13, 1775, our nation has recognized that seapower is critical to protecting U.S. national security and the American way of life.[2]

II. MISSION

A. Navy Mission. The mission of the Navy is to maintain, train and equip combat-ready Naval forces capable of winning wars, deterring aggression and maintaining freedom of the seas.[3]

B. Maritime Strategic Concept. "The expeditionary character and versatility of maritime forces provide the United States the asymmetric advantage of enlarging or contracting its military footprint in areas where access is denied or limited. Permanent or prolonged basing of our military forces overseas often has unintended economic, social or political repercussions. The sea is a vast maneuver space, where the presence of maritime forces can be adjusted as conditions dictate to enable flexible approaches to escalation, de-escalation and deterrence of conflicts. The speed, flexibility, agility and scalability of maritime forces provide joint or combined force commanders a range of options for responding to crises. Additionally, integrated maritime operations, either within formal alliance structures (such as the North Atlantic Treaty Organization) or more informal arrangements (such as the Global Maritime Partnership initiative), send powerful messages to would-be aggressors that we will act with others to ensure collective security and prosperity. ***United States seapower will be globally postured to secure our homeland and citizens from direct attack and to advance our interests around the world***."[4]

III. ORGANIZATION AND FORCE STRUCTURE

A. Components. The Department of the Navy has three principal components: (1) The Navy Department; (2) the operating forces, including the Marine Corps, the reserve components, and, in time of war, the U.S. Coast Guard (in peacetime a component of the Department of Homeland Security); and (3) the shore establishment.

1. *Navy Department.* The Navy Department is comprised of the Office of the Secretary of the Navy (SECNAV), and the Office of the Chief of Naval Operations (OPNAV). The Chief of Naval Operations (CNO) is the senior military officer in the Navy, and thus is akin to the Chief of Staff of the Army or Air Force.[5]

2. *Operating Forces.* The operating forces commanders and fleet commanders have a dual chain of command. Administratively, they report to the CNO and provide, train, and equip naval forces. Operationally, they provide naval forces and report to the appropriate Unified Combatant Commanders. Commander, Fleet Forces Command, commands and controls fleet assets in both the Atlantic and the Pacific Oceans for interdeployment training cycle

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[1] U.S. Navy, U.S. Marine Corps, & U.S. Coast Guard, *A Cooperative Strategy for 21st Century Seapower* (2007), available at http://www.navy.mil/maritime/MaritimeStrategy.pdf.
[2] *Id.*
[3] Mission of the Navy, *available at* http://www.navy.mil/navydata/organization/org-top.asp.
[4] *A Cooperative Strategy for 21st Century Seapower*, supra note 1.
[5] Navy Organization, *available at* http://www.navy.mil/navydata/organization/org-over.asp. Office of the Chief of Naval Operations, *available at* http://www.navy.mil/navydata/organization/org-cno.asp. The Marine Corps and Coast Guard are discussed elsewhere.

purposes. As units of the Navy enter the area of responsibility for a particular Navy area commander, they are operationally assigned to the appropriate numbered fleet. All Navy units also have an administrative chain of command (exercising administrative control, or ADCON), with the various ships reporting to the appropriate Type Commander.[6]

3. *Shore Establishment.* The shore establishment provides support to the operating forces (known as "the fleet") in the form of facilities for the repair of machinery and electronics; communications centers; training areas and simulators; ship and aircraft repair; intelligence and meteorological support; storage areas for repair parts, fuel, and munitions; medical and dental facilities; and air bases.[7]

B. Power Projection. Three types of Naval power projection are the Carrier Strike Group (CSG), the Amphibious Ready Group (ARG), and its embarked Marine Expeditionary Unit (MEU).

1. *Carrier Strike Group.* A CSG generally consists of an aircraft carrier (CVN),[8] its embarked air wing (CVW)[9] of approximately eighty fixed- and rotary-wing aircraft,[10] a cruiser and two destroyers,[11] a replenishment ship,[12] and a submarine.[13] A CSG is normally commanded by a Rear Admiral (lower or upper half, one or two stars respectively), with a Lieutenant Commander (O-4) as staff judge advocate (SJA). The SJA is the only lawyer assigned to the Admiral's staff.[14]

2. *Amphibious Ready Group.* An ARG generally consists of a "big-deck" amphibious assault ship (LHA/LHD), or "amphib"; its embarked Marine Expeditionary Unit (MEU) including an Aviation Combat Element (ACE) of approximately thirty fixed- and rotary-wing aircraft,[15] and two smaller amphibs (LPD/LSD). Each of the three vessels in an ARG will have a variety of landing craft used to transport Marines ashore, such as Landing Craft Air Cushioned (LCAC), Amphibious Assault Vehicle (AAV), and Landing Craft Utility (LCU). If the mission requires an expanded strike capability, the ARG can be augmented by a cruiser and/or two destroyers, and a

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[6] The Operating Forces, *available at* http://www.navy.mil/navydata/organization/orgopfor.asp. Example: a guided missile destroyer (DDG) homeported in San Diego reports *administratively* to a Destroyer Squadron (DESRON, i.e., its Type Commander), but deploys as part of a Carrier Strike Group (*see infra*), which reports *operationally* to Commander Third Fleet (C3F) when the CSG is transiting from San Diego to Hawaii, to Commander Seventh Fleet (C7F) when the CSG is transiting from Hawaii through the Indian Ocean, and to Commander Fifth Fleet (C5F) when the CSG arrives in the Arabian Gulf. C5F is dual-hatted as Commander U.S. Naval Forces Central Command (COMNAVCENT), the Naval Component Commander for Central Command (CENTCOM). *See generally* COMNAVCENT/C5F Mission & Area of Operations, *available at* http://www.cusnc.navy.mil/mission/index.html.

[7] The Shore Establishment, *available at* http://www.navy.mil/navydata/organization/org-shor.asp.

[8] "CVN" is the hull classification symbol or code for "Carrier, Aircraft (Nuclear-Propulsion)" (i.e., nuclear powered aircraft carrier). There are currently eleven nuclear powered aircraft carriers. Each has a crew of approximately 3,200 sailors. *See generally* U.S. Navy Fact File—Aircraft Carriers, *available at* http://www.navy.mil/navydata/fact_display.asp?cid=4200&tid=200&ct=4.

[9] An air wing adds approximately 2,400 sailors onboard the aircraft carrier.

[10] An embarked air wing will generally consist of F/A-18C/D Hornets and F/A-18E/F Super Hornets, EA-6B Prowlers (soon to be replaced by the EA-18G Growler), E-2C Hawkeyes, C-2A Greyhounds, and MH-60R/S, and HH-60H Seahawk helicopters.

[11] The cruisers and destroyers provide defense against air, surface, and submarine threats.

[12] This ship performs underway replenishment of food, ammunition, fuel, repair parts, and other provisions for the other CSG ships.

[13] Attack submarines (SSN) are designed to seek and destroy enemy submarines and surface ships; project power ashore with Tomahawk cruise missiles and Special Operation Forces; carry out Intelligence, Surveillance, and Reconnaissance (ISR) missions; support Carrier Strike Groups; and engage in mine warfare. *See generally* U.S. Navy Fact File—Attack Submarines – SSN, *available at* http://www.navy.mil/navydata/fact_display.asp?cid=4100&tid=100&ct=4.

[14] The CSG Staff is typically assigned to a particular aircraft carrier (i.e., a CSG Staff is assigned to each of the eleven aircraft carriers). The strike group commander, if not operating as head of, or a component of a Joint Task Force (JTF), will usually be operating under the direction of a numbered fleet commander (*see supra*), who will have a more senior staff judge advocate (generally an O-5), but the strike group commander will rely almost exclusively on his own SJA for advice on a variety of issues ranging from rules of engagement, to military justice and foreign claims. Note also that each carrier typically has two Judge Advocates (JAs) as part of the "ship's company," typically an O-4 and an O-3. Those JAs work for the commanding officer of the carrier (an O-6), and will be primarily concerned with discipline on board the carrier. However, the strike group SJA and the carrier SJA often cooperate on various legal issues.

[15] An ACE generally has a mix of AV-8B Harriers capable of Vertical/Short Take Off and Landing (V/STOL), along with rotary assets such as the CH-53E Super Stallion, CH-46 Sea Knight, AH-1Z Super Cobra, UH-1N Huey, or MV-22 Osprey tilt-rotor aircraft.

submarine to form an Expeditionary Strike Group (ESG). An ESG is normally commanded by a Rear Admiral (one-star), who is supported by an O-3 or O-4 SJA.

C. Strategic Deterrence. The U.S. Navy maintains the ability to respond to nuclear aggression or threats with highly reliable, credible and survivable nuclear forces. Undetected ballistic missile submarines (SSBNs) provide the most survivable leg of the U.S. strategic defense arsenal.[16] Since the 1960s, strategic deterrence has been the SSBN's sole mission, providing the United States with its most survivable and enduring nuclear strike capability.[17] Each SSBN has two crews, Blue and Gold, which alternate manning the submarines while on patrol. This maximizes the SSBN's strategic availability, reduces the number of submarines required to meet strategic requirements, and allows for proper crew training, readiness, and morale.

D. Aegis Ballistic Missile Defense (BMD). The Aegis Ballistic Missile Defense (BMD) is the mobile sea-based component of the Missile Defense Agency's BMD System. The Navy embraces BMD as a core mission of and one of the key enabling capabilities that the Navy provides the joint force, assuring access in the maritime domain. Aegis BMD is capable of defeating short-to intermediate-range, unitary, and separating, midcourse-phase, ballistic missile threats with the Standard Missile-3 (SM-3), as well as short-range ballistic missiles in the terminal phase with the SM-2. As of November 2012, there are twenty-six Aegis BMD ships (five cruisers and twenty one destroyers) in the U.S. Navy. Of the twenty-six ships, sixteen are assigned to the Pacific Fleet and ten to the Atlantic Fleet. In response to the increasing demand for Aegis BMD capability from the Combatant Commanders, the Missile Defense Agency and Navy are working together to increase the number of Aegis BMD into the Aegis Modernization Program and new construction of the Aegis BMD destroyers.[18]

IV. OPERATIONS

The following six capabilities comprise the core of U.S. maritime power and reflect an increase in emphasis on those activities that prevent war and build partnerships:[19]

1. *Forward Presence*. Maritime forces will be forward deployed, especially in an era of diverse threats to the homeland. Operating forward enables familiarity with the environment, as well as the personalities and behavior patterns of the regional actors.

2. *Deterrence*. Preventing war is preferable to fighting wars. Deterring aggression must be viewed in global, regional, and transnational terms via conventional, unconventional, and nuclear means.

3. *Sea Control*. The ability to operate freely at sea is one of the most important enablers of joint and interagency operations, and sea control requires capabilities in all aspects of the maritime domain, including space and cyberspace.

4. *Power Projection.* Our ability to overcome challenges to access and to project and sustain power ashore is the basis of our combat credibility.

5. *Maritime Security.* Creating and maintaining security at sea is essential to mitigating threats short of war, including piracy, terrorism, weapons proliferation, drug trafficking, and other illicit activities.

6. *Humanitarian Assistance and Disaster Response.* Building on relationships forged in times of calm, we will continue to mitigate human suffering as the vanguard of interagency and multinational efforts, both in a deliberate, proactive fashion and in response to crises.

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[16] *See generally* U.S. Navy Fact File—Fleet Ballistic Missile Submarines - SSBN, *available at* http://www.navy.mil/navydata/fact_display.asp?cid=4100&tid=200&ct=4.

[17] Beginning in 2002, four *Ohio* class guided-missile submarines were converted into guided missile submarines (SSGN). Armed with tactical missiles and equipped with superior communications capabilities, SSGNs provide the Navy with an unprecedented combination of strike and special operation mission capability within a stealthy, clandestine platform. Each SSGN is capable of carrying up to 154 Tomahawk or Tactical Tomahawk land-attack cruise missiles and has the capacity to host up to 66 SOF personnel at a time. *See generally* U.S. Navy Fact File—Guided Missile Submarines - SSGN, *available at* http://www.navy.mil/navydata/fact_display.asp?cid=4100&tid=300&ct=4.

[18] For more information see Aegis Ballistic Missile Defense Fact Sheet, *available at* http://www.mda.mil/global/documents/pdf/aegis.pdf; or http://www.mda.mil/system/aegis_bmd.html

[19] *Id.*

V. CONCLUSION

The United States Navy is committed to its fundamental mission to **win the nation's wars, deter aggression from state and non-state actors, and maintain the freedom of the seas.** Today, its challenge is to apply seapower in a manner that protects U.S. vital interests even as it promotes greater collective security, stability, and trust. While defending our homeland and defeating adversaries at war remain the indisputable ends of seapower, it must be applied more broadly if it is to serve the national interest. Moving forward, the U.S. Navy must contribute to winning wars decisively while enhancing its ability to prevent war, win the long struggle against terrorist networks, positively influence events, and ease the impact of disasters."[20]

[20] *A Cooperative Strategy for 21st Century Seapower*, supra note 1

U.S. AIR FORCE

Aim High…Fly-Fight-Win

I. INTRODUCTION

The U.S. Air Force traces its lineage to the Aeronautical Division of the U.S. Army Signal Corps, which was created in 1907 and acquired its first airplane from the Wright Brothers in 1909.[1] The Air Force remained a functional component of the Army until the U.S. Air Force was established as an independent, co-equal branch of the military following the enactment of the National Security Act of 1947. President Truman signed the act on 26 July 1947 and the first Secretary of the Air Force was sworn on 18 September 1947.[2]

The National Security Act established the requirement that the Air Force "shall be organized, trained and equipped primarily for prompt and sustained offensive and defensive air operations."[3] The same day he signed the act, President Truman also signed Executive Order 9877, which established the first Air Force core missions of air superiority, airlift, air reconnaissance, strategic air force, air support to ground and naval forces, and coordination of air defense.[4] Today, the Air Force continues to meet these requirements, even as they have evolved over the years, resulting in *Global Vigilance*, *Global Reach*, and *Global Power* for America and achieving its new vision as: "The World's Greatest Air Force—Powered by Airmen, Fueled by Innovation."[5]

II. MISSION OF THE AIR FORCE

A. Mission and Vision of the Air Force. The Air Force mission is to "*fly*, *fight*, and *win*…in *air*, *space*, and *cyberspace*."[6] To achieve that mission, the Air Force adopted the following vision:

> The United States Air Force will be a trusted and reliable Joint partner with our sister Services known for integrity in all of our activities, including supporting the Joint mission first and foremost. We will provide compelling air, space, and cyber capabilities for use by the combatant commanders. We will excel as stewards of all Air Force resources in service to the American people, while providing precise and reliable *Global Vigilance*, *Reach*, and *Power* for the Nation.[7]

This vision was modified in August 2013 to simply, "The World's Greatest Air Force—Powered by Airmen, Fueled by Innovation." However, the tenets of Global Vigilance, Global Reach, and Global Power remain part of that

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[1] U.S. DEP'T OF AIR FORCE, CREATION OF THE AERONAUTICAL DIVISION FACT SHEET (3 Apr. 2009) *available at* http://www.nationalmuseum.af.mil/factsheets/factsheet.asp?id=14205 (last visited 23 April 2014).
[2] U.S. DEP'T OF AIR FORCE, USAF ESTABLISHED FACT SHEET (22 Oct. 2013) *available at* http://www.nationalmuseum.af.mil/factsheets/factsheet.asp?id=1845 (last visited 23 April 2014).
[3] *Id. See also*, 10 U.S.C. § 8062(c) (2011) *available at*, http://www.law.cornell.edu/uscode/text/10/8062.
[4] U.S. DEP'T OF AIR FORCE, AIR FORCE 101 POWERPOINT PRESENTATION, slide 17 (Apr. 2014) *available at* https://www.my.af.mil (Common Access Card Required).
[5] U.S. DEP'T OF AIR FORCE, THE WORLD'S GREATEST AIR FORCE—POWERED BY AIRMEN, FUELED BY INNOVATION: A VISION FOR THE UNITED STATES AIR FORCE (15 Aug. 2013) [hereinafter AF VISION] *available at* http://www.af.mil/Airpower4America.aspx.
[6] U.S. DEP'T OF AIR FORCE, INSTR. 1-1, AIR FORCE STANDARDS para. 1.2 (7 Aug 2012) [hereinafter AFI 1-1] *available at* http://www.e-publishing.af.mil.
[7] *Id.* at para. 1.2.1.

vision.[8]

B. Role and Responsibilities of the Air Force. Air Force doctrine states that the role of the Air Force is "to defend the United States and protect its interests through airpower, guided by the principles of joint operations and the tenets of airpower."[9] Airpower is defined as "the ability to project military power or influence through the control and exploitation of air, space, and cyberspace to achieve strategic, operational, or tactical objectives."[10] Doctrine further delineates the Air Force role in the application of airpower as distinguished from the other military services:

> As the nation's most comprehensive provider of military airpower, the Air Force conducts continuous and concurrent air, space, and cyberspace operations. The air, space, and cyberspace capabilities of the other Services serve primarily to support their organic maneuver paradigms; the Air Force employs air, space, and cyberspace capabilities with a broader focus on theater-wide and national-level objectives. Through airpower, the Air Force provides the versatile, wide-ranging means towards achieving national objectives with the ability to deter and respond immediately to crises anywhere in the world.[11]

To achieve its overall mission and vision, the Air Force conducts five core missions. These missions have evolved from the six original core missions established by President Truman in 1947. Today they are: 1) air and space superiority; 2) intelligence, surveillance, and reconnaissance; 3) rapid global mobility; 4) global strike; and 5) command and control.[12] The Air Force accomplishes these core missions through a commitment to three core values: *Integrity first, Service before self,* and *Excellence in all we do*.[13]

III. ORGANIZATION AND FORCE STRUCTURE

A. Total Force. The Air Force total force concept is defined as all "the US Air Force organizations, units, and individuals that provide the capabilities to support the Department of Defense in implementing the national security strategy. Total force includes Regular Air Force, Air National Guard of the United States, Air Force Reserve military personnel, US Air Force military retired members, US Air Force civilian personnel (including foreign national direct and indirect-hire, as well as non-appropriated fund employees), contractor staff, and host-nation support personnel."[14]

B. Standard Organization of the Air Force. The following is the basic command structure of the Air Force as established and described by Air Force Instruction (AFI) 38-101, *Air Force Organization*, dated 16 March 2011.[15]

1. Headquarters, U.S. Air Force (HQ USAF). Consists of the Secretariat led by the Secretary of the Air Force (SecAF) and the Air Staff led by the Chief of Staff (CSAF).

2. Major Commands (MAJCOM). Management headquarters directly subordinate to HQ USAF and assigned a major component of the Air Force mission. MAJCOMs are generally functional or geographic. MAJCOMs are commanded by a three (O-9) or four-star general officer (O-10). The following is the current list of Air Force MAJCOMs:[16]

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[8] AF VISION, *supra* note 5.
[9] U.S. DEP'T OF AIR FORCE, AIR FORCE DOCTRINE, VOL. 1, BASIC DOCTRINE 1 (14 Oct. 2011) [hereinafter AF DOCTRINE, V1], *available at* https://doctrine.af.mil/download.jsp?filename=Volume-1-Basic-Doctrine.pdf (last visited 30 Apr. 2014).
[10] *Id.* at 24.
[11] *Id.*
[12] AF VISION, *supra* note 5.
[13] *Our Mission,* AIR FORCE.COM, http://www.airforce.com/learn-about/our-mission/ (last visited 29 Apr. 2014).
[14] U.S. DEP'T OF AIR FORCE, AIR FORCE DOCTRINE, VOL. 2, LEADERSHIP 8 (4 Nov. 2011) [hereinafter, AF DOCTRINE, V2], *available at* https://doctrine.af.mil/download.jsp?filename=Volume-2-Leadership.pdf (last visited 30 Apr. 2014).
[15] *See,* U.S. DEP'T OF AIR FORCE INSTR. 38-101, AIR FORCE ORGANIZATION (16 Mar. 2011) [hereinafter, AFI 38-101].
[16] U.S. DEP'T OF AIR FORCE, U.S. AIR FORCE FACT SHEET (18 Jan. 2006) *available at* http://www.af.mil/AboutUs/FactSheets/Display/tabid/224/Article/104613/the-us-air-force.aspx (last visited 23 April 2014).

a. Air Combat Command (ACC)
b. Air Education and Training Command (AETC)
c. Air Force Global Strike Command (AFGSC)
d. Air Force Materiel Command (AFMC)
e. Air Force Reserve Command (AFRC)
f. Air Force Space Command (AFSPC)
g. Air Mobility Command (AMC)
h. Pacific Air Forces (PACAF)
i. United States Air Forces Europe and Air Forces Africa (USAFE)
j. Air Force Special Operations Command (AFSOC)
k. Air National Guard (ANG)*

***The Air National Guard is considered a component in addition to a command in that it has a dual mission. In Federal status, the ANG augments the Active Component. In non-Federal status, the ANG reports directly to their respective state governors.

3. **Numbered Air Force (NAF).** A level of command directly under a MAJCOM. NAFs have been described as a tactical echelon in that they provide operational leadership and supervision. A NAF is assigned subordinate units, such as wings, groups and squadrons. Their purpose is to ensure the readiness of assigned forces and prepare forces for deployment and employment. Numbered Air Forces are typically commanded by a three-star general (O-9). There are currently 16 activated NAFs worldwide.

a. Named Air Force. Operates at the same level of command as a numbered air force, there is currently one named air force, United States Air Forces Central (USAFCENT), which serves as the air component of United States Central Command.

b. Component NAFs (C-NAF). C-NAFs support the Air Force component commander (COMAFFOR) at the operational and tactical level. When designated as the Air Force component to a Unified Combatant Command (UCC), the C-NAF will function at the strategic, operational and tactical level. There are currently 9 C-NAFs supporting the UCCs and United States Forces Korea (a subunified combatant command). A C-NAF may carry a number, but also have a name associated with it. For example, First Air Force is the C-NAF supporting US Northern Command (USNORTHCOM), but it also referred to as Air Forces Northern (AFNORTH).

4. Wing. A level of command below the NAF or higher headquarters. A wing has a distinct mission with significant scope. A wing is usually composed of a primary mission group (e.g., operations, training, etc.) and the necessary supporting groups. By pulling together the mission and support elements, a wing provides a significant capability under a single commander. It is often responsible for maintaining the installation. A wing has several squadrons in more than one dependent group. There are generally three types of wings: operational, air base wing (support), and specialized wings. Either of these types may serve as the host wing on an installation. In practice, Air Base Wings have been created and utilized as the host units of joint bases. Wings must have a minimum of 1,000 people assigned. Wings are commanded by either a Colonel (O-6) or a Brigadier General (O-7) at larger installations.

5. Group. A level of command between wings and squadrons. Groups bring together multiple squadrons or other lower echelon units to provide a broader capability. For instance, a mission support group pulls together several squadrons in a variety of areas to provide a full spectrum mission support capability. Groups will have a minimum adjusted population of at least 400 personnel assigned. Groups are often commanded by a Colonel (O-6).

6. Squadron. Squadrons are the basic building block organizations in the Air Force, providing a specific operational or support capability. A squadron may be either a mission unit, such as an operational flying squadron, or a functional unit, such as a civil engineer, security forces, or maintenance squadron. A squadron has a substantive mission of its own that warrants organization as a separate unit based on factors like unity of command, functional grouping and administrative control, balanced with efficient use of resources. Squadrons vary in size according to responsibility, but will have a minimum adjusted population of at least 35 personnel. Squadrons are often commanded by a Major (O-4) or Lieutenant Colonel (O-5).

7. Flight. If internal subdivision is required, a flight may consist of sections, then elements. A flight may be either a numbered flight, named flight, alpha flight, or a functional flight. A numbered or named flight is the smallest unit in the Air Force. It is usually led by a First Lieutenant (O-2) or a Captain (O-3).

8. Other Organizations. Other types of organizations in the Air Force include: (1) direct reporting units (DRUs) such as the Air Force Academy or Air Force District of Washington; (2) laboratories; (3) centers; and (4) field operating agencies (FOA). In addition, the Civil Air Patrol (CAP) serves as the civilian auxiliary of the Air Force.

C. Commander, Air Force Forces (COMAFFOR). Although all Air Force units, regardless of level, have an Air Force commander, the title of Commander, Air Force Forces (COMAFFOR) is reserved exclusively to the single Air Force commander of an Air Force Service component command assigned or attached to a joint force commander (JFC) at the unified combatant command, subunified combatant command, or joint task force (JTF) level.[17]

> The COMAFFOR provides unity of command. To a JFC, a COMAFFOR provides a single face for all Air Force issues. Within the Air Force Service component, the COMAFFOR is the single commander who conveys commander's intent and is responsible for operating and supporting all Air Force forces assigned or attached to that joint force. Thus, the COMAFFOR commands forces through two separate branches of the chain of command: the operational branch and the administrative branch. The operational branch runs through joint channels from the JFC and is expressed in terms such as operational control (OPCON), tactical control (TACON), and support. The administrative branch runs through Service channels only, from the AETF, up through the appropriate component numbered Air Force (C-NAF), major command (MAJCOM), to the Air Force Chief of Staff (CSAF) and Secretary of the Air Force (SECAF); this authority is expressed as administrative control (ADCON). [18]

D. The Air & Space Expeditionary Force (AEF). The Air Force supports global combatant commander (CCDR) requirements through a combination of assigned, attached (rotational), and mobility forces that may be forward deployed, transient, or operating from home station. The AEF is the force generation construct used to manage the battle rhythm of these forces in order to meet global CCDR requirements while maintaining the highest possible level of overall readiness. The total force is part of the AEF. Through the AEF, the Air Force establishes a predictable, standardized battle rhythm ensuring rotational forces are properly organized, trained, equipped, and ready to sustain capabilities while rapidly responding to emerging crises. Thus, while AEF forces may deploy, they stand up as part of an air expeditionary task force, not as their own warfighting entity. In short, the AEF is the mechanism for managing and scheduling forces for expeditionary use; the Air Expeditionary Task Force (AETF), discussed below, is the Air Force warfighting organization attached to a JFC.[19]

E. Air Expeditionary Task Force (AETF). The AETF is the organizational structure for Air Force forces in response to operational tasking. In other words, the AETF is how the Air Force will support the JFC. The AETF provides a task-organized, integrated package with the appropriate balance of force, sustainment, control, and force protection. While the task force model itself is not new, its emphasis within the Air Force is recent. (AETFs) can be sized and tailored to meet the specific requirements of the mission. The basic building block of an AETF is the squadron; however, a squadron normally does not have sufficient resources to operate independently. Thus, the smallest AETF is normally an air expeditionary group; larger AETFs may be composed of several expeditionary wings. Within an AETF, the AETF commander organizes forces as necessary into wings, groups, squadrons, flights, detachments, or elements to provide reasonable internal spans of control, command elements at appropriate levels, and to retain unit identity. AETFs may be established as an Air Force Service component to a joint task force (JTF), or as a subordinate task force within a larger Air Force Service component to address specific internal tasks. If an

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[17] AF DOCTRINE, V1, *supra* note 9, at 66.
[18] *Id.*
[19] *See,* U.S. DEP'T OF AIR FORCE INSTR. 10-401, AIR FORCE OPERATIONS PLANNING AND EXECUTION para. 2.2 (7 Dec. 2006, Incorporating Through Change 4, 13 Mar. 2012) [hereinafter, AFI 10-401] *available at* http://www. e-publishing.af.mil. *See also,* AF DOCTRINE, V1, *supra* note 9, at 71.

AETF is formed as the former, the AETF commander is also a commander, Air Force forces (COMAFFOR). Otherwise, the AETF commander is not a COMAFFOR, but reports to a COMAFFOR.[20]

F. Joint and Coalition Operations. The Air Force prefers—and in fact, plans and trains—to employ in the joint fight through a commander, Air Force forces (COMAFFOR) who is normally also dual-hatted as a joint force air component commander (JFACC) when operations involve air assets from multiple services. Joint doctrine provides that the JFACC should be from the service with the majority of air assets in the joint force. The JFACC may become a combined force air component commander (CFACC) when operations involve multinational air assets.[21]

IV. AIR OPERATIONS

A. Core Missions. As mentioned earlier, the Air Force currently has five core missions: 1) air and space superiority; 2) intelligence, surveillance, and reconnaissance; 3) rapid global mobility; 4) global strike; and 5) command and control.[22] These core missions have evolved since they were first established by President Truman in 1947, but fundamentally they have remained the same.

1. Air & Space Superiority. Includes the ability to control the air and space so that our military forces do not have to worry about being attacked from the air and space, while ensuring that joint forces have the freedom to attack in the air, on the ground, and at sea.

2. Intelligence, Surveillance, and Reconnaissance. Includes the exploitation of the vertical dimension though a mix of aircraft, satellites, and other technologies to gain a decisive information advantage over our foes helping joint force leaders make informed decisions to maintain deterrence, contain crises, or achieve success in battle.

3. Rapid Global Mobility. Includes delivering essential equipment and personnel for missions ranging from major combat to humanitarian relief operations around the world. Mobility forces also provide in-flight refueling necessary for joint power projection and medical airlift resulting in unprecedented survival rates across the joint force.

4. Global Strike. Includes the ability of the Air Force's nuclear and conventional precision strike forces to credibly threaten and effectively conduct global strike operations by holding any target on the planet at risk and, if necessary, disabling or destroying it promptly—even from bases in the continental United States. Whether employed from forward bases or enabled by in-flight refueling, global strike derives from a wide-range of systems that include bombers, missiles, special operations platforms, fighters, and other Air Force aircraft.

5. Command and Control. Includes providing access to reliable Air Force communications and information networks so that the joint team can operate globally at a high tempo and level of intensity.

B. Airpower Operations. The Air Force supports joint force commanders by conducting specific airpower operations that provide specific effects. The following is a summary of these operations from Air Force Doctrine, Volume 4, *Operations*.[23] Each of these operations has their own expanded Doctrine Annex that describes these operations in greater detail available online through the Curtis E. LeMay Center for Doctrine Development and Education.

1. Strategic Attack. Strategic attack is defined as offensive action that is specifically selected to achieve national or military strategic objectives. These attacks seek to weaken the adversary's ability or will to engage in

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[20] AF DOCTRINE, V1, *supra* note 9, at 72-74.
[21] *See*, AF DOCTRINE, V1, *supra* note 9, at 112-114.
[22] U.S. DEP'T OF AIR FORCE, GLOBAL VIGILANCE, GLOBAL REACH, AND GLOBAL POWER FOR AMERICA (15 Aug. 2013) *available at* http://www.af.mil/Airpower4America.aspx.
[23] *See*, U.S. DEP'T OF AIR FORCE, AIR FORCE DOCTRINE, VOL. 4 OPERATIONS (5 Jun. 2013) *available at* https://doctrine.af.mil/download.jsp?filename=Volume-4-Operations.pdf (last visited 29 Apr. 2014) [hereinafter, AF DOCTRINE, V4].

conflict, and may achieve strategic objectives without necessarily having to achieve operational objectives as a precondition.

2. Counterair Operations. Counterair is a mission that integrates offensive and defensive operations to attain and maintain a desired degree of air superiority.

3. Counterland Operations. Counterland operations are airpower operations against enemy land force capabilities to create effects that achieve joint force commander objectives. The aim of counterland operations is to dominate the surface environment using airpower.

4. Countersea Operations. Countersea operations are conducted to attain and maintain a desired degree of maritime superiority through the destruction, disruption, delay, diversion, or other neutralization of threats in the maritime domain and prevent opponents from doing the same.

5. Airspace Control. Airspace control is the process used to increase operational effectiveness through safe, efficient, and flexible use of airspace. Properly employed, airspace control maximizes the effectiveness of combat operations while minimally impacting the capabilities of any service or functional component.

6. Space Operations. Space operations involve space superiority and mission assurance. The essence of space superiority is controlling the ultimate high ground of space. However, space superiority is focused on mission assurance rather than dominating or “owning” space.

7. Cyberspace Operations. Cyberspace operations involve the employment of cyberspace capabilities where the primary purpose is to achieve military objectives or effects in or through cyberspace. Cyberspace operations are not synonymous with information operations (IO). IO is a set of operations that can be performed in cyberspace and other domains.

8. Air Mobility. Joint doctrine defines air mobility as the rapid movement of personnel, materiel, and forces to and from or within a theater by air.

9. Special Operations. Air Force special operations forces, include dedicated special operations aviation units, battlefield Airmen (combat control teams, pararescue teams, special operations weather teams, and tactical air control party units), and dedicated SOF intelligence, surveillance, reconnaissance (ISR) units.

10. Homeland Operations. For the Air Force, homeland operations is the umbrella construct through which it supports homeland defense (HD), defense support of civil authorities (DSCA), and emergency preparedness (EP) operations designed to detect, preempt, respond to, mitigate, and recover from incidents and threats to the homeland, whether man-made or natural.

11. Nuclear Operations. The Air Force role in nuclear operations is to organize, train, equip, and sustain forces with the capability to support the national security goals of deterring adversaries from attacking the United States and its interests with their nuclear arsenals or other weapons of mass destruction (WMD); dissuading competitors from developing WMD; assuring allies and partners of the US' ability and determination to protect them; and holding at risk a specific range of targets.

12. Irregular Warfare (IW). As an integral part of the IW campaign, the Air Force is prepared to support and conduct principal IW activities or operations that may be undertaken in sequence, in parallel, or blended within a coherent campaign to address irregular threats.

13. Foreign Internal Defense (FID). Generally, the preferred methods of helping another country are through education and developmental assistance programs. Most Air Force FID actions entail working by, with, and through foreign aviation forces to achieve US strategic and operational objectives.

14. Global Integrated Intelligence, Surveillance, and Reconnaissance. The Air Force defines Global Integrated Intelligence, Surveillance, and Reconnaissance as cross-domain synchronization and integration of the

planning and operation of ISR assets; sensors; processing, exploitation and dissemination systems; and, analysis and production capabilities across the globe to enable current and future operations.

15. Targeting. Targeting is the process of selecting and prioritizing targets and matching the appropriate response to them, considering operational requirements and capabilities.

16. Information Operations (IO). The purpose of IO is to affect adversary and potential adversary decision-making with the intent to ultimately affect their behavior. IO influences, disrupts, corrupts, or usurps the decision-making of adversaries while protecting our own.

17. Electronic Warfare (EW). EW is defined by joint doctrine as military action involving the use of electromagnetic and directed energy to control the electromagnetic spectrum or to attack the enemy.

18. Personnel Recovery. The Air Force organizes, trains, and equips personnel to conduct personnel recovery operations (PRO) using the fastest and most effective means. Although traditionally PRO assets have focused on the recovery of downed aircrews, Air Force PRO forces have been responsible for the recovery of any isolated personnel.

C. The Air & Space Operations Center (AOC). The AOC provides operational-level command and control (C2) of air component forces as the focal point for planning, executing, and assessing air component operations. The AOC can be tailored and scaled to a specific or changing mission and to the associated task force the commander, Air Force forces (COMAFFOR) presents to the joint force commander (JFC). The baseline AOC organization includes an AOC commander, five divisions (strategy, combat plans, combat operations, ISR, and air mobility), and multiple support/specialty teams. Each integrates numerous disciplines in a cross-functional team approach to planning and execution. Liaisons from other Service and functional components may also be present to represent the full range of joint air, space, and cyberspace capabilities made available to the COMAFFOR/JFACC. [24] In joint or coalition operations, the AOC will be referred to as the Joint Air Operations Center (JAOC) or Coalition Air Operations Center (CAOC) as the COMAFFOR becomes the JFACC or CFACC.[25]

V. CONCLUSION

"Today the pace of technological change moves ever faster while America's role in protecting against aggression and fostering world democracy is more complex….With these challenges in mind, the Air Force looks eagerly to the future while remembering the lessons and achievements of the past as well as honoring the memory, sacrifices and contributions of those who succeeded, often in the face of skepticism, in building what is now the world's only truly global air and space force."[26]

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[24] *Id.* at 46.
[25] *Id.* at 47.
[26] *About the Air Force: History: Part IV*, AIR FORCE.COM, http://www.airforce.com/learn-about/history/part4/ (last visited, 29 Apr. 2014).

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SEMPER PARATUS

U.S. COAST GUARD

I. INTRODUCTION

This section provides a brief overview of United States Coast Guard (USCG) missions and the unique operational law issues it faces. As an armed force, the Coast Guard shares a similar national security role with the DoD services, and thus its attorneys must be prepared to address many of the same operational law issues encountered by DoD services. However, because of its role as the Nation's primary maritime law enforcement agency, Coast Guard missions can also involve many unique operational law issues that differ from those ordinarily faced by DoD services.

II. MISSIONS, AUTHORITIES, AND ACTIVITIES

A. Primary Missions. Under 14 U.S.C. § 1, 14 U.S.C. § 2 and 10 U.S.C. § 101(a)(4), the United States Coast Guard is designated as both an armed force and a Federal law enforcement agency. The Coast Guard is the principal Federal agency responsible for maritime safety, security, and stewardship. As such, the Coast Guard protects vital economic and security interests of the United States, including the safety and security of the maritime public, natural and economic resources, the global maritime transportation system, and the integrity of U.S. maritime borders.[1] It has eleven statutory missions discussed in more detail below that enable it to protect the public, the environment, and U.S. economic interests in the Nation's ports and waterways, on international waters, or in any maritime region as required to support national security.[2]

B. Authority. In the maritime environment, there is no geographical limit to the USCG's authority (although the exercise of that authority may be subject to flag and coastal State consent in accordance with international law). To the extent that seizure, arrest, and prosecution are desired outcomes of any maritime interdiction, the USCG is

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[1] *See* 14 U.S.C. § 1 (LexisNexis 2014), which provides: "The Coast Guard as established January 28, 1915, shall be a military service and a branch of the armed forces of the United States at all times. The Coast Guard shall be a service in the Department of Homeland Security, except when operating as a service in the Navy." *See also* 10 U.S.C. § 101(a)(4)–(5) (defining the Coast Guard as an "armed force" and a "uniformed service") (LexisNexis 2014).

[2] *See* COAST GUARD PUBLICATION 1, U.S. COAST GUARD: AMERICA'S MARITIME GUARDIAN (1 May 2009) [hereinafter USCG PUB 1], *available at* http://www.uscg.mil/doctrine/CGPub/Pub_1.pdf. 14 U.S.C. § 2 (LexisNexis 2014) sets forth the USGC's missions:

> The Coast Guard shall enforce or assist in the enforcement of all applicable Federal laws on, under, and over the high seas and waters subject to the jurisdiction of the United States; shall engage in maritime air surveillance or interdiction to enforce or assist in the enforcement of the laws of the United States; shall administer laws and promulgate and enforce regulations for the promotion of safety of life and property on and under the high seas and waters subject to the jurisdiction of the United States covering all matters not specifically delegated by law to some other executive department; shall develop, establish, maintain, and operate, with due regard to the requirements of national defense, aids to maritime navigation, ice-breaking facilities, and rescue facilities for the promotion of safety on, under, and over the high seas and waters subject to the jurisdiction of the United States; shall, pursuant to international agreements, develop, establish, maintain, and operate icebreaking facilities on, under, and over waters other than the high seas and waters subject to the jurisdiction of the United States; shall engage in oceanographic research of the high seas and in waters subject to the jurisdiction of the United States; and shall maintain a state of readiness to function as a specialized service in the Navy in time of war, including the fulfillment of Maritime Defense Zone command responsibilities.

well-positioned to enforce U.S. law in waters subject to U.S. jurisdiction, on the high seas, and in foreign territorial seas in cooperation with coastal states.

C. Maritime Law Enforcement. Since the beginning of the Nation, Congress has authorized the USCG to exercise broad law enforcement authority upon the high seas and waters over which the United States has jurisdiction, and aboard any vessel, wherever located, that is subject to the jurisdiction, or to the operation of any law, of the United States.[3] The USCG is also specifically authorized to respond to acts of maritime terrorism.[4] The Coast Guard routinely exercises its maritime law enforcement authority on foreign flagged vessels thousands of miles from the United States, sometimes on the high seas, and sometimes in foreign waters.[5] The USCG is also authorized to carry weapons ashore, and to make seizures and arrests at maritime facilities.[6] The Coast Guard's commissioned, warrant, and petty officers are also designated by statute as officers of the customs.[7]

D. Activities. Coast Guard law enforcement and homeland security operations cover a wide spectrum of activities including maritime smuggling of illicit drugs and other contraband, migrant smuggling and human trafficking, piracy, violations of U.N. Security Council resolutions, acts of violence in the maritime realm, and maritime transportation of weapons of mass destruction. International and domestic law govern the USCG's conduct of maritime interdiction operations. Generally, international law applicable to USCG operations focuses on the exclusive jurisdiction of flag States on the high seas, and on the sovereign rights and control that coastal States exercise in their territorial seas. Thus, except in the exercise of national or collective self-defense, flag State and coastal State cooperation and consent are required for maritime interdiction activities not undertaken pursuant to the enforcement of U.N. Security Council resolutions. USCG maritime interdiction activities throughout the world always take into consideration the need to cultivate and sustain such cooperation and necessary consent.

E. International Agreements. Consistent with the well-settled legal principles discussed above, the USCG seeks flag or coastal State consent for extraterritorial enforcement operations on foreign vessels or in foreign waters, or exercises a variety of international legal authorities to obtain authority and jurisdiction over vessels not otherwise subject to exclusive U.S. jurisdiction. The USCG, as executive agent for the Department of State, has negotiated and completed more than sixty bilateral agreements between the United States and other countries that provide expedited procedures or preapproval for obtaining flag or coastal state consent for the USCG to conduct boardings and searches of foreign flagged vessels suspected of various illegal activities.[8] In cases in which such agreements are not in place, the USCG takes a leading role in the Maritime Operational Threat Response (MOTR) process to coordinate interagency concurrence and assistance in approaching foreign governments for authorization to take appropriate action.[9]

F. Federal, State, and Local Cooperation. In accordance with 14 U.S.C. § 141, the USCG is specifically authorized to lend assistance to and receive assistance from other Federal and state agencies. Unlike DoD personnel restrained by the Posse Comitatus Act,[10] the Coast Guard may utilize its personnel and facilities "to assist any

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[3] 14 U.S.C. § 89(a) (LexisNexis 2014).

[4] 33 U.S.C. § 1226 (LexisNexis 2014).

[5] *See, e.g.*, The Maritime Drug Law Enforcement Act (MDLEA), 46 U.S.C. §§ 70501–70508 (LexisNexis 2014). The MDLEA is the primary U.S. law that the USCG enforces in its maritime counter-drug mission in cooperation with the U.S. Navy and other interagency partners. Congress expressly provides that the MDLEA applies extraterritorially. The USCG cooperates with foreign navies and coast guards through various bilateral agreements and agreed operational procedures that extend authority for USCG personnel to board, search and inspect foreign flagged vessels and/or to conduct patrols in foreign territorial seas in cooperation with partner-states. In many cases, foreign partners waive jurisdiction over suspected drug smuggling vessels in favor of the application of U.S. laws.

[6] 14 U.S.C. § 99 (LexisNexis 2014).

[7] *See* 4 U.S.C. § 143 (2006); 19 U.S.C. § 1401 (LexisNexis 2014).

[8] The texts of all bilateral agreements relating to USCG boarding activities are reproduced in the Coast Guard Fast Action Reference Materials (FARM). The Center for Law and Military Operations (CLAMO) at the Judge Advocate General's Legal Center and School maintains copies of the FARM and also has made the latest edition of the FARM available at the maritime operations portal on the CLAMO website (AKO account required for access).

[9] Coast Guard operational cases can potentially have a direct impact on U.S. foreign relations. As a result, cases and the legal issues arising therein are often resolved through interagency processes, such as the MOTR process. *See e.g.*, The Maritime Operational Threat Response (MOTR) Plan (Approved by POTUS November 8, 2006) of the National Strategy for Maritime Security called for in NSPD-41/HSPD-13 (Maritime Security Policy, December 21, 2004).

[10] 18 U.S.C. § 1385 (LexisNexis 2014). The Posse Comitatus Act was made applicable to the Navy and Marine Corps by policy. *See* U.S. DEPARTMENT OF DEFENSE INSTR. 3025.21, DEFENSE SUPPORT OF CIVILIAN LAW ENFORCEMENT AGENCIES, (27 Feb. 2013)

Federal agency, State, Territory, possession, or political subdivision thereof, or the District of Columbia, to perform any activity for which such personnel and facilities are especially qualified."[11] Furthermore, the Coast Guard, with the consent of the appropriate agency head, "may avail itself of such officers and employees, advice, information, and facilities of any Federal agency, State, Territory, possession, or political subdivision thereof, or the District of Columbia as may be helpful in the performance of its duties."[12] This unique authority provides the USCG with great flexibility when partnering with DoD and other Federal and state agencies to support various missions.

III. ORGANIZATION

A. Administrative. Following the events of September 11, 2001, the USCG was transferred to the Department of Homeland Security (DHS).[13] Notably, the Homeland Security Act specifically provided that the USCG's authorities, functions, and capabilities would remain intact following its transfer to DHS.[14] The Commandant of the USCG reports directly to the Secretary of Homeland Security. Although the USCG ordinarily operates under DHS, "[u]pon the declaration of war if Congress so directs in the declaration or when the President directs," the USCG may be transferred to the Department of the Navy.[15]

B. Forces. Presently, the USCG force is comprised of approximately 41,000 active duty military personnel, over 8,000 Reservists, over 8,000 civilian employees, and approximately 30,000 Auxiliarists.[16]

C. Geography. The majority of day to day Coast Guard operations are directed by the Pacific Area (PACAREA) and Atlantic Area (LANTAREA) Commands.. Operational responsibilities are further delegated to District Commanders underneath each Area. PACAREA is located in Alameda, CA with an area of responsibility encompassing four Districts in the Western United States and the Pacific Ocean. LANTAREA is located in Portsmouth, VA with an area of responsibility encompassing five Districts in the Eastern United States, Atlantic Ocean, and Gulf of Mexico. PACAREA and LANTAREA are each commanded by a Vice Admiral (O-9); each District is commanded by either a Rear Admiral (Upper Half) (O-8) or Rear Admiral (Lower Half) (O-7). Each Coast Guard District exercises operational control over shore commands such as Sectors, Air Stations, and Small Boat Stations. While PACAREA and LANTAREA exercise operational control over larger USCG cutters,[17] Districts and Sectors retain operational control of smaller cutters. Command centers at USCG Headquarters, LANTAREA and PACAREA, Districts, and Sectors control operations within their respective areas of responsibility.

[hereinafter DoDI 3025.21]; U.S. DEPT OF NAVY, SEC'Y NAVY INSTRU. 5820.7C, COOPERATION WITH CIVILIAN LAW ENFORCEMENT OFFICIALS (26 Jan. 2006) [hereinafter SECNAVINST 5820.7C] .

[11] 14 U.S.C. § 141(a) (LexisNexis 2014).

[12] *Id.* at §141(b).

[13] *See* Homeland Security Act of 2002, Pub. L. 107-296, 116 Stat. §§2144, 2249, 2314 (codified primarily at 6 U.S.C. §§ 101-557).

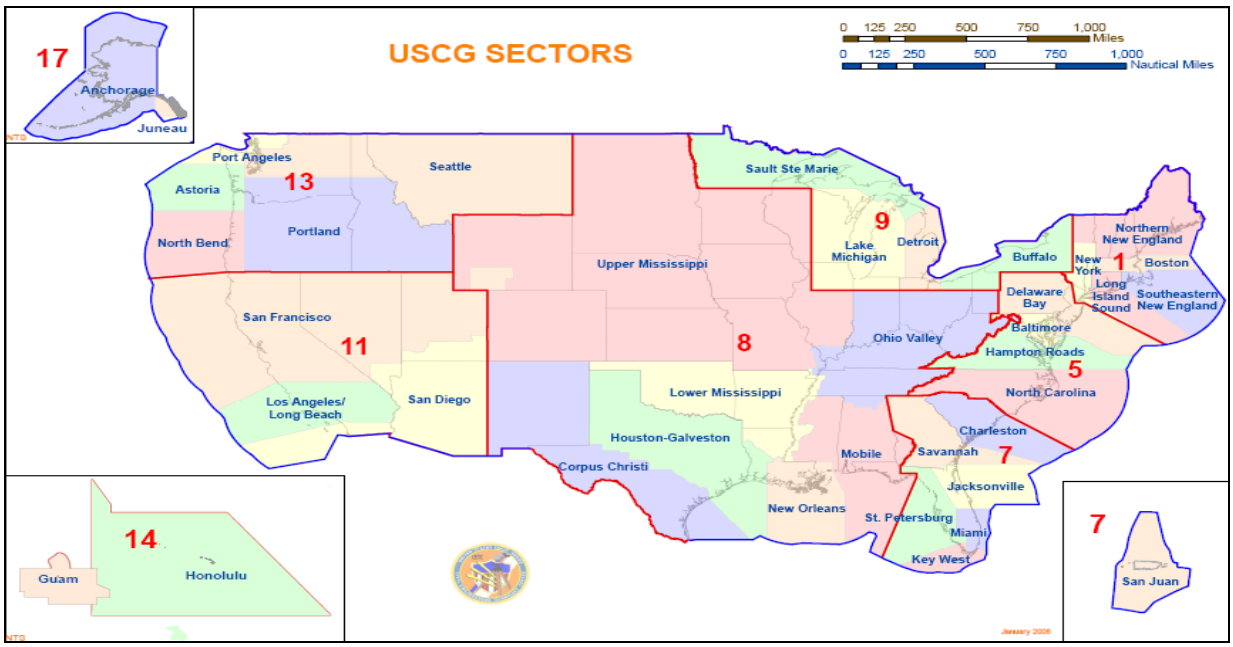
[14] *See* 6 U.S.C. § 468 (LexisNexis 2014).

[15] *See* 14 U.S.C. §§ 1, 3 (LexisNexis 2014); *see also* Coast Guard and Maritime Transportation Act of 2006, Conf. Rept., H. Rept. 109-413, § 211, as adopted by House and Senate conferees on April 6, 2006 (to accompany H.R. 889). The USCG operated as a component of the U.S. Navy during World War I and World War II.

[16] U.S. COAST GUARD, U.S. COAST GUARD PUBLICATION 3-0, OPERATIONS 22 (Feb. 2012) [hereinafter CG PUB 3-0], *available at* http://www.uscg.mil/doctrine/CGPub/CG_Pub_3_0.pdf.

[17] A Coast Guard "cutter" is any vessel sixty-five feet or more in length. A "larger" cutter is defined as any vessel over 179 feet in length.

The following chart shows the USCG's geographical organization of Sectors within each District:



Sectors, as indicated on the diagram above, are located in most large ports within the U.S. and have oversight of marine safety, security, and environmental response missions in all United States port areas, coastlines, and major navigable rivers. The Sector Commander can act under one of four main legal titles while conducting Sector missions, which are: 1) Officer In Charge of Marine Inspection (OCMI, used for vessel safety controls); 2) Captain of the Port (COTP, used for safety and security issues affecting persons, vessels, or waterfront facilities in a port area); 3) Federal Maritime Security Coordinator (FMSC, used while addressing issues surrounding an Area Maritime Security Plan); or 4) Federal On-Scene Coordinator (FOSC, used while overseeing a response to an oil spill or hazardous materials release in the coastal zone under the National Contingency Plan).

IV. OPERATIONS OVERVIEW

A. Role. The USCG's fundamental responsibility to protect the public, the environment, and U.S. economic and security interests. The USCG carries out this responsibility in America's inland waterways, ports and harbors; along 95,000 miles of U.S. coastline; in the U.S. territorial seas; in the nearly 3.4 million square miles of U.S. Exclusive Economic Zone (EEZ); and on international waters and other maritime regions of importance to the United States.

B. History. The USCG's history shows a gradual accumulation of additional responsibilities, resulting primarily from its status as the nation's primary maritime law enforcement agency and protector of U.S. ports and waterways.[18] On August 4, 1790 the First Congress authorized the construction of ten vessels to enforce tariff and trade laws, prevent smuggling, and protect the collection of the Federal revenue, which became known as the Revenue Cutter Service. In 1915 the Revenue Cutter Service merged with U.S. Life-Saving Service and was renamed the U.S. Coast Guard, and was placed under the Treasury Department. In 1939 President Franklin Roosevelt ordered the transfer of the Lighthouse Service to the Coast Guard. In 1946 Congress permanently transferred the Commerce Department's Bureau of Marine Inspection and Navigation to the Coast Guard. In 1967

[18] *See generally* USCG PUB 1, *supra* note 2.

the USCG transferred to Department of Transportation. Finally, in 2003 the USCG transferred to the Department of Homeland Security. As the service merged with other agencies over time, it accumulated the missions it has today. Although the USCG occupies a unique position as an armed force that also serves as the Nation's primary maritime law enforcement agency (and now the lead Federal agency for maritime homeland security), it is probably best known for its humanitarian service missions.

C. Mission Categories. The Homeland Security Act (HLSA) of 2002, Pub. L. 107-296, which transferred the USCG from the Department of Transportation to DHS, categorizes the USCG's eleven statutory missions as either Homeland Security or Non-Homeland Security missions.[19]

1. Homeland Security missions include: Ports, Waterways, and Coastal Security; Drug Interdiction; Migrant Interdiction; Defense Readiness; and Other Law Enforcement.[20]

2. Non-Homeland Security missions include: Marine Safety; Search and Rescue; Aids to Navigation; Living Marine Resource Protection (Fisheries Enforcement); Marine Environmental Response; and Icebreaking.[21]

V. HOMELAND SECURITY OPERATIONS

The following is a brief description of the USCG's principal operations as organized within the HLSA.

A. Maritime Homeland Security (MHLS)/Maritime Homeland Defense (MHLD).

1. As both a military service and a Federal law enforcement agency, the USCG plays a unique role in homeland security and homeland defense. Although homeland security had always been incorporated into the USCG's maritime security role,[22] the USCG refocused its homeland security capabilities in the wake of September 11, 2001. Following the attacks, the USCG quickly organized and conducted the largest port security operation since World War II to protect the U.S. Marine Transportation System (MTS).[23] The USCG immediately deployed resources and established security zones around vessels and significant critical infrastructure such as power plants, bridges, dams, and locks—in addition to providing overall security in U.S. ports. Additionally, on September 21, 2001, the USCG promulgated temporary regulations creating stationary and moving Naval Vessel Protection Zones (NVPZ), in order to ensure the safety and security of U.S. naval vessels within U.S. navigable waters. Many of these security zones, including those created under the NVPZ regulations, were made permanent.[24]

2. On a day-to-day basis, the USCG carries out its homeland security mission as a law enforcement agency while working with the Department of Justice (DOJ) and numerous DHS agencies, such as Immigration and Customs Enforcement and Customs and Border Protection. In addition to its general law enforcement authorities, the USCG draws on a broad range of legal authorities specifically tailored to port and waterways safety and security to carry out its homeland security missions.[25] Moreover, the Maritime Transportation Security Act (MTSA) of 2002,[26] while establishing new security requirements, clarifies USCG legal authorities and provides additional homeland security assets and capabilities."[27]

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[19] *See* 6 U.S.C. § 468(a) (LexisNexis 2014).
[20] *Id.* § 468(a)(2).
[21] *Id.* § 468(a)(1).
[22] *See id*. §§ 468(a), (c), & (e).
[23] The Marine Transportation System or MTS is the marine portion of the national transportation system and consists of waterways, ports, and intermodal landside connections that allow various modes of transportation to move people and goods to, from, and on the water. *See Marine Transportation System*, U.S. DEP'T OF TRANSP., http://www.marad.dot.gov/ports_landing_page/marine_transportation_system/MTS.htm (last visited Mar. 25, 2014).
[24] 33 C.F.R. §§ 165.9, 165.2010–2030 (LexisNexis 2014). A Naval Vessel Protection Zone is a 500-yard regulated area of water placed around large U.S. naval vessels (vessels greater than 100 feet in length) used as a safety and security measure. *Id*. § 165.2015.
[25] *See, e.g.*, 33 U.S.C. § 1225 (LexisNexis 2014) (waterfront safety); 33 U.S.C. § 1226 (LexisNexis 2014)(Port, harbor, and coastal facility security); 14 U.S.C. § 99 (LexisNexis 2014) (law enforcement ashore); 50 U.S.C. § 191 (LexisNexis 2014) (Regulation of anchorage and movement of vessels during national emergency); and 14 U.S.C. § 91 (LexisNexis 2014) (Safety of naval vessels).
[26] Maritime Transportation Security Act (MTSA) of 2002, Pub. L. 107-295, 116 Stat. 2064.
[27] Maritime Safety and Security Teams (MSST) are one example of a new asset. MSSTs are quick-response forces capable of rapid, nationwide deployment via air, ground, or sea transportation, and were created to "safeguard the public and protect vessels, harbors, ports, facilities, and cargo in waters subject to the jurisdiction of the United States from destruction, loss or injury from crime, or sabotage due to terrorist activity . . . .46 U.S.C. § 70106 (LexisNexis 2014).

B. Maritime Law Enforcement, Drug Interdiction, and Migrant Interdiction.

1. Since its founding as the Revenue Cutter Service in 1790,[28] the USCG has been the Nation's primary maritime law enforcement agency. The USCG's statutorily-defined law enforcement mission provides that it "shall enforce or assist in the enforcement of all applicable Federal laws on, under, and over the high seas and waters subject to the jurisdiction of the United States."[29] Coast Guard active duty commissioned, warrant, and petty officers are authorized to "make inquiries, examinations, inspections, searches, seizures, and arrests upon the high seas and waters over which the United States has jurisdiction, for the prevention, detection, and suppression of violations of laws of the United States."[30] Notwithstanding the Posse Comitatus Act, authorized DoD assistance to USCG law enforcement missions includes: the provision of information collected during military operations; use of military equipment and facilities—or providing DoD personnel to operate and maintain that equipment; and use of U.S. Navy vessels to embark USCG Law Enforcement Detachments (LEDETs) for counterdrug support and homeland security missions.[31] Today, the USCG's law enforcement mission involves significant USCG-DoD interaction, as LEDETs are statutorily required to deploy on U.S. Navy ships assigned to "drug-interdiction areas" to interdict illegal narcotics.[32]

2. Drug traffickers operating out of South and Central America typically transport multi-ton loads of cocaine on fishing or other commercial vessels, "go-fast" vessels, and self-propelled semi-submersibles.[33] Drug loads typically range in size from two to ten tons, but loads in excess of twenty tons are not uncommon. Coast Guard LEDETs and other boarding team personnel receive extensive training in the drug interdiction mission and are uniquely qualified to find well-concealed drug loads, collect other evidence (e.g., biometrics, ion scans) and prepare detailed prosecution case packages in support of Federal investigations and prosecutions.

3. The USCG's migrant interdiction mission is part humanitarian operations, part border control, and part law enforcement. Because migrants take great risks to flee their countries, often sailing in overloaded and unseaworthy vessels, USCG migrant interdiction operations often begin as search and rescue operations. Nonetheless, migrants pose a significant potential security threat, and as outlined in Executive Orders and other Presidential directives, the President suspended the entry of undocumented aliens into the United States and established a policy that the USCG interdict migrants as far as possible from U.S. shores.[34] As in the counter drug realm, the nature of the migrant interdiction mission continues to change in response to increasingly sophisticated smuggling operations and enhanced security risks that undocumented migration poses to the United States.

C. National Defense. Though the more familiar non-defense missions dominate the public perception of the USCG, the USCG is at all times an armed force of the United States.[35] Indeed, the USCG is a military, multi-mission maritime service that has answered America's calls continuously for over 220 years. In addition to its status

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[28] The Revenue Cutter Service was also known as the Revenue Marine.

[29] 14 U.S.C. § 2 (LexisNexis 2014).

[30] 14 U.S.C. § 89 (LexisNexis 2014).

[31] 10 U.S.C. §§ 371–382 (LexisNexis 2014); 10 U.S.C. § 379 (LexisNexis 2014) (mandating the assignment of Coast Guard personnel to certain naval vessels for law enforcement purposes).

[32] 10 U.S.C. § 379 (LexisNexis 2014). LEDETS may also deploy on U.S. Navy or allied vessels to support maritime homeland security or related operations.

[33] To further complicate the U.S. counterdrug mission, South American countries[?] began building self-propelled, fully-submersible (SPSF) submarines. See *U.S. Southern Command Posture Statement*, 112th Cong. 10 (2011) (statement of General Douglas M. Fraser, Commander, U.S. Southern Command, noting that drug traffickers have begun using SPFSs to transport narcotics), *available at* http://www.dod.mil/dodgc/olc/docs/testFraser04052011.pdf. Admiral Hernando Wills, Colombian Navy, predicted in February 2011 that "remote-controlled subs" would perfect the evolution of this subsurface threat. Dan Molinksi, *Colombia Captures Drug Smugglers' Submarines*, WALL ST. JOURNAL, Feb. 14, 2011, http://online.wsj.com/article/SB10001424052748703703804576144752329031500.html.

[34] *See* Presidential Decision Directive 9, 18 June 1993 (directing implementation of preemption, interdiction, and deterrence measures by the Coast Guard on the high seas to counter alien smuggling efforts into the United States); Exec. Order No. 12,807, 57 Fed. Reg. 23,133 (Jun. 1, 1992) (directing Coast Guard to interdict vessels and undocumented aliens and return those vessels and aliens to their country of origin), *amended by* Exec. Order No. 13,286, 68 Fed. Reg. 10,619 (Feb. 28, 2003); Proclamation No. 4865, 46 Fed. Reg. 48,107 (Sept. 29, 1981) (suspending entry of undocumented aliens into the United States by sea). *See also* Exec. Order No. 13276, 67 Fed. Reg. 69985 (Nov. 15, 2002) (directing DoD support for the Coast Guard interdiction mission).

[35] 14 U.S.C. § 1 (establishing the U.S. Coast Guard as a military service and branch of the armed forces) (LexisNexis 2014), and 10 U.S.C. § 101(a)(4) (including "the Army, Navy, Air Force, Marine Corps, and Coast Guard" in the definition of "armed forces") (LexisNexis 2014).

as a Federal maritime law enforcement agency[36] within the DHS, the USCG is "a military service and a branch of the armed forces of the United States at all times."[37] The USCG's role as both a maritime law enforcement agency and a military service is not a matter of changing hats depending on the mission—the USCG is at *all* times military and at *all* times may exercise its unique and broad law enforcement authority. During peacetime, the USCG supports the Navy and regional Combatant Commanders by participating in port security and military exercises, providing polar icebreaking capabilities, and conducting Freedom of Navigation operations. The USCG has served alongside the U.S. Navy during critical national defense missions in every major conflict in the Nation's history,[38] and today, the USCG routinely supports DoD's homeland defense mission.

VI. NON-HOMELAND SECURITY OPERATIONS

A. Marine Safety. The USCG's Maritime Safety mission involves numerous aspects of the maritime industry. USCG marine safety experts establish vessel design and equipment standards, inspect vessels (ranging in size from small charter fishing boats to passenger cruise ships), investigate marine casualties (accidents involving vessels and waterfront facilities), implement waterways management criteria (for example, the management of bridge opening and closing schedules), and oversee merchant mariner credentialing, among other items. Sectors, discussed above, have the largest role in overseeing these missions, which typically fall under the OCMI or COTP role of the Sector Commander. At the international level, the USCG promotes maritime safety standards as the primary Unites States representative to the International Maritime Organization.

B. Search and Rescue. From the founding of the U.S. Life Saving Service in 1848, Search and Rescue (SAR) has been a cornerstone USCG mission.[39] The USCG is the lead U.S. agency for maritime SAR in U.S. waters. Each year, the USCG saves thousands of lives and millions of dollars of property. In fact, in 2012 the USCG responded to 20,510 SAR cases and saved 3,800 lives. To carry out its SAR mission, the USCG closely coordinates with Federal, state, local, and tribal authorities, as well as the maritime industry.[40] Established and operated under international[41] and national legal obligations and standards, the USCG serves as a model for SAR services in other countries.

C. Living Marine Resource Protection and Fisheries Enforcement. Protecting the Exclusive Economic Zone (EEZ) and key areas of the high seas is another important mission for the Coast Guard. The U.S. EEZ is the largest in the world, containing 3.3 million square miles of ocean and 90,000 miles of coastline, and the USCG is the Nation's primary at-sea fisheries enforcement agency charged with protecting EEZ resources. In 2012 the commercial fishing industry landed over nine billion pounds of fish worth over $5 billion in 2012 in the U.S.,[42] thus, protection of this resource is very important. To carry out these missions, the USCG enforces both international treaties and domestic fisheries laws, including the Magnuson-Stevens Fisheries Conservation and Management Act,[43] a primary U.S. fishery law which extends U.S. fisheries management authority out to the full extent of the EEZ (200 nautical miles as authorized by international law).[44] The USCG's fisheries priorities, in order of importance, are: (1) to protect the U.S. EEZ from foreign encroachment; (2) to enforce domestic fisheries laws; and (3) to enforce international fisheries agreements. The USCG's efforts reflect the substantial economic interest the Nation has in protecting its ocean resources. At the policy and strategic levels, the USCG closely coordinates with the National Oceanographic & Atmosphere Administration (NOAA) for this mission, since the enforcement of fisheries laws is also a primary mission of the National Marine Fisheries Service, which falls under NOAA.

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[36] 14 U.S.C. § 89 (LexisNexis 2014).
[37] 14 U.S.C. § 1 (LexisNexis 2014).
[38] For example, most recently during Operation Iraqi Freedom.
[39] 14 U.S.C. § 88; 14 U.S.C. § 2 (LexisNexis 2014).
[40] See THE NATIONAL SEARCH AND RESCUE PLAN OF THE UNITED STATES (2007), *available at:* http://www.uscg.mil/hq/cg5/cg534/sar_manuals.asp#NSP, and U.S. COAST GUARD ADDENDUM TO THE UNITED STATES NATIONAL SEARCH AND RESCUE SUPPLEMENT TO THE INTERNATIONAL AERONAUTICAL AND MARINE SEARCH AND RESCUE MANUAL, COMDTINST M16130.2F (Jan. 2013) for extensive discussion regarding USCG interaction with local, state, and other federal agencies on SAR missions. Often such interactions are conducted under Memoranda of Agreement with these agencies.
[41] *See* International Convention on Maritime Search and Rescue Convention (SAR Convention), 1979, with Annex, T.I.A.S. No. 11093.
[42] *See Commercial Fisheries Statistics*, NOAA OFFICE OF SCIENCE AND TECHNOLOGY, http://www.st.nmfs.noaa.gov/commercial-fisheries/commercial-landings/annual-landings/index (last visited Mar. 13, 2014).
[43] 16 U.S.C. §§ 1801–1891 (LexisNexis 2014).
[44] *See* United Nations Convention on the Law of the Sea, 1982, 1833 U.N.T.S. 397 (entered into force 16 Nov. 1994), art. 57; Proclamation No. 5030, 3 C.F.R. 22 (1983); 33 C.F.R. § 2.30 (2012).

D. Marine Environmental Protection.

1. The USCG executes its Marine Environmental Protection (MEP) mission through both regulation of the marine industry (which is part of the "Prevention" mission set for the Coast Guard) and enforcement actions against polluters who violate the law (which is part of the "Response" mission set for the Coast Guard). On the Prevention side, the USCG inspects marine facilities, waterfront oil terminals, mobile fuel transfer facilities, and many types of vessels to ensure they are in compliance with safety and environmental protective measures.[45] On the Response side, the USCG oversees spill cleanups and takes action via civil penalties against polluters. The USCG also has the regulatory authority to halt marine operations by facilities and vessels until they have properly addressed a pollution issue. Under the Federal Water Pollution Control Act (FWPCA or Clean Water Act) and the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), its two primary pollution response authorities, the USCG can supervise the cleanup of pollution by a responsible party, or assume control of the cleanup as FOSC (as mentioned above) if needed. In response to the *Exxon Valdez* oil spill on March 23, 1989, Congress passed the Oil Pollution Act of 1990[46] (OPA 90), which amended the FWPCA. OPA 90 re-emphasizes the role of the USCG as the Federal agency with primary responsibility for preventing and responding to maritime oil spills. As discussed above, USCG Sector Commanders, typically with the rank of Captain (O-6), are the pre-designated Federal On-Scene Coordinators under the National Contingency Plan for spills involving oil or releases involving hazardous substances in all coastal areas in the U.S. [47] In 2010, the USCG served as the lead agency for the Federal response to the *Deepwater Horizon* oil spill—the United States' first ever declared spill of national significance, or SONS. Initially, the District Commander for the Eighth Coast Guard District (headquartered in New Orleans) was designated as the Federal On-Scene Coordinator; weeks later, the Commandant of the Coast Guard was designated as the National Incident Commander for this incident.

2. The USCG also plays a critical role in many DOJ prosecutions for environmental crimes in the maritime realm involving other Federal statutes, such as the Clean Water Act,[48] the Act to Prevent Pollution from Ships,[49] CERCLA,[50] the Ocean Dumping Act,[51] and the Refuse Act.[52] Often, vessel crew member efforts to conceal pollution crimes from USCG investigators result in DOJ prosecutions for false official statements and obstruction of justice.[53]

E. Maritime Mobility: Aids to Navigation and Icebreaking. The Maritime Transportation System (MTS) "facilitates America's global reach into foreign markets and the nation's engagement in world affairs."[54] The USCG is a leading force in ensuring a safe and efficient MTS. Pursuant to its maritime mobility responsibilities, the USCG domestically maintains aids to navigation (e.g. buoys, lighthouses, dayboards, etc.),[55] administers the Nation's bridges, oversees waterways and vessel traffic management systems, and conducts icebreaking operations in critical waterways to ensure the continued flow of commerce by water.

VII. USE OF FORCE POLICY/RULES OF ENGAGEMENT

Since a primary USCG mission is law enforcement, most USCG use of force issues arise in that context. The use of force in law enforcement operations is governed by the USCG Use of Force Policy,[56] which comports with requirements established in the Fourth Amendment to the U.S. Constitution that any use of force by a law

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[45] See, for example, 33 C.F.R. § 154 (LexisNexis 2014), which details regulations regarding bulk oil and hazardous materials facilities and USCG oversight responsibilities pertaining to those entities.
[46] Pub. L. No. 101-380, 104 Stat. 507 (1990).
[47] *See, e.g.* 40 C.F.R. § 300 (LexisNexis 2014). By Memorandum of Understanding the Coast Guard and the Environmental Protection Agency split oil spill and hazardous materials release oversight responsibility between inland (EPA) and coastal (USCG) zones. *Id.*
[48] 33 U.S.C. § 1251–1376 (LexisNexis 2014).
[49] 33 U.S.C. §§ 1901–1915 (LexisNexis 2014).
[50] 42 U.S.C. §§ 9610–9675 (LexisNexis 2014).
[51] 33 U.S.C. §§ 1401–1445 (LexisNexis 2014).
[52] 33 U.S.C. § 407 (LexisNexis 2014).
[53] *See* 18 U.S.C. § 1001; U.S. COAST GUARD MARITIME LAW ENFORCEMENT MANUAL, COMDTINST M16247, series, chs. 6, 9, & 12 (2010) (For Official Use Only manual) (copy on file with CLAMO) [hereinafter MLEM].
[54] USCG PUB 1, *supra* note 2, at 11.
[55] *See* 14 U.S.C. § 81 (LexisNexis 2014).
[56] *See* MLEM, *supra* note 55, ch. 4.

enforcement officer must be reasonable under the circumstances present.[57] The USCG adheres to the Standing Rules of Engagement (SROE)[58] as directed within that instruction.

[57] *See e.g.*, *Graham v. Connor*, 490 U.S. 386 (1989); *Tennessee v. Garner*, 471 U.S. 1 (1985).
[58] JOINT CHIEFS OF STAFF, CHAIRMAN OF THE JOINT CHIEFS OF STAFF INSTRUCTION 3121.01B, STANDING RULES OF ENGAGEMENT, (13 June 2005).

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NORTH ATLANTIC TREATY ORGANIZATION (NATO)

I. OVERVIEW

A. The North Atlantic Treaty Organization (NATO) has existed since 1949, yet its organization remains obscure to many Judge Advocates (JA). This chapter discusses NATO's structure and decision making process.

B. Twelve countries founded NATO on 4 April 1949 by signing the North Atlantic Treaty in Washington, D.C. Because it was signed in Washington, the North Atlantic Treaty is often referred to as the "Washington Treaty." NATO's Headquarters are located in Brussels, Belgium.

C. Article 9 of the North Atlantic Treaty develops the basic structure of NATO, establishing a "Council to consider matters concerning the implementation of this Treaty." This Council is known as the North Atlantic Council (NAC). All NATO members have a Permanent Representative (PermRep) of ambassadorial rank who represents them in the NAC. PermReps must be available "to meet promptly at any time." The NAC meets regularly in "Permanent Session," to fulfill its treaty based obligation. The NAC occasionally meets at the level of Ministers of Defense (aka DEFMIN), where the United States is represented by the Secretary of Defense, and at the level of Ministers of Foreign Affairs (aka FORMIN), where the United States is represented by the Secretary of State. The NAC meets less frequently at a "Summit" meeting of NATO Heads of State and Government, where the U.S. is represented by the U.S. President. When the NAC meets to discuss the Alliance's nuclear policy, it is called the "Nuclear Planning Group" (NPG), which does not include France.[1]

D. Article 9 also created "such subsidiary bodies as may be necessary." Besides the NAC and NPG, the third principal NATO committee is the Military Committee (MC).[2] The MC is composed of the Military Representatives (MilReps), usually general officers of three star or equivalent rank, from all NATO members. The MC is the senior military authority in NATO and the primary source of military advice to the Secretary General and the NAC. The MC meets regularly in Permanent Session. The MC occasionally meets at the level of Chiefs of Defense (aka CHODs), where the U.S. is represented by the Chairman of the Joint Chiefs of Staff.

E. There are two supporting staffs at NATO Headquarters: the International Staff (IS), and the International Military Staff (IMS). The IS provides direct support to the NAC and the civilian/political committees under it. The IS facilitates reaching consensus among the Allies on the political side of NATO by chairing meetings, preparing policy recommendations, and drafting communiqués and reports. The IMS provides support for the Military Committee and is composed of military officers from each NATO country. The IMS facilitates reaching consensus among the Allies on the military side of NATO by chairing meetings, and preparing draft military advice, which is typically considered by Allies in MC working groups at the staff/action officer level, and then by the MC itself.

F. The Alliance's integrated military command structure is headed by two Strategic Commands (SC): Allied Command Operations (ACO) and Allied Command Transformation (ACT).[3] ACO is located at Supreme Headquarters Allied Powers Europe (SHAPE) in Mons, Belgium, which is forty-five miles south of NATO

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[1] http://www.nato.int/cps/en/natolive/topics_50069.htm. France wants its nuclear deterrent to remain independent from the NATO Alliance.

[2] http://www.nato.int/cps/en/natolive/topics_49174.htm.

[3] http://www.nato.int/cps/en/natolive/topics_49608.htm. Traditionally, ACO and ACT were known as Strategic Allied Command Europe (SACEUR) and Strategic Allied Command Atlantic (SACLANT), respectively. The Commander of U.S. European Command (USEUCOM) is dual-hatted as the Commander of ACO, and is still referred to as SACEUR. The Commander of U.S. Joint Forces Command (JFCOM) was formerly dual-hatted as the Commander of ACT, which is now referred to as SACT (pronounced "sack T") vice SACLANT. With French reintegration into NATO's military command structure in 2009, France is now filling the SACT position.

Headquarters in Brussels. ACT is located in Norfolk, Virginia. The SCs are responsible to the Military Committee for the overall direction and conduct of all NATO military matters within their command areas. The SCs provide direct advice to the Military Committee, and are authorized to provide direct advice to the NAC on matters within their purview while keeping the Military Committee simultaneously informed. When preparing for and conducting operations, the SCs may receive political guidance directly from the NAC, although this is typically done via the MC. ACO and ACT are continuously represented at NATO Headquarters by representatives from their respective staffs to facilitate the timely two-way flow of information.

G. Article 3 requires "the Parties, separately and jointly, by means of continuous and effective self-help and mutual aid, [to] maintain and develop their individual and collective capacity to resist armed attack." Thus NATO seeks to be interoperable across numerous military forces, many with several branches.[4] The individual nations have joint and individual responsibilities to be able to defend themselves and others.

H. Article 5 is the heart of NATO in that "[t]he Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all . . . ." This Article forms the basis for collective self-defense, but it is not unlimited since "if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence recognized by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, *such action as it deems necessary*, including the use of armed force, to restore and maintain the security of the North Atlantic area." [emphasis added]. The first time NATO invoked Article 5 was in response to the September 11, 2001, attacks against the United States, by sending five Airborne Warning And Control Systems (AWACS) aircraft from NATO Allies to assist in U.S. continental defense operations.[5]

I. Article 5, as well as Article 51 of the United Nations Charter, requires notification to the United Nations Security Council of measures taken in self-defense. Actions planned or actually undertaken pursuant to Article 5 are referred to as "Article 5 Operations." Article 6 defines the area where Article 5 applies, that is, essentially, "on the territory of any of the Parties in Europe or North America" or the islands in the North Atlantic "under the jurisdiction of any of the Parties . . . north of the Tropic of Cancer." Also included in the geographic confines of Article 6 are attacks "on the forces, vessels, or aircraft of any of the Parties when in or over these territories . . . the Mediterranean Sea or the North Atlantic area north of the Tropic of Cancer." Besides Article 5 operations, NATO conducts Article 4 operations, such as Peace Support Operations (PSO).[6] The first NATO PSO was the Implementation Force (IFOR) in the Balkans in 1995, pursuant to the General Framework Agreement for Peace (GFAP, also known as the Dayton Peace Accord).

J. NATO has expanded six times and now numbers "at" twenty-eight members,[7] the most recent two members (Albania and Croatia) having joined in April 2009. 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/consensus of the current members and is based on the invitees' ability to further the principles of the Treaty and "contribute to the security of the North Atlantic area."

K. To assist the candidate nation, NATO develops a Membership Action Plan (MAP). While not establishing criteria, MAP is a consultative process between NATO and the prospective member State to ascertain the State's progress toward membership. MAP is divided into five areas dealing with political and economic issues, military and defense issues, resource issues, security issues, and legal issues. Each aspiring nation drafts an annual "national programme" on preparations for possible membership, setting objectives for its preparations, and containing specific information on steps being taken on the preparations. Participation in MAP does not imply a timeframe for or guarantee of NATO membership. Decisions on membership have been, and will continue to be, "taken" on a case-by-case basis by the NAC at a NATO Summit. The Alliance has no precondition for stationing troops or nuclear weapons on the territory of new members. However, new members must accede to several key NATO status and technical agreements.

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[4] Iceland has no military, yet is a member of the NATO Alliance.
[5] http://www.defense.gov/news/newsarticle.aspx?id=44663.
[6] Article 4 of the NATO Treaty provides that "[t]he Parties will consult together whenever, in the opinion of any of them, the territorial integrity, political independence or security of any of the Parties is threatened."
[7] http://www.nato.int/cps/en/natolive/nato_countries.htm.

L. The Alliance rests upon commonality of views and a commitment to work for unanimity/consensus. To enhance the consensus building process, NATO developed the "silence procedure."[8] The silence procedure is used in all committees and subordinate working groups at NATO Headquarters to reach consensus on NATO decisions and policies.

M. The NAC typically tasks the Military Committee to provide military guidance on an issue. The MC provides guidance to the SCs, who develop their input and report back to the MC. Then the IMS develops a document called an IMS Working Memorandum (IMSWM), which is sent to the MilReps for consideration and coordination with their respective capitals. After reviewing the IMSWM, each NATO Ally can either maintain silence (with or without providing comments), or formally express their disagreement by breaking silence. This is the so-called "silence procedure." If silence is maintained, this means that the member State does not vehemently disagree with the content of the IMSWM. If all members maintain silence, then the IMSWM goes forward to the NAC as an MC Memorandum (MCM) of military advice. Silence is broken by a member nation sending a letter to the IMS indicating its objection and the rationale for this objection. When silence is broken, the cognizant working group typically meets again to attempt to achieve consensus.

N. After this subsequent attempt at consensus, the Chairman of the Military Committee may convene the MC to discuss the issue. If consensus is reached at the MC, the MCM is sent forward to the NAC as military advice. If consensus is not reached, however, the Chairman may send forward his own recommendation, called a Chairman's Memorandum (CMCM), to the Secretary General as military advice, noting the different positions of Allies. Consensus is always the goal, but occasionally 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 (as noted previously, usually three star flag officers) and Deputy MilRep (usually one star flag officers).

O. The NAC makes all policy level decisions at NATO, and only with full consensus of all of the NATO Allies.

II. THE U.S. DECISION-MAKING PROCESS

A. The formulation of the U.S. position at NATO involves interagency coordination between the Department of Defense (DoD), Department of State (DOS), and the Joint Staff. The U.S. Mission to NATO (i.e. the Ambassador's staff) and the U.S. Military Delegation (MILDEL) to the NATO Military Committee (i.e. the U.S. MilRep's staff) are physically located across the main corridor from one another in the NATO Headquarters building, and coordinate with each other on a daily basis. On issues within the cognizance of the European Union, coordination is established with the U.S. Mission to the EU (USEU), also located in Brussels, Belgium.

B. When the U.S. position is formulated and interagency guidance received by the U.S. Mission and MILDEL in Brussels, the U.S. planners begin to work the issue with the IMS and the other Allies' staffs in Brussels to arrive at consensus. If this background work is successful, the issue is resolved by the document "passing silence."

III. NATO RULES OF ENGAGEMENT

A. "With the exception of self-defence," the NATO Rules of Engagement (ROE) "provide the sole authority to NATO/NATO-led forces to use force."[9] The NATO ROE are:

> written as a series of prohibitions and permissions . . . When issued as prohibitions, the rules are orders to commanders not to take the designated action(s). When issued as permissions, they 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.[10]

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[8] Under the "silence procedure," basic premises of a text are first negotiated in one or more working groups, after which a draft version is circulated. If no NATO member "breaks silence" by proposing an amendment (implying that the member State still has fundamental problems with parts of the text), all members are considered to have adopted the text (i.e., silence implies consent).

[9] MC 362/1, NATO Rules of Engagement, 30 June 2003, at p. 2, ¶ 2. The NATO ROE are marked "NATO Unclassified, Releasable to PfP/EU/SFOR/KFOR/ISAF/Australia."

[10] *Id.* at p. 7, ¶ 15.

In contrast with the U.S. Standing ROE, which are generally considered *permissive*, NATO ROE may be considered by some to be more *restrictive* in nature.

B. International law, including the law of armed conflict, applies to all NATO military operations. With the different obligations of each NATO member to "relevant conventions and treaties, every effort will be made to ensure . . . that a common approach is adopted . . . for the purposes of military operations."[11]

C. NATO members must also adhere to their respective national laws. Each nation has two separate obligations under this provision. Each nation must issue instructions restricting and/or amplifying the ROE to their troops to ensure compliance with their respective national laws. "[N]ations must inform the NAC … and the Strategic Commander of any inconsistencies [i.e. caveats], as early as possible."[12] While separate obligations may exist under other treaties and conventions, the unifying element in NATO is the commitment in the Preamble to the Washington Treaty to maintaining a common defense under the rule of law.

D. NATO defines "self-defence" as "the use of such necessary and proportional force, including deadly force, by NATO/NATO-led forces and personnel to defend themselves against attack or an imminent attack."[13] The definition is further refined by defining "necessary" as "indispensable,"[14] "proportional" as "a response commensurate with the perception of the level of the threat posed,"[15] "imminent" as "manifest, instant and overwhelming,"[16] and "attack" as "the use of force against NATO/NATO-led forces and personnel."[17] NATO also employs the concept of "extended self-defence" to "defend other NATO/NATO-led forces and personnel from attack or imminent attack."[18]

E. Guidance regarding the "use of force during peacetime operations and operations prior to the commencement of armed conflict" is contained in paragraphs 10 and 11 of the NATO ROE.[19] Once an armed conflict has commenced in which NATO/NATO-led forces are involved as combatants, the NATO ROE recognize that "[c]are must be taken … to ensure that any ROE requested and authorized do not unduly restrict, beyond the restrictions imposed by international law, the commander's ability to effectively carry out the mission and obtain Military Advantage."[20] Annex A is entitled "Compendium of Rules of Engagement," and lists "a menu of possible options."[21] Specific guidance on the use of ROE in each of the various war-fighting mediums are contained in Annexes B (Air), C (Land), and D (Maritime). There is also a glossary in Annex F that is helpful. Copies of the NATO ROE may be obtained from the Center for Law and Military Operations (CLAMO) via SIPRNET (see the CLAMO chapter for contact information).

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[11] *Id.* at p. 3, ¶ 4.c.
[12] *Id.* at p. 3, ¶ 5.
[13] *Id.* at p. 4, ¶ 7.
[14] *Id.* at p. 4, ¶ 7.a.
[15] *Id.* at p. 4, ¶ 7.b.
[16] *Id.* at p. 4, ¶ 7.c.
[17] *Id.* at p. 4, ¶ 7.d. Appendix 1 to Annex A of the NATO ROE, entitled Hostile Intent and Hostile Act, clarifies this guidance (pp. A-1-1 to A-1-2).
[18] *Id.* at p. 4, ¶ 8.
[19] *Id.* at pp. 5-6, ¶¶ 10-11.
[20] *Id.* at p. 6, ¶ 12.
[21] *Id.* at p. 8, ¶ 15.

MULTINATIONAL OPERATIONS

America's interests are inextricably linked to the integrity and resilience of the international system. Chief among these interests are security, prosperity, broad respect for universal values, and an international order that promotes cooperative action . . . military forces must be capable of working effectively with a range of civilian and international partners . . . Building and sustaining such networks and partnerships will require effective strategic communication. We will need to improve our ability to understand the concerns, perceptions, and attitudes of foreign governments and populations, as well as the ways in which our words and actions may affect allies and partners.

- U.S. Quadrennial Defense Review 2010

There are no words to express the abyss between isolation and having one ally. It may be conceded to the mathematician that four is twice two. But two is not twice one; two is two thousand times one.

- G.K. Chesterton, *The Man Who Was Thursday*

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I. INTRODUCTION

A. Doctrine. Doctrinally, military actions conducted by forces of two or more nations are defined as "multinational operations."[1] Such actions are usually undertaken within the structure of either a formal alliance or an ad hoc coalition. An alliance is a relationship that results from a formal agreement (e.g., treaty) between two or more nations for broad, long-term objectives that further the common interests of the members. A coalition is an ad hoc arrangement between two or more nations for common action. Coalitions may be formed for a single occasion or a longer period, but usually address a narrow sector of common interest. They are less likely to provide the same degree of organizational maturity as alliances.

[1] *See* JOINT CHIEFS OF STAFF, JOINT PUB. 3-16, MULTINATIONAL OPERATIONS (7 Mar. 200716 Jul 2013) [hereinafter JOINT PUB. 3-16].

B. Military Operations. Both alliances and coalitions may be employed across the full spectrum of military operations, and may require coordination, not only with other multinational partners, but also with a variety of U.S. government agencies, host nation authorities, and intergovernmental and nongovernmental organizations.

C. Judge Advocates. Judge Advocates (JAs) need to be cognizant of differences in multinational partner laws, doctrine, organization, weapons, equipment and terminology; and the potential of those differences to impact on operations. Additionally, an understanding of cultural, political and religious considerations applicable to partner nations will benefit a JA operating in a multinational environment.

II. MISSION

A. Sources. The mission of a multinational force may derive from national channels or from international treaties, mandates, resolutions or agreements common to the contributing nations. Each nation will be driven by its own political considerations which may affect mission execution. Mission analysis for a multinational operation must consider the rules of engagement (ROE) of each troop contributing nation (TCN) and other national factors that may affect mission accomplishment. National differences in doctrine, training, capabilities and equipment may be overcome by informed force composition and mission assignment.

B. Coordination. When advising at any stage of a multinational operation it is imperative that JAs liaise and maintain close coordination with legal staff of partner forces and those employed within the allied/ coalition headquarters. A sound understanding of legal differences across the spectrum of operational functions is necessary in order to advise in relation to the legal aspects of the mission.

III. ORGANIZATION

A. Planning Multinational Operations

1. *Cohesion.* Perhaps the biggest challenge to any multinational operation is the requirement to protect the cohesion of the force. Political, practical, and legal considerations shape the nature of multinational action. Commanders must be clear about the terms[2] under which constituent national contingents will operate, as well as the possible impact upon the strength and cohesion of the multinational force.

2. *Legal Authority*. Judge Advocates must be conversant with and advise on the differing legal regimes applicable to multinational partners.[3] Signatures and ratifications of treaties are published in the United Nations Journal and may be accessed electronically via the UN treaty database.[4] Moreover, JAs must be aware that States parties to treaties may not interpret their obligations and responsibilities in exactly the same manner as the United States. If differing interpretations are understood and accommodated within the multinational force's plan, their potential to become a source of friction or negatively impact the cohesion of the multinational force can be minimized.

3. *Limitations.* Other factors which may limit the military capabilities of multinational partners include linguistic and communications issues, domestic political considerations, doctrine, organization, training, technology levels, and casualty tolerance. Indeed, it is not uncommon for nations to limit their role within a multinational operation on the basis of such factors—for example, participation may be restricted to the support of strictly defensive roles. However, multinational commanders may be able to reduce the impact of such differences by merging capabilities in order to balance weaknesses in one contingent with strengths in others.

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[2] Where these terms restrict action, they are typically referred to as "caveats." The North Atlantic Treaty Organization typically uses a "Transfer of Authority" (TOA) message procedure whereby troop contributing nations transfer national force elements to NATO command. The TOA message will stipulate the caveats under which the transferred forces can be employed.
[3] The legal regime applicable to each state depends upon that State's treaty and customary international law obligations.
[4] *Available at* https://treaties.un.org. A further useful reference tool, which also includes information relating to a State's customary international law behavior is the ICRC's Customary IHL database. *Available at* www.icrc.org/customary-ihl/eng/docs/home.

4. *Procedures.* The rationalization, standardization, and cooperation procedures for formal alliances may assist with planning in this regard.[5] Moreover, JAs should familiarize themselves with any bilateral agreements between multinational partners, including status of forces agreements (SOFAs) or status of mission agreements (SOMAs), which may shape the legal landscape.

B. Command and Control, C-2

1. *Chain of Command.* Command relationships in multinational operations involve both national and multinational chains of command. U.S. policy dictates that the President, as Commander in Chief, always retains national command authority, but may place U.S. forces under the operational control (OPCON) of a multinational commander.

2. *Command Structure*. While multinational operations within formal alliances lend themselves to an integrated command structure (i.e., where an integrated multinational headquarters supports the designated commander), a coalition operation is often characterized by a lead nation command structure which may or may not rotate. Less common is a parallel command structure where no single force commander is designated and consensus often stems from compromise. As exemplified by the C-2 structure for the Operation Desert Storm coalition, lead nation and parallel command structures may exist alongside one another and may evolve as the operation progresses.

C. Communications and Intelligence Sharing

> *We will not win the war on terror through military action. The sharing of information and intelligence will be vital to protecting our country.*
>
> - Former Secretary of State for Defense, William Cohen

1. *National Disclosure Policy*. The release of classified information to multinational partners is governed by national disclosure policy (NDP).[6] Multinational partners frequently request access to U.S. information, but the security classification of such information may preclude this. Lack of multinational partner access to SIPRNET can be a major interoperability issue as these means are typically the default setting for passage of significant amounts of both classified and unclassified operational information.

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[5] *See* CHAIRMAN OF THE JOINT CHIEFS OF STAFF, INSTR. 2700.01C, INTERNATIONAL MILITARY AGREEMENTS FOR RATIONALIZATION, STANDARDIZATION, AND INTEROPERABILITY BETWEEN THE UNITED STATES, ITS ALLIES AND OTHER FRIENDLY NATIONS (8 Feb. 2008).

[6] *See* NATIONAL SECURITY DECISION MEMORANDUM (NSDM) 119, DISCLOSURE OF CLASSIFIED UNITED STATES MILITARY INFORMATION TO FOREIGN GOVERNMENTS AND INTERNATIONAL ORGANIZATIONS (20 July 1971); NATIONAL DISCLOSURE POLICY (NDP) 1, NATIONAL POLICY AND PROCEDURES FOR THE DISCLOSURE OF CLASSIFIED MILITARY INFORMATION TO FOREIGN GOVERNMENTS AND INTERNATIONAL ORGANIZATIONS (1 Oct. 1988); U.S. DEP'T OF DEFENSE, DIR. 5230.11, DISCLOSURE OF CLASSIFIED MILITARY INFORMATION TO FOREIGN GOVERNMENTS AND INTERNATIONAL ORGANIZATIONS (16 June 1992); CHAIRMAN OF THE JOINT CHIEFS OF STAFF, INSTR. 5221.01B, DELEGATION OF AUTHORITY TO COMMANDERS OF COMBATANT COMMANDS TO DISCLOSE CLASSIFIED MILITARY INFORMATION TO FOREIGN GOVERNMENTS AND INTERNATIONAL ORGANIZATIONS (1 Dec. 2003) (C1, 13 Feb. 2006) (delegating to the commanders of combatant commands the authority to disclose classified military information to foreign governments and international organizations in certain circumstances).

2. *Standardization Agreements*. While NDP tends to be controlled by the Combatant Commands, JAs should be aware of the existence of international standardization agreements, such as those established within standing alliances (e.g., the North Atlantic Treaty Organization (NATO) standardization agreements (STANAG)). Such documents provide a useful starting point for policies concerning the ability to share classified information among multinational partners; however the unique nature of coalition operations means that their application may require modification based on the circumstances. Details of the intelligence sharing agreements between the United States, the United Kingdom, Canada, Australia and New Zealand are laid out in classified memoranda of understanding. Additionally the ABCA Coalition Intelligence Handbook provides guidance in relation to the planning and conduct of intelligence in support of ABCA coalitions.[7]

D. Military Justice

Jurisdiction over U.S. personnel suspected of committing criminal offenses is decided on a case-by-case basis in accordance with applicable international agreements with host nation authorities. It is U.S. policy to retain jurisdiction in all criminal cases to the fullest extent possible. This position is common to most nations willing to contribute forces to multinational operations, who will seek, as far as practicable, to retain exclusive criminal jurisdiction over their own forces.[8] Foreign military commanders exercising operational or tactical control over U.S. forces do not administer discipline. The converse is also true; U.S. commanders exercising operational or tactical control over multinational forces do not administer discipline over those forces.

E. Exchange Personnel

The United States has a number of permanent individual exchange positions with other nations. Deployed exchange personnel must comply with their own domestic law. Thus an exchange officer's government may place conditions on involvement in certain operations if its domestic law or policy is more restrictive than that of the host unit. Exchange personnel are essential to promoting multinational interoperability and disseminating lessons learned from previous multinational operations. They can also be key to explaining to other multinational partners how the evolving nature of an operation may impact them, and therefore prevent misunderstanding and risk of weakening the strength and unity of the multinational effort.

F. Investigations and Claims

1. *Multinational incidents*. Incidents that give rise to investigations, including accidents and alleged war crimes, may involve members of more than one multinational partner force. Each multinational partner is likely to have its own national requirements for investigations and release of information and it may not be possible for all partners to adopt the same policy. While there is no simple solution, early discussion of the types of incidents to be investigated by each multinational partner, as well as the information that will be released, will help minimize the impact (both from a substantive context, and a procedural / administrative, point of view) of national policy differences.

2. *Claims in a multinational environment*. Each nation will also tend to have its own policies and procedures with regard to claims received by the force. JAs should be aware that differences may be due to domestic law (for example, where a SOFA removes the legal requirement to pay compensation, a multinational partner may lack the legal basis for making such payments). Different policies and the existence of multiple procedures may increase the potential for exploitation by the local population, for example "forum shopping" or, indeed, the submission of multiple claims in relation to the same incident. Alliance operations may generate common claims polices or procedures which multinational partners are requested to follow to the extent possible. In any event, maintaining an open dialogue and sharing claims related information between multinational force members will facilitate a more effective and economic claims regime within the area of operations.

G. Fiscal Law Considerations

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[7] ABCA COALITION INTELLIGENCE HANDBOOK EDITION 5 (2013).

[8] Such was the position during Operation Iraqi Freedom, where Coalition Provisional Authority Order Number 17 provided for coalition force immunity from Iraqi criminal jurisdiction. Another example is the Military Technical Agreement signed between the International Security Assistance Force and Afghanistan.

Many multinational partners do not have the same degree of fiscal regulation as the United States. Multinational partners often make logistic requests of the United States. JAs must understand and be able to explain U.S. fiscal limitations, especially the operation of acquisition and cross-servicing agreements (ACSAs). In some circumstances, a multinational partner's greater fiscal flexibility may be used to achieve multinational force objectives that cannot be funded from U.S. sources.

IV. OPERATIONS

A. Detention Operations

1. *National Policies*. Multinational operations often feature the involvement of armed forces in the detention of individuals. Given the responsibilities of the Detaining Power under international humanitarian law (IHL) and national obligations under international human rights law (IHRL), detention is regarded as a national issue. In view of this, and heightened political sensitivities surrounding management and treatment of detainees, detention policies are generally determined at a national level. The treatment and management of detainees has been of particular importance in recent operations to a number of multinational partners, including Australia, Canada and the United Kingdom.[9]

2 *Obligations*. A Nation's legal position in relation to detention will be shaped by its interpretation of its IHL and IHRL obligations. In relation to the application of IHL, nations may reach different conclusions based on their classification of the conflict. Even when there is consensus in this respect, nations may determine the status of detainees differently. IHRL is even more likely to impact nations differently owing to national positions regarding the extraterritoriality of human rights treaties; and the application of regional human rights systems and domestic law. National obligations under IHRL have the potential to impact on detention operations and may in fact shape the willingness of some multinational partners to detain civilians during overseas military operations.[10] European partners increasingly face complex human rights considerations in relation to security detention arising from decisions of the European Court of Human Rights.[11]

3. *Transfer*. In the context of multi-national operations legal issues may arise in relation to the transfer of individuals from the effective control of one nation to that of another, owing to human rights responsibilities. Concerns regarding transfer between TCNs may be alleviated by the negotiation of an agreement establishing terms and procedures for the transfer of prisoners of war, civilian internees and/ or civilian detainees between multinational partners (as was done in Operation Iraqi Freedom).[12] Concerns arising from potential execution of the death penalty, torture or ill-treatment by the receiving nation, have been particularly significant in recent multinational operations in relation to transfer to the host authorities.[13] Both the UK[14] and Canada[15] faced legal

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[9] The United Kingdom's doctrinal approach to detainees is contained in Joint Doctrine Publication 1-10 Captured Persons (CPERS), 2dEdition, October 2011. *Available at* www.gov.uk/government/uploads/system/uploads/attachment_data/file/3370320111129jdp110_Ed2_cpers.pdf

[10] During Operation Iraqi Freedom, the only coalition partners to establish detention facilities were the United States and United Kingdom, the latter establishing an internment camp in Basra.

[11] Article 1 of the European Convention on Human Rights provides that the rights apply to those within the jurisdiction of a State party. Case law indicates that jurisdiction applies to include civilians who are detained in an overseas State run military facility. Indeed, in some limited circumstances, the very capacity of States who are signatories to the European Convention on Human Rights, to detain persons for imperative reasons of security, has been thrown into doubt following the European Court of Human Rights case of Al Jedda. *Al-Jedda v. The United Kingdom*, App. No. 27021/08, 7 July 2011. Domestic courts have also considered detainee related issues such as the use of hooding (*Al Bazzouni v The Prime Minister and others*, [2011] EWHC 2401 (Admin), 3 October 2011) and the transfer of detainees to a host nation State (*Evans R (on the application of) v Secretary of State for Defence* [2010] EWHC 1445 (Admin) 25 June 2010).

[12] An Arrangement for the Transfer of Prisoners of War, Civilian Internees, and Civilian Detainees Between the Forces of the United States of America, the United Kingdom of Great Britain and Northern Ireland, and Australia (23 Mar. 2003) (on file with CLAMO).

[13] Arising from UK detention in Iraq, the European Court of Human Rights case of *Al-Saadoon and Mufdhi v. The United Kingdom*, App. No. 61498/08), 2 March 2010 concluded that transfer to Iraqi authorities, when there were substantial grounds for believing that there was a real risk of the imposition of the death penalty, amounted to a violation of Art. 3 of the European Convention of Human Rights.

challenges in their domestic courts in relation to their policy to transfer detainees to Afghan authorities. Furthermore, reports by the United States Assistance Mission in Afghanistan (UNAMA) led NATO to impose restrictions on transfers. Negotiation of agreements with the host nation containing assurances regarding humane treatment and use of the death penalty may alleviate some of the concern. The issue is whether such arrangements can adequately address any risk that detainees will be subject to torture or mistreatment on transfer. Accordingly, some nations monitor their transferred detainees within the Afghan system.

4. *Standard Operating Procedures.* While detention is necessarily a matter of national concern, this does not detract from the desirability of a common and coordinated approach. The Copenhagen Process: Principles and Guidelines[16] is an example of an effort to develop principles and good practices for states and international organizations who detain individuals during the course of non-international armed conflict and peace support operations. One of the challenges for multinational commands is the development of standard operating procedures and common standards that reflect detailed legal obligations. Potential areas that warrant consideration include the determination of a detainee's status, standards for the treatment and management of detained individuals, use of terminology and policies regarding transfer and personnel exploitation. Additionally, the oft heard refrain "we don't do detention" requires scrutiny and should not prevent the formulation of a plan in the event of circumstances demanding detention by a nation that takes such a stance. Detention within multinational operations is potentially complex and problematic. A clear understanding of national positions will ensure maximum cooperation and enable planning to minimize operational impact.

5. *International Committee for the Red Cross.* Engagement with the International Committee for the Red Cross (ICRC) is a central issue to consider in relation to detention. Even during multinational operations, detention facilities are usually administered by individual nations, such that the confidential reports provided by the ICRC tend to be directed to national governments.[17] This does not, however, rule out the opportunity for a multinational commander to engage with the ICRC and, for instance, to report consolidated, force-wide, detainee-related information to the ICRC.

C. Use of Force

1. *Self-Defense*

a. While domestic laws of all nations recognize a right of self-defense, it is a concept that varies in meaning between countries. JAs must not assume that multinational partners share the U.S. understanding with regard to the use of force in self-defense. The right to self-defense is exercised in accordance with national laws which differ in terms of definition and scope of the right. Accordingly, the circumstances in which forces from different nations can act in self-defense may vary.

b. Regardless of the terms of the ROE or any SOFA, U.S. forces retain the right to use necessary and proportional force for unit self-defense in response to a hostile act or demonstration of hostile intent.[18] Other nations use different criteria to determine when the right of self-defense is triggered and may apply different meaning to the same terminology. Different parameters with regard to self-defense may affect when the right to use lethal force in self-defense ends and the requirement for mission accomplishment ROE begins[19].

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[14] *Evans R (on application of) v Secretary of State for Defence* [2010] EWHC 1445 (Admin) 25 June 2010).

[15] *Amnesty International Canada v. Canada (Chief of the Defence Staff)* 2008 FCA 401,[2009] 4 F.C.R. 149. Dec. 17, 2008. The Federal Court of Appeal upheld the judgment of the Supreme Court concluding that the Canadian Charter of Rights did not apply during the armed conflict in Afghanistan to the detention of non-Canadians by Canadian Forces or their transfer to Afghan authorities and that the applicable law was International Humanitarian Law.

[16] The Copenhagen Process on the Handling of Detainees in International Military Operations (The Copenhagen Process) was launched on Oct. 11, 2007 and concluded on Oct 19, 2012. Representatives of twenty-four countries participated. THE COPENHAGEN PROCESS PRINCIPLES AND GUIDELINES was adopted on Oct. 19, 2012. *Available at* um.dk/en/~/media/UM/English-site/Documents/Politics-and-diplomacy/Copenhagen%20Process20Principles%20and%20Guidelines.pdf

[17] Where a detention facility is administered by several nations, it is understood that the ICRC will provide reports to the facility commander, who passes the report up his national and multinational reporting chains.

[18] CJCSI 3121.01B, *supra* note 11, encl. A, para. 1(f)(1).

[19] The terms 'hostile intent' and 'hostile act' (specifically defined) are used within NATO mission accomplishment ROE and apply to circumstances in which some nations cannot use lethal force in self-defense.

c. National self-defense rules may also differ with regard to who or what can be defended. U.S. forces must have specific authorization to use collective self-defense and defend multinational forces.[20] Other nations' laws of self-defense may govern the defense of others, such that their soldiers retain that right unless it is specifically restricted. Self-defense rules may also differ with regard to the protection of property. For example, at all times, including when guarding property, UK forces must not use lethal force other than for the protection of human life unless explicitly authorized under ROE or in accordance with the law of armed conflict. Only when the potential loss or destruction of property causes an imminent threat to life, will self-defense rules apply. Mission accomplishment ROE may designate specified property as mission essential and stipulate what force can be used to protect it.

d. While the U.S. ROE provide that unit commanders may limit individual self-defense by members of their unit, other nations consider individual self-defense to be inherent such that it cannot be restricted in any circumstances. Differences may also arise in relation to the use of warning shots and whether, and in what circumstances pursuit is permitted in self-defense. The practical impact of different national laws of self-defense may in some circumstances be addressed by provision within the mission accomplishment ROE but higher authority may be required to use force on that basis.

2. *Rules of Engagement (ROE).*

a. While an alliance may issue ROE that apply to the entire multinational force, it is rare for the ROE for any coalition operation to be contained within a single document. More commonly each contingent will receive ROE from their respective chain of command that reflect, in addition to common considerations such as international law and mandate; national, political and operational concerns and domestic law. National caveats may be declared to facilitate the application of multinational ROE. The U.S. Standing Rules of Engagement (SROE) provide that U.S. forces assigned to the operational or tactical control of a multinational force will follow the ROE of that force for mission accomplishment if authorized by the Secretary of Defense.[21] When U.S. forces operate in conjunction with a multinational force, reasonable efforts are made to establish common ROE. If this is not possible, U.S. forces operate under the SROE.[22] The U.S. currently has combined ROE (CROE) with a number of nations and is continuing to work on CROE with additional nations.

b. Whether coalition partners operate under separate national ROE or one multinational ROE, there will be variations in their ability to use force which may be reflected in different rules or national caveats. Even when the terminology looks familiar, JAs must ensure that they understand the coalition partner's meaning in advance of a mission. For example, other countries may have a different approach from the Unites States in relation to the meaning of "hostile act" and "hostile intent." While the U.S. uses the term to define situations in which the use of lethal force is always permitted, the U.K. and other nations apply a different definition and require specific authorization to use force in response.[23] This approach is reflected within NATO ROE.[24] Where nations have different treaty obligations, for example in relation to weapon usage, constraints will be stipulated within national ROE which may also provide guidance in relation to interoperability with nations that do not have the same constraints.

c. It is essential for the ROE for each coalition partner to be understood and continually reviewed, as they are likely to be subject to change (particularly if the nature of the operation changes in the view of that coalition partner). Differences in terminology should be minimized, or where this is not possible, understood. Joint consultation while drafting the ROE can be beneficial, although it is accepted that this is typically the exception, not the rule. A clear understanding of national ROE positions will inform decisions in relation to force composition and mission assignment and minimize operational impact. Legal advice to commanders and ROE training for U.S.

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[20] *Id.*, encl. A, para. 3(c).
[21] CHAIRMAN OF THE JOINT CHIEFS OF STAFF, INSTR. 3121.01B, STANDING RULES OF ENGAGEMENT/STANDING RULES FOR THE USE OF FORCE FOR U.S. FORCES, encl. A, para. 1(f)(1) (13 June 2005) [hereinafter CJCSI 3121.01B].
[22] *Id.*, encl. A, para. 1(f)(2).
[23] U.K. Ministry of Defense, Joint Service Publication 398, 16 Sep. 13 Annex A, para 14. (partially classified document).
[24] North Atlantic Treaty Organization Rules of Engagement MC362/1, Part II.

forces must address any issues arising from different national ROE. An agreed matrix showing the comparison of national ROE will be of value.

3. *Military Objective / Targeting*

a. States may come to different conclusions regarding whether certain objects are military objectives in accordance with Art. 52(2) of Additional Protocol I to the 1949 Geneva Conventions.[25] Differences of opinion often arise in relation to television and radio stations that are state-owned or may be used for propaganda purposes; symbols of the enemy regime such as palaces and statues; and civilian (non-uniformed) enemy regime officials. Another area of diverse opinion amongst coalition partners is the question of when a civilian taking a direct part in hostilities can be lawfully targeted. In addition, some multinational partners may not view certain objects as politically acceptable targets despite their legality under international law. Such targets may be prohibited outright, or require high-level approval before engagement. This may affect not only the relevant multinational partner's ability to prosecute the target, but also whether it may provide support to other multinational forces who do so. For example, if the target falls outside of a State's permissible target set, that multinational partner may be prohibited from refueling strike aircraft, providing airborne early warning and control, or participating in the planning for that mission.

b. Despite the legality of an operation against a military objective, some multinational partners may have particular sensitivities that need to be considered if their support for the operation is to be maintained. Consultation in the planning process may help to avoid potential negative consequences for multinational force cohesion.

c. Multinational partners may also use different methodology when conducting collateral damage or proportionality assessments (i.e. the determination of whether the anticipated concrete and direct military advantage outweighs the expected incidental loss of civilian life, injury to civilians, damage to civilian objects, or combination thereof), or have different collateral damage thresholds and target sets.

4. *Anti-Personnel Landmines (APL)*

a. Unlike many other nations, the United States is not bound by the Ottawa Treaty, which prohibits States parties from developing, producing, acquiring, stockpiling, retaining or transferring APL, either directly or indirectly, and from assisting, encouraging or inducing any of these activities.[26] When APL use is under consideration during a multinational operation, it is important to understand the parameters of the APL prohibition for relevant multinational partners, especially regarding assistance and whether the partner is permitted to take tactical advantage of U.S. employment of APL.

b. These parameters depend upon national interpretation and policy, so are not necessarily the same for each State. The prohibition on assistance may impact a multinational partner's ability to be involved in air-to-air refueling, transport, or even mission planning. While several multinational partners have issued unclassified guidance on their national interpretation of their obligations, these documents provide insufficient detail for mission planning.[27] Accordingly, JAs should seek advice from multinational legal advisors regarding their nation's position.

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[25] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 48 [hereinafter AP I]. Article 52(2) provides, in part, that "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."

[26] Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Landmines and on Their Destruction art. 1(1), Sept. 18, 1997, 36 I.L.M. 1507.

[27] *See* Landmines Act 1998 (UK) (the statute permits UK military members to participate in the planning of and conduct of military operations in which other coalition partners lawfully use APLs) *available at* www.legislation.gov.uk/ukpga/1998/33/contents; Anti-Personnel Mines Convention Implementation Act 1997 (Canada) (can participate in an operation with a State that uses APL but may not actively assist), *available at* http://laws-lois.justice.gc.ca/eng/acts/A-11.5/FullText.html; Declaration to the Ottawa Convention by Australia (assistance does not include permissible indirect support such as the provision of security for the personnel of a State not party to the Convention engaging in

5. *Cluster Munitions*

a. The Convention on Cluster Munitions (CCM)[28] prohibits party States from the use, production, stockpiling and transfer of cluster munitions and requires them to act to clear remnants and destroy stocks. The United States is not a signatory and is guided in its use of cluster munitions by the DoD Cluster Munitions Policy.[29]

b. Military cooperation and engagement in operations by State parties with non-State parties is provided for within the CCM.[30]Additionally, national positions may be affected by their domestic law giving effect to the convention. In the event that use of cluster munitions is being considered in a multinational environment, JAs should seek advice from national legal advisers as to their nation's position.

6. *Riot Control and Riot Control Agents (RCA)*

a. The Chemical Weapons Convention (CWC) prohibits the use of RCA "as a method of warfare."[31] The phrase does not enjoy universal definition and interoperability issues may arise in the event that States do not share the U.S. interpretation. The view adopted by the United Kingdom and Germany is that when troops are deployed in armed conflict, RCA cannot be used in offensive operations. [32] However ROE or domestic laws of those nations may permit the use of RCA in other circumstances. Other multinational partners may take a more restrictive view.

b. The use of military personnel in policing and riot control work is one that requires a careful assessment of a multinational partner's capabilities and legal authority to conduct. Consultation with multinational partners is essential to determine if their troops are permitted to participate in such operations, including in relation to developing (by providing resources or training) a host nation's capacity in these fields.

D. Reconstruction and Civil Affairs Efforts

Provincial Reconstruction Teams (PRTs) may be established in support of multinational operations, with multinational partners providing all or a portion of a PRT's personnel. Moreover, those personnel may be civilian, military, or both. According to the U.S. Center for Army Lessons Learned, "PRTs are intended to improve stability in a given area by helping build the host nation's legitimacy and effectiveness in providing security to its citizens and delivering essential government services."[33] While there is no alliance or coalition doctrine with respect to PRTs, documents such as the NATO-led International Security Assistance Force (ISAF) PRT Handbook provide guidance.[34]

E. The American-British-Canadian-Australian-New Zealand (ABCA) Program

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such activities). Copies of classified policies releasable to the United States are on file with the International and Operational Law Department, The Judge Advocate General's Legal Center and School.

[28] *See* Convention on Cluster Munitions, CCM//77 (30 May 2008), [hereinafter CCM], *available at* www.clusterconvention.org.

[29] *See* Robert M. Gates, Memorandum for Secretaries of the Military Dep'ts et al., SUBJECT: DoD Policy on Cluster Munitions and Unintended Harm to Civilians, 19 June 2008, available atwww.defense.gov.news/d20080709cmpolicy.pdf.

[30] CCM, *Supra* note 28, Art 23.

[31] Convention on the Prohibition of the Development, Production, Stockpiling, and Use of Chemical Weapons and on Their Destruction art. 1, Jan. 13, 1993, 32 I.L.M. 800.

[32] U.K. ROE may permit the use of RCA in circumstances other than offensive operations which include maintenance of security of designated service establishments or other military facilities, Military Aid to the Civil Power, and in assisting in crowd control for Non-combatant Evacuation Operations (NEO) scenarios. (JSP 398 A-9, para 26). The German position is in accordance with the German Chemical Weapons Convention Implementation Act (Amended version dated 11 Oct. 04) and reflected within the Joint Service Regulation (ZDv) 15/2 International Humanitarian Law in Armed Conflict Manual 471 (May 2013) (on file with CLAMO).

[33] *See* CENTER FOR ARMY LESSONS LEARNED, HANDBOOK 07-34, PROVINCIAL RECONSTRUCTION TEAM (PRT) PLAYBOOK (Sept. 2007) (providing a detailed analysis of the nature and roles of PRTs), *available at* usacac.army.mil/cac2/call/docs/07-34/07-34.pdf.

[34] *See* ISAF PRT HANDBOOK, EDITION 4, MAR. 09 *available at* https://www.cimicweb.org/Documents/PRT%20CONFERENCE%202010/PRT%20Handbook%20Edition%204.pdf.

The American-British-Canadian-Australian-New Zealand (ABCA) Program[35] evolved from the World War II coalition, a security relationship between the United States and its Anglo-Saxon allies based on a common culture, historical experience, and language.[36] Although not a formal alliance, ABCA has become an interoperability standard-bearer. The ABCA nations have served together in ad hoc coalitions on several occasions. ABCA nations developed the Coalition Operations Handbook,[37] now in its fifth edition, to assist in the establishment of coalitions, and to "provide guidance to commanders and staff of organizations operating in a coalition environment . . . thereby helping the coalition commander to understand and develop solutions to create an effective fighting force."[38]

V. CONCLUSION

A. Resolving Interoperability Issues

1. Interoperability issues may be successfully managed through:

a. early and effective communication to identify differences;

b. resolution of those differences where possible; and

c. where resolution is difficult or impossible, ensuring that differences are not overstated and that action is taken to ensure that they are factored into mission planning and execution.

2. The development of relationships between multinational partner legal advisors is an important aspect of this process. Operational and training experience is valuable and is enhanced by bilateral, multilateral, and institutional contacts. Indeed, the U.S. Army JAG Corps has established exchange officers in the United Kingdom and Canada. Moreover, multinational partner legal advisors sent to the United States on exchange or for training develop an understanding of U.S. military culture and ethos, as well as becoming acquainted with U.S. Army JAG Corps doctrine, training, and equipment.

B. Working in an Alliance or Coalition

Our experience of operating as part of multinational coalitions in long-duration conflicts has demonstrated the importance of continually fostering long-term relationships with allies and partners.[39]

- Quadrennial Defense Review 2010

Close and trusted working relationships and liaison networks at all levels significantly enhance effective multinational operational planning. Such relationships and networks should be cultivated with actual and potential multinational partners. However, given that each operation will be different, a truly agile force will be required to adapt and exploit their key liaison appointments and requirements in order to exploit the opportunities and minimize the frictions that multinational operations present. Potential future multinational partners, including both traditional allies and less familiar partners, should maintain awareness of and ensure interoperability with each other's forces, and in particular identify which areas come within multinational control and which remain under national control. This requires forces to be organized, trained and resourced, in order to facilitate multinational partner interoperability.

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[35] ABCA expanded its membership in 2006 to include New Zealand.
[36] *But see* the dedication to the ABCA COALITION OPERATIONS HANDBOOK, 5th Edition, which describes the ABCA countries as "Five nations, divided by a common language."
[37] ABCA COALITION OPERATIONS HANDBOOK (1 Sep. 2010) (on file with CLAMO).
[38] *Id.*, at i.
[39] THE QUADRENNIAL DEFENSE REVIEW 2010, at 62.

CHAPTER 24

THE MILITARY DECISIONMAKING PROCESS AND OPERATIONS PLANS

REFERENCES

1. JOINT CHIEFS OF STAFF, JOINT PUB. 1-04, LEGAL SUPPORT TO MILITARY OPERATIONS (17 Aug. 2011).
2. JOINT CHIEFS OF STAFF, JOINT PUB. 3-0, OPERATIONS (11 Aug. 2011).
3. JOINT CHIEFS OF STAFF, JOINT PUB. 3-33, JOINT TASK FORCE HEADQUARTERS (30 July 2012).
4. ARMY DOCTRINE REFERENCE PUBLICATION 3-0, (22 May 2012).
5. ARMY DOCTRINE REFERENCE PUBLICATION 5-0, THE OPERATIONS PROCESS (17 May 2012).
6. JOINT CHIEFS OF STAFF, MANUAL 3122.01A, JOPES Vol. I (Planning Policies and Procedures) (29 Sept. 2006) (current as of 2 July 2010).
7. JOINT CHIEFS OF STAFF, MANUAL 3130.03, Adaptive Planning and Execution (APEX) Planning Formats and Guidance (31 Aug. 2012).

I. OPERATIONS PLANS AND ORDERS IN THE ARMY ARENA

A. The military decisionmaking process (MDMP) is an established and proven analytical process (Figure 1). It is an established planning methodology that integrates the activities of the commander, staff, subordinate headquarters, and other partners to understand the situation and mission; develop and compare courses of action (COAs); decide on a COA that best accomplishes the mission; and produce an operations plan (OPLAN) or operation order (OPORD). The difference between an OPLAN and OPORD is that an OPLAN becomes an OPORD when the commander sets an execution time. The Judge Advocate (JA) must be involved in every aspect of the MDMP, beginning with the Plan Development process, not merely the Plan Review stage. Participation in the Plan Development process enables JAs to assist in the development of a plan that is suitable, feasible, and legal. Judge Advocates can accomplish this by fully integrating themselves into the planning staff and providing direct input into the decision-making process.

B. The planning staff will vary in size and composition depending on the complexity of the operation and the size of the unit. The key players in the Brigade Combat Team (BCT) will be the brigade S-3 (operations officer), S-2 (intelligence), S-4 (logistics officer), and the brigade fire support coordinator (FSCOORD). These officers are primarily responsible for taking the brigade commander's intent and producing a workable, thorough OPORD. There are other important members of the planning staff, usually a representative from each of the warfighting functions (WFF; doctrinal replacement for the battlefield operating systems) and perhaps Air Force, Air & Naval Gunfire Liaison Company (ANGLICO), allied and special operations forces (SOF) liaisons, and of course the BJA. These supporting members of the planning staff all take an active part in the planning process and have the responsibility of assisting the key players in fulfilling the commander's intent. Significantly, all these officers have other crucial duties in the BCT. The planning staff comes together upon the receipt of a warning order (WARNO) from higher headquarters, then plans, produces an order, and moves into the execution phase.

C. The planning staff at the Division level or higher will usually consist of officers and non-commissioned officers (NCOs) who serve on that staff as their primary duty. The planning staff may be called the Battle Management Cell (BMC) or the Future Plans Group (FPG). The operational law (OPLAW) attorneys at the Division level will work on a daily basis with the BMC. The relationship between those JAs and the officers who make up this planning cell is as crucial as the JA's knowledge of relevant legal issues.

D. **OPLAW Concerns in Plans and Orders**. By fully participating in the MDMP, JAs can engage the staff on legal issues during the planning process as well as review the plans and mission orders for all legal issues. Legal issues may be found throughout the plan; therefore, the JA should read the entire plan. The JA must know the law and be able to identify operational issues that raise potential legal issues. Every plan will address many OPLAW issues including, but not limited to, rules of engagement; criminal jurisdiction; claims; displaced persons; riot control agents; command and control; and fiscal law. The Legal Annex provides the JA a place to capture guidance on policy matters contained in other annexes throughout the plan.

Key Inputs	Step	Key Outputs
• Higher headquarters' plan or order or a new mission anticipated by the commander	Step 1: **Receipt of Mission**	• Commander's initial guidance • Initial allocation of time
	Warning Order	
• Higher headquarters' plan or order • Higher headquarters' knowledge and intelligence products • Knowledge products from other organizations • Design concept (if developed)	Step 2: **Mission Analysis**	• Mission statement • Initial commander's intent • Initial planning guidance • Initial CCIRs and EEFIs • Updated IPB and ruining estimates • Assumptions
	Warning Order	
• Mission statement • Initial commander's intent, planning guidance, CCIRs, and EEFIs • Updated IPB and running estimates • Updated assumptions	Step 3: **Course of Action (COA) Development**	• COA statements and sketches – Tentative task organization – Broad concept of operations • Revised planning guidance • Updated assumptions
• Updated running estimates • Revised planning guidance • COA statements and sketches • Updated assumptions	Step 4: **COA Analysis (War Game)**	• Refined COAs • Potential decision points • War-game results • Initial assessment measures • Updated assumptions
• Updated running estimates • Refined COA • Evaluation criteria • War-game results • Updated assumptions	Step 5: **COA Comparison**	• Evaluated COAs • Recommended COAs • Updated running estimates • Updated assumptions
• Updated running estimates • Evaluated COAs • Recommended COA • Updated assumptions	Step 6: **COA Approval**	• Commander-selected COA and any modifications • Refined commander's intent, CCIRs, and EEFIs • Updated assumptions
	Warning Order	
• Commander-selected COA and any modifications • Refined commander's intent, CCIRs, and EEFIs • Updated assumptions	Step 7: **Orders Production**	• Approved operation plan or order

CCIR commander's critical information requirement EEFI essential element of friendly information
COA course of action IPB intelligence preparation of the battlefield

Figure 1: The Military Decision Making Process (MDMP).

E. For a detailed description of the MDMP, see Chapter 2 of ADRP 5-0, The Operations Process (17 May 2012). A brief synopsis of the 7-step MDMP is provided below.

F. **MDMP Step 1: Receipt of Mission**.

1. The MDMP begins with the receipt or anticipation of a new mission. The general actions within the receipt of mission step are: alert the staff; gather the tools; update running estimates; conduct initial assessment; issue the commander's initial guidance; and issue the initial WARNO. Upon receipt of a new mission, the unit's operations section alerts the staff of the pending planning requirement. The unit's standing operating procedure (SOP) will identify who is to participate and where they should assemble. The staff (including the JA) prepares for the mission by gathering the tools needed to conduct mission analysis. These include:

a. Higher headquarters order or plan.

b. Map of the area of operations (AO).

c. Appropriate field manuals.

d. Any existing staff estimates.

e. SOP for both your own and higher headquarters.

2. The JA must also prepare for the upcoming mission analysis by having the proper resources to include:

a. Current ROE with any changes and any requests for changes.

b. Relevant status of forces agreement (SOFA) or relevant local law in the anticipated AO.

c. Higher headquarters Legal Appendix.

d. International and Operational Law Department's Law of Armed Conflict Documentary Supplement.

e. International and Operational Law Department's OPLAW Handbook.

3. A critical decision made during the "receipt of mission" step is the allocation of available time. The commander must provide guidance to subordinate units as early as possible to allow them the maximum time for their own planning and preparation for operations. As a general rule, the commander allocates a minimum of two-thirds of available time for subordinate units to conduct their planning and preparation. This leaves one-third of the time for the commander and his staff to do their planning. The commander will then issue initial planning guidance to the staff. In a time-constrained environment, the commander may decide to abbreviate the MDMP.

4. The final task during this step is to issue a WARNO to subordinate and supporting units.

G. **MDMP Step 2: Mission Analysis**.

1. Mission analysis is crucial to the MDMP. It allows the commander to begin battlefield visualization, a combination of *situational awareness* (achieving a clear understanding of the current state of friendly forces in relation to the enemy and environment) and *commander's intent* (the desired end state that represents mission accomplishment and the key tasks that will get the force from the current state to the end state). The result of mission analysis is defining the tactical problem and beginning the process of determining feasible solutions. It consists of 17 steps (see Figure 2), not necessarily sequential, and results in the staff formally briefing the commander. The JA has an important role in each step.

2. Significant legal issues may arise during each of the above steps. The JA must ask the difficult questions of the plans officer leading the mission analysis to ensure that all relevant legal concerns are worked into the plan. The Adaptive Planning and Execution (APEX) samples at the end of this chapter provide a useful checklist of legal issues that commonly arise. Above all else, by actively participating in the mission analysis phase of orders development, the JA will become intimately familiar with the operation's parameters.

Key Inputs	Process	Key Outputs
• Higher headquarters plan or order • Higher headquarters' intelligence and knowledge products • Knowledge products from other organizations • Updated running estimates • Initial commander's guidance • COA evaluation criteria • Design concept (if design precedes mission analysis)	• Analyze the higher headquarters' plan or order • Perform initial IPB • Determine specified, implied, and essential tasks • Review available assets and identify resource shortfalls • Determine constraints • Identify critical facts and develop assumptions • Begin composite risk management • Develop initial CCIRs and EEFIs • Develop initial ISR synchronization plan • Develop initial ISR plan • Update plan for the use of available time • Develop initial themes and messages • Develop a proposed mission statement • Present the mission analysis briefing • Develop and issue initial planning guidance • Develop COA evaluation criteria • Issue a warning order	• Approved mission statement • Initial commander's intent • Initial CCIRs and EEFIs • Initial commander's planning guidance • Information themes and messages • Updated IPB products • Updated running estimates • Assumptions • Resource shortfalls • Updated operational timeline • COA evaluation criteria

CCIR commander's critical information requirement
COA course of action
EEFI essential element of friendly information
IPB intelligence prepara d
ISR intelligence, survei sance

Warning Order

Figure 2. Mission Analysis

H. **MDMP Step 3: COA Development**. After receiving the restated mission, commander's intent, and commander's planning guidance, the staff develops courses of action (COAs) for the commander's approval. The commander must involve the entire staff in COA development. The commander's guidance and intent focus the staff's creativity to produce a comprehensive, flexible plan within the time constraints. Typically, the staff will develop at least two and as many as five, different COAs for the commander to consider.

1. The staff will develop a concept of operations for each COA. The concept of operations describes how arrayed forces will accomplish the mission within the commander's intent. It concisely expresses the "how" of the commander's visualization, summarizing the contributions of each WFF (intelligence, movement and maneuver, fire support, protection, sustainment, command and control), as well as information operations (IO). Also, the operations officer will prepare a COA statement and supporting sketch for each COA. The COA statement clearly portrays how the unit will accomplish the mission and explains the concept of operations. The sketch provides a picture of the maneuver aspects of the concept of operations.

2. The JA must know the legal advantages and disadvantages of each COA and be ready to brief them if required. For example, COA 1 may involve bypassing a major urban area and subsequently using indirect fire on enemy forces defending the city. COA 2 might involve the destruction of an enemy dam in order to flood a likely enemy counterattack axis of advance. COA 3 might use FASCAM mines to achieve the same end. Each COA

presents unique legal issues that the JA must be prepared to brief to the commander in a simple advantage/disadvantage style.

3. Most staffs use a synchronization matrix during COA development. The top of the matrix shows the "H-hour" (the hour at which the operation begins) sequence (e.g., H-4, H-hour, H+2, etc.), which allows the staff to synchronize the COA across time and space in relation to anticipated enemy action. The first column on the left usually contains WFF, IO, projected enemy actions, and decision points to be made at certain H-hours. The synchronization matrix provides a highly visible, clear method for ensuring that planners address all WFF when they are developing COAs and recording the results of wargaming. The matrix clearly shows the relationships between activities, units, support functions, and key events. It assists the staff in adjusting activities based on the commander's guidance and intent, as well as the enemy's most likely COAs.

I. **MDMP Steps 4-6: COA Analysis / COA Comparison / COA Approval.**

1. *COA Analysis.*

a. Using the process of wargaming to visualize the flow of battle, COA Analysis identifies which COA will accomplish the mission with minimum casualties, while best positioning the force to retain the initiative for future operations. During wargaming, the staff takes a COA and begins to develop a detailed plan, while determining the strengths and weaknesses of each COA. Wargaming tests a COA or improves a developed COA.

b. The JA should be an active participant in the wargaming process. Such participation will not only increase the JA's knowledge of both the military and operational planning, but will also provide opportunities to address other legal issues that inevitably will arise as the staff wargames each COA. For example, during wargaming, the staff member playing the part of the opposing force may react to a U.S. air assault deep behind his lines by using poison gas on the landing zone. Suddenly, an unplanned legal issue is presented to the staff, and the JA is given the opportunity to resolve it before the COA is approved.

2. *COA Comparison.*

a. Each staff officer analyzes and evaluates the advantages and disadvantages of each COA from his or her perspective, using evaluation criteria developed prior to wargaming. Staff members present their findings for the others' consideration. Each WFF representative will rate each COA according to how well his or her function can support it. From these numerical ratings, a decision matrix will be assembled in which each COA is compared for supportability according to WFF. After completing the matrix and the analysis, the staff identifies its preferred COA and makes a recommendation to the commander.

b. Although JAs are not included as one of the WFF representatives, their input before this phase is crucial, since an initial COA may not be supportable from a legal standpoint. For example, COA 1 may rely on the use of riot control agents (RCA), without approval from the proper authority, for the suppression of enemy air defense (SEAD) on the drop zone before a planned airborne assault. In such a case, the JA must identify the critical issue during the COA development, and before the staff spends precious time and resources planning it.

3. *COA Approval*. After the decision briefing, the commander selects the COA he believes will best accomplish the mission. If the commander rejects all developed COAs, the staff will have to start COA development all over again. If the commander modifies a proposed COA or announces an entirely different one, the staff must wargame the revised or new COA to derive the products that result from that process. Based on the commander's decision, the staff will immediately issue another WARNO with the essential information subordinate units need to refine their plans.

J. **MDMP Step 7: Orders Production**.

1. Based on the commander's decision and final guidance, the staff refines the COA, completes the plan and prepares to issue the order. The staff prepares the order or plan by turning the selected COA into a clear, concise concept of operations and required supporting information.

2. The plans officers may ask the JA to read the finished order to see if it meets general standards of clarity, internal consistency, and completeness. The JA should seek every opportunity to serve in such a capacity, as it demonstrates that she is considered "one of the team." Increasingly, JAs serve as the "honest broker" in the review of plans and orders. Good advice to JAs serving in such a role is to: (a) look at the *entire plan*—both of

your unit and of the higher unit; (b) *read and study* the mission statement and commander's intent (ask: Are the statement and intent clear? Do they sufficiently define the parameters of the operation, while affording the requisite flexibility to the unit?); (c) carefully review the parts of the plan that discuss fire support, civil affairs, military police, intelligence (particularly low level sources), acquisition, and funding. Look to the command's authority to undertake proposed actions. Consider:

a. Express authority (e.g., the mission statement).

b. Implied authority (e.g., the authority to detain civilians can be implied from the mission to "restore order"; the authority to undertake minor, short-term repairs to a civilian power plant, thereby enabling lights to operate, can be implied from the mission to "enhance security and restore civil order").

c. Inherent authority (e.g., authority—always—to protect the force).

d. Watch out for "mission creep," in that you should help the commander stay in his lane. When dealing with the State Department (DoS), typically through the Country Team, do not presume DoD/DoS synchronization. Protect the commander and use technical channel communications and resources. Remember that "color of money" issues are important, particularly in post-combat stability, security, transition, and reconstruction (SSTR) operations. See this Handbook's Fiscal Law Chapter.

3. When called upon to proofread an order, try to use the following checklist:

a. Does the order use doctrinally-established terms?

b. Is there sufficient detail to permit subordinate commanders to accomplish the mission without further instructions?

c. Is there sufficient detail for subordinate commanders to know what other units are doing?

d. Does the order focus on essential tasks?

e. Does the order limit the initiative of subordinate commanders? That is, does it prescribe details of execution that lie within the subordinate commanders' province?

f. Does the order avoid qualified directives such as "try to hold" or "as far as possible"?

g. After finishing the order, does the reader have a grasp of the "big picture" of the operation?

II. OPERATION PLANS AND ORDERS IN THE JOINT ARENA

A. The Joint Task Force (JTF) OPLAN in Context**.**

1. Almost all future contingency operations will be based on the JTF, which will consist of combat and support units from all Services. The JTF will have one commander, who will be responsible for coordinating the complex interplay between the Services to produce maximum combat power. The JTF OPLAN is the mechanism by which this objective is planned. It does not exist in a vacuum. In that regard, as a supporting plan to the OPLAN of a particular Combatant Command, the JTF OPLAN must reflect the guidance contained in the Combatant Command OPLAN and be structured in such a way as to assist in the overall accomplishment of the Combatant Command mission.

2. Combatant Command OPLANs are the mechanisms through which Combatant Commanders (CCDRs) will accomplish national security objectives, as well as the derived military objectives and tasks assigned to them in the Joint Strategic Capabilities Plan (JSCP). This is one of the principal documents prepared by the Chairman of the Joint Chiefs of Staff (CJCS) for the purpose of translating national security policy (formulated by the National Security Council (NSC)) into strategic guidance, direction, and objectives for operational planning by Combatant Commands.

3. Planning for military operations is conducted either deliberately or in crisis action mode.

a. *Deliberate (a/k/a contingency) planning*. Deliberate planning is triggered by the JSCP for the development of Combatant Command OPLANs or other plans. Deliberate planning involves four phases: (1) strategic guidance; (2) concept development; (3) plan development; and (4) plan refinement.

b. *Crisis action planning*. Crisis action planning is initiated by CJCS orders during a crisis, resulting in the development of an OPORD. Crisis action planning involves three phases: (1) situational awareness; (2) planning; and (3) execution.

4. As indicated earlier, JOPES is a single, standardized framework for developing and executing plans and orders, and is used to coordinate the actions of the various Services to accomplish a mission. It prescribes a standardized format that is uniform, predictable, and thorough. Judge Advocates should be familiar with the JOPES format for constructing OPLANs and OPORDs because the relevant information will be located in standardized areas in the plan. For example, the legal annex will always be Appendix 2 to Annex E. The ROE are always Appendix 7 to Annex C. Note that the format and annexes for JOPES plans and orders differs slightly from the standard format and annexes for Army plans and orders.

B. Reviewing Plans and Mission Orders**.**

1. *Types of Plans and Mission Orders*. Units plan for specific contingencies and missions with OPLANs or contingency plans (CONPLANs). CONPLANs are abbreviated and require additional planning to become OPLANs. Once the time of execution is set, an OPLAN becomes an OPORD. Combatant Commands, and units down to the Division level, prepare and maintain OPLANs and CONPLANs days, months, or even years prior to execution. These plans, in conjunction with the forces assigned or apportioned to the CCDR, enable the staff to develop the Time Phased Force Deployment Data (TPFDD). The TPFDD is a sequenced plan that details the flow of forces into theater using available lift or transport assets. It determines the priority and sequence of units that the JA must ensure are trained in the ROE, and will impact the composition and availability of legal assets in theater.

2. *Responsibility for Plan and Order Review*. Operational Law attorneys must periodically review all existing OPLANs and CONPLANs, though the responsibility for the review rests with the Staff Judge Advocate (SJA). The plans review process must be continuous, with the SJA's representative in constant coordination with the G-3 Plans (or the J-3/5 or J-5 if the JA is working with a JTF element). The SJA's representative must be in the decision-making cycle not only of his or her unit, but of the next higher unit as well. The JA should be a member of the plans team and a "known commodity," not an interloper in the operations planning process.

3. At brigade level and below, written and oral mission orders are often prepared and executed within hours.

4. *The OPLAN/OPORD Review Process*. The appendix to this chapter contains an OPLAN checklist using the JOPES format. Though structured for the review of OPLANs at higher echelons, the checklist offers an extensive list of issues to look for in plans and mission orders at all levels of command. Judge Advocates with more experience than time may prefer to use a shorthand approach to OPLAN/OPORD review. The FAST-J method, which precedes the OPLAN checklist, is a good generalized mechanism for this review.

5. *Developing the Legal Appendix to an OPLAN*. A detailed and easily understood Legal Appendix to an OPLAN/OPORD, complete with relevant references, is essential. Specific Legal Annexes or Appendices must be tailored to each operation, and developed on the basis of individual mission statements and force composition. In addition, pay particular attention to tailoring a "General Order Number One" to each operation. For example, what worked (and made sense) in a conventional conflict may not be prudent for a UN peacekeeping operation. The appendix to this chapter includes relevant JOPES formats, as well as an example of Appendix 4 to Annex E (Legal) for U.S. Forces Haiti, the U.S. component of the UN Mission in Haiti (UNMIH), FRAGO 16 of OPLAN 2380 (Uphold Democracy).

6. *Personal Preparation for Deployment*. Deploying JAs must ensure that their personal affairs are current and that they are prepared for deployment to include personal equipment, TA-50, weapons qualifications, and necessary security clearances. SJAs and other leaders must train subordinate JAs on preparation for, and execution of, deployment.

7. *Preparation of the Legal Deployment Package*. A deployment package includes tactical and office equipment, office supplies, and reference materials. This equipment should be packed and ready for deployment at

all times. Store deployment materials in footlockers, plastic truck boxes, or other containers, and keep them up to date to prevent delays during the deployment sequence. Check the contents and condition of the containers according to a schedule. Determine how the deployment package can be palletized. Keep load plans for vehicles on file. Know how to prepare vehicles and equipment for air movement or shipment. In most units, the SJA deployment package is the responsibility of the OPLAW Attorney or NCO, but the Legal Administrator and the Chief Paralegal NCO must participate in the preparation and care of the deployment package. Train on executing the office deployment plan. Take the deployment package to the field. Tailor the materials for your unit's AO and likely missions. The deployment package should include all applicable SOFAs; country law and area studies; and publications of the Combatant Command with responsibility for the country in which operations will occur.

8. *Deployment SOP*. Deployable SJA offices must maintain an up-to-date deployment SOP, checklists and "smart," or "continuity," books. Corps and Division SOPs will necessarily vary as a result of differences in missions and force composition. To the extent possible, SOPs for SJA offices operating in the same theater should be coordinated for the purpose of ensuring uniformity and consistency of approach toward the provision of legal services to combat commanders. Deployment SOPs must be exercised and refined periodically.

THE FAST-J METHOD FOR OPLAN/OPORD REVIEW

1. **FORCE**

   When and what do we shoot?

   Mission?

   Commander's Intent?

   ROE?

2. **AUTHORITY**

   To conduct certain missions

   - "Law enforcement"
   - Training (FMS, FAA)
   - HCA

   To capture/detain locals

3. **STATUS**

   Ours

   - Law of the Flag (combat or vacuum [e.g., Somalia])
   - SOFA
   - Other (e.g., Admin. & Tech., P. & I. through Diplomatic Note)

   Theirs

   - Status
   - Treatment
   - Disposition

4. **THINGS**

   Buying (Contracting)

   Breaking (Claims)

   Blowing Up (Targeting)

5. **JUSTICE**

   Jurisdiction (Joint or service specific)

   Convening Authorities

   Control Measures (GO # 1)

   TDS, MJ Support

APPENDIX

FORMATS FOR LEGAL APPENDICES

[See APEX Planning Formats and Guidance, *available at* http://www.dtic.mil/cjcs_directives/cjcs/manuals.htm] NOTE: ADDITIONAL SAMPLE LEGAL ANNEXES ARE CONTAINED IN THE JAGCNET (CLAMO) DATABASE.

(Standardized APEX Format, **Rules of Engagement Appendix**)

CLASSIFICATION

HEADQUARTERS, U.S. EUROPEAN COMMAND
APO AE 09128
25 May 2012

APPENDIX 7 TO ANNEX C TO USEUCOM OPLAN 4999-12 ( ) RULES OF ENGAGEMENT (ROE) ( )

( ) References: List DoD Directives, rules of engagement (ROE) issued by the CJCS, and existing and proposed ROE of the supported commander to be applied when conducting operations in support of this OPLAN.

1. ( ) Situation.
a. ( ) General. Describe the general situation anticipated when implementation of the plan is directed. Provide all information needed to give subordinate units accurate insight concerning the contemplated ROE.
b. ( ) Enemy. Refer to Annex B, Intelligence. Describe enemy capabilities, tactics, techniques, and probable COAs that may affect existing or proposed ROE on accomplishment of the U.S. mission.
c. ( ) Friendly. State in separate subparagraphs the friendly forces that will require individual ROE to accomplish their mission; for example, air, land, sea, SO, hot pursuit. Where appropriate, state the specific ROE to be applied.
d. ( ) Assumptions. List all assumptions on which ROE are based.
e. ( ) Legal Considerations.
2. ( ) Mission. Refer to the Basic Plan. Further, state the mission in such a way that ROE will include provisions for conducting military operations according to the "Laws of War."
3. ( ) Execution.
a. ( ) Concept of Operation
(1) ( ) General. Summarize the intended COA and state the general application of ROE in support thereof. Indicate the time (hours, days, or event) the ROE will remain in effect.
(2) ( ) U.S. National Policies. Refer to appropriate official 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, include specific guidance in a tab. Refer to a separate list of NO STRIKE targets, which may include facilities afforded special protection under international law.
b. ( ) Tasks. Provide guidance for development and approval of ROE prepared by subordinate units.
c. ( ) Coordinating Instructions. Include, as a minimum:
(1) ( ) Coordination of ROE with adjacent commands, friendly forces, appropriate second-country forces, neutral countries, appropriate civilian agencies, and Department of State elements.
(2) ( ) Dissemination of ROE.
(3) ( ) Provision of ROE to augmentation forces of other commanders.
(4) ( ) Procedures for requesting and processing changes to ROE.
4. ( ) Administration. Provide requirements for special reports.
5. ( ) Command and Control. Refer to the appropriate section of Annex K. Provide pertinent extracts of information required to support the Base Plan, including:
a. ( ) Identification, friend or foe, or neutral (IFFN) ROE policy.
b. ( ) Relation of ROE to use of code words.
c. ( ) Specific geographic boundaries or control measures where ROE are applicable.
d. ( ) Special systems and procedures applicable to ROE.

CLASSIFICATION

(Standardized APEX Format, **Legal Appendix**)

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APPENDIX 2 TO ANNEX E TO USEUCOM OPLAN 4999-12 ( ) LEGAL ( )

( ) References: Cite the documents specifically referred to in this plan element.

1. ( ) Situation.
   a. ( ) Legal Basis for the Operation. Recite appropriate international and domestic law.
   b. ( ) General Order Number One. Recite for wide dissemination.
   c. ( ) General Guidance. See appropriate references, including inter-Service support agreements.

2. ( ) Mission.

3. ( ) Execution.

   a. ( ) Concept of Legal Support. Describe how legal will support the overall operation.
   b. ( ) Tasks. Identify tasks to accomplish legal support. For the following state policies, assign responsibilities, and cite applicable references and inter-Service support agreements:
      (1) ( ) International Legal Considerations.
      (2) ( ) Legal Assistance.
      (3) ( ) Claims.
      (4) ( ) Military Justice.
      (5) ( ) Acquisitions During Combat or Military Operations.
      (6) ( ) Fiscal Law Considerations.
      (7) ( ) Legal Review of Rules of Engagement.
      (8) ( ) Law of War.
      (9) ( ) Environmental Law Considerations.
      (10) ( ) Intelligence Law Considerations.
      (11) ( ) Humanitarian Law.
      (12) ( ) Operations Other Than War.
      (13) ( ) Nuclear, Biological and Chemical Weapons.
      (14) ( ) Targeting and Weaponry (including nonlethal weapons).
      (15) ( ) Enemy Prisoners of War.
      (16) ( ) Interaction with the International Committee of the Red Cross and other nongovernmental and Private Voluntary Organizations (NGOs/PVOs).

4. ( ) Administration and Logistics. Identify administrative and logistics requirements for legal support.

5. ( ) Command and Control. Identify command relationships for legal support.

SAMPLE LEGAL APPENDIX

APPENDIX 4 TO ANNEX E TO USFORHAITI OPORD(U)
LEGAL (U)

(U) **REFERENCES**:

a. UN Charter (U)
b. UN Security Council Resolutions 867 (1993), 905, 917, 933, 940, 949, 964 (1994), 975 (1995)(U)
c. Multinational Force (MNF) Status of Forces Agreement, dated 8 Dec 1994 (U)
d. UN Status of Mission Agreement, dated XXXXXXXX (U)
e. Agreement for Support of UNMIH, dated 19 Sep 1994 (U)
f. Governors Island Agreement of 3 July 1993 (U)
g. UN Participation Act (UNPA), 22 U.S.C. § 287 (U)
h. Foreign Assistance Act (FAA), 22 U.S.C.. § 2151-2429 (U)
i. Joint Pub 0-2, Unified Action Armed Forces (UNAAF) (U)
j. U.S.-Haiti, Bilateral Mutual Defense Assistance Agreement, dated 28 Jan 1955 (U)
k. International Agreement Negotiation: DoD Directive 5530.3, and CINCUSACOM 5711.1A (U)
l. Service regulations on Legal Assistance: AFI 51-504, AR 27-3, JAGMAN (USN/USMC) (U)
m. Uniform Code of Military Justice and Manual for Courts-Martial, United States, 1984 (U)
n. Service regulations on Military Justice: AFI 51-201, AFI 51-202, AR 27-10, JAGMAN (U)
o. CINCUSACOMINST 5710.3A, Political Asylum (U)
p. Claims: AR 27-20, DA Pam 27-162, JAGMAN, JAGINST 5890.1 AFM 112-1B, DoD Directive 5515.8 (U)
q. International Law: DA Pam 27-1 (Treaties Governing Land Warfare), DA FM 27-10 (Law of Land Warfare), NWP 9 (Rev. A)/FMFM 1-10 (Commander's Handbook on the Law of Naval Operations), AFP 110-20 (Selected International Agreements), AFP 110-31 (International Law-The Conduct of Armed Conflict and Air Operations), AFP 110-34 (International Law-Commander's Guide to the Law of Armed Conflict) (U)
r. Control and Registration of War Trophy Firearms: AR 608-4, OPNAVINST 3460.7A, AFR 125-13, MCO 5800.6A (U)

1. a. (U) **General Guidance**. JTF USFORHAITI will conduct operations in Haiti as the U.S. military component of the United Nations Mission in Haiti (UNMIH), OPCON to the Commander, UNMIH. Reference (a) establishes the general legal foundation for peacekeeping operations (Chapter VI) and peace enforcement operations (Chapter VII). References (b), (d), (e), and (f) are the specific authorizations for the UNMIH. References (g) and (h) contain statutory authority for U.S. manpower and logistics contributions to United Nations operations. Reference (i) establishes the general policy for addressing legal issues of U.S. joint service operations.

b. (U) The JTF SJA will:

(1) Provide legal advice to JTF and Staff.

(2) Serve as a single point of contact for operational legal matters affecting forces under the operational command of JTF within Haiti.

(3) Monitor foreign criminal jurisdiction matters involving U.S. personnel within Haiti.

(4) Ensure all plans, rules of engagement (ROE), policies, and directives, are consistent with the DoD Law of War Program and domestic and international law.

(5) Monitor foreign claims activities within country.

2. (U) **Specific Guidance**.

a. (U) Claims.

(1) (U) U.S. Claims. The Department of the Army (DA) has been assigned Executive Agency, UP ref (p), for claims arising from U.S. operations in Haiti. An Army Judge Advocate will be appointed as a Foreign Claims Commission to adjudicate U.S. claims, where possible, and forward them to DA. Any residual claims resulting from U.S. operations should be addressed through the SJA, USFORHAITI, to the Chief, Foreign Claims Branch, U.S. Army Claims Service, Ft. Meade, Maryland, DSN 923-7009, Ext. 255.

(2) (U) UN Claims. Per ref (e), the UN has held the United States and all U.S. members of the UNMIH harmless from all claims arising from acts or omissions committed by U.S. personnel serving with the UNMIH.

Commanding officers of U.S. personnel assigned to the UNMIH will be sensitive to any damage caused by members of their command. Claims arising from UN operations will be submitted per UN direction, in accordance with the UN claims procedures, ref (d), and UN directives.

(3) (U) Claims investigations. Any injury of a civilian or damage of personal property will be reported to the SJA, JTF USFORHAITI, immediately. JTF USFORHAITI will coordinate with the commanding officer of the service member involved in any alleged claim to ensure that an officer from that service is appointed to conduct a thorough investigation into the matter. All claims investigations will be promptly completed and forwarded to the SJA for review. Information copies will be forwarded to the SJA, U.S. Atlantic Command (USACOM). Unless otherwise directed, the SJA, JTF USFORHAITI, will review the investigation, and after approval by JTF USFORHAITI, forward the report through the appropriate chain of command for adjudication and payment.

b. (U) International Legal Considerations.

(1) (U) Status of Forces. UP of para. 52, of ref (c), any residual MNF personnel in country after transition to UNMIH will be covered by the MNF SOFA, ref (c). Reference (d) details the status of UNMIH, its component personnel, and assets. All questions regarding status and privileges should be referred to the Legal Advisor, Commander, UNMIH. Any U.S. bilateral security assistance elements will be given administrative and technical status of embassy personnel, as provided for in Article V of ref (j), upon negotiation of an implementing agreement.

(2) (U) Peacekeeping Operations. The UNMIH is a peacekeeping operation as described in Chapter VI, reference (a). It is organized under the command of the United Nations, exercised on behalf of the Security Council and the Secretary-General by a Special Representative. Both a military and a civilian component report to the Special Representative. Logistics support may be provided in part by one or more contractors. Participating nations give operational control of their military component forces to the Military Component Commander, UNMIH, but retain all other functions of command.

(3) (U) Jurisdiction Over Non-UNMIH Personnel. Per ref (d), jurisdiction over non-UNMIH personnel remains with the GOH.

(4) (U) Political asylum. UNMIH personnel are not authorized to grant political asylum. U.S. personnel should forward requests for asylum in the U.S. by immediate message to CINCUSACOM and refer applicant to the U.S. diplomatic mission. Temporary refuge will be granted only if necessary to protect human life. Reference (o) provides detailed information concerning political asylum and temporary refuge.

c. (U) Legal Assistance. JTF USFORHAITI will make arrangements for legal assistance for U.S. personnel of the UNMIH. U.S. service components should ensure maximum use of pre-deployment screening for wills and powers of attorney to reduce demands for emergency legal assistance. Component commanders will make arrangements for legal assistance for personnel assigned or attached to their respective forces. Use inter-service support to maximum extent. Ref (l) applies.

d. (U) Military Justice.

(1) (U) The inherent authority and responsibilities for discipline of the commanders of U.S. military personnel assigned to UNMIH, described in references (i), (m) and (n), remain in effect.

(2) (U) Courts-martial and nonjudicial punishment are the responsibility of service component commands, IAW service regulations.

(3) (U) Component commanders will establish appropriate arrangements for disciplinary jurisdiction, including attachment orders for units and individuals, where appropriate.

(4) (U) Immediately report to component and the JTF SJA all incidents in which foreign civil authorities attempt to assume jurisdiction over U.S. forces. The SJA, JTF USFORHAITI, will coordinate all military justice actions with the SJA, USACOM.

(5) (U) Jurisdiction. Under the privileges and immunities enjoyed by the UN, criminal and civil jurisdiction over U.S. members of UNMIH resides solely with the United States. Detailed guidance on the jurisdictional status of the UNMIH is contained in ref (d).

(6) (U) Criminal investigations. JTF USFORHAITI will coordinate with the commanding officer of any U.S. service member who is allegedly involved in an act of criminal misconduct to ensure that an official from the appropriate investigative service is appointed to conduct a thorough investigation into the matter. Allegations against non-military U.S. nationals should be forwarded to an appropriate investigative service after consultation with the SJA, JTF USFORHAITI. Allegations against non-U.S. persons will be forwarded to the UNMIH Special Representative for proper disposition. Completed reports of investigation that involve U.S. nationals shall be reviewed by the SJA, approved by JTF USFORHAITI, and forwarded to the appropriate authority, with copies to the SJA, USACOM, and the UNMIH Special Representative.

e. (U) Reporting violations of the Law of War and ROE.

(1) (U) Acts of violence. UNMIH personnel will report all acts of violence, to include homicides,

assaults, rapes, robberies, abductions, and instances of mayhem or mass disorder, immediately to their commanding officer. Those officers shall immediately pass reports to JTF USFORHAITI and the UNMIH Special Representative. UNMIH personnel will interfere with the actions of Haitian military or police personnel only as authorized by the rules of engagement.

(2) (U) Law of War. Ref (d) requires that military personnel assigned to UNMIH apply the minimum standards of the Law of War contained in ref (q). Component commanders who receive information concerning a possible violation of the Law War and ROE will:

(A) (U) Conduct a preliminary inquiry to determine whether violations were committed by or against U.S. personnel.

(B) (U) Cooperate with appropriate allied authorities should their personnel be involved.

(C) (U) Report all suspected violations to the JTF SJA, as well as through service component channels, according to service regulations, utilizing OPREP-3 procedures.

(D) (U) When U.S. personnel are involved as either victims or perpetrators, or when directed by CINCUSACOM, conduct a complete investigation, preserve all evidence of the suspected violation, and take appropriate corrective and/or disciplinary action.

(E) (U) Provide copies of all OPREPs, initial reports and reports of investigation to SJA, JTF USFORHAITI, and SJA, USACOM.

f. (U) Captured Weapons, war trophies, documents, and equipment. Component commanders will establish immediate accountability for all captured property, including weapons, trophies, documents and equipment. See refs (q) and (r), and MNF Guidelines, for disposition of captured public and private property remaining from MNF operations. UN directives apply to any items seized during the duration of UNMIH.

g. (U) Host Nation Support and Fiscal Authority.

(1) (U) Refs (c) and (d) contain basic provisions for host nation support, which is acquired by bilateral logistics agreements or off-shore contracts.

(2) (U) Fiscal authority is always available for U.S. support to U.S. forces, even when they are assigned a UN mission. UN operational requirements, even those involving U.S. personnel, should be supported under the authority discussed below. However, logistics support for U.S. forces which is above and beyond the capacity of UN logistics operations, and determined by the command to be essential to the sustainment of U.S. forces, is authorized under Article II of the U.S. Constitution and 22 U.S.C. § 2261.

(3) (U) Authority for support to other nations participating in MNF, provided under provisions of sections 506 (Drawdown), 451 and 632 (Peacekeeping) of the FAA [ref (h)], will terminate upon transition of those contingents to UNMIH.

(4) (U) U.S. support to UN operational requirements, the UNMIH staff, or UNMIH contingent nations should be effected pursuant to ref (e). Ref (e) and section 2357 of ref (h) require a request in writing from the UN, with a commitment for reimbursement. UN procedures should be used to ensure proper documentation of the request, and proper accounting of funds for reimbursement. Support for the UN may also be provided under separate authority, pursuant to section 7 of the UN Participation Act (22 U.S.C. § 287), where reimbursement may be waived by the NCA.

(5) (U) Economy Act reimbursement from DoS, cross-servicing agreements, separate 607 agreements with participating countries, and other alternate authorities may be relied on to support third countries in the absence of a UN request. Cross-servicing agreements are currently in effect with several nations participating in UNMIH. Copies of the agreements can be obtained from J-4 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.

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CHAPTER 25

CENTER FOR LAW AND MILITARY OPERATIONS (CLAMO)

REFERENCE

1. U.S. DEP'T OF ARMY, FIELD MANUAL 1-04, LEGAL SUPPORT TO THE OPERATIONAL ARMY (18 Mar. 2013).

I. OVERVIEW

The purpose of this chapter is to familiarize operational legal professionals with the Center for Law and Military Operations (CLAMO), encourage the use of CLAMO as a resource provider, and request the submission of information to CLAMO. This chapter also provides information concerning the Army's combat training centers (CTCs) and the Mission Command Training Program (MCTP).

II. CLAMO MISSION

CLAMO is a joint, interagency, and multinational legal center responsible for collecting and synthesizing data relating to legal issues arising in military operations, managing a central repository of information relating to such issues, and disseminating resources addressing these issues to facilitate the development of doctrine, organization, training, material, leadership, personnel, and facilities (DOTMLPF) as these areas affect the military legal community.

III. CONTACTING CLAMO

CLAMO invites contribution of operational legal materials and suggestions, including legal after action reports (AARs), ideas from the field, comments about its products, and requests for information or assistance. Please e-mail, call, or write to request or submit materials and ask questions. You may e-mail CLAMO at usarmy.pentagon.hqda-tjaglcs.mbx.clamo-tjaglcs@mail.mil. CLAMO's Secure Internet Protocol Router Network (SIPRNet) e-mail address is clamo.clamotjaglcs@us.army.smil.mil. You may write to CLAMO at 600 Massie Road, Charlottesville, Virginia 22903-1781. CLAMO's phone number is (434) 971-3145, DSN prefix 521. The CLAMO JAGCNet web page[1] contains CLAMO's repository and publications. CLAMO's most current AARs are posted on the International and Operational Law Document Library, also on JAGCNET.[2] CLAMO provides alerts concerning the availability of new resources through CLAMO's Facebook® web page.[3]

IV. CLAMO: A RESOURCE PROVIDER FOR OPERATIONAL LEGAL PROFESSIONALS

A. Description

1. Established by order of the Secretary of the Army in 1988, CLAMO is located at The U.S. Army Judge Advocate General's Legal Center and School (TJAGLCS) in Charlottesville, Virginia. In addition to U.S. Army Judge Advocates (JAs), CLAMO's staff includes legal advisors from the U.S. Marine Corps, U.S. Navy, U.S. Coast Guard, Canadian Forces, the British Army, and the German Ministry of Defense.

2. CLAMO strives to be the most responsive resource provider for operational legal professionals in both the classified and unclassified environments, disseminating current best practices and timely lessons learned provided by the operational force, and serving as expert identifiers of emerging legal issues.

B. Information Collection

1. **Unit and Individual AARs**. The primary formal means by which CLAMO collects information is the AAR process. The JAG Corps (JAGC) expects its legal professionals to contribute to the betterment of the Corps by producing and sharing written AARs following significant operational training, exercises, and deployments.

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[1] *See* The Center for Law and Military Operations, *available at* https://www.jagcnet.army.mil/clamo (last visited May 19, 2014).
[2] *See* The International and Operational Law Document Library, *available at* https://www.jagcnet.army.mil/IODocLib (last visited May 19, 2014).
[3] *See* CLAMO (Center for Law and Military Operations), *available at* http://www.facebook.com/pages/CLAMO-Center-for-Law-and-Military-Operations/105770019466402?ref=ts (last visited May 19, 2014).

Appendix C of FM 1-04 contains the JAGC's doctrinal format for AARs.[4] Operational legal professionals should submit their AARs to CLAMO using the contact information above.

2. **CLAMO AARs**. Upon review of submitted AARs or upon the return of a deployed unit or individual, CLAMO may contact legal personnel to set up a formal CLAMO AAR. CLAMO then interviews the personnel to capture their lessons learned. This interview may be telephonic or in person, at either TJAGLCS or the interviewee's home station. From this information, CLAMO produces a formal written AAR approved by the contributing legal personnel. CLAMO encourages contact from individuals desiring to participate in this process.

3. **Operational Products and Information**. CLAMO also collects information provided by deployed legal personnel. CLAMO encourages legal professionals to send any of their products and best practices directly to CLAMO. Additionally, CLAMO strongly encourages units and personnel to add CLAMO's email address to any standard distribution list used to keep their subordinates and higher headquarters informed. Legal situation reports, operational law updates, and operational summaries contain a wealth of useful information. Placement on the distribution list allows CLAMO to remain apprised of the most current information in the deployed environment without placing an additional burden on deployed legal personnel.

4. **Deployed CLAMO Personnel**. CLAMO occasionally deploys its personnel to operational theaters to collect the most current information directly. These deployments are typically of short duration (90 days) and funded by the receiving unit. The receiving unit is free to use the deployed CLAMO member as best suits the needs of the unit.

5. **Other Sources**. Finally, CLAMO constantly monitors a variety of sources for information that might be of use to operational legal professionals. Such sources include the Center for Army Lessons Learned (CALL), classes and lectures at TJAGLCS, the Army's various combat training centers, other services and our allies, public symposiums and conferences, and other open sources.

C. **Information Management**

1. **Repositories**. CLAMO's primary tools for information management are its repositories. The repositories (both secure and unsecure), serve as the JAGC's central storehouses for operational legal materials. They contain information for current and future reference, as well as for facilitating the development of training, doctrine, force structure, materiel, curriculum and other resources. Materials include primary source documents, directives, regulations, country law studies, graphic presentations, photographs, and various legal products. CLAMO organizes its repositories into the categories of International and Operational Law, Administrative and Civil Law, Contract and Fiscal Law, Claims, Legal Assistance, Military Justice, Multinational Operations, Interagency Operations, Homeland Security Operations, DOTMLPF and Country Materials.

2. **Repository Locations**. CLAMO's website on JAGCNet (https://www.jagcnet.army.mil/clamo) provides access to the International and Operational Law Document Library on the unsecured network. This library contains most of CLAMO's materials and is searchable using a free-text search. If there is a specific document you cannot find in the library please contact CLAMO directly. To access the CLAMO SIPR Repository, search for "CLAMO REPOSITORY" on AKO-S. If you cannot find a particular document in the SIPR repository, requests for classified material should be emailed to CLAMO's shared AKO-S inbox (clamo.clamotjaglcs@us.army.smil.mil). CLAMO monitors that inbox on a regular basis.

3. **Repository Access**. As CLAMO's knowledge management structure develops and matures, you may occasionally have trouble reaching the information you need. Additionally, required security protocols sometimes block access for non-U.S. Army JAGC members. Should this occur, do not hesitate to contact CLAMO directly. Not only will CLAMO assist you in obtaining the information, but also your experiences with the systems will help CLAMO make the adjustments necessary to provide the maximum allowable accessibility.

D. **Information Dissemination**

1. **Websites**. CLAMO's websites are its most far-reaching tools for information dissemination. Constantly updated, they contain the most current information. Between CLAMO's JAGCNet website and the International and Operational Law Document Library, you can access all of CLAMO's AARs and products, as well as the repository discussed above.

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[4] U.S. DEP'T OF ARMY, FIELD MANUAL 1-04, LEGAL SUPPORT TO THE OPERATIONAL ARMY (18 Mar. 2013).

2. **Deployed Resource Library DVD**. Recognizing that operational legal professionals are not always in an environment where there is Internet access, CLAMO also produces the Deployed Resource Library DVD. This DVD contains those materials most likely to be of use to a legal professional in an immature theater or contingency environment. CLAMO constantly updates the DVDs' content and produces them at least bi-monthly. Use the contact information above to request copies.

3. **Publications**. CLAMO also disseminates information through its many written texts. CLAMO writes on a wide variety of topics including current overseas contingency operations, domestic operational law, and rule of law operations. Additionally, to assist operational legal professionals in avoiding the relearning of lessons previously identified, CLAMO has published a compendium of lessons learned during major operations since 1994. Use the contact information above to request copies of CLAMO publications (or the Operational Law Handbook, Law of Armed Conflict Deskbook, or Law of Armed Conflict Documentary Supplement published by the TJAGLCS International and Operational Law Department). CLAMO's publications include:

a. Tip of the Spear: After Action Reports from August 2009 – August 2010 (2010).

b. Forged in the Fire: Legal Lessons Learned During Military Operation 1994–2008 (2008).

c. Rule of Law Handbook: A Practitioner's Guide for Judge Advocates (2011).

d. Domestic Operational Law 2013 Handbook for Judge Advocates.

e. Legal Lessons Learned from Afghanistan and Iraq: Volume II, Full Spectrum Operations (1 May 2003 to 30 June 2004) (2005).

f. Legal Lessons Learned from Afghanistan and Iraq: Volume I, Major Combat Operations (11 September 2001 to 1 May 2003) (2004).

g. U.S. Government Interagency Complex Contingency Operations Organizational and Legal Handbook (2004).

h. Deployed Marine Air-Ground Task Force Judge Advocate Handbook (2013)

i. Law and Military Operations in Kosovo, 1999–2001: Lessons Learned for Judge Advocates (2001).

j. Law and Military Operations in Central America: Hurricane Mitch Relief Efforts, 1998–1999: Lessons Learned for Judge Advocates (2000).

k. Rules of Engagement Handbook for Judge Advocates (2000).

l. Law and Military Operations in the Balkans, 1995–1998: Lessons Learned for Judge Advocates (1998).

m. Law and Military Operations in Haiti, 1994–1995: Lessons Learned for Judge Advocates (1995).

4. **The Legal Center and School**. CLAMO's location at TJAGLCS enables the rapid communication of current operational materials and lessons learned to the school faculty and legal center directorates. This allows timely incorporation of current best practices and lessons learned into the JAGC's educational processes, as well as into force structure, doctrine, and training development. In a matter of days, the Legal Center and School can teach and incorporate the latest lessons learned from operational legal professionals.

5. **The Combat Training Centers (CTCs) and the Mission Command Training Program (MCTP)**. The Army has three CTCs and one Training Program: The Joint Readiness Training Center (JRTC), the National Training Center (NTC), the Joint Multinational Readiness Center (JMRC), and the Mission Command Training Program (MCTP). Each of these focuses on specific elements of a broad spectrum of military operations and incorporates lessons from all recent operations, including those in the Balkans and Afghanistan. CLAMO's relationship with the legal personnel assigned to the CTCs and MCTP allows it to both gather lessons learned during training rotations and share those and other lessons with and among the CTCs and MCTP for immediate implementation by training units.

6. **Individual Operational Legal Professionals**. CLAMO also disseminates information directly to individuals. CLAMO encourages operational legal queries from the field. Use the contact information above to submit a query. In response to such requests for information/assistance, CLAMO attempts to locate the resource(s)

necessary to assist the requestor. In keeping with CLAMO's vision of being the most responsive resource provider for operational legal professionals, initial responses go out within twenty-four hours of receipt. The nature of some requests, however, necessitates a longer time to gather a complete response.

V. COMBAT TRAINING CENTERS AND THE MISSION COMMAND TRAINING PROGRAM

This section describes the CTCs and MCTP, whom they train, and the role of the judge advocate(s) and paralegal(s) at each.

A. **The Joint Readiness Training Center (JRTC)**.

1. The JRTC is located at Fort Polk, LA. This CTC focuses primarily on training brigade combat teams (BCTs) and attached units for Decisive Action Training Environment (DATE) rotations, the Global Response Force Mission, and mission rehearsal exercises (MREs) for specific deployments. The JRTC and Operations Group provide realistic, relevant, and rigorous training conditions in both remote and urban environments.

2. A rotation at JRTC varies in length, but generally lasts from fourteen to twenty-one days. Units ordinarily begin planning for their JRTC rotation more than seven months before the rotation and identify their training objectives to JRTC from home station 210 days before execution. The BJA should conduct parallel planning and liaise with the legal Observer/Coach/Trainers (OCTs) at this time to communicate his or her training objectives and focus. Around ninety days before the rotation, the unit will send primary staff members to JRTC for the Leaders Training Program (LTP).

3. The Brigade Judge Advocate (BJA) and the Paralegal NCOIC should both attend LTP. The Trial Counsel (TC) should also attend if the TC's trial schedule permits. During the LTP, the brigade staff members—including the BJA—use the Military Decision Making Process (MDMP)[5] to plan their operation. The BJA will prepare the brigade legal appendix, rules of engagement, and conduct a legal review of the full draft operations order (OPORD). Preparation of the order requires access to classified and unclassified computer systems. Without access to those systems, the BJAs will not complete their responsibilities at LTP. The BJAs will meet the OPLAW Planner and the OPLAW OCTs during the LTP session. BJAs should be prepared to discuss their training objectives with the OPLAW Planner and OCTs and get best practices from the OCTs to prepare their brigade legal section (BLS) for rigorous training at the JRTC. BJAs should identify their personnel, equipment, and training requirements for the upcoming rotation.

4. Based on the requirements identified at LTP, the BJA and Paralegal NCOIC should develop a deployed standard operating procedure (SOP) which includes a draft battle rhythm, duties and responsibilities, equipment list (including communication and automation requirements), investigation guide, foreign claims guide, reporting format, and battle drills. The SOP should also include example claims packets, investigations packets, detention packets, rules of engagement (ROE) matrices, Commanders' Emergency Response Program (CERP) guidance, and a concept of operation (CONOP) review SOP. The BJA and Paralegal NCOIC must prepare their team for their JRTC rotation through counseling and training.

5. Battalion paralegals can either work at their battalions, in accordance with Army doctrine and unit authorizations, or be consolidated at the brigade level. Take the time to review battalion-level tactical standard operating procedures (TACSOPs) and integrate paralegal tasks into the battalion TACSOP. If the paralegals are not consolidated at brigade level, the BJA will have less daily contact with battalion paralegals while at JRTC, but proper planning for battalion paralegal communication platforms will allow for horizontal and vertical communication. Pre-rotational training and the SOP must give the battalion paralegal the confidence to operate at the battalion with minimal daily guidance from brigade. For example, a battalion paralegal with minimal supervision must be prepared to process non-judicial punishment; understand the ROE and mission approval authority; identify/report legal significant acts (SIGACTs); provide administrative assistance for investigations; review detention packets; and support legal services for the battalion command and Soldiers.

6. An Afghanistan MRE at JRTC will include a relief in place (RIP) and a transition of authority (TOA) with a fictitious brigade (or outgoing unit). The OPLAW Planner acts as the outgoing Brigade JA (BJA) for the Operations and Intelligence (O&I) briefing during RIP. For a DATE, which may include a forced entry into hostile territory, the JA must rely solely on the OPORD from higher headquarters and the intelligence provided to his unit.

[5] See the Military Decision Making Process chapter in this Handbook for further discussion of MDMP.

JAs should identify legacy issues from the outgoing unit and/or higher headquarters and be prepared to send up requests for information (RFIs) to Division as necessary.

7. The BJA must determine how, when, and where BCT units and augmentees will receive operational legal support and ROE training for the rotation. Besides the approximately 3,500 troops organic to the BCT, there may also be units augmenting or requiring support from the BCT during a rotation. These units may include an aviation battalion, an engineer battalion, a combat hospital, or Security Force Advisory and Assistance Teams (SFAATs). Other supporting elements may include Civil Affairs (CA) and Military Information Support to Operations (MISO) detachments.

8. The JRTC provides a legally rich training environment. The BLS will encounter issues with ROE (including escalation of force, fire control measures, collateral damage estimation and dynamic targeting); detention operations; human intelligence collection; claims; fiscal law (including CERP or Reintegration Funding for theater specific MREs); Rule of Law; and investigations (including financial liability, fratricide, escalation of force, ROE and law of armed conflict incidents). In addition, there are multiple Situational Training Exercise (STX) lanes for combat convoy, cordon and search, Improvised Explosive Device (IED) defeat, and key leader and street level engagements and Tactical Site Exploitation (TSE). Very few of the issues that arise for the BLS are "injects." Instead, the vast majority of these issues arise as the result of actions taken by the brigade. For example, with over 1,000 local nationals (civilian role-players), units may see a significant number of claims as a result of damage or injuries in civilian-populated areas. Units may have to investigate fratricide or civilian casualties, even though the unit may not be aware that it caused the deaths of those persons, except from allegations made in the local media.

9. The unit's actions or inactions will shape the operational environment, either garnering more support for the host nation or the insurgency. Reactions and attitudes of the local population often shift based on their perceptions of U.S. Forces. For the BCT, the prompt payment of claims, the rapid use of CERP funds for sustainable projects, and plans in place to affect the civilian populace can have a positive impact on the area of operations. Units will encounter non-governmental organizations (NGOs), competing inter-agency governmental organizations, political parties, news media, police and paramilitary forces, and insurgent forces. The presence of these organizations may require JA involvement to determine their status and appropriate treatment by U.S. forces. The International Committee for the Red Cross (ICRC) may conduct inspections of the brigade detention/internment facility, and JAs will be present during such inspections.

10. Three JAG Corps personnel at JRTC serve as OCTs: two JAs and one paralegal NCO. The OCTs take a hands-on role in teaching, coaching, and mentoring the BLS members involved in the exercise in an effort to help them improve their respective contributions to their unit's mission. Another JA serves as the OPLAW Planner responsible for the legal content of scenarios and replicating the Division or Combined Joint Task Force SJA. OCTs will conduct "green book" AARs during the training rotation in order to assist the BLS to see themselves and to reinforce positive actions or trends within the BLS. The intent of AARs is to help the BLS improve as a collective whole.

11. Formal AARs occur after the Force on Force (FoF) phase, and a final consolidated BCT AAR occurs at the conclusion of the JRTC rotation. Upon leaving JRTC, the BLS and the unit receive a Take Home Packet capturing OCT observations to assist the unit over both the short and long-term.

12. In conclusion, a BLS should begin preparing for its rotation a minimum of 90 days before the rotation. Greater preparation by the BLS results in a higher level of legal support to the brigade during operations. A BLS that arrives with personnel who are trained for the mission, armed with the prepared materials, and has developed a ROE card will have a much more successful rotation than a BLS who does not prepare.

B. **The National Training Center (NTC)**.

1. The NTC is located at Fort Irwin, California, in the middle of the Mojave Desert. In July 2004, the NTC training environment shifted from the traditional role of training heavy brigade combat teams (BCTs) in mid-to-high intensity conflict, to preparing brigade-level units to support OIF and OEF. In 2012, this focus began to shift back to mid-to-high intensity conflict in the DATE rotations.

2. The NTC regularly hosts brigade-sized units—light, heavy, and Stryker BCTs ("brigades"). Much like at JRTC, this training uses realistic joint and combined arms training in DATE scenarios and MREs. The NTC provides comprehensive training scenarios from brigade-size live fire to combined armed maneuver (CAM) and wide area security (WAS) as subsets of training to conduct unified land operations.

3. 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 operational environment gives a brigade the unique opportunity to exercise all of its elements in a realistic training area. An NTC rotation is often a unit's only opportunity to test its combat service and combat service support elements over a doctrinal distance. Brigades must be able to communicate through up to eight communications corridors, evacuate casualties over forty kilometers, and navigate at night in treacherous terrain with few distinguishable roads. Other environmental conditions, such as a forty to fifty degree diurnal temperature range, winds over forty-five knots, and constant exposure to the sun, stress every system and Soldier to their limits. The NTC is the only training area in the United States that allows a complete brigade-sized unit to conduct both a live fire attack and a live fire defense integrating all war fighting functions, including direct air support from Air Force and Naval platforms.

4. Historically, the NTC based its training scenario on contemporary operating environment scenarios originally developed at Fort Leavenworth. However, as NTC began training brigades for deployment to OIF and OEF, the scenarios shifted to Iraq or Afghanistan focused MREs that emphasize theater TTPs and problem sets. With the cessation of OIF and drawdown of OEF, MRE rotations are less common at the NTC. Future NTC training rotations will focus on DATE and train BCTs in sustained land operations through simultaneous offensive, defensive, and stability operations in order to prevent or deter conflict, prevail in war, and create the conditions for favorable conflict resolution.

5. Each fiscal year, NTC conducts ten rotations, each rotation consisting of twenty-eight days. The first five days of reception, staging, onward-movement and integration (RSOI 1-5) are spent generating combat power and integrating the brigade into the notional division headquarters, 52nd ID (M). During this period, there are host nation visits, civilian demonstrations, media events, and attacks by militants and terrorists. All of these challenge the BJA and civil-military operations (CMO) cell. The second phase is 14 training days which can be partitioned into a STX period and a Full Spectrum Operations (FSO) period. The normal split is 6 STX and 8 FSO, but 7 and 7, and 5 and 9 rotations have been executed. For an MRE rotation, the brigade will occupy a number of operating bases in the training area, both during STX and FSO. But, during a DATE rotation, the brigade will establish tactical assembly areas (TAAs). Additionally, the BCT may conduct live fire exercises throughout the course of the rotation. The final seven days of the typical NTC rotation are regeneration of combat power and redeployment back to the brigade's home station.

6. The DATE scenario deploys the brigade into a nation facing both external and internal threats. The external threat manifests in the form of invasion by a near-peer force from a neighboring country. The internal threat consists of various insurgent groups and criminal syndicates. The brigade must effectively employ combined arms maneuver to deal with the invading conventional forces, then transition to wide area security to deal with the various unconventional forces and criminal syndicates. The brigade is challenged to repel the invading forces, restore the international borders, and to assist the host nation government in reestablishing internal security and building legitimacy.

8. Judge Advocates (JAs) can expect to encounter a full range of legal issues during all phases of the rotation. Those issues include, but are not limited to, ROE advice covering all aspects of self-defense and deliberate offensive operations, detainee and POW operations, international agreements, authorities to fund and assist humanitarian operations, administration of investigations, foreign claims, and support to MDMP and targeting. OCTs at NTC do not inject legal assistance or military justice issues into the training scenario as real world problems typically arise from the training units during rotation.

9. Brigade legal sections should conduct deliberate planning for their NTC rotation and contact the OCTs at least 120 days prior to the rotation to communicate training objectives. For more information on what to expect during an NTC rotation, contact the NTC OCTs at (760) 380-6652, DSN prefix 470, or CLAMO at usarmy.pentagon.hqda-tjaglcs.mbx.clamo-tjaglcs@mail.mil.

C. **The Joint Multinational Readiness Center (JMRC)**.

1. The Joint Multinational Readiness Center is located at Hohenfels, Germany. The JMRC trains multi-national and U.S. forces for decisive action, joint, and combined operations. It provides Brigade Combat Teams with tough, realistic, Army/Joint battle-focused training. The focus is on training adaptive leaders for decisive action operations by integrating Joint, Interagency, and Multinational elements, and focusing on execution of simultaneous, non-contiguous operations. The integration of multinational forces and combined and joint operations scenarios are major training enablers available at JMRC.

2. The JMRC trains up to a task-organized BCT, with selected division/corps and joint force assets. It plans and conducts MREs to prepare units for operational missions and conducts live fire exercises at the nearby Grafenwoehr Training Area.

3. The JMRC supports the U.S. Army Europe (USAREUR) Expeditionary Training Center with the Deployed Instrumentation System by providing CTC capabilities to deployed forces. It provides doctrinally sound observations, training feedback and trends and lessons learned.

4. The JMRC typically conducts approximately five brigade rotations per year, each with embedded battalion rotations. The JMRC also conducts two MREs per year and teaches two Individual Readiness Training Situational Training Exercises (IRT STXs) per month. Each brigade rotation is comprised of up to three battalion-sized task forces. Rotations typically employ the 3-10-10-3 day rotational task force window model: 3-day deployment/multiple integrated laser engagement system (MILES) draw; 10-day company focused STX lane training and Brigade CPX; 10-day force-on-force maneuver exercise in a counter-insurgency environment and movement to contact, attack and defend stages, followed by a 3-day recovery.

5. With the expansion of multinational training requirements, the JMRC also conducts multiple NATO unit training cycles throughout the year. These multinational training cycles prepare NATO multinational forces to conduct operations in Afghanistan as Observer Mentor Liaison Teams (OMLTs).

6. Judge Advocates can expect to encounter a wide variety of legal issues at JMRC, whether involved in counter-insurgency, decisive action, peacekeeping/enforcement, or stability and support operations. Issues that routinely arise include ROE training and annex production; detention operations; foreign claims; targeting (lethal and non-lethal); law of armed conflict violations and investigations; the handling of displaced persons; and fiscal law issues. Although a JMRC rotation is intended to focus broadly on the brigade's systems, judge advocates can provide input to the training scenario development (approximately six months prior to the rotation) to incorporate additional, judge advocate specific training events.

7. Currently, there are two JA OCTs at JMRC. The role of the JA OCT is to oversee the incorporation and execution of legal issues in the training scenario. Additionally, the JA OCT serves as the primary coach and mentor for the JAs and paralegals involved in an exercise, to help improve their contribution to the unit's mission. The JA OCT conducts multiple informal AARs throughout the rotations and a more formal AAR at the culmination of the unit's training exercise. Two brigade-wide, instrumented AARs occur during the rotation: one at the mid-point, and one upon conclusion of the rotation. The JA OCT captures his observations in a take home packet provided to the BJA upon the conclusion of the rotation. The JA OCT continues to provide assistance to legal sections as they prepare for deployment after the training rotation.

D. **The Mission Command Training Program (MCTP)**.

1. MCTP is located at Fort Leavenworth, Kansas. MCTP supports the collective training of Army units as directed by the Chief of Staff of the Army and scheduled by FORSCOM IAW the ARFORGEN process at worldwide locations in order to train leaders and provide commanders the opportunity to train on mission command in unified land operations. Mission command is the exercise of authority and direction by the commander using mission orders to enable disciplined initiative within the commander's intent to empower agile and adaptive leaders in the conduct of unified land operations.

2. MCTP is composed of a Headquarters and seven Operations Groups (OPSGRPs). MCTP is commanded by a post-BCT command Colonel; each OPSGRP is also commanded by a Colonel called the Chief of Operations Group (COG). Operational Law Observer/Coach/Trainers (OPLAW OC/Ts) are assigned to MCTP Headquarters and support all of the OPSGRPs. The JAGC usually assigns three OPLAW JAs (a lieutenant colonel and two majors) to MCTP at any given time.

3. OPSGRP A provides support and training for Army, Joint, and Coalition Senior Staffs in the training of unified land operations. OPSGRP A integrates with other interagency partners to facilitate the sharing and instruction of relevant doctrine, Chief of Staff of the Army guidance, and best practices as required.

4. OPSGRPs B, C, F, and S provide support and training to brigades and battalion task forces to create training experiences enabling the Army's senior mission commanders to develop current, relevant, campaign quality, joint and expeditionary mission command instincts and skills, as well as opportunities to train on mission command in unified land operations.

5. OPSGRP D provides support and training to ASCCs, JFLCCs, and JTFs in order to create training experiences enabling the Army's senior mission commanders to develop current, relevant, campaign quality, joint and expeditionary mission command instincts and skills. As required, OPSGRP D conducts tactical level mission command training for Divisions and Corps.

6. OPSGRP Contemporary Operating Environment (COE) integrates the training objectives/requirements of MCTP OPSGRPs and external agencies into comprehensive exercise design and control plans. COE oversees all Division/Corps WFX/MRE coordination/synchronization/integration planning events and meetings. COE also provides an opportunities-based opposing force (OPFOR) and manifestations of emerging/future threats and threat TTPs.

7. MCTP differs from NTC, JRTC, and JMRC in two respects. First, MCTP is a deployable CTC. MCTP OPSGRPs travel to the unit to conduct training. Second, there is no tangible area of operations or "box." Instead, training occurs via simulation within a notional computer-generated area of operations and the broader operational environment.

8. Many spontaneous legal issues arise naturally during the course of an exercise, such as targeting issues, fratricides, detention operations and civilians on the battlefield. Additionally, OPSGRPs inject legal issues into the training scenario. "Inject" topics include: law of armed conflict; ROE; international agreements; justification of the use of force; contract and fiscal law; military justice; foreign claims; and legal aspects of Joint, interagency, NGO and international organization coordination.

9. The training unit commander's mission essential task list (METL) is the basis of each MCTP exercise. Once the exercise actually begins, OPLAW OC/Ts support the unit's training objectives by monitoring events that indicate how well the unit has integrated the SJA cell into the operations process (plan – prepare – execute – lead – assess). All MCTP OC/Ts observe the relationships between the training unit's SJA cell and commanders and staff sections to help identify ways in which the SJA cell can better integrate into the command information process and support the commander's ability to exercise mission command. OPLAW OC/Ts work directly with the SJA to help improve staff functions, information flow, and management processes.

10. Every OPSGRP rotation includes at least two formal AARs led by the COG. In addition, the OPLAW OC/T conducts at least one informal AAR with the SJA cell, several "hot washes," and frequent one-on-one mentoring for the JAs undergoing training.

GLOSSARY

AA	Active Army
AAFES	Army and Air Force Exchange Service
AAR	After Action review
ABA	American Bar Association
ABCA	American-British-Canadian-Australian
ABCMR	Army Board for the Correction of Military Records
ACO	Administrative Contracting Officer
ADA	Anti-deficiency Act
ADCON	Administrative Control
AECA	Arms Export Control Act
AFCYBER	United States Air Force Cyber Command
AFE	Armed Forces Entertainment
AFRC	Armed Forces Recreation Center
AFRICOM	United States Africa Command
AIB	Accident Investigation Board
AIF	Afghan Infrastructure Fund
AIFA	AAFES Impress Fund Activities
AMCITS	United States Citizens
ANGLICO	Air and Naval Gunfire Liaison Company
ANZUS	Australia, New Zealand and United States
AO	Area of Operations
AOA	Acquisition Only Authority
AOC	Army Operations Center/Air and Space Operations Center
AOR	Area of Responsibility
AP I	Protocol Additional to the Geneva Conventions of 1949, and Relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I)
AP II	Protocol Additional to the Geneva Conventions of 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II)
APF	Appropriated Fund
APL	Anti-Personnel Landmine
AR	Army Regulation
ARABSAT	Arab Satellite Communications Organization
ARC	American Red Cross
ARCYBER	United States Army Cyber Command
ARIMS	Army Records Information management System
ARMP	Army Recreation Machine Program
ARNG	Army National Guard
ARNGUS	Army National Guard of the United States
ASA(FM&C)	Assistant secretary of the Army (Financial Management and Comptroller)
ASCC	Army Service Component Command
ASD(HD&ASA)	Assistant Secretary of Defense (Homeland Defense and America's Security Affairs)
ASD(ISA)	Assistant Secretary of Defense (International Security Affairs)
ASD(PA)	Assistant Secretary of Defense(Public Affairs)
ASD (SO/LIC)	Assistant Secretary of Defense (Special Operations and Low Intensity Conflict)
ASFF	Afghan Security Force Funds
ASLP	Archipelagic sea Lane Passage
BASOPS	Base Operations
BATF	Bureau of Alcohol Tobacco and Firearms
BCT	Brigade Combat Team
BDE	Brigade
BJA	Brigade Judge Advocate
BPA	Blanket Purchase Agreement
BPC	Building Partner Capacity
BWC	Biological Weapons Convention
C2	Command and Control
CA	Convening Authority/Civil Affairs
CAAF	Contractor Accompanying the Armed Force/Court of Appeals for the Armed Forces
CAC	Common Access Card
CAD	Contract Administration Delegation
CALL	Center for Army Lessons Learned
CAO	Casualty Assistance Officer
CAP	Civil Augmentation Program
CAT	Convention Against Torture and Other Cruel, Inhuman, and Degrading Treatment
CBIRF	Chemical Biological Incident Response Force
CBRNE	Chemical, Biological, Radiological, Nuclear, and High Yield Explosives
CBV	Capability-Based Volunteer
CCA	Contingency Construction Authority
CCDR	Combatant Commander
CCIF	Combatant Commander Initiative Fund
CCP	Contingency Contracting Personnel
CCW	See UNCCW
CD	Counter Drug
CDA	Contract Disputes Act
CDF	Contractor Deploying with the Force
CEM	Combined Effects Munitions or Cluster Bombs
CERD	Convention on the Elimination of

	All Forms of Racial Discrimination
CERP	Commanders' Emergency Response Program
CF	Coalition Forces
CI	Counter Intelligence
CIA	Central Intelligence Agency
CICA	Competition in Contracting Act
CID	Criminal Investigation Division
CIL	Customary International Law
CINCSOC	Commander in Chief United States Special Operations Command
CIO	Chief Information Officer
CIP	Critical Information Protection
CIS	Client Information System
CIVTRACKS	Civilian Tracking System
CJA	Command Judge Advocate
CJCS	Chairman of the Joint Chiefs of Staff
CJCSI	Chairman of the Joint Chiefs of Staff Instruction
CJTF	Combined Joint Task Force
CLAMO	Center For Law and Military Operations
CLEA	Civilian Law Enforcement Agency
CMAOC	Casualty and Mortuary Affairs Operations Center
CMO	Civil Military Operations
CMP	Contractor Management Plan
CNA	Computer network Attack
CND	Computer Network Defense
CNE	Computer Network Enabling Operations
CNO	Computer Network Operations
CO	Cyberspace Operations/Conscientious Objector/Commanding Officer
COA	Course of Action
COB	Civilian on the Battlefield
COCOM	Combatant Command
COIN	Counter Insurgency
COMCAM	Combat Camera
CONOP	Concept of the Operation
CONPLAN	Contingency Plan
CONUS	Continental United States
COR	Contracting Officer's Representative
COWC	Conventional Weapons Convention
CPA	Coalition Provisional Authority
CPOL	Civilian Personnel Online
CPX	Command Post Exercise
CQB	Close Quarters Battle
CQC	Close Quarters Combat
CRC	CONUS Replacement Center
CREST	Contingency Real Estate Support Team
CROE	Combined Rules of Engagement
CS	Civil Support
CSB	Contracting Support Brigade
CSIP	Contracting Support Integration Plan
CT	Counter Terrorism
CTC	Combat training Center
CTR	Cooperative Threat Reduction
CUL	Common User Logistics
CWC	Chemical Weapons Convention
CYBERCOM	United States Cyber Command
CZ	Combat Zone
D&M	Detection and Monitoring
DACORB	Department of the Army Conscientious Objector Review Board
DAEO	Designated Agency Ethics Official
DAGO	Department of the Army General Order
DCA	Defense Cooperation Act
DCID	Director of Central Intelligence Directive
DCIO	Defense Criminal Investigative Organization
DCIS	Defense Criminal Investigative Service
DCO	Defense Coordinating Officer /Designated Commanding Officer/Deputy Commanding Officer/Defensive Cyberspace Operations
DCO-RA	Defensive Cyberspace Operations Response Action
DCP	Detainee Collection Point/Detainee Control Point
DCS	Direct Commercial Sales
DEPOPSDEP	Deputy Operations Deputy
DEPSECDEF	Deputy Secretary of Defense
DEROS	Date Eligible to Return from Overseas
DFAR	Defense Federal Acquisition Regulation
DFAS	Defense Finance and Accounting Service
DHF	Declared Hostile Force
DHHS	Department of Health and Human Services
DHS	Department of Homeland Security
DIA	Defense Intelligence Agency
DISAM	Defense Institute of Security Assistance Management
DLA	Defense Logistics Agency
DNA	Deoxyribonucleic Acid
DNI	Director of National Intelligence
DOB	Date of Birth
DOD	Department of Defense
DODAA	Department of Defense

	Appropriations Act
DODD	Department of Defense Directive
DODFMR	Department of Defense Financial Management regulation
DODI	Department of Defense Instruction
DODIN	Department of Defense Information Networks
DOHA	Defense Office of Hearings and Appeals
DOJ	Department of Justice
DOT	Department of Transportation
DPA	Danger Pay Allowance
DR	Disaster Relief
DRMO	Defense Reutilization and Marketing Office
DRMS	Defense Reutilization and Marketing Service
DSCA	Defense Support to Civil Authorities
DSPD	Defense Support to Public Diplomacy
DTA	Detainee Treatment Act
EA	Electromagnetic Attack
EBS	Environmental Baseline Survey
EC	Ethics Counselor
EDA	Excess Defense Articles
EDATE	Effective Date
EE	Emergency Essential
EEA	Environmental Executive Agent
EEE	Emergency and Extraordinary Expense
EEZ	Exclusive Economic Zone
EFT	Electronic Fund Transfer
EIAP	Environmental Impact Analysis Process
EM	Electromagnetic
EMAC	Emergency Management Assistance Compact
EMS	Electromagnetic Spectrum
ENMOD	Environmental Modification
EO	Executive Order
EOF	Escalation of Force
EP	Electromagnetic Protection
ePRT	Embedded Provincial Reconstruction Team
EPW	Enemy Prisoner of War
ER	Environmental Review
ES	Electronic Warfare Support/ Environmental Study
ESF	Emergency Support Function
ESGR	Employer Support to the Guard and Reserve
ETS	Expiration Term of service
EUMETSAT	European Organization for the Exploitation of Meteorological Satellites
EUTELSAT	European Telecommunications Satellite Organization
EVE	Equal Value Exchange
EW	Electronic Warfare
EWS	Electronic Warfare Support
F&ES	Fire and Emergency Services
FAA	Foreign Assistance Act
FAR	Federal Acquisition Regulation
FARC	Revolutionary Armed Forces of Colombia
FCA	Foreign Claims Act
FCC	Foreign Claims Commission
FCN	Friendship, Commerce and Navigation
FCO	Federal Coordinating Officer
FCP	Family Care Plan
FDM	Financial Disclosure Management
FECA	Federal Employee Compensation Act
FEGLI	Federal Employee Group Life Insurance
FEMA	Federal Emergency Management Agency
FEPP	Foreign Excess Personal Property
FGS	Final Governing Standards
FHA	Foreign Humanitarian Assistance
FM	Field Manual
FMF	Foreign Military Financing
FO	Flag Officer
FOA	Field Operating Agency
FOAA	Foreign Operations, and Related Programs Appropriations Act
FOIA	Freedom of Information Act
FOO	Field Ordering Officer
FORSCOM	United States Forces Command
FOUO	For Official Use Only
FPD	Foreign Post Differential
FRAGO	Fragmentary Order
FRG	Family Readiness Group
FSCOORD	Fire Support Coordinator
FSU	Former Soviet Union
FTCA	Federal Tort Claims Act
FTX	Field Training Exercise
FY	Fiscal Year
G.A.	General Assembly (United Nations)
GAO	Government Accountability Office
GC	See GC IV
GC I	Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva Convention I) (GWS)
GC II	Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea (Geneva Convention II)

	(GWS(SEA))
GC III	Geneva Convention Relative to the Treatment of Prisoners of War (Geneva Convention III) (GPW)
GC IV	Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Geneva Convention IV) (GC)
GCC	Geographic Combatant Commander
GCCC	Global Contingency Construction Contract
GCM	General Court-Martial
GCMCA	General Court-Martial Convening Authority
GCSC	Global Contingency Service Contract
GIRoA	Government of the Islamic Republic of Afghanistan
GO	General Officer/General Order
GOI	Government of Iraq
GPC	Government Purchase Card
GPE	Government Wide Point of Entry
GPW	See GC III
GSA	General Services Agency
GWOT	Global War on Terrorism
GWS	See GC I
GWS(SEA)	See GC II
HA	Humanitarian Assistance
HBCT	Heavy Brigade Combat Team
HCA	Humanitarian and Civic Assistance
HD	Homeland Defense
HEO	Highly Elliptical Orbits
HHC	Headquarters and Headquarters Company
HHD	Headquarters and Headquarters Detachment
HIV	Human Immunodeficiency Virus
HLS	Homeland Security
HN	Host Nation
HQDA	Headquarters Department of the Army
HRC	Human Rights Committee
HSPD	Homeland Security Presidential Directive
HUMINT	Human Intelligence
IA	Information Assurance
IAW	In Accordance With
IBCT	Infantry Brigade Combat Team
ICAO	International Civil Aviation Organization
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICF	Intelligence Contingency Funds
ICRC	International Committee of the Red Cross
IDA	Initial Denial Authority
IDIQ	Indefinite Delivery Indefinite Quantity
IDP	Imminent Danger Pay/Internally Displaced Person
IDS	Individual Deployment Site
IDT	Inactive Duty Training
IFB	Invitation for Bids
IHL	International Humanitarian Law
IHRL	International Human Rights Law
IMET	International Military Education and Training
IMINT	Imagery Intelligence
IMO	International Maritime Organization
INMARSAT	International Maritime Satellite Organization
INSCOM	Intelligence and Security Command (US Army)
INTELSAT	International Communications Satellite Organization
IO	Information Operations/Intelligence Oversight/Investigating Officer
IOII	Information Operations Intelligence Integration
IRC	Information-Related Capabilities
IRR	Inactive Ready Reserve
ISAF	International Security Assistance Force (NATO Afghanistan)
ISFF	Iraqi Security Force Funds
ISR	Individual Service Responsibility/Intelligence, Surveillance and Reconnaissance
ITARS	International Traffic in Arms Regulations
J&A	Justification and Approval
JA	Judge Advocate
JARB	Joint Acquisition Review Board
JCC-I/A	Joint Contracting Command-Iraq/Afghanistan
JCET	Joint Combined Exchange Training
JCS	Joint Chiefs of Staff
JDOMS	Joint Director of Military Support Operations
JEMB	Joint Environmental Management Board
JEMSO	Joint Electromagnetic Spectrum Operations
JER	Joint Ethics Regulation
JFO	Joint Field Office
JIACG	Joint Interagency Coordination Group
JIEDDO	Joint Improvised Explosive Device Defeat Organization
JMD	Joint Manning Document

JMRC	Joint Multinational Readiness Center
JOC	Joint Operations Center
JOPES	Joint Operations Planning and Execution System
JRC	Joint Replacement Center
JRTC	Joint Readiness Training Center
JSCP	Joint Strategic Capabilities Plan
JTF-CS	Joint Task Force-Civil Support
KIA	Killed in Action
KISE	Known Imminent and Substantial Endangerments
KLE	Key Leader Engagement
KO	Contracting Officer
LAA	Legal Assistance Attorney
LAD	Latest Arrival Date/Latest Available Date
LAMP	Legal Assistance to Military Personnel
LATAM	Latin America
LEDET	Law Enforcement Detachment
LHWCA	Longshoreman and Harbor Worker's Compensation Act
LOA	Letter of Assistance/Authorization
LOAC	Law of Armed Conflict
LOD	Legal Operational Detachment
LOGCAP	Logistics Civil Augmentation Program
LOT	Legal Operational Team
LOW	Law of War
LSO	Legal Services Organization
LTP	Leader Training Program
MAAWS	Money as a Weapon System
MACDIS	Military Assistance to Civil Disturbance
MACP	Mortuary Affairs Collection Point
MARFORCY	United States Marine Corps Force
BER	Cyberspace Command
MCA	Military Claims Act
MCM	Manual for Courts-Martial
MCOE	Multinational Military Center of Excellence
MCTP	Mission Command Training Program
MDCO	Maneuver Damage Claim
MDMP	Military Decision Making Process
MEJA	Military Extraterritorial Jurisdiction Act
METT-TC	Mission, Enemy, Terrain, Troops, Time, Civilians
MGS	Mobile Gun System
MIA	Missing in Action
MILCON	Military Construction
MILDEC	Military Deception
MILPER	Military Personnel
MIO	Maritime Interception Operation
MISO	Military Information Support Operations (Formerly PSYOP)
MNCI-I	Multinational Corps-Iraq
MOA	Memorandum of Agreement
MOHS	Maintain Operations or Protect Human Health and Safety
MOUT	Military Operations in Urban Terrain
MP	Military Police
MPS	Military Postal Service
MRE	Military Rule of Evidence/Mission Rehearsal Exercise/Meal Ready to Eat
MSO	Military Source Operations
MSR	Main Supply Route
MTF	Military Treatment facility
MTOE	Modified Table of Organization and Equipment
MTT	Mobile Training Team
MWD	Military Working Dog
MWR	Morale, Welfare and Recreations
NAF	Non-Appropriated Fund
NAFI	Non-Appropriated Fund Instrumentality
NATO	North Atlantic Treaty Organization
NCA	National Command Authority
NCE	Non-Combatant Essential
NCIS	Navy Criminal Investigative Service
NCO	Non-Commissioned Officer
NEO	Noncombatant Evacuation Operation
NG	National Guard
NGA	National Geospatial Intelligence Agency
NGO	Nongovernmental Organization
NII	National Information Infrastructure
NJP	Non-Judicial Punishment
NLT	No Later Than
NOK	Next of Kin
NORTHCOM	United States Northern Command
NRF	National Response Framework
NRO	National Reconnaissance Office
NRP	National Response Plan
NSA	National Security Agency/National Security Act
NSA/CSS	National Security Agency and Central Security Service
NSC	National Security Council
NSS	National Security Strategy
NSSE	National Special Security Events
NTC	National Training Center
O&I	Operations and Intelligence
O&M	Operations and Maintenance Funds
O/C	Observer Controller
O/C-T	Observer Controller-Trainer
OAS	Organization of American States

OC	Oleoresin Capsicum Pepper Spray
OCO	Overseas Contingency Operations/ Offensive Cyberspace Operations
OCONUS	Outside the Continental United States
ODNI	Office of the Director of National Intelligence
OEBDG	Overseas Environmental Baseline Guidance Document
OEF	Operation Enduring Freedom
OFDA	Office for Foreign Disaster Assistance (USAID)
OGA	Other Governmental Agency
OGC	Office of General Counsel
OGE	Office of Government Ethics
OGO	Other Governmental Organization
OHDACA	Overseas Humanitarian Disaster and Civic Aid
OIC	Officer in Charge
OIF	Operation Iraqi Freedom
OJC	Operation Just Cause
OND ROE	Operation New Dawn Rules of Engagement
OOTW	Operations Other Than War
OPA	Other Procurement Army
OPCON	Operational Control
OPLAN	Operational Plan
OPORD	Operations Order
OPSEC	Operational Security
OPTEMPO	Operational Tempo
OPWC	Organization for the Prohibition of Chemical Weapons
OSD	Office of the Secretary of Defense
OSINT	Open Source Intelligence
OSJA	Office of the Staff Judge Advocate
OTJAG	Office of the Judge Advocate General (US Army)
PA	Public Affairs
PACOM	United States Pacific Command
PADD	Person Authorized to Direct Disposition of Remains
PARC	Principal Assistant Responsible for Contracting
PCA	Posse Comitatus Act/ Personnel Claims Act
PCF	Pakistan Contingency Funds
PCH&T	Packaging, Crating, Handling and Transportation
PCO	Procuring Contracting Office
PDD	Presidential Decision Directive
PEO	Peace Enforcement Operation
PFO	Principal Federal Officer
PFP	Partnership for Peace
PID	Positive Identification
PIK	Payment in Kind
PKO	Peacekeeping Operation
PMCS	Preventative Maintenance Checks and Service
PNOK	Primary Next of Kin
POA	Power of Attorney
POL	Petroleum Oil and Lubricants
POLAD	Political Advisor
POW	Prisoner of War
PPO	Project Purchasing Officer
PR&C	Purchase, Request and Commitment
PRC	Presidential Reserve Call Up
PRT	Provincial Reconstruction Team
PSC	Private Security Company
PSD	Personal Security Detachment/Photos, Statements and Diagrams
PSYOP	Psychological Operations (now MISO)
PUC	Persons Under United States Control
PVA	Public Vessel Act
PVO	Private Voluntary Organization
QHDA	Qualified Hazardous Duty Area
R&R	Rest and Recuperation
RC	Convention Relating to the Status of Refugees/ Reserve Component
RCA	Riot Control Agent
RCC	Regional Contracting Center
RCM	Rule for Court-Martial
RCO	Regional Contracting Officer
RCRA	Resource Conservation and Recovery Act
RFI	Request for Information
RFP	Request for Proposals
RIK	Replacement in Kind
RIP	Relief in Place
RLG	Regional Liaison Group
RM	Resource Management
ROE	Rules of Engagement
ROMO	Range of Military Operations
RP	Protocol relating to the Status of Refugees
RRS-A	Records Retention Schedule-Army
RS	Receiving State
RSO	Regional Security Officer
RUDs	Reservations, Understandings and Determinations
RUF	Rules for the Use of Force
S&RO	Stability and Reconstruction Operations
S2X	Brigade HUMINT Officer
SAA	Suits in Admiralty Act
SAD	State Active Duty
SAMM	Security Assistance Management Manual
SAT	Simplified Acquisition Threshold
SATMO	Security Assistance Management

	Office
SBCT	Stryker Brigade Combat Team
SC	Strategic Communication
SCMO	Summary Court-Martial Officer
SCO	Senior Contracting Officer/Squadron Commanding Officer
SCPO	Special Claims Processing Officer
SCRA	Servicemembers Civil relief Act
SCRAG	Senior Civilian Representative of the Attorney General
SECDEF	Secretary of Defense
SECSTATE	Secretary of State
SES	Special Executive Service
SF	Standard Form
SHAPE	Supreme Headquarters Allied Powers Europe
SIGINT	Signals Intelligence
SIU	Special Intelligence Unit
SME	Significant Military Equipment/Subject Matter Expert
SMU	Special Mission Unit
SOCOM	Special Operations Command
SOCOM	United Stated Special Operations Command
SOF	Special Operations Forces
SOFA	Status of Forces Agreement
SOMA	Status of Mission Agreement
SOP	Standing/Standard Operating Procedure
SOSO	Stability Operations Support Operations
SOUTHCOM	United States Southern Command
SPCMCA	Special Court-Martial Convening Authority
SPOT	Synchronized Predeployment and Operational Tracker
SROE	Standing Rules of Engagement
SRP	Soldier Readiness Processing
SRSG	Special Representative to the Secretary General
SRUF	Standing Rules for the Use of Force
SS	Sending State
SSN	Social Security Number
SSR	Single Service Responsibility
SSTR	Security Stabilization Transition and Reconstruction
STANAG	Standardization Agreement
STO	Special Technical Operations
STRATCOM	United States Strategic Command
STX	Situational Training Exercise
TA	Target Audience
TACON	Tactical Control
TACSOP	Tactical Standing Operating Procedures
TAG	The Adjutant General
TBC	Theater Business Clearance
TC	Trial Counsel
TCN	Third Country National
TCP	Traffic Control Point
TDA	Table of Distribution and Allowances
TDY	Temporary Duty
TECHINT	Technical Intelligence
TFE	Tactical Field Exchanges
TIG	The Inspector General
TJAGLCS	The Judge Advocate General's Legal Center and School (US Army)
TOC	Tactical Operations Center
TPFDD	Time Phased Deployment Data
TRA	Training Readiness Authority
TSCA	Tort and Special Claims Act
TTP	Tactics, Techniques and Procedures
UAV	Unmanned Aerial Vehicle
UCMJ	Uniform Code of Military Justice
UCO	Unit Claims Officer
UCP	Unified Command Plan
UDHR	Universal Declaration of Human Rights
UGMA	Uniform Gifts to Minors Act
UIC	Unit Identification Code
UMMC	Unspecified Minor Military Construction
UN	United Nations
UNCCW	United Nations Convention on Certain Conventional Weapons
UNCLOS	United Nations Convention on the Law of the Sea
UNHCR	United Nations High Commission on Refugees
UNPA	United Nations Participation Act
UNSCR	Unite Nations Security Council Resolution
USAFMWRC	US Army Family, Morale, Welfare and Recreation Commander
USAIC	US Army Intelligence Center
USAID	United States Agency for International Development
USAR	United States Army Reserve
USARC	United States Army Reserve Command
USC	United States Code
US-CERT	United States Computer Emergency Readiness Team
USCYBERCOM	United States Cyber Command
USD(ATL)	Under Secretary of Defense (Acquisition, Technology and Logistics)
USD(C)	Under Secretary of Defense (Comptroller)
USD(I)	Under Secretary of Defense

	(Intelligence)
USD(P)	Under Secretary of Defense (Policy)
USD(P&R)	Under Secretary of defense (Personnel and Readiness)
USERRA	Uniformed Services Employment and Reemployment Rights Act
USF-I	United States Forces-Iraq
USFOR-A	United States Forces-Afghanistan
USG	United States Government
USSOCOM	United States Special Operations Command
USSTRATCOM	United States Strategic Command
USV	Unmanned Surface Vehicle
UTMA	Uniform Transfer to Minors Act
UUV	Unmanned Underwater Vehicle
UXO	Unexploded Ordinance
VETS	Veterans Employment Training Service
VTC	Video Teleconference
WF	War Fighting Function
WHCA	War Hazards Compensation Act
WL	Wage Leader
WLG	Washington Liaison Group
WMD	Weapons of Mass Destruction`
WMD-CST	Weapons of Mass Destruction-Civil Support Team
WPR	War Powers Resolution
WS	Wage Supervisor

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