Operational Law Handbook

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OPERATIONAL LAW HANDBOOK
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To all the faculty who have served before us and contributed to the literature in the field of national security law

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PREFACE

The Operational Law Handbook is a "how to" guide for judge advocates practicing national security law. It provides references and describes tactics and techniques for the practice of national security law. The Handbook is not a substitute for official references. Like national security law itself, the Handbook is a focused collection of diverse legal and practical information. It 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 is NOT an official representation of U.S. policy regarding the binding application of various sources of law, and should not be used as such**. However, it may reference source documents.

The Operational Law Handbook was originally published in 1987. It is designed and written for junior and mid-level Judge Advocates practicing national security 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 Generals' Corps who serve alongside their clients in the national security context. Accordingly, the Operational Law Handbook is compatible with current joint and combined doctrine.

The proponent for this publication is the National Security Law Department, The Judge Advocate General's Legal Center and School (TJAGLCS). Send comments, suggestions, and work product from the field to TJAGLCS, National Security Law Department, Attention: Ms. Trisha Spahn, TJAGLCS-ADI, 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 Ms. Spahn at DSN 521-3370; Commercial (434) 971-3370; or email at trisha.h.spahn.civ@mail.mil. She will refer you to the appropriate subject matter expert.

The Operational Law Handbook is available on the Internet at https://tjaglcspublic.army.mil/tjaglcs-publications. To order copies of the Operational Law Handbook, please contact the Center for Law and Military Operations (CLAMO) at DSN 521-3339; Commercial (434) 971-3339; or email usarmy.pentagon.hqda-tjaglcs.mbx.clamo-tjaglcs@mail.mil.

TABLE OF CONTENTS

LEGAL BASES FOR THE USE OF FORCE **1**

SOURCES OF THE LAW OF ARMED CONFLICT **9**

THE LAW OF ARMED CONFLICT **57**

Appendix A 87
Appendix B 90

INTERNATIONAL HUMAN RIGHTS LAW **93**

RULES OF ENGAGEMENT **105**

Appendix 115

NATIONAL SECURITY STRUCTURE & JOINT OPERATIONS **131**

U.S. Army 142
U.S. Marine Corps 145
U.S. Navy 150
U.S. Air Force 154
U.S. Space Force 160
U.S. Coast Guard 161
North Atlantic Treaty Organization (NATO) 169
Multinational Operations 180

DETENTION AND INTERROGATION OPERATIONS **193**

INTELLIGENCE OPERATIONS **209**

CYBERSPACE OPERATIONS **215**

INFORMATION OPERATIONS **223**

SEA, AIR, & OUTER SPACE OPERATIONS **231**

DOMESTIC OPERATIONS **257**

Appendix 274

INTERNATIONAL AGREEMENTS **275**

FOREIGN HUMANITARIAN ASSISTANCE **287**

NONCOMBATANT EVACUATION OPERATIONS (NEO) **311**

FOREIGN AND DEPLOYMENT CLAIMS **321**

Appendix A 331
Appendix B 333
Appendix C 342
Appendix D 345

FISCAL LAW **347**

CONTINGENCY AND DEPLOYMENT CONTRACTING **385**

CONTINGENCY CONTRACTOR PERSONNEL **405**
EMERGENCY ESSENTIAL CIVILIANS SUPPORTING MILITARY OPERATIONS **421**
RESERVE COMPONENT SOLDIERS AND OPERATIONS **429**
ENVIRONMENTAL LAW IN OPERATIONS **431**
Appendix 445
ADMINISTRATIVE LAW IN OPERATIONS **449**
LEGAL ASSISTANCE IN OPERATIONS **483**
Appendix 495
MILITARY JUSTICE IN OPERATIONS **497**
Appendix 505
CENTER FOR LAW AND MILITARY OPERATIONS (CLAMO) **515**
GLOSSARY **525**
INDEX **533**

CHAPTER 1

LEGAL BASES 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 use of force) is reflected in the United Nations (UN) Charter.[1] The UN Charter provides two bases for a State's choice to resort to the use of force: Chapter VII enforcement actions authorized by 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 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 use of force decisions 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 effort 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. JAs 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.[2] 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.[3] 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.[4] An integral aspect of Article 2(4) is the principle of non-intervention,

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[1] U.S. DEP'T OF DEF., DoD LAW OF WAR MANUAL § 1.11.2 (Dec. 2016) [hereinafter LAW OF WAR MANUAL].

[2] 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." *See* LAW OF WAR MANUAL, *supra* note 1 § 1.11.3. The UN Charter is reprinted in full in the National Security Law Department's Law of Armed Conflict Documentary Supplement. It is also available at http://www.un.org/en//charter-united-nations/index.html.

[3] 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."

[4] 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.[5] 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),[6] 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.[7]

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).[8]

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, rotating, 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

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[5] 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."

[6] 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."

[7] *See* Report of the International Commission on Intervention and State Sovereignty (ICISS), 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 ICISS Report clarifies the above comment by advising States to work within the existing framework and only use military force to intervene in a humanitarian crisis when authorized by the Security Council. The United States does not accept humanitarian intervention as a separate basis for the use of force; however, the United Kingdom has relied on it as a legal basis to justify their use of force in Syria. *See* House of Commons Foreign Affairs Committee Report, *Global Britain: The Responsibility to Protect and Humanitarian Intervention*, (5 Sep. 2018), https://publications.parliament.uk/pa/cm201719/cmselect/cmfaff/1005/1005.pdf. NATO's military action to address the humanitarian catastrophe in Kosovo in 1999 is commonly cited as supporting the doctrine of humanitarian intervention due to the absence of a UN Security Council resolution. The U.S. did not adopt this theory as a legal rationale for its actions in Kosovo, but rather implied that such action was justified on the basis of a number of factors. *See* Ashley Deeks, *How Does the Syria Situation Stack Up to the "Factors" that Justified Intervention in Kosovo?* LAWFARE (7 Apr. 2017), https://www.lawfareblog.com/how-does-syria-situation-stack-thefactors-justified-intervention-kosovo.

[8] As stated above, a minority of States would include humanitarian intervention as a separate exception to the rule of Article 2(4). The United States has not adopted this legal rationale. LAW OF WAR MANUAL, *supra* note 1 § 1.11.4.4. 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.

the concurring votes of all five permanent members.[9] In practice, anything other than a veto by one of the five permanent 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."

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 identify and label illegal threats and uses of force. The Security Council may then 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 makes available 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 under article 43. 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 their resolutions as 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 peacekeeping 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 peacekeeping 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

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

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). The inclusion of the International Security Assistance Force in UNSCR 1386 (2001), is an example of the Security Council relying on its power pursuant to Article 53 to authorize military action by regional organization.

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.[10] 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[11]," 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 a majority of 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." 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.[12]

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 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.[13]

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[10] LAW OF WAR MANUAL, *supra* note 1 § 1.11.5.

[11] 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 interpretation is likely the cause of much of the debate between the restrictive approach and the expansive approach.

[12] LAW OF WAR MANUAL, *supra* note 1 § 1.11.5.2.

[13] 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 *jus in bello* (law of armed conflict) defines these terms for purposes of targeting analysis.

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 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.[14]

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.

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.

(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 the victim State must consent to the assistance. There is no recognized right of a third-party State to unilaterally intervene in internal conflicts where the issue in

[14] 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 "Combatants refrain from attacks in which the expected loss of civilian life, injury to civilians, and damage to civilian objects incidental to the attack would be excessive in relation to the concrete and direct military advantage expected to be gained." LAW OF WAR MANUAL, *supra* note 1 § 5.10. This is not the test for a *proportionate response* in the *jus ad bellum* context.

question is one of a group's right to self-determination and there is no consent given 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 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[15] 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.[16]

c. Preemptive Use of Force. In the 2002 National Security Strategy (NSS), the United States took a step toward what some view as a significant expansion of use of force doctrine from anticipatory self-defense to preemption.[17] 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.[18] 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

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[15] 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.

[16] *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 Jun. 2005).

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

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

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."[19]

d. The U.S. analyzes a variety of factors when determining whether an armed attack is imminent.[20] These factors include "the nature and immediacy of the threat; the probability of an attack; whether the anticipated attack is part of a concerted pattern of continuing armed activity; the likely scale of the attack and the injury, loss, or damage likely to result therefrom in the absence of mitigating action; and the likelihood that there will be other opportunities to undertake effective action in self-defense that may be expected to cause less serious collateral injury, loss, or damage."[21] It is the U.S. position that, "the absence of specific evidence of where an attack will take place or of the precise nature of an attack does not preclude a conclusion that an armed attack is imminent for purposes of the exercise of the right of self-defense, provided that there is a reasonable and objective basis for concluding that an armed attack is imminent."[22]

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.**

1. Many States have a greater fear of armed attacks launched by non-state actors vice attacks launched by States. The law responsive to non-state actor armed attacks is unsettled, but the United States has stated that Article 51's inherent right of self-defense applies to any "armed attack," not just attacks from State actors.[23] 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.[24] 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.[25] Several countries, including the United States, have cited the unwilling and unable standard as justification for use of force in Syria in self-defense against ISIS.[26]

2. In the wake of the attacks on the World Trade Center on 11 September 2001, the UN Security Council passed 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 (non-state actors) who perpetrated the 9/11 attacks. The basis for the United States' use of force in Afghanistan was, therefore, the Article 51 right of individual or collective self-defense. Arguably, UNSCR 1368 signals a change where the right of self-defense against non-state actors is recognized, even if the UN Charter did not originally envision this.

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.[27]

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[19] THE WHITE HOUSE, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 15 (2002).
[20] THE WHITE HOUSE, REPORT ON THE LEGAL AND POLICY FRAMEWORKS GUIDING THE UNITED STATES' USE OF MILITARY FORCE AND RELATED NATIONAL SECURITY OPERATIONS (2016) (*citing* Daniel Bethlehem, *Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors*, 106 AM. J. INT'L L. 769 (2012)).
[21] *Id.*
[22] *Id.*
[23] LAW OF WAR MANUAL, *supra* note 1 § 1.11.5.4; THE WHITE HOUSE, REPORT ON THE LEGAL AND POLICY FRAMEWORKS GUIDING THE UNITED STATES' USE OF MILITARY FORCE AND RELATED NATIONAL SECURITY OPERATIONS (2018).
[24] *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).
[25] *See* Michael N. Schmitt, *Responding to Transnational Terrorism Under the* Jus Ad Bellum*: A Normative Framework*, 56 NAVAL L. REV. 1 (2008).
[26] *See* Michelle Nichols, *Exclusive: United States Defends Syria Airstrikes in Letter to U.N. Chief*, REUTERS (23 Sep. 2014), http://www.reuters.com/article/us-syria-crisis-un-usa-exclusive-idUSKCN0HI22120140923.
[27] 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

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

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

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).

CHAPTER 2

SOURCES OF THE LAW OF ARMED CONFLICT

I. INTRODUCTION

A. While there are numerous law of armed conflict treaties in force today, most fall within two broad categories, commonly referred to as the "Hague Law" or "Hague Tradition" of regulating *means and methods* of warfare, and the "Geneva Law" or "Geneva Tradition" of *respecting and protecting victims* of warfare.

B. **The Hague Tradition**

1. This prong of the law of armed conflict focuses on regulating the means and methods of warfare (e.g., tactics, weapons, and targeting decisions). It primarily consists of the various Hague Conventions of 1899, as revised in 1907,[1] the 1954 Hague Cultural Property Convention[2] and the 1980 Certain Conventional Weapons Convention.[3] 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 Convention IV. Article 22 states that the means of injuring the enemy are <u>not</u> unlimited.

2. The following treaties, limiting specific aspects of warfare, are also sources of targeting guidance. These treaties are discussed more fully in the Means and Methods of Warfare section on weapons.

a. The 1925 Geneva Protocol prohibits use in war of asphyxiating, poisonous, or other gases.[4] A number of States, including the United States, reserved the right to respond with chemical weapons to a chemical attack. The 1993 Chemical Weapons Convention (CWC), however, prohibits production, stockpiling, and use of chemical weapons, even in retaliation.[5] The United States ratified the CWC in April 1997.[6]

b. The 1954 Hague Cultural Property Convention seeks to protect cultural property.[7]

c. The 1925 Geneva Protocol prohibits biological weapons.[8] The 1972 Biological Weapons Convention prohibits their use in retaliation, as well as production, manufacture, and stockpiling.[9]

d. The 1980 Certain Conventional Weapons Convention (often referred to as the CCW) restricts or prohibits the use of certain weapons deemed to cause unnecessary suffering or to be indiscriminate: Protocol I - non-detectable fragments; Protocol II - mines, booby traps, and other devices; Protocol III - incendiaries; Protocol IV - laser weapons; and Protocol V - explosive remnants of war. The United States has ratified the Convention with certain reservations, declarations, and understandings.[10]

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[1] Convention IV Respecting the Law and Customs of War on Land and its Annex: Regulations Concerning the Law and Customs of War on Land. The Hague, 18 Oct. 1907 [hereinafter Hague IV].
[2] Convention for the Protection of Cultural Property in the Event of Armed Conflict. The Hague, 14 May 1954 [hereinafter Hague Cultural Property Convention].
[3] Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects. Geneva, 10 Oct. 1980 [hereinafter CCW].
[4] Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods or Warfare. Geneva, 3 Sep. 1992.
[5] Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction. Geneva,
[6] United Nations Office for Disarmament Affairs, *Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction*, UN.ORG, (23 Apr. 2020), http://disarmament.un.org/treaties/t/cwc.
[7] Hague Cultural Property Convention, *supra* note 2.
[8] Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare. Geneva, 17 Jun. 1995.
[9] Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction. London, Moscow, and Washington. 10 Apr. 1972.
[10] CCW, *supra* note 3.

C. **The Geneva Tradition**

1. This prong of the law of armed conflict is focused on establishing protections for the "victims of war." In contrast to the Hague Tradition of regulating specific weapons and their application, the Geneva Tradition confers the protections of the law of armed conflict primarily by assigning certain persons and places a legal status.

2. This Geneva Tradition is exemplified by the four Geneva Conventions of 1949. While there were earlier Geneva Conventions (1864, 1906, and 1929), the current four treaties of 1949 are each devoted to protecting a specific category of war victims:[11]

a. GC I: Wounded and Sick in the Field.[12]

b. GC II: Wounded, Sick, and Shipwrecked at Sea.[13]

c. GC III: Prisoners of War.[14]

d. GC IV: Civilians.[15]

3. The Geneva Conventions entered into force on 21 October 1950.[16] The United States ratified the conventions on 8 February 1955.[17] Currently, all States are party to the 1949 Geneva Conventions.[18]

D. **The Intersection**

1. In 1977, two treaties were drafted to supplement the 1949 Geneva Conventions: Additional Protocol I (AP I) and Additional Protocol II (AP II).[19] The Additional Protocols illustrate the convergence of "Hague Law" and "Geneva Law" by updating and including both traditions in one document.

2. The United States has signed, but not ratified, both AP I and AP II. Despite the fact that the United States has not ratified these treaties, understanding AP I and AP II is important for at least two reasons: (1) Certain provisions of AP I and AP II are considered customary international law (CIL) and binding on the United States; and (2) many U.S. coalition partners have ratified AP I and AP II, and may have different legal obligations than the United States during combined operations.[20] U.S. commanders must be informed that AP I and AP II bind numerous allied forces, including all members of NATO except Turkey.[21]

3. While there is no authoritative list of the AP I articles the United States views as CIL, or specifically rejects as CIL, many consider remarks made in 1987 by Michael J. Matheson, then Deputy Legal Advisor at the

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[11] Some may find it confusing that there are four historical Geneva Conventions (1906, 1929, 1907, and 1949), and the 1949 Convention itself contains four separate conventions. For clarity, references in this publication to GC I, GC II, GC III, or GC IV refer to the 1949 Conventions. Any reference to the historical Geneva Conventions will include the applicable date (i.e. the 1906 Geneva Convention).

[12] Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, August 12, 1949 [hereinafter GC I].

[13] Convention II for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked members of Armed Forces at Sea. Geneva, August 12, 1949 [hereinafter GC II].

[14] Convention III Relative to the Treatment of Prisoners of War. Geneva, August 12, 1949 [hereinafter GC III].

[15] Convention IV Relative to the Treatment of Civilian Persons in Time of War. Geneva, August 12, 1949 [hereinafter GC IV].

[16] *See Treaties, States Parties and Commentaries*, INTERNATIONAL COMMITTEE OF THE RED CROSS, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=4825657B0C7E6BF0C12563CD002D6B0B&action=openDocument (last visited 9 Jun. 2020).

[17] *Id.*

[18] *Id.*

[19] *Treaties, States Parties and Commentaries*, INTERNATIONAL COMMITTEE OF THE RED CROSS, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=D9E6B6264D7723C3C12563CD002D6CE4&action=OpenDocument (last visited 9 Jun. 2020).

[20] *See* U.S. DEP'T OF DEF., DOD LAW OF WAR MANUAL § 3.1.1.1 (Dec. 2016) [hereinafter LAW OF WAR MANUAL].

[21] *Treaties, States Parties and Commentaries*, INTERNATIONAL COMMITTEE OF THE RED CROSS, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treaty.
Selected=470 (last visited 20 May 2020); *see also* LAW OF WAR MANUAL, *supra* note 20 § 19.20.

Department of State, as the most comprehensive expression of the U.S. position.[22] In March 2011, President Obama announced that the United States would comply with Article 75 of AP I, which provides fundamental guarantees for persons in the hands of opposing forces in an international armed conflict, "out of a sense of legal obligation."[23]

4. As for AP II, in March 2011, President Obama announced continued support of AP II and urged the Senate to act "as soon as practicable."[24] Furthermore, the Obama Administration stated that U.S. military activities were consistent with the provisions in AP II.[25]

E. **Other Sources**

1. Treaty Commentaries. These are written works (also referred to as *travaux preparatoires*) by official recorders of the drafting conventions for the major law of armed conflict treaties (Jean Pictet for the 1949 Geneva Conventions and Yves Sandoz for the Additional Protocols).[26] The commentaries provide critical explanations to many treaty provisions, and are similar to legislative history in the domestic context. Where the meaning of a provision contained in the treaty is unclear, the *travaux* can be helpful in resolving conflicts regarding the understanding of the parties at the time States party became signatories.

2. Military Publications. Military manuals are not sources of law in the context of creating law. Rather, such manuals are useful references in developing an understanding of the application of law of armed conflict concepts within the military generally and specific services in particular. However, recent studies have examined military manuals for evidence of *opinio juris* in seeking to resolve questions of whether State practice has ripened into binding customary international law.[27]

a. *DoD Law of War Manual*.[28] "This manual is a Department of Defense (DoD)-wide resource for DoD personnel—including commanders, legal practitioners, and other military and civilian personnel—on the law of war."[29]

b. FM 6-27, *The Commander's Handbook on the Law of Land Warfare*. "[P]rovides guidance to Soldiers and Marines on the doctrine and practice related to customary and treaty law applicable to the conduct of warfare on land and to relationships between opposing belligerents, in order to train and prepare for combat operations."[30]

c. NWP 1–14M/MCWP 5–12.1, *The Commander's Handbook on the Law of Naval Operations*.[31] Chapters 5, 6, and 8–12 address specific aspects of the law of armed conflict. Other chapters of the publication are more broadly applicable to maritime operations and international law generally.

d. *Air Force Operations and the Law*.[32] Chapters 1–3 generally focus on the law of armed conflict. Other chapters address specific aspects of international law, air warfare, cyber operations, and space operations.

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[22] Michael J. Matheson, *The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U. J. INT'L L. & POL'Y 419, 420 (1987).
[23] The White House, *Fact Sheet: New Actions on Guantánamo and Detainee Policy*, https://obamawhitehouse.archives.gov/the-press-office/2011/03/07/fact-sheet-new-actions-guant-namo-and-detainee-policy (last visited 20 May 2020).
[24] *Id.*
[25] *Id.*
[26] INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY: I GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD 136 (Jean S. Pictet ed. 1952) [hereinafter GC I Commentary]; INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS (ed. Yves Sandoz, 1987) [hereinafter AP Commentary].
[27] *See generally* JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW (2005).
[28] LAW OF WAR MANUAL, *supra* note 20.
[29] *Id.* at iii.
[30] U.S. DEP'T OF ARMY, FIELD MANUAL 6-27 11-10C, THE COMMANDER'S HANDBOOK ON THE LAW OF LAND WARFARE (Aug. 2019) [hereinafter FM 6-27].
[31] U.S. NAVY, WARFARE PUB. 1-14M, THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS (Aug. 2017) [hereinafter NWP 1-14M].
[32] THE JUDGE ADVOCATE GENERAL'S SCHOOL, AIR FORCE OPERATIONS AND THE LAW (2014).

II. THE GENEVA CONVENTIONS

A. Historical Background.

1. In 1862, Henry Dunant, the founder of the ICRC,[33] wrote the book, *"A Memory of Solferino."*[34] Dunant's account of Solferino impacted many states across Western Europe,[35] and in 1863, states gathered in Geneva, Switzerland, to hold a conference to discuss the treatment of the wounded and sick on the battlefield.[36] The Conference resulted in the 1864 Geneva Convention.[37] Key provisions include:

a. Neutrality of military ambulances;

b. Neutrality of medical personnel and chaplains, including repatriation should they be captured;

c. Obligation of the parties to the conflict to provide care for the wounded and sick, including repatriation if the wounded and sick were incapable of further service and agreed not to take up arms again.[38]

2. The Convention was updated in 1906, 1929, 1949, and 1977.

B. **Framework for Analysis.** When applying the Geneva Conventions to military operations, a recommended starting point is to answer the following two questions: (1) In what type of conflict are the parties engaged?; and (2) What type of person or object is the subject of the analysis?

1. Geneva Trigger: What Type of Conflict? All four Geneva Conventions of 1949 have "common articles." Common Article 2 sets up all four Conventions with an "either/or" condition/trigger:

a. Either it is an *international* armed conflict (IAC), in which case the Geneva Conventions apply in their entirety; or it is a *non-international* conflict (NIAC), in which case although the Geneva Conventions do not apply in their entirety; however, Common Article 3 and other basic protections do apply.

b. Not all conflicts 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 or are conducted in conditions not amounting to armed conflict. Conflicts which are neither international armed conflicts nor non-international armed conflicts are not regulated by LOAC, but are regulated by rules governing law enforcement activity, international human rights law, and the international law governing the exercise of extraterritorial enforcement jurisdiction. Moreover, the United States may apply the Geneva Conventions by policy.[39] Characterization of a conflict will generally be determined at the national level; however, Judge Advocates must understand the applicable legal framework and what law governs the conduct of military operations.

c. It is possible to have a hybrid situation, with both an IAC and a NIAC occurring simultaneously. For example, during the 2011 conflict in Libya, there was an IAC between NATO and Libya (Gaddafi), as well as a NIAC between Libya (Gaddafi) and armed Libyan insurgents/rebels.

d. For States party to AP I, article 1(4) expands the scope of IAC to "include armed conflicts which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination."[40] This expansion is one of the reasons the United States has not ratified AP I.[41]

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[33] *Henry Dunant*, INTERNATIONAL COMMITTEE OF THE RED CROSS (6 Jun. 1998), https://www.icrc.org/en/doc/resources/documents/misc/57jnvq.htm.
[34] HENRY DUNANT, A MEMORY OF SOLFERINO (1939).
[35] *Henry Dunant, supra* note 33.
[36] *The ICRC and the Geneva Convention (1863-1864)*, INTERNATIONAL COMMITTEE OF THE RED CROSS (29 Dec. 2004) https://www.icrc.org/en/doc/resources/documents/misc/57jnvt.htm.
[37] *Id.*
[38] The Geneva Convention for the Amelioration of the Wounded in Armies in the Field. Geneva, 22 Aug. 1864 [hereinafter 1864 Geneva Convention].
[39] LAW OF WAR MANUAL, *supra* note 20, at § 3.1.1.
[40] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), Geneva, 8 Jun. 1977, art. 1(4) [hereinafter AP I].
[41] Ronald Reagan, *Letter of Transmittal*, Jan. 29, 1987, MESSAGE FROM THE PRESIDENT TRANSMITTING AP II, III-IV.

e. For States party to AP II, article 1 expands protections beyond Common Article 3 when a NIAC reaches a certain level, including control of territory by a non-state group.[42]

2. Geneva Trigger: What Type of Person or Object? A legal analysis involving the Geneva Conventions must also ask what type of person or object is the subject of the analysis? For instance, civilians are primarily protected by GC IV, while the protections governing a shipwrecked sailor would generally be found in GC II.

3. Even if a State is not legally required to apply the protections of the Geneva Conventions based on the above analysis, the State may choose, as a matter of policy, to provide protection. For instance, DoD Directive 2311.01E states that U.S. Forces will "comply with the law of war during all armed conflicts, however such conflicts are characterized, and in all other military operations."[43]

C. The First Geneva Convention (GC I)

1. General Rule

a. Protections for the Wounded and Sick in a NIAC

(1) Common Article 3, also known as the "Mini-Convention" because it provided protections in NIAC, includes some protections for the wounded and sick. The protections demanded by Common Article 3 include humane treatment for those placed "hors de combat by sickness, wounds, detention, or any other cause;"[44] no adverse distinction in providing medical care;[45] and the obligation to collect and care for the wounded and sick.[46]

(2) For those nations party to it, AP II expands slightly the protection for the wounded and sick and those who aid them beyond that provided for in Common Article 3.[47]

(3) Additional Protocol III (AP III) also contains some provisions that apply in NIAC. These provisions primarily relate to protected symbols (discussed below).

b. Protections for the Wounded and Sick in an IAC. In an IAC, also called a Common Article 2 conflict, the full GC I protections are applicable. The protections consist of three main pillars: treatment of the wounded and sick; protections for personnel aiding the wounded and sick; and distinctive emblems to identify protected personnel, units, and establishments.

2. Who are the Wounded and Sick?

a. The term "wounded and sick" is not defined in the Geneva Conventions. The drafters were concerned that any definition would be misinterpreted, so they decided that the meaning of the words was a matter of "common sense and good faith."[48] AP I, art. 8(1), does contain a definition of wounded and sick: "Persons, whether military or civilian, who, because of trauma, disease or other physical or mental disorder or disability, are in need of medical assistance or care and who refrain from any act of hostility."[49] Thus, a wounded soldier who continues to fight is not entitled to protection under this definition.

b. *Hors de Combat*. A person is *hors de combat* if they are in the power of an adverse party, if they have surrendered, if they are parachuting from an aircraft in distress, or if they are incapacitated by wounds, sickness, or shipwreck.[50] It is prohibited to attack enemy personnel who are *hors de combat*.[51]

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[42] *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), Geneva, 8 Jun. 1977, art. 1 [hereinafter AP II].
[43] U.S. DEPT'T OF DEF., DIRECTIVE 2311.01E, DOD LAW OF WAR PROGRAM, para, 4.1 (9 May 2006, certified current 22 Feb. 2011).
[44] GC I, *supra* note 12, art. 3, para. (1).
[45] *Id*.
[46] *Id*. at art. 3, para. (2).
[47] Although not a party to AP II, the United States has said that its activities are consistent with the provisions of AP II.
[48] GC I Commentary, *supra* note 26.
[49] AP I, *supra* note 40 at art. 8(1).
[50] LAW OF WAR MANUAL, *supra* note 20, § 5.9.
[51] *Id.*

c. The title of GC I—Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field—implies that its application is limited to Armed Forces. This is largely, though not entirely, true. Article 13 sets forth those persons protected by GC I.[52] This article is the same as GC III, art. 4;[53] therefore, the analysis to determine whether the person is protected by GC I is identical to the analysis of whether the person is entitled to POW status under GC III, art. 4.

d. Wounded and sick persons who do not qualify under any of the categories in GC I, art. 13, will be covered as civilians by GC IV.[54] This coverage of civilians is qualified by GC IV, art. 16, which provides, "*As far as military considerations allow*, each Party to the conflict *shall facilitate* the steps taken to search for the killed and wounded, to assist the shipwrecked and other persons exposed to grave danger, and to protect them against pillage and ill-treatment."[55] This recognizes that "civilian authorities would often be responsible for collecting and bringing in civilian casualties. However, as a practical matter, the armed forces may be asked to lead such efforts or to carry out a joint relief operation with civilian authorities."[56] Civilians who are injured as a result of U.S. military operations may be collected and provided initial medical treatment in accordance with theater policies.[57] Additionally, it is U.S. Army policy that once medical care is provided to a civilian, the standards of care in GC I apply.[58] Moreover, if a civilian is detained, humane treatment, including medical care, remains the minimum standard of care.[59]

e. The rules applicable to civilians connected with medical transports may vary depending on whether such persons accompany the armed forces,[60] are members of the staff of voluntary aid societies either of a belligerent State[61] or of a neutral State,[62] or are civilians not otherwise protected by GC I or GC III.[63]

3. Specific Protections for the Wounded and Sick

a. Respect and Protect.[64] "Members of the armed forces and other persons mentioned in the following Article, who are wounded or sick, shall be *respected* and *protected* in all circumstances."[65]

(1) *Respect*: "[T]o spare, not to attack;" a prohibition on doing further harm.[66] It is "unlawful for an enemy to attack, kill, illtreat or in any way harm a fallen and unarmed soldier."[67] The shooting of wounded soldiers who are out of the fight is illegal. Similarly, "mercy killings" are illegal.

(2) *Protect*: an affirmative obligation to come to another's defense, to lend help and support, and to give aid.[68] The enemy has an obligation to come to the aid of a fallen and unarmed soldier and give such care as the condition requires.[69]

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[52] GC I, *supra* note 12 at art 13.
[53] GC III, *supra* note 14 at art 4.
[54] GC IV, *supra* note 15, art. 16 ("The wounded and sick, as well as the infirm, and expectant mothers, shall be the object of particular protection and respect."); AP I, *supra* note 40 at art. 8 (including civilians within its definition of "wounded and sick").
[55] *Id.* (emphasis added).
[56] LAW OF WAR MANUAL, *supra* note 20 at § 7.16.1.
[57] *See, e.g.* U.S. DEP'T OF ARMY, FIELD MANUAL 4-02, ARMY HEALTH SYSTEM, Table 1-2 (Aug. 2013) [hereinafter FM 4-02].
[58] *Id.* at para. 3-9.
[59] FM 6-27, *supra* note 30 at para. 5-16.
[60] GC III, *supra* note 14 at art. 4.A.(4).
[61] GC I, *supra* note 12 at art. 26.
[62] *Id.* at art. 27.
[63] GC IV, *supra* note 15 at art. 4.
[64] GC I, *supra* note 12 at art. 12.
[65] GC I, *supra* note 12 at art. 12, para. 1 (emphasis added).
[66] GC I Commentary, *supra* note 26 at 134.
[67] *Id.* at 135.
[68] *Id.*
[69] *Id.*

b. Standard of Care. Protected persons "shall be treated humanely and cared for by the Party to the conflict in whose power they may be."[70] Thus, the standard is one of humane treatment: "[E]ach belligerent must treat his fallen adversaries as he would the wounded of his own army."[71]

c. Order of Treatment.

(1) No adverse distinction may be made in providing care, other than for medical reasons.[72] Medical personnel must make the decisions regarding medical priority on the basis of their medical ethics.[73] Parties may not discriminate against wounded or sick because of "sex, race, nationality, religion, political opinions, or any other similar criteria."[74] The use of the term "adverse" permits favorable distinctions, e.g., taking physical attributes into account, such as children, pregnant women, the aged, etc.[75]

(2) "Only urgent medical reasons will authorize priority in the order of treatment."[76]

(i) Treatment is accorded using triage principles that provide the greatest medical assets to those with significant injuries who may benefit from treatment, while those whose injuries are not life-threatening and those who are terminally injured are given lesser priority.[77]

(ii) The United States applies this policy at the evacuation stage and the treatment stage.[78]

d. Abandoning Wounded and Sick to the Enemy. If, during a retreat, a commander is forced to leave behind wounded and sick, the commander is required, as military considerations permit, to leave behind medical personnel and material to assist in their care.[79]

(1) "[A]s far as military considerations permit" provides a limited military necessity exception to this requirement.[80] Thus, a commander need not leave behind medical personnel if such action will leave the unit without adequate medical staff[81] or if it would subject the medical personnel to mistreatment by an enemy that does not follow the law of armed conflict.[82]

(2) A commander coming upon abandoned enemy wounded and sick may not refuse to provide medical care on the grounds that the enemy failed to leave behind medical personnel.[83] The detaining power ultimately has the absolute respect and protect obligation.[84]

e. Search, Protection, and Care.

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[70] GC I, *supra* note 12, art. 12.
[71] GC I Commentary, *supra* note 26 at 134–37.
[72] GC I, *supra* note 12, art. 12.
[73] *See* GC I, *supra* note 12, art. 28; *see also* AP I, *supra* note 40 at art. 16.
[74] GC I, *supra* note 12, art. 12.
[75] *See* GC I Commentary, *supra* note 26 at 140.
[76] GC I, *supra* note 12, art. 12.
[77] U.S. DEP'T OF ARMY, TECHNIQUES PUBLICATION 4-02.3, ARMY HEALTH SYSTEM SUPPORT TO MANEUVER FORCES, Appendix A. (9 Jun. 2014);
[78] *See id.* at Appendix A, para. A-5; A-25.
[79] GC I, *supra* note 12 art. 12.
[80] *Id.*
[81] *But see* GC I Commentary, *supra* note 26 at 141 ("It is his duty to provide for present needs without keeping back the means of relieving future casualties.").
[82] INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY ON THE FIRST GENEVA CONVENTION 1441 (2016) [hereinafter 2016 GC I Commentary] ("[T]he obligation depends on the circumstances of each case, taking into consideration humanitarian as well as military interests, including the anticipated treatment to be provided by the opposing Party once the abandoned personnel are in its power.").
[83] GC I Commentary, *supra* note 26 at 142 ("A belligerent can never refuse to care for enemy wounded he has picked up, on the pretext that his adversary has abandoned them without medical personnel and equipment. On the contrary, he is bound to give to them the same care as he gives the wounded of his own army.").
[84] *Id.*

(1) "At all times, and particularly after an engagement," parties have an ongoing obligation to search for the wounded and sick as conditions permit.[85] The commander determines when it is possible to do so.[86] This mandate applies to all casualties, not just friendly casualties.[87] The drafters recognized that there were times when military operations would make the obligation to search for the fallen impracticable.[88] The search obligation also extends to searching for the dead, again *as military conditions permit*.[89]

(2) The protection requirement refers to preventing pillage of the wounded by civilian looters, referred to as the "hyenas of the battlefield."[90]

(3) Care refers to the requirement to render first aid.[91]

(4) Suspensions of Fire and Local Agreements.[92]

(i) Suspensions of fire are agreements calling for ceasefires that are sanctioned by the Convention to permit the combatants to remove, transport, or exchange the wounded, sick and the dead.[93]

(ii) Suspensions of fire are not always possible without negotiation and the involvement of the chain of command. Consequently, local agreements, an innovation in the 1949 Convention, are sanctioned for use by on-scene commanders to remove or exchange wounded and sick from a besieged or encircled area, as well as the passage of medical and religious personnel and equipment into such areas.[94] GC IV, art. 17, contains similar provisions for civilian wounded and sick in such areas.[95]

f. Identification of Casualties.

(1) Parties are required, as soon as possible, to record the following information regarding the wounded, sick, and the dead: name, identification number, date of birth, date and place of capture or death, and particulars concerning wounds, illness, or cause of death.[96]

(2) Forward the information to the Information Bureau.[97] Information Bureaus are established by Parties to the conflict to transmit and to receive information/personal articles regarding Prisoners Of War to/from the International Committee of the Red Cross' (ICRC's) Central Tracing Agency.[98]

(3) Parties are required to forward the following information and materials regarding the dead:

(i) Death certificates;

(ii) Identification disc;

(iii) Important documents, e.g., wills, money, etc., found on the body;

(iv) Personal property found on the body.[99]

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[85] GC I, *supra* note 12 art. 15; GC II, *supra* note 13 art. 18.
[86] GC I Commentary, *supra* note 26 at 151 ("[T]here are times when military operations will make the obligation to search for the fallen impracticable. . . . The obligation to act without delay is strict; but the action to be taken is limited to what is possible, and it is left to the military command to judge what is possible, and to decide to what extent it can commit its medical personnel.).
[87] *Id.*
[88] *Id.*
[89] *Id.*
[90] *Id.* at 152.
[91] *Id.* at 152–53
[92] GC I, *supra* note 12 art. 15.
[93] GC I Commentary, *supra* note 26 at 155.
[94] *Id.* at 154–55.
[95] GC IV, *supra* note 15 at art. 17.
[96] GC I, *supra* note 12 at arts. 16–17.
[97] GC III, *supra* note 14 at art. 122
[98] *Central Tracing Agency*, INTERNATIONAL COMMITTEE OF THE RED CROSS, https://casebook.icrc.org/glossary/central-tracing-agency (last visited 20 May 2020).
[99] GC I, *supra* note 12 at art. 16.

(4) Handling of the Dead

(i) Examination of bodies (a medical examination, if possible) to confirm death and to identify the body;[100]

(ii) No cremation (except for religious or hygienic reasons);

(iii) Honorable burial;[101]

(iv) Mark and record grave locations.[102]

g. Voluntary Participation of Local Population in Relief Efforts.

(1) Commanders may appeal to the charity of local inhabitants to collect and care for the wounded and sick.[103] Such actions by the civilians must be voluntary.[104] Similarly, commanders are not obliged to appeal to the civilians.[105]

(2) Spontaneous efforts on the part of civilians to collect and care for the wounded and sick are also permitted, and parties may not interfere with this activity.[106]

(3) Ban on the punishment of civilians for participation in relief efforts.[107]

(4) Civilians must also respect the wounded and sick.[108] This is the same principle discussed above vis-à-vis armed forces. This is the only article of the Convention that imposes a duty directly on civilians.[109]

(5) Continuing obligations of occupying power. The Parties cannot use the employment of civilians as a pretext for avoiding their own responsibilities for the wounded and sick.[110] The contribution of civilians is only incidental.

4. Protections for Personnel Aiding the Wounded and Sick

a. There are three categories of persons who are protected because their work is devoted to aiding the wounded and sick: medical personnel exclusively engaged in providing aid to the wounded and sick, auxiliary medical personnel, and personnel of aid societies in neutral countries.

b. First category: Medical personnel *exclusively engaged* in the search for, or the collection, transport or treatment of the wounded or sick, or in the prevention of disease; staff exclusively engaged in the administration of medical units and establishments; chaplains attached to the armed forces;[111] and personnel of national Red Cross/Red Crescent Societies and other recognized relief organizations.[112]

(1) Medical personnel exclusively engaged in aiding the wounded and sick must be respected and protected "in all circumstances."[113] They must not knowingly be attacked, fired upon, or unnecessarily prevented from discharging their proper functions.[114] The accidental killing or wounding of such personnel, due to their

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[100] Such examinations can play a dispositive role in refuting allegations of war crimes. Thus, they should be conducted with as much care as possible.
[101] Individual burial is strongly preferred; however, a military necessity exception permits burial in common graves if circumstances, such as climate or military concerns, necessitate it. *See* GC I Commentary, supra note 26 at 177.
[102] GC I, *supra* note 12 at art. 17.
[103] *Id.* at art. 18.
[104] GC I Commentary, *supra* note 26 at 186.
[105] *Id.*
[106] GC I, *supra* note 12 at art. 18.
[107] *Id.*
[108] *Id.*
[109] GC I Commentary, *supra* note 26 at 191.
[110] GC I, *supra* note 12 at art. 18; GC I Commentary, *supra* note 26 at 193.
[111] GC I, *supra* note 12 at art. 24.
[112] GC I, *supra* note 12 at art. 26.
[113] GC I, *supra* note 12 at art. 24.
[114] GC I Commentary, *supra* note 26 at 220.

presence among or in proximity to combatant elements actually engaged, by fire directed at the latter, gives no just cause for complaint.[115]

(2) Status upon capture: Retained Personnel, not POWs.[116] This was a new provision in the 1949 convention.[117] What resulted was a compromise: medical personnel were to be repatriated, but if needed to treat POWs, they were to be retained and treated at least as well as POWs.[118] Note that medical personnel may only be retained to treat POWs. Under no circumstances may they be retained to treat *enemy* personnel.[119] While the preference is for the retained persons to treat POWs of their own nationality, the language is sufficiently broad to permit retention to treat any POW.[120]

(3) Repatriation of Medical Personnel.[121] Medical personnel are to be retained only so long as required by the health and spiritual needs of POWs and are to be returned when retention is not indispensable.[122] Repatriation is the rule; retention the exception. GC I, art. 31, states that selection of personnel for return should be irrespective of race, religion or political opinion, preferably according to chronological order of capture—first-in-first-out approach. Parties may enter special agreements regarding the percentage of personnel to be retained in proportion to the number of prisoners and the distribution of the said personnel in the camps. The U.S. practice is that retained persons will be assigned to POW camps in the ratio of 2 doctors, 2 nurses, 1 chaplain, and 7 enlisted medical personnel per 1,000 POWs.[123] Those not required will be repatriated.[124]

(4) Treatment of Medical Personnel.[125] Medical personnel and chaplains may only be required to perform medical and religious duties.[126] They will receive at least all benefits conferred on POWs, e.g., pay, monthly allowances, correspondence privileges.[127] They are subject to camp discipline.[128]

(5) Belligerents may relieve doctors retained in enemy camps with personnel from their home country.[129] During World War II some Yugoslavian and French doctors in German camps were relieved by other doctors from Yugoslavia and France.[130] The detaining power is bound to provide, free of charge, whatever medical attention the POWs require.[131]

c. Second category: *Auxiliary* medical support personnel of the Armed Forces.[132] These are personnel who have received special training in medical specialties (e.g., orderlies, stretcher bearers) in addition to performing military duties.[133] While Article 25 refers to nurses, nurses are Article 24 personnel if they meet the "exclusively engaged" criteria. Auxiliary medical personnel are not widely used.[134]

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[115] LAW OF WAR MANUAL, *supra* note 20 at § 7.8.2.1.
[116] GC I, *supra* note 12 at art. 28.
[117] GC I Commentary, *supra* note 26 at 238.
[118] *Id.* at 238–40.
[119] *Id.* at 241–42
[120] *Id.*
[121] GC I, *supra* note 12 at arts. 30–31.
[122] *See* GC I Commentary, *supra* note 26 at 260–262. Since World War II, this is one of the least honored provisions of the convention. U.S. medical personnel in Korea and Vietnam were neither repatriated nor given retained person status. *See* Memorandum of W. Hays Parks to Director, Health Care Operations *reprinted in* THE ARMY LAWYER 5–6 (April 1989), https://www.loc.gov/rr/frd/Military_Law/pdf/04-1989.pdf.
[123] U.S. DEP'T OF ARMY, REG. 190-8, ENEMY PRISONERS OF WAR, RETAINED PERSONNEL, CIVILIAN INTERNEES AND OTHER DETAINEES para. 3-15 (1 Oct. 1997).
[124] *Id.*
[125] GC I, *supra* note 12 art. 28.
[126] *Id.*
[127] *Id.*
[128] *Id.*
[129] *Id.*
[130] GC I Commentary, *supra* note 26 at 257.
[131] GC I, art. 28.
[132] GC I, *supra* note 12 at arts. 25 and 29.
[133] *Id.* at art. 25.
[134] LAW OF WAR MANUAL, *supra* note 20 at § 4.13.1. *But see* Parks, *supra* note 122 at ("U.S. Army MSC officers, AMEDD noncommissioned officers, or other Medical Corps personnel serving in positions that do not meet the 'exclusively engaged'

(1) Auxiliary medical personnel must be respected and protected when acting in their medical capacity.[135] When not acting in their medical capacity, they remain lawful military targets.[136]

(2) Status upon capture: POWs; however, they must be employed in medical capacity insofar as a need for their special training arises.[137]

(3) Treatment. When not performing medical duties, shall be treated as POWs.[138] When performing medical duties, they remain POWs, but receive treatment under GC III, art. 32 as retained personnel; however, they are not entitled to repatriation.

d. Third category: Personnel of aid societies of neutral countries.[139]

(1) Procedural requirements: Consent of neutral government; consent of party being aided; notification to adverse party.[140]

(2) Retention prohibited: must be returned "as soon as a route for their return is open and military considerations permit."[141]

(3) Treatment pending return: must be allowed to perform medical work.[142]

5. Medical Units and Establishments

a. Protection.

(1) Fixed establishments and mobile medical units may not be attacked, provided they do not abrogate their status.[143]

(2) "Responsible authorities shall ensure that military medical establishments and units are, as far as possible, situated in such a manner that attacks against military objectives cannot imperil their safety. In no case may a military medical unit or facility be used for the purpose of shielding military objectives from attack."[144]

(3) If these units fall into the hands of an adverse party, medical personnel will be allowed to continue caring for wounded and sick, as long as the captor has not ensured the necessary care.

(4) GC I does not confer immunity from search by the enemy on medical units, establishments, or transports.[145]

b. Discontinuance of Protection.

(1) Medical units/establishments lose protection if committing "acts harmful to the enemy."[146] Acts harmful to the enemy include setting up observation posts or using a hospital as a liaison center for fighting

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criteria of article 24 are not entitled to its protection but, under article 25 are entitled to protection from intentional attack during those times in which they are performing medical support functions.").

[135] GC I, *supra* note 12 at art. 25.

[136] LAW OF WAR MANUAL, *supra* note 20 at § 4.13.3.

[137] GC I, *supra* note 12 at art. 29.

[138] *Id.*

[139] *Id.* at art. 27 and 32.

[140] *Id.* at art. 27.

[141] *Id.* at art. 32.

[142] *Id.*

[143] *Id.* at art. 19.

[144] *Id*. at art. 19; LAW OF WAR MANUAL, *supra* note 20 at § 7.10.2; *see also* AP I, *supra* note 40 at art. 12 ("Under no circumstances shall medical units be used in an attempt to shield military objectives from attack. Whenever possible, the Parties to the conflict shall ensure that medical units are so sited that attacks against military objectives do not imperil their safety").

[145] LAW OF WAR MANUAL, *supra* note 20 at § 7.10.1.2.

[146] GC I, *supra* note 12 art. 21.

troops, a shelter for combatants, or an ammunition dump.[147] Protection will not cease because a medical unit is providing care to the enemy.[148]

(2) Protection ceases only after a warning has been given, and it remains unheeded after a reasonable time to comply.[149] A reasonable time varies depending on the circumstances, e.g., no time limit would be required if fire is being taken from the hospital.[150]

(3) AP I, art. 13, extends this same standard to civilian hospitals.[151]

(4) Conditions not depriving medical units and establishments of protection:

(i) Unit personnel armed for their own defense against marauders and those violating the law of armed conflict, e.g., by attacking a medical unit.[152] Medical personnel may carry small arms, such as rifles or pistols, for this purpose.[153] What constitutes a defensive weapon varies on the circumstances.[154] It has been the practice of the United States to not provide medical personnel crew-served weapons for self-defense.[155]

(ii) Although medical personnel may carry arms for self-defense, they may not employ such arms against enemy forces acting in conformity with the law of armed conflict.[156] These arms are for their personal defense and for the protection of the wounded and sick under their charge against persons violating the law of armed conflict.[157] Medical personnel who use their arms in circumstances not justified by the law of armed conflict expose themselves to penalties for violation of the law of armed conflict, and, provided they have been given due warning to cease such acts, may forfeit the protection of the medical unit or establishment.[158]

(iii) Unit guarded by sentries. A medical establishment will not lose its protection if guarded by non-medical personnel.[159] These personnel may be regular members of the armed force, but they may only use force in the same circumstances as discussed in the previous paragraph.[160]

(iv) Small arms and ammunition taken from wounded may be present in the unit.[161] However, such arms and ammunition should be removed as soon as practicable to avoid the appearance of storing munitions in a protected facility and, in any event, are subject to confiscation.[162]

(v) Presence of personnel from the veterinary service.[163]

(vi) Provision of care to civilian wounded and sick.[164]

c. Disposition of Captured Buildings and Material of Medical Units and Establishments.

(1) Mobile Medical Units.

(i) Material of mobile medical units, if captured, need not be returned.[165]

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[147] GC I Commentary, *supra* note 26 at 200–01.
[148] *Id.* at 201; LAW OF WAR MANUAL, *supra* note 20 at § 7.10.3.1.
[149] GC I Commentary, *supra* note 26 at 201–02; LAW OF WAR MANUAL, *supra* note 20 at § 7.10.3.2.
[150] GC I Commentary, *supra* note 26 at 201.
[151] AP I, *supra* note 40 at art. 13.
[152] GC I, *supra* note 12 at art. 22.
[153] *Id.*
[154] LAW OF WAR MANUAL, *supra* note 20 at § 7.10.3.4.
[155] *Id.* at fn. 258; U.S. DEP'T OF ARMY, TECHNIQUES PUB. 4-02.5, CASUALTY CARE para. 1-2 (May 2013).
[156] LAW OF WAR MANUAL, *supra* note 20 at § 7.10.3.4.
[157] *Id.*
[158] *Id.*
[159] GC I, *supra* note 12 art. 21.
[160] GC I Commentary, *supra* note 26 at 204.
[161] GC I, *supra* note 12 at art. 22.
[162] GC I Commentary, *supra* note 26 at 204.
[163] GC I, *supra* note 12 at art. 22.
[164] *Id.*
[165] *Id.* at art. 33.

(ii) Captured medical material must be used to care for the wounded and sick.[166] First priority for the use of such material is the wounded and sick in the captured unit. If there are no patients in the captured unit, the material may be used for other patients.[167]

(2) Fixed Medical Establishments.[168]

(i) The captor has no obligation to restore this property to the enemy—can maintain possession of the building, and its material becomes captor's property. However, the building and the material must be used to care for wounded and sick as long as a requirement exists.

(ii) Exception: "[I]n case of urgent military necessity," they may be used for other purposes.[169]

(iii) If a fixed medical establishment is converted to other uses, prior arrangements must be made for care of the wounded and sick. Medical material and stores of both mobile and fixed establishments "shall not be intentionally destroyed."[170]

6. Medical Transportation

a. Medical Vehicles—Ambulances.

(1) Respect and protect: Medical vehicles may not be attacked if performing a medical function.[171]

(2) These vehicles may be employed permanently or temporarily, and they need not be specially equipped for medical purposes.[172] As ambulances are not always available, any vehicle may be adapted and used temporarily for transport of the wounded.[173] Military vehicles going up to the forward areas with ammunition may bring back the wounded; however, they may only display the emblem when the vehicle is being employed on medical work, i.e. they must not display the emblem when transporting ammunition or able-bodied troops.[174] Extreme care must be taken so that the distinctive emblem is <u>not</u> be displayed while the vehicle is being used for non-medical purposes; misuse of the distinctive symbol is a war crime.[175]

(3) Camouflage: Belligerents are only under an obligation to respect and protect medical vehicles so long as they can identify them. Consequently, absent other intelligence regarding the identity of a medical vehicle with no emblem displayed, belligerents would not be under any obligation to respect and protect it.[176]

(4) Upon capture, these vehicles are subject to the laws of armed conflict. The captor may use the vehicles for any purpose; however, the material of mobile medical units falling into the hands of the enemy must be used only for the care of the wounded and sick.[177] If the vehicles are used for non-medical purposes, the captor must remove the distinctive markings and otherwise ensure proper care of the wounded and sick.[178]

b. Medical Aircraft.[179]

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[166] GC I, *supra* note 12.
[167] GC I Commentary, *supra* note 26 at 274.
[168] GC I, *supra* note 12 at art. 33.
[169] *Id.*
[170] *Id.*
[171] GC I, *supra* note 12 at art. 22 and art. 35.
[172] GC I Commentary, *supra* note 26 at 281.
[173] *Id.*
[174] *Id.*
[175] *Id.*
[176] LAW OF WAR MANUAL, *supra* note 20 at § 7.15.2.1.
[177] GC I, *supra* note 12 at art. 35.
[178] *Id.*; GC I Commentary, *supra* note 26 at 282–83.
[179] GC I, *supra* note 12 at art. 36.

(1) Definition: Aircraft exclusively employed for the removal of wounded and sick and for the transport of medical personnel and equipment. Excluded from this definition are combat search and rescue aircraft because soldiers merely lost or trapped are not wounded or sick.

(2) Under GC I, protection of medical aircraft ultimately depends on an agreement: medical aircraft are not to be attacked if "flying at heights, times and on routes specifically agreed upon between the belligerents."[180] The differing treatment accorded to aircraft, as opposed to ambulances, is a function of their increased mobility and consequent heightened fears about their misuse.[181] Without such an agreement, belligerents use medical aircraft at their own risk.[182] "However, known medical aircraft, when performing their humanitarian functions, must be respected and protected."[183] "Thus, even if not flying pursuant to an agreement, such aircraft shall not be deliberately attacked or fired upon, if identified as protected medical aircraft."[184]

(3) Aircraft may be used permanently or temporarily on a medical relief mission; however, to be protected it must be used "exclusively" for a medical purpose during its relief mission.[185] This raises questions as to whether the exclusivity of use refers to the aircraft's entire round trip or to simply a particular leg of the aircraft's route. The point is overshadowed, however, by the ultimate need for an agreement.

(4) Flights over enemy or enemy-occupied territory are prohibited unless agreed otherwise.[186]

(5) Summons to land and Inspection. This is a means by which belligerents can ensure that the enemy is not abusing its use of medical aircraft.[187] Consequently, a summons to land must be obeyed.[188] Aircraft must submit to inspection by the forces of the summoning Party.[189] If not committing acts contrary to its protected status, medical aircraft should be allowed to continue.[190]

(6) Involuntary landing.

(i) Occurs as the result of engine trouble or bad weather.[191]

(ii) Aircraft may be used by the captor for any purpose.[192] Materiel will be governed by the provisions of GC I, arts. 33 and 34.[193]

(ii) Personnel are retained personnel or POWs, depending on their status.

(iii) Care must still be provided to the wounded and sick.

(7) AP I and Medical Aircraft.

(i) The inadequacy of GC I, art. 36, in light of growth of use of medical aircraft, prompted an overhaul of the regime in AP I.[194] AP I establishes three overflight regimes:

(a) Land controlled by friendly forces:[195] No agreement between the parties is required for the aircraft to be respected and protected; however, the article recommends that notice be given, particularly if there is a SAM threat.

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[180] *Id.*
[181] GC I Commentary, *supra* note 26 at 288.
[182] *Id.*
[183] LAW OF WAR MANUAL, *supra* note 20 at § 7.14.1.
[184] FM 6-27, *supra* note 30 at 4-26.
[185] GC I, *supra* note 12 at art. 36; GC I Commentary, *supra* note 26 at 289.
[186] GC I, *supra* note 12 at art. 36.
[187] GC I Commentary, *supra* note 26 at 292.
[188] GC I, *supra* note 12 at art. 36; LAW OF WAR MANUAL, *supra* note 20 at § 7.14.5.
[189] LAW OF WAR MANUAL, *supra* note 20 at § 7.14.5.
[190] *Id.*
[191] GC I Commentary, *supra* note 26 at 293.
[192] *Id.*
[193] *Id.*
[194] AP I, *supra* note 40 at arts, 24–31.
[195] *Id.* at art. 25.

(b) Contact Zone (disputed area):[196] Agreement required for absolute protection. However, enemy is not to attack once aircraft identified as medical aircraft.

(c) Land controlled by enemy:[197] Overflight agreement required. Similar to GC I, art. 36(3) requirement.

(ii) Bottom line: *Known* medical aircraft shall be respected and protected when performing their humanitarian functions.[198] The duty to identify a medical aircraft belongs to the Party flying the aircraft.[199] Distinctive signals (radio, flashing blue lights, and electronic identification) are ways an aircraft can actively identify itself as a medical aircraft.[200]

7. Parachutists vs. Paratroopers. Descending *paratroopers* are presumed to be on a military mission and therefore may be targeted.[201] *Parachutists* are pilots and crew members of a disabled/downed aircraft. They are presumed to be out of combat and may not be targeted unless it is apparent they are engaging in hostile acts 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."[202]

8. Distinctive Emblems

a. Emblem of the Conventions and Authorized Exceptions.

(1) Red Cross. The distinctive emblem of the conventions.[203]

(2) Red Crescent. Authorized exception.[204]

(3) Red Lion and Sun. Authorized exception that has since been withdrawn.[205]

(4) Red Crystal. On 14 January 2007, the Third Additional Protocol to the 1949 Geneva Conventions (AP III) entered into force.[206] AP III established an additional emblem—the red crystal—for use by Governments and the International Red Cross and Red Crescent Movement. The red crystal offers the same protection as the red cross and the red crescent when marking military medical personnel, establishments, and transport; the staff of national societies; staff, vehicles and structures of the ICRC and the International Federation.[207] The United States is a party to AP III.[208]

b. Identification of Medical and Religious Personnel.[209]

(1) The protections given to medical and religious personnel are, as a practical matter, accorded by the armband and the identification card.[210] The armband identifies protection from intentional attack on the battlefield. The identification card indicates "retained person" status.

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[196] *Id.* at art. 26.
[197] *Id.* at art. 27.
[198] LAW OF WAR MANUAL, *supra* note 20 at § 7.14.1.
[199] *Id.*
[200] AP I, *supra* note 40 at Annex I, Chapter 3.
[201] LAW OF WAR MANUAL, *supra* note 20 at § 14.4.3.1; FM 6-27, *supra* note 30 at para. 2-114; AP I, *supra* note 40 at art 42.
[202] AP I, *supra* note 40 at art 42.
[203] GC I, *supra* note 12 at art. 38.
[204] *Id.*
[205] *Id.*; GC I Commentary, *supra* note 26 at 299–302; LAW OF WAR MANUAL, *supra* note 20 at § 7.15.1.
[206] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Adoption of an Additional Distinctive Emblem (Protocol III), 8 Dec. 2005 [hereinafter AP III].
[207] *Id.* at art. 1.
[208] Office of Treaty Affairs, *Multilateral (07-908) – Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Adoption of an Additional Distinctive Red Cross Emblem (Protocol III)*, U.S. DEPARTMENT OF STATE (8 Sep. 2007), https://www.state.gov/07-908.
[209] GC I, *supra* note 12 at art. 40.
[210] LAW OF WAR MANUAL, *supra* note 20 at § 7.15.

(2) Permanent medical personnel, chaplains, personnel of National Red Cross and other recognized relief organizations, and relief societies of neutral countries are also entitled to protections.[211] They may wear an armband displaying the distinctive emblem,[212] and may carry an identification card identifying their status.[213] Confiscation of ID cards by a captor is prohibited.[214]

(3) Auxiliary personnel wear an armband displaying the distinctive emblem in miniature and carry an ID card indicating special training and temporary character of medical duties.[215]

c. Marking of Medical Units and Establishments. The distinctive flag of the Convention (e.g., the Red Cross) may be hoisted only over such medical units and establishments that are entitled to be respected under GC I.[216] It may be accompanied by the national flag of the Party to the conflict; however, if captured, the unit will fly only the Red Cross flag.[217] Medical Units of Neutral Countries shall fly the Red Cross flag, national flag, and the flag of belligerent being assisted.[218] If captured, will fly only the Red Cross flag and their national flag.[219]

d. Authority over the Emblem. The use of the emblem by medical personnel, transportation, and units is subject to "competent military authority."[220] The commander may give or withhold permission to use the emblem, and the commander may order a medical unit or vehicle camouflaged.[221] While the Convention does not define who is a competent military authority, it is generally recognized that this authority is held no lower than the brigade commander (generally O-6) level.[222] It is not a violation of the LOAC to not display the emblem, but may result in the forfeit of protected status.[223] Valid reasons for not displaying the emblem include camouflage or because the enemy does not respect the emblem.[224]

e. The emblem of the red cross on a white ground and the words "Red Cross" or "Geneva Cross" may not be employed, either in time of peace or in time of war, except to indicate or to protect the medical units and establishments, the personnel and material protected by GC I.[225] "The use by individuals, societies, firms or companies . . . of the emblem . . . shall be prohibited at all times."[226]

D. **The Second Geneva Convention (GC II)**

1. Extensive coverage of GC II may be found in other military publications,[227] and the law of naval operations is covered later in this publication. What follows is a brief summary of some of the GC II provisions a Judge Advocate is more likely to encounter during military operations.

2. In addition to providing protections for those who are wounded and sick at sea, GC II provides protections for those who are shipwrecked. Like the term "wounded and sick," the term "shipwrecked" is not defined apart from saying that it includes shipwrecks "from any cause and includes forced landings at sea by or from aircraft."[228] AP I, art. 8(2) provides a more detailed definition of "shipwrecked" to mean "persons, whether military

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[211] GC I, *supra* note 12 at art. 40.
[212] *Id.*
[213] *Id.*
[214] *Id.*; GC I Commentary, *supra* note 26 at 315–16.
[215] GC I, *supra* note 12 at art. 41.
[216] GC I, *supra* note 12 at art. 42.
[217] *Id.*
[218] GC I, *supra* note 12 at art. 43.
[219] *Id.*
[220] GC I, *supra* note 12 at art. 39.
[221] GC I Commentary, *supra* note 26 at 308.
[222] LAW OF WAR MANUAL, *supra* note 20 at § 7.15.2.1 ("In the practice of the United States, removal or obscuration of the distinctive emblem has generally been controlled by the responsible major tactical commander, such as a brigade commander or higher.")
[223] *Id.*
[224] *Id.*
[225] GC I, *supra* note 12 at art. 44; *see also* AP I, *supra* note 40 art. 38; AP II, *supra* note 42 at art. 12 (prohibiting the improper use of the distinctive emblems).
[226] GC I, *supra* note 12 at art.53.
[227] *See, e.g.* LAW OF WAR MANUAL, *supra* note 20 at § 7.12 and Chapter 13; NWP 1-14M *supra* note 31.
[228] GC II, *supra* note 13 at art. 12.

or civilian, who are in peril at sea or in other waters as a result of misfortune affecting them or the vessel or aircraft carrying them."[229] "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."[230] The term "shipwrecked" includes both military personnel and civilians.[231]

3. Hospital ships. GC II adds hospital ships to the list of objects protected by the Geneva Conventions. Military hospital ships, which are to be marked in the manner specified by GC II, art. 43, may not be attacked or captured, and must be respected and protected.[232] Their names and descriptions must be provided to the Parties to the conflict ten days before those ships are employed.[233]

a. Hospital ships must be used exclusively to assist, treat, and transport the wounded, sick, and shipwrecked.[234] The protection to which hospital ships are entitled shall not cease unless they are used to commit, outside their humanitarian duties, acts harmful to the enemy.[235]

b. Traditionally, hospital ships could not be armed, but crew members could carry light individual weapons for the maintenance of order, their own defense, and the defense of the wounded, sick, and shipwrecked.[236] Due to the changing threat environment (e.g. refusals of some hostile groups / actors to recognize the protection afforded by the distinctive emblem), the United States views the manning of hospital ships with defensive weapons systems (e.g. anti-missile defense systems or crew-served weapons to defend against small boat threats) as prudent force protection measures.[237] These protections are analogous to arming crew members with small arms, and are consistent with the humanitarian purpose of hospital ships.[238]

c. GC II, art. 34 provides that hospital ships may not use or possess "secret codes" as means of communication.[239] Subsequent technological advances in encryption and satellite navigation, while recognized as problematic, have not been specifically addressed by treaty. As a practical matter, modern navigational technology requires that the traditional rule prohibiting "secret codes" be understood to not include modern encryption communication systems.[240]

d. A hospital ship in a port that falls into the hands of the enemy is authorized to leave the port.[241]

e. Retained Personnel and Wounded and Sick Put Ashore. The religious, medical, and hospital personnel of hospital ships retained to care for the wounded and sick are, on landing, subject to GC I.[242] Other forces put ashore become subject to GC III.[243]

E. The Third Geneva Convention (GC III)

1. General Provisions—Protections for Prisoners of War (POW).[244] Geneva Convention III sets forth several protections for POWs. This section briefly summarizes some of those protections and related rules:

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[229] AP I, *supra* note 40 at art. 8.
[230] NWP 1-14M, *supra* note 31 at para. 11.7.
[231] AP I, *supra* note 40 at art. 8.
[232] GC II, *supra* note 13 at art. 22.
[233] *Id.*
[234] *Id.* at art. 34.
[235] *Id.*
[236] *Id.* at art. 35; INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY: II GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES AT SEA 192–95 (Jean S. Pictet ed. 1960) [hereinafter GC II Commentary].
[237] NWP 1-14M, *supra* note 31, at para. 8.6.3.1.
[238] *Id.*
[239] GC II, *supra* note 13 at art. 34.
[240] LAW OF WAR MANUAL, supra note 20 at § 7.12.2.7.
[241] GC II, *supra* note 13 at art. 29.
[242] *Id.* at art 37.
[243] *Id.* at art. 4.
[244] GC III, *supra* note 14 at art. 4; Hague IV, *supra* note 1 at art. 23(c)-(d).

a. Detainees. POW status arises only during international armed conflicts of the kind described in Common Article 2 of the Geneva Conventions.[245] In non-international armed conflict, Common Article 3 applies.[246] During peacekeeping situations (e.g., Somalia, Haiti, Bosnia, as discussed above), or other situations where armed conflict does not exist, 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. Regardless of a detainee's legal status, it is DOD Policy that all detainees will be treated in accordance with Common Article 3.[247]

b. Surrender. Surrender may be made by any means that communicates the intent to give up the fight. In order to place a person *hors de combat* surrender must be genuine, clear and unconditional, and under circumstances where it is feasible for the opposing party to accept the surrender (note that this is an extremely narrow exception—see the Law of War manual for details).[248] Captors must *respect* (not attack) and *protect* (care for) those who surrender—reprisals are prohibited.[249] Civilians who are captured accompanying the force also receive POW status.[250]

c. Identification and Status. The initial combat phase will likely result in the capture of a wide array of individuals.[251] 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.[252] 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.[253]

d. Treatment. There is a legal obligation to provide a wide array of rights and protections to POWs, including adequate food,[254] facilities,[255] and medical aid[256] to all POWs. This obligation poses significant logistical problems in fast-moving tactical situations; thus, JAs must be aware of how to meet this obligation while placing a

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[245] GC III, *supra* note 14 at art. 2.
[246] LAW OF WAR MANUAL, *supra* note 20 at § 8.1.4.1.
[247] *See* U.S. DEP'T OF DEF., DIRECTIVE 2310.01E, DOD DETAINEE PROGRAM (19 Aug. 2014, incorporating Change 1, 24 May 2017) [hereinafter DoDD 2310.01E] (including the requirement to apply Common Article 3 protections to all detainees).
[248] LAW OF WAR MANUAL, *supra* note 20 at § 5.9.3.3.
[249] GC III, *supra* note 14 at art. 13.
[250] *Id.* at art. 4(a)(4).
[251] 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.
[252] DoDD 2310.01E, *supra* note 247. DoD detainees will also receive the protections of Articles 4-6 of AP II in non-international armed conflict, and Article 75 of AP I in international armed conflict.
[253] 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).
[254] GC III, *supra* note 14 at art. 26.
[255] *Id.* at arts. 22–24.
[256] *Id.* at arts. 29–32.

minimum burden on operational assets.[257] POWs must be protected from physical and mental harm.[258] 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.

2. **History of Prisoners of War**

a. "In ancient times, the concept of "prisoner of war" [259] was unknown and the defeated became the victor's 'chattel.'"[260] The captive could be killed, sold, or put to work at the discretion of the captor. No one was as helpless as an enemy prisoner of war.[261]

b. Greek, Roman, and European theologians and philosophers began to write on the subject of POWs. However, treatment of POWs was still by and large left to military commanders.[262]

c. The American War of Independence. For the colonists, it was a revolution. For the British, it was an insurrection. The British, saw the colonists as the most dangerous of criminals, traitors to the empire, and threats to state survival. The British, therefore, prepared to try colonists for treason at the war's onset. In time however, British forces begrudgingly recognized the colonists as belligerents and this plan was discarded. However, colonists that were captured were subjected to inhumane treatment and neglect. There were individual acts of mistreatment by American forces of the British and Hessian captives; however, General Washington appears to have been sensitive to the welfare of POWs. He took steps to prevent abuse.[263]

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[257] 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.

[258] GC III, *supra* note 13 at art. 13.

[259] *See* WILLIAM FLORY, PRISONERS OF WAR: A STUDY IN THE DEVELOPMENT OF INTERNATIONAL LAW (1942) (providing a more detailed account of prisoner of war treatment through antiquity).

[260] INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY: III GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 4 (Jean S. Pictet ed. 1952) [hereinafter GC III Commentary].

[261] Probably the most famous medieval prisoner of war was England's Richard I of Robin Hood fame. King Richard's ship sank in the Adriatic Sea during his return from the Third Crusade in 1192. While crossing Europe in disguise, he was captured by Leopold, Duke of Austria. Leopold and his ally, the Holy Roman Emperor, Henry VI, entered into a treaty with Richard on St. Valentine's Day, 1193, whereby England would pay them £100,000 in exchange for their king. This amount then equaled England's revenues for five years. The sum was ultimately paid under the watchful eye of Richard's mother, Eleanor of Aquitaine, and he returned to English soil on March 13, 1194. *See* M. Foster Farley, *Prisoners for Profit: Medieval Intrigue Quite often Focused upon Hopes of Rich Ransom*, MIL. HISTORY, Apr. 1989, at 12. Richard's own confinement did seem to ingrain some compassion for future prisoners of war he captured. Richard captured 15 French knights in 1198. He ordered all the knights blinded but one. Richard spared this knight one eye so he could lead his companions back to the French army. This was considered an act of clemency at the time. MAJOR PAT REID, PRISONER OF WAR (1984).

[262] *See generally*, Rev. Robert F. Grady, *The Evolution of Ethical and Legal Concern for the Prisoner of War*, 1-30 (1970) (unpublished Ph. D. dissertation, Cath. Univ.) (on file with the TJAGLCS library) [hereinafter Grady].

[263] JOHN C. MILLER, TRIUMPH OF FREEDOM (1948); REV. R. LIVESAY, THE PRISONERS OF 1976; A RELIC OF THE REVOLUTION COMPILED FROM THE JOURNAL OF CHARLES HERBERT (1854); SYDNEY GEORGE FISHER, THE STRUGGLE FOR AMERICAN INDEPENDENCE (1908).

d. The first agreement to establish prisoner of war (POW) treatment guidelines was likely found in the 1785 Treaty of Friendship between the U.S. and Prussia.[264]

e. American Civil War. At the outset, the Union forces did not view the Confederates as professional Soldiers deserving protected status. They were considered nothing more than armed insurrectionists. As southern forces began to capture large numbers of Union prisoners, it became clear to Abraham Lincoln that his only hope for securing humane treatment for his troops was to require the proper treatment of Confederate soldiers. President Lincoln issued General Order No. 100, "Instructions of the Government of Armies of the United States in the Field," known as the Lieber Code. The Lieber Code provided several protections for Confederate prisoners.

(1) Although the Lieber Code went a long way in bringing some humanity to warfare, many traditional views regarding POWs prevailed. For example, Article 60 of the Code provides: "a commander is permitted to direct his troops to give no quarter, in great straits, when his own salvation makes it *impossible* to cumber himself with prisoners."[265]

(2) Confederate policy called for captured black Soldiers to be returned or sold into slavery and for white Union officers serving with black troops to be prosecuted for "exciting servile insurrection."[266] Captured black Soldiers that could not prove they were free were sold into slavery. Free blacks were not much better off. They were treated like slaves and forced to perform labor to support the Confederate war effort. In response to this policy, Article 58 of the Lieber Code stated that the Union would take reprisals for any black POWs sold into slavery by executing Confederate prisoners.[267] Very few Confederate prisoners were executed in reprisal. However, Confederate Soldiers were often forced into hard labor as a reprisal.[268]

(3) The Union and Confederate armies operated a "parole" or prisoner exchange system.[269] The Union stopped paroling southern Soldiers for several reasons, most notably its significant numerical advantage. It was fighting a war of attrition and POW exchanges did not support that effort. This Union decision may have impacted on the poor conditions in southern POW camps because of the additional strain on resources at a time when the Confederate army could barely sustain itself. Some historians point out that the Confederate POW guards were living in conditions only slightly better than their Union captives.[270]

(4) Captured enemy have traditionally suffered great horrors as POWs. Most Americans associate POW maltreatment during the Civil War with the Confederate camp at Andersonville. However, maltreatment was equally brutal at Union camps. In the Civil War 26,486 Southerners and 22,576 Northerners died in POW camps.[271]

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[264] *See* HOWARD S. LEVIE, 60 INTERNATIONAL LAW STUDIES, DOCUMENTS ON PRISONERS OF WAR 8 (1979) [hereinafter Levie, DOCUMENTS ON PRISONERS OF WAR] (providing additional test interpreting the Third Geneva Convention).
[265] *See id*. at 39; George B. Davis, *Doctor Francis Lieber's Instructions for the Government of Armies in the Field,* 1 AM. J. INT'L L. 13 (1907) (providing a summary of who Doctor Francis Lieber was and the evolution of the Lieber Code).
[266] VOL. V, THE WAR OF THE REBELLION: A COMPILATION OF THE OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES AT 807-808 (Gov. Printing Office 1880-1901).
[267] Francis Lieber, War Department, Instructions for the Government of Armies of the United States in the Field art. 58 (1863) [hereinafter Lieber Code], *reprinted in* The Laws Of Armed conflicts 3 (Dietrich Schindler & Jiri Toman eds., 3d rev. ed. 1988).
[268] George G. Lewis & John Mewha, Dep't of the Army, Pamphlet No. 20-213: History of Prisoner of War Utilization by the United States Army 1776-1945 (1955).
[269] The Dix-Hill Cartel was signed and ratified by both sides on the Civil War on July 22, 1862. It lasted until 1863, failing primarily because of Confederate refusals to parole black POWs, and the rapid return parolees to the battlefield. *See* HENRY P. BEERS, THE CONFEDERACY, GUIDE TO THE ARCHIVES OF THE GOVERNMENT OF THE CONFEDERATE STATES OF AMERICA 234 (GSA 1986).
[270] REV. J. WILLIAM JONES, CONFEDERATE VIEW OF THE TREATMENT OF PRISONERS (1876).
[271] Over one-half of the Northern POWs died at Andersonville. *See* Lewis L. Laska & James M. Smith, *"Hell and the Devil": Andersonville and the Trial of Captain Henry Wirz, C.S.A., 1865,* 68 MIL. L. REV. 77 (1975).; *see also* U.S. SANITARY COMMISSION, NARRATIVE OF PRIVATIONS AND SUFFERINGS OF UNITED STATES OFFICERS AND SOLDIERS WHILE PRISONERS OF WAR IN THE HANDS OF THE REBEL AUTHORITIES, S. REP. NO. 68 (3d Sess. 1864), for a description of conditions suffered by POWs during the Civil War. FLORY, *supra* note 259, at 19, n. 60 also cites the Confederate States of America, *Report of the Joint Select Committee Appointed to Investigate the Condition and Treatment of Prisoners of War* (1865).

(5) Despite its national character and Civil War setting, the Lieber Code went a long way in influencing European efforts to create international rules dealing with the conduct of war.

f. The first multilateral international attempt to regulate the handling of POWs occurred in 1907 with the promulgation of the Hague Regulations Respecting the Laws and Customs of War on Land (HR). Although the HR gave POWs a definite legal status and protected them against arbitrary treatment, the Regulations were primarily concerned with the methods and means of warfare rather than the care of the victims of war. Moreover, the initial primary concern was with the care of the wounded and sick rather than POWs.[272]

g. World War I. The Hague Regulations proved insufficient to address the treatment of the nearly 8,000,000 POWs taken in WWI. Germany was technically correct when it argued that the Hague Regulations were not binding because not all participants were signatories.[273] According to the regulations, all parties to the conflict had to be signatories if the Regulations were to apply to any of the parties. If one belligerent was not a signatory, then all parties were released from mandatory compliance. The result was the inhumane treatment of POWs in German control.

h. Geneva Convention Relative to the Treatment of Prisoners of War in 1929. This convention complemented the requirements of the 1907 Hague Regulations and expanded safeguards for POWs. This convention applied even if all parties to a conflict were not signatories.

i. World War II. Once again, all the participants were not signatories to the relevant treaties protecting POWs. Arguably, this was a large contributing factor in the maltreatment of POWs during the war. The gross maltreatment of POWs constituted a prominent part of the indictments preferred against the Germans and Japanese in the post World War II war crimes trials.

(1) Prior to World War I, the Japanese had signed, but not ratified, the 1929 Geneva Convention. They had reluctantly signed the treaty as a result of international pressure but ultimately refused to ratify it. The humane treatment of POWs was largely a western concept. During the war, the Japanese were surprised at the concern for POWs. To many Japanese, surrendering Soldiers were traitors to their own countries and a disgrace to the honorable profession of arms.[274] As a result, most POWs in the hands of the Japanese during World War II were subject to extremely inhumane treatment.

(2) In Europe, the Soviet Union had refused to sign the 1929 Geneva Convention, which provided the Germans with the legal justification to deny its protections to Soviet POWs. In Sachsenhausen alone, some 60,000 Soviet POWs died of hunger, neglect, flogging, torture, and execution in the winter of 1941-42. In turn, the Soviets retained many German POWs in the U.S.S.R. some twelve years after the close of hostilities.[275] Generally speaking, the regular German army, did treat American and British POWs comparatively well. The same cannot be said about the treatment Americans experienced at the hands of the German Schutzstaffel (SS) or Sicherheitsdienst des Reichsführers (SD)[276]

(3) The post-World War II war crimes tribunals determined that international law regarding the treatment of POWs had become customary international law (CIL) by the outset of hostilities. Therefore, individuals could be held criminally liable for the mistreatment of POWs whether or not the perpetrators or victims were from States that had signed the various international agreements protecting POWs.[277]

j. Geneva Convention Relative to the Treatment of Prisoners of War in 1949 (GC III). The experience of World War II resulted in the expansion and codification of the laws of war in four Geneva Conventions of 1949. International armed conflict triggers the full body and protections of the Geneva Conventions.[278] In such a conflict, signatories must respect the Convention in "all circumstances." This language

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[272] GC III Commentary, *supra* note 260 at 6.
[273] G.I.A.D. DRAPER, THE RED CROSS CONVENTIONS 11 (1958).
[274] Grady, *supra* note 262 at 103.
[275] DRAPER, *supra* note 273 at 49.
[276] Grady, *supra* note 262 at 126.
[277] *Id*.
[278] GC III, *supra* note 14 at art. 2.

means that parties must adhere to the Convention unilaterally, even if not all belligerents are signatories. There are provisions that allow non-signatories to decide to be bound.[279] Moreover, with the exception regarding reprisals, all parties must apply the rules of the treaty even if the protections are not being applied reciprocally. The proper treatment of POWs has now risen to the level of CIL.

k. 1977 Additional Protocols I to the 1949 Geneva Conventions (AP I). The U.S. is not a party to this Protocol, though it adopts some of its provisions as CIL. It creates no new protections for prisoners of war. However, it expanded the definition of "status"-- who is entitled to the POW protections in international armed conflict.[280]

3. **Prisoner of War Status as a Matter of Law**

a. Important Terminology.

(1) Prisoners of War: A detained person as defined in GC III, art. 4.

(2) Civilian Internees: A civilian who is interned during armed conflict or occupation for security reasons, for protection, or for offenses against the detaining power.[281] Also, a term used to refer to persons interned and protected in accordance with GC IV.[282]

(3) Retained personnel: Medical and religious personnel retained by the Detaining power with a view of assisting fellow POWs.[283]

(4) Detainee: [284] Any person captured, detained, held, or otherwise under the control of DoD personnel (military, civilian, or contractor employee). It includes any person held during operations other than war. This is the default term to use when discussing persons who are in custody of U.S. armed forces.

(5) Refugee: A person who owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his or her nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country.[285]

(6) Dislocated civilian: Dislocated civilian is a "broad term" that "includes a displaced person, an evacuee, an IDP [internally displaced person], a migrant, a refugee, or a stateless person."[286] Displaced person is broad term "used to refer to internally and externally displaced persons collectively."[287]

b. To achieve POW <u>status</u>, the individual must be the right kind of person in the right kind of conflict. POW status is only given in an International Armed Conflict (also known as a Common Article 2 conflict (CA2)). The status of POW is not recognized in a Non-International Armed conflict (Common Article 3 conflict (CA3)). Not all hostile actors in a CA2 conflict are entitled, however, to POW status. Captured persons must also belong to one of the groups of fighters described in Article 4 of GC III. The question of status is enormously important. There are two primary benefits of POW status. First, POWs receive immunity for warlike acts (i.e., any acts of killing and breaking things are not criminal). Second, POWs are entitled to all the rights, privileges, and protections under GC III. One of those rights is that the prisoner is no longer a lawful target.

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[279] Currently, 196 nations are party to the 1949 Geneva Conventions. *Treaties, States Parties and Commentaries*, INTERNATIONAL COMMITTEE OF THE RED CROSS, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=375 (last visited 4 Jun. 2020).
[280] AP I, *supra* note 40 at arts. 43-45.
[281] DoDD 2310.01E, *supra* note 247 at para. 3(m).
[282] GC IV, *supra* note 15 at art. 79-90.
[283] GC III, *supra* note 14, art. 33.
[284] DoDD 2310.01E, *supra* note at 247 para. E2.1.
[285] *See also* GC IV, *supra* note 15, art. 44; 1951 UN Convention Relating to the Status of Refugees, 189 U.N.T.S. 137.
[286] CHAIRMAN, JOINT STAFF, JOINT PUB. 3-29 FOREIGN HUMANITARIAN ASSISTANCE I-8 (14 May 2019). "The term "dislocated civilian" is unique to DOD and not used by DOS, NGOs, or international organizations." *Id.* at IV-30.
[287] *Id.* "DOD personnel should request specific DOS guidance when involved in operations that require the classification of groups of displaced persons." *Id.* at IV-31.

c. The Right Kind of Person for GC III protections.

(1) Once a conflict rises to the level of a Common Article 2 international armed conflict, parties should look to GC III, art. 4 in order to determine who is entitled to POW status. Traditionally, persons were only afforded POW status if they were members of the regular armed forces involved in an international armed conflict. GC III also includes, members of militias or resistance fighters belonging to a party to an international armed conflict if they meet the following criteria:

(a) Commanded by a person responsible for subordinates;

(b) Fixed distinctive insignia recognizable at a distance;[288]

(c) Carrying arms openly;[289] and,

(d) Conducting their operations in accordance with the laws and customs of war.

(2) In addition, numerous other persons detained by military personnel are entitled to POW status if "they have received authorization from the armed forces which they accompany." (i.e., possess a GC identity card from a belligerent government). Specific examples include:

(a) Contractors;[290]

(b) War Correspondents;[291]

(c) Civilian members of military aircraft crews;[292]

(d) Merchant marine and civil aviation crews;[293]

(e) Persons accompanying armed forces (dependents);[294] and

(f) Mass Levies (Levée en Masse).[295] To qualify these civilians must:

(i) Be in non-occupied territory;

(ii) Act spontaneously to the invasion;

(iii) Carry their arms openly; and,

(iv) Respect the laws and customs of war.

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[288] For an early discussion of the uniform requirement, *see Ex parte Quirin*, 317 U.S. 1 (1942) and Mohamadali and Another v. Public Prosecutor (Privy Council, 28 July 1968), 42 I.L.R. 458 (1971). The first attempt to codify the uniform requirement necessary to receive POW status occurred during the Brussels Conference of 1874. Remember that Quirin discussed the state of the law before the modern Geneva Conventions.

[289] This term carrying arms openly does NOT require they be carried visibly. However, the requirement rests upon the ability to recognize a combatant as just that. AP I changes this requirement in a significant way. Under GC III, a combatant is required to distinguish himself throughout military operations. AP I, art. 44(3) only obligates a combatant to distinguish himself from the civilian population "while they are engaged in an attack or in a military operation preparatory to an attack, or in any action carried out with a view to combat." AP Commentary, *supra* note 26 at 527. The United States has opposed this change. Judge Advocates must recognize that with coalition operations, one may have to apply a different standard; our coalition partners may use AP I's criteria. AP I only requires combatants to carry their arms openly in the attack and to be commanded by a person responsible for the organization's actions, comply with the laws of war, and have an internal discipline system. Therefore, guerrillas may be covered.

[290] GC III, *supra* note 14 at art. 4(a)(4).

[291] *See* Hans-Peter Gasser, *The Protection of Journalists Engaged in Dangerous Professional Missions*, 232 INT'L REV. RED CROSS 3 (Jan. 31, 1983); *see also* KATE WEBB, ON THE OTHER SIDE (1972) (journalist held for 23 days in Cambodia by the Viet Cong).

[292] GC III, *supra* note 14 at art. 4(a)(4).

[293] GC III, art. 4(a)(5).

[294] *See* Stephen Sarnoski, *The Status Under International Law of Civilian Persons Serving with or Accompanying Armed Forces in the Field*, Pamphlet 27-50-260, THE ARMY LAWYER 29 (July 1994). *See generally*, Memorandum for the Assistant Judge Advocate General (Civil Law), Subj: Civilians in Desert Shield -- Information Memorandum (Nov. 26, 1992).

[295] *See* GC III, *supra* note 14 at art. 4(a)(6).

(g) This is NOT an all-inclusive list. One's status as a POW is a question of fact. One factor to consider is whether or not the individual is in possession of an identification card issued by a belligerent government. Prior to 1949, possession of an identification card was a prerequisite to POW status.[296]

(3) Medical and religious personnel (Retained Personnel) receive the protections of GC III.[297]

(a) Retained personnel are repatriated as soon as no longer needed to care for POWs.

(b) Of note, retained status is not limited to doctors, nurses, Corpsmen, etc. This status also includes, for example, the hospital clerks, cooks, and maintenance workers.[298]

(4) Persons whose POW status is debatable:[299]

(a) Deserters/Defectors;[300]

(b) Saboteurs;[301]

(c) Military advisors;[302]

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[296] GC III Commentary, *supra* note 260 at 63.
[297] GC III, *supra* note 14 at arts. 4(c) and 33.
[298] *See* GC I Commentary, *supra* note 26 at 218-58; *see generally*, ALMA BACCINO-ASTRADA, MANUAL ON THE RIGHTS AND DUTIES OF MEDICAL PERSONNEL IN ARMED CONFLICTS (ICRC, 1982); and Liselotte B. Watson, *Status of Medical and Religious Personnel in International Law*, JAG J. 41 (Sep-Oct-Nov 1965).
[299] *See* Levie, *supra* note 264, at 82-84; Richard R. Baxter, *So-Called 'Unprivileged Belligerency': Spies, Guerrillas, and Saboteurs*, 1952 BRITISH YEARBOOK OF INTERNATIONAL LAW, reprinted in MIL. L. REV. BICENTENNIAL ISSUE 487 (1975)(Special Ed.); Albert J. Esgain and Waldemar A. Solf, *The 1949 Geneva Convention Relative to the Treatment of Prisoners of War: Its Principles, Innovations, and Deficiencies*, MIL. L. REV. BICENTENNIAL ISSUE 303 (1975)(Special Ed.).
[300] *See* Memorandum from Headquarters Department of the Army, DAJA-IA, subject: Distinction Between Defectors/Deserters and Enemy Prisoners of War (22 Jan. 1991); *see also* Levie, *supra* note 264, at 77-78; James D. Clause, *The Status of Deserters Under the 1949 Geneva Prisoner of War Convention*, 11 MIL. L. REV. 15 (1961); L.B. Schapior, *Repatriation of Deserters*, 29 BRIT. YB. INT'L L. 310 (1952).
[301] This issue is currently unsettled. Early cases such as Ex parte Quirin (317 US 1, 31 (1942)) stated that eight German saboteurs were not entitled to POW status because they did not distinguish themselves as combatants and engaged in a sabotage mission behind enemy lines. Also, FM 6-27 states, "Persons engaging in spying, sabotage, and other secretive, hostile acts behind enemy lines are persons who may have initially qualified as combatants (that is, by falling into one of the three categories in paragraph 1-50) but who have acted so as to forfeit the privileges of combatant status by engaging in spying or sabotage while acting clandestinely or on false pretenses (HR art. 29)." FM 6-27, *supra* note 30 at para. 1-66; see also LAW OF WAR MANUAL, supra note 20 at § 4.17.2.1 (discussing the meaning of "acting clandestinely or under false pretenses"). The ICRC, in a study authored by Jean-Marie Henckaerts, supported the argument that combatants do not have POW status if they fail to distinguish themselves while engaged in a military operations. However, other scholarship disputes this. For example, Hays Parks noted that historically, members of the regular armed forces received POW status once they were identified as such, no matter how they were attired when captured. Note that POW status here does not mean that a captured soldier receives combatant immunity for the act of wearing an enemy uniform. Combatant immunity is not absolute and members of the armed forces can still be punished for violations of the laws of war, such as spying. An example of this are the German "Greif" SS Commandos at the Battle of the Bulge in 1944. They wore U.S. uniforms in an attempt to cause havoc behind US lines. While it is unclear as to whether they were officially given POW status, General Eisenhower gave them POW-like protections, since they were tried by courts-martial in December 1944, convicted, and executed by firing squad. At the core of this debate is whether members of the armed forces under Art. 4A(1) must nonetheless satisfy all Art. 4A(2) requirements to get POW status. For more information see W. Hays Parks, *Special Forces Wear of Non-Standard Uniforms*, 4 CHI. J. INT'L. L. 2 (Fall 2003) at 76; *see* also JEAN-MARIE HENCKAERTS AND LOUISE DOSWALD-BECK, eds. CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, VOL. I, RULES (Cambridge: Cambridge University Press, 2005) Rule 106, at 386; GARY SOLIS, THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR 223 (2010); HOWARD S. LEVIE, 59 INTERNATIONAL LAW STUDIES, PRISONERS OF WAR IN INTERNATIONAL ARMED CONFLICT 36-37 and 82-83 (1977).
[302] If a neutral nation sends a military advisor or some other representative that accompanies an armed force as an observer then that person, if taken into custody of the armed forces of the adverse Party, would not be considered a POW. The military representative could be ordered out of, or removed from the theater of war. On the other hand, if military representatives take part in the hostilities, act as a "military advisor," and render "military assistance to the armed forces opposing those of the belligerent Power into whose hands they have fallen, they arguably fall within the ambit of Article 4(A) and that they are therefore entitled to prisoner-of-war status." Levie, *supra* note 301, at 83-84.

(d) Belligerent diplomats;[303]

(e) Mercenaries[304] (AP I, art. 47).

(f) U.N. personnel during U.N. peace missions.[305]

(5) Spies are not entitled to POW status (HR, art. 29, and AP I, art. 46).

d. When POW's Status is in Doubt.

(1) Article 5, GC III: "Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal."

(2) AR 190-8[306] provides guidance on how to conduct an Article 5 Tribunal.

(a) A General Court-Martial Convening Authority appoints the tribunal.

(b) There are to be three voting members, the president must be a field grade officer, and one nonvoting recorder, preferably a Judge Advocate.

(c) The standard of proof is "preponderance of the evidence." The regulation does not place the burden of proof or production on either party. The tribunal should not be viewed as adversarial as the recorder need not be a judge advocate and there is no right to representation for the subject whose status is in question.

(d) If a Combatant Commander has a regulation or policy on how to conduct an Article 5 Tribunal, the Combatant Commander's regulation controls. For example, *see* CENTCOM Regulation 27-13.[307]

4. Primary Protections Provided to Prisoners of War

a. Protection "Top Ten."[308]

(1) Humane Treatment[309] (GC III, art. 13)

(2) Prohibition against medical experiments (GC III, art. 13)

(3) Protection from violence, intimidation, insults, and public curiosity[310] (GC III, art. 13)

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[303] If a belligerent diplomat, in addition to his political office, is a member of the regular armed forces or is accompanying the armed forces in the field in one of the categories included in GC III, art. 4(A), then he is subject to capture and to POW status. Levie, *supra* note 301, at 83, n342.

[304] *See generally* AP I, *supra* note 40 at art. 47 (indicating that mercenaries do not qualify for Prisoner of War status; the United States is not a party to AP I and objects to this specific provision); John R. Cotton, *The Rights of Mercenaries as Prisoners of War*, 77 MIL. L. REV. 144 (1977). However, the 6 factor test used in AP I art. 47 is rather strict and virtually all American security contractors would not meet this definition.

[305] *See* Convention on the Safety of United Nations and Associated Personnel, G.A. Res. 59, U.S. GAOR 49th Sess., U.N. Doc. A/RES/49/59 (Dec. 9, 1994).

[306] U.S. DEP'T OF ARMY, REG. 190-8, ENEMY PRISONERS OF WAR, RETAINED PERSONNEL, CIVILIAN INTERNEES AND OTHER DETAINEES para. 1-6(a) (1 Oct. 1997) [hereinafter AR 190-8].

[307] U.S. CENTRAL COMMAND, REG. 27-13 CAPTURED PERSONS, DETERMINATION OF ELIGIBILITY FOR ENEMY PRISONER OF WAR STATUS (7 Feb. 1995).

[308] For an excellent discussion regarding the "Top Ten" protections, s*ee* Major Geoffrey S. Corn and Major Michael L. Smidt, *"To Be or Not to Be, That is the Question," Contemporary Military Operations and the Status of Captured Personnel*, ARMY LAWYER. June 1999.

[309] The requirement that POWs must at all times be humanely treated is the basic theme of the Geneva Conventions. GC III Commentary, *supra* note 260, at 140. A good rule of thumb is to follow the "golden rule." That is, to treat others in the same manner as you would expect to be treated or one of your fellow service members to be treated if captured. In other words, if you would consider the treatment inhumane if imposed upon one of your fellow service members, then it probably would violate this provision.

[310] Trial of Lieutenant General Kurt Maelzer, Case No. 63, *reprinted in* UNITED NATIONS WAR CRIMES COMMISSION, XI LAW REPORTS OF TRIALS OF WAR CRIMINALS 53 (1949) (parading of American prisoners of war through the streets of Rome). *See*

(4) Equality of treatment (GC III, art. 16)

(5) Free maintenance and medical care (GC III, art. 15)

(6) Respect for person and honor (specific provision for female POWs) (GC III, art. 14)

(7) No Reprisals (GC III, art. 13)

(8) No Renunciation of Rights or Status (GC III, art. 7)

(9) The Concept of the Protecting Power, especially the ICRC (GC III, art. 8)

(10) Immunity for warlike acts, but not pre-capture criminal offenses or violations of the LOAC[311]

b. Post-Capture Procedures

(1) Authority to detain can be expressly granted in the mission statement; implied with the type of mission; or inherent under the self-defense/force protection umbrella.

(2) The protection and treatment rights, as well as the obligations begin "from the time they fall into the power of the enemy . . . ."[312] (GC III, art. 5)

(3) POWs can be secured with handcuffs (flex cuffs) and blindfolds, as well as shirts pulled down to the elbows, as long as it is done humanely (cannot be for humiliation/intimidation purposes).

(a) Protect against public curiosity.

(i) GC III, Art. 13 does not *per se* prohibit photographing a POW. The prohibition extends to photographs that degrade or humiliate a POW. With respect to POWs, there is some value added in disseminating photographs since it gives family members assurance that their loved one is alive. Bottom line: strict guidelines required.[313]

(ii) This is in stark contrast to Iraq and North Vietnam's practice of parading POWs before the news media.

(b) POW capture tags. All POWs will, at the time of capture, be tagged using DD Form 2745.[314]

(4) Property of Prisoners. (GC III, art. 18)

(a) Weapons, ammunition, and equipment or documents with intelligence value will be confiscated and turned over to the nearest intelligence unit. (AR 190-8)

Gordon Risius and Michael A. Meyer, *The Protection of Prisoners of War Against Insults and Public Curiosity*, *295* INT'L REV. RED CROSS 288 (July 27, 1993). This article focuses on the issue of photographing POWs.

[311] GC III does not specifically mention combatant immunity. Rather, it is considered to be customary international law. Moreover, it can be inferred from the cumulative effect of protections within GC III. For example, Article 13 requires that prisoners not be killed, and Article 118 requires their immediate repatriation after cessation of hostilities. Although Article 85 does indicate that there are times when prisoners of war may be prosecuted for precapture violations of the laws of the detaining power, the Commentary accompanying Article 85 limits this jurisdiction to only two types of crimes: a prisoner of war may be prosecuted only for (1) war crimes, and (2) crimes that have no connection to the state of war. *See* Corn and Smidt, *supra* note 308, at n. 124.

[312] During Desert Storm some Iraqi Commanders complained that the Coalition forces did not fight "fair" because our forces engaged them at such distances and with such overwhelming force that they did not have an opportunity to surrender. Additionally, some complained that they were merely moving into position to surrender. However, the burden (and risk) is upon the surrendering party make his intentions clear, unambiguous, and unequivocal to the capturing unit.

[313] AR 190-8 provides: "Photographing, filming, and video taping of individual EPW, CI, and RP for other than internal Internment Facility administration or intelligence/counterintelligence purposes is strictly prohibited. No group, wide area or aerial photographs of POW, CI and RP or facilities will be taken unless approved by the senior Military Police officer in the Interment Facility commander's chain of command. AR 190-8, *supra* note 306, para. 1-5(4)(d).

[314] *Id.* at para. 2-1.a.(1)(b), (c). This provision is routinely overlooked, as noted in After Action Reviews from Operation Iraqi Freedom.

(b) POWs and retained personnel are allowed to retain personal effects such as jewelry, helmets, canteens, protective mask and chemical protective garments, clothing, identification cards and tags, badges of rank and nationality, and Red Cross brassards, articles having personal or sentimental value and items used for eating except knives and forks. [315] (*See* GC III, art. 18; AR 190-8)

(c) But what about captured persons not entitled to POW status? [316] (*See* GC IV, art. 97)

(5) Rewards for the capture of POWs are permissible, but they must avoid even the hint of a "wanted dead or alive" mentality.[317]

(6) What can I ask a POW? Anything!

(a) All POWs are required to give: (GC III, art. 17)

(i) Surname, first name;

(ii) Rank;

(iii) Date of birth; and,

(iv) Service number.

(b) What if a POW refuses to provide his or her rank? Continue to treat as POW, but as of the lowest enlisted rank.[318]

(c) No torture, threats, coercion in interrogation (Art. 17, GC III). **It's not what you ask but how you ask it.**[319]

(d) The U.S. military ID card doubles as the Geneva Conventions identification card. Note: Categories are I to V, which corresponds to respective rank. (GC III, art. 60)

5. POW Camp Administration and Discipline

a. Responsibility. (GC III, art. 12). The State (Detaining Power) is responsible for the treatment of POWs. POWs are not in the power of the individual or military unit that captured them. They are in the hands of the State itself, of which the individuals or military units are only agents.[320]

b. Locations.

(1) Land only. (GC III, art 22). However, during the Falklands War, the British temporarily housed Argentine POWs on ship while in transit to repatriation.

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[315] *Id.*; *see also* GC III Commentary, *supra* note 260, at 166, n. 2.

[316] GC IV, *supra* note 15 at art. 97 essentially allows the military to seize, but not confiscate, personal property of those civilians protected by GC IV. The difference is important. Confiscate means to take permanently. Seizing property is a temporary taking. Property seized must be receipted for and returned to the owner after the military necessity of its use has ended. If the property cannot be returned for whatever reason, the seizing force must compensate the true owner of the property. *See* Elyce K.K. Santerre, *From Confiscation to Contingency Contracting: Property Acquisition on or Near the Battlefield*, 124 MIL L. REV. 111 (1989), for a more detailed discussion of the distinction between, requisition, seizure, and confiscation of private property and when it is lawful to do each.

[317] The U.S. issued an offer of reward for information leading to the apprehension of General Noreiga. Memorandum For Record, Dep't of Army, Office of the Judge Advocate General, DAJA-IA, Subj: Panama Operations: Offer of Reward (Dec. 20, 1989). This is distinct from a wanted "dead or alive" type award offer prohibited by the Hague Regulations. *See* LAW OF WAR MANUAL, *supra* note 20 at § 5.26.3.1 ("It is forbidden to place a price on the head of enemy persons or to offer a reward for enemy persons 'dead or alive.'").

[318] GC III, *supra* note 14 at art. 17, para. 2; *see also* GC III Commentary, *supra* note 260 at 158-59.

[319] 15 UNITED NATIONS WAR CRIMES COMMISSION, LAW REPORTS OF TRIALS OF WAR CRIMINALS 105 n. 2 (1949); *See also* Stanley J. Gold and Lawrence J. Smith, *Interrogation Under the 1949 Prisoners of War Convention*, 21 MIL. L. REV. 145 (1963); GC III Commentary, *supra* note 260 at 163-64; Levie, *supra* note 301, at 106-09.

[320] GC III Commentary, *supra* note 260, at 128–29.

(2) Not near military targets.[321] (GC III, art. 23). During the Falklands War, several Argentine POWs were accidentally killed while moving ammunition away from their billets.

(3) Certain detainees, specifically suspected Somali Pirates, have been held aboard U.S. Navy warships for brief periods. In one particular case, the detainee was held for over two months. POWs must be assembled into camps based upon their nationality, language, and customs. (GC III, art. 22)

(4) Generally, cannot segregate prisoners based on religion or ethnic background.[322] However, segregation by these beliefs may be required when they are a basis for the conflict. Such as in Yugoslavia: Serbs, Croats, and Muslims; Rwanda: Hutus, Tutsis; and Iraq: Sunni and Shia.

(5) Political beliefs. GC III, art. 38 encourages the practice of intellectual pursuit. However, the U.N. experience in POW camps demonstrated that pursuit of political beliefs can cause great discipline problems within a camp. In 1952, on Koje-do Island, riots broke out at the POW camps instigated by North Korean POW communist activists. Scores of prisoners sympathetic to South Korea were murdered by North Korean POW extremist groups. During the rioting, POWs captured the camp commander, Brigadier General Dodd.[323]

c. What Must Be Provided?

(1) Quarters equal to that provided to Detaining forces; total surface and minimum cubic feet, bedding, lighting, etc. (GC III, art. 25)

(2) Adequate clothing considering climate. (GC III, art. 27)

(3) Canteen. [324] (GC III, art. 28)

(4) Tobacco.[325] (GC III, art. 26)

(5) Recreation. (GC III, art. 38)

(6) Religious accommodation. (GC III, art. 34)

(7) Food accommodation (GC III, arts. 26, 34); if possible, utilize enemy food stocks and let POWs prepare their own food.

(8) Copy of GC III in POWs own language. Copies available at: www.icrc.org.

(9) Due process. (GC III, arts. 99-108)

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[321] Iraq used U.S. and allied POWs during the Persian Gulf War as human shields in violation of GC III, arts. 19 and 23. *See Iraqi Mistreatment of POWs*, DEP'T OF STATE DISPATCH, Jan. 28, 1991, at 56 (Remarks by State Department Spokesman Margaret Tutwiler); *see also* DEP'T OF DEFENSE, FINAL REPORT TO CONGRESS: CONDUCT OF THE PERSIAN GULF WAR 619 (April 1992) [hereinafter DOD PERSIAN GULF REPORT].

[322] GC III, *supra* note 14 at art. 34. One of the most tragic events of religious discrimination by a detaining power for religious reasons was the segregation by the Nazis of Jewish-American POWs. Several Jewish American Soldiers were segregated from their fellow Americans and sent to slave labor camps where "they were beaten, starved and many literally worked to death." MITCHELL G. BARD, FORGOTTEN VICTIMS: THE ABANDONMENT OF AMERICANS IN HITLER'S CAMPS (1994). *See also* Trial of Tanaka Chuichi and Two Others *in* UNITED NATIONS WAR CRIMES COMMISSION, XI LAW REPORTS OF WAR CRIMES TRIALS 62 (1949) (convicting Japanese prison guards, in part, for intentionally violating the religious practices of Indians of the Sikh faith).

[323] DEP'T OF THE ARMY, OFFICE OF THE PROVOST MARSHALL, REPORT OF THE MILITARY POLICE BOARD NO. 53-4, COLLECTION AND DOCUMENTATION OF MATERIAL RELATING TO THE PRISONER OF WAR INTERNMENT PROGRAM IN KOREA, 1950-1953 (1954); *see also* WALTER G. HERMES, TRUCE TENT AND FIGHTING FRONT 232-63 (1966); DEP'T OF STATE, DEP'T OF STATE BULLETIN: THE COMMUNISTS WAR IN POW CAMPS 273 (Feb. 6, 1953); Harry P. Ball, *Prisoner and War Negotiations: The Korean Experience and Lesson, in* 62 INT'L LAW STUDIES: THE USE OF FORCE, HUMAN RIGHTS AND GENERAL INT'L LEGAL ISSUES, VOL. II, 292-322 (Lillich & Moore, eds., 1980).

[324] *See* U.S. Dep't of Army, Field Manual 3-63, Detainee Operations (2 January 2020) [hereinafter FM 3-63] para. A-26.

[325] *See* Memorandum from HQDA-IO, subject: Tobacco Products for Enemy Prisoners of War (12 Sep. 1994). During Desert Storm, the 301st Military Police POW camp required 3500 packages of cigarettes per day. *Operation Desert Storm: 301st Military Police EPW Camp Briefing Slides, available in* TJAGSA, ADIO POW files. *See also* WILLIAM G. PAGONIS, MOVING MOUNTAINS: LESSONS IN LEADERSHIP AND LOGISTICS FROM THE GULF WAR 10 (1992), for LTG Pagonis' views about mandatory tobacco purchases for POWs.

(10) Hygiene (GC III, art. 29); separate baths, showers and toilets must be provided for women prisoners of war.

d. POW Accountability.[326] (GC III, arts. 122, 123)

(1) Capture notification–PWIS (Prisoner of War Information System). This system was utilized during Operations Desert Storm and Operation Uphold Democracy. The PWIS is now known as the National Detainee Reporting Center (NDRC).

(2) POW deaths. (GC III, arts. 120, 121). Any death or serious injury to a POW requires an official inquiry. Look to theater-specific SOPs to provide additional guidance on the appointing authority and routing system for the investigation or inquiry into a POW death or serious injury.

(3) Reprisals against POWs are prohibited. (GC III, art. 13)

e. Transfer of POWs. (GC III, arts. 46-48)

(1) Belligerent can only transfer POWs to nations which are parties to the Convention.

(2) Detaining Power remains responsible for POW care.

(a) There is no such thing as a "U.N." or "coalition" POW.[327]

(b) To ensure compliance with the GC III, U.S. Forces routinely establish liaison teams and conduct GC III training with allied forces prior to transfer POWs to that nation.[328]

f. Complaints and Prisoners' Representatives.

(1) The primary rights and duties/oversight responsibilities of Prisoner Representatives are set forth in the following articles of GC III: 57, 78-81, 98, 104, 107, 125, and 127.

(2) There is the potential for conflict of the Prisoner Representative duties with the Code of Conduct Senior Ranking Officer (SRO) requirement.[329]

(3) The SRO will take command, regardless of the identification of the Prisoners Representative.

g. POW Labor.[330] (GC III, arts. 49-57)

(1) Rank Matters.

(a) Officers cannot be compelled to work.

(b) NCOs can be compelled to supervise only.

(c) Enlisted can be compelled to do manual labor.

(d) If enlisted POWs work, they must be paid.

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[326] See Vaughn A. Ary, *Accounting for Prisoners of War: A Legal Review of the United States Armed Forces Identification and Reporting Procedures*, Pamphlet 27-50-261, THE ARMY LAWYER (Aug. 1994), at 16, for an excellent review of the United States system of tracking POWs. *See also* Robert G. Koval, *The National Prisoner-of-War Information Center*, MILITARY POLICE, June 1992, at 25.

[327] *See* Albert Esgain & Waldemar Solf, *The 1949 Geneva Convention Relative to the Treatment of Prisoners of War: Its Principles, Innovations, and Deficiencies*, MIL. L. REV. BICENTENNIAL ISSUE 303, 328-330 (1975) (Special Ed.), for a discussion of the practical problems faced with this provision.

[328] *See, e.g.*, Memorandum of Agreement Between the United States of America and the Republic of Korea on the Transfer of Prisoners of War/Civilian Internees, signed at Seoul February 12, 1982, T.I.A.S. 10406. *See also* UNITED STATES FORCES KOREA, REGULATION 190-6, ENEMY PRISONERS TRANSFERRED TO REPUBLIC OF KOREA CUSTODY (3 Apr. 1992). *See also* DOD PERSIAN GULF REPORT, *supra* note 321, at 583.

[329] *See* U.S. DEP'T OF DEFENSE, INSTR, 1300.21, CODE OF CONDUCT TRAINING AND EDUCATION (8 Jan. 2001).

[330] *See* Howard S. Levie, *The Employment of Prisoners of War*, 23 MIL. L. REV. 41, and Levie, *supra* note 301, at 213-254. *See generally*, Frank Kolar, *An Ordeal That Was Immortalized: Not all was fiction in the story of the bridge on the River Kwai*, MIL. HISTORY, Feb. 1987, at 58.

(e) Retained Personnel shall not be required to perform any work outside their medical or religious duties. This is an absolute prohibition that includes work connected to the administration and upkeep of the camp. (GC I, art. 28(c))

(2) Compensation.[331] (GC III, art. 60). 8 days paid vacation (GC III, art. 53)

(3) Type of Work.

(a) Work cannot be unhealthy or dangerous, unless the POW volunteers. Work cannot be humiliating. (GC III, art. 52)

(b) Work such as camp administration, installation, and maintenance is authorized, as well as work relating to agriculture; commercial business, and arts, and crafts; and domestic service without restriction to military character or purpose.[332]

(c) Industry work (other than in the metallurgical, machinery, and chemical industries); public works and building operations; transport and handling of stores; and public utility services is authorized provided it has no military character or military purpose. (GC III, art. 50)

(d) Work in the metallurgical, machinery, and chemical industry is strictly prohibited. (GC III, art. 50)

h. Camp Discipline.

(1) Disciplinary sanctions.

(a) Must relate to breaches of camp discipline.

(b) Only four types of punishments (UCMJ Art. 15-type punishments) are authorized (GC III, arts. 89, 90). The maximum punishments are:[333]

(i) Fine: ½ pay up to 30 days.

(ii) Withdrawal of privileges, not rights.

(iii) 2 hours of fatigue duty per day for 30 days.

(iv) Confinement for 30 days.

(c) Imposed by the camp commander. (GC III, art. 96)

(2) Judicial sanctions.

(a) POWs: Pre-capture v. post-capture.

(i) Pre-capture: General court-martial or federal or state court prosecution if they have jurisdiction over U.S. Soldier for the same offense.[334] (GC III, arts. 82, 85)

(ii) Post-capture: any level court-martial allowed under UCMJ. Jurisdiction for post-capture offenses is found under Art. 2(9), UCMJ (GC III, arts. 82 and 102).

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[331] *See* AR 190-8, *supra* note 306 at para. 4-14.
[332] GC III Commentary, *supra* note 260, at 150-51.
[333] GC IV provides the same maximum punishments for civilian internees. *See* GC IV, *supra* note 15 at art. 119.
[334] *See* 10 U.S.C. § 802(a)(9) and 18 U.S.C. § 3227. It should be noted that at least 12 nations have made a reservation to GC III, art. 85. The reservation in essence would deny a POW their protected status if convicted of a war crime. North Vietnam used their reservation under Art. 85 to physically beat American pilots and threaten trials as war criminals. *See* MARJORIE WHITEMAN, 10 DIGEST OF INTERNATIONAL LAW 231–34 (1968); James Burnham, *Hanoi's Special Weapons System: threatened execution of captured American pilots as war criminals*, NAT'L. REV., Aug. 9, 1966; *Dangerous decision: captured American airmen up for trial?*, NEWSWEEK, July 25, 1966; *Deplorable and repulsive: North Vietnam plan to prosecute captured U.S. pilots as war criminals*, TIME (29 Jul. 1966), at 12-13. *See generally*, Joseph Kelly, *PW's as War Criminals*, MIL REV 91 (Jan. 1972).

(iii) Court-martial or military commission.[335] (GC III, art. 84). [But note effect of GC III, art. 102, is that U.S. must use a court-martial unless policy is changed to allow trial of a U.S. service members before a military commission.]

(b) Due process required.

(i) POWs: same due process as that provided to the Detaining Power's own military forces. (GC III, arts. 99-108)

(ii) Right to appeal. (GC III, art. 106)

i. Escape.

(1) When is an escape deemed successful?[336] (GC III, art. 91)

(a) Service member has rejoined their, or an ally's, armed forces;

(b) Service member has left the territory of the Detaining Power or its ally; (i.e., entered a neutral country's territory);

(c) Service member has joined a ship flying the flag of the Power on which the service member depends, or of an Allied Power, in the territorial waters of the Detaining Power, the said ship not being under the control of the last named Power.[337]

(2) Unsuccessful escape.

(a) Only disciplinary punishment for the escape itself (GC III, art. 92).[338]

(b) Offenses in furtherance of escape.

(i) Disciplinary punishment only: [339] If sole intent is to facilitate escape and no violence to life or limb, or self-enrichment (GC III, art. 93). For example, a POW may wear civilian clothing during escape attempt without losing their POW status.[340]

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[335] *See* Major Timothy C. MacDonnell, *Military Commissions and Courts-Martial: A Brief Discussion on the Constitutional and Jurisdictional Distinctions Between the Two Courts*, ARMY LAW., Mar. 2002. For a historical use of military commissions, *see* Major Michael O. Lacey, *Military Commissions: A Historical Survey*, ARMY LAW., (Mar. 2002).

[336] Between 1942 and 1946, 2,222 German POWs escaped from American camps in the U.S. At the time of repatriation, 28 still were at large. One remained at large and unaccounted for in the U.S. until 1995! None of the German POWs ever successfully escaped. During World War II, 435,788 German POWs were held on American soil (about 17 divisions worth). Of all the Germans captured by the British in Europe, only one successfully escaped and returned to his own forces. This German POW did this by jumping a prisoner train in Canada and crossing into the U.S., which at that time was still neutral. ALBERT BIDERMAN, MARCH TO CALUMNY: THE STORY OF AMERICAN POW'S IN THE KOREAN WAR 90 (1979); Jack Fincher, *By Convention, the enemy within never did without*, SMITHSONIAN, June 1995, at 127; *see also* ARNOLD KRAMMER, NAZI PRISONERS OF WAR IN AMERICA (1994). See A. Porter Sweet, *From Libby to Liberty*, MIL. REV. 63 (Apr. 1971), for an interesting recount of how 109 union Soldiers escaped a Confederate POW camp during the Civil War. See ESCAPE AND EVASION: 17 TRUE STORIES OF DOWNED PILOTS WHO MADE IT BACK (Jimmy Kilbourne ed., 1973), for stories of service members who successfully avoided capture after being shot down behind enemy lines or those who successfully escaped POW camps after capture. The story covers World War I through the Vietnam War. According to this book, only three Air Force pilots successfully escaped from captivity in North Korea. Official Army records show that 670 Soldiers captured managed to escape and return to Allied control. However, none of the successful escapees had escaped from permanent POW camps. *See* Paul Cole, I POW/MIA ISSUES, THE KOREAN WAR 42 (Rand Corp. 1994). *See also* George Skoch, *Escape Hatch Found: Escaping from a POW camp in Italy was one thing. The next was living off a war-torn land among partisans, spies, Fascists and German Patrols*, MIL. HIST. 34 (Oct. 1988).

[337] *See* SWISS INTERNMENT OF PRISONERS OF WAR: AN EXPERIMENT IN INTERNATIONAL HUMANE LEGISLATION AND ADMINISTRATION (Samuel Lindsay ed., 1917), for an account of POW internment procedures used during World War I.

[338] *See also* GC IV, *supra* note 15 at art. 120, for similar treatment of civilian internees who attempt escape.

[339] *But see* 18 U.S.C. § 757 which makes it a felony, punishable by 10 years confinement and $10,000 to procure "the escape of any prisoner of war held by the United States or any of its allies, or the escape of any person apprehended or interned as an enemy alien by the United States or any of its allies, or . . . assists in such escape . . ., or attempts to commit or conspires to commit any of the above acts. . ."

[340] Rex v. Krebs (Magistrate's Court of the County of Renfrew, Ontario, Canada), 780 Can. C.C. 279 (1943). The accused was a German POW interned in Canada. He escaped and during his escape he broke into a cabin to get food, articles of civilian

(ii) Judicial punishment: if violence to life or limb or self-enrichment (GC III, art. 93).

(3) Successful escape.

(a) Some authors argue no punishment can be imposed for escape or violence to life or limb offenses committed during escape if later recaptured. (GC III, art. 91)

(b) However, most authors posit that judicial punishment can occur if a POW is later recaptured for his or her previous acts of violence.

(c) As this issue is still debated, so U.S. policy is not to return successfully escaped POW to same theater of operations.

(4) Use of force against POWs during an escape attempt or camp rebellion is lawful. Use of deadly force is authorized "only when there is no other means of putting an immediate stop to the attempt."[341]

j. Repatriation of Prisoners of War.[342]

(1) Sometimes required before cessation of hostilities (GC III, art. 109).

(a) Seriously sick and wounded POWs whose recovery is expected to take more than 1 year (GC III, art. 110).

(b) Incurably sick and wounded (GC III, art. 110).

(c) Permanently disabled, physically or mentally (GC III, art. 110).

(2) After cessation of hostilities.

(a) GC III, art. 118, provides: "Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities."

(b) Rule followed after World War II. Result: thousands of Russian POWs executed by Stalin upon forced repatriation.

(c) U.N. command in Korea first established principle that POWs do not have to be repatriated, if they do not so wish.[343]

F. The Fourth Geneva Convention (GC IV)

1. General Provisions—Protections for Civilians. LOAC provides extensive protections for civilians. This section briefly summarizes several of those protections:

a. General Rule. Specific rules for the protection of civilians may be grouped into two categories: (1) essentially negative duties to respect civilians and to refrain from directing military operations against them; and (2) affirmative duties to take feasible precautions to protect civilians and other protected persons and objects.[344] While the term "civilian" is used in different ways in the law of war,[345] in general a civilian is "a person who is neither part of nor associated with an armed force or group, nor otherwise engaging in hostilities."[346] "Protected

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clothing, and a weapon. The court held that, since these acts were done in an attempt to facilitate his escape, he committed no crime.

[341] GC III Commentary, *supra* note 260 at 246. *Compare Trial of Albert Wagner*, XIII THE UNITED NATIONS WAR CRIMES COMMISSION, LAW REPORTS OF THE TRIAL OF WAR CRIMINALS, Case No. 75, 118 (1949), with *Trial of Erich Weiss and Wilhelm Mundo*, XIII THE UNITED NATIONS WAR CRIMES COMMISSION, LAW REPORTS OF THE TRIAL OF WAR CRIMINALS, Case No. 81, 149 (1949). "The use of weapons against prisoners of war, especially against those who are escaping or attempting to escape, shall constitute an extreme measure, which shall always be preceded by warnings appropriate to the circumstances." GC III, *supra* note 20, at 42.

[342] For a thorough list of resources on this issue, *see* BIBLIOGRAPHY ON REPATRIATION OF PRISONERS OF WAR (1960), copy maintained by the TJAGLCS Library.

[343] *See* R.R. Baxter, *Asylum to Prisoners of War*, BRITISH YEARBOOK INT'L L. 489 (1953).

[344] LAW OF WAR MANUAL, *supra* note 20 at § 5.2

[345] *Id.* at § 4.8.1.

[346] *Id.* at § 4.8.1.5.

Person" is a term of art under Geneva Convention IV that refers to two specific categories of civilians that have individualized law of war protections, discussed below.

b. Specific Protections.

(1) Civilian Medical and Religious Personnel. Such personnel shall be respected and protected.[347] 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.

(2) Journalists. Protected as "civilians" provided they take no action inconsistent with their status.[348] Engaging in journalism does not constitute taking a direct part in hostilities. If captured while accompanying military forces in the field, a journalist or war correspondent is entitled to POW status.[349]

(3) Personnel Engaged in the Protection of Cultural Property.[350] Article 17 of the Hague Cultural Property Convention established a duty to respect (not directly attack) persons protecting such property. These individuals are treated like military medical and religious personnel.[351]

(4) 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).[352] They may be at 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.

c. Exception to General Rule: Direct Participation in Hostilities.[353] Civilians who take a direct part in hostilities forfeit protection from being made the object of attack. This rule will be discussed in more detail.

2. **The Definition of "Civilian" under the LOAC**

a. Background. Although the concept of distinction between combatants and civilians dates back to the very foundations of the LOAC, the term "civilian" had no precise definition in the LOAC until 1977, when the international community adopted AP I for application in IACs. The 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War (GC IV) provides protections for civilians during IACs but it does not define the term "civilian." For non-international armed conflicts (NIACs), neither Common Article 3 nor AP II contains a specific definition of the term "civilian," and, as the ICRC has noted in its work described below, customary international law (CIL) does not provide a clear definition either. Further, while the ICRC espouses the view that during armed conflict a person is either a combatant or a civilian, and thus civilians are those who are not combatants, the U.S. recognizes a third group of "mixed cases" for certain classes of persons who do not fit neatly within the combatant or civilian category.[354] One of these classes includes "unprivileged belligerents"[355] or "unprivileged enemy belligerents."[356] The key take away from this background is an understanding that determining whether a person is a civilian entitled to LOAC protections requires an analysis of the facts; including the type of conflict; and the law applicable to those facts.

b. International Armed Conflict.

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[347] GC IV, *supra* note 15 at art. 20; AP I, *supra* note 40 at art. 15; *see also* LAW OF WAR MANUAL, *supra* note 20 at §§ 4.11, 4.12, and 4.26.
[348] LAW OF WAR MANUAL, *supra* note 20 at § 4.24; *see also* AP I, *supra* note 40 at art. 79.
[349] GC III, *supra* note 14 at art. 4(a)(4).
[350] LAW OF WAR MANUAL, *supra* note 20 at §§ 4.14 and 19.17.
[351] *Id.* at § 4.14.
[352] GC III, *supra* note 14 at art. 4(a)(4); *see also* LAW OF WAR MANUAL, *supra* note 20 at § 4.15.
[353] LAW OF WAR MANUAL, *supra* note 20 at § 5.8.
[354] *See* LAW OF WAR MANUAL, *supra* note 20 at § 4.2.3.
[355] *Id.*
[356] *See* Military Commissions Act of 2009 § 1802, 10 U.S.C. § 948a (2015) (defining "unprivileged enemy belligerents").

(1) GC IV and AP I.[357] GC IV does not define the term "civilian;" rather, it uses the term "protected persons" to refer to those persons protected by the convention. However, AP I, art. 50 defines "civilian" as "any person who does not belong to one of the categories of persons referred to in Article 4(A)(1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol." AP I, art. 43 states that "[t]he armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates." In case of doubt whether a person is a civilian, that person shall be considered to be a civilian." As the AP I Commentary explains, the Protocol contains a "negative definition" of civilian, which "follows a process of elimination and removes from the definition those persons who could by and large be termed 'combatants.'"[358] Accordingly, under AP I, art. 50, a person is a "civilian" if that person does not belong to one of the groups identified in GC III, art. 4(A) and AP I, art. 43, and is not otherwise taking a direct part in hostilities.

(2) Customary International Law. Remember that States also are bound by CIL, which is formed over time by the general and consistent practice of States followed from a sense of legal obligation (*opinio juris*). Determining CIL is not as precise an exercise as looking up a statute or even interpreting the holding of a judicial opinion. A thorough analysis (which cannot be completed in this Deskbook) should consider any existing U.S. views on the particular provision as well as other sources of CIL.

(a) U.S. Views. The DoD Law of War Manual and FM 6-27 contain the most current position of the Department of Defense as a whole on the law of war. Included in the Manual is a discussion on the U.S. position on AP I and AP II.[359]

(i) Prior to the publication of the DoD Law of War Manual, the most comprehensive U.S. statement on whether AP I provisions are considered CIL was a 1986 memorandum signed by attorneys from each of the four services for Mr. John McNeill, the Assistant General Counsel for International Affairs in the Secretary of Defense's Office.[360] At the time of that memo, the U.S. did not view the definition of "civilians" found in AP I, art. 50 "as already part of customary international law" or "supportable for inclusion in customary law through state practice."[361]

(ii) Another U.S. position on whether certain AP I provisions relevant to civilian protections are "deserving of treatment as customary law" is found in remarks made in 1987 by Mr. Michael Matheson, Deputy Legal Advisor, U.S. Department of State, at the Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law.[362] In his remarks, Mr. Matheson commented on U.S. support for certain principles espoused in various Articles of AP I, and stated that such principles "should be

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[357] Recall from the Chapter on the Framework of the Law of Armed Conflict that the international community created the Additional Protocols to supplement and update the 1949 Geneva Conventions and the 1907 Hague Regulations. As described more fully in this Chapter, AP I supplements the full GCs with civilian protections that are applicable in IACs, and AP II supplements CA 3 with civilian protections that are applicable in NIACs. The U.S. has signed, but not ratified, AP I and AP II so it is not bound by their provisions as a matter of treaty law. However, the U.S. considers itself bound by many AP I and AP II provisions as a matter of customary international law.

[358] COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 26 at 610-11.

[359] LAW OF WAR MANUAL, *supra* note 20 at § 19.20.

[360] Memorandum from W. Hays Parks, Chief, Int'l Law Branch, DAJA-IA, LCDR Michael F. Lohr, NJAG, Code 10, Lt Colonel Dennis Yoder, AF/JACI, and William Anderson, HQ USMC/JAR, 1977 Protocols Additional to the Geneva Conventions: Customary International Law Implications, for Mr. John H. McNeill, Assistant Gen. Counsel (Int'l), Office of the Sec'y of Def. (May 9, 1986) [hereinafter AP I CIL Memo]. This memorandum is available in the most recent copy of the Law of Armed Conflict Documentary Supplement published by the International and Operational Law Department at The Judge Advocate General's Legal Center and School, U.S. Army [hereinafter LOAC Documentary Supplement].

[361] *See id*.

[362] A summary of these remarks is available in the most recent copy of the LOAC Documentary Supplement. For Mr. Matheson's full remarks, *see* Martin P. Dupuis, et al., *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*, 2 AM. U. J. INT'L L. & POLICY 419, 426-28 (1987) [hereinafter Matheson's Remarks].

observed and in due course recognized as customary international law, even if they have not already achieved that status."[363] Mr. Matheson did not comment on AP I, art. 50 or its definition of "civilians."

(b) Other References.

(i) The ICRC CIL Database,[364] launched in August 2010 and built in large part upon the ICRC's study of CIL that it began in 1996 and published in 2005, contains two parts. The first part contains an analysis of CIL, and part two is a summary of State practice underlying those rules. The second part is updated regularly. Note, however, that the U.S. has disagreed with the ICRC's methodology used to determine many of the rules listed in its study and CIL Database.[365]

(ii) The ICRC CIL Database defines "civilians" for the purposes of IACs as "persons who are not members of the armed forces" and cites AP I, art. 50 and other sources as support for the customary status of the rule.[366]

(iii) The ICRC CIL Database excepts out of its customary definition of "civilians" applicable in IACs the *levée en masse* ("inhabitants of a country which has not yet been occupied, on the approach of the enemy, spontaneously take up arms to resist the invading troops without having time to form themselves into an armed force").[367]

c. Non-International Armed Conflict.

(1) Geneva Conventions CA 3 and AP II. Common Article 3 does not contain a precise definition of the term "civilian" for application in NIACs. It does, however, require "each Party to the conflict" to treat humanely "persons taking no active part in the hostilities" and it also lists specific acts that are prohibited against such persons. AP II provides specific protections for civilians during NIACs,[368] but it also does not contain a precise definition of the term "civilian."

(2) Customary International Law.

(a) U.S. Views. The U.S. has not expressed an official position on the customary status of a definition of civilians applicable in NIACs.

(b) Other References.

(i) The ICRC CIL Database recognizes the absence of any precise definition of the term "civilian" in AP II but asserts that "[i]t can be argued that the terms 'dissident armed forces or other organized armed groups … under responsible command' in Article 1 of Additional Protocol II inferentially recognized the essential conditions of armed forces, as they apply in international armed conflict, . . . and that it follows that civilians are all persons who are not members of such forces or groups."[369]

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[363] Matheson's Remarks, *supra* note 262 at 422.
[364] *Customary IHL*, INT'L COMMITTEE OF THE RED CROSS, http://www.icrc.org/customary-ihl/eng/docs/home [hereinafter ICRC CIL Database] (last visited 3 Jun. 2020).
[365] Letter from John Bellinger III, Legal Advisor, U.S. Dep't of State, and William J. Haynes, General Counsel, U.S. Dep't of Defense, to Dr. Jakob Kellenberger, President, Int'l Committee of the Red Cross, Regarding Customary International Law Study (Nov. 3, 2006), *reprinted in* 46 INT'L LEGAL MATERIALS 514 (2007) [hereinafter U.S. Letter on ICRC CIL Rules] ("[W]e are concerned about the methodology used to ascertain rules and about whether the authors have proffered sufficient facts and evidence to support those rules."); *see also*, John B. Bellinger III & William J. Haynes II, *A US Government Response to the International Committee of the Red Cross Study* Customary International Humanitarian Law, 89 INT'L REV. OF THE RED CROSS 443 (2007), http://www.icrc.org/eng/resources/documents/article/review/review-866-p443.htm. For a response to the U.S. position, see Jean-Marie Henckaerts, Customary International Humanitarian Law*: A Response to US Comments*, 866 INT'L REV. OF THE RED CROSS 473 (2007), https://www.icrc.org/en/international-review/article/customary-international-humanitarian-law-response-us-comments.
[366] ICRC CIL Database, *supra* note 364 at Rule 5.
[367] *Id*.
[368] *See* AP II, *supra* note 42.
[369] ICRC CIL Database, *supra* note 364 at Rule 5 (quoting MICHAEL BOTHE ET AL., NEW RULES FOR VICTIMS OF ARMED CONFLICTS 672 (1982).

(ii) The ICRC CIL Database also provides that "practice is not clear as to whether members of armed opposition groups are civilians subject to [ICRC CIL Database] Rule 6 on loss of protection from attack in case of direct participation or whether members of such groups are liable to attack as such, independently of the operation of Rule 6."[370]

(iii) Note, however, that the U.S. has disagreed with the ICRC's methodology used to determine many of the rules listed in its study and CIL Database.[371]

3. **Development of Civilian Protections During Armed Conflict**

a. Historical Background. Although the LOAC did not precisely define the term "civilian" until 1977, the concept of protecting civilians during conflict is ancient. Historically, three considerations motivated implementation of such protections.

(1) Desire of sovereigns to protect their citizens. Based on reciprocal self-interests, ancient powers entered into agreements, followed codes of chivalry, or issued instructions to soldiers in the hope similar rules would protect their own land and people if they fell under their enemy's control.

(2) Facilitation of strategic success. Military and political leaders recognized that enemy civilians who believed that they would be well treated were more likely to surrender and cooperate with occupying forces. Sparing the vanquished from atrocities facilitated ultimate victory.

(3) Desire to minimize the devastation and suffering caused by war. Throughout history, religious leaders, scholars, and military professionals advocated limitations on the devastation caused by conflict. This rationale emerged as a major trend in the development of the law of war in the mid-nineteenth century and continues to be a major focus of advocates of "humanitarian law."

b. The Lieber Code. Prior to the American Civil War, although treatises existed, there was no written "Law of War." Only customary law existed regarding the need to distinguish between combatants and civilians.

(1) Dr. Francis Lieber, a law professor at Columbia College in New York at the outset of the American Civil War, advised President Lincoln on law of war matters. In November 1862, Dr. Lieber and four General Officers drafted the Lieber Code. On April 24, 1863, the United States published the Lieber Code as General Orders No. 100, *Instructions for the Government of Armies of the United States in the Field*.[372] Incorporating customary law and contemporary practices, it was the first official copy of the laws of war published and implemented by a State.

(2) The Lieber Code contained 157 articles and ten sections. The first two sections contain specific language regarding civilians.

(a) Section I, Martial law—Military jurisdiction—Military necessity—Retaliation.

(b) Section II, Public and private property of the enemy—Protection of persons, and especially of women; of religion, the arts and sciences—Punishment of crimes against the inhabitants of hostile countries.

(3) **Lieber Code Principles on Treatment of Civilians**. The Lieber Code expressly condoned, under military necessity, starvation of civilians; however, it recognized civilian status and that the "unarmed citizen is to be spared in person, property, and honor as much as the exigencies of war will admit."[373] The Lieber Code contained at least eight articles specifically addressing civilians.[374]

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[370] ICRC CIL Database, *supra* note 364 at Rule 5. The database also explains that "most [military] manuals [of States] define civilians negatively with respect to combatants and armed forces and are silent on the status of members of armed opposition groups." *Id.*
[371] *See* U.S. Letter on ICRC CIL Rules, *supra* note 365.
[372] Lieber Code, *supra* note 267.
[373] Lieber Code, *supra* note 267 at art. 22.
[374] *E.g.*, Lieber Code, *supra* note 267 at art. 19 (warnings) and art. 23 (refrain from interfering in private lives of civilians).

c. Civilian Protections in the Modern Jus in Bello. By the early twentieth century, two methodologies for regulating the conduct of war developed under international law.

(1) The Hague Tradition. The Hague Tradition developed a focus on limiting the means and methods used in combat. Named for the series of treaties produced at the 1899 and 1907 Hague Conferences, instruments of the Hague Tradition restrict Parties' conduct of combat operations. The Hague treaties contain regulations regarding the means and methods of warfare during hostilities (regarding protection of civilian property) and protection of civilians during occupation, as listed below, but general civilian protections are not a focus of the Hague Tradition.

(a) Protections during Hostilities.

(i) No killing or wounding treacherously individuals belonging to the hostile nation (HR, art. 23(b)).[375]

(ii) No seizing or destroying enemy property unless imperatively demanded by military necessity (HR, art. 23(g)).

(iii) No compelling enemy nationals to assist in the war effort against their own nation (HR, art. 23(h)).

(iv) No attacking or bombarding towns, villages, dwellings, or buildings which are undefended (HR, art. 25).

(v) All necessary measures must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not being used at the time for military (HR, art. 27).

(vi) No pillaging (HR, art. 28).

(b) Protections of Civilians during Occupation. "Territory is considered occupied when it is actually placed under the authority of the hostile army." (HR, art. 42)

(i) Occupying power must restore and ensure public order and safety while respecting, unless absolutely prevented, the laws in force in the country. (HR, art. 43)

(ii) No coercing inhabitants of occupied territory to furnish information about the enemy army. (HR, art. 44)

(iii) No forcing inhabitants of occupied territory to swear an oath of allegiance to the hostile Power. (HR, art. 45)

(iv) No disrespecting family honor and rights, the lives of persons, and private property, or religious convictions and practice. (HR, art. 46)

(v) No pillaging. (HR, art. 47)

(2) The Geneva Tradition. The second methodology, the Geneva Tradition, focuses on treatment of war victims in the hands of enemy armed forces. Prior to World War II, the Geneva Conventions of 1864,[376] 1906,[377] and 1929[378] afforded protections to civilians only when they were aiding wounded soldiers.[379] Following

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[375] Hague IV, *supra* note 1.
[376] *See* 1864 Geneva Convention, *supra* note 38.
[377] *See* Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, 6 July 1906, Art. 5, 35 Stat. 1885, 1 Bevans 516.
[378] *See* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick of Armies in the Field, July 27, 1929, 47 Stat. 2074, 118 L.N.T.S. 303.
[379] As the Commentary to GC IV notes, "[t]he lack, at that time, of any recent international Convention for the protection of civilians is explained by the fact that it was until quite recently a cardinal principle of the law of war that military operations must be confined to the armed forces and that the civilian population must enjoy complete immunity. It is interesting to note, for example, that the Hague Conference in 1907 decided not to include a provision to the effect that the nationals of a belligerent

World War II, however, the international community signed the Fourth Geneva Convention to expressly protect civilians from the effects of armed conflict in the broader circumstances detailed below.

4. Protections Provided in the Fourth Geneva Convention

a. Background. World Wars I and II exposed civilians to increasingly destructive methods of warfare and arbitrary action while in the hands of their nations' enemies.[380] Consequently, as early as 1921, the ICRC began proposing the ratification of a Convention for the protection of civilians.[381] Only in the aftermath of World War II's devastating civilian carnage, however, did the international community finally recognize the need for such a Convention and sign GC IV.[382]

b. Organization. GC IV is organized in three Parts. Part I contains the Convention's General Provisions; Part II provides protections for "the whole of the populations of the countries in conflict;"[383] and Part III – "the main body of the Convention"[384] – provides additional protections for a specific category of civilians defined in Article 4 of the Convention as "protected persons."

(1) GC IV, Part I - General Provisions. Part I contains, among other Articles, Articles 2 and 3, which determine the Convention's application. It also contains Article 4, which defines a specific category of civilians – referred to as "protected persons" – that is entitled to the most robust set of protections under the Convention. Article 5 authorizes derogations from certain GC IV provisions in specific circumstances, and Article 8 prohibits "protected persons" from renouncing in part or in entirety their GC IV protections.

(a) Articles 2 and 3 (LOAC Triggers). Recall that, as a matter of law, full protection under the Geneva Conventions, including GC IV, exists only in the right type of conflict.[385]

(b) Article 4 ("Protected Persons"). As mentioned above, GC IV provides protections for two primary groups of civilians: 1) the whole of the civilian populations of the countries in conflict, covered in GC IV, Part II; and 2) the specifically defined category of "protected persons," covered in GC IV, Part III. GC IV, art. 4 defines who qualifies for this second group, "protected persons," under the Convention.

(i) Who is a "protected person" (GC IV, art. 4). "Persons protected by the Convention are those who, at a given moment and in any manner whatsoever find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals."

(1) This definition can create the mistaken belief that only "protected persons" as defined by GC IV, art. 4 are "protected by the Convention." However, a civilian may not qualify as a "protected person" as defined in GC IV, art. 4, but still be protected by the Convention if that civilian is part of the "whole population" of one of the countries in conflict, which is covered by GC IV, Part II. This result is confirmed by the third paragraph in GC IV, art. 4, which provides that the GC IV, Part II provisions are "wider in application" than those limited to "protected persons."[386]

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residing in the territory of the adverse Party should not be interned, considering that that principle went without saying." INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY, IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 3 (Jean S. Pictet ed., 1958) [hereinafter GC IV Commentary].

[380] JOHN NORTON MOORE, SOLVING THE WAR PUZZLE 91 (2004) ("World War II, with the associated Holocaust, produced at least forty million deaths. As many as 1,700 cities and towns and 70,000 villages were devastated in the Soviet Union. Over 40 percent of the buildings were destroyed in forty-nine of Germany's largest cities and many suffered much worse.")

[381] GC IV Commentary, *supra* note 379 at 4.

[382] *Id.* at 5.

[383] *Id.* at 118.

[384] *Id.*

[385] *See* GC IV, *supra* note 15 at art. 2.

[386] GC IV Commentary, *supra* note 379 at 50 ("It will be recalled that Part II has the widest possible field of application; it covers the whole population of the Parties to the conflict, both in occupied territory and in the actual territory of the Parties. It could have formed a special Convention on its own.").

(2) A key teaching point about the definition of "protected person" is that it "remains faithful to a recognized principle of international law: it does not interfere in a State's relations with its own nationals."[387]

(ii) Who is not a "protected person" (GC IV, art. 4).

(1) Nationals of a State not bound by the Convention *(all states are GC IV parties).*

(2) Nationals of a neutral State who are located in the territory of a belligerent State, as long as the neutral State has normal diplomatic representation in the belligerent State. In belligerent territory, the drafters believed that the "position of neutrals is still governed by any treaties concerning the legal status of aliens and their diplomatic representatives can take steps to protect them."[388]

(3) Nationals of a co-belligerent State (an ally), as long as their State has normal diplomatic representation in the State where they are located "or with the Occupying Power."[389]

(4) Persons protected by any of the other three GCs.

(iii) Determining whether a civilian qualifies for "protected person" status is important because while all "protected persons" under GC IV also are entitled to the "whole population" protections provided under GC IV, Part II, not all civilians entitled to the "whole population" protections under Part II qualify as "protected persons" entitled to protections under Part III. Accordingly, determining who qualifies and who does not qualify for "protected person" status under GC IV is critical to ensuring compliance with GC IV.[390]

(c) Article 5 (Derogations). GC IV, art. 5 provides for the suspension of certain protections afforded to "protected persons."

(i) Such derogations are authorized in two specific circumstances:

(1) Protected persons suspected or who have engaged in activities hostile to the security of the State in an enemy State's territory. In these circumstances, the State may suspend any right or privilege under GC IV that would prove prejudicial to the security of the State.

(2) Protected persons detained as spies, saboteurs, or suspected of activity hostile to an occupying power. In an occupation, the Occupying Power may suspend only rights of communication under GC IV.

(ii) While these provisions appear to subject "protected persons" in the territory of the detaining power to the potential suspension of a far larger number of protections than that relevant to a "protected person" in occupied territory, the GC IV Commentary suggests otherwise: "[T]he Article refers mainly to the relations of the detained person with the outside world, and that is the sphere in which restrictions will doubtless be applied."[391]

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[387] *Id.* at 46. The only exception to this rule is the case of nationals of an Occupying Power who sought refuge in the occupied State before hostilities. *Id.*
[388] *Id.* at 49.
[389] While the language of GC IV, art. 4 does not expressly contain this quoted text, the Commentary indicates that it should be read into the Article. *Id.*
[390] For examples of such legal analyses conducted at the national strategic level during ongoing military operations, see Memorandum Opinion from Jack L. Goldsmith III, Assistant Attorney Gen., U.S. Dep't of Justice, Office of Legal Counsel, to the Counsel to the President, subject: "Protected Person" Status in Occupied Iraq Under the Fourth Geneva Convention (Mar. 18, 2004), https://www.justice.gov/sites/default/files/olc/opinions/2004/03/31/op-olc-v028-p0035_0.pdf; Memorandum for the Files from Howard C. Nielson, Jr. Deputy Assistant Attorney Gen., U.S. Dep't of Justice, Office of Legal Counsel, subject: Whether Persons Captured and Detained in Afghanistan are "Protected Persons" under the Fourth Geneva Convention (Aug. 5, 2005), http://www.justice.gov/olc/docs/aclu-ii-080505.pdf. Note that the 2005 OLC memorandum relevant to GC IV and Afghanistan highlights in footnote 8 a conflict between official U.S. government legal interpretations of certain GC IV requirements and official U.S. policy requirements regarding GC IV implementation as promulgated in U.S. Army Field Manual (FM) 27-10 (1956), which was rescinded and replaced by FM 27-10 in 2019.
[391] GC IV Commentary, *supra* note 379 at 56.

(d) Article 8 (Renunciation Prohibited). In no circumstances may a "protected person" renounce in part or in entirety the rights afforded to them by GC IV.

(2) GC IV, Part II - Protection of the Entire Population. GC IV, art. 13 provides that "the provisions of Part II cover the whole of the populations of the countries in conflict, without any adverse distinction based, in particular, on race, nationality, religion or political opinion, and are intended to alleviate the suffering caused by war." GC IV Part II protections apply to every civilian in countries that are a party to an IAC, regardless of nationality or citizenship.[392] Some illustrative Part II protections follow below.

(a) GC IV, Part II – art. 14. Provides for, but does not mandate, the establishment of "hospital/safety zones" (permanent structures established outside combat area) to shelter from the effects of war the following specific groups of civilians:

(i) Wounded, sick, and aged persons;

(ii) Children under fifteen; and

(iii) Expectant mothers and mothers of children under seven.

(b) GC IV, Part II - art. 15. Provides for, but does not mandate, the establishment of "neutralized zones" (temporary zones in the area of combat) to shelter from the effects of war:

(i) Wounded and sick combatants and non-combatants;

(ii) Civilian persons who take no part in hostilities, and who, while they reside in the zones, perform no work of a military character.

(c) Additional Protections for the Entire Population. In addition to providing for the establishment of these "protected" zones, Part II also mandates the following protections:

(i) The wounded, sick, infirm and expectant mothers must be "respected and protected" by all parties to the conflict at all times. (GC IV, art. 16)

(ii) The parties to the conflict shall attempt to conclude agreements for the removal of wounded, sick, infirm, aged persons, and children and maternity cases from besieged areas, and for the passage of ministers and medical personnel/equipment to such areas. (GC IV, art. 17)

(iii) Civilian hospitals shall be respected and protected and shall not be the object of attack. (GC IV, art. 18)

(iv) Free passage of consignments of medical supplies and objects necessary for religious worship, and essential foodstuffs, clothing and tonics for children under 15, expectant mothers and maternity cases. (GC IV, art. 23)

(v) Protection and maintenance of children under 15 who are orphaned or separated from their families, including the exercise of their religion and education in all circumstances. (GC IV, art. 24)

(vi) The right to communicate with family via correspondence, and through a neutral intermediary if necessary. (GC IV, art. 25)

(3) GC IV, Part III – Protections for Protected Persons. Individuals who meet the definition of "protected person" are entitled to Part II protections. They are also entitled to additional protections from GC IV, Part III, as described below.

(a) Part III, Section I – Provisions Common to the Territories of the Parties to the Conflict and to Occupied Territories. Unlike the provisions in Part III, Sections II and III, the provisions in Part III, Section I apply to all "protected persons" regardless of whether they are located in the territory of a party to an armed conflict or in an occupied territory. "Protected persons are entitled, in all circumstances, to respect for their persons, their

[392] *See id*. at 50.

honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated." (GC IV, art. 27) Some illustrative Part III, Section I protections follow below.

(i) Respect for Their Persons. Intended to grant a wide array of rights to protect physical, moral, and intellectual integrities. (GC IV, art. 27; GC Commentary at 201)

(ii) Respect for Honor. Acts such as slander, insults, and humiliation are prohibited. (GC IV, art. 27; GC Commentary at 202)

(iii) Respect for Family Rights. Arbitrary acts which interfere with marital ties, the family dwelling, and family ties are prohibited. This is reinforced by GC IV, art. 82, that requires, in the case of internment, that families be housed together. (GC IV, art. 27; GC Commentary at 202)

(iv) Respect for Religious Convictions. Arbitrary acts which interfere with the observances, services, and rites are prohibited (only acts necessary for maintenance of public order/safety are permitted). (GC IV, art. 27; GC Commentary at 203)

(v) Respect for Manners and Customs. Intended to protect the class of behavior which defines a particular culture. This provision was introduced in response to the attempts by World War II Powers to effect "cultural genocide." (GC IV, art. 27; GC Commentary at 203)

(vi) No insults and exposure to public curiosity. (GC IV, art. 27)

(vii) No rape, enforced prostitution, and indecent assault on women. (GC IV, art. 27)

(viii) No using physical presence of protected persons to make a place immune from attack. (GC IV, art. 28)

(ix) No physical or moral coercion, particularly to obtain information. (GC IV, art. 31

(x) No actions causing physical suffering, intimidation, or extermination; including murder, torture, corporal punishment, mutilation, brutality, and medical/scientific experimentation. (GC IV, art. 32)

(xi) No collective penalties. (GC IV, art. 33)

(xii) No pillaging (under any circumstances or at any location). (GC IV, art. 33)

(xiii) No reprisals against the person or property. (GC IV, art. 33)

(xiv) No taking of hostages (GC IV, art. 34)

(b) Part III, Section II - Aliens in the Territory of a Party to the Conflict. The provisions in this Section apply only to "protected persons" who are located in the territory of a party to an IAC. They do not apply to "protected persons" located in occupied territory. Many of the rights and privileges granted in this Section, including some listed below, equal those provided to a nation's civilians.

(i) Right to Leave the Territory. (GC IV, art. 35). (Right may be overcome by the national interests (security) of the State.)

(ii) Right to Humane Treatment during Confinement. Protected persons are entitled to humane treatment when confined pending proceedings or subject to a sentence involving loss of liberty for a violation of penal law. (GC IV, art. 37)[393]

(iii) Right to receive relief packages, medical attention, and practice of their religion. (GC IV, art. 38)

[393] "[T]his Article is restricted to protected persons who are the subject of judicial measures either on preventive grounds or as a result of conviction and sentence. Persons to whom security measures are applied are protected under other provisions." GC IV Commentary, *supra* note 379 at 242.

(iv) Right to find paid employment, subject to security concerns, and the right to support if security concerns prohibit employment. (GC IV, art. 39)

(v) Limitations on the Type and Nature of Labor.

(1) Can be compelled to work only to the same extent as own nationals. (GC IV, art. 40)

(2) Cannot be compelled to do work that is directly related to the conduct of military operations. (GC IV, art. 40)

(vi) Internment. Protected persons in the territory of a party to an IAC may be interned or placed in assigned residence in accordance with other GC IV provisions if the security of the Detaining power makes it absolutely necessary. (GC IV, arts. 41-46), see the commentary to the GC as well.

(c) Part III, Section III - Occupied Territories. The provisions in this Section apply only to "protected persons" who are located in occupied territory. They do not apply to "protected persons" located in the territory of a party to an IAC. Some examples follow below.

(i) Repatriation. Protected persons who are not nationals of the occupied territory may leave the territory. (GC IV, art. 48)

(ii) Deportations, Evacuations, and Transfers. (GC IV, art. 49)

(1) Deportations of protected persons out of the occupied territory and forcible individual or mass transfers are prohibited.

(2) If security or military necessity requires it, the Occupying Power may partially or completely evacuate a given area, but not outside of occupied territory unless it cannot be avoided for material reasons.

(3) Occupying Power may not relocate its own population into occupied territory.

(iii) Children. (GC IV, art. 50)

(1) Occupying Power shall facilitate proper working of institutions devoted to care and education of children.

(2) Occupying Power shall take all necessary steps to facilitate identification of children and registration of parentage.

(3) Occupying Power shall arrange for the maintenance and education (if possible, by persons of the same nationality, religion, and language) of children orphaned or separated from their parents.

(4) Occupying Power shall take all necessary steps to identify children whose identity is in doubt.

(5) Occupying Power shall not hinder application of preferential treatment for children younger than age fifteen, expectant mothers, and mothers of children under age seven in terms of food, medical care, and protection against effects of war.

(iv) Property. Destruction of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations is prohibited except when military necessity requires such destruction. (GC IV, art. 53)

(v) Public Officials. Occupying Power may not alter the status of, apply sanctions to, or coerce or discriminate against public officials or judges in occupied territory should they abstain from fulfilling their functions for reasons of conscience. (GC IV, art. 54)

(vi) Food and Medical Supplies. Occupying Power has duty to ensure population has food and medical supplies, particularly if resources of occupied territory are inadequate. (GC IV, art. 55)

(vii) Hygiene and Public Health. Occupying Power has duty to ensure and maintain medical and hospital establishments and services and public health and hygiene in the occupied territory. (GC IV, art. 56)

(viii) Requisition of Hospitals. In cases of urgent necessity for care of military wounded and sick, the Occupying Power may requisition civilian hospitals temporarily provided that Occupying Power arranges for care of civilian patients; if materials and stores of civilian hospitals cannot be requisitioned if needed for the civilian population. (GC IV, art. 57)

(ix) Spiritual Assistance. Occupying Power shall allow clergy to provide religious and spiritual assistance to their religious communities; Occupying Power shall accept religious articles and books and arrange for their distribution. (GC IV, art. 58)

(x) Relief.

(1) Collective Relief. If all or part of the population of an occupied territory needs supplies, then the Occupying Power shall agree to and facilitate relief schemes through other states or the ICRC; provisions shall consist of food, clothing, and medical supplies; passage of such consignments must be permitted and protected. (GC IV, art. 59)

(2) Responsibilities of Occupying Power. Relief consignments do not relieve the Occupying Power of its obligations regarding food and medical supplies, hygiene, and public health, nor may the Occupying Power divert such relief consignments from their intended purpose. (GC IV, art. 60)

(3) Relief Consignments.

(a) Distribution. All contracting parties shall make every effort to ensure transit and transport of relief consignments to occupied territories; such consignments shall be exempt from charges, taxes, or customs duties. (GC IV, art. 61; AP I, art. 81)

(b) Individual Relief. Protected persons in occupied territories shall be allowed to receive individual consignments sent to them. (GC IV, art. 62)

(4) Relief Societies. Recognized national Red Cross, Red Crescent, and Red Lion and Sun societies shall be permitted to pursue their activities, as shall other humanitarian organizations; Occupying Power may not require changes to personnel or structure of such societies. (GC IV, art. 63)

(xi) Penal Laws. "[P]enal laws of the occupied territory shall remain in force" unless they constitute a threat to security or an obstacle to application of GC IV; subject to those same considerations, "the tribunals of the occupied territory shall continue to function" with respect to penal offences. (GC IV, art. 64)[394]

(xii) Internment. Protected persons in occupied territory may be interned or placed in assigned residence in accordance with other GC IV provisions if the Occupying Power considers it necessary for "imperative reasons of security." (GC IV, art. 78), see also the commentary to the GC.

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[394] The Occupying Power may subject the occupied population to provisions that are essential to enable the Occupying Power to comply with GC IV, to maintain orderly government in the territory, and to ensure the Occupying Power's security. GC IV, *supra* note 15 at art. 64. Any penal provisions enacted by the Occupying Power may not be retroactive and shall not come into force before publication to the occupied population in their native language. *Id.* at art. 65. Breaches of penal provisions enacted by the Occupying Power pursuant to GC IV, art. 64 may be tried in the Occupying Power's military courts if they are situated in the occupied territory. *Id.* at art. 66. Articles 67–77 contain additional GC IV provisions relevant to the Occupying Power's prosecution of protected persons for penal offences committed in occupied territory.

(d) Part III, Section IV - Regulations for the Treatment of Internees. This Section provides the protections required for all "protected persons" who are interned either in the territory of a party to an IAC or in occupied territory. Internment is the most severe form of non-penal related restraint permitted under GC IV. The parties to the conflict shall not intern protected persons, except in accordance with the provisions of Articles 41, 42, 43, 68, and 78 of the GC. Even if the Detaining Power finds that neither internment nor assigned residence serves as an adequate measure of control, it may not use any measure of control that is more severe. Some provisions relevant to internment follow below.[395]

(i) Internment is subject to periodic (6 months) review by a competent body. (GC IV, art. 79, referencing arts. 43 and 78)

(ii) Internees shall be grouped as families whenever possible. (GC IV, art. 82)

(iii) Separate from POWs and Criminals. Internees "shall be accommodated separately from prisoners of war and persons deprived of liberty for any other reason." (GC IV, art. 84)

(iv) Proper housing. (GC IV, art. 85)

(v) Premises suitable for holding religious services, of whatever denomination. (GC IV, art. 86)

(vi) Sufficient food, water, and clothes. (GC IV, art. 89)

(vii) Adequate infirmary with qualified doctor. (GC IV, art. 91)

(viii) Complete religious freedom. (GC IV, art. 93)

(ix) Right to control property and money. (GC IV, art. 97)

(x) Must post convention in native language, right to petition for redress of grievances and elect internee committee. (GC IV, arts. 99-102)

(xi) Right to notify family of location and send and receive letters. (GC IV, arts. 105-107)

(xii) Penal laws in place continue to apply to internees (subject to operational imperatives); internees cannot be sent to penitentiaries for disciplinary violations. (GC IV, art. 117)[396]; see arts. 118-126 for additional penal and disciplinary provisions)

(xiii) Transfers must be done safely and notice must be given to internee's family. (GC IV, art. 128)

(xiv) Interning power must ensure issuance of death certificates; must conduct inquiry if death of internee is caused by sentry or other internee. (GC IV, arts. 129-131)

(xv) Each internee shall be released "as soon as the reasons which necessitated his internment no longer exist." GC IV, art. 132. Internment shall cease as soon as possible after the close of hostilities. (GC IV, art. 133).

d. Civilian Protections under The Additional Protocols and Customary International Law

(1) Additional Protocols I and II.

(a) AP I – IACs. Part IV of AP I covers the civilian population in IACs. It is further subdivided into three Sections.

[395] *See* LAW OF WAR MANUAL, *supra* note 20 at § 10.9.
[396] *See* GC IV, *supra* note 15 at arts. 118-126.

(i) Section I (Arts. 48-67) provides general protections against the effects of IACs, and specifically supplements, among other rules, the "whole population" protections afforded by GC IV, Part II described above;

(ii) Section II (Arts. 68-71) covers relief actions for civilians primarily located in occupied territory; and

(iii) Section III (Arts. 72-79) governs the treatment of persons in the power of a party to an IAC, supplementing, among other rules, GC IV, Parts I and III.

(b) AP II – NIACs. AP II "develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949."[397]

(i) Part II of AP II contains provisions governing humane treatment in NIACs and is subdivided into three articles: Article 4 contains a list of "fundamental guarantees" for "[a]ll persons who do not take a direct part or who have ceased to take part in hostilities….;" Article 5 provides protections for persons interned or detained for reasons related to the NIAC; and Article 6 mandates basic procedural guarantees in prosecutions of criminal offenses related to the NIAC.

(ii) Part IV of AP II specifically covers civilian populations in NIACs via Articles 13-18.

(1) Civilians and the civilian population shall be protected from the dangers arising from military operations and shall not be targeted. (AP II, art. 13)

(2) Starvation of civilian populations is prohibited and objects that are "indispensable to the survival of the civilian population" are protected from attack. (AP II, art. 14)

(3) Works or installations that contain dangerous forces, such as dams, nuclear plants, etc., are protected from attack even when they are lawful military objectives, if their destruction would cause the release of dangerous forces and severe losses to the civilian population. (AP II, art. 15)

(4) Protection of cultural objects and places of worship. (AP II, art. 16)

(5) The forced movement of civilians is prohibited. (AP II, art. 17)

(6) Relief actions. (AP II, art. 18)

(2) Customary International Law. CIL also obligates States to provide LOAC protections for civilians. Accordingly, even though the U.S. is not bound by AP I and II as a matter of treaty law, it regards many AP I and AP II provisions relevant to civilian protections as binding CIL or otherwise consistent with U.S. practice.

(a) AP I civilian protections provisions regarded as CIL.

(i) U.S. Views.

(1) In 1986, the authors of the AP I CIL Memo viewed "as already part of customary international law" the following AP I Articles relevant to civilian protections: 51(2), 52(1), 52(2) (except for the reference to "reprisals"), 57(1), 57(2)(c), 57(4), 59, 60, 73, 75, 76(1), and 77(1).[398] They also opined that AP I, Articles 74, 76(2), 76(3), 77(2) – 77(4), 78 ("subject to the right of asylum and compliance with the [UN] Protocol on Refugees"), and 79 were "supportable for inclusion in customary law through state practice."[399]

[397] AP II, *supra* note 42 art. 1.
[398] *See supra* note 9 and accompanying text.
[399] *Id*.

(2) In his 1987 remarks, Mr. Matheson commented on U.S. support for certain principles espoused in various Articles of AP I, including several relevant to civilian protections.[400]

(3) On March 7, 2011, in a Fact Sheet on American policy for the detention facility at Guantánamo Bay, the U.S. President declared that the "U.S. Government will…choose out of a sense of legal obligation to treat the principles set forth in [AP I,] Article 75 as applicable to any individual it detains in an [IAC], and expects all other nations to adhere to these principles as well."[401]

(4) The 2015 DoD Law of War Manual discusses the DoD view of AP I and what provisions are consistent with U.S. practice, supported by the U.S., and objected to by the U.S.[402]

(ii) Other References. The ICRC CIL Database references many provisions of AP I, including those relevant to civilian protections, as customary international law applicable in IACs.[403] It also cites other sources as justification for the CIL status of "rules" applicable in IACs.[404]

(b) AP II civilian protections provisions regarded as CIL.

(i) U.S. Views.

(1) In 1987, the Reagan Administration submitted AP II to the Senate for its advice and consent to ratification, subject to certain reservations and understandings.[405] Reagan's Secretary of State, George Shultz, concluded at that time that "the obligations contained in [AP II] are no more than a restatement of the rules of conduct with which U.S. military forces would almost certainly comply as a matter of national policy, constitutional and legal protections, and common decency."[406] Secretary of State Shultz also wrote at that time, however, that AP II's provisions "are not uniformly observed by other States."[407]

(2) To date, the Senate has not provided its advice and consent to ratification of AP II but the Obama Administration has recognized that "[U.S.] military practice is already consistent with the Protocol's provisions" and has urged the Senate to consent to ratification of AP II.[408]

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[400] *See* Matheson's Remarks, *supra* note 262, and accompanying text.
[401] Fact Sheet, *supra* note 23.
[402] LAW OF WAR MANUAL, *supra* note 20 at § 19.20.1.
[403] ICRC CIL Database, *supra* note 364 at Rule 5.
[404] *See, e.g.*, *id.*. The Rule 5 commentary relevant to IACs recognizes that in addition to the definition of civilians found in AP I, Article 50, support for the customary status of the Rule can also be found in *Prosecutor v. Tihomir Blaškić*, IT-95-14-T, Judgment, ¶ 180 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 3, 2000), http://www.icty.org/x/cases/blaskic/acjug/en/bla-aj040729e.pdf (defining civilians within the meaning of the ICTY's statute as "persons who are not, or no longer, members of the armed forces"). *But see* U.S. Letter on ICRC CIL Rules, *supra* note 365.
[405] Reagan, *supra* note 41.
[406] *Id.*
[407] *Id.*
[408] Fact Sheet, *supra* note 401. *See also* LAW OF WAR MANUAL, *supra* note 1, at § 19.20.2.1.

(ii) Other References. The ICRC CIL Database references many provisions of AP II, including those relevant to civilian protections, as reflective of customary international law applicable in NIACs.[409] It also cites other sources as justification for the CIL status of "rules" applicable in NIACs.[410]

[409] ICRC CIL Database, *supra* note 364.

[410] *See, e.g.*, *id.* at Rule 24, Removal of Civilians and Civilian Objects from the Vicinity of Military Objectives. The Rule 24 commentary recognizes that while AP II does not explicitly contain a provision directly on point, compliance with AP II, Article 13(1) would be difficult "when civilian persons and objects are not removed from the vicinity of military objectives whenever feasible." *Id.* The commentary further notes that the Rule's customary status is also supported through other instruments pertaining to NIACs, including the Second Protocol to the Hague Convention for the Protection of Cultural Property. *Id.* (citations omitted). *But see* U.S. Letter on ICRC CIL Rules, *supra* note 365.

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CHAPTER 3

THE LAW OF ARMED CONFLICT

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 resort to armed force; the conduct of hostilities and the protection of war victims in both international and non-international armed conflict; belligerent occupation; and the relationships between belligerent, neutral, and non-belligerent States."[1] It is often termed the law of armed conflict (LOAC) and sometimes called international humanitarian law (IHL). The LOAC "comprises treaties and customary international law applicable to the United States."[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 certain actions necessary to defeat the enemy as quickly and efficiently as possible that are not prohibited by LOAC."[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.

1. Military necessity does not authorize acts otherwise prohibited by the LOAC. The principle of military necessity 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.

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[1] U.S. DEP'T OF DEF., LAW OF WAR MANUAL, § 1.3 (Jun. 2015, updated Dec. 2016) [hereinafter LAW OF WAR MANUAL]
[2] *Id.*
[3] Department of Defense Directive 2311.01E, *DoD Law of War Program*, para, 4.1 (9 May 2006, certified current 22 Feb. 2011).
[4] FM 6-27/MCTP 11-10C, *The Commander's Handbook on the Law of Land Warfare* (Aug. 2019) [hereinafter FM 6-27] para. 1-21.

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

a. The LOAC prohibits making the civilian population and other protected persons (such as military medical and religious personnel,[5] persons placed *hors de combat*,[6] and civilians[7]) the object of attack.

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.[8] 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.[9] 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."[10]

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."[11]

d. Judge advocates must consider the law of war when advising commanders about military justice or adverse administrative actions arising out of combat operations. Judge advocates should consult OTJAG's Administrative Investigations & Criminal Law Supplement on Targeting and the Law of War before advising commanders in this area.[12]

e. 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.

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[5] LAW OF WAR MANUAL, *supra* note 1 at § 2.5.2, 4.9.
[6] *Id.* at 5.9.
[7] *Id.* at 5.2.
[8] *See* HR art. 23(g), LAW OF WAR MANUAL, *supra* note 1 at § 5.6.3.
[9] *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.
[10] *Id.* at 1297.
[11] S. EXEC. 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.
[12] Targeting and the Law of War, Administrative Investigations & Criminal Law Supplement, OTJAG, Army (30 May 2017).

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.[13]

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 treats as a single military objective a number of clearly separated and distinct military objectives in a city, town, or village . . ." [14]); 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[15] or collateral damage excessive in relation to concrete and direct military advantage[16]); and

d. "consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction."[17]

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."[18] See discussion of Military Objectives *infra*.

3. Distinction applies both offensively and defensively. Offensively, it requires parties to a conflict to direct military force only against combatants and military objectives. Defensively, the principle of distinction requires parties to a conflict "(1) take certain measures to help ensure that military forces and civilians can be visually distinguished from one another; (2) physically separate, as feasible, their military objectives from the civilian population and other protected persons and objects; and (3) refrain from the misuse of protected persons and objects to shield military objectives."[19]

4. Precautions in the Attack. "Combatants must take feasible precautions in conducting attacks to reduce the risk of harm to civilians and other protected persons and objects."[20] Feasible precautions may include adjusting the timing of the attack or selecting certain weapons. In some situations, warnings may be required. See discussion of the Warning Requirement *infra*.

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[13] LAW OF WAR MANUAL, *supra* note 1 at § 2.5; *see also* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), Geneva, 8 Jun. 1977, art. 48 [hereinafter AP I]. As stated above, the United States is not a party to AP I, *supra* note 13 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* LAW OF WAR MANUAL, *supra* note 1 at § 19.20.
[14] AP I, *supra* note 13 at art. 51, para. 5(a).
[15] *Id.* at art. 56. The United States does not entirely accept this article. *See* LAW OF WAR MANUAL, *supra* note 1 at § 5.13.
[16] AP I, *supra* note 13 at art. 51, para. 5(b).
[17] *Id.* at art. 51, para. 4(c).
[18] *Id.* at 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).
[19] LAW OF WAR MANUAL, *supra* note 1 at § 2.5.3. On the duty to distinguish defensively, *see* W. Hays Parks, *Special Forces' Wear of Non-Standard Uniforms*, 4 CHI. J. INT'L L. 493, 514 (2003). *See also* LAW OF WAR MANUAL, *supra* note 1 at § 5.21, 5.22, 5.23, and 5.25.
[20] *Id.* at §§ 5.11, 5.2.3.2; *see also* AP I, *supra* note 13 at art. 57, para. 2. AP I states that those who plan an attack shall do everything "feasible" to verify that the objectives to be attacked are neither civilians nor civilian objects, and take all "feasible" precautions in the choice of means and methods of attack to minimize individual civilian losses. In the 1987 Matheson Memo, Deputy Department of State Legal Advisor Michael Matheson provided the U.S. interpretation of "feasible" under Art. 57-60 to mean "practicable."

C. **Principle of Proportionality.** The principle of proportionality requires commanders to refrain from attacks in which the expected harm incidental to such attacks would be excessive in relation to the concrete and direct military advantage anticipated to be gained. The principle of proportionality also requires commanders to take feasible precautions in planning and conducting attacks to reduce the risk of harm to civilians and other persons and objects protected from being made the object of attack. [21]

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."[22]

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."[23] "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.[24] 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 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.[25]

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."[26] 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, lances with barbed heads, etc.), 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. [27]

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

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[21] LAW OF WAR MANUAL, *supra* note 1 at § 2.4; *see also* FM 6-27, *supra* note 4 at para. 1-44.
[22] AP I, *supra* note 13 at art. 51, para. 5(b).
[23] *Id.* at art. 49, para. 1.
[24] LAW OF WAR MANUAL, *supra* note 1 at § 5.12.2.
[25] *See, e.g.*, DOD FINAL REPORT TO CONGRESS, CONDUCT OF THE PERSIAN GULF WAR (April 1992), p. 611.
[26] HR, art. 23(e).
[27] LAW OF WAR MANUAL, *supra* note 1 at § 6.6.

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.[28] 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.[29] Chivalry is not based on reciprocity, it 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." The United States considers it unlawful to kill or wound by resort to perfidy. However, it is not unlawful to capture by resort to perfidy.[30] 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, and feigning noncombatant or neutral status. Perfidy, therefore, involves injuring the enemy through the enemy's 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."[31] 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.[32] 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

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[28] LAW OF WAR MANUAL, *supra* note 1 at § 2.6.
[29] Convention IV Respecting the Law and Customs of War on Land and its Annex: Regulations Concerning the Law and Customs of War on Land. The Hague, 18 Oct. 1907 [hereinafter Hague IV], art. 23; FM 6-27, *supra* note 4 at para. 1-31.
[30] LAW OF WAR MANUAL, *supra* note 1 at § 5.22.2.1.
[31] Francis Lieber, War Department, Instructions for the Government of Armies of the United States in the Field art. 58 (1863) para. 101, *reprinted in* The Laws Of Armed conflicts 3 (Dietrich Schindler & Jiri Toman eds., 3d rev. ed. 1988).
[32] AP I, *supra* note 13 at art. 1(4).

to guerrilla warfare, internal rebellions, and transnational terrorist operations could all qualify as NIACs.[33] 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 the 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 frequently arise. The United States, United Nations, and NATO have long required that their forces apply the LOAC in these operations,[34] 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 that would trigger the LOAC, Judge Advocates (JA) should consult with attorneys within 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 follow its requirements exactly. Even where not directly applicable, U.S. practice has been to comply with the LOAC to the extent "practicable and feasible."[35] In military operations short of international armed conflict, LOAC treaties provide an invaluable template for military conduct. The Soldier's Rules[36] 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 the 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.**[37] "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 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 1907 Regulations Respecting the Laws and Customs of War on Land annexed to Hague IV; hence the term "Hague Regulations."[38]

B. **Geneva Conventions of 1949**.[39] 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."

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[33] U.S. Dep't of State, International Law, Legal Diplomacy, and the Counter-ISIL Campaign, Apr. 1, 2016, http://www.state.gov/s/l/releases/remarks/255493.htm (discussing how the United States characterizes its military activities against ISIL).
[34] *See, e.g.*, DoDD 2311.01E, *supra* note 3 at para. 4.
[35] *See* Memorandum of W. Hays Parks to the Judge Advocate General of the Army, 1 October 1990.
[36] Included *infra* in this chapter, Appendix A.
[37] *See* Hague IV, *supra* note 29 at and Hague IX (1907).
[38] Hague IV, *supra* note 29 at, arts. 22-41.
[39] *See generally* Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, August 12, 1949 [hereinafter GC I]; Convention II for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked members of Armed Forces at Sea, Geneva, August 12, 1949 [hereinafter GC II]; Convention III Relative to the Treatment of Prisoners of War. Geneva, August 12, 1949 [hereinafter GC III]; Convention IV Relative to the Treatment of Civilian Persons in Time of War. Geneva, August 12, 1949 [hereinafter GC IV].

C. **1977 Additional Protocols to the Geneva Conventions**.[40] 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.[41] 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 Documentary Supplement. Implementing LOAC guidance for U.S. armed forces is found in DoD, joint, and service regulations, policies, manuals, and doctrine.[42]

VIII. PERSONS NOT SUBJECT TO ATTACK UNDER THE LOAC

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).[43] 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. **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 they are in the power of an adverse party, if they have surrendered, if they are parachuting from an aircraft in distress, or if they are incapacitated by wounds, sickness, or shipwreck.[44] It is prohibited to attack enemy personnel who are *hors de combat*.[45]

2. Members of the armed forces who are wounded or sick[46] and who cease to fight are to be respected and protected, as are shipwrecked members of the armed forces at sea.[47]

3. Medical units and establishments may not be attacked intentionally.[48] 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,[49]" and, if after a reasonable time, they fail to heed a warning to desist.[50]

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[40] *See generally* AP I *supra* note 13; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), Geneva, 8 Jun. 1977, art. 1 [hereinafter AP II]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Adoption of an Additional Distinctive Emblem (Protocol III), 8 Dec. 2005 [hereinafter AP III].
[41] *See* Memorandum from Hays Parks, Chief International Law Branch, to Mr. John H. McNeill, Assistant 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; *see also* LAW OF WAR MANUAL, *supra* note 1 at § 19.20.
[42] *See*, *e.g.*, FM 6-27, *supra* note 4; NWP 1-14M/MCTC 11-10B, *The Commander's Handbook on the Law of Naval Operations* (Aug. 2017); AFPD 51-4; Joint Publication 3-60, *Joint Targeting* (31 January 2013).
[43] AP I, *supra* note 13 art. 51(3).
[44] LAW OF WAR MANUAL, *supra* note 1 at § 5.9.
[45] *Id.*
[46] GC III, *supra* note 39 at art. 12.
[47] GC II, *supra* note 39 at art. 12.
[48] *Id.* at art. 19.
[49] 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. *See* LAW OF WAR MANUAL, *supra* note 1 at § 7.8.3.
[50] GC I, *supra* note 39 at art. 21; LAW OF WAR MANUAL, *supra* note 1 at § 7.10.3.2.

4. Medical personnel "exclusively engaged" in medical duties,[51] chaplains,[52] personnel of national Red Cross Societies, and other recognized relief organizations,[53] 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.[54] Medical personnel 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.

D. **Protections for Civilians**. LOAC provides extensive protections for civilians. 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 made the object of direct (intentional) attack.[55] While the term "civilian" is used in different ways in the law of war, [56] in general a civilian is "a person who is neither part of nor associated with an armed force or group, nor otherwise engaging in hostilities."[57]

2. Specific Protections.

a. Civilian Medical and Religious Personnel. Such personnel shall be respected and protected.[58] 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.

b. Journalists. Protected as "civilians" provided they take no action inconsistent with their status.[59] Engaging in journalism does not constitute taking a direct part in hostilities. If captured while accompanying military forces in the field, a journalist or war correspondent is entitled to POW status.[60]

c. Personnel Engaged in the Protection of Cultural Property.[61] Article 17 of the Hague Cultural Property Convention established a duty to respect (not directly attack) persons protecting such property. These individuals are treated like military medical and religious personnel.[62]

d. 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).[63] They may be at 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.[64] Civilians who take a direct part in hostilities forfeit protection from being made the object of attack. This rule will be discussed in more detail below.

IX. PERSONS SUBJECT TO ATTACK UNDER THE LOAC

A. **General Rules**. 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. Lawful combatants also are privileged belligerents, i.e., authorized to use force against the enemy. On the other hand, unprivileged belligerents are persons who, by engaging in hostilities, have incurred one or more of the corresponding liabilities of combatant status (e.g.,

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[51] GC I, *supra* note 39 at art. 24.
[52] *Id.*
[53] GC I, *supra* note 39 at art. 26,
[54] INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY: I GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD 221 (Jean S. Pictet ed. 1952) [hereinafter GC I Commentary].
[55] AP I, *supra* note 13 arts. 48, 51(2).
[56] LAW OF WAR MANUAL, *supra* note 1 at § 4.8.1.
[57] *Id.* at § 4.8.1.5.
[58] GC IV, *supra* note 39 at art. 20; AP I, *supra* note 13 art. 15; *see also* LAW OF WAR MANUAL, *supra* note 1 at § 4.11, 4.12, and 4.26.
[59] LAW OF WAR MANUAL, *supra* note 1 at § 4.24; *see also* AP I, *supra* note 13 art. 79.
[60] GC III, *supra* note 39 at art. 4(a)(4).
[61] LAW OF WAR MANUAL, *supra* note 1 at §§ 4.14 and 19.17.
[62] *Id.* at § 4.14.
[63] GC III, *supra* note 39 at art. 4(a)(4); *see also* LAW OF WAR MANUAL, *supra* note 1 at § 4.15.
[64] *Id.* at § 5.8.

being made the object of attack and subject to detention), but who are not entitled to any of the distinct privileges of combatant status (e.g., combatant immunity and POW status).[65]

B. **Lawful Combatants**.

1. Lawful combatants include:

a. The regular armed forces of a State Party to the conflict;

b. 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; and

c. Participants in the *levée en masse*.[66] A *levée en masse* is a spontaneous uprising of the inhabitants of non-occupied territory who, on the approach of the enemy in an international armed conflict, take up arms to resist the invading forces, without having time to form themselves into regular armed units.[67]

2. Lawful Combatants as defined in the LOAC:

a. Are entitled to carry out attacks on enemy military personnel and equipment;

b. May be the subject of lawful attack by enemy military personnel;

c. 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;

d. May be tried for breaches of the LOAC;

e. May only be punished for breaches of the LOAC as a result of a fair and regular trial (similar to procedure for capturing nation's soldiers); and

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

C. **Members of Non-State Armed Groups**.

1. Like members of an enemy State's armed forces, individuals who are formally or functionally part of a non-State armed group that is engaged in hostilities may be made the object of attack because they likewise share in their group's hostile intent.[68] Judge advocates should look to their ROE to determine which groups may be attacked.

2. <u>Determining membership in the non-State armed group</u>. Formal or functional criteria may be used to determine whether an individual is a member of a non-State armed group. A person may not be made the object of attack based on his or her association with a non-State armed group if that association has clearly been severed.[69] In other words, once a person has quit the group, they may no longer be attacked based on membership (though they may be attacked if another valid basis exists).

a. <u>Formal Membership</u>. Formal membership may exist where a person has a rank/title, has taken an oath of loyalty to the group, wears a uniform or other identifying clothing, or where a person has membership documents.[70] Other factors exist—for details consult para. 5.7.3.1 of the DoD Law of War Manual.

b. <u>Functional Membership</u>. Functional membership may exist where a person is integrated into the group such that the group's hostile intent may be imputed to him or her, even if not formally a member of the group.

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[65] *Id.* at § 4.3.
[66] *Id.* at § 5.7.2.
[67] *Id.* at § 4.7.
[68] *Id.* at § 5.7.3.
[69] *Id.* at § 5.7.3.3.
[70] *Id.* at § 5.7.3.1.

This usually occurs with groups that are not organized in a formal command structure. Persons who are merely sympathetic to the group's goals are not functional members. Consult para. 5.7.3.2 of the DoD Law of War Manual for details. Criteria to determine functional membership include whether a person:

(1) follows directions issued by the group or its leaders;

(2) takes a direct part in hostilities on behalf of the group on a sufficiently frequent or intensive basis; or

(3) performs tasks on behalf of the group similar to those provided in a combat, combat support, or combat service support role in the armed forces of a State.[71]

D. **Civilians Directly Participating in Hostilities**.

1. Civilians who take a direct part in hostilities forfeit protection from being made the object of attack.[72]

a. 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 meaning and limits of the concept of DPH remains hotly contested.[73] 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).

c. More difficult cases arise as conduct becomes less connected 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. This proposal and others remain debated by nations, warfighters, and scholars alike.[74]

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[71] *Id.* § 5.7.3.2.

[72] *Id.* at § 5.8.

[73] This paragraph is based on the editor's best understanding of accepted parameters in an ongoing debate that encompasses both academic and real world considerations. JAs should be aware that the International Committee of the Red Cross has 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), 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), 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).

[74] *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,

e. 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.

f. The United States approach begins by recognizing that members of hostile, non-state armed groups are combatants who may be targeted based on their formal or functional membership in the armed group.[75] In such cases, U.S. forces need not conduct a DPH analysis, as group membership provides the proper basis for attack (see discussion above).

g. For individuals not part of a hostile, non-state armed group, U.S. forces use a case-by-case[76] DPH analysis based on the factors listed in Paragraph 5.8.3 of the DoD Law of War Manual. After considering the relevant LOAC factors and the information available at the time, appropriate authorities may, if authorized under the current theater ROE, either engage such personnel or declare them hostile (see the Rules of Engagement chapter for further details). 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.

h. Under the LOAC, individuals who DPH remain subject to attack until they have permanently ceased their participation.[77] This means that the concept of DPH is broader than the concept of unit self-defense in the SROE. Theater ROE may limit the authority to engage individuals who are directly participating in hostilities but not currently committing hostile acts or demonstrating hostile intent.

E. **Leaders**.[78]

1. Military leaders are subject to attack on the same basis as other members of the armed forces. Similarly, leaders of non-State armed groups are also subject to attack on the same basis as other members of the group. There is no objection to making a specific enemy leader who is a combatant the object of attack.

2. Leaders who are not members of an armed force or armed group (including heads of State, civilian officials, and political leaders) may be made the object of attack if their responsibilities include the operational command or control of the armed forces. For example, as the commander-in-chief of the U.S. armed forces, the President would be a legitimate target in wartime, as would, for example, the Prime Minister of a constitutional monarchy. In contrast, the reigning monarch of a constitutional monarchy with an essentially ceremonial role in State affairs may not be made the object of attack.

3. In addition to leaders who have a role in the operational chain of command, leaders taking a direct part in hostilities may also be made the object of attack. Planning or authorizing a combat operation is an example of taking a direct part in hostilities. As a matter of practice, attacks on the national leadership of an enemy State have often been avoided on the basis of comity and to help ensure that authorities exist with whom peace agreements may be concluded.

X. MILITARY OBJECTIVES AND PROTECTED PLACES

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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.

[75] LAW OF WAR MANUAL, *supra* note 1 at §§ 4.18.4.1 and 5.8.2.1.

[76] *Id.* at § 5.8.3. *See generally* Parks, *supra* note 82; Schmitt, *supra* note 82. *See also* Col W. Hays 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 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. Hays 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).

[77] LAW OF WAR MANUAL, *supra* note 1 at § 5.8.4.

[78] *Id.* at § 5.7.4.

A. **Military Objectives**. Military objectives are "any object which by its nature, location, purpose or use makes 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."[79]

1. Determining Military Objectives**.** Military equipment, bases, and certain objects containing military objectives are always military objectives.[80] Other objects not expressly military become military objectives when they satisfy both elements of the above two-part test.

a. This test, derived from AP I,[81] sets forth criteria establishing when military necessity may exist to consider an object a lawful target that may be seized or attacked.[82] 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 subscribes to this definition, as evidenced by its ratification of several CCW Protocols with identical definitions and incorporation into FM 6-27.

b. 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. 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 then that object has 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 test for Military Objectives. The AP I military objective definition/test, which FM 6-27 and several weapons treaties[83] 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 objective is not enemy military forces and equipment, the second part of the test limits the ability to attack 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 civilians or civilian objects must comply with the principle of proportionality.

a. Nature, location, purpose or use as making an effective contribution to military action:[84]

(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: 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.

(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

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[79] CCW Amended Protocol II, art. 2(6); *see also* AP I, *supra* note 13 at art. 52(2); LAW OF WAR MANUAL, *supra* note 1 at § 5.6.
[80] LAW OF WAR MANUAL, *supra* note 1 at § 5.6.4.
[81] *Id.* at § 5.6.3.
[82] *Id.*
[83] FM 6-27, *supra* note 4 at para. 2-29; CCW Protocol II, art. 2(4); CCW Amended Protocol II, art. 2(6); CCW Protocol III, art. 1(3).
[84] LAW OF WAR MANUAL, *supra* note 1 at § 5.6.6.

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 billeting for enemy troops.

b. Destruction, capture or neutralization offers a definite military advantage:[85]

(1) 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.

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

(3) 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.**[86]

1. Civilians. Unless circumstances do not permit, effective advance warning must be given for any attack that may affect the civilian population.[87] This rule only applies if civilians are present. Warnings need not be specific as to time and location of the attack, but can be general and issued through broadcasts, leaflets, etc. If civilians are present, a duty also exists to take feasible precautions to minimize civilian casualties.[88] *Consider* AP I Art. 51, 52 and 57. Feasible precautions are those that are practicable or practically possible, taking into account all circumstances ruling at the time, including humanitarian and military considerations.[89]

2. Religious, Cultural, and Historic Sites.[90] Parties are prohibited from using cultural property in a manner likely to expose it to destruction or damage in the event of armed conflict. Also, cultural property may not be destroyed or damaged unless military necessity imperatively requires such acts. Even where imperative military necessity exists, feasible precautions should be taken to reduce the risk of harm to cultural property.[91] Judge advocates should note that cultural property is a term of art under the law of war—see DoD Law of War Manual, para. 5.18.

3. Hospitals. Hospitals are also protected from attack under GC I. Hospitals and medical facilities that are currently being used wrongfully for military purposes nonetheless **always** require warnings before attack under Art. 19 and 21 of GC I and AP I Art. 13. The **sole exception** to this rule is when a unit is actively taking fire from the hospital and is returning fire in self-defense.[92] Warnings need not be specific as to time and location of the attack, but can be general and issued through broadcasts, leaflets, etc.

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[85] *Id.* at § 5.6.7.
[86] Hague IV, *supra* note 29 at, art. 26. Hague IV, *supra* note 29 at art. 26 calls for warnings if civilians are present for bombardment, unless a surprise attack is planned. AP I art. 57 calls for advance warning if attacks may effect civilian targets, unless "circumstances do not permit."
[87] LAW OF WAR MANUAL, *supra* note 1 at § 5.11.5.
[88] *Id.* at § 5.11.
[89] *Id.* at § 5.2.3.2.
[90] *Id.* at § 5.18.
[91] *Id.* at § 5.18.3.1.
[92] Hague IV, *supra* note 29 at art. 26-27. *See also* LAW OF WAR MANUAL, *supra* note 1 at § 7.17.1.2. Note that while the law does not always require a warning for some protected sites, an individual nation's policy/ROE may be more restrictive.

C. **Defended Places**. 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.[93]

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).[94]

2. While the HR, Article 25, prohibits attacking undefended "habitations or buildings," the term was used in the context of intentional bombardment. Such structures remain civilian objects and immune from intentional attack unless they meet the test for a military objective discussed above.

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.[95] 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."[96] 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.[97] While Article 52(3) of AP I provides for a presumption of civilian status for objects traditionally associated with civilian use (dwellings, school, etc.[98]), the United States has rejected this view. The United States applies the same test to all targets, requiring commanders to act in good faith based on the information available at the time.[99] The presence of civilians in a military objective does not alter its status as a military objective.

2. Medical Units and Establishments; Hospitals.[100] 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."[101] As discussed above, both fixed and mobile medical units[102] and hospitals[103] require warnings before attack.

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[93] Hague IV, *supra* note 29 at art. 25; *see also* LAW OF WAR MANUAL, *supra* note 1 at § 5.15.
[94] FM 6-27, *supra* note 4 at, para. 2-122.
[95] GC I, *supra* note 39 at art. 23; GC IV, *supra* note 39 at art. 14; LAW OF WAR MANUAL, *supra* note 1 at § 5.14.3.1.
[96] LAW OF WAR MANUAL, *supra* note 1 at § 5.18.8.
[97] FM 6-27, *supra* note 4 at, para. 5-1; *see also* AP I, *supra* note 13 art. 51, para. 2.
[98] AP I, *supra* note 13 art. 52(3).
[99] LAW OF WAR MANUAL, *supra* note 1 at § 5.4.3.2.
[100] FM 6-27, *supra* note 4 at para. 4-6; GC I, *supra* note 39 at art. 19.; GC IV, *supra* note 39 at arts. 18 & 19.
[101] GC I, *supra* note 39 at art. 21; LAW OF WAR MANUAL, *supra* note 1 at § 7.10.
[102] LAW OF WAR MANUAL, *supra* note 1 at § 7.10.3.2.
[103] *Id.* at § 7.17.1.2.

3. Medical Transport. Transports of the wounded and sick or of medical equipment shall not be attacked.[104] While GC I, article 36, only protects medical aircraft from direct attack if they fly in accordance with an agreement between the parties, known medical aircraft are not military objectives liable to attack regardless of the existence of an agreement.[105] AP I contains a new regime for medical aircraft protection.[106] 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.

4. Cultural Property.[107] 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."[108] 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." 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. As discussed above, there are situations where a warning is required before cultural property that has lost its protection may be attacked. Judge advocates should be aware that there are limitations on both attack of cultural property and the use of cultural property for military purposes. Consult § 5.18 of the DoD Law of War Manual for details.

G. **Works and Installations Containing Dangerous Forces**.[109] The United States has objected to AP I's detailed rules governing attacks on works and installations containing dangerous forces. 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). The United States view is that such targets may be lawfully engaged under LOAC, but raise significant proportionality concerns.[110] The United States did not object to AP II's similar rules in non-international armed conflicts—consult DoD Law of War Manual paragraph 17.7.1 for details.

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.[111] Starvation of civilians as a method of combat is prohibited in both international and non-international armed conflict.[112]

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[104] GC I, *supra* note 39 at art. 35.
[105] LAW OF WAR MANUAL, *supra* note 1 at § 7.14.1.
[106] AP I, *supra* note 13 arts. 24-31.
[107] LAW OF WAR MANUAL, *supra* note 1 at § 5.18; *see generally* 1954 Cultural Property Convention.
[108] 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).
[109] AP I, *supra* note 13 art. 56; AP II, art. 15.
[110] LAW OF WAR MANUAL, *supra* note 1 at § 5.13; *see* CJCSI 3160.01B for more information about applying the CDE methodology to such targets.
[111] LAW OF WAR MANUAL, *supra* note 1 at § 5.20.
[112] *Id.*

I. **Protective/Distinctive Emblems**.[113] Objects and personnel displaying certain protective or distinctive emblems are presumed to be protected under the Conventions.[114]

1. Medical and Religious Emblems. The recognized emblems are the Red Cross, Red Crescent, and the newly-ratified Red Crystal.[115] 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 space on either side being taken up by a white triangle."[116] 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.[117] Works and installations containing dangerous forces include dams, dikes, and nuclear power facilities.

XI. 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."[118] To properly advise war fighters, JAs must be proficient not only in *what* legally may be targeted, but also *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.[119] 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.[120]

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 poison, poisoned weapons, poisonous gases, and other chemical weapons; biological weapons; certain environmental modification techniques; weapons that injure by fragments that are non-detectable by X-rays; certain types of mines, booby-traps, and other devices; and lasers specifically designed to cause permanent blindness to unenhanced vision.[121]

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

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[113] FM 6-27, *supra* note 4 at para. 4-7.
[114] GC I, *supra* note 39 at art. 38.
[115] AP III, *supra* note 40; LAW OF WAR MANUAL, *supra* note 1 at § 7.15.
[116] 1954 Cultural Property Convention, arts. 16, 17; LAW OF WAR MANUAL, *supra* note 1 at § 5.18.7.
[117] AP I, *supra* note 13 annex I, art. 16.
[118] Hague IV, *supra* note 29 at, art. 22.
[119] *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].
[120] *See* CLAMO website at http://www.jagcnet.army.mil/clamo (contact CLAMO for authorization).
[121] FM 6-27, *supra* note 4 at para. 2-203; LAW OF WAR MANUAL, *supra* note 1 at § 6.6.

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 in greater detail 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 or her 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.[122] 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 Documentary Supplement 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.

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. 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 Ottawa treaty.[123] Per a February 2004 U.S. Presidential Memorandum under George W. Bush, and after its 2010 deadline, the United States no longer employed anti-personnel landmines that do not automatically self-destruct or self-neutralize (sometimes called "dumb" or "persistent" anti-personnel land (APL) mines).[124] However, on September 23, 2014, the Obama Administration went further and announced that it would discontinue production of all anti-personnel landmines, regardless of whether they were persistent or non-persistent. The policy also halted any service life extension of existing APLs through maintenance. In addition, the policy statement prohibited the *use* of any anti-personnel landmines (persistent or non-persistent) outside the Korean peninsula. This restriction to the Korean peninsula was removed by the Trump Administration on January 31, 2020. Today, anti-personnel landmines (only non-persistent types existed in the current U.S. inventory after 2010) are authorized for storage and possible use if combatant commanders authorize the use of landmines in a major combat situation. Those landmines will include necessary safeguards to prevent them from being a threat to civilians after a conflict ends.[125]

c. Protocol III does not ban incendiary weapons but restricts their use near civilian areas 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

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[122] *See generally* CCW.
[123] *See* The International Campaign to Ban Land Mines, at http://www.icbl.org/ (includes treaty history, text, and parties).
[124] U.S. Land Mine Policy can be found at http://www.state.gov/t/pm/wra/. The 2004 policy announcement can be found at http://www.dod.mil/pubs/landminepolicy/fact_sheet_feb_2004.pdf.
[125] Statement attributable to Vic Mercado, Performing the Duties of Assistant Secretary of Defense for Strategy, Plans and Capabilities. https://www.defense.gov/Newsroom/Releases/Release/Article/2071692/landmine-policy/.

purpose is not burn injury to persons.[126] Thus, white phosphorous is not an incendiary weapon 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.[127] 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, soft-skinned vehicles, artillery, and large enemy personnel concentrations. In particular, they are far more effective than conventional bombs against large area targets that are lightly armored. 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. Under U.S. policy, CMs are not mines, are legal under the laws of armed conflict, and are not designed to go off as anti-personnel devices. However, disturbing or disassembling submunitions may explode them and cause civilian casualties.[128]

a. Another NGO-initiated treaty, the 2008 Convention on Cluster Munitions (CCM), 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, including France, Germany, and the United Kingdom, but the nations that manufacture or use CMs (Russia, China, India, Israel) 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. In 2017, DoD changed its CM policy. The current policy requires procurement of CM that have either a less than 1% unexploded ordnance (UXO) rate or possess advanced features to minimize UXO risk.[129] It also requires military departments to budget to procure compliant CM. In the meantime, however, it allows Combatant Commanders to approve legacy cluster munitions if necessary. 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.[130] Such marking and clearance activities are required by the new CM policy. From 2008-2011, the United States also sponsored an unsuccessful effort to add a new CCW Protocol regulating—but not banning—cluster munitions.[131] The Obama Administration reiterated its opposition to the CCM.

3. Exploding Bullets. 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.[132] The prohibition on projectile weight must be distinguished from overall cartridge weight.

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[126] LAW OF WAR MANUAL, *supra* note 1 at § 6.14.1.
[127] *Id.* at § 6.15.1.
[128] *Id.* at § 6.13.
[129] *See* Deputy Secretary of Defense, Memorandum for Secretaries of the Military Dep'ts et. al., SUBJECT: DoD Policy on Cluster Munitions, 30 Nov 2017, https://www.defense.gov/Portals/1/Documents/pubs/DOD-POLICY-ON-CLUSTER-MUNITIONS-OSD071415-17.pdf.
[130] *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).
[131] *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/.
[132] LAW OF WAR MANUAL, *supra* note 1 at § 6.5.4.3. Four hundred grams refers to projectile weight, not the full cartridge weight. For the purposes of visualization, 400 grams is roughly the projectile weight of a 25 mm cannon round.

4. Hollow point or soft point ammunition. Hollow point or soft-point ammunition consists of 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. While expanding military small arms ammunition is prohibited by the 1899 Hague Declaration Concerning Expanding Bullets, the United States is not a party to this treaty, and takes the position that the "law of war does not prohibit the use of bullets that expand or flatten easily in the human body. Like other weapons, such bullets are only prohibited if they are calculated to cause superfluous injury."[133] "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.

5. Poison. Poison has been outlawed for generations, and is prohibited by treaty.[134]

6. Biological Weapons.[135] 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.[136] The United States has renounced all use of biological and toxin weapons.

7. Chemical Weapons.[137] 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 state's 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 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).[138] 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.[139] 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[140] 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

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[133] LAW OF WAR MANUAL, *supra* note 1 at § 6.5.4.4.
[134] Hague IV, *supra* note 29 at, art. 23(a).
[135] LAW OF WAR MANUAL, *supra* note 1 at § 6.9; *see also* 1925 Geneva Protocol; BWC.
[136] *See* BWC.
[137] LAW OF WAR MANUAL, *supra* note 1 at § 6.8; *see generally* Geneva Gas Protocol; CWC.
[138] LAW OF WAR MANUAL, *supra* note 1 at § 6.16.
[139] Exec. Order No. 11850, 3 C.F.R., 1971-1975 Comp, p. 980 (1975).
[140] U.S. Senate Consent to Ratification of the CWC, S. Exec. Res. 75 sec. (2)(26), 105th Cong. (1997).

"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.[141]

(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, 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.[142]

c. Herbicides. E.O. 11850 renounces first use in armed conflicts, except for domestic uses and to control vegetation around defensive areas. Use of herbicides in war by the U.S. armed forces requires Presidential approval.[143]

XII. MEANS OF WARFARE: STRATEGIES AND TACTICS

A. **Ruses**.[144] "Ruses of war are acts that are intended to mislead an adversary or to induce him to act recklessly, but that do not infringe upon any rule of international law applicable in armed conflict and that are not perfidious because they do not invite the confidence of an adversary with respect to protection under that law."[145] Ruses of war are permissible.[146] 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.[147] Example: 1991 Gulf War: Coalition forces, specifically XVIII Airborne Corps and VII Corps, used phony weapons to create the impression that they were going to attack near the Kuwaiti boot heel, as opposed to the "left hook" strategy actually implemented.[148] 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.[149] Under the U.S. position, 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 the escape.[150] Military personnel captured in enemy uniform or civilian clothing risk being treated as spies.[151] In contrast, under the European view espoused by Article 39 of Additional Protocol I, the use of enemy uniforms is prohibited in virtually all cases.

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[141] U.N. Charter ch. VI.
[142] *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.
[143] LAW OF WAR MANUAL, *supra* note 1 at § 6.17.4.
[144] FM 6-27, *supra* note 4 at para. 2-172; LAW OF WAR MANUAL, *supra* note 1 at § 5.21.
[145] LAW OF WAR MANUAL, *supra* note 1 at § 5.25.
[146] Hague IV, *supra* note 29 at, art. 24.
[147] FM 6-27, *supra* note 4 at para. 2-176.
[148] RICK ATKINSON, CRUSADE 331-33 (1993).
[149] LAW OF WAR MANUAL, *supra* note 1 at § 5.23.1. 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).
[150] GC III, *supra* note 39 at art. 93.
[151] FM 6-27, *supra* note 4 at paras. 2-157 through 2-163; NWP 1-14M, *supra* note 42 at para. 12.5.3.

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[152] 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.[153]

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.[154]

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.[155] The current and long-standing 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 (such as the use of deceptive lighting) 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 and status prior to engaging in hostilities.[156]

B. **Military Information Support Operations (MISO)**. Formerly known as psychological operations (PSYOP), MISO are lawful.[157] 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.[158]

C. **Treachery and Perfidy.** The LOAC prohibits treachery and perfidy used to kill or wound.[159] Perfidy involves injuring the enemy by the enemy's 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.[160]

1. Perfidy Used to Capture. "Acts of perfidy are acts that invite the confidence of enemy persons to lead them to believe that they are entitled to, or are obliged to accord, protection under the law of war, with intent to betray that confidence."[161] It is prohibited to kill or wound the enemy by resort to perfidy. However, the United States does not support AP I Article 37's prohibition of capture by resort to perfidy.[162]

2. Perfidy and Misuse of Certain Signs. In addition to perfidy, it is prohibited to misuse certain signs regardless of whether the purpose is to kill or wound.[163] Included are such signs as uniforms and emblems of a neutral state (though some exceptions exist), the distinctive emblems of the Geneva Conventions (such as the Red Cross, Red Crescent, Red Crystal), markings for POW or Civilian Internee camps, markings for hospital, safety, or neutralized zones, markings for cultural property, flags of truce, and distinctive and visible signs to identify civilian

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[152] Hague IV, *supra* note 29 at, art. 23(f).
[153] FM 6-27, *supra* note 4 at para. 2-164; NWP 1-14M, *supra* note 42 at para 12.5. AP I, *supra* note 13 at article 39(2) outlaws such use, but the United States objects to this term.
[154] Hague IV, *supra* note 29 at, art. 53. *See* LAW OF WAR MANUAL, supra note 1 at §§ 5.17 and 11.18.
[155] AP I, *supra* note 13 art. 39(3).
[156] NWP 1-14M, *supra* note 42 at paras. 12.3.1 & 12.5.1. LAW OF WAR MANUAL, *supra* note 1 at § 13.13.
[157] LAW OF WAR MANUAL, *supra* note 1 at § 5.26.
[158] *See* R. B. Adolph, *PSYOP: The Gulf War Force Multiplier*, Army Magazine 16 (Dec. 1992).
[159] LAW OF WAR MANUAL, *supra* note 1 at § 5.22. Hague IV, *supra* note 29 at. art. 23(b).
[160] FM 6-27, *supra* note 4 at para. 2-151
[161] LAW OF WAR MANUAL, *supra* note 1 at § 5.22.1.
[162] *Id.* at § 5.22.2.
[163] *Id.* at § 5.24.

objects as such.[164] Since the intent of the misuse need not be to kill or wound, this prohibition is broader than the rule against perfidy.

3. Prohibited acts include:

a. Use of a flag of truce to gain time for retreats or reinforcements.[165]

b. Feigning surrender or the intent to negotiate under a flag of truce.[166]

c. 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.[167] 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.

d. Declaring that no quarter will be given or killing/injuring enemy personnel who surrender.[168]

e. Compelling nationals of the enemy state to take part in hostilities against their own country.[169]

D. **Espionage.**[170] 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.[171] 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.[172] Offering rewards for information leading to capture of an individual, or attacking military command and control or personnel is not assassination, nor prohibited.[173]

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.[174] 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.[175]

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.[176]

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,

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[164] *Id.*
[165] Hague IV, *supra* note 29 at, art 23(f).
[166] AP I, *supra* note 13 art 37(1)(a).
[167] Hague IV, *supra* note 29 at art. 23(f).
[168] *Id.*
[169] *Id.*
[170] FM 6-27, *supra* note 4 at para. 7-110; AP I, *supra* note 13 art. 46; LAW OF WAR MANUAL, *supra* note 1 at § 4.17.
[171] *See* UCMJ art. 106.
[172] E.O. 12333.
[173] *See* W. Hays Parks, *Memorandum of Law: Executive Order 12333 and Assassination*, ARMY LAW, Dec. 1989, at 4.
[174] FM 6-27, *supra* note 4 at para. 8-74.
[175] LAW OF WAR MANUAL, *supra* note 1 at § 18.18.
[176] Hague IV, *supra* note 29 at, art. 47; GC I, *supra* note 39 at art. 15; GC II, *supra* note 39 at art. 18; GC IV, *supra* note 39 at art. 33; LAW OF WAR MANUAL, *supra* note 1 at § 5.17.4.

and regulations." The law authorizes the retention of captured weapons as souvenirs if rendered unserviceable and approved jointly by DoD and the Bureau of Alcohol, Tobacco, and Firearms (BATF). Implementing directives have not been promulgated.

2. 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 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."

XIII. MILITARY OCCUPATION

A. **The Nature of Military Occupation.** Territory is considered occupied when it is actually placed under the authority of the hostile armed forces. The occupation extends only to territory where such authority has been established and can effectively be exercised.[177] 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.[178] 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.[179] It is also forbidden to compel the inhabitants of occupied territory to swear allegiance to the hostile occupying power.[180] 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.[181] 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.[182]

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

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[177] Hague IV, *supra* note 29 at, art. 42; LAW OF WAR MANUAL, *supra* note 1 at § 11.2.
[178] FM 6-27, *supra* note 4 at para. 6-18.
[179] *See* GC IV, *supra* note 39 at art. 47.
[180] Hague IV, *supra* note 29 at, art. 45.
[181] Hague IV, *supra* note 29 at, art. 43.
[182] LAW OF WAR MANUAL, *supra* note 1 at § 11.4; *see also* 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.

obstacles to application of the GC IV.[183] 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.[184] 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.[185] 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.[186]

3. The occupying power is forbidden from destroying or seizing enemy property unless such action is "imperatively demanded by the necessities of war,"[187] or "rendered absolutely necessary by military operations."[188] Pillage, that is, the unauthorized taking of private or personal property for personal gain or use, is expressly prohibited.[189] 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.[190]

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.[191]

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.[192] However, the inhabitants may be employed voluntarily in such activities.

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

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

2. If the occupant considers it necessary, as a matter of imperative security needs, it may assign protected persons to specific residences or internment camps.[193] Security detainees should not be subjected to "prolonged arbitrary detention."[194] The occupying power may also enact penal law provisions, but these may not come into

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[183] LAW OF WAR MANUAL, *supra* note 1 at § 11.5.2; *see* GC IV *supra* note 39 at art. 64.
[184] GC IV, *supra* note 39 at art. 49.
[185] *Id.* art. 55.
[186] *Id.* at art. 50.
[187] Hague IV, *supra* note 29 at, art. 23.
[188] GC IV, *supra* note 39 at art. 53.
[189] Hague IV, *supra* note 29 at, art. 47; GC I, *supra* note 39 at art. 15; GC II, *supra* note 39 at art. 18; GC IV, *supra* note 39 at art. 33.
[190] Hague IV, *supra* note 29 at, art. 52; FM 6-27, *supra* note 4 at para. 6-102.
[191] GC IV, *supra* note 39 at art. 51.
[192] *See id*.
[193] *Id.* at art. 78.
[194] 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.

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.[195]

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 their language of the charges, 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, the accused is entitled to petition against the conviction and sentence to the competent authority of the occupying power.[196]

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.[197] 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.[198]

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.[199]

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."[200]

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.

XIV. NEUTRALITY

A. **General.** 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:

1. The territory of the neutral state is inviolable.[201] 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.[202] In consequence, the efforts of the neutral to resist, even by force, attempts to

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[195] GC IV, *supra* note 39 at art. 65.
[196] *Id.* at arts. 72, 73.
[197] *Id.* at art. 68.
[198] *Id.* at art. 68; *see also* LAW OF WAR MANUAL, *supra* note 1 at § 11.11.5.
[199] GC IV, *supra* note 39 at arts. 74, 75.
[200] Hague IV, *supra* note 29 at art. 50; GC IV, *supra* note 39 at art. 33.
[201] Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, 18 Oct. 1907 [hereinafter Hague V], art. 1.
[202] *Id.* at art. 2.

violate its territory cannot be regarded as hostile acts by the offending belligerents.[203] However, if the neutral is "*unwilling or unable*" 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.[204] 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.[205]

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.[206] 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.[207]

4. The nationals of a neutral state are also considered as neutrals.[208] 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.[209] 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 neutral status if they commit hostile acts against a belligerent or acts in favor of a belligerent, such as enlisting in its armed forces. However, such a person is not to be more severely treated than would be a national of the enemy state for the same acts.[210]

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.[211]

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 Council, pursuant to Articles 42 and 43 of the Charter, to join in collective military action against an aggressor state,

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[203] *Id.* at art. 10.
[204] *Id.* at art. 3.
[205] *Id.* at art. 9. Note that this theory has application to the cyber realm today. Some analysts argue that the transmission of computer code/packets through neutral countries is not a neutrality violation as long as "effects" are not being created in the neutral state.
[206] *Id.* at art. 14; *see* GC I, *supra* note 39 at art. 37.
[207] GC I, *supra* note 39 at art. 37.
[208] Hague V, *supra* note 201 at art. 16.
[209] *See* GC IV, *supra* note 39 at art. 4.
[210] Hague V, *supra* note 201 art. 17.
[211] *See* 18 U.S.C. 956-68; 22 U.S.C. 441-57, 461-65.

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.[212]

XV. 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.[213]

2. 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.

3. 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 an impartial, neutral, and independent humanitarian organization 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. ICRC access and notification is required by statute.[214] 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.[215]

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[212] *See generally* LAW OF WAR MANUAL, *supra* note 1 at § 15.2.3.
[213] 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.
[214] National Defense Authorization Act for Fiscal Year 2016, Pub. L. No. 114-92, § 1045, 129 Stat. 726, 977-79 (2015).
[215] Memorandum, Sec'y of Def, SUBJECT: Handling of Reports from the [ICRC] (14 July 2004).

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.[216] The JA can quickly identify and resolve many LOAC 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 AOR and the organization can serve as an additional resource to resolve various legal and humanitarian matters.

XVI. 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.[217]

2. In the case of other persons subject to trial by general courts-martial for violating the laws of war[218] the charge shall be "Violation of the Laws of War" rather than a specific UCMJ article.

3. The War Crimes Act of 1997[219] 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;[220]

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[216] General Prugh (former TJAG) fulfilled the task of "interfacing" with the ICRC when he was the legal advisor to CDR, MACV in Vietnam. General Prugh relates that during the early stages of Viet Nam, OTJAG concluded that the U.S. was involved in an Art 3, not Art 2, conflict. In June '65 the situation had changed, and by Aug '65 a formal announcement was made that art. 2 now applied. Soon, ICRC delegates began to arrive, and it fell upon the judge advocates to meet with the delegates. This role continued in operations in Grenada, Panama, Somalia, Haiti, and during the Gulf War. The development of this liaison role was also apparent in Haiti, particularly in the operation of Joint Detention Facility.
[217] FM 6-27, *supra* note 4 at para. 8-39.
[218] UCMJ, art. 18.
[219] 18 U.S.C. § 2441.
[220] LAW OF WAR MANUAL, *supra* note 1, §§ 18.4 and 18.23.1.

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

c. "In order for the commander to be liable, however, the commander's personal dereliction must have contributed to or failed to prevent the offense; the commander is required to take necessary and reasonable measures to ensure that their subordinates do not commit violations of LOAC."[221] While this principle has long been recognized in the Army Field Manual, the ICRC has concluded that this principle of command responsibility also operates as a matter of customary international law.[222]

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 potential responsibility for war crimes committed by subordinates. JAs must also review "all plans, policies, directives, and rules of engagement issued by the command and its subordinate commands."[223] 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 other (generally minor) offenses, investigations can be conducted with organic assets and legal support, using AR 15-6.[224] (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 several instances. The first is when the suspected offense violates Title 18 of the United States Code. The second is where the offense is one of the violations of the UCMJ listed in Appendix B to AR 195-2, Criminal Investigation Activities (generally felony-level offenses). HQDA may also direct CID to investigate.[225]

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.[226] 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.

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[221] FM 6-27, *supra* note 4 at para. 8-29.
[222] *See generally* LAW OF WAR MANUAL, *supra* note 1 at § 18.23.3; *see also* JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 211 (2005).
[223] DoDD 2311.01E, *surpa* note 3 at para. 5.11.
[224] U.S. DEP'T OF ARMY, ARMY REGULATIONS 15-6, PROCEDURES FOR INVESTIGATING OFFICERS AND BOARDS OF OFFICERS (2016).
[225] U.S. DEP'T OF ARMY, ARMY REGULATIONS 195-2, CRIMINAL INVESTIGATIVE ACTIVITIES para. 3-3a(6) (2014).
[226] A reportable incident includes conduct during military operations other than war that would constitute a violation of the law of war if it occurred during an armed conflict.

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

a. High friendly losses.

b. High turnover rate in the chain of command.

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

d. Poorly trained or inexperienced troops.

e. The lack of a clearly defined enemy.

f. Unclear orders.

g. High frustration level among the troops.

2. Clear, unambiguous orders are a responsibility of good leadership. Soldiers who receive ambiguous orders or who receive orders that clearly violate the 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 there was no intent to commit a war crime. If the superior insists that the 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 a 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. 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. LOAC RIGHTS AND OBLIGATIONS 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; DoD Law of War Manual paras. 5.17.3, 11.18.6). 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 (retroactive) lease 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 6-27, para. 6-111; DoD Law of War Manual para 5.17.3.1). Examples of property which might be seized include arms and ammunition in contractor factories; radio, TV, and other communication equipment; 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 6-27, para. 6-2). Public personal property that has some military use may be confiscated without compensation. (FM 6-27, para. 2-199; DoD Law of War Manual para. 11.18). The occupying military may always take temporary possession of enemy property (real or personal, and public or private) where required for direct military use in military operations. In the case of private property, an occupying military, where possible, should requisition the property and offer compensation to the owner force (Hague IV, art. 52; FM 6-27, para. 6-98). 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 6-27, para. 6-98; DoD Law of War Manual para. 11.18.6).

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 6-27, para. 6-98; DoD Law of War Manual para. 11.18.6). 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. LOAC RIGHTS AND OBLIGATIONS 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 6-27, para. 3-109). POWs may not be used as a source of labor for work of a military character or purpose. (GC III, art. 49; FM 6-27, para. 3-111). 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 6-27, para. 3-112). Civilians considered protected persons and enemy nationals may not be compelled to take part in military operations against their own country. (GC IV, art. 51; DoD Law of War Manual para. 5.27).

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 6-27, para. 6-138).

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 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 4

INTERNATIONAL HUMAN RIGHTS LAW

I. INTRODUCTION

A. International human rights law (IHRL) focuses on a 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 seeks to protect the individual when subject to an abuse of power by a State and impose obligations to protect the rights of the individual.

B. International human rights law exists 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; however, the trend is towards broad extraterritorial application. 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 form until after World War II. Previously, how States treated their own citizens was regarded largely as a purely domestic matter. Extant 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. The systematic abuse and near-extermination of entire populations by States during the first half of the 20th Century opened the door to regulation of such conduct and aided the acceptance of IHRL. This new body of law established standards and 'pierced the veil' of sovereignty by directly regulating how States treat people within their own borders.[4]

B. The Nuremberg War Crimes Trials are an early 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 (in addition to violations of the laws and customs of war), violations of the customary "laws of humanity."[5]

C. Human rights occupied a central place in the newly formed United Nations. The Charter of the United Nations contains several provisions dealing directly with human rights. One of the earliest General Assembly resolutions, the Universal Declaration of Human Rights (UDHR), is considered foundational international human rights law instrument.

D. In the decades following the establishment of United Nations, IHRL experienced significant growth. Two of the most significant international human rights treaties, the International Covenant on Civil and Political Rights[6] (ICCPR) and the International Covenant on Economic Social and Cultural Rights[7] were adopted and opened for signature in 1966, then came into force in 1976. Since the 1970s, news media, private activism, public diplomacy,

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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.").
[5] Charter of the International Military Tribunal, Article 6, August 8, 1945, 82 U.N.T.S. 279 ("murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war…whether or not in violation of the domestic law of the country where perpetrated.").
[6] Int'l Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR]
[7] Int'l Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3.

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.[8]

III. HUMAN RIGHTS TREATIES

A. **Major Human Rights Treaties**. Human rights treaties cover a wide range of subjects. The United States did not ratify major international human rights treaties until 1988. Table 1 lists ten treaties that the United Nations considers core human rights treaties.[9] Each is administered by a separate treaty-monitoring international body.[10]

Table 1. Core United Nations Human Rights Treaties[11]

TREATY	SUBJECT	OPEN	MONITOR	U.S. STATUS[12]
CPPCG	Genocide	1948	Various	Ratified 1988
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
UNCTOC	UN Conv Against Trans Org Crime	2000	UNTOC	Ratified 2005
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.

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[8] *See generally* 22 U.S.C. § 2304(a)(1) (2018) ("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 (July 2017) ("Above all, we value the dignity of every human life, protect the rights of every person, and share the hope of every soul to live in freedom"); 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)

[9] *See also* the UN online database of multi-lateral treaties deposited with the Secretary-General, chapter IV on Human Rights, https://treaties.un.org/pages/Treaties.aspx?id=4&subid=A&clang=_en.

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

[11] 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).

[12] Current as of May 15, 2020.

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.[13] As noted, this focus of IHRL was groundbreaking when it emerged after World War II. Previously, such protections were viewed as a function of domestic law. The remainder of this section briefly describes two of the most consequential treaties for military practitioners and the bodies that monitor the application of the rights they provide.[14]

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 either authoritatively interpret or enforce the provisions of the ICCPR.

b. The ICCPR addresses so-called "first generation rights" which are restrictions on government as opposed to entitlements from government. These include the most fundamental and basic rights and freedoms (e.g., life, liberty). Part III of the Covenant lists substantive rights.

c. The ICCPR appears to be 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 . . ." The United States interprets this clause narrowly, although this is now the minority view. Many commentators and human rights bodies argue for a disjunctive reading of "and," such that the ICCPR would cover any person under the control of a Party.[15] The International Court of Justice has held aspects of the ICCPR apply extraterritorially in certain circumstances, such as cases of belligerent occupation.[16]

d. The First Optional Protocol empowers private parties to file "communications" with the UNHRC, which evolved to operate as a basis for individual causes of action under the ICCPR where domestic remedies have been exhausted. The Second Optional Protocol seeks to abolish the death penalty. The United States is not a party to either protocol.

e. The protections described in the ICCPR are also covered by several regional treaties, such as the European Convention on Human Rights (ECHR). Described more fully below, these regional treaties cover many of the same rights as the ICCPR but may offer additional or more explicit protections and human rights courts where individuals may bring claims against States for violations of their human rights.

2. **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.[17]

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."

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[13] *See* RESTATEMENT, *supra* note 2.

[14] 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. *See* RESTATEMENT, *supra* note 2.

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

[16] S*ee, e.g.*, Armed Activities on the Territory of the Congo (Democratic Republic of the Congo (DRC) v. Uganda), Judgment, ICJ, 19 Dec. 2005.

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

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. During the conflicts in Iraq and Afghanistan, the United States did not recognize a transfer of an individual in the territory of Iraq or Afghanistan from U.S. to host-nation control as a *refoulement*. However, the United States did on occasion stop transfers in response to reports of abuse as a matter of policy.

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.

C. **The United States Treaty Process**

1. 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.[18] 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. Executive Order 13107 describes the policy and practice of the U.S. Government related to the implementation of human rights obligations.[19]

2. **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 are essential to mustering political support for ratification. 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. 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.[20] 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."[21]

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."[22]

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.[23]

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[18] 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/.
[19] Executive Order No. 13107, Implementation of Human Rights Treaties, 63 Fed. Reg. 68991 (10 December 1998).
[20] 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) [hereinafter Vienna Convention].
[21] S. EXEC. REP. NO. 102–23, at 11–12 (1992).
[22] *Id.*
[23] *See e.g., id.* ("[T]he United States declares that the provisions of Articles 1 through 27 of the Covenant are not self-executing.").

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.[24] The United States reaffirmed its position regarding the non-extraterritorial nature of the ICCPR in March 2014.[25] This theory of treaty interpretation is referred to as "non-extraterritoriality."[26] As noted above regarding the CAT, not all human rights treaties contain non-extraterritorial scope language. The UN Human Rights Committee does not share the U.S. non-extraterritoriality view with regard to the ICCPR.[27] 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. In practice, such an expansive view could mean that the U.S. military would have to provide due process and law enforcement style protections to detainees on the battlefield. Judge advocates working with other nations should recognize that their interpretation of the application of IHRL treaties such as the ICCPR or one of its regional analogues may differ from the United States' view. This may restrict their operations which can in turn affect U.S. operations.[28]

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.

a. According to treaty interpretation doctrine, although treaties entered into by the United States become part of the "supreme law of the land," [29] some are not enforceable in U.S. courts absent subsequent legislation or executive order to "execute" the obligations created by such treaties. This relates primarily to the ability of a litigant to secure enforcement of a treaty provision in U.S. courts.[30]

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."[31] The U.S. position is that its unilateral statement of intent, made through the vehicle of a declaration during the ratification process, is determinative of the intent of the parties. 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.[32]

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[24] 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 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).
[25] *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. *See also* U.S. DEP'T OF DEF., DoD LAW OF WAR MANUAL § 1.6.3.3 (Dec.2016) [hereinafter LAW OF WAR MANUAL].
[26] *See* Theodor Meron, *Extraterritoriality of Human Rights Treaties*, 89 Am. J. Int'l L. 78-82 (1995).
[27] General Comment No. 31, *supra* note 15.
[28] For example, the European Court of Human Rights embraces an expansive reading of the European Convention on Human Rights, binding on all members of the Council of Europe. *See* Case of Al-Skeini and Others v. The United Kingdom (Application no. 55721/07, July 7, 2011), Case of Al-Jedda v. The United Kingdom (Application no. 27021/08, July 7, 2011).
[29] U.S. CONST. art VI. "Treaties made under the authority of the United States are part of the laws of the United States and are supreme over State and local law." *See* RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 301 (2017) [hereinafter Restatement (Fourth)].
[30] *See* RESTATEMENT, *supra* note 2, at cmt h.
[31] *See* RESTATEMENT, *supra* note 2, at § 131.
[32] *See* RESTATEMENT (FOURTH), *supra* note 29, at § 310.

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 may not be derogated from, including: right to life, prohibition on torture, prohibition on slavery, and prohibition on *ex post* punishment.[33] States are also prohibited from adopting measures inconsistent with their obligations under international law.[34]

b. There is a very high threshold for derogation.[35] 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*).[36] 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,[37] 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 Restatement of The Foreign Relations Law of the United States, Common Article III of the Geneva Conventions, and authoritative pronouncements[38] 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. Under one widely held view, customary international law and treaty law are equal in stature, with the later in time controlling.[39]

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* ("fundamental human rights") and customary IHRL that is not considered to be *jus cogens* ("non-fundamental human rights").[40]

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

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[33] *See* ICCPR, *supra* note 6.
[34] *Id.*
[35] For example, the European Convention on Human Rights (ECHR) permits derogation "[i]n time of war or other public emergency *threatening the life of the nation*." ECHR, Art. 15, section 1 (emphasis added).
[36] *See* RESTATEMENT, *supra* note 2, § 102(2) cmt c. (from the Latin *opinio juris sive necessitates*, a practice undertaken by a State out of a sense of legal obligation).
[37] *See The Paquete Habana*, 175 U.S. 677 (1900); *see also* RESTATEMENT, *supra* note 2 at § 111.
[38] *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), 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.

[39] *See* Vienna Convention, *supra* note 20, art. 64 (the emergence of a new *jus cogens* peremptory norm which conflicts with existing treaty obligations voids the conflicting treaty provisions).
[40] *See* RESTATEMENT, *supra* note 2, § 702, which 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.

degrading treatment; prolonged arbitrary detention; and systematic racial discrimination are considered to be *jus cogens.*[41] Many of these basic protections are also found in Common Article 3 of the Geneva Conventions.

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 practiced by States out of a sense of legal obligation.

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 IHRL and the LOAC.[42] Positions range from arguments that they are entirely separate systems, to a view that makes LOAC a completely integrated component of IHRL.[43] In the late 1960s, the United Nations General Assembly considered the application of human rights during armed conflict in two different resolutions.[44] 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.** 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. Under this view, IHRL and the LOAC are viewed as separate systems of protection, where one wholly displaces the other when applied to distinct situations and relationships. Specifically, LOAC governs during armed conflict, displacing peacetime laws such as IHRL. This view also notes that the LOAC largely predates IHRL and therefore was never intended to comprise a sub-category of IHRL.

a. The Law of Armed Conflict, under the displacement view, regulates relations between belligerents and protected persons such as civilians, usually not a state's own citizens or nationals during armed conflict. For example, the 1949 Geneva Conventions largely do not apply to a state's own nationals, the very group IHRL was designed to protect. Much of the Fourth Convention applies to "protected persons," a group characterized as civilians in the hands of their nation's enemy.[45]

b. Additionally, under the displacement view, IHRL 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, that includes States and human rights courts, views the application of IHRL and the LOAC as complementary and overlapping. Under the complementarity view, LOAC does not 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

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[41] Barcelona Traction, Light and Power Company, Limited, Judgment, 1970 I.C.J. 3, ¶ 34 (Feb. 5); *see also See* RESTATEMENT, *supra* note 2, § 702.
[42] Fundamental human rights would apply in armed conflict; non-fundamental may not. Fundamental human rights are often explicitly protected in LOAC, for example Common Article 3 to the Geneva Conventions. Even with these rights, however, there is disagreement as to what protective standards (IHRL or LOAC) apply to a given situation.
[43] *See* RENE PROVOST, INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW (2002).
[44] 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).
[45] *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].

a given situation. The International Court of Justice (ICJ) adopted this view in several Advisory Opinions.[46] The ICJ determined that although the ICCPR prohibition on arbitrary deprivation of life still applies during armed conflict, in order to define arbitrary one must refer to the LOAC as the *lex specialis*. or the more specific rule applies over the more general rule.[47] Most international scholars accept that the LOAC constitutes a *lex specialis* for situations of armed conflict, particularly international armed conflict. In non-international armed conflict, where there are fewer codified LOAC protections, courts are also increasingly applying IHRL rules and protections.[48] Accordingly, U.S. partners in multilateral operations, particularly in non-international armed conflicts, may be subject to significant operational restrictions.

3. **The U.S. View.**

a. The State Department, in the United States Fourth Periodic Report to the UNHRC, stated that "a time of war does not suspend the operation of the [ICCPR] to matters within its scope of application."[49] 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 . . ."[50]

b. The Department of Defense (DoD), in the Law of War Manual, similarly states that apparent conflicts between human rights treaties and LOAC may be resolved by "the principle that the law of war is the *lex specialis* during situations of armed conflict, and, as such, is the controlling body of law with regard to the conduct of hostilities and the protection of war victims."[51] The DoD further explains that a human rights treaty "would clearly be controlling" with respect to matters that are not addressed by the law of war and are within the scope of the treaty.[52]

c. These statements suggest that the United States 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, not IHRL, will likely set the rules and provide authoritative guidance for military action. However, where LOAC is silent or its guidance inadequate, specific

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[46] *See* Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 226, para. 25 (July 8), ("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 relationship 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.

[47] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 226; *see also* Armed Activities on the Territory of the Congo (Democratic Republic of the Congo (DRC) v. Uganda), *supra* note 16, para. 216 (the ICJ concluded that both international human rights law and LOAC would have to be considered).

[48] *See* Case of the Afro-Descendant Communities Displaced from the Cacaria River Basin (Operation Genesis) v. Columbia, Judgment, IACtHR, 20 Nov. 2013; Serdar Mohammed v. Ministry of Defence, UKSC, 17 Jan. 2017.

[49] *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.

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

[51] LAW OF WAR MANUAL, *supra* note 25 at § 1.6.3.1.

[52] *Id. See also* 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 44, at 397. 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).

provisions of applicable human rights law may supplement, or possibly even displace, at least to a limited degree, the LOAC in a particular situation. For the practicing judge advocate, to date there have been no significant pronouncements by U.S. officials declaring that a specific IHRL norm overrides a rule found in the LOAC.

d. The importance of determining the controlling body of law is evident when analyzing how each regime governs a State's use of force. In armed conflict, LOAC permits lethal force against combatants as a first resort, based solely on the combatant's status. In contrast, IHRL permits lethal force only as a last resort and in response to conduct, never status. This is only one example of the many differences between IHRL and LOAC.

VI. INTERNATIONAL HUMAN RIGHTS BODIES AND SYSTEMS

International human rights are developed and implemented through a layered structure of complementary and coextensive systems. 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, specifically 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.[53] 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.

A. Human Rights Bodies. There are both UN Charter based bodies and bodies created under international human rights treaties.[54] The following are examples of each:

1. **The UN Human Rights Committee** (UNHRC). The ICCPR established the UNHRC 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.

2. **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, after that body was discredited for allowing states with poor human rights records to serve as members.[55] The United States submitted its first report to the Council as part of the Universal Periodic Review process in 2010. The U.S. withdrew from the Human Rights Council in 2018 and indicated it will only return if reform is enacted to prevent the Council's shielding of egregious human rights abusers.[56]

B. **Regional Human Rights Systems**

1. **The European Human Rights System**. The European Human Rights System was the first regional human rights system and is 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 (ECtHR). Presently, all members of the Council of Europe are party to the ECHR. In recent years, the ECtHR has taken an expansive interpretation of the Convention's obligations. The

[53] *Sei Fujii v. California*, 38 Cal.2d 718, 242 P.2d 617 (1952).
[54] UN Office of the High Commissioner for Human Rights at https://www.ohchr.org/en/hrbodies/Pages/HumanRightsBodies.aspx.
[55] G.A. Res. 60/251, U.N. Doc A/Res/60/251 (3 Apr. 2006).
[56] Remarks by President Trump to the 73rd Session of the United Nations General Assembly, 25 Sept. 2018, at whitehouse.gov/briefings-statements/remarks-president-trump-73rd-session-united-nations-general-assembly-new-york-ny/.

United States is not a party to the ECHR, however, judge advocates working with European allies should become familiar with the treaty's basic terms[57] and recent case law[58] that may impact allied operations.

2. **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. The United States is not a party to this Convention and 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.[59]

3. **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 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.[60]

4. **Emerging System.** In Asia, the Association of Southeast Asian Nations is slowly developing and may be the fourth system in the near future.

VII. "LEAHY VETTING"

A. **General.** The Leahy Amendment, 10 U.S.C. § 362 (previously § 2249e), prohibits the Department of Defense from providing, "any training, equipment, or other assistance" to a foreign security force if the Secretary of Defense has credible information that the unit committed a "gross violation of human rights" (GVHR).[61] Thus, foreign security forces must be vetted for human rights violations before they can receive U.S. assistance. There is also a similar prohibition applicable to State Department funding found in the Foreign Assistance Act.[62] Unlike the IHRL treaties discussed above, the Leahy Amendment is not an international treaty, but is a federal law designed to ensure U.S. forces do not support foreign forces that commit serious human rights abuses.

B. **Defining Terms**

1. "Foreign Security Forces." Foreign security forces include both military and law enforcement personnel. Further, since the restriction only applies to specific units, even if one foreign unit has committed GVHR, the U.S. may still train or fund other units within that country. Further, the vetting requirement only applies to funds specifically benefitting foreign forces. Thus, programs such as CERP (Commander's Emergency Response Program) do not require Leahy Vetting because the beneficiary of the funds is the civilian population, and not the foreign military force.

2. "Gross Violations of Human Rights." Leahy Vetting is only designed to address major human rights violations such as torture or cruel, inhuman, or degrading treatment, prolonged detention without charges and trial, forced disappearances, and other flagrant denials of the right to life, liberty, or the security of person such as extra-judicial killings. Thus, there are human rights violations that don't rise to the level of GVHR.

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[57] 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/.
[58] *See* Richard Ekins, Jonathan Morgan & Tom Tugendhat, *Clearing the Fog of Law*, Policy Exchange (2015).
[59] *See e.g.*, U.S. Additional Response to the Request for Precautionary Measures: Detention of Enemy Combatants at Guantanamo Bay, Cuba, (15 July 2002), http://www.state.gov/s/l/38642.htm.
[60] *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/.
[61] *See* Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015, §1204, 10 U.S.C. § 2249e (2014), https://www.congress.gov/bill/113th-congress/house-bill/3979/text. Reorganized into 10 U.S.C. §362 by Section 1241 of the National Defense Authorization Act for Fiscal Year 2017.
[62] 22 U.S.C. § 2378d (2018).

C. **Vetting Process**

1. To determine whether there is derogatory information on a unit or individual, the DoD relies on the Department of State's INVEST-C database. Derogatory information can come from any source, whether media reports, non-governmental organizations, U.S. intelligence gathering, or even anonymous reports. Whether the allegation is "credible" is not defined by law.[63] In general, the burden is lower than "beyond a reasonable doubt," but a simple allegation with no corroboration is unlikely to be credible. Also, once the initial vetting of a foreign unit is completed, there is still an ongoing requirement to monitor for new GVHR. Although the Department of State is involved and conducts the vetting, the decision on whether the derogatory information is credible belongs to the Secretary of Defense. In practice, when there is disagreement over whether an allegation is credible, DoS and DoD work together to try to resolve the issue.

2. Remediation and Exceptions. Once GVHR are identified, the Secretary of Defense may still provide assistance if he or she determines that the host-nation government has taken all necessary corrective steps, which is known as remediation. Although previously unused, remediation has been applied recently in Afghanistan and elsewhere once the government has effectively investigated and adjudicated the incident. Specific guidance on how to initiate the remediation process can be found in a 2015 Memorandum published by the Secretary of Defense.[64] There are also two exceptions to the Leahy Vetting requirement. First, assistance may be provided if necessary to assist in disaster relief operations or other humanitarian or national security emergencies. Second, the Secretary of Defense may waive the prohibition if such waiver is required by extraordinary circumstances. These are rarely used. Additionally, certain funds such as the Afghanistan Security Forces Fund (ASFF) have specific exceptions, whereby assistance may be provided if the Secretary of Defense certifies the presence of several factors.[65]

D. Leahy Vetting Resources for Judge Advocates**.** There are two distinct scenarios where a judge advocate may be required to work on Leahy Vetting issues. First, in a mature theater or on a large national-level mission such as Operation Freedom's Sentinel in Afghanistan. In these situations judge advocates should search for established unit SOPs or look for published guidance, such as the implementing guidance published by the Secretary of Defense.[66] The other common scenario where judge advocates may encounter Leahy Vetting requirements are Regionally Aligned Forces, or RAF, missions. In these situations, there is likely little guidance, and the judge advocate should reach out as early as possible to the Office of Defense Cooperation or Office of Security Cooperation, typically headed by a military officer, at the U.S. embassy in the nation where the training will take place to identify the requirements and initiate the potentially lengthy vetting process. Since training cannot be provided until vetting is complete, it is important to initiate this process as soon as possible. For further discussion of these operational funding issues, refer to Chapter 18, Fiscal Law.

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[63] U.S. Dep't of State Leahy Law Fact Sheet at https://www.state.gov/key-topics-bureau-of-democracy-human-rights-and-labor/human-rights/leahy-law-fact-sheet/.
[64] Secretary of Defense Memorandum, Additional Guidance on Implementation of Section 8057(b), DoD Appropriations Act, 2014 (Division C of Public Law 113-76)("the DoD Leahy Law") and New or Fundamentally Different Units, 10 Feb. 2015.
[65] 2018 Consolidated Appropriations Act, Sec. 9022.
[66] *See* Secretary of Defense Memorandum, Implementation of Section 8057 DoD Appropriations Act, 2014, 18 Aug. 2014.

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CHAPTER 5

RULES OF ENGAGEMENT

I. INTRODUCTION

The primary source document and current version of the SROE is contained within the Chairman of the Joint Chiefs of Staff Instruction 3121.01B, Standing Rules of Engagement (SROE)/Standing Rules for the Use of Force (SRUF) for U.S. Forces, dated 13 June 2005.[1] At the time this handbook was published, the 2005 version is still the most current publication of the SROE.

A. Rules of Engagement (ROE) are the commanders' tools for regulating the use of force, making the ROE 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 are ultimately responsible 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 speak 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 operational concepts 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. National security law attorneys must have ready access to the complete SROE and study it thoroughly to understand 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 3-84, *Legal Support*: ROE are "[d]irectives issued by competent military authority that delineate the circumstances and limitations under which United States [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. **Policy 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

[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).

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 influence world opinion in a particular direction, place a positive limit on the escalation of hostilities, or avoid ineffective or improper use of military force. 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. **Operational 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 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 SROE are the 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 supersede DoD Directive 5210.56, Arming and The Use of Force.[2]

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 further 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

[2] For further information regarding SRUF, see CJCSI 3121.01B, Enclosures L(UNCLASSIFIED) and M-Q (SECRET), and the Domestic Operations Handbook, available at http://www.loc.gov/rr/frd/Military_Law/CLAMO.html.

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.[3]

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 an Appendix.]

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, including the CJCS, 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**. 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.

(3) **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. 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,[4] commanders 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(s) 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.

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[3] 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.

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

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.

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 should be sufficient to respond decisively to the hostile act / hostile intent. The means and intensity of the 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. In other words, supplemental measures are options that commanders can request or add to modify the SROE or mission ROE. Tables of supplemental measures are divided into those actions requiring President or SECDEF approval; those that require Combatant Commander approval; and those that are delegated to subordinate commanders (though the delegation may be withheld by a higher authority). The application of supplemental measures may trigger notification requirements through the chain of command.

(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 the Appendix 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 (or depending on the level of command, the G-3/G-5, or S-3/S-5, as appropriate) 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 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 office for ROE guidance.

8. **Enclosures L-Q (SRUF)**. Much like what 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 Center for Law and Military Operations' (CLAMO) most recent Domestic Operational Law Handbook for Judge Advocates (DOMOPS Handbook) (https://www.jagcnet2.army.mil/CLAMO or http://www.loc.gov/rr/frd/Military_Law/CLAMO.html), as well as the U.S. Army North, Office of the Staff Judge Advocate, for mission-specific RUF guidance.

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 affect its ROE. Ultimately, each nation is bound by its own domestic law and policy, which 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.

C. One tool for JAs to consider when conducting MNF exercises is the *Rules of Engagement Handbook*.[5] The *ROE Handbook* provides international partners with a framework for addressing a wide variety of operational issues, from the use of force in self-defense, to detention, to the use of various weapon systems. Once the staff creates the exercise ROE, legal and political advisors can work through each ROE Rule to produce a ROE matrix that allows the staff to quickly identify areas of commonality and friction. With a ROE matrix in hand, the staff can ascertain constraints on operations and then work through various scenarios to create ROE training that requires units to train on how to operate under a common MNF 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 JAs will confront and will identify techniques to accomplish them. Although presented as discrete tasks, they often are interrelated and occur simultaneously.

B. Task 1: Determining the current ROE.

[5] INT'L. INST. OF HUMANITARIAN LAW, RULES OF ENGAGEMENT HANDBOOK (Nov. 2009), http://iihl.org/sanremo-handbook-rules-engagement/.

1. In operational units, the commander will typically task the Judge Advocate with briefing the ROE to the commander and staff during the operational planning process as well as the daily operational brief (at least during the beginning of an 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., Land, Maritime, Space, or Counterdrug operations, etc.).

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

d. The 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 one of the geographic combatant commands' portals, such as the USCENTCOM 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 regularly-occurring 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. Task 2: 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. Baseline ROE typically are promulgated at the Combatant Command and higher and receive great thought. Be especially careful about requesting supplemental measures that require President or SECDEF approval, since these items have already received significant consideration. This is not to say that there are no circumstances for which requesting such a measure is appropriate, only that they are 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 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. Task 3: 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 or her 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 or her own, and distribute this ROE message throughout the 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 or her 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 or her 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 11, Annex C (Rules of Engagement) of Army operations orders (*see* FM 6-0, Commander and Staff Organization and Operations (with Change 2).

E. Task 4: Training ROE.

1. The commander, not the JA, is responsible for unit ROE training. The commander normally relies on the staff principal for training (the G-3 or S-3) to plan and coordinate all unit training. However, JAs should play a significant role in ensuring the troops (Soldiers, staff, and unit leaders) understand the mission-specific ROE and are able to apply the rules reflected therein.

a. A JA's first task in helping train the ROE may be to help the commander see the value in taking a systematic approach.

b. 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.

c. 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.

d. 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 effective training on ROE issues will occur.

2. 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.

3. 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.

4. 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.

5. 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.

6. 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 exercise or mission ROE.

F. Pocket Cards.[6]

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. When confronted with a crisis in the field, the Soldier, Sailor, Airman, or Marine will not be able to consult his or her pocket card—he or she 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

[6] For examples of ROE cards from past operations, see www.jagcnet.army.mil/clamo.

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.

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,[7] but 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"[8] 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://call2.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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[7] Arguably, EOF is inherent in the SROE principle of proportionality.

[8] Lieutenant Colonel Randall Bagwell, *The Threat Assessment Process (TAP): The Evolution of Escalation of Force*, ARMY LAW., Apr. 2008, at 5.

APPENDIX

CHAIRMAN OF THE JOINT CHIEFS OF STAFF INSTRUCTION

J-3 CJCSI 3121.01B

DISTRIBUTION: A, C, S 13 June 2005

STANDING RULES OF ENGAGEMENT/STANDING RULES FOR THE USE

OF FORCE FOR 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.

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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.

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CHAPTER 6

NATIONAL SECURITY STRUCTURE & JOINT OPERATIONS

I. INTRODUCTION

A. "As a nation, the U.S. wages war employing all instruments of national power—diplomatic, informational, military, and economic. The President employs the Armed Forces of the United States to achieve national strategic objectives. The Armed Forces of the United States conduct military operations as a joint force. 'Joint' connotes activities in which elements of two or more Military Departments participate."[1]

B. This chapter is divided into two components for purposes of Judge Advocate national security law knowledge. The first component is the national military structure, which involves the organization of the Department of Defense and how service component forces (i.e., the Army, Navy, Air Force, and Marines) are provided to the operational commanders (i.e., combatant commands) to conduct military operations overseas. The United States military operates as a joint force, therefore this chapter also discusses the joint force operational structures and command relationships associated with those structures.

C. The second component is the national security process, which describes how the decision to use military force is made and how other strategic guidance is communicated through the military chain of command to the operational and tactical commanders. This structure and process is important to understand because it serves as the source for guidance and approval authority on various operational issues.

D. The appendices to this chapter contain more specific information on individual components of the national security structure.

II. ORIGINS OF THE MODERN NATIONAL SECURITY STRUCTURE

A. The Army, Navy, and Marine Corps were initially established by the Continental Congress in 1775 at the onset of the American Revolution. Following adoption of the U.S. Constitution, the War Department was formally established in 1789 with the progenitor of the Coast Guard (part of the Navy in wartime) being formed a year later in 1790 and the Department of the Navy formally established in 1798. The dichotomy of the armed services under these two cabinet-level departments remained in place until the end of World War II.[2] Following World War II, a trend toward greater centralization and jointness permeated the national security structure.

B. The National Security Act of 1947 created the modern national security structure by bringing all of the military departments under one entity, the National Military Establishment (NME) headed by the newly minted Secretary of Defense. "The changes in military organization prescribed in the act were intended to bring about unification of the armed forces through more centralized direction, stronger cohesion, and greater join effort and mutual support."[3] The same act also created the Department of the Air Force, the Central Intelligence Agency, and the President's National Security Council (NSC).[4]

C. In 1949, amendments to the National Security Act changed the name of the NME to the Department of Defense and elevated it to an executive department while subordinating the military departments under the DoD. This had the practical effect of removing the Service Secretaries from directly advising the president on military matters in the Cabinet. The Secretary of Defense was given increased authority to exercise "direction, authority, and control" over the department. In addition, the amendment created the Chairman of the Joint Chiefs of Staff (CJCS)

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[1] JOINT PUBLICATION 1, *Doctrine for the Armed Forces of the United States* (25 Mar. 2013, Incorporating Change 1, 12 July 2017) [hereinafter, JOINT PUB. 1].
[2] *About the Department of Defense*, U.S. DEP'T OF DEF., https://archive.defense.gov/about/ (last visited 29 May 2020).
[3] ROGER R. TRASK &ALFRED GOLDBERG, THE DEPARTMENT OF DEFENSE 1947-1997: ORGANIZATION AND LEADERS iii (1997).
[4] National Security Act of 1947, U.S. DEP'T OF STATE, OFFICE OF THE HISTORIAN, https://history.state.gov/milestones/1945-1952/national-security-act (last visited 29 May 2020).

and the entire JCS was designated the "principal military advisers" to the president, the NSC, and the Secretary of Defense.[5]

D. The Goldwater-Nichols Defense Reorganization Act of 1986

1. Goldwater-Nichols provided for a stronger and more active chairman, or CJCS, as the principal adviser to the president, NSC, and secretary of defense.[6] It increased the CJCS's powers in relation to the Joint Chiefs of Staff (JCS), gave full authority over a strengthened Joint Staff, and control over the development of joint doctrine. To assist the chairman and act in his or her place when necessary, the act created the position of vice chairman of the JCS.[7]

2. Goldwater-Nichols also clarified the chain of command from the President to the Secretary of Defense to the Combatant Commands. The Combatant Commanders came directly under the Secretary of Defense—the chairman and the JCS were eliminated from the command chain.[8] The act authorized the Secretary of Defense to use the CJCS as a channel of communication to the Combatant Commanders, and this has generally been the practice.[9] The emphasis on the primacy of the Secretary of Defense in the military establishment reiterated a major theme of all major Defense Department organizational legislation since 1949 and clearly reflected the intent of Congress.[10]

III. NATIONAL STRATEGIC DIRECTION AND NATIONAL COMMAND AUTHORITY

A. National strategic direction is governed by the Constitution, U.S. law, U.S. policy regarding internationally recognized law, and the national interest as represented by national security policy. This direction leads to unified action which results in unity of effort to achieve national goals. At the strategic level, unity of effort requires coordination among government departments and agencies within the executive branch, between the executive and legislative branches, with nongovernmental organizations (NGOs), intergovernmental organizations (IGOs), the private sector, and among nations in an alliance or coalition, and during bilateral or multilateral engagement.[11]

B. National policy and planning documents generally provide national strategic direction. The President and Secretary of Defense, through the Chairman of the Joint Chiefs of Staff (CJCS), provide direction for Service Chiefs, Military Department Secretaries, Combatant Commanders (CCDRs), and Combat Support Agencies (CSA) directors to:[12]

1. Provide clearly defined and achievable national strategic objectives.

2. Provide timely strategic direction.

3. Prepare Active Component (AC) and Reserve Component (RC) forces for combat.

4. Focus DOD intelligence systems and efforts on the operational environment.

5. Integrate DOD, partner nations, and/or other government departments and agencies into planning and subsequent operations.

6. Maintain all required support assets in a high state of readiness.

7. Deploy forces and sustaining capabilities that are ready to support the Joint Force Commander's (JFC) concept of operations (CONOPS).

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[5] Department of Defense, *Documents on Establishment and Organization 1944-1978*, OFFICE OF THE SECRETARY OF DEFENSE, HISTORY OFFICE, https://history.defense.gov/Portals/70/Documents/other/DODDocsEstandOrg1944-1978.pdf?ver=2014-06-24-092403-700 (last visited 29 May 2020).
[6] H.R. 3622 (99th): Goldwater-Nichols Department of Defense Reorganization Act of 1986, https://www.govtrack.us/congress/bills/99/hr3622/summary#libraryofcongress (last visited 29 May 2020).
[7] *Id.*
[8] *Id.*
[9] TRASK & GOLDBERG, *supra* note 3, at 44.
[10] *Id.*
[11] JOINT PUB. 1, *supra* note 1, II-1.
[12] *Id.*

C. **The President of the United States** is responsible to the American people for national strategic direction. When the U.S. undertakes military operations, the Armed Forces of the United States are only one component of a national-level effort involving all instruments of national power.[13]

1. Instilling unity of effort at the national level is necessarily a cooperative endeavor involving a number of USG departments and agencies. In certain operations, agencies of states, localities, or foreign countries may also be involved. The President establishes guidelines for civil-military integration and disseminates decisions and monitors execution through the NSC.[14]

2. Complex operations may require a high order of civil-military integration. Presidential directives guide participation by all U.S. civilian and military agencies in such operations. Military leaders should work with the members of the national security team in the most skilled, tactful, and persistent ways to promote unity of effort. Operations of departments or agencies representing the diplomatic, economic, and informational instruments of national power are not under command of the Armed Forces of the United States or of any specific JFC.[15]

3. In U.S. domestic situations, another department such as the Department of Homeland Security (DHS) may assume overall control of interagency coordination including military elements. Abroad, the chief of mission, supported by the country team, is normally in control.[16]

D. **The Secretary of Defense (SecDef)** is responsible to the President for creating, supporting, and employing military capabilities. SecDef is the link between the President and the CCDRs, and provides direction and control of the CCDRs as they conduct military activities and operations. SecDef provides authoritative direction and control over the Services through the Secretaries of the Military Departments. SecDef exercises control of and authority over those forces not specifically assigned to the combatant commands (CCMDs) and administers this authority through the Military Departments, the Service Chiefs, and applicable chains of command. The Secretaries of the Military Departments organize, train, and equip forces and provide for the administration and support of forces within their department, including those assigned or attached to the CCDRs.[17]

E. **The Chairman of the Joint Chiefs of Staff (CJCS)** is the principal military advisor to the President, the NSC, and SecDef and functions under the authority, direction, and control of the President and SecDef. The CJCS assists the President and SecDef in providing for the strategic direction of the Armed Forces. Communications between the President or SecDef and the CCDRs are normally transmitted through the CJCS.[18]

F. **The Combatant Commanders (CCDRs)** exercise combatant command (command authority) (COCOM) over assigned forces and are responsible to the President and SecDef for the preparedness of their commands and performance of assigned missions. Geographic combatant commanders (GCCs) have responsibility for a geographic area of responsibility (AOR) assigned through the Unified Command Plan (UCP). The UCP establishes CCMD missions and responsibilities, delineates the general geographical AOR for GCCs, and provides the framework used to assign forces. Functional combatant commanders (FCCs) have transregional responsibilities for assigned functions and support (or can be supported by) GCCs or may conduct missions assigned by the UCP independently.[19]

IV. ORGANIZATION OF THE DEPARTMENT OF DEFENSE

A. The Department of Defense (DoD) is essentially composed of: (1) the Office of the Secretary of Defense; (2) the Joint Chiefs of Staff; (3) the Joint Staff; (4) the Office of the Inspector General DoD; (5) Combatant Commands; (6) the Military Departments; (7) the Defense Agencies; and (8) the Field Activities.[20] Directions for

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[13] *Id.* at II-2.
[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] U.S. DEP'T OF DEF, DIR. 5100.01, *Functions of the Department of Defense and its Major Components* para. 4 (21 Dec. 2010) [hereinafter DODD 5100.01]. A sixth component contained within the directive is the DoD Inspector General.

military operations emanate from the National Command Authority, a term used to collectively describe the President and the SecDef. The President, as commander-in-chief of the armed forces, is the ultimate authority. The Office of the Secretary of Defense (OSD) carries out the SecDef's policies by tasking the military departments, the Chairman of the Joint Chiefs of Staff and the Combatant Commands. The military departments train and equip the military forces. The Chairman plans and coordinates military deployments and operations. The Combatant Commands conduct the military operations.

B. **Office of the Secretary of Defense (OSD).** The SecDef has statutory authority, direction, and control over the Military Departments and is responsible for the effective, efficient, and economical operation of the DoD. The Office of the Secretary of Defense helps the Secretary plan, advise, and carry out the nation's security policies as directed by both the Secretary of Defense and the President. Several key advisers work with the Secretary of Defense in critical areas, including policy, finance, personnel, and intelligence. OSD also performs oversight and management of the Defense Agencies and DoD Field Activities.[21]

C. **Joint Chiefs of Staff (JCS).** The Joint Chiefs of Staff, consisting of the Chairman of the Joint Chiefs of Staff; the Vice Chairman of the Joint Chiefs of Staff; the Chief of Staff, U.S. Army; the Chief of Naval Operations; the Chief of Staff, U.S. Air Force; and the Commandant of the Marine Corps, and supported by the Joint Staff under the direction of the Chairman of the Joint Chiefs of Staff, constitute the immediate military staff of the Secretary of Defense. An all-service, or "joint" service office supports the Chairman of the Joint Chiefs of Staff as the principal military advisor to the President, the National Security Council, the Homeland Security Council, and the Secretary of Defense. The Chairman plans and coordinates military operations involving U.S. forces and as such is responsible for the operation of the National Military Command Center, commonly referred to as the "war room," from where all U.S. military operations are directed. In carrying out these duties, the Chairman consults with and seeks the advice of the other members of the Joint Chiefs of Staff and the combatant commanders, as appropriate.[22]

D. **Military Departments.** The Military Departments (Department of the Army, Department of the Navy, and Department of the Air Force) are organized separately under civilian secretaries who are responsible for and have authority to conduct the affairs committed to their departments. The Service secretaries are not in the operational chain of command. The Secretary of each Military Department, and the civilian employees and Military Service members under the jurisdiction of the Military Department Secretary, must cooperate fully with OSD to achieve efficient administration of the DoD and to exercise the authority, direction, and control of the SecDef effectively, efficiently, and economically. [23]

E. **Defense Agencies and Field Activities.** Defense Agencies and 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. There are currently 18 defense agencies. Some defense agencies are assigned combat support functions and referred to as CSAs. CSAs support CCMDs. There are currently 10 DoD Field Activities.[24]

F. **Combatant Commands.** The Commanders of the Combatant Commands are responsible to the President and the Secretary of Defense for accomplishing the military missions assigned to them and exercise command authority over assigned forces as directed by the Secretary of Defense. The National Security Act of 1947 required that the Joint Chiefs of Staff create "unifiedcommands," and the Reorganization Act of 1958 confirmed in law the concept of "unified or specified combatant commands." The number of commands varied over the years, but today there are now eleven "unified" commands—six geographic and five functional: USAFRICOM; USCENTCOM; USEUCOM; USNORTHCOM; USINDOPACOM; USSOUTHCOM; USSPACECOM; USCYBERCOM; USSOCOM; USSTRATCOM; and USTRANSCOM[25]

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[21] *See id.*, Encl. 2.
[22] *See id.*, Encl. 3.
[23] *See id.*, 3.
[24] *See id.*, Encl. 7 (Function of DoD Agencies) and Encl. 8 (Function of DoD Field Activities).
[25] *See* U.S. Department of Defense, *Combatant Commands*, https://www.defense.gov/Our-Story/Combatant-Commands/ (last visited 13 Jun. 2020).

V. THE CHAIN OF COMMAND

A. The President and SecDef exercise authority, direction, and control of the Armed Forces through two distinct branches of the chain of C2. One branch runs from the President, through SecDef, to the CCDRs for missions and forces assigned to their commands. For purposes other than the operational direction of the CCMDs, the chain of command runs from the President to SecDef to the Secretaries of the Military Departments and, as prescribed by the Secretaries, to the commanders of Military Service forces.[26]

B. The Administrative Chain of Command.

1. The Military Departments operate under the authority, direction, and control of the Secretary of that Military Department. The Secretaries of the Military Departments may exercise administrative control (ADCON) over Service forces through their respective Service Chiefs and Service commanders. The Service Chiefs, except as otherwise prescribed by law, perform their duties under the authority, direction, and control of the Secretaries of the respective Military Departments to whom they are directly responsible.[27]

2. The Secretaries of the Military Departments operate under the authority, direction, and control of SecDef. This branch of the chain of command is responsible for ADCON over all military forces within the respective Service not assigned to CCDRs (i.e., those defined in the Global Force Management Implementation Guidance [GFMIG] as "unassigned forces"). This branch is separate and distinct from the branch of the chain of command that exists within a CCMD.[28]

C. The Operational Chain of Command. The CCDRs exercise combatant command or COCOM over assigned forces and are directly responsible to the President and SecDef for the performance of assigned missions and the preparedness of their commands. CCDRs prescribe the chain of command within their CCMDs and designate the appropriate command authority to be exercised by subordinate commanders.[29] Judge Advocates must understand the precise definitions of the various degrees of command in order to help ensure that U.S. commanders do not exceed the lawful authority conveyed by the command and control arrangements of the CJCS execute order.[30] NOTE: The command and control lines between foreign commanders and U.S. forces represent legal boundaries that the lawyer should know and monitor.[31]

D. Role of the CJCS. The role of the CJCS in the chain of command of the combatant commands is threefold: communications, oversight, and spokesman. Communications between the president and SecDef and the combatant commanders may pass through the CJCS. The Goldwater-Nichols DOD Reorganization Act of 1986 permits the

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[26] *See* JOINT PUB. 1, *supra* note 1, at II-9.
[27] *See id.*
[28] *See id.*
[29] *See id.*
[30] The precise definitions of the degrees of command authority are contained in JOINT PUBLICATION. 3-0, *Joint Operations* (17 Jan. 2017, incorporating Change 1, 22 Oct. 2018) [hereinafter, JOINT PUB 3-0].
[31] *See* JOINT PUBLICATION 3-16, *Multinational Operations* (1 Mar. 2019) [hereinafter, JOINT PUB. 3-16].

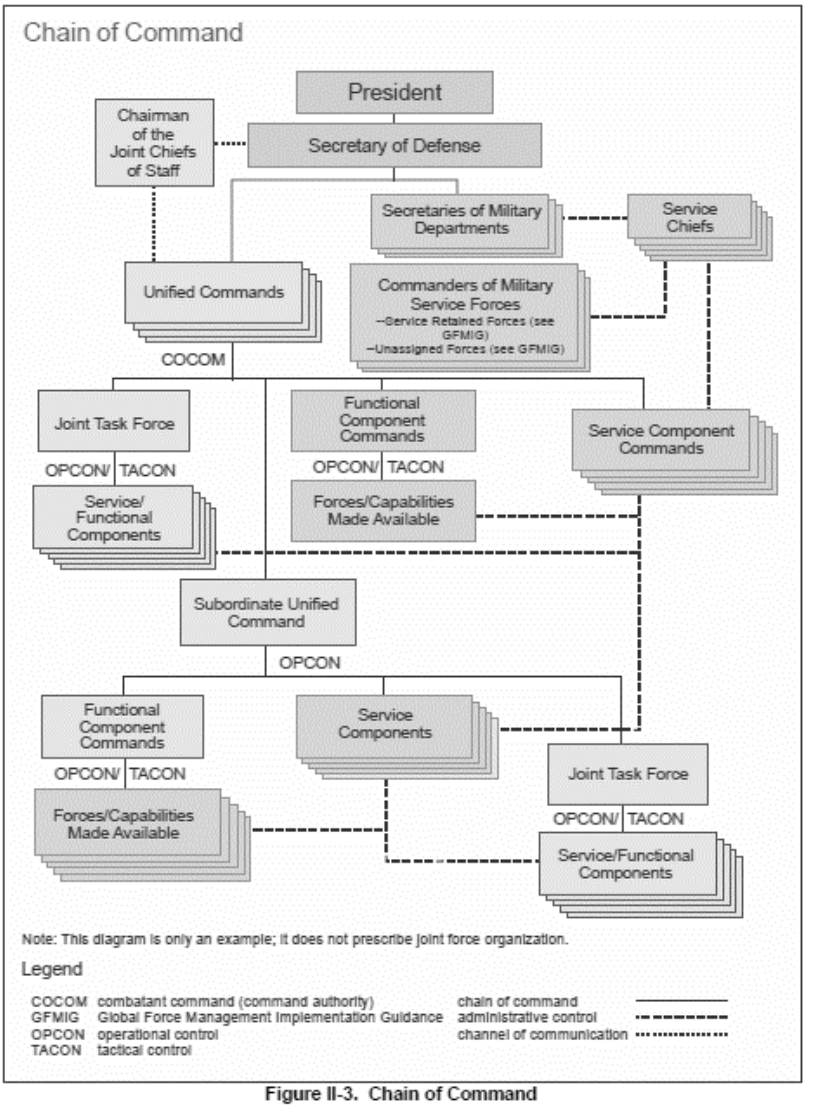

Figure II-3. Chain of Command

From JP 1, *Doctrine for the Armed Forces of the United States*, II-10

President to place the Chairman in the communications chain and the president has in fact directed that such communications pass through the Chairman. Oversight of the activities of combatant commands may be delegated by the SecDef to the CJCS. Finally, the CJCS is the spokesman for the CCDRs on the operational requirements of their commands. It must be reinforced here that the CJCS is *not* in the operational chain of command. The CJCS has no authority to direct operational forces.[32]

VI. COMMAND AUTHORITY AND RELATIONSHIPS

A. **Combatant command (COCOM)** (command authority) is the command authority over assigned forces vested in the combatant commander by Title 10, U.S. Code, Section 164, and is not transferable. Combatant command is exercised only by the CDRs of unified and specified CCMDs. It is the authority of a CCDR to perform those functions of command over assigned forces involving organizing and employing commands and forces,

[32] JOINT PUB. 1, *supra* note 1 at II-10.

assigning tasks, designating objectives, and giving authoritative direction over all aspects of military operations, joint training, and logistics necessary to accomplish the missions assigned to the command.[33]

B. **Operational Control (OPCON)** is another level of authority used frequently in the execution of joint military operations. OPCON authority may be delegated to echelons below the combatant commander. Normally, this is authority exercised through component commanders and the commanders of established subordinate commands. Limitations on OPCON, as well as additional authority not normally included in OPCON, can be specified by a delegating commander.[34]

1. OPCON is the authority delegated to a commander to perform those functions of command over subordinate forces involving the composition of subordinate forces, the assignment of tasks, the designation of objectives, and the authoritative direction necessary to accomplish the mission. It includes directive authority for joint training. Commanders of subordinate commands and joint task forces will normally be given OPCON of assigned or attached forces by a superior commander.

2. OPCON normally provides full authority to organize forces as the operational commander deems necessary to accomplish assigned missions and to retain or delegate OPCON or tactical control as necessary. OPCON may be limited by function, time, or location. It does not include such matters as administration, discipline, internal organization, and unit training.

C. **Tactical Control (TACON)** The term tactical control is used in execution of operations and is defined as: "the detailed and, usually, local direction and control of movements or maneuvers necessary to accomplish missions or tasks assigned."[35]

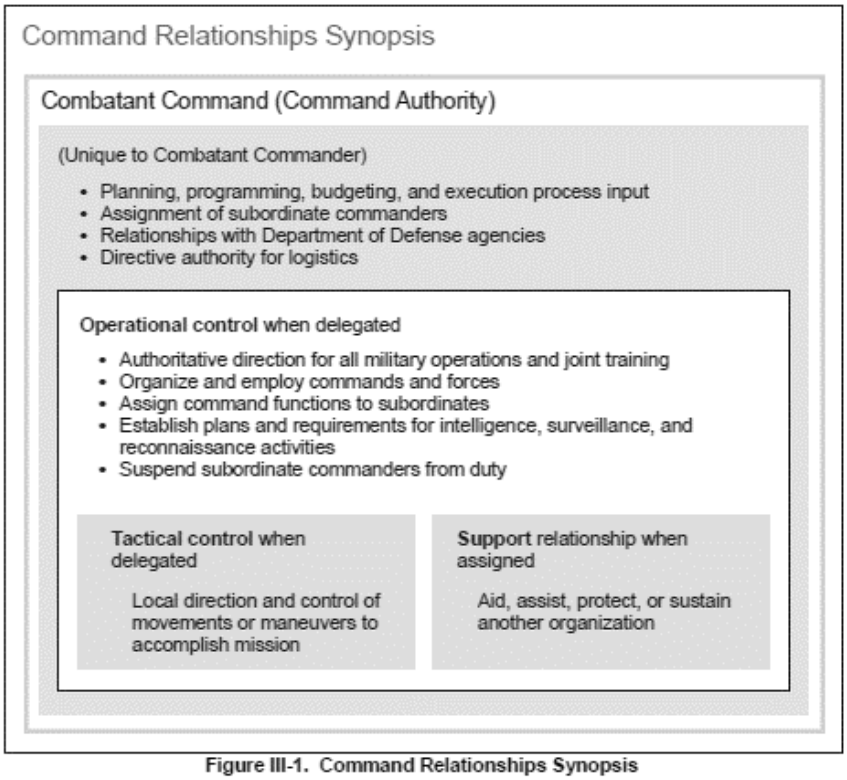

Figure III-1. Command Relationships Synopsis

From JOINT PUB. 3-0, *Joint Operations*, II-3.

[33] *See Id.*, at V-2. *See also* JOINT PUB. 3-0, *supra* note 30, at III-4.
[34] *Id.* at 101. *See also* JOINT PUB. 1, *supra* note 1, at V-6. *See also* JOINT PUB. 3-0, *supra* note 30, at III-4.
[35] *See* JOINT PUB. 1, *supra* note 1, at V-7; *see also* JOINT PUB. 3-0, *supra* note 30, at III-4.

VII. GLOBAL FORCE MANAGEMENT

A. The Goldwater-Nichols Act requires that forces under the jurisdiction of the Military Departments be assigned to the combatant commands, with the exception of forces assigned to perform the mission of the Military Department, (e.g., recruit, supply, equip, maintain). A force assigned or attached to a CCMD, or Service retained by a Service Secretary, may be transferred from that command to another CCDR only when directed by SecDef and under procedures prescribed by SecDef and approved by the President. The command relationship the gaining commander will exercise (and the losing commander will relinquish) will be specified by SecDef.[36]

B. Assignment and Transfer of Forces. Establishing authorities for subordinate unified commands and Joint Task Forces (JTFs) may direct the assignment or attachment of their forces to those subordinate commands and delegate the command relationship as appropriate. More information on how this process works in practice can be found in the following excerpt from Joint Publication 1, Doctrine for the Armed Forces of the United States:[37]

1. The CCDR exercises COCOM over forces *assigned* or reassigned by the President or SecDef. Forces are assigned or reassigned when the transfer of forces will be ***permanent*** or for an unknown period of time, or when the broadest command authority is required or desired. OPCON of assigned forces is inherent in COCOM and may be delegated within the CCMD by the CCDR.

2. The CCDR normally exercises OPCON over forces *attached* by SecDef. Forces are attached when the transfer of forces will be ***temporary***. Establishing authorities for subordinate unified commands and JTFs normally will direct the delegation of OPCON over forces attached to those subordinate commands.

3. Except as otherwise directed by the President or SecDef, all forces operating within the geographic area assigned to a specific GCC shall be assigned or attached to, and under the command of, that GCC. (This does not apply to USNORTHCOM.) Transient forces do not come under the chain of command of the GCC solely by their movement across operational area boundaries, except when the GCC is exercising TACON for the purpose of force protection.

4. Unless otherwise specified by SecDef, and with the exception of the USNORTHCOM AOR, a GCC has TACON for exercise purposes whenever forces not assigned to that GCC undertake exercises in that GCC's AOR.[38]

VIII. JOINT OPERATIONS[39]

A. Joint Force Commands (JFCs).

1. Combatant Commands (CCMDs). A CCMD is a unified or specified command with a broad continuing mission under a single commander established and so designated by the President, through SecDef, and with the advice and assistance of the CJCS. Unified commands typically are established when a broad continuing mission exists requiring execution by significant forces of two or more Military Departments and necessitating single strategic direction and/or other criteria found in JP 1, *Doctrine for the Armed Forces of the United States*.

2. Subordinate Unified Commands. When authorized by SecDef through the CJCS, commanders of unified (not specified) commands may establish subordinate unified commands (also called subunified commands) to conduct operations on a continuing basis in accordance with the criteria set forth for unified commands. A subordinate unified command may be established on a geographic area or functional basis. Commanders of subordinate unified commands have functions and responsibilities similar to those of the commanders of unified commands and exercise OPCON of assigned commands and forces and normally of attached forces within the

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[36] JOINT PUB. 1, *supra* note 1, at V-11.
[37] *Id.*
[38] *Id.*
[39] This subsection is excerpted and summarized from JOINT PUB 3-0, *supra* note 30. See separate sites for each combatant command. See, e.g. United States Africa Command, *About the Command*, https://www.africom.mil/about-the-command (last visited 29 May 2020).

assigned operational or functional area.[40] Current examples of subunified commands are Alaskan Command under USNORTHCOM, and U.S. Forces, Korea (USFK) under USINDOPACOM.

3. Joint Task Forces (JTFs). A JTF is a joint force that is constituted and so designated by SecDef, a CCDR, a subordinate unified command commander, or an existing commander, joint task force (CJTF) to accomplish missions with specific, limited objectives and which do not require centralized control of logistics. However, there may be situations where a CJTF may require directive authority for common support capabilities delegated by the CCDR.[41]

a. JTFs may be established on a geographical area or functional basis. JTFs normally are established to achieve operational objectives. When direct participation by departments other than DOD is significant, the TF establishing authority may designate it as a joint interagency task force. This might typically occur when the other interagency partners have primacy and legal authority and the JFC provides supporting capabilities, such as disaster relief and humanitarian assistance.[42]

b. The proper authority dissolves a JTF when the JTF achieves the purpose for which it was created or is no longer required.[43]

c. There are several ways to form a JTF HQ. Normally, the CCMD's Service component HQ or the Service component's existing subordinate HQ (e.g., Army corps, numbered air force, numbered fleet and Marine expeditionary force) convert themselves to JTF HQ. Also, the theater special operations forces, or SOF command or a subordinate SOF HQ with the requisite C2 capability can form the basis for a JTF HQ staff.[44]

d. CCDRs are responsible for verifying the readiness of assigned Service HQ staffs to establish, organize, and operate as a JTF-capable HQ. JTF HQ basing depends on the JTF mission, operational environment, and available capabilities and support. JTF HQ can be land- or sea-based with transitions between both basing options. JTFs are normally assigned a JOA.[45]

B. Components of a Joint Force Command (JFC).

1. There are essentially two major components of a JFC: a service component and/or a functional component. Regardless of the organizational and command arrangements within joint commands, Service component commanders retain responsibility for certain Service-specific functions and other matters affecting their forces, including internal administration, personnel support, training, logistics, and Service intelligence operations. This generally means that Army commanders will be responsible for Army matters within a Joint Command. Functional and Service components of the joint force conduct supported, subordinate, and supporting operations, not independent campaigns.

a. Service Components. CCDRs and subordinate unified commanders conduct either single-Service or joint operations to accomplish a mission. All JFCs may conduct operations through their Service component commanders, lower-echelon Service force commanders, and/or functional component commanders. Conducting joint operations through Service components has certain advantages, which include clear and uncomplicated command lines. This arrangement is appropriate when stability, continuity, economy, ease of long-range planning, and scope of operations dictate organizational integrity of Service components. While sustainment remains a Service responsibility, there are exceptions such as arrangements described in Service support agreements, CCDR-directed common-user logistics lead Service, or DOD agency responsibilities.[46]

b. Functional Components. The JFC can establish functional component commands to conduct operations when forces from two or more Services must operate in the same physical domain or accomplish a

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[40] JOINT PUB 3-0, *supra* note 30, at IV-6.
[41] *Id.* at IV-7.
[42] *Id.*
[43] *Id.*
[44] *Id.*
[45] *Id.*
[46] *Id.* at IV-8.

distinct aspect of the assigned mission. These conditions apply when the scope of operations requires that the similar capabilities and functions of forces from more than one Service be directed toward closely related objectives and unity of command is a primary consideration. For example, functionally oriented components are useful when the scope of operations is large and the JFC's attention must be divided between major operations or phases of operations that are functionally dominated. Functional component commands are subordinate components of a joint force. Except for the Joint Force Special Operations Component Commander (JFSOCC), joint special operations task force (JSOTF), functional components do not constitute a "joint force" with a JFC's authorities and responsibilities, even when composed of forces from two or more Military Departments.[47]

2. JFCs may conduct operations through functional components or employ them primarily to coordinate selected functions. The JFC will normally designate the Service component commander who has the preponderance of forces and the ability to command and control them as the functional component commander. However, the JFC will always consider the mission, nature and duration of the operation, force capabilities, and C2 capabilities when selecting a commander. The establishment of a functional component commander must not affect the command relationship between Service component commanders and the JFC.[48]

3. The functional component commander's staff composition should reflect the command's composition so that the staff has the required expertise to help the commander effectively employ the component's forces. Functional component staffs require advanced planning, appropriate training, and frequent exercises for efficient operations. Liaison elements from and to other components facilitate coordination and support. Staff billets and individuals to fill them should be identified and used when the commander forms the functional component staff for exercises and actual operations.[49]

4. Joint forces often are organized with a combination of Service and functional components. For example, joint forces organized with Service components normally have SOF organized under a JFSOCC, while the conventional air forces will normally have a Joint Force Air Component Commander (JFACC) designated, whose authorities and responsibilities are defined by the establishing JFC based on the JFC's CONOPS.[50]

IX. THE NATIONAL SECURITY PROCESS AND THE MILITARY

A. To best understand how the national security process impacts military operations, an understanding of the levels of warfare is necessary. Joint doctrine identifies three levels of warfare: strategic, operational, and tactical. The strategic, operational, or tactical purpose of employment depends on the nature of the objective, mission, or task. While most Judge Advocates will practice at the tactical and operational level, a few Judge Advocates advise at the strategic level as well.[51] Judge Advocates should read and refer to the following strategic level documents: the National Security Strategy, the National Defense Strategy, the National Military Strategy, and the Unified Command Plan.

B. Equally important is that Judge Advocates at the tactical level should have an understanding of the processes that lead to important strategic and operational guidance that ultimately shapes the tactical missions they may be providing legal advice on. While the traditional separate levels of war may help commanders visualize a logical arrangement of missions, allocate resources, and assign tasks to the appropriate command, campaigns and major operations then provide the framework within which the joint force accomplishes the mission; the actual execution is more complicated. With today's constant 24-hour media coverage and easy access to the Internet by our enemies for propaganda, a tactical-level plan and resulting action can have severe operational or strategic implications. For example, national policy established by the NSC may inform certain ROE limitations at the tactical level and explain why those limitations are in place. The figure below from JP 1 better illustrates the levels of warfare and their interaction.[52]

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[47] *Id.*
[48] *Id.*
[49] *Id.*
[50] *Id.* at IV-9.
[51] JOINT PUB. 1, *supra* note 1, at I-7.
[52] *Id.*

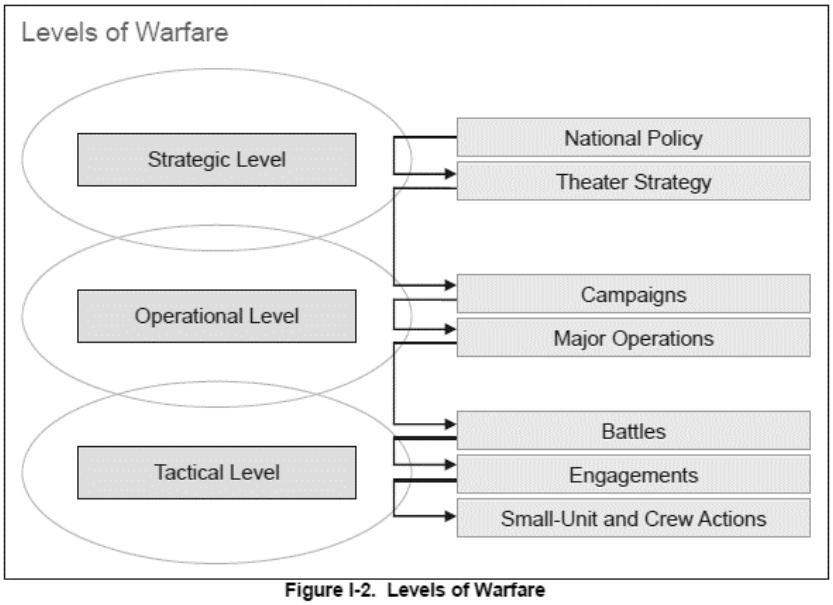

Figure I-2. Levels of Warfare

From JP 1, *Doctrine for the Armed Forces of the United States*, p. I-7.

1. Strategic Level of Warfare: Strategy is a prudent idea or set of ideas for employing the instruments of national power in a synchronized and integrated fashion to achieve theater and multinational objectives. At the strategic level, a nation often determines the national (or multinational in the case of an alliance or coalition) guidance that addresses strategic objectives in support of strategic end states and develops and uses national resources to achieve them. The President, aided by the National Security Council (NSC) and Homeland Security Council (HSC) as the National Security Staff, establishes policy and national strategic objectives. The day-to-day work of the NSC and HSC is accomplished by the combined National Security Staff, the President's principal staff for national security issues. The Secretary of Defense (SecDef) translates these into strategic military objectives that facilitate identification of the military end state and theater strategic planning by the CCDRs. CCDRs usually participate in strategic discussions with the President and SecDef through the CJCS and with partner nations. The CCDR's strategy is an element that relates to both U.S. national strategy and operational-level activities within the theater.[53]

2. Operational Level of Warfare: The operational level links strategy and tactics by establishing operational objectives needed to achieve the military end states and strategic objectives. It sequences tactical actions to achieve objectives. The focus at this level is on the planning and execution of operations using operational art: the cognitive approach by commanders and staffs—supported by their skill, knowledge, experience, creativity, and judgment—to develop strategies, campaigns, and operations to organize and employ military forces by integrating ends, ways, and means. JFCs and component commanders use operational art to determine when, where, and for what purpose major forces will be employed and to influence the adversary's disposition before combat. Operational art governs the deployment of those forces and the arrangement of battles and major operations to achieve operational and strategic objectives.[54]

3. Tactical Level of Warfare: Tactics is the employment and ordered arrangement of forces in relation to each other. The tactical level of war is where battles and engagements are planned and executed to achieve military objectives assigned to tactical units or JTFs. Activities at this level focus on the ordered arrangement and maneuver of combat elements in relation to each other and enemy to achieve combat objectives.[55]

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[53] *Id.*
[54] *Id.* at I-8.
[55] *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

Landpower is the ability—by threat, force, or occupation—to gain, sustain, and exploit control over land, resources, and people.[1] Our Army provides the United States with a campaign-quality force able to secure, seize, and occupy terrain; sustain itself; and enable our unified action partners to interact with, secure, or control populations. When necessary, the Army conducts large-scale ground combat operations on land to achieve strategic objectives and impose our will on enemies. No other force has this capability. [2]

II. MISSION

"The Army mission—our purpose—remains constant: to deploy, fight, and win our nation's wars by providing ready, prompt, and sustained land dominance by army forces across the full spectrum of conflict as part of the joint force. The Army mission is vital to the nation because we are a service capable of defeating enemy ground forces and indefinitely seizing and controlling those things an adversary prizes most—its land, its resources, and its population."[3]

III. ORGANIZATION. The major warfighting elements of the operational Army are the modular corps, modular divisions, and brigade combat teams (BCT).[4] 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:

A. **Army Service Component Command (ASCC), or Theater Army.** Armies are usually commanded by three- or four-star Generals. Of the nine ASCCs, six are focused on geographic regions, while three are focused on functional areas.[5]

B. **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).[6]

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[1] U.S. DEP'T OF ARMY, DOCTRINE PUB. 3-0, MILITARY OPERATIONS (31 Jul. 2019) [hereinafter, ADP 3-0].
[2] U.S. DEP'T OF ARMY, DOCTRINE PUB. 1, THE ARMY para. 1-8 (31 Jul. 2019) [hereinafter, ADP 1].
[3] U.S. Army, *The Army's Vision and Strategy*, ARMY.MIL, https://www.army.mil/e2/downloads/rv7/vision/the_army_vision.pdf (last visited 29 May 2020).
[4] U.S. DEP'T OF ARMY, FIELD MANUAL 3-94, THEATER ARMY, CORPS, AND DIVISION OPERATIONS Table 1-1 (21 Apr. 2014) [hereinafter FM 3-94].
[5] U.S. Army, *Understanding the Army Structure*, ARMY.MIL, https://www.army.mil/organization/ (last visited 29 May 2020). The 10 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); U.S. Army Space and Missile Defense Command/Army Strategic Command (USASMDC/ARSTRAT) and U.S. Army Cyber Command (ARCYBER).
[6] FM 3-94, *supra* note 4, Table 1-1.

C. **Divisions.** Divisions are commanded by Major Generals (two-star). The Army has eighteen division headquarters (ten Active Component, one Integrated, and eight National Guard).[7] The division headquarters are designated light, armored, airborne, etc.; however, they have all types of brigades task-organized to them for operations.

D. **Brigade Combat Teams (BCT).** Commanded by Colonels, BCTs are the Army's primary combined arms close combat force.[8] BCTs conduct offensive, defensive, stability and civil support operations. All BCTs include maneuver; field artillery; intelligence; signal; engineer; chemical, biological, radiological, and nuclear (CBRN); and sustainment capabilities. Augmentation might include aviation, armor, infantry, field artillery, air defense, military police, civil affairs, military information support elements, engineers, CBRN, and information systems. The BCT legal 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.[9] The brigade judge advocate (BJA) serves as the legal advisor to the BCT commander. However, the BJA is under the technical supervision of the staff judge advocate.[10] There are three types of maneuver BCTs: infantry, armored, and Stryker.

1. *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.[11] IBCTs do not have heavy combat vehicles and are organized around dismounted infantry. Some specialized IBCTs are designated as airborne or air assault; although all IBCTs can conduct air assault operations.

2. *Armored BCT (ABCT).* The ABCT is composed of three combined arms battalions (CABs), a cavalry squadron, field artillery battalion, brigade support battalion, and brigade engineer battalion.[12] CABs are organized in a "two-by-two" design, consisting of two armor companies and two mechanized infantry companies.[13] ABCTs utilize large, heavily armored, tracked vehicles such as the M1 Abrams tank, the M2/M3 Bradley Fighting Vehicle, and the M109 Paladin howitzer.

3. *Stryker BCT (SBCT).* The SBCT is organized around mounted infantry.[14] 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 120-mm Stryker mortar carrier vehicles with 60-mm dismounted mortar capability, a mobile gun system (MGS) platoon with three MGS vehicles, and a sniper team.[15]

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[7] The ten active 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 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).
[8] U.S. DEP'T OF ARMY, FIELD MANUAL 3-96, BRIGADE COMBAT TEAM para. 1-1 (8 Oct. 2015) [hereinafter FM 3-96].
[9] U.S. DEP'T OF ARMY, FIELD MANUAL 1-04, LEGAL SUPPORT TO THE OPERATIONAL ARMY para. 4-7 (18 Mar. 2013).
[10] *Id.* at para. 3-6.
[11] FM 3-96, *supra* note 4, para. 1-8.
[12] *Id.* at para. 1-48.
[13] *Id.*
[14] *Id.* at 1-26.
[15] *Id.* at paras. 1-26, 1-28.

Army Units

Unit	Commander/Leader	Approx. Size	Unit	Commander/Leader	Approx. Size
Army	General or Lieutenant General	100,000+	Battalion	Lieutenant Colonel	500-600
Corps	Lieutenant General	20,000-40,000	Company	Captain	100-200
Division	Major General	10,000-18,000	Platoon	Lieutenant	16-50
Brigade	Colonel	3,000-5,000	Squad	Staff Sergeant	4-10

IV. OPERATIONS. The Army prepares leaders and Soldiers for the fluid operational environment. The operational environment is characterized by diverse operational and mission variables.[16] No two operational environments are alike and the operational environment will change over time.[17] Army land operations are characterized by four tenets: simultaneity, depth, synchronization, and flexibility.[18] Commanders in these operations leverage the six warfighting functions—command and control, movement and maneuver, intelligence, fires, sustainment, and protection—to accomplish the mission.[19] Commander apply combat power through these warfighting functions using leadership and information.[20]

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.

[16] ADP 3-0, *supra* note 1 at para. 4. These operational variables are political, military, economic, social, information, infrastructure, physical environment, and time (PMESII-PT). *Id.* at para, 1-14. Mission variables are mission, enemy, terrain and weather, troops and support available, time available, and civil considerations (METT-TC). *Id.* at para. 1-15.
[17] *Id.* at para. 1-12
[18] *Id.* at para. 66.
[19] *Id.* at para. 5-11 to 5-25
[20] *Id.* at para. 5-11.

U.S. MARINE CORPS

I. MISSION

A. Under 10 U.S.C. § 5063, the Marine Corps' primary mission is to be "organized, trained, and equipped to provide fleet marine forces of combined arms, together with supporting air components, for service with the fleet in the seizure or defense of advanced naval bases and for the conduct of such land operations as may be essential to the prosecution of a naval campaign." In addition, the Marine Corps provides detachments and organizations for service on 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.[1]

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 INHERENT RESOLVE (OIR) and OPERATION FREEDOM'S SENTINAL (OFS). 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 186,000 active duty Marines and 38,000 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). II Marine Expeditionary Force (II MEF) is provided by the Commander, MARFORCOM, to Combatant Commanders. I and III MEFs are provided by the Commander, MARFORPAC, to the Commander, U.S. Pacific Command. Marine forces are apportioned to the remaining geographic combatant commands for contingency planning and are provided to the Combatant Commands when

[1] U.S. MARINE CORPS, DOCTRINAL PUB. 1-0, MARINE CORPS OPERATIONS (29 Mar. 2019, with changes 1-3).

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**.[2] 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, Okinawa, 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)[3]

A. 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 with scalable, versatile amphibious and expeditionary forces able to assure allies; deter potential adversaries; provide persistent United States presence with little or no footprint ashore; and respond to a broad range of contingency, crisis, and conflict situations. MAGTFs are a balanced combined arms force package containing command, ground, aviation, and logistics 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 logistics group 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).

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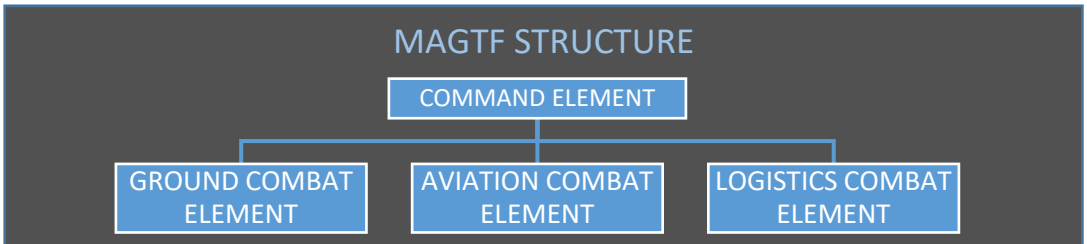
[2] U.S. MARINE CORPS, WARFIGHTING PUB. 11-10, MARINE CORPS LEGAL SUPPORT (19 Jun. 2018).
[3] *U.S. Marine Corps Concepts and Programs 2019*, MARINES.MIL, https://www.candp.marines.mil/ (last visited 3 Jun. 2020).



The CE Provides a single headquarters for command, control, and coordination of ground, air, and logistic support elements.

The GCE may range in size from an infantry battalion to one or more divisions. It may include artillery, tanks, assault amphibious vehicles, light armored infantry, and combat engineer organizations.

The ACE may vary in size from a detachment of one or more aircraft to a reinforced helicopter squadron to one or more aircraft wings. It may include offensive air support, assault support, air reconnaissance, anti-air warfare, electronic warfare, and command and control organizations.

The LCE forms around a combat logistics headquarters, and may vary in size and composition from a support detachment to, one or more Marine Logistics Groups (MLGs). It is task organized to provide the full range of combat logistics functions and capabilities necessary to maintain the continued readiness and sustainability of the MAGTF as a whole.

B. Four types of MAGTFs can be task organized as follows: the Marine Expeditionary Force (MEF), the Marine Expeditionary Brigade (MEB), the Marine Expeditionary Unit (MEU), 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.

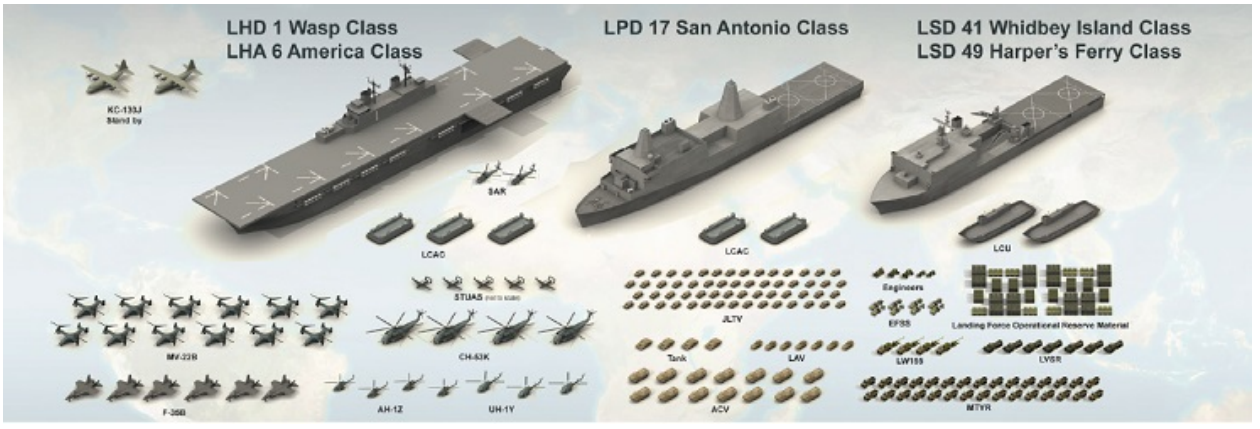
D. A MEB, normally commanded by a brigadier general, is a scalable MAGTF with a force of up to 20,000 Marines and Sailors. The scalable MEB is capable of full spectrum operations, and self-sustainment for 30 days. The standing MEB CEs are the 1st MEB, which is embedded in the I MEF staff, while 2d and 3d MEBs are stand-alone organizations. The standing MEB CEs do not have permanently assigned forces, instead they maintain habitual relationships with associated major subordinate elements through planning and exercises. When mobilized, a MEB is comprised of a reinforced infantry regiment, a composite Marine Aircraft Group, and a task-organized Combat Logistics Regiment. MEBs provide CCDRs with a scalable warfighting capability across the ROMO and can conduct amphibious assaults and operations ashore in any geographic environment. As an expeditionary force, a

MEB is capable of rapid deployment and employment via amphibious shipping, strategic air and sealift, geographic or MPF assets, or any combination of these. A MEB can operate independently, serve as the forward echelon of a MEF, or act as a JTF headquarters with augmentation. 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 MEUs 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 is typically comprised of approximately 2,600 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. MEUs train for operations to be executed within six hours of receipt of the mission. The forward-deployed MEU, 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 aviation 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. A MEUs organic capabilities include:

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, Embassy Reinforcement, 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.



Notional laydown of a Marine Expeditionary Unit (MEU)

F. A SPMAGTF may be of any size, but normally no larger than a MEU, with tailored capabilities required for accomplishing a particular mission. It may be task-organized from non-deployed Marine Corps forces or formed on a contingency basis from a portion of a deployed MAGTF. Regimental-level headquarters often assume the role as a SPMAGTF command element and may conduct training in anticipated mission skills prior to establishment. A SPMAGTF may deploy using amphibious warfare ships, commercial ships or aircraft, inter-theater airlift, or organic Marine aviation. Frequently, SPMAGTFs conduct sea and land-based security cooperation activities, while others have been formed to provide sea-based FHA or military support to civil authorities or to participate in freedom of navigation operations.

G. **Maritime Prepositioning Force.** As is evident from the above, an overriding requirement for MAGTFs, and especially MEUs, 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 fourteen 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 two Maritime Pre-positioning Ship Squadrons (MPSRON),. MPSRON-2 is based at Diego Garcia in the Indian Ocean, and MPSRON-3 is based in Guam and Saipan in the Western Pacific Ocean. 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.

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 Department of the Navy will recruit, train, equip and organize to deliver combat ready Naval forces to win conflicts and wars while maintaining security and deterrence through sustained forward naval presence."[3]

B. **Maritime Strategic Concept.** The 2015 Cooperative Strategy for 21st Century Seapower states the most recent strategy reaffirms two foundational principle; "First, U.S. forward naval presence is essential to accomplishing the following naval missions derived from national guidance: defend the homeland, deter conflict, respond to crises, defeat aggression, protect the maritime commons, strengthen partnerships, and provide humanitarian assistance and disaster response. Our self-sustaining naval forces, operating in the global commons, ensure the protection of the homeland far from our shores, while providing the President with decision space and options to deny an adversary's objectives, preserve freedom of action, and assure access for follow-on forces. Second, naval forces are stronger when we operate jointly and together with allies and partners. Merging our individual capabilities and capacity produces a combined naval effect that is greater than the sum of its parts. By working together in formal and informal networks, we can address the threats to our mutual maritime security interests. Maximizing the robust capacity of this global network of navies concept, we are all better postured to face new and emerging challenges. The Sea Services have historically organized, trained, and equipped to perform four essential functions: deterrence, sea control, power projection, and maritime security. Because access to the global commons is critical, this strategy introduces a fifth function: all domain access. This function assures appropriate freedom of action in any domain the sea, air, land, space, and cyberspace, as well as in the electromagnetic (EM) spectrum."[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.

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[1] U.S. Navy, U.S. Marine Corps, & U.S. Coast Guard, *A Cooperative Strategy for 21st Century Seapower* (2015), http://www.navy.mil/local/maritime/150227-CS21R-Final.pdf.
[2] *Id.*
[3] *Secretary of the Navy Year 3 Strategic Vision, Goals, and Implementation Guidance*, https://www.navy.mil/strategic/Department_of_the_Navy_Strategic_Guidance_FY2020.pdf.
[4] *A Cooperative Strategy for 21st Century Seapower*, *supra* note 1.

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 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.

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.

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),[5] its embarked air wing (CVW)[6] of approximately eighty fixed- and rotary-wing aircraft,[7] a cruiser and two destroyers,[8] a replenishment ship,[9] and a submarine.[10] 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.[11]

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,[12] 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 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.

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[5] "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*, NAVY.MIL (15 Jul. 2019), http://www.navy.mil/navydata/fact_display.asp?cid=4200&tid=200&ct=4.

[6] An air wing adds approximately 2,400 sailors onboard the aircraft carrier.

[7] An embarked air wing will generally consist of F/A-18C/D Hornets and F/A-18E/F Super Hornets, EA-18G Growler, E-2C/D Hawkeyes, C-2A Greyhounds (to be replaced by CMV-22B Ospreys by 2018), and MH-60R/S, and HH-60H Seahawk helicopters.

[8] The cruisers and destroyers provide defense against air, surface, and submarine threats.

[9] This ship performs underway replenishment of food, ammunition, fuel, repair parts, and other provisions for the other CSG ships.

[10] 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*, NAVY.MIL (26 Feb. 2019), http://www.navy.mil/navydata/fact_display.asp?cid=4100&tid=100&ct=4.

[11] 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, 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.

[12] 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.

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.[13] 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.[14] 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.[15]

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:[16]

A. *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.

B. *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.

C. *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.

D. *Power Projection*. Our ability to overcome challenges to access and to project and sustain power ashore is the basis of our combat credibility.

E. *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.

F. *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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[13] *See generally U.S. Navy Fact File—Fleet Ballistic Missile Submarines - SSBN*, NAVY.MIL (29 Jan. 2019) http://www.navy.mil/navydata/fact_display.asp?cid=4100&tid=200&ct=4.

[14] 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*, NAVY.MIL (27 Feb. 2019), http://www.navy.mil/navydata/fact_display.asp?cid=4100&tid=300&ct=4.

[15] For more information see Missile Defense Agency, *Aegis Ballistic Missile Defense*, MDA.MIL, https://www.mda.mil/system/aegis_bmd.html (last visited 3 Jun. 2020).

[16] U.S. DEP'T OF NAVY, DOCTRINE PUBLICATION 1, NAVAL WARFARE (March 2010), https://www.usni.org/sites/default/files/inline-files/NDP-1-Naval-Warfare-%28Mar-2010%29_Chapters2-3.pdf.

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."[17]

[17] *A Cooperative Strategy for 21st Century Seapower*, *supra* note 1.

U.S. AIR FORCE

I. INTRODUCTION

A. 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 Department of the 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]

B. 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 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

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[1] WINGED SHIELD, WINGED SWORD: A HISTORY OF THE UNITED STATES AIR FORCE, vol. I 1907-1950, at 10 (Bernard C. Nalty, ed., 1997).
[2] *Id.* at 395.
[3] RICHARD I. WOLF, THE UNITED STATES AIR FORCE: BASIC DOCUMENTS ON ROLES AND MISSIONS 76 (1987); *see also* 10 U.S.C. § 8062(c) (2011).
[4] U.S. DEP'T OF AIR FORCE, AIR FORCE 101 POWERPOINT PRESENTATION, slide 12 (Apr. 2016), 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], 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, Incorporating Change 1, 12 Nov. 2014) [hereinafter AFI 1-1], http://www.e-publishing.af.mil.
[7] *Id.* at para. 1.2.1.
[8] AF VISION, *supra* note 5.

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, *Manpower and Organization*, dated 29 August 2019.[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). MAJCOMs are management headquarters directly subordinate to HQ USAF that are 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] Air Combat Command (ACC), Air Education and Training Command (AETC), Air Force Global Strike Command (AFGSC), Air Force Materiel Command (AFMC), Air Force Reserve Command (AFRC), Air National Guard (ANG),* Air Force Space Command (AFSPC), Air Mobility Command (AMC), Pacific Air Forces (PACAF), United States Air Forces Europe and Air Forces Africa (USAFE), and Air Force Special Operations Command (AFSOC).

*****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.

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[9] U.S. DEP'T OF AIR FORCE, AIR FORCE DOCTRINE, VOL. 1, BASIC DOCTRINE 48 (27 Feb 2015) [hereinafter AF DOCTRINE, V1], https://doctrine.af.mil/download.jsp?filename=Volume-1-Basic-Doctrine.pdf.
[10] *Id.* at 25.
[11] *Id.*
[12] AF VISION, *supra* note 5.
[13] *Vision*, AIR FORCE.COM, https://www.airforce.com/mission/vision (last visited 3 Jun. 2020).
[14] U.S. DEP'T OF AIR FORCE, AIR FORCE DOCTRINE, VOL. 2, LEADERSHIP 8 (8 Aug 2015) [hereinafter, AF DOCTRINE, V2], https://doctrine.af.mil/download.jsp?filename=Volume-2-Leadership.pdf.
[15] *See*, U.S. DEP'T OF AIR FORCE INSTR. 38-101, MANPOWER AND ORGANIZATION (29 Aug. 2019) [hereinafter, AFI 38-101].
[16] U.S. DEP'T OF AIR FORCE, *U.S. Air Force Fact Sheet* (18 Jan. 2006), http://www.af.mil/AboutUs/FactSheets/Display/tabid/224/Article/104613/the-us-air-force.aspx (last visited 3 Jun. 2020).

3. **Numbered Air Force (NAF).** NAFs are a level of command directly under a MAJCOM that 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. NAFs are typically commanded by a three-star general (O-9). There are currently 16 activated NAFs worldwide.

a. **Named Air Force.** Named Air Forces operate 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.** Flights are a level of organization lower than squadron. 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 (UCC), subunified combatant command, or joint task force (JTF) level.[17]

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[17] U.S. DEP'T OF AIR FORCE, AIR FORCE DOCTRINE, VOL. 3, COMMAND 44 (22 Nov. 2016) [hereinafter AF DOCTRINE, V3], https://www.doctrine.af.mil/Portals/61/documents/Volume_3/Volume-3-Command.pdf.

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. The COMAFFOR commands forces through two separate branches of the chain of command: the operational branch and the administrative branch.

When Air Force forces are assigned or attached to a JFC, the JFC normally receives operational control (OPCON) of these forces. This authority is best exercised through subordinate JFCs and Service component commanders and thus is normally delegated accordingly. [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 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 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 FORCE 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.

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[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], https://static.e-publishing.af.mil/production/1/af_a3_5/publication/afi10-401/afi10-401.pdf

[20] AF DOCTRINE, V3, *supra* note 17 at 51.

[21] *Id.* at 67.

[22] U.S. DEP'T OF AIR FORCE, GLOBAL VIGILANCE, GLOBAL REACH, AND GLOBAL POWER FOR AMERICA 4 (15 Aug. 2013), https://www.af.mil/Portals/1/documents/af%20events/2015/newGV_GR_GP_PRINT.pdf..

1. Air & Space Superiority is 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.[23]

2. Intelligence, Surveillance, and Reconnaissance is 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.[24]

3. Rapid Global Mobility is the delivering of 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.[25]

4. Global Strike is 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.[26] 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 is the providing of 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.[27]

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:

USAF Airpower Operations	
1. Strategic Attack	Offensive action that is specifically selected to achieve national or military strategic objectives.
2. Counterair Operations	Operations that integrate offensive and defensive operations to attain and maintain a desired degree of air superiority.
3. Counterland Operations	Operations against enemy land force capabilities to create effects that achieve joint force commander objectives.
4. Countersea Operations	Operations conducted to attain and maintain a desired degree of maritime superiority.
5. Airspace Control	The process used to increase operational effectiveness through safe, efficient, and flexible use of airspace.
6. Space Operations	The combination of space superiority (controlling the ultimate high ground of space) and mission assurance.
7. Cyberspace Operations	The employment of cyberspace capabilities where the primary purpose is to achieve military objectives or effects in or through cyberspace.
8. Air Mobility	The rapid movement of personnel, materiel, and forces to and from or within a theater by air.
9. Special Operations	USAF 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 ISR units.
10. Homeland Operations	Construct through which the USAF supports homeland defense, defense support of civil authorities, and emergency preparedness operations designed to detect, preempt, respond to, mitigate, and recover from incidents and threats to the homeland.
11. Nuclear Operations	The USAF organizes, trains, equips, and sustains forces with the capability to support the national security goals of deterring adversaries

[23] *Id.*
[24] *Id.* at 6.
[25] *Id.* at 7.
[26] *Id.* at 8.
[27] *Id.* at 9.

	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; and holding at risk a specific range of targets.
12. Irregular Warfare (IW)	The USAF supports and conducts 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 ISR	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	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.
17. Electronic Warfare (EW)	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.

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.[28] 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).[29] The baseline AOC organization includes an AOC commander, five divisions (strategy, combat plans, combat operations, ISR, and air mobility), and multiple support/specialty teams.[30] 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.[31] 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.[32]

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."[33]

[28] THE JUDGE ADVOCATE GENERAL'S SCHOOL, AIR FORCE OPERATIONS AND THE LAW 308 (2014) [hereinafter AF Ops & Law]; U.S. DEP'T OF AIR FORCE, AIR FORCE DOCTRINE, ANNEX 3-30 COMMAND AND CONTROL 55 (7 Jan. 2020) [hereinafter AF DOCTRINE, ANNEX 3-30], https://www.doctrine.af.mil/Portals/61/documents/Annex_3-30/Annex%203-30-Command-and-Control.pdf.
[29] AF DOCTRINE, ANNEX 3-30 at 55.
[30] JOINT CHIEFS OF STAFF, JOINT PUB. 3-30, JOINT AIR OPERATIONS at II-14 (25 Jul. 2019).
[31] *Id*. at II-22.
[32] AF OPS & LAW, *supra* note 28 at 308.
[33] *About the Air Force: History: Part IV*, AIR FORCE.COM, http://www.airforce.com/learn-about/history/part4/ (last visited 29 May 2020).

U.S. SPACE FORCE

I. The U.S. Space Force (USSF) was established as a new military service on December 20, 2019, under the Fiscal Year 2020 National Defense Authorization Act (NDAA). The NDAA established the USSF within the Department of the Air Force, just as the U.S. Marine Corps falls under the Department of the Navy.

II. As of June 2020, the U.S. Space Force is still developing its doctrine. According to the NDAA, the mission of the U.S. Space Force is to protect U.S. and allied interests in space, to deter aggression in, from, and to space, and to conduct space operations.[1] Additional USSF responsibilities include developing military space professionals, acquiring military space systems, maturing the military doctrine for space power, and organizing space forces to present to our Combatant Commands.[2]

III. The senior military member of the USSF is the Chief of Space Operations (CSO), who is a full member of the Joint Chiefs of Staff.[3] The USSF's personnel primarily comprise members formerly assigned to Air Force Space Command (AFSPC). Over time, the Department of Defense (DOD) vision is to consolidate space missions from across the Armed Forces into the USSF, as appropriate and consistent with law.[4]

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[1] National Defense Authorization Act for Fiscal Year 2020, Pub. L. 116-92, [hereinafter FY 2020 NDAA], https://www.congress.gov/bill/116th-congress/senate-bill/1790/text#toc-H6E519C3D8D7C4DD7822C33EDAAF464B2.
[2] *About the US Space Force*, SPACEFORCE.MIL, https://www.spaceforce.mil/About-Us/About-Space-Force (last visited 1 Jun. 2020) [hereinafter Space Force].
[3] FY 2020 NDAA, *supra* note 1.
[4] Space Force, *supra* note 2.

U.S. COAST GUARD

I. INTRODUCTION. As an armed force, the United States Coast Guard (USCG) 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. However, because of its role as the United States' primary maritime law enforcement agency, USCG 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. § 101, 14 U.S.C. § 102, and 10 U.S.C. § 101(a)(4), the USCG is designated as both an armed force and a federal law enforcement agency. The USCG is the principal federal agency responsible for maritime safety, security, and stewardship. As such, the USCG 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 United States' 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).

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[1] *See* 14 U.S.C. § 101, 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." *See also* 10 U.S.C. § 101(a)(4)–(5) (defining the Coast Guard as an "armed force" and a "uniformed service").

[2] *See* COAST GUARD PUBLICATION 1, DOCTRINE FOR THE U.S. COAST GUARD (Feb. 2014) [hereinafter USCG PUB 1], https://media.defense.gov/2018/Oct/05/2002049081/-1/-1/1/CGPUB_1-0_DOCTRINE.PDF. 14 U.S.C. § 102 sets forth the USCG's missions:

> The Coast Guard shall—
>
> (1) 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;
>
> (2) engage in maritime air surveillance or interdiction to enforce or assist in the enforcement of the laws of the United States;
>
> (3) 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;
>
> (4) develop, establish, maintain, and operate, with due regard to the requirements of national defense, aids to maritime navigation, icebreaking 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;
>
> (5) 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;
>
> (6) engage in oceanographic research of the high seas and in waters subject to the jurisdiction of the United States; and
>
> (7) maintain a state of readiness to assist in the defense of the United States, including when functioning as a specialized service in the Navy pursuant to section 103.

To the extent that seizure, arrest, and prosecution are desired outcomes of any maritime interdiction, the USCG is well-positioned to enforce U.S. law 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 United States, 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 USCG 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 USCG's commissioned, warrant, and petty officers are also designated by statute as officers of the customs.[7]

D. **Activities.** USCG 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. § 701, the USCG is specifically authorized to lend assistance to and receive assistance from other federal and state agencies. Unlike DoD personnel

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[3] 14 U.S.C. § 522(a).

[4] 46 U.S.C. § 70116.

[5] *See, e.g.*, The Maritime Drug Law Enforcement Act (MDLEA), 46 U.S.C. §§ 70501–70508. 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. § 523.

[7] 14 U.S.C. § 143; 19 U.S.C. § 1401.

[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] USCG 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).

restrained by the Posse Comitatus Act,[10] the USCG may utilize its personnel and facilities "to assist any 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 USCG, 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 7,000 Reservists, over 8,000 civilian employees, and approximately 31,000 Auxiliarists (volunteers who assist the USCG in its boating safety mission).[16]

C. **Geography.** The majority of day-to-day USCG 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. The following map shows the USCG's geographical organization of Areas and Districts:

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[10] 18 U.S.C. § 1385. 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) [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. § 701(a).

[12] *Id.* at §701(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.

[15] 14 U.S.C. §§ 101, 103; *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], https://media.defense.gov/2018/Oct/05/2002049082/-1/-1/0/CGPUB_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.

USCG Sectors 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 is 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 in 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 the 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 the 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 United States' 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 law 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]

B. **Maritime Law Enforcement, Drug Interdiction, and Migrant Interdiction.**

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[19] 6 U.S.C. § 468(a).
[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., https://www.maritime.dot.gov/outreach /maritime-transportation-system-mts/maritime-transportation-system-mts (last visited Jun. 3, 2020).
[24] 33 C.F.R. §§ 165.9, 165.2010–2030. 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.*, 46 U.S.C. § 70011 (waterfront safety); 46 U.S.C. § 70116 (port, harbor, and coastal facility security); 14 U.S.C. § 523 (law enforcement ashore); 50 U.S.C. § 191 (Regulation of anchorage and movement of vessels during national emergency); and 14 U.S.C. § 91 (Safety of naval vessels).
[26] Maritime Transportation Security Act of 2002, Pub. L. No. 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.

1. Since its founding as the Revenue Cutter Service in 1790, the USCG has been the primary maritime law enforcement agency in the United States. 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."[28] 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."[29] 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.[30] 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.[31]

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. 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 operation, 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.[32] 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.[33] 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 as a federal maritime law enforcement agency[34] within the DHS, the USCG is "a military service and a branch of the armed forces of the United States at all times."[35] 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 geographic 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

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[28] 14 U.S.C. § 102.
[29] 14 U.S.C. § 522.
[30] 10 U.S.C. §§ 271–284; 10 U.S.C. § 279 (mandating the assignment of USCG personnel to certain naval vessels for law enforcement purposes).
[31] 10 U.S.C. § 279. LEDETS may also deploy on U.S. Navy or allied vessels to support maritime homeland security or related operations.
[32] *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).
[33] 14 U.S.C. § 101 (establishing the U.S. Coast Guard as a military service and branch of the armed forces); 10 U.S.C. § 101(a)(4) (including "the Army, Navy, Air Force, Marine Corps, and Coast Guard" in the definition of "armed forces").
[34] 14 U.S.C. § 522.
[35] 14 U.S.C. § 101.

the U.S. Navy during critical national defense missions in every major conflict in the United States' history,[36] 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.[37] 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 Fiscal Year 2019, the USCG responded to 15,257 SAR cases and saved 4,335 lives. To carry out its SAR mission, the USCG closely coordinates with federal, state, local, and tribal authorities, as well as the maritime industry.[38] Established and operated under international[39] 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 United States' primary at-sea fisheries enforcement agency charged with protecting EEZ resources. In 2018 the commercial fishing industry landed over 9.4 billion pounds of fish worth over $5.5 billion,[40] 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,[41] 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).[42] 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 United States 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.

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

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[36] For example, most recently during Operation Iraqi Freedom.

[37] 14 U.S.C. § 521; 14 U.S.C. § 102.

[38] See THE NATIONAL SEARCH AND RESCUE PLAN OF THE UNITED STATES (2016), https://www.dco.uscg.mil/Portals/9/CG-5R/manuals/National_SAR_Plan_2016.pdf, 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.

[39] *See* International Convention on Maritime Search and Rescue Convention (SAR Convention), 1979, with Annex, T.I.A.S. No. 11093.

[40] *See Commercial Fisheries Statistics*, NOAA OFFICE OF SCIENCE AND TECHNOLOGY, https://foss.nmfs.noaa.gov/apexfoss/f?p=215:200:::::: (last visited Jun. 3, 2020).

[41] 16 U.S.C. §§ 1801–1891.

[42] *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.

many types of vessels to ensure they are in compliance with safety and environmental protective measures.[43] 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[44] (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. [45] 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,[46] the Act to Prevent Pollution from Ships,[47] CERCLA,[48] the Ocean Dumping Act,[49] and the Refuse Act.[50] The Coast Guard details judge advocates to various DOJ U.S. Attorney's Offices to serve as the lead prosecutors for these criminal cases. Often, vessel crew member efforts to conceal pollution crimes from USCG investigators result in DOJ prosecutions for false official statements and obstruction of justice.[51]

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."[52] 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.),[53] administers bridges, oversees waterways and vessel traffic management systems, and conducts icebreaking operations in critical waterways to ensure the continued flow of commerce by water. The USCG operates the only U.S.-flagged heavy icebreakers capable of providing year-round access to the polar regions.

VII. USE OF FORCE POLICY/RULES OF ENGAGEMENT. Since a primary USCG mission is law enforcement, most USCG use of force issues arise within that context. The use of force in law enforcement operations is governed by the USCG Use of Force Policy,[54] which comports with requirements established in the Fourth Amendment to the U.S. Constitution that any use of force by a law enforcement officer must be reasonable under the circumstances present.[55] When applicable, the USCG adheres to the Standing Rules of Engagement (SROE)[56] as directed within that instruction.

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[43] *See, e.g.*, 33 C.F.R. § 154, which details regulations regarding bulk oil and hazardous materials facilities and USCG oversight responsibilities pertaining to those entities.
[44] Pub. L. No. 101-380, 104 Stat. 507 (1990).
[45] *See, e.g.* 40 C.F.R. § 300. 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*.
[46] 33 U.S.C. § 1251–1376.
[47] 33 U.S.C. §§ 1901–1915.
[48] 42 U.S.C. §§ 9610–9675.
[49] 33 U.S.C. §§ 1401–1445.
[50] 33 U.S.C. § 407.
[51] *See* 18 U.S.C. § 1001; U.S. COAST GUARD MARITIME LAW ENFORCEMENT MANUAL, COMDTINST M16247, series, chs. 11 & 14 (2017) (For Official Use Only manual) (copy on file with CLAMO) [hereinafter MLEM].
[52] USCG PUB 1, *supra* note 2, at 11.
[53] *See* 14 U.S.C. § 541.
[54] *See* MLEM, *supra* note 51, ch. 4.
[55] *See e.g.*, Graham v. Connor, 490 U.S. 386 (1989); Tennessee v. Garner, 471 U.S. 1 (1985).
[56] JOINT CHIEFS OF STAFF, CHAIRMAN OF THE JOINT CHIEFS OF STAFF INSTRUCTION 3121.01B, STANDING RULES OF ENGAGEMENT, (13 June 2005).

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, decision making process, its regulatory framework and NATO ROE and self-defense.

B. NATO provides a multitude of doctrine, directives, guidance, and procedural frameworks which cover matters of coordination and collaboration among forces within a multination operational framework. NATO doctrine (i.e., Allied Administrative Publications (AAP), Allied Joint Publications (AJP)) and regulations range from purely legal directives to classic operational directives dealing with the conduct of operations. In order to be able to provide correct, conducive and, most importantly, effective legal advice a thorough understanding of NATO's command and force structure set up, procedures and dynamics and the NATO operational and regulatory environment U.S. Forces operate in is crucial.

C. In this context, it is not only important to comprehend the troop contributing nations' (TCN) different national self-defense concepts, the NATO ROE regime, NATO member nations respective national caveats to it, the Red Card Holder principle, the (U.S. and NATO) military decision making process and the dynamics and interactions of national and NATO chains of command, but also NATO terminology.

II. NATO INSTITUTIONAL BACKGROUND AND INTEGRATED COMMAND STRUCTURE

A. Institutional Background, Treaty Provisions, and Status

1. 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.

2. 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 of ambassadorial rank who represents them in the NAC. Permanent Representatives 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, where the United States is represented by the Secretary of Defense, and at the level of Ministers of Foreign Affairs, 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]

3. 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

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[1] North Atlantic Treaty Organization, *Nuclear Planning Group*, NATO.INT (27 Mar. 2020), http://www.nato.int/cps/en/natolive/topics_50069.htm.

[2] http://www.nato.int/cps/en/natolive/topics_49174.htm. North Atlantic Treaty Organization, *NATO Nuclear Deterrence* NATO.INT (20 Feb. 2020), https://www.nato.int/nato_static_fl2014/assets/pdf/2020/2/pdf/200224-factsheet-nuclear-en.pdf ("Irrespective of whether or not they have nuclear weapons, all Allies are members of the NPG with the exception of France, which has decided not to participate.").

Representatives, 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, where the U.S. is represented by the Chairman of the Joint Chiefs of Staff.

4. 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.[3] The individual nations have joint and individual responsibilities to be able to defend themselves and others.

5. 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-defense 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 only time NATO invoked Article 5 was in response to the September 11, 2001, attacks against the United States. On 4 October 2001, once it had been determined that the attacks came from abroad, NATO agreed on a package of eight measures to support the United States. On the request of the United States, it launched its first ever anti-terror operation – Eagle Assist – from mid-October 2001 to mid-May 2002. It consisted of seven NATO AWACS radar aircraft that helped patrol the skies over the United States; in total 830 crew members from 13 NATO countries flew over 360 sorties. This was the first time that NATO military assets were deployed in support of an Article 5 operation. On 26 October, the Alliance launched its second counter-terrorism operation in response to the attacks on the United States, Active Endeavour. Elements of NATO's Standing Naval Forces were sent to patrol the Eastern Mediterranean and monitor shipping to detect and deter terrorist activity, including illegal trafficking. In March 2004, the operation was expanded to include the entire Mediterranean.

6. 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." Article 5 operations do not therefore apply to locations such as The United States Virgin Islands or to the Falkland Islands.

7. Besides Article 5 operations, NATO conducts so called "Non-Article 5 Crisis Response Operations" (NA5CRO), in order to respond to a crisis beyond the concept of collective defense under Article 5. Essentially, NATO's objective of NA5CRO is focused on contributing to effective crisis management when there appears to be no direct threat to NATO nations or territories that otherwise would fall under Article 5. Examples of NA5CRO are Peace Support Operations (PSO). The first NATO PSO was the Implementation Force (IFOR) in the Balkans in 1995, pursuant to the General Framework Agreement for Peace (also known as the Dayton Peace Accord); the ISAF operations was another example for a NA5CRO.

8. NATO has expanded eight times and now numbers at 30 members[4]. The expansion process is elaborated in Article 10 of the Treaty. Specifically, "any other European State" may be invited to join NATO. The invitation is made by unanimous agreement of the current members and is based on the invitees' ability to further the principles of the Treaty and "contribute to the security of the North Atlantic area."

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[3] Iceland has no military, yet is a member of the NATO Alliance.

[4] North Atlantic Treaty Organization, *NATO Member Countries*, NATO.INT, (27 Mar. 2020) https://www.nato.int/cps/en/natohq/nato_countries.htm.

9. To assist the candidate nation, NATO develops a Membership Action Plan (MAP). While not establishing criteria, the MAP is a consultative process between NATO and the prospective member State to ascertain the State's progress toward membership. The MAP is divided into five areas dealing with political and economic issues, military and defense issues, resource issues, security issues, and legal issues. Each aspiring nation drafts an annual "national program" 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 for example, the Ukraine approach to join the MAP in 2008 was withdrawn in 2010 after a change of president. 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.

10. The status of military and civilian personnel and NATO International Military Headquarters is determined by the regulations of the NATO SOFA and the headquarter Status Agreements and their respective supplemental agreements. They establish a framework of rights and responsibilities in the relationship between the sending state or the NATO headquarters and the receiving state. Those include, inter alia, rules for weapons, entry and exit procedures, taxes and fees, driver's license, claim procedures and jurisdiction.

B. Political and Military Decision Making Process

1. NATO as a collective defense and security alliance is, based on and constituted by its 30 sovereign nations. Since the 30 sovereign member states retain full command over their military, and NATO is not a supranational organization having legal power or influence that transcends national sovereignty, all decisions within NATO, predominantly at NAC level, are made exclusively with full consensus of all of the NATO member states. In order to achieve a formal NATO position or decision on any given topic, all 30 NATO member states must agree. This guiding principle of consensus among its member states affects any political and military decision-making, which includes e.g., OPLAN, ROE and targeting frameworks.

2. To enhance the consensus building process, NATO developed the "silence procedure." The silence procedure is used in all committees and subordinate working groups at NATO Headquarters to reach consensus on NATO decisions and policies. 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).

3. There are two supporting staffs at the political NATO Headquarters in Brussels: 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.

4. The NAC typically tasks the MC to provide military guidance on an issue. The MC then provides military 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 Military Representatives 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. 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.

5. 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 a 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 Military Representatives (as noted previously, usually three star flag officers) and Deputy Military Representatives (usually one star flag officers).

C. The U.S. Decision-Making Process

1. The formulation of the U.S. position at NATO involves interagency coordination between the Department of Defense, Department of State, and the Joint Staff. The U.S. Mission to NATO (i.e. the Ambassador's staff) and the U.S. Military Delegation to the MC (i.e. the U.S. Military Representative'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.

2. When the U.S. position is formulated and interagency guidance received by the U.S. Mission and Military Delegation 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

D. NATO Integrated Military Command Structure (NCS) and Dual Chains of Command

1. NATO is often seen, and commonly referred to solely in its pure military context, i.e. "the military Alliance". However, NATO comprises of more than its military structure. NATO has also a civilian one as well including a multitude of NATO organizations and agencies, e.g. the NATO Communications and Information Agency or the NATO Support and Procurement Agency being two of them.[5] Beyond that, NATO Centers of Excellence exist, which, being entities based on Memoranda of Understandings rather than the North Atlantic Treaty itself and relevant agreements, are not pure NATO, but national bodies integrated into the broader NATO framework.

2. From a terminological point of view neither the military nor the civil structure in itself, nor the other mentioned organizations and agencies, can be equated by default with "NATO". Undoubtedly, being NATO bodies and entities, they form and are each of them respectively a part of the Alliance, but NATO as the "North Atlantic Treaty Organization" is distinct in terms of legal and structural characteristics from its mere organizational subsets, because the "North Atlantic Treaty Organization" is first and foremost an international organization with own legal personality and an independent subject of international law.

3. It follows from the principle of national sovereignty, as mentioned above, that neither NATO as an international organization, NATO military headquarters like the Supreme Headquarters Allied Powers Europe (SHAPE), nor military commanders have legal power over member nations or their military forces respectively. Rather, the 30 sovereign member nations retain full command of their military, even after a transfer of authority to a NATO commander has taken place, and troops consequently being placed under his or her operational command. This leads to the challenge of dealing with the phenomenon of dual chains of command: The NATO integrated military command structure with its chain of command and the additional respective NATO member state's national chain of command.

[5] North Atlantic Treaty Organization, *NATO Organization*, NATO.INT (19 May 2020), https://www.nato.int/cps/en/natohq/structure.htm.

4. At first sight the coexistence of a NATO chain of command within the NCS with a parallel national chain of command might be perceived as cumbersome and a hindrance for fast and goal-oriented decision-making that might even unnecessarily slow down the operations tempo. However, the integrated command structure, which in operations can be best described as an integrated multinational chain of command, provides potential to mitigate interoperability challenges as will be discussed below.

5. After the recent reform of the NCS, NATO possesses a rather flat command structure, consisting of a number of permanently established headquarters operating at the strategic, operational and tactical levels and headed by two Strategic Commands (SC): Allied Command Operations (ACO) and Allied Command Transformation (ACT).[6] ACO is located at Supreme Headquarters Allied Powers Europe (SHAPE) in Mons, Belgium, which is forty-five miles south of NATO Headquarters in Brussels. ACT is located in Norfolk, Virginia.

6. The SCs are responsible to the NAC via the MC for the overall direction and conduct of all NATO military matters within their command areas. Their main role is to prepare, plan, conduct and execute NATO or NATO-led military operations, as well as ensuring command and control capabilities.

7. The SCs provide direct advice to the MC, and are authorized to provide direct advice to the NAC on matters within their purview while keeping the MC 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 in Brussels by representatives from their respective staffs to facilitate the timely two-way flow of information.

8. ACO at the strategic level is at the head of its three subordinated operational commands that are supported by tactical level entities: Joint Forces Commands in Norfolk (USA), Brunssum (NLD) and Naples (ITA) at the operational level; Headquarters Allied Air Command (DEU), Headquarters Allied Maritime Command (GBR), Headquarters Allied Land Command (TUR), the Communications and Information Systems Group (BEL), and the Joint Support & Enabling Command (DEU)

9. In a purely operational context of any given NATO or NATO-led operation, the NCS and the respective NATO chain of command might be perceived as a challenge by TCNs, their forces and commanders. As mentioned above, NATO member states retain full national command over their forces, even when these are placed under NATO operational command. The NATO command structure and chain of command, as indicated above, hence, does not override national direction. Although forces may be placed under operational command of a NATO commander within the NCS through the process of "transfer of authority", the respective member nation will never

[6] North Atlantic Treaty Organization, *Allied Command Operations Overview*, NATO.INT, https://shape.nato.int/resources/3/website/NATO%20organisation%20overview.pdf (last visited 2 Jun. 2020).

lose its full command over its troops. They are therefore still subject to and bound by their national laws and interpretation of international law. That leads to the peculiar situation that a NATO commander in a national role, in the NATO chain of command can—and by virtue of national laws maybe even is legally required to—disobey an order by a NATO commander if and when in contradiction and opposition to national orders, direction or guidance[7]. By virtue of the sovereignty of the member nations and the prevalence of national laws, policies, direction and guidance their national orders always trump any NATO order. It is this parallelism that has the potential to lead to unpredictability, because beyond formal caveats uncertainty may exist regarding a member nation's position in regard to a specific operational matter and its undeclared respective reservations.

10. The significant challenges within a dual chain of command environment are related to command responsibilities, one under the NATO legal, regulatory and military framework and the other under the respective national framework.

11. National caveats to an operation are an appropriate and meaningful tool to mitigate conflicts between NATO and national requirements and the potentially related risk to the interoperability of the force (see below).

12. Unlike NATO operations, pure coalition operations are structurally characterized by their completely separate parallel national chains of command without – beyond mere liaison elements – any mutual integration of command elements, and hence without any significant command and control interfaces. Consequently, this structural concept results in and coincides generally with the execution and conduct of operations by the respective multinational coalition partner nation using solely its own national chain of command.

13. A NATO operation, under the NATO integrated military command structure, on the other hand possesses both national chains of command, and at the same time ties them together and incorporates and connects them with the NCS and its chain of command. The phenomenon of dual chains of command might be better described as integrated multinational chains of command within the NCS. This systemic concept provides for more transparency among allies, standardized procedures and infrastructure under unifying commands, a direct link to the political decision makers, shared multinational operational expertise, common communication, terminology, understanding, staffing and standing operation procedures, and the same frame of reference which ultimately results in a combined and joint collective decision making process, the result of which being efficient and effective planning and subsequent conduct of operations.

14. As a practical example, Commander, NATO Resolute Support and USFOR-A exercises simultaneous command over the NATO and U.S. national operations in Afghanistan, two different operations: The former being a non-combat, while the latter is a still a combat mission. COM NATO RS/ COM USFOR-A has thus to take into consideration during the planning and execution of operations the differing NATO and U.S. target engagement and other authorities, ROE sets, self-defense concepts as well as investigative authorities and obligations prescribes by domestic law.

15. In summary, while the NCS with its NATO chain of command is, figuratively, the shell or framework within which the TCNs operate under NATO command and control, this concept still leaves room for NATO commanders to adhere to their respective national orders. Frictions can thus arise if and when NATO and national orders contradict each other. This repercussion can yet be mitigated by timely advanced consideration of national caveats.

16. Although not part of the NATO integrated command structure the NATO Force Structure (NFS) is composed of allied and multinational forces and headquarters placed at NATO's disposal on a permanent or temporary basis. The NFS provides additional and follow-on joint headquarters capabilities, and most of the tactical capabilities and forces to meet the full level of ambition. An example of entities under the NFS would be the NATO Rapid Deployable Corps.

E. Terminology. Even seemingly simple terminology can be problematic and have an impact on the interoperability of a multinational force, because the same term may be defined, understood and used differently

[7] See the well documented discussion between Generals Clark and Jackson in 1999 during NATO's Kosovo war as an example of this friction.

across the spectrum of a multinational force, with consequential effects on the conduct of operations. AAP 6 provides guidance on NATO terminology.

III. NATO RULES OF ENGAGEMENT, SELF DEFENSE CONCEPTS, AND CAVEATS

A. NATO ROE

1. The Rules of Engagement (ROE) for NATO forces are guidance and directives to NATO

Commanders and the forces under their command or control.."[8] The NATO ROE templates are written as a series of prohibitions and permissions applicable to activities in a wide range of military operations and activities. 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.[9]

2. In contrast with U.S. ROE, which are generally considered permissive, NATO ROE may be considered by some to be more restrictive in nature. However, NATO ROE are always mission specific, and thus not by definition or default more restrictive that U.S. ROE; i.e., the ISAF ROE set included defensive and offensive attack ROEs and certain mission accomplishment ROEs.

3. International law, including the law of armed conflict, applies to all NATO military operations. Where some NATO Nations, but not others, have ratified relevant conventions and treaties, efforts will be made to develop a common approach consistent with the obligations assumed by those who have ratified, and respecting the rights of those who have not ratified."[10]

4. NATO member states must also adhere to their respective national laws, and their military, in addition, must adhere to national political guidance. Thus, if national laws, interpretations of international law, or national policies are more restrictive than those in NATO ROE, the affected forces must comply with their national constraints. In this case, each nation must issue instructions restricting the ROE to their troops to ensure compliance with their respective national laws and political guidance. "When national laws are at variance with the ROE for a NATO operation or an activity, nations must inform the Strategic Commander (SC) of any inconsistencies, as early as possible."[11] 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. One formal way for NATO member nations to reflect their national laws and state their respective restrictions is to declare national caveats regarding either the general application, or the specific use of certain ROEs for their military.

5. Caveats are defined as: "[A]ny limitation, restriction or constraint of any nation on its military forces or civilian elements under NATO Command and Control or otherwise available to NATO, that does not permit NATO commanders to deploy or employ these assets fully in line with approved OPLAN. But note that a caveat may apply inter alia to freedom of movement within the joint operations area and/or to compliance with the approved ROE."[12]

6. National caveats to an operation are thus an appropriate and meaningful tool to mitigate conflicts between NATO and national requirements and the potentially related risk to the interoperability of the force. Where caveats are notified and articulated during the operational planning process, they become an integral part of the OPLAN including NATO ROE. Any given national restrictive position can be anticipated before the commencement of and during the execution of NATO operations or missions. In practice caveats are submitted to and published by SHAPE for a given operation as either part of the OPLAN, or within the ROE set or as a separate accompanying document. Since these caveats may impact on the ability of national forces to perform assigned task

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[8] MC 362/2, *NATO Rules of Engagemen*t p. 2, ¶ 1 (18 July 2019) at p. 2 [hereinafter MC 362/2].
[9] *Id*. at p. 12, ¶ 43.
[10] *Id*. at p. 4, ¶ 12.
[11] *Id*. at p. 4, ¶ 19.
[12] NATO Glossary of Terms and Definitions, AAP 6, 2019.

under NATO operational command JAs need to be very vigilant of any such caveats in order to advise the commander during the planning process and execution of any given mission during a NATO operation.

B. Self-Defense

1. NATO defines self-defense as "[t]he use of such necessary and proportional force, including deadly force, to defend NATO forces and personnel against attack or an imminent attack."[13] The definition is further refined by defining "necessary" as indispensable; "proportional" as a response commensurate with the perception of the level of the threat posed; "imminent" as manifest, instant and overwhelming; and "attack" as "the use of force against NATO forces and personnel. The NATO ROE MC 362/2 guidance on NATO ROE acknowledges that ROE do not limit the right of individual and unit self-defense.2. Even though the NATO ROE guidance provides for a NATO definition of self-defense, it is important to bear in mind that NATO member nations' domestic self-defense laws and respective definitions always prevail. All NATO member nations share in principle the same definition, except for slightly different interpretations. However, a significant different use of terminology by the U.S. must be noted.

3. U.S. and NATO terminology differ significantly, both in terms of concrete meaning and definition, and also in respect of the context in which an identical term is being used. For example, while the basic U.S. definition of "hostile act" means "an attack or use of force," the NATO ROE definition defines the same term differently and more narrowly, covering only situations short of an actual attack. The respective ROEs permit attack "against . . . individuals who commit or directly contribute to any intentional act causing serious prejudice or posing a serious danger to NATO/NATO-led forces . . . ." In the context of this definition, it is important to note its broad scope and that the NATO ROE guidance specifically clarifies and further defines hostile attack as "hostile act (not constituting an actual attack)." Not only is the same term "hostile attack" defined differently, the term is not used in the context and framework of self-defense concept, but only in order to describe a threat scenario covered solely by ROE and hence LOAC, yet, outside the NATO and member states' self-defense concept of imminent and actual attack.

4. The U.S. and NATO define the term "hostile intent" very similarly. Hostile intent under NATO ROE is a "likely and identifiable threat recognizable on the basis of both the following conditions: (a) capability and preparedness of individuals…which pose a threat to inflict damage and, and (b) evidence, including intelligence, which indicates an intention to attack or otherwise inflict damage." Under the U.S. definition, the term means a "threat of imminent use of force; imminent not necessarily means immediate or instantaneous". Both terms define "threat" very similarly, and the definition of imminence does not diverge significantly. The broad NATO definition, particularly the conditions (a) and (b), allows for the assumption of a broad temporal scope of "imminence", like in U.S. ROE. While the same term is defined similarly, it is however used in different legal concepts: In the U.S. under the ROE self-defense concept, whereas NATO uses it solely within its NATO ROE use of force context, outside the legal self-defense regime.

5. Unlike the U.S. ROE concept, the use of force in individual or unit self-defense is never part of any given NATO ROE set, because systematically the latter allows for the use of force only based on international law considerations, predominantly LOAC. Since national laws differ, some NATO member nations may have a very broad understanding of self-defense, and others might follow a narrower approach, which is why there might not always be consistency between nations as to where the right to use force in self-defense begins and ends. In order to mitigate this uncertainty and particularly to close the legal gaps between the different legal regimes allowing for the permissible use of force in self-defense, NATO ROE may authorize the use of force in "hostile act" and "hostile intent" situations (so called defensive NATO attack ROE). These NATO ROE are basically rules on attack against elements constituting a threat to NATO forces which falls short of the requirements of an imminent or actual attack (i.e., NATO and most member states' definition of self-defense). Thereby, all use of force cases not meeting the requirements of restrictive national self-defense concepts based merely on imminent and actual attack are covered by way of expanding the use of force spectrum. In other words, NATO defensive attack ROE accommodate different national self-defense concepts, because the authorization of defensive attack NATO ROE allows for the use of force under an international law/LOAC paradigm beyond the above narrow national self-defense concepts.

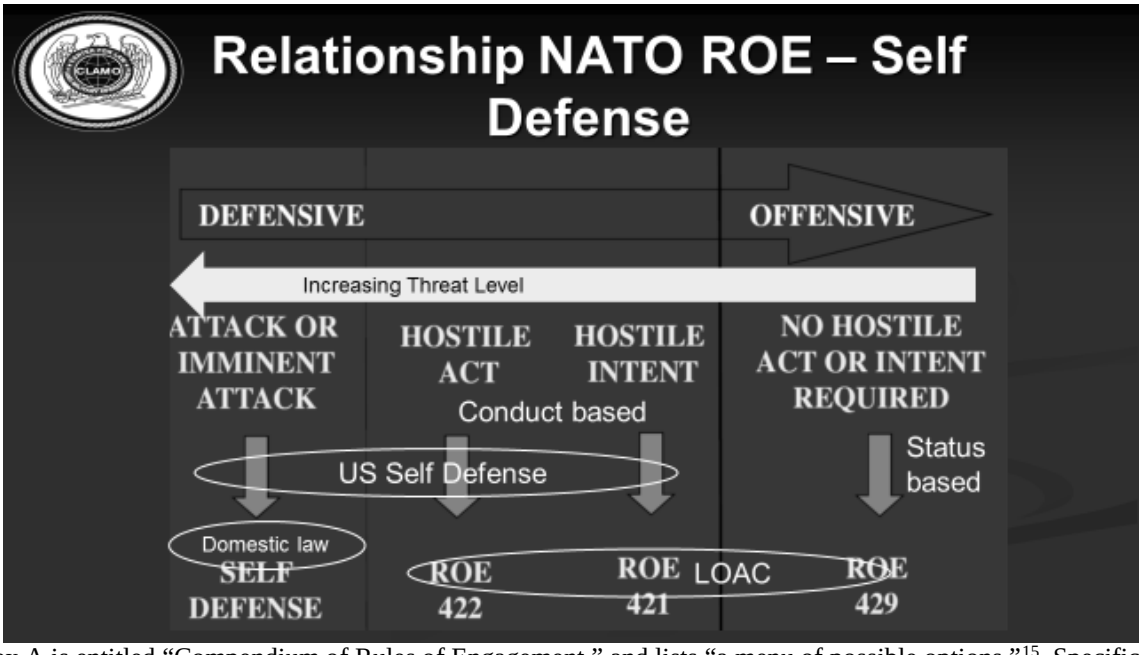
[13] MC 362/2 *supra* note 8 at G-6.

This assures the commander of a combined force that the forces under his or her command will respond uniformly to the actions of the enemy.

6. The different understanding of self-defense and its relation to NATO ROE has direct implications on the work of the JA in a NATO operational environment. If unaware of the different self-defense definitions, one might be tempted to consider self-defense and its interpretation as a universal term without significant differences with regard to its meaning among the members of a NATO operation. Yet, a real life scenario from ISAF is testament of the opposite: U.S. forces in Afghanistan called in close air support (CAS) claiming a self-defense situation. The CJOC dispatched non-U.S. fighter jets. Over the target, the pilots cancelled the mission, because the situation on the ground—which was undoubtedly a self-defense situation under U.S. ROE—did not meet the requirements of the national self-defense concept of the NATO member nation that provided the CAS, as the threat was not imminent under its national self-defense law. An engagement of the target under NATO ROE (hostile intent) was not possible because the member nation had a caveat that CAS was only to be provided in case of self-defense.

7. This example shows that while using the same technical legal terms, definitions and interpretation may differ significantly which can result in immediate and direct interoperability issues if and when unaware about it. Since definitions and understanding often differ some nations may need to issue clarifying guidance to their commanders in order to clarify the differences between national and NATO definitions of the terms "hostile act" and "hostile intent" whenever the defensive attack NATO ROE are authorized. The above figure illustrates the interplay and relationship between NATO ROE and Self-Defense.

8. Despite MC 362/2 formally distinguishing peacetime ROE from armed conflict ROE, however, in light of recent NATO operations, this distinction is no longer as certain. Current ROE, whether in peacetime or in armed conflict, are a mixture of authorizations and limitations. Once an armed conflict has commenced in which NATO forces are involved as combatants, the NATO ROE recognize that "[c]are must be taken to ensure that any ROE do not unduly restrict the commander's ability to effectively carry out the mission and obtain military advantage."[14]



Annex A is entitled "Compendium of Rules of Engagement," and lists "a menu of possible options."[15] Specific guidance on the use of ROE in each of the various war-fighting mediums are contained in Annexes B (Air), C

[14] *Id*. at p. 7, ¶ 29.
[15] *Id*. at p. 12, ¶ 45.

(Land), D (Maritime), and E (Cyberspace). NATO related material may be requested from the Center for Law and Military Operations (CLAMO) (see the CLAMO chapter for contact information).

IV. LOAC & INTERNATIONAL HUMAN RIGHTS

A. It is important for JAs to be aware of the latest decisions of the European Court for Human Rights (ECtHR) regarding the system and application of the European Convention of Human Rights (ECHR) in armed conflict. Most importantly, the ECtHR has ruled that the ECHR is applicable extraterritorially, e.g. in Afghanistan and Iraq and the LOAC has to be read in light of the ECHR.

B. Only the U.S. and Canada out of the 30 NATO member nations are not ECHR states. Hence, JAs might find themselves in a situation where they have to take ECtHR jurisprudence into account when advising on NATO operations.

V. NATO FUNDING

A. NATO member states make both direct and indirect contributions to the costs of running NATO, and implementing its policies and activities.

B. The former are direct financial contributions made by the 30 NATO member states to finance Alliance requirements that cannot be attributed to a single member nation, but rather serve the interest of all 30 member nations. These costs are born collectively, in many cases using the NATO common funding mechanism.

C. Under common funding all 30 NATO member states contribute according to an agreed upon cost-share formula. Common funding arrangements are used to finance NATO's principal budgets: the civil budget (e.g., NATO HQs' running costs), the military budget (e.g., cost of the integrated military command structure) and the NATO Security Investment Program which is basically military capabilities (e.g., the NATO-wide air defense or command and control systems).

D. Indirect funding, or national contributions, are non-financial and come from NATO member states when they volunteer military assets, equipment or troops to a military operation and bear the cost of the decision to do so in accordance with the principle "Cost lay where they fall". These voluntary contributions are offered by individual NATO member states and are taken from the overall defense capability to form a combined NATO capability. A nuance of indirect funding is the 2014 Wales Summit Agreement among NATO member states to commit 2% of their GDP to spending on national defense within one decade (by 2024). This agreement is an indicator of the political resolve of individual NATO member states to devote a predictable level of resources to defense.

VI. DETENTION

A. NATO is not a state and therefore cannot itself be a party to treaties and other international instruments relating to the conduct of hostilities; only individual NATO member states may be a party to such instruments, e.g. the Geneva Conventions (GC). The conduct of detention ops is hence a pure national responsibility.

B. However, in 2007 NATO issued an Allied Joint Publication on Captured Persons to provide guidance on the procedures for the handling and administration of captured persons and their affects, and for their interrogation within the NATO Alliance. It is also intended to improve cooperation between NATO forces during the conduct of operations.

C. Given the prevalence of national responsibilities and obligation in respect of detention operations the AJP itself is – not surprisingly – rather broad in order to set the lowest common denominator among NATO member states. During the approval process the U.S. submitted reservations regarding NATO's concept of Captured Persons. The U.S. reservations to this document in 2007 demonstrate and illustrate in a very condensed and succinct way the U.S. position on detention issues in a NATO/ multinational doctrinal environment. The basic U.S. approach towards detention issues, beyond some changes in terminology, appears not to have changed since. Yet, the quoted DOD Directive 5100.77 in the U.S. reservations is superseded and has been replaced by DOD Directive 2310.01E, dated August 19, 2014.

VII. REFERENCES

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MULTINATIONAL OPERATIONS

"Alliances and multinational partnerships provide avenues for peace, fostering conditions for economic growth with countries sharing the same vision."

Former Secretary of Defense Mattis, 5 Oct 2017

I. INTRODUCTION

A. **Doctrine.** Military actions conducted by forces of two or more nations are defined as "multinational operations."[941] Such actions are usually undertaken within either a formal alliance, e.g. NATO, 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. The starting point for consideration of multinational operations is JP 3-16. JP 3-16 lists eight core tenets; ignoring them may lead to mission failure on account of a resulting failure to achieve and maintain unity of effort within the coalition or alliance; Judge Advocates (JA) have a role in ensuring that failure does not occur. The eight core tenets are: Respect, Rapport, Knowledge of Partners, Patience, Mission Focus, Team Building, Trust, and Confidence. NATO AAP – 6 provides a list of accepted definitions; this should be consulted when working with NATO partners. Outside of NATO the ABCANZ (American, British, Canadian, Australian, and New Zealand Armies' Program) process also provides a source of interoperability policy and direction. ABCANZ is the FVEY (Five Eye community) lead for interoperability; it has potential to be of particular use when integrating Australia and New Zealand into NATO and ad hoc coalition activities. (See further below)

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. Multinational operations do not necessarily mean, or require, interoperability.

C. **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. For instance the U.S. definition of "hostile act" as used in the SROE is significantly different from the respective NATO definition (*See above, NATO*). Additionally, an understanding of cultural, political and religious considerations applicable to partner nations will benefit a JA operating in a multinational environment. It is essential to appreciate that different nations will have different approaches to the provision of legal advice to commanders. Not all partners or allies will deploy legal officers into theater. Not all legal officers will be members of a bar or equivalent.

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 actively 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 essential in order to advise in relation to the legal aspects of the mission. JAs will need to understand the respective national positions and the legal or policy rationale behind them in order to ensure that they are properly accounted for in the planning and execution of operations. JAs cannot be expected to know all of the variations in legal

[941] *See* JOINT PUBLICATION 3-16, *Multinational Operations* (Mar. 2019) [hereinafter JOINT PUB. 3-16].

approach and obligations but can be expected to reach and identify points of contact within the legal branches of partner nations. This process begins before you deploy.

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[942] 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*. JAs must be conversant with and advise on the differing legal regimes applicable to multinational partners.[943] Signatures and ratifications of treaties are published in the United Nations Journal and may be accessed electronically via the UN treaty database.[944] 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. It is essential to consider any published reservations to treaties entered by multinational partners as well as verifying which partner has ratified specific treaties. It is also important to consider the national status of and approach to memoranda of understanding; for some, these are treated as treaties whilst for others they have less enforceable value.

3. *Limitations.* Other factors which may limit the military capabilities of multinational partners include linguistic and communications issues, domestic political and policy considerations, doctrine, organization, training, and technology levels; a good example for domestic policy considerations is the casualty tolerance in respect of both own forces and civilian casualties. 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. This requires JAs to assist the staff in identifying which component is able to carry out which tasks.

4. *Procedures.* The rationalization, standardization, and cooperation procedures for formal alliances may assist with planning in this regard.[945] 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.[946]

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

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[942] 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.
[943] The legal regime applicable to each state depends upon that State's treaty, customary international law, and domestic law obligations, e.g. constitutional restrictions or constraints.
[944] *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. This is an indicative rather than authoritative source.
[945] *See* CHAIRMAN OF THE JOINT CHIEFS OF STAFF INSTR. 2700.01G, RATIONALIZATION, STANDARDIZATION, AND INTEROPERABILITY ACTIVITIES (11 Feb. 2019).
[946] It is important to note that the U.S command state OPCON encompasses three NATO command states: OPCOM, OPCON & TACOM.

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).[947] Multinational partners frequently request access to U.S. information, but the security classification of such information may preclude this. It is therefore good practice to encourage a 'write for release' approach with appropriate use of paragraph marking and the use of 'tear lines'. 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.

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.[948]

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.[949] 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. Although nations do not administer discipline over other nation's personnel they may seek the involvement of personnel during investigations and disciplinary or criminal process. The process for, and degree of, such mutual support will need to be considered on a case by case basis. This should be considered at the outset of operations rather than when an incident arises. Acknowledging that discipline is a matter for national authorities there will be occasions where a commander, under command responsibility, needs to be satisfied that a multinational partner is taking action in respect of an allegation and that allegations are investigated.

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[947] *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. 5221.01E, DELEGATION OF AUTHORITY TO COMMANDERS OF COMBATANT COMMANDS TO DISCLOSE CLASSIFIED MILITARY INFORMATION TO FOREIGN GOVERNMENTS AND INTERNATIONAL ORGANIZATIONS (6 June 2018 (delegating to the commanders of combatant commands the authority to disclose classified military information to foreign governments and international organizations in certain circumstances).

[948] ABCA COALITION INTELLIGENCE HANDBOOK EDITION 5 (2013).

[949] 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 former Military Technical Agreement signed between the International Security Assistance Force and Afghanistan which has been superseded by the "Bilateral Security Agreement" between the United States and Afghanistan, and the SOFA between NATO and Afghanistan, both dated 30 September 2014

E. **Exchange Personnel**. The United States has a number of permanent bilateral individual exchange positions with other nations; this includes a GBR legal officer at CLAMO. Deployed exchange personnel must comply with their own domestic law. Thus an exchange officer's government may place conditions on, or prohibit, 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. JAs have a role to play in the deployment of exchange personnel by ensuring that both the commander and the exchange personnel are aware of the impact of any national limitations and that they have the relevant authority to deploy. Exchange officers are distinct from liaison officers.

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. In many cases, particularly in alliance operations, respective Standing Operation Procedures agreed upon by the multinational partners delineate the procedures to be followed. Examples of positive interaction in multinational investigations include the Linda Norgrove[950] inquiry and the PUMA II helicopter crash at HQ RS. The Norgrove inquiry was a US investigation with GBR participation. That investigation successfully fused the requirements of both nations in a report that was written for release and could be used by a GBR coroner in his inquiry into the cause of death. The PUMA II crash investigation was a British service inquiry that included both French and US observers on account of the death of their personnel.[951] These are just two examples of situations in which U.S. personnel were required, and able, to work with other nations in conducting successful investigations during multinational operations.

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. Not all countries will use military legal personnel for this task. 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.** Many multinational partners do not have the same degree, or type, 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. In an alliance operations, common funding of specific military requirements may be provided for. These issues should be analyzed at the earliest point in the development of the operational plan in order that the implications can be addressed in the planning process and workarounds put in place where possible. This area can be further complicated where commanders have dual roles and responsibilities such as commanding both a USA and NATO or coalition force concurrently; the fiscal streams must be clearly delineated and the methods for crossover must be made clear if they exist.

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[950] A redacted report is available on the CENTCOM FOIA portal.

[951] https://www.gov.uk/government/publications/service-inquiry-into-an-accident-involving-a-puma-hc-mk-2-xw229-in-kabul-afghanistan-on-11-october-2015

IV. OPERATIONS

A. **Detention Operations – Detention is normally a matter for national command chains but will have a multinational element in terms of command responsibility and cohesion.**

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 domestic and 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. However, NATO endeavored to accommodate different national policies and approaches in an Allied Joint Publication[952], which is intended to provide guidance on the procedures for the handling, administration and interrogation of captured persons, as well as to improve coordination between NATO forces in operations. The document provides a good overview of detention related matters in a multinational context and contains relevant official U.S. reservations regarding this issue. However it cannot and does not provide all of the answers; therefore JAs must understand the underlying principles and the operation of the third and fourth Geneva Conventions, the Additional Protocols, Common Article three and applicable IHRL. 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.[953]

2 *Obligations*. A Nation's legal position in relation to detention will be shaped by its interpretation of its IHL, IHRL and domestic law 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.[954] European partners increasingly face complex human rights considerations in relation to security detention arising from decisions of the European Court of Human Rights, particularly with regard to the extraterritorial jurisdiction of the European Convention of Human Rights (ECHR) beyond the territorial space of Europe.[955] The issue of hooding is one example of a practice that is not prohibited under LOAC but which has been prohibited as a matter of policy and practice by at least one coalition partner. JA need to be able to explain the importance and reality of such differences in approach.

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. This is in recognition of both Geneva Convention[956] and human rights responsibilities. Risks associated with transfer of detained persons are not new and can arise both within an alliance and in respect of the host nation. Concerns regarding transfer between TCNs may

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[952] NATO Allied Joint Publication 2.5 (A), *Captured Persons, Material and Documents* (Aug 2007) (document not publically available).

[953] The British doctrinal approach to detainees is contained in Joint Doctrine Publication 1-10 Captured Persons (CPERS), 3rd Edition, January 2015 Change 1, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/455589/20150820-JDP_1_10_Ed_3_Ch_1_Secured.pdf

[954] During Operation Iraqi Freedom, the only coalition partners to establish detention facilities were the United States and United Kingdom.

[955] The watershed case of Al Skeini, *Al Skeini v the United Kingdom (2011) 53 EHRR 18*, confirmed this principle and has since been confirmed in the subsequent case of Hassan, *Hassan v the United Kingdom [2014] ECHR 9936*. *Hassan* is of particular interest in respect of the approach taken by the court in respect of the interpretation of the permitted grounds of detention under article 5 of the European Convention on Human Rights. While this is a rapidly developing area of law Article 1 of the European Convention on Human Rights provides that the rights apply to those within the jurisdiction of a State party and the British courts, in particular, have recently confirmed that jurisdiction extends to any situation where a state agent (e.g a soldier) has control and authority over an individual (*Smith v Ministry of Defence [2014] AC 52)*, 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), the legality of Detention in a non-international armed conflict (*Serdar Mohammed v Ministry of Defence [2014] EWHC 1369 (QB))* and at [2017] UKSC 1 & [2017] UKSC 2 and for the purpose of bringing civil law claims for unlawful imprisonment *(Al Saadoon v Ministry of Defence [2015] EWHC 715 (Admin)).*

[956] Geneva Convention III Relative to the Treatment of Prisoners of War 1949 Article 12

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).[957] 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.[958] Both the GBR[959] and Canada[960] faced legal challenges in their domestic courts in relation to their policy to transfer detainees to Afghan authorities. Furthermore, reports by the United Nations 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 have chosen to use post transfer monitoring regimes in order to address this issue. Such regimes may also be used within a multinational force in order to discharge national responsibilities.

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[961] 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 for 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 of the Red Cross*. Engagement with the International Committee of 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 are directed in confidence to national governments and their senior military commander in theatre.[962] 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.

B. **Use of Force**

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[957] 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). But also see
Secretary of State for Foreign and Commonwealth Affairs and another (Appellants) v Yunus Rhamatullah (Respondent)[2012] UKSC 48 appeal from [2011] EWCA Civ 1540; [2012] EWCA Civ 182 and also *Rahmatullah v Ministry of Defence* in *[2017] UKSC 3* for a discussion of this arrangement in the context of a habeas corpus application.

[958] Arising from British 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.

[959] *Evans R (on application of) v Secretary of State for Defence* [2010] EWHC 1445 (Admin) 25 June 2010).

[960] *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.

[961] 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 (19 Oct. 2012), http://um.dk/en/politics-anddiplomacy/copenhagen-process-on-the-handling-of-detainees-in-international-military-operations/~/media/368C4DCA08F94873BF1989BFF1A69158.pdf.

[962] 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.

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.[963] Other nations use different criteria to determine when the right of self-defense is triggered and may apply different meaning to the same terminology. The right to use self-defense can be considered to be triggered in cases of actual and imminent attacks; however the particular interpretation of the term "imminent" differs from country to country. While the U.S. definition of "demonstration of hostile intent" as per the current SROE concept follows a broad interpretation by way of stipulating that "imminent does not necessarily mean immediate or instantaneous", other countries construe "imminent" to mean "immediate". These latter interpretations include merely constellations in which an attack is immediate in terms of directly impending, being near execution and hence require immediate defensive action. 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[964].

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.[965] 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, British 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.[966] 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.[967] The U.S. currently has combined ROE (CROE) with a number of

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[963] CJCSI 3121.01B, encl. A, para. 1(f)(1).
[964] 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.
[965] CJCSI 3121.01B, encl. A, para. 3(c).
[966] *Id.*, encl. A, para. 1(f)(1).
[967] *Id.*, encl. A, para. 1(f)(2).

nations and is continuing to work on CROE with additional nations. JA should confirm the detail of the relevant authorities that they are understood by both commanders and the relevant staff sections.

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.[968] This approach is reflected within NATO ROE,[969] when they allow e.g. for the use of force in situations which fall under the NATO definitions of "hostile act" and "hostile intent" (see Chapter 23, NATO). Where nations have different treaty obligations, for example in relation to weapon usage, constraints will be stipulated within national ROE, or by way of using caveats in multinational ROE, which may also provide guidance in relation to interoperability with nations that do not have the same constraints.

c. Where national ROE are issued, it is essential that the ROE of each coalition partner are 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. References such as the NATO AAP-6 agreed terms and definitions and the NATO compendium of ROE should be considered in the effort to reduce such differences. 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. 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.[970] 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 multinational 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

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[968] U.K. Ministry of Defense, Joint Service Publication 398, 16 Sep. 13 Annex A, para 14. (partially classified document).
[969] North Atlantic Treaty Organization Rules of Engagement MC362/1, Part II.
[970] 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." The United States is not a party to AP I but most coalition or alliance partners are party to it and to AP II.

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. JA should therefore seek opportunities to identify and understand the differing national interpretations and requirements.

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 using, developing, producing, acquiring, stockpiling, retaining or transferring APL, either directly or indirectly, and from assisting, encouraging or inducing any of these activities.[971] If 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. If a multinational partner is prohibited from deploying or assisting the deployment of APL it is unlikely that they will authorized to request such deployment by U.S. personnel.

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.[972] Accordingly, JAs should seek advice from multinational legal advisors regarding their nation's position.

c. Anti-handling/anti-tamper devices used as part of an anti-vehicle mine should also be taken into consideration with multinational partners. An anti-vehicle mine equipped with an anti-handling device is not considered to be an APL.

5. *Cluster Munitions*

a. The Convention on Cluster Munitions (CCM)[973] 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.[974]

b. Military cooperation and engagement in operations by State parties with non-State parties is provided for within the CCM.[975] 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."[976] The phrase does not enjoy universal definition and interoperability issues may arise in the event that States do not

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[971] 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.
[972] *See* Landmines Act 1998 (GBR (the statute permits British military members to participate in the planning of and conduct of military operations in which other coalition partners lawfully use APLs), http://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), 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 such activities). Copies of classified policies releasable to the United States are on file with the National Security Law Department, The Judge Advocate General's Legal Center and School.
[973] *See* Convention on Cluster Munitions, CCM//77 (30 May 2008), [hereinafter CCM], *available at* www.clusterconvention.org.
[974] *See* DoD Policy on Cluster Munitions (30 Nov 2017), https://dod.defense.gov/Portals/1/Documents/pubs/DOD-POLICY-ON-CLUSTER-MUNITIONS-OSD071415-17.pdf.
[975] CCM, Art 23.
[976] 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.

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.[977] However ROE or domestic laws of those nations may permit the use of RCA in other circumstances such as a civil policing role or within a detention facility for the purposes of maintaining or restoring control. 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 and understanding of a multinational partner's capabilities and legal authority to conduct such operations. 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. The JA should and can assist the staff in making best use of the assigned resources by identifying the strengths and weaknesses of each partner nation so that the staff allocate tasks that can be completed.

C. **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."[978]

D. **The American-British-Canadian-Australian-New Zealand (ABCA) Program.** The American-British-Canadian-Australian-New Zealand (ABCA) Program[979] evolved from the World War II alliance, a security relationship based on a common culture, historical experience, and language.[980] 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,[981] 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."[982]

E. **Challenges.** The chart that follows this section is designed to assist commanders and JA in navigating the challenges that multinational operations present. It is neither prescriptive nor perfect but serves to highlight areas that should be considered in the preparation, planning and execution of multinational operations. This chart may assist with the running legal estimate and support mission analysis. It is an unavoidable fact that different states have different legal obligations and different interpretations of international law and that treaty ratification is not universal. This should be reflected in caveats. One suggested use for this chart is as a handrail for discussions with your commanders and with your international colleagues in order to identify actual or potential friction points as well as to identify areas for further exploration.

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[977] 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).

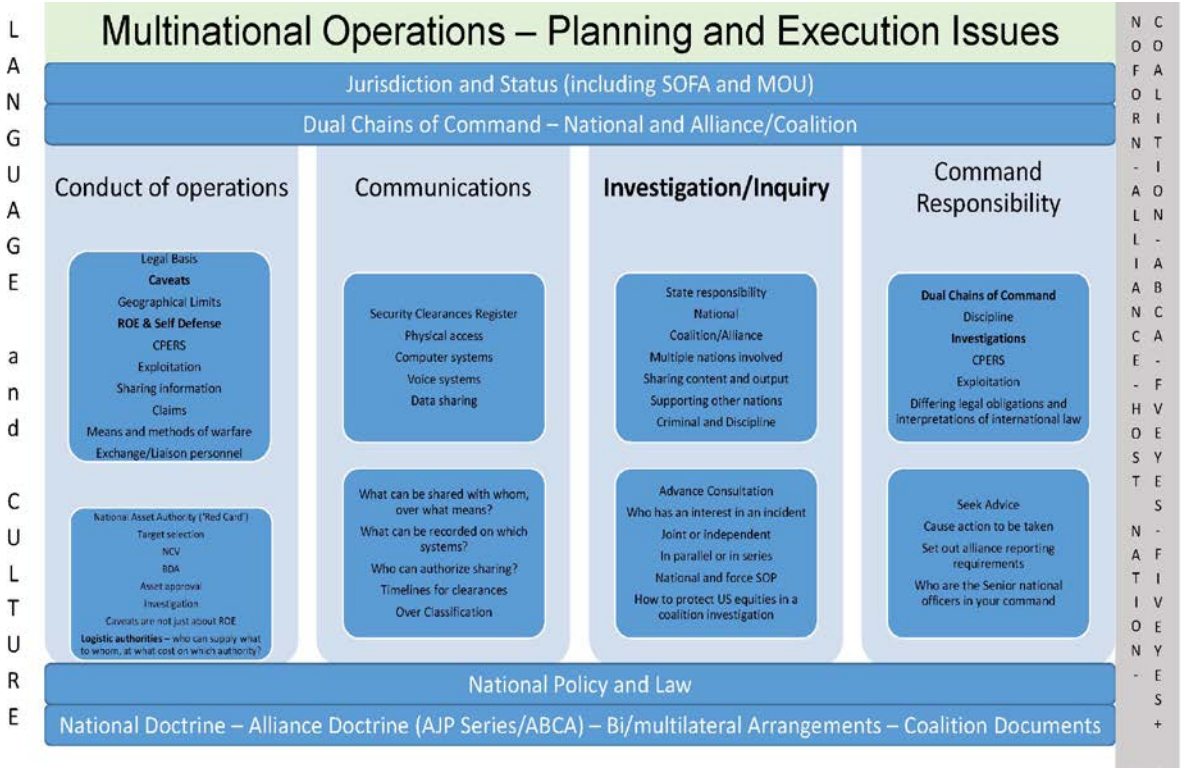
[978] *See* CENTER FOR ARMY LESSONS LEARNED, HANDBOOK 07-34, PROVINCIAL RECONSTRUCTION TEAM (PRT) PLAYBOOK (Sept. 2007), usacac.army.mil/cac2/call/docs/07-34/07-34.pdf (providing a detailed analysis of the nature and roles of PRTs).

[979] ABCA expanded its membership in 2006 to include New Zealand.

[980] *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."

[981] ABCA COALITION OPERATIONS HANDBOOK (1 Sep. 2010) (on file with CLAMO).

[982] *Id.*, at i.



V. LEGAL CONFERENCES. This chapter has sought to identify some of the issues associated with multinational, whether alliance or coalition, operations and, in places, to suggest some answers. The experience of multiple JAs and legal officers from a number of theatres and deployments has shown that legal conferences can perform a leveling function to maximize exposure to issues and differences in approach between partner nations. Legal conferences, both virtual and physical, can be conducted at any time or level and should not be limited to responding when problems have arisen – forewarned is forearmed.

VI. CONCLUSION

A. Resolving Interoperability Issues

1. Interoperability issues may be successfully managed through:

   a. communication between legal officers early and often 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. The National Security Law Division (NSLD) at the Office of The Judge Advocate General (OTJAG) and CLAMO also maintain a list of training opportunities including overseas courses and distributed on line learning.

B. **Working in an Alliance or Coalition.** 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.

C. Finally, recall the eight core tenets set out in JP 3 – 16: Respect, Rapport, Knowledge of Partners, Patience, Mission Focus, Team Building, Trust, and Confidence.

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CHAPTER 7

DETENTION AND INTERROGATION OPERATIONS

I. FRAMEWORK

A. Throughout the 20th century, U.S. 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 Iraqi Freedom U.S. forces have captured personnel and treated them as criminals, insurgents, and prisoners of war (POWs). U.S. forces continue 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 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. 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]

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[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.
[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 GPW], 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**]**.
[5] GPW, *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.*

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 belligerents 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 Qaida and ISIS are examples of American forces in non-international armed conflicts.

D. Within the historical framework of the Global War on Terrorism 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 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 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 JP 3-63,[14]FM 3-63, and AR 190-8, all 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 GPW until a more precise determination is made regarding status; and to raise specific issues on a case-by-case and 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.

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[11] GPW, *supra* note 4, art. 3.
[12] U.S. DEP'T OF DEFENSE, DIR. 2311.01E, DOD LAW OF WAR PROGRAM, (9 May 2006), incorporating Change 1 (15 Nov. 2010) [hereinafter DOD DIR. 2311.01E].
[13] *Id*. para. 4.1.
[14] JOINT PUBLICATION 3-63, DETENTION OPERATIONS (13 Nov. 2014) [hereinafter JOINT PUB. 3-63] is the joint level doctrine for detention operations.

1. The following definitions are found in DoDD 2310.01E, DoD Detainee Program, and Joint Publication 3-63, *Detainee Operations*. [15]

a. *Detainee*. Any individual captured by, or transferred to the custody or control of, DoD personnel pursuant to the law of war. This does not include persons being held solely for law enforcement purposes, except where the United States is the occupying power. Detainees who are U.S. citizens or U.S. resident aliens will continue to enjoy all applicable rights and privileges under U.S. law and DoD regulations. As a matter of policy, all detainees will be treated as Enemy Prisoner of War (EPWs) until the appropriate legal status is determined and granted by competent authority IAW the criteria enumerated in the GPW. Detaining officials must recognize that detained belligerents who have not satisfied the applicable criteria in the GPW are still entitled to humane treatment, IAW Common Article 3 of the GPW during non-international armed conflicts, and the principles set forth in Article 75 of Additional Protocol I to the Geneva Conventions during international armed conflicts. The inhumane treatment of detainees is prohibited and is not justified by the stress of combat or deep provocation.

b. *Belligerent.*[16] In general, a person who is engaged in hostilities against the US or its multinational partners during an armed conflict. The term belligerent includes both privileged belligerent and unprivileged enemy belligerent.

(1) *Privileged Belligerent.*[17] Privileged belligerents are EPWs upon capture, and are entitled to combatant immunity for their lawful pre-capture war-like acts. They may be prosecuted for violations of the law of war. If so prosecuted, they still retain their status as EPWs.

(2) *Unprivileged Enemy Belligerent.*[18] Unprivileged enemy belligerents are belligerents who do not qualify for the distinct privileges of combatant status (e.g., combatant immunity). Examples of unprivileged belligerents are:

(a) Individuals who have forfeited the protections of civilian status by joining or substantially supporting an enemy non-state armed group in the conduct of hostilities, and

(b) Combatants who have forfeited the privileges of combatant status by engaging in spying, sabotage, or other similar acts behind enemy lines.

c. *Prisoner of War*.[19] An individual who is described by Articles 4 and 5 of GPW and who is in the custody or control of DoD.

d. *Retained Person.*[20] An individual who is described by Article 28 of GWS[21] and Article 33 GPW and who is in the custody or control of DoD.

e. *Civilian Internee.*[22] Any civilian, including any person described by Article 4 of GC, who is in the custody or control of DoD during an armed conflict or case of occupation, such as those held for imperative reasons of security or protection.[23]

2. The following are defined persons found in Geneva Conventions III (GPW) and IV (GC).

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[15] U.S. DEP'T OF DEFENSE, DIR. 2310.01E, DOD DETAINEE PROGRAM, Glossary, Part II (19 Aug. 2014, with change 1 effective 24 May 2017) [hereinafter DOD DIR. 2310.01E].
[16] JOINT PUB. 3-63, *supra* note 14 at viii. DOD DIR. 2310.01E does not define "belligerent," only "unprivileged belligerent."
[17] DOD DIR. 2310.01E, *supra* note 15, at 14.
[18] *Id.* at 14.
[19] *Id.*
[20] *Id.*
[21] 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 GWS].
[22] DOD DIR. 2310.01E, *supra* note 15, at 13.
[23] These individuals qualify as "protected persons" under the Fourth Geneva Convention (GC). *See* GC, *supra* note 4, art. 4. Protected persons are entitled to various protections in Part II and Part III of GC. *Id.* Refer to the GC outline for additional details.

a. *Prisoner of War (POW)*. A detained person as defined in Article 4 of GPW. 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 GPW. 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 is any person who at a given moment and in any manner whatsoever finds himself or herself in case of conflict or occupation, in the hands of a Party to the conflict or Occupying Power, of which he or she 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: 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 since 2001. 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 Enemy Combatant

b. Person of Interest / Person Under US Control (PUC)

c. Terrorist

d. Security Detainee

B. **Status v. Treatment.** The key for JAs is to ensure that service members 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

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[24] *See* JOINT PUB. 3-63, *supra* note 14, at I-2 – I-5.
[25] GC, *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, almost all persons would be "protected persons" in some way.
[27] GC, *supra* note 4, art. 76.
[28] *See generally*, GC, *supra* note 4, art. 79 – 135 (discussing the protections afforded to civilian internees).
[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.

Interrogation. The FM was re-released as FM 2-22.3, *Human Intelligence Collector Operations*, on September 6, 2006. 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] The requirements of President Obama's executive order were subsequently codified in section 1045 of the NDAA for FY 2016.

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, are the guidance for commanders and JAs as U.S. forces continue to participate in conflicts across the globe.

III. 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".[34] 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.[35] Evidence linking the detainee to the basis for detention includes photographs, sworn statements, diagrams, and physical evidence.[36] 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 or her 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 files to determine if continued detention is appropriate.[37] Individuals from the unit should take photographs of all

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[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] 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 1994-2008 36 (Sept. 2008).
[35] PowerPoint Presentation, Detainee Operations, Joint Readiness Training Center (2006) [hereinafter JRTC PowerPoint].
[36] TASK FORCE 134, MULTI-NATIONAL FORCE – IRAQ, SOLDIER'S INVESTIGATION GUIDE AND CRIME TIP MANUAL 3 (2006) [hereinafter TF 134 Guide].
[37] JRTC PowerPoint, *supra* note 35, at slide 12.

potentially relevant evidence, such as weapons, ammunition, money, detonators, etc.[38] 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."[39] Therefore, take photographs before the evidence is moved.[40] Attempt to capture photographs covering 360 degrees around the site.[41] 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.[42] 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.[43] 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.[44] Each sworn statement should cover the "who, what, when, where, why, and how" of the detention.[45] 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.[46] Furthermore, the statement should also identify other members of the unit who were present for the operation by full name and rank.[47]

b. What: Explain what happened and the events leading up to the detainee's capture.[48] 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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[38] TF 134 GUIDE, *supra* note 36, at 4.
[39] 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].
[40] *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.*
[41] *Id.*
[42] *Id.*
[43] Evidence PowerPoint Presentation, *supra* note 39, slide 22.
[44] *See* U.S. DEP'T OF ARMY, FIELD MANUAL 3-90.6, THE BRIGADE COMBAT TEAM (Oct. 2015). 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.
[45] *Id.*
[46] 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."
[47] TF 134 GUIDE, *supra* note 36, 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.
[48] TF 134 GUIDE, *supra* note 36, at 5.

c. When: Record the date and time of the incident.[49] 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.[50]

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.[51]

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."[52] 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."[34] The diagram should also correspond to the photographs taken at the site.[35] 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.[36] 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.[37]

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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[49] *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).
[50] TF 134 GUIDE, *supra* note 36, at 5.
[51] *Id.* Furthermore, the statement should refer to whether or not the detainee signed the evidence inventory form.
[52] Evidence PowerPoint Presentation, *supra* note 39, slide 23.
[34] *Id.*
[35] Clearly label the diagram so that the link to various photographs is as clear as possible.
[36] 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].
[37] 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).[38] 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:[39]

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 (resulting 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 (i.e., lying to or fleeing from Coalition Forces) as the sole basis for continued confinement;

8. Only evidence supporting detention is guilt by association (i.e., phone activity with known bad guys);

9. Lack of photos or diagrams; and,

10. Failure to corroborate times with events.

G. The Role of the Judge Advocate may include the following:

1. Participating in targeting meetings and assisting 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. Reviewing the initial packet for completeness and conducting a magistrate's review.

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[38] *See* FM 27-10, *supra* note 55, 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.
[39] 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).

3. Ensuring accuracy of the forms submitted in the packet and assisting 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.

H. Point of Capture (POC) Processing. The Appendix that accompanies this Chapter lists steps for processing detainees using the "5 S's and T" standard. The new FM 3-63, *Detainee Operations* (2 Jan. 2020) contains a wealth of information on conducting tactical detention operations, including from the initial POC; however, because of the "Distribution Restriction" of the manual, public distribution of information in the manual, while unclassified, is restricted.[40]

IV. INTERROGATION OPERATIONS

A. Army Field Manual (FM) 2-22.3 provides doctrinal guidance, techniques, and procedures for interrogators[41] 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 11 October 2012, with Change 2 27 April 2018; and DoDD 2310.01E, DoD Detainee Program, dated 19 August 2014, with Change 1 24 May 2017, 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."

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,

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[40] FM 3-63 is available at the U.S. Army's Official Department of the Army (DA) Publication and Forms portal at: https://armypubs.us.army.mil (Common Access Card log-in required). Users are reminded to properly transmit and store limited distribution material in accordance with Army Regulations (ARs). *See* U.S. DEP'T OF ARMY, REG. 380-5, DEPARTMENT OF THE ARMY INFORMATION SECURITY PROGRAM (29 Sept. 2000) [hereinafter AR 380-5] and AR 25-55, THE DEPARTMENT OF THE ARMY FREEDOM OF INFORMATION ACT PROGRAM (1 Nov. 1997).

[41] 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.

non-certified person may conduct with a detainee (note that DoDD 3115.09 requires "DoD personnel who conduct, support, or 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 15 November 2010, certified current as of 22 February 2011): 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, 19 August 2014 (incorporating Change 1 of 24 May 2017: "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 (POWs)[42]; and

[42] 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) 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).

2. **H**umane treatment is the standard. DoDD 2310.01E 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 or 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, isolation from loved ones, and feelings of helplessness. The interrogator

directs that love towards the appropriate object, focusing the detainee on what the detainee can do to help, such as being able to see family sooner, help comrades, help a particular ethnic group, or help the 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, 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 to gain credit and build his or her 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 or her ego, reveals information to justify or rationalize his or her 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 the 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 the detainee's 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 the detainee knows is contained within the dossier, the interrogator proceeds to topics on which the interrogator 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 or she purports to be. In an effort to clear himself or herself of this allegation, the detainee makes a genuine and detailed effort to establish or substantiate his or her 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 the detainee 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 because of the lack of time to formulate 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 the detainee squarely in the eye, preferably with a slight smile on his or her 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 the detainee in a setting where he or she 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 United States are conducting the interrogation, 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: *Separation*.

(1) 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 to keep the detainee from learning counter-resistance techniques or gathering new information to support a cover story and/or decrease the detainee's resistance to interrogation.

(2) There is additional guidance for use of this technique.

(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.[43]

(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:

(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.

[43] 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.

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). 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	Detainees should not be allowed to talk except to answer your questions. Talk among recently captured individuals tends to center around plans to overpower their captors or to escape. By insisting on silence, you will cut down on their ability to plan an escape. Operational considerations may also dictate that detainees remain silent. Muffle may be employed if necessary in extreme circumstances (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. Once interned in a secure facility GC III and GC IV rules (if applicable) may require re-uniting certain groups with their leadership/head of household.
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 detainees. 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 service investigative agencies.
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.[44]

[44] U.S. MARINE CORPS, REF. PUB. 4-11.8C, ENEMY PRISONERS OF WAR and CIVILIAN INTERNEES (29 Apr. 1998), at 9-10.

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CHAPTER 8

INTELLIGENCE OPERATIONS

I. INTRODUCTION

A. **Overview**. Intelligence plays a critical role across the range of military operations. Information superiority is essential to a commander in conducting operations and in accomplishing his or her mission. Intelligence collection activities have become a sophisticated and essential element of mission command.[1] Department of Defense-authorized intelligence collection activities involve the collection of military and military-related foreign intelligence and counterintelligence, based on collection requirements.[2] Because intelligence is so important to the commander, operational lawyers must understand the basics of intelligence law. 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 8 of FM 3-24 (Insurgencies and Countering Insurgencies)—HUMINT collection is essential.

B. **Intelligence in General**. Intelligence can be either strategic or tactical. *Strategic intelligence* is information required for the formation of policy and long-term 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. *Operational intelligence* is intelligence that is required for planning and coordinating campaigns or operations by Combatant Commanders (CCDRs) and subordinate Joint Force Commanders (JFCs). *Tactical intelligence*, on the other hand, is information gathered about the threat across the range of military operations that can be passed to the operational level for future planning. It is usually perishable and temporary in nature.[3]

C. **Intelligence Disciplines**. The form and substance of intelligence depends on well-defined disciplines that involve specific categories, collections and analysis. These disciplines include the following:

1. Human Intelligence (HUMINT);
2. Signals Intelligence (SIGINT);
3. Measurement and Signature Intelligence (MASINT);
4. Open-source Intelligence (OSINT);
5. Geospatial Intelligence (GEOINT);
6. Technical Intelligence (TECHINT);
7. Counterintelligence (CI). [4]

While the Department of Defense, and each service intelligence commands may be able to utilize these intelligence disciplines, each discipline requires unique training, skill sets, and authorities. A Judge Advocate (JA) advising on intelligence law issues must first look for proper authority for the specific intelligence discipline to be used, and ensure the person using the discipline has the associated training.

D. **Legal Discussion**.

1. International Regulation. The conduct of intelligence collection[5] by nation States against other nation States, broadly known as espionage, is largely unregulated by international law. Sovereignty as a fundamental

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[1] JOINT CHIEFS OF STAFF, JOINT PUB. 2-01, JOINT & NATIONAL INTELLIGENCE SUPPORT TO MILITARY OPERATIONS (5 Jul. 2017).
[2] 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). [hereinafter EO 12333]
[3] JOINT CHIEFS OF STAFF, JOINT PUB. 2-0, JOINT INTELLIGENCE (22 Oct. 2013).
[4] *Id.*
[5] Intelligence, when used for military planning and operations, includes both collection and analysis. Almost any discussion of international law is focused on intelligence "collection" as the process of intelligence "analysis" generally has little impact on the relations between States.

principle of international law is at the core of this lack of regulation. Sovereignty has two distinct elements. The first element, internal sovereignty, is the right of a State to exercise control over its territory. The second element, external sovereignty, is a State's right to conduct relations with other States.[6] This recognition of freedom of relations with other States was affirmed by the Permanent Court of International Justice in The S.S. Lotus (1927). In this case, the court ruled that States pursue international interests by agreeing to limit rights. In the absence of an agreement, there is no limit on that right.[7] Espionage, is an example of the kind of State activity with no specific prohibitions. Espionage can be divided into two categories; 1) Wartime Intelligence Activities, 2) Peacetime Intelligence Activities.

a. Wartime Intelligence Activities. The United States is not a party to any law of war treaty that prohibits spying[8] by a belligerent State during conflict.[9] However, while not prohibiting the activity, there are treaties that regulate the conduct of spies—to include the loss of Prisoner of War status if acting clandestinely or under false pretenses.[10]

b. Peacetime Intelligence Activities. It is commonly believed the conduct of espionage during peacetime is not regulated by international law.[11] However, there are emerging discussions in International Human Rights cases regulating some areas of intelligence collection such as interrogation tactics and privacy intrusions into individual citizen's homes.[12]

2. Domestic Regulation. The Constitution, FISA, IRTPA, and DoD Regulations are the primary sources for domestic intelligence law (see above).

E. **The Intelligence Community**. The U.S. intelligence community is made up of seventeen intelligence agencies. 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—are part of the Department of Defense (DoD). 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.[13] 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.[14]

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[6] *Draft Declaration on Rights and Duties of States*, 1949 Y.B. INT'L L. COMM'N 287, art. 2. These draft articles have been consistently used for the development of current treaties and customary international law.
[7] The Case of the S.S. Lotus (Fr. v. Tur.), 1927 P.C.I.J. ser. A No. 10, at 18 (Sept. 7). *See also* U.S. DEP'T OF DEF., DOD LAW OF WAR MANUAL, para. 1.3.3.1 (Dec. 2016).
[8] A spy is "one who secretly and without uniform passes the military lines of a belligerent in time of war, seeking to gather military information and communicate it to the enemy." *See*, Ex Parte Quirin, 317, U.S. 1, 31 (1942).
[9] *Id*., para. 4.17.4.
[10] *See* HAGUE IV REG. arts. 24, 29-31 (governing the classification, conduct, and treatment of spies). *See also*, AP I art. 46.
[11] LASSA OPPENHEIM, INTERNATIONAL LAW: A TREATISE, at § 455 (Ronald R. Roxburgh ed., 1920), noting that spies may be punished by a State, peacetime spying "is not considered wrong morally, politically or legally." See also, W. Hays Parks, *The international Law of Intelligence Collection*, in NATIONAL SECURITY LAW 433-34 (John Norton Moore & Robert F. turner eds., 1999), arguing that the reason there are domestic laws to punish espionage is not because of some general international norm the prohibits the conduct, rather because the spy has committed an offense against that States national interest.
[12] *See* Chapter 4 of this handbook for a full discussion of International Human Rights Laws and an understanding of how the United States applies human rights treaties.
[13] Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, §1011(a), 118 Stat.3638. [hereinafter IRTPA]
[14] *Id.*

II. OPERATIONAL ISSUES

A. **Scope**. Aspects of intelligence law exist in all military 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.[15]

B. **Collection on U.S. Person Information**. The authority for and restrictions on collection of intelligence on U.S. persons stems from Executive Order (E.O.) 12333, as amended, which requires all government agencies to implement guidance consistent with the Order.[16] The Department of Defense's implementation of E.O. 12333 is contained in DoDD 5240.01 and its accompanying regulation, DoDM 5240.01.[17] Each service has issued complementary guidance. Army Regulation (AR) 381-10 is the Army guidance. It is important to recognize that portions of AR 381-10 apply to intelligence activities relating to non-U.S. persons as well as U.S. persons.

1. Chapter 3 of DoDM 5240.01 sets forth procedures[18] "governing the conduct of Defense Intelligence components or elements, or anyone acting on behalf of those components or elements, when conducting intelligence activities under DoD authorities."[19] The collection, retention, and dissemination of information concerning U.S. person information (USPI) by DoD Intelligence Components is detailed in Procedures 2-4. Of importance, Chapter 3 requires that information identifying USPI be collected by a DoD intelligence component only if it is reasonably believed necessary for the performance of an authorized intelligence mission or function assigned to the component.[20]

2. Two threshold questions regarding intelligence collection must be addressed: (1) whether information has been "collected?" And, (2) whether the information collected concerns USPI?

a. **Collected**. Information is collected when it has been received for use by an employee of an intelligence component in the course of his or her official duties.[21]

b. **USPI**. United States person information (USPI) is information that is reasonably likely to identify one or more "U.S. person." USPI can be either a single item of information, or information in the aggregate that when put together by an intelligence professional would reasonably identify a U.S. Person.[22]

c. "**U.S. Person**." A U.S. Person is generally defined as a U.S. citizen; permanent resident alien; a corporation incorporated in the United States; 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

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[15] It is important to remember that often these OPLANs may give general authority to conduct intelligence, but may not direct the type of intelligence or give specific authority to conduct certain types of intelligence. Because some intelligence activities, such as SIGINT/HUMINT must be delegated from specific agencies or higher authority, Judge Advocates must be diligent in ensuring that authority has been given and training has occurred through the proper authorities and format.
[16] *Supra* note 2, at § 3.2.
[17] U.S. DEP'T OF DEF MANUAL 5240.01, Procedures Governing the Conduct of DoD Intelligence Activities (Aug 2016). [hereinafter DoDM 5240.01]
[18] The chapters of DoDM 5240.01 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.
[19] DoDM 5240.0, *supra* note 17 at Chapter 3, 8.
[20] *Id.*
[21] 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 DoDM 524.01 and AR 381-10, the DoD manual controls. The DoD manual specifically articulates that a component may not find another purpose or use for information to circumvent the USPI analysis if information was originally sought by an intelligence employee. It must further be understood that in August 2016 the DoD manual was updated and as of July 2017, at the time of the publishing, the Army regulation had not been updated to reflect changes.
[22] DoDM 5240.0, *supra* note 17, Glossary.

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) should be resolved prior to relying on the presumption in making a collection decision.

3. **Collection of USPI**. Whether a DoD intelligence component may collect USPI will likely arise in one of two scenarios. The first scenario may occur when the component is collecting authorized defense foreign intelligence and believes they also collected information reasonably believed to be USPI. The second scenario may occur when the component desires to collect USPI in furtherance of their authorized intelligence mission. Procedure 2, contained within Chapter 3 of DoDM 5240.01, governs both possibilities. When presented with either fact pattern, a JA must first ensure the component has the authorized intelligence mission. Next the JA should ask the two threshold questions detailed above—if the information (to be/was) collected, and if it is reasonably believed to be USPI. If the answer to both threshold questions is yes, the component is only authorized to continue to collect the information if it fits within one of thirteen categories presented in Procedure 2.[23]

4. **Retention**. Once collected, the component should determine whether the information may be retained by the intelligence component (Procedure 3 of Chapter 3 of DoDM 5240.01). In short, information properly collected under Procedure 2 may be retained. The time period in which a component may retain information is based on the way in which it was collected and the type of information. It is incumbent on a JA to read, in detail, the retention timelines detailed in Procedure 3 before making a retention determination.[24]

5. **Dissemination**. Procedure 4 of Chapter 3 of DoDM 5240.01 governs dissemination of USPI outside of the intelligence component in which it was collected and retained. 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. If an intelligence component is retaining information that was not originally collected by that component, they should NOT disseminate the information until first consulting with the originating collection agency.

C. **Special Collection Techniques**. DoDM 5240.01 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 DoDM 5240.01 and AR 381-10, and should seek clarifying guidance from the National Security 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 through 13. Both INSCOM and the U.S. Army Intelligence Center (USAIC) offer assistance with drafting legal reviews and training in special collection techniques. The National Security Law Division may also

[23] Consider when analyzing proper mission and authority that neither DoDM 5240.01 nor AR 381-10 gives an element the requisite authority to conduct foreign intelligence collection. While these regulations detail procedures to conduct intelligence activities, the actual authority to conduct a mission must come from an executive or operational order or other direct tasking.
[24] DoDM 5240.01, s*upra* note 17 at Chapter 3.

be contacted for assistance with interpreting DoDM 5240.01 and AR 381-10 and drafting legal reviews concerning 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.[25] 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.[26] Procedures for coordinating counterintelligence efforts are found in Intelligence Community Directives (ICD).

3. The Department of Defense has primary responsibility for conducting military-related counterintelligence worldwide.[27] These activities are typically carried out by Service counterintelligence units. Depending on the location of the activity and the subjects involved, coordination of effort with the FBI or CIA is normally required, the specific parameters of which are detailed in the agreements and ICDs discussed above.

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.[28] Typically, MSO authorities and operations are classified, but help with providing necessary legal support is available from INSCOM, OTJAG, and USAIC. Key considerations for JAs 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[29] 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), DoDM 5240.01, DoDD 5148.13, 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.

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[25] E.O. 12333, ¶ 1.3(c)(20)(A).
[26] E.O. 12333, ¶ 1.3(c)(20)(B)
[27] E.O. 12333, ¶ 1.10(b).
[28] U.S. DEP'T OF ARMY, FIELD MANUAL 2-22.3, Ch. 5. (6 Sep. 2006).
[29] U.S. DEP'T OF AIR FORCE, INSTR. 14-101, Intelligence Contingency Funds (21 June 2016).

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CHAPTER 9

CYBERSPACE OPERATIONS

I. INTRODUCTION

A. **Overview**. Cyberspace operations (CO) is the employment of cyberspace capabilities where the primary purpose is to achieve objectives in or through cyberspace.[1] While cyberspace is wholly contained within the information environment, CO have evolved to the point where they can create effects beyond the information environment into each warfighting domain.[2] As such, the Department of Defense (DoD) treats cyberspace as a "fifth domain" with distinct cyber missions. Success on the battlefield, both immediate and lasting, often depends on working in and through several domains, to include cyberspace. To understand and provide legal advice in this complex area, legal advisors must be familiar with basic CO terminology (section II); significant legal issues (section III); and command relationships and authorities (section IV). To fully appreciate each of these topics however, the fundamentals on the sources of law and emerging guidance is necessary.

B. **Sources of Law**. As a general matter, the "DOD conducts CO consistent with US domestic law, applicable international law, and relevant USG and DOD policies. The laws that restrict military actions in US territory also apply to cyberspace."[3] Admittedly, however, precisely how the law of war applies to CO is "not well-settled."[4] This area of the law continues to develop as new cyber capabilities emerge and States determine and declare their legal positions.[5]

C. **Spectrum of Operations**. CO are conducted across the full spectrum of operations. Therefore, legal advisors must know the authorities governing particular capabilities and how to apply them in armed conflict and peacetime situations.

1. Given the spectrum of operations, it is important to remember that "each CO mission has unique legal considerations."[6] The legal framework will depend on the nature of the activity.[7] "Before conducting CO, commanders, planners, and operators require clear understanding of the relevant legal framework to comply with laws and policies, the application of which may be challenging given the global nature of cyberspace and the geographic orientation of domestic and international law."[8]

2. When preparing legal advice on CO, take note of these important caveats:

a. **Changing Guidance**. Unlike more established areas of law and policy, CO legal guidance is new and 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. To keep pace with the ever-changing domain of cyberspace, the United States and DoD are constantly updating 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.

b. **Classified Sources.** Many specific sources of operational guidance remain classified (for example, several Presidential Executive Orders, Chairman of the Joint Chiefs (CJCS) Instructions specific to CO capabilities). This chapter cites to, but does not discuss the content of some of these sources.[9] Judge Advocates are

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[1] JOINT CHIEFS OF STAFF, JOINT PUB. 3-12, *Cyberspace Operations* at I-1 (8 June 2018) [hereinafter JOINT PUB. 3-12].
[2] *Id.* at I-2, I-7.
[3] JOINT PUB. 3-12, *supra* note 1 at III-11.
[4] U.S. DEP'T OF DEF., DOD LAW OF WAR MANUAL, § 16.1 (Dec. 2016) [hereinafter LAW OF WAR MANUAL].
[5] *Id.*
[6] JOINT PUB. 3-12, *supra* note 1 at III-11.
[7] *Id.*
[8] *Id.*
[9] 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.

strongly encouraged to seek out, consult, and safeguard classified sources applicable to particular capabilities, commands, and operations.

c. **Operational Guidance**. Specific guidance on CO may be found in standard military planning documents, particularly in the Operational Plans (OPLANs), Operational Orders (OPORDs), and/or Execute Orders (EXORDs). These documents have standardized formats and annexes, several of which apply directly to CO, and are usually classified to protect military decision-making and strategies. Judge Advocates 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.[10] For most CO questions, Judge Advocates should start their research by looking at existing operational guidance for specific ongoing operations.[11]

3. The growth of cyberspace and CO has led to an increase in academic scholarship discussing the contours of international and domestic law. Perhaps most notable among this wealth of scholarship is the International Group of Experts' Tallinn Manual 2.0.[12] Tallinn Manual 2.0 is an excellent resource for legal practitioners, but is not itself a source of law.[13] It does not necessarily reflect international law or the legal position of the United States.

II. BASIC TERMINOLOGY

A. **Overview**. This section defines several basic terms related to CO. The primary source for definitions is published joint doctrine.[14] Older sources, as well as classified inter-agency sources may employ slightly different terms and definitions.

B. **Cyberspace**. "[T]he domain within the information environment that consists of the interdependent network of information technology (IT) infrastructures and resident data."[15] "Physically, and logically, the domain is in a state of perpetual transformation."[16] "Cyberspace, while part of the information environment, is dependent on the air, land, maritime, and space physical domains."[17] The DoD has divided cyberspace into three interconnected layers: physical network layer, logical network layer, and the cyber-persona layer.[18]

1. Physical Network Layer: "[C]onsists of the IT devices and infrastructure in the physical domains that provide storage, transport, and processing of information within cyberspace, to include data repositories and the connections that transfer data between network components. The physical network components include the hardware and infrastructure (e.g., computing devices, storage devices, network devices, and wired and wireless links)."[19] "The physical network layer is the first point of reference CO use to determine geographic location and appropriate legal framework."[20]

2. Logical Network Layer: "[C]onsists of those elements of the network related to one another in a way that is abstracted from the physical network, based on the logic programming (code) that drives network components (i.e., the relationships are not necessarily tied to a specific physical link or node, but to their ability to be addressed

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[10] *See* JOINT PUB. 5-0, JOINT OPERATION PLANNING (16 June 2017). This document describes the joint planning process and its plans and orders. Appendix A lists the standard operational plan format and annexes.
[11] *See* JOINT PUB. 3-13, *supra* note 1 at ch. 4 (describing how IO and IRCs are integrated into the joint planning process).
[12] NATO CYBER CENTER OF EXCELLENCE, TALLINN MANUAL ON THE INTERNATIONAL LAW APPLICABLE TO CYBER WARFARE (Michael N. Schmitt gen. ed. 2017) [hereinafter TALLINN 2.0].
[13] *Id.* at 2 ("It is essential to understand that *Tallinn Manual 2.0* is not an official document, but rather the product of two separate endeavors undertaken by groups of independent experts acting solely in their personal capacity.").
[14] 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.
[15] JOINT PUB. 3-12, *supra* note 1 at I-1.
[16] Hon. Paul Ney, General Counsel, Department of Defense, Remarks at U.S. Cyber Command Legal Conference, Joint Base Andrews, Maryland, 2 March 2020.
[17] Joint Pub 3-12, *supra* note 1 at I-1.
[18] *Id.* at I-2.
[19] *Id.* at I-2–3.
[20] *Id.* at I-3.

logically and exchange or process data). Individual links and nodes are represented in the logical layer but so are various distributed elements of cyberspace, including data, applications, and network processes not tied to a single node."[21] "Logical layer targets can only be engaged with a cyberspace capability."[22]

3. Cyber-Persona Layer: "[C]onsists of network or IT user accounts, whether human or automated, and their relationships to one another. Cyber-personas may relate directly to an actual person or entity, incorporating some personal or organizational data (e.g., e-mail and IP addresses, Web pages, phone numbers, Web forum log-ins, or financial account passwords). One individual may create and maintain multiple cyber-personas; . . . [conversely, a single cyber-persona can have multiple users."[23] This feature, along with other aspects of cyberspace and cyber operations, "can make attributing responsibility for actions in cyberspace difficult."[24]

C. **Cyberspace Operations.** "The employment of cyberspace capabilities where the primary purpose is to achieve objectives in or through cyberspace."[25] The *DoD Law of War Manual* adds, "Cyber operations: (1) use cyber capabilities, such as computers, software tools, or networks; and (2) have a primary purpose of achieving objectives or effects in or through cyberspace."[26] Those effects could be to disrupt, deny, degrade, destroy or manipulate information resident in computers or computer networks, or the computers and networks themselves.[27]

Practice Tip: It is imperative to distinguish CO from certain other types of operations that merely use computers or networks as the tool for achieving a non-cyber objective (i.e., command and control or broad use of computers for message distribution). Likewise, targeting cyber capability through non-cyber mechanisms would not be considered a CO.[28] "CO can be conducted independently or synchronized, integrated, and deconflicted with other activities and operations."[29] "During joint planning, cyberspace capabilities are integrated into the joint force commander's (JFC's) plans and synchronized with other operations across the range of military operations."[30]

D. **Military Operations in and through Cyberspace**: "All actions in cyberspace that are not cyberspace-enabled activities are taken as part of one of three cyberspace missions: offensive cyberspace operations (OCO), defensive cyberspace operations (DCO), or DoDIN operations."[31] "[S]uccessful execution of CO requires integration and synchronization of these missions."[32] Specific mission categorization of these operations are as follows:

1. **Offensive Cyberspace Operations (OCO)**: "CO missions intended to project power in and through foreign cyberspace through actions taken in support of CCDR or national objectives."[33]

2. **Defensive Cyberspace Operation-Response Action (DCO-RA)**: "DCO mission where actions are taken external to the defended network or portion of cyberspace without the permission of the owner of the affected system. DCO-RA actions are normally in foreign cyberspace. Some DCO-RA missions may include actions that rise to the level of use of force, with physical damage or destruction of enemy systems."[34]

3. **Defensive Cyberspace Operations-Internal Defensive Measures (DCO-IDM)**: "DCO mission where authorized defense actions occur within the defended network or portion of cyberspace."[35] While DCO

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[21] *Id.* at I-3–4
[22] *Id.* at I-4.
[23] *Id.* at I-4.
[24] *Id.*
[25] LAW OF WAR MANUAL, *supra* note 5 at § 16.1.2, *citing* JOINT PUB. 3-0, *Joint Operations* (22 October 2018).
[26] LAW OF WAR MANUAL, *supra* note 5 at § 16.1.2.
[27] *Id.*; JOINT PUB. 3-12, *supra* note 1 at II-7.
[28] LAW OF WAR MANUAL, *supra* note 5 at § 16.1.2.2.
[29] Joint Pub 3-12, *supra* note 1 at I-7.
[30] *Id.* at ix.
[31] *Id.* at x-xi.
[32] *Id.* at II-2.
[33] *Id.* at II-5.
[34] *Id.* at II-4
[35] *Id.*

generally focus on the DODIN, which includes all of DOD cyberspace, military cyberspace forces prepare to defend any US or other blue cyberspace when ordered."[36]

4. **Department of Defense Information Networks Operations (DODIN)**: "[O]perational actions taken to secure, configure, operate, extend, maintain, and sustain DOD cyberspace and to create and preserve the confidentiality, availability, and integrity of the DODIN."[37] "DODIN operations are network focused and threat-agnostic."[38]

Practice Tip: While each mission set of CO present complex legal issues, because OCO and DCO-RA operations go outside the DoDIN and other friendly networks, they present unique issues under international law. Particular attention must be paid to legal implications of these types of operations.

III. SIGNIFICANT LEGAL CONSIDERATIONS IN CYBERSPACE OPERATIONS

A. Framework for Analysis:

1. There is no single "checklist" for analyzing the legal aspects of CO. As discussed above, the legal landscape necessarily changes with the contours of the specific operation. Nevertheless, a consistent approach to analyzing the myriad of legal issues in CO is desirable, and the following questions will often provide a useful starting point for legal analysis.

2. Questions to ask:[39]

a. What is the purpose of the activity? What is the military objective we seek to achieve? What is the operational scheme of maneuver and how does it contribute to achieving that objective?

c. Where is the target located? Does the operation involve multiple geographic locations?

d. What is the target system used for?

e. How will we access the target system? What cyber capabilities will be employed?

f. What effects—such as loss of access to data—will we generate within that system? How will those effects impact the system's functioning?

g. Which people or processes will be affected by anticipated changes to the system's functioning? Are any of those likely to be impacted civilians or public services?

B. **Authorities and Responsibilities**:

1. "The *2018 DoD Cyber Strategy* directs the Department to <u>defend forward, shape the day-to-day competition, and prepare for war</u> by building a more lethal force, expanding alliances and partnerships, reforming the Department, and cultivating talent, while actively competing against and deterring our competitors."[40]

2. As with other military operations, cyber forces are distributed between the services and the combatant commands. "USCYBERCOM accomplishes its missions within three primary lines of operation: secure, operate, and defend the DODIN; defend the nation from attack in cyberspace; and provide cyberspace support."[41] "The Services man, train, and equip cyberspace units and provide them to USCYBERCOM."[42]

3. Authority to conduct CO is generally held at the upper echelons of government. Direction to conduct CO can be found in several different documents, most commonly the ROE, OPORDs, and EXORDs.[43] National

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[36] *Id.*
[37] *Id.* at II-2.
[38] *Id.*
[39] *See* Ney Remarks, *supra* note 16 at 3.
[40] Department of Defense, Cyber Strategy Summary (2018), I-9https://media.defense.gov/2018/Sep/18/2002041658/-1/-1/1/CYBER_STRATEGY_SUMMARY_FINAL.PDF. The 2018 DoD Cyber Strategy is a classified document. The Summary, however, is unclassified.
[41] JOINT PUB. 3-12, *supra* note 1 at I-8.
[42] *Id.*
[43] *Id.* at II-2.

Security Policy Memorandum (NSPM) 13, as amended, provides the general guidance for many CO and "allows for the delegation of well-defined authorities to the Secretary of Defense to conduct time-sensitive military operations in cyberspace."[44]

C. **Law of Armed Conflict in Cyberspace**: While the majority of CO will occur outside of armed conflict, those that rise to the level of a use of force or are conducted as part of an ongoing armed conflict must comply with the law of armed conflict. "[T]he principles of the law of war form the general guide for conduct during war, including conduct during cyber operations."[45] A CO may present challenging legal issues under both the *jus ad bellum* and *jus in bello*.

1. *Jus ad bellum*.

a. A CO may, in certain circumstances, constitute a use of force.[46] If a CO rises to the use of force under Article 2(4) of the United Nations Charter and customary international law, there shall be a proper legal basis that would not violate the prohibition against the use of force.[47]

b. "Cyber activities that proximately result in death, injury, or significant destruction would likely be viewed as a use of force. In assessing whether an event constituted a use of force in or through cyberspace, we must evaluate factors: including the context of the event, the actor perpetrating the action (recognizing challenging issues of attribution in cyberspace), the target and location, effects and intent, among other possible issues."[48]

c. "The dilemma lies in the fact that CO 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)."[49]

d. In 1999, Professor Michael Schmitt first offered several factors to determine whether a CO amounts to a use of force under the UN Charter.[50] These factors were incorporated and expanded upon in the Tallinn Manuals.[51] While they have not been adopted by the United States, they provide a useful means to evaluate a particular CO. No one factor outweighs the others, and not all would necessarily be required for a determination that a CO rose to the level of a use of force. These factors are:

(1) *Severity*: Armed attacks threaten physical injury or destruction of property to a much greater degree than other forms of coercion.

(2) *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.

(3) *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.

(4) *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

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[44] Ney Remarks, *supra* note 16 at 2.
[45] LAW OF WAR MANUAL, *supra* note 5 at § 16.2.2. Noting, under the principle of humanity, suffering, injury, or destruction unnecessary to accomplish a legitimate military purpose must be avoided in cyber operations.
[46] *Id.* at § 16.3.1.
[47] *Id.*
[48] Hon. Harld H. Koh, Legal Advisor, Department of State, Remarks U.S. Cyber Command Legal Conference, Ft. Meade, MD, 18 Sep. 2012, at 2.
[49] 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*].
[50] Michael N. Schmitt, *The Sixteenth Waldemar A. Solf Lecture in International Law*, 176 MIL. L. REV. 364, 417 (2003).
[51] Tallinn 2.0, *supra* note 12 at 334–36.

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.

(5) *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.

(6) *Military Character*: The closer the connection between a CO and other military action, the more likely the CO is a use of force. For example, a CO targeting a military air defense system in connection with a traditional air assault is likely a use of force.

(7) *State Involvement*: The extent to which the State is responsible for the attack.

(8) *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 generalized rule).

e. CO may also implicate other aspects of international law that govern interactions among states, such as the prohibition on coercive intervention in the core functions of another state, countermeasures, necessity, and state sovereignty.[52] Because of evolving state practice and ever-changing technology, how these areas of international law impact CO is not entirely clear. Nevertheless, some clarity may be found. "For example, 'a cyber operation by a State that interferes with another country's ability to hold an election' or that tampers with 'another country's election results would be a clear violation of the rule of non-intervention.'"[53]

2. *Jus in Bello*.

a. "If a cyber operation constitutes an attack, then the law of war rules on conducting attacks must be applied to those cyber operations."[54]

b. Conversely, a CO operation that does not constitute an attack is not restricted by the rules that apply to attacks, and may be directed at civilians or civilian objects so long as they constitute a military necessary. These operations should nonetheless "comport with the general principles of the law of war,"[55] and the parties must take feasible precautions to reduce the risk of incidental harm to the civilian population" and civilian infrastructure.[56]

c. A CO that only involves temporary or reversible effects is likely not an attack.[57] Examples include: "defacing a government webpage; a minor, brief disruption of internet services; briefly disrupting, disabling, or interfering with communications; and disseminating propaganda."[58]

IV. CYBER FORCES AND COMMAND AUTHORITIES

A. Judge Advocates must be aware of the cyber force structure and respective operational authority to determine if a unit has the authority to engage in a certain CO. If the unit is not part of this force structure, then it is unlikely they may take action beyond the protection and operation of their own network. Judge Advocates must be proactive in determining what authorities, if any, have been granted to their units before they engage in CO.

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[52] *Compare* Koh Remarks, *supra* note 48 at 4, *with* Ney Remarks, *supra* note 16 at 7.
[53] Ney Remarks, *supra* note 16 at 6.
[54] LAW OF WAR MANUAL, *supra* note 5 at § 16.5.1.
[55] *Id.* at § 16.5.2.
[56] *Id.* at § 16.5.3.
[57] *Id.* at § 16.5.2.
[58] *Id.*

B. United States Cyber Command (USCYBERCOM). USCYBERCOM was elevated to a combatant command in 2018. The Commander of USCYBERCOM "commands a preponderance of the cyberspace forces that are not retained by the Services,"[59] and "manages day-to-day global CO."[60]

C. Service Components. Each service is responsible for protecting its service-specific cyber network to ensure its ability to detect, mitigate, and defeat advanced persistent threats capable of compromising the network and the DoDIN itself.[61] Service components work with parent services, USCYBERCOM, JFHQ-DoDIN (described below), the Defense Information Systems Agency (DISA), and the National Security Agency (NSA) to prevent malicious actors from gaining access to service-specific networks.

D. The Cyber Mission Force (CMF). The goal of the CMF is to "organize and resource the force structure required to conduct key cyberspace missions."[62] "Service tactical cyberspace units, assigned to CDRUSCYBERCOM, comprise the three elements of the CMF."[63] The CMF consists of the following:

1. Cyber Protection Force (CPF). Defend the DoDIN and other blue cyberspace when directed.[64]

2. Cyber National Mission Force (CNMF). Defeat significant cyber threats to the DoDIN and, when ordered, the nation.[65] Forces that conduct DCO-RA are normally assigned to the CNMF.

3. Cyber Combat Mission Force (CCMF). Conduct CO to support the combatant commands.[66] OCO missions are normally conducted by forces assigned to the CCMF.

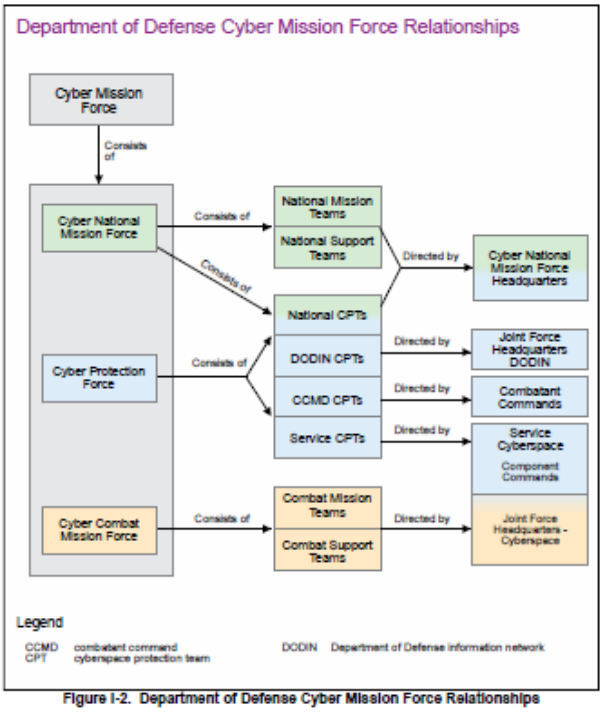

Figure I-2. Department of Defense Cyber Mission Force Relationships

E. USCYBERCOM Subordinate Headquarters. Subordinate Headquarters of USCYBERCOM execute C2 of the CMF and other cyberspace forces. These subordinate headquarters include the following:

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[59] JOINT PUB. 3-12, *supra* note 1 at I-8.
[60] *Id.* at IV-11.
[61] JOINT PUB. 3-12 *supra* note 1 at I-10.
[62] *Id.* at I-9.
[63] *Id.*
[64] *Id.*
[65] *Id.*
[66] *Id.*

1. Cyber National Mission Force Headquarters (CNMF-HQ). The National Mission Teams are aligned under the CNMF-HQ against specific cyber threats.[67] Responsible for operational-level planning and execution of DCO-RA missions.[68]

2. Joint Force Headquarters-Department of Defense Information Network (JFHQ-DoDIN). Responsible for the overall operation and defense of DoD information systems. While each service maintains some responsibility for protection and operation of its networks, JFHQ-DoDIN provides overall unity of effort and command for sustained effort at scale. Generally this means identifying and imposing standards for application across the DoDIN. JFHQ-DoDIN serves as a "functional component command" of USCYBERCOM and its commander is dual-hatted as Director of the Defense Information Systems Agency (DISA).

3. Joint Force Headquarters-Cyberspace (JFHQ-C). The Combat Mission Teams that are normally assigned to conduct OCO missions are aligned under the JFHQ-C in support of a combatant command.

4. Service Cyberspace Component Command (SCC) Headquarters. The Services provide cyber forces to USCYBERCOM through the SCCs.[69] Each of the SCC commanders is dual-hatted as the commander of one of the four JFHQs-C.[70] In conjunction with JFHQ-DoDIN, they conduct DoDIN operations and DCO-IDM within their Service portion of the DoDIN.[71]

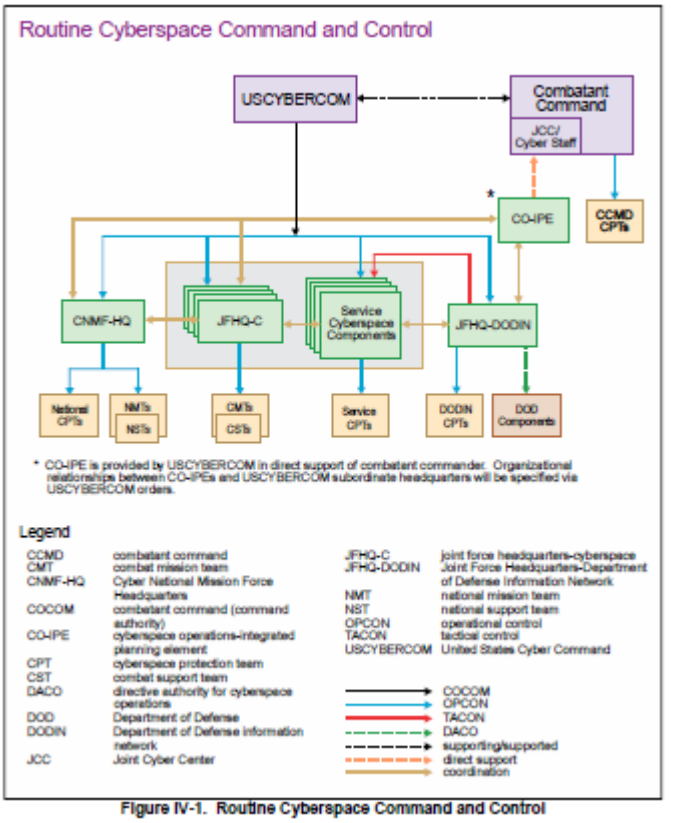

Figure IV-1. Routine Cyberspace Command and Control

[67] *Id.* at II-8.
[68] *Id.* at III-6.
[69] *Id.* at I-8.
[70] *Id.* at I-10.
[71] *Id.* at III-6.

CHAPTER 10

INFORMATION OPERATIONS

I. INTRODUCTION

A. **Overview**. Information Operations (IO) are the integrated employment, during military operations, of information related capabilities (IRCs) in concert with other lines of operation to influence, disrupt, corrupt, or usurp the decision making of adversaries and potential adversaries while protecting our own.[1] The term "IRC" refers to those tools, techniques, or activities that are inherently information-based or primarily focused on affecting the information environment.[2] This chapter provides an overview of common IRCs, along with common legal issues, lead proponents, and capability-specific guidance.

B. **Information-Related Capabilities**[3]

1. **Strategic Communication (SC)**: "Focused United States Government (USG) efforts to create, strengthen, or preserve conditions favorable for the advancement of national interests, policies, and objectives by understanding and engaging key audiences through the use of coordinated programs, plans, themes, messages, and products synchronized with the actions of all instruments of national power."[4]

a. Discussion: "SC is a whole-of-government approach, driven by interagency processes and integration that are focused upon effectively communicating national strategy."[5] SC focuses on IO's strategic impact, i.e., coordinating and synchronizing efforts to ensure IO objectives complement overall USG objectives.[6] SC planners must work closely with the interagency community to ensure coordination and synchronization of USG efforts.[7] A principal interagency partner is the U.S. Department of State, which is responsible for the related mission to coordinate public diplomacy.[8] Though not without controversy,[9] SC remains an important IRC.

b. Common Legal Issue(s): Information fratricide;[10] Mission overlap with other agencies, e.g. Department of State public diplomacy. At operational and tactical levels, legal advisors must ensure IO support and 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.

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[1] CHAIRMAN, JOINT CHIEFS OF STAFF, JOINT PUB. 3-13, INFORMATION OPERATIONS at x (27 Nov. 2012, Incorporating Change 1, 20 Nov. 2014) [hereinafter JOINT PUB. 3-13].
[2] U.S. DEP'T OF ARMY, FIELD MANUAL 3-13, INFORMATION OPERATIONS, para. 1-14 (6 Dec. 2016) [hereinafter FM 3-13].
[3] Cyberspace Operations and Space Operations are two common IRCs. These topics are addressed more completely elsewhere in this handbook. However, judge advocates should be aware of the potential crossover between cyberspace operations, space operations, and information operations. Because of the crossover, judge advocates should be particularly attuned to properly characterizing the operation, the authority to conduct the type of operation, and the potential for information fratricide. Judge advocates should also be aware of the term cyberspace electromagnetic activities (CEMA). CEMA "is the process of planning, integrating, and synchronizing cyberspace and electronic warfare operations in support of unified land operations." U.S. DEP'T OF ARMY, TECHNIQUES PUB. 3-13.1, THE CONDUCT OF INFORMATION OPERATIONS para. 3-14 (Oct. 2018). CEMA is "not an IRC in and of itself; cyberspace operations and EW operations are IRCs. Through CEMA, the Army plans, integrates, and synchronizes these missions, supports and enables the mission command system, and provides an interrelated capability for information and intelligence operations." *Id.*
[4] *Id.* at II-5.
[5] *Id.*
[6] *See* JOINT PUB. 3-13, *supra* note 1 at II-5 to II-6.
[7] *Id.* at II-6.
[8] *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.
[9] *See, e.g.*, 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").
[10] FM 3-13, *supra* note 2 at para. 1-33 ("[I]nformation fratricide . . . is defined as adverse effects on the information environment resulting from a failure to effectively synchronize the employment of multiple information-related capabilities which may impede the conduct of friendly operations or adversely affect friendly forces.").

c. Proponents: Joint Staff;[11] Undersecretary of Defense for Policy (USD(P)) and the Assistant Secretary of Defense for Public Affairs (ASD(PA));[12] Joint Interagency Coordination Group (JIACG) representatives on joint staffs facilitate coordination.[13]

d. Operational Guidance: Annex Y to the OPLAN addresses Communication Synchronization.[14]

2. **Public Affairs (PA)**: "Communication activities with external and internal audiences."[15] "When addressing external publics, opportunities for overlap exist between PA and IO."[16]

a. Discussion: "PA activities and IO support JFC objectives; counter adversary propaganda, misinformation and disinformation; and deter adversary actions. Although both PA and IO staffs plan public information activities and conduct media analysis, IO differs with respect to their authorities regarding domestic and international populations, scope, and intent."[17] PA provides truthful and accurate information regarding U.S. intentions and actions both to U.S. and foreign audiences.[18] 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.[19] 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.[20]

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.[21]

c. Proponents: ASD(PA); Joint Staff and service public affairs representatives and staffs.

d. Operational Guidance: Annex F to the OPLAN addresses Public Affairs.[22]

3. **Civil Affairs (CA)**: "Joint forces conduct [civil military operations (CMO)] and civil affairs operations (CAO) to enable unified action."[23] CMO are "[a]ctivities of a commander performed by designated military forces that establish, maintain, influence, or exploit relations between military forces and indigenous populations and institutions by directly supporting the achievement of objectives relating to the reestablishment or maintenance of stability within a region or host nation."[24] CAO are "[a]ctions planned, coordinated, executed, and assessed to enhance awareness of, and manage the interaction with, the civil component of the operational environment; identify and mitigate underlying causes of instability within civil society; and/or involve the application of functional specialty skills normally the responsibility of civil government."[25] While CA is the

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[11] JOINT PUB. 3-13, *supra* note 1 at III-2 ("The Joint Staff is assigned the responsibility for joint IO proponency.").
[12] *See* Secretary of Defense Memorandum, *Strategic Communication and Information Operations in the DoD*, (25 Jan. 11) (designating these two offices as "SC co-leads").
[13] JOINT PUB. 3-13, *supra* note 1 at II-6. The JIACG is "[a] staff group that establishes regular, timely, and collaborative working relationships between civilian and military operational planners." CHAIRMAN, JOINT CHIEFS OF STAFF, JOINT PUB. 3-08, INTERORGANIZATIONAL COOPERATION GL-8 (18 Oct. 2017). Interagency coordination occurs between the DoD and other USG departments and agencies, nongovernmental organizations, private entities, foreign forces, and host nations. JOINT PUB. 3-13, *supra* note 1, at II-7. Several combatant command 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." *Id.*
[14] JOINT CHIEFS OF STAFF, JOINT PUBLICATION 5-0, JOINT PLANNING, at A-9 (16 Jun. 2017) [hereinafter JOINT PUB. 5-0].
[15] CHAIRMAN, JOINT CHIEFS OF STAFF, JOINT PUB. 3-61, PUBLIC AFFAIRS at GL-6 (17 Nov. 2015, incorporating Change 1, 19 Aug. 2016) [hereinafter JOINT PUB. 3-61].
[16] JOINT PUB. 3-13, *supra* note 1 at II-7.
[17] JOINT PUB. 3-61, *supra* note 15 at II-7–8.
[18] *See id.* at I-7 to I-9.
[19] *See* JOINT PUB. 3-13, *supra* note 1 at II-7.
[20] *See* JOINT PUB. 3-61, *supra* note 15 at II-9 (noting PA and IO "are separate functional areas.").
[21] *See, e.g.* U.S. DEP'T OF ARMY, FIELD MANUAL 3-61, PUBLIC AFFAIRS OPERATIONS, para. 4-32 (Apr. 2014).
[22] JOINT PUB. 5-0, *supra* note 14 at A-8.
[23] CHAIRMAN, JOINT CHIEFS OF STAFF, JOINT PUB. 3-57, CIVIL-MILITARY OPERATIONS at I-3 (9 Jul. 2018) [hereinafter JOINT PUB. 3-57].
[24] *Id.* at GL-6.
[25] *Id.*

primary coordinators and synchronizers of CMO and CAO, other joint forces, including legal support, "play major roles in supporting CMO."[26]

a. Discussion: "The joint force conducts CMO to facilitate military operations by establishing, maintaining, influencing, or exploiting relationships between military forces and the civilian populace."[27] However, CMO remain distinct from IO in that CMO target friendly and neutral populations, with potential secondary impacts to adversary audiences.[28]

b. Common Legal Issues: Same as SC (at a tactical, local level). There are several statutory and policy requirements and limitations for CMO.[29] "[R]estraints on CMO will exist during [security cooperation] based upon bilateral agreements the [United States] has with given countries. Most agreements prevent interference with HN internal affairs."[30] "Within the realm of [Defense Support to Civil Authorities], CMO is limited to the support rendered by DOD to domestic civilian authority."[31]

c. Proponents: Assistant Secretary of Defense for Special Operations and Low Intensity Conflict (ASD(SO/LIC)); U.S. Special Operations Command (USSOCOM).

d. Operational Guidance: Annex G to the OPLAN addresses Civil-Military Operations.[32]

4. **Military Information Support Operations (MISO)**: "[P]lanned 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."[33]

a. Discussion: MISO, formerly known as psychological operations (PSYOP),[34] "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."[35] 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."[36]

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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[26] *Id.* at I-17.
[27] *Id.* at I-9.
[28] *See* JOINT PUB. 3-13, *supra* note 1, at II-8 to II-9.
[29] *See, e.g.*, U.S. DEP'T OF DEF., DIRECTIVE 5132.03, DOD POLICY AND RESPONSIBILITIES RELATING TO SECURITY COOPERATION (29 Dec. 2016); U.S. DEP'T OF DEF., DIRECTIVE S-3321.1, (U) OVERT PSYCHOLOGICAL OPERATIONS CONDUCTED BY THE MILITARY SERVICES IN PEACETIME AND IN CONTINGENCIES SHORT OF DECLARED WAR; CHAIRMAN, JOINT CHIEFS OF STAFF, INSTR. 3214.01E, DEFENSE SUPPORT FOR CHEMICAL, BIOLOGICAL, RADIOLOGICAL, AND NUCLEAR INCIDENTS ON FOREIGN TERRITORY (28 May 2015); U.S. DEP'T OF DEF., DIRECTIVE 3000.07, IRREGULAR WARFARE (IW) (28 Aug. 2014, incorporating Change I, 12 May 2017); CJCSI 3210.06A, IRREGULAR WARFARE (25 Sep. 2015); CHAIRMAN, JOINT CHIEFS OF STAFF, INSTR. 3710.01B, DOD COUNTERDRUG SUPPORT 26 Jan. 2007); U.S. DEP'T OF DEF., DIRECTIVE 3600.01, INFORMATION OPERATIONS (2 May 2013, incorporating Change I, 4 May 2017).
[30] JOINT PUB. 3-57, *supra* note 23 at I-4.
[31] *Id.*
[32] JOINT PUB. 5-0, *supra* note 14 at A-8.
[33] JOINT PUB. 3-13, *supra* note 1 at II-9–II-10.
[34] Robert Gates, Secretary of Defense, *Memorandum: Changing the Term Psychological Operations (PSYOP) to Military Information Support Operations (MISO)* (3 Dec. 2010) ("[T]he term 'Psychological Operations' has become anachronistic and misleading. Although PSYOP activities rely on truthful information, credibly conveyed, the term PSYOP tends to connote propaganda, brainwashing, manipulation, and deceit.").
[35] JOINT PUB. 3-13, *supra* note 1 at II-10.
[36] *Id.*

customary norms, e.g., rules on treachery and perfidy,[37] as well as prisoner of war and detainee treatment[38]); 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,[39] copyright and trademark restrictions, and prohibition on propaganda directed at U.S. audiences,[40] 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.[41]

d. Operational Guidance: Generally contained in Appendix 3 to Annex C of the OPORD or OPLAN.[42] MISO generally proceeds under approved MISO programs. A MISO series is nested under a MISO program. In creating a MISO series, PSYOP planners must conduct research and analysis of critical information, develop themes and messages, and recommend methods of production and dissemination of the MISO product. When planning dissemination to an approved target audience, the staff must consider the most effective type of MISO product for a particular area; for example, leaflets, radio broadcasts, TV broadcasts, SMS messages, and/or internet-based products may each work better as delivery platforms in certain areas of the world than they would in

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[37] 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* 26 Jan. 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]; DEP'T DEF., LAW OF WAR MANUAL § 5.26.1.3 (Dec. 2016) [hereinafter LAW OF WAR MANUAL] (discussing types of prohibited propaganda); *see also* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts [hereinafter AP I], Geneva, June 8, 1977, arts. 37–38, 40 (expanding the rules on perfidy, improper use, and threatening an enemy).

[38] 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).

[39] *See* 50 U.S.C. § 3093(e) (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"); 10 U.S.C. § 397 ("Congress affirms that the Secretary of Defense is authorized to conduct military operations, including clandestine operations, in the information environment to defend the United States, allies of the United States, and interests of the United States, including in response to malicious influence activities carried out against the United States or a United States person by a foreign power."). 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. *See, e.g.* U.S. DEP'T OF DEF. INSTR. O-3607.02 MILITARY INFORMATION SUPPORT OPERATIONS (MISO) (2016) (FOUO); CHAIRMEN, JOINT CHIEFS OF STAFF. INSTR. (CJCSI) 3110.05F, MILITARY INFORMATION SUPPORT OPERATIONS SUPPLEMENT TO THE JOINT STRATEGIC CAPABILITIES PLAN (2017) (FOUO); CHAIRMAN, JOINT CHIEFS OF STAFF, JOINT PUB. 3-13.2, MILITARY INFORMATION SUPPORT OPERATIONS (2014) (available on JEL+).

[40] U.S. military forces have long 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). *See* DoDD 3600.01, *supra* note 29 at para. 3(k) ("DoD IO activities will not be directed at or intended to manipulate audiences, public actions, or opinions in the United States."). Furthermore, Congress has limited the use of funds obligated for propaganda purposes. 10 U.S.C. 2241a ("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.")

[41] *See* SECDEF 25 Jan 11 Memo at 2.

[42] *See* JOINT PUB. 5-0, *supra* note 14 at A-8.

others. Furthermore, **MISO products must not be directed at domestic (i.e. U.S.) audiences**. Legal advisors assist both in developing programs and series and in ensuring products comply therewith.

5. **Military Deception (MILDEC)**: "[A]ctions executed to deliberately mislead adversary decision makers, creating conditions that will contribute to the accomplishment of the friendly mission."[43]

a. Discussion: "One of the oldest IRCs used to influence an adversary's perceptions is MILDEC."[44] 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."[45] "MILDEC differs from other IRCs in several ways," and is controlled on a strict need-to-know basis due to the sensitive nature of its plans, goals, and objectives.[46]

b. 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 perfidy and protection of civilians and civilian property);[47] 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. § 3093, 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.[48]

c. Proponents: USD(P), Joint Staff.[49]

d. Operational Guidance: Generally contained in Appendix 3 to Annex C of the OPORD or OPLAN.[50]

6. **Operations Security (OPSEC)**: "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."[51]

a. Discussion: OPSEC facilitates IO's mission to 'protect our own' information and decision-making. 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.[52]

b. Common Legal Issues: Counter Intelligence investigations; Freedom of Information Act (FOIA); Unauthorized disclosures of information. "OPSEC practices must balance the responsibility to account to the

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[43] JOINT PUB. 3-13, *supra* note 1 at II-10.
[44] *Id.*
[45] *Id.*
[46] *See* JOINT PUB. 3-13, *supra* note 1 at II-12.
[47] *See* LAW OF WAR MANUAL, *supra* note 37 at § 5.25; CHAIRMAN, JOINT CHIEFS OF STAFF, JOINT PUB. 3-13.4, MILITARY DECEPTION (14 Feb. 2017) (available on JEL+); U.S. DEP'T OF ARMY, FIELD MANUAL 3-13.4, ARMY SUPPORT TO MILITARY DECEPTION, para. 2-91 (Feb. 2019) [hereinafter FM 3-13.4] ("Certain deception activities or techniques are prohibited because they violate the law of war, including killing or wounding the enemy by resorting to perfidy. Acts of perfidy are acts that, by design, invite the confidence of an enemy to lead it to believe that the enemy is entitled to, or obliged to accord, protection under the law of war, with intent to betray that confidence. Moreover, the law of war prohibits misusing certain protected signs such as the Red Cross or Red Crescent, fighting in the enemy's uniform, and feigning non-hostile relations in order to seek a military advantage.").
[48] FM 3-13.4, *supra* note 47 at 2-93.
[49] *See* CHAIRMAN, JOINT CHIEFS OF STAFF, INSTR. (CJCSI) 3210.01C, JOINT INFORMATION OPERATIONS PROPONENT (14 FEB. 2014).
[50] JOINT PUB. 5-0, *supra* note 14 at A-8.
[51] JOINT PUB. 3-13, *supra* note 1 at II-12.
[52] *See id.*; *see also* JOINT CHIEFS OF STAFF, JOINT PUB. 3-13.3, OPERATIONS SECURITY (6 Jan. 2016) (available on JEL+).

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."[53]

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.[54]

7. **Joint Electromagnetic Spectrum Operations (JEMSO)**: "Those activities consisting of electronic warfare and joint electromagnetic spectrum management operations used to exploit, attack, protect, and manage the electromagnetic operational environment to achieve the commander's objectives."[55]

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."[56] 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. "All nations have a sovereign right to allocate the EMS as needed to support their national interests, but the successful conduct of operations requires the JFC to work with the nation at issue to balance these rights with the need to maintain security of US and multinational forces."[57]

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).[58] 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.[59]

(1) **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. EA platforms may also be used to deliver MISO messages in inaccessible terrain; rather than jamming a frequency with static, the platform broadcasts an approved MISO message to an approved target audience.

(2) **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.

(3) **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

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[53] JOINT PUB. 3-13, *supra* note 1 at II-12.
[54] JOINT PUB. 5-0, *supra* note 14 at A-8.
[55] JOINT CHIEFS OF STAFF, JOINT PUB. 6-01, JOINT ELECTROMAGNETIC SPECTRUM MANAGEMENT OPERATIONS at GL-5 (20 Mar. 2012) [hereinafter JOINT PUB. 6-01.
[56] JOINT PUB. 3-13, *supra* note 1 at II-12.
[57] JOINT PUB. 6-01, *supra* note 55 at 52 II-1.
[58] U.S. DEP'T OF DEF., DIRECTIVE 3222.04, ELECTRONIC WARFARE (EW) POLICY, para 1 (26 Mar. 2014, incorporating Change 2 31 Aug. 2018).
[59] *See generally* JOINT CHIEFS OF STAFF, JOINT PUB. 3-13.1, ELECTRONIC WARFARE (8 Feb. 2012) (available on JEL+) (discussing EW and its three sub-divisions in greater detail).

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);[60] 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 capabilities that blur the line between CO, signals intelligence (SIGINT), and EW and that may require case-by-case determination whether the activity is SIGINT and, when EW and CO are assigned separate release authorities.

d. Proponents: USD(P) [IO]; USD for Acquisition, Technology, and Logistics (AT&L) [JEMSO]; Combatant commands.

e. Operational Guidance: Generally contained in Appendix 3 to Annex C of the OPORD or OPLAN.[61]

8. **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."[62]

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. At the tactical level, such engagements may be referred to as "Soldier and leader engagements." 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. When fully integrated with other IRCs into operations, KLEs can effectively shape and influence the leaders of foreign audiences."[63]

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.

9. Combat Camera (COMCAM): "(COMCAM) provides operational imagery; supports combat, information, humanitarian, special force intelligence, engineering, legal, and public affairs requirements; provides imagery that supports strategic, operational, and tactical levels of war; speeds decision making; and facilitates the vertical and horizontal flow of information."[64]

a. Discussion: COMCAM provides unique benefits at all levels of military operations. Some of these benefits include recording "engagements for historical purposes," preparing "future public affairs or MISO

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[60] The domestic communications law issues presented by EW may be particularly complex and regulation dependent, because the DoD "shall comply with U.S. and host nation (HN) spectrum regulations and obtain applicable authorizations before operating [spectrum-dependent] systems." U.S. DEP'T OF DEF. INSTR. 4650.01, POLICY AND PROCEDURES FOR MANAGEMENT AND USE OF THE ELECTROMAGNETIC SPECTRUM para. 4(c) (9 Jan. 2009, incorporating Change 1 17 Oct. 2017) (citations omitted), *citing* NAT'L TELECOMM. AND INFO. ADMIN,, MANUAL OF REGULATIONS AND PROCEDURES FOR FEDERAL RADIO FREQUENCY MANAGEMENT (Sep. 2017) (NTIA Redbook).
[61] JOINT PUB. 5-0, *supra* note 14 at A-8.
[62] *Id.* at II-13.
[63] *Id.*
[64] ATP 3-13.1, *supra* note 3.

products," and countering "threat propaganda."[65] As a general precaution, units should avoid using the same footage for both MISO and public affairs products, as it can blur the distinction between the two. "If combat camera assets are not available, units can designate one or more Soldiers to use unit-issued or personal cameras."[66]

b. Common Legal Issues: The most common legal issues with COMCAM are related to how the unit chooses to use the footage. Footage of captured, wounded, or deceased personnel should not be used in a manner that would constitute humiliating or degrading treatment.[67] Additionally, units "must have a procedure in place for the review, clearance, and disposition of any images taken."[68]

c. Proponents: "Normally, COMCAM augments the IO officer or IO elements. If assigned, the COMCAM officer manages all COMCAM assets by planning, preparing, and executing COMCAM activities; if not assigned, the IO officer provides planning and guidance on COMCAM employment."[69]

d. Operational Guidance: No specific annex is currently dedicated to COMCAM.

10. Intelligence (Intel): While not an IRC, intelligence plays a vital role in the planning, execution, and analysis of IO. The term intelligence can refer to (1) "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;" (2) the "activities that result in the product;" or (3) the "organizations engaged in such activities."[70]

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.[71]

b. Common Legal Issues: The rules governing intelligence operations are 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*, requires IO information gathering programs and activities be coordinated and deconflicted with DoD intelligence activities[72] and that human-derived information gathering activities in support of IO "remain separate from authorized HUMINT and related intelligence activities." [73] For an overview of intelligence law, and notably the restrictions on collections on U.S. persons by members of the Intelligence Community.

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.

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[65] FM 3-13, *supra* note 2 at para. 9-17.
[66] *Id.*
[67] LAW OF WAR MANUAL, para. 8.2.2.
[68] *Id.*
[69] ATP 3-13.1, *supra* note 3 at para. 3-13.
[70] CHAIRMAN, JOINT CHIEFS OF STAFF, JOINT PUB. 2-0, JOINT INTELLIGENCE at GL-8 (22 Oct. 2013).
[71] *See* JOINT PUB. 3-13, *supra* note 1 at II-10.
[72] *See* U.S. DEP'T OF DEF. MANUAL 5240.01, PROCEDURES GOVERNING THE CONDUCT OF DOD INTELLIGENCE ACTIVITIES (8 Aug. 2016)
[73] DoDD 3600.01, *supra* note 29 at para 3(l).

CHAPTER 11

SEA, AIR, & OUTER SPACE OPERATIONS

I. INTRODUCTION

A. Unlike some other areas of national security law, which focus on questions of "what" is permitted or prohibited or "how" to legally obtain a certain result, the topics of Sea, Air, and Outer Space operations also add the question of "where." In other words, what an individual or State may do in a particular domain depends on where the action takes place (i.e. land, sea, air, or outer 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. Third, it will present the competencies of States to conduct operations within these various regimes. Finally, the chapter will discuss specific issues related to military operations in each of these domains during periods of armed conflict.

II. SOURCES OF LAW

There are many sources of law governing Sea, Air, and Outer Space Operations. The primary source governing a particular operation depends largely on "when" the operation is taking place. Certain sources of law are only applicable during periods of armed conflict. Likewise, certain legal provisions are only applicable in peacetime (i.e. suspended during armed conflict). Finally there are legal regimes that remain in place during an armed conflict, but may not apply in an area of active hostilities. Despite legal complexity, there are three foundational treaties that serve as bedrock sources of law in the domains of Sea, Air, and Outer Space:

A. **1982 United Nations Convention on the Law of the Sea (UNCLOS III).**

1. 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

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[1] United Nations Treaty Collection, *Law of the Sea*, https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en#1 (last visited 28 May 2020); *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]. Note: The Annotated Supplement to the Commander's Handbook on the Law of Naval Operations has not been updated since 1997. In August 2017, the latest version of NWP 1-14M was promulgated. NWP 1-14M/ MCTP 11-10B/COMDTPUB P5800.7A, *The Commander's Handbook on the Law of Naval Operations* (Aug. 2017) [hereinafter NWP 1-14M (2017)], http://usnwc.libguides.com/ld.php?content_id=38386466. The Annotated Supplement is a valuable resource for judge advocates; however, the updated NWP 1-14 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] United Nations Convention on the Law of the Sea, art. 87, 10 Dec. 1982 [hereinafter UNCLOS III]; *see also* Churchill & Lowe, *supra* note 2, at 205-08.

[5] UNCLOS III, Pmbl. para. 6 and art. 136.

purposes.[6] This is generally interpreted to mean that such use is in compliance with the *jus ad bellum* principles of the UN Charter.[7]

2. On July 9, 1982, the United States announced that it would not sign the Convention, objecting to provisions related to deep seabed mining[8] (Part XI of the Convention).[9] In a March 10, 1983, Presidential Policy Statement, the United States reaffirmed that it would not ratify UNCLOS III because of the deep seabed mining provisions, which it characterized as wealth redistribution and forced technology transfer.[10] Nevertheless, the United States considers the navigational articles to be generally reflective of customary international law, and therefore binding upon all nations.[11] In 1994, the UN General Assembly proposed amendments to the mining provisions.[12] On October 7, 1994, President Clinton submitted the Convention, as amended, to the Senate for its advice and consent.[13] On February 25, 2004, 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.[14]

B. **1944 Convention on International Civil Aviation (Chicago Convention).**[15] This Convention was intended to encourage the safe and orderly development of the then-rapidly growing civil aviation industry. While it does not by its terms apply to State aircraft (i.e. military, police, or customs),[16] it does create an important standard that all aircraft must follow when flying. While recognizing the absolute sovereignty of the State within its national airspace,[17] the Convention provides some additional freedom of movement for aircraft flying over and refueling within the national territory of a foreign state.[18] The Convention also attempts to regulate various aspects of aircraft operations and procedures.[19] The Convention created the International Civil Aviation Organization (ICAO), which "aims . . . to develop the principles and techniques of international air navigation and to foster the planning and development of international air transport . . . ."[20]

C. **1967 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 or OST).**[21] This treaty limited

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[6] *Id.* at arts. 88 and 301; *see also* Churchill & Lowe, *supra* note 2, at 208, 421-30.
[7] U.S. DEP'T OF DEF., DOD LAW OF WAR MANUAL, § 13.1.1 (Dec. 2016) [hereinafter LAW OF WAR MANUAL].
[8] Since it is not a party to UNCLOS III, the United States maintains that it may mine the deep sea-bed without being bound by any limitations contained in UNCLOS III. Annotated NWP 1-14M, *supra* note 1, at 1-25 to 1-26, 1-39.
[9] *See generally id.* at 1-30, 1-38.
[10] *Id.* at 1-1 to 1-2, 1-38 to 1-39, 1-65 to 1-67.
[11] *Id.* at 1-25, 2-59, 2-63.
[12] *Id.* at 1-2.
[13] *Id.* at 1-2, 1-29 to 1-30. In his submission, President Clinton noted, "Since the late 1960s, the basic U.S. strategy has been to conclude a comprehensive treaty on the law of the sea that will be respected by all countries. Each succeeding U.S. Administration has recognized this as the cornerstone of U.S. oceans policy." *Id.* at 1-29.
[14] 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, http://www.state.gov/e/oes/lawofthesea/179798.htm.
[15] Convention on International Civil Aviation, 7 Dec. 1944 [hereinafter Chicago Convention].
[16] *Id.* at art. 3(a) ("This Convention shall be applicable only to civil aircraft, and shall not be applicable to state aircraft.").
[17] *Id.* at art. 1 ("[E]very State has complete and exclusive sovereignty over the airspace above its territory.").
[18] *See id.* at Chapter II.
[19] *See id.* at Chapter IV.
[20] *See id.* at art. 44.
[21] Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, Jan. 27, 1967 [hereinafter OST].

State sovereignty in outer space,[22] and declared outer space to be the "province of all mankind."[23] This treaty prohibited certain military operations in outer space and upon celestial bodies,[24] including the placing in orbit of any nuclear weapons or other weapons of mass destruction[25] and the installation of such weapons on celestial bodies.[26] Outer space was otherwise to be reserved for peaceful uses.[27] "The United States has interpreted use of outer space for 'peaceful purposes' to mean 'non-aggressive and beneficial' purposes consistent with the Charter of the United Nations and other international law.[28]

II. LEGAL DIVISIONS

A. The Earth's surface, sub-surface, and atmosphere are broadly divided into National and International areas.[29] 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.[30]

B. National Areas.

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

2. *Internal Waters*. These are all waters landward of the baseline,[31] over which the coastal State "exercise[s] the same jurisdiction and control . . . as they do over their land territory."[32] The baseline is an artificial line generally corresponding to the low-water mark along the coast.[33] 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.[34] 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).[35] 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[36] and across the furthest extent of river deltas or other unstable coastline features.[37] Straight baselines are overused,[38] and the United States strictly interprets the few instances when straight baselines may be properly drawn.[39]

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[22] *See id*. at art. 2.
[23] *Id.* at art. 1.
[24] *See, e.g.* at art 4.
[25] *Id.*
[26] *Id.*
[27] *Id.* at art. 3.
[28] LAW OF WAR MANUAL, *supra* note 7 at § 14.10.4.
[29] *See* Annotated NWP 1-14M, *supra* note 1, at 1-69 to 1-70.
[30] NWP 1-14M (2017), *supra* note 1, at para. 1.6 and 1.9.
[31] UNCLOS III, art. 8; Annotated NWP 1-14M, *supra* note 1, at 1-14.
[32] Annotated NWP 1-14M, *supra* note 1, at 2-6.
[33] 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.
[34] For a full list of U.S. declarations and state practices challenging excessive claims, *see* DoD Representative for Ocean Policy Affairs, *Maritime Claims Reference Manual*, https://www.jag.navy.mil/organization/code_10_mcrm.htm (last updated Feb. 2020).
[35] UNCLOS III, art. 7(1); Annotated NWP 1-14M, *supra* note 1, at 1-5.
[36] UNCLOS III, art. 9; Annotated NWP 1-14M, *supra* note 1, at 1-12.
[37] UNCLOS III, art. 7(2); Churchill & Lowe, *supra* note 2, at 37-38.
[38] Churchill & Lowe, *supra* note 2, at 38-40; Annotated NWP 1-14M, *supra* note 1, at 1-77 to 1-79.
[39] Annotated NWP 1-14M, *supra* note 1, at 1-6.

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.[40] 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).[41] *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."[42] The United States does not recognize many claims to historic bay status,[43] such as Libya's claim to the Gulf of Sidra[44] (closure line in excess of 300 NM) or Canada's claim to Hudson Bay (closure line in excess of 50 NM).[45]

c. *Archipelagic Baselines*. UNCLOS III allows archipelagic States (i.e., those consisting solely of groups of islands,[46] such as Indonesia[47]) to draw baselines around their outermost islands, subject to certain restrictions.[48] The waters within are given special status as archipelagic waters, which are more akin to territorial waters than to internal waters.

d. *Maritime Claims Reference Manual*. This DoD publication[49] 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.[50] 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.[51] 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.[52]

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."[53] 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,[54] which is used for

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[40] *Id.* at 1-8, 1-47.
[41] 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.
[42] UNCLOS III, art. 10(6); Annotated NWP 1-14M, *supra* note 1, at 1-11; Churchill & Lowe, *supra* note 2, at 43-45.
[43] Annotated NWP 1-14M, *supra* note 1, at 1-80.
[44] *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.
[45] Annotated NWP 1-14M, *supra* note 1, at 1-11 to 1-12 n.23.
[46] *Id.* at 1-17 to 1-18, 1-85 to 1-88.
[47] Seventeen States have claimed archipelagic status, including the Bahamas, Indonesia, Jamaica, and the Philippines. Churchill & Lowe, *supra* note 2, at 121-22.
[48] 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.
[49] Maritime Claims Reference Manual, *supra* note 34. 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.
[50] UNCLOS III, art. 2; Annotated NWP 1-14M, *supra* note 1, at 1-14 to 1-15, 1-62.
[51] UNCLOS III, art. 3; Annotated NWP 1-14M, *supra* note 1, at 1-15.
[52] Annotated NWP 1-14M, *supra* note 1, at 1-81 to 1-84. See DoD Maritime Claims Reference Manual, *supra* note 34, for claims of specific States, or the Annotated NWP 1-14M for a synopsis of State claims.
[53] *Id.* at 1-54.
[54] UNCLOS III, art. 13; Annotated NWP 1-14M, *supra* note 1, at 1-15 to 1-16.

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.[55]

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.[56] Rocks are entitled to a territorial sea and a contiguous zone, but not to an exclusive economic zone (EEZ) or a continental shelf,[57] 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.[58]

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).[59]

5. *National Airspace*. This area includes all airspace over the land territory, internal waters, and territorial sea.[60]

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.[61]

2. *Exclusive Economic Zone (EEZ)*. This zone is immediately seaward of the territorial sea and extends no more than 200 NM from the baseline.[62]

3. *High Seas*. This zone includes all areas beyond the exclusive economic zone.[63]

4. *International Airspace*. This includes all airspace beyond the furthest extent of the territorial sea.[64]

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.[65] Many in the international community recognize the edge of space as 100 kilometers (62 miles) above mean sea level.[66] The United States has consistently opposed establishing such a boundary in the absence of a showing that one is needed.[67]

6. *Polar Regions*

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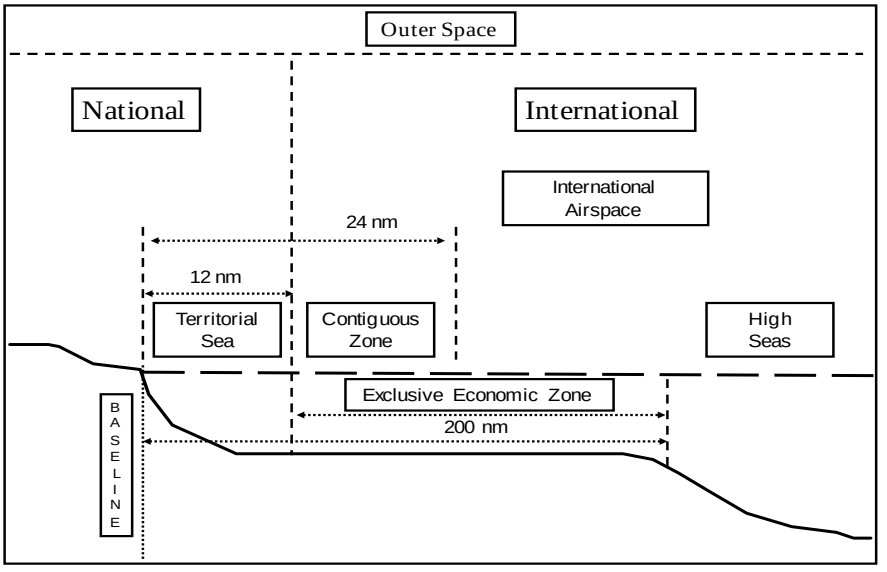
[55] UNCLOS III, art. 7(4); Annotated NWP 1-14M, *supra* note 1, at 1-6 to 1-8.
[56] Annotated NWP 1-14M, *supra* note 1, at 1-15 to 1-16.
[57] The continental shelf is the seabed and subsoil, which may extend beyond the 200 NM EEZ, but generally not more than 350 NM from the baseline, over which the 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.
[58] *See, e.g.*, Martin Flacker, A Reef or a Rock? Question Puts Japan in a Hard Place, Wall Street Journal (Feb. 16, 2005), 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, 25 Jan. 2014, http://blogs.wsj.com/searealtime/2014/01/25/why-china-and-the-philippines-are battling-over-rocks-reefs/
[59] Annotated NWP 1-14M, *supra* note 1, at 1-15 to 1-16.
[60] UNCLOS III, art. 2; LAW OF WAR MANUAL, *supra* note 7 at § 14.2.1.1
[61] UNCLOS III, art. 33; Annotated NWP 1-14M, *supra* note 1, at 1-89; Churchill & Lowe, *supra* note 2, at 132-39.
[62] UNCLOS III, arts. 55, 57; Churchill & Lowe, *supra* note 2, at 160-79.
[63] UNCLOS III, art. 86; Annotated NWP 1-14M, *supra* note 1, at 1-21.
[64] LAW OF WAR MANUAL, *supra* note 7 at § 14.2.1.2.
[65] *Id.* at § 14.2.2.
[66] *See, e.g.* European Space Agency, *Astronaut's Glory* (11 May 2018), https://www.esa.int/ESA_Multimedia/Images/2018/11/Astronaut_s_glory; Fédération Aéronautique Internationale, *Statement about the Karman Line* (30 Nov. 2018), https://www.fai.org/news/statement-about-karman-line
[67] LAW OF WAR MANUAL, *supra* note 7 at § 14.2.1.2.

a. *Antarctica*. The Antarctic Treaty of 1959 applies to the area south of 60 degrees South Latitude, reserving that area for peaceful purposes only.[68] 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.[69] However, the Treaty does not prejudice the exercise of rights on the high seas within that area.[70] "The United States recognizes no territorial, territorial sea, or airspace claims in Antarctica."[71]

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.[72] 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.[73]

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.[74] Therefore, the

[68] The Antarctic Treaty (1959), art. VI.
[69] *Id.* at art. I. 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. *Id* at art. VII. 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.
[70] *See* NWP 1-14M (2017), *supra* note 1, at para. 10.2.2.3.
[71] *Id.* at para. 2.6.5.2.
[72] *Id.* at para. 2.6.5.1.
[73] *Id.*
[74] *Id.* at para. 1.5 and 1.9.

navigational regime is "consent of the State."[75] 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.[76] The Chicago Convention "generally is not applicable to State aircraft. However, [it] imposes requirements with respect to entry by State aircraft into foreign airspace and with respect to the issue of due regard for the safety of navigation of civil aircraft."[77]

2. The DoD Foreign Clearance Manual[78] 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).[79] 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).[80] "Passage is *innocent* so long as it is not prejudicial to the peace, good order, or security of the coastal nation."[81] 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.[82] Moreover, UNCLOS III contains no requirement that passage through a State's territorial sea be *necessary* for it to be innocent; it does, however, enunciate a list of twelve activities deemed not to be innocent, including: threat or use of force; weapons exercise or practice; intelligence collection or act of propaganda; the launching or recovery of aircraft or any military device (e.g. landing craft or Unmanned Aerial Vehicles); willful act of serious pollution, fishing, research, or survey activities; intentional interference with communications systems; or "any other activity not having a direct bearing on passage."[83]

(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.[84] If a vessel is not engaged in the above listed activities, its passage is deemed innocent.[85]

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[75] *See id.* at 2.5.1.
[76] *See* Chicago Convention, art. 5, 6, and 7.
[77] LAW OF WAR MANUAL, *supra* note 7 at § 14.1.1; *see also* Chicago Convention, art. 3(d).
[78] Department of Defense, *Foreign Clearance Manual* (30 Sep. 2019) (NOT RELEASABLE OUTSIDE US GOVERNMENT), https://www.fcg.pentagon.mil/ (CAC required).
[79] UNCLOS III, art. 18; Annotated NWP 1-14M, *supra* note 1, at 2-7 to 2-9.
[80] UNCLOS III, art. 18(3); Annotated NWP 1-14M, *supra* note 1, at 2-7, 3-3.
[81] Annotated NWP 1-14M, *supra* note 1, at 2-7.
[82] *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* note 34.
[83] 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.
[84] NWP 1-14M (2017), *supra* note 1 at para. 2.5.2.4.
[85] 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)

(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.[86]

(3) Innocent Passage does not apply to aircraft. The airspace above the territorial sea is considered "national airspace," which aircraft can generally enter only with the consent of the coastal State (i.e. in accordance with the Chicago Convention).[87]

(4) A submarine in innocent passage must transit on the surface, showing its flag.[88]

(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.[89]

(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.[90]

(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.[91]

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."[92] The location of the persons in danger must be reasonably well-known—the right does not permit a search.[93] Aircraft may be used to render assistance, though this right is not as well-recognized as that for ships rendering assistance.[94]

c. *Transit Passage*.

(1) Transit passage applies to passage through *International Straits*,[95] which are defined as: (1) routes between the high seas or exclusive economic zone (EEZ) and another part of the high seas or exclusive

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[86] *Id.* at para. 2.
[87] Annotated NWP 1-14M, *supra* note 1, at 2-7, 2-9, 2-28.
[88] UNCLOS III, art. 20; Annotated NWP 1-14M, *supra* note 1, at 2-11; Churchill & Lowe, *supra* note 2, at 88-92.
[89] Annotated NWP 1-14M, *supra* note 1 at 2.9.
[90] 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.
[91] 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 (2017), *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 para. 1.8. 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." Annotated NWP-14M, *supra* note 1, 2-22.
[92] *See* NWP 1-14M (2017), *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.
[93] *See* NWP 1-14M (2017), *supra* note 1, at para. 2.5.2.6; *see also* Annotated NWP 1-14M, *supra* note 1, at 2-12.
[94] See Chairman of the Joint Chiefs Staff Instruction 2410.01D, *Guidance for the Exercise of Right-of-Assistance Entry* (31 Aug. 2010) for further guidance on the exercise of the right-of-assistance entry.
[95] *See generally* Annotated NWP 1-14M, *supra* note 1, at 2-71 to 2-76 for large-scale charts of popular international straits.

economic zone;[96] (2) overlapped by the territorial sea of one or more coastal States;[97] (3) with no other high seas or exclusive economic zone route of similar convenience;[98] (4) natural, not constructed (e.g. not the Suez Canal);[99] and (5) must actually be used for international navigation.[100] The U.S. position is that the strait must only be *susceptible* to use, and not necessarily *actually* be used for international navigation.[101]

(2) 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.[102] In the normal mode of transit, ships may travel in formation, launch and recover aircraft and uncrewed aerial vehicles (UAVs) if that is normally done during their navigation (e.g., for force protection purposes), and submarines may transit submerged.[103] Aircraft may also exercise transit passage (i.e. aircraft may fly in the airspace above international straits without consent of the coastal States).[104] Transit passage may <u>not</u> be suspended by the coastal States during peacetime.[105] The U.S. view is that, unlike Archipelagic Sea Lanes Passage, the right of transit passage exists from coastline to coastline of the strait, and of the approaches to the strait.[106]

(3) 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.[107]

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*.[108] ASLP "is substantially identical to the right of transit passage through international straits."[109]

(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*

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[96] 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.
[97] 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.
[98] UNCLOS III, art. 36; Churchill & Lowe, *supra* note 2, at 105.
[99] Annotated NWP 1-14M, *supra* note 1 at 2-12 & n. 36.
[100] UNCLOS III, art. 37.
[101] Annotated NWP 1-14M, *supra* note 1 at 2-12 & n. 36.
[102] UNCLOS III, arts. 38 and 39(1)(c); *see* Churchill & Lowe, *supra* note 2, at 109-13; NWP 1-14M (2017), *supra* note 1, at para. 2.5.3.2.
[103] *See* NWP 1-14M (2017), *supra* note 1, at para. 2.5.3.2; Annotated NWP 1-14M, *supra* note 1, at 2-15.
[104] Annotated NWP 1-14M, *supra* note 1, at 1-24, 2-29.
[105] 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, 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.
[106] 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 (2017), *supra* note 1, at para. 2.5.3.2. 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.
[107] 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.
[108] UNCLOS III, art. 53; Annotated NWP 1-14M, *supra* note 1, at 2-17 to 2-18; Churchill & Lowe, *supra* note 2, at 127.
[109] Annotated NWP 1-14M, *supra* note 1, at 2-17.

used as routes for international navigation or overflight through or over archipelagic waters,[110] 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.[111] Once ASLs are designated, transiting ships and aircraft[112] 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.[113] Upon ASL designation, the regime of innocent passage applies to Archipelagic Waters outside ASL.[114] ASLP may not be hampered or suspended;[115] however, if ASLs are designated, innocent passage outside the lanes—but within Archipelagic Waters—may be suspended in accordance with UNCLOS III.

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."[116] Although reserved for peaceful purposes,[117] 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 consistent with the provisions of the UN Charter are "peaceful."[118] The United States has fought to maintain high seas freedoms in international waters through its Freedom of Navigation Program.[119]

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.[120] 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.[121] 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 and whether the craft is State or civil.

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[110] *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.
[111] 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.
[112] Annotated NWP 1-14M, *supra* note 1, at 1-24, 2-29.
[113] I*d.* at 2-18 to 2-19.
[114] *Id.* at 2-18.
[115] *Id.*
[116] *Id.* at 2-21. *See also* UNCLOS III, arts. 58 and 87.
[117] UNCLOS III, arts. 88 and 301; *see also* Churchill & Lowe, *supra* note 2, at 208, 421-30.
[118] LAW OF WAR MANUAL, *supra* note 7 at § 13.1.1.
[119] *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 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. 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 (12 Oct. 1990); Thom Shanker, *U.S. Sends Two B-52 Bombers Into Air Zone Claimed by China*. N.Y. TIMES, 26 Nov. 2013 at A1.
[120] NWP 1-14 (2017), *supra* note 1 at paras. 3.4 and 3.11.2.2.1.
[121] 18 U.S.C. § 7 (2007).

1. *State Craft*. State ships include warships[122] 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.[123] By policy, the United States has incorporated uncrewed vehicles (surface, underwater, and aerial—USVs, UUVs, and UAVs, respectively) that are either autonomous or remotely navigated into the definition of State craft.[124] State craft enjoy complete sovereign immunity.[125]

2. *Civil Craft*. These are any craft other than State craft. States must set conditions for the granting of nationality to ships and aircraft.[126] Craft may be registered to only one State at a time.[127]

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 coastal 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;[128]

(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).[129]

(2) *State Craft*. State vessels enjoy complete sovereign immunity.[130] However, the Flag State bears liability for any costs that arise from a State vessel's violation of laws that would otherwise be applicable to civil vessels.[131] The coastal State's only power over State vessels not complying with its rules is to require them to leave the territorial sea immediately,[132] arguably by using "any force necessary to compel them to do so."[133]

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 EEZ. These include customs, fiscal, immigration, and sanitary laws, and prohibitions on exploitation of resources (e.g., fishing).

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[122] "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.
[123] Chicago Convention, art. 3.
[124] See NWP 1-14M (2017), *supra* note 1, at paras. 2.3.4 to 2.3.6, and 2.4.4.
[125] UNCLOS III, art. 30; Annotated NWP 1-14M, *supra* note 1, at 2-1. FOOTNOTE.
[126] *See* Chicago Convention, arts. 17.
[127] *See id*. at art 18.
[128] UNCLOS III, art. 27; Churchill & Lowe, *supra* note 2, at 98, 268.
[129] UNCLOS III, art. 28; Churchill & Lowe, *supra* note 2, at 98, 461.
[130] 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 (2017), *supra* note 1, at para. 2.1 (stating this immunity arises as a matter of customary international law.).
[131] UNCLOS III, art. 31; Churchill & Lowe, *supra* note 2, at 99.
[132] UNCLOS III, art. 30; Annotated NWP 1-14M, *supra* note 1, at 1-18 to 1-19, 2-2.
[133] Churchill & Lowe, *supra* note 2, at 99.

Additionally, the coastal State may propose a traffic separation scheme, but it must be approved by the International Maritime Organization (IMO).[134]

(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 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*."[135] 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.[136] Although coastal State consent is required to conduct marine scientific research in its EEZ,[137] the coastal State cannot regulate hydrographic surveys or military surveys conducted beyond its territorial sea, nor can it require notification of such activities.[138] "[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.[139]

3. *High Seas.*

a. *Civil Craft*. On the high seas, the general rule is Flag State jurisdiction only.[140] 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*.[141] 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*.[142] "Piracy is an international crime of universal jurisdiction consisting of illegal acts of violence, detention, or depredation committed for private ends by the crew or passengers of a private ship or aircraft in or over international waters against another ship or aircraft or persons and

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[134] *See generally* http://www.imo.org/.
[135] 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 (2017), *supra* note 1, at para. 1.6.1.
[136] NWP 1-14M (2017), *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.
[137] 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).
[138] NWP 1-14M (2017), *supra* note 1, at para. 2.6.2.2.
[139] 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 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.
[140] UNCLOS III, art. 92; Churchill & Lowe, *supra* note 2, at 461; *see also* UNCLOS III, art. 217; Churchill & Lowe, *supra* note 2, at 348.
[141] UNCLOS III, art. 99.
[142] *Id.* at arts. 101-107.

property on board."[143] This act must occur on the high seas or outside the territorial jurisdiction of a state.[144] Note that both sides must be located onboard an aircraft or vessel.[145] Terrorist acts committed for purely political motives, vice private gain, have not generally been considered piracy.[146] International law has long recognized a general duty of all nations to cooperate in the repression of piracy. Under customary international law and the provisions of UNCLOS III, any State craft may seize and arrest pirates,[147] and any State may prosecute pirates under a theory of universal jurisdiction, provided the State has domestic laws criminalizing such behavior.

(3) *Ship or installation (aircraft not mentioned) engaged in unauthorized broadcasting*.[148] 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*.[149] The right of approach and visit—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 state vessel, it may be stopped, boarded, and the ship's documents examined, provided there is reasonable ground for suspecting that: (1) the vessel visited is engaged in slave trade,[150] piracy,[151] or unauthorized broadcasting;[152] (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);[153] or (3) the vessel, although flying a foreign flag, actually is of the same nationality of the visiting State ship or aircraft.[154] 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*.[155] 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 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.[156]

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[143] NWP 1-14M (2017), *supra* note 1, at para. 3.5.2.
[144] UNCLOS III, art. 101. 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.
[145] As such, events such as the 1985 *Achille Lauro* incident do not meet the strict definition of piracy.
[146] *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.
[147] NWP 1-14M (2017), *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.
[148] UNCLOS III, art. 109.
[149] *Id.* at art. 110; *see also* NWP 1-14M (2017), *supra* note 1, at para. 3.4.
[150] Annotated NWP 1-14M, *supra* note 1, at 3-13.
[151] *Id.* at 3-9 to 3-13.
[152] *Id.* at 3-13 to 3-14.
[153] *Id.* at 3-25.
[154] *Id.* at 3-8.
[155] UNCLOS III, art. 111; Annotated NWP 1-14M, *supra* note 1, at 3-21 to 3-23.
[156] NWP 1-14M (2017), *supra* note 1, at para. 3.5.3.2.

(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.[157]

c. *Maritime Interception Operations (MIO)*.[158] Nations may desire to intercept vessels at sea 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;[159]

(2) Flag state consent;[160]

(3) Vessel Master's consent;[161]

(4) Right of approach and visit;[162]

(5) Stateless vessels;[163]

(6) Condition of port entry;[164]

(7) Bilateral/Multilateral agreements;[165]

(8) Belligerent rights under the law of armed conflict (LOAC);[166]

(9) Inherent right of self-defense.[167]

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[157] UNCLOS III, art. 95.
[158] *See* NWP 1-14M (2017), *supra* note 1, at para. 4.4.4.
[159] *Id*. at para. 4.4.4.1.1.
[160] *Id*. at para. 4.4.4.1.2.
[161] *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).
[162] *Id*. at para. 4.4.4.1.4.
[163] NWP 1-14M (2017), *supra* note 1, at para. 4.4.4.1.5.
[164] *Id*. at para. 4.4.4.1.6.
[165] *Id*. at para. 4.4.4.1.7.
[166] *Id*. at paras. 4.4.4.1.8 and 7.6.
[167] *Id*. at para. 4.4.4.1.9.

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 focused on the law during 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. Additionally, in the event of armed conflict at sea, legal analysis must also include the LOAC. 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.[168] *The Commander's Handbook on the Law of Naval Operations*, 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.[169]

VI. THE LAW OF AIR WARFARE

A. Introduction

1. The focus of this chapter has primarily been on the rules governing peacetime operations. In the context of air operations this is sometimes called the *law of air mobility.*[170] This should not be mistaken to exclude combat aircraft. The same rules apply to them whenever they perform a non-combat operation in a peacetime environment. However, in wartime, many of these rules may not necessarily apply, especially in areas of active hostilities. Judge Advocates should nonetheless be familiar with these rules if they are deploying to units supported by air assets. The ability to deliver supplies or to send combat aircraft to a target can be impacted by the law of air mobility.[171]

2. In terms of the rules governing air warfare, there is no separate treaty specifically governing air combat. An attempt to create a separate treaty resulted in the 1923 *Hague Rules of Air Warfare*, but these rules were

[168] DoD Directive 2311.01E, *DoD Law of War Program*, para. 4.1 (9 May 2006, certified current 22 Feb. 2011)
[169] *See generally* NWP 1-14M (2017), *supra* note 1, at ch. 5 to 12.
[170] *See generally,* Lieutenant Colonel Christopher M. Petras, *The Law of Air Mobility—The International legal Principles Behind the U.S. Mobility Air Forces' Mission*, 16 A.F. L. REV. 1 (2010). This article provides an excellent overview of the issues discussed in this chapter as applied specifically to air operations.
[171] The best example of the impact of the law of air mobility on air combat operations was Operation ELDORADO CANYON in 1986. Air Force F-111 fighter aircraft launched from bases in the United Kingdom to bomb Libyan targets in response to a terrorist activity blamed on Libya, were forced to fly around the European Continent when overflight clearances were denied. *See* Air Force Historical Support Division, *1986 - Operation El Dorado Canyon*, 18 Sep. 2012), https://www.afhistory.af.mil/FAQs/Fact-Sheets/Article/458950/operation-el-dorado-canyon/.

never ratified.[172] However, many of its principles may have become customary international law.[173] Certain rules particular to air warfare have been codified in both Hague Law and Geneva Law, such as the rules governing bombardment of undefended places and the rules governing medical aircraft.

B. Sources of Authority

1. Article 89 of the 1944 *Chicago Convention* allows for the LOAC to take precedent over the treaty obligations during an armed conflict.[174] Nonetheless, certain restrictions on state and military aircraft passing through neutral airspace without permission may still apply.[175] With no treaty specifically devoted to air warfare, Judge Advocates must apply existing law to operations occurring within the air domain.

2. Service guidance can be found in Air Force and Navy documents. Judge Advocates should consult the most recent edition of the *Air Force Operations and the Law* which discusses the LOAC applied to air operations as well as the specifics of air targeting and weaponeering. The Navy's *Commander's Handbook on the Law of Naval Operations*, also contains references to air and space operations.

3. The Program on Humanitarian Policy and Conflict Research at Harvard University published the *Manual on International Law Applicable to Air and Missile Warfare* (AMW Manual), which consists of 175 "Black-letter Rules" agreed upon by a group of experts and associated commentary.[176] The manual has been described as a "tremendous accomplishment" that "can provide a baseline," but ultimately "an effective practitioner in this area of the law requires much more knowledge than the AMW Manual can provide."[177]

C. Planning Air Operations

1. Judge Advocates must not only be aware of the applicable LOAC and rules of engagement, but should also become familiar with the Joint Operations Planning Process for Air (JOPPA) and the Joint Air Tasking Cycle (JATC), which generates the daily Air Tasking Order (ATO).[178]

2. Command and Control of Air Operations. Doctrinally, air operations are either controlled: (1) directly by the joint force commander (JFC); (2) by the designated service component commander; or (3) by a joint functional air component commander (JFACC).[179] The JFACC is the most common; however, operations may rely on service component commanders as well.[180] Generally speaking, the JFACC will be the service component commander with "the preponderance of forces to be tasked and the ability to effectively plan, task, and control joint air operations."[181] In many cases, the designated JFACC is the Air Force service component commander.

3. Joint Air Operations Center (JAOC). Each service has its own organic structure for command and control of air assets. However, when a JFACC has been established, he or she will operate from a JAOC, which serves an "integrated command center" staffed by members of all participating components. Common elements of a JAOC are the strategy division (SD), combat plans division (CPD), intelligence, surveillance, and reconnaissance division (ISRD), air mobility division (AMD), and combat operations division (COD).[182] Each of the JAOC's major

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[172] U.S. AIR FORCE JUDGE ADVOCATE GEN.'S SCH., AIR FORCE OPERATIONS & THE LAW 20 (3rd. Ed, 2014) [hereinafter A.F. Ops & Law].
[173] *Id.*
[174] LAW OF WAR MANUAL, *supra* note 7 at § 14.1.1.1.
[175] *Id.*
[176] PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH, MANUAL ON INTERNATIONAL LAW APPLICABLE TO AIR AND MISSILE WARFARE (2009) [hereinafter AMW MANUAL].
[177] *See* Maj. Gen. (Ret.) Charles J. Dunlap, Jr., *Law of War Manuals and Warfighting: A Perspective,* 47 TEX. INT'L L.J. 265, 275-276 (2012).
[178] The ATO is the daily list of all planned air missions, which includes what planes will fly where. All of these concepts are discussed in greater detail in Joint Publication 3-30, *Joint Air Operations* (25 Jul. 2019) [hereinafter JOINT PUB. 3-30].
[179] *Id.* at II-1.
[180] For example, in *Operation Inherent Resolve,* the air campaign against the Islamic State in Iraq and the Levant (ISIL) is commanded directly by the Air Force component commander at U.S. Central Command (commander, U.S. Air Forces Central or AFCENT) rather than designating a separate JFACC under a Joint Task Force Commander as was done in the air campaign against Libyan forces during *Operation Odyssey Dawn* in 2011.
[181] JOINT PUB. 3-30, *supra* note 178 at II-2.
[182] *Id.* at II-14 to II-15.

activities relies on expertise from liaisons (e.g., battlefield coordination detachment [BCD], US Army Air and Missile Defense Command [AAMDC] liaison team, Naval and Amphibious liaison element [NALE], Air Force liaison element [AFLE], special operations liaison element [SOLE], Marine liaison element [MARLE]) to coordinate requests or requirements and maintain a current and relevant picture of the other component operations.[183]

4. Deliberate and Dynamic Targeting. Air targeting operations generally fall into two broad categories: *deliberate targeting* operations and *dynamic targeting* operations.[184] Deliberate targeting is the procedure for prosecuting targets that are detected, identified, and developed in sufficient time to schedule actions against them in tasking cycle products such as the ATO.[185] Dynamic targeting is the procedure for prosecuting targets that are not detected, identified, or developed in time to be included in deliberate targeting, and therefore have not had missions scheduled against them.[186]

5. Legal Considerations.

a. "The law of armed conflict (LOAC) and other legal considerations, such as rules of engagement (ROE), directly affect all phases of targeting and ultimately targeting decisions. Those involved in targeting should have a thorough understanding of these legal considerations and be able to apply them during the targeting process."[187]

b. In addition to the LOAC and ROE, there are other restrictions that impact targeting in the air context. The first restriction is target lists. "The no-strike list (NSL), restricted list (RTL), joint prioritized effects lists (JPEL), and joint prioritized target list (JPTL) are compiled and maintained by the combatant command or, in coalition operations, by senior coalition leadership elements."[188] The second restriction is collateral damage methodology (CDM).[189] The third restriction is the Joint Air Operations Plan (JAOP), which may contain restrictions from the commanders.[190] The fourth restriction is Special Instructions (SPINS), which are issued by the JFACC through the CAOC and may contain ROE-like restrictions.[191] Fragmentary Orders (FRAGOs) or Fire Support Annexes to OPORDs may also contain guidance on targeting.[192] Finally, coalition forces may have their own restrictions that must be considered as well.[193]

c. Regardless of the targeting phase, the following legal considerations must be made:[194]

(1) *Is the target a valid target?* The question of whether a target is valid can frequently be answered by the theater-specific ROE or by analyzing the target using LOAC principles.

(2) *Has positive identification (PID) of the target been established and maintained?* Based upon the principle of necessity and distinction, most combatant commands have specific requirements for sensors that can establish positive identification. Commonly more than one form of intelligence will be required. It is important for judge advocates to know the source of the PID and that it has been continuously maintained. If PID is lost, it must be regained in accordance with theater PID requirements before the target can be engaged.

(3) *Are there any restrictions that would limit the ability to strike this target such as ROE, NSL, RTL, etc.?* The judge advocate must consult the NSL and RTL to determine whether the nominated target appears on either list. Some CAOCs' systems have databases that generate any conflicts with NSL and RTL once the target

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[183] *Id.* at II-15.
[184] A.F. Ops & Law, *supra* note 172 at 276.
[185] *Id.*
[186] *Id.*
[187] *Id.* at 269.
[188] *Id.* at 274.
[189] *Id.* at 275.
[190] *Id.*
[191] *Id.*
[192] *Id.*
[193] *Id.*
[194] *Id.* at 283-84.

has been plotted. However, the databases should not be relied upon; it is a good idea to also review the collateral damage estimate produced by the targeteers during the dynamic targeting process.

(4) *What is the expected collateral damage and does it exceed the expected military advantage?* As mentioned above, the targeteers will nearly always generate a collateral damage estimate. Both targeteers and judge advocates use this estimate to determine the expected strike results versus expected collateral damage and to determine ways to minimize civilian casualties, if possible through weapons choice, delivery parameters, and fusing options. This estimate is also used to determine the appropriate strike approval authority. Higher expected collateral damage generally corresponds to a higher strike approval authority.

(5) *Has the target nominator received strike approval from the proper authority?* Usually captured in the ROE, the judge advocate will determine whether the target nominator has received approval to strike the target from the appropriate strike approval authority. The more sensitive a target is, the higher the strike approval authority will be. Further, during coalition air operations, use of coalition strike assets usually requires approval from that nation's designated strike approval authority.

D. *Air Combat Zones.* The *DoD Law of War Manual* recognizes the right of belligerents to prohibit or establish special restrictions upon flight activities in the immediate vicinity of hostilities to prevent such activities from jeopardizing military operations.[195] Such prohibitions or restrictions do not absolve the imposing nation from its obligations under the LOAC.[196] Nonetheless, the declaration of air combat zones may assist in decreasing the risk of attacking aircraft that are not being used for military purposes by an adversary.

1. War, Operational, Warning, or Exclusionary Zones. These zones are designed primarily to warn away civil or neutral aircraft to reduce the risk of being mistakenly attacked. They are historically based on similar zones established at sea. Such zones can be "exclusionary" by preventing the operating of any aircraft within the zone (similar to a No-Fly Zone, discussed below), but they cannot interfere with certain enemy exports on neutral aircraft unless a *blockade* has been established. Moreover, these zones must be distinguished from the belligerent right to control the immediate vicinity of hostilities where air operations are taking place.[197]

2. No-Fly Zones (NFZs). Since states enjoy the right of sovereignty over their national airspace, the infringement of that sovereignty can only occur when either: (1) another nation acts in self-defense; or (2) if the Security Council takes action. The Security Council has passed resolutions creating NFZs over Iraq in 1990, Bosnia-Herzegovina in 1992, and most recently Libya in 2011.

3. Air Defense Identification Zone (ADIZ). The *DoD Law of War Manual* defines an ADIZ as "an area of airspace over land or water in which the ready identification, location, and control of aircraft may be required in the interests of national security."[198] The legal basis of an ADIZ is a State's right to set conditions and procedures for entry into its national airspace. U.S. practice requires identification only from those aircraft penetrating an ADIZ with the intent to enter US national airspace. The United States does not apply or accept ADIZ identification requirements on aircraft that do not intend to penetrate national airspace. This is because an ADIZ, by definition, extends beyond national airspace, which a state is entitled to control, and into international airspace, where aircraft are entitled to freedom of navigation. *Practitioner's Tip:* Although foreign aircraft enjoy freedom of navigation in the U.S. ADIZ, U.S. military aircraft may intercept foreign military aircraft that approach U.S. national airspace.[199]

E. *Air-to-Air Considerations.*

1. Attacks against Military Objectives in the Air. The general rules on conducting attacks also apply to attacks against military objectives in the air.[200] Generally speaking, enemy military aircraft may be made the object of attack.[201] The challenge in air-to-air engagements is positively identifying that the object targeted is a valid

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[195] LAW OF WAR MANUAL, *supra* note 7 at § 14.6.
[196] *Id.* at § 13.9.2.
[197] *See* AMW Manual, *supra* note 176 at 291.
[198] LAW OF WAR MANUAL, *supra* note 7 at § 14.2.4.
[199] A.F. Ops & Law, *supra* note 172 at 28.
[200] LAW OF WAR MANUAL, *supra* note 7 at § 14.8.
[201] *Id.*

military objective.[202] In modern air combat, aircraft can engage each other at great distances, and modern weapon systems can increase the range of engagement beyond that which the human eye is capable of seeing.[203]

2. Protection of Civil Aircraft. During an armed conflict, civil aircraft are generally considered civilian objects, but they can lose their protection if they constitute a military objective.[204] An enemy civil aircraft may become a legitimate target if it fails to comply with military instructions.[205] Failure to comply does not, of itself, render the civil aircraft a target, but it may be evidence to suggest hostile act or hostile intent.[206] This protection of civil aircraft in armed conflict must be distinguished from the protection of civil aircraft in peacetime contained in Art 3*bis* of the Chicago Convention.[207]

3. Protection of Medical Aircraft. Specific rules found in the 1949 *Geneva Conventions* address the protection of aircraft that are engaged exclusively in specified medical functions.[208] These aircraft must be exclusively employed for the removal of wounded, sick, and shipwrecked, and for the transport of medical personnel and equipment to warrant protection and fly at heights, times, and routes agreed upon by the belligerents.[209] However, *known* medical aircraft must be respected and protected even if no pre-arranged agreement exists.[210]

4. Protection of Aircraft and Aircrew *Hors De Combat.*

a. Surrender by Enemy Aircraft. While it is possible for an enemy aircraft to surrender, it may be difficult to know when an opponent has surrendered, and moreover, it may be difficult to enforce the surrender. This does not preclude the possibility of accepting the surrender where feasible. "Persons who are conducting attacks against enemy military aircraft must assess in good faith whether surrender is offered in good faith and can feasibly be accepted based on the information that is available to them at the time."[211]

b. Downed Aircrew. Generally, aircrew parachuting from an aircraft in distress are treated as *hors de combat* unless they engage hostile acts or attempt to evade capture. At sea, downed aircrew are to be treated as shipwrecked and must not be attacked. In addition, there are obligations to search for and collect them under the Second Geneva Convention of 1949. Rescue of downed aircrew is considered a combat activity, especially when the purpose is to prevent capture.[212]

F. Air-to-Ground Considerations.

1. Attacks against Military Objectives on the Ground. The general principles of the LOAC apply to air attacks on ground targets with a few key exceptions specific to the unique nature of air attack and air weaponry.[213] Historically, the law disfavored aerial bombardment of ground targets due to its inaccuracy.[214] However, as bombardment became more precise and advantageous, these early prohibitions gave way. Air attacks on ground targets are held "to the same legal standard as other means and methods of warfare, not a higher standard."[215]

2. Aerial Bombardment. The aerial bombardment of towns, villages, dwellings, or buildings that are undefended is prohibited by Hague IV, art. 25.[216] The term "undefended" does not mean that it simply lacks

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[202] *See id.* at §§ 14.8.2 and 14.8.2.1.
[203] A.F. Ops & Law, *supra* note 172 at 26. "The criteria used to determine that an airborne target is in fact a military objective may be specified in rules of engagement. These criteria may be set by commanders to specify the degree of confidence that must exist before attacking an airborne target. The law of armed conflict does not specify the degree of confidence or probability that must exist before determining that an airborne aircraft is a military objective." *Id.*
[204] LAW OF WAR MANUAL, *supra* note 7 at § 14.8.3.
[205] *Id.* at § 14.5.2.1.
[206] *Id.*
[207] *Id.* at § 14.8.3.1.
[208] *Id.* at § 14.8.1.
[209] *Id.* at § 7.14.
[210] *Id.* at § 7.14.1.
[211] *Id.* at § 14.8.2.
[212] Medical personnel cannot hamper or interfere with an enemy attempting to capture enemy personnel. *Id.* at § 14.4.3.3.
[213] A.F. Ops & Law, *supra* note 172 at 24.
[214] *Id.*
[215] *Id.* at 25.
[216] Convention (IV) Respecting the Laws and Customs of War on Land, 18 Oct. 1907.

defensive capabilities, but rather that the undefended location can be seized or occupied without the use of force.[217] The prohibition of bombing undefended places does not preclude attacks on military objectives within civilian population centers. The rule must be read in conjunction with the protection accorded to civilians and civilian property and the other principles of the LOAC.[218]

3. Aerial Weaponry and Precision. As noted above, there have been many advancements in the technology and capability of aerial weaponry. However, the LOAC does not require the use of specific weapons based on their accuracy.[219] A commander is not required to use a precision-guided munition (PGM) if another weapon can be used that still meets the requirements of LOAC. Commanders are obligated to take certain precautions to ensure that attacks reduce the risk of harm to the civilian population and the selection of a certain weapon system may be among various precautions that a commander may take to reduce the risk of that harm.[220] Ultimately, the selection of weapons must be governed by the general principles of LOAC.

4. Enemy Ground Forces *Hors De Combat.*

a. Surrender by Enemy Ground Forces. The surrender of enemy ground forces to aircraft is difficult, as aircrew may not know for certain whether an enemy is actually surrendering. Further, it may be impossible for the aircrew to accept the surrender (i.e., the aircraft cannot land and take the enemy force into custody.) Nonetheless, there may be means by which the aircrew can facilitate a surrender by communicating steps for enemy units to take to communicate the intent to surrender to friendly ground forces.[221] The feasibility of accepting surrender must be considered *in addition* to whether a surrender is genuine, clear, and unconditional.[222]

b. Identifying Enemy Ground Forces *Hors De Combat.* Identification by aircraft of an enemy combatant on the ground placed *hors de combat* is also challenging. Aircrew may not be certain that enemy combatant is dead or injured or merely taking cover or feigning injury or surrender to avoid attack. Aircrews must "assess in good faith whether persons have been placed *hors de combat* based on the information that is available to them at the time."[223]

G. *Measures Short of Attack.*

1. Interception. During an armed conflict (and peacetime), a party may choose to intercept aircraft. All interceptions should be conducted with due regard for the safety of such aircraft.[224] Interception helps to: (1) determine whether the aircraft is a military objective or warn away civil aircraft entering into an area of operations; (2) enforce blockages or NFZs; (3) enforce right of visit and search; or (4) maneuver to position for possible attack. Interception is only restricted in armed conflict in neutral airspace and during passage through neutral straits or neutral archipelagic sea lanes.[225]

2. Diversion. Diversion and search of civil aircraft may be conducted outside neutral airspace as part of the belligerent right of visit and search. Interference with civil aircraft of neutral States must be justified by military necessity. Certain aircraft are exempt from the belligerent right to divert aircraft for purposes of visit and search: (1) neutral military aircraft; and (2) neutral civil aircraft accompanied by neutral military aircraft of the same nationality.[226]

3. Capture. Enemy civil aircraft may be seized and put to use by a belligerent. Neutral civil aircraft engaged in activity in violation of neutrality are also liable for capture.[227]

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[217] *Id.*; *see also* LAW OF WAR MANUAL, *supra* note 7 at §§ 5.15 and 14.9.1.
[218] A.F. Ops & Law, *supra* note 172, at 25.
[219] LAW OF WAR MANUAL, *supra* note 7 at § 14.9.2.
[220] *Id.*
[221] *Id.* at § 14.9.3.
[222] *Id.*
[223] *Id.* at § 14.9.3.1.
[224] *Id.* at § 14.5.1.
[225] *Id.* at § 14.5.1.2.
[226] *Id.* at § 14.5.2.
[227] *See* A.F. Ops & Law, *supra* note 172 at 29; *see also* LAW OF WAR MANUAL, *supra* note 7 at § 14.5.3.

H. *Uncrewed Aerial Vehicles.*[228]

1. UAVs are generally governed by the same rules and principles as crewed aircraft; however, the application of these rules may be challenging. Moreover, certain UAV operations, both using them and countering the threat they pose (cUAV), are governed by specific laws, regulations, and policies.

2. International Legal Considerations.

a. Use During Peacetime. The airspace divisions and navigation regimes previously discussed are applicable to UAV operations. Additionally, while UAVs that are state aircraft are not required to follow ICAO guidelines,[229] the DoD policy is to follow ICAO guidelines when "practical and compatible with the mission."[230] Moreover, UAVs operating in foreign national airspace must comply with relevant international agreements and host nation laws.[231]

b. Use During Armed Conflict. The LOAC applies to UAVs in the same way it applies to crewed aircraft.[232] As such, the LOAC and ROEs will guide the legal analysis of particular operations. Moreover, because of UAVs' ability to transit to locations and for durations crewed aircraft cannot, UAVs may offer additional ways for commanders to comply with the LOAC.[233]

3. Domestic Legal Considerations.

a. Use of UAVs. The use of UAVs within the United States is restricted not only for safety concerns under Federal Aviation Administration (FAA) regulations, but also out of concerns over the use of military aircraft to carry out law enforcement or intelligence functions. "The primary purpose of [DoD] domestic aviation operations are to support Homeland Defense (HD) and Defense Support of Civilian Authorities (DSCA) operations, and military training and exercises."[234] In 2018, the Secretary of Defense provided guidance for the domestic use of UAVs in U.S. national airspace.[235] This guidance streamlines the approval process for domestic use of UAVs, including delegating authority for the use of smaller UAS (sUAS) to the Secretaries of the military departments; authorizing geographic combatant commanders to approve the use of sUAS in support of force protection and incident awareness and assessment; and authorizing state governors to approve national guard use of sUAS for search and rescue and incident awareness and assessment.[236] It further directs that "[a]ll domestic use of DoD UAS will be conducted in accordance with [FAA] policies, regulations, and memoranda of agreement (MOA) concerning UAS operations in U.S. National Airspace, unless otherwise permitted by law or agreement."[237] Particular care should be paid to the privacy and civil liberties requirements for domestic UAV operations, including any

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[228] Generally, this handbook uses the term uncrewed aerial vehicle (UAV); however, citations reference both UAV and uncrewed aerial system (UAS). The distinction between these terms is not relevant to this handbook; as such, they are used interchangeably.
[229] LAW OF WAR MANUAL, *supra* note 7 at § 14.3.3 ("In general, military aircraft are operated by commissioned units of the armed forces of a State, bearing the military markings of that State, and commanded by a member of the armed forces of that State.
. . . [A]ircraft that are remotely piloted or controlled, may also be designated as military aircraft.").
[230] Department of Defense Instruction 4540.01, *Use of International Airspace by U.S. Military Aircraft and for Missile and Projectile Firings*, para. 3.e(1) (2 Jun. 2015, incorporating Change 1, 22 May 2017).
[231] A.F. Ops & Law, *supra* note 172 at 154-55. These may include restrictions on flight operations or guidance on the use of the electromagnetic spectrum. Department of Defense Instruction 4650.01, *Policy and Procedures for Management and Use of the Electromagnetic Spectrum* para. 4(c) (9 Jan. 2009, incorporating Change 1, 17 Oct. 2017) ("[The DoD] shall comply with . . . host nation (HN) spectrum regulations and obtain applicable authorizations before operating [spectrum-dependent] systems."
[232] *See, e.g.*, HPCR MANUAL, *supra* note 156, at 156. (Commentary to Rule 39.)
[233] For example, the ability of a UAV to loiter over a particular target may provide a commander a better understanding of the feasible precautions in the attack.
[234] Department of Defense, *Unmanned Aircraft Systems (UAS): DoD Purpose and Operation Use*, https://dod.defense.gov/UAS/ (last visited 26 May 2020).
[235] Secretary of Defense, *Guidance for the Domestic Use of Unmanned Aircraft Systems in U.S. National Airspace* (18 Aug. 2018), https://media.defense.gov/2018/Nov/05/2002059511/-1/-1/1/GUIDANCE-FOR-THE-DOMESTIC-USE-OF-UNMANNED-AIRCRAFT-SYSTEMS-IN-US-NATIONAL-AIRSPACE.PDF
[236] *Id.*
[237] *Id.* at Enclosure 1.

intelligence laws, policy, and oversight.[238] The Secretary of Defense guidance also provides a useful matrix for the approval authorities for domestic use of DoD UAS.[239]

b. Countering the Threat of UAVs. The proliferation of UAVs has also brought unique force protection challenges. UAVs are aircraft, so the rules regarding protection of aircraft are applicable to UAVs. For example, the Aircraft Sabotage Act criminalizes the destruction of aircraft or aircraft facilities.[240] However, the Secretary of Defense is authorized to take actions "necessary to mitigate the threat" that a UAV "poses to the safety or security of a covered facility or asset."[241] Discussion of "threats" is provided in classified guidance or mission specific ROE/RUF.[242] Counter-UAV capabilities must undergo a weapons review for compliance with the LOAC.[243] When implementing cUAV capabilities into installation protection procedures, particular attention should be paid to those that utilize the electromagnetic spectrum as they may require coordination with the FAA and the National Telecommunications and Information Administration.[244]

VII. SPACE OPERATIONS

A. Introduction

1. "Space is fundamental to U.S. prosperity and national security."[245] Yet, with the growth of space capabilities, "[o]perations in the space domain are increasingly contested, degraded, and operationally limited."[246] "Space is no longer utilized by only the most technologically advanced countries; people worldwide rely on services provided by, or dependent upon, space assets."[247] As such, "[s]pace underpins the U.S. way of life and U.S. way of war."[248] For the DoD, "[s]pace operations support and enable the joint force to conduct operations."[249] "[DOD] space policy is centered to deter adversaries, defend against threats, and pursue resilient space architectures that contribute to achieving space mission assurance and objectives."[250] In carrying out this mission, the United States conducts space activities and operations that "comply with the law of war and any other applicable treaties or international agreements to which the US is a party, with all applicable domestic law and policy, and with any applicable host nation laws."[251]

2. The FY20 NDAA created the U.S. Space Force (USSF) as the sixth branch of the U.S. military.[252] The USSF was established within the Department of the Air Force with a four-star general, known as the Chief of Space Operations (CSO), as the senior military member and a member of the Joint Chiefs of Staff.[253] The mission of the

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[238] *Id.* at Enclosure 2.
[239] *Id.*
[240] 18 USC § 32.
[241] 10 USC § 130i.
[242] In July 2017, the Deputy Secretary of Defense issued guidance on the criteria to use when determining whether an adversarial SUAS is a threat. This document is classified SECRET.
[243] *See* Department of Defense Directive 5000.01, *The Defense Acquisition System*, para. E1.1.15 (12 May 2003, incorporating Change 2, 31 Aug. 2018); Department of Defense Directive 3000.03E, *DoD Executive Agent for Non-Lethal Weapons (NLW), and NLW Policy*, Enclosure 2, para. 11.c (25 Apr. 2013, incorporating Change 2, 31 Aug. 2018)
[244] *See* National Telecommunications and Information Administration, *Manual of Regulations and Procedures for Federal Radio Frequency Management* § 7.25.3 (Sep. 2017) (NTIA Redbook); DoDI 4650.01, *supra* note 231 at para. 4(c) ("[The DoD] shall comply with U.S. and host nation (HN) spectrum regulations and obtain applicable authorizations before operating [spectrum-dependent] systems.") (citations omitted).
[245] Department of Defense, *United States Space Force* at I (Feb. 2019), https://media.defense.gov/2019/Mar/01/2002095012/-1/-1/1/UNITED-STATES-SPACE-FORCE-STRATEGIC-OVERVIEW.PDF [hereinafter USSF Strategic Overview].
[246] JOINT PUBLICATION 3-14, *Space Operations* I-1 (10 Apr. 2018) [hereinafter JOINT PUB. 3-14].
[247] *Id.*
[248] USSF Strategic Overview, *supra* note 245 at 1.
[249] JOINT PUB. 3-14, *supra* note 245 at I-4.
[250] *Id.* at I-1.
[251] *Id.* at IV-5.
[252] United States Space Force, *About U.S. Space Force* (15 May 20), https://www.spaceforce.mil/About-Us/Fact-Sheet
[253] *Id.*

USSF is to organize, train, and equip forces to "protect U.S. and allied interests in space and to provide space capabilities to the joint force."[254]

3. United States Space Command (USSPACECOM) is the newest of the eleven unified commands.[255] Its mission is to conduct "operations in, from, and through space to deter conflict, and if necessary, defeat aggression, deliver space combat power for the Joint/Combined force, and defend U.S. vital interests with allies and partners."

B. *Sources of Authority*

1. The primary treaty governing military operations in space is the 1967 *Outer Space Treaty*. That treaty made international law, including the UN Charter and the LOAC, applicable to the space domain.

2. In addition to the OST, key legal principles are also found in three other treaties: the Rescue and Return of Astronauts Agreement; the Liability Convention; and the Space Objects Registration Convention.[256] The 1979 Moon Treaty has not been ratified by most space-faring nations, including the United States.[257] The United States has specifically rejected claims that its provisions reflect customary international law.[258]

3. Several other agreements restrict activities in outer space. For example, the 1963 Limited Test Ban Treaty includes an agreement to not test nuclear weapons or carry out other nuclear explosions in outer space,[259] and the 1977 Environmental Modification Convention prohibits military or other hostile use of environmental modification techniques in outer space.[260]

4. There are several resources available for Judge Advocates advising on space operations. These include Chapter IV of Joint Publication 3-14; section 2.11 of the *Commander's Handbook on the Law of Naval Operations*, chapter 5 of the *Air Force Operations and the Law*; and chapter XIV of the *DoD Law of War Manual*.

C. *Military Operations in Outer Space*

1. Peaceful Purposes. The preamble to the Outer Space Treaty recognizes that it is in the common interest of all mankind to use space for peaceful purposes.[261] The United States has expressed the view that outer space should be used for only peaceful purpose, interpreting "peaceful purpose" to mean "non-aggressive and beneficial."[262] Therefore, it is not a violation to use satellites in space for observation or information gathering or to take lawful military action in self defense.[263]

2. Weapons Restrictions

a. Art. IV of the OST places certain restrictions on military activity in outer space. First, there is a restriction on deployment in orbit of nuclear weapons and other weapons of mass destruction (WMD) in outer space.[264] This does not prohibit the transit of nuclear weapons through outer space, only the stationing of nuclear

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[254] *Id.*
[255] United States Space Command, *Fact Sheet* (8 May 2020), https://www.spacecom.mil/Portals/32/Documents/FINAL_UNITED%20STATES%20SPACE%20COMMAND%20FACT%20SHEET_8May20.pdf?ver=2020-05-08-172510-637.
[256] Agreement on the Rescue of Astronauts, the Return of Astronauts, and the Return of Objects Launched into Outer Space, 22 Apr. 1968; Convention on International Liability for Damage Caused by Space Objects, 29 Mar. 1972; Convention on Registration of Objects Launched into Outer Space, 12 Nov. 1974.
[257] Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, 5 Dec, 1979.
[258] Executive Order 13914, *Encouraging International Support for the Recovery and Use of Space Resources* (6 Apr. 2020), https://www.govinfo.gov/content/pkg/FR-2020-04-10/pdf/2020-07800.pdf.
[259] Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, art. 1, 5Aug. 1963 ("Each of the Parties to this Treaty undertakes to prohibit, to prevent, and not to carry out any nuclear weapon test explosion, or any other nuclear explosion, at any place under its jurisdiction or control: (*a*) in the atmosphere; beyond its limits, including outer space; or under water, including territorial waters or high seas . . . .").
[260] Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, 18 May 1977.
[261] OST, preamble.
[262] LAW OF WAR MANUAL, *supra* note 7 at § 14.10.4.
[263] *Id.*
[264] OST, art. IV.

weapons in orbit. Other arms control treaties have banned the production, testing, or deployment of systems into full or fractional earth orbit.[265]

b. The OST does not restrict any other weapons. This would include anti-satellite weapons (ASATs) or other conventional weapons.[266] This has been a point of contention. Some states have called for a treaty banning the use of weapons in space and otherwise limiting the military use of outer space.[267] Additionally, there may be other risks if a state elects to destroy another state's satellite in orbit.[268]

c. Testing of weapons in outer space is not prohibited by the OST; however, other treaties, most notably the Limited Test Ban Treaty, prohibit the peacetime testing of nuclear weapons in space.[269]

3. Maneuver Restrictions

a. The OST declares outer space free for use and exploration by all States. No state can prohibit access to space and most states understand and accept the overflight of objects in orbit over terrestrial territory.[270]

b. Outer space and celestial bodies are not subject to national appropriation by claim of sovereignty.[271] The United States distinguishes the prohibition on national appropriation from the lawful use of particular locations in space. For example, States, and private entities, may claim resources from outer space, the moon, and other celestial bodies without violating the principle of non-appropriation.[272]

c. States must conduct their activities in space with "due regard" for the interests of other states in outer space.[273] Article IX requires States to make "appropriate international consultations" before conducting activities that would cause potentially harmful interference with the activities of other States Parties in the peaceful exploration and use of outer space.[274] The United States has proposed "safety zones" to assist in the notification and coordination between partner nations to prevent harmful interference.[275]

d. States may build military "bases" or space stations in outer space itself, but not on the moon or other celestial bodies.[276]

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[265] LAW OF WAR MANUAL, *supra* note 7, § 14.10.3.1.
[266] *Id.*
[267] *See* David A. Koplow, *The Fault Is Not in Our Stars: Avoiding an Arms Race in Outer Space*, 59 Harvard Int'l L. J. 331, 351-52 (Summer 2018). The United States has opposed the PPWT. *See id., citing* Delegation of the United States of America to the Conference on Disarmament, *Analysis of the 2014 Russian-Chinese draft "treaty on the prevention of the placement of weapons in outer space, the threat or use of force against outer space objects,"* U.N. Doc. CD/1998 (Sept. 3, 2014).
[268] The White House, *National Security Strategy of the United States* (Dec 2017), https://www.whitehouse.gov/wp-content/uploads/2017/12/NSS-Final-12-18-2017-0905.pdf ("The United States considers unfettered access to and freedom to operate in space to be a vital interest. Any harmful interference with or an attack upon critical components of our space architecture that directly affects this vital U.S. interest will be met with a deliberate response at a time, place, manner, and domain of our choosing."); see also A.F. Ops & Law, *supra* note 172, at 92 ("For purposes of self-defense, a State might decide that the destruction of a satellite constitutes a necessary and proportional response to the threat encountered. The State causing the damage, however, might be subject to liability claims under the Outer Space Treaty and the Liability Convention, although claims would not ordinarily be paid for damage arising from combat operations.")
[269] *Id.*
[270] A.F. Ops & Law, *supra* note 172, at 89.
[271] OST, art. II
[272] 51 USC § 51303 ("A United States citizen engaged in commercial recovery of an asteroid resource or a space resource under this chapter shall be entitled to any asteroid resource or space resource obtained, including to possess, own, transport, use, and sell the asteroid resource or space resource obtained in accordance with applicable law, including the international obligations of the United States."); *see also* Executive Order 13914, *supra* note 258 ("Outer space is a legally and physically unique domain of human activity, and the United States does not view it as a global commons. Accordingly, it shall be the policy of the United States to encourage international support for the public and private recovery and use of resources in outer space, consistent with applicable law.")
[273] *Id.*
[274] LAW OF WAR MANUAL, *supra* note 7, § 14.10.5.
[275] National Aeronautics and Space Administration, *The Artemis Accords* (May 2020), https://www.nasa.gov/specials/artemis-accords/img/Artemis-Accords_v7_print.pdf.
[276] *See* OST, art. IV; LAW OF WAR MANUAL, *supra* note 7 at § 14.10.3.2.

e. These restrictions may not apply to a conventional armed conflict conducted in outer space.[277] For example, in an international armed conflict, belligerent states may choose to deploy ASATs to eliminate the enemy's use of outer space for communication, reconnaissance, navigation, or targeting. States may also elect not to use of this capability due to the risk to friendly or neutral space systems by the creation of space debris.[278]

D. *Military Operations on the Moon and Other Celestial Bodies*

1. Article IV of the OST places certain prohibitions on military activities on the moon and other celestial bodies. It prohibits (1) the establishment of military bases, installations, and fortifications; (2) the testing of any type of weapons; and (3) the conduct of military maneuvers.[279]

2. Article IV also recognizes the unimpeded right to: (1) the use of military personnel for scientific research or other peaceful purposes on outer space missions; and (2) the use of any equipment or facility necessary for the peaceful exploration of the moon and other celestial bodies.[280]

E. *Other Considerations*

1. Growth of Private Space Action. The United States has championed the case for the use of space by private entities. Many of the recent changes to U.S. space policy have focused on developing a robust private space sector.[281] While essential for the continued growth of space technologies and capabilities, it increases the number of actors and objects in space. Moreover, as reflected in Article VI of the OST, States "bear international responsibility" for the activities of private entities conducted in outer space.[282] As private actors continue to grow and develop space capabilities—adding to the contested, congested, and competitive nature of space—Sates will have to adjust national laws and policies to adequately monitor this activity.[283] In remains to be seen what, if any, role the DoD will have in this process.

2. The Rescue and Return Agreement requires that State Parties immediately rescue foreign spacecraft personnel who land in their territory, and safely and promptly return them to the launching State. The treaty also provides a measure of protection for space objects; a State party to the treaty must retrieve objects in its territory when requested by the launching State, but only to the extent practicable.[284]

3. Space Debris. Space debris is not illegal *per se* under international law. There is no requirement that objects be deorbited or transferred to another orbit prior to the end of their useful life. The Outer Space Treaty declares that States shall avoid "harmful contamination."[285] All operations in space create some form of space debris. Much of this debris will remain in orbit for hundreds or thousands of years depending on height of its orbit. Even small pieces of debris, including debris that is too small to be tracked by current sensors, can potentially disable or destroy an operational satellite.[286] The Department of Commerce has the primary role in monitoring space debris,[287] but the DoD continues to monitor objects for impacts on U.S. national security interests.[288]

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[277] LAW OF WAR MANUAL, *supra* note 7 at § 14.10.2.1.
[278] *See* A.F. Ops & Law, *supra* note 172, at 92.
[279] LAW OF WAR MANUAL, *supra* note 7 at § 14.10.3.2.
[280] *Id.*
[281] *See, e.g.*, National Security Strategy, *supra* note 268 at 31; The White House, *Space Policy Directive-2, Streamlining Regulations on Commercial Use of Space* (24 May 2018), https://www.whitehouse.gov/presidential-actions/space-policy-directive-2-streamlining-regulations-commercial-use-space/.
[282] OST, art. VI.
[283] National Air and Space Intelligence Center, *Competing in Space* 3 (Dec. 2018), https://www.nasic.af.mil/Portals/19/documents/Space_Glossy_FINAL--15Jan_Single_Page.pdf?ver=2019-01-23-150035-697.
[284] A.F. Ops & Law, *supra* note 172, at 95.
[285] OST, art. IX.
[286] JOINT PUB. 3-14, *supra* note 245 at I-12.
[287] The White House, *Space Policy Directive-3, National Space Traffic Management Policy* (18 Jun. 2018), https://www.whitehouse.gov/presidential-actions/space-policy-directive-3-national-space-traffic-management-policy/
[288] *Id.* at 96 (discussing how the U.S. and other states are attempting to deal with space debris in greater detail).

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CHAPTER 12

DOMESTIC OPERATIONS

I. OVERVIEW

The primary mission of the U.S. military is war-fighting. Historically, those wars were fought abroad. However, after the tragic events of September 11, 2001, U.S. military involvement in domestic operations expanded. As a result, today's U.S. military leaders must be prepared to protect and defend the United States from direct attacks of state or non-state actors. Leaders must also stand ready to provide civil support to state and local authorities during major disasters or emergencies. This chapter will outline the increasingly complex legal framework for the use of the U.S. military within the United States for both homeland defense and civil support.

II. DEFINITIONS: HOMELAND DEFENSE (HD) AND DEFENSE SUPPORT OF CIVIL AUTHORITIES (DSCA)

A. Today's military must be prepared for both HD and DSCA 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."[1]

B. The DoD has defined 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."[2] It is generally considered to consist of war-fighting missions led by the DoD. Examples of HD activities include combat air patrols and maritime defense operations.

C. The DoD has defined DSCA as, "Support provided by U.S. military forces, DoD civilians, DoD contract personnel, DoD component assets, and National Guard forces (when the Secretary of Defense, in coordination with the governors of the affected states, elects and requests to use those forces in Title 32, United States Code, status) in response to requests for assistance from civil authorities for domestic emergencies, law enforcement support, and other domestic activities, or from qualifying entities for special events."[3] Examples of civil support activities include disaster response, counterdrug (CD) support, and support to civilian law enforcement agencies.

III. DEFENSE SUPPORT OF CIVIL AUTHORITIES

A. The DoD released DoDD 3025.18, Defense Support of Civil Authorities (DSCA), on 29 December 2010, incorporating and canceling DoDDs 3025.15 and 3025.1. Also, on February 27, 2013, the DoD issued DoDI 3025.21, Defense Support of Civilian Law Enforcement Agencies, which incorporated and canceled DoDDs 3025.12, 5525.5, and 5030.46.

B. It is DoD policy to provide defense support of civil authorities consistent with applicable law, Presidential Directives, Executive Orders, and DoDD 3025.18. Assistance is generally in the form of support; civilian authorities retain primary responsibility and control.

C. Execution and Oversight of DSCA**.**

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. All requests for assistance from civil authorities and qualifying entities must be evaluated based on the six factors set forth in the directive. Commanders at all levels should use these evaluation factors when providing civil support recommendations up the chain of command, which are referred to as the CARRLL factors.

a. ***C****ost*: Who pays, impact on DoD budget.

b. ***A****ppropriateness*: Whether the requested mission is in the interest of the DoD to conduct.

c. ***R****isk*: Safety of DoD forces.

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[1] DEP'T OF DEFENSE, STRATEGY FOR HOMELAND DEFENSE AND DEFENSE SUPPORT OF CIVIL AUTHORITIES, 1 (Feb. 2013), http://www.dtic.mil/dtic/tr/fulltext/u2/a582464.pdf.

[2] JOINT CHIEFS OF STAFF, JOINT PUB. 3-28, DEFENSE SUPPORT OF CIVIL AUTHORITIES, I-6 (29 Oct. 2018) [hereinafter JOINT PUB. 3-28.].

[3] JOINT PUB. 3-28, I-4.

d. ***R**eadiness*: Impact on the DoD's ability to perform its primary mission.

e. ***L**egality*: Compliance with the law.

f. ***L**ethality*: Potential use of lethal force by or against DoD forces.

2. When federal support is requested by the states and, "[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." SECDEF is the approval authority for DoD assistance provided when responding:

a. To civil disturbances.[4]

b. To chemical, Biological, Radiological, Nuclear, and High-Yield Explosives (CBRNE) events.[5]

c. To Civilian law enforcement organizations except as authorized by DoDI 3025.21[6]

d. With assets with potential for lethality[7]

e. With use of DoD unmanned aerial systems[8]

3. When approved by the SECDEF, heads of DoD components will plan, program, and budget for DSCA capabilities in accordance with law, policy, and assigned missions. Combatant Commanders with DSCA responsibilities, with the advisement of the Chief of the National Guard Bureau, will coordinate with the CJCS in the planning and execution of DSCA operations.[9]

IV. RESTRICTIONS ON CIVIL SUPPORT: THE POSSE COMITATUS ACT (PCA)

A. Although the Armed Forces must be ready to provide support to civil authorities, there are significant restrictions on the use of the U.S. military for law enforcement activities within the United States. The PCA criminalizes the use of the Army and Air Force for certain law enforcement activities within the 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."[10]

To advise commanders properly, especially in the area of civil support, judge advocates must understand the limitations created by the PCA as well as the constitutional and statutory exceptions to the rule.

B. Definition and History.

1. *Posse comitatus*: "The power of a county: (a) the entire body of the inhabitants who may be summoned by the sheriff to assist in preserving the public peace (as in a riot) or in executing a legal precept that is forcibly opposed including under the common law every male inhabitant who is above 15 years of age and not infirm (b) a body of persons so summoned."[11]

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 U.S. 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 U.S. 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."

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[4] DoDD 3025.18, para. 4.l.
[5] *Id.* at para. 4.l.(2).
[6] *Id.* at para. 4.l.(3).
[7] *Id.* at para. 4.l.(4)).
[8] *Id.* at para. 4.q).
[9] *Id.* at encl. 2.
[10] 18 U.S.C. § 1385
[11] Merriam-Webster Dictionary, *Posse Comitatus*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/posse%20comitatus (last viewed 2 Jun. 2020).

C. To Whom the PCA Applies.

1. Active duty personnel in the Army and Air Force.

a. Most courts interpreting the PCA have refused to extend its terms to the Navy and Marine Corps.[12]

b. In 10 U.S.C. § 275, 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*." Accordingly, DoD issued DoDI 3025.21. Therefore, by direction of Congress, the SECDEF has in effect extended the PCA restrictions to all members of the U.S. military. However, based on compelling and extraordinary circumstances, the SECDEF or Deputy Secretary of Defense may grant exceptions to the policy restrictions.

2. The Army Reserve, Air Force Reserve, Naval Reserve and Marine Corps Reserve (collectively the Reserves) when they are in a drilling status (on active duty, active duty for training, or inactive duty for training).

3. Army or Air National Guard personnel only when they are in a Title 10 status formally referred to as the Army or Air National Guard of the United States (ARNGUS/ANGUS).

4. Civilian employees of DoD when under the direct command and control of a U.S. military officer.

D. To Whom the PCA does **not** apply.

1. A member of a U.S. 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.

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 the Reserves when not on active duty, active duty for training, or inactive duty for training.

4. Members of the Coast Guard.[13]

5. Members of the armed forces who are not a "part of the Army or Air Force."[14]

E. U.S. Military Actions that the PCA Restricts.

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. DoDI 3025.21 prohibits direct law enforcement assistance, including:

(1) Interdiction of a vehicle, vessel, aircraft, or other similar activity.

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[12] *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).

[13] 14 U.S.C. § 2; *Jackson v. Alaska*, 572 P.2d 87 (Alaska 1977).

[14] 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 U.S. 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, DoD, 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) [hereinafter Transportation Opinion].

(2) Search or seizure.

(3) Arrest, apprehension, stop and frisk, or similar activity.

(4) Use of U.S. military personnel for surveillance or pursuit of individuals, or as undercover agents, informants, investigators, or interrogators.[15]

b. *Analytical framework for PCA violations*. There are three separate tests that courts apply to determine whether the use of U.S. military personnel violated the PCA.[16]

(1) Whether the action of the U.S. military personnel was "active" or "passive."[17]

(2) Whether use of the armed forces pervaded the activities of civilian law enforcement officials.[18]

(3) Whether the U.S. 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); and/or *Compulsory* (a power that exerts some coercive force)[19]

2. *Military Purpose Activities* Under the "Military Purpose Doctrine," the PCA does not apply to actions furthering a military or foreign affairs function of the United States.[20] For an action to qualify, the primary purpose of the act must be to further a military interest. Note that civilians may receive an incidental benefit of the military action. Such military actions include:

a. Investigations and other actions related to enforcement of the UCMJ.[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.[22]

c. Investigations and other actions related to the commander's inherent authority to maintain law and order on a military installation or facility[23] Civilians may be detained for an on-base violation long enough to determine whether the civilian authorities are interested in assuming the prosecution.[24]

d. Protection of classified military information or equipment.[25]

e. Protection of DoD personnel, DoD equipment, and official guests of the DoD.[26]

f. Other actions undertaken primarily for a military or foreign affairs purpose.[27]

F. Where the PCA Applies – Extraterritorial Effect of the PCA.

1. A 1989 Department of Justice (DoJ) Office of Legal Counsel opinion concluded that the PCA does not have extraterritorial application.[28] This opinion also states that the restrictions of 10 U.S.C. §§ 371-381 (this includes 10 U.S.C. § 275, which was renumbered in 2017), were also not intended to have extraterritorial effect.

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[15] DoDI 3025.21.
[16] *United States v. Kahn*, 35 F.3d 426 (9th Cir. 1994); *United States v. Hitchcock*, 103 F.Supp. 2d 1226 (D. Haw. 1999).
[17] *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).
[18] *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).
[19] *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).
[20] DoDI 3025.21.
[21] *United States v. Thompson*, 33 M.J. 218 (CMA 1991), *cert. denied*. 502 U.S. 1074 (1992) (DoDI 3025.21).
[22] DoDI 3025.21.
[23] *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).
[24] *Applewhite v. United States*, 995 F.2d 997 (10th Cir. 1993), *cert. denied*, 510 U.S. 1190 (1994).
[25] DoDI 3025.21.
[26] *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.
[27] DoDI 3025.21
[28] Memorandum, Office Legal Counsel for General Brent Scowcroft, 3 Nov. 1989.

2. Some courts have also adopted the view that the PCA imposes no restriction on use of U.S. Armed Forces abroad, noting that Congress intended to preclude military intervention in domestic affairs.[29]

3. Note, however, that DoD policy, as reflected in DoDI 3025.21 applies to all U.S. forces wherever they may be located. Two weeks after the promulgation of the DoJ memo, then-SECDEF Cheney amended DoDI 3025.21 to read that, in the case of compelling and extraordinary circumstances, SECDEF may consider exceptions to the prohibition against direct U.S. military assistance with regard to U.S. military actions outside the territorial jurisdiction of the United States.

G. The Effects of Violating the PCA.

1. *Criminal Sanctions*. Two years imprisonment, fine, or both.

a. To date, no direct criminal actions have been brought for violations of the PCA. Instead, the issue of posse comitatus has arisen as a "collateral" issue, whether as a defense to a charge by a criminal defendant or in support of an argument for exclusion of evidence. [30]

b. *Exclusionary rule*. In general, courts have not applied the exclusionary rule to cases where the PCA was violated, generally holding that:

(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.[31]

(2) The PCA is designed to protect the rights of all civilians, not the personal rights of the defendant.[32]

(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.[33]

(4) Failure to prove an element. Where the offense requires that law enforcement officials act lawfully, violation of the PCA would negate that element.[34]

(5) The dismissal of charges is not likely to be considered an appropriate remedy.[35]

2. Civil Liability.

a. The PCA is a criminal statute and does not provide for a private cause of action for a violation of the statute.[36]

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[29] *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: *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.").

[30] *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).

[31] *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).

[32] *United States v. Walden*, 490 F.2d 372 (4th Cir. 1974), *cert. denied* 416 U.S. 983 (1974).

[33] *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).

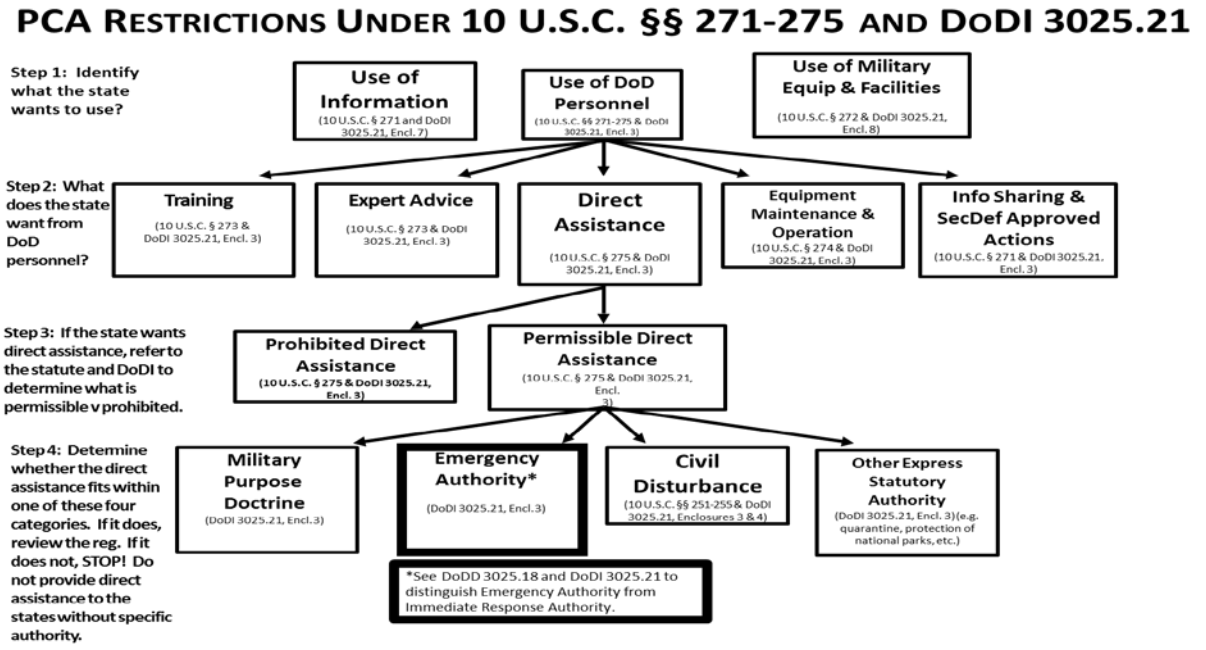
[34] *United States v. Banks*, 383 F. Supp. 368 (1974).

[35] *United States v. Rasheed*, 802 F. Supp 312 (D. Haw. 1992); *United States v. Hitchcock*, 103 F. Supp 2d. 1226 (D. Haw. 1999).

[36] *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. A violation of PCA may potentially be the basis of a constitutional tort, (i.e. a "Bivens"[37] suit); this is an evolving area of the law.[38]

c. A violation of the PCA may also be the basis of a Federal Tort Claims Act (FTCA).[39] 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 employment, in accordance with the law of the state where the act or omission occurred. Consequently, a 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.



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.

B. Although the activities discussed below may be considered law enforcement-like activities, they do not violate the PCA because U.S. military personnel are not providing direct assistance while performing these activities. Further, many of these activities are statutorily directed, and thus may be considered "exceptions" to the PCA. This section is divided into three functional areas of support: (1) loan, maintenance, and operation of equipment and facilities; (2) expert advice and training; and (3) sharing information. Material not otherwise covered in one of these three areas can be found in DoDI 3025.21.

1. ***Loan, Maintenance, and Operation of Equipment and Facilities***.[40] 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. There must be no adverse impact on national security or U.S. military preparedness. 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

[37] A "Bivens" suit refers to the case of *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.
[38] *Applewhite v. United States Air Force*, 995 F.2d. 997 (10th Cir. 1993), *cert. denied*, 510 U.S. 1190 (1994) (finding PCA was 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).
[39] 28 U.S.C. §§ 1346(b), 2671-2680.
[40] 10 U.S.C. §§ 272 and 274; DoDI 3025.21.

aircraft; and (c) ammunition.[41] 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 provided for in Service-specific authorities[42]

2. ***Expert Advice and Training***.[43]

a. U.S. 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 U.S. military personnel in activities that are fundamentally civilian law enforcement operations. DDEPSECDEF 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).

b. A single general exception exists to provide this advanced training at the U.S. Army Military Police School. On an exceptional basis, the Commander, United States Special Operations Command (USSOCOM), may approve this training by special operations forces personnel.[44]

c. U.S. military personnel may be asked 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 expert advisory support is the military working dog team (MWDT) support provided to civilian law enforcement. The military working dog (MWD) has been analogized to equipment, and its handler provides expert advice.[45] Pursuant to 10 U.S.C. § 272, SECDEF 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. § 273. If a MWD is loaned to an LEA, its U.S. 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. 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 advice is provided on a non-reimbursable basis because Congress has appropriated funds for these purposes. (*See* 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.***[46] 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. 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 U.S. military training and operations. However, DoDI 3025.21 prohibits planning and/or creation of missions or training for the primary purpose of aiding civilian law enforcement officials.

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[41] DoDD 3025.18, para. 4.j.(4).
[42] AR 700-131, SECNAVINST 5820.7C, and AFI 10-801.
[43] 10 U.S.C. §§ 273, 275, 277 and 50 U.S.C. § 2315; DoDI 3025.21; DoDD 5200.31E.
[44] *See* the Appendix to this Chapter.
[45] *See* DoDD 5200.31E, Military Working Dog (MWD) Program, 10 Aug. 2011.
[46] 10 U.S.C. § 271(b); DoDI 3025.21.

VI. CIVIL DISTURBANCES

A. Article 4, Section 4 of the U.S. Constitution states, "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." Amendment X to the U.S. Constitution provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

B. The DoD policy, as incorporated in DoDI 3025.21, recognizes that 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.[47] Involvement of U.S. military forces will only be appropriate in extraordinary circumstances. Use of the U.S. military under these authorities to conduct law enforcement activities is a specific exception to the PCA. The tiered response to civil disturbances within the states occurs in the following order:

1. Local and state police.
2. The state's National Guard (normally in state active duty status but may also be Title 32).
3. Federal civilian law enforcement officials.
4. U.S. military (may also include the National Guard if federalized in their Title 10 status).

C. Subject to certain restrictions, the Insurrection Act[48] permits the President to use the Armed Forces in the following circumstances:

1. An insurrection within a state. The legislature or governor must request assistance from the President.[49]

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.[50]

3. To suppress in any state, any insurrection, domestic violence, unlawful combination or conspiracy, if it: 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, opposes or obstructs execution of U.S. law or justice.[51]

D. Federal Response. If the President considers it necessary to use the militia (i.e., the National Guard) or the U.S. Armed Forces, the President must first issue a proclamation directing the insurgents to disperse and retire peacefully.[52] Responsibility for the management of the federal response to civil disturbances rests with the Attorney General of the United States. As discussed above, if the President decides to respond to the situation, the President must first issue a proclamation to the persons responsible for the insurrection. The proclamation is prepared by the Attorney General of the United States and directs the people involved in the disturbance to disperse within a limited period of time. The Attorney General of the United States appoints a Senior Civilian Representative of the Attorney General (SCRAG) as the action agent. At the end of the period identified in the proclamation, the President may issue an execute order directing the use of the use of Title 10 Armed Forces.

E. The DoD Response. SECDEF has reserved to himself the authority to approve support in response to civil disturbances. [53] Although the primary responsibility for response to civil disturbances is vested in the State and local governments, Federal military personnel will remain under Federal control.[54]

F. Emergency Employment of Military Forces.[55]

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[47] DoDI 3025.21; DoDD 3025.18; CNGBI 3000.04; and NGR 500-5.
[48] 10 U.S.C. §§ 251-255.
[49] *Id.* at § 251.
[50] *Id.* at.§ 252.
[51] *Id.* at. § 253.
[52] *Id.* at § 254.
[53] DoDD 3025.18, para. 4.j.(1).
[54] DoDI 3025.21.
[55] *Id.*

1. U.S. military forces shall not be used for civil disturbances unless specifically directed by the President, pursuant to 10 U.S.C. §§ 251-255. There is a very limited exception to this rule. When 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.[56] This authority is extremely limited. U.S. military action is permitted only when:

a. 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, or

b. When duly-constituted federal, state or local authorities are unable or decline to provide adequate protection for federal property or fundamental federal function.

2. Other Considerations. Although employment under these authorities permits direct enforcement of the law by U.S. military forces, the U.S. military's role in law enforcement is supplementary versus primary. Any employment of Federal military forces in support of law enforcement operations shall maintain the primacy of civilian authority.

VII. DISASTER AND EMERGENCY RELIEF (NON-LAW ENFORCEMENT DSCA)

A. Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act).[57] 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 Stafford Act is not a statutory exception to the PCA. All missions performed during a disaster relief response are subject to the PCA restrictions. The Stafford Act provides four means by which the federal government may become involved in a relief effort:

1. *The President may declare the area a major disaster*.[58] "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.[59] In order for the President to declare a major disaster, (1) the State Governor must request a declaration, (2) the state must have executed its own emergency plan and requires supplemental help (2); and the State certifies that it will comply with cost sharing provisions under the Stafford Act.

2. *The President may declare the area an emergency*.[60] "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.[61] To declare an area an emergency, the same criteria applies as for a major disaster and in addition, the governor must define the type and amount of federal aid required. Total federal assistance may not exceed 5 million dollars. Operationally, there is no significant distinction between an emergency and a major disaster.

3. *President's 10-day Emergency Authority*. The President may send in DoD assets on an emergency basis to "preserve life and property."[62] DoD assets may be provided to the state before any Presidential declaration, but the governor's request is still required. The use of DoD assets may not last more than 10 days. Additionally, there is very limited authority for use of DoD assets to clear debris and wreckage, and to temporarily restore essential public facilities and services.

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[56] DoDD 3025.18.
[57] 42 U.S.C. § 5121, *et seq*; DoDD 3025.18; The National Response Framework (NRF) (*See* https://www.fema.gov/media-library/assets/documents/117791).
[58] 42 U.S.C. § 5170.
[59] 42 U.S.C. § 5122.
[60] 42 U.S.C. § 5191.
[61] 42 U.S.C. § 5122.
[62] 42 U.S.C. § 5170(b).

4. The President may order the provision of federal assets when an emergency occurs in an area over which the federal government exercises primary responsibility by virtue of the Constitution or Federal statute. For example, President Clinton exercised this authority on April 19, 1995, when the Murrah Federal Building was bombed in Oklahoma City, Oklahoma .[63] A Governor's request is not required, although the statute directs consultation with the governor, if practicable. This action results in a Presidential declaration of an emergency regarding a situation for which the primary responsibility for a response rests with the United States.

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.[64]

b. Distribution of medicine, food, and other consumable supplies, and emergency assistance.[65]

c. Utilizing, lending or donating federal equipment, supplies, facilities, personnel, and other resources to state and local governments.[66]

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.[67]

(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.

B. The Federal Response**.**

1. FEMA, which is part of the Department of Homeland Security (DHS), directs and coordinates the federal response on behalf of the President. In Homeland Security Presidential Directive (HSPD)-5, the President directed the development of a National Response Plan (NRP) 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.

2. The National Response Framework (NRF).[68]

a. The NRF superseded the NRP on March 22, 2008. (DHS published the Fourth Edition on October 29, 2019.) It is "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

[63] 42 U.S.C. § 5191(b).
[64] 42 U.S.C. §§ 5170a(1) and 5192(a).
[65] 42 U.S.C. §§ 5140a(4) and 5192(a)(7).
[66] 42 U.S.C. §§ 5170b(a)(1) and 5192(b).
[67] 42 U.S.C. § 5170b(a)(3).
[68] 73 Fed. Reg. 4887-4888 (Jan. 22, 2008); Homeland Security Publication 4th ed., 28 Oct 2019.

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.

b. The core NRF 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. It consists of the following components:

(1) 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).

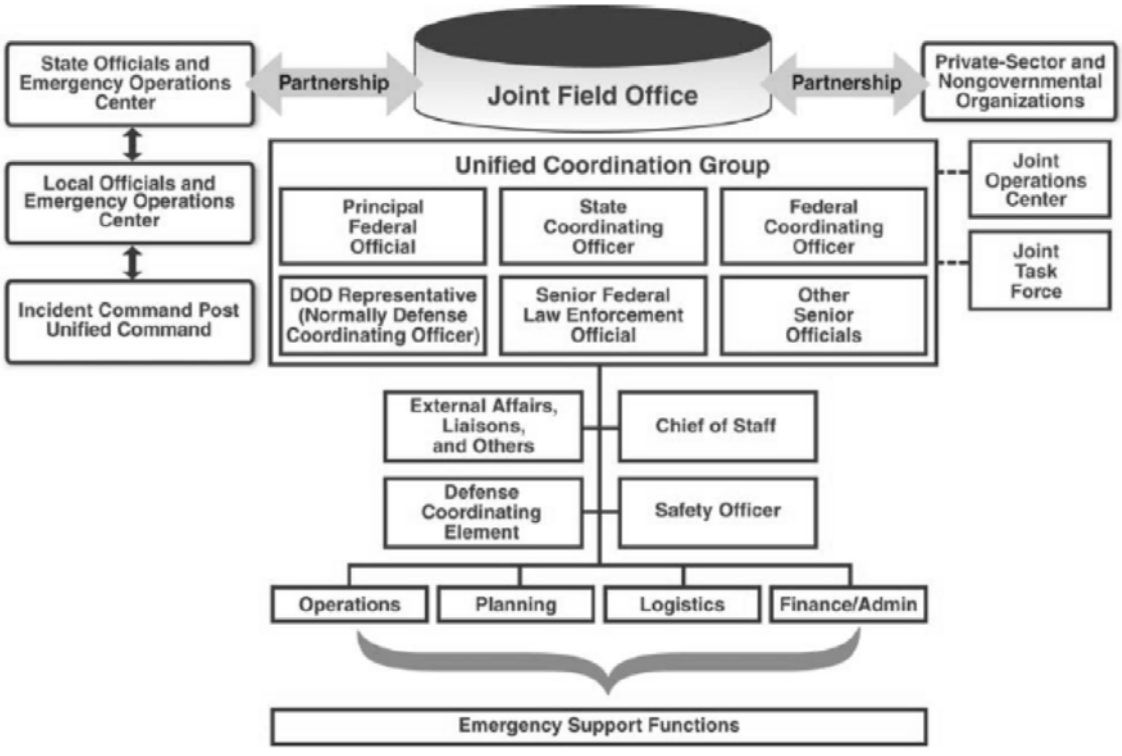
(2) The Support Annexes describe essential supporting aspects that are common to all incidents (e.g., Financial Management, Volunteer and Donations Management, Private-Sector coordination).

(3) 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).

(4) The Partner Guides provide ready references describing the key roles and actions for local, tribal, state, federal and private-sector response partners.

c. The NRF applies a functional approach that groups the capabilities of federal departments and agencies and the American Red Cross into 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 the DoD is a Primary Agency for ESF #9 (Search and Rescue). The DoD serves as a support agency for all 15 ESFs.

d. 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 U.S. military support, forwarding mission assignments to the appropriate military organizations through DoD-designated channels, and assigning military liaisons, as appropriate, to activated ESFs.

C. The DoD Response.

1. DoD Policy. DoDD 3025.18 governs all planning and response by DoD components for defense support of civil authorities, with the exception of contingency war plans and U.S. military support provided to civilian law enforcement agencies under DoDI 3025.21. DSCA shall include, but is not limited to, support similar to that described in para 2(c) of DoDD 3025.18, including U.S. military assistance provided to civilian law enforcement agencies (DoDD 3025.18, para. 2(c)(5)).

2. 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 the DoD and lead federal agencies (LFAs).

3. 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 de-conflicts 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).

4. Supported CCDRs. The U.S. 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 U.S. Indo-Pacific Command (USINDOPACOM) DSCA AOR includes Hawaii and U.S. territories and possessions in the Pacific.

5. 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.

6. Immediate Response Authority (IRA).[69]

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, Federal military commanders, Heads of DoD Components, and/or responsible DoD civilian officials (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 U.S. military power that is regulatory, prescriptive, proscriptive, or compulsory.[70]

b. Types of support authorized include:

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[69] DoDD 3025.18, para. 4.i.
[70] *Id.*

(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.[71]

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 as well as in any other case potentially involving this type of assistance to civil authorities.[72]

7. Disaster Support Involving Law Enforcement Activities.

a. The Stafford Act is not an exception to the PCA. Therefore, any support that involves direct involvement in the enforcement of civilian law must undergo the PCA analysis discussed above. Typical areas of concern include directing traffic, guarding supply depots, and patrolling.

b. National Guard personnel acting under state authority (either state active duty or under Title 32) should be the organization of choice in these areas.

c. Law enforcement duties that involve U.S. military functions may be permissible (i.e., guarding a military supply depot).

VIII. DUAL STATUS COMMAND AUTHORITIES

A. Unity of Command and Unity of Effort are significant concerns during a DSCA event. Disaster responses may involve federal, state and local civilians, non-profit organizations, the National Guard, and the U.S. military all responding. The total military response may include both the National Guard, operating in a state capacity under the direction of their Governor, and the U.S. military, operating under the direction of the President. To unify the total military response, federal law permits a "dual-status commander" to command both U.S. military personnel in a Title 10 status and National Guard personnel in a Title 32 or state active duty status. This dual-status commander simultaneously holds a state commission and a federal commission. As a result, the commander may direct both state and federal forces to coordinate the total military response and provide a unity of effort.

B. Dual-status commander operates two chains of command simultaneously. The commander receives orders from both State and Federal superiors. These two separate chains of command flow through different sovereigns that recognize and respect a dual-status commander's duty to treat the chains 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 U.S. military staff and a National Guard staff. The subordinate officers on each staff operate in only one status, state or federal.

(1) National Guard Dual Status Commander. 32 U.S.C. § 325(a)(2) provides limited authority for a National Guard officer to serve simultaneously in both state and federal statuses.[73] 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. The National Guard dual-status command authority has been used during recent National Special Security Events (NSSEs). An NSSE is a highly visible, well-attended event that, if attacked by terrorists, would have significant impact on our country because of physical and psychological damage (i.e., the G8 Summit, the Republican and Democratic National Conventions, Superstorm Sandy, and the Super Bowl).

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[71] *Id.* at para. 4.i.(6).

[72] The distance from the incident to the DoD office or installation is not a limiting factor for the provision of support under immediate response authority. However, DoD officials should use the distance and the travel time to provide support as a factor in determining DoD's ability to support the request for immediate response. JOINT PUB. 3-28, II-6

[73] *See* also NGR 500-5, para 4.2(f).

(2) 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[74]

A. Detection and Monitoring (D&M)**.** Pursuant to 10 U.S.C. § 124, the 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. Although it is a DoD mission, D&M is to be carried out in support of Federal, State, and local law enforcement authorities. Note that the statute does not extend to D&M missions covering land transit (i.e., the Mexican-U.S border). Interception of vessels or aircraft is permissible outside the land area of the United States to identify and direct the vessel or aircraft to a location designated by the supported civilian authorities. 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. This mission is not covered by CJCSI 3710.01B.

B. The National Guard**.** Pursuant to 32 U.S.C. § 112, SECDEF may make Federal funding available for the National Guard drug interdiction and counterdrug activities, to include pay, allowances, travel expenses, and operations and maintenance expenses. 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. 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 (ANG/ARNG under Title 32) and is not to be considered a federal force (ANGUS/ARNGUS under Title 10) for purposes of the PCA. 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.[75]

C. Additional Support to Counterdrug (CD) Agencies.

1. In addition to the authorities contained in 10 U.S.C. §§ 271-277 (discussed above), Congress has given DoD additional authorities to support federal, state, local, and foreign entities that have counterdrug responsibilities in 10 U.S.C. § 284.

2. This statute is the primary authority for counterdrug operations and permits broad support to federal, state, and local law enforcement agencies that have counterdrug responsibilities. The statute also provides support to foreign law enforcement agencies 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).

3. Types of support.[76]

a. Equipment maintenance.

b. Transportation of personnel (U.S. & foreign), equipment and supplies CONUS/OCONUS.

c. Establishment of bases of operations CONUS/OCONUS.

d. Counterdrug-related training of law enforcement personnel, including associated support and training expenses.

e 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.

f. Engineer support (e.g., construction of roads, fences and lights) along the U.S. border.

g. Command, control, communication, and intelligence and network support.

h. Linguist and intelligence analyst services.

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[75] *See* NGR 500-2.
[76] *See also* CJCSI 3710.01B.

i. Aerial and ground reconnaissance.

j. Diver support.

k. Tunnel detection support.

l. Use of military vessels for law enforcement agencies operating bases by Coast Guard personnel.

m. Technology demonstrations.

3. Training of law enforcement personnel.[77]

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.

X. MISCELLANEOUS SUPPORT

A. **Sensitive Support**. Details contained in DoDD S-5210.36 (a controlled document).

B. **Law Enforcement Detachments (LEDETs)**.[78] U.S. Coast Guard personnel shall be assigned to U.S. Navy vessels operating in drug interdiction areas. Such personnel have law enforcement powers, and are known as LEDETs. When approaching a contact of interest, tactical control (TACON) of the vessel shifts to the Coast Guard. As a "constructive" Coast Guard vessel, the ship and its crew are permitted to participate in direct law enforcement. However, to the maximum extent possible, law enforcement duties should be left to Coast Guard personnel. Military members should offer necessary support.

C. **Emergencies Involving Chemical or Biological Weapons.** SECDEF, upon request of the Attorney General, may provide assistance in support of DOJ activities during an emergency situation involving a biological or chemical weapon of mass destruction.[79]

1. DoD 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).[80] 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).[81] 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 U.S. military forces to enforce the civil law. Among them are protection of the President, Vice President

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[77] *See id.*
[78] 10 U.S.C. § 279.
[79] 10 U.S.C. § 282.
[80] 50 U.S.C. § 2314(a).
[81] 10 U.S.C. § 12310(c).

and other dignitaries, and assistance in the case of crimes against members of Congress or foreign officials, or involving nuclear materials.

XI. CONCLUSION

The U.S. 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 laws and policies pertaining to the use of DoD for domestic operations are dynamic and continues to evolve. The terrorist attacks of September 11, 2001, and significant disasters such as Hurricane Katrina, the 2010 Gulf of Mexico oil spill, and Superstorm Sandy, have resulted 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.

XII. REFERENCES

A. Military Support for Civilian Law Enforcement Agencies, 10 U.S.C. §§ 271-284.

B. Insurrection Statutes, 10 U.S.C. §§ 251-255.

C. Operations Relating to Defense Against Weapons of Mass Destruction and Terrorist Attacks, 10 U.S.C. § 12310(c).

D. Posse Comitatus Act, 18 U.S.C. § 1385.

E. Drug Interdiction and Counter-Drug Activities, 32 U.S.C. § 112.

F. Stafford Act, 42 U.S.C. § 5121, *et seq*.

G. Defense Against Weapons of Mass Destruction Act, 50 U.S.C. § 2301, *et seq*.

H. Homeland Security Act of 2002, Pub. L. No. 107-296 (2002).

I. National Response Framework, October 2019.

J. Homeland Security Presidential Directive (HSPD)-5 (28 Feb. 2003).

K. JOINT CHIEFS OF STAFF, JOINT PUB. 3-28, DEFENSE SUPPORT OF CIVIL AUTHORITIES (DSCA) (29 October).

L. U.S. DEP'T OF DEFENSE, DIR. 3025.18, DEFENSE SUPPORT OF CIVIL AUTHORITIES (29 Dec. 2010, Incorporating Change 2, 19 Mar. 2018).

M. U.S. DEP'T OF DEFENSE, INSTR. 3025.21, DEFENSE SUPPORT OF CIVILIAN LAW ENFORCEMENT AGENCIES (27 Feb. 2013).

N. U.S. DEP'T OF DEFENSE, MANUAL. 3025.21, Vol. 1, DEFENSE SUPPORT OF CIVIL AUTHORITIES: OVERVIEW (11 Aug. 2016).

O. U.S. DEP'T OF DEFENSE, MANUAL. 3025.21, Vol. 2, DEFENSE SUPPORT OF CIVIL AUTHORITIES: DOD INCIDENT RESPONSE (11 Aug. 2016).

P. U.S. DEP'T OF DEFENSE, MANUAL. 3025.21, Vol. 3, DEFENSE SUPPORT OF CIVIL AUTHORITIES: PRE-PLANNED DOD SUPPORT OF LAW ENFORCEMENT AGENCIES, SPECIAL EVENTS, COMMUNITY ENGAGEMENT, AND OTHER NON-DOD ENTITIES (11 Aug. 2016).

Q. U.S. DEP'T OF DEFENSE, INSTR. 3025.22, THE USE OF THE NATIONAL GUARD FOR DEFENSE SUPPORT OF CIVIL AUTHORITIES (26 July 2013).

R. U.S. DEP'T OF DEFENSE, DIR. 5210.56, ARMING AND THE USE OF FORCE (18 NOV. 2016).

S. U.S. DEP'T OF DEFENSE, DIR. 5200.31E, DOD MILITARY WORKING DOG (MWD) PROGRAM (10 Aug. 2011).

T. U.S. DEP'T OF DEFENSE, INSTR. 6055.06, DOD FIRE AND EMERGENCY SERVICES (F&ES) PROGRAM (21 Dec. 2006).

U. JOINT CHIEFS OF STAFF, INSTR. 3710.01B, DOD COUNTERDRUG SUPPORT (26 Jan. 2007).

V. 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).

W. U.S. DEP'T OF ARMY, REG. 700-131, LOAN, LEASE, AND DONATION OF ARMY MATERIEL (23 Aug. 2004)

X. U.S. DEP'T OF ARMY, FIELD MANUAL 3-07, STABILITY (June 2014).

Y. CHIEF, NATIONAL GUARD BUREAU, INSTR. 3000.04, NATIONAL GUARD BUREAU DOMESTIC OPERATIONS (24 Jan. 2018).

Z. U.S. NATIONAL GUARD BUREAU, REG. 500-2/ANGI 10-801, NATIONAL GUARD COUNTERDRUG SUPPORT (29 Aug. 2008).

AA. U.S. DEP'T OF NAVY, SECNAV INSTR. 5820.7C, COOPERATION WITH CIVILIAN LAW ENFORCEMENT OFFICIALS (26 Jan. 2006).

BB. U.S. DEP'T OF NAVY, OPNAV INSTR. 3440.16E, NAVY DEFENSE SUPPORT OF CIVIL AUTHORITIES PROGRAM (18 May 2016).

CC. U.S. DEP'T OF AIR FORCE, INSTR. 10-801, DEFENSE SUPPORT OF CIVIL AUTHORITIES (DSCA) (23 Dec. 2015)

DD. U.S. NATIONAL GUARD BUREAU, REG. 500-5/ANGI 10-208, NATIONAL GUARD DOMESTIC LAW ENFORCEMENT SUPPORT AND MISSION ASSURANCE OPERATIONS (18 Aug. 2010)

APPENDIX

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

CHAPTER 13

INTERNATIONAL AGREEMENTS

I. INTRODUCTION

A. The Judge Advocate (JA) may face numerous and varied international agreements throughout the spectrum of military operations. The JA should be prepared to perform the following tasks related 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. There are too many international agreements, many of which are classified, to discuss specific agreements in this chapter. Instead, this chapter focuses on the JA's role when dealing with international agreements.

B. The United States divides international agreements into two general categories (1) Treaties and (2) International Agreements Other Than Treaties.[1] 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 required by the treaty instrument. International Agreements Other Than Treaties include agreements that may enter into force upon signature and do not require the advice and consent of the Senate.[2] 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).[3]

II. DETERMINING THE EXISTENCE OF AN INTERNATIONAL AGREEMENT

A. Determining the existence of an international agreement is more challenging than one might think. A JA must search multiple databases and conduct extensive research to determine (1) whether an agreement exists and (2) how to locate the actual text of the agreement.

B. The U.S. Department of State (DoS) is the domestic repository for all international agreements to which the United States is a party.[4] Federal law (1 U.S.C. § 112a) requires DoS to publish annually a document entitled Treaties in Force (TIF), a list of all treaties and other international agreements in force as of 1 January of that year.[5] 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.[6] The TIF may include citations to the United States Treaties and Other International Agreements (UST),[7] the Treaties and Other International Agreements (TIAS) series,[8] or the United Nations Treaty Series (UNTS).[9] 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 DoS determined it will not publish the particular agreement. Also keep in mind the TIF and

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[1] *See generally* U.S. CONST. art. 2, § 2; Volume 11, Foreign Affairs Manual, Chapter 720, *Negotiation and Conclusion*, at 723.2-1 – 723.2-2 (Sep. 25, 2006) [hereinafter 11 FAM 720].

[2] Under international law, all international agreements are generally known as treaties. *See* Vienna Convention on the Law of Treaties art. 2, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT]; Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 [hereinafter VCCR].

[3] 11 FAM 720 at 723.2-2.

[4] 1 U.S.C. § 112a.

[5] The U.S. Department of State also maintains an online list of U.S. treaty actions. *Treaty Actions*, U.S. DEP'T OF STATE, https://www.state.gov/treaties-in-force/ (last visited 17 May 2020).

[6] The official text of an international agreement to which the U.S. is a party can be found at the Department of State website. *Treaties and Other International Acts Series (TIAS)*, U.S. DEP'T OF STATE, https://www.state.gov/tias/ (last visited 17 May 2020).

[7] The United States Treaties and Other International Agreements (UST) is a bound compilation that was published between 1950-1982 and is since discontinued. Publications of the UST can be found in federal depositary libraries, U.S. DEP'T OF STATE, https://www.fdlp.gov/about-the-fdlp/federal-depository-libraries (last visited 17 May 2020).

[8] *See TIAS*, *supra* note 6.

[9] *See United Nations Treaty Collection*, UNITED NATIONS, https://treaties.un.org/Pages/Home.aspx (last visited 17 May 2020).

TIAS are unclassified series and do not contain classified agreements. While TIF and the TIAS are a good place to start when looking for an international agreement, they may not offer a complete solution.

C. Within DoS, the Country Desk responsible for the country to which the unit is set to deploy may be able to help.[10] Another resource is the Military Group for the country at issue. Either the Country Desk or the Military Group should have the most current information about any agreements with their country.

D. Within the Department of Defense (DoD), JAs have other options. First, through the appropriate chain of command, consult the legal office for the combatant command (COCOM) with responsibility for the country at issue. Combatant commands are responsible for maintaining a list of international agreements with countries within their area of responsibility. Other options include the division of each service's headquarters legal office responsible for international law. For example, the Army Office of the Judge Advocate General, National Security Law Division has an online document library that contains many unclassified international agreements. You may also find international agreements elsewhere on the internet, such as on the United Nations (UN) or North Atlantic Treaty Organization (NATO) websites.[11]

III. AUTHORITIES

A. General. An international agreement binds the United States under international law. The Constitution vests the power to make treaties with the President, "by and with the Advice and Consent of the Senate."[12] Therefore, any authority DoD 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 DoD 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, "the President may provide training and related support to military and civilian defense personnel of a friendly foreign country or an international organization" which support may require an international agreement.[13] In Executive Order 13637, the President delegated agreement authority under 22 U.S.C. § 2770a to the SECDEF.[14] Acquisition and Cross-Servicing Agreements (ACSAs) pursuant to 10 U.S.C. § 2342 authorize SECDEF to enter into certain agreements with specified countries for logistics support, supplies, and services.

2. The SECDEF delegated authority to enter into international agreements to the Under Secretary of Defense for Policy (USD(P)), and delegated some authorities further.[15] Matters that are predominately the concern of a DoD Component are delegated to the applicable DoD Component head.[16] SECDEF delegated agreements concerning the operational command of joint forces to the Chairman, Joint Chiefs of Staff (CJCS).[17] Additional special authorities are delegated to various defense agencies.[18]

3. The CJCS delegated authority in this area to the Combatant Commanders.[19] Re-delegation to subordinate commanders is permitted and as directed by a Combatant Commander's regulation. Similarly, the

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[10] *See* U.S. DEP'T OF STATE, TELEPHONE DIRECTORY, https://www.state.gov/wp-content/uploads/2019/09/Country-Offices.pdf (*last visited* 17 May 2020); *Websites of U.S. Embassies, Consulates, and Diplomatic Missions*, http://www.usembassy.gov (last visited 17 May 2020).
[11] *See* UNITED NATIONS, DOCUMENTS, http://www.un.org/en/documents/index.html (*last visited* 17 May 2020); NORTH ATLANTIC TREATY ORGANIZATION, E-LIBRARY, https://www.nato.int/cps/en/natohq/publications.htm (*last visited* 17 May 2020).
[12] U.S. CONST. art. 2, § 2.
[13] Exchange of Training and Related Support, 22 U.S.C. § 2770a.
[14] Exec. Order No. 13,637, 78 Fed. Reg. 16, 127 (Mar. 8, 2013), https://www.gpo.gov/fdsys/pkg/DCPD-201300143/pdf/DCPD-201300143.pdf (last visited 17 May 2020).
[15] U.S. DEP'T OF DEFENSE, INST. 5530.03, INTERNATIONAL AGREEMENTS (4 Dec. 2019) [hereinafter DODI 5530.03].
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] CHAIRMAN, JOINT CHIEFS OF STAFF, INSTR. 2300.01D, INTERNATIONAL AGREEMENTS (5 Oct 2007; current as of 27 Sep 2013) [hereinafter CJCSI 2300.01D].

Service Secretaries have published regulations or instructions that delegate some portion of the Secretaries' authority.[20]

4. The USD(P) or the USD(A&S), as applicable, or their respective designees, retain the authority to negotiate agreements with policy significance. They may approve the authority for a DoD Component head to negotiate or conclude each proposed international agreement under his or her cognizance that has policy significance. The term "policy significance" is interpreted broadly. A non-inclusive list of examples of agreements with policy significance is reproduced here: [21]

a. International agreements that have policy significance include, but are not limited to, international agreements that:

(1) Could significantly affect:

(a) Foreign or defense relations between the United States and another government, including, but not limited to, agreements relating to the status of U.S. Armed Forces and DoD civilian employee personnel in foreign countries, e.g., exemptions from host nation laws.

(b) Access to foreign territory.

(c) Access to or use of foreign government-owned land or structures on a reimbursable or non-reimbursable basis.

(d) Construction or relinquishment of the right of use of land or structures on foreign government-owned facilities.

(e) Bilateral defense or military-to-military associations between the United States and another country.

(2) Would create security commitments, assurances, or arrangements currently not assumed by the United States in existing treaties; would create mutual security or other defense agreements and arrangements; or would alter U.S. obligations with respect to the defense of a foreign government or area.

(3) Would raise unusual or uncommon legal issues or establish significant new legal precedents, as determined by the DoD Component GC or SJA, as applicable.

(4) By their nature would require approval, negotiation, or signature at the OSD or diplomatic level.

(5) Have foreign disclosure policy implications pursuant to DoDD 5230.11 and DoDD 5230.20, or involve communications interoperability or security.

(6) Involve cooperative production of military equipment or cooperation in the research, development, test, evaluation, or production of defense articles, services, or technology.

(7) Concern cooperative or reciprocal logistic support, including shared use of equipment, facilities, and services.

(8) Have cost-sharing provisions.

5. In general, delegations are to be construed narrowly. Judge advocates should refer questions about whether an authority has been delegated through their technical chain to the higher authority for resolution.

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[20] *See* U.S. DEP'T OF THE ARMY, REG. 550-51, INTERNATIONAL AGREEMENTS (2 May 08) [hereinafter AR 550-51]; U.S. DEP'T OF THE AIR FORCE, INSTR. 51-403, INTERNATIONAL AGREEMENTS (8 Feb 19) [hereinafter AFI 51-403]; U.S. DEP'T OF THE NAVY, INSTR. 5710.32, INTERNATIONAL AGREEMENTS (31 Jul 19) [hereinafter SECNAVINST 5710.32].

[21] DoDI 5530.03, para. 5.1.d.(1)(a)-(h)

C. Seeking Authority: Circular 175 Procedure.[22]

1. The DoD strictly prohibits personnel from negotiating or concluding an international agreement without the prior written approval of the responsible DoD official.[23]

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.[24] The legal memorandum must trace the Constitutional or statutory authority to execute each of the proposed obligations and address any other legal considerations.[25] When USD(P) does not have the blanket authority to negotiate and conclude an agreement, DoD will submit a Circular 175 request to the Department of State, Treaties Affairs Office in accordance with the procedures set forth in 11 FAM 720.

D. Coordination. In addition to the approval requirements summarized above, Congress created coordinating and reporting requirements through the Case-Zablocki Act.[26] Section (c) of the 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."[27] The Secretary of State (SECSTATE) published procedures to implement the Case-Zablocki Act.[28] and 11 FAM 720. Unless otherwise delegated within DoDI 5530.03, USD(P) has the responsibility to coordinate with DoS. Such coordination is generally not below the Secretariat or COCOM.

IV. NEGOTIATING AND CONCLUDING INTERNATIONAL AGREEMENTS

A. Although JAs may be involved in the negotiation and conclusion of an international agreement, it is likely that the DoS will lead the negotiation team. Nonetheless, this information is important for the following reasons:

1. The international agreement negotiations process is governed by very detailed rules that require significant interagency coordination.

2. It is essential for JAs to know what constitutes an international agreement and what constitutes the "negotiation" or "conclusion" of an international agreement to help commanders and staff avoid inadvertent action without the proper authority.

B. The elements of an international agreement are: (1) any agreement with one or more foreign government (including their agencies, instrumentalities, or political subdivisions) or international organizations; (2) 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 the government.[29]

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

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[22] 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, https://www.state.gov/s/l/treaty/c175/ (last visited 17 May 2020).
[23] DoDI 5530.03, para. 3.
[24] DoDI 5530.03, para. 5.2.
[25] *Id.*
[26] 1 U.S.C. § 112b.
[27] *Id.*
[28] 22 C.F.R. Part 181.
[29] *See* DoDI 5530.03, para G.2.

are not regarded as international agreements include contracts made under the Federal Acquisition Regulations (FAR), credit arrangements, standardization agreements (STANAG), leases, agreements solely to establish administrative procedures, and Foreign Military Sales (FMS) letters of offer and acceptance. 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 JAs and their commands to understand that the negotiation of an international agreement cannot begin without first completing the proper approval and coordination described above. It is also important for JAs and their commands to understand what constitutes negotiation. DoDI 5530.03 defines "negotiation" as:

> Communication by any means of a position or an offer, on behalf of the United States, the DoD, or 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 includes any such communication, even though the agreement may be conditioned on later approval by the responsible authority. The term also includes the presentation 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 does not include preliminary or exploratory discussions, consultations, or routine meetings where no proposed texts or draft documents are presented, so long as such discussions or meetings are conducted with the understanding that the views communicated do not and will not bind or commit any side, legally or otherwise.[30]

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, unless the initial written approval included the authority to both negotiate and conclude the agreement.

E. Reporting Requirements.

1. Once an international agreement is concluded, DoD 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.[31]

2. To comply with the Case-Zablocki Act, DoDI 5530.03 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's 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.[32] 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

[30] *Id.*
[31] *Id*. at para. 2.5.c.7; 10 U.S.C. § 112b (a).
[32] DoDI 5530.03, para. 7.2.

Secretary of the Army, the organizational element is required to forward four copies to HQDA (DAJA-IO) within ten days of signing the agreement.[33] Judge advocates should also consult applicable Combatant Commander regulations to ensure compliance with any additional reporting requirements.

V. IMPLEMENTING & ENSURING COMPLIANCE WITH AN INTERNATIONAL AGREEMENT

A. The JA 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 already fall within the JA's practice area. 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 ACSA, 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: Status of Forces Agreements (SOFAs), logistics support, pre-positioning, cryptologic support, personnel exchange programs, and defense assistance programs (to include security assistance). Deploying JAs will most frequently reference SOFAs, or other agreements establishing jurisdictional protections. However, JAs will also find logistics support agreements, such as ACSAs, of critical importance.

1. Status of Forces Agreements.

a. *Historical Background*. There is little international law governing the stationing of friendly forces in a host nation's territory. Most frequently, the countries applied the law of the flag. Since friendly forces were transiting a territory with host nation permission, it was understood that the nation of the visiting forces retained jurisdiction over its service 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 clarify 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.[34]

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 state (the host nation). 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 U.S. personnel who may be subject to criminal trial by foreign courts and imprisonment in foreign prisons."[35]

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: Administrative and Technical Status (A&T status);

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[33] AR 550-51, para. 9.a.

[34] 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.

[35] U.S. DEP'T OF DEFENSE, DIR. 5525.1, STATUS OF FORCES POLICY AND INFORMATION, para. 3 (7 Aug. 79; incorporating through change 2, 2 Jul. 97; certified current as of 21 Nov. 03) [hereinafter DoDD 5525.1].

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 or long-term deployments. The receiving state typically recognizes the A&T status of the deploying forces through an exchange of diplomatic notes or similar instrument.

(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. 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.

(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 jurisdiction 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 jurisdiction when the acts or omissions are committed in the performance of official duty. For example, if a U.S. Soldier strikes 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. 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). 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 JA acquire a copy of the host nation's Visiting Forces Act before deploying to that country.

(4) No Protection. U.S. forces may also deploy to 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 protection may not be feasible. If a U.S. Soldier allegedly commits a crime in such a country, diplomatic negotiations may successfully secure a more favorable treatment for the service member. Judge advocates should remember that a lack of status protections is merely a planning factor for commanders, not a legal objection, but the decision to deploy forces to a nation without such protections is usually held at the Combatant Command.

e. *The United States as a Receiving State*.

(1) Traditionally, the SOFA issues JAs face involve U.S. service members deployed to other countries. In the post-Cold War era, foreign forces began routinely coming to the U.S. for training. Some NATO countries have units permanently stationed in the United States.[36] The status of these foreign forces in the United States depends on agreements 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 complicated issues with 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 Federal and State jurisdictions. Conversely, international agreements that are not treaties (executive agreements) are 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 can be 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.[37]

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 service member receives a fair trial.[38]

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.[39] 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

[36] For example, German Tornado Fighters have been stationed at Holloman Air Force Base, New Mexico. *See, e.g.*, Charles D. Brunt, *German Air Force leaving Holloman*, Albuquerque Journal, Apr. 15, 2016, http://www.abqjournal.com/757845/german-air-force-leaving-holloman-afb.html (*last visited* 17 May 2020).
[37] *See e.g.*, U.S. DEP'T OF DEFENSE, INST. 5525.03, CRIMINAL JURISDICTION OF SERVICE COURTS OF FRIENDLY FOREIGN FORCES AND SENDING STATES IN THE UNITED STATES (23 May 16).
[38] *See generally* DoDD 5525.1.
[39] *See e.g.*, Georgetown Law Library, *International Criminal Court - Article 98 Agreements Research Guide*, http://guides.ll.georgetown.edu/article_98 (last visited 17 May 2020).

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.[40]

The United States negotiated and concluded many Article 98 Agreements to protect U.S. service members and other U.S. nationals from being subject to the ICC. Article 98-type language may be integrated into a SOFA, diplomatic note, etc. to temporarily protect U.S. troops. 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, JAs should check with their technical chain of command regarding the existence of any applicable Article 98 Agreements and the impact of existing SOFAs on potential ICC 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. law and policy, i.e., the Foreign Claims Act (FCA).[41] However, the Soldier may remain subject to host nation civil jurisdiction, which may be mitigated by payments made under the FCA.

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 responsibility for safety (i.e., self-defense) of the unit. As part of pre-deployment preparation, the JA should determine whether the applicable agreement includes provisions regarding force 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, 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.[42] 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 by other expedited procedures.

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[40] Rome Statute of the International Criminal Court, art. 98, Jul. 17, 1998, https://legal.un.org/icc/statute/99_corr/cstatute.htm (*last visited* 17 May 2020).

[41] 10 U.S.C. § 2734-2736. Payment of claims under the FCA is based not on legal liability, but on the maintenance of good foreign relations.

[42] *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/Portals/105/Documents/SOFA/A01_SOFA.Art.I-XXXI.pdf (*last visited* 17 May 2020).

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 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.

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 to a foreign country, 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[43] 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.[44] 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 the Fiscal Law Chapter.

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.[45]

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[43] 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.

[44] *See* 10 U.S.C. § 2347.

[45] *See* CHAIRMAN OF THE JOINT CHIEFS OF STAFF, INSTR. 6510.01F, *Information Assurance (IA) and Support to Computer Network Defense (CND)*, 9 Feb. 11 (current as of 9 June 2015).

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CHAPTER 14

FOREIGN HUMANITARIAN ASSISTANCE

I. BACKGROUND AND FRAMEWORK

A. Foreign Humanitarian Assistance (FHA) is an umbrella term comprising all types of humanitarian assistance operations the DoD has the authority to conduct, which includes Foreign Disaster Relief (FDR). Note the terminology used in this chapter will align to the extent possible with Joint Publication (JP) 3-29.[1] FHA consists of all DoD activities conducted outside the U.S. and its territories to directly relieve or reduce human suffering, disease, hunger, or that assist in preparing for future disasters. DoD-authorized FHA activities range from steady-state programs in support of a respective Geographic Combatant Command (CCMD) theater strategy, certain limited FHA activities conducted during contingency operations, and large scale FDR operations to alleviate suffering of foreign disaster victims.

1. Interagency coordination. FHA operations (including FDR operations) are conducted in coordination with the United States Agency for International Development (USAID) and the Department of State (DoS). USAID is the lead U.S. Government agency that works to end extreme global poverty and enable resilient, democratic societies to realize their potential. USAID's Office of Foreign Disaster Assistance (OFDA) is the lead federal agency for foreign disaster response. DoD FDR operations are typically in response to a USAID/OFDA request for DoD support. Political and historical reticence to the DoD provision of FHA stems from the fear of confusing foreign citizens regarding the role of the U.S. military, the potential to put future U.S. civilian aid workers at greater risk due to the possible confusion of their role with that of the DoD, and the seemingly detached connection between FHA and DoD strategic objectives. However, there are certain statutory authorizations and appropriations, as will be discussed below, that allow for a unique DoD, supporting role. Even where the specific statute authorizing the DoD activity does not obligate concurrence or coordination with DoS, DoD regulation and policy will require it. The only notable exception is the "72-hour life and limb" authority where an on-site commander at scene determines prompt action to save human lives is required (see Section II, C of this chapter).

2. Scope of this chapter. This chapter focuses disproportionately on FDR under 10 U.S.C. § 404, 10 U.S.C. §2561 and DoD Directive 5100.46, as opposed to smaller, steady-state CCMD FHA programs. Though a subset of overall FHA activities, the scale and complexity of FDR normally makes these operations significantly larger than DoD's steady-state FHA activities. As such, FDR operations tend to contain more operational law lessons learned. Steady-state FHA projects by contrast, are likely to be theater specific and more difficult to extrapolate from. FDR operations are in response a calamitous situation or event that occurs naturally or through human activities, which threatens to cause human suffering on a scale such that the Host Nation (HN) cannot meet the emergency relief need of their populace. USAID categorizes disasters as falling into one of three categories: rapid onset disaster, such as a tsunami, earthquake, or flood; slow onset disaster, such as a famine, drought, or disease outbreak; complex emergency, which will involve a conflict element (e.g., Syria, Somalia). The DoD is most often called upon to respond to rapid onset disasters where the HN infrastructure has been overwhelmed or destroyed, such that civilian aid agencies require unique military capabilities in order to deliver immediate relief.

3. DoD FHA Program Goals. When interagency coordination requirements are satisfied and to the extent permitted by law, DoD FHA programs and FDR operations will promote the following objectives globally:[2]

a. Alleviate suffering and save lives;

b. Improve the basic living conditions of the civilian populace in a country or region that is strategically important to the U.S.;

c. Enhance the legitimacy of the HN government by improving their capacity to provide services to the populace;

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[1] U.S. DEP'T OF DEFENSE, JOINT PUB. 3-29, JOINT DOCTRINE FOR FOREIGN HUMANITARIAN ASSISTANCE (14 May 2019) [hereinafter JOINT PUB. 3-29].

[2] Office of the Secretary of Defense Cable: Policy Guidance for DoD Humanitarian Assistance Programs, Including those Activities Funded by the OHDACA Appropriation (released 10 Aug 2016) [Hereinafter, OSD HA Policy Cable].

d. Promote coalition-building and with foreign military and civilian counterparts; and,

e. Contribute to HN military and civilian institutions' positive perceptions of the U.S. Government and DoD. The most effective steady-state FHA projects are those that include knowledge or skills transfer, thus building local capacity rather than merely performing an action for the HN or donating materials.

4. Role of Judge Advocates. The time available for planning FDR operations can be short, even as little as a few days. Often these operations will be conducted in countries where US military forces have had little, if any, presence previously. As emphasized in JP 3-29, many aspects of FHA operations require legal scrutiny. Judge Advocates are expected to assist in analyzing and preparing Status of Forces Agreements (SOFA), Rules of Engagement (ROE), fiscal law guidance, plans and orders, and especially any agreements between U.S. forces, multinational forces, and the affected HN. In addition to planning, Judge Advocates will be expected to provide briefings on legal authorities, existing agreements, and international law considerations specific to the affected HN.[3] Judge Advocates should also ensure that U.S. military forces understand the scope of the HA mission tasked to the respective CCMD and any other specific guidance from the CCMD.

B. DoD Roles and Responsibilities in FHA. The U.S. military is not an instrument of first resort in responding to humanitarian crises, but in certain severe operations it will be called upon to support civilian relief agencies as part of overall USG efforts. The percentage of FDR crises where DoD assistance is requested is historically about 10%. Military assets can provide an important contribution to humanitarian actions based upon advantages in terms of speed, specialization, and, efficiency especially in the early phase of response. Within DoD, the Office of the Secretary of Defense (OSD) coordinates FHA policy and funding. The Under Secretary of Defense for Policy (USD(P)) develops military policy for FHA operations. Within USD(P), Assistant Secretary of Defense for Special Operations/Low Intensity Conflict (ASD (SO/LIC)) is responsible for policy development and oversight for DoD's humanitarian activities. Defense Security Cooperation Agency (DSCA) provides programmatic oversight of the OHDACA appropriation and policy guidance on other issues related to funding.

C. FHA Authorities.[4] Many DoD authorized FHA activities are funded by Overseas Humanitarian, Disaster and Civic Aid (OHDACA), which is the fiscal cornerstone of 10 U.S.C. §§ 401-2, 404, 407, 2561, 2557. All OHDACA-funded projects, other than FDR operations (which take shape rapidly in response to sudden onset disaster) and minimal cost, steady state projects, must go through various levels of staffing, and receive concurrence from several stakeholders, including DSCA.

1. Introduction. Each CCMD will execute their own steady state humanitarian assistance projects throughout the year. DoD does not allocate the entire annual OHDACA appropriation between the CCMDs. During the budget process, DoD will withhold an amount of OHDACA funding in order to ensure DoD has sufficient financial resources in order to initiate a response to an unanticipated disaster.[5] The amount set aside for FDR directly impacts the amount of OHDACA available for CCMD steady state FHA programs. Each CCMD HA Program Office submits an OHDACA allocation plan in Overseas Humanitarian Assistance Shared Information System (OHASIS) each year; any deviations from this plan or out-of-cycle projects during the year must also be submitted via OHASIS. Each steady state HA project is vetted and coordinated through other USG agencies, namely USAID, DSCA, and the HN U.S. Embassy to avoid duplication of USG efforts. Further, all steady state projects are reviewed (minimum cost projects need only be reviewed by the CCMD HA manager; all other projects

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[3] For assistance in compiling legal checklists and outlines for use in planning FDR operations, in addition to the contents of this chapter, *see*: DoD JOINT TASK FORCE COMMANDER'S FDR HANDBOOK, GTA 90-01-030 (13 Jul 2011), sections 7.2.1.1, 7.5.2, and appendix A; U.S. DEP'T OF DEFENSE, JOINT PUB. 3-29, JOINT DOCTRINE FOR FOREIGN HUMANITARIAN ASSISTANCE (14 MAY 2019), appendices A & B; appendix B of this chapter, Checklist for Use of OHDACA – Office of the Deputy Assistant Secretary of Defense for Stability and Humanitarian Affairs (ASD (SO/LIC)), dtd 6 Jan 2016; and, OFDA FIELD OPERATIONS GUIDE FOR DISASTER ASSESSMENT AND RESPONSE, version 4 (Nov 2005) at chapters 1 and 2.

[4] *See also* DSCA SECURITY ASSISTANCE MANAGEMENT MANUAL (SAMM), chapter 12, last revision 10 May 2020, http://www.samm.dsca.mil/chapter/chapter-12 [hereinafter DSCA SAAM MANUAL].

[5] Most of OHDACA is actually spent on steady state FHA efforts. In recent years, approximately 80% to 90% of OHDACA is expended on steady state efforts rather than FDR. DoD will set aside an adequate amount of funding to initiate an FDR operation (usually $20 million) but there will need to be a reprogramming action or a supplemental appropriation to respond to a large-scale disaster.

require DSCA and OSD review) and ensure linkage to the DoD strategic goals, and related USG program requirements.[6]

2. FHA distinct from security assistance. Security assistance is a group of programs by which the USG provides defense articles, military training, and other defense-related services to further national policies and objectives. Though security assistance might lay the groundwork for access and a favorable environment for FHA, the authorities and policies underlying each are distinct. FHA activities are designed to save lives, alleviate human suffering, and reduce the impact of disasters and humanitarian crises. The law surrounding both types of programs is complex, consisting of statutes, annual appropriations, policies, regulations, and directives. Judge Advocates must scrupulously delineate and avoid intermingling of the authorities for FHA and security assistance.

3. OHDACA funded FHA activities.[7]

a. 10 U.S.C. § 402 – Transportation of humanitarian relief supplies to foreign countries. Also sometimes referred to as "Space-A transport" or the "Denton Humanitarian Assistance Program." This allows DoD to transport goods provided by non-governmental organizations (NGO), without charge, for humanitarian purposes. Transport is permitted only on a space available basis. In order to use the program, the following factors must be considered:

(1) The transport is consistent with U.S. foreign policy;

(2) The supplies are in useable condition and suitable for humanitarian purposes;

(3) A legitimate humanitarian need exists;

(4) The supplies will indeed be used for humanitarian purposes; and,

(5) Adequate arrangements have been made for the distribution and use of supplies in the HN.

Limitations are that the humanitarian assistance may not benefit military or paramilitary personnel or combatants, and this authority cannot be used to transport USG purchased commodities.

b. 10 U.S.C. § 404 – FDR. See section II of this chapter for more in-depth FDR overview. [8]

c. 10 U.S.C. § 407 – Humanitarian Demining Assistance (HMA) includes activities related to the furnishing of education, training, and technical assistance with respect to detection, clearance, and stockpile management of land mines and other explosive remnants of war (ERW).[9] ERW includes landmines, unexploded ordnance and abandoned ammunition storage and cache sites. By law, DoD personnel may not engage in the physical detection, lifting or destroying of landmines or other ERW (unless the member does so for the concurrent purpose of supporting U.S. military operations). Total cost of supplies, services, and equipment provided to foreign governments may not exceed $14.7 million per fiscal year (all participating countries).[10]

d. 10 U.S.C. § 2561 – Humanitarian Assistance (HA). Funds explicitly appropriated to DoD for humanitarian assistance must be expended by DoD for humanitarian purposes. The DoD relies upon this authority to conduct the "funded transport program" to hire commercial shippers to transport humanitarian relief supplies.[11] This authority is more flexible than the Space-A or Denton Program and Humanitarian and Civic Assistance (HCA)

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[6] For more background and policy guidance on CCMD implementation of OHDACA activities into overall theater planning, *see*, OSD HA Policy Cable, *supra* note 2.

[7] *See also* Office of the Deputy Assistant Secretary of Defense for Stability and Humanitarian Affairs (ASD (SO/LIC)), *Checklist for Use of OHDACA*, 6 Jan 2016.

[8] Note, however, though somewhat counterintuitive, DoD normally does not invoke or rely upon 10 USC 404 to conduct FDR. This statute triggers a Congressional reporting requirement that can be avoided if DoD relies upon 10 USC 2561. In practice, DoD will only rely upon 10 USC 404 if there are no OHDACA funds available for the response. *See*, appendix D of this chapter, SECDEF Memorandum to U.S. Southern Command, Authorization to Support USAID/OFDA Foreign Disaster Relief for Hurricane Mathew, dated 5 Oct 2016.

[9] *See also* CJCS INSTRUCTION 3207.01C, DOD SUPPORT TO HUMANITARIAN MINE ACTION PROGRAMS (8 Aug 2013) (defines the responsibilities and provides guidance for supporting HMA).

[10] National Defense Authorization Act for Fiscal Year 2020, P.L. 116-92 (Dec 2019).

[11] *See* Presidential Memorandum on the Distribution of Department of Defense Funded Humanitarian Assistance in Syria, 13 Nov. 2015 (memo is particularly important in the context of FHA activities in Operation Inherent Resolve); *see also*, appendix C, SECDEF Memorandum to U.S. Central Command, Authorization of DoD Humanitarian Assistance/Disaster Relief Activities to Support Iraq's Internally Displaced Persons, 16 Sep 2015.

(10 U.S.C. § 401), and as such it constitutes the vast majority OHDACA-funded FHA activities carried out by DoD. It is the 10 U.S.C. § 2561(a)(l) language "other humanitarian purposes worldwide" which allows DoD and DSCA to conduct a wide variety of humanitarian programs not directly related to a military operation or exercise. These FHA activities can even be implemented without using U.S. military personnel, through contracts with private entities. DoD HA efforts under 10 U.S.C. § 2561 do not have to be intended to promote the operational skills of U.S. participants and USG purchased commodities can be transported. Privately donated cargo may also be shipped. Limitations are that the humanitarian assistance may not be for the primary benefit of military or paramilitary personnel or combatants, and the activity must have a humanitarian nexus (e.g., food, water, shelter, and health/medicine). DSCA has approved projects under this authority such as refurbishment of medical facilities, construction of schools, water-well drilling, equipping a disaster relief warehouse and, training HN personnel on disaster relief/emergency response training.

e. 10 U.S.C. § 2557 – Excess property (EP) is that quantity of non-lethal property in possession of a DoD component that exceeds the quantity required or authorized for retention by that component. EP donations typically include furniture, medical and school equipment and supplies, vehicles, tools, tents, and construction equipment. There is a process whereby a DoD unit can declare material EP and it is transferred to the Defense Logistics Agency (DLA), who in turn stores EP in warehouses designed for that purpose.[12] DSCA maintains three different EP warehouses that obtain EP from DLA for the purpose of meeting requirements for CCMD nominated EP projects. When EP items are identified as a need during an FHA operation they are shipped from one of the DSCA warehouses and transferred to a DoS representative at the U.S. Embassy in the assisted country. Under the statute, DoS is responsible for distribution to HN recipients. The EP statute does not include the authority for DoD transport, however that authority may be provided in the context of FDR (10 U.S.C. § 404) or the DoD funded transport program (10 U.S.C. § 2561).[13]

4. Other DoD FHA Authorities.

a. 10 U.S.C. § 401 – Humanitarian and Civic Assistance (HCA) in conjunction with ongoing military operations. HCA is technically not a form of FHA, as the primary intent of an HCA project is to train DoD personnel.[14] HCA is justified in terms of mutual security and operational readiness through operations, exercises, and/or training deployments. HCA projects are pre-planned and funded by O&M and approved by the Joint Staff.[15] Typically, these activities have to be nominated by the CCMD pursuant to DoDI 2205.02, may not duplicate USAID efforts, must be approved by DoS, and coordinated through the HN. Permissible activities are delineated by the statute, they include: medical or surgical care; well drilling and construction of basic sanitation facilities; or, rudimentary construction and repair of public facilities. These projects must promote specific operational readiness skills of the members of the U.S. forces who participate. An HCA project's support for the economic and social interest of the HN are a secondary and unintended benefit.

b. Commander's Emergency Response Program (CERP). Current CERP authority is found at § 1208 of the FY20 NDAA, which is reviewed annually by Congress. The present authority allows commanders in Afghanistan to carry out small-scale projects designed to meet urgent needs and provide a direct and immediate benefit to the people of Afghanistan. Note that CERP funds were specifically excluded from the authorities available in Operation Inherent Resolve, with the exception of restricted use in Iraq (e.g., gratia payments for

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[12] U.S. DEP'T OF DEFENSE, DEFENSE MATERIEL DISPOSITION MANUAL 4160.21-M – DISPOSAL GUIDANCE AND PROCEDURES, 22 Oct 2015; DSCA SAAM MANUAL, *supra* note 4, at chapter 12, § C12.6.

[13] In practice physical delivery is usually accomplished by DoD. DoS normally signs transfer documents without actually taking physical custody of the EP.

[14] Large U.S. Navy exercises such as Continuing Promise and Pacific Partnership have large HCA components. These missions are supported by U.S. and international military medical personnel, U.S. government agencies, regional health ministries, NGOs, and U.S. academic institutions. Medical practitioners, humanitarian relief workers, and active-duty military personnel perform medical treatments/surgeries and conduct basic construction projects to both help the HN and gain operational skills.

[15] S*ee* Consolidated Appropriations Act of 2016, P.L. 114-113 § 8011 (18 Dec 2015). 10 USC 401 requires the use of OHDACA funds to pay for the cost of any items that provide a direct benefit to the assisted country (such as the cost of medical supplies or construction materials needed for an HCA project). However, the annual National Defense Authorization Act or corresponding appropriations act(s) often provides DoD additional leeway to also expend O&M to pay for the cost of any items that provide a direct benefit to the assisted country. Typically, in practice, DoD relies upon this temporary authority and opts to fund HCA entirely with O&M.

damage, injury, or death). CERP funds were not appropriated to current operations in Iraq and Syria because of perceived overuse and failure to have a measurable impact in other areas of operation (e.g., Afghanistan).

c. 10 U.S.C. § 166a – Combatant Commander's Initiative Fund (CCIF). CCIF provides independent statutory authority to conduct FHA as well as a funding source. Pursuant to CJCSI 7401.01G, CJCS may provide funds to CCMD upon request, for, among other activities, humanitarian relief. It must be coordinated with the relevant Chiefs of Mission to the extent practicable. CCIF is intended for urgent and unanticipated humanitarian relief that conventional FHA cannot address in the required timeframe, particularly in a country where the armed forces are engaged in a contingency operation. The authorized project categories for CCIF are rather broad (e.g., food, water, medical supplies, etc.); note though several improper uses of fund are outlined. From a practical standpoint however, CCIF is not typically used to support recurring FHA needs.

D. Background on Office of Foreign Disaster Assistance (OFDA). Together, DoS and USAID are the principal agencies for providing FHA on behalf of USG. USAID is an independent agency that provides economic, development, and disaster relief around the world in support of the foreign policy goals of the USG. Although a separate agency from DoS, USAID shares certain administrative functions with DoS, and reports to and receives overall foreign policy guidance from the Secretary of State (SECSTATE). OFDA is aligned under the Democracy, Conflict, and Humanitarian Assistance Bureau of USAID.[16]

1. History of USG support to FDR operations. The Foreign Assistance Act of 1961 separated out different aid programs and delineated military aid from non-military aid. The Foreign Assistance Act also created USAID and granted it authority over international humanitarian assistance. But at that time there still was not a specific entity with the authority and resources to respond quickly to a disaster in another country. In March of 1963 President Kennedy was visiting Costa Rica and Mount Irazu erupted the same day creating a humanitarian crisis. President Kennedy felt compelled to help Costa Rica, but there was no one office within the USG to call. Later in July of 1963, a 6.9 magnitude earthquake struck Skopje, Yugoslavia destroying 80% of the city, leaving 120,000 people homeless and taking the lives of 1,100 people. In both cases, USG assistance was ad hoc and showed severe internal coordination difficulties. No single agency within USG had the resources or expertise to respond to these types of disasters. In 1964 Congress authorized the President to appoint a coordinator for International Disaster Assistance to the USAID administrator, who then delegated the responsibility to the OFDA director with a mandate to save lives, alleviate human suffering, and reduce the social and economic impact of disasters. OFDA on average responds to over 50 FDR crises per year. For example, in fiscal year 2015, OFDA responded to 49 humanitarian emergencies in 45 countries, ranging from floods, to earthquakes, food insecurity situations, hurricanes, disease outbreaks, and other complex emergencies. At one point during 2015, OFDA had a record number of teams responding to five major crises simultaneously (Syria, South Sudan, Iraq, the West Africa Ebola outbreak, and the Nepal earthquake).

2. On-scene management. During a foreign disaster OFDA serves as the lead for organizing and managing the USG response. OFDA represents the U.S. to the other international country teams, relief organizations, and, in consultation with the Chief of Mission, the HN officials involved in relief effort. They will develop a strategy, serve as the reporting source for other USG entities, and provide USG funding to implementing partners. Depending on the size and scale of the disaster, OFDA personnel may be organized into a Disaster Assistance Response Team (DART). It is the DART that will typically be liaising with DoD personnel, requesting DoD assets using the processes laid out further in this chapter. OFDA is also responsible for formulating overall USG foreign disaster assistance policy in coordination with other departments and agencies.

3. Special authorities. OFDA has several special authorities that allow greater flexibility in FDR operations. One of these is notwithstanding authority under 22 USC 2292 which allows them provide assistance "notwithstanding any other provision of [22 USC 2292] or any other Act" which would otherwise prohibit or restrict aid to selected countries such as economic sanction. Essentially this gives OFDA the ability to request exemptions from government regulations in order to expedite assistance. This authority is most frequently invoked in order to expedite procurement and when OFDA needs to travel to a restricted country. OFDA also has a special borrowing authority allowing them to obtain up to $50 million for disaster assistance from other USAID accounts.

4. OFDA outreach and planning. OFDA has humanitarian assistance advisors to the military (HAA/M) at each major CCMD. They are part of a larger USAID/OFDA Military Liaison Team (MLT). The MLT's goal is

[16] *See*, Foreign Assistance Act of 1961, P. L. 87-195, as amended through P.L. 114–195, enacted 20 Jul 2016, chapter 9, §§ 491, 492 (22 USC 2151, 2292) [Hereinafter, Foreign Assistance Act].

to enable greater civil/military coordination upon the onset of a disaster, and to increase the situational awareness of potential responding units. Moreover, the MLT is the primary office for communicating requests for DoD assistance originating from the civilian community. The MLT also facilitates the Joint Humanitarian Operations Course (JHOC), a two-day course for U.S. military personnel on working with OFDA during FDR operations. In addition, OFDA has regional offices in several countries across Africa, South America, and Asia. OFDA also has stockpiles of relief commodities in Miami, Italy, UAE, and Malaysia. Each U.S. Embassy has a designated Mission Disaster Relief Officer (MDRO) responsible for preparing and planning emergency action plans in the case of a disaster event in their respective country. When an FDR operation does occur, this MDRO is one of the Embassy's chief liaison officers to OFDA and DoD.

E. Implementing Partners. OFDA does not directly distribute aid to beneficiaries in an affected country but rather works through a multitude of implementing partners to facilitate the delivery of aid and focus the efforts of USG. OFDA and the international community work with local organizations and specialized NGOs because those groups know the country, are more experienced in working with beneficiaries, and because working through implementing partners builds local capacity. This philosophy also works as a bulwark against taking on more responsibility than can be managed over the immediate relief period. Similarly, military personnel supporting humanitarian activities will normally not be used in the direct delivery of assistance.

F. HN and the Operating Environment (OE). FDR missions are done only by request from the HN, or with their concurrence. With very few exceptions,[17] the HN remains in control of the USG response at all times and can limit its size, duration, or scope. When the international community does respond to a disaster at the request of a HN, the U.S. will normally be part of an organized, professional humanitarian system consisting of many countries, donors, and organizations.

1. Mentality of pull not push. The provision of unwanted or unneeded commodities during an FDR crises can burden a HN and the overall relief efforts. Relief efforts are intended to provide the HN with what they need in order to alleviate suffering, but many HN problems will not be a USG responsibility and/or will exceed the specific DoD operational mandate. This can run counter to DoD culture at times but Judge Advocates must help ensure DoD assistance falls within the scope of CCMD's operational mandate and is validated USAID requirement. DoD personnel must understand that OFDA is coordinating with the HN to identify and prioritize life-saving tasks. OFDA vetting also ensures assistance to the HN complements, rather than duplicates, any other form of social or economic assistance provided to the country concerned by another agency of the USG.

2. Nature of OE. This will have an obvious impact on the conduct of any type of FHA operation, to include FDR. There are three types of OEs when providing FHA: permissive, uncertain, and hostile. The type of OE will have a direct impact on the decision to conduct the operation, as well as many planning aspects. Note that this FHA chapter is primarily focused on the provision of FDR in permissive environments, where the HN has control and has requested assistance. However note that for many of the DoD FHA authorities other than FDR, the nature of the OE has a greater impact. This is particularly the case during contingency FHA operations, where FHA might be provided in a hostile or even non-permissive OE (i.e., Syria theater of Operation Inherent Resolve).[18]

3. HN involvement. A sovereign country has the right to restrict access, or not request assistance, if they so choose. There are applicable international guidelines, such as the ICRC Code of Conduct for Disaster Relief and the Oslo Guidelines, as will be explained more fully in Section III of this chapter. These guidelines are not binding but they are generally accepted by the international aid community and can serve as the basis for discussions. During a disaster HN governments will generally facilitate rapid access to disaster victims for international relief organizations, and if necessary, foreign governments. An affected HN should also take steps to ensure relief supplies and equipment are brought into a country solely for the purpose of alleviating human suffering, not for commercial benefit. Relief supplies should normally be allowed free and unrestricted passage and should not be subject to requirements certificates of origin or invoices, import and/or export licenses, importation taxation, or landing fees and/or port charges. If foreign military assistance is requested the Oslo Guidelines also implore the HN to advise the necessary ministries and local governance structures to facilitate the arrival of foreign military forces by ensuring: overflight and landing permission; waiver of commercial documentation; exemption from customs

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[17] *See, e.g.*, United Nations S.C. Res. 2165 (14 Jul 2014), https://www.un.org/press/en/2014/sc11473.doc.htm (allowing for the provision of humanitarian aid to Syria despite the fact that previous demands for aid access in Syria had not been heeded).
[18] *See* CENTER FOR LAW AND MILITARY OPERATIONS AFTER ACTION REPORT, SPECIAL OPERATIONS JOINT TASK FORCE (SOJTF) OIR 2016 (May 2017) (classified version available upon request to CLAMO).

duties; waiver of visa requirements; free access to disaster zones; and, recognition of certificates and licenses. They should also make arrangements for security of foreign military forces, as practicable.[19] In addition, transit states, those which require crossing of their national borders, territorial waters, and/or airspace, should be contacted as early as possible in order to coordinate the movement of any material or personnel necessary for the relief effort.[20] This responsibility is more critical if the transit state borders the affected HN.

II. COMMAND AND CONTROL IN FDR AND THE ROLE OF DOD

A. Procedure for Requesting U.S. FDR Assistance. As noted above, whenever a disaster event occurs, the HN determines how it will best provide relief to the affected population including if and when it will accept assistance, if at all, and from whom that assistance will be accepted. The USG will generally only provide FDR when the HN's capacity to respond to the disaster has been overwhelmed, the HN requests assistance from the USG or otherwise indicates that it is willing accept U.S. assistance, and it is in the interest of the USG to respond.

1. The HN's decision to either request or indicate that it will accept U.S. disaster assistance is normally communicated through the U.S. Ambassador, or Chief of Mission, to that country.[21] In cases where there is no official U.S. diplomatic presence in the country, the Assistant Secretary of State for the appropriate region takes responsibility for the request.[22]

2. Once the HN indicates that it will accept U.S. disaster assistance, the Chief of Mission must validate the need for the U.S. to provide humanitarian assistance according to the following criteria laid out by USAID/OFDA.

a. The affected State must request, or otherwise indicate that it will accept, assistance from the U.S.,

b. The disaster is beyond the ability of the affected State to respond, and,

c. Responding is in the interests of the USG.[23]

3. Upon validation of the request for U.S. assistance, the Chief of Mission issues a Disaster Declaration Cable either to the (SECSTATE) or directly to USAID/OFDA. This Cable signals the intention of the USG to provide assistance to the HN. The Cable will normally outline the nature and extent of the damages, HN relief efforts that are already underway, and the type of assistance that may be required from the U.S.[24] The Cable also gives the Chief of Mission the authority to request up to $50,000 for immediate disaster relief or rehabilitation from USAID/OFDA. These funds may not be used for long-term reconstruction or to purchase food.

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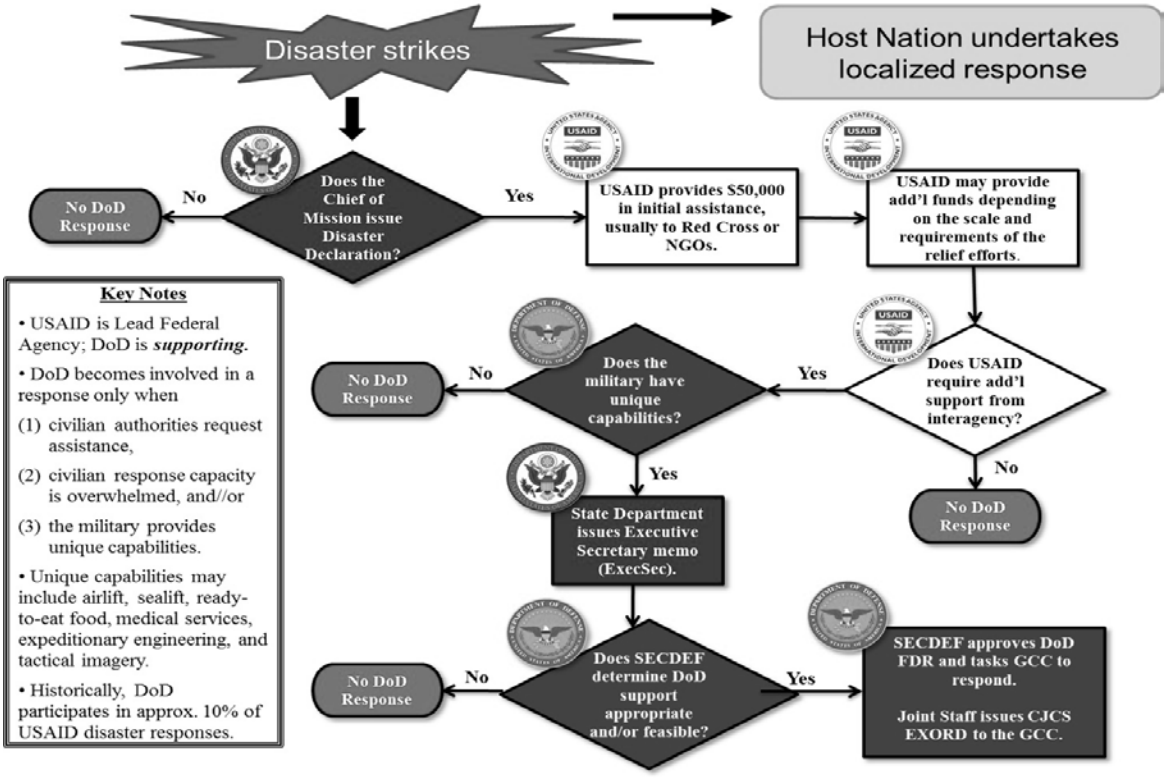
[19] UN Office for the Coordination of Humanitarian Affairs, Oslo Guidelines on the Use of Foreign Military and Civil Defense Assets in Disaster Relief, para. 60 (Nov 2007).
[20] *Id*. at para. 63.
[21] USAID's Office of U.S. Foreign Disaster Assistance: Guidance for Disaster Planning and Response - Fiscal Year 2017, paras. 7-9 (cable released 7 Oct 2016) [hereinafter OFDA FY17 Policy Cable].
[22] *Id*.
[23] *Id*.; *see also* JOINT PUB. 3-29, *supra* note 1, at chapter II, para. 3(b)(1).
[24] OFDA FY17 Policy Cable, *supra* note 22, at paras. 7-11.



Source: OSD Joint Humanitarian Operations Course (JHOC).[25]

B. Procedure for Requesting DoD Assistance. Once the Disaster Declaration cable is issued the USG begins providing disaster relief. In practice OFDA begins to mobilize and make other arrangements soon after the disaster event, as through experience they know when to anticipate a USG response. USAID/OFDA serves as the lead federal agency for the relief mission and thus directs all USG relief efforts.[26] The DoD only becomes involved in the mission upon request from either USAID/OFDA, DoS, or from the President. The vast majority of FDR missions are accomplished without DoD involvement.[27] Normally, the request will come via an Executive Secretary memorandum (ExecSec memo) from the SECSTATE, as in the above flow chart.

1. Overview of Authorities. 10 USC 404 provides a statutory basis for the President to direct DoD to respond to FDR situations. In practice however, as noted above, DoD usually invokes 10 USC 2561 as the DoD authority to provide humanitarian assistance during a FDR, as this simplifies the reporting requirements. EO 12966 delegates the DoD response authority to the SECDEF when he or she has concurrence of SECSTATE, or in emergency situations in order to save human lives where there is not sufficient time to seek the prior initial concurrence (i.e., the 72-hour life and limb rule). DoD Directive 5100.46 provides the implementation framework for when and how DoD will respond. Additional policy guidance is promulgated via the annual USAID cable on disaster planning and the Assistant Secretary of Defense for Special Operations/Low Intensity Conflict (ASD (SO/LIC)) will also issue guidance cables and/or memorandums periodically.

2. The request for DoD involvement will generally come from either USAID/OFDA or DoS. The request will normally be communicated in the form of an ExecSec memo sent to the DoD.[28]

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[25] This is a simplified overview of the official request process for USG support to a foreign disaster. For those involved in preliminary discussions with the Embassy or DoS on potential DoD support, it's important for Judge Advocates to maintain open lines of communication as there are always numerous policy, legal, fiscal, and operational issues to be resolved under the very short timelines of FDR.

[26] JOINT PUB. 3-29, *supra* note 1, at chapter II, para. 3-4; Foreign Assistance Act, *supra* note 16, at chapter 9, § 493; Exec. Order No. 12966, Foreign Disaster Assistance, Vol. 60 Fed. Reg. No. 137 (14 Jul. 1995).

[27] OFDA FY17 Policy Cable, *supra* note 22, at paras. 22-25.

[28] *Id*. at para. 22.

a. The ExecSec memo will state that the civilian response capacity has been overwhelmed and that the DoD possesses unique capabilities, which the lead federal agency is requesting to use in the on-going disaster response. The memo will specify exactly what type of support is being requested.

b. The memo will also state whether the assistance requested will be on a reimbursable or non-reimbursable basis. If the assistance is to be on a reimbursable basis, the request will be accompanied by a reimbursable interagency agreement in accordance with the Foreign Assistance Act.[29]

c. Examples of unique capabilities possessed by the DoD include transportation assistance to move relief supplies through both fixed and rotary wing assets, airfield and port opening, the rapid deployment of medical personnel and services, expeditionary engineering, tactical imagery and reconnaissance, and/or the provision of needed non-lethal excess property (e.g., trucks, tents, cots, medical supplies).

3. The DoD will evaluate the request for assistance based on the following factors:

a. The availability of the requested DoD support,

b. The impact that providing the requested support will have on ongoing or potential military operations,

c. The urgency of the disaster situation, and

d. Other relevant factors associated with DoD involvement.[30]

4. If the SECDEF approves the request for assistance a memo will be issued to the relevant CCMD to authorizing support to the mission. The memo will usually specify the type of aid that will be provided, the amount of money that may be expended, the source the money will come from, and the authorities being granted.[31] CJCS also has responsibility for communicating approved requests for FDR and funding authorization to the CCMD, and for ensuring compliance with DoD policy guidance and the requirements of DoD Directive 5100.46. Depending on the scale of the operation this may take the form of an EXORD.

5. The exact composition of the response will vary depending on the nature of each disaster event as well as any restrictions put in place by the U.S. Ambassador and the HN. [32] However, the CCMD will typically utilize the following:

a. A Crisis Action Team (CAT) consisting of a Humanitarian Assistance Coordination Center (HACC), a Humanitarian Assistance Survey Team (HAST) and a Joint Logistics Operations Center (JLOC). The CAT is sent to provide immediate relief and assess the disaster to inform the Combatant Commander of follow-on needs.

b. The CCMD will most commonly assemble a Joint Task Force (JTF) to serve as the main responder to the disaster. The JTF's ability to deploy quickly and execute a variety of tasks makes it ideally suited to provide Foreign Disaster Relief. It is recommended that the JTF have a dedicated Liaison Officer within the OFDA DART and also that USAID/OFDA attach a civilian-military advisor to the JTF.

6. Other DoD agencies involved in an FDR mission include:

a. DSCA will coordinate with the CCMD, USAID/OFDA, and other relevant offices to finalize logistical and financial requirements.[33] Depending on the scope of the disaster, DSCA will coordinate the relevant interagency stakeholders and the CCMD to manage the availability of OHDACA funds and determine if additional resources are required.

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[29] *See* Foreign Assistance Act, *supra* note 16 at § 632.

[30] U.S. DEP'T OF DEFENSE DIR. 5100.46, FOREIGN DISASTER RELIEF, para. 4(e) (6 Jul 2012); DOD JOINT TASK FORCE COMMANDER'S FDR HANDBOOK, GTA 90-01-030, § 1.5.2 (13 Jul. 2011) [hereinafter DOD JTF HANDBOOK]; OSD HA Policy Cable, *supra* note 2, at § 5(I)(VI).

[31] *See* SECDEF Memorandum to U.S. Southern Command, Authorization to Support USAID/OFDA Foreign Disaster Relief for Hurricane Mathew, Appendix D (5 Oct. 2016).

[32] DOD JTF HANDBOOK, *supra* note 30, at chapter 9; JOINT PUB. 3-29, *supra* note 1, at chapter IV.

[33] OSD HA Policy Cable, *supra* note 2, at § 5(I)(VI); DSCA SAAM MANUAL, *supra* note 4, at chapter 12.

b. DLA provides a substantial portion of the consumable items needed during the operation including food, fuel and energy, uniforms, medical supplies, and construction and barrier equipment.[34]

c. The National Geospatial Intelligence Agency can provide information such as geospatial imagery including pre-disaster views of the HN, areas affected by the disaster, and key terrain features.[35]

d. The Defense Information Systems Agency (DISA) provides support to the commander's ability to maintain a command and control network in an expeditionary environment. DISA maintains Combatant Command Field Offices which are specifically tailored for support within their geographic area.[36]

C. Exceptions to the Process. In certain limited circumstances DoD might be involved in an FDR operation absent an official disaster declaration cable and a request for assistance from either the DoS or USAID/OFDA. Even in these cases, DoD must coordinate with DoS and obtain the permission of the HN in order to begin providing assistance. Note that the other authorities listed in Section I of this chapter could potentially be used in a FDR-type situation, or lesser calamity, where there is operational authority to do so and the other requirements in those statutes are satisfied. Meaning you can always have FHA outside the FDR, as FDR is a subset of FHA.

1. The "72 hour" or "Life and Limb" Authority. EO 12966 as implemented by DoDD 5100.46, allows commanders with forces located at or near the immediate scene of the disaster event to take prompt action in order to provide urgent life-saving relief.[37] This authority is the primary means by which the DoD responds to a disaster event without an official disaster declaration. There are FDR situations where USG recognizes that the more time that passes, the less likely the assistance will be deemed critical to saving human lives. It is important to emphasize that even in a DoD emergency response situation, the CCMD must informally notify and coordinate efforts with OSD and DoS.[38]

a. The on-scene commander invoking this authority must obtain the concurrence of the HN and the U.S. Chief of Mission before committing forces. The on-scene commander should report the action taken at once and request guidance from the CCMD. Regulations provide that the CCMD will then follow up as soon as possible, but no later than 72 hours after the start of relief operations, to secure SECDEF or Deputy SECDEF approval for continuing assistance. The commander must stop providing support once urgent life-threatening circumstances have been addressed unless given approval by the SECDEF to continue support.

b. This authority shall only be invoked in a true emergency, where the contribution will assist urgent life-saving efforts. A request for DoD assistance transmitted directly to the military commander from a HN or from a U.S. Country Team is not necessarily sufficient grounds to justify DoD participation because a HN may misdiagnose the need and/or the U.S. Country Teams may lack expertise to make a fully-informed assessment. DoD involvement in FDR in other than in-extremis situations depletes limited DoD resources and diverts personnel from core military missions.

c. The phrase "at or near the immediate scene of the disaster" has not been clearly defined, but has been interpreted to mean that the on-scene commander must have forces that are geographically located near the disaster event.[39] In the absence of a clearer definition, Judge Advocates should be aware that the further the definition of "immediate" is stretched the more risk that the use of O&M funds will not be reimbursed.

d. Reimbursement through OHDACA in emergency situations may be limited and will depend on the availability of funds. This is part of the rationale for why the CCMD must inform the SECDEF so quickly; failure to do so will restrict the ability to receive OHDACA reimbursement. In the absence of reimbursement, costs must come out of O&M funds.

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[34] DOD JTF HANDBOOK, *supra* note 30, at 10-9 (page includes link to DLA handbook and other resources).
[35] *Id*. at 10-12.
[36] *Id*.
[37] U.S. DEP'T OF DEFENSE DIR. 5100.46, FOREIGN DISASTER RELIEF, ¶¶ (4)(b)(3), (4)(f) (6 Jul 2012).
[38] An example was the SOUTHCOM response to Panama forest fires in April 2016. The on-scene commander, with CCMD concurrence, used the "72-hour/life-and-limb" authority to respond to a crises and lend assistance in containing forest fires. SOUTHCOM requested permission to continue the response after the 72-hour period, but OSD informed that SOUTHCOM had to end assistance at 72-hours.
[39] An example of is the Amphibious Ready Group/Marine Expeditionary Unit (ARG/MEU) that responded to the earthquake that struck Turkey in 1998. At the time the earthquake occurred the ARG/MEU was located off the coast of the Anatolian peninsula and therefore did not have to relocate in order to begin providing aid.

2. Presidential Drawdown Authority in FDR Context. 22 U.S.C. 2318(a)(1) authorizes the President to direct the transfer of on-hand DoD-stock defense articles and services and military education and training to foreign countries in response to humanitarian catastrophes. For the most part, no new procurements are authorized and no new funds may be placed on existing contracts with the exception of transportation and related services where new contracts would be cheaper than providing the service with DoD assets. The aggregate value of existing materials and services from on-hand stock may not exceed $75M aggregate value. Note also, drawdowns are not actual funds, and the organization providing the material or service may or may not be reimbursed at a later date. DSCA is the DoD entity responsible for processing drawdowns in conjunction with DoS.[40]

D. Overall Coordination and DoD Tasking. Not only is DoD in a supporting role to USAID/OFDA, but those agencies are themselves occupying a supporting role to the HN and other international organizations, especially in a large FDR operation. Disaster Relief missions are often complex undertakings involving multiple nations, international organizations, NGOs, charitable organizations and even private donors. Each of these organizations function independently of one another, making command and control difficult to maintain. For that reason, the JTF commander needs to understand how the military fits into the effort and the lines of authority by which all the parties operate.

1. Office for the Coordination of Humanitarian Affairs (OCHA). OCHA is the office within the UN responsible for bringing together all the participants in the relief mission in order to ensure a coherent response to the disaster. One of the ways they accomplish this mission is by creating a framework, known as the Cluster System.

2. Cluster System. This framework approach breaks down participating humanitarian organizations into sectors, or clusters, of assistance needed (e.g., water, health and logistics).[41] All clusters are then appointed a central point of contact known as a Cluster Lead Agency which ensures that any assistance provided within that sector is coordinated within the overall relief effort.

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[40] *See*, DSCA SAAM MANUAL, *supra* note 4, at chapter 12, § C12.9.4.2.
[41] JOINT PUB. 3-29, *supra* note 1, at chapter II, appendix D.

3. USAID/OFDA serves as the USG representative within the Cluster System, vetting and validating the relief requests as they are received before assigning the request to the most appropriate provider within the USG. Note that although many relief requirements are identified in this way, there is nothing to prevent OFDA or the JTF from bringing proposed relief requirements to the attention of the Cluster System.

4. Mission Tasking Matrix. Once USAID/OFDA has vetted and validated a specific request for assistance, they utilize the Mission Tasking Matrix (MiTaM) as a means to communicate their authorized mission set to whichever organization they have assigned the particular relief request. Because USAID/OFDA is the lead federal agency, the MiTaM defines the boundaries of the U.S. relief effort. Therefore having a MiTaM is often the only assured way to receive reimbursement with OHDACA funds.[42] An example of an appropriate Request for Assistance (RFA) and the MiTaM process is as follows:[43]

a. Step 1: An NGO will submit request to an entity within the Cluster System known as the Joint Operation Tasking Center (JOTC).

b. Step 2: The JOTC will revise and forward the request to the appropriate supporting cluster. JOTC will host a daily meeting to review all RFAs.

c. Step 3: If a request for assistance is given to USAID, then the OFDA DART will determine if the RFA can be supported by OFDA or the DoD JTF. If the RFA is to be assigned to the JTF, a MiTaM is created by the Civil Military Affairs Coordinator (CMAC) and sent to the Civil-Military Affairs (i.e., J9) office within the JTF. Ideally, and as likely would be policy in a large FDR operation, the JTF should only be tasked if that particular FDR need could not be fulfilled except by the unique military capabilities of JTF.[44]

d. Step 4: The JTF determines which units will support specific, approved MiTaMs. Depending on the scale of the task, the JTF might generate a FRAGO. After the MiTaM is complete, the assigned unit will report back and issue a completion report to the CMAC, copying the DART and JOTC.

III. INTERNATIONAL LEGAL AND POLICY GUIDELINES

A. Oslo Guidelines for the Use of Foreign Military and Civil Defense Assets in Disaster Relief. When a country's military has the ability to provide "unique services" actually derives from international guidance.[45] The U.S. both helped to negotiate and follows the Oslo Guidelines. The criteria enumerated in DoD Directive 5100.46 are based upon them.

1. Background. The international community has sensitivities about the militarization of FDR operations. Many countries express wariness about any use of military forces during FDR operations. These concerns somewhat stem from most militaries lacking the professionalism and command structures of the U.S. military. Though a significant number of UN Member States participated in the development of the Oslo Guidelines, they are not considered binding. They are not intended to affect the rights or obligations of countries under international law. Their implementation by participating countries and implementing partners is encouraged. Hence, an understanding of these principles is important as they inform the domestic laws and policies of most of the countries that routinely assist in FDR operations. The Oslo Guidelines will also be part of the nomenclature during actual operations and can serve as a basis for diplomatic discussions.

2. Core principles. The Oslo Guidelines foundationally assert that humanitarian assistance must be provided in accordance with the basic principles of:

a. Humanity. Human suffering must be addressed wherever it is found, with particular attention to the most vulnerable in the population, such as children, women and the elderly. The dignity and rights of all victims must be respected and protected

b. Neutrality. Assistance must be provided without engaging in hostilities or taking sides in controversies of a political, religious or ideological nature.

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[42] DOD JTF HANDBOOK, *supra* note 30, at appendix C.
[43] CENTER FOR LAW AND MILITARY OPERATIONS AFTER ACTION REPORT, JOINT TASK FORCE – HAITI, at pgs. 4, 13-14 (Aug 2010) (unit deployed Mar - May 2010).
[44] *Id*.
[45] UN Office for the Coordination of Humanitarian Affairs, Oslo Guidelines on the Use of Foreign Military and Civil Defense Assets in Disaster Relief, paras. 17, 23, 27, 32, 51, 67, 93, 99 (Nov 2007).

c. Impartiality. Humanitarian assistance must be provided without discriminating as to ethnic origin, gender, nationality, political opinions, race or religion. Relief of the suffering must be guided solely by needs and priority must be given to the most urgent cases of distress.

3. Additional guidelines. The Oslo guidelines also state that foreign militaries should only be requested when there is no comparable civilian alternative and such operations should be clearly limited in time and scale. Foreign military assistance should be provided at no cost to the affected country, unless otherwise agreed upon. The guidelines also emphasize that all relief actions are the overall responsibility of the affected country. An affected HN has the right to decline assistance. Other pertinent provisions include: if there are military units within an affected HN either perceived as belligerents or actively engaged in hostilities, then they should not be used in support of FDR operations; humanitarian assistance should be provided by humanitarian organizations, military support should not encompass direct assistance; foreign militaries providing FDR support beyond their borders should include within issued orders guidance on the parameters for use of their military resources; and, when military forces have assumed responsibility for vital civilian functions, such as water systems, air traffic control, or power delivery, then regardless of how this responsibility was acquired, those military units will facilitate the transfer back to appropriate civilian authorities as soon as possible.

4. Model SOFA. Annex 1 of the Oslo Guidelines contains a model SOFA. Most military forces deployed to a natural disaster zone should do so consistent with a bilateral agreement or multilateral agreement of some kind. If no agreement is in place between a responding country and an affected HN, then the Oslo Guidelines recommend utilizing Annex 1 as the basis for a bilateral agreement or SOFA. Those mobilized under UN auspices are granted the status of experts in the execution of the mission according to article IV of the Convention on Privileges and Immunities of the UN. Moreover, if procedures have not already been established for resolution of claims and disputes then they should be settle in accordance with Annex 1.

B. Civil-Military Guidelines and Reference for Complex Emergencies- This OCHA publication[46] was produced in 2008. It is the first collection of core humanitarian instruments developed by the United Nations (UN) and the Inter-Agency Standing Committee (IASC) on civil-military relationship in complex emergencies. Its goal is to help promote respect for international law, standards and principles in these situations. Having set out guiding principles and operating principles for the integration of military into humanitarian assistance, the document seeks to serve as a non-binding reference for humanitarian practitioners, assisting them in formulating country-specific operational guidelines on civil-military relations for particular complex emergencies. This document attempts to highlight, in a generic manner, the nature and character of civil-military relations in complex emergencies. Secondly, it reviews some fundamental humanitarian principles and concepts that must be upheld when coordinating with the military. Thirdly, attention is given to practical key considerations for humanitarian workers engaged in civil-military coordination. Subjects covered include co-ordination with the military and the factors to be considered in the provision of armed escorts to humanitarian convoys. Additional guidance can be found in the OCHA July 2014 publication A Guide for the Military[47]

C. Code of Conduct in Disaster Relief. These principles were drafted after the genocide in Rwanda. The project was managed by the International Committee of the Red Cross (ICRC) and completed in the summer of 1994.[48] It is a voluntary, self-policing code, to which humanitarian organizations active in disaster relief can become signatories. The code seeks to guard the standards of behavior of the ICRC and non-governmental organizations and does not provide specific guidance for military organizations. However, the code can be applied to military FDR. In event of armed conflict the Code does specify that it is to be interpreted and applied in conformity with international humanitarian law. The code seeks to ensure that aid is delivered according to humanitarian imperative, independent of political, religious of other ideological drivers. Improperly delivered aid can divide communities, fuel conflicts, force displacement, and build cultures of dependency.

D. DoD implementation. The U.S. strives to adhere to international humanitarian guidelines, in particular the Oslo Guidelines and the Code of Conduct for Disaster Relief, because the U.S. understands that providing the wrong type of assistance or even providing too much assistance (i.e., "over-helping") during FHA operations, especially on the part of a military force, can have negative consequences. The provision of unwanted or unneeded commodities

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[46] Inter-Agency Standing Committee (IASC) of The Office for the Co-ordination of Humanitarian Affairs (OCHA), *Civil-Military Guidelines and Reference for Complex Emergencies* (2008).
[47] The Office for the Co-ordination of Humanitarian Affairs (OCHA), *A Guide for the Military* (Jul 2014).
[48] Int'l Committee of the Red Cross (ICRC), *Code of Conduct for the International Red Cross and Red Crescent Movement and Non-Governmental Organizations (NGOs) in Disaster Relief* (1994).

during an FDR crises can burden a HN. Though these international guidelines are not specifically incorporated into statutory authorities, many DoD regulations and doctrinal principles borrow directly from these guidelines. Furthermore, it is often these overlapping U.S. and international criteria relied upon by OSD when denying a request for support to an FDR mission. As touched on above, use of military assets and funding in a non-essential context garners a lot of scrutiny. The other concern is the proverbial mission creep. If the U.S. military goes into a devastated country and takes on a lot of responsibility, then they will create an expectation of continued presence and management.

1. Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, Section 2110 of the 2005. Provides that funds marked as International Disaster Assistance (IDA) may not be obligated to an organization that fails to adopt a code of conduct for the protection of beneficiaries of assistance from sexual abuse exploitation and abuse in humanitarian relief operations. This provision applies to funds obligated for FY 2005 and for subsequent fiscal years. Hence, all USG awards or grants of IDA funding must include language conditioning the award on adoption of a code of conduct with core principles: prohibiting sexual activity with children; providing that sexual exploitation must be grounds for termination of employment; prohibiting the exchange of money for sexual services or other forms of exploitative behavior; discouraging sexual relationships between humanitarian workers and beneficiaries; mandatory reporting requirements when concerns or suspicions of exploitation arise; and, language obliging all workers to implement the code and maintain an environment that prevents sexual crimes.

E. Implications of the OE. Compliance with international guidelines becomes more difficult as the degree of hostility in the OE increases. In particular, in a unique situation were the OE is non-permissive, the following issues invariably create concerns: distinction; acceptance of assistance by third parties and/or foreign militaries; respect for neutrality of persons providing humanitarian assistance; access to civilian population in need; and, protection of relief supplies and persons providing aid. When deviations from the international guidelines occur, every effort should be made to explain what prompted the aberration in order to promote transparency and avoid distraction from the critical task of providing essential relief to a population in need.

IV. NATO SUPPORT FOR NATIONAL AUTHORITIES IN CIVIL EMERGENCIES

A. Humanitarian Assistance Doctrine. NATO doctrine[49] states that specific types of military support to humanitarian assistance include disaster relief (DR), support to dislocated civilians, technical assistance and support, chemical, biological, radiological and nuclear (CBRN) consequence management and security. NATO manages a network of civil experts located across the Euro-Atlantic area which assists allies and partner nations faced with the consequences of crisis, disaster or conflict. Of note, NATO's support for civil authorities is planned, managed and executed outside of NATO's Integrated Military Command Structure.

1. While the UN retains the primary role in coordinating large-scale international disaster relief, NATO provides an effective forum in which the use of civilian, as well as military assets, can be added to achieve a desired goal within the context of support in civil emergencies.

2. In the case of a disaster relief operation or other humanitarian emergency not connected to any NATO operation, NATO military capabilities may be deployed in support of civil authorities overseeing the emergency. NATO policy on military support for international disaster relief operations, as outlined in MC 343/1, describes the use of military owned or controlled assets and capabilities not connected to any NATO operation. It emphasizes that NATO assistance to international disaster relief operations (IDRO) will be by exception and will not occur without the consultation of the Strategic Commanders, recommendation by the Military Committee (MC), and approval by the North Atlantic Council (NAC). When NATO-led forces are conducting another type of operation, they may be tasked to deal with humanitarian emergencies. In that case, the military assets will be given finite tasks, within means and capabilities, through the military chain of command.

B. Disaster Relief. NATO recognizes that civil emergencies and disaster planning is, first and foremost, a pure national responsibility. This ultimately led to the creation of NATO's Euro-Atlantic Disaster Response Coordination Centre (EADRCC), based at NATO Headquarters in Brussels, Belgium, which manages the response network. The EADRCC is NATO's principal civil emergency response mechanism in the Euro-Atlantic area, countries in which NATO is involved militarily and other partners across the globe. It is active all year round, operational on a 24/7 basis, and involves all NATO Allies and partner countries. National authorities request and

[49] Allied Joint Doctrine for the Military Contribution to Humanitarian Assistance – AJP 3.4.3 Edition A Version 1 (Oct. 2015).

NATO provides support within this network on an ad hoc basis, in times of crisis or under extraordinary circumstances.

1. Request and Approval Process. The EADRCC functions as a clearing-house system for coordinating both requests and offers of assistance mainly in case of natural and man-made disasters. NATO member or partner countries request assistance from the EADRCC, which in turn circulates them to the member countries and Partnership for Peace countries. The EADRCC facilitates the coordination of responses, and then sends the resulting offers of assistance back to the requesting country. The EADRCC then approves the offers of assistance from contributing nations that most closely align with the requests of the affected nation. In this way, duplication of effort is avoided. In order to ensure the best possible assistance and unity of effort, the EADRCC works closely with the UNOCHA and other international organizations.

a. In the United States, support was provided in the aftermath of Hurricane Katrina, which devastated the U.S. Gulf Coast in August 2005. In total, 189 tons of relief and emergency supplies were flown to the United States via an emergency transport operation led by NATO.

b. In certain cases, approval to provide assistance to civil authorities must come from the North Atlantic Council, the Alliance's principal decision-making body, and not from the EADRCC. This can happen when the requestor is not a NATO member or Partner country or when collective Allied military resources are used.

C. Relationship to DoD FDR Operations. The NATO support outlined above is relevant to the military commander in a limited number of situations.

1. First, the potential exists for an overseas U.S. commander to receive a request from his host country to respond to a civil emergency (e.g. FDR situations via NATO processes). The commander's role under these circumstances would be defined and limited by the HN's request; his specific mission in the affected country; and his operational/tactical guidance. The likelihood of a commander receiving such a request, however, is low. Civil NATO support is typically requested and received by civilian authorities, completely separate from the military's chain of command. Recognize that NATO member countries are not normally going to be faced with a disaster that overwhelms their local capacity such that foreign military assistance is needed. Thus, the situation would have to be especially grave and suitable for a military response. The more likely situation that a deployed commander could be faced with is the decision to use immediate response authority in a civil emergency (i.e., on-scene commander "72 hour" authority). If this situation occurred, the utilization of immediate response authority would likely be limited by the NATO ROE and tactical guidance.

2. The second situation would involve a request by a member State to NATO for civil support. For example and as mentioned above, the USG requested NATO relief support during Hurricane Katrina in the form of food, medical, and logistical supplies. Following the request, multiple NATO countries offered support, and NATO eventually approved transport of the requested supplies to the U.S. Once in the United States, Federal Emergency Management Agency (FEMA) coordinated the physical delivery of the supplies to the necessary locations. While this particular NATO civil support operation did not involve the U.S. military, it certainly could have. In the case of NATO assistance in the U.S., the law and policy surrounding such a response would be guided by the DoD's domestic operations policy.[50]

V. COMMON OPERATIONAL LAW CONSIDERATIONS

A. Introduction. This section is merely a primer of common issues encountered by Judge Advocates during major FDR operations and in the context of out-of-cycle FHA projects. A Judge Advocate should recognize that each FDR operation is a complex and dynamic undertaking with a host of players and that each situation will require thorough analysis.

1. It is important to understand that these large-scale FDR missions, especially those crossing the threshold for DoD involvement, represent high-visibility USG undertakings. A lot of scrutiny will be applied by Congress, the Office of Management and Budget (OMB), the Government Accountability Organization (GAO), and various Inspector General Offices.

[50] *See* U.S. DEP'T OF DEFENSE, DOD MANUAL 3025.01, DEFENSE SUPPORT OF CIVIL AUTHORITIES, vols. 1-3 (Aug 2016).

2. AARs from recent FDR operations, especially if from the same country or region, could serve as an additional resource. See the online references and databases included as appendix A at the end of this chapter or contact CLAMO for assistance in locating relevant AARs.

3. Some overarching lessons:

a. Detailed records of expenditures are critical to the reimbursement process.

b. Validate all DoD tasks. OFDA will be using a Mission Tasking Matrix (MiTaMS) and all DoD tasks should be reflected there.

c. Pull not push. Do not force materials into an area if not requested. The Judge Advocate needs to serve as a bulwark against this mentality.

d. Whenever possible, plan for the mission together with the other USG entities.

e. Plan for transition and Phase-Out from the start of the operation. DoD cannot get involved in something they cannot quickly extricate from.

f. Engage early, and often, with the CCMD, OSD, OFDA/USAID representative and the relevant U.S. Embassy.

B. DoD Relief Operation Timeline and Parameters. Judge Advocates participating in an FDR mission need to be aware of the parameters of the DoD role in the operation and the unintended consequences that can result from providing assistance outside of those parameters. The immediate relief period typically lasts anywhere from six weeks to two months and is chiefly focused on saving lives within the affected country. If the U.S. spearheads long-term development projects in the affected country after the immediate relief period, then those efforts would fall under the authority of other USAID entities. Hence, the duration of DoD FDR operations will almost always comprise only a subset of the overall USG timeline. If called upon in a crisis, U.S. military forces will be some of the first responders on the scene, but they should also be among the first to depart as well. This timeline should be communicated early and often to the military leadership.

1. This mentality aligns with the international community's guidelines on use of the military in FDR. OFDA, the wider international relief community, and often HN officials in the country effected tend to display unease about the FDR operations appearing overly militaristic. Additionally, these are operations which lend themselves to the proverbial mission creep. In the affected countries, there are frequently NGO's already operating on the ground that will be in the best position to offer the right relief in the right places. DoD personnel often will be bombarded with requests for assistance outside of the approved channels and should therefore be prepared to refer these RFA's to the DART.

a. The DoD has defined FDR as "assistance that can be used immediately to alleviate the suffering of foreign disaster victims."[51] Examples of permissible assistance includes but are not limited to: the rescue and evacuation of victims; the provision and transportation of food, water, clothing, medicines, beds, and bedding, temporary shelter, the furnishing of medical equipment, medical and technical personnel; and repairs to essential services.

b. By contrast, examples of DoD support which are likely to be found outside the scope of DoD's FDR mission and/or outside the scope of humanitarian assistance include: long term reconstruction projects;[52] creation/improvement of transportation infrastructure that is not necessary to accommodate the delivery of the humanitarian relief efforts; repairing of infrastructure not damaged by the disaster; facilitating law enforcement or judicial organizations (e.g., police).[53] All of these are examples of projects that are not immediately related to the

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[51] U.S. DEP'T OF DEFENSE DIR. 5100.46, FOREIGN DISASTER RELIEF (6 Jul 2012).

[52] *See* CENTER FOR LAW AND MILITARY OPERATIONS AFTER ACTION REPORT, U.S. PACIFIC COMMAND/U.S. PACIFIC FLEET – OPERATION TOMODACHI, pgs. 7-8 (Mar 2012) (unit deployed Mar 2011 – Feb 2012). An on-scene commander wanted to respond positively to a Japanese request to clean schools so local children could get back to a normal routine. OSD determined this effort was not an immediate disaster relief activity and therefore not payable with OHDACA. Because the school cleaning request was relatively low cost, ultimately it was funded with a service-funded community relations program.

[53] However, during Operation United Response (OUR) in Haiti in 2010 did receive concurrence from OSD for the JTF to supply the local Haitian police with MREs and water so they could staff positions and conduct basic police activities. The JTF viewed the local police as an organization vital to the nation's stability. Without logistics support, in particular the supply of food items, it did not appear that they could get a majority of their force to remain at work and fulfill this vital role. *See* CENTER FOR LAW

disaster relief mission. The farther the mission strays from the provision of immediate disaster relief, the more risk the commander assumes in using OHDACA.

2. The main documents which establish the parameters of the mission are the SECDEF memorandum authorizing the CCMD to engage in the mission, as well as any OPORDs, EXORDs, or other concept of operations published by the CCMD or the JTF Commander. These documents define the types of support that may be provided and anything outside of what is listed is not permissible without a separate authority. Judge Advocates participating in an FDR mission should obtain copies of these documents as they are the key to understanding the mission parameters. The order for the military to leave might come from the HN or the Ambassador, or it might have been enumerated in the SECDEF memo.

3. Naval Sea Basing. In FDR operations where there is an active Naval component, it is often advantageous, either from the outset or as the JTF transitions out, to set up command and control off-shore. FDR operations ideally are suited for sea basing because of the mobility, self-sustainment, and, most importantly, minimal footprint ashore. Sea based forces engaged in FDR operations reduce the demand on the affected country's airfields and other infrastructure. This allows for more support of the stricken people and government as well as for other aid agencies. The sea base also arrives at the affected area with full command and control capabilities operating rather than having the time lag required by other forces and agencies that require setup time to be operational.[54]

C. Fiscal Law. Understanding and then overseeing the OHDACA funding source is one of the most important aspects for a Judge Advocate in a FDR operation. The regulatory framework appears straightforward: the proposed activity must have a humanitarian nexus (e.g., food, water, shelter, and health/medicine); HA must serve civilian populations; HA may not primarily benefit military or paramilitary personnel or combatants; and, the activity may not be reconstruction/developmental in nature.[55] A specific FDR operation, in either an OPORD or FRAGO, will typically contain more detailed parameters, namely: whether the military has a unique capability to offer; and, whether DoD is compelled to step forward to meet immediate needs that otherwise would go unfilled.[56] However, interpreting this language in the context of an FDR mission, where HN and NGO representatives are constantly asking military commanders for support, will be difficult. Judge Advocates play a crucial role in carefully tying requests to a proper purpose, establishing justifications for projects, and building a robust audit trail.[57] DSCA or DoD may object to a COCOM's use of OHDACA funds if the proposed or accomplished assistance is poorly or inadequately justified as falling with the assigned HA mission and complies with all DoD HA guidance. It may be challenging to apply the broad and general HA guidance in the DSCA Security Assistance Management Manual to your specific situation. With the concurrence of the applicable CCMD legal office, you may directly contact DSCA Office of General Counsel for advice on any issues that merit further legal scrutiny.

1. Minimal Cost and Out-of-Cycle Projects. These issues normally come up in the context of FHA projects pursued by the CCMD, yet not included in the annual OHDACA allocation plan. Out-of-cycle simply refers to those requested outside of the annual CCMD plan; they could be minimal cost or those HA projects requested in the context of an FDR or contingency operation. Minimal cost projects are conducted under the auspices of the 10 USC 256l (a)(l) language that allows for providing "other humanitarian purposes worldwide." The minimal cost project upper limit is set by OSD and currently is $15,000 (unless modified by a waiver from DSCA); these can be approved at the CCMD level.[58]

AND MILITARY OPERATIONS AFTER ACTION REPORT, JOINT TASK FORCE – HAITI, at pgs. 5-6 (Aug 2010) (unit deployed Mar - May 2010).

[54] The most recent example of FDR sea basing occurred in 2016 when JTF-Mathew transited from inland Haiti to onboard the USS Iwo Jima (LHD-7) toward the end of the Hurricane Matthew response. One consideration with sea basing is whether the CCMD has limits as to who can receive treatment on Navy ships at-sea and to what extent. The CCMD SJA should be consulted. *See* CENTER FOR LAW AND MILITARY OPERATIONS AFTER ACTION REPORT, U.S. SOUTHERN COMMAND – JOINT TASK FORCE MATHEW (Mar 2017) (operation occurred in Oct 2016).

[55] Office of the Secretary of Defense Cable: Policy Guidance for DoD Humanitarian Assistance Programs, Including those Activities Funded by the OHDACA Appropriation, paras. 3-4 (released 10 Aug 2016).

[56] CENTER FOR LAW AND MILITARY OPERATIONS AFTER ACTION REPORT, U.S. ARMY AFRICA/SOUTHERN EUROPEAN TASK FORCE – OPERATION UNIFIED ASSISTANCE, pgs. 11-14 (Mar. 2015) (unit deployed Sep 2014 – Oct 2014).

[57] *See*, U.S. DEP'T OF DEFENSE, FINANCIAL MANAGEMENT REGULATIONS, DoD 7000.14-R, Vol. 12, Ch. 23 (last revised June 2009). Contains guidance on accounting and audit requirements. For audit purposes, CCMDs are required to report all costs pursuant to these OHDACA authorities. Annex 1 is a template for reporting the "incremental costs" of a contingency operation.

[58] OSD HA Policy Cable, *supra* note 2, at ¶ 5(G).

a. Overseas Humanitarian Assistance Shared Information System (OHASIS). All minimal cost and any out-of-cycle projects must be nominated through OHASIS. It is important that the proper accounting and tracking in order to document completion and compliance with the proper goals of OHDACA. These projects are also tracked to avoid repetitive aid that does not address issues or properly complement assistance provided by USAID.[59]

b. Project Splitting. Incremental implementation or project splitting by dividing one project into two less expensive ones is prohibited. However, at times the use of separate contracts might be necessary to meet its mission requirements. Project splitting is only a violation when it is being done to reduce costs below statutory limitations, contracting thresholds, or other project approval levels.[60] A CCMD may not divide a single project into multiple projects as a means to fall within the HA minimal cost project threshold.

2. Property Disposition Issues During FDR completion and Redeployment. In the FHA context, and especially in the case of an FDR operation, questions may arise about how to dispose of, or give away, unwanted DoD property by redeploying DoD forces. Redeploying DoD forces may also seek to retain OHDACA funded equipment that was purchased by DoD forces who needed such equipment to execute the HA mission.

a. OHDACA funded equipment/supplies purchased for DoD use to execute the HA mission. Since OHDACA funds are specifically purposed for addressing overseas HA needs and not to benefit U.S. forces, a DoD unit cannot just keep OHDACA-funded equipment or personal property at the conclusion of the FDR mission.[61] If a DoD unit opts to retain OHDACA-procured equipment for use in future DoD missions, it will be necessary to accomplish a cost swap to ensure that the full acquisition cost for the retained equipment is paid for with O&M funds instead of OHDACA. The CCMD can avoid the need for a cost swap by either: (1) seeking permission to abandon the OHDACA-funded equipment at conclusion of the FDR mission; or, (2) by declaring the property excess and having the CCMD pursue an excess property project pursuant to 10 USC 2557. If OHDACA-procured property for DoD use is declared excess, pursuant to 10 USC 2557, the excess property must be transferred to DoS (typically via the U.S. Embassy), who will then take responsibility for distributing (sometimes through the HN) to a charitable organization or NGO that supports the population.[62] In order for excess property to be properly recorded DoD must turn over property to Defense Logistics Agency (DLA) Disposition Services (formerly known as DRMS/DRMO) for processing.[63]

b. Excess Property Procedures. In the context of FHA or an FDR operation, regulations allow flexibility in declaring, acquiring, and transporting excess property. Ideally before an operation commences, the Judge Advocate should consult with CCMD HA Program Manager, DLA representative, and the local USAID representative for area-specific processes. These expedited processes do not eliminate the requirement for proper record keeping of all transactions surrounding the transfer, to include filling all associated documentation with DLA and in OHASIS. In practice, the excess property or medical supplies used at a given site (e.g., a hospital or clinic) are often turned over to a representative at that site and the documentation is completed contemporaneously.[64]

c. Improper Foreign Assistance. Without securing proper authority before disposing of U.S. taxpayer purchased property to a foreign entity, the JTF risks engaging in improper foreign assistance. The intended

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[59] CENTER FOR LAW AND MILITARY OPERATIONS AFTER ACTION REPORT, COMBINED JOINT TASK FORCE – HORN OF AFRICA, pg. 8 (Sep. 2016) (deployed Jul 2015 – Jun 2016).

[60] *See* U.S. Dep't of ARMY REG. 420-1 – ARMY FACILITIES MANAGEMENT, § 2-15 (Aug 2012).

[61] CENTER FOR LAW AND MILITARY OPERATIONS AFTER ACTION REPORT, U.S. ARMY AFRICA/SOUTHERN EUROPEAN TASK FORCE – OPERATION UNIFIED ASSISTANCE, pg. 16 (Mar 2015) (unit deployed Sep 2014 – Oct 2014).

[62] DSCA SAAM MANUAL, *supra* note 4, at chapter 12, C12.6.

[63] U.S. DEP'T OF DEFENSE, DEFENSE MATERIEL DISPOSITION MANUAL 4160.21-M – DISPOSAL GUIDANCE AND PROCEDURES, Vol. 1, 22 Oct 2015.

[64] CENTER FOR LAW AND MILITARY OPERATIONS AFTER ACTION REPORT, U.S. PACIFIC FLEET – PACIFIC PARTNERSHIP 2016, at pgs. 9-10 (Dec 2016) (unit deployed Jul 2016 – Sep 2016); *See also*, CENTER FOR LAW AND MILITARY OPERATIONS AFTER ACTION REPORT, U.S. ARMY AFRICA/SOUTHERN EUROPEAN TASK FORCE – OPERATION UNIFIED ASSISTANCE, pg. 16 (published Mar 2015) (unit deployed Sep 2014 – Oct 2014). This unit used the authority of 40 U.S.C. Sec. 701(b)(2)(B) which allows the head of an executive agency to "dispose of foreign excess property in a manner that conforms to the foreign policy of the U.S." (informally called "FEPP" authority for "foreign excess personal property," or "FERP" authority for "foreign excess real property").

recipient can also be a significant consideration, especially if it is a HN government entity or part of their security forces.[65]

3. DoD movements prior to CCMD HA mission tasking. Sometimes when a large scale disaster strikes, such that DoD anticipates being requested to assist, maritime assets will be pre-positioned or supplies will be pre-staged.[66] While the placement of DoD authorities is within DoD's purview, the cost of deploying DoD forces prior to when a CCMD is directed to execute a FDR mission may not be reimbursed with OHDACA funds.

D. Force Protection. This issue relates to JTF active duty personnel and other humanitarian relief personnel, especially if often working side-by-side with U.S. Forces. Though FDR missions usually occur in a permissive environment, issues such as ROE, weapons posture, and general safety remain a sensitive and justifiable concern for commanders. Quite often tension arises with the desires of the HN officials who have unease about a foreign military force walking around with weapons.

1. Engage CCMD and U.S. Embassy Country Team Early. The starting point for ROE and RUF development for an FDR mission is the Standing Rules of Engagement (SROE) and Standing Rules for the Use of Force (SRUF). Because the mission is not offensive in nature, the main concerns are the rules for self-defense of personnel and defense of designated property. Judge Advocates should work ahead of time to begin identifying which property or equipment needs to be designated for self-defense purposes and which level of command bears the responsibility for the designation. Supplemental measures and the overall proposed JTF ROE will have to be approved prior to promulgation through appropriate channels (e.g., CJSC, SECDEF).[67]

a. HN Concurrence. The HN government will likely define the force protection measures that they will accept. The HN controls the importation of weapons into its territory, therefore it exercises a substantial amount of control over ROE development. The HN may insist on minimal force protection measures out of concerns for the negative perception, both internally and externally, that could be created by having an armed foreign military moving through the population, especially during a time of crisis and confusion which is often created by the disaster event. The HN may even insist that U.S. Forces not carry weapons openly but instead rely on local security forces for protection.

b. If at any point the JTF Commander feels that HN security measures are not sufficient to guarantee the safety of DoD personnel participating in the mission this should be communicated to higher as it negates one of the DoD criteria for participation in an FDR mission.

2. ROE Working Group. Although the ROE development is an operations function and is generally the responsibility of the cognizant G-3/J-3, Judge Advocates will often be tasked with drafting the ROE and/or provide critical input when developing operations orders. Judge Advocates with ROE drafting responsibility should form a working group early. Topics analyzed should cover weapons posture, designations (who can carry, who cannot), escalation of force measures, when/if lethal force would be authorized, and ensuring any bilateral agreements or diplomatic notes with the HN encompass all the issues necessary to maintain adequate security.[68] Other considerations may include: alignment with ROE of other participating countries; whether designated personnel have necessary small arms qualifications; when/if any Sailors at sea would be designated to carry arms; approval authority for Riot Control Agents (RCA) and or other non-lethal measures; and, whether temporary detention might be necessary.[69] In a very permissive environment, the ROE will probably look like Rules for the Use of Force (RUF).

3. ROE Alignment and Training. To the extent possible, all units participating in the mission should use the same ROE in order to prevent any confusion and to ensure that all units are supporting the goals set by the JTF commander. In a large FDR operations with other participating countries, there will of course be at least some caveats. Judge Advocates should identify all partner nations and/or troops working under the UN mandate and

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[65] CENTER FOR LAW AND MILITARY OPERATIONS AFTER ACTION REPORT, JOINT TASK FORCE – HAITI, at pg. 9 (Aug 2010) (unit deployed Mar - May 2010).
[66] CENTER FOR LAW AND MILITARY OPERATIONS AFTER ACTION REPORT, U.S. NAVY FLEET FORCES COMMAND – OPERATION UNIFIED RESPONSE, pgs. 7-8 (Mar 2010) (unit deployed Jan 2010-Feb 2010).
[67] JOINT PUB. 3-29, *supra* note 1, at chapter IV, appendix A.
[68] CENTER FOR LAW AND MILITARY OPERATIONS AFTER ACTION REPORT, U.S. ARMY AFRICA/SOUTHERN EUROPEAN TASK FORCE – OPERATION UNIFIED ASSISTANCE, pgs. 4-7 (Mar 2015) (unit deployed Sep 2014 – Oct 2014).
[69] CENTER FOR LAW AND MILITARY OPERATIONS AFTER ACTION REPORT, JOINT TASK FORCE – HAITI, at pgs. 2-4 (Aug 2010) (unit deployed Mar - May 2010).

provide operational planners with a resource distinguishing the differences between U.S. and multinational ROE.[70] As with any operation, to the extent time allows Judge Advocates should use the completed mission-specific ROE to develop scenario based training on the proper use of less than lethal force, and protection of people and places. Create unclassified and releasable ROE materials to the extent possible.

E. International Agreements. Because an FDR mission occurs within sovereign territory of another nation, many aspects of the mission will be affected by local laws as well as any agreements that the HN has entered into with the U.S. Pre-existing and negotiated agreements will affect entry of humanitarian personnel, as well as the legal issues that pertain to the importation of humanitarian goods and materials.

1. Overview. The most common types of agreements that pertain to an FDR mission include: Status of Forces Agreements (SOFA), Visiting Forces Acts (VFA), and Diplomatic Notes.

a. SOFA. An agreement between the HN and the U.S. which defines the legal status of U.S. Forces when they are deployed in the territory of the HN. This is the most comprehensive agreement and is usually reserved for countries in which the U.S. military has a standing presence.

b. VFA. Also known as a Visiting Forces Agreement, a VFA serves to extend some level of protection to U.S. Forces where there is no SOFA. A VFA usually provides many similar protections to those found in a SOFA, however, because it is meant to cover forces temporarily visiting the country, a VFA will likely not provide as much protection as a SOFA.

c. Diplomatic Notes. In situations where there is no pre-existing SOFA or VFA with the HN and there is insufficient time to negotiate one, the exchange of diplomatic notes may be used. For purposes of an FDR mission, diplomatic notes contain official agreements between the HN and the USG governing how the mission will be conducted.

2. Pre-deployment Preparation. Judge Advocates should obtain and read diplomatic notes or existing SOFAs before entering an area of operations. DoS and the CCMD legal office should have the most up-to-date information. CLAMO and the Army National Security Law Law Division (NSLD) also maintain a document library.[71] Also be aware of the start and end dates for any agreements.

3. Planning and Negotiation. DoS is the lead agency for negotiating an international agreement,[72] but they need injects and requirements from the JTF Commander, who will rely on input and advice from the Judge Advocate. If JTF personnel do engage in preliminary discussions with HN officials over international agreements, the CCMD and DoS representatives need to be notified. DSCA Office of General Council needs to review any proposed agreement between DoD and the HN if the subject of the proposed agreement concerns the use of OHDACA funds. For planning purposes, Judge Advocates participating in the mission should consider whether any pre-existing agreements, or under negotiation agreements, cover issues such as: entry and departure permits (visa requirements or waiver);[73] freedom of movement within the HN; recognition of medical credentials; criminal jurisdiction issues; overflight issues including overflight of neighboring countries; terms on importation and customs (i.e., tariff free import for military supplies); claims against the U.S. (ideally a waiver); and, any terms related to security protections, in particular protections for civilians who are employed by or accompanying the U.S. Forces.

F. Relief messaging. The strategic impetus for U.S. FHA and FDR operations centers not just on alleviating suffering, but also gaining trust and influence around the globe. The statements released by DoD and the operations chosen as highlights have a tremendous impact on the local populous and regional partners. Moreover, the U.S. public often does not understand that giving money to implementing partners is the best way to help. Sending large amounts of commodities creates logistics problems and often these supplies are not what is most needed. Experience has also demonstrated that public statements from USG officials, those within DoD included, concerning

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[70] CENTER FOR LAW AND MILITARY OPERATIONS AFTER ACTION REPORT, U.S. NAVY FOURTH FLEET – OPERATION UNIFIED RESPONSE, pgs. 2-4 (Mar 2010) (unit deployed Jan-Feb 2010).

[71] Army International and Operational Law Division (IOLD) online document library, https://www.jagcnet.army.mil/Sites/io.nsf/homeLibrary.xsp, (AKO account required for CAC log-in).

[72] U.S. DEP'T OF STATE FOREIGN AFFAIRS MANUAL, Volume 11, Political Affairs, chapter 720 (25 Sep 2006). DoS authority to negotiate and conclude SOFAs rests with Circular 175 Procedure.

[73] CENTER FOR LAW AND MILITARY OPERATIONS AFTER ACTION REPORT, U.S. ARMY AFRICA/SOUTHERN EUROPEAN TASK FORCE – OPERATION UNIFIED ASSISTANCE, pgs. 2-3 (Mar 2015) (unit deployed Sep 2014 – Oct 2014).

humanitarian aid are sometimes misinterpreted as general pleas for any type of assistance, for example unneeded commodities and untrained volunteers.

1. Public Affairs Coordination. Judge Advocates should ensure persons speaking to the media understand DoD's role and key messages. Immediately make contact and set expectations with the DoD public affairs personnel assigned to the operation as well as the U.S. Embassy public affairs personnel. Emphasize to them how important their role is to the overall mission and request that they bring important issues to the attention of the Judge Advocates. In addition, help craft appropriate language for press statements, this is particularly important when the use of military forces are part of a larger USG response within a HN. The U.S. Embassy and military Public Affairs Offices likely will have promulgated guidance; Judge Advocates should review this also.

2. USAID has developed a message regarding donations, based on years of experience, to manage the public's response to overseas disasters. Embassies and OFDA personnel can assist with public statements, messages, and they can also provide information on properly vetted relief organizations accepting donations to serve the affected country. Also see the online resources listed at the end of this chapter.

3. Judge Advocates must ensure federal employees and active duty personnel follow ethics rules. Many federal workers want to raise money to assist with relief efforts. Judge Advocates should put out information on ways federal workers can donate to disaster relief in the workplace.

G. Contingency Operations and Aid through Foreign Militaries. The worse the security situation the more difficult delivery, equitable access, and compliance with OHDACA requirements becomes. These are typically not going to be large FDR operations, but rather out-of-cycle FHA projects in contingency operations, typically under the authority of 10 USC 2561(a)(1).[74] Even in a contingency operation, remember that, unless an exception applies, support may be provided only at the request of DoS or USAID, and only upon the subsequent approval of DoD (typically through the EXECSEC Memo process). DoD law and policy states that humanitarian assistance may not benefit military or paramilitary personnel or combatants. However, if necessary, DoD OHDACA funded materials may be provided through foreign militaries if the ultimate beneficiary is the civilian population and the foreign military has an official role in providing humanitarian services directly to the public (e.g., an emergency response or medical mission).[75] While any DoD assistance to foreign military or security forces require human rights vetting,[76] using foreign security forces to distribute aid to the civilian populace is not considered assistance to the foreign security forces. Leahy vetting would be required if the foreign security forces would also be consuming or benefiting from a portion of the provided assistance.

1. Non-Permissive Environments. Some operations where the USG views a humanitarian need might be so hostile as to hinder the ability of USG civilian entities to operate. Gaining concurrence from the HN might also be complicated, especially if it is not clear which HN entity is the recognized government. In these situations 10 USC 2561(a)(1) usually will be the authority with the most flexibility in delivering assistance, however some high-level exceptions to policy might be required.[77]

2. Equitable Access. Even in a less than permissive environment, DoD policy still requires FHA projects to benefit the civilian population of the HN and be distributed based on an objective assessment of humanitarian needs. FHA cannot be allocated based upon any considerations of race, ethnic origin, religion, or to show favor toward one group over another.

3. Support to Foreign Militaries. Sometimes in the context of these operations a foreign military might be involved as the recipient of what seems like an FHA request. Keep in mind that funding sources other than

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[74] *See* SECDEF Memorandum to U.S. Central Command, Authorization of DoD Humanitarian Assistance/Disaster Relief Activities to Support Iraq's Internally Displaced Persons, appendix C (16 Sep 2015).

[75] OSD HA Policy Cable, *supra* note 2, at para. 5(E).

[76] Foreign Assistance Act, *supra* note 16, at § 620M; s*ee also* CENTER FOR LAW AND MILITARY OPERATIONS AFTER ACTION REPORT, 101ST AIRBORNE DIVISION – OPERATION UNIFIED ASSISTANCE, pg. 3 (May 2015) (unit deployed Oct 2014 – Mar 2015). If significant assistance through a foreign military is contemplated, the CCMD might choose to release guidance clarifying that Leahy Vetting is not required for any interactions with the HN security forces. This guidance would not alter the law and policy concerning OHDACA funding.

[77] *See* CENTER FOR LAW AND MILITARY OPERATIONS AFTER ACTION REPORT, SPECIAL OPERATIONS JOINT TASK FORCE (SOJTF) OIR 2016 (May 2017) (classified version available upon request to CLAMO).

OHDACA and/or use of an Acquisition Cross-Servicing Agreement (ACSA) are available.[78] Since contingency operations can be complex and not all countries will have an ACSA with the U.S., it is imperative that the JTF understand the ACSA relationships existing within the operating area.

H. Relationships with NGOs. Ideally MoUs are constructed with each significant NGO in order to provide consistency, and then each individual NGO might have a one-page addendum addressing issues specific to each.[79] Often in fast moving FDR operations DoD elements will not have the ability to craft MoUs and/or they will be working with NGOs without much experience with the military. Even in these situations NGOs will have been vetted by USAID as capable implementing partners, at least if they are distributing aid paid for by USG. DoD does not have any authority to provide grant assistance to an NGO. DoD would be able to contract with an NGO but not all NGOs have the ability or wiliness to serve as a DoD contractor. Other issues that may arise while working with NGOs include, but are not limited to: gift acceptance; when non-DoD personnel can embark as passengers in helicopter and fixed wing aircraft (waiver likely required); information sharing with NGOs; utilization of liaison officers; and, the transportation of NGO personnel and supplies.[80]

I. Status of Affected Population. Correct terminology and application of those affected by the disaster is extremely important. In the aftermath of the earthquake in Haiti in 2010, there were several instances where the press quoted U.S. officials as using the terms "refugee" and/or "asylee" when referring to survivors of the Haiti earthquake seeking to leave Haiti.[81] Neither of these terms applied to the situation. These various terms have legal ramifications under domestic and international law. In general, members of the population forced to flee within the country are "displaced" or "earthquake affected" persons; those interdicted at sea are "migrants." Political asylum is a request for protection and sanctuary by a foreign national because of persecution or fear of persecution on account of race, religion, nationality, membership in a particular group, or political opinion. Temporary refuge is a request for protection by a foreign national for humanitarian reasons under conditions of urgency in order to secure the life or safety of that person against imminent danger.[82] Judge Advocates should inform themselves of any guidance issued by DoS Bureau of Population, Refugees, and Migration (PRM) related to any area or specific operation. This is an important legal training topic or there is a risk that DoD personnel will inadvertently encourage requests for asylum.

VI. REFERENCES

A. 10 USC § 401, Humanitarian and Civic Assistance in Conjunction with Military Operations

B. 10 USC § 402, Transportation of Humanitarian Relief Supplies to Foreign Countries

C. 10 USC § 404, Foreign Disaster Relief

D. 10 USC § 407, Humanitarian Demining Assistance

E. 10 USC § 2561, Funded Transportation of Humanitarian Assistance

F. 10 USC § 2557, Excess Nonlethal Supplies for Humanitarian Aid and Related Forms of Assistance

G. 22 USC § 2318(a)(1), Presidential Drawdown Authority (relating to international disaster assistance)

H. Foreign Assistance Act of 1961, P. L. 87-195, as amended through P.L. 114–195, enacted 20 Jul 2016

I. Exec. Order No. 12966, Foreign Disaster Assistance, Vol. 60 Fed. Reg. No. 137 (14 Jul 1995)

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[78] CENTER FOR LAW AND MILITARY OPERATIONS AFTER ACTION REPORT, JOINT TASK FORCE – HAITI, at pg. 7 (Aug 2010) (unit deployed Mar - May 2010).

[79] CENTER FOR LAW AND MILITARY OPERATIONS AFTER ACTION REPORT, U.S. PACIFIC FLEET – PACIFIC PARTNERSHIP 2012, at 3 (Dec 2012) (unit deployed Apr 2012 – Sep 2012).

[80] JOINT PUB. 3-29, *supra* note 1, at chapter II, para. 6; CENTER FOR LAW AND MILITARY OPERATIONS AFTER ACTION REPORT, U.S. NAVY FOURTH FLEET – OPERATION UNIFIED RESPONSE, pgs. 4-5 (Mar 2010) (unit deployed Jan 2010-Feb 2010); CENTER FOR LAW AND MILITARY OPERATIONS AFTER ACTION REPORT, U.S. NAVY CARRIER STRIKE GROUP ONE – OPERATION UNIFIED RESPONSE, pgs. 2, 7 (Apr 2010) (unit deployed Jan 2010-Feb 2010).

[81] CENTER FOR LAW AND MILITARY OPERATIONS AFTER ACTION REPORT, U.S. NAVY CARRIER STRIKE GROUP ONE – OPERATION UNIFIED RESPONSE, pgs. 4-5 (Apr 2010) (unit deployed Jan 2010-Feb 2010); CENTER FOR LAW AND MILITARY OPERATIONS AFTER ACTION REPORT, U.S. NAVY SECOND FLEET – OPERATION UNIFIED RESPONSE, pgs. 1-2 (Feb 2010) (unit deployed Jan 2010-Feb 2010).

[82] U.S. SECRETARY OF NAVY INST. 5710.22B, ASYLUM AND TEMPORARY REFUGE (19 Jun 2014).

J. National Security Presidential Directive 44: Management of Interagency Efforts Concerning Reconstruction and Stabilization (7 Dec 2005)

K. U.S. DEP'T OF DEFENSE DIR. 5100.46, FOREIGN DISASTER RELIEF, (6 Jul 2012)

L. U.S. DEP'T OF DEFENSE DIR. 2010.9, ACQUISITION AND CROSS-SERVICING AGREEMENTS (30 Sep 2016)

M. U.S. DEP'T OF DEFENSE INST. 2205.02, HUMANITARIAN AND CIVIC ASSISTANCE (HCA) ACTIVITIES (23 Jun 2014)

N. U.S. DEP'T OF DEFENSE, FINANCIAL MANAGEMENT REGULATIONS, DOD 7000.14-R, (last revised June 2009)

O. U.S. DEP'T OF DEFENSE, MANUAL 3025.01, DEFENSE SUPPORT OF CIVIL AUTHORITIES, (Aug 2016)

P. U.S. DEP'T OF DEFENSE, DEFENSE MATERIEL DISPOSITION MANUAL 4160.21-M – DISPOSAL GUIDANCE AND PROCEDURES, 22 Oct 2015

Q. DSCA SECURITY ASSISTANCE MANAGEMENT MANUAL (SAMM), chapter 12, last revision 14 July 2016. Available at: http://www.samm.dsca.mil/chapter/chapter-12

R. U.S. DEP'T OF DEFENSE, JOINT PUB. 3-29, JOINT DOCTRINE FOR FOREIGN HUMANITARIAN ASSISTANCE (3 Jan 2014)

S. U.S. DEP'T OF DEFENSE, JOINT PUB. 3-07.6, JOINT TACTICS, TECHNIQUES, AND PROCEDURES FOR FOREIGN HUMANITARIAN ASSISTANCE (15 Aug 2001)

T. DOD JOINT TASK FORCE COMMANDER'S FDR HANDBOOK, GTA 90-01-030 (13 Jul 2011)

U. U.S. DEP'T OF NAVY, WARFARE DEVELOPMENT COMMAND (NWDC) TACMEMO 3-07-6-05, HA/DR OPERATIONAL PLANNING (Aug 2005)

V. U.S. CHIEF OF NAVAL OPERATIONS INST. 5726.3D, PROJECT HANDCLASP (26 Sep 2016)

W. OFDA FIELD OPERATIONS GUIDE FOR DISASTER ASSESSMENT AND RESPONSE, version 4 (Nov 2005)

X. Office of the Secretary of Defense Cable: Policy Guidance for DoD Humanitarian Assistance Programs, Including those Activities Funded by the OHDACA Appropriation (released 10 Aug 2016)

Y. USAID's Office of U.S. Foreign Disaster Assistance: Guidance for Disaster Planning and Response - Fiscal Year 2017, (cable released 7 Oct 2016)

Z. Oslo Guidelines on The Use of Foreign Military and Civil Defense Assets in Disaster Relief, Nov 2007

AA. The Code of Conduct for the International Red Cross and Red Crescent Movement and Non- Governmental Organizations (NGOs) in Disaster Relief, 1994

VII. ONLINE RESOURCES

A. ReleifWeb (http://reliefweb.int/). The leading humanitarian information source on global crises and disasters. It is a specialized digital service of OCHA.

B. Humanitarian Response (https://www.humanitarianresponse.info/). Another operational website fostered by OCHA. Its goal is to be the place where the disaster response community can share, find, and collaborate on information to inform strategic decisions.

C. UN Logistics Cluster (http://www.logcluster.org/). A field-based inter-agency logistics information platform to coordinate operations, support operational decision-making and improve the predictability, timeliness and efficiency of the humanitarian emergency response. Where necessary, the Logistics Cluster also facilitates access to common logistics services.

D. U.S. Geological Survey (USGS) (https://earthquake.usgs.gov/earthquakes/). Provides real-time alerts regarding earthquakes around the world.

E. National Hurricane Center (http://www.nhc.noaa.gov/). Provides real-time alerts regarding hurricanes, tropical storms, and other significant rains around the world.

F. UN Office for the Coordination of Humanitarian Affairs (OCHA) (http://www.unocha.org/). Contains information management resources and guidance on civil-military relations (http://www.unocha.org/themes/humanitarian-civil-military-coordination).

G. USG Foreign Assistance info (http://beta.foreignassistance.gov/). A website for improving transparency in U.S. foreign assistance spending. Transparency and open data enable stakeholders and the general public to better understand U.S. foreign assistance investments around the world, make foreign assistance more useful for development, and help hold ourselves more accountable.

H. Defense Security Cooperation Agency (DSCA) (http://www.dsca.mil/). In particular their Security Assistance Management Manual (SAMM) is available in a navigable online format (http://www.samm.dsca.mil/chapter/chapter-12).

I. CLAMO and Army NSLD Document Library, https://www.jagcnet.army.mil/Sites/io.nsf/homeLibrary.xsp. AKO account required for CAC log-in. This database contains AARs, SOFAs, and related operational law resources for the Judge Advocate. Requests for information can also go directly to CLAMO at (434) 971-3145 or usarmy.pentagon.hqda-tjaglcs.mbx.clamo-tjaglcs@mail.mil. CLAMO Navy JAG Corps SharePoint site (https://portal.secnav.navy.mil/orgs/JAG/10/SitePages/CLAMO.aspx).

CHAPTER 15

NONCOMBATANT EVACUATION OPERATIONS (NEO)

I. INTRODUCTION

A. **Noncombatant Evacuation Operations (NEO)**. Defined as operations "whereby noncombatant evacuees are evacuated from a threatened area abroad, which includes areas facing actual or potential danger from natural or manmade disasters, civil unrest, imminent or actual terrorist activities, hostilities, and similar circumstances, that is carried out with the assistance of the Department of Defense (DoD)."[1] Typically, if U.S. citizens need to leave a country the Department of State (DoS) will issue an ordered departure. When DoD is requested to help then it is referred to as a military-assisted ordered departure, military assisted NEO, or simply a NEO. A NEO occurs infrequently, but carries enormous diplomatic and strategic consequences. A crisis situation requiring a NEO will be heavily scrutinized and images of noncombatants in danger can carry a powerful message.

B. **Department of State (DoS) Supported Operations**. Within the host nation (HN), the Chief of Mission (COM) is the lead federal official for protection and evacuation of all U.S. noncombatant evacuees, including DoD dependents.[2] DoD has responsibility for preparing and implementing plans for NEO, and such plans must be integrated into corresponding DoS plans for evacuation of noncombatants. DoD is also responsible for assisting DoS in executing a NEO when militarily feasible and when requested by the Secretary of State (SECSTATE). The authority of the COM or principal officer of DoS to order evacuation does not extend to personnel of the U.S. armed forces not under COM authority, except as agreed upon between DoS and DoD.[3]

C. **Types of NEO and Nature of Evacuees**. A NEO can be a concurrent mission with other operations across the spectrum of conflict in a particular foreign country.[4] It can also be conducted gradually in phases of authorized departures or ordered departures.[5] Diplomatic or other considerations may make the use of the term NEO inadvisable and require the use of other terms for the operation instead. An authorized departure normally refers to a situation where 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. An ordered departure, which may or may not include DoD assistance, is where U.S. citizens with a connection to the military or government are ordered to leave the country. 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.

1. U.S. citizens who may be ordered to evacuate by competent authority include:[6]

a. Civilian employees of U.S. government agencies and their dependents, except that category as explained in 2a below (who can be assisted but typically not ordered); and

b. Military personnel of the U.S. armed forces and their dependents.

2. U.S. (and non-U.S.) citizens who may be authorized and/or eligible for assistance (but not necessarily ordered to evacuate) by competent authority include:

a. Civilian employees of U.S. government agencies and their dependents, who are residents in the country concerned on their own volition, but express the willingness to be evacuated;

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[1] JOINT PUB. 3-68, NONCOMBATANT EVACUATION OPERATIONS, GL-6 (18 Nov. 2015) [hereinafter JOINT PUB. 3-68]; DOD DICTIONARY OF MILITARY AND ASSOCIATED TERMS, 154 (January 2020) [hereinafter DOD DICTIONARY].
[2] DEP'T. OF DEFENSE DIRECTIVE 3025.14, EVACUATION OF U.S. CITIZENS AND DESIGNATED ALIENS FROM THREATENED AREAS ABROAD, 3 (26 Feb 2013) [hereinafter DODD 3025.14].
[3] JOINT PUB. 3-68, at Figure III-1, pg. 44 (depicts the chain of command for a NEO).
[4] Commonly a NEO will be executed concurrently with a Foreign Disaster Response (FDR) operation. *See*, CENTER FOR LAW AND MILITARY OPERATIONS AFTER ACTION REPORT, U.S. PACOM AND COMMANDER U.S. PACIFIC FLEET, at pgs. 1-4 (published 1 Mar 2012) (deployed Mar 2011 – May 2012).
[5] DODD 3025.14, at 3; JOINT PUB. 3-68, at IV-20 - IV-21; DOD DICTIONARY, at 162.
[6] DODD 3025.14, at glossary part II; JOINT PUB. 3-68, at IV-23 and IV-24.

b. Private U.S. citizens and their dependents;[7]

c. Military personnel and dependents of members of the armed forces of the United States not under COM authority, short of an ordered evacuation; and

d. Other designated personnel, including dependents of U.S. government civilian employees, and U.S. military personnel that do not fall into categories 1a and 1b, such as HN civilians and third country nationals whose lives are in danger.

II. DOD NEO PLANNING RESPONSIBILITIES AND CONSIDERATIONS

A. **DoD Planning and Preparation**. NEO operations typically require rapid responses and therefore rely on as much pre-planning as possible. Though DoS has overall planning responsibility for NEOs, due to the complexity of NEO operations and the U.S. interests involved, DoD retains significant duties in worldwide planning. Most of these planning responsibilities lie with the respective Combatant Command (CCMD).[8]

1. Assisting DoS representatives in the preparation of Embassy emergency action plans. Ensuring these plans are updated annually, that they adequately account for U.S. military facilities and personnel, and that they are properly distributed to subordinate military commands and other DoD entities.

2. Monitoring the capability and willingness of HN authorities to provide adequate protection for U.S. noncombatants. Relatedly, monitoring the local hostilities or civil disturbances which may endanger U.S. citizens.

3. Ensuring adequate provisions are made for the evacuation of all DoD noncombatants and, when appropriate, military personnel.[9] This includes contingencies for early return of dependents, voluntary authorized departures, voluntary assisted departures, and a NEO. In appropriate circumstances, SECDEF may authorize the evacuation of DoD noncombatants after consultation with the SECSTATE.

4. Preparing evacuation and protection capabilities, including transportation/lift requirements. Similarly, ensuring the availability of relatively safe holding or survival areas for staging evacuees during emergencies.

5. Exercising plans and capabilities as appropriate. This includes, in appropriate locations, conducting volunteer based exercises to prepare for a NEO. In these situations family members of military and DoD civilians (to include those DoD civilians who are not in positions designated as "emergency essential") are highly encouraged to participate to prepare for a potential NEO. Invited contractors, technical representatives, retirees, and their families are all encouraged to participate as well.

B. **Issues for Judge Advocates in Planning and Preparation**. Joint Publication 3-68 directs commanders to ensure Judge Advocates fully participate in all aspects of NEO planning and that a legal review be performed on all operational planning products, warning orders, commander's estimates, ROE, operation orders, execute orders, and other operational guidance to ensure compliance with applicable law and regulations.[10] Often however, Judge Advocates will only get deeply involved in NEO planning during an exercise or in response to a rising threat in a particular HN resulting in a warning order or similar measure. As such it is helpful to prioritize focus areas based on legal issues that have arisen in past NEO planning.

1. International Agreements. For a particular country it might not be clear which agreements are applicable or where to find them. Any existing HN agreements (i.e., Status of Forces Agreement, Defense Cooperation Agreement) need to be reviewed. [11] In addition, it is also important to develop an understanding of any agreements with allies that have a presence or at least some citizens present in the HN. Agreements documenting

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[7] Though private U.S. citizens cannot be ordered to evacuate, often these end up being the people for whom NEOs are conducted. They have a tendency to wait until the last minute when there is no longer commercial transportation available.
[8] DODD 3025.14, at Encl. 2.
[9] *See*, https://www.ready.navy.mil/be_informed/emergency_actions/oconus_actions/neo.html, for an example of measures a service undertakes to keep military members informed and ready in the event of a NEO.
[10] JOINT PUB. 3-68, at appendices A and B.
[11] Maneuver Support Center of Excellence (MSCoE) Observation Report (OR) from Exercise Ulchi Freedom Guardian 2016 (29 Nov 2016). Available on the Joint Lessons Learned Information System (JLLIS) as reference number 110201 (subset of larger initial impressions report).

relationships with Non-Governmental Organizations (NGO) operating in the country and those with countries that would serve as designated safe havens could also prove crucial to a successful NEO execution. If time permits work to alter or create agreements as needed, but only through DoS as that function is solely their responsibility.

a. NEO Initiation and Messaging. International agreements with partners within the HN might influence a decision to order a NEO, or a lesser type of citizen evacuation, and also might affect the terminology used in messaging the evacuation.

b. Military to Military Engagements. A decision from each of the participating nations is required before a NEO may be conducted with a multinational force. However, it might be possible to conduct military to military engagements to facilitate a U.S. only NEO, so long as no agreements (formal or informal) are inconsistent.[12]

c. Intelligence Sharing. Whether a NEO is a combined or U.S. only operation it is inevitable that the sharing of intelligence data with allies will occur; this is especially true if it is undertaken in a country where the U.S. military does not have as many assets as some of our allies.[13] These allies may have trusted sources on the ground with valuable information for the safe and efficient execution of a NEO. To the extent possible, decisions on the sharing of intelligence should be negotiated in advance of military deployment to the HN.

2. SOPs, Execute Orders, and Tasking Orders. Judge Advocates need to clear up potential ambiguities and conflicts before execution. Ensure, to the extent possible, that all activities along the evacuation route are clearly delineated between those performed by DoS personnel and those performed by the Joint Task Force (JTF). DoS and Embassy staff are responsible for verifying the eligibility of evacuees and they should conduct screenings at the Evacuation Control Centers (ECC). However, if dictated by the operating environment, the JTF should be prepared to perform functions that are normally executed by the DoS. Often issues arise related to DoD noncombatants.

a. Identification. Determine what other forms of identification (in addition to U.S. passports and military I.D. cards) are acceptable to DoS in identifying evacuees as U.S. citizens. Incorporate criteria into unit training SOPs. Non-U.S. citizen dependent spouses and other non-U.S. family members can complicate processing. During recent NEO exercises in the Philippines, procedures for processing alien family members of U.S. citizens were not well defined. Unit SOPs called for evacuees to be categorized as either U.S. or non-U.S. citizens, and as customary, families were to remain together. Evacuees often will not bring passports, making identification of non-U.S. citizens problematic. Non- U.S. citizen dependent spouses should always be considered legitimate evacuees, if it is permissible to identify them by their dependent I.D. card that will likely be easier and more efficient for prioritizing their evacuation status.

b. Pre-Categorizing Eligible Evacuees. As noted above, family members of U.S. citizens should receive the same evacuation priority as their sponsors and remain together throughout the evacuation. But the definition of a family member must be clear. There also needs to be a plan in place, both from a processing and messaging standpoint, for extended family members that do not qualify for either evacuation or prioritization in the same category as the rest of their family. Moreover, the “others eligible” or “designated other persons” evacuee category is usually controversial. These should be negotiated and designated in advance by DoS for inclusion in the emergency action plan or what is called the F-77 report. These eligibility designations need to be validated and analyzed for any issues that could arise with DoD civilians, dependents, or other classes of eligible evacuees.

III. COMMAND AND CONTROL DURING NEO EXECUTION

A. **DoD Role in Executing Military Assisted NEO**. The foundational reference is the Memorandum of Agreement (MOA) between DoS and DoD entered into on 14 July 1998, which established their “respective roles and responsibilities regarding the protection and evacuation of U.S. citizens and nationals and designated other

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[12] JOINT PUB. 3-68, at xi.

[13] Operation Guardian Retrieval (Central Africa), Joint Task Force Guardian Retrieval (JTF-GR) After Action Report, at pgs. 47-48 (1994). Available on the Joint Lessons Learned Information System (JLLIS).

persons from threatened areas overseas."[14] This MOA affirmed that DoS holds overall responsibility within the U.S. interagency for NEO, except that DoD has responsibility for NEO from the U.S. Naval Base, Guantanamo.[15]

1. Execution by Joint Force Commander (JFC). The MOA also enumerates that once the decision has been made to use military personnel and equipment to assist in the implementation of a NEO, the military commander is solely responsible for conducting the operation. This responsibility will normally be vested in a JFC appointed by the responsible CCMD.

2. Unique DoD Command and Control Framework. Unlike DoD support to DoS and U.S. Agency for International Development (USAID) during a Foreign Disaster Relief (FDR) operation, DoD assumes the lead in the actual execution of the NEO once DoD is called upon and correspondingly approved. DoS is not the on-scene manager during the operation.

3. DoS Coordination Still Required During Execution. However, as the MOA also makes clear, the military commander shall conduct the NEO in coordination with and under policies established by COM or principal DoS representative to the HN, except to the extent delays in communication would make it impossible to do so.[16]

4. Additional Interagency Coordinating Responsibilities. The Secretaries of the Military Departments also appoint a member from their respective service to the Washington Liaison Group (WLG), which is discussed more below. The Chairman of the Joint Chiefs of Staff (CJCS) appoints a CJCS representative to the WLG. Respective CCMD staffs represent DoD on each of the Regional Liaison Groups (RLG).

B. **U.S. Government Interagency Response Framework**. A NEO involves whole-of-government efforts, depending on the particular circumstances surrounding the evacuation. 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 relied upon.[17]

1. The Chief of Mission (COM) or principal officer of the DoS. Within the HN this individual serves as the lead official responsible for the evacuation of all U.S. noncombatants, including DoD dependents, with the caveat that this authority does not extend to uniformed personnel of the U.S. armed forces and designated emergency-essential DoD civilians who are not under the authority of the U.S. Diplomatic Mission.[18]

2. Washington Liaison Group (WLG). SECSTATE and SECDEF are responsible for an established WLG, chaired by the DoS representative, to ensure national level coordination of the work of their departments in fulfilling their responsibilities for protection and evacuation of U.S. citizens abroad.[19]

a. WLG membership consists of representatives from the DoS and DoD. "The WLG may invite representatives of such other departments and agencies of the U.S. government (e.g., Department of Health and Human Services, Agency for International Development, etc.,) to participate in or attend as observers its meetings when appropriate and useful."[20]

b. The WLG also monitors activities of Regional Liaison Groups (RLG).

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[14] Memorandum of Agreement between the Departments of State and Defense on the Protection and Evacuation of U.S. Citizens and Nationals and Designated Other Persons from Threatened Areas Overseas (14 Jul. 1998), http://prhome.defense.gov/Documents/ [hereinafter DoD DoS MOA].

[15] *Id.* at C.3.b. Note also, though DoS is the Lead Federal Agency (LFA) for a NEO, the CCMD still retains some authority to engage in Early Return of Dependents from DoD overseas locations.

[16] *Id.* at E.2. This language is aligned with the DoDD 3025.14 in the applicable part: "DoD will execute the evacuation from threatened areas abroad in close coordination with the Secretary of State as an integral part of the overall DoD response to the danger or crisis that precipitates the withdrawal."

[17] Executive Order No. 12656, ASSIGNMENT OF EMERGENCY PREPAREDNESS RESPONSIBILITIES, 53 Fed. Reg. 47491, 3 C.F.R. 585, sections 502 and 1301 (18 Nov. 1988) [hereinafter E.O. 12656], as amended by Executive Order Nos. 13074 (9 Feb. 1998); 13228 (8 Oct. 2001); 13286 (28 Feb. 2003); and 13603 (16 Mar. 2012).

[18] DODD 3025.14, at 2; DoD DoS MOA at para. C.3, D.1.b.; JOINT PUB. 3-68, at III-10.

[19] DoD DoS MOA; DODD 3025.14, at glossary part II; JOINT PUB. 3-68, at II-1 - II-2; DOD DICTIONARY, at 229.

[20] DoD DoS MOA, at appendix 4; JOINT PUB. 3-68, at II-1, II-2.

3. Regional Liaison Groups (RLG).[21] SECSTATE and SECDEF are responsible for established RLGs collocated with CCMDs as necessary to ensure coordination of emergency and evacuation planning. Each RLG is chaired by a DoS representative and includes representatives from the appropriate CCMD staff, as well as other 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 CCMD. The RLG performs the following functions:

a. Provides support to officials at diplomatic and consular posts and military commands within the relevant region by serving as a liaison between the WLG, military commands, and diplomatic posts.

b. Assists diplomatic posts and appropriate military commands in planning for evacuation and/or in-place protection of U.S. citizens and nationals, and other designated persons in an emergency.

c. Reviews emergency action plans created by the diplomatic posts and forwards them to the DoS for approval and distribution.

4. Guidance on Interagency Coordination and Cost Sharing. 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."[22] This cost sharing guidance does not have adequate depth for many of today's missions; for example it does not contemplate a NEO undertaken in the context of FDR operations. The MOA is focused on a protection type mission where U.S. citizens are evacuated from areas where combat is ongoing or anticipated. More granular administrative issues like reimbursement to DoD for services such as billeting and messing are not covered by any doctrine. Hence negotiation of cost sharing issues related to evacuation is often required as the mission unfolds. This can cause confusion and hesitation as commanders assume risk associated with expending Operations and Maintenance (O&M) funds without any promise of reimbursement by DoS.[23]

IV. LEGAL ISSUES INVOLVED IN THE EXECUTION OF NEO

A. **International Law and Use of Force**. A NEO will fall into one of three categories: permissive, hostile or non-permissive, or uncertain. The non-permissive and uncertain categories raise the majority of legal issues because the receptiveness of the HN to the U.S. NEO are ambiguous or even opposed.[24] In situations where a NEO may intrude into the territorial sovereignty of a nation (and the nation will not give consent), then a legal basis is required. Judge Advocates must be proactive in forming a consensus on the legal basis for the NEO and analyzing how the legal basis effects other obligations, if any. In particular the legal basis could have consequences for agreements with other nations in the event the NEO has a multinational character. While there may not be international consensus on the legal basis to use armed forces for the purpose of NEO, the most common bases are:

1. Custom and Practice (pre-U.N. Charter) allowed NEO. In this regard, a nation could intervene to protect its citizens located in other nations when those nations would not or could not protect them.[25]

2. U.N. Charter Articles 2(4) and Article 51.[26] Under Article 2(4), a nation may not threaten or use force "against the territorial integrity or political independence of any state . . . ." One 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). Another view is that NEO must be permissive, authorized by the U.N. Security Council, or constitute a legitimate act of individual or

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[21] DoD DoS MOA at Appendix 5; JOINT PUB. 3-68 at II-2 - II-3.
[22] DoD DoS MOA, at pgs. 12-17.
[23] CENTER FOR LAW AND MILITARY OPERATIONS AFTER ACTION REPORT, JOINT TASK FORCE – 505 OPERATION TOMADACHI/PACIFIC PASSAGE, at pg. 7 (published 25 May 2011) (deployed Mar 2011 – Apr 2011).
[24] JOINT PUB. 3-68 at IV-14 - IV-15; *see also* Steven F. Day, *Legal Considerations in Noncombatant Evacuation Operations*, 50 NAVAL L. REV. 45 (1992); Andrew W.R. Thomson, *Doctrine of the Protection of Nationals Abroad: Rise of the Non-Combatant Evacuation Operation*, 11 WASH. U. GLOBAL STUD. L. REV. 627 (2012).
[25] *See, Legal Considerations in Noncombatant Evacuation Operations*, *supra* note 24; *see also* Fonteyne, *Forcible Self-Help by States to Protect Human Rights: Recent Views from the United Nations, in Humanitarian Intervention and the United Nations* 198 (Lillich ed. 1973) (Charlottesville, Va: U. Press of Va.).
[26] U.N. CHARTER.

collective self-defense pursuant to Article 51 of the U.N. Charter and/or customary international law.[27] Article 51 allows for an "inherent right of individual or collective self-defense," and the majority opinion holds this to include the customary pre-charter practice of intervention to protect citizens.

B. **Sovereignty and Diplomatic Clearance Issues**. Planners need to know the territorial extent of the countries in the operating area. Absent consent, or the need to act in self-defense under Article 51 of the U.N. Charter, U.S. forces should respect countries' territorial boundaries when planning NEO ingress and egress routes.[28]

1. Extent of Territorial Seas and Airspace. There is a right of innocent passage through the territorial seas. Airspace, however, is inviolable. There is no right of innocent passage for aircraft. Only "transit passage" allows over-flight over international straits.[29]

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 noncombatants, 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.[30]

3. Time Sensitive NEO. The lack of diplomatic clearances can hold up a time-sensitive NEO. During Operation Distant Runner, a NEO conducted by EUCOM in the Rwanda/Burundi region in 1994, the Crisis Action Team tried to rapidly facilitate the approval process.[31] However, circumstances on the ground delayed the approval process. For example, no request could be sent until specific detailed data was available for the flight (e.g., times, aircraft). Although general information was available early, the specific data was not available until the operation was near execution. The timing of the operation (over a weekend) also hindered the U.S. Embassies' efforts to obtain approval from HN governments. If a NEO is time-sensitive it is important that military planners lean on the Embassy and/or DoS headquarters to devote sufficient staff to resolve issues ahead of execution.

C. **Law of Armed Conflict Considerations**. Under the DoD Law of War Program, 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*."[32] So forces executing a NEO are bound by all LOAC responsibilities to the extent they are applicable. This is the case even when the NEO is not conducted in the context of an armed conflict.

1. Rules of Engagement (ROE). Refer to Chapter V of this handbook for guidance on Judge Advocate input on creating and training to ROE. Additionally, a NEO will have unique attributes that affect ROE drafting and implementation, as such the starting point must be Enclosure G of the CJCS Standing Rules of Engagement, which is specific to NEO. ROE needs to be tailored to support the mission and it must take into account the operating environment. For a NEO, this typically necessitates ROE reflecting the limited military objectives to be accomplished, and to some extent, assumption of risk on the part of the force in order to protect the overall objective of getting all the evacuees out safely. Coordination with all NEO stakeholders is essential.

a. Reference to SOFA and ROE of Marine Corps Security. Analyze all SOFA or similar documents of the HN, as they provide insights into the security situation, any local security force support, and HN restrictions

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[27] *Id.* art 2, ¶ 4, art. 51; *supra* Chapter 1 of this Handbook, Legal Basis for the Use of Force; *Legal Considerations in Noncombatant Evacuation Operations*, *supra* note 24.
[28] U.S. DEP'T OF DEFENSE, DOD LAW OF WAR MANUAL, Chapters XIII - XV (Dec. 2016) [hereinafter LAW OF WAR MANUAL].
[29] *See, supra,* Chapter 12 of this Handbook, Sea, Air, and Space Law.
[30] *Id.*
[31] EUCOM Operation Distant Runner (Rwanda NEO) After Action Report (May 1994). Available on the Joint Lessons Learned Information System (JLLIS).
[32] U.S. DEP'T OF DEFENSE DIR. 2311.01E, DEP'T OF DEFENSE LAW OF WAR PROGRAM, at para. 4.1, (9 May 2006) [hereinafter DoDD 2311.01E]; 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, Encl. G, NEO (13 June 2005) [hereinafter CJCS SROE].

on weapons or ROE, if any. The current ROE utilized by the Marine Corps detachment will also be informative and could serve as the foundation of the ROE for the NEO team.

b. Embassy Coordination. Though ROE might appear as a tactical level military function for which the JTF Commander has sole responsibility, failure to take into account the advice of the Ambassador or COM can lead to serious mistakes. The Ambassador will know details about the security environment, facilities, and egress routes that cannot be gleamed from reading a SOFA. They will also have knowledge on local sensitives to foreign military forces which may be useful in planning. Moreover, if the Ambassador and Embassy staff do not have the same understanding as the military force on hostile intent thresholds, use of Riot Control Agents (RCA), or related ROE nuances, then confusion can create an unacceptable risk to the mission.

c. Fire Support. If the NEO takes place in a non-permissive environment ROE for Close Air Support (CAS) or other means of fire support needs to be clarified and disseminated to the military commanders and Ambassador.

d. Case Study: Operation Eastern Exit. During Eastern Exit in Mogadishu in 1991, the Ambassador helped provide clear guidance on hostile intent as it related to the Embassy compound, directed which security zones within the compound would be withdrawn from rather than resorting to deadly force (should that choice need to be made), and outlined other steps the military team undertook to avoid creating an appearance of intervening in the Somali conflict. [33] The instructions from the Ambassador proved critical for the 60-man evacuation force executing the sea-based NEO. Eastern Exit also demonstrated the importance of emphasizing that engagement is not necessary or even prudent in all situations where sporadic fire is being directed toward the force. A NEO is an operation for which the force, depending on the operating environment, might need to assume more risk to lessen the risk to the evacuees and mission as a whole. Despite intermittent harassing fire from outside the Embassy compound the force held their fire during the 17 hours spent on the ground and successfully evacuated 281 people from 30 countries (including 8 Ambassadors and 39 Soviet citizens).

2. Riot Control Agents (RCA). The use of non-lethal weapons, such as RCAs, by the U.S. military has been a contentious issue since their inception, but may be appropriate for a NEO.[34] The Chemical Weapons Convention prohibits the use of RCAs as a "method of warfare," though that term is not defined.[35] The United States ratified the Chemical Weapons Convention subject to the understanding that nothing in the Convention prohibited the use of RCAs in accordance with Executive Order 11850.

a. The United States considers the prohibition on the use of RCAs as a "method of warfare" to apply in international and non-international armed conflict. U.S. policy allows the use of RCA in non-armed conflict and defensive situations, to include "rescue of hostages."[36]

b. Use of RCAs during a NEO may be authorized by SECDEF, or in limited circumstances, by the respective CCMD. Authorization to use RCAs would normally be requested as a supplemental ROE under the SROE.[37]

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[33] Eastern Exit: The Noncombatant Evacuation Operation (NEO) From Mogadishu, Somalia, in January 1991, at pgs. 28-32. Adam B. Siegel, Center for Naval Analysis (CNA) Oct 1991.

[34] Lieutenant Colonel James C. Duncan, *A Primer on the Employment of Non-Lethal Weapons*, 45 NAVAL L. REV. 1, 9-12 (1998).

[35] Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Paris, (13 January 1993) [hereinafter CWC].

[36] 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 (8 Apr. 1975) [hereinafter E.O. 11850]; CHAIRMEN OF THE JOINT CHIEFS OF STAFF INSTRUCTION (CJCSI) 2030.01C, CHEMICAL WEAPONS CONVENTION COMPLIANCE POLICY GUIDANCE, at Encl. C (9 Apr 2010); (S//REL TO USA, ACGU) CHAIRMEN OF THE JOINT CHIEFS OF STAFF INSTRUCTION (CJCSI) 3110.07D, GUIDANCE CONCERNING RIOT CONTROL AGENTS AND HERBICIDES (31 Jan 2011).

[37] E.O. 11850; COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS, NWP 1-14M/MCTP 11-10B/COMDTPUB P5800.7A, at 10.3.2.2 (Aug 2017 ed.). *See also*, 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, Encl. G, NEO (13 June 2005).

c. Use of RCAs can be useful during a NEO. For example, during Operation Assured Response (Liberia, 1996), the use of RCAs (CS gas, pepper gas, and illumination rounds) was authorized.[38]

D. **Status and Treatment of Civilians**. In a NEO, commanders will face a multitude of legal issues regarding the civilians encountered on the ground. The Embassy evacuation plans may not provide for the Embassy site to be a primary assembly area or evacuation site. However, experience shows that during times of crisis large numbers of U.S. citizens, citizens of the HN, and even nationals of other countries congregate on or near the Embassy compound because it is perceived as secure. Plans must incorporate crowd management and treatment of civilians encountered during a NEO, both as potential security threats to the Embassy and as evacuees.

1. Terminology. One of the first issues to resolve will be how to properly refer to the civilians who have been affected by the crisis. Certain words can have specific legal consequences. For example, referring to someone as a refugee or a migrant, or in any way implying or stating that they have been granted asylum, can confuse the situation and create a basis for a claim of additional legal or political rights. The best practice is to refer to them using terms which do not impart legal status, such as internally displaced persons (IDPs) or affected persons, and ensure that the JTF Commander and any public affairs officers (PAOs) use those terms as well. At the same time, particular legal language is sometimes necessary to trigger entitlements and fiscal authorities under U.S. domestic regulations, so there has to be a balance. These terms need to be deliberately decided upon early. [39]

2. Civilians Seeking Refuge: Temporary Refuge v. Asylum. 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. commanders may, however, offer temporary refuge in emergencies under conditions of urgency to secure the life or safety of that person against imminent danger.[40] The best practice is to immediately socialize the issue to the DoS representative at the Embassy in the country being evacuated, if time permits.

3. Detainee Treatment. A NEO will not include a detention mission, however in any contingency operation there must be guidance on detaining, caring for, and releasing/transferring those persons that interfere with the mission and/or pose a security threat. This guidance could be contained within the ROE or in a separate fragmentary order. After consultations with the Embassy and the CCMD, guidance should be issued clarifying that traditional military detention will not be conducted, that anyone temporarily detained must be safeguarded humanely, and how temporary detainees will be transferred to local authorities or released.[41] If temporary detainees are going to be turned over to the HN, the Embassy should negotiate the disposition of the detainee and facilitate the transfer.[42] In the event the local authorities do not have the capability to accept transfer or if the circumstances justifying the detention cease, then U.S. policy is that such persons shall be released with the minimum delay possible, unless circumstances justify holding longer in order to effectuate safe and orderly release.[43]

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[38] After Action Review Operation Assured Response (Liberia), U.S. Army Southern European Task Force (4 Dec. 1996). Available on the Joint Lessons Learned Information System (JLLIS).

[39] Captain Bertrand A. Pourteau, A*nswering the Call: A Guide to Humanitarian Assistance for the Expeditionary Judge Advocate*, 2016 ARMY LAW. 4, 8-9 (2016). During events Operation Pacific Passage, a NEO executed concurrently with FDR Operation Tomodachi, the military operations order failed to use the term safe haven, which is a term of art, and caused fiscal confusion when displaced U.S. citizens attempted to settle their claims. The best way to avoid creating a perception of over- or under entitlement is to properly use the Joint Travel Regulations (JTR) terminology. The staff should plan for the full spectrum of contingencies likely to be encounter and plan for every type of affected person.

[40] U.S. DEP'T OF DEFENSE INSTR. 2000.11, PROCEDURES FOR HANDLING REQUESTS FOR ASYLUM AND TEMPORARY REFUGE (13 May 2010, *incorporating Change 1, 23 May 2017*); U.S. DEP'T OF ARMY, REG. 550-1, PROCESSING REQUESTS FOR POLITICAL ASYLUM AND TEMPORARY REFUGE (21 Jun. 2004).

[41] CENTER FOR LAW AND MILITARY OPERATIONS AFTER ACTION REPORT, JOINT TASK FORCE – HAITI, at pgs. 3-4, (published Aug 2010) (unit deployed Mar - May 2010; LAW OF WAR MANUAL, Chapter VIII, at pg. 486, 505-506; *See also*, CJCS SROE, at Encl. G.

[42] Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135 [hereinafter GC III]; LAW OF WAR MANUAL, Chapter VIII; DEP'T. OF DEFENSE DIRECTIVE 2311.01E, DOD DETENTION PROGRAM, at para. 4.6 (5 Sep 5 2006) ("No detainee shall be released or transferred from the care, custody, or control of a DoD Component except in accordance with applicable law, regulation, policy, and other issuances.").

[43] LAW OF WAR MANUAL, Chapter VIII, at pg. 505-506.

4. Status of U.S. Embassy Premises. As NEO activities usually involve actions at the U.S. Embassy or a consulate it is important to understand the special status of Embassy property.

a. The Vienna Convention on Diplomatic Relations. 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 HN is a signatory to the Vienna Convention on Diplomatic Relations. [44] If the mission is an Embassy in a foreign country that is a signatory to the convention, the premises of the mission are inviolable, meaning "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."[45]

b. The Foreign Missions Act. Even if these conditions are not met, the premises are usually inviolable anyway due to reciprocal agreements with countries under U.S. legislation that establishes procedures for reciprocal agreements to provide for the inviolability of diplomatic missions.[46] Most countries have a mission in the United States and thus wish to benefit from a reciprocal relation of inviolability.

5. Search of Evacuees and Their Luggage. Though Embassy staff are responsible for screening at the evacuation centers, DoD might be required to assist, particularly if the NEO is rapid. For security reasons, baggage will be searched for firearms, explosives, ammunition, or items declared to be restricted items.

a. Search of Accredited Diplomats. In accordance with the Vienna Convention on Diplomatic Relations, the persons, property, papers, and families of accredited foreign diplomats authorized passage to the U.S. are exempt from search. However, even with accredited diplomatic personnel, luggage may be inspected if reasonable grounds exist to suspect that luggage contains restricted items.[47] An "accredited" diplomatic bag retains absolute inviolability.[48]

b. Female Searches. Male military personnel are normally reluctant to conduct detailed searches of female evacuees or detainees; there could also be sensitivities in the HN to males performing searches on females. DoS might have a shortage of female personnel needed to search female evacuees, children, and disabled individuals. Military personnel should be available to augment; during DoD exercises this function is normally conducted by female medical personnel.

E. **Management and Administrative Issues Related to Evacuees**. As touched on previously, decisions made early on terminology and the posture of either the NEO or voluntary assisted departure will affect entitlements and determine whether exceptions to travel regulations will need to be authorized.

1. Travel Benefits, Access to Base, Use of Commissary. Normally it will be beneficial to try and eliminate arbitrary differences in policy based purely on the category of personnel (military vs. civilian), but there will be situations for which the distinction cannot be overlooked.[49] In drafting the orders and memorandum that will effectuate a NEO it is critical to understand the differences early and factor them into the options offered to departing personnel.

a. Failure to use terms like "safe haven" or "evacuation," even where the deviation is grounded in logical messaging considerations, could cause fiscal law problems and frustration for evacuees.[50]

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[44] 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.) [hereinafter VCDR].; The Foreign Missions Act (Pub. L. 88-885, codified at 22 U.S.C. § 4301 *et seq*.).
[45] VCDR, at Art. 22.
[46] The Foreign Missions Act (Pub. L. 88-885, codified at 22 U.S.C. § 4301 *et seq*.).
[47] CJCS SROE, at Encl. G, (containing additional U.S. policy guidance on when it is appropriate to inspect diplomatic personnel).
[48] VCDR, at Arts. 27, 29, 36.
[49] CENTER FOR LAW AND MILITARY OPERATIONS AFTER ACTION REPORT, U.S. PACOM AND COMMANDER U.S. PACIFIC FLEET, at pgs. 1-6 (published 1 Mar 2012) (deployed Mar 2011 – May 2012). DoD military entitlements are governed by the Joint Federal Travel Regulations (JFTR), while civilian entitlements fall under the Joint Travel Regulations (JTR).
[50] CENTER FOR LAW AND MILITARY OPERATIONS AFTER ACTION REPORT, JOINT TASK FORCE – 505 OPERATION TOMADACHI /PACIFIC PASSAGE, at pgs. 5-6 (published 25 May 2011) (deployed Mar 2011 – Apr 2011).

b. If a NEO involves support of large groups of evacuees (DoD personnel, dependents, contractors, designated foreign nationals) then use of installation commissaries and exchanges will be implicated.[51] Some categories of evacuees might be outside the SOFA and prohibited from using these facilities. If not accounted for in advance, this will require requests to higher for fiscal law decisions and/or policy exceptions.

2. Claims and Hold-Harmless Agreements. Particularly when in the context of a larger disaster operation, transportation of civilians could be a mission requirement. Due to liabilities in the transport of civilians, it will be necessary to document the manifests appropriately and execute hold harmless agreements. Note also that depending on the platform and service, there will be additional waiver requirements before civilians can ride on military transport (e.g., NATOPS waiver).

3. Privacy Issues Related to NEO Tracking System (NTS). Ensure requests for information comport with DoD and service regulations to the extent possible.

F. **Chemical, Biological, Radiological, Nuclear, and High-Yield Explosives (CBRNE) Issues**. If a CBRN mission or related issues exist within a NEO then other U.S. agencies will be involved and a whole host of U.S. laws and regulations will be relevant. Below are a subset of issues Judge Advocates have worked through in previous operations, but it is by no means exhaustive.

1. Measures of Radiation and Exposure Levels. The JTF needs to standardize how this will be done prior to the deployment. The JTF personnel need to be reassured with accurate and understandable information on the effects of any radiation exposure. Initially during Operation Tomadachi, radiation exposure was measured and communicated using several different units, creating confusion and uncertainty. Soon after, exposure levels were standardized and based on Code of Federal Regulations Title 10, Section 20.[52] Personnel were also provided with a radiation comparison chart and directed on appropriate precautions. If personnel were exposed to radiation they would be medically screened for continued duty.

2. Force Protection. Under certain circumstances, such as a radioactive disaster or disease outbreak, it may be necessary to establish additional force protection policies, such as quarantine and decontamination.

3. Authority to Transport Contaminated Evacuees. Check with TRANSCOM for updated guidance on transportation of contaminated people via aircraft. The problem is that this will cause the aircraft to likewise become contaminated. The general rule is that a person must be decontaminated before boarding a military aircraft. However, during a rapid, non-permissive NEO there may be no time to decontaminate evacuees.

4. Entry into U.S. Territory. Another problem if there is a contamination issue is where the aircraft can land upon returning to the United States. Department of Health and Human Services has repatriation agreements with each State. Those agreements authorize noncombatant evacuees to land at certain airports. However, States can quarantine a contaminated person and prevent them from traveling outside the airport (because of their public safety power). For this reason the plan might call for the aircraft to land on a federal installation.

5. Medical Recording. Failure to share information with Veterans Administration may lead to problems when processing future claims. All personnel entering an "area of radiation" exposure should have a medical record entry indicating dates within the exposure area. An accurate recording of exposure is critical for mission accomplishment and long-term health care.

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[51] *Id*., at 4.

[52] CENTER FOR LAW AND MILITARY OPERATIONS AFTER ACTION REPORT, U.S. ARMY JAPAN, I CORPS FORWARD, 10TH AREA SUPPORT GROUP, & JOINT LAND TASK FORCE-10, OPERATION TOMODACHI/PACIFIC PASSAGE (May 24, 2011).

CHAPTER 16

FOREIGN AND DEPLOYMENT CLAIMS

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 (JAs) 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 (30 Aug. 2016)[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 in a non-Army country, JAs must coordinate their investigations with the responsible Service's Foreign Claims Commission (FCC) 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.

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, JAs should 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 U.S. Therefore you will not use the FTCA in most deployments, unless the deployment is within the U.S. (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

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[1] This instruction cancels DoDD 5515.8, Single-Service Assignment of Responsibility for Processing of Claims (11 Nov. 2006).
[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.

that occurs incident to service. JAs must first consider all claims under the PCA; only if not compensable under the PCA 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 U.S.; 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 the 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 resulted 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 the CENTCOM theater of operations, commanders are responsible for processing the Soldier's personal effects in accordance with the following procedures:

a. The appropriate commander appoints a Summary Court-Martial Officer (SCMO) immediately upon notification. The SCMO will safeguard, inventory, and package all personal effects. While NCOs in the rank of Staff Sergeant or above may serve as medically-evacuated inventory officials, officers must still serve as SCMOs for KIA and MIA Soldiers.

b. If a Soldier is declared KIA or MIA, or is medically-evacuated because of combat-related injuries and will not return to the unit, the SCMO will process all personal effects through the mortuary affairs collection point (MACP).

c. The MACP will send the property to the Joint Personal Effects Depot (JPED) which 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 to recover under the MCA. All CONUS tort claims must first be considered under the PCA and 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 members of the force, by family members and civilian employees 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

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[5] Under the small claims procedures set forth in DA PAM 27-162, CLAIMS, para. 11-10 (21 Mar. 2008) [hereinafter DA PAM 27-162]. 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* DA PAM 27-162, para. 11-10b. Therefore, substantiation of the value of the property may be accomplished through telephone calls and internet searches, rather than requiring more complex substantiation. Although UCOs 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.
[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].

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 U.S.-based claims offices, JAs and UCOs must familiarize themselves with its provisions and compile as much supporting information (e.g., country law summaries and Status of Forces Agreements (SOFAs)) as possible before deployment. Under the FCA, meritorious claims for property losses, injury, or death caused by service members or the civilian component of 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. service members 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 U.S. 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 and civilian employees outside of the U.S. "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 within one year of receipt.[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 was an inhabitant at the time of loss.[16] To promote access to the claims program, many units distribute claims cards when potential claims arise. 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. The FCA claims are investigated and adjudicated by FCCs, which may have one or three voting members. They are usually comprised of JAs, although other commissioned officers may serve as single-member commissions, as may officers of other U.S. military Services. At least two members of three-member FCCs must be JAs. Regardless of their composition, proper authority must appoint FCCs.[17] The USARCS Commander, TJAG, and DJAG are the only appointing authorities for FCCs in Afghanistan and Iraq. These appointments should take

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[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*. Note, however, that nationals of a country at war or engaged in armed combat with the U.S, or an ally of such country, may be proper claimants if the settlement authority determines the claimant is, and at the time of the incident was, friendly to the U.S. Claims by prisoners of war after capture are also compensable unless otherwise barred.
[15] AR 27-20, *supra* note 9, para. 2-5.
[16] AR 27-20, *supra* note 9, para. 10-9*b*.
[17] In the Army, the USARCS Commander appoints FCCs. The 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 a JA may pay or deny claims up to $15,000. Non-JA FCCs 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. The USARCS is the settlement authority for claims in excess of $50,000. The Secretary of the Army or his designee will approve payments in excess of $100,000. All payments must be in full satisfaction of the claim against the U.S. and all appropriate contributions from joint tortfeasors, applicable insurance, or Article 139, UCMJ proceedings must be deducted before payment. Advance payments may be authorized in certain cases. *See* AR 27-20, *supra* note 9, paras. 10-5 to 10-9.

place immediately after deployment, if possible. All legal offices subject to mobilization or deployment should identify FCC members and alternates as a part of their pre-deployment planning. Then, the FCC members must contact the USARCS Foreign Torts Branch (usarmy.meade.hqda-otjag.mbx.foreign-claims@mail.mil or (301) 677-9490/9498 [DSN 622]) for additional information regarding how to obtain a written appointment memorandum. All FCCs should also 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 in-person or on-line training available on JAGCNET. The USARCS Commander will not appoint FCCs until they are deployed and confirmed as requiring appointment. While JAs make take and pass the examination prior to deployment, JAs should not submit appointment request memoranda until deployed. The qualifying exam is good for three years; JAs who have not passed the exam in the three years prior to deployment must retake the exam for certification.

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 the USARCS.[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. Claims may be paid in any currency, but the CDR, USARCS must approve payment in other than local currency. If an FCC intends to "deny a claim, award less than the amount claimed, or recommend an award less than claimed but in excess of its authority," it must notify the claimant. This notice will give the claimant an opportunity to submit additional information for consideration before a final decision is made. When the FCC proposes an award to a claimant, it also forwards a settlement agreement that the claimant may either sign or return with a request for reconsideration.

E. **Claims Cognizable Under International Agreements (SOFA Claims)**.[20]

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 JA 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

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[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 Foreign Torts Branch (301-677-9490/9498 (DSN 622)) 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).

[21] *Id.*

[22] *See* Claims Offices the reader can link to from the USARCS portion of JAGCNET.

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 and 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 faced with such a situation, JAs should contact their command claims service for guidance.

I. **Article 139 Claims.**[24] Article 139, UCMJ authorizes collection of damages directly from a service member's pay for willful damage to or wrongful taking of property by military personnel acting outside the scope of their employment. 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 (SPCMCAs), who function as appointing and final action authorities for Article 139 claims, may be geographically separated from the investigating officer and the reviewing 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 JAs and Corps of Engineers (COE) officers after deployment is essential. The JAs should also be aware that not all claims for damage or use of real estate are based

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[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).

[24] 10 U.S.C. § 939. *See generally*, AR 27-20, *supra* note 9, ch. 9; DA PAM 27-162, ch. 9.

on contract. Some are based on tort law and may be considered as claims under the FCA or MCA, such as claims for damage or 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 COE rotated civilian real estate officers into the area of operations on sixty-day tours. In addition, in the first years of OIF and OEF, COE personnel were frequently rotated through theaters, making building relationships extremely difficult. However, as of late the COE has significantly increased its presence and largely remedied many of these difficulties.[26]

K. **Claims Involving Non-appropriated Fund Instrumentalities (NAFI)**. Frequently, FCCs will receive claims involving NAFIs. Although FCCs may adjudicate such claims, the FCCs will not actually pay the claimant unless the damage was "caused" by U.S. Forces or a DoD appropriated fund employee. Therefore, the FCCs 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 FCCs will investigate and adjudicate the claim, as it would for any other FCA claim. However, instead of making payment, the FCCs 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 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 the 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 the Commander's Emergency Response Program (CERP) funds may be used to make payments under certain circumstances in which a claim is not cognizable. 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 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 (GC) issued an opinion that solatia is a custom in Iraq and Afghanistan.[28] Before deploying to one of these theatres, JAs should review 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:

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[25] DA PAM 27-162, *supra* note 5, para. 2-15m.
[26] For an example of implementing guidance for real property claims, *see* Appendix D, Enclosure 4, *infra*.
[27] *See, e.g.*, AR 27-20, *supra* note 9, para. 10-10a; 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).

a. "Repair of damage that results from U.S., coalition, or supporting military operations and is not compensable under the Foreign Claims Act"; and,

b. "Condolence payments to individual civilians for death, injury, or property damage resulting from U.S., coalition, or supporting military operations." [29]

c. All JAs 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. Those JAs deploying to Afghanistan should be mindful of the timeline for CERP payments. Prior DoD 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. 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). This should be an ongoing part of the daily mission, whether or not deployment is contemplated. Claims JAs and paralegals must know the procedures for serving as FCCs and Foreign Claims NCOICs as well as for operating Special Claims Processing Offices. All 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, the 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 pre-existing damage. Finally, claims personnel should ensure that UCOs 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.

Claims personnel should also ensure that all deploying Soldiers are trained to recognize and react to someone attempting to file an oral FCA claim. Since the FCA allows an oral claim initially, all Soldiers must receive training on where and to whom to send the claimant to file a written claim and ensure all claims are properly received and acknowledged.

C. **The Tort and Special Claims Application (TSCA) Training.** The TSCA 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.

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[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.

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. The military is called to react to natural and man-made disasters both within and outside the U.S. 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. 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, in combat zones, claims teams may be subject to force protection rules that prohibit them from leaving their base camps except in four-vehicle convoys with crew-served weapons. Unfortunately, if Brigade Legal Teams do not have the vehicles or weapons (e.g., crew-served weapons) necessary to comply with applicable force protection orders, extensive coordination with supported units and other staff sections will become critical to accomplishing the claims mission.

1. Claimant forms and correspondence 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, FCCs 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

[32] In November 1998, the 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.

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 have Class A agents. Claims teams may have to train unit or legal personnel to be certified to act in this capacity. Likewise, do not assume that the Finance Office certification process is an easy one. After action reports from Iraq have related that claims operations were significantly delayed because after arrival into theater, the local finance offices had their 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." One option a JA may consider is an agreement where the host nation assumes responsibility for claims that result from any combat activity.[34] Such an agreement must be negotiated and concluded by appropriate officials.

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 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 Article 139, UCMJ [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]

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[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.
[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.

2. After OPERATION URGENT FURY in Grenada in 1983, the U.S. Department of State (DoS) 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 in Panama, the U.S. provided funds to the Government of Panama both to stimulate the Panamanian economy and to help Panama recover from the effects of the operation. 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 all requisitioned items. A system using bilingual property receipts distributed down to the UCOs might prove effective, for example.

2. Also, JAs 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.

VIII. APPENDICES

A. Single Service Claims Responsibility Assignments

B. UCO Deployment Guide

C. Deployment Claims Office Operation Outline

D. Sample Pocket Claim Card

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[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 DoS 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 non-statutory, gratuitous payment program outside of the combat activities exclusion using USAID funds. The 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. The U.S. 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. Some U.S. forces took vehicles in OPERATIONS URGENT FURY, JUST CAUSE, DESERT STORM, and 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).

APPENDIX A

ASSIGNMENT OF SINGLE SERVICE CLAIMS RESPONSIBILITY FOR TORT CLAIMS

Afghanistan	Army
Albania	Army
Algeria	Air Force
Angola	Army
Australia	Air Force
Austria	Army
Azores	Air Force
Bahrain	Navy
Belarus	Army
Belgium	Army
Botswana	Air Force
Bulgaria	Army
Burkina Faso	Army
Burundi	Army
Canada	Air Force
Cameroon	Army
Cape Verde	Navy
Central African Republic	Army
Chad	Army
Comoros	Army
Congo	Army
Cote D'Ivoire	Navy
Cyprus	Air Force
Czech Republic	Army
Dem. Rep. of Congo	Army
Denmark	Air Force
Djibouti	Navy
Egypt	Air Force
El Salvador	Army
Equatorial Guinea	Army
Eritrea	Army
Estonia	Army
Ethiopia	Army
France	Air Force
Gabon	Army
Gambia	Navy
Germany	Army
Greece	Navy
Greenland (Denmark)	Air Force
Grenada	Army
Guinea	Navy
Guniea-Bissau	Navy
Honduras	Army
Hungary	Army
Iceland	Navy
India	Air Force
Iran	Army
Iraq	Army
Israel	Navy
Italy	Navy
Japan	Air Force
Jordan	Air Force
Kenya	Army[46]
Korea	Army
Kuwait	Army
Latvia	Army
Liberia	Navy
Libya	Air Force
Lithuania	Army
Luxembourg	Air Force
Madagascar	Air Force
Malawi	Air Force
Marshall Islands	Army
Mauraitania	Navy
Mauritius	Air Force
Moldova	Army
Morocco	Air Force
Mozambique	Navy
Namibia	Air Force
Nepal	Air Force
Netherlands	Army
Niger	Air Force
Nigeria	Air Force
Norway	Air Force
Oman	Air Force
Pakistan	Air Force
Poland	Army
Portugal	Navy
Qatar	Air Force
Romania	Army
Rwanda	Army
Sao Tome and Principe	Navy
Saudi Arabia	Air Force
Senegal	Navy

Serbia ..... Army
Seychelles ..... Army
Sierra Leone ..... Navy
Slovak Republic/Slovakia . Army
Slovenia ..... Army
Somalia ..... Army
South Africa ..... Air Force
Spain ..... Navy
Sudan ..... Army
Swaziland ..... Air Force
Switzerland ..... Army
Syria ..... Air Force
Tanzania ..... Army
Togo ..... Navy
Tunisia ..... Air Force
Turkey ..... Air Force
Uganda ..... Army
Ukraine ..... Army
United Arab Emirates ..... Navy
United Kingdom ..... Air Force
Vietnam (war era claims) .. Navy
Yemen ..... Army
Western Sahara ..... Air Force
Zambia ..... Army
Zimbabwe ..... Air Force

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 (UCOs) to investigate and document claims incidents on behalf of Foreign Claims Commissions (FCCs) during deployments.

II. INTRODUCTION. Any deployment of U.S. forces into a foreign country (a "receiving state") may cause damage to the personnel and property of either the U.S. or the receiving state and its inhabitants. Willful misconduct or negligent acts and omissions on the part of U.S. or receiving state personnel can cause these damages. Ordinarily, prior to deployment, each company- or battalion-sized unit appoints a UCO to investigate and document every incident that may result in a claim either against or on behalf of the U.S.

III. INVESTIGATION REQUIREMENT

A. Prompt and thorough investigations will be conducted on all potential and actual claims against or in favor of the government. Information must be collected and recorded, whether favorable or adverse. The object of the investigation is to gather, with the least possible delay, the best possible evidence without accumulating excessive evidence concerning any particular fact.

B. Occasions upon which immediate investigations are required include when: non-governmental property is lost or damaged by a government employee; an actual claim is filed; a receiving state national is killed 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."[1793] 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**. All UCOs should coordinate with the servicing Judge Advocate (JA) 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**. All 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. The UCOs must consult with the servicing JA 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

[1793] Http://www.jagcnet.army.mil. In order to navigate to the USARCS website, click on the "Claims Website" link, then the "Divisions" 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. The 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. UCO 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 2020

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Duty Appointment

1. Effective 12 September 2020, 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 2020 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.

(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 (UCOs) and Maneuver Damage Control Officers (MDCOs) are appointed by unit commanders and trained by unit or claims judge advocates or Foreign Claims Commissioners.

B. During the course of deployments, UCOs and MDCOs investigate claims incidents and forward potential claims files, both against and on the behalf of the U.S., to servicing Judge Advocates (JAs). DA Forms 1208 (Report of Claims Officer) are completed and forwarded as well, when appropriate.

C. Unit JAs forward potential claims files and completed DA Forms 1208 to the appropriate Foreign Claims Commissions (FCCs) for further processing and entry into the potential claims database.

D. Potential claims files are transferred to the active claims files system in the Tort and Special Claims Application (TSCA) database 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. The 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 the military police (MP).

C. Coordinate the training of UCOs in compiling potential claims files and completing DA Forms 1208 with unit or claims JAs.

D. Train a paralegal 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 JA and one NCO to staff an SCPO.

IV. **DEPLOYMENT PLANNING**

A. **The U.S. Army Claims Service (USARCS)**. Immediately upon being informed of a possible deployment, contact the USARCS Foreign Torts Branch for current claims information and technical guidance at (301) 677-

9490/9498 [DSN 622]. The USARCS Commander 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.

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). The DoD Directive 5515.08 (2016) assigns SSR for claims for certain countries to particular service components. The 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 (CMA) 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 public affairs and the SJA must occur before claims information is publicized. U.S. Department of State 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 FCC 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**. 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 MPs**. 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 paralegal 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.

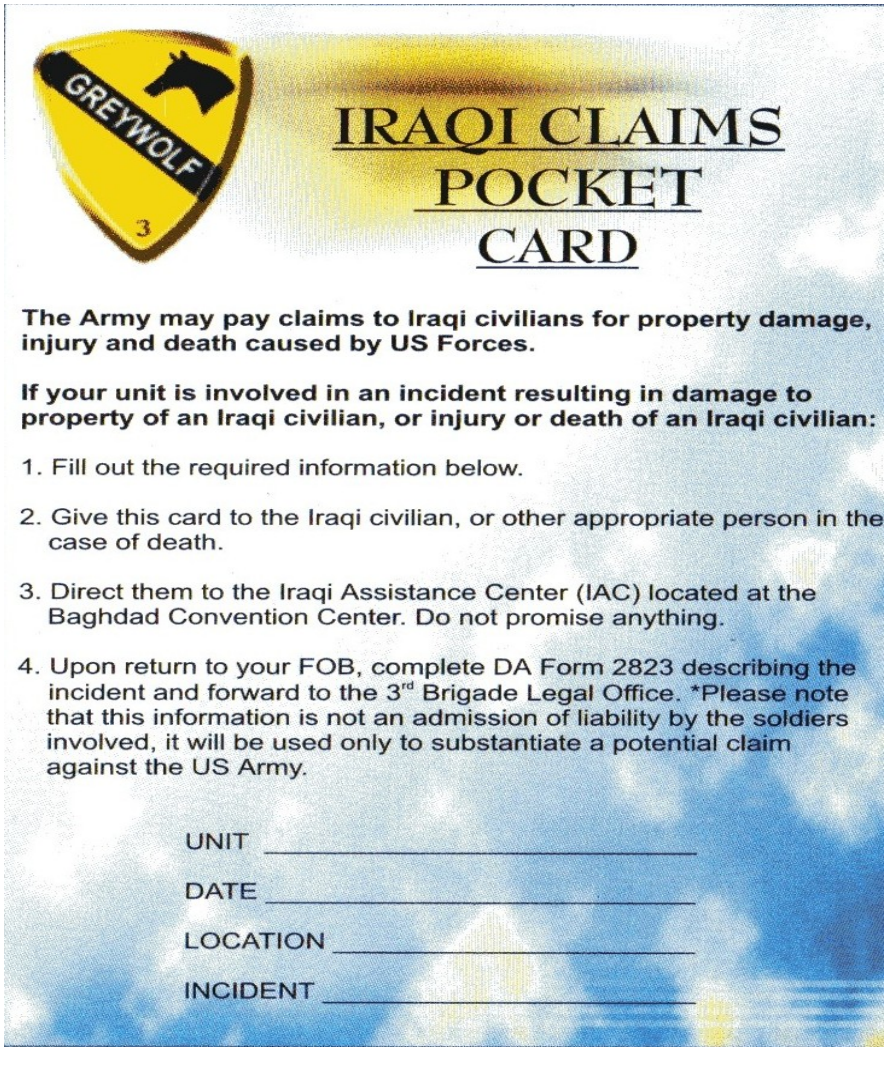
L. **Coordination with Non-Governmental Organizations (NGOs) and Other Governmental Organizations (OGOs)**. Depending upon the area into which the unit deploys, it could find various international and charitable organizations already operating there. Likewise, other agencies of the U.S. government may 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 the 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.

N. **Coordination with the Corps of Engineers Real Property Teams (CREST)**. Ensure that identification of the legal owners of all real property occupied or used by U.S. forces and obtain assistance from Real Estate personnel in determining fair market rental value and execution of a lease if the use/occupation lasts longer than 30 days.

APPENDIX D

FRONT SIDE OF SAMPLE POCKET CLAIMS CARD



IRAQI CLAIMS POCKET CARD

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 SAMPLE POCKET CLAIMS CARD

CHAPTER 17

FISCAL LAW

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 necessary 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 Forces. 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.[1] 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 to expend funds. When it comes to Fiscal Law, the problem 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.[2] *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 general "deployment" exceptions to the fiscal principles discussed throughout this chapter. However, Congress has provided DoD with special appropriations

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[1] *See* U.S. CONST. art. I, § 9, cl. 7.

[2] 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.

and/or authorizations for use during contingency operations usually limited by location, or purpose, or intended beneficiary.

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.

II. BASIC FISCAL CONTROLS[3]

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.

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[3] For a more in-depth review of fiscal law issues, *see*, CONTRACT & FISCAL L. DEP'T, THE JUDGE ADVOCATE GEN'S LEGAL CTR & SCH., U.S. ARMY, FISCAL LAW DESKBOOK.

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.

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 bona fide 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.[4] 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.[5] 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.[6] In any event, "stockpiling" items is prohibited.

2. **Services**. Normally, *severable* services are bona fide needs of the period in which they are performed.[7] Grounds maintenance, custodial services, vehicle/equipment maintenance, and other services that address recurring 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.[8] 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.[9]

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.[10]

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[4] *See* 31 U.S.C. § 1502(a).
[5] Betty F. Leatherman, Dep't of Commerce, B-156161, 44 Comp. Gen. 695 (1965); To Administrator, Small Business Admin., B-155876, 44 Comp. Gen. 399 (1965); Chairman, United States Atomic Energy Commission, B-130815, 37 Comp. Gen. 155 (1957).
[6] *See* U.S. DEP'T OF DEF., DEFENSE FINANCE AND ACCOUNTING SERVICE REG.-INDIANAPOLIS 37-1, ch. 8 [hereinafter DFAS-IN 37-1]; U.S. DEP'T OF DEF., DOD FINANCIAL MANAGEMENT REGULATION, 7000.14-R, vol. 3, ch. 8, para. 080304 (Feb. 2016) [hereinafter DODFMR 7000.14-R].
[7] Theodor Arndt GmbH & Co., B-237180, Jan. 17, 1990, 90-1 CPD ¶ 64; EPA Level of Effort Contracts, B-214597, 64 Comp. Gen. 154 (1985).
[8] DFAS-IN 37-1, tbl. 8-1; Incremental Funding of U.S. Fish and Wildlife Service Research Work Orders, B-240264, 73 Comp. Gen. 77 (1994) (fish and wildlife research projects); Proper Fiscal Year Appropriation to Charge for Contract and Contract Increases, B-219829, 65 Comp. Gen. 741 (1986) (study on psychological problems of Vietnam veterans); Comptroller General to W.B. Herms, Dep't of Agriculture, B-37929, 23 Comp. Gen. 370 (1943) (cultivation and protection of rubber-bearing plants).
[9] *See* DFAS-IN 37-1, ch. 8; DODFMR 7000.14-R, vol. 3, ch. 8, para. 080304.
[10] 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.[11]

3. Accepting voluntary services, unless authorized by law.[12]

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.[13] Similarly, as described in the Purpose section above, an obligation in excess of a statutory limit, e.g., the $2 Million O&M threshold for construction or the $250,000 expense/investment threshold, may lead to an ADA violation.

C. **Requirements when an ADA violation is suspected**. Commanders must investigate suspected violations to establish responsibility and discipline violators. Regulations require "flash reporting" of possible ADA violations.[14] If a violation is confirmed, the command must identify the cause of the violation and the responsible individual(s), usually the senior individual with actual or constructive knowledge of action taken and the questionable nature or impropriety of the action. 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.[15] 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 $1 Million 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

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[11] 31 U.S.C. § 1517.
[12] 31 U.S.C. § 1342.
[13] *See* 31 U.S.C. § 1514(a) (requiring agencies to subdivide and control appropriations by establishing administrative subdivisions); 31 U.S.C. § 1517; DODFMR 7000.14-R, vol. 14, Ch. 1, 2; DFAS-IN 37-1, ch. 4.
[14] DODFMR 7000.14-R, vol. 14, chs. 3-7; DFAS-IN 37-1, ch. 4, para. 040204.
[15] 31 U.S.C. §§ 1349, 1350.

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…."[16] 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."[17] Splitting projects into separate parts in order to stay under a statutory threshold is strictly prohibited.[18] *See* summary of construction funding thresholds in paragraph VI.C. below.

3. "Maintenance" and "Repair" are combined into a single category of work.[19]

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."[20] 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).[21]

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.[22]

c. Section 2802 of the 2017 NDAA included an additional definition of repair: "to convert a real property facility, system, or component to a new functional purpose without increasing its external dimensions." In other words, we could "convert" a DFAC into an office building and so long as the external dimensions remain unchanged we could categorize it as repair and use O&M. However, little guidance has been given on this recent change and JAs should check with their higher headquarters before relying on this change.

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

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[16] 10 U.S.C. § 2801.
[17] 10 U.S.C. § 2801(b).
[18] *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.
[19] DA PAM 420-11, para. 2-2 (18 Mar. 2010).
[20] AR 420-1, Glossary, sec. II.
[21] *See* DA Pam 420-11, para. 1-6a.
[22] AR 420-1, Glossary, sec. II.

relocatable building is designed to be moved and reassembled without major damage to the floor, roof, walls, or other significant structural modification.[23] 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.[24] 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 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.[25]

5. Funded Costs. Costs which are charged to the appropriation designated to pay for a project.[26] 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.[27] Only *funded costs* count against the construction funding thresholds.

C. **Funds and approval levels.** The charts below summarize military construction and repair & maintenance funding thresholds.[28]

Current Military Construction Thresholds		
Amount	**Type Funds**	**Approval**
>$6 Mil	**MILCON**	**Congress**
$2 Mil-$6 Mil	**Unspecified Minor MILCON (UMMC)**	**(Under or Dep) Service SEC Level, w/Congressional Notice**
$750K-$2 Mil	**O&M**	**Garrison or Unit Commander (Quarterly Reporting Req.)**
Under $750K	**O&M**	**Garrison or Unit Commander**
Current Maintenance & Repair Thresholds		
Amount	**Type Funds**	**Approval**
>$7.5M	**O&M**	**(Under or Dep) Service SEC Level, w/Congressional Notice**
$2 Mil-$7.5 Mil (R/R >75%)	**O&M**	**(Under or Dep) Service SEC Level**
<$7.5 Mil (R/R <75%)	**O&M**	**Unit Commander**
<$2 Mil (R/R >75%)	**O&M**	**Unit Commander**

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

[23] *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).
[24] *See* Memorandum, Office of the Assistant Secretary of the Army (Installations and Environment), Delegation of Authority – Relocatable Buildings (22 Feb. 2011).
[25] *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).
[26] AR 420-1, Glossary.
[27] *See* DA Pam 420-11,para. 2-9.
[28] *See* Memorandum, Assistant Chief of Staff for Installation Management, Delegation of Authority for Use of Funds Available for Operation and Maintenance on Real Property, Maintenance, Repair, and Minor Construction Projects (4 April 2018); *see* Memorandum, U.S. Army Installation Management Command, Delegation of Authority for Use of Funds Available for Operation and Maintenance on Real Property, Maintenance, Repair, and Minor Construction Projects (2 May 2018).

funds for unspecified minor military construction up to $2 million per project. Military Construction projects between $2 million and $6 million may use Unspecified Minor Military Construction funds (UMMC).[29] Military Construction projects above $6 million must be funded with Military Construction Funds specifically authorized by Congress.

2. As noted in the chart above, judge advocates must be mindful of the approval authorities and funded costs associated with maintenance and repairs. The approval of a real property maintenance and repair project resides with the unit commander if it does not exceed $7,500,000 (total funded cost) with a repair to replacement (R&R) ratio at 75% or below. The approval of a real property maintenance and repair project also resides with the unit commander if it does not exceed $2,000,000 (total funded cost) and the R/R ratio is above 75%. On the other hand, if the funded costs of a real property maintenance and repair project exceed $7,500,000, or if the funded costs exceed $2,000,000 with an R/R ratio above 75%, the approval level is at the service secretary level. **Before rendering legal advice, judge advocates should reference the current policy regarding the R&R thresholds**. **This policy is subject to frequent changes or updates.**

3. 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.[30]

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 <$2M; UMMC >$2M < $6M; MILCON > $6M); 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 are normally limited in amount.[31]

1. **Contingency Construction Authority (CCA)**. Congress recognized that DoD needed a special construction authority for contingency operations, and provided DoD with this authority beginning in 2003. This authority, sometimes referred to as Contingency Construction authority (CCA), allows DoD to use O&M to fund construction projects outside of the U.S. in support of contingency operations. Section 2804 of the FY18 NDAA provides DoD with authority to use up to $100 million O&M for these types of projects. JAs should seek guidance from the COCOM prior to attempting to utilize this particular authority.

2. **Projects Resulting from a Declaration of War or National Emergency**. Upon a Presidential declaration of war or national emergency, 10 U.S.C. § 2808 permits the Secretary of Defense (SECDEF) to undertake construction projects not otherwise authorized by law that are necessary to support the armed forces. These projects are funded with unobligated military construction and family housing appropriations, and the

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[29] 10 U.S.C. § 2805(a)(2) (2018).
[30] *See* Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, § 113 (2018).
[31] 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).

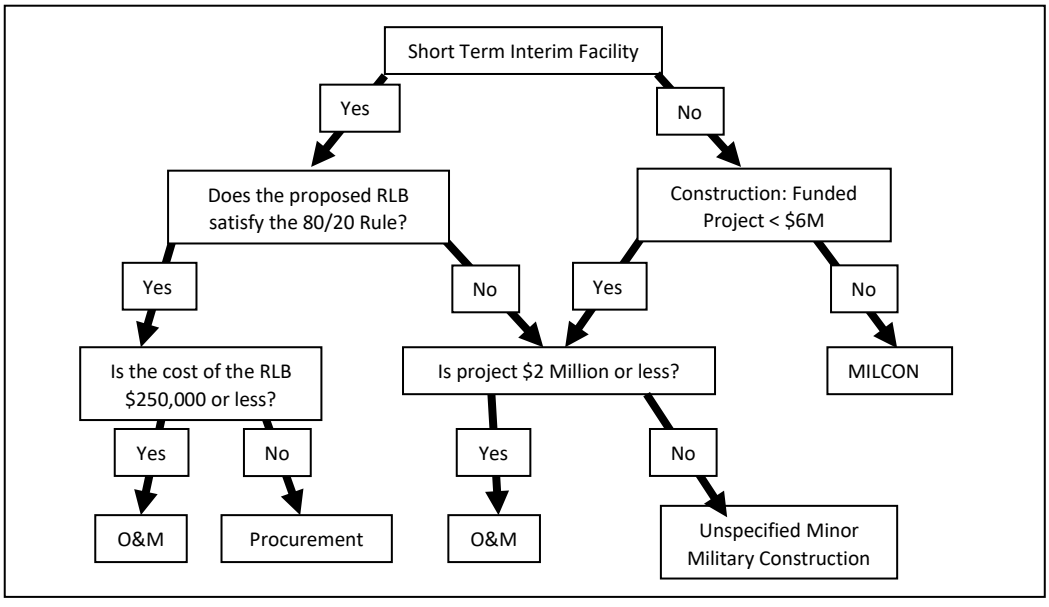
SECDEF must notify the appropriate committees of Congress of (a) the decision to use this authority; and (b) the estimated costs of the construction project. On 16 November 2001 President Bush invoked this authority in support of the Global War on Terrorism.[32]

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.

F. Recurring Construction Funding Issues – Relocatable Buildings and the Logistics Civil Augmentation Program (LOGCAP)

1. **Relocatable Buildings**. Department of the Army issued guidance regarding Relocatable Buildings and the delegation authority in February 2011.[33] 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

[32] *See* Executive Order 13235, Nov. 16, 2001, 66 Fed. Reg. 58343.
[33] *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).

included in the foundation cost)." 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.[34]

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 . . . ."[35]

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 that cost $250,000 or less.[36] For several years during the contingency operations in Iraq and Afghanistan, Congress has also permitted the expense/investment threshold to increase to $500,000. Section 9010 of the 2018 Consolidated Appropriations Act (CAA) authorizes 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."[37] 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

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[34] *See* Consolidated Appropriations Act, 2018, § 9010.
[35] *See* Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, div. C, tit. II (2018).
[36] *Id.* at div. C, tit. IX, § 9010.
[37] *Id.* at div. C., tit. III.

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 2018 CAA (e.g., $75k limit per passenger vehicle and $450k limit per heavy and light armored security vehicles).

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 $2 million. There are, however, some statutory exceptions to the general limitation on the use of O&M funds for construction projects that exceed $2 million, 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:

1. 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 DoDAA, though many appropriations for operations occur in "wartime supplemental" appropriations.

2. 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.

3. 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.

4. 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 an 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

authorization *and* an apprpriation. 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 operational funding rule 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, prior to a combined exercise or operation. 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.[38]

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.[39] This language is also found in Title 10 of the U.S. Code prohibiting

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[38] *See* CONTRACT & FISCAL L. DEP'T, THE JUDGE ADVOCATE GEN'S LEGAL CTR & SCH., U.S. ARMY, FISCAL LAW DESKBOOK, current edition, Chapter 10: Operational Funding, discussing The Honorable Bill Alexander, B-213137, 63 Comp. Gen. 422 (1984).
[39] 22 U.S.C. § 2378d.

the DoD from funding any training program involving a unit of the security forces of a foreign country if credible information exists that the unit 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.[40]

B. **Legal Framework for Foreign Assistance**.

1. The Foreign Assistance Act.

a. The Foreign Assistance Act of 1961 (FAA).[41] 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. [42]

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.[43] The purposes served by the provision of defense articles and services under the security assistance section of the FAA are essentially the same as those described for the Arms Export Control Act,[44] 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.[45] In addition to these broadly-defined purposes, the FAA contains numerous other specific authorizations for providing aid and assistance to foreign countries.[46]

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.[47]

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[40] 10 U.S.C. § 362.
[41] 22 U.S.C. §§ 2151 *et seq*.
[42] Annual Foreign Operations Appropriations Acts, http://www.congress.gov/.
[43] *See* 22 U.S.C. § 2301.
[44] 22 U.S.C. § 2751.
[45] *See* 22 U.S.C. §§ 2151, 2151-1.
[46] *See* 22 U.S.C. §§ 2292-2292q (disaster relief); 22 U.S.C. § 2293 (development assistance for Sub-Saharan Africa).
[47] 22 U.S.C. 2378d.

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 to provide professional education, research, and support to advance U.S. foreign policy through Security Assistance and Security Cooperation. 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 (USASAC) with support from the 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.[48]

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.

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[48] *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.

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.[49]

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 DoS. When DoD executes Security Assistance programs on behalf of DoS, DoS generally reimburses DoD for all its costs. When 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.[50]

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 DoS International Traffic in Arms Regulations (ITARs).

c. The FMS program, like many 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

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[49] *See* Presidential Decision Directive 25, Section IV.B., http://www.fas.org/irp/offdocs/pdd25.htm.
[50] 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).

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.[51]

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 FY18 Consolidated Appropriations Act provided over $5.6 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."

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.[52]

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.[53]

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

[51] Secretary of State for Defense v. Trimble Navigation Limited, 484 F.3d 700 (4th Cir. 2007).
[52] Defense and Security Assistance Improvements Act, Pub. L. 104-164 (1996) (increase from $75M to $100M).
[53] *See id*; *see also* Security Assistance Act, Pub. L. 106-280, 114 Stat. 850 (2000).

and requires fifteen days notice to Congress. President Bush subsequently directed $92 million in drawdown assistance in 2002.[54]

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.[55]

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.[56] 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.[57] 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.[58]

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

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[54] *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.
[55] *See* Sec. 1307 of the FY-03 Emergency Wartime Supplemental Appropriation.
[56] *See* Security Assistance Management Manual (SAMM).
[57] *See* Foreign Military Financing, *supra* VIII.D.1.
[58] *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).

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.[59]

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.[60]

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 non-reimbursable 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.[61] The current statutory authority continuing this tradition is located in the Foreign Assistance Act.[62] 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."[63] 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.[64] Given this fact, DoD traditionally has possessed limited authority to engage in disaster assistance support. In the

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[59] FAA § 630, 22 U.S.C. § 2390.
[60] FAA § 630, 22 U.S.C. § 2390.
[61] 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.
[62] 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).
[63] 22 U.S.C. § 2292(b).
[64] E.O. 12966, 60 Fed. R. 36949 (14 July 1995).

realm of Foreign Disaster Assistance, the primary source of funds should be the International Disaster Assistance Funds.[65] The Administrator of USAID controls these funds because the President has designated that person as the Special Coordinator for International Disaster Assistance.[66] In addition, the President has designated USAID as the lead agency in coordinating the U.S. response for foreign disaster.[67] 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.[68] 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.[69]

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).

2. The DoD legal advisor should be aware of the cultural, structural, and procedural differences between DoD and DoS, and plan accordingly.[70] 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 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. DOD APPROPRIATIONS AND AUTHORIZATIONS FOR OPERATIONAL FUNDING

A. Introduction. In 2017, Congress established Chapter 16 in Title 10 of U.S. Code to address a patchwork of funding authorities for the DoD. The 2017 NDAA consolidated and repealed a number of authorities within the DoD's security cooperation enterprise to create a more effective and efficient system. This section introduces the most commonly used operational funding authorities within that system, as well as other authorities that enable operations. Although judge advocates may find new authorities and terms within this section, the required elements to fund an operation are still the same. In order to fund any task, mission, or operation, the DoD (and the executing

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[65] FAA §§ 491 - 495K, 22 U.S.C. §§ 2292 - 2292q.
[66] *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).
[67] *See generally*, E.O. 12966, 60 Fed. R. 36949 (July 14, 1995).
[68] *See generally*, JOINT CHIEFS OF STAFF, JOINT PUB. 3-29, FOREIGN HUMANITARIAN ASSISTANCE (3 Jan. 2014).
[69] The OHDACA appropriation funds several different statutorily authorized programs: 10 U.S.C. § 402, Denton Transportation of Humanitarian Relief Supplies for NGOs; 10 U.S.C. § 404, Foreign Disaster Assistance; 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. Congress also authorizes OHDACA funds for 10 U.S.C. § 401; however, by policy the DoD funds its §401 activities with O&M.
[70] *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).

unit) must have the following: (1) operational authority, (2) funding authority, and (3) proper funds. The operational authority to conduct a mission flows from the COCOM's command authority (10 U.S.C. § 164(c)) in its area of responsibility. Operational authority provides commanders the objectives and requirements (i.e., the mission) to achieve. Much of this section will focus on particular funding authorities and funds from Congress, yet judge advocates must understand the requirements of the mission and its operational authority prior to advising commanders on funding authorities and proper funds.

The following paragraphs discuss particular funding authorities and funds applicable to overseas operations or activities with friendly foreign forces. The general rule in analyzing a funding authority 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 in advance of a combined exercise. The second group of exceptions occur when Congress specifically authorizes and appropriates funds for the DoD to conduct foreign assistance (security assistance, development assistance, and/or humanitarian assistance):

a. **Exception 1 - Security Assistance Training ("Big T training") vs. Interoperability, Safety, and/or Familiarization Training ("Little t training")**.

(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 safety and/or familiarization prior to a combined exercise or operation, 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. Also, the foreign troops and U.S. Forces must have a combined exercise or operation for which they are training, a critical element in every "Little t" analysis.

(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 prior to a combined exercise. 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 four general categories of appropriations and/or authorizations: (1) Support to Security Cooperation and Foreign Partners; (2) Overseas Contingency Operations (OCO) and Authorities that Enable Operations; (3) Humanitarian Assistance; and (4) Special Payment Authorities. Judge Advocates will find both permanent and temporary authorizations in all of these general categories.

B. **Support to Security Cooperation and 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).[71] 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.[72]

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 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

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[71] *See* U.S. DEP'T OF DEF., DIR 2010.9, ACQUISITION AND CROSS-SERVICING AGREEMENTS (28 Apr. 2003); CHAIRMAN, JOINT CHIEFS OF STAFF, INSTR.(CJCSI) 2120.01D, ACQUISITION AND CROSS-SERVICING AGREEMENTS (21 May 2015).
[72] 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.

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-15 NDAA (sec. 1207) extended this special "ACSA-*lend*" authority through 30 September 2019. Section 1271 of the FY-19 NDAA restricted third party transfers of equipment under these loans. Finally, section 1202 of the FY-20 NDAA extended this loan authority to 31 December 2024.

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).[73]

(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.[74]

(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

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[73] *See* U.S. DEP'T OF DEF., DIR. 2010.9, ACQUISITION AND CROSS-SERVICING AGREEMENTS (28 Apr. 2003); *see also* CHAIRMAN, JOINT CHIEFS OF STAFF, INSTR. 2120.01D, ACQUISITION AND CROSS-SERVICING AGREEMENTS, (21 May 2015).
[74] *See* Presidential Decision Directive 25, http://www.fas.org/irp/offdocs/pdd25.htm.

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. **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.[75]

c. While the purpose these funds can be used for is broad, they are highly regulated and the amount appropriated is very small. The FY18 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.

4. **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 Civic Assistance (to include urgent and unanticipated humanitarian relief and reconstruction 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; and (10) Joint warfighting capabilities.

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."

[75] Pub. L. No. 104-106, § 915, 110 Stat. 413 (1996).

5. **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.)

6. **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.

(1) **Regional Centers for Security Studies**. 10 U.S.C. § 342. 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.

(2) **Multinational Military Centers of Excellence (MCOE)**. 10 U.S.C. § 344. 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.

(3) **Traditional Combatant Commander Activities (TCA).** This Joint Staff program provides funding for U.S. Personnel during COCOM-directed military-to-military contacts (M2Ms), inferring 10 U.S.C. § 164. M2Ms consist of interactions between U.S. and foreign forces for security cooperation or other specific

COCOM objectives. TCA funding fulfills the long-standing requirement for COCOMs to interact with militaries of nations within their AOR in order to promote regional security and other national security goals.

7. **Bilateral & Multilateral Exercise Programs, Developing Countries Combined Exercise Program (DCCEP)**, **10 U.S.C. § 321**.

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. Definitions.

(1) 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.

(2) Developing Country. "Developing country" for the purposes of security cooperation programs (10 U.S.C. § 301(4)), means all low and middle income countries based on gross national income (GNI) per capita as published annually in the World Bank list of economies.[76]

8. **Payment of [Foreign] Personnel Expenses Necessary for Theater Security Cooperation, 10 U.S.C. § 312.**

a. Scope. The SECDEF may pay personnel expenses of defense personnel of friendly foreign governments, and other personnel of friendly foreign governments with SECSTATE concurrence. These expenses may include travel, subsistence, and similar personnel expenses necessary for theater security cooperation.

b. Limits payable expenses to personnel from developing countries. SECDEF may waive this limitation in extraordinary circumstances.

c. This authority consolidates or replaces the former authorities of: § 1050 (Latin American cooperation), § 1050a (African cooperation), § 1051 multilateral, bilateral, or regional cooperation – personnel expenses), § 1051a (liaison officers).

9. **Training <u>with</u> Friendly Foreign Forces: Payment of Training and Exercise Expenses, 10 U.S.C. § 321.** In § 1203 of the 2014 NDAA, Congress provided DoD the initial version of this authority in order to conduct training with friendly foreign forces. In 2017, Congress amended and codified this authority as 10 U.S.C. § 321. The intent behind this authority is to increase U.S. military readiness; hence, the purpose of 321 events are to benefit U.S. Forces. Congress provided the following limitations to this particular type of training:

a. Requires SECDEF approval prior to executing any training under this authority. Approval has been delegated to the ASD(SPC).[77]

b. The type of training authorized by this provision is limited to training that supports the mission essential tasks for which the unit of the U.S. Forces in such training is responsible.

c. Requires the training include, to the maximum extent practicable, elements that promote:

(1) Observance of and respect for human rights and fundamental freedoms; and

[76] Memorandum, Office of the Under Secretary of Defense, Definition of "Developing Country" for Security Cooperation Programs (15 May 2017).
[77] Memorandum, Under Secretary of Defense, Delegation of Authority for 10 U.S.C. 321 (25 October 2017).

(2) Respect for legitimate civilian authority within the foreign country concerned.

10. **Special Operations Forces (SOF): Training with Friendly Foreign Forces**, **10 U.S.C. § 322**.

a. Scope. The Commander of U.S. Special Operations Command and the commander of any other unified or specified combatant command may pay any of the following expenses:

(1) Expenses of training the SOF assigned to the command in conjunction with training, and training with, armed forces and other security forces of a friendly foreign country;

(2) Expenses of deploying SOF for that training;

(3) Incremental expenses incurred by the friendly developing foreign country as the result of the training.

b. Definitions. SOF includes civil affairs and psychological operations forces. Incremental expenses with respect to a developing country (see para. 7(b)(2) above), means the reasonable and proper cost of rations, fuel, training ammunition, transportation, and other goods and services consumed by such country, except that the term does not include pay, allowances, and other normal costs of such country's personnel.

11. **Foreign Security Force: Authority to Build Partner Capacity (BPC), 10 U.S.C. § 333.** (Formerly "1206" or "2282") This train and Equip (T&E) authority provides DoD with the ability to "build the capacity" of foreign military forces in support of Security Cooperation and Overseas Contingency Operations.

a. 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;

(2) conduct counter-weapons of mass destruction operations;

(3) conduct counter-illicit drug trafficking operations;

(4) conduct counter-transnational organized crime operations;

(5) conduct maritime or border counterterrorism operations;

(6) conduct military intelligence operations; or

(7) operations or activities that contribute to an international coalition operation that is determined by the Secretary to be in the national security interest of the United States.

b. Small scale construction is limited to $750,000 per project, and all construction projects in a particular fiscal year are limited to 5% of the amount available under this authority.

c. Requires concurrence of the Secretary of State and 15-day prior Congressional notification. This program is available for new obligations.

d. The majority of BPC training events are administered through DSCA. The DoD uses the pseudo-FMS process to plan, coordinate, and execute BPC cases.[78] The operational authority for these BPC training events typically flows from COCOM and/or component command orders, which enables planning and execution by subordinate units.

C. **Overseas Contingency Operations (OCO) and Authorities to Enable Operations**.

1. **Coalition Support Fund (CSF)**. The current authorization of $450 million (for any key cooperating nation other than Pakistan) for the CSF is found in Section 1217 of the FY20 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

[78] Additional information on the FMS or pseudo-FMS process can be found at http://www.samm.dsca.mil/.

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 and Iraq Lift and Sustain**. This temporary authority is currently authorized under Section 9006 of the FY20 Consolidated Appropriations Act (CAA). 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 and Iraq from DoD O&M. This authority is similar to "global lift and sustain," except that it is geographically limited to Afghanistan and Iraq. Practitioners should note that:

a. The authority's period of availability expires on 30 September 2020.

b. 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)**. Current authority is in the 2020 NDAA Sec. 1520 and Congress appropriated $4.2 billion for ASFF to be available through 30 September 2021. ASFF is available to the SECDEF "for the purpose of allowing the Commander, Combined Security Transition Command-Afghanistan (CSTC-A), 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. For detailed information regarding policy, planning, resourcing, and executing ASFF, refer to the CSTC-A ASFF SOP (Jan. 2018).

4. **Authority to Provide Assistance to Counter ISIL.** FY15 NDAA section 1236 as amended by FY20 NDAA section 1221, authorizes assistance to counter the Islamic State of Iraq and the Levant (ISIL). Assistance includes training, equipment, logistics support, supplies and services, stipends, facility and infrastructure repair and renovation, small-scale construction, and sustainment to military and other security forces of or associated with the Government of Iraq, including Kurdish and tribal security forces or other local security forces with a national security mission.

a. Funding for this authority is provided through the Counter-ISIL Train and Equip Fund (CTEF). In FY 2020, the CAA appropriated $1.195 billion for CTEF available through 30 September 2021. The expenditure of CTEF is currently limited to the following countries: Iraq, Syria, Turkey, Jordan, Lebanon, Egypt, and Tunisia.

b. The approval authority for the use of CTEF is SECDEF in coordination with SECSTATE; however, authority has been delegated and practitioners must check local delegations to determine who is authorized to approve use of CTEF funds. Currently, Commander, Combined Joint Task Force – Operation Inherent Resolve has overall responsibility for utilizing and managing CTEF. Although the Authority to Provide Assistance to Counter ISIL authorizes small-scale construction, the CTEF appropriation does not contain a corresponding authorization. Accordingly, construction is currently unauthorized with CTEF.

c. Provision of assistance must be for the purposes of defending Iraq, its people, allies, and partner nations from the threat posed by ISIL and groups supporting ISIL; or securing the territory of Iraq.

d. In addition to "Leahy" vetting, this authorization requires vetting for associations with terrorist groups or groups associated with the Government of Iran. This authorization also requires elements receiving assistance to commit to promoting respect for human rights and the rule of law.

5. **Syria Train and Equip**. FY15 NDAA section 1209 as amended by FY20 NDAA section 1222, provides authority to assist appropriately vetted elements of the Syrian opposition and other appropriately vetted Syrian groups and individuals. Assistance includes provision of training, equipment, supplies, stipends, construction of training and associated facilities, and sustainment, through 31 December 2020 for purposes of: (1) Defending the Syrian people from attacks by ISIL, and securing territory controlled by the Syrian opposition; (2) protecting the United States, its friends and allies, and the Syrian people from the threats posed by terrorists in Syria; and (3)

promoting the conditions for the negotiated settlement to end the conflict in Syria. Funding for Syria Train and Equip is found within the CTEF appropriation.

6. **Friendly Foreign Countries: Authority to Provide Support For Conduct of Operations, 10 U.S.C. § 331**. Authorizes the Secretary of Defense to provide support to friendly foreign countries in connection with designated operations. This authority was formerly located at 10 U.S.C. §127d. Sec. 1245, FY17 NDAA redesignated and amended §127d as 10 U.S.C. §331. The approval authority remains at the SECDEF level. Support that can be authorized includes: LSSS,[79] procurement of equipment for the purpose of the loan of such equipment to the military forces of a friendly foreign country participating in a U.S.-supported coalition or combined operation, training in connection with an operation, small-scale construction.[80]

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 its use since Iraq/Afghanistan Lift and Sustain is the more specific authorization.

7. **Support of Special Operations to Combat Terrorism, 10 U.S.C. § 127e.** (Formerly "1208" authority)

a. Scope. Provides SECDEF up to $100,000,000 annually, for support to foreign forces, irregular forces, groups, or individuals engaged in supporting or facilitating ongoing military operations by SOF to combat terrorism.

b. Requires concurrence from the relevant Chief of Mission.

c. Requires a separate operational authority to conduct activities against a specific target or group.

8. **Support of Special Operations for Irregular Warfare, § 1207 FY 20 NDAA**.

a. Scope. Provides authority for up to $10,000,000 in funding to SECDEF through fiscal year 2020 for support to foreign forces, irregular forces, groups, or individuals engaged in supporting or facilitating ongoing and authorized irregular warfare operations by SOF.

b. Requires concurrence from the relevant Chief of Mission.

c. Defines "Irregular Warfare" as activities in support of predetermined United States policy and military objectives conducted by, with, and through regular forces, irregular forces, groups, and individuals participating in competition between state and non-state actors short of traditional armed conflict.

D. **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*."[81]

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[79] 10 U.S.C. §331(h) ("In [§331] the term [LSSS] has the meaning given that term" in 10 U.S.C. §2350(1)).
[80] Within Chapter 16 Title 10 U.S.C., the term "small-scale construction" is defined as construction at a cost not to exceed $750,000 for any project. 10 U.S.C. §301(9).
[81] 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."[82]

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."[83]

c. **Emergency Medical Care**. AR 40-400 authorizes medical care to any person in an emergency "to prevent undue suffering or loss of life." AR 40-400, Patient Administration, ¶ 3-55 (08 Jul. 2014).

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.

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[82] U.S. DEP'T OF DEF., DIR. 5100.46, FOREIGN DISASTER RELIEF (3 Jul. 2012) (C1, 28 Jul. 2017).
[83] U.S. DEP'T OF DEF., DIR. 3025.18, DEFENSE SUPPORT OF CIVIL AUTHORITIES (DSCA) (29 Dec. 2010) (C1, 19 Mar. 2018). *See also* OPNAVINST 3440.16D, and MCO 3440.7A.

(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 (*see* HCA authority below). 10 U.S.C. § 2561 primarily allows more flexibility in emergency situations such as disasters (natural or man-made), and it allows contracts if necessary for mission execution. 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 have this requirement. 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 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 promote: (1) 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.

(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, petroleum, oil, and lubricants; and repair of equipment) that likely would have been incurred whether or not the HCA was provided.[84]

b. **Command Approved HCA**. **10 U.S.C. § 401(c)(4)**.

(1) 10 U.S.C. § 401(c)(4). Based on language in the authorizing statute (10 U.S.C. 401), and also 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.

(2) Command-approved HCA projects are held to the same standards and requirements for coordination and policy compliance as other HCA projects. Project splitting is not authorized. If actual or estimated costs exceed the threshold established by the ASD (SO/LIC), which is currently $15,000, the CCMD will notify the Joint Staff immediately to determine the appropriate action. Command-approved HCA projects are approved at the CCMD level, unless otherwise directed.[85]

5. HCA vs. OHDACA from a funding perspective. 10 U.S.C. § 401 "Pre-planned" or "budgeted" HCA is funded from DoD O&M. All the other Humanitarian Assistance authorizations are funded from the OHDACA appropriation.

F. **Special Payment Authorities**

1. **Commander's Emergency Response Program (CERP)**. CERP is a temporary authorization found in the NDAA which allows the DOD O&M appropriation to be used by commanders to conduct stability tasks that have traditionally been performed by U.S., foreign, or indigenous personnel or agencies. Current CERP authority is found at § 1208 of the FY20 NDAA. Each year, Congress reviews the provisions concerning the CERP program

[84] *See* U.S. DEP'T OF DEF., INSTR. 2205.2, HUMANITARIAN AND CIVIC ASSISTANCE (HCA) ACTIVITIES (23 Jun. 2014) (C1, 22 May 2017).
[85] *Id.*

and Judge Advocates must review the authorization and appropriation to verify the purposes for which funds can be utilized under the program.

a. Afghanistan. The present authority allows for the expenditure of funds for the primary purpose of authorizing U.S. military commanders in Afghanistan "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."

b. **CERP Appropriated Funding**. CERP is funded by the Operations and Maintenance, Army appropriation.[86] For FY 2020, the program was authorized up to $5,000,000 of OMA funds.

(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.

c. **DoD Guidance for CERP**. DoD regulates CERP through the DoD Financial Management Regulation (DoD FMR) Volume 12, Chapter 27 (last updated December 2019). CERP is not available for battle damage or condolence payments. Section 1213 of the FY 20 NDAA established a new authority for *ex gratia* payments to foreign civilian recipients determined by local military commanders to be friendly to the United States for damage, personal injury, or death both caused by and during a combat operation by US Armed Forces or certain military organizations supporting US under. Payment may be authorized when it is not compensable under the FCA; the enemy did not cause the loss; and claimant had no involvement in act causing use of force. This authority expires on 31 December 2022 and is limited to $3M of DoD-wide O&M under section 8104 of the FY20 CAA.

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 authority 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.

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

[86] Consolidated Appropriations Act, 2017, § 9005.

(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.

X. DOD PROPERTY DISPOSAL AUTHORITIES

A. **Property Disposal**. As with foreign assistance, 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 implement new legislation for property disposal.

B. **Foreign Excess Personal Property (FEPP)**. 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 Manual 4160.21-V2, Defense Materiel Disposition: Property Disposal and Reclamation, 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 and Iraq. 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.

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. Multiple government entities may have a need for the property disposed of by DLA Disposition Services. Therefore, DLA Disposition Services assigns the following four priorities to government elements requesting DLA Disposition Services -owned property:[87]

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 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.

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[87] *See* DRMS-I 4160.14.

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 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, especially its funding sources. This will shape all aspects of 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 since been made, and actions based on those decisions have already been executed.

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.

XI. REFERENCES

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D. U.S. DEP'T OF DEFENSE, INSTR. 2205.2, HUMANITARIAN AND CIVIC ASSISTANCE (HCA) ACTIVITIES (23 June 2014) (C1, 22 May 2017)

E. U.S. DEP'T OF DEFENSE, 5105.38-M, SECURITY ASSISTANCE MANAGEMENT MANUAL (SAMM) (30 Apr. 2012).

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I. DEFENSE REUTILIZATION AND MARKETING SERVICE (DRMS), INSTR. 4160.14, OPERATING INSTRUCTIONS FOR DISPOSITION MANAGEMENT (12 May 2008).

J. U.S. DEP'T OF DEFENSE, 4160.21-V2-M, DEFENSE MATERIAL DISPOSITION: PROPERTY DISPOSAL AND RECLAMATION (22 Oct. 2015) (see Enclosure 4, Disposal of Foreign Excess Personal Property).

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CHAPTER 18

CONTINGENCY AND DEPLOYMENT CONTRACTING

I. INTRODUCTION

A. General. The past nineteen years of continuous 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 more and more on contracted support. The apparatus for competing, awarding, and supervising contractors in deployed or contingency environments is called "contingency contracting." The Joint Chiefs, in Joint Publication (JP) 4-10, define Contingency Contracting as: "The process of obtaining goods, services, and construction via contracting means in support of contingency operations." JP 4-10, Part II-Terms and Definitions.

B. Legal Support to Operations. Doctrine covering 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, JAs 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, Legal Counsel should participate fully in the acquisition process at their level, make themselves continuously available to their clients, involve themselves early in the contracting process, communicate closely with procurement officials and contract lawyers in the technical supervision chain, and provide legal and business advice as part of the contract management team. *Id.* para. 5-40; *see also* AFARS 5101.602-2-90 (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 units' operation plan (OPLAN), and being available to give advice on the 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-level main and tactical command posts, Theater Sustainment Command (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. 5-39 to 5-43.

4. Contract-Specific Roles. Judge Advocates may be assigned as Command Judge Advocates or Deputy Command Judge Advocates 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. 1-14. 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 and fiscal law training. *Id*.

5. Demonstrated Importance. After action reports (AAR) from Iraq and Afghanistan consistently indicate that JAs, including Brigade Judge Advocates, throughout both theaters—regardless of the position to which they are assigned—practiced fiscal law on a daily basis. These same AARs indicated that while most JAs encountered contract law issues less frequently, they needed an understanding of basic government 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, paras. 5-38 and 5-39. 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 applies during combat operations and imposes limitations, for example, on the use of prisoners of war (POW) for labor. Many contractors are authorized to accompany the force, a technical distinction that allows them to receive POW status should they be captured. *See* GCIV, ART 4(A)(4).

b. The Law of Armed Conflict – Occupation. The Law of Armed Conflict also applies during occupation, and may also be followed as a guide when no other body of law clearly applies.

c. International Agreements. A variety of international agreements, such as treaties and status of forces agreements (SOFA) may apply. These agreements can have substantial impact on contingency contracting by, for example, limiting the ability of foreign corporations from operating inside the local nation, placing limits and tariffs on imports, and governing the criminal and taxation jurisdiction over contractors and their personnel.

Example: The Security and Defense Cooperation Agreement (SDCA), also known as the Bilateral Security Agreement (BSA), executed between the United States and the Government of the Islamic Republic of Afghanistan (effective 1 January 2015) covers many of the duties and rights of the United States and its contractors operating in Afghanistan. The agreement states that the Government of the United States, its military and civilian personnel, contractors and contractor personnel "*shall not be liable to pay any tax or similar or related charges* assessed by the Government of Afghanistan…" (emphasis added). Obviously, this type of provision has a profound impact on contract pricing and contractor performance. Legal Counsel must know these agreements to properly advise their clients when facing contingency contracting.

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 otherwise available may exist in contingency operations and can 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 details the use of simplified acquisition procedures (SAP). Approximately 95% of all contracting actions in contingency operations will use SAP, which are based primarily on acquisitions falling below a certain cost threshold. More expensive acquisitions may not qualify.

(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 cover foreign acquisitions, including the "Buy American" Act (41 U.S.C. §§ 8301-8305) and other requirements.

(5) FAR Part 50 outlines the extraordinary contractual actions available during emergency situations. These are rarely used due to their low dollar threshold ($70,000) and high approval levels, involving Congressional notification.

b. Fiscal Law. 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)). For a more in-depth discussion of fiscal law principles, *see generally* CONTRACT & FISCAL LAW DEP'T, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, FISCAL LAW DESKBOOK (updated frequently and available online at www.jagcnet.army.mil).

c. Executive Orders and Declarations.

d. 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 give rise to circumstances making it easier to develop a justification and approval to support the use of the unusual and compelling urgency exception to full and open competition located at FAR 6.302-2.

(2) Appropriation and authorization acts may contain temporary, extraordinary fiscal and contract authorities specific to a particular operation. Operations in Afghanistan contain numerous examples of these extraordinary authorities, from the expenditure of Commander Emergency Response Funds (CERP) through the Afghanistan First program.

e. 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 delegees may initiate or amend contracts notwithstanding any other provision of law whenever it is deemed necessary to facilitate the national defense. Pub. L. No. 85-804, codified 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 in excess of $70,000 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. 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 joint force commanders. Command authority does NOT include the ability to make binding contracts for the U.S. Government. ATP 4-92, para. 1-40; *see also* JP 4-10, p. x.

2. Contract Authority. Premised on the U.S. Constitution, federal statutes, 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 his or her 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, p. I-13; ATP 4-92, para. 1-40.

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. At a minimum, however, 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. JP 4-10, p. III-9. 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). *Id*. Annex W to the GCC OPLAN/OPORD contains the CSIP. *Id.*

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, and that the contract support integration and contractor management related guidance and procedures are identified and included in the overall plan. ATP 4-92, para. 2-24.

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.

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 to acquire and manage contracted support, the CMP is focused on government obligations under contracts to provide support to contractor personnel. JP 4-10, p. V-5.

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, paras. V-5 to V-6. Therefore, the GCC and subordinate joint forces commander must establish clear, enforceable, and well understood theater entrance, accountability, force protection, and general contractor management and procedures early in the planning stages of any military contingency. *Id*. To accomplish this task, the GCC should publish a CMP. JP 4-10, para. V-6.

c. The CMP should specify operational specific contractor personnel and equipment requirements so the Joint Forces Commander, Service components, theater support contracting command, special operations forces, external support contracts, and the Defense Logistics Agency can incorporate these into applicable contracts. JP 4-10, para. V-6 to V-8. 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. *Id.*

d. The Joint Forces Command and Service components should prepare supporting CMPs that support the GCC's CMP but provide more specific details. ATP 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 ch. 31, Contingency Contractor Personnel (updated frequently and available online at www.jagcnet.army.mil).

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, such as the Money as a Weapons System—Afghanistan (MAAWS-A). AARs from Afghanistan indicate that familiarity with this resource is foundational to anyone who will be providing fiscal or contract law advice in theater.

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 at various levels and with varying levels of authority. AFARS 5101.603. The chief of a contracting office, also a contracting officer, may appoint field ordering officers (FOOs) to conduct relatively low dollar value purchases. AFARS 5101.602-2-92. 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. Soldiers or DOD civilians known as paying agents (formerly known as Class A Agents), handle money and pay merchants for purchases made by the FOOs.

1. Head of Contracting Activity (HCA). A Flag Officer or equivalent senior executive service (SES) civilian who has overall responsibility for managing a contracting activity. 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 Materiel Command, U.S. Army Corps of Engineers, U.S. Transportation Command, U.S. Special

Operations Command, and the Joint Theater Support Contracting Command. The head of each contracting activity is an HCA. DFARS 202.101; AFARS 5101.692.

c. See generally AFARS 5101.692 for a discussion on the responsibilities of HCAs.

2. Senior Contract Official (SCO). 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 in 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) (17 Oct. 2008). Presently, CENTCOM Contracting Command (C3) has one SCO or PARC for Afghanistan.

b. In the Army, SCOs were previously known as a Principal Assistants Responsible for Contracting (PARC). The 10 September 2019 AFARS update changed the term in AFARS 5101.693 PARC to SCO aligning the Army with much of the rest of the Executive branch. However, the term and title of PARC is still used throughout many contracting offices and by many Army regulations and doctrinal publications.

c. HCAs appoint SCOs. AFARS 5101.692.

d. The SCO 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 do not require the HCA to perform personally (except when the HCA elects to exercise selected authorities). The SCO, by virtue of the organizational position occupied, may execute command functions for the contracting activity, however, these functions are separate and distinct from procurement authority. AFARS 5101.693(3).

Example—The Commander of the Army Materiel Command (AMC) is an HCA. The HCA normally appoints each Contracting Support Brigade Commander as a SCO. ATP 4-92, para. 1-7.

3. Contracting Officer (KO). The government official (military officer, enlisted, or civilian) with the legal authority to enter into, administer, modify, and/or terminate contracts. JP 4-10, p. GL-6; *see also* FAR 1.602.

a. Appointed in writing through a warrant (Standard Form 1402) by the HCA or SCO/PARC. JP 4-10, p. I-7.

b. Only duly warranted contracting officers are authorized to obligate the U.S. Government, legally binding it to make payments against a contract. *Id.*

c. Three main types of contracting officers: procuring contracting officers (PCOs), administrative contracting officers (ACOs), and terminating contracting officers (TCOs). *Id*. PCOs enter into contracts. ACOs administer contracts. TCOs settle terminated contracts. A single contracting officer may be responsible for duties in any or all of these areas. FAR 2.101 (definition of "contracting officer").

4. Contracting Officer's Representative (COR). CORs operate as the KO's "eyes and ears" regarding contract performance, and provide the key link between the command and the KO regarding the command's needs. CORs are organic members of the unit and are 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 (usually after nomination by the unit command). FAR 1.602-2(d). CORs do NOT exercise any contract authority and are used for communication regarding contract performance. *See* FAR 1.602-2(d). Any issues with the contractor must still be resolved by the KO. *See* DFARS 201.602-2; JP 4-10, p. I-6.

a. A properly trained COR shall be designated in writing prior to contract award. FAR 1.602-2(d), PGI 201.602-2, DoDI 5000.72, DoD COR HANDBOOK, March 22, 2012. A COR must be a U.S. Government employee, unless authorized by agency-specific regulations. In this case, DFARS 201.602-2 authorizes officers of foreign governments to act as CORs as well.

b. Local policies and mission specific orders may dictate additional responsibilities regarding CORs due to their importance for mission success. Many of these require the identification and training of CORs well in advance of deployment or mission execution.

For example, see HQDA EXORD 048-10: Pre-Deployment Training for Contracting Officer's Representative and Commander's Emergency Response Program (CERP) Personnel, dated 5 Dec. 2009. This required brigades, brigade equivalents, and smaller units deploying in support of OEF or OIF to determine the number of CORs needed to meet theater contracting requirements no later than (NLT) 180 days before the latest arrival date (LAD), and then complete preliminary training for the identified CORs NLT 90 days before LAD. They would then require additional training from the KO upon appointment as a COR.

c. For more detailed information on COR responsibilities, *see* DEFENSE CONTINGENCY COR HANDBOOK, V2 (Sep. 2012); *see also* DFARS 201.602-2(2) and PGI 201.602-2.

5. Field Ordering Officer (FOO).

a. Service member or DOD civilian appointed in writing and trained by a contracting officer. AFARS 5101.602-2-92; 5101.603-1; 5101.603-3-90.

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 over the counter 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 5101.602-2-92. FOOs may also be government purchase card holders. AFARS 5113.2. However, FOOs are still 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 found at AFARS 5153.303-2.

d. AFARS 5101.602-2-92 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.

6. Paying Agents. Finance specialists, and Soldiers and DOD civilians appointed and trained by Finance, hold money. When FOOs or KOs make purchases using SF44s, the merchant can present the form to the paying agent for payment. Alternatively, and most likely a necessity in an immature theater, the paying agent will accompany the FOO or KO. Once the FOO/KO completes the transactions, the paying agent will pay the merchant. Pre-deployment coordination with finance to determine who the paying agents are and where they will be located will aid the deployed contracting process. Paying agents may not be FOOs. For detailed guidance on paying agents, *see generally*, FM 1-06; *see also* DOD FMR, vol. 5, para. 020704 (discussing the appointment and responsibilities of paying agents). For Afghanistan specific guidance on paying agents, see the MAAWS-A.

D. Sources of Contracted Support in a Contingency Operation.

1. General. Three different sources of contract support generally are used in support of contingency operations: Theater Support Contracts, Systems Support Contracts, and External Support Contracts.

2. Theater Support Contracts. Contracts awarded by contracting officers in the operational area serving under the direct contracting authority of the Service component, special operations forces command, or designated joint HCA for the designated contingency operation. JP 4-10, p. I-9 and app. B. These contracts are commonly referred to as contingency contracts. *Id.* For example, theater support contracts in Afghanistan include contracts awarded by the CENTCOM Joint Theater Support Contracting Command or any of its Regional Contracting Centers or Offices.

3. Systems Support Contracts. Contracts awarded by Service acquisition program management offices that provide technical support, maintenance and, in some cases, repair parts for selected military weapon and support systems. Systems support contracts are routinely put in place to provide support to newly fielded weapons systems, including aircraft, land combat vehicles, and automated command and control systems. These contracts are often awarded long before—and unrelated to—a specific operation. JP 4-10, app. A, p. A-1. Of note, only the contracting activity that issued the contract has the authority to modify or terminate the contract.

4. External Support Contracts. Contracts awarded from contracting organizations whose contracting authority does not derive directly from the theater support contracting HCA or from system support contracting authorities. External support contracts provide a variety of logistic and other noncombat related services and supply support. JP 4-10, p. I-9.

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. *Id*.

(2) Non-logistic support may include communication services, interpreters, commercial computers and information management, and subject to congressional as well as DOD policy limitations, interrogation and physical security service support. *Id.*

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). *See generally*, JP 4-10, p. I-9. Only AMC has the authority to change the LOGCAP contract.

c. Major External Support Contracts include each Service's civil augmentation program (CAP) contracts (LOGCAP for the Army, 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 DLA Energy; 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, p. I-9.

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, p. I-9.

(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 and general logistic support and can be used for supply support.

(iii) The Navy GCCC focuses exclusively on construction.

(iv) The Navy GSCS focuses on facilities support.

E. Theater Contracting Support Organizational Options.

1. General. There is no single preferred contracting organizational option for theater support contracting organizations; the specific organization option is determined by the Geographic Combatant Commander (GCC) in coordination with the subordinate Joint Force Command and Service Components. JP 4-10, app. E, p. E-2 to E-3. In general, however, there are three main organizational options: service component support to own forces, choosing a lead Service, and forming a joint theater support contracting command. *Id.* 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, and so forth). *See generally*, ATP 4-92, ch. 1.

2. Service Component Support to Own Forces.

a. During smaller scale operations with an expected short duration, the GCC may allow the Service component commanders to retain control of their own theater support contracting authority and organizations. This organizational option is also applicable to operations where the bulk of individual Service component units will be operating in distinctly different areas of the joint operations area thus limiting potential competition for the same vendor. JP 4-10, p. IV-2.

b. Army. The Army established the Expeditionary Contracting Command to provide theater support contracting in support of deployed Army forces worldwide and garrison contracting support for Outside the Continental United States Army installations. The commanders of each of six regionally focused contracting support brigades (CSB) are PARCs or SCOs. FM 4-92, p. 1-2. In turn, each brigade has a number of contingency contracting battalions, contingency contracting teams, and senior contingency contracting teams. *Id.* para. 1-7. CSB units are deployed as necessary to meet mission contracting requirements. *Id.* para. 1-8. Specifically, the CSB may be organized to provide Service component support to Army forces. *Id.*

3. Lead Service Responsible for Theater Support Contracting.

a. GCCs may designate a specific Service component responsible to provide consolidated theater contracting support. JP 4-10, p. IV-2 to IV-3.

b. 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. *Id.*

c. The lead service often has command and control of designated other Service component theater contracting organizations and also has its staff augmented by other Services' contingency contracting personnel. *Id.*

d. 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). ATP 4-92, p. 2-2.

4. Joint Theater Support Contracting Command.

a. 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, p. E-7 to E-13. For Afghanistan, the CENTCOM Contracting Command (C3) has been established and organized as a Joint Theater Support Contracting Command.

b. Since GCCs do not have their own contracting authority, the joint theater support contracting command's HCA authority flows from one of the Service components to the operational area. In this option, the joint theater support contracting command headquarters should be established by a Joint Manning Document (JMD). *Id.*

c. Within the Army, the CSB may serve as the building block for the formation of a joint theater support contracting command. ATP 4-92, p. 3-3.

5. There is no formally approved, established model for lead Service theater support or the joint theater support contracting command organization options. JP 4-10, app. B, however, provides a general model or organization framework for each type of organization, to include a discussion of legal support to these organizations. Significantly, each of these organizational options will likely 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. ATP 4-92, p. 2-12.

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. *Id.*

6. Reachback Contracting. The National Defense Authorization Act for Fiscal Year 2012 granted the Under Secretary of Defense for Acquistion, Technology, and Logistics the power to designate a lead contracting activity for Operation Enduring Freedom and Operation New Dawn.

a. Army Contracting Command – Rock Island (ACC-RI) was designated in June 2012 as the Lead reach-back contracting authority by DOD.

b. ACC-RI directly contracts for theater requirements over $1M. ACC-RI provides support in Afghanistan to all services.

III. REQUIREMENTS GENERATION, APPROVAL, AND CONTRACTING PROCESS

A. General. Once a requirement for goods or services is identified and approved by a requiring activity, resource management, finance operations, and contracting personnel must work in concert to actually acquire and pay for the good or service. Together, these three are known as the "Fiscal Triad." FM 1-06, at 1-6; ATP 4-92, p. 2-13, FM 1-04, p. 13-1.

1. Requiring Activity. Units requesting the goods and services 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 and conducting basic market research. JP 4-10, p. III-18. Unit commanders and staff identify, develop, validate, prioritize, and approve requirements. ATP 4-92, p. 2-16.

a. Requiring activities are responsible for developing "acquisition ready" requirements. In coordination with the supporting contracting activity (e.g., RCC or RCO), the requiring activity must be able to describe what is needed to fulfill the minimum acceptable standard for the government. This information allows the contracting activity to create a solicitation against which commercial vendors can bid a proposal and successfully deliver in accordance with the terms of the contract to satisfy a government requirement. *Id.*; *see* JP 4-10, app. C.

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. JP 4-10, p. III-18. JAs conducting fiscal and contract reviews must carefully review each of these documents. For example, requirements which superficially appear to be services and would be properly funded with operations and maintenance appropriations may in fact include requirements for construction or the procurement of investment items that may require the use of a different appropriation.

2. Resource Management (RM).

a. Serves as the commander's representative to lead the requirement validation, prioritization, and approval effort.

b. Certifies the availability of funds by executing a purchase, request, and commitment (PR&C) and ensures the use of the funds is legal and proper.

3. Contracting Officers.

a. The only government officials (military officer, enlisted, or civilian) with the legal authority to enter into, administer, and/or terminate contracts. JP 4-10, p. GL-6; *see also* FAR 1.602.

b. Upon receipt of certified funding and properly developed requirement, contracts on behalf of the U.S. Government to obtain the good or service. ATP 4-92, p. 1-10.

c. Responsible for appointing and training field ordering officers (FOO).

4. Finance Operations.

a. As the government's banker, finance is the only triad element with funds disbursement authority. Once a contract has been awarded, finance operations provide vendor payment through cash, check, government purchase card, or electronic funds transfer. FM 1-06, p. 1-26.

b. Funds and clears paying agents.

B. Requirements Approval Process.

1. Ensures the appropriate functional staffs coordinate on, prioritize, approve, and certify funding for the "acquisition ready requirements" package before it is forwarded to the appropriate contracting activity. ATP 4-92, p. 2-14. These staff reviews can include, but are not limited to:

a. Legal

b. Supply/logistics/property book.

c. Engineer

d. Medical

e. Signal (information technology and communication)

f. Resource Management

g. Other as needed/required by the circumstances.

2. In major operations, common user logistics (CUL) (also known as base life support or base operations support) are coordinated by the GCC and subordinate Joint Forces Commander among the functional staffs through the use of three important contracting related review boards as discussed below. JP 4-10, ch. 4; *see also* ATP 4-92, para. 3-3.

3. 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, p. III-6, GL-6. Focuses on general policies and AOR-wide issues related to contracting support at the GCC level, to include:

a. 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;

b. Establishing AOR-wide contracting and contractor management policies and procedures; and

c. Determining theater support contracting organization structure.

4. Joint Requirements Review Board (JRRB). JP 4-10, III-6.

a. Utilized to coordinate and control the requirements generation and prioritization of joint common user logistics (CUL) supplies and services that are needed in support of the operational mission.

b. Normally chaired by the Joint Forces Deputy Commander or designated staff officer, with participation by the functional staff (to include JAs) as well as theater, external, and system support contracting members.

c. Main role is to make specific approval and prioritization recommendations for all GCC directed, subordinated Joint Forces Commander controlled, high-value and/or high visibility CUL requirements and to include recommendations on the proper source of support for these requirements.

d. The role of theater support and external support contracting members is to inform the other JRRB members which contracting mechanisms are readily available for a particular acquisition.

e. For an example, *see* Money as a Weapons System—Afghanistan (MAAWS-A). This contains detailed guidance on the JARB (and related, subordinate, and superior ARBs) and the requirements approval process. Judge Advocates deploying to Afghanistan, regardless of organizational level, must familiarize themselves with the policy contained in these documents in advance of deploying to theater.

f. Once a requirement is validated and approved by the JRRB, the resource manager certifies funding and the packet is provided to a contracting activity.

5. Joint Contracting Support Board (JCSB). JP 4-10, p. F-8.

a. Focuses on how contracting will procure support in the Joint Operations Area.

b. 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.

c. Establishes theater support contracting procedures.

d. Chaired by SCO/PARC or subordinate J-4 acquisition officer.

C. Theater Business Clearance (TBC)/Contract Administration Delegation (CAD).

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 in Iraq and Afghanistan, the Deputy Under Secretary of Defense, Acquisition, Technology, and Logistics and the Director of Defense Procurement and Acquisition Policy issued a series of memoranda directing JCC-I/A (now CENTCOM Contracting Command (C3)) to develop TBC procedures, to include procedures on contract administration delegation. Headquarters, Joint Contracting Command – Iraq / Afghanistan, subj.: Theater Business Clearance (TBC) Authority, Procedures, and Requirements for Iraq and Afghanistan, *available at* http://www.acq.osd.mil/dpap/pacc/cc/policy.html#TBC

3. CENTCOM Contracting Command uses the TBC review process to ensure that contracting officers outside theater (e.g., external and system support contracting officers) insert mandatory language and clauses in contracts. *Id.* 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 or whether administration will be re-delegated to the procuring contracting officer. *Id.* On June 13, 2013, DPAP issued updates to the TBC policy, including requirements for an in-theater sponsor and in-theater management over contracts, *e.g.* COR, COTR, GTPR. *See* Director, Defense Procurement and Acquisition Policy, subj. Theater Business Clearance Update for the USCENTCOM Area of Responsibility *available at* http://www.acq.osd.mil/dpap.

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 discusses specific alternatives to acquiring supplies and services pursuant to a new contract to meet the needs of a deploying force.

B. Competition Requirements. The Competition in Contracting Act (CICA), 10 U.S.C. § 2304, requires the government to seek competition for its requirements. *See also* FAR Part 6 and FAR 2.101. In general, the government must seek full and open competition by providing all responsible sources an opportunity to compete. No automatic exception is available for contracting operations during deployments.

1. For contracts awarded and performed within CONUS, the statutory requirement of full and open competition for purchases over the simplified acquisition threshold creates a 45-day minimum procurement administrative lead time (PALT), which results from a requirement to publish notice of the proposed acquisition 15 days before issuance of the solicitation (by synopsis of the contract action in the Government-wide Point of Entry (GPE)) at FedBizOpps.gov, followed by a requirement to provide a minimum of 30 days for offerors to submit bids or proposals. Three additional time periods extend the minimum 45-day PALT: 1) time needed for the unit to define the requirement and 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 to a particular source where that source has exclusive control of necessary raw materials or patent rights. FAR 6.302-1 provides additional examples of circumstances where use of this exception may be appropriate. This exception allows the KO to limit the competition to those sources that can meet the Government's need.

b. Unusual and compelling urgency. FAR 6.302-2. This exception applies where the need for the supplies or services is of such an unusual or compelling nature 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 or she reasonably believes can properly satisfy the requirement in the limited time available.[1] 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).

c. Industrial mobilization, engineering, developmental, or research capability; or expert services for litigation. FAR 6.302-3. This exception is used primarily when it is necessary to keep vital facilities or suppliers in business, to prevent insufficient availability of critical supplies or 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 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.

3. Use of any of these exceptions to full and open competition requires a "Justification and Approval" (J&A). FAR 6.303. For the contents and format of a J&A, refer to AFARS 5106.303, 5153.303-4, and 5153.-303-5. The approving authority is responsible for the J&A, but attorney involvement and assistance is critical to successful defense of the decision to avoid full and open competition. Limiting competition in any way invites protests of the procurement which may interrupt the procurement process. Approval levels for justifications, as listed in FAR 6.304:

a. Actions under $700,000: the contracting officer.

b. Actions from $700,000 to $13.5 million: the competition advocate designated pursuant to FAR 6.501.

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[1] This exception can be particularly applicable to meet urgent critical needs relating to human safety and which affects military operations. For example, it 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 the U.S. Marine Corps's light armored vehicles (Meggitt Safety Systems, Inc., B-297378, B-297378.2, 2006 U.S. Comp. Gen. LEXIS 27 (Jan. 12, 2006)). However, this exception cannot be used where the urgency was created by the agency's lack of advanced planning. 10 U.S.C. § 2304(f)(5); *see, e.g.*, WorldWide Language Resources, Inc.; SOS International Ltd., B-296984; B-296984.2; B-296984.3; B-296984.4; B-296993; B-296993.2; B-296993.3; B-296993.4., 2005 U.S. Comp. Gen. Proc. Dec. ¶ 206 (Nov. 14, 2005) (protest of December 2004 award of sole-source contract for bilingual-bicultural advisor/subject matter experts in support of Multinational Forces-Iraq sustained where the urgency – the immediate need for the 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).

c. Actions from $13.5 million to $68 million (or $93 million for DOD, NASA, and the Coast Guard): the HCA or designee.

d. Actions above $68 million (or above $93 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)).

4. Contract actions awarded and performed outside the United States, its possessions, and Puerto Rico, for which only local sources will be solicited, generally are exempt from compliance with the requirement to synopsize the acquisition in the GPE. These actions therefore may be accomplished with less than the normal minimum 45-day PALT, but they are not exempt from the requirement for competition. *See* FAR 5.202(a)(12); *see also* FAR 14.202-1(a) (thirty-day bid preparation period only required if 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 for other than full and open competition for many procurements executed in rapid fashion. Obtain full and open competition under these circumstances by posting notices on procurement bulletin boards, soliciting potential offerors on an appropriate bidders list, advertising in local newspapers, and telephoning potential sources identified in local telephone directories. *See* FAR 5.101(a)(2) & (b) and AFARS Manual No. 2, para. 4-3.e.

5. Temporary Exceptions. During contingency operations, Congress may authorize temporary exceptions to normal contacting and competition rules through authorization acts or annual or supplemental appropriations acts. Examples in Afghanistan have included the Commander's Emergency Response Program, 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 – Sealed Bidding. This is the appropriate method if award is based only on price and price-related factors, and is made to the lowest, responsive, responsible bidder. *See* FAR Part 14.

1. Sealed bidding procedures must be used if the four conditions enumerated in the Competition in Contracting Act exist. 10 U.S.C. § 2304(a)(2)(A); FAR 6.401; *see also,* Racal Filter Technologies, Inc., B-240579, Dec. 4, 1990, 70 Comp. Gen. 127, 90-2 CPD ¶ 453. These four conditions, commonly known as the "Racal factors," are:

a. Time permits the solicitation, submission, and evaluation of sealed bids;

b. Award will be made only on the basis of price and price-related factors;

c. It is not necessary to conduct discussions with responding sources about their bids; and

d. There is a reasonable expectation of receiving more than one sealed bid.

2. 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. A clear description/understanding of the requirement is needed to avoid having to conduct discussions. Sealed bidding requires more sophisticated contractors because minor errors in preparing a bid can make the bid non-responsive and prevent the government from accepting the offer. Only fixed-price type contracts are awarded using these procedures. Sealed bidding procedures are rarely used during active military operations in foreign countries because it is usually necessary to conduct discussions with responding offerors to ensure their understanding of, and capability to meet, U.S. requirements.

D. Methods of Acquisition – Negotiations (also called "competitive proposals").

1. With this acquisition method, award is based on stated evaluation criteria, one of which must be cost, and is made to the responsible offeror whose proposal offers the "best value" to the government. The contracting officer informs potential offerors up front whether best value will be based upon an offeror submitting the "lowest cost, technically acceptable" solution to the government's requirement, or whether best value will be determined on a "cost-technical tradeoff" basis, which allows the government to accept a higher-priced offer if the perceived benefits of the higher-priced proposal outweigh the additional cost. The basis for award (low-cost, technically-acceptable *or* cost-technical tradeoff), and a description of all factors and major subfactors that the contracting officer will consider in making this determination, must be stated in the solicitation. *See* FAR Part 15.

2. Negotiations are used when the use of sealed bids is not appropriate. 10 U.S.C. § 2304(a)(2)(B). Negotiations permit greater discretion in the selection of a source, and allow consideration of non-price factors in the evaluation of offers, such as technical capabilities of the offerors, past performance history, etc. Offers are solicited by use of a Request for Proposals (RFP). Proposals are submitted by offerors and are evaluated in the manner stated in the solicitation. Consistent with the solicitation, the contracting officer may establish a competitive range comprised of the most highly-rated proposals and conduct discussions with those offerors, after which those offerors submit revised proposals for evaluation. Award is made to the offeror whose proposal represents the best value to the government. Negotiations permit the use of any contract type.

E. 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, Section 822 of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, amended 41 U.S.C. § 1902 (Special Emergency Procurement Authority) to increase each of these thresholds for procurements in support of a contingency operation as defined in 10 U.S.C. § 101(a)(13), or to facilitate defense against or recovery from a cyber, nuclear, biological, chemical, or radiological attack. Presently, the base thresholds and the increased contingency thresholds are as follows:

a. Simplified Acquisition Threshold - Generally. 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 million. 41 U.S.C. § 1903; FAR 2.101 (restating SAT and defining contingency operation). The SAT is $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.

b. Department of Defense (DOD) Simplified Acquisition Threshold. Notably, the Department of Defense recently increased its SAT to $250,000 as implemented by Class Deviation 2018-O0018, "Micro-Purchase Threshold, Simplified Acquisition Threshold, and Special Emergency Procurement Authority," dated 31 August 2018. For DOD purchases supporting a contingency operation but made (or awarded and performed) inside the United States, the SAT is now **$750,000**. For DOD purchases supporting a contingency operation made (awarded and performed) outside the United States, the SAT is **$1.5 million**. The SAT is **$500,000** when the DOD is soliciting or awarding contracts to be awarded and performed outside the United States to support a humanitarian or peacekeeping operation.

c. Micro-purchase threshold. The normal DOD "micro-purchase threshold," below which purchases may be made without competition, is **$10,000**. 10 U.S.C § 2338. For DOD purchases supporting a contingency operation but made (or awarded and performed) inside the United States, the micro-purchase threshold is **$20,000**. For DOD 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. § 1903; FAR 2.101. These changes were implemented via Class Deviation 2018-O0018, "Micro-Purchase Threshold, Simplified Acquisition Threshold, and Special Emergency Procurement Authority," dated 31 August 2018.

d. Commercial items. Commercial Items (CI) may be procured using Simplified Acquisition Procedures (SAP) using increased thresholds. The normal CI SAP threshold is **$7,000,000**. For purchases supporting a declared contingency operation, or to defend or recover from a chemical, biological, radiological, nuclear (CBRN) or cyber attack, the threshold is **$13,000,000**. 41 U.S.C. § 1903; FAR 13.500(c).

2. 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:

a. Purchase Orders. FAR Subpart 13.302; DFARS Subpart 213.302; AFARS Subpart 5113.302 and 5113.306 (for use of the SF 44).

b. Blanket Purchase Agreements (BPA). FAR Subpart 13.303; DFARS Subpart 213.303; AFARS Subpart 5113.303.

c. Imprest Fund Purchases. FAR 13.305; DFARS Subpart 213.305; DOD FMR vol. 5, para. 0209.

d. Government Purchase Card Purchases. FAR 13.301; DFARS 213.279, 213.301; AFARS Subpart 5113.2.

e. Accommodation checks/government purchase card convenience checks. DOD FMR, vol. 5, ch. 2, para. 0210; *see also* DFARS 213.270(c)(6).

3. Purchase Orders. A purchase order is an offer to buy supplies or services, including construction. Purchase orders usually are issued only after requesting quotations from potential sources. Issuance of an order does not create a binding contract. A contract is formed when the contractor accepts the offer either in writing or by performance. In operational settings, purchase orders may be written using three different forms.

a. DD Form 1155 or SF 1449. These are multi-purpose forms which can be used as a purchase order, blanket purchase agreement, receiving/inspection report, property voucher, or public voucher. They contain some contract clauses, but users must incorporate all other applicable clauses. FAR 13.307; DFARS 213.307; DFARS PGI 213.307. *See* clause matrix in FAR Part 52. When used as a purchase order, the KO may make purchases up to the simplified acquisition threshold. Only KOs are authorized to use these forms.

b. Standard Form (SF) 44. This is a pocket-sized form intended for over-the-counter or on-the-spot purchases. Clauses are not incorporated. Use this form for "cash and carry" type purchases. Ordering officers, as well as KOs, may use this form. Reserve unit commanders may use the SF 44 for purchases not exceeding the micro-purchase threshold when a Federal Mobilization Order requires unit movement to a Mobilization Station or site, or where procurement support is not readily available from a supporting installation. FAR 13.306; DFARS 213.306; AFARS 5113.306. Conditions for use:

(1) As limited by KO's warrant or FOO's appointment letter.

(2) Away from the contracting activity.

(3) Goods or services are immediately available.

(4) One delivery, one payment.

c. Ordering officers may use SF 44s for purchases up to the micro-purchase threshold for supplies or services, except that purchases up to the simplified acquisition threshold may be made for aviation fuel or oil. During a contingency operation, a contracting officer may make purchases up to the simplified acquisition threshold. *See* DFARS 213.306(a)(1).

4. Blanket Purchase Agreements (BPA). FAR Subpart 13.303; DFARS 213.303-5; and AFARS 5113.303. A BPA is a simplified method of filling anticipated repetitive needs for supplies or services essentially by establishing "charge account" relationships with qualified sources of supply. They are not contracts, but merely advance agreements for future contractual undertakings. BPAs set prices, establish delivery terms, and provide other clauses so that a new contract is not required for each purchase. The government is not bound to use a particular supplier as it would be under a requirements contract. KO negotiates firm-fixed-prices for items covered by the BPA, or attaches to the BPA a catalog with pertinent descriptions/prices.

a. BPAs are prepared and issued on DD Form 1155 or SF 1449 and must contain certain terms/conditions. FAR 13.303-3:

(1) Description of agreement.

(2) Extent of obligation.

(3) Pricing.

(4) Purchase limitations.

(5) Notice of individuals authorized to place purchase orders under the BPA and dollar limitation by title of position or name.

(6) Delivery ticket requirements.

(7) Invoicing requirements.

b. 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). Consider BPAs with multiple sources. If insufficient BPAs exist, solicit additional quotations for some purchases and make awards through separate purchase orders.

5. Imprest Funds. 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 (pay agent). 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.

a. DOD activities are not authorized to use imprest funds unless approved by the Director for Financial Commerce, Office of the Deputy Chief financial Officer, Office of the Under Secretary of Defense (Comptroller). DFARS 213.305-3. Exceptions to receiving approval at this level include overseas transactions at or below the micro-purchase threshold in support of a declared contingency operation, a humanitarian/peacekeeping operation, or a classified operation. DFARS 213.305-3.

b. 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.

6. Government-wide Purchase Card (GPC). 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 $25,000 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 (containing additional limitations on and requirements for this authority). The GPC can also be used as a payment instrument for orders made against Federal Supply Schedule contracts, calls made against a Blanket Purchase Agreement (BPA), and orders placed against Indefinite Delivery/Indefinite Quantity (IDIQ) contracts that contain a provision authorizing payment by purchase card. FAR 13.301(c); AFARS 5113.202-90. 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**.

7. Accommodation Checks/Purchase Card Convenience Checks. Commands involved in a deployment 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. 10, ch. 23, para. 2305.

8. Commercial Items Acquisitions. FAR Part 12. Much of 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. However, any contract for commercial items must be firm-fixed-price or fixed-price with economic price adjustment. FAR 12.207.

9. Simplified Acquisition Competition Requirements. The requirement for full and open competition does not apply to simplified acquisitions. However, for simplified acquisitions above the micro-purchase threshold, there is still a requirement to obtain competition "to the maximum extent practicable," which ordinarily means soliciting at least 3 quotes from sources within the local trade area. FAR 13.104(b). For purchases at or below the micro-purchase threshold, there is no competition requirement at all, and obtaining just one oral quotation will suffice so long as the price is fair and reasonable. FAR 13.202(a)(2). Additional simplified acquisition competition considerations:

a. Micro-purchases. While there is no competition requirement, micro-purchases shall be distributed equitably among qualified sources to the extent practicable. FAR 13.202(a)(1). If practicable, solicit a quotation from other than the previous supplier before placing a repeat order. Oral solicitations should be used as much as possible, but a written solicitation must be used for construction requirements over $2,000. FAR 13.106-1(d).

b. Simplified acquisitions above the micro-purchase threshold. Because there is still a requirement to promote competition "to the maximum extent practicable," KOs may not sole-source a requirement above the micro-purchase threshold unless the need to do so is justified in writing and approved at the 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). Contracting officers normally should also solicit the incumbent contractor. J. Sledge Janitorial Serv., B-241843, Feb. 27, 1991, 91-1 CPD ¶ 225.

c. Requirements aggregating more than the SAT or the micro-purchase threshold may not be broken down into several purchases merely to avoid procedures that apply to purchases exceeding those thresholds. FAR 13.003(c).

10. 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. § 1708; 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. § 1708; 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. § 1708; FAR 5.101(a)(2)(ii) and FAR 5.202(a)(1). Disclosure of most needs in a deployment would not compromise national security. Still, the requirement to publish notice in FedBizOpps.gov is often not required in deployment contracting because there are other exemptions listed at FAR 5.202 that will often apply. For example, publication is not required for contracts that will be made and performed outside the United States, and for which only local sources will be solicited. FAR 5.202(a)(12). Accordingly, notice of proposed contract actions overseas is accomplished primarily through public posting at the local equivalent of a Chamber of Commerce, bulletin boards outside the deployed contracting office, or other locations readily accessible by the local vendor community. *See* FAR 5.101(a)(2) & (b)

F. 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 indefinite quantity-indefinite delivery (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 awardee of the underlying IDIQ contract utilizing the "fair opportunity" to be considered procedures in FAR 16.5.

G. 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 (ACSA) are also 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). These authorities permit acquisitions and transfers of specific categories of logistical support, supplies, and services (LSSS) 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 (updated frequently and available online at www.jagcnet.army.mil).

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 (25 April 2013); 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 (updated frequently and available online at www.jagcnet.army.mil).

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 delegees may initiate or amend contracts notwithstanding any other provision of law whenever it is deemed necessary to facilitate the national defense. Pub. L. No. 85-804, codified 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 in excess of $70,000 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.

H. 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. This may occur, for example, 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 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.

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 6 months of furnishing the goods or services, *and* it must have been impracticable to have used normal contracting procedures at the time of the commitment. FAR 50.102-3(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., B-242019, Aug. 5, 1991, 70 Comp. Gen. 664 (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. *Id.*

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 https://ogc.osd.mil/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 (COFC) or the cognizant board of contract appeals. 41 U.S.C. §§ 7101-7109; FAR Subpart 33.2.

E. Contracting With the Enemy.

1. Section 841 of the 2012 NDAA (Pub. L. 112-81) authorized the HCA to restrict award, terminate contracts already awarded, or void contracts over $100,000 to contractors who directly or indirectly fund the insurgency or forces opposing the U.S. in the CENTCOM theater of operations. Section 831 of the FY14 NDAA (Pub. L. 113-66) carried forward the requirements of Section 841, lowered the contract threshold to $50,000, and expanded the law's scope to include the U.S. European Command, U.S. Africa Command, U.S. Southern Command, and U.S. Pacific Command. Section 831 is implemented through DFARS 252.225-7993, "Prohibition on Contracting with the Enemy (DEVIATION 2014-O0020)." Further, the CENTCOM Commander can use battlefield intelligence to make this determination and does not have to disclose that intelligence to the affected contractor.

2. Section 842 of the 2012 (Public Law 112-81) NDAA required the inclusion of a contract term for contracts covered by sections 841 and 842 that allowed the government to inspect "any records of the contractor" or subcontractor to ensure contract funds are not going to support the insurgency or otherwise oppose U.S. action in the CENTCOM AOR. *See* DFARS 252.225-7994 (DEVIATION 2014-O0020). Section 842(c) of the FY15 NDAA (Pub. L. 113-291) amended section 842(d) of the FY12 NDAA to also include that funds are not "(1) [s]ubject to extortion or corruption; or (2) Provided, directly or indirectly, to persons or entities that are actively supporting an insurgency or otherwise actively opposing United States or coalition forces in a contingency operation." DFARS DEVIATION 2015-O0013**.**

VI. CONCLUSION

Individuals who have little to no contracting experience often spend staggering sums of money in support of their unit's mission. The most important thing to remember when dealing with the expenditure of appropriated funds—whatever the vehicle or mechanism—is that each decision to spend money carries consequences. To that extent, it is worth the time and effort to prepare, research, reach out, and be diligent to adhere to contracting rules and regulations. Judge Advocates are encouraged to develop reach-back relationships prior to deployment, both within their command and outside, so difficult questions can be answered accurately and quickly.

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CHAPTER 19

CONTINGENCY CONTRACTOR PERSONNEL

I. INTRODUCTION

Throughout the history of U.S. military operations, the United States has relied upon goods and services provided by contractors. Contractors multiply the effectiveness of our fighting force by freeing up uniformed personnel to focus on primary duties. 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. A report by the Commission on Wartime Contracting cited that the Defense Department alone had 207,533 contractors in Iraq and Afghanistan as of 31 March 2010. This represented a ratio of Soldiers to contractors of approximately 1:1. In 2016, reports from DOD and the Congressional Research Service showed a contractor to Soldier ratio of 3:1 in Afghanistan and 2:1 in Iraq. 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. CATEGORIES OF CONTRACTORS

A. General.

1. The contract is the principle document for establishing the legal relationship between a contractor and the U.S. Government. 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, Part II (definitions). However, they are not all afforded the same legal status, access to government-provided benefits, and access to government property (installations, billeting, etc.).

2. Types of contingency contractors. Based on the terms included in their respective contracts, a contractor's relationship to the U.S. Government generally fits into one of four broad categories: (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.).

3. Letter of Authorization (LOA). The LOA is a document that memorializes all the support due to a contractor under their contract. Each individual contractor must carry a copy of his or her LOA on their person at all times, as this document provides their authorization to obtain the support/services that are called for under the contract. Without this document, it will be very difficult to determine what support a particular individual should receive. (DFARS 252.225-7995(c)(3))

B. Contractors Authorized to Accompany the Force (CAAF).

1. Contractors authorized to accompany the force (CAAF) may receive Government-furnished support commensurate with the operational situation in accordance with the terms and conditions of their contract. These contractors are imbedded in units, live in government housing on the compound or camp, and often perform duties 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.

2. Legal Status. CAAF personnel are neither combatants nor noncombatants. This means that CAAF are entitled to most protections afforded to noncombatants in addition to some protections afforded to combatants. For instance, if captured during international armed conflict, contractors with CAAF status are entitled to prisoner of war status. CAAF not directly participating in hostilities may not be legitimately targeted by enemy forces, but CAAF personnel could be exposed to risk of injury or death while supporting military operations. CAAF status does not apply to contractor personnel supporting domestic contingencies.

3. Government Support.

a. 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.

b. Obtaining CAAF status begins with the language in the underlying contract. If the contract (or portions of the contract) requires employees to have CAAF status, that contract will contain DFARS Clause 252.225-7995, Contractor Personnel Performing in the United States Central Command Area of Responsibility. This clause applies to CAAF who accompany U.S. forces in contingency operations, humanitarian or peacekeeping operations, or other operations or exercises as approved by the Combatant Commander. It provides a number of important authorizations and requirements, including:

(1) Access to health care (on a reimbursable basis to the Government), including 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. Medical or dental care beyond this standard can no longer be authorized via contract. (DFARS 252.225-7995(c)(2)).

(2) Government-provided security, if:

(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.

4. When armed for personal protection, contingency contractor personnel are only authorized to use force for individual self-defense. Unless immune from local laws or HN jurisdiction by virtue of an international agreement or international law, the contract shall include language advising contingency contractor personnel that the inappropriate use of force could subject them to U.S. and local or host nation (HN) prosecution and civil liability. DoDI 3020.41, Enclosure 2, para 4(e)(2).

5. To be considered a Prisoner of War if captured by the enemy, CAAF must carry a Geneva Conventions ID card identifying the individual as one authorized to accompany the force.

C. Non-CAAF, Performing in CENTCOM AOR.

1. 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 at the same location, or even alongside, DOD employees.

2. DFARS Class Deviation 2017-O0004, Contractor Personnel Performing in the United States Central Command (CENTCOM) Area of Responsibility (AOR), governs contractor personnel in a Designated Operational Area or Supporting a Diplomatic or Consular Mission within the CENTCOM AOR, but who are not considered CAAF.

3. The main difference between these contractors and those designated as CAAF is found in the support provided to, and accountability of, those contractors:

a. Non-CAAF contractors typically receive a lower level of support from the U.S. Government (e.g., security protection and medical treatment), and

b. Non-CAAF may not be subject to the UCMJ for offenses committed in theater.

D. Non-CAAF, Performing Outside the 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 and Liberia). 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.

E. Non-DOD Contractors in Contingency Environments.

Contractors of other government agencies, such as the Department of State, are governed by the FAR Section 25.301 and its accompanying clause at FAR 52.225-19 as well as other agency specific regulations and directives.

III. TYPES OF CONTRACTS

A. General.

Contingency operations require many contracts to support full operations. These may be issued by 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 CONUS to support operations overseas. Still others are issued 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. These contracts are awarded by contracting organizations with a contracting authority not derived directly from theater support contracting HCAs or from systems support contracting authorities. External support contracts provide a variety of logistics and other noncombat-related services and supply support. External support contracts are illustrated by the services' CAP (Civil Augmentation Programs) contracts, including the Army LOGCAP, Air Force AFCAP, Navy GCCC and GCSC, DLA prime vendor contracts, and Navy fleet husbanding contracts. External support contracts normally include a mix of U.S. citizens, third-country nationals, and local national contractor employees. Support under external support contracts is often designated as "essential contractor services" under the contract.

2. Contract personnel under external support contracts who are hired predominantly from outside the operational area to support deployed operational forces. External support contractors include other country national (OCN) personnel and local national (LN) personnel who are hired under a subcontract relationship of a prime external support contract.

C. System Support Contracts.

1. These contracts are awarded by a military department acquisition PMO (Program Management Office) that provides technical support, maintenance, and (in some cases) repair parts for selected military weapon and support systems. Systems support contracts are routinely put in place to support newly fielded weapons systems, including aircraft, land combat vehicles, and automated command and control systems. Systems support contracting, contract management, and program management authority reside with the military department systems materiel acquisition program offices. Support under systems support contracts is often designated as "essential contractor services" under the contract.

2. Systems support contractor employees, mostly U.S. citizens, provide support in garrison and often deploy with the force in both training and contingency operations. Much of a service component's equipment is maintained partially or fully through contracted logistics support. These are often U.S. Citizens and are considered CAAF in most cases.

D. Theater Support Contracts.

1. These contracts are awarded by contracting officers in the operational area, serving under the direct contracting authority of the service component, SOF command, or designated joint HCA for the specific contingency operation. During a contingency, theater support contracts are normally executed under expedited contracting authority and provide supplies, services, and construction from commercial sources that, in general, are in the operational area. Also important from the contractor management perspective are the local national personnel who make up the bulk of the theater support contract employees.

2. Theater support contracting can be used to acquire support from commercial sources, similar to external support contract services. In addition, theater support contracting can be used to acquire commercially available supply items from local and global sources.

3. These contracts often rely on LNs or OCNs. These personnel are usually not considered CAAF.

IV. LEGAL STATUS

A. International Law.

1. Contractors may support military operations as "civilians accompanying the force." Contractors must be designated as such by the military force they are accompanying and must be provided an appropriate identification (ID) card under the Geneva Conventions.

2. If captured during armed conflict, CAAF are entitled to POW status.

3. CAAF 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. CAAF 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).

4. Arming of CAAF, and CAAF performance of security services, are addressed below in Section VIII.

5. Each service to be performed by CAAF in contingency operations shall be reviewed, on a case-by-case basis, in consultation with the servicing legal office, to ensure compliance with applicable laws and regulations.

B. Host Nation (HN) and OCN Laws.

1. Subject to international agreements, CAAF are subject to HN law and the law of their home country (OCN law).

2. Status of Forces Agreements (SOFAs). SOFAs are international agreements between two or more governments that provide various privileges, immunities, and responsibilities. SOFAs 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 and Soldiers will be treated differently by a local government.

a. The United States may have a lesser international agreement than a SOFA, such as Diplomatic Notes (as of 2020 the current US presence in Iraq is currently governed by such an exchange of Diplomatic Notes).

b. CAAF may or may not be subject to criminal and/or civil jurisdiction of the host country to which they are deploying. CAAF status will depend upon the specific provisions of the international agreement, if any, that are applicable between the U.S. and the country of deployment at the time of deployment.

c. If an international agreement (e.g., SOFA) does not address CAAF status, the contractor may be unable to perform because their employees may not be able to enter the country, or the contractor could be treated as a foreign corporation subject to local laws and taxation policies.

d. The North Atlantic Treaty Organization (NATO) SOFA is generally accepted as the model for bilateral and multilateral SOFAs between the U.S. Government and host nations around the world.

e. The NATO SOFA covers three general classes of sending state personnel: (1) Members of the "force," i.e., members of the armed forces of the sending state; (2) Members of the "civilian component," i.e., civilian employees of the sending state; or (3) "Dependents," i.e., the spouse or child of a member of the force or civilian component that is dependent upon them for support.

f. Under the generally accepted view of the NATO SOFA, contractor employees are not considered members of the civilian component. Accordingly, special technical arrangements or international agreements generally must be concluded to afford contractor employees the rights and privileges associated with SOFA status.

g. If there is no functioning government that the Department of State can negotiate a SOFA, contract planners must comply with the policy and instructions of the Combatant Commander when organizing the use of contractors in that country.

h. If there is any contradiction between a SOFA and an employer's contract, the terms of the SOFA will take precedence.

i. The following websites may help determine if the U.S. has a SOFA agreement with a particular country: https://www.state.gov/treaties-in-force (Treaties in Force is published annually by the Department of State to provide information on treaties and other international agreements to which the United States is presently a party.

It lists those treaties and other international agreements in force for the United States as of the stated publication date for each edition); https://www.jagcnet.army.mil/Sites/io.nsf/homeLibrary.xsp (CLAMO and Army NSL Document Library); 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 where personnel are deploying).

3. Contingency contractor personnel remain subject to the laws of their home country. Application of U.S. law is discussed below in Section IX.

C. Afghanistan.

1. Authority. United States relations with the Government of the Islamic Republic of Afghanistan (GIRoA) and immunities are discussed in the Security and Defense Cooperation Agreement Between the United States of America and the Islamic Republic of Afghanistan (SDCA). The agreement, also known as the Bilateral Security Agreement (BSA), entered into force on 1 January 2015.

2. U.S. Military and Civilian Personnel. Article 13 of the agreement provides "the United States shall have the exclusive right to exercise jurisdiction over [U.S. Military and Civilian Personnel] in respect of any criminal or civil offenses committed in the territory of Afghanistan." Members of the US military and civilian component "may not be arrested or detained by Afghan authorities for any reason" and "may not be surrendered to, or otherwise transferred to, the custody of an international tribunal or any other entity or state without the express consent of the United States."

3. Contractor Personnel. Article 13(6) states, "Afghanistan maintains the right to exercise jurisdiction over United States contractors and United States contractor employees." Article 17(3) states, "United States contractors shall not be liable to pay any tax or similar or related charges assessed by the Government of Afghanistan."

V. ADMINISTRATIVE ACCOUNTABILITY AND PROCESSING

A. General. Combatant Commanders are responsible, with assistance from their Component Commanders, for visibility of all personnel within their AOR, including contractors.

B. The Synchronized Pre-deployment and Operational Tracker (SPOT).

1. All defense contractors awarded contracts that support contingency operations are required to register their employees in the SPOT system. DFARS 252.225-7995(g). Registration in SPOT is required in order to receive a Letter of Authorization (LOA). *See infra* Subpart III(A)(3) for a discussion of LOAs.

2. Pursuant to requirements in the 2008 and 2009 National Defense Authorization Acts, the Departments of Defense and State, together with USAID, entered into a "Memorandum of Understanding Relating to Contracting in Iraq and Afghanistan." In this document, the three parties agreed to use the SPOT system as the system of record for tracking all contractors in those locations. The agencies must include information on contacts with more than 14 days of performance or valued at more than $100,000 in the database.

3. SPOT may be accessed at https://spot.dmdc.mil/.

C. Contractor Responsibilities.

1. Accountability. All contingency contractor personnel must be registered in SPOT. These contractors are responsible for knowing the general location of their employees and shall keep the database updated. The clauses at DFARS 252.225-7995(g), DFARS Class Deviation 2017-O004, and DFARS 225.301-4 (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 CAAF deemed unsuitable to deploy during the deployment process, due to medical or dental reasons, will not be authorized to deploy. The clauses at DFARS 252.225-7995(e)(1)(ii), DFARS Class Deviation 2017-O004, and FAR 52.225-19 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. Contracts must stipulate that CAAF must provide medical, dental and DNA reference specimens, and make available medical and dental records.

b. Contracting officers may authorize contractor-performed medical deployment processing. Contracting officers shall coordinate with and obtain approval from the military departments for contractor-performed processing.

D. CONUS Replacement Centers (CRC) and Individual Deployment Sites (IDS).

1. All CAAF shall report to a deployment center designated in the contract, or be processed through a government-authorized deployment processing facility before deploying to a contingency operation. Actions at the deployment center include:

a. Validating accountability information in the joint database; verify: security background checks completed, possession of required vehicle licenses, passports, visas, and next of kin/emergency data cards;

b. Issuing/validating proper ID cards;

c. Issuing applicable government-furnished equipment;

d. Providing medical/dental screenings and required immunizations. Screening will include HIV testing, pre and post-deployment evaluations, dental screenings, and TB skin tests. A military physician will determine if the contractor employee is qualified for deployment and will consider factors such as age, medical condition, job description, medications, and requirements for follow-up care;

e. Validating/completing required theater-specific training (e.g., law of war, detainee treatment, Geneva Conventions, General Orders, standards of conduct, force protection, nuclear/biological/chemical, etc);

f. All CAAF shall receive deployment processing certification (annotated in the letter of authorization (LOA) or separate certification letter), shall bring this certification to the JRC, and shall carry it with them at all times.

2. 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, and medical requirements (unless prior approval of qualified medical personnel). CAAF with waivers shall carry the waiver with them at all times.

3. Contractor Personnel Other than CAAF. Contractors not accompanying the Armed Forces and who are arriving from outside the area of performance must also process through the departure center specified in the contract or complete another process as directed by the contracting officer to ensure minimum theater admission requirements are satisfied.

E. Joint Replacement Center (JRC). CAAF shall process through an in-theater reception center upon arrival at the deployed location. The JRC will validate personnel accountability, ensure theater-specific requirements are met, and brief CAAF on theater-specific policies and procedures. DFARS 252.225-7995(f) subjects CAAF 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.

VI. LOGISTICS SUPPORT

A. Policy.

Generally, contractors are responsible for providing for their own logistical support and logistical support for their employees. However, in austere, uncertain, and/or hostile environments, the DOD *may* provide logistical support to ensure continuation of essential contractor services. The contracting office is required to verify the logistical and operational support that will be available for CAAF.

B. Letter of Authorization (LOA).

1. An LOA shall be issued via the SPOT system for all CAAF, as well as for other designated non-CAAF contractors. The LOA will be required for processing through a deployment center and travel to/from/within the AOR, and will detail the privileges and government support to which each contractor employee is entitled.

2. All contractors issued an LOA shall carry the LOA with them at all times.

3. The LOA shall state the intended length of assignment in the AOR, and identify the government facilities, equipment, and privileges the CAAF/non-CAAF is entitled to use.

C. Individual Protective Equipment (IPE).

Upon determination of the Combatant Commander, CAAF and designated non-CAAF contractors will be provided body armor, a ballistic helmet, and a chemical/biological ensemble. The equipment is typically issued at the deployment center and must be returned upon redeployment. 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.

D. Clothing.

Generally, contractors are required to furnish their own appropriate clothing and may not wear military or military look-alike clothing. However, the Combatant Commander may authorize contractor wear of certain items for operational reasons. Any such wear must be distinguishable from combatants (through the use of armbands, headgear, etc.).

E. Government Furnished Equipment (GFE).

1. GFE may include protective equipment, clothing, or other equipment necessary for contract performance.

2. The contract must specify that the contractor is responsible for storage, maintenance, accountability, and performance of routine inspection of Government furnished property. The contract must also specify contractor responsibilities for training and must specify the procedures for accountability of Government furnished property.

3. Contractor employees will be responsible for maintaining all issued items and must return them to the issuer upon redeployment. In the event that issued clothing and/or equipment is lost or damaged due to negligence, a financial liability investigation of property loss (FLIPL) will be initiated IAW AR 735-5. According to the findings of the Survey Officer, the government may require reimbursement from the contractor.

F. Legal Assistance. Legal assistance services are not available to contractors either in theater or at the deployment processing center.

G. I.D. Cards.

1. Contingency Contractor Personnel will receive one or more of the following three distinct forms of identification:

a. Common Access Card (CAC). Required for access to facilities and use of privileges afforded to military, government civilians, and/or military dependents. CAAF are issued CACs.

b. DD Form 489 (Geneva Conventions Identity Card for Persons who Accompany the Armed Forces). Identifies one's status as a contractor employee accompanying the U.S. Armed Forces. Must be carried at all times when in the theater of operations. Pursuant to the Geneva Convention Relative to the Treatment of Prisoners of War, Article 4(4), if captured, contractors accompanying the force are entitled to prisoner of war status.

c. Personal identification tags. The Army requires all CAAF to have personal ID tags. The identification tags will include the following information: full name, social security number, blood type, and religious preference. These tags should be worn at all times when in the theater of operations.

2. In addition, other identification cards, badges, etc., may be issued depending upon the operation. For example, when U.S. forces participate in United Nations (U.N.) or multinational peace-keeping operations, contractor employees may be required to carry items of identification that verify their relationship to the U.N. or multinational force.

3. If the contractor processes CAAF for deployment, it is the responsibility of the contractor to ensure CAAF receive required identification prior to deployment.

H. Medical and Dental Care. CAAF are entitled to resuscitative care, stabilization, hospitalization at level III Military Treatment Facilities (MTF), and assistance with patient movement in emergencies where loss of life, limb, or eyesight could occur. The following applies:

1. All costs associated with treatment and transportation are reimbursable to the government.

2. Resuscitative care. The aggressive management of life and limb-threatening injuries. Examples of emergencies include refills of prescription/life-dependent drugs, broken bones, and broken teeth.

3. Primary care. Support beyond resuscitative or emergency care, such as primary medical or dental care cannot be authorized under the terms of the contract. DFARS 252.225-7995(c)(2)(iii).

4. Long term care. Long term care will not be provided.

I. Evacuation, Next of Kin Notification, Personnel Recovery, Mortuary Affairs.

1. Evacuation. The government will provide assistance, to the extent available, to U.S. and OCN contractors if the Combatant Commander orders a mandatory evacuation.

2. NOK Notification. The contractor is responsible for notification of the employee-designated NOK in the event an employee dies, requires evacuation due to an injury, or is isolated, missing, detained, captured, or abducted.

3. The government will assist, in accordance with DoDD 3002.01, Personnel Recovery, in the case of isolated, missing, detained, captured, or abducted CAAF.

4. Mortuary Affairs. Mortuary affairs will be handled in accordance with DoDD 1300.22, Mortuary Affairs Policy.

J. Religious Support. Access to military religious support may be authorized under the terms of a contract.

K. Military Postal Service (MPS). U.S. citizen CAAF contractors will be authorized to use MPS. However, non-U.S. citizen CAAF and other contractors may only use MPS to send their paychecks to their homes of record.

L. Morale, Welfare, and Recreation (MWR) Support. CAAF who are also U.S. Citizens will be authorized to use MWR and exchange services, including post exchanges and vendors. However, non-U.S. and non-CAAF contractors will not be authorized.

M. American Red Cross (ARS) Services. ARC services such as emergency family communications and guidance for bereavement airfare are available to contractors in the area of operations.

N. Hostage Aid. When the Secretary of State declares that U.S. citizens or resident aliens are in a “captive status” as a result of “hostile action” against the U.S. Government, CAAF personnel and his or her dependents become entitled to a wide range of benefits. Potential benefits include: continuation of full pay and benefits, select remedies under the Servicemembers’ Civil Relief Act, physical and mental health care treatment, education benefits to spouses or dependents of unmarried captives, and death benefits. Eligible persons must petition the Secretary of State to receive benefits. Responsibility for pursuing these benefits rests with the contractor employee, the employee’s family members, or the contractor.

VII. SECURITY, WEAPONS, AND USE OF FORCE

A. Security.

1. CAAF and designated non-CAAF personnel may be eligible for US-provided security. It is DOD policy to develop a plan for protection of CAAF in locations where there is not sufficient or legitimate civil authority and the commander decides it is in the interests of the government to provide security because the contractor cannot obtain effective security services, such services are unavailable at a reasonable cost, or threat conditions necessitate security through military means.

2. The contracting officer shall include the level of protection to be provided to contractor personnel in the contract.

3. In appropriate cases, the Combatant Commander may provide security through military means, commensurate with the level of security provided to DOD civilians.

4. All contingency contractors shall comply with applicable Combatant Commander force protection orders, directives, and instructions. However, only the Contracting Officer is authorized to modify the terms and conditions of the contract. (DFARS 252.225-7995(p)).

B. CAAF Arming for Self-Defense.

1. In accordance with applicable U.S., HN, and international law, and relevant international agreements, on a case-by-case basis, the Combatant Commander, may authorize CAAF arming for *individual* self-defense.

2. The contractor's request shall be made through the Contracting Officer.

3. The contracting officer will notify the contractor what weapons and ammunition are authorized and the contractor will ensure its personnel are adequately trained, will adhere to all applicable combatant commander and local commander force protection policies, and understand that the use of force could subject them to U.S or host-nation prosecution and civil liability. DFARS 252.225-7995(j).

4. The contractor must ensure that employees are not prohibited under U.S. law to possess firearms (e.g., Lautenberg Amendment, 18 U.S.C. § 922(d)(9)).

C. Security Services.

1. If consistent with applicable U.S., HN, and international law, international agreements, DoDI 3020.41, and DoDI 3020.50, a defense contractor may be authorized to provide security services for other than uniquely military functions. Contracts for security services shall be used cautiously in contingency operations where major combat operations are ongoing or imminent. Whether a particular use of contract security personnel to protect military assets is permissible is dependent on the facts and requires legal analysis considering the nature of the operation, the type of conflict, and a case-by-case determination.

a. Private Security Company (PSC). A PSC is a company employed by the DoD performing "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." The definition of PSC similarly expands in areas designated as "other significant military operations" by both the Secretary of Defense and Secretary of State.

b. Private Security Functions include:

(1) Guarding of personnel, facilities, designated sites, or property of a Federal agency, the contractor or subcontractor, or a third party.

(2) Any other activity for which personnel are required to carry weapons in the performance of their duties. Contractor personnel armed for self-defense are not subject to requirements of DoDI 3020.50; DoDI 3020.41 continues to prescribe policies related to the arming of individual contractors for self-defense.

(3) Contractors are not authorized to perform inherently governmental functions. Therefore, any private security function is limited to a defensive response to hostile acts or demonstrated hostile intent.

c. Covered Contracts include:

(1) A DoD contract for the performance of security services or delivery of supplies in an area of contingency operations, humanitarian or peace keeping operations, or other military operations or exercises, outside the United States. A "contingency operation" is a military operation that is either designated as such by the Secretary of Defense or becomes a contingency operation as a matter of law under 10 U.S.C. § 101(a)(13).

(2) A contract of a non-DOD Federal agency for performance of services or delivery of supplies in an area of combat operations or other significant military operations, as designated by the Secretary of Defense.

2. Requests for permission to arm PSCs to provide security services shall be approved or denied by the Combatant Commander.

3. Requirements for requesting permission to arm PSCs to provide security services are listed in DODI 3020.50.

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. This instruction discusses in-depth the minimum requirements for this guidance, which deals with security, arming, accountability, and rules for the use of force.

6. DFARS Class Deviation 2017-O0004 requires non-CAAF PSC personnel 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.

VIII. COMMAND, CONTROL AND DISCIPLINE

A. Contractors in the Workplace. 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 primary vehicle establishing the legal relationship between DOD and the contractor. The contract shall specify the terms and conditions under which the contractor is to perform.

2. Functions and duties that are inherently governmental are barred from private sector performance. Additionally, the contracting officer is statutorily required to make certain determinations before entering into a contract for the performance of each function closely associated with inherently governmental functions.

3. Contractor personnel are not under the direct supervision of military personnel in the chain of command. However, CAAF and certain non-CAAF personnel working on military facilities are under the direct authority of local commanders for administrative and force protection issues. Contractor personnel shall not be supervised or directed by military or government civilian personnel.

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.

5. Contractor personnel cannot command, supervise, or control military or government civilian personnel.

B. Orders and Policies.

1. All contracts involving contractor personnel should include provisions requiring contractor personnel to comply with: applicable U.S. and HN laws; applicable international agreements; applicable U.S. regulations, directives, instructions, policies, and procedures; orders, applicable directives, and instructions issued by the Combatant Commander relating to force protection, security, health, safety, or relations and interaction with local nationals.

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 (direction to contractor personnel) in emergency situations.

a. DFARS. The DFARS maintains the general rule that only Contracting Officers may change a contract, even in emergency situations. The DFARS clause does expand the scope of the standard Changes Clause, by allowing, in addition to changes otherwise authorized, that the Contracting Officer may, at any time, make changes to Government-furnished facilities, equipment, material, services, or site.

b. DoDI. The Instruction 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 that CAAF and non-CAAF personnel take emergency actions to remove themselves from harm's way or take other appropriate self-protective measures. DoDI 3020.41, Enclosure 2, paragraph 4d(1).

C. Discipline.

1. The contractor is responsible for disciplining contractor personnel; commanders have LIMITED authority to take disciplinary action against contractor personnel.

2. Commander's Options.

a. Revoke or suspend security access or impose restriction from installations or facilities.

b. Request the contracting officer to inquire whether the employer intends to take any disciplinary action against the employee.

c. Request that the contracting officer direct removal of the individual. However, the government may be liable if the employee successfully claims they were wrongfully terminated and that termination was based upon the government direction.

3. Contracting Officer Options. If permitted under the contract, 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 contractors who are so removed.

4. Specific jurisdiction for criminal misconduct is subject to the application of international agreements. Application of HN and OCN law is discussed above in Section V.

5. Military Extraterritorial Jurisdiction Act of 2000, *as amended by* §1088 of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005 (MEJA).

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.

b. Solution. The MEJA closes the jurisdictional gaps by extending Federal criminal jurisdiction to certain civilians overseas and former military members.

c. Covered Conduct:

(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:

(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:

(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; or

(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 (CAAF):

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) OCNs 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 Department of States (DOS) should be notified of any potential investigation or arrest of an OCN.

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.

6. 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.

b. Under the law for at least the past 30 years, CAAF were only subject to the UCMJ in a Congressionally declared war. During that time, there was never UCMJ jurisdiction over CAAF because there were no Congressionally declared wars.

c. Congress amended the UCMJ in the John Warner National Defense Authorization Act for Fiscal Year 2007 (2007 NDAA). In section 552 of the 2007 NDAA, Congress changed Article 2(a)(10), addressing UCMJ jurisdiction over civilians accompanying the Armed Forces, from "time of war" to "time of declared war or contingency operation." This change now subjects CAAF and other civilians accompanying the Armed Forces to the UCMJ in contingency operations.

d. It is not clear whether this congressional attempt at expanding UCMJ jurisdiction over civilians in less-than Congressionally declared war is constitutional. Prior Congressional attempts at expanding UCMJ jurisdiction have been rejected by the courts as unconstitutional.

e. The Secretary of Defense published guidance on the exercise of this expanded UCMJ jurisdiction in March 2008. Office of the Secretary of Defense memorandum, Subject: UCMJ Jurisdiction Over DoD Civilian Employees, DoD Contractor Personnel, and Other Persons Serving With or Accompanying the Armed Forces Overseas During Declared War and in Contingency Operations, dated March 10, 2008. This guidance requires, among other things, that the Department of Justice be notified and afforded an opportunity to pursue U.S. federal criminal prosecution under the MEJA or other federal laws before disciplinary action pursuant to the UCMJ authority is initiated.

f. However, see *United States v. Ali*, 71 M.J. 256, No. 12-0008/AR (C.A.A.F. 2012) (where CAAF upheld the Court-Martial conviction of and jurisdiction over an Iraqi/Canadian citizen contractor for attacking a fellow translator in Iraq) and, *United States v. Brehm*, __ F.3d __, No. 11-4755 (4th Cir. Aug. 10, 2012) (http://www.ca4.uscourts.gov/Opinions/Published/114755.P.pdf (where the 4th Circuit upheld the MEJA prosecution of a foreign national for an offense against another foreign national based on status as a military contract employee).

IX. OTHER CONTINGENCY CONTRACTOR ISSUES

A. Working Conditions.

1. Tours of Duty. Contingency Contractor Personnel 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.

2. Hours of Work. Contractors must comply with local laws, regulations, and labor union agreements governing work hours. Federal labor laws that govern work hours and minimum rates of pay do not apply to overseas locations. FAR Subsection 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 U.S. Government 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. Worker's 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. Pursuing any of the following benefits is up to the contractor employee or the contractor.

2. Defense Base Act (DBA) 42 U.S.C. §§ 1651 *et seq.*; FAR 28.305 and 52.228-3; DFARS 228.305, 228.370(a), and 252.228-7000.

a. Requires contractors to obtain worker's compensation insurance coverage or to self-insure with respect to injury or death incurred in the scope of employment for "public work" contracts or subcontracts performed outside the United States.

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.

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. The statute does not focus on fault.

4. War Hazards Compensation Act (WHCA) 42 U.S.C. §§ 1701-17, FAR 28.309 and 52.228-4, DFARS 228.370(a) and 252.228-7000. 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.

D. Pay. CAAF pay and benefits are governed by the CAAF employment contract with the contractor. The U.S. Government is not a party to this employee-employer relationship. CAAF are not entitled to collect any special pay, cash benefits or other financial incentives directly from the U.S. Government.

E. Veteran's Benefits. Service performed by CAAF is NOT active duty or service under 38 U.S.C. 106. DOD policy is that contractors operating under this clause shall not be attached to the armed forces in a way similar to the Women's Air Forces Service Pilots of World War II. The rationale behind this policy is that contractors today are not being called upon to obligate themselves in the service of the country in the same way as the Women's Air Forces Service Pilots or any of the other groups listed in 38 U.S.C. 106.

F. Continued Performance During a Crisis.

1. During non-mandatory evacuation times, Contractors shall maintain personnel on location sufficient to meet contractual obligations.

2. DoDI 3020.41 requires planning to minimize the impact of losing essential contractor services by, among other things, including contract terms that obligate contractors to ensure the continuity of essential contractor services.

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.

X. COMBATING TRAFFICKING IN PERSONS

A. Policy. U.S. Government is committed to proactively prevent trafficking in persons and ensuring our contractors and subcontracts do as well. 22 USC § 7101 et. seq.

1. FAR Subpart 22.17 and 52.222-50 have been revised to reflect this Government priority.

2. DOD established a Task Force to Combat Trafficking in Persons involving senior personnel from all Services, AAFES, DLA and other organizations.

3. DOS releases a *Trafficking in Persons Report* each June (https://www.state.gov/trafficking-in-persons-report/).

4. DFARS Procedures, Guidance, and Information 222.1703 applies to contracts outside the United States.

B. Living Conditions.

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. CENTCOM requires contractor personnel be provided square footage equivalent to an E1 in government-furnished facilities. Previously, CENTCOM required 50 sq. ft. of living space for contractor employees in government furnished facilities. (CENTCOM Clause 5152.222-5900, revised March 2014)

3. Contractors are still required to provide 50 sq. ft. in contractor-provided facilities within the CENTCOM AOR.

C. Passports.

1. Contractors may not knowingly destroy, conceal, remove, confiscate, or possess any passport or similar document in order to maintain the employment of any person (18 USC § 1592).

2. Contractors shall only hold an employee's passport or other identification documents for the shortest period of time reasonable for administrative processing purposes.

D. Native Language.

1. Employees must be provided a signed copy of their employment contract in both English *and* their native language.

2. Contractors should have informational posters in their employees' native languages regarding reporting Trafficking in Person violations and hotlines with native speakers.

XI. CONCLUSION

During Contingency Operations, the U.S. Military will continue to use contractor support to perform many non-governmental functions. The individuals employed by defense contractors will be present in the theater of operations and will often live and work side-by-side with uniformed military personnel. It is imperative, given this close relationship and mutual dependence, that Judge Advocates understand the proper legal context for our relationship with contractors on the battlefield, and know how to ensure they are properly provided for, supervised, and employed.

XII. REFERENCES

A. U.S. Dep't of Defense, Defense Federal Acquisition Reg. Supp. 225.371 [hereinafter DFARS]; U.S. Dep't of Defense, Defense Procedures, Guidance, and Information 225.371. [hereinafter DFARS PGI]; DFARS Class

Deviation 2017-O0004, Contractor Personnel Performing in the United States Central Command Area of Responsibility, with its accompanying clause at DFARS 252.225-7995 (updated 15 Sept. 2017), https://www.acq.osd.mil/dpap/policy/policyvault/Class_Deviation_2017-O0004.pdf [DFARS Class Deviation 2017-O0004].

B. U.S. Dep't of Defense, Instr. 3020.41, Operational Contract Support (31 Aug. 2018) [DoDI 3020.41].

C. JOINT PUBLICATION 4-10, OPERATIONAL CONTRACT SUPPORT (4 Mar. 2019) [JP 4-10].

D. 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 (31 Aug. 2018) [DoDI 3020.50].

E. 32 CFR Part 153, CRIMINAL JURISDICTION OVER CIVILIANS EMPLOYED BY OR ACCOMPANYING THE ARMED FORCES OUTSIDE THE UNITED STATES, CERTAIN SERVICE MEMBERS, AND FORMER SERVICE MEMBERS (2013).

F. Defense Contingency Contracting Handbook Webpage, *located at* http://www.acq.osd.mil/dpap/ccap/cc/jcchb/index.html (containing an online handbook designed to provide essential information, tools, and training to help DOD Contingency Contracting Officers (CCOs) and other Operational Contract Support (OCS) staff meet the challenges they may face in contingency environments).

G. Contingency Contracting Resources, http://www.acq.osd.mil/dpap/pacc/cc/resources.html (containing links to materials relevant to contingency contracting; deployments; contingency contractor personnel; suggested contracting clauses; contingency contracting articles; etc.).

H. CENTCOM- Joint Theater Support Contracting Command (C-JTSCC) Information, located at http://www.acq.osd.mil/dpap/ccap/cc/jcchb/HTML/Topical/cjtscc.html (containing training materials, checklists, policy documents, acquisition instructions, and contract clauses).

I. U.S. Dep't Of Army, Reg. 715-9, Operational Contract Support Planning and Management (24 Mar. 2017) [AR 715-9].

J. U.S. Dep't Of Army, Reg. 700-137, Logistics Civil Augmentation Program (LOGCAP) (23 Mar. 2017) [AR 700-137].

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CHAPTER 20

EMERGENCY ESSENTIAL CIVILIANS SUPPORTING MILITARY OPERATIONS

I. INTRODUCTION.

Throughout our history, civilians have played an important and unique role in accompanying the force during military operations. Recent operations highlight civilian employees' importance to the military mission, as an integrated and value-added member of the team. Civilian employees may perform a wide variety of jobs "to ensure the success of combat operations."[1]Understanding the process for designating, training, and directing the efforts of emergency-essential (E-E) civilians while deployed is essential for Judge Advocates (JA) when advising commanders.

II. DESIGNATING EMERGENCY-ESSENTIAL POSITIONS

A. An E-E 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. Emergency essential civilians are not contractor employees. Department of the Army (DA) officials should identify a subset of the civilian workforce as the DA Expeditionary Civilian Workforce (ECW). 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. The timeframes during which the ECW is susceptible to expeditionary assignments will be designated in six or twelve-month rotational periods.[2] Individual deployment tours shall not exceed two years.[3] Consecutive deployments should generally not be approved without at least a six-month period of reintegration between deployments and assurance that medical clearance requirements are met and not more than twelve months have lapsed since the employee's last physical examination.[4] Civilian manpower requirements are determined based on DoD Instruction 1100.22.

B. The specific crisis situation or wartime duties, responsibilities, and physical requirements of each E-E position must be identified and documented to ensure that E-E employees know what is expected and to ensure that each EE employee is able to satisfy the conditions of their employment.

C. Expeditionary Civilian Workforce positions should be pre-identified whenever practicable. Situations where civilian employees must be directed to perform in E-E and Non-Combat Essential (NCE) positions on an involuntary or unexpected basis should be limited to the degree practicable.[5] Civilian employees applying for an EE or NCE position must sign DD Form 2365 as a condition of employment. Job announcements and position descriptions (PD) must contain a statement that the position is designated E-E or NCE, that it is part of the ECW, and that signing the form is a condition of employment.[6] Example:

> This position is emergency-essential. In the event of a crisis situation, the incumbent, or designated alternate, must continue to perform the emergency-essential 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.

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[1] U.S. DEP'T OF ARMY, REG. 690-11, DEPARTMENT OF THE ARMY EXPEDITIONARY CIVILIAN WORKFORCE AND CIVILIAN DEPLOYMENTS, IN SUPPORT OF MILITARY CONTINGENCY AND EMERGENCY OPERATIONS (8 Nov. 2019) [hereinafter AR 690-11].
[2] *Id.* para. 4-2a.
[3] *Id.* para. 4-2d.
[4] *Id.*
[5] *Id.* para 3-1a.
[6] *Id.* para. 3-1.

D. If an incumbent employee is unable or unwilling to accept a position designation as E-E or NCE, every effort will be undertaken to reassign the employee to a different position, including a vacant position if reasonably practicable, consistent with the needs of the mission and approval of management.[7]

E. Civilian employees in E-E or NCE positions may be directed to accept deployment requirements of the position, however, whenever possible, the ECW will be asked to serve expeditionary requirements voluntarily.[8]

F. **Department of the Army Expeditionary Civilian Workforce**. Members of the DA ECW 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 Department of Defense (DoD) in accordance with Directive-type Memorandum (DTM) 17-004.[9] The ECW will be coded as:[10]

1. **Emergency Essential (E-E)**. 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.

2. **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..

3. **Capability-Based Volunteer (CBV)**. An employee who may be asked to volunteer for deployment.

4. **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.

5. **Key Employees**. Federal position that shall not be vacated during a national emergency or mobilization without seriously impairing the capability of the parent federal agency or office to function effectively. Positions and employees designated as E-E and NCE will be designated "key" in accordance with DoDD 1200.7.[11]

G. The FY 2001 National Defense Authorization Act amended Title 10, U.S. Code, to require that E-E civilians be notified of anthrax immunization requirements. The most recent guidance on the Anthrax Vaccine Immunization Program can be found at https://health.mil. The notification requirement applies to both current and new E-E employees. The notice must be written, and the employee must sign to acknowledge receipt. File a copy of the notice and acknowledgement with the signed DD Form 2365. A sample notice follows:

> This is to notify you that your position has been designated as emergency essential. You may be required, as a condition of employment, to take the series of anthrax vaccine immunizations, to include annual boosters. This may also include other immunizations that may in the future be required for this position, or for a position you may fill as an emergency-essential alternate. Failure to take the immunizations may lead to your removal from this position or separation from Federal service. [Acknowledgement: This is to acknowledge that I have read and fully understand the potential impact of the above statement. (employee signature and date)].

H. Notice of the anthrax vaccine requirements must also be included in all vacancy announcements for E-E positions. The notice may mirror that provided above. Newly hired E-E personnel should also be required to acknowledge and accept this requirement in writing prior to entry on duty.

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[7] *Id.* para 2-4e.
[8] *Id.* para. 2-4d.
[9] U.S. DEP'T OF DEFENSE, DIRECTIVE-TYPE MEMO. 17-004, DEPARTMENT OF DEFENSE EXPEDITIONARY CIVILIAN WORKFORCE (25 Jan. 2017).
[10] *Id.* para. 4.d.
[11] AR 690-1.

I. Personnel selected for, or occupying, E-E 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. Civilian employees covered by Sections 791 through 794d, Title 29, United States Code (The Rehabilitation Act of 1973, as amended) will undergo an individualized assessment to determine if the employee is able to perform the essential functions of an ECW position with or without reasonable accommodation.[12]

J. By memorandum dated March 30, 1999, the Under Secretary of Defense made it mandatory for all military personnel and DoD E-E 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 situations where existing E-E employees refuse to be vaccinated, Army policy requires that management first consider taking a non-adverse action, such as a reassignment to a non-E-E position; identification of an alternate employee who is willing to be immunized and serve as an E-E employee; curtailment of tour, etc. If none of these are possible, the E-E employee could be subject to adverse action, up to and including, removal from the federal service for failure to meet a condition of employment.

III. DEPLOYMENT PREPARATIONS

A. **Identification**. Issue Geneva Convention Identity Cards to E-E employees, or employees occupying positions determined to be E-E. 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 DA civilians are expected to wear the appropriate military uniform, as determined and directed by the theater commander. Army Regulation 670-1 contains more detail 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 ECW shall consist of initial orientation upon becoming part of the ECW, 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 cover topics to include first aid and field survival, the use of specialized equipment required for the specific missions such as vehicles, weapons, and communication systems, obtaining medical treatment, and recognizing stress-related conditions that may result from serving expeditionary requirements. Of particular interest to JAs, members of the ECW 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.[13]

E. **Medical and Dental Care**. All DoD civilian employees who hold an E-E or NCE position are required to have an annual health assessment to determine whether the employee is available for worldwide deployment. 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 in accordance with DoDI 6490.03. 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 employee and at the same level and scope provided to military personnel. Deployed 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'

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[12] *Id.* para 3-4e; U.S. DEP'T OF ARMY, REG. 690-12, EQUAL EMPLOYMENT OPPORTUNITY AND DIVERSITY (12 Dec. 2019).
[13] *Id.* para 3-3.

Compensation Program (DOL OWCP) upon their return at no cost to the employee.[14] If a civilian employee is subsequently determined to have compensable illnesses, diseases, wounds, or injuries under the DOL OWCP, they are eligible for treatment in an MTF or civilian medical facility at no cost to the employee.[15]

F. **Administrative Preparedness**. Members of the ECW receive a valid official passport, Common Access Card, Geneva Conventions Identification Card, and required security clearances, when appropriate. Civilian employees who are part of the ECW are required to maintain current and valid administrative documents and clearances and current Family Care Plans.[16] Personnel must also complete a pre outside the continental United States (OCONUS) travel file program survey, which creates a digital Isolated Personnel Report File (IPRP) in the Personnel Recovery Mission Software database. Civilians are required to review their IPRP within 90 days of travelling OCONUS.[17]

G. **Legal Assistance**. Legal assistance, including wills and any necessary powers of attorney relating to deployments, is available to E-E civilians notified of deployment, as well as their families, and will be available throughout the deployment. Assistance is limited to deployment-related matters as determined by the on-site supervising attorney. Department of Defense civilian employees who are serving with the U.S. military in a foreign country (and their family members who accompany them) are eligible to receive legal assistance.[18].

H. **Weapons Certification and Training**. Under certain conditions, and subject to weapons familiarization training in the proper use and safe handling of firearms, E-E 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. [19]

IV. COMMAND AND CONTROL DURING DEPLOYMENTS. During deployments, E-E 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. 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 a web-based automated tracking system called Civilian Tracking System (CIVTRACKS) designed to account for civilian employees supporting unclassified military contingencies and mobilization exercises. Deployed DA ECW must be tracked and accounted for, including their daily locations, in accordance with Army Regulation 638-8 and DoDI 1400.32. It is the employee's responsibility to input their 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). The CIVTRACKS is maintained by the Deputy Chief of Staff G-1. [20]

B. **Tour of Duty**. The administrative workweek constitutes the regularly-scheduled hours for which an E-E 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 or her representative has the authority for establishing and changing EE tours of duty. The in-theater commander will establish the duration of the change.

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[14] 5 U.S.C. §§ 8101-8173.
[15] *Id.* para. 3-4.
[16] *Id.*
[17] *Id.* para. 3-3d.
[18] U.S. DEP'T OF ARMY, REG. 27-3, THE ARMY LEGAL ASSISTANCE PROGRAM (21 FEB. 1996).
[19] AR 690-11, para. 2-3i.
[20] AR 690-11, para. 4-7.

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.[21] Normally, the employee has up to two years to use restored annual leave.

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. The 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.

F. **The Federal Employees' Compensation Act (FECA)**, 5 U.S.C. § 8101 et seq, provides comprehensive workers compensation coverage for deployed federal employees in zones where armed conflict may take place.[22] 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 DOL OCP 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."[23]

G. **Foreign Duty Pay** (FPD**)**. Employees assigned to work in foreign areas where 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 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 SECSTATE 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. Danger pay allowance 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.

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[21] *Id.* para. 4-4.
[22] *See also* 20 C.F.R Part 10 for Federal Procedure Manual and related guidance. Federal Employees' Compensation Act is administered by the Office of Workers' Compensation Program not the Department of the Army.
[23] 5 U.S.C. §§ 8101-8173.

I. **Life Insurance**. Going to a combat zone can be considered a qualifying 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 the Military Extraterritorial Jurisdiction Act.[24]

VI. CONTRACTOR EMPLOYEES. For contractor issues during deployment, see 18 U.S.C. § 3261.

VII. REFERENCES

A. Criteria for Designating Emergency Essential Employees, 10 U.S.C. § 1580.

B. Anthrax Notification Requirements, 10 U.S.C. § 1580a.

C. U.S. DEP'T OF DEFENSE DIR. 1400.31, DOD CIVILIAN WORK FORCE CONTINGENCY AND EMERGENCY PLANNING AND EXECUTION (28 Apr. 1995).

D. U.S. DEP'T OF DEFENSE INSTR. 1400.32, DOD CIVILIAN WORK FORCE CONTINGENCY AND EMERGENCY PLANNING GUIDELINES AND PROCEDURES (24 Apr. 1995).

E. U.S. DEP'T OF DEFENSE INSTR. 1100.22, POLICY AND PROCEDURES FOR DETERMINING WORKFORCE MIX (1 Dec. 2017).

F. U.S. DEP'T OF DEFENSE INSTR. 6490.06, DEPLOYMENT HEALTH (19 Jun. 2019).

G. U.S. DEP'T OF DEFENSE INSTR. 1000.13, IDENTIFICATION CARDS FOR MEMBERS OF THE UNIFORMED SERVICES, THEIR DEPENDENTS, AND OTHER ELIGIBLE INDIVIDUALS (13 Dec. 2017).

H. 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).

I. U.S. DEP'T OF ARMY, REG. 690-11, DEPARTMENT OF THE ARMY EXPEDITIONARY CIVILIAN WORKFORCE AND CIVILIAN DEPLOYMENTS, IN SUPPORT OF MILITARY CONTINGENCY AND EMERGENCY OPERATIONS (8 Nov. 2019).

J. 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).

L. Army Civilian Personnel Online (CPOL), *Civilian Deployment/Mobilization Guidance*, http://cpol.army.mil/library/mobil/civ-mobil.html.

M. Army Civilian Personnel Online (CPOL) *Anthrax Immunization and Emergency Essential Civilians (EECs) Policy*, http://cpol.army.mil/library/permiss/114dd.html.

N. Office of Personnel Management, *Pay & Leave: Pay Administration*, http://www.opm.gov/policy-data-oversight/pay-leave/pay-administration/#url=Combat-Zone-Employees

O. Department of State Office of Allowances (Foreign Post Differential and Danger Pay Allowance), http://www.state.gov/m/a/als.

P. Limitation on Premium Pay, 5 U.S.C. § 5547 (2014).

[24] 32 C.F.R. § 153; DoDI 5525.11.

Q. Federal Employees' Compensation Act (FECA), 5 U.S.C. § 8101 (2016).

R. Hours of Duty, 5 C.F.R. § 610.

S. Military Extraterritorial Jurisdiction Act (MEJA) of 2000, 18 U.S.C. § 3261.

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CHAPTER 21

RESERVE COMPONENT SOLDIERS AND OPERATIONS

I. OVERVIEW

A. Overview. The Army's Reserve Components (RC) consists of the United States Army Reserve (USAR) and the Army National Guard of the United States (ARNGUS).[1] USAR units made up of combat service or combat service support type units, whereas ARNGUS units are typically combat or combat support type units.

B. 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.[2] Instead, state law provides for military justice. In addition, certain Soldier protections under federal law such as The Uniformed Services Employment and Reemployement Rights Act (USERRA) are not available to Soldiers who serve in a SAD status.[3] Further, the *Posse Comitatus Act*[4] 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. 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[5] duty status at the time of commission of the offense. Proving this can 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.[6]

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.[7] An Active Army General Court-Martial Convening Authority (GCMCA) can also order an RC Soldier back to active duty (recall) for court-martial or Article 15 punishment under this authority.[8] Only the Active Army GCMCA that: (1) has area support responsibilities over the Soldier's unit, or (2) has jurisdiction over the unit where the misconduct occurred is vested with the authority to recall an RC Soldier to active duty for UCMJ purposes.[9]

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[1] *See* 10 U.S.C. § 3062(c)(1). 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] 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) (2016). *See also* U.S. DEP'T OF ARMY, REG. 135-200, ACTIVE DUTY FOR MISSIONS, PROJECTS, AND TRAINING FOR RESERVE COMPONENT SOLDIERS para. 7-2b (26 Sep. 2017) [hereinafter AR 135-200]; U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE para. 20-2b (11 May 2016) [hereinafter AR 27-10].

[3] 32 U.S.C. § 4303(13).

[4] 18 U.S.C. § 1385.

[5] 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) (2016). *See also* AR 135-200, *surpa* note 14, para. 1-12; AR 27-10, *supra* note 14, para. 20-3a.

[6] *See, e.g.* United States v. Chodara, 29 M.J. 943 (ACMR, 1990).

[7] *See* AR 135-200, *supra* note 14, para. 7-4; AR 27-10, *supra* note 14, para. 20-4.

[8] *See generally* AR 27-10, *supra* note 2, chapter 21. *See also* 10 U.S.C. § 802(d).

[9] *See* 10 U.S.C. § 802 (2018). *See also* AR 27-10, *supra* note 14, para. 20-3. A Soldier may be recalled for (1) investigation under Article 32; (2) trial by court-martial; or (3) non-judicial punishment. *See* 10 U.S.C. § 802(d).

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. Consequently, when the Soldier is demobilized and returns to ARNG status, the State is unable to prosecute the Soldier under its State Code of Military Justice for crimes committed when in Title 10 (federal) status. If the Federal authorities wish to court-martial the Soldier, the Soldier must be recalled to active duty under Title 10. Otherwise, the State is likely only authorized to pursue administrative action against the Soldier.

C. Adverse 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 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[10] rather than AR 135-178.[11] 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.[12]

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[10] U.S. DEP'T OF ARMY, REG. 635-200, ACTIVE DUTY ENLISTED ADMINISTRATIVE SEPARATIONS (19 Dec. 2016).
[11] U.S. DEP'T OF ARMY, REG. 135-178, ENLISTED ADMINISTRATIVE SEPARATIONS (7 Nov. 2017).
[12] *See, e.g.*, U.S. DEP'T OF ARMY, REG. 600-37, UNFAVORABLE INFORMATION para. 3-5f (10 Apr. 2018) (providing for the completion of the memorandum of reprimand process following the departure of a Soldier from the command).

CHAPTER 22

ENVIRONMENTAL LAW IN OPERATIONS

I. INTRODUCTION

A. Environmental law is a complex body 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 between the success or 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. Nevertheless, U.S. policy imposes a structure that is similar to domestic environmental 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. JAs can accomplish this through traditional legal counsel methods such as issue spotting, training, and contract formation and review. A JA brings a unique ability to examine environmental issues across disciplines in a contingency operation.

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]

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[1] U.S. DEP'T OF DEFENSE, JOINT PUB. 3-34, *Joint Engineer Operations* (6 Jan. 2016) [hereinafter JOINT PUB. 3-34].
[2] *Id.* at ch. III, para. 6a(3).
[3] U.S. DEP'T OF DEFENSE, INSTR. 4715.05, ENVIRONMENTAL COMPLIANCE AT INSTALLATIONS OUTSIDE THE UNITED STATES (1 NOV 2013, INCORPORATING CHANGE 2, 31 AUG 2018) [hereinafter DoDI 4715.05] (a listing of designated LECs is found in the Appendix to Enclosure 3 of the DoDI). In Europe, this position is called the Theater Environmental Coordinator (TEC) to differentiate the responsibilities in the European Union area of operations. *Id.* at Enclosure 4.
[4] *Id.* at Enclosure 3, para. 4.
[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 (March 2013) [hereinafter FM 1-04].

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 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. NGOs 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, unless language within a statute makes a clear expression of Congress' intent for extraterritorial application.[7] Courts have examined several of the major environmental statutes regarding 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 73 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. The remainder of this chapter discuss the differences in how policy is applied in those situations.

IV. OVERSEAS ENVIRONMENTAL PLANNING PROCESS.

A. Environmental operations planning should begin with the overarching U.S. policy. Even though the National Environmental Policy Act (NEPA) does not generally have extraterritorial effect, 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.[11] In 1979, the DoD issued the Department of Defense Directive (DoDD) 6050.7 to implement E.O. 12114.[12] *[This reference has recently been removed in preparation for a new DoD Instruction, but that update has not yet been released. As DoDD 6050.7 serves as the basis for service implementation of the NEPA-like rules, this chapter will continue to describe DoDD 6050.7 as if it were in effect. Future iterations of this chapter will address any new DoD releases on this matter]*. DoDD 6050.7 provides definitions, the review process, and document requirements for environmental analysis. 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]

B. 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

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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. Part 651 (29 Mar 2002); Air Force, Environmental Impact Analysis Process, 32 C.F.R. PART 989 (Mar 2014; change 1, 6 Oct 2016); Navy, Evaluation of Environmental Effects from Department of the Navy Actions, Secretary of the Navy Instruction (SECNAV Inst.) 5090.6A (26 April 2004); Marine Corps, U.S. Marine Corps Order P5090.2A, Environmental Compliance and Protection Manual, Chapter 12 (10 July 1998; change 3, 26 Aug 2013).
[14] DoDD 6050.7, *supra* note 12, at para. E.1.1 (the Directive sets forth procedures for examining major DoD actions within the global commons, adhering more closely to traditional NEPA environmental impact statements (EIS) format).
[15] *Id.* at para. E2.2.1.1; *see also* the discussion in this Chapter, *infra*, at Section IV.B.
[16] *Id.* at para. E2.2.1.2.
[17] *Id.* para. E2.2.1.3.
[18] *Id.* para. E2.2.1.1
[19] *Id.*

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 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.

C. 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.

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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.

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 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.

V. AUTHORITIES AT ENDURING OVERSEAS LOCATIONS

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, permanent type setting or in a deployed context. The answer is typically not found in the "law," but by implementing applicable policy directives. This section briefly addresses overseas management of the former settings, known as enduring locations.

B. Compliance.

1. DoDI 4715.05 is the authority for compliance matters, such as protection of air, water, natural resources and other environmental categories.[31] The DoDI only applies to enduring locations[32] 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.

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[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 (OPORD) process should note this conclusion.

[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.

[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] DoDI 4715.05, *supra* note 3. The goal of compliance is to minimize potential adverse impacts on human health and the environment while maximizing readiness and operational effectiveness. JOINT PUB. 3-34, *supra* note 1, at Appendix C, para. 2a.

[32] An enduring location is one where the DoD intends to maintain access and use of that location for the foreseeable future. The following types of sites are considered enduring: main operating base, forward operating site, and cooperative security locations. All three types of locations may be composed of more than one distinct site. Enduring locations are published in the OSD-approved Enduring Location Master List. DoDI 4715.05, *supra* note 3, at Glossary. Necessarily encompassed within the meaning of this definition is an "installation" which is defined as an enduring location consisting of a base, camp, post, station, yard, center, or other DoD activity under the operational control of the Secretary of a Military Department or the Secretary of Defense. *Id.*

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).[33]

3. The DoDI establishes environmental compliance standards for protecting human health at overseas enduring locations published as the Overseas Environmental Baseline Guidance Document (OEBGD).[34] The OEBGD is a generic document that establishes a set of objective criteria and management practices to protect human health and the environment.[35] 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 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.[36]

C. Remediation of Contamination Outside the U.S. Cleaning up environmental contamination attributable to our activities outside the territorial jurisdiction of the United States is controlled by DoDI 4715.08.[37] Remediation is an action taken to clean up our past contamination – it is not a spill response activity which is addressed in DoDI 4715.05.[38] The DoDI provides very narrow authority to remediate overseas. The basic policy is that DoD shall take no action outside of a DoD installation to remediate environmental contamination caused by DoD actions or activities beyond that specifically required by applicable international agreement.[39] This rule is strictly applied, and has created some difficult situations with the host country. The DoDI clearly specifies when remediation is required, when it is authorized but not required, and when it is prohibited.

1. *Required remediation*. DoD components are required to:

a. take prompt action to address a substantial impact to human health and safety (SIHS)[40] due to environmental contamination that is caused by DoD activities and is located on a DoD installation;[41]

b. comply with the provisions of an applicable international agreement;[42]

c. prevent immediate exposure of US forces and personnel to contamination that poses a SIHS at an enduring location that the SecDef has approved for realignment.[43]

2. *Authorized but not required remediation*. DoD may address contamination:

a. from non-DoD activities on DoD installations if the contamination poses a SIHS of US Forces or personnel;[44]

b. when needed to undertake an approved military construction project,[45] or;

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[33] *See* this Chapter, *supra* Section II.B.
[34] DoD Pub 4715.05-G, OVERSEAS ENVIRONMENTAL BASELINE GUIDANCE DOCUMENT (OEBGD) (1 November 2013, Incorporating Change 2, 31 August 2018).
[35] DoDI 4715.05, *supra* note 3, at para. E2.1.5.
[36] *See Id*., at Enclosure 3, para. 4 for a description of the FGS development process.
[37] U.S. DEP'T OF DEFENSE INSTR. 4715.08, REMEDIATION OF ENVIRONMENTAL CONTAMINATION OUTSIDE THE UNITED STATES (1 NOV 2013, INCORPORATING CHANGE 2, 31 AUGUST 2018) [hereinafter DoDI 4715.08].
[38] A spill response would be cleaning up something contemporaneous with the spill, such as within days or weeks of the release.
[39] DoDI 4715.08, *supra* note 37, at section 3d.
[40] A "substantial impact" is defined as a level of exposure that is occurring, or is about to occur within the next 3 to 5 years, and exceeds a generally established, published, and applied federal standard in the U.S. *Id*. at Glossary. A SIHS is determined through an investigation. An investigation is triggered if there is a reasonable likelihood that the contamination is a SIHS. Once triggered, the investigation involves medical personnel and supported by a health impact assessment. After this assessment, the in-theater component commander may make a determination of a SIHS. *Id.* at Encl. 3, para 4.
[41] *Id.* at Encl. 3, para 1a. Note that the remediation of a SIHS is only to the extent that it removes the SIHS. This can reduce a risk, but not entirely eliminate it. *Id.* at Encl. 3, para 4c. The determination of whether or not a SIHS exists is made by the in-theater component commander with consultation with the appropriate DoD medical authority and the DoD LEC. The determination is made in writing, and supported by a health impact assessment. *Id*. at Encl. 3, para. 4.a.
[42] An international agreement must be supported by a legal determination that the requirement for remediation is mandatory and arises from binding agreement. *Id*. at Encl. 3, para. 1.e.
[43] *Id.* at Encl. 3, para. 1d.
[44] *Id*. at Encl. 3, para. 1b. Host nation contribution must first be sought, and DoD concurrence is required.
[45] *Id*. at Encl. 3, para 1.d. Remediation is permitted only to the extent it is needed for the project.

c. when not otherwise authorized by the DoDI if extraordinary circumstances exist.[46]

3. *Prohibited remediation*. DoD shall not remediate for any of the following:

a. off-installation contamination from any source unless remediation is specifically required by applicable international agreement;[47]

b. contamination at installations approved for realignment, except for measures needed to prevent immediate exposure of US forces and personnel to a SIHS;[48]

c. contamination at returned installations unless required by international agreement;[49]

d. activities of a DoD contractor outside an installation,[50] and;

e. for symbolic purposes.[51]

VI. NON-ENDURING OVERSEAS LOCATIONS.

A. In some countries and in most contingency operations, enduring locations have not been established, and the DoDIs do not apply.[52] Although environmental issues often have a significant impact on operations,[53] there is not always specific guidance available to the commander in a deployed contingency operation.

B. The Department of Defense is beginning to address these deficiencies. In 2013, DoD Directive 3000.10 (DoDD 3000.10) charged the Deputy Under Secretary of Defense for Installations and Environment to develop comprehensive environmental policies for contingency basing.[54] In 2016, DoD Instruction 4715.22 was released to establish policy, assign responsibility, and provide direction for environmental management at contingency locations.[55] The instruction directs that DoD establish and maintain contingency location environmental standards (CLES),[56] which are objective criteria and management practices intended to protect human health and the environment, much as the OEGBD does in DODI 4715.05. The CLES are currently under development. Until the CLES are released, the remainder of this section will discuss various other authorities that may assist practitioners.

C. The Joint Operational Planning Execution System (JOPES) incorporates environmental considerations into operational planning, and devotes Annex L of the OPORD to these issues. [57] 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.

D. 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.[58] To begin this effort, the JA should gather all the relevant resources and authorities that might apply in that theater of operation.[59] The JA should contact the

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[46] *Id.* at Encl. 3, para 1.g. DoD approval is required. Extraordinary circumstances is not defined, but certainly would not include remediation for symbolic value or to "get along" with the host nation authorities.
[47] *Id.* at para 3.
[48] *Id.* at Encl. 3, para 1.d.
[49] *Id*. at Encl. 3, para 3.
[50] *Id*. at Encl. 3, para 1h.
[51] *Id*. at Encl. 3, para 1i.
[52] DoDI 4715.05, *supra* note 3, at para. 2; DoDI 4715.08, *supra* note 37, at para. 2.
[53] 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.
[54] U.S. DEP'T of DEFENSE DIRECTIVE 3000.10, CONTINGENCY BASING OUTSIDE THE UNITED STATES (10 Jan 2013, Incorporating Change 1, 18 Aug 2017), at Encl. 2, para 4.
[55] U.S. DEP'T of DEFENSE INSTRUCTION 4715.22, ENVIRONMENTAL MANAGEMENT POLICY FOR CONTINGENCY LOCATIONS (18 Feb 2016, Incorporating Change 2, 31 Aug 2018)[hereinafter DoDI 4715.22].
[56] *Id.* at Glossary.
[57] JOINT PUB. 3-34, *supra* note 1, at Appendix C.
[58] *Id.*
[59] There are many resources to assist the JA draft and review Annex L. *See, e.g.* Air Force Handbook, 10-222, Volume 4, *Environmental Considerations for Overseas Contingency Operations* (1 September 2012), 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).

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).[60] 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.

E. 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.[61] 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.[62] United States policy is to always conduct a good faith environmental audit to reduce potential adverse consequences to the host nation's environment.[63] 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.[64]

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.[65] 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 principles.[66] While all phases of operations have LOAC concerns, this phase is perhaps the most relevant because of the targeting implications. In 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.[67] 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 generally 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.

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[60] *See* this Chapter, *infra* Sec. VII.
[61] JOINT PUB. 3-34, *supra* note 1, at Appendix C, para 4.
[62] 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).
[63] DoDI 4715.22, *supra* note 55, at section 3.5. Known as an Environmental Condition Study (ECS), these characterize environmental conditions and risks at contingency locations, and at a minimum be conducted as the location is established and as it is closed. The term Environmental Baseline Survey (EBS) might also be used.
[64] *See* JOINT PUB. 3-34, *supra* note 1, at Appendix C.
[65] 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.
[66] U.S. DEP'T OF DEFENSE, JOINT PUB. 3-60, JOINT TARGETING, Appx. A (31 Jan 2013) (including the LOAC principles of military necessity, unnecessary suffering, proportionality, and distinction).
[67] *Id* at Appx. A; *see also*, this Chapter, *infra* Section VII.

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 Condition Study (ECS), sometimes known as the Environmental Baseline Survey (EBS)[68] is an important tool in this selection process. The primary purpose of an ECS 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. Judge Advocates must also integrate a directive for documentation of initial environmental conditions into the OPLAN.[69]

b. Environmental protection strategies apply in four broad areas of base operations (BASOPS), and should be incorporated into planning:[70]

(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).[71]

(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.[72] 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.

(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.[73]

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.[74] A closure

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[68] *See* DoDI 4715.22, *supra* note 55, at 3.5, and FM 3-34, *supra* note 1, at Appx. C; *see also* U.S. ARMY IN EUROPE REG. 200-2, ENVIRONMENTAL GUIDANCE FOR MILITARY EXERCISES (13 April 2012).

[69] 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").

[70] JOINT PUB. 3-34, *supra* note 1, Appendix C, section 4.

[71] *See* DEPARTMENT OF DEFENSE INSTRUCTION 4715.19, Use of Open-Air Burn Pits in Contingency Operations (13 Nov 2018).

[72] 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.

[73] 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).

[74] 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, http://www.fas.org/irp/doddir/army/clamo-v2.pdf.

survey will provide a measurement of change of the environmental conditions against an ECS, if one was completed. This process will assist in the potential adjudication of claims.[75]

VII. 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.

1. Hague Convention No. IV (Hague IV).[76] 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).[77] 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.[78] 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.[79] 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.[80] The Geneva Gas Protocol bans the use of "asphyxiating, poisonous, or other gases, and all analogous liquids, materials, and devices . . ." during war.[81] 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.[82]

3. The 1993 Chemical Weapons Convention (CWC).[83] The CWC complements the Geneva Gas Protocol. Executive Order 11850[84] specifies U.S. policy relative to the use of chemicals, herbicides, and RCA, and sets out several clear rules regarding the CWC.[85] 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.[86] In regard to herbicides, the E.O. sets out two uses that are expressly permitted, even without NCA

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[75] USCENTCOM REG. 200-2, CENTCOM CONTINGENCY ENVIRONMENTAL GUIDANCE, para. 3-2f (Appendix F contains a sample checklist for base closure).
[76] 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].
[77] *Id.* at art. 22.
[78] *Id.* at art. 23e.
[79] *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).
[80] 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].
[81] *Id.*
[82] *Id.* (the U.S. position is that neither agent meets the definition of a chemical under the treaty's provisions).
[83] 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).
[84] Exec. Order No. 11850, 40 Fed. Reg. 16187 (1975) [hereinafter E.O. 11850].
[85] *Id.*
[86] *Id.* (for example the CWC's restrictions do not apply relative to uses that are not methods of warfare).

authorization: domestic use and control of vegetation within and around the "immediate defensive perimeters" of U.S. installations.[87]

4. 1980 Certain Conventional Weapons Treaty (CCW).[88] 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.[89]

5. The Fourth Geneva Convention (GC IV).[90] 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."[91] 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.[92] 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.[93] A simple breach only requires parties to take measures necessary for the suppression of the type of conduct that caused the breach.[94] 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.[95] 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).[96] 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 requirement).[97] Another distinction between ENMOD and other treaties is that ENMOD only prohibits environmental modifications that cause damage to another party to ENMOD.[98]

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 . . . ."[99] 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

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[87] *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).
[88] 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].
[89] *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.*
[90] 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].
[91] *Id.* at art. 53.
[92] *Id.* at art. 147.
[93] *Id.* at art. 146, cl. 2.
[94] *Id.* at art. 146, cl. 3.
[95] 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).
[96] 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].
[97] *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.
[98] *Id.* at Art. I.
[99] *Id.* at Art. II.

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.[100] As before, ENMOD probably does not reach this application of a relatively low technology.[101] 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.[102]

7. The 1977 Protocols Additional to the Geneva Conventions (AP I & AP II).[103] 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."[104] 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.

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.[105] 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."[106] 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.[107] For instance, there is little doubt that the

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[100] *Id.* However, these types of activities would violate Hague IV and the Gas Protocol.
[101] Environmental Modification Treaty: Hearings Before the Committee on Foreign Relations, U.S. Senate, 95th Cong., 2nd Sess. 83 (1978) (Environmental Assessment).
[102] *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.")
[103] *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.
[104] *Id.* at Art. 33, 55.
[105] 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 410–420 (1987) [hereinafter Pilloud].
[106] *Id.* (Article 55 language has roughly the same meaning as the meaning of "severe" within the ENMOD Convention).
[107] 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.*

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.[108]

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.[109] 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.[110]

e. 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.[111]

8. Convention for the Protection of Cultural Property in the Event of Armed Conflict.[112] 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.[113] 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.[114] Occupying powers also assume the obligations of protection just as the party State had prior to the armed conflict.[115] Judge Advocates should be aware that parties to the Convention must develop inventories of 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.[116]

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.[117] 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,

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[108] *See* Pilloud, *supra* note 105, at 417.
[109] AP I, *supra* note 103, art. 54-56.
[110] FM 6-27/MCTP 11-10C, *The Commander's Handbook on the Law of Land Warfare*, para 2-130 (Aug. 2019). However, "it is prohibited to attack, destroy, remove, or render useless objects indispensable to the survival of the civilian population of an enemy nation, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations, and supplies for irrigation works, for the purpose of denying their sustenance value to the civilian population." *Id*. at 131. If the food center is shared by both enemy military and enemy civilian population, then "[m]ilitary action intended to starve enemy forces must not be taken when it is expected to result in incidental harm to the civilian population that is excessive in relation to the military advantage expected to be gained pursuant to the principle of proportionality." *Id*. at 133.
[111] 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).
[112] Cultural Property Convention, *supra* note 57.
[113] *Id.* at Art. 1.
[114] *Id.*
[115] *Id.* at Art. 5.
[116] *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.)").
[117] FM 1-04, *supra* note 5, at paras. 5-35 to 5-36 (Mar. 2013).

law, and policy in this area. Due to the specialized nature of this discipline, JAs should not hesitate to establish "reach-back" capabilities with subject matter experts (e.g. the Army's Environmental Law Division and Army Environmental Command). 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.

APPENDIX

LAWS AND REGULATIONS

I. SUMMARIES OF SOME OF THE MAJOR DOMESTIC (U.S.) ENVIRONMENTAL LAWS

A. 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.

B. 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.

C. 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.

D. 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.

E. 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.

F. 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.

G. 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.

H. 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.

I. 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.

J. 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.

K. 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.

L. 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.

M. 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.

N. 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.

O. 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.

P. 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.

Q. 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

A. 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.

B. 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

A. 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. *NOTE: this Directive has been withdrawn pending re-issuance. See discussion in Section IV of this chapter.*

B. 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.

C. 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.

D. DoD Pub 4715.05-G, Overseas Environmental Baseline Guidance Document (OEBGD) (1 May 2007, Incorporating Change 1, 31 Aug 2018). 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.

E. DoDI 4715.08, Remediation of Environmental Contamination Outside the United States (1 NOV 2013, INCORPORATING CHANGE 2, 31 AUG 2018). 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.

F. DoDI 4715.19, Use of Open-Air Burn Pits in Contingency Operations (15 Feb. 2011, Change 3, 3 Jul. 2014). 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

G. DoD Joint Publication 3-34, Joint Engineer Operations (6 Jan. 2016). This publication provides for the planning, command and control, execution, and assessment of joint engineering operations. Appendix C helpfully identifies all JOPES Annexes and Appendices with significant environmental considerations.

IV. SERVICE REGULATIONS, PUBLICATIONS, FIELD MANUALS, ORDERS, AND INSTRUCTIONS

A. 32 CFR part 651, Environmental Analysis of Army Actions (29 Mar 2002). The Army's implementing guidance for E.O. 12114 and DoDD 6050.7. See Subpart H for Environmental Effects of Major Army Action Abroad.

B. 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.

C. 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.

D. FM 1-04, Legal Support to the Operational Army (Mar. 2013). The Army's manual for operational legal doctrine.

E. 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.

F. OPNAVINST 5090.1E, Environmental Readiness Program (3 September 2019). The instruction delineates responsibilities, and issues policy guidance for the management of the environmental resources for all Navy ships and shore activities.

G. SECNAVINST 5090.6B - Environmental Planning for Department of the Navy Actions (9 Oct 2018). Updates Navy policy and responsibilities to ensure comprehensive program of environmental planning and stewardship consistent with, and in support of, the readiness of the Naval Forces of the United States.

H. MCO P5090.2, Environmental Compliance and Protection Program (11 June 2018). Codifies 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.

I. MCRP 4-11B. Environmental Considerations (Feb. 2010) (Supersedes FM 3-100.4/ MCRP 4-11B, 15 June 2000).

J. 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.

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CHAPTER 23

ADMINISTRATIVE LAW IN OPERATIONS

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 pursuant to such reasonable exceptions as are provided 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 promulgated pursuant to this order. 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. DoD Employee (JER § 1-209). 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 non-appropriated 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 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. Any faculty member in a civil service position or hired pursuant to Title 10, United States Code, and any student (including a cadet or midshipman) of an academy, college, university, or school of DoD.

g. Consistent with labor agreements and international treaties and agreements, and host country laws, any foreign national working for a DoD Component except those hired pursuant to a defense contract., e.g., local national employees in Germany and Japan are <u>not</u> subject to JER; but Korean national employees are.

h. 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). The DAEO is responsible for the implementation and administration of the component's ethics program. (JER § 1-401a).

3. Ethics Counselor (EC) (JER §§ 1-212, 1-401).

a. A DoD employee (must be an 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 (JER § 3-300); review of public (OGE 278) and confidential (OGE 450) financial disclosure reports, and resolving conflicts of interests (JER § 7-206); post-Government employment restrictions (JER § 9-400); and use of Government resources and time (JER § 2-301) .

b. 5 C.F.R. § 2635.107 gives the EC authority to provides ethics advice on standards of conduct issues. Advice may be oral, however, some circumstances require that the ethics advice be in writing (see below under specific duties). Disciplinary action generally will not be taken against an employee who has engaged in conduct in good faith reliance upon an EC's advice. However, the employee may be subject to criminal prosecution where such conduct violates a criminal statute. This constitutes *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 the 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 the Ethics Counselor.

C. Authority and Appointment of Ethics Counselors.

1. *Army*. Secretary of the Army appointed General Counsel (GC) as DAEO; GC appointed the Deputy General Counsel (Ethics & Fiscal) as Alternate DAEO; DAEO appointed Deputy DAEOs and delegated authority: Principal Deputy General Counsel; Deputy General Counsel (Ethics & Fiscal); TJAG; DJAG, The Assistant Judge

Advocate General for Military Law and Operations, Chief, Administrative Law Division, Chief Counsel, USACE; Command Counsel, USAMC. 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 the Deputy General Counsel, Fiscal, Ethics, Administrative Law 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.)

4. *Marine Corps*: The Staff Judge Advocate to the Commandant of the Marine Corps has appointed Ethics Counselors based on positions. That list includes the Deputy Staff Judge Advocate, Judge Advocate Division, HQ USMC; Head, Research and Civil Law Branch, HQ USMC; Deputy Head, Research and Civil Law Branch, HQ USMC; Directors and Deputy Directors, Joint Law Centers, for all Marine Corps Air Stations; SJAs and DSJAs at all Marine Corps Bases; and Staff, Force, and Fleet JAs and DSJAs for all staffs and commands having GCMCA.

D. Required Reports.

1. OGE Form 450 - Confidential Financial Disclosure Reports (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). Gifts of travel that exceed $250 in value must be reported in writing using form SF 326 (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. (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. § 2638.207). (Due 1 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,” revised Oct. 2016.).

E. Resources

1. GAO Principles of Federal Appropriations Law (The Red Book), for fiscal law related issues, http://www.gao.gov/.

2. OGE Material: http://www.oge.gov/.

3. DoD SOCO website: https://ogc.osd.mil/defense_ethics/.

4. Your MACOM/MAJCOM/higher command EC.

5. Navy JAG (Code 13); Navy Assistant General Counsel (Ethics); AF/JAA Ethics; 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. Milsuite: https://www.milsuite.mil/book/groups/jagconnect-army-administrative-law.

II. GIFTS

A. **Definition of a Gift.** 5 CFR § 2635.203(b). 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 excluded from the definition of "gifts" (however, see paragraph 4(c)(3) below):

1. Coffee, donuts, and similar modest items of food and non-alcoholic refreshments when offered other than as a meal.

2. Greeting cards and items of little intrinsic value such as personalized plaques, certificates, trophies, intended primarily for presentation.

3. Loans from banks and other financial institutions (entities in the business of loaning money) on terms generally available to the public.

4. Opportunities and benefits, including favorable rates and 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. Rewards and prizes in contests "open to the public." Employee's entry into the contest must not be part of his or her official duties.

6. Pension and other benefits resulting from continued participation in an employee welfare and benefits plan maintained by a current or former employer.

7. Anything paid for by the government or secured by the government under a government contract.

8. Free attendance to an event provided by the sponsor of the event to an employee who is assigned to present information on behalf of the agency at the event on any day when the employee is presenting.

9. Any gift accepted by the government under specific statutory authority.

10. 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*. (10 U.S.C. §§ 2601, 2608, and DoD 7000.14-R, Volume 12, Chapter 3).

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. Under a prior gift regulation, a local commander could accept unconditional gifts valued up to $1,000. This was changed in the July 2015 update to AR 1-100, and this authority no longer exists. Gifts offered to the Army or gifts offered originally to a commander exceeding any applicable exception threshold may be accepted only by the Secretary of the Army or designee. The point of contact for such gifts is the Army Gift Program Coordinator, Office of the Administrative Assistant to the Secretary of the Army, https://giftstoarmy.army.mil/ .

(1) 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 4001.2K, Acceptance of Gifts (previously SECNAVINST 4001.2J, recodified May 2018.

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.

(1) All donations of nonmonetary assets or services 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 Undersecretary of Defense (Comptroller) (USD(C)). 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.

(2) 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). In October 2014, The Secretary of the Army delegated gift acceptance authority to the IMCOM commander of up to $250,000 for Non-Appropriated Fund Instrumentalities (NAFIs), and increased gift acceptance authorities for Gifts to the Army of up to $100,000. This authority was renewed in July 2018. Pursuant to the Secretary of the Army's delegation, the IMCOM commander further delegated this authority. For gifts to NAFIs: Garrison FMWR directors may accept up to $50K (when delegated by the Garrison Commander in writing); Garrison and Army Support Activity Joint Base Commanders (ASAJB) may accept up to $100K and may accept Fisher Houses; Director/Deputy G-9 FMWR Programs may accept up to $150K. For Gifts to the Army: ASAJB Commanders may accept offers up to $5K; Director/Deputy G-9 FMWR Programs may accept up to $50K for Army programs under the G-9's area of responsibility; IMCOM Deputy Commanding General (Support) may accept up to $50K. Any gifts over $250,000 (NAFI) or $100,000 (Gifts to the Army) 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. (AR 215-1). *See also* AFI 34-201 and SECNAVINST 4001.2K.

2. *Gifts to Individuals*. (DoD 5500.07-R).

a. The Joint Ethics Regulation (JER), DoD 5500.07-R, is applicable to all DoD employees including enlisted personnel. Any further agency supplementation requires approval from the General Counsel of the DoD. (The JER and the Ethics Counselor's Deskbook may be found at the DoD SOCO website under the Ethics Resource Library: https://ogc.osd.mil/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*. (AR 1-100; 5 U.S.C. § 7342; DoDD 1005.13).

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." "Minimal value" is determined based on the retail value in the United States at the time of receipt and 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 $390.

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 $390 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 $390 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 $390 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 $390 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. (5 U.S.C. § 7342). 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 (forward to GSA or return to donor). U.S.C. § 7342; DoDD 1005.13). For Army, within sixty days of receipt, report to and deposit gifts with, Army Gift Program Coordinator, Office of the Administrative Assistant to the Secretary of the Army, https://giftstoarmy.army.mil/, the same POC as for Gifts to the Army. (AR 1-100). 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. (41 CFR § 102-42.20; AR 1-100).

g. It is always appropriate to accept a gift from a foreign government, even one valued at more than $390, 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. (5 U.S.C. § 7342; DoDD 1005.13).

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). (5 CFR §§ 2635.202 – 2635.203).

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. (5 CFR § 2635.203).

c. Determining whether a gift from an outside source can be accepted:

(1) First, determine whether the proffer is actually a gift under 5 CFR § 2635.203. See Section II.A. discussing the definition of a gift.

(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; and free attendance at certain widely-attended gatherings. Another 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. (5 CFR § 2635.204).

(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 (*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. (5 CFR §§ 2635.201 - 2635.205).

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 $390) 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. This exception is retroactive to September 11, 2001. (JER §§ 3-400 - 3-406; 10 U.S.C. § 2601a).

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. (5 CFR § 2635.302).

b. There are two exceptions to the general prohibition. Unsolicited gifts may be given to an official superior or accepted from a subordinate on (1) special infrequent occasions (e.g., marriage, PCS, retirement, etc.), and (2) an occasional basis (e.g., birthdays and holidays). (5 CFR § 2635.304).

(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). (5 CFR § 2635.304). 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. (5 CFR § 3601.104) 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. (5 CFR § 2635.303). Gifts may not exceed $300.

(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). (5 CFR § 2635.304).

C**.** **Handling Improper Gifts to Individuals**. If a prohibited 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. (5 CFR § 2635.206).

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 450, Confidential Financial Disclosure Report. Previously the OGE 278e, Public Financial Disclosure Report, was also filed by DoD personnel in FDM, however, now all 278es will be filed in the Integrity system managed by the Office of Government Ethics, https://integrity.gov/efeds-login/.

1. Army policy requires those Army personnel who are required to file to do so online in either FDM or integrity. Army personnel deployed to a combat zone (CZ) on the due date of the report may obtain an extension to file.

a. For OGE 278e 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 278e.

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 or her 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 or her 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 or Integrity. For additional information on FDM visit the FDM website, https://www.fdm.army.mil, or contact the FDM Webmaster, email: FDMWebmaster2@conus.army.mil. For additional information on Integrity visit the integrity website at https://integrity.gov/efeds-login/.

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 Soldiers’ 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 Service Component Command G-1/AG 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 or her 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**. (AR 215-1, Chapter 9-8)

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 Administrative Investigations and Boards of Officers.

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 638-34 (if death results, a family brief may be triggered under AR 638-34); Hostile death Investigations required by AR 638-8; 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 638-8.

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 pursuant to 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 administrative 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. When criminal misconduct is suspected that may be in the investigative purview of law enforcement, JAs should consult with either the Military Police (MP), Criminal Investigation Command (CID), or other appropriate law enforcement authorities prior to initiating the investigation.

2. *Methods*. An administrative fact-finding procedure under AR 15-6 may be designated a preliminary inquiry, an administrative investigation or a board of officers. Proceedings that involve a single officer, or a single officer with assistant investigating officers are designated administrative investigations. Proceedings that involve more than one Investigating Officer (IO) 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*. Unless mandated by service or theater policy, the appointing authority must determine, based on the seriousness and complexity of the issues and the purpose of the inquiry, what type of investigation to conduct. For investigations appointed under provisions of AR 15-6, the appointing authority has three options: a preliminary inquiry, an administrative investigation or a board of officers.

a. *Preliminary Inquiry*. Used to assess the nature and size of a particular problem, to identify witnesses and summarize initial statements and to determine the necessity and scope of follow-up investigations.

b. *Administrative Investigation*. Conducted by a single IO, or by an investigation team consisting of an IO and one or more assistant IOs designated by the appointing authority to assist the IO in gathering evidence. IOs may use whatever method they deem most efficient and effective for acquiring information. The IO in an administrative investigation or may use whatever method they find most efficient and effective for acquiring information. For example, the IO may divide witnesses, issues or evidentiary aspects of the inquiry among the assistant IOs 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 administrative investigations procedures are used, and no one is entitled to the rights of a respondent. Before beginning an administrative 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.

c. *Boards of Officers*. When multiple fact-finders are appointed using formal procedures, they will be designated as a board of officers. Boards of officers meet in full session to take evidence. Definite rules of procedure will govern the proceedings. Depending on the subject matter under investigation, these procedural rules are found in AR 15-6 (Chapter 7), 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 6055.07 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 6055.07 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. Timelines may vary depending upon the Combatant Command. For example, 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. *Board of Officers*. 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/Flag Officer.

c. Any commander, deputy commander, or special, personal, or principal staff officer in the grade of colonel (lieutenant colonel may appoint if assigned to a slot authorized a colonel) or above at HQDA, 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. Principal Deputies, Assistant Deputy Chiefs of Staff, and Assistant secretaries of the Army are authorized to serve as appointing authorities at HQDA.

g. 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. *Administrative Investigations and Preliminary Inquiries*. Administrative investigations may be appointed by:

a. Any officer or civilian authorized to appoint a board.

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 special, personal, or principal staff officer or supervisor in the grade of major or above.

3. *Special Cases with specific appointing authority requirements under AR 15-6*

a. In investigations under AR 15-6, only a GCMCA or a general/flag officer assigned to a command billet with a servicing SJA, may appoint an investigation or board for incidents resulting in property damage of $2 million or more, the loss/destruction of an Army aircraft or an unmanned aircraft system with a replacement or repair cost of $2 million or more, an injury/illness resulting in or likely to result in death or permanent total disability.

b. Only the next superior authority to the GCMCA or general/flag officer authorized to appoint an administrative investigation or board of officers for Class A accidents may appoint an administrative investigation or board of officers for: Class A training accidents resulting in, or likely to result in, the permanent total disability or death of one or more persons; or combat-related deaths involving non-DOD personnel or an insider (green on blue) attack.

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 appointing authority will immediately notify the combatant commander, or his or her delegee, as appropriate, who has the authority to appoint an investigation into the 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.

E. **Choosing the Investigating Officer**.

1. The IO must be the best qualified by reason of their education, training, experience, length of service, demonstrated sound judgment and temperament. In the Army, the IO must be a commissioned or warrant officer, or a Civilian GS-11 or above and senior to any likely subjects of the investigation. When military exigencies are determined to exist and no other commissioned officer, warrant officer or qualified DA civilian is readily available, a noncommissioned officer in the grade of E-7 or above may be appointed as an IO. 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 Investigating Officer's Guide is included here as

an appendix. The Naval Justice School has a similar publication, the JAGMAN Investigations Handbook. The Air Force publishes the Air Force Commander-Directed Investigations Guide.

F. **Methods of Appointment**.

1. Army administrative investigations and boards will be appointed in writing. Air Force CDIs and Navy CIs must be appointed in writing. The appointment should clearly specify the purpose and scope of the administrative 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. Note that the Memorandum of Appointment should include certain information: the specific regulation or directive under which the administrative investigation or board is appointed; the purpose of the administrative investigation board; the scope of the investigation; and the nature of the required findings and recommendations. The scope of the IO or board's power is very important because an IO or 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. 2-2. It may be possible for the appointing authority to ratify the board's action.

3. The Memorandum of Appointment in a board of officers 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 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. Appendix C to AR 15-6 is an IO's guide that is an exceptional resource for investigating officers and JAs who are new to the practice of advising IOs on administrative investigations.

H. **Findings and Recommendations**.

1. *Report Structure*. Army administrative investigations normally begin with DA Form 1574-1, while boards of officers utilize DA Form 1574-2. The forms provide a "fill in the box" guide to procedures followed during the investigation. Additional enclosures and exhibits may be required depending on the type of investigation (see, e.g., AR 15-6, paragraphs 3-13 and 3-14 or AR 600-8-4, paragraph 3-8). 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 a legal review of Army administrative investigations and boards directed under AR 15-6. 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 general prohibition against the advisor to the investigating officer also conducting the legal review. However, the regulation advises that whenever possible, the legal advisor designated to support the investigation or board will not conduct the 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. The legal review should also advise the approval authority whether evidence supports any additional relevant findings, or suggests that additional investigation is appropriate to address additional concerns, including anticipating future uses of the investigation.

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. Disapprove, Except or Substitute individual 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 without the approval of the appointing authority. For a discussion on how to respond to a Freedom of Information Act (FOIA) request for an administrative investigation, please refer to section VI of this chapter.

2. Investigations must be retained by the approving authority for five years. This requirement is for the original and a digital copy. If the investigation or board contains adverse information with regard to a field grade officer, or involves a high-profile case, the approval authority will keep the original and a digital copy for not less than 10 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 Oct. 2007).

3. Passing investigation or board reports to succeeding commands; requirement to return and maintain investigations at home station. When an investigation or board is conducted in a deployed environment and pertains to deployed operations, the approval authority should provide a copy of the final report of proceedings to the replacing unit prior to redeploying. The approval authority will keep the original and a digital copy of the report of proceedings at home station in accordance with the requirements of this paragraph, and retains the authority to release the report.

L. **Right to respond to adverse information**

1. Field grade officers have a right to respond to adverse information in a report of proceedings. This right exists regardless of whether adverse administrative action is recommended or contemplated against the field grade officer.

2. When a field grade officer has the right to respond pursuant to this paragraph, the portion of the report of investigation and supporting evidence pertaining to the adverse information will be referred to the officer after being properly redacted. The officer will have at least 10 business days to respond.

3. The right of a field grade officer to respond to adverse information should not influence the conduct of an investigation. The officer's right to respond to adverse information will not serve as a substitute for attempting to interview the individual during the investigation.

4. The field grade officer's response to the adverse information may include anything that the officer deems to be relevant to the finding, including, but not limited to, a rebuttal memorandum prepared by the officer or his or her representative, additional evidence in any format, and letters of support. All materials provided in response to adverse information will be included as an exhibit to the report of proceedings.

VI. THE FREEDOM OF INFORMATION ACT (FOIA) (5 USC § 552)

A. Deployed units should anticipate requests under the FOIA for records they maintain in their possession and control. 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 responses to FOIA requests within 20 working days of receipt of a proper request. This requires units to search, review, duplicate, and if necessary redact requested records rather quickly. Judge advocates must have general knowledge regarding the FOIA and the appropriate regulations.

C. Under the FOIA, an agency (i.e., DoD) may deny records responsive to FOIA requests only if: (1) the agency reasonably foresees that disclosure would harm an interest protected by one of the nine statutory exemptions; or (2) disclosure is prohibited by law. Mere speculation or abstract fears are not a sufficient basis for withholding information or denying requests. Instead, the agency must reasonably foresee that disclosure would cause harm.

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 the DoD the authority to deny a FOIA request rests solely with the designated Initial Denial Authority (IDA). The Army's IDAs are designated in paragraph 5-200d of AR 25-55. 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. However, when operating as part of a Combatant Command 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 IDA 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 is a request 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 may apply. Also, post-request classification is authorized as long as the criteria of Executive Order 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 resources 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 Exemptions 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 servicemembers are not released [See Exemption 6 below]. This requires the redaction of personally identifiable 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 Communications.** 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 may be withheld under the deliberative process privilege so long as they are pre-decisional. However, once approved recommendations become final agency decisions and no longer qualify 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 a reasonably foreseeable 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 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 individual's privacy interest in the information must be balanced with the public's interest in disclosure. Since 9/11 DoD personnel, 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 Sept. 2005). As a matter of practice, personal information about lower level employees (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 ongoing investigation or during the pendency of a resultant adverse administrative action, but could not be used once the adverse administrative action is 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 reasonably foreseeable harm 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. IAW AR 600-8-2, as of May 2016, there is no longer a requirement to place a flag (suspension of favorable personnel actions) based solely on the initiation of a financial liability investigation.

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 $500 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. *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 communications security (COMSEC), sensitive item, 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 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.

3. *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 rating chain.

4. *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 or her 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; and

(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.

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 or 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; and

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 (per para 13-40.d, 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 or her 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). Note: DOD regarding CO policy changed in July 2017, while not all service policies have been amended to reflect these changes. The terms and rules listed here comply with the July 2017 policy, when current Army policy conflicts.

2. Classification.

a. *Class 1-O*: A member who, by reason of conscientious objection, sincerely opposes participation in combatant and non-combatant military training and service in war in any form and for whom such beliefs play a significant role in his or her other life

b. *Class 1-A-O*: A member who, by reason of conscientious objection, sincerely opposes participation only in combatant military training and service and for whom such beliefs play a significant role in his or her other life.

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 to 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 service member 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 (email army.arbainquiry@mail.mil).

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. Key Definitions.

a. *Fatal Incident Brief* is a comprehensive term that includes all categories of Army Chief of Staff mandated offers of a Family brief to a deceased active duty Soldier's PNOK that died as a result of: training and operational accidents, friendly fire/suspected friendly fire, confirmed suicides, or high interest case.

b. *Fatal Accident Brief* is one of two subsets of Fatal Incident. It includes mandatory offer of Family brief to PNOK of a deceased active duty Soldier who died as a result of: training and operational accident, such as a government helicopter crash or government vehicle rollover; friendly fire/suspected friendly fire; or high interest case.

c. *Suicide Incident Brief* is one of two subsets of Fatal Incident. It includes mandatory offer of Family to PNOK of a deceased active duty Soldier whose manner of death was "suicide" as listed on either a death certificate, autopsy report, or other source document.

d. *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 as defined in AR 600-8-1. Seniority, as determined by age, will control when the persons are of equal relationship.

e. *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:* for operational, training and/or friendly fire incidents, and confirmed Soldier suicides investigated under the provisions of AR 15–6, AR 385–10, DODI 6055.07, and AR 638-34 for the following:

a. Class A military training and/or operational accidents resulting in the death of a Soldier.

b. Death of a Soldier where there is anticipated litigation for or against the Government or a Government contractor.

c. All Soldier death cases where the Armed Forces Medical Examiner (AFME), or civilian equivalent, has determined the manner of death to be suicide.

d. In general, fatal accidents that are hostile, but do not occur as a result of engagement with the enemy.

e. Special interest cases as determined by The Adjutant General (TAG).

C. **Preparing the Presentation to the PNOK**.

1. Once the approval authority has taken final action on the investigation, the investigation has been redacted, and the O-6 briefer has been identified, the CMAOC will prepare the statement of offer (SOO) of presentation letter to PNOK for an Army Fatal Incident Family Brief. The brigade-level commander will prepare the SOO for a confirmed Suicide Family Brief. The CAO will then provide the SOO to the PNOK to make their election to accept or decline the offer.

2. Briefing Team.

a. At a minimum, the briefing team must consist of the briefer (O6 or higher), the Family's CAO, a chaplain (unless the NOK requests no chaplain), other SMEs, and for fatal training, operational, and/or friendly fire accidents, a CMAOC representative where directed by TAG.

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 Presentation**. Within ten working days of the presentation, the briefer must submit an AAR through the AR 15-6 investigation appointing authority and command channels to the CMAOC.

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 designee should be prepared to attend the presentation if requested by the briefer if the situation dictates (Family has invited or may invite a Family legal representative to attend.

3. The SJA 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. Interested offices within DOD and DA.

3. Members of Congress, upon request, IAW AR 1-20.

3. Members of the public and media, upon request, IAW AR 360-1.

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 10 (26 May 2010).**

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: References

A. **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).

B. **Gifts**

1. 10 U.S.C. § 2601, General Gift Funds.

2. 10 U.S.C. § 2608, Acceptance of Contributions for Defense Programs, Projects, and Activities.

3. 5 U.S.C. § 7342, Receipt and Disposition of Foreign Gifts and Decorations.

4. 5 U.S.C. § 7351, Gifts to Superiors.

5. STANDARDS OF ETHICAL CONDUCT FOR THE EXECUTIVE BRANCH 5 C.F.R. 2635, et. seq.

6. U.S. DEP'T OF DEF., DIR. 5500.07-R, JOINT ETHICS REGULATION (JER) (2011).

7. U.S. DEP'T OF DEF., DIR. 1005.13, GIFTS AND DECORATIONS FROM FOREIGN GOVERNMENTS (19 Feb. 2002) (c1, 6 Dec. 2002).

8. U.S. DEP'T OF DEF., REG. 7000.14-R, FINANCIAL MANAGEMENT REGULATION, vol. 12, ch. 3 (July 2010).

9. U.S. DEP'T OF ARMY, REG. 1-100, THE ARMY GIFT PROGRAM (27 July 2015).

10. U.S. DEP'T OF ARMY, REG. 215-1, MORALE, WELFARE AND RECREATION ACTIVITIES AND NON-APPROPRIATED FUND INSTRUMENTALITIES (24 Sept. 2010).

11. U.S. DEP'T OF ARMY, REG. 600-8-22, MILITARY AWARDS, ch. 9 (RAR 002, Rapid Action Revision (RAR) 28 June 2013).

12. 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).

13. 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).

14. U.S. DEP'T OF AIR FORCE, INSTR. 51-901, GIFTS FROM FOREIGN GOVERNMENTS (16 Feb. 2005).

15. U.S. DEP'T OF AIR FORCE, INSTR. 34-201, USE OF NONAPPROPRIATED FUNDS (NAFs) (17 June 2002).

16. U.S. DEP'T OF NAVY, SEC'Y OF THE NAVY, INSTR. 4001.2J, ACCEPTANCE OF GIFTS (12 Aug. 2009).

17. OPNAVINST 4001.1F, ACCEPTANCE OF GIFTS (2 Jul. 2010).

18. U.S. DEP'T OF NAVY, SEC'Y OF THE NAVY, INSTR. 1650.1H, NAVY AND MARINE CORPS AWARDS MANUAL (22 Aug. 2006).

19. U.S. MARINE CORPS, ORDER P5800.16A , MARINE CORPS MANUAL FOR LEGAL ADMINISTRATION (31 Aug. 1999) (c1-5, 28 Nov. 2005).

C. **Financial Disclosures in a Combat Zone**

1. 5 C.F.R. § 2634.101 TO 805 (1 JUL. 2011).

2. 5 C.F.R. § 2634.901 TO 909 (1 JUL 2011).

3. U.S. DEP'T OF DEF., DIR. 5500.07-R, JOINT ETHICS REGULATION (JER) (2011).

4. Helpful Resources for Public Financial Disclosure Filers: www.oge.gov/Financial-Disclosure/Public-Financial-Disclosure-278/Helpful-Resources/Helpful-Resources-for-Public-Financial-Disclosure/).

5. Helpful Resources for Confidential Financial Disclosure Filers: www.oge.gov/Financial-Disclosure/Confidential-Financial-Disclosure-450/Helpful-Resources/Helpful-Resources-for-Confidential-Financial-Disclosure/).

6. FDM: HTTPS://WWW.FDM.ARMY.MIL.

D. **Morale, Welfare and Recreation (MWR)**

1. 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).

2. U.S. Dep't of Army, Reg. 215-1, MORALE, WELFARE AND RECREATION ACTIVITIES AND NON-APPROPRIATED FUND INSTRUMENTALITIES (24 SEP. 2010).

3. U.S. Dep't of Army, Reg. 700-135, SOLDIER SUPPORT IN THE FIELD (20 FEB. 2009).

4. U.S. Dep't of Navy, Sec'y of the Navy, Instr. 1700.12A, OPERATION OF MORALE, WELFARE AND RECREATION (MWR) ACTIVITIES (15 JULY 2005).

5. U.S. Dep't of Air Force, Instr. 34-262, SERVICES PROGRAMS AND USE ELIGIBILITY (27 JUNE 2002).

6. U.S. Marine Corps, Order P1700.27B, MARINE CORPS COMMUNITY SERVICES POLICY MANUAL (9 MAR. 2007).

E. **Command Investigations**

1. U.S. Dep't of Def., Instr. 6055.07, Mishap Notification, Investigation, Reporting, and Record Keeping (6 JUN. 2011).

2. 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).

3. U.S. Dep't of Def., Instr. 3002.03, DoD Personnel Recovery – Reintegration of Recovered Personnel (15 JUL. 2013).

4. U.S. Dep't of Def., Instr. 1300.06, Conscientious Objectors (12 JULY 2017).

5. U.S. Dep't of Army, Reg. 15-6, Procedure for Administrative Investigations and Boards of Officers (1 APR. 2016).

6. U.S. Dep't of Army, Reg. 385-10, The Army Safety Program (27 NOV. 2013).

7. U.S. Dep't of Army, Reg. 638-34, Army Fatal Incident Family Brief Program (19 FEB. 2015).

8. U.S. Dep't of Army, Reg. 638-8, Army Casualty Program (23 JUN. 2015).

9. Army Directive 2009-02, The Army Casualty Program (Dover Media Access and Family Travel) (3 APR. 2009) [THIS DIRECTIVE SUPPLEMENTS AR 600-8-1].

10. U.S. Dep't of Army, Reg. 600-8-4, Line of Duty Policy, Procedures, and Investigations (4 SEP. 2008).

11. U.S. Dep't of Army, Reg. 600-43, Conscientious Objection (21 AUG. 2006).

12. U.S. Dep't of Army, Reg. 735-5, Policies and Procedures for Property Accountability (10 MAY 2013, INCORPORATING RAR, 22 AUG. 2013).

13. U.S. Dep't of Army, Reg. 380-5, Department of the Army Information Security Program (29 SEPT. 2000).

14. 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).

15. U.S. Dep't of Army Dir. 2010-02, Guidance for Reporting Requirements and Redacting Investigation Reports of Deaths and Fatalities (26 MAR. 2010).

16. U.S. Dep't of Air Force, Instr. 51-503, Aerospace Accident Investigations (26 MAY 2010).

17. U.S. Dep't of Air Force, Instr. 91-204, Safety Investigations Reports (12 FEB. 2014).

18. 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, 18 SEP. 2013).

19. U.S. Dep't of Air Force, Instr. 36-2910, Line of Duty (Misconduct) Determination (4 OCT. 2002, INCORPORATING CHANGE 2, 5 APR. 2010).

20. U.S. Dep't of Air Force, Manual 23-220, Reports of Survey for Air Force Property (1 JUL. 1996).

21. U.S. Dep't of Air Force, Instr. 36-3204, Procedures for Applying as a Conscientious Objector (15 JUL. 1994).

22. U.S. Dep't of Air Force, Instr. 90-301, Inspector General Complaints Resolution (23 AUG. 2011, INCORPORATING CHANGE 1, 6 JUN. 2012).

23. THE AIR FORCE COMMANDER-DIRECTED INVESTIGATION GUIDE (26 APR. 2010).

24. 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. 2009).

25. U.S. Dep't of Navy, OpNav (CNO) Instr. 5100.19E, Navy Safety and Occupational Health (SOH) Program Manual for Forces Afloat (30 MAY 2007).

26. 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).

27. 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 2, 5 OCT. 2010).

28. JAGINST 5800.7F, Manual of the Judge Advocate General (JAGMAN), CHAPTER 2 (26 JUNE 2012).

F. **Freedom of Information Act (FOIA)**

1. THE FREEDOM OF INFORMATION ACT, 5 U.S.C. § 552, as amended by PUBLIC LAW NO. 114-185 (2016).

2. U.S. DEP'T OF DEF. FREEDOM OF INFORMATION ACT (FOIA) PROGRAM, 32 C.F.R. § 286 (Jan. 5, 2017).

3. U.S. DEP'T OF DEF. MANUAL 5400.07, THE DEPARTMENT OF DEFENSE FREEDOM OF INFORMATION ACT (FOIA) PROGRAM (25 Jan. 2017).

4. U.S. DEP'T OF ARMY, REG. 25-55, THE DEPARTMENT OF THE ARMY FREEDOM OF INFORMATION ACT PROGRAM (1 Nov. 1997).

5. U.S. DEP'T OF AIR FORCE, GUIDANCE MEMO. 2017-01, DoD5400.7-R_AFMAN33-302, FREEDOM OF INFORMATION ACT PROGRAM (26 APR 2018).

6. U.S. DEP'T OF NAVY, SEC'Y OF THE NAVY INSTR. 5720.42F, DEPARTMENT OF THE NAVY FREEDOM OF INFORMATION ACT (FOIA) PROGRAM (6 Jan. 1999).

7. U.S. COAST GUARD, COMMANDANT'S INSTRUCTION M5260.3, THE COAST GUARD FREEDOM OF INFORMATION ACT (FOIA) AND PRIVACY ACTS MANUAL (14 JUNE 1996).

8. U.S. DEPARTMENT OF JUSTICE, GUIDE TO THE FREEDOM OF INFORMATION ACT, http://www.justice.gov/oip/foia-guide.html.

G. **Financial Liability Investigations**

1. U.S. DEP'T OF ARMY, REG. 600-4, REMISSION OR CANCELLATION OF INDEBTEDNESS (7 Dec. 2007, incorporating rapid action revision, 29 Apr. 2009).

2. U.S. DEP'T OF ARMY, REG. 735-5, POLICIES AND PROCEDURES FOR PROPERTY ACCOUNTABILITY (9 Nov. 2016).

3. U.S. DEP'T OF ARMY, PAM. 735-5, PROPERTY ACCOUNTABILITY PROCEDURES AND FINANCIAL LIABILITY OFFICER'S GUIDE (23 Mar. 2016).

4. U.S. DEP'T OF AIR FORCE, MANUAL 23-220, REPORTS OF SURVEY OF AIR FORCE PROPERTY (1 July 1996).

5. JAGINST 5800.7F, MANUAL OF THE JUDGE ADVOCATE GENERAL (JAGMAN), Chapter 2 (26 June 2012).

6. U.S. MARINE CORPS, ORDER 5530.14A, MARINE CORPS PHYSICAL SECURITY PROGRAM, Ch. 8 & 10, APP. L & M, (5 Jun. 2009).

H. **Conscientious Objectors**

1. U.S. DEP'T OF DEF, INSTR. 1300.06, CONSCIENTIOUS OBJECTORS (31 May 2007).

2. U.S. DEP'T OF ARMY, REG. 600-43, CONSCIENTIOUS OBJECTION (21 Aug. 2006).

I. **Family Presentations**

1. 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).

2. DEP'T OF ARMY, REG. 638-34, ARMY FATAL INCIDENT FAMILY BRIEF PROGRAM (19 Feb. 2015).

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CHAPTER 24

LEGAL ASSISTANCE IN OPERATIONS

I. INTRODUCTION

A. Personal legal problems can affect Soldiers' combat efficiency and detract from their ability to concentrate on the military mission at hand.[1] One objective of the Army Legal Assistance Program is to enhance combat efficiency by assisting Soldiers with their personal legal issues.[2]

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 PROCESSING (SRP)

A. AR 600-8-101 establishes the SRP and mandates that Soldiers of the Active Army (AA), the Army National Guard (ARNG), and United States Army Reserve (USAR) Soldiers in troop program units will all undergo a comprehensive SRP annually and within thirty days of a deployment.[3] USAR Soldiers not in troop program units should still undergo a comprehensive SRP whenever they serve on active duty.

1. Ten functional areas comprise the SRP: personnel, medical, dental, Provost Marshal Office, military pay, security, legal, logistics, operations, and TAP center. 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. Judge advocates must ensure the most current edition of the DA Form 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 legal component of the SRP requires Soldiers receive counseling about wills and powers of attorney (POA).[4] 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."[5] 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-

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[1] The provision of any legal assistance by Army Judge Advocates in personal civil matters is governed by: U.S. DEP'T OF ARMY, REG. 27-3, THE ARMY LEGAL ASSISTANCE PROGRAM (21 Feb. 1996) (RAR 13 Sept. 2011).
[2] A great resource is the Client Services Deskbook. The most up to date version can be found on the JAG School's public webpage at https://tjaglcspublic.army.mil/tjaglcs-publications.
[3] *See* U.S. DEP'T OF ARMY, REG. 600-8-101, PERSONNEL PROCESSING (IN-, OUT-, SOLDIER READINESS, AND DEPLOYMENT CYCLE SUPPORT) (6 Mar. 2018).
[4] U.S. Dep't of Army, DA Form 7425, Readiness and Deployment Checklist at Instruction Section I, Legal, Item 1-2 (Feb. 2015).
[5] *Id*. at Sec. I, Personnel, Item 21-22.

26.[6] 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, correctly processing the DA Form 7425 at 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 standing rules for the use of force and Posse Comitatus (for domestic missions), the Servicemembers Civil Relief Act (SCRA), and the Uniformed Services Employment and Reemployment Rights Act (USERRA). An SRP standardized training packet is available on the TJAGLCS public site.[7]

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. Legal sections must identify the legal support assets the deployed unit will need ensuring this requirement conforms with the unit's deployment manning allocation. Legal sections must also identify the legal assets needed to support home station legal requirements and how deploying JAs and paralegals will affect performance of home station legal requirements. Legal sections should explore requesting mobilized USAR legal support to ensure home station legal services are not degraded.

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 pre-deployment 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 at home station. Deploying legal sections should also establish relationship with the forward unit they will replace as well as the higher forward headquarters.

B. LAOs and BCT JAs should aggressively sponsor preventive law programs to educate Soldiers and their families before deployment occurs. One best practice for this is LAO or BJA attendance at pre-deployment family readiness (FRG) meetings. These meetings offer the opportunity to discuss issues with both Soldiers and Families and provide a chance to distribute preventative law information and possibly schedule follow on legal assistance appointments for estate planning services. At a minimum, topics at pre-deployment briefings 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.[8]

b. If the servicemember has or wants a testamentary trust, often for the benefit of minors, that is to be funded using life insurance (e.g., 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 (or other designated beneficiary) under my will."

c. If the servicemember prefers to put his or her SGLI proceeds in a custodial account (UGMA/UTMA) for the benefit of his or her 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)."

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[6] U.S. DEP'T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS (28 Jun. 2018).
[7] https://tjaglcspublic.army.mil/stp.
[8] Beginning in 2018, Soldiers can now make changes to their SGLI designation at any time by using the SGLI Online Enrollment System (SOES). This system can be accessed through milConnect at https://milconnect.dmdc.osd.mil/milconnect/.

3. Wills.

a. Educate clients on the need for comprehensive estate planning, such as estate building, asset protection and allocation, and beneficiary or transfer on death designations. Provide them information about other ancillary documents they may need, to include 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 or bypass trusts, marital deduction trusts (e.g., QTIPs 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 tax credit (i.e., portability).

f. Educate clients on the importance of preventing conflicts or ambiguity with respect to designating a person authorized to dispose of a Soldier's remains. Generally, active duty servicemembers should avoid designating such a person in their will if one is already designated on their DD 93, which is updated more frequently.[9] Most states have statutes indicating that a designation on a DD 93 takes precedence over a designation made elsewhere, but best practice is to avoid any ambiguity.

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 anticipating a proper POA expiration date and 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 or persons outside the military.

c. No business or other entity is required to accept or honor 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 businesses may require a special, or limited, POA. Additionally, many on-post agencies will require their own special POA and will not accept a general POA.

d. Educate clients on the nature, effects, and consequences of general and special POAs, and the prudence of Soldiers utilizing special, or limited, POAs over general POAs.

5. SCRA.[10]

a. Brief Soldiers on the SCRA's provisions governing a Soldier's ability—or inability—to change or delay court dates now or while deployed. It should be stressed that the SCRA does not allow for the delay of CRIMINAL court dates.

b. Brief Soldiers on the SCRA's applicability to residential lease terminations, car lease terminations, cell phone contract terminations, television and internet contract terminations, and other applicable provisions.

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[9] *See generally* U.S. DEP'T OF DEF., FORM 93, RECORD OF EMERGENCY DATA (Jan. 2008). The person authorized to direct disposition (PADD) is located at block 13.

[10] Pub. L. No. 108-189, 117 Stat. 2835 (2003) (codified at 50 U.S.C. §§ 3901-4043. A more detailed discussion can be found section VI (D) of this chapter.

c. Brief Soldiers 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, such as AR 608-99 (Family Support, Child Custody, and Paternity), are not relieved by deployment. They must plan for the continued support of family members during the period of deployment.

c. 50 U.S.C. § 3931 protects servicemembers against default judgments in "any civil action or proceeding, including any child custody proceeding, in which the defendant does not make an appearance." Also, 50 U.S.C. § 3932 allows for a stay "to any civil action or proceeding, including any child custody proceeding, in which the plaintiff or defendant at the time of filing an application . . . (1) is in military service or is within 90 days after termination of or release from military service; and (2) has received notice of the action or proceeding."

d. IAW 50 U.S.C. § 3938, if a court issues a temporary child custody order based solely on a servicemember's deployment or anticipated deployment, that temporary order must expire at the conclusion of the deployment. In considering a petition for a permanent modification to a custody order, a court may not consider a servicemember's absence due to deployment or potential deployment as the sole factor in determining the best interests of the child. If a state provides higher standards of protections for deploying servicemembers with regard to temporary child custody orders, a court will apply the higher standards rather than § 3938's baseline standards.

e. 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 Soldiers 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.

f. Educate Soldiers on the Consumer Financial Protection Bureau's (CFPB) Office of Servicemember Affairs[11], and the resources provided by this government agency to our Soldiers.

g. Judge advocates should seek redress for businesses which violate the consumer rights of Soldiers with the Armed Forces Disciplinary Control Board (AFDCB) with jurisdiction for the affected units. The AFDCB's

[11] http://www.consumerfinance.gov/servicemembers/

authority is broad and may place an off-limits restriction on a business that pursues "unfair commercial or consumer practices."[12]

h. Educate Soldiers on their ability to place an active duty credit freeze on their credit reports to prevent the creation of fraudulent accounts while they are deployed.

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 or her 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. The deadline for filing tax returns, paying taxes, filing claims for refund, and taking other actions with the IRS is automatically extended if either of the following is true: the servicemember is in a combat zone or has qualifying service outside of a combat zone, or the servicemember is a on deployment outside the United States away from his or her permanent duty station while participating in a contingency operation.

9. Reemployment rights issues (USAR and ARNG).

a. Army Reserve and National Guard member must receive a USERRA briefing during pre & post mobilization process. They are also required to receive a USERR briefing yearly.

b. Servicemembers should be briefed on notice requirements, waiver provisions (or the lack thereof), and seniority rights.

c. Servicemembers should also be briefed on USERRA rights regarding health insurance, reemployment disqualifications (5 year rule), and the ESGR.

C. BCT JAs and Chiefs of Client Services should ensure that their offices have an SRP SOP. To tailor the SOP, BCT JAs and Chiefs of Client Services need to be familiar with the installation/unit SRP SOP or operations plan and should coordinate, in advance, with other staff elements. A key issue will be to ensure that the installation/unit plans to conduct the SRP in a suitable location; that is, a location conducive to the delivery of competent and confidential legal services. Some issues to address in the SOP might include:

1. Establishing the simultaneous administration of the SRP site and the LAO.

2. Designating the teams of attorneys and paralegal specialists who will staff the SRP site.

3. Designating the teams of attorneys and paralegal specialists who will staff the LAO during the SRP.

4. Anticipating whether and how to reschedule LAO hours of operation.

5. Anticipating whether it will be necessary to suspend the delivery of certain routine legal assistance services during the SRP.

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[12] *See* U.S. DEP'T OF ARMY, REG. 190-24, ARMED FORCES DISCIPLINARY CONTROL BOARDS AND OFF-INSTALLATION LIAISON AND OPERATIONS para. 2-4.b. (27 Jul. 2006).

6. Considering whether RC JAs and paralegal specialists are available for rotations at the SRP site.[13]

7. Considering whether RC JAs and paralegal specialists are available for rotations at the LAO.

V. DEPLOYMENT

A. Legal Assistance issues certainly do not stop during deployment, nor should Legal Assistance services. 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, if any, 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. Coordinate travel to other locations to provide legal assistance support throughout the area of operations (AO).

10. Determine which civilian contractors in the AO are eligible to receive legal assistance by reviewing the applicable DoD contracts.

11. Coordinate for legal assistance coverage when potential conflicts of interest arise within the office providing legal assistance.

12. Deploying legal sections should coordinate through technical channels to ensure Special Victims Counsel (SVC) coverage during the deployment.

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

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[13] 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).

basic tax issues, including a discussion of filing extensions. Both JAs and paralegals should obtain tax training before deployment.

VI. RECURRING SUBSTANTIVE DEPLOYMENT LEGAL ASSISTANCE ISSUES

A. Family Care Plans (FCP).[14]

1. Army Regulation 600-20 requires single parent Soldiers, Soldiers living apart from their spouse, 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.[15] 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. Also, through the 2015 National Defense Authorization Act, Congress amended the Servicemembers Civil Relief Act to include a provision requiring that temporary child custody orders based solely on a Servicemember's deployment or anticipated deployment will expire upon the servicemember's redeployment.

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. Naturalization: Becoming a U.S. Citizen.

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,[16] Operations Desert Shield/Desert Storm,[17] or any subsequent period of armed conflict designated by presidential executive order.[18] This benefit is currently in effect for servicemembers on active duty for any period since 11 September 2001[19]; 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 the servicemember served honorably for one year and applies for naturalization while in service or within six months of separation.[20]

(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[21] and photos

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[14] *See* U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY (6 Nov. 2014) .
[15] *Id*. para. 5-5.
[16] Exec. Order No. 12,081, 43 Fed. Reg. 42237 (Sept. 18, 1978) (designating the period from Feb. 28, 1961 to Oct. 15, 1978).
[17] Exec. Order No. 12,939, 59 Fed. Reg. 61231 (Nov. 22, 1994) (designating the period from Aug. 2, 1990 to Apr. 11, 1991).
[18] 8 USC § 1440 (West 2012); *see also* 8 C.F.R. pt. 329 (2012).
[19] Exec. Order No. 13,269, 67 Fed. Reg. 45287 (July 3, 2002).
[20] 8 USC § 1439; *see also* 8 C.F.R. pt. 328.
[21] 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], https://www.hrc.army.mil/site/ASSETS/PDF/SoldierGuideCit.pdf

taken, prepare supporting documents, and submit the packet to the U.S. Citizenship and Immigration Services (USCIS) Nebraska Service Center.[22] Deploying or overseas servicemembers may request overseas processing of naturalization.[23]

b. Naturalization of Deceased Servicemembers. A non-citizen servicemember who served during a designated period of armed hostilities[24] and died due to service-related injury or disease qualifies for posthumous U.S. citizenship.[25] 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.[26] Posthumous citizenship will provide surviving non-citizen spouse or dependents with a special immigration or naturalization benefit.[27]

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.[28]

(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.[29]

(3) Since 2008, a lawful permanent resident spouse who resides with the servicemember-spouse abroad under official orders is eligible for overseas naturalization processing.[30]

(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.[31] 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.[32] These benefits do not apply to a step child of a U.S. citizen servicemember.[33]

2. Immigration: Becoming a Lawful Permanent Resident ("Green Card Holder").

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[22] *See id.*; U.S. DEP'T OF NAVY, U.S. NAVY GUIDE TO NATURALIZATION APPLICATIONS BASED ON QUALIFYING MILITARY SERVICE (8 USC 1439 and 1440) (22 Jun. 2011), 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], http://www.marines.mil/Portals/59/Publications/MCO%20P5800.16A%20W%20CH%201-7.pdf; U.S. AIR FORCE PERS. CTR., PERSONNEL SERVICE DELIVERY GUIDE: TOTAL FORCE U.S. CITIZENSHIP (1 Nov. 2011), http://www.jber.af.mil/shared/media/document/AFD-110209-045.pdf.

[23] SOLDIER'S NATURALIZATION GUIDE, *supra* note 21, at 12─14.

[24] *See supra* notes 11-14 and accompanying text.

[25] 8 USC § 1440-1 (West 2012); *see also* 8 C.F.R. pt. 392 (2012).

[26] U.S. CITIZENSHIP & IMMIGR. SERVS., USCIS POLICY MANUAL ch. 8 (2015) [hereinafter USCIS POLICY MANUAL], http://www.uscis.gov/policymanual/HTML/PolicyManual-Volume12-PartI-Chapter8.html#S-B; *see also* LEGADMINMAN, *supra* note 22, at 14-24 to -25.

[27] 8 USC § 1430(d); 8 C.F.R. § 319.3; USCIS POLICY MANUAL, *supra* note 26, ch. 9, para. D.

[28] 8 USC § 1430(b); 8 C.F.R. § 319.2; USCIS POLICY MANUAL, *supra* note 26, ch. 9, para. B.

[29] 8 USC § 1430(d); 8 C.F.R. § 319.3; USCIS POLICY MANUAL, *supra* note 26, ch. 9, para. D.

[30] 8 USC § 1430(e)(2); USCIS POLICY MANUAL, *supra* note 20, ch. 9, para. D.

[31] 8 USC § 1431; 8 C.F.R. pt. 320; USCIS POLICY MANUAL, *supra* note 26, ch. 9, para.C.

[32] 8 USC § 1433; 8 C.F.R. pt. 322; USCIS POLICY MANUAL, *supra* note 26, ch. 9, para.C.

[33] USCIS POLICY MANUAL, *supra* note 26, ch. 9, para.C.

a. Servicemember's Marriage to a Foreign Citizen. Provided service policy[34] on marrying a foreign citizen abroad is met, a servicemember may sponsor a foreign fiancé(e) for K-1 nonimmigrant visa[35] before marriage in the United States or may sponsor a foreign spouse for immigrant visa[36] after marriage abroad. Both situations will require USCIS approval of the visa petition and the servicing consular office's issuance of the visa.[37] 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.[38] The foreign spouse of a non-citizen servicemember has similar benefit, but is of a lower preference.[39]

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.[40]

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: does not provide lawful status in the United States, but provides the eligible illegal immigrants work authorization.[41] The benefit contemplates servicemembers who may not have lawful status and provides a specific category of eligibility for having served in armed services.[42]

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 638-8, 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.[43] Judge advocates should also be prepared to brief surviving Family members on survivor benefits.

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

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[34] *See, e.g.*, U.S. Navy, NAVPERS 15560D, NAVY MILITARY PERSONNEL MANUAL 5352-030 (22 Aug. 2002) (C22, 17 Mar. 2008).

[35] *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).

[36] *Id.* (follow "Spouse" hyperlink).

[37] *Id.* (follow "Fiancé(e) Visa" and "Spouse" hyperlink).

[38] *Id.* (follow "Spouse" hyperlink).

[39] *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).

[40] *See supra* notes 29─34 and accompanying text.

[41] *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).

[42] *Id.*

[43] 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).

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).[44]

D. **Servicemembers Civil Relief Act (SCRA)**.[45]

1. Overview. The SCRA provides a number of substantive benefits and procedural protections to members of the Armed Forces on active duty including members of the USAR and NG in certain circumstances.[46] Some of these benefits and protections are extremely important during exercises, deployments, and times of mobilization. LAAs must familiarize themselves with the following SCRA issues, at a minimum, and be prepared to assist servicemembers in resolving those issues.

2. Interest rate reduction.[47]

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.[48]

(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 **$3,716.73** per month.[49] This amount changes every year.

(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.[50]

(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."

(3) Importantly, the lease is not terminated immediately. The effective date of the lease termination is thirty days after the scheduled rent payment due date following the date notice was provided to the landlord under the SCRA. For example in leases where rent is due on the 1st of the month, a servicemember that provides notice between 1-31 May could terminate the lease on 1 July (notice provided between 1-31 May, the next rent due date is 1 June, the lease may terminate on 1 July which is 30 days after 1 June).

4. Automobile leases. [51]

a. Soldiers may terminate their automobile leases when they are transferred from bases within the continental United States (CONUS) to locations outside the continental United States (OCONUS). Soldier may also terminate automobile leases when they transfer from OCONUS locations to another OCONUS location or back to CONUS.

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[44] *See supra* note 6 and accompanying text.
[45] Pub. L. No. 108-189, 117 Stat. 2835 (2003) (codified at 50 U.S.C. §§ 3901-4043.
[46] *See* 50 U.S.C. § 3911.(2). The SCRA provides protections to servicemembers of all branches when those servicemembers fall under the definition of "military service" in § 3911.(2). *Id.*
[47] 50 U.S.C. § 3937.
[48] *Id* § 3951.
[49] This amount is subject to annual adjustment. *Id*. § 3951(a). The figure listed is for 2018.
[50] *Id*. § 3955.
[51] *Id*.

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. [52]

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. Television and internet termination/suspension. [53]

a. As a result of changes to the SCRA in Public Law 115-407, the Veterans Benefits and Transition Act (VBTA) of 2018, Soldiers may now also terminate or suspend a television or internet 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.

7. Stays of proceedings. [54]

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.

8. Mortgage Protections[55]

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.

E. **Uniformed Services Employment and Reemployment Rights Act of 1994.**

1. USERRA[56] protects Reserve Component servicemembers from discrimination in the workplace and affords servicemembers the right to return to their civilian employment following periods of military service. USERRA also provides for other employment related protections for servicemembers.[57]

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[52] *Id*. § 3955a.
[53] Pub. L. No. 115-407, 132 Stat. 5368 (2018)
[54] 50 U.S.C. § 3932.
[55] *Id*. § 3953.
[56] Pub. L. No. 103-353, 108 Stat. 3149 (1994), codified as amended at 38 U.S.C.S. §§ 4301–4334 (LexisNexis 2008).
[57] In fact, the Act's protections are much broader than simply reemployment rights As the Act 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).

2. To take advantage of reemployment rights, the servicemember must provide his or her employer with notice of the pending absence.[58] Periods of absence, per employer, must not exceed five years,[59] and the service must be characterized as "honorable" or "under honorable conditions."[60] For any type of military service (inactive duty training or active duty) up to 30 days," 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."[61] If the absence is for a longer period, the servicemember must make an "application" for reemployment within specified times.[62]

3. USERRA provides that employers must promptly reinstate their returning servicemembers to the same, or like, position that they left, including any accrued seniority.[63] 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.[64]

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

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.[65] That said, providing 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 even following up with VETS should not present a problem for a servicemember who later decides to seek in-court representation.[66]

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 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/.

2. The George Mason University School of Law runs the Clinic for Legal Assistance to servicemembers and accepts applications from military members. Information is at https://mvets.law.gmu.edu/.

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[58] *Id*. § 4312(a)(1).
[59] *Id*. § 4312(a)(2). There are a number of exceptions to the five-year provision.
[60] *Id*. § 4304.
[61] *Id*. § 4312(e)(1)(A)(i).
[62] *See id*. § 4312(e)(1)(C), (D). For 31-180 days of duty, the Soldier must apply for reemployment within 14 days. *See Id*. § 4312(e)(1)(C). For duty 180 days or more, the Soldier must apply for reemployment within 90 days of the expiration of his duty. *See Id*. § 4312(e)(1)(D).
[63] *Id*. § 4313(a).
[64] *Id*.
[65] *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).
[66] *Id*. para. 3-5e(2)(b).

APPENDIX

DEPLOYED LEGAL ASSISTANCE READY BOX CHECKLISTS AND REFERENCES

Table 1: Sample Ready Box

Item	***Quantity***	***O/H***	***Item***	***Quantity***	***O/H***
Notebook computer/printer	4		Paper, Printer (Ream)	12	
DL Wills Version 10 with latest supplement update			Paper, tablets	14	
Client Information System (CIS) program			Pens, boxes	5	
Printer toner cartridges	5		Regulations & References if on-line resources are unavailable		
Client Interview Cards	200		Seals (authority of 10 U.S.C. § 1044a)*	2	
Electrical extension cords	6		Signs (Legal Assistance)	2	
Will Cover Sheets	200		Staple removers	2	
Envelopes, 4” x 9 ½” (DA)	150		Stapler w/extra staples	4	
Envelopes, 4” x 9 ½” (plain)	150		3 inch Binders	20	
Markers, red	10		3 hole punch	1	
Masking tape, rolls	5		Will Interview Worksheets	150	
Scotch Tape, rolls	5				

* 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 638-8	Army Casualty Programs (7 Jun. 2019)

AR 600-8-101	Personnel Readiness Processing (06 Mar. 2018)
AR 600-20	Army Command Policy (06 Nov. 2014)
AR 608-99	Family Support, Child Custody, and Paternity (29 Oct. 03)

Table 3: TJAGLCS Publications on https://tjaglcspublic.army.mil/tjaglcs-publications

Publication	***Title***
	2018 Consumer Law Deskbook
	2018 Client Services Deskbook

CHAPTER 25

MILITARY JUSTICE IN OPERATIONS

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

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[1] Administrative control (ADCON) as opposed to operational control (OPCON) is defined in JP 1 as follows:

> ADCON is the 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, logistics, individual and unit training, readiness, mobilization, demobilization, discipline, and other matters not included in the operational missions of the subordinate or other organizations.

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.[2]

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 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

[2] Dep't Army Regulation 27-10, *Military Justice*, para. 3-8 (11 May 2016).

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, scanner, 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, Special Victim Counsel (SVC), Victim Advocates (VA), Sexual Assault Response Coordinators (SARC), Victim-Witness Liaisons (VWL), 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, para. 17-7, and start training him or her.

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.[3] When the Soldier first goes into confinement, the unit may need to set up a holding area, separate from enemy prisoners of war

[3] *See United States v. Wise*, 64 M.J. 468 (C.A.A,F. 2007).

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 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(e)). 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.[4]

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 124.[5] 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.

C. 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.

D. 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:

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[4] UCMJ art. 43(f). The date hostilities end is proclaimed by the President or established by a joint resolution in Congress.
[5] *United States v. Martinelli*, 62 M.J. 52 (C.A.A.F. 2005).

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. Malingering (UCMJ art. 115).

11. Offenses by a Sentinel (UCMJ art. 134).

12. 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.[6] 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.[7]

B. Civilian misconduct.

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

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[6] *See* UCMJ art. 17 (2016) and RCM 201(e); *United States v. Egan*, 53 M.J. 570 (A. Ct. Crim. App. 2000).

[7] 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.

(MEJA), Art. 2(a)(10), UCMJ, and the U.S. Government "missions or entities in foreign States" provision[8] 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.[9]

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.[10]

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.

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 DoDM 4525.6-M

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[8] 18 U.S.C. § 7(9) (2001); *United States v. Passaro*, 577 F.3d 207 (2009).

[9] *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.

[10] Some training is significantly more relevant while downrange, such as the training required by DOD Instruction 2200.01 (Combating Trafficking in Persons). As with all training requirements, Commanders and their staff should be aware of the training requirements set forth in this instruction, to include the training reporting requirements.

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;[11] and the general order for the operation is rescinded.

X. REFERENCES

A. Manual for Courts-Martial, United States (2016) [hereinafter, MCM].

B. U.S. Dep't of Army, Reg. 27-10, Military Justice, 11 May 2016.

C. U.S. Dep't of Air Force, Instr. 51-201, Administration of Military Justice, 6 June 2013. (See: Air Force Guidance Memorandum 2016-01 dated 3 August 2016.)

D. U.S. Dep't of Air Force, Instr. 51-202, Nonjudicial Punishment, 31March 2015.

E. JAGINST 5800.7F, Manual of the Judge Advocate General (JAGMAN), 26 June 2012.

F. The Judge Advocate Gen.'s Legal Ctr. & School, Practicing Military Justice (March 2017), https://tjaglcspublic.army.mil/tjaglcs-publications [hereinafter, Practicing Military Justice].

G. Office of the Judge Advocate General, Deploying Justice: A Handbook for the Chief of Military Justice (June 2008) [hereinafter, Deploying Justice].

[11] *See United States v. Newlove*, 59 M.J. 540 (A. Ct. Crim. App. 2003).

APPENDIX

GENERAL ORDER NUMBER 1C (GO-1C)

UNITED STATES CENTRAL COMMAND
OFFICE OF THE COMMANDER
7115 SOUTH BOUNDARY BOULEVARD
MACDILL AIR FORCE BASE, FLORIDA 33621-5101

21 May 2013

GENERAL ORDER NUMBER 1C (GO-1C)*

TITLE: Prohibited Activities for U.S. Department of Defense (DOD) Personnel Present Within the U.S. Central Command (USCENTCOM) Area of Responsibility (AOR).

PURPOSE: To identify and regulate conduct that is prejudicial to the good order and discipline of forces in the USCENTCOM AOR (as defined in FM 1-02, page 1-12).

AUTHORITY: Title 10, U.S. Code (U.S.C.) §164(c); and the Uniform Code of Military Justice (UCMJ), 10 U.S.C., §§801-940.

APPLICABILITY: This General Order (hereinafter, Order) applies to all U.S. Armed Forces (as defined in 10 U.S.C. §101), DOD employee (as defined by 5 U.S.C. §2105), and contingency contractor personnel (as defined by DOD Instruction (DODI) 3020.41), present in the USCENTCOM AOR. This Order does not apply to personnel assigned to other Executive Departments or agencies (as defined in 18 U.S.C. §6 and 5 U.S.C. §101) (e.g., personnel assigned to Defense Attaché Offices or U.S. Marine Corps Security Detachments), with the exception of personnel assigned to Security Cooperation Offices (SCO) and Security Assistance Offices (SAO) who remain subject to this Order. The definition of the term "Service members" as used in this Order is a member of the U.S. Armed Forces to include members of the National Guard or Reserve Component. The term "DOD civilians" includes DOD employees and contingency contractor personnel.

1. **STATEMENT OF MILITARY PURPOSE AND NECESSITY**: Current operations and deployments place Service members and DOD civilians in 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 preserve United States and host-nation relations, ensure the success of combined operations between U.S. and friendly forces, and protect the health, safety, and welfare of members of the U.S. and friendly forces. In addition, the high operational tempo combined with often-hazardous duty faced by Service members and DOD civilians in the region makes it prudent to restrict certain activities in order to maintain good order and discipline and ensure optimal force readiness.

* This General Order supersedes General Order Number 1B, dated 13 March 2006 (*see* Paragraph 7)

2. **PROHIBITED ACTIVITIES:**

a. Alcohol.

(1) This Order prohibits the actual or attempted importation, introduction, exportation, possession, purchase, sale, resale, distribution, transfer, manufacture, or consumption of any alcoholic beverage or alcohol-containing substance within the countries of Kuwait, Saudi Arabia, Afghanistan, Pakistan, and Iraq. The terms "alcoholic beverage" or "alcohol-containing substance" are defined as items containing more than .5% alcohol by volume; however, this Order prohibits beverages or substances non-commercially distilled, fermented, or otherwise manufactured producing any alcohol content. Alcoholic beverages do not include near beer or non-alcoholic sparkling wine offered at dining facilities; Morale, Welfare, and Recreation (MWR) facilities; or sold at exchange activities (Army & Air Force Exchange Service (AAFES), Navy Exchange (NEX), or Marine Corps Exchange (MCX)). Items with alcohol content such as over-the-counter medications, hand sanitizers, and oral products (mouthwash, Carmex, Orajel, etc.) are exempt from this prohibition, providing these items are not used as intoxicants.

(2) The following are exceptions to the prohibitions of paragraph 2(a)(1):

(a) As an exceptional matter to recognize special holidays, occasions, or events, the Commander, U.S. Forces-Afghanistan, within the Combined Joint Operations Area Afghanistan (CJOA), has non-delegable authority to grant written, event-specific, waivers to paragraph 2(a)(1), for personnel subject to this Order. The Commander, International Security Assistance Force (ISAF), within the CJOA, has non-delegable authority to grant waivers to paragraph 2(a)(1), for U.S. Service members and DOD civilians assigned to purely North American Treaty Organization billets (i.e., Headquarters, ISAF).

(b) SCO Chiefs in Kuwait, Saudi Arabia, Pakistan, and Iraq only, in coordination and with the concurrence of the Chief of Mission, have non-delegable authority to issue directives authorizing personnel assigned to the SCO to possess and consume alcoholic beverages. These SCO Chiefs will forward such directives to the USCENTCOM, Office of the Staff Judge Advocate (CCJA). These SCO Chiefs also have non-delegable authority to grant written, event-specific, waivers to paragraph 2(a)(1), in advance, for service members and DOD civilians subject to this Order to consume alcoholic beverages for official SCO events, or as official guests in the homes of Security Assistance Personnel, U.S. Embassy personnel, or host-nation officials.

(c) Exchange activities may import, introduce, export, possess, sell, and transfer alcoholic beverages only to Department of State (DOS) personnel and DOS contractors in Iraq at the following locations where The Exchange operates retail activities: the U.S. Embassy in Baghdad (Chancery compound), Basrah, and Sather. The Exchange will ensure proper use, storage, and control of alcoholic beverages possessed under this exception. This exception does not authorize The Exchange personnel or contractors to consume alcoholic beverages, nor does it authorize the introduction, possession, sale, resale, distribution, or transfer of alcohol to personnel not authorized to possess or consume alcohol.

(d) Subject to the written approval of senior U.S. Military commanders upon consideration of host-nation laws and customs, Military Chaplains may obtain, possess, and securely store alcohol, such as wine, obtained through official military supply channels, and use such alcohol during recognized religious services in which alcohol is a necessary component of the religious service. Service members and DOD civilians subject to this Order may consume alcohol only when participating in religious services where alcohol is a necessary component of the religious service, provided a Military Chaplain directly performs, authorizes, and supervises any alcohol consumption. This Order prohibits the introduction, possession, sale, resale, distribution, transfer, or consumption of alcohol used in religious services to otherwise unauthorized personnel.

(3) Regardless of any exception listed in paragraph 2(a)(2)(a-d), or any properly authorized temporary waiver to paragraph 2(a)(1), and in all other USCENTCOM countries, all Service members and DOD civilians will conform to their respective Service or organizational component leadership restrictions on alcohol, and maintain appropriate behavior by respecting host-nation laws and customs. To maintain good order and discipline, ensure optimal force readiness, and protect U.S. and friendly forces in all locations where this Order does not prohibit alcohol or where I have granted an exception, I direct all officials, commanders, and senior leaders to exercise discretion and good judgment in promulgating and enforcing appropriate guidelines and restrictions, and specifically ensure all personnel subject to this Order receive express guidance on the appropriate and responsible alcohol or alcoholic beverage use and limits. Guidelines should recognize that in some countries alcohol consumption may be legal within certain facilities (e.g., hotels) but that persons, upon any consumption of alcohol, may be presumed under host-nation laws to be under the influence upon leaving the facility or upon operating a motor vehicle (e.g., Qatar, United Arab Emirates). Officials, commanders, and senior leaders should regularly review alcohol consumption guidelines and restrictions to ensure the policies are commensurate with current or reasonably foreseeable operations, threats, and host-nation laws.

(4) Any listed exceptions or subsequent waivers to paragraph 2(a)(1) do not authorize the importation, introduction, exportation, possession, purchase, sale, resale, distribution, transfer, manufacture, or consumption of alcohol by personnel not expressly authorized by the exception or waiver. Personnel subject to this Order who may be unclear if a listed exception or waiver applies to them should seek express authorization in advance from their leadership, and not presume an exception or waiver applies.

b. Controlled Substances and Drug Paraphernalia. This Order prohibits the actual or attempted importation, introduction, exportation, possession, purchase, sale, resale, distribution, transfer, manufacture, use, or consumption of any controlled substances. This Order further prohibits the use of any chemical, product, or substance with the purpose or intent of obtaining an altered state of mind (e.g., psychoactive changes in perception, mood, cognition, behavior, decreased motor function, loss of concentration, and impaired short-term memory), an unnatural feeling of euphoria, or stupefaction of the central nervous system, including, but not limited to, substances known as or similar to: synthetic cannabis or synthetic cannabinoids (Spice), substituted cathinones (bath salts or Khat), Phenethylamine (Smiles or 2C-drug family), Salvia Divinorum, Mitragyna Speciosa, Korth, Armanita Muscaria mushrooms, Nymphaea Caerulea, Convolvulaceae Argyreia Nervosa, Lysergic Acid Amide, Datura, 5-Methoxy-dimethyltryptamine,

nitrous oxide, misused over-the-counter medication, paint products, glue, canned air, or other similar items.

(1) This Order prohibits the importation, introduction, export, possession, purchase, use, sale, resale, distribution, transfer, or manufacture of drug paraphernalia (*see definition*, 21 U.S.C. §863). Personnel subject to this Order may purchase and possess souvenir items from Exchange activities or MWR outlets (i.e., on-post bazaars) such as hookah pipes, but such pipes are only for smoking tobacco products.

(2) This controlled substances and drug paraphernalia provision does not include lawfully prescribed controlled substances, medications, or medical devices, provided such substances, medications, or medical devices are used in a manner consistent with their intended medical purpose and the prescribing physician's instructions. The original prescription label must accompany all prescribed medication, especially when traveling, identifying the prescribing medical facility or authority. Additionally, the prohibitions of paragraph 2(b) do not apply to tobacco products, caffeine, or sugar, nor traditional bath or Epsom salt products.

(3) Service members and DOD civilians are subject to probable cause, competence for duty, limited inspection, and limited drug testing when a Commander, in consultation with their supporting Judge Advocate, determines a violation of paragraph 2(a) or (b) or when probable cause exists to warrant an inspection or test.

c. Currency. This Order prohibits the selling, bartering, or exchanging of any currency other than at the official host-nation exchange rate.

d. Firearms. This Order prohibits the importation, introduction, exportation, possession, purchase, sale, resale, transfer, manufacture, or use of privately owned firearms, ammunition, or explosives. This prohibition encompasses items acquired by means other than through official military issue. This Order permits the purchase of souvenir or antique firearms (as defined in 18 U.S.C. §921(a)(16)), determined on the purchase date) obtained at Exchange activities or MWR outlets (i.e., on-post bazaars), but these firearms cannot be fired or used in theater; removing these items from theater is subject to applicable U.S. Customs and Alcohol, Tobacco, and Firearms laws and regulations.

e. Gambling. This Order prohibits gambling of any kind, including sports pools, lotteries, and raffles, unless permitted by applicable service regulations and host-nation laws. MWR sponsored card games and other games of chance are permissible subject to the Joint Ethics Regulation (JER) and service regulations.

f. National Treasures. This Order prohibits removing, possessing, selling, defacing, destroying, or defiling archeological artifacts or national treasures. The term, "defiling" includes actions that are indecent, reproachful, or detract from the significance, status, or position of a national treasure.

g. Pets. This Order prohibits adopting as pets or mascots of any kind, caring for, or feeding any type of domestic or wild animal due to elevated zoonotic disease risk (e.g., rabies) in many USCENTCOM AOR countries. This prohibition does not apply in those USCENTCOM AOR

countries where Service members and DOD civilians live off military installations and the Component Commander, Joint Task Force Commander, or Unit Chief issues a written policy permitting domestic pets, providing all personnel comply with the local command policy.

h. Photography and Videotaping.

(1) Except as authorized for official use and purposes described below, this Order prohibits the taking, making, possession, reproduction, or transfer (to include uploading) of photographs, videos, depictions, and audio-visual recordings of the following:

(a) detainees or former detainees; detention facilities; active combat operations (e.g., firefights); flight-line operations or equipment, subject to written, local exceptions; improvised explosive devices or damage resulting from an improvised explosive device; casualty transfers; damaged or destroyed ISAF, coalition, or U.S. equipment; or battle damage;

(b) human casualties, defined as deceased, wounded, or injured human beings, to include separated body parts, organs, and biological material, resulting from either combat or noncombat activities; however, this Order does not prohibit taking or possessing photographs of wounded personnel while in a medical facility and during periods of recovery, only with the patient's express consent;

(c) the interior, underside, or the ballistic hull showing any armor design, or disclosure of the tactics, techniques, and procedures of a Mine Resistant Ambush Protected (MRAP) vehicle or associated equipment; any classified or cryptographic communications equipment; electronic countermeasure (jamming) equipment; any vehicle or aircraft performance testing results; and any depiction violating or disclosing operational security measures (such as position access points, gates, guard towers or locations, checkpoints, or any other security measures); or,

(d) any photographic or video image, depiction, or audio-visual recording, however obtained, the nature, substance, or release of which, under the circumstances, is prejudicial to good order and discipline or brings discredit to the service. Personnel subject to this Order will consult their supervisory chain of command with questions concerning paragraph 2(h) before potentially engaging in any prohibited conduct.

(2) Subject to paragraph 2(h)(1)(d), the prohibitions listed in paragraph 2(h)(1)(a-c) do not apply to the possession of photographic or video images acquired solely from open media sources (e.g., possessing print or online images from recognized magazines and newspapers); possession of open media sources images are subject to applicable copyright protections or notices. This Order does not prohibit possession and distribution of open media source images if required for official duties (e.g., official briefings, investigations, or Public Affairs personnel).

(3) Official use and purposes for taking photographs or videos include:

(a) evidence collection in preparation for prosecution;

(b) military intelligence purposes;

(c) tactical site exploitation;

(d) medical treatment;

(e) photographing or videotaping directed by commanders, Detention Facility Officers-In-Charge, Military Police, or medical personnel in order to document and protect USCENTCOM and Coalition Forces personnel against false allegations of detainee abuse;

(f) properly appointed administrative or claims investigations or inquiries;

(g) criminal investigations; or

(h) other official purposes specifically relating to operational requirements (e.g., command briefings, Combat Camera).

(4) Official photographs, videos, depictions, and audio-visual recordings are those obtained on government and non-government equipment for official uses and purposes. Unofficial photographs, depictions, and audio-visual recordings are those obtained for personal use or purposes.

(5) Before using non-government equipment for official photographs, videos, depictions, and audio-visual recordings, individuals must obtain the non-delegable approval from a commander in the grade of O-5 or higher.

i. Pornography. Notwithstanding any other provision of this Order, and in keeping with the customs of the countries within the USCENTCOM AOR, this Order prohibits the actual or attempted importation, introduction, exportation, possession, purchase, sale, resale, distribution, transfer, manufacture, use, or display of any pornographic or sexually explicit picture, photograph, video, streaming media, film, DVD, movie, audio recording, drawing, book, magazine, digital or computer image made by any means, visual depiction, or anime containing such images or similar representations (collectively, images).

(1) For purposes of this order, "pornographic" and "sexually explicit" mean any images, the theme of which is the graphic, obscene, lascivious, or lustful depiction or portrayal of sexual organs, a woman's breast or breasts, and includes sexual intercourse, sodomy, or sexual excretory activities.

(2) The prohibitions contained in subparagraph 2(i) shall not apply to Armed Forces Radio and Television Service (AFRTS) broadcasts or commercial picture, photograph, video, streaming media, film, DVD, movie, audio recording, drawing, book, magazine, or other media sold, distributed, or displayed through Exchange activities, or MWR outlets (i.e., Red Cross or on-post bazaars) located within the USCENTCOM AOR, or to the same material purchased or obtained through other comparable commercial outlets (e.g., iTunes, Netflix, but not pornographic outlets).

(3) The prohibitions of paragraph 2(i) shall not apply within those areas exclusively under the jurisdiction of the United States, such as aboard U.S. Government vessels and aircraft, which shall remain subject to service regulations.

j. Property. This Order prohibits taking or retaining public or private property belonging to an enemy or former enemy, except, private or public property may be seized or temporarily retained during operations only on order of a Commander when based on military necessity. Private property will be collected, inventoried, processed, secured, and stored for later return to the lawful owner. Contraband property or public property lawfully seized by Service members or certified Law Enforcement personnel is the property of the United States. At the time of this Order's publication, no military operation or exercise allows the United States to seize public property permanently.

(a) This Order permits the receipt and importation of foreign gifts by individuals or units to the United States or overseas U.S. military installations, provided receipt of such gifts is in accordance with U.S. and applicable international laws; the JER; CCR 27-3, Gifts from Foreign Governments; and applicable service regulations.

(b) This Order permits the lawful acquisition of tourist souvenirs if such items can legally be imported into the United States or overseas U.S. military installations in accordance with U.S. or international laws.

(c) The restrictions in paragraph 2(j) do not apply to private property seized during counter piracy operations and held as evidence for possible criminal proceedings or law enforcement investigation.

k. Religious Matters.

(1) This Order prohibits entrance into a mosque or other site of Islamic religious significance by non-Muslims, unless directed to do so by military authorities, required by military necessity, or as part of an official tour conducted with the nondelegable approval of a commander in the grade of O-6 or higher and the host-nation. This prohibition does not apply to Service members and DOD civilians, their families, or official visitors of the Office of Military Cooperation in Egypt when visits to mosques or other sites of Islamic religious significance in Egypt are tourist sites, open to non-Muslims, and approved for visitation in advance by the Chief, Military Cooperation, Egypt. Commanders may further restrict this provision when warranted by the local security situation.

(2) This Order prohibits creating or reproducing an image or likeness of the Prophet Muhammad.

(3) This Order prohibits intentionally desecrating or defiling the following:

(a) religious items or symbols (regardless of the religion);

(b) religious holy books, such as the Qur'an, Bible, or Torah;

(c) any religious shrine or place of worship (such as a church or mosque);

(d) national flags containing religious notations (such as the Afghanistan, Saudi, and Iraqi national flags);

(e) any historical or cultural artifact, relic, or location.

(f) The term, "desecrating" includes divesting or diverting from a sacred to a profane use or purpose by blasphemous, sacrilegious, irreverent, contemptuous, or disrespectful action. The term "defiling" includes actions or words that are abusive, cruel, indecent, reproachful, or detract from the significance, status, or position of a person or property.

(4) This Order prohibits proselytizing of any religion, faith, or practice to local nationals or third country nationals in countries in the USCENTCOM AOR. This rule does not prohibit Chaplains from performing their official religious duties.

(5) Internment of deceased Muslim will be done in accordance with Muslim religious practice and customs. This Order prohibits burning or cremating Muslim remains under any circumstances.

1. Violations of Host-nation Laws. This Order charges all personnel subject to this Order with the responsibility to become familiar with and respect the laws, regulations, and customs of their host-nation insofar as the host-nation laws, regulations, and customs do not interfere with the execution of official duties. Violations of host-nation laws, regulations, and customs may be punishable under applicable U.S. criminal statutes or U.S. military administrative regulations.

3. **PUNITIVE ORDER**: Paragraph 2 of this General Order is punitive. Persons violating this Order are subject to appropriate administrative, non-judicial, or judicial action. DOD civilians may also face criminal prosecution or adverse administrative action for violation of this Order. The intent of this Order is not to preempt already enumerated UCMJ offenses. If a court or higher authority supersedes or determines a provision within this Order is legally unenforceable or insufficient, the unaffected portions of this Order will remain enforceable.

4. **INDIVIDUAL DUTY**: Personnel subject to this Order have the individual responsibility to know and understand the prohibitions contained herein.

5. **LEADER RESPONSIBILITY**: This Order charges all commanders, SCO Chiefs, senior leaders, and military and DOD civilian supervisors to brief ALL PERSONNEL on the prohibitions and requirements of this Order. Commanders and SCO Chiefs may further supplement and restrict the conduct of their forces and personnel concerning matters set forth in this Order; however, the CCJA will receive a copy of such restrictions upon publication.

6. **CONFISCATION OF OFFENDING ARTICLES**: Items determined to violate this Order may be considered contraband by command or law enforcement authorities if found in the USCENTCOM AOR. Before destroying any contraband, commanders or law enforcement personnel will coordinate with their servicing Judge Advocate. Military Customs officials and

other pre-clearance officials will enforce this Order in their inspections of personnel before departure from the AOR.

7. **EFFECTIVE DATE**: This Order is effective immediately. This Order rescinds GO-1B, dated 13 March 2006, all waivers granted pursuant to GO-1B, and any other order, directive, or policy conflicting with this Order.

8. **EXPIRATION**: This Order will expire when rescinded by the Commander, USCENTCOM, or higher authority.

9. **WAIVER AUTHORITY**: I grant non-delegable authority to waive or modify the prohibitions of Paragraph 2 of this Order only to the USCENTCOM Deputy Commander, and the USCENTCOM Chief of Staff.

LLOYD J. AUSTIN III
General, U.S. Army

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CHAPTER 26

CENTER FOR LAW AND MILITARY OPERATIONS (CLAMO)

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. 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 can also be obtained by contacting CLAMO at that address. 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 SharePoint web page[1] contains CLAMO's repository and publications. CLAMO's most current AARs are posted on the National Security Law Document Library, found on JAGCNET.[2]

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 usually 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. Appendix C of FM 1-04 contains the JAGC's doctrinal format for AARs.[3] 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

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[1] *See* The Center for Law and Military Operations, https://intelshare.intelink.gov/sites/clamo/ (*last visited* 7 Jun. 2020).
[2] *See* The National Security Law Department, *Document Library*, https://tjaglcspublic.army.mil/adn (last visited 13 Jun. 2020).
[3] U.S. DEP'T OF ARMY, FIELD MANUAL 1-04, LEGAL SUPPORT TO THE OPERATIONAL ARMY (18 Mar. 2013).

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 National Security 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 National Security Law Document Library on the unsecured network. However, the primary repository operated by CLAMO is available on IntelShare (https://intelshare.intelink.gov/sites/clamo). 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, or you are seeking classified resources, please contact CLAMO directly.

3. **Repository Access**. As CLAMO's knowledge management structure develops and matures, you may occasionally have trouble reaching the information you need. 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.

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 DVD's content and reproduces it regularly. Use the contact information above to request copies. For your convenience the content of this disc is also conveniently located and available for download on our CLAMO IntelShare website.

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 and/or Law of Armed Conflict Documentary Supplement published by the TJAGLCS National Security Law Department). All CLAMO publications are available online on the CLAMO IntelShare site. Those identified below with an asterix (*) are also available in paper copy. 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 (2015).

d. *Domestic Operational Law 2018 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. Additionally, CLAMO has a similar relationship with NATO's Joint Warfare Centre in Stavanger, Norway, which provides a link to training events with our NATO Allies.

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 (OC/Ts) 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)[4] 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 OC/Ts during the LTP session. BJAs should be prepared to discuss their training objectives with the OPLAW Planner and OC/Ts and get best practices from the OC/Ts 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. 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

[4] See the Military Decision Making Process chapter in this Handbook for further discussion of MDMP.

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 OC/Ts—two JAs and one paralegal NCO. The OC/Ts 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. OC/Ts 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 OC/T 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 trained the BCT on ROE 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, CA, in the middle of the Mojave Desert. It trains brigade combat teams (BCTs) and attached units to conduct Unified Land Operations with the Decisive Action Training Environment (DATE). The NTC is the only training facility in the world with the ability to provide BCT-sized live-fire and combined arms maneuver training. The NTC and Operations Group provide realistic, relevant, and rigorous training conditions to replicate the challenges of both open desert warfare and urban operations. Each training rotation is tailored to meet the unit specific training objectives and the unique challenges that may be faced during specific deployments.

2. The NTC regularly hosts Infantry, Armor, and Stryker BCTs as well as other brigade-size units. 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. A rotation at the NTC consists of 28 days of realistic, complex operational challenges which test the ability of a BCT to simultaneously conduct offensive, defensive, and stability operations; employ organic and Echelons Above Brigade (EAB) assets; coordinate and deliver joint fires; and conduct Cyber Electromagnetic

Activities (CEMA), while simultaneously conducting area security, planning follow-on operations, and engaging with unified action partners, host nation official and the local populace to achieve tactical and strategic goals. Units ordinarily begin planning for their NTC rotation more than seven months before the rotation; communicating their training objectives to NTC 210 days before execution. The unit will plan and execute a rigorous home station training calendar across all warfighting functions, advancing from individual through collective training, and culminating in a brigade-level field training exercise (FTX) in preparation for their rotation. The Brigade Judge Advocate (BJA) should conduct parallel planning, develop a brigade legal section (BLS) training calendar, and liaise with the legal Observer-Coach/Trainers (OC/Ts) during this time to communicate his or her training objectives and focus. Early and active participation by the brigade JAs and paralegals throughout this training cycle is critical for success of the BLS at NTC. This participation in training exercises by battalion paralegals and OPLAW JAs facilitates staff integration, operationalizes legal support roles and responsibilities to commanders and staffs, and identifies and develops BLS communication, transportation, and logistical requirements concurrent with brigade timelines.

5. Around ninety days before the rotation, the unit will send primary staff members to NTC for the Leadership Training Program (LTP). The BJA and the Paralegal NCOIC should both attend LTP. During the LTP, the brigade staff (including the BJA) receive training on effective techniques for employing Army Design Methodology (ADM), completing the Military Decision Making Process (MDMP), and executing an operation. The BJA will integrate into the planning process, prepare the brigade legal appendix and rules of engagement (ROE), and conduct a legal review of the full draft operations order (OPORD). Preparation of the order requires access to classified computer systems, so the BJA should plan accordingly. The BJA will meet with the OPLAW OC/Ts during the LTP. BJAs should use those meetings to incorporate the lessons learned from previous rotations and get best practices from the OC/Ts to prepare their brigade legal section (BLS). BJAs and Paralegal NCOICs should finalize their personnel, equipment, and training requirements at least 90 days in advance of their NTC rotation.

6. From the requirements identified at LTP, the BJA and the Paralegal NCOIC should refine their deployed standard operating procedure (SOP), including 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, ROE matrices, and a concept of operation (CONOP) review SOP.

7. 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 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. The BCT's actions or inactions will shape the Operational Environment, either garnering more support for the Host Nation or the insurgency. For the BCT, having plans in place to mitigate the effect of operations on the civilian populace and to quickly and decisively respond to events that adversely affect the populace can have a significant positive impact on the area of operations. Units will encounter non-governmental organizations (NGOs), competing governmental organizations, political parties, news media, police and paramilitary forces, lawful enemy combatants, 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.

8. Judge Advocates (JAs) can expect to encounter a broad range of legal, moral, and political 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. Brigade legal sections should be prepared to help the BDE conduct high-profile, short suspense investigations under degraded communications, security, and logistical conditions. OC/Ts 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. There are currently three JAG Corps personnel at the NTC: one JA OC/T, one paralegal NCO OC/T and one OPLAW Planner. The OC/Ts 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. The OPLAW Planner is responsible for the legal content of the scenario and for replicating the Division or Combined

Joint Task Force SJA. OC/Ts will conduct "green book" AARs during the training rotation to reinforce positive and negative actions or trends within the BLS or throughout the brigade. Formal BCT staff AARs occur periodically during the training rotation with a final consolidated BCT AAR occurring at the conclusion of the NTC rotation. The BJA will attend each of the AARs. Additionally, the NTC legal training team will conduct an AAR with the BLS following the training rotation. Upon leaving the NTC, the BLS and the unit receive a Take Home Packet capturing OC/T observations to assist the unit with home station training following the training rotation.

10. Brigade legal sections should conduct deliberate planning for their NTC rotation in parallel with the rest of the BCT, approximately 210 days prior to the rotation, and contact the OC/Ts 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 OC/Ts 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 contributes substantially to the strengthening of the North Atlantic Treaty Organization (NATO) alliance, bringing together multiple allied and partner nations' armies to train with U.S. forces for decisive action, joint operations, and combined operations. It provides Brigade Combat Teams, our allies, and our partners, with tough, realistic, Army/Joint/Multinational battle-focused training. The focus is on training adaptive leaders for decisive action operations within a multinational context 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 is the premier venue for up to brigade-level force-on-force training, with selected division/corps and Joint Force assets, in the decisive action training environment – Europe (DATE-E). Rotations routinely feature several thousand participants from allied and partnered nations. Given the various types of units and nations that participate, every rotation conducted at JMRC is different. The JMRC is a place where U.S. Army units build readiness, and learn to interoperate with allies and partners while training for unified land operations against a near-peer adversary incorporating emerging trends. The JMRC also supports numerous "away game" exercises across Europe, and other missions such as reception, staging, onward movement, and integration for regionally aligned forces (RAF).

3. In addition to the DATE-E scenario, the JMRC continues to plan and conduct mission readiness exercises (MRX) to prepare U.S., allied, and partnered units for operational missions across Europe,and conducts live fire exercises at the nearby Grafenwoehr Training Area. The JMRC also supports the U.S. Army Europe (USAREUR) Expeditionary Training Center with the Mobile Instrumentation System providing CTC capabilities across Europe and 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 three 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 DATE-E 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 as Observer Mentor Liaison Teams (OMLTs).

6. Judge Advocates can expect to encounter a wide variety of legal issues at JMRC, whether involved in decisive action, peacekeeping/enforcement, or stability and support operations. Issues that routinely arise include national caveats; legal aspects of multinational interoperability; 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 is one JA OC/T and one NCO Paralegal OC/T at JMRC. The role of the legal OC/T is to provide expert, doctrinally-based, observation, coaching, and training to U.S. and Multinational Commanders and their staffs on legal considerations. Additionally, the legal OC/Ts serve as the primary coaches and mentors for U.S. Judge Advocates, multinational legal advisors (LEGADs), and their staffs involved in an exercise, to help improve their contribution to the unit's mission, to include the operations process and the relationships between core military legal disciplines and the warfighting functions. The legal OC/Ts also assist with the formulation, instruction, and implementation of international and operational law and policy of the operational environment specific to each exercise.

8. The legal OC/Ts conduct 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 legal OC/Ts capture observations in a take home packet provided to the BJA upon the conclusion of the rotation. The legal OC/Ts continue 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.

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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
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 Ops
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
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
INSCOM	Intelligence and Security Command (US Army)
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
MARFORCYBER	United States Marine Corps Force 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	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
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
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

INDEX

1907 Hague Regulations, 29, 42
1925 Geneva Protocol, 9
1929 Geneva Convention, 29
1954 Hague Cultural Property Convention, 9
1980 Certain Conventional Weapons Convention, 9
632 Agreements, 361
Acquisition and Cross-Servicing Agreements (ACSAs), 183, 276, 280, 285, 368
ADA (Antideficiency Act), 350
Additional Protocol I, 10, 11, 12, 13, 14, 15, 19, 20, 22, 23, 24, 25, 26, 30, 31, 33, 41, 42, 43, 51, 52, 53, 54, 59, 60, 61, 63, 64, 68, 69, 70, 71, 72, 76, 77, 78, 98, 187, 195, 210, 226, 441, 442, 443
Additional Protocol II, 10, 11, 12, 13, 24, 26, 41, 42, 43, 53, 54, 55, 62, 63, 71, 187, 442, 525
Additional Protocol III, 13, 23, 63, 72
Administrative and Technical (A&T) Status, 280, 281
Administrative Investigations, 459
Affirmative Claims, 326
Afghanistan Lift and Sustain, 373
After Action Report (AAR), 515
Agency Designee, 450
Alliance, 180
American Red Cross (ARC), 459
Antarctic Treaty, 236
Anticipatory Self-Defense By Nations, 6
Anti-Deficiency Act, 350
Appropriations and Authorizations, 357
Archipelagic Baselines, 234
Archipelagic Sea Lane Passage, 239
Arctic Region, 236
Article 139 Claims, 325
Article 5 Tribunal, 33
Article 98 Agreements, 282
Assassination, 78
Asylum, 318
augmentation, 349
Augmenting Appropriations, 349
Auxiliary personnel, 24
Availability of Funds
Amount, 350
Purpose, 348
Time, 349
Bays, 234
Belligerents, 65, 82
Biological Weapons Convention, 75
Bona Fide Needs Rule, 350
Booby-Traps, 73
Brigade Combat Team (BCT), 143
Building Partner Capacity (BCP), 373
Bullets, 75
Case-Zablocki Act, 278
Casualty Assistance, 477, 491
Center for Army Lessons Learned (CALL), 516
Center for Law and Military Operations (CLAMO), 515
Certain Conventional Weapons (CCW) Treaty, 73
Protocol II (Amended), 73
Chapter 1
Legal Basis for the Use of Force, 1
Chemical Biological Incident Response Force, 271
Chemical Weapons, 317
Chemical Weapons Convention, 75
Chicago Convention, 232, 237
Chivalry, Principle of, 61
Civil Craft, 241, 242
Civil Disturbances, 258
Civil Support, 257
Civilian, 41
Civilian aircraft crews, 31
Civilian Forced Labor, 91
Civilian Internee, 18, 30, 33, 37, 185, 195, 196, 207, 226
Civilian misconduct, 503
Civilian Object, 68
Civilian Property, 64
Civilians, 64
Internment, 52
Protected Persons in occupied territory, 50
Special Needs, 48
Claims, 283
CLAMO
Contact Information, 515
Repositories, 516
Resources, 516
Cluster Munitions, 74
Coalition Support Fund (CSF), 373
Code of Conduct, 37
Code of Conduct in Disaster Relief, 299
Collateral Damage, 60
Collective Self-Defense
By Nations, 5
Combatant Commander Initiative Funds (CCIF), 370
Combatant Commander's Initiative Fund (CCIF), 290
Combatant's privilege, 65
Combatants, 64, 82
Combined Effects Munitions, 74
Command Investigations, 459
Command Responsibility, 84

Commander's Emergency Response Program (CERP), 290, 378
Common Article 2, 12
Common Article 3, 193
Confinement facilities, 500
Confiscation of Enemy Property, 90
Conscientious Objector, 459, 473
Contiguous Zone, 235, 242, 243
Contractors, 31, 41, 52, 64
Convention on Cluster Munitions (CCM), 74
Convention on International Civil Aviation, 232
Counterdrug
Foreign Government Support, 270
Cultural Property, 41, 64, 70, 71, 72
Cyberspace, 215
Cyberspace Operation
CO, 215, 217
Cyberspace Operations
Joint Electromagnetic Spectrum Management Operations, 228
Legal
Jus ad Bellum, 219
Defense Institute of Security Assistance Management (DISAM), 360
Defense Logistics Agency (DLA), 290
Defense Security Cooperation Agency (DSCA), 288, 360
Defense Support of Civil Authorities, 257
Defensive Cyberspace Operations
DCO, 217
Derogation, 98
Designated Agency Ethics Official (DAEO), 450
Detainee, 30, 195, 196
Other Terms, 196
Detainee Operations
Framework, 193
JA Roles, 200
Packet Deficiencies, 200
Packet Minimum, 200
Point of Capture (5S+T), 207
Practical Considerations, 197
Status vs. Treatment, 196
Detainee Treatment Act, 196
Detainees, 26
Diplomatic Notes, 278, 280
Direct Participation in Hostilities (DPH), 41, 63, 64, 66
Distinction, Principle of, 59
DoD Information Operations, 218
Domestic Operations, 257
Chemical Weapons Emergencies, 271
Emergency, 265
Emergency Authority, 264, 265
Expert Advice and Training, 263
Immediate Response Authority, 268
Legally Protected Persons, 194
Loan of Equipment and Facilities, 262
Major Disaster, 265
National Guard WMD Civil Support Teams, 271
National Special Security Events, 269
Sharing Information, 263
Weapons of Mass Destruction, 263
Dunant, Henry, 12
Economy Act, 349
Emblems, 23
Cultural Property, 72
Dangerous Forces, 72
Distinctive, 71
Medical and Religious, 72
Misuse, 78
Protective, 72
Red Cross, Red Crescent, 72
Red Crystal, 72
Emergency & Extraordinary Expenses, 370
Emergency Contingency Operations Funding Authority, 370
Emergency-Essential Civilians, 421
Enemy Combatant, 195
Enemy Property, Use of, 76
Colors, 77
Equipment, 77
Uniforms, 76
Enforcement Actions, Regional Org'n, 3
Environmental Law, 431
Applicability when Deployed, 432
Established Overseas Installations, 435
Laws and Regulations, 445
LOAC Analysis, 440
Non-Established Overseas Installations, 437
OPLAN/OPORD Annex L, 432
Participating Nation Exclusion, 433
Espionage, 78
Ethics
Basic Principles of Ethical Conduct, 449
Counselor, 450
Excess Defense Articles (EDA), 364
Excess Nonlethal Supplies for Humanitarian Relief, 377
Excess Property, 304
Exclusive Economic Zone, 235, 242, 243
Exploding Bullets, 74
Explosive remnants of war, 74
Family Care Plans, 489
Family Presentations, 475
Federal Tort Claims Act (FTCA), 321
Financial Disclosures, 451
In a Combat Zone, 456
Financial Liability Investigations (FLIPL), 467
Fiscal Law
O&M Recurring Issues, 356
Foreign Assistance Act, 349, 359
Foreign Claims Act, 283

Foreign Criminal Jurisdiction, 280
Foreign Disaster Assistance, 359, 365
Foreign Disaster Relief (FDR), 287
Foreign Humanitarian Assistance (FHA), 287
Foreign Military Financing (FMF) Program, 363
Foreign Military Lease Program, 363
Foreign Military Sales (FMS) Program, 362
Friendly Fire, 461
Friendship, Commerce and Navigation Treaties, 237
General Court-Martial Convening Authority, 33
General Order, 501
General Order No. 100, 28
Geneva Conventions, 10, 11, 12, 13, 23, 29, 30, 31, 33, 35, 42, 43, 45, 46, 53, 59, 62, 226
Additional Protocol (AP) I, 10, 61, 63
Additional Protocol (AP) II, 61, 63
Civilian Protections, 40, 64
Common Article 2, 61, 91
Common Article 3, 61
Geneva Tradition, 10, 45
Gifts, 452
Goldwater-Nichols Defense Reorganization Act of 1986, 132
Hague Cultural Property Convention, 41, 64, 71
Hague IV, 62
Hague Regulations, 62
Hague Tradition, 9, 45
Herbicides, 76
High Seas, 235, 242
Hollow Point Ammunition, 75
Hors de Combat, 13, 63
Hospital or safety zones, 70
Hospital ships, 25
Hospital/Safety Zones, 48
Hospitals, 19, 70
Hot Pursuit, 243
Human Rights, 93
Humanitarian and Civic Assistance (HCA), 290
Humanitarian Assistance (HA), 289
Humanitarian Intervention, 2
ICCPR, 95
Immediate Response Authority, 268
International Covenant on Civil and Political Rights, 95
Incendiaries, 73
Indiscriminate Attacks, 59
Information Operations
IRCs
JEMSO, 228
Innocent Passage, 237, 241
Interagency Acquisition, 349
Internal Waters, 233, 241
International Agreements, 275
Authority to Enter into, 276
Circular 175 Procedure, 278
Communications Support, 284
Compliance, 280
Contracting, 284
Customs & Taxes, 284
Determining Existence of, 275
Elements, 278
Entry/Exit Requirements, 283
Force Protection/Use of Deadly Force, 283
Jurisdiction, 281
Negotiation, 278, 279
Reporting Requirements, 279
Title and Form, 278
U.S. as Receiving State, 282
USCG Boardings/Searches, 162
Vehicles, 284
International Airspace, 235
International Armed Conflict, 30, 32, 41
International armed conflict (IAC), 61
International Committee of the Red Cross (ICRC), 83
International Criminal Court, 282
International Human Rights Law, 93
Complementarity, 99
Extraterritoriality, 97
Regions, Africa, 102
Regions, Americas, 102
Regions, Europe, 101
Treaties, 94
International Humanitarian Law–See Law of Armed Conflict, 57
International Military Education & Training (IMET), 364
Internee, 196
Internment (Civilian), 51
Internment of Civilians, 52
Interoperability Training, 367
Interoperability, Safety, and Familiarization Training, 358
Investigations, 459
Board of Officers, 461
Choosing an IO, 462
Financial Liability (FLIPL), 467
Financial Liability Limits, 470
Friendly Fire, 461
Islands, 235
Jean Pictet, 11
JER, 453
John McNeill (OSD), 42
Joint Environmental Management Board (JEMB), 431
Joint Ethics Regulation (JER), 453
Joint Military Justice, 503
Joint Multinational Readiness Center (JMRC), 521
Joint Readiness Training Center (JRTC), 517
Journalists, 31, 41, 64

***Jus in Bello*, 45**
Land Mines, 73
Land Territory, 233
Lasers, 74
Law Enforcement Detachments (LEDETs), 166, 271
Law of Armed Conflict, 57
Attack, 60
Collateral Damage, 60
Distinction, Principle of, 59
Environmental Analysis, 440
Indiscriminate Attacks, 59
Military Necessity, Principle of, 57
Proportionality, Principle of, 60
Purposes, 57
Reasons to Comply, 87
U.S. Policy on Compliance, 84
Unnecessary Suffering, Principle of, 60
Law of the Sea Treaty, 231
Law of War
General Responsibilities, 87
Law of War–See Law of Armed Conflict, 57
Leahy Amendment, 358
Legal Assistance, 483
Casualty Assistance, 491
Consumer Law, 486
Family Care Plans, 489
Family Law, 486
Immigration, 489
JA Checklists, 495
JA's Role, 483, 484, 494
Preparing to Deploy, 483
Resources, 494
Servicemembers Civil Relief Act, 485, 492
SGLI, 484
Soldier Readiness Program, 483
Special Victims Counsel, 488
Tax, 487
USERRA, 493
While Deployed, 488
Wills, 485
***levée en masse*, 43**
Levée en masse, 31
Lieber Code, 28, 44
Logistics Agreements, 284
Cryptologic Support, 285
Pre-Positioning, 284
Logistics Civil Augmentation Program (LOGCAP), 356, 357
Low Tide Elevations, 234
MAGTF (Marine Air Ground Task Force), 146
Maintenance and Repair, 352
Marine Environmental Protection, 167
Marine Expeditionary Force (MEF), 147
Marine Expeditionary Unit (MEU), 148
Maritime Claims Reference Manual, 234
Maritime Intercept Operations, 244
Means and Methods, 72
Medical
Personnel, 64
Transport, 71
Units, 63
Medical material, 21
Medical personnel
Auxiliaries, 18
Exclusively engaged, 17
Repatriation, 18
Medical units
Fixed, 19
Mobile, 19
Self-Defense, 20
Medical vehicles
Aircraft, 21
Ambulances, 21
Mercenaries, 33
Merchant marines, 31
Michael J. Matheson,, 10, 11
Military Clubs, 458
Military Construction, 351
Contingency Construction Authority, 354
Contingency use of O&M, 354
Funding Basics, 353
JA's Methodology, 354
National Emergency, 354
Military Decisionmaking Process (MDMP), 518
Military Information Support Ops (MISO), 77
Military Judge's Benchbook, 498
Military Necessity, Principle of, 57
Military Objective, 59, 68
Military Occupation, 79
Militias, 31
Miltary Construction
Contingency Construction, 355
Miscellaneous Receipts, 349
Mission Command Training Program (MCTP), 522
Mission Tasking Matrix (MiTaM), 297
Mr. Michael Matheson, 42, 54
MWR Operations, 457
National Airspace, 235
National Response Framework, 265, 266
National Response Plan, 266
National Training Center (NTC), 519
NATO
Status of Forces Agreement (SOFA), 281
Transfer of Authority Message, 181
NATO Claims, 325
Navigational Regimes, 236
Necessary Expense Doctrine, 348
Necessity
Self-Defense (jus ad bellum), 5
Neutrality, 81, 316

Neutralized Zones, 48
Next of Kin Notifications, 475
Noncombatant, 63
Noncombatant Evacuation Operations (NEO), 311
Legal Issues, 315
LOAC Considerations, 316
Status of Personnel, 318
Non-Governmental Organizations (NGO), 289
Non-International Armed Conflict, 43
Objects Indispensable, 71
Occupation, 79
Offensive Cyberspace Operations
OCO, 217
Office for the Coordination of Humanitarian Affairs (OCHA), 297
Office of Foreign Disaster Assistance (OFDA), 287
Off-Shore Elevation, 234
Oleoresin Capsicum Pepper Spray (OC), 76
Operational Control, 181
Operational Funding, 356
Building & Funding Foreign Partners, 368
Exceptions, 358
Foreign Assistance, 358
Foreign Assistance Personnel Details, 364
Foreign Developmental Assistance, 365
Foreign Disaster Assistance, 376
Foreign Disaster Relief, 365
Foreign Personnel Details, 370
General Rule, 358
Global Lift and Sustain, 374
Human Right & Security Assistance, 358
Humanitarian & Civic Assistance (HCA), 377
Humanitarian Assistance, 375, 377
Humanitarian Disaster Assistance, 377
Immediate Response Authority., 375
JA's Role, 382
Multilateral Suppot, 371
Security Assistance, 362
Security Assistance (Big T), 366
Security Assistance (Big T) Training, 367
Security Assistance (Little T) Training, 367
Transport of NGO Relief Supplies, 376
Oslo Guidelines, 298
Ottawa Treaty, 73
Outer Space Treaty, 232, 235
Overseas Contingency Operation Authorizations, 373
Overseas Humanitarian, Disaster and Civic Aid (OHDACA), 288
Overseas, Humanitarian, Disaster, and Civic Aid (OHDACA), 376
Parachutists, 23
Penal Law, 80
Perfidy, 61, 77, 78, 226, 227, 229
Personnel Claims Act (PCA), 321
Personnel of Aid Societies, 19
Persons accompanying armed forces, 31
Pillage, 78, 80
Piracy, 242
Poison, 75
Posse Comitatus Act, 258, 429
POW
Civilian aircraft crews, 31
Contractors, 31
Disciplinary punishment, 38
Escape, 39
Journalists, 31
Judicial punishment, 38
Labor, 37
Levée en masse, 31
Merchant marines, 31
Militia, 31
Persons accompanying armed forces, 31
Photographing, 34
Property, 34
Questioning, 35
Repatriation, 40
Representative, 37
Status, 30
Status in doubt, 33
Transfer, 37
POW camp administration, 35
President Obama, 11
Presidential Decision Directive 25, 361
Presidential Drawdowns, 363
Prisoner of War, 196
Prisoners of War, 10, 18, 25, 27, 28, 29, 30, 32, 33, 34, 35, 36, 37, 39, 40, 62, 88, 91, 195
Private Property, Acquisition for War Effort, 91
Privileged Belligerent, 195
Property Disposal, for DoD, 380
Proportionality
Self-Defense (jus ad bellum), 5
Proportionality, Principle of, 60, 122
Protected Person, 196
Protecting Powers, 83
PSYOPS–See Military Info Support Ops, 77
Public Vessels Act (PVA), 324
Purpose Statute, 348
Violations, 349
Rapid Response Team, 271
Real Estate Claims, 325
Red Crescent, 23
Red Cross, 23
Red Crystal, 63
Refugee, 30
Relocatable Buildings, 352, 355
Rendulic Rule, 58
Reporters, 41, 64
Reports of Survey—see also Financial Liability, 467
Repositories, 516

Reprisals, 78
Reprisals (POW), 37
Requisitions, 91
Requisitions under the Law of Armed Conflict, 330
Reservations, Understandings, and Declarations, 96
Reserve Component, 429
Adverse Actions, 429
Rest Centers, 458
Retained Person, 195
Retained Personnel, 18, 25, 30, 32, 33, 38, 226
Rewards Program, 379
Right of Approach and Visit, 243
Right-of-Assistance Entry, 238
Riot Control Agents (RCA), 75, 317
Rocks, 235
Rules of Engagement
U.S. Coast Guard, 168
Ruses of War, 76
Saboteurs, 32
Sea-Air-Space Law
National Areas, 233
Security Assistance Training, 367
Seizure of Enemy Property, 90
Self-Defense
Against Non-State Actors, 7
By Nations, 4
Necessity (jus ad bellum), 5
Preemptive Use of Force, 6
Proportionality (jus ad bellum), 5
Servicemembers Civil Relief Act, 492
Automobiles, 492
Cell Phones, 493
Mortgages, 493
Stays of Proceedings, 493
Sexual Assault Response Coordinators, 500
Shipwrecked
Defined, 24
Shipwrecked persons, 25
Small Arms, 74
SOFA Claims, 324
Solatia Payments, 326
Soldier's Rules, 62, 87
Souvenirs, 78
Special Operations Forces Training, 372
Special Victims Counsel, 488
Spies, 33
Spies or Spying, 78
SRP, 483
Stafford Act, 265
Stafford Act,, 265
State Control of Vessels, 240
State Craft, 241, 244
Status of Forces Agreements (SOFA), 237, 280, 305
NATO, 281
Status of Forces Agreements (SOFAs), 280
Status of Mission Agreements, 282
Straight Baselines, 233
Suits in Admiralty Act (SAA), 324
Surrender, 26
Suspension of Fire agreements, 16
Tactical Field Exchanges (TFE), 458
Temporary Refuge, 318
Territorial Sea, 234, 237, 241
Terrorism, 244
Time of War, 501
Torture Convention, 95
Train and Equip Authority, 373
Transit Passage, 238, 241
***travaux preparatoires*, 11**
Treachery, 77
Treaties, 275
Treaties and Other International Agreements, 275
Treaties Generally
Declarations, 96
Reservations, 96
Self-Execution, 97
Understandings, 96
Treaties in Force, 275
U.S. Coast Guard, 271
Bilateral Agreements, 162
Homeland Security, 165
Maritime Operations, 165, 167
Mission, 161, 164
MOTR Plan, 162
Oil/Hazmat Spills, 168
Organization, 163
Rules of Engagement, 168
Use of Force, 168
U.S. Marine Corps
Force Structure, 145
Mission, 145
U.S. Navy
Missile Defense, 152
Mission, 150
Organization, 150
Power Projection Units, 151
Strategic Deterrence, 152
UNCLOS III, 231
Uniforms, 76
Unit Lounges, 458
United Nations
Human Rights Committee, 101
Human Rights Council, 101
Security Council, 2
United Nations Charter, 1, 93, 232, 315
Article 51 Self-Defense, 4
Chapter VII Actions, 3
Chapter VII Security Council Actions, 3

Chapter VIII Regional Org'n Enforcement Actions, 3
Universal Declaration of Human Rights, 93
Unnecessary Suffering, Principle of, 60
Unprivileged Enemy Belligerent, 195
USERRA, 493
USG Property Disposal, 380
USO/Armed Forces Entertainment (AFE), 458
Vienna Convention on Diplomatic Relations, 281, 319
Visiting Forces Acts, 281
War Crimes
Command Responsibility, 84
Definition, 84
Investigation, 85
Prevention, 85, 88
Prosecution, 84, 86
Reporting, 85, 89
War Powers Resolution, 1, 8
War Trophies, 78
Warnings, prior to attack, 69
Weapons
Illegal, 72
Improper Use, 73
Legal Review, 72
Works and Installations Containing Dangerous Forces, 53, 59, 71, 72, 443
Wounded and Sick, 63
Abandoning, 15
Civilians, 14
Defined, 13
Order of treatment, 15
Relief efforts, 17
Standard of care, 15
Treatment, 13

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1. Legal Bases for the Use of Force
2. Sources of Law
3. The Law of Armed Conflict
4. International Human Rights Law
5. Rules of Engagement
6. National Security Structure and Joint Operations
7. Detention and Interrogation Operations
8. Intelligence Operations
9. Cyberspace Operations
10. Information Operations
11. Sea, Air, & Outer Space Operations
12. Domestic Operations
13. International Agreements
14. Foreign Humanitarian Assistance
15. Noncombatant Evacuation Operations
16. Foreign & Deployment Claims
17. Fiscal Law
18. Contingency & Deployment Contracting
19. Contingency Contractor Personnel
20. Emergency Essential Civilians
21. Reserve Component and Operations
22. Environmental Law in Operations
23. Administrative Law in Operations
24. Legal Assistance in Operations
25. Military Justice in Operations
26. CLAMO
Glossary
Index