FORGED in the FIRE

Legal Lessons Learned During Military Operations 1994-2006

Center for Law and Military Operations
The Judge Advocate General's Legal Center & School
United States Army
Charlottesville, Virginia

September 2006

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The contents of this book are not to be construed as official positions, policies, or decisions of The U.S. Army, The Judge Advocate General of the U.S. Army, the U.S. Marine Corps, or the Staff Judge Advocate to the Commandant of the Marine Corps. The Legal Center welcomes and solicits suggestions and contributions of relevant operational law materials from the field.

FORGED IN THE FIRE
LESSONS LEARNED DURING MILITARY OPERATIONS (1994-2006)

2006

CENTER FOR LAW AND MILITARY OPERATIONS

1 September 2006

FORMAT

Forged in the Fire – Legal Lessons Learned During Military Operations is organized in a format that is intended to soon become the standard throughout the Judge Advocate General's Corps for all after action reviews (AARs). The format is based upon the six core legal disciplines found in Field Manual 27-100, plus the emerging areas of our practice in coalition, interagency, domestic operations and the Joint Vision 2020 concept of Doctrine, Organization, Training, Material, Leadership, Personnel, and Facilities (DOTMLPF) as it is used to translate emerging joint operational concepts into joint warfighting capabilities. The exact AAR format is found at the beginning of the International and Operational Law chapter on page 5a.

The framework is meant to provide a guide to judge advocates and other legal personnel as they capture specific lessons learned during the course of a deployment. Use of this format also permits the standardization of data collection in such a way as to provide an improved, systemic ability to cross reference data trends across different organizations.

The next substantive undertaking for the Center for Law and Military Operations (CLAMO) will be a complete revision of the CLAMO database to reflect the new AAR format. By radically reducing the number of files and eliminating the redundancy that is found throughout the database, it is hoped that the end user will find legal research and issue resolution much easier. Also, by introducing and teaching this format at each Judge Advocate Basic/Advance/Graduate and follow on Operational Law Courses, it is hoped that familiarity will breed comfort and lead to an increased use of an underutilized resource – the CLAMO database.

The template as it exists now is merely a framework. It is expected that with your contribution and ideas, the template will expand to include other legal issues and themes. Everything in CLAMO is a product of the imagination, contribution, and innovation of our judge advocates and legal personnel in the field. Your efforts with the standardization of our AAR methodology that the JAG Corps uses to capture, analyze, and share information is appreciated. Please send your ideas on how to improve or expand this format to CLAMO@hqda.army.mil.

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I. INTRODUCTION

The Judge Advocate General established the Center for Law and Military Operations (CLAMO) in 1988 at the direction of the Secretary of the Army.

CLAMO's **mission** is to examine legal issues that arise during all phases of military operations and to devise training and resource strategies for addressing those issues. It seeks to fulfill this mission in five ways. **First**, it is the central *repository* within The Judge Advocate General's Corps for all-source data, information, memoranda, after-action materials and lessons learned pertaining to legal support to operations, foreign and domestic. **Second**, it supports judge advocates by *analyzing* all data and information, *developing lessons learned* across all military legal disciplines, and by *disseminating* these lessons learned and other operational information to the Army, Marine Corps, and Joint communities through publications, instruction, training, and databases accessible to operational forces, world-wide. **Third**, it supports judge advocates in the field by responding to *requests for assistance*, by engaging in a continuous exchange of information with the *Combat Training Centers* and their judge advocate observer-controllers, and by creating operational law *training guides*. **Fourth,** *it facilitates the integration of lessons learned* from operations and the Combat Training Centers into emerging *doctrine* and into the *curricula* of all relevant courses, workshops, orientations, and seminars conducted at The Judge Advocate General's Legal Center and School. **Fifth**, in conjunction with The Judge Advocate General's Legal Center and School, it sponsors *conferences and symposia* on topics of interest to operational lawyers.

Over the last 12 years, CLAMO has published a variety of source materials on legal issues faced in several different types of military operations to include *Law and Military Operations in Haiti 1994-1995; Law and Military Operations in the Balkans 1995-1998; Law and Military Operations in Kosovo 1999-2001; Legal Lessons Learned From Afghanistan and Iraq Volume I; Legal Lessons Learned from Afghanistan and Iraq Volume II; Law and Military Operations in Central America: Hurricane Mitch Relief Efforts, 1998-1999; U.S. Government Interagency Complex Contingency Operations Organization and Legal Handbook; Rules of Engagement (ROE) Handbook for Judge Advocates.*

All of these resources have been used by judge advocates for over a decade and continue to be in high demand today. A re-occurring comment from the field, however, is the difficultly encountered when trying to research an issue on a specific topic such as claims, rules of engagement, or rule of law. Before the introduction of this compendium, judge advocates were forced to research an issue by going volume by volume and compiling their information from a variety of different sources. This often led to the additional frustration of re-reading the same lessons learned from one operation to the next. The compendium seeks to gather all available lessons learned in several key operational law areas and put them under one heading that can be quickly read, searched

and digested. CLAMO will update the compendium as our judge advocates and paralegals continue to be forged by the fire and practice law in the most challenging, yet rewarding environment imaginable – the United States Military.

The contents of this Publication are not to be construed as official positions, policies, or decisions of the U.S. Army, The Judge Advocate General of the U.S. Army, the U.S. Marine Corps, the Staff Judge Advocate to the Commandant of the Marine Corps, the U.S. Department of State, or the Legal Adviser of the U.S. Department of State. The CLAMO welcomes and solicits suggestions and contributions of relevant operational law materials from the field.

Entry headings in this publication which are followed by an asterisk (*) denotes that although it is recognized as an important subject matter area, CLAMO has not received sufficient information on the topic to add specific content at the time of publication.

II. INTERNATIONAL AND OPERATIONAL LAW

II.A. AFTER ACTION REPORT FORMAT

Listed below you will find the Judge Advocate General's Corps After Action Report (AAR) format. The attached framework provides a guide to judge advocates and other legal personnel as they capture specific lessons learned during the course of a deployment. Use of this format also permits the standardization of data collection in such a way as to provide an improved, systemic ability to cross-reference data trends across different organizations and deployments. To the extent possible, the format attempts to capture the range of issues that might be encountered during deployments. However, if your office dealt with a significant issue not found in the AAR format, please simply capture the issue in the appropriate disciplinary area.

The directory of substantive areas should be reviewed using the Issue, Decision, Recommendation (IDR) methodology. As an example, was there a particular issue (whether soldiers were prohibited from possessing Iraqi bayonets by General Order 1A) in a discrete area of the law (Artifacts and War Trophies, International & Operational Law) that the command and legal community had to deal with? If so, knowing the issue as framed above, what decision was made and why was that particular decision reached? Finally, what recommendations can be made to prepare future forces to deal with this issue? Sufficient clarity should be provided when using the IDR methodology to ensure the proper context is captured to understand the issue, decision, and recommendation.

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II.B. ARMS CONTROL

II.B.1. Chemical Weapons/Riot Control Agents

Riot Control Agents (RCA) are rarely used during military operations for various reasons, but RCA issues decidedly play a large part in planning and executing military operations. RCA issues also contribute significantly to the task of the JA both in the planning stage and during the operation. RCAs are generally discussed and decided within the Rules of Engagement. However, RCA issues are so significant that they must be viewed separately in order for Judge Advocates to develop a better understanding and to ensure the best advice to commanders.[1] JAs must be familiar with Executive Order (EO) 11850 and the accompanying documents that provide the principal foundation for DoD use of RCAs and in particular the perpetual question of permissions or restrictions concerning the use of pepper spray and CS (teargas) rounds.[2]

The key document regarding the use of RCAs is the Chemical Weapons Convention (CWC), which prohibits the use of RCAs "as a method of warfare."[3] However, the term "method of warfare" is not defined. The United States is a party to the CWC, as are all our major coalition partners.[4] The United States is also a party to the 1925 Gas Protocol, but asserts that RCAs are not chemicals as defined by the Gas Protocol.[5]

To minimize the need to adjust tactics, training, and ROE in midstream to meet a crisis, commanders and judge advocates should plan for the employment and deployment of Riot Control Means, to include RCA, at the earliest opportunity.[6] A learning point

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[1] *See* CENTER FOR LAW AND MILITARY OPERATIONS, LEGAL LESSONS LEARNED FROM AFGHANISTAN AND IRAQ, VOLUME I: MAJOR COMBAT OPERATIONS (11 September 2001 – 1 May 2003), pg. 92 (1 Aug. 2004) [hereinafter OEF/OIF, Vol. I]. Beyond standing self-defense rules, the typical issues to be addressed in mission-specific rules are what, if any, forces are declared hostile, for whom collective self-defense has been authorized, and whether riot control agents are authorized.

[2] *See* CENTER FOR LAW AND MILITARY OPERATIONS, LEGAL LESSONS LEARNED FROM AFGHANISTAN AND IRAQ, VOLUME II: FULL SPECTRUM OPERATIONS (11 September 2001 – 1 May 2003), 145 (1 Sep. 2005) [hereinafter OEF/OIF, Vol. II].

[3] Convention on the Prohibition of the Development, Production, Stockpiling, and Use of ChemicalWeapons and on Their Destruction, 13 January 1993, 32 I.L.M. 800 [hereinafter CWC], art.1(5).

[4] 161 States have ratified the CWC. Major non-signatories (at Apr. 2004) include Iraq, North Korea, Syria,Lebanon, and Egypt.

[5] 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]. The Gas Protocol bans the use of "asphyxiating, poisonous, or other gases, and all analogous liquids, materials, and devices" during war. The United States is a party to this treaty, but asserts that neither herbicides nor riot control agents (RCA) are chemicals, as defined by the Gas Protocol. *See* Exec. Order 11,850, 40 Fed. Reg. 16187 (1975) (stating U.S. policy on the use of chemical, herbicides, and riot control agents (RCAs) and setting out rules on the use of chemical weapons and herbicides).

[6] *See* CENTER FOR LAW AND MILITARY OPERATIONS, LAW AND MILITARY OPERATIONS IN THE BALKANS, 1995 – 1998: LESSONS LEARNED FOR JUDGE ADVOCATES, 69 (13 Nov. 1998) [hereinafter Balkans LL].

concerning RCAs is that an extraordinary amount of time and planning effort goes into arguing over use of RCAs even though they are seldom, if ever, actually used. Further, there are very few situations that present themselves where use of RCAs, consistent with EO 11850, would help units successfully execute a mission. There is, however, never a shortage of proposed uses of RCAs which are clearly inconsistent with EO 11850. Arguing over these proposals often bogs down planning for missions, which but for the arguments over RCAs, would most likely be approved relatively quickly. The bottom line is that before wrangling over RCA use jeopardizes a planning effort entirely, the JA should critically examine the utility of including a controversial RCA request.[7]

The SJA also should pay close attention to what the other presenters are briefing. Even though the SJA is an integral participant in COA development and detailed planning, there is always the possibility that the confirmation brief will reveal significant legal issues that slipped through the planning cracks. If so, the SJA must bring these issues to the commanders' attention. For instance, the SJA should pay close attention to the fine print of tables of equipment and weapons loads,[8] air weapons release postures,[9] and the latest intelligence on the enemy's uniforms and disposition.

JAs must also be prepared to advise commanders on RCA interoperability issues due to legal interpretations and policies rather than law, especially if there are coalition forces involved in the operation.[10] In multinational operations, Troop Contributing Nations (TCN) may lack the necessary ROE training to adequately deal with a difficult enforcement situation. Multinational partners may have domestic limitations more restrictive than the U.S Forces ROE or may have a culture of applying force in peacekeeping operations. A multinational partner may also have historical considerations

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[7] *See* pg.. 145 OEF/OIF Vol. II.

[8] The SJA should particularly watch for riot control agents (if not authorized), claymore mines in the stand-alone trip-wire mode (which has implications under land mine treaties), and other weapons or ordnance that might raise the potential for disproportionate collateral damage. See P. 41 MAGTF

[9] The air defense community uses the terms "weapons hold," "weapons tight," and "weapons free." The SJA should ensure that the use of these terms does not conflict with the applicable ROE. The SJA will also find that these terms many times do not neatly translate into the applicable ROE. "Weapons tight" means that air defense weapons may only engage targets recognized as hostile, while "weapons hold" means that the weapons may only be fired in self-defense or in response to a formal order. It is easy to see how the two terms might get confused in the ROE context. Weapons free means that air defense weapons may be engage any target not positively identified as friendly; again, it is hard to imagine ROE that would support this weapons posture.

[10] See P. 92 OEF/OIF Vol. I *Some Coalition Partners Will Not Be Permitted to Use the Full Range of Weapons that May Be Available to U.S. Forces.* The weapons capabilities available to each force may be different. This may be due to one, or a combination, of three reasons. First, the coalition partner may have different legal obligations, such as being a signatory to a treaty to which the United States is not a party and which the United States does not consider customary international law (legal reasons). Second, the United States and the coalition partner may both be legally bound by a provision of international law, by treaty or custom, but may interpret their obligations differently (interpretation of law). Finally, the difference may not result from law at all, but from the application of domestic policy (policy reasons). The two weapon capabilities that are most affected by these differences are anti-personnel landmines (APL) and riot control agents (RCAs).

which cause hesitation in the use of force.[11] Also, a TCN may have policy or legal restrictions on the use of Riot Control Agents (RCA).[12] Still other TCNs may not agree with the U.S.'s view on particular definitions such as what constitutes hostile intent.

Authorization for the employment and deployment of RCAs is impacted by the type of operation being planned. The United States RCA policy distinguishes between war and military operations other than war (MOOTW) and between offensive and defensive use in war. RCAs may be used in armed conflicts such as OEF and OIF, if permission has been granted through the chain of command. The types of circumstances where approval may be granted include:

- To control rioting EPWs;
- To reduce or avoid civilian casualties, where enemy forces use civilians to mask or screen attacks;
- During rescue missions for downed aircrew and passengers and escaping prisoners;
- In rear echelon areas to protect convoys from civil disturbances, terrorists and paramilitary activities; and
- For security operations for the protection or recovery of nuclear weapons.[13] CS (tear) gas was approved for use on OIF.[14] Secretary of Defense Donald Rumsfeld indicated

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[11] *See* Interview with LTC Denise K. Vowell, Staff Judge Advocate, 1st Infantry Division (Fwd), in Germany (27 Jan. 1998 and 22 Feb. 1998) [hereinafter Interview with LTC Vowell].

[12] Some examples of RCA include pepper spray and CS/tear gas. Interview with COL Gerard A. St. Amand, former V Corps Staff Judge Advocate, at the Judge Advocate General's School, Charlottesville, Virginia (2 Oct. 1998) (host nation law in Britain stems from the situation in Ireland and limits the range of options for British soldiers dealing with civilians).

[13] Ex Ord. No. 11850. Australia has a similar viewpoint regarding permissible use of RCAs during armed conflict:

> This does not mean riot control agents cannot be used at all in times of conflict; however, use of such agents should be authorized by the Chief of the Defense and only then in specific circumstances. When considering the use of riot control agents, specialist legal advice should be sought. Situations where the use of riot control agents may be considered are:
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> a. to control rioting prisoners of war (PWs);
> b. rescue missions involving downed aircrew or escaped PWs;
> c. protection of supply depots, military convoys and other rear echelon areas from civil disturbances and terrorist activities;
> d. civil disturbance where the ADF is providing aid to the civil power; and
> e. during humanitarian evacuations involving Australian or foreign nationals.

ROYAL AUSTRALIAN AIR FORCE, OPERATIONS LAW FOR RAAF COMMANDERS, DI(AF) AAP 1003, par. 9.16 (2nd ed., forthcoming 2004).

[14] As reported by Nicholas Wade & Eric Schmitt, *Bush Approves Use of Tear Gas in Battlefield*, NEWYORK TIMES 2 Apr. 2003.

that there were circumstances when the use of RCAs would be appropriate in war.[15] The examples he cited were:

- when you are transporting dangerous people in a confined space.. [like an airplane]..
- "when there are enemy troops, for example, in a cave in Afghanistan, and you know that there are women and children in there with them, and they are firing out at you, and you have the task of getting at them. And you would prefer to get at them without also getting at women and children, or non-combatants."[16]

An alternative interpretation of the term "method of warfare' is that the CWC places a total prohibition on the use of RCAs in an armed conflict. The UK subscribes to this latter interpretation, indicating that UK forces would not be involved in operations using RCAs in Iraq, nor transport RCAs.[17] As with APL, these differences in national viewpoints may impact on coalition operations. It is critical that JAs understand these differences and assess the potential impact on their particular mission.

During the Balkans Operation the Supreme Allied Commander, Europe (SACEUR), delegated to the Commander, Implementation Force (COMIFOR) (and later to the Commander, Stabilization Force) the release authority decision for the use of RCA. Consistent with the SACEUR OPLAN, COMIFOR delegated RCA release authority to the Commander, Allied Rapid Reaction Corps (COMARRC).[18] This meant the Commander of Task Force Eagle needed COMARRC approval to employ RCA. Although this seemed simple, it was not. Executive Order 11850 required U.S. Presidential approval for U.S. service members to use RCA. Yet the NCA approved the NATO ROE for IFOR which provided for the use of RCA. The question became whether NCA approval of the NATO ROE equated to Presidential approval of the use of RCA under Executive Order 11850. This question was left unresolved through most of Operation Joint Endeavor. Ultimately, TFE commanders, with specific approval from the Commander of SFOR, could utilize RCA.[19]

Riot Control Agents should be at the forefront during operational mission planning. Judge Advocates are responsible for understanding how RCA issues impact planning decisions. JAs are also responsible for understanding RCA issues "on the ground." From authorization to deployment to the escalation of force, RCAs impact all military operations.

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[15] Hon. Donald Rumsfeld, Secretary of Defense, Testimony before the 108th Congress House Armed Services Committee, 5 Feb. 2003, *at* http://armedservices.house.gov/schedules/2003.html#feb03 .

[16] *Id.*

[17] Defense Minister Hoon (UK) briefed the Press that RCAs "would not be used by the United Kingdom in any military operations or on any battlefield" (27 Mar. 2003) *at* http://www.operations.mod.uk/telic/press_27march.htm. For a good general discussion of the issues surrounding use of RCA see Barbara H. Rosenberg, *Riot Control Agents and the Chemical Weapons Convention*, Open Forum on the Challenges to the Chemical Weapons Ban, 1 May 2003 *available at* http://www.fas.org/bwc/papers/rca.pdf .

[18] *See* pg. 70 Balkans LL.

[19] *Id.*

II.C. CIVIL AFFAIRS

Civil Affairs (CA) plays an essential role in most military operations, creating an interface between the US military and civilians/civilian institutions. Judge advocates frequently work with CA units and personnel in a deployed setting. Often, Judge Advocates are assigned to Civil Affair units in international law slots, in addition to SJA/CJA positions.

II.C.1. Haiti Legal Operations

Civil affairs judge advocates played a central role in civil military operations during the Haiti deployment. That role was to support the Multinational Force's (MNF) relationship with Haitian civil authorities and the civilian populace, promote the legitimacy of the mission, and enhance the effectiveness of the military forces in the country. Civil affairs operations comprise two distinct types of missions. The first—to conduct civil-military operations—involves a complex of activities and interactions with civilian authorities directed toward eliciting favorable behavior from civilian inhabitants of a war zone or area of operations.[20] The second—to support civil administration—consists of direct military involvement with executive, legislative, and judicial branches of a foreign government so as to stabilize it.[21] In addition to describing these two types of missions, the term "civil affairs" denotes military personnel and units trained to plan, support, or conduct these missions.[22]

Elements of four different civil affairs units—all of them United States Army Reserve (USAR) component units—supported the MNF in Haiti.[23] Because the MNF sought to restore the democratically elected president and leave the reins of government with his administration, these elements limited their activities to the first type of mission (civilmilitary operations).[24] The second type of civil affairs mission (support to civil administration) would have implied a degree of involvement with the inner workings of the Haitian government that might have frustrated rather than fulfilled Resolution 940.[25] Civil affairs personnel planned and coordinated numerous humanitarian assistance and military civic action projects. They supported the J-3 civil affairs officer, an army major

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[20] *See* U.S. DEP'T OF ARMY, FIELD MANUAL41-10, CIVIL AFFAIRS, Glossary 5 (1 Mar. 2000) [hereinafter FM 27-100].

[21] *See id.*

[22] *See id.*

[23] These were the 450th Civil Affairs Battalion, the 416th Civil Affairs Battalion, the 360th Civil Affairs Brigade, and the 358th Civil Affairs Brigade. *See* Telephone interview with LTC John McNeill, USAR, Former team Chief, tactical Planning team 3601, 360th Civil Affairs Brigade, in Port-au-Prince from 19 SEP 1994 to 22 NOV 1994 (24 AUG 1995) [McNeill Interview]. S*ee also* FM 41-10, at 4-1 to 4-13 (describing civil affairs organization).

[24] *See id.* at ch. 10 (describing the five major civil-military organization missions as foreign nation support, populace and resource control, humanitarian assistance, military civic action, and civil defense).

[25] *See id.* at ch. 11.

who had staff responsibility for tasking elements of the MNF, such as the Joint Logistics Support Command, or the separate military police brigade to support civil affairs projects.

The terms "civil affairs," "civil-military operations," and "civil administration" are creatures of United States military doctrine rather than law. The rule of law is so important to legitimacy and stable government, however, that judge advocates inevitably become deeply involved in civil affairs operations. For example, because formal support to civil administration, as doctrinally defined, did not strictly serve the purposes of the MNF's presence in Haiti, the Ambassador and the country team developed a program of "legal mentorship."[26] Judge advocates in the reserve and active components were ideal participants in this program, which was so close in method and intent to civil affairs operations as to be indistinguishable from them.

Civil affairs doctrine further implicates judge advocates because it purports to give civil affairs officers a role in advising the command on legal obligations to the foreign civilian populace. Recall that the mission of The Judge Advocate General's Corps is to support the commander by providing legal services as far forward as possible throughout the operational continuum.[27] This mission implies that judge advocates are the command's legal advisors, and the field manual guiding judge advocates expressly reinforces this role.[28] Yet the Army's civil affairs field manual states that the civil affairs personnel and related staff officers "[r]ecommend[] command policy concerning obligations to the population in the [area of operations] and obligations relative to treaties, agreements, international law, and U.S. policies."[29] This apparent conflict between the role of judge advocates and the role of civil affairs personnel need never become a problem. Indeed, professionalism and careful coordination on the part of the individual officers involved can obviate confusion and ensure that the command has a single source for its legal advice.[30]

The staff judge advocate for the MNF eliminated potential confusion of roles at an early stage, primarily in the area of fiscal law issues. Humanitarian assistance projects and military civic action programs employ military personnel and require the expenditure

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[26] *See infra* at subpart H.2 and H.3.

[27] *See* FM 27-100, at para. 1-4.

[28] *See, e.g., id.* at para. 11-6a ("The staff judge advocate is the commander's primary legal advisor and supervises legal operations in support of civil affairs. The G5 coordinates with the SJA on all legal matters related to civil affairs.").

[29] *See* FM 41-10, at 4-9; *See also id.* at 4-3, 4-4, 4-5 ("Advises and assists the commander to meet legal obligations and moral considerations.").

[30] *See generally* DSAT REPORT, at Operational Law-6, 11, 12, Issues 520, 573, 626, and 627 (discussing the potential friction arising from overlapping roles); Lieutenant Colonel Rudolph C. Barnes, Jr., *Legitimacy and the Lawyer in Low-Intensity Conflict (LIC): Civil Affairs Legal Support,* ARMY LAW., Oct. 1988, at 5, 7 ("Because many issues in LIC are mixed legal and political issues, however, there is no clear line of demarcation between the support requirements of the SJA and the civil affairs staff support element.").

of military operations and maintenance and construction appropriations.[31] These civil affairs operations in Haiti took the form of medical care, food distribution, and rudimentary construction of roads and sanitation facilities.[32] By designating three judge advocates, including himself, as the sole advisors on the propriety of using military resources for such operations, the staff judge advocate prevented misallocation of funds and protected the command.[33]

Civil affairs officers cooperated in this arrangement. The civil affairs mission in a country such as Haiti is challenging enough without the added responsibility of advising the command on its legal obligations. Coordinating the work of nongovernmental and private voluntary organizations, planning and executing those humanitarian assistance and civic action projects deemed by judge advocates to be proper uses of funds, and persuading Haitian officials and citizens of the benefits of orderly and rule-governed processes—these and related activities easily absorbed the full attention of available civil affairs resources. For example, in September and early October, civil affairs officers in the Humanitarian Assistance Coordination Center devoted much time and energy to conferences with Haitian merchants. The port director of Port-au-Prince, a corrupt official allied with the junta, continued to charge tariffs and storage charges these merchants deemed unjust. The civil affairs officers, in full coordination with the Staff Judge Advocate, assisted the merchants in devising a plan to engage in commerce while respecting Haitian law.[34]

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[31] *See* FM 41-10, at 10-19 (reprinting 10 U.S.C. §§ 401-402, which prescribe fiscal and other limitations on conduct of humanitarian and civic assistance by military units)

[32] *See, e.g.,* Passar AAR, note 120, at para. 6d; Telephone Interview with LTC Richard E. Gordon, Former Deputy SJA for MNF Haiti (7 SEP 1995) [Gordon Interview], telephone interview with LTC Karl K. warner, SJA, 10th Mountain Division (7 SEP 1995) [Warner Interview].

[33] *See* 10th Mountain Div. AAR, at 7; 25th ID Lessons Learned Memorandum ; *cf.* Memorandum, Major General George A. Fisher, Commander of Multinational Forces Haiti, MNF-CG, to Distribution A, subject: Medical-Civil Action Guidelines (25 Jan. 1995) ("Refrain from independent Medical Civic-Action (MEDCAP) activities unless specifically approved by the CMOC or MNF Surgeon."). Provision of humanitarian and civic assistance by military units is likely to be scrutinized by the General Accounting Office (GAO). A recent GAO report on Department of Defense humanitarian and civic assistance projects was critical in tone and substance: Program coordination between the U.S. military and the U.S. embassies and AID missions in two of the countries we visited—Panama and Honduras—was minimal. We found projects that were not designed to contribute to U.S. foreign policy objectives, did not appear to enhance U.S. military training, and either lacked the support of the host country or were not being used. Finally, the two commands we visited have not systematically evaluated HCA projects to determine their success or failure. HCA program officials at the command level had not performed routine follow-up visits.

See UNITED STATES GENERAL ACCOUNTING OFFICE, REPORT TO CONGRESSIONAL REQUESTERS, DEP'T OF DEFENSE: CHANGES NEEDED TO THE HUMANITARIAN AND CIVIC ASSISTANCE PROGRAM, B-248270, GAO/NSIAD-94-57 (Nov. 2, 1993) at 3.

[34] Electronic Message, Lieutenant Colonel Karl K. Warner, Staff Judge Advocate, 10th Mountain Division (LI), to Deputy Director, Center for Law and Military Operations (19 Oct. 1995) (opining that when the de facto government is illegitimate, and the United States controls the port on behalf of the de jure government, customs should be paid to the de jure government upon its arrival and assumption of port control rather than to the outgoing de facto government).

A log of legal services that have been provided serves three practical functions. First, it jogs the memory when one seeks to recall facts and legal reasoning behind prior advice rendered. Second, it alerts judge advocates serving different shifts in the command post that prior advice has been rendered on particular topics.[35] Third, it enables the staff judge advocate to identify patterns and areas of high demand for legal services, information that is helpful in deciding what products and training to develop. The first two functions help eliminate inconsistent guidance to the command and discourage "forum-shopping."[36] The third provides a key management tool.

II.C.2. Balkans Legal Operations

Civil Affairs units, primarily from the reserves, provided extensive support during the operation in the Balkans. Because these units do not have a habitual relationship with the active component unit they find themselves supporting, the civil affairs units can easily slip out of the main effort, and their effect as a combat multiplier for the supported unit may be lost.[37] An additional difficulty is that their technical channels will generally include lawyers (from their civilian occupation) who are not members of the JAG Corps.[38] As their actions are under the authority of the supported commander, however, the commander needs to be accustomed to checking out the missions with his own judge advocate. Judge advocates at all levels need to cultivate a relationship with their commander that will lead him to turn immediately to them when legal issues present themselves.[39]

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[35] *See* 10th Mountain Div. AAR, at 12 ("Although the Staff Judge Advocate, the Deputy SJA, and the Operations Law Judge Advocate led the office effort, every judge advocate worked shifts in the Joint Operations Center (JOC), which was manned by a judge advocate 24 hours a day. Thus, every judge advocate needed to keep abreast on all operations issues. . . . While the SJA attended morning and evening command and staff briefings, to include executive sessions, judge advocates attended JOC shift change briefings twice daily. At this briefing, judge advocates briefed the joint staff on current legal issues of interest.").

[36] *See id.* at 7 ("Many times, civil affairs personnel would 'forum shop' until they found a judge advocate who would provide legal approval for a project. Communication within the SJA office, and with the brigade legal counsel, through SJA meetings and extensive entries in the SJA Duty Log, put an end to this practice.").

[37] LTC George B. Thomson (Ret.), comments *in* OJE-AAR, Vol. I at 40 ("they tend to become free agents, uncontrollable, out there in heart of darkness land operating on their own").

[38] In addition to the judge advocate positions within the civil affairs structure, many of the soldiers are attorneys—indeed, some are Department of the Army Civilian attorneys—in their full-time occupations. See COL Joseph A. Russelburg, comments *in* OJE-AAR, Vol. I at 42.

[39] BG (now MG The Assistant Judge Advocate General) John D. Altenburg Jr., comments *in* OJEAAR, Vol. I at 41. The broader judge advocate community needs to work on establishing structural relationships with the civil affairs units. *See* COL David E. Graham, comments *in* OJE-AAR, Vol. I, at 43. These relationships are already established doctrinally. *See* U.S. DEP'T OF ARMY FIELD MANUAL 27-100, LEGAL OPERATIONS, paras. 7-4, 8-14, and esp. ch. 11 (1991). Unfortunately, U.S. DEP'T OF ARMY FIELD MANUAL 41-10, CIVIL AFFAIRS OPERATIONS (11 Jan. 1993) contains no overt requirement for civil affairs units to coordinate with the Staff Judge Advocate of units they serve with, even if the relationship is that of direct support.

Soldiers in civil affairs units, by virtue of their mission, may believe that they have both the duty and the authority to resolve claims based on the activities of U.S. forces. This caused frequent concerns because they sometimes made representations to local claimants that were inconsistent with actual resolution of the matters by the claims service.[40] Early coordination with these units can make lemonade of this problem, however. As one claims officer noted, civil affairs personnel have vehicles, translators, and contacts in the local community. With training and coordination with the office of the staff judge advocate, they could function as unit claims officers, investigating and reporting on the relative merit of claims. In this way, they become a vital part of the process while simultaneously being educated in the importance of withholding comment to the claimant until after the claims commission has made its decision.[41]

Judge advocates may also get involved with civil affairs when it comes to establishing ground rules for nation rebuilding, including election support. In the course of peace operations, numerous bits of technical assistance and advice will be given to civic officials of the host nation. Because much of the advice will center on legislative and judicial matters, units will rely upon their judge advocates for coordinating and providing such advice. In order to do so appropriately, judge advocates must stay in communication with the Political Advisor (POLAD) to ensure that all contacts with officials—whether the national legislative body or the local bar—are consistent with broader U.S. policy.[42]

Article IV of the General Framework Agreement for Peace (GFAP) announced that the "Parties welcome and endorse the elections program for Bosnia and Herzegovina."[43] Annex 3 to that agreement spelled out the program implementing those elections. The Organization for Security and Cooperation in Europe (OSCE) was the lead international organization for elections. The Provisional Election Commission (PEC) was directly responsible for the election rules and regulations. The Local Elections Commission (LEC) was responsible for running the elections. Implementation Forces (IFOR)/Stabilization Forces (SFOR) had the task of creating conditions for free elections. The OSCE, its Election Appeals Sub-Commission, the PEC and the LEC had the primary duties in running free elections. The IFOR/SFOR mission to create conditions allowing for free elections translated into U.S. forces providing security at elections sites and along routes to the polling stations and sites, and transportation to the polling stations. This

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[40] "The civil affairs people see it as part of their mission to go out and do the hearts and minds thing, and that includes taking care of meritorious claims.... [S]ome of them take this a little bit further than they should. They don't have the experience, they don't have the expertise, and quite frankly, most importantly of all, they don't have the money." MAJ Jody M. Prescott, comments *in* OJE-AAR, Vol. II at 131.

[41] *Id.*

[42] 1AD-AAR, at 29. Occasionally, U.S. forces, especially judge advocates, will assist the nation's civil institutions merely by accomplishing their usual missions. *See, e.g.*, Memorandum for Record by CPT Thomas Gauza, subject: 20 May 1996 Hearing in Bosnian Court (no date) (discussing the author's appearance in a Bosnian court representing the U.S., which was the victim in the computer theft case being tried).

[43] GFAP, Art. IV (*see* Appendix E(5) for text).

support required significant military police, civil affairs, and transportation support.[44] There were many elections—municipal elections in September 1997, the Serb national assembly in November 1997, and national elections. Task Force Eagle treated each election as a military operation. For example, Operation Plan Libra addressed the municipal elections. Before the support was rendered, the task force analyzed the mission and created an information paper and a slide briefing that outlined the duties and limitations that the soldiers had regarding the elections.[45] A constant theme of those briefings was that soldiers had the right to prevent acts of violence around polling places, but that "local election commissions (LECs) [were] responsible for protecting the integrity of the election process."[46]

Judge advocates were involved at every stage—reading, proofing, and preparing plans, orders, and annexes. Two reserve judge advocates in particular became critical to the success of the mission. One was the liaison from IFOR to the OSCE; the other orchestrated the civil affairs support for the elections.[47] All judge advocates by virtue of their training and expertise, should expect to play key roles in advising commanders about elections during similar operations.[48]

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[44] 1AD-AAR, at 27. This provision of support, of course, also raised questions about the use of O&M funds in support of OSCE. For a determination that such funds were expendable because election support had become a military mission and were civil-military actions rather than civil and humanitarian support, see Memorandum For The Judge Advocate, Headquarters, United States Army Europe and Seventh Army, LTC Maher, Subject: Funding for OSCE Support, 18 Aug. 1996. *But cf.* Memorandum, CPT Matthew D. Ramsey, to ACofS G3, subject: Office of the Staff Judge Advocate Election After Action Review Comments (4 Oct. 1996) ("On 6 Jul. 1996, HQ ARRC Phase IV Directive identified support to the OSCE as the Corps' main effort. Fiscal law questions inherent in this change in mission were never fully resolved.")

[45] Specifically, soldiers were obligated to use force to protect personnel with "special status"— election monitors and the like. They were also permitted to use force to protect others, but only with the authorization of "the commander on the scene." *See* Information Paper, CPT Matthew D. Ramsey, subject: Election Guidance for TF Eagle Forces (17 Aug. 1996). Although the restriction to commanding officers might potentially have led to inflexibility (such an order might prevent a commander from assigning a platoon to a mission alone, for example), it does seem to have prevented a recurrence of the Haiti scenario when U.S. forces who misunderstood the ROE stood by watching a civilian being beaten to death. See HAITI AAR, at 37-38.

[46] *See* Memorandum, CPT Matthew D. Ramsey, to ADC(M), TF Eagle, subject: OSCE Election Security Plan (9 Sep. 1996).

[47] 1AD-AAR at 27.

[48] *Id.* at 28.

II.C.3. OIF/OEF Legal Operations

The military operations in Operation IRAQI FREEDOM (OIF) and Operation ENDURING FREEDOM (OEF) facilitated similar civil affairs lessons learned that were observed from previous operations. However, several new civil affairs lessons learned were a result of the operations in Afghanistan and Iraq.

The doctrinal guides used by Civil Affairs (CA) judge advocates deployed in support of Operation IRAQI FREEDOM and Operation ENDURING FREEDOM were Joint Publication 3-57, *Doctrine for Civil Affairs*,1370 and Army Field Manual 41-10, *Civil Affairs*.[49] According to this doctrine, CA personnel, including JAs, are intended to be coordinators and facilitators between civil and military authorities. Rather than performing the long-term reconstruction of building an institution, or a system of government, CA operators seek to bring together governmental and nongovernmental assets and organizations to accomplish the "hands-on" part of the task. CA units are designed and specially trained to facilitate coordination between military and civilian authorities in order to deconflict operational matters (civilian or military) that can impact one or more key players involved in the reconstruction effort.[50] Thus, in conducting civil-military operations (CMO) the goal is not for CA assets to carry out the detailed work of reconstruction itself, but to initiate projects that are ultimately transitioned to nonmilitary control. Simply put, CA works its way out of a job.

A CA JA wears essentially two hats. He or she is a resource for the commander in traditional JA or staff judge advocate (SJA) roles, providing, for example, military justice and law of war advice in the operational environment. The CA JA is also a CA operator, possessing general knowledge concerning the operation and restoration of legal systems, government administration, and finance issues.[51]

Under long-established doctrine, part of the mission of CA JAs is to carry out rule of law operations. As stated by the former SJA and Rule of Law Officer, OMC–A:
[Judge advocates] were placed in CA units to perform the legal functional specialty tasks, which includes advising and assisting the local (host nation) judicial agencies administering the legal system and establishing supervision over the local judicial system, establishing civil administration courts, and helping to prepare or enact necessary laws for the enforcement of US policy and international law.

Civil affairs JAs, in addition to being judge advocates, are experienced civilian attorneys who are accustomed to dealing with legal systems other than that found in the US military. This civilian experience is extremely important to being able to provide

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[49] *See* FM 41-10.

[50] Roberts A. Borders, *Provincial Reconstruction Teams in Afghanistan: A Model for Post-Conflict Reconstruction and Development*, Journal of Development and Social Transformation, p. 8 (2003) [hereinafter *Provincial Reconstruction Teams in Afghanistan*].

[51] Reserve CA units target their recruitment at individuals who already possess the functional specialty skills outlined in JOINT PUB. 3-57. *Id.*

effective support and assistance to a foreign civilian legal system that has been degraded by international isolation and armed conflict. . . . JAs in CA units specifically prepare themselves to perform rule of law missions. Because of their experience in CA units, CA JAs understand how rule of law operations fit in with public safety, public health, economic development, and other operations conducted by CA units in post-conflict and other situations.[52]

A lesson learned from both Afghanistan and Iraq is that JAs conducting rule of law missions must have a specialized set of skills—including expertise in international law and human rights law, and training in comparative law. Training in rule of law tactics, techniques, and procedures (TTPs) is also necessary. During the period of this Publication, there was no systemic program for specialized training of JAs to conduct rule of law operations. Based on this lesson learned, however, the U.S. Army Civil Affairs and Psychological Operations Command (Airborne) SJA is developing such a program.[53]

Iraq

Eighteen hundred CA troops deployed in support of OIF I and approximately eight hundred deployed in support of OIF II. Both deployments included several dozen JAs.[54] These Army JAs served as Command JAs and International Law Officers for numerous CA battalions and brigades, as well as the 352d CA command headquarters. These CA operators were the lead military elements charged with restoring essential government services and institutions for a newly liberated Iraq.

During OIF, however, the traditional CMO model of acting as coordinators and facilitators between civil and military authorities generally was not followed for two reasons. First, as an occupying force, the Coalition maintained long-term responsibility for the reestablishment of all essential government functions. Consequently, in the absence of functioning Iraqi government offices, Coalition CA assets and the Coalition Provisional Authority (CPA) became the day-to-day managers of the Ministries and Provincial Government offices.

Second, in the increasingly nonpermissive environment that began in August 2003, NGOs and IOs did not maintain operations where their personnel were being targeted or put at risk by anti-Coalition elements. Accordingly, many projects that had been transitioned to NGOs and IOs by the military during the summer of 2003 were dropped or returned to CA control and administration when these NGOs and IOs began

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[52] Memorandum, Colonel David Gordon, former Staff Judge Advocate, CJCMOTF and OMC-A (OEF) subject: Rule of Law Operations in Afghanistan 2002-2003: Lessons Observed, para. 7 (27 Apr. 2005) [hereinafter Gordon Lessons Observed].

[53] Gordon Lessons Observed, para. 8.

[54] Civil Affairs Association Website, *at* http://www.civilaffairsassoc.org, (lasted visited 21 Mar. 2005).

pulling out of Iraq in September 2003.[55] Therefore, many CA JAs who entered Iraq during the early months of the occupation found themselves operating as the day-to-day managers of the Iraqi legal system, planning, financing, reconstructing, and operating the system for an indefinite period.

The mission that eventually consumed the greatest time of the CA JA during OIF was the reconstruction of courts and the reestablishment of a legal system. Unfortunately, CA units had received little training in this area prior to the beginning of major combat operations. The primary training objectives focused on the large number of civilians expected to flee from the high intensity combat and, perhaps, chemical battlefield.[56] Consequently, predeployment training had focused on dealing with displaced persons (DPs) and separating enemy combatants from the DPs that might flow south toward Kuwait.

Prior to deploying in support of OIF, CA units, including JAs, conducted weeks of training on the DP mission, including the decontamination of "gassed" civilians, emergency medical care, and the establishment of short term DP camps. The JAs wrote draft rules for the governance of such camps and for the earliest possible return of refugees to their homes, in accordance with International Committee of the Red Cross and Geneva Convention requirements. Army and U.S. Marine Corps JAs also drafted plans for Article 5 Tribunals, as well as detention facilities for those enemy prisoners of war separated from the DP flow.[57]

Against the background of hundreds of hours of tactical CA training, little training on the Iraqi legal system or government structure occurred at the CA brigade or battalion level. Although CA JAs requested copies of the laws of Iraq from their higher headquarters, with the primary focus on the impending major combat operations these requests became a second priority and they were not answered prior to deployment.[58] As the saying goes, "no plan survives first contact with the enemy," and the OIF CA plan was no exception. With the brief exception of a water shortage in Um Qasr in the opening days of the war, there was no massive civilian emergency or significant DP mission as expected. The local Iraqis remained in their homes and did not take to the roads. Major combat operations led to the occupation of Baghdad in only three weeks and the immediate fall of the Ba'athist Government and its institutions. As a result, CMO

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[55] Most NGOs are not designed or equipped to operate in a hostile environment. As soon as it became clear that their NGO status would not protect them, many left Iraq, leaving behind unfinished reconstruction projects that either had to be abandoned or assumed by the Coalition. *See* Interview with Major Chris Stockel, JA, attached to the 402d CA Bn, in An Nasariyah, Iraq (Aug. 2003).

[56] MEFEX AAR at 2.

[57] Interview with Colonel Michael O'Hare, Staff Judge Advocate, 358th CA Brigade (1 Dec. 2004) [hereinafter O'Hare Interview 2004]

[58] *Id.* A three day seminar was held for JA CAs at FT Dix, NJ in early 2003 that related extremely valuable cultural background information on the Iraqi Kurds, Sunnis, and Shiites, as well as other important information concerning Islamic culture. Unfortunately, no instruction regarding the workings of the civil government and its legal system was available. *Id.*

planners, who had anticipated major combat operations continuing for many weeks or months, suddenly found that they had transitioned to stability and support operations with only the broadest outline of a plan.[59]

It was during this time that the concept of the Government Support Team (GST) was born. Training was initiated in Kuwait for Army CA troops who had yet to cross into Iraq to learn how to administer the foreign government system. These GSTs were the CA entities established in each province to interface with the Iraqi populace and officials. Ranging in size from twelve to twenty-four CA operators, the GSTs were the civil administration face of the local military governor. A typical GST had a JA, a fiscal officer, a logistics/engineering officer, a medical expert, an education officer and a law enforcement officer, among other specialties. The military governors tasked the GSTs with getting the provincial Iraqi bureaucracies running again and overseeing the reconstruction of critical infrastructure within the province.

From the CA JA perspective, GST training, although conducted late, was important to convey the nuances of the civil law based Iraqi court system, which was akin to the French magistrate code system. This was a new type of law to most military attorneys, who were only familiar with a system characterized by common law court precedents.[60] The lessons learned from the JAs assigned to CA units during OIF includes that all JAs must plan for judicial reconstruction missions in all contingency operations. Such plans must include obtaining a copy of the local civil and criminal laws and procedures, and conducting training on the local judicial systems and traditions. The JAs cannot afford to lose valuable time needed to carry out reconstruction operations and restoring government services by deploying without adequate legal resources concerning the area of operations.

Command Relationships Impacting CA Legal Operations

The CA JAs also learned that to share information on reform and reconstruction efforts, they must not only have a reliable means of communication, but also a robust command reporting structure. Without such a structure, CA elements can become isolated from each other and unable to do what such units do best—coordinate and facilitate. Under Army CA doctrine, CA battalions operate under a CA brigade, which in turn reports to a CA command.[61] Civil Affairs units, including their JAs, are trained and organized to work in a cooperative fashion with various levels of command and to create

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[59] LTC John Taylor, 358th Civil Affairs Brigade, Telephonic Interview, 2 DEC 04 ("[t]he transition from Phase 3 to Phase 4 operations occurred abruptly and much sooner than we expected. The Marines . . . were screaming for [their Army CA units] to get into action as soon as possible when the fighting stopped. The only problem was that there was no plan for what many of the units were supposed to do.")

[60] *See* Interview with Captain David Ashe, U.S. Marine Corps, in Samawah, Iraq (Aug. 2003) ("[w]e wasted so much time just learning their system that could have been put to better use actually doing something. We lost at least a month just trying to understand how the Iraqi system operated. By losing that month we lost a lot of local goodwill that we had to struggle to get back.")

[61] FM 41-10, para. 4-7.

relationships between civil government organizations, military organizations, and international organizations, where appropriate. Their strength is not in performing the massive task of running a government, but to coordinate the various military and civilian assets necessary for a governmental structure to exist and succeed. Each CA battalion, brigade, and command possesses organic JA assets in the role of international law officers, whose responsibility in times of occupation include restoration of the occupied country's legal institutions.

In Iraq, several CA battalions were in direct support of the 1st Marine Division (MARDIV) in southern Iraq and these constituted the GSTs operating under 1st MARDIV control. Treated as standard line units by the U.S. Marine Corps, the CA battalions supporting the Marines were directed to communicate their reports and requests exclusively through formal G-3 channels, causing a lack of inter-province coordination between Army CA units and the various Marine battalions that were operating as military governance in the southern Iraqi provinces.[62] Accordingly, the strength of the Army CA units, their ability to operate independently to establish relationships with NGOs, locate human and material resources, and bring organizations together across municipal, provincial, and national levels of government, were hampered in the south by reporting and command channels that were hierarchical in nature and did not facilitate this lateral communication.

The ability of the CA JA to control his own reporting channels and to directly influence the structure of command relationships is limited. The lesson learned, however, is that it is critical that the JA voice his or her opinion where command structure and its attendant restrictions are impairing the accomplishment of mission goals. During OIF, once restrictions on direct coordination were removed in July 2003,[63] brigade and battalion level JAs were able to coordinate common issues across the breadth of southern Iraq, resulting in the same mistakes not occurring in each province. It also opened lines of communication both to and from CPA, enabling needed resources to reach the Ministry of Justice in Baghdad, and the CPA to directly send policy and legal changes through CA channels to the operators on the ground that needed to implement them in a timely fashion.

As the occupying power, the Coalition possessed significant power and influence within Iraq. Despite this great power and influence, it was vital not to overreach and seek

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[62] *See* 358th CA AAR, at 3. The USMC's own CAGs are designed to operate at the tactical level for short periods of time. The CA JAs in southern Iraq were required to make all of their reports and recommendations to the 1st MARDIV G-3, who would in turn forward that information deemed important to the I MEF G-3. The I MEF G-3 would then provide any information deemed important to the Commander, 358th CA Brigade, the 304th CA Brigade, or the 308th CA Brigade, and to the G-3 of CJTF-7 (who ideally would report pertinent information to the 352d CA Command).

[63] In mid-June 2003, the I MEF Commander authorized attached brigade-level CA elements to begin direct coordination with their counterparts in the 352d CACOM in Baghdad and with the battalion level CA operators running the provincial level GSTs for 1st MARDIV. This provided the necessary "bridge" that had been missing in the flow of information concerning the status of the Iraqi courts and other Government institutions in the provinces to reach Baghdad.

to impose Western values and beliefs upon a society not built upon the same traditions. Civil affairs officers are trained to be sensitive to local values and beliefs and yet errors still happen under the well intentioned desire to "make things better." Such an occasion occurred in Najaf in September 2003 when the military governor proposed to appoint a woman judge to the bench.[64]

Saddam Hussein had appointed a handful of women judges during his rule, which served primarily in Baghdad and were responsible for adjudicating inheritance and other family matters that would not put them in direct control over a man and his rights. However, even Saddam's initiative to place women on the bench had been received in a lukewarm fashion by the Iraqis and it had not been expanded.[65] Despite numerous indications that such a proposition was not welcomed by the locals in Najaf, the CPA and the military governor for that Province sought to swear a woman judge onto the bench in the holiest city to Shiite Muslims in September 2003. The attempt was met by a boisterous protest outside the swearing-in ceremony that threatened to result in violence until the last-minute cancellation of the ceremony and her appointment to the bench.

While well intentioned and apparently built upon the belief that the Coalition was seeking greater equality for women, this ceremony alienated the local population and was potentially destabilizing. Fortunately, the military governor realized that he was about to open a Pandora's box in his province by seeking to impose Western values of gender and political equality for women upon a society that had embraced a concept of a male dominated society for over a thousand years. The battalion commander made the prudent decision to abandon the initiative where the risk was much greater than the potential payoff. The lesson learned is to always remain sensitive to cultural differences when seeking to apply U.S. concepts of individual equality and justice to the legal structure of a foreign culture.

Afghanistan

The mission of the CA JAs deployed to Iraq was to overlay the rule of law and human rights concepts on a centrally controlled legal system. Their primary challenge was encouraging judges to operate independently from political agendas and influence. In contrast, the challenge in Afghanistan was to establish the concept of a nation-wide legal system in a country that has been characterized by decentralized tribal authority for centuries.1448 Moreover, the CA JAs had to understand that the Islamic legal tradition of Afghanistan rested on their interpretation of the Koran: the concept that authority to make laws comes from God, not the people, is unfamiliar to military commanders and JAs who have operated under a Western government.[66]

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[64] Interview with Specialist Rachel Roe, Paralegal Specialist, 432d CA Bn (2 Jun. 2003) [hereinafter Roe Interview]. Although not a JA, SPC Roe was a very talented Harvard Law School educated attorney who was in charge of administering legal affairs and restoration of the Najaf court system for the Najaf GST.

[65] *Id.*

[66] Lieutenant Colonel Vincent Foulk, 19 *Legal Perspectives for Civil-Military Operations in Islamic Countries*, COMBINED ARMS CENTER MILITARY REVIEW (Jan-Feb 2002), *at*

The Coalition Joint Civil-Military Operations Task Force (CJCMOTF) achieved its mission through the four Provincial Reconstruction Teams (PRT), the Civil-Military Coordination Office (CMCOORD), and the Kabul National Impact Team. Civil Affairs JAs played a role in the functioning of each of these entities. The CMCOORD focused its CA mission at the national level. The members coordinate with the national Ministries to train and support them. As explained in the previous subparagraph, the CA JAs played a key role in attempting to meld western concepts of the rule of law into the framework of an Islamic constitution. This work required CA JAs to have an understanding of Islamic traditions and laws. It was also important that they recognized that Afghanistan had a well-established system of informal, traditional justice that could not be ignored.[67] Many JAs and military commanders did not have an understanding or appreciation of the Islamic system in Afghanistan before they redeployed.[68] Civil affairs JAs and other U.S. service members who derive their knowledge and value systems from a Western, democratic orientation had to understand the Islamic framework to attain credibility with the local people and to avoid imposing views that may undermine the legitimacy of the Coalition presence and mission. Therefore, similar to learning the civil law system to operate effectively in Iraq, JAs must also understand other judicial systems based on religious laws. They must receive comparative law training on these various systems to permit them to provide more timely and accurate advice to their commanders regarding judicial reform and reconstruction.

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www.leavenworth.army.mil/milrev/English/JANFEB02/foulk.htm [hereinafter *Legal Perspectives for Civil-Military Operations in Islamic Countries*]. According to Colonel David Gordon, former SJA, OMC-A, "All the jurists in Afghanistan I dealt with would have subscribed to the principle that the authority to make laws comes from God—you will find this even in moderate Islamic legal thinking."

[67] Gordon Lessons Observed, para. 6. In many instances, judges and prosecutors did not have a great deal of training or access to codified legal materials. Therefore, judges relied on their understanding of the Koran and local customs, also sometimes applying conflicting statutes created during the 1970s, the communist era, or the period of factional conflict prior to the Bonn Agreement. *Id.*

[68] *See, e.g.*, E-Mail from Major Anthony Ricci, JA, serving with the Ministry of Justice, CPA, to Lieutenant Colonel Craig Trebilcock, Drilling Individual Mobilization Augmentee, Center for Law and Military Operations (5 Oct. 2004) ("[t]his [training] would save an enormous amount of time and frustration in the post-conflict environment and would allow for our JAG folks to better advise the commanders.").

II.D. CIVILIANS ON THE BATTLEFIELD/ CONTRACTORS

The phrase "civilians accompanying the force" generally refers to two distinct categories of individuals, each governed by separate regulatory guidance: 1) DoD civilians; and 2) DoD civilian contractor employees.[69] Judge Advocates should expect issues related to civilians accompanying force as a mainstay of their practice in a deployed environment. Judge advocates must understand key concepts and be prepared to address a series of common issues that often arise. These common concepts and issues are:

(a) Civilians accompanying the force come in two major types. These are US Government Civilian employees (GS, GG, etc.), and Civilian Contractors supporting the force under a US Government Contract. Within the latter, civilian contractors are in some cases differentiated based upon whether they are a US Person, a local national (LN) or a third country national (TCN);

(b) Civilian employees and government contractors are regulated by different, though sometimes overlapping, Directives, Instructions, Regulations and local general orders;

(c) Judge advocates can expect to encounter questions as to access to medical care, legal services, weapons possession, discipline, and criminal responsibility;

(d) Judge advocates must understand the status of civilians accompanying the force vis a vis local national law and understand the impact of any SOFA or other diplomatic agreement in place that may affect criminal or civil jurisdiction over civilians by the host nation (HN).

II.D.1. Different Classifications of Civilians Exist Under Regulations/Directives

For DoD civilians deployed to support military operations overseas, the umbrella regulation is DoD Directive 1404.10, *Emergency-Essential (E-E) DoD U.S. Citizen Civilian Employees* (10 Apr. 1992).[70] The Army implementing regulations, also referenced by Marines, are Department of the Army (DA) Regulation 690-11, *Planning for Use and Management of Civilian Personnel in Support of Military Contingency Operations*,[71] and DA Pamphlet 690-47, *DA Civilian Employee Deployment Guide.*[72] An

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[69] *See generally* Major Lisa L. Turner & Major Lynn G. Norton, U.S. Air Force, *Civilians at the Tip of the Spear*, 51 A.F. L. REV. 1 (2001).

[70] U.S. DEP'T OF DEFENSE, DIR. 1404.10, EMERGENCY-ESSENTIAL (E-E) DoD U.S. CITIZEN CIVILIAN EMPLOYEES (10 Apr. 1992) [hereinafter DoD DIR. 1404.10].

[71] U.S. DEP'T OF ARMY, REG. 690-11, PLANNING FOR USE AND MANAGEMENT OF CIVILIAN PERSONNEL IN SUPPORT OF MILITARY OPERATIONS (14 Sept. 1990) [hereinafter AR 690-11]. This regulation subsequently was updated 26 May 2004, with an effective date of 26 June 2004.

"emergency-essential" employee is a direct-hire DoD employee who fills an "E-E civilian position" and who is expected to sign a "DoD Civilian Employee Overseas Emergency-Essential Position Agreement."[73] An "E-E civilian position" essentially is a position that is located overseas during a crisis in support of a military operation, that is required to ensure the success of combat operations, and that cannot be converted to a military position.[74]

The regulatory scheme governing contractors is governed by DoDI 3020.41, *Contractor Personnel Authorized to Accompany the U.S. Armed Forces* (3 Oct. 2005).[75]

II.D.2. Status under the Law of War

Under the Geneva Conventions, contractors fall into the category of "persons who accompany the armed forces," but are not members of that force.[76] Consequently, they are not "combatants" under the generally accepted view that combatants include individuals who meet the criteria for prisoner of war (POW) status enumerated in Articles 4.A(1), (2), (3) and (6) of the Third Geneva Convention (GC III).[77]

As civilians accompanying the armed forces in the field, in accordance with Article 4.A(4) and (5) of the Third Geneva Convention, contractors are, however, entitled to POW status if captured.[78] (NOTE: Other civilians accompanying the armed forces are also entitled to POW status, such as war correspondents and persons responsible for welfare of the armed services.) Contractors in an active theater of operations during armed conflict are at risk of incidental injury as a result of enemy operations. Moreover, a contractor may be subject to intentional attack for such time as he or she takes a direct part in hostilities. DoDI 3020.41, para 6.1.1 lists those things considered "indirect participation that are permitted to contractors. However, all such activities should be given legal analysis to determine whether the activity would constitute direct or indirect participation in hostilities.[79]

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[72] U.S. DEP'T OF ARMY, PAM. 690-47, DA CIVILIAN EMPLOYEE DEPLOYMENT GUIDE (1 Nov. 1995) [hereinafter DA PAM. 690-47].

[73] *See DoD* DIR. 1404.10, para. E2.1.4.

[74] *See id.*, para. E2.1.5.

[75] DoDI 300.41, CONTRACTOR PERSONNEL AUTHORIZED TO ACCOMPANY THE U.S. ARMED FORCES (3 OCT 2005).

[76] *See* GC III, Art. 4A(4)

[77] Thus, members of the armed forces, and militias and volunteer corps forming part of such armed forces, of a Party to the conflict are combatants under Article 4.A(1) of the Convention.[77] Moreover, members of other militias and volunteer corps are combatants under Article 4.A(2) of the convention if they: (a) are commanded by a person responsible for his subordinates; (b) have a fixed distinctive sign recognizable at a distance; (c) carry arms openly; and (d) conduct their operations in accordance with the laws and customs of war. *Id.* art. 4.A(2)

[78] See DoDI 3020.41 at paragraph 6.1.1

[79] *See* GC III, Art. 85 (defining acts of perfidy). *See also,* E-mail from Mr. Hays Parks, Office of the General Counsel, Department of Defense, to Colonel Michael W. Meier, Office of the Legal Advisor,

II.D.3. Civilians' Status Impacts Their Privileges/Liabilities

The Department of Defense uses contractors to provide U.S. forces that are deployed overseas with a wide variety of services because of force limitations and a lack of needed skills. These services are acquired through normal contracting procedures as well as through the Logistics Civil Augmentation Program (LOGCAP).[80] The types of services contractors provide to deployed forces include communication services, interpreters, base operations services, weapons systems maintenance, gate and perimeter security, intelligence analysis, and oversight of other contractors.[81]

Uniforms and Weapons

Judge advocates should also be aware that as civilian employee/contractor issues arise, the outcome will differ depending on whether the non-military member is a DoD civilian or a contract employee. Regarding uniforms and weapons for E-E employees, DoD Directive 1404.10 states that "[i]t is not a violation of the law of war for an E-E employee to wear a uniform or to carry a weapon for personal defense while accompanying a military force" and that civilian employees "may be issued a weapon for personal defense on request by the employee, *if approved by the DoD Component commander, theater commander, or other authorized official.*"[82] DA Pamphlet 690-47 goes further to state that "only government issued sidearms/ammunition are authorized" and that "familiarization training will be conducted in accordance with FM 23-35 [the then-existing Army training manual on pistol handling and marksmanship]."[83] The Pamphlet also states that "Organization Clothing and Individual Equipment (OCIE) will be issued to emergency-essential personnel and other civilians who may be deployed in support of military operations."[84]

Chairman, Joint Chiefs of Staff, subject: Contractors (4 May 2004) ; Memorandum, International Law Division, Office of The Judge Advocate General, U.S. Army, for Lieutenant Colonel Lind, subject: Coalition Provisional Authority (CPA) Program Management Office (PMO) Statement of Work (SOW) Reconstruction Security Support Services, para. 3 (15 Mar. 2004) [hereinafter OTJAG Memorandum] ("when contractors take up arms and engage in combat activities going well beyond the use of small arms for individual self defense, they are acting as soldiers without having the legal status or protections of soldiers.")

[80] *See* U.S. DEP'T OF ARMY, REG. 700-137, LOGISTICS CIVIL AUGMENTATION PROGRAM (16 Dec. 1985) [hereinafter AR 700-137] (defining the LOGCAP as "The Army's premier capability to support global contingencies by leveraging corporate assets to augment Army current and programmed Combat Support/Combat Service Support (CS/CSS) force structure).

[81] U.S. General Accounting Office Report to the Subcommittee on Readiness and Management Support, Committee on Armed Services, U.S. Senate, Contractors Provide Vital Services to Deployed Forces but Are Not Adequately Addressed in DoD Plans (June 2003).

[82] *See DoD* DIR. 1404.10 para. 6.9.8 (emphasis added).

[83] DA PAM. 690-47, para. 1-12. The current version of FM 23-35 is U.S. DEP'T OF ARMY, FIELD MANUAL 3-23.35, COMBAT TRAINING WITH PISTOLS, M9 AND M11 (25 June 2003).

[84] DA PAM. 690-47, para. 1-13. Appendix C to DA PAM. 690-47 lists out the OCIE available for issue.

The rules for contractors are different. For uniforms, AR 715-9 states, "Contractors accompanying the force are not authorized to wear military uniforms, except for specific items required for safety or security, such as: chemical defense equipment, cold weather equipment, or mission specific safety equipment The DoDI governing contractors echos the general restriction. However, DoDI 3020.41 does permit Combatant Commanders to authorize "certain contingency contractor personnel" to wear uniform items for "operational reasons." In such cases distinctive patches or name tapes must be used so as to distinguish government contractors from uniformed military personnel.[85]

The DoDI also governs weapons possession by contractor personnel. The possession of personally owned weapons by contractors accompanying the force is prohibitied.[86] However, Combatant Commanders may authorize contractors to carry weapons for their personal defense in which case it will be set forth in the contract.[87] In addition to the authority granted by the combatant commander, the individual contractor must not be prohibited from possessing a firearm under United States law and must voluntarily agree to accept the weapon.[88] The government is responsible for providing appropriate weapons familiarization before the weapon is issued.[89]

Contractors possessing weapons must be advised that the unlawful use of the weapon could subject them to civil or criminal liability under US or local national laws.[90] Further, JAs must be aware of any limitations placed upon the possession or regulation of weapons from sources such as SOFAs, bilateral agreements, host nation law if applicable, and other regulatory schemes. In Iraq, JAs should familiarize themselves with CPA Order 17 as modified by CPA Order 100 which provides guidance concerning immunities and the possession of weapons by civilians and private contractors directly supporting coalition forces.

During OIF, U.S. contractor personnel were killed, injured, or taken hostage by Iraqi insurgents. Contractors in Afghanistan were also at risk. Therefore, many wanted to carry personal firearms for their own protection. In fact, some Coalition Forces contractor employees were accustomed to receiving permission from the host nation in which they had worked previously to possess a privately-owned weapon.[91] The USCENTCOM GO-1A, however, prohibited the "[p]urchase, possession, use or sale of privately owned firearms, ammunition, explosives, or the introduction of these items into the USCENTCOM AOR [area of responsibility]."[92] In addition, although some U.S.

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[85] DoDI 3020.41 at paragraph 6.2.7.7.

[86] Id. at 6.2.7.8.

[87] Id. at 4.4.1. to 4.4.2.

[88] Id. at 6.3.4.1.

[89] Id.

[90] Id.

[91] *See* Weapons Possession Information Paper, para. 4.a.

[92] USCENTCOM GO-1A, para. 2.a.

contracts included language permitting contractor employees to possess weapons for their personal protection with the authorization of the theater commander, many contracts did not address the issue.

Legal opinions were consistent that merely carrying a weapon for self defense does not abrogate a contract employee's status as a person accompanying the force, nor does it make them a combatant not within the protections of the Third Geneva Convention regarding status as a POW. For instance, the OSJA, CJTF-7, found that contractors who are issued weapons to protect their person and property, "run little risk of being classified as combatants or mercenaries under international law" because they are "only ensuring their own protection, not taking an 'active part in the hostilities.'"[93]

Joint policy recognizes the international law issues involved in arming contract personnel. It provided that as a general rule, contractor personnel accompanying the U.S. forces should not be armed. "Regardless of prior military experience or reserve status, contract personnel are not military personnel."[94] Moreover, as the Joint policy states "[i]ssuing weapons to contractor personnel deployed in an uncertain or hostile environment can cloud their status, leaving them open to being targeted as a combatant."[95] Joint policy does, however, provide that contractors may be issued weapons for their personal protection if consistent with host nation law and not precluded by the law of armed conflict. In these limited cases, the geographic commander must authorize carrying weapons and the contractor must comply with military regulations regarding firearms training and safe handing. Underlying any authorization to carry firearms, of course, is that it must be consistent with the terms of their contract.[96] The Army policy explains this concept further: [U]nder certain conditions . . . [contractors] may be allowed to arm for self-defense purposes. Once the combatant commander has

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[93] Information Paper, Office of the Staff Judge Advocate, Combined Joint Task Force 7, subject: Legal Bases for Maximizing Logistics Support in an Operational Environment Using Contracted Security, para. 2 (3 Feb. 2004) [hereinafter CJTF-7 Information Paper] . The Information Paper also looked at the definition of mercenary found in the 1977 Protocol 1 Additional to the Geneva Conventions, article 47, which defines "mercenaries" as a person who

(a) is specially recruited locally or abroad in order to fight in an armed conflict;
(b) does, in fact, take a direct part in the hostilities;
(c) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promise or paid to combatants of similar ranks and functions in the armed forces of that Party;
(d) is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict;
(e) is not a member of the armed forces of a Party to the conflict; and
(f) has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces.
The 1977 Protocols Additional to the Geneva Conventions, art. 47(a), December 12, 1977, 16 I.L.M. 1391.

[94] JOINT PUB. 4-0, app. V., para. 13b; *see also* FM 3-100.21, app. 6 ("[t]he general policy of the Army is that contractor employees will not be armed.").

[95] JOINT PUB. 4-0, app. V., para. 13b.

[96] *Id.See also DoDI* 3020.41 at para. 6.3.4.1. to 6.3.5.4.

approved their issue and use, the contractor's company policy must permit its employees to use weapons, and the employee must agree to carry a weapon. When all of these conditions have been met, contractor employees may only be issued military specification sidearms, loaded with military-specification ammunition. Additionally, contractor employees must be specifically trained and familiarized with the weapon and trained in the use of deadly force in order to protect themselves. Contractor employees will not possess privately owned weapons. When determining to issue weapons to a contractor the combatant commander must consider the impact this may have on their status as civilians authorized to accompany the force.[97]

The lessons learned regarding authorizing DoD contract employees to carry firearms for their personal protection are many. First, such a decision must be made by the combatant commander, or his delegee, on a case-by-case basis. According to Joint policy, which is based on international law, force protection should be the responsibility of the armed forces. If a decision is made to allow contractor employees to carry weapons for their personal protection, the legal advisor must review the contract to ensure it is allowed and must consider many questions. For example, if the contractor is requesting that all of his employees be armed for their personal protection, will a military weapon be issued to each and every employee? If not, upon what basis will a determination be made to selectively arm particular personnel? What limitation will be placed on the personnel to be issued weapons—U.S. citizens, third country nationals, local nationals? Who is accountable for each weapon issued? Who will exercise command and control? Questions regarding training, including training on the use of the weapon and use of force rules must be answered. Issues regarding improper use of force by a contractor with a U.S. government issued weapon must also be considered. What happens if a contractor uses his or her weapon not in self-defense, but in an offensive manner? Will the military be subject to a claim of wrongful death because it armed the contractor?

Regarding Claims, the Federal Claims Act (FCA) does not provide any mechanism to pay claims for damage caused by contractors.[98] Contractors and other civilians accompanying the force play a large role in present-day military operations. Simply denying claims caused by contractor personnel caused difficulties for JAs and commanders alike, as in the eyes of an Iraqi claimant, there was little to distinguish between U.S. contractor employees and U.S. Forces. Accordingly, claimants would attribute any damage to their property generically as caused by U.S. Forces. To resolve this difficulty, the 101st Airborne Division recommended amending the FCA to allow for payments in such instances, or to amend contracts to permit reimbursement for paying these claims.[99]1043 However, the issue has not been resolved, and any amendment of the FCA would, of course, need to be accomplished by legislation.

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[97] FM 3-100.21, Chap. 6.

[98] *See* U.S. DEP'T OF ARMY, REG. 27-20, CLAIMS, para. 2-40 (1 July 2003) (describing as a threshold issue that claims are not payable for damage caused by contractors).

[99] 101st ABN DIV AAR, at 23.

The Logistics Civil Augmentation Program (LOGCAP) contract is designed to be a force multiplier by providing logistical support for the deployed force.[100] Although it is generally perceived to work well, there remain some difficulties with performance under it to which judge advocates should be attentive. The primary (initial) problem was disunity of command. Without a centralized process for requesting logistics support, U.S. units yanked contractors from job to job. Besides being inefficient for work already contracted for, this added costs for those jobs that were not originally estimated for. The accessibility of the contractor meant that costs increased and productivity diminished because the contractor was frequently pulled from Project A and sent to Project B, which sometimes was unauthorized (a sort of "mission creep"). With no central authority to prioritize requests for logistics support, various commanders and senior officers in theater imposed their individual and sometimes conflicting priorities on contractors.[101] To administer the contract efficiently (to avoid unauthorized commitments), communication links were established between the headquarters and the contractor, and units were told to seek LOGCAP support through the headquarters rather than going directly to the contractor. To enforce this from the contractor side, the unit made clear that it would not reimburse unauthorized work—that done at the request of someone other than the designated point of contact.[102]

Medical Care

Another common issue for JAs was entitlement to DoD medical care. Generally, during combat operations non-coalition personnel were not entitled to full medical care by the U.S. military. These personnel were treated only for injuries that threatened their life, limbs, or eyesight.[103] Nevertheless, U.S. military medical personnel ordinarily treated individuals injured by coalition forces, regardless of their injuries. Additionally, as the operation continued and more contract personnel entered the theater, the issue of providing medical care to DoD contractor personnel arose. Although the largest DoD contractor in theater, KBR (Kellogg, Brown and Root), brought its own health care, most contractors did not. Moreover, it proved very difficult, if not impossible, to locate these contractors' agreements with the U.S. Government to discern whether the provision of

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[100] 1AD-AAR, at 52. *SEE* U.S. DEP'T OF ARMY, REG. 700-137, LOGISTICS, CIVIL AUGMENTATION PROGRAM (LOGCAP) (16 Dec. 1985). The Corps of Engineers administers the contract. However, as one experienced judge advocate noted, units using the services provided by LOGCAP will want legal advice concerning the contract from their own contract attorney. Therefore, the deploying contract attorney should immediately get a copy of the LOGCAP contract, as well as the telephone number for the point of contact for administration. MAJ Susan Tigner, comments *in* OJE-AAR, Vol. I at 236.

[101] Memorandum, Contract Law Division, Office of the Judge Advocate, U.S. Army Europe, subject: Lessons Learned (17 Jan. 1996). *See also* Memorandum, MAJ Paul D. Hancq, for Chief, International Law and operations Division, subject: Problems with LOGCAP Contract (6 Jan. 1996).

[102] *See* MAJ Susan Tigner, comments *in* OJE-AAR, Vol. I at 237 ("That really got their attention").

[103] *See* CFLCC Rules of Care, OEF/OIF Vol. II, Appendix G-6.

medical care was provided for in the contract.[104] Army policy permits provision of medical and other support to contractor employees deployed with military forces on a reimbursable basis. The lesson here is that JAs must anticipate that non-DoD personnel—from local nationals, to DoD contractors, to other U.S. Government Agency personnel, to coalition forces—will request medical care and treatment from U.S. military medical personnel. JAs must be prepared to assist their commanders in determining who is entitled to medical care. A matrix, such as the one developed by CFLCC, is an excellent way to inform commanders and medical personnel of who is entitled to care and for what injuries.

Some issues involving the provision of medical care to contractors authorized to accompany US Forces have been clarified by a recent DoDI. DoDI 3020.41 notes the limitations of medical care available in many austere environments common to modern contingency operations. This DoDI states that the DoD "may provide resuscitant care, stabilization, hospitalization at level III MTFs, and assistance with patient movement in emergencies where loss of life, limb or eyesight could occur."[105] All costs associated with transportation to and treatment at a "selected civilian facility" are "reimbursable to the government."[106] These concepts are further amplified in the text of the DoDI.[107]

II.D.4. Criminal Jurisdiction Over Civilians

Lastly, it is very important to identify the proper authority for exercising criminal jurisdiction over civilians accompanying the force and "battlefield" contractors. In time of declared war, contractor employees would be subject to the Uniform Code of Military Justice. However, there has not been a declared war since World War II. Not having a declared war has substantial effects. In Haiti only administrative options were available to a commander faced with contractor personnel who flouted command orders.[108]

There are several ways that jurisdiction may be exercised over civilians and contractors. Determining whether criminal jurisdiction exists over contractors may depend upon the "type" of contractor involved in misconduct, as well as any applicable written provisions within the contract itself.[109] Furthermore, civilians may be subject to

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[104] *See* V Corps AAR Transcript, (comments from Captain Kirsten M. Mayer, JA, 30th Medical Brigade, V Corps).

[105] DoDI 3020.41 at para. 6.3.8.

[106] Id.

[107] Id. at para. 6.3.8.1 to 6.3.8.5.

[108] *See* Passar AAR, at para. 6i.

[109] *See* U.S. DEP'T OF ARMY, FIELD MANUAL 3-100.21, CONTRACTORS ON THE BATTLEFIELD (6 Nov. 2002) [hereinafter FM 3-100.21]; U.S. DEP'T OF ARMY, REG. 715-9, CONTRACTORS ACCOMPANYING THE FORCE (29 Oct. 1999); Policy Letter, Coalition Forces Land Component Command, subject: Uniform Policy Letter (26 Nov. 2002); Policy Memorandum, Headquarters, U.S. Dep't of the Army, subject: Contractors on the Battlefield (12 Dec. 1997); U.S. DEP'T OF ARMY, FIELD MANUAL 100-10-2, CONTRACTING SUPPORT ON THE BATTLEFIELD (4 Aug. 1999) [hereinafter FM 3- 100.21]. *See also* Policy Memorandum, Coalition Forces Land Component Command, subject:

the Military Extraterritorial Jurisdiction Act of 2000 (MEJA), which establishes Federal jurisdiction over offenses committed outside the United States by persons employed by or accompanying the Armed Forces, or by members of the Armed Forces who are released or separated from active duty prior to being identified and prosecuted for the commission of such offenses, and for other purposes.[110]

Punishing civilians for misconduct will vary, depending upon the facts and circumstances involved, as well as the severity of the offense(s). As discussed above, jurisdiction over criminal acts will likely be handled by MEJA. For offenses that do not rise to the level of criminal conduct for prosecution under MEJA, commanders have several options, including sending the offender back to the continental United States (CONUS), requesting that a reprimand be given or that the offender's position be terminated by the contracting agency. Furthermore, "battlefield" contractors need to understand that they must be familiar and comply with applicable Department of Defense regulations, directives, instructions, general orders, policies, and procedures, U.S. and host nation laws, international laws and regulations, and all applicable treaties and international agreements (e.g., Status of Forces Agreements, Host Nation Support Agreements, Geneva Conventions, and Defense Technical Agreements) relating to safety, health, force protection, and operations under their contract.[111]

[See also Military Justice Section VII.J. of this Compendium for additional information pertaining to Military Justice and Civilians Accompanying the Force.]

Managing Contractors on the Battlefield (17 Mar. 2003) (distinguishing between contingency contractors (contractor(s) brought to the theater in support of Operation Enduring Freedom/Iraqi Freedom) and sustainment contractors (contractor(s) who come to theater on a permanent change of station status)).

[110] See 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) (implementing 18 U.S.C. 3261-67, Military Extraterritorial Jurisdiction Act (MEJA), as required by 18 USC § 3266, as approved by Deputy Secretary of Defense Paul Wolfowitz on March 3, 2005). Department of Defense instruction 5525.11 calls upon each of the Uniformed Services to implement MEJA into their respective service regulations. Note that MEJA is anticipated to apply during times of declared war as well as peacetime.

[111] *See* Solicitations Provisions and Contract Clauses, 48 CFR § 5152.225-74-9000(a)(3) (2004). The text of the regulation continues, stating that the Contractor shall ensure that all personnel working in the AO comply with all orders, directives, and instructions of the combatant command relating to noninterference with military operations, force protection, health, and safety.

II.E. DETENTION OPERATIONS AND PRISONER OF WAR ISSUES

If there is one common thread taken from military operations over the last 12 years with regard to detainee operations, it is that there must be a system in place for the capture, evidence collection, processing, questioning, tracking, internment, prosecution, and subsequent release of captured individuals prior to deployment. While the status of said detainees is of great legal significance, it will be determined at a level well above that of the judge advocate working at the tactical or even operational level.

Of much greater immediate importance than the detainees' status is the development, training and implementation of a comprehensive system to flawlessly accomplish the above. Detainee operations will not only occupy an inordinate amount of a command's legal office's time, but they also represent a potential media/public relations landmine as was demonstrated at Abu Ghraib.

II.E.1. Article 5 Tribunals

When the status of a detainee is in doubt, the GPW, Article 5 provides that the detainee shall receive EPW treatment until their status is determined by a "competent tribunal" (Article 5 tribunal).[112] The GPW does not provide guidance concerning the tribunal's composition[113], operation, or standard of proof.[114] AR 190-8 provides implementing guidance. Under AR 190-8, the person whose status is to be determined enjoys limited procedural rights, and status is determined by majority vote based on a preponderance of the evidence.[115] Possible determinations are; "(a) EPW, (b) Recommended [Retained Personnel], entitled to EPW protections . . . , (c) Innocent civilian who should be immediately returned to his home or released, [or] (d) Civilian

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[112] *See generally* 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].

[113] *See also, U.S. CENTRAL COMMAND, REGULATION 27-13 (7Feb. 95) LEGAL SERVICES, CAPTURED PERSONS. DETERMINATION OF ELIGIBILITY FOR ENEMY PRISONER OF WAR STATUS* [hereinafter CCR 27-13]. This regulation provides guidance on determining when Article 5 tribunals are required as well as guidance on how to conduct them when they are required. The appendices include a sample tribunal appointment letter, tribunal procedures, the procedures do require at least one judge advocate be a member of the tribunal, a sample tribunal report, and a script for conducting a hearing.

[114] The GPW, art. 5 states only that the tribunal must be "competent." Thus, it would appear that the detaining power enjoys wide latitude in the operation of tribunals.

[115] U.S. DEP'T OF ARMY, REG. 190-8, ENEMY PRISONERS OF WAR, RETAINED PERSONNEL, CIVILIAN INTERNEES AND OTHER DETAINEES (1 Oct. 1997) [hereinafter AR 190-8]. "This is a multi-service regulation. It applies to the Army, Navy, Air Force and Marine Corps and to their Reserve components when lawfully ordered to active duty under the provisions of Title 10 United States Code." *Id.* AR 190-8 is numbered by other U.S. military services as OPNAVINST 3461.6 (Navy), AFJI 31-304 (Air Force), and MCO 3461.1 (Marine Corps), but it is the same regulation. The Article 5 tribunal shall be composed of three officers, one of whom must be a field grade officer. *Id.* para. 1-6c. The senior officer serves as the tribunal president, and another non-voting officer, preferably a JA, serves as the recorder. *Id.*

Internee who for reasons of operational security, or probable cause incident to criminal investigation, should be detained."[116]

The portion of AR 190-8 cited above mentions two additional detention categories—Retained Personnel (RP) and Civilian Internees (CIs). RP are medical and religious (chaplains) personnel detained with a view to their assisting EPWs.[117] CIs are civilians interred by an occupying power for reasons of imperative security.[118]

An Article 5 tribunal is only required "[s]hould 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 [GPW] Article 4 . . . ."[119] In other words, detained persons clearly entitled to CI, RP, or EPW status should be granted that status without a tribunal.[120] Likewise, should there be no doubt on the part of the detaining power that a detained person is an unprivileged belligerent—spy, saboteur, brigand, mercenary—an Article 5 tribunal is unnecessary and the person need not be granted EPW status if further detained.

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[116] Id.

[117] *See* GPW, art. 33. While retained personnel (RP) are not considered EPWs, they enjoy the same rights and protections as EPWs and are subject to EPW camp discipline. *Id.*

[118] GC, art. 78 ("If the Occupying Power considers it necessary, *for imperative reasons of security*, to take safety measures concerning protected persons, it may, at the most, subject them to assigned residence *or to internment.*") (emphasis added). CIs have the right to appeal their initial status determination and have their status reviewed every six months, if possible. *Id.* In addition, CIs may not be interred with EPWs or other detained personnel. *Id.* art. 84. *See also id.* arts. 41-43 (providing alternate authority to inter civilians in certain as those awaiting status determination and entitled to EPW treatment until their status is determined

[119] *See* GPW, art. 5.

[120] *Cf.* Memorandum, Major Alvin "Perry" Wadsworth, 12th LSO, subject: OIF After Action Report – Detainee Outline: Articles 5 (GPW) and 78 (GC) para. B (2003) The Geneva Convention, AR 190-8, paragraph 1-6, and CENTCOM REG 27-13 state that Article 5 Tribunals should be performed if there is doubt as to whether a person (read "detainee") who has committed a belligerent act is entitled to EPW status IAW Article 4, GPW. The language appears to make a "belligerent act" a prerequisite to performing an Article 5 Tribunal. This created some confusion in OIF. Coalition forces captured 10,000 people, a vast majority of whom were dressed as civilians. . . . Without conducting a tribunal (or a screening interview) one could not determine whether they committed a belligerent act, much less what their appropriate status was, i.e., EPW, civilian internee, innocent civilian, or retained person. . . . There is no requirement for a service member to be wearing a uniform to be entitled to EPW status. A soldier captured while sleeping in pajamas at a friend's home is still entitled to EPW status, even if he did not commit a belligerent act. On the other hand, a person dressed as a civilian cannot be given EPW status as a default measure simply because we do not know whether he committed a belligerent act. He can be treated as an EPW until his status is determined, but we do not want to give him EPW status and the immunity that comes with it without a proper examination of the circumstances of his case. A person's status dictates what his rights are, how he should be treated, and whether he can be tried. Consequently, determining status is a key component of both the detention process and determinations about disposition – e.g., release/repatriation, hold for security reasons or criminal investigation, or try. **Recommendation:** U.S. forces should implement the Tribunal process when a detainee's status is in doubt regardless of whether there is evidence of a belligerent act. Both CFLCC and V Corps did this. . . . We decided that if status was in doubt and there was doubt as to whether a belligerent act had been committed then a Tribunal process was necessary. When status was in doubt, we either conducted an "Article 5 Screening" interview or an Article 5 Tribunal, the latter being more formal. *Id.*

In past operations, JAs used an informal screening process to make the initial determination whether to release a detainee or to conduct an Article 5 tribunal if classification was not possible after the informal screening.[121] JAs conducted the informal screening based on LOAC principles and limited guidance in AR 190-8 and U.S. CENTCOM Regulation 27-13. Almost all detainees will arrive at the detainee facility with limited or incomplete information concerning the circumstances of their capture. Information from previous detainee interrogations was sometimes available, but, in most cases, no interrogation had been conducted. Because detainees are often untruthful, JAs will have to be creative in searching for inconsistencies in the detainees' stories.[122] One JA noted that these creenings would have presented a good opportunity to collaborate with intelligence personnel in seeking information on war crimes and the location of missing U.S. personnel, but such collaboration did not occur.[123]

Although neither the GPW nor AR 190-8 require that JAs sit on the Article 5 tribunal, in most recent cases, three JAs sat on the tribunal, and a fourth JA served as the recorder.[124] The tribunals sometimes took up to four or five hours to conduct, due in part to their anticipated use as a basis for later war crimes prosecution determinations. After each tribunal, formal findings of fact were prepared, and the detainee was advised of the status determination. Personnel determined releasable were handled as described above. As during the initial screenings, detainees often fabricated stories, and force protection considerations always weighed heavily in status determinations.[125]

Before any tribunals are begun, JAs must develop an Article 5 tribunal standard operating procedure. They must also conduct training for personnel, including interpreters, who would be involved in conducting the tribunals.

II.E.2. Article 78 Reviews

Experience in Iraq demonstrated that judge advocates will be called upon to perform an Article 78 review for civilian detainees under the Fourth Geneva Convention.[126] A good example of an Article 78 review standard is included in this excerpt from Memorandum Number Three from the Coalition Provisional Authority.

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[121] *See* After Action Review Conference, 12th Legal Support Organization and Center for Law and Military Operations, Charlottesville, Va. (12-13 Feb. 2004) [hereinafter 12th LSO AAR].

[122] For example, if the detainee said that he was a farmer, the JA would test his knowledge of information a farmer should know. *See* 12th LSO AAR.

[123] *Id.*

[124] 12th LSO JAs worked with JAs assigned to the 800th MP Brigade and other commands. *See id. See also CCR 27-13* at App. C, para. 3.c., which requires a panel of three commissioned officers, at least one of whom must be a judge advocate for tribunals conducted in the USCENTCOM area of responsibility.

[125] *Id*

[126] Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949 [hereinafter GC IV], *reprinted in*, Int'l & Operational Law Dep't, The Judge Advocate General's Legal Center and School, Law of War Documentary Supplement, 236 (2005).

(a) In accordance with Article 78 of the Fourth Geneva Convention, Coalition forces shall, with the least possible delay, afford persons held as security internees the right of appeal against the decision to intern them.

(b) The decision to intern a person shall be reviewed not later than six months from the date of induction into an internment facility by a competent body established for the purpose of Coalition Forces.

(c) The operation, condition and standards of any internment facility established by Coalition Forces shall be in accordance with Section IV of the Fourth Geneva Convention.

(d) Access to internees shall be granted to official delegates of the ICRC. Access will only be denied delegates for reasons of imperative military necessity as an exceptional and temporary measure. ICRC delegates shall be permitted to inspect health, sanitation and living conditions and to interview all internees in private. They shall also be permitted to record information regarding an internee and to pass messages to and from the family of an internee subject to reasonable censorship by the facility authorities.

(e) If a person is subsequently determined to be a criminal detainee following tribunal proceedings concerning his or her status, or following the commission of a crime while in internment, the period that person has spent in internment will not count with respect to the period set out in Section 6(1)(d) herein.

(f) Where any security internee held by Coalition Forces is subsequently transferred to an Iraqi Court, a failure to comply with these procedures shall not constitute grounds for any legal remedy, but may be considered in mitigation of sentence.[127]

Within seventy-two hours of their arrival at the main detention facility in Iraq, the Detention Review Authority (DRA)—a JA, acting as a magistrate—reviewed the case files and separated them into security internees or criminal detainees.[128] A decision to classify a detainee as a security internee could only be made upon a finding that there was a "reasonable basis" to support the classification.[129] If the detainee was classified as a security internee, the JA would also recommend them for internment or refer the case to an Article 78 Panel. Major criminals were referred to the Iraqi Criminal Court or the Criminal Release Board.[130] The DRA determined a release date for all Minor

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[127] Coalition Provisional Authority, Memorandum No. 3, subject: Criminal Procedures (18 Jun. 2003) .

[128] CJTF-7 Detention SOP, para. 5.r.

[129] *Id.*

[130] Serious crimes" were defined as any crime punishable by more than five years confinement under the Iraqi Criminal Code of 1969. That included: murder, rape, armed robbery, kidnapping, abduction, state infrastructure sabotage, car-jacking, assault causing bodily harm, arson, destruction of property valued at equal to or greater than $500, or inchoate offenses associated with the above. *Id.*

Criminals.[131] If a detainee's status as an EPW was in doubt, the detainee would be referred to an Article V Tribunal to determine whether he qualified for EPW status or for security internee status.

For security internees, the next step under the SOP was to notify the individual of their status in writing and provide them an opportunity to appeal their status and their internment. These rights were given under Article 78, Fourth Geneva Convention.[132] It should be noted that there is a question regarding whether those who were detained under Article 5 of the Fourth Geneva Convention for "suspicion of activity hostile to the security of the Occupying power" are entitled to the appeal rights granted under Article 78, Fourth Geneva Convention. The latter article provides appellate rights if the Occupying Power considers necessary, for imperative reasons of security, to take safety measures concerning protected persons, by subjecting them to assigned residence or to internment. Nevertheless, the CJTF-7 procedure gave all security internees appellate rights.

It is recommended that representatives from the Criminal Investigations Division (CID), MI, MP and JA communities all sit on any Appellate Review Panel to hear the security internees' appeals and recommend either internment until the six-month review or the Article 78 Review and Appeal Board hear the case. The Article 78 Review and Appeal Board can then review the cases for all Security Internees recommended for release, either by the initial Appellate Review Panel or the Six-Month Review Panel.

The Task Force Senior Intelligence Officer C-2 should sit as the President of the board and members of the board should include the MP brigade commander and the SJA or their delegees. The officer in charge of the SJA Joint Detention Operations section can act as the recorder for the board.

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[131] For example, the DRA would release minor criminals within 24 hours for violation of curfews and traffic violations; for discharging a weapon in city limits or being drunk and disorderly, the DRA would release the individual after ten days. *See* Internment Boards, Operation Iraq Freedom, Power Point Presentation (undated).

[132] Article 78 provides: If the Occupying Power considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons, it may, at the most, subject them to assigned residence or to internment. Decisions regarding such assigned residence or internment shall be made according to a regular procedure to be prescribed by the Occupying Power in accordance with the provisions of the present Convention. This procedure shall include the right of appeal for the parties concern. The Appeals shall be decided with the least possible delay. In the event of the decision being upheld, it shall be subject to periodic review, if possible every six months, by a competent body set up by the said Power. GC IV, art. 27.

II.E.3. Code of Conduct

Judge advocates will no doubt find themselves expected to provide training and classes on the Code of Conduct prior to any contingency operation. A basic understanding of its tenets and background is important.

The Code of Conduct (CoC) is the guide for the behavior of military members who are captured by hostile forces. The Code of Conduct, in six brief Articles, addresses those situations and decision areas that, to some degree, all military personnel could encounter. It includes basic information useful to U.S. POWs in their efforts to survive honorably while resisting their captor's efforts to exploit them to the advantage of the enemy's cause and their own disadvantage. Such survival and resistance requires varying degrees of knowledge of the meaning of the six Articles of the CoC.[133] The code is reprinted below and there are several excellent training packages available at the CLAMO website.

Article I

I am an American, fighting in the forces which guard my country and our way of life. I am prepared to give my life in their defense.

Article II

I will never surrender of my own free will. If in command, I will never surrender the members of my command while they still have the means to resist.

Article III

If I am captured I will continue to resist by all means available. I will make every effort to escape and to aid others to escape. I will accept neither parole nor special favors from my captors

Article IV

If I become a prisoner of war, I will keep faith with my fellow prisoners. I will give no information or take part in any action which might be harmful to my comrades. If I am senior, I will take command. If not, I will obey the lawful orders of those appointed over me and will back them up in every way.

[133] http://usmilitary.about.com/od/justicelawlegislation/a/codeofconduct6.htm

Article V

When questioned, should I become a prisoner of war, I am required to give name, rank, service number, and date of birth. I will evade answering further questions to the utmost of my ability. I will make no oral or written statements disloyal to my country and its allies or harmful to their cause.

Article VI

I will never forget that I am an American, fighting for freedom, responsible for my actions, and dedicated to the principles which made my country free. I will trust in my God and in the United States of America.

Training for a peacekeeping operation usually includes some combination of Law of Armed Conflict training, ROE training, and Code of Conduct training. Code of Conduct training for peacekeeping operations is a modified form of Code of Conduct training for wartime missions.[134] For example, Article III of the Code of Conduct requires prisoners of war to make every effort to escape. In a peacekeeping operation, the provisions of the Geneva Conventions affording prisoner of war protections may not apply. As a result, U.S. soldiers detained by a force during a peacekeeping mission may be subject to the domestic criminal laws of the detaining nation. Because escape from government detention is a crime in most countries, a failed escape attempt may provide the detaining country with further justification to prolong detention by adding additional criminal charges. Because of the potential for additional criminal charges and prolonged detention, escape from detention is discouraged except under unique or life-threatening circumstances under the Peace Operation variation to the Code of Conduct.[135] JAs must understand these distinctions and be prepared to conduct the necessary training.

II.E.4 Detainees and Detention Operations

Judge advocates must begin early in the planning stages to assist the Operations section in the development of a detention SOP. Just a few of the details must include making detailed arrangements for locating a building of appropriate size and sturdiness, for processing, safeguarding, feeding, and clothing the detainees. Plans must also consider providing health care, questioning detainees for intelligence purposes, and responding to requests for access made by attorneys, human rights groups, and members of the media.[136] Given the ultimate responsibility they bear in administering the facility,

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[134] *See* U.S. DEP'T OF DEFENSE, INSTR. 1300.21, CODE OF CONDUCT (COC) TRAINING AND EDUCATION ¶ E3.3 (8 Jan. 2001) [hereinafter DoDI 1300.21]; *See generally* U.S. DEP'T OF DEFENSE, DIR. 1300.7, TRAINING AND EDUCATION TO SUPPORT THE CODE OF CONDUCT (COC) (8 Dec. 2000).

[135] *See DoD*I 1300.21, ¶ E3.10.5.

[136] *See, e.g.*, Colonel Ted B. Borek, *Legal Services in War,* 120 MIL. L. REV. 19, 47 (1988) (describing judge advocate involvement in detention issues in Grenada); Center for Law and Military Operations, Just Cause After-Action Seminar Executive Summary, para. III.C (26-27 Feb. 1990) ("Over 4100 persons were detained during the first few days of Just Cause.").

military police must be involved at every stage of the planning process. Peculiarities of the locale must receive careful attention. Will there be any buildings suitable to house the detainees? If not, when will the flow of material into the country permit the erection of a shelter? What is the extent of the disparity between United States standards of detention and local living conditions?[137]

The plan should also anticipate transfer of responsibility for the facility to the host government. Bolstering the legitimacy of that government militates in favor of such a transfer, as does relieving scarce military police assets from a burdensome mission. Usually, the transfer will occur in phases.

In addition to the detention facility lessons discussed above, operating a detention facility will lead to a host of issues. Some of these issues are listed for consideration.

- Care for detainees with medical conditions (including pregnancy)
- Care for detainees with mental conditions
- Handling juvenile detention
- Force-feeding hunger-striking detainees
- Detainee escape, recapture, and misconduct
- Press interviews with detainees
- Access to detainees by family, local medical personnel, and local court personnel
- Religious accommodation
- Detainee labor and payment
- Use of force within the detention facility

The JAe must regularly review conditions of each detention facility to ensure the proper treatment of detainees. Experience has shown that it is not enough to merely show up and "inspect" such a facility. Questioning the detainees about their treatment and using that information to identify established patterns of abuse is one of the best methods to detect a problem in a facility.

Judge advocates can expect regular visits from such organizations as the International Committee of the Red Cross (ICRC), the Organization for Security and Cooperation in Europe (OSCE), United Nation's Children's Fund, Amnesty International, and other human rights organizations. Judge advocates typically accompany the representatives from these international organizations.

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[137] The Staff Judge Advocate for the MNF discussed the implications of this question as follows: The material on detention facilities in [the draft *Haiti Lessons Learned* report] is crucial, especially when we are not an occupying force. Much work needs to be done in this area. However, a problem we really need to look at is the difference between what we as Americans consider acceptable physical standards and what the local populace is experiencing. More specifically, when detainees were afflicted with any unusual diseases? With regard to this last question, those who planned the detention facility and those who executed the plan grappled with how to provide medical care to HIV-infected Haitians.

Handling detainee property from the point of capture to the ultimate confinement facility will also be a challenge. It has proven difficult to return property to detainees because their belongings sometimes got lost or misdirected during transport or some detainees had tampered with their documentation.[138] When Camp Bucca, Iraq first opened, detainee property and currency were intermingled in a large metal cargo container. Although this situation was quickly remedied, some detainees inevitably left without being able to reclaim their property. In the future, U.S. forces must have a detailed plan to properly account for and return seized property.

Media relations also posed various challenges. In some cases, reporters confused matters by using incorrect terminology—combatant, non-combatant, unlawful combatant, belligerent, non-belligerent, terrorist, insurgent—to refer to detainees. In other cases, media members took pictures of detainees in violation of U.S. policy.[139] Although most media members agreed not to take or disseminate pictures of detainees, some violated this policy and were sent home.[140]

III. E.5. Interrogation

Perhaps no other area of combat operations has generated as much controversy and legal oversight as interrogations. As a result of the many undefined and novel aspects of the Global War on Terror (GWOT)--including the enemy's composition and tactics--established LOAC tenets are consistently tested with respect to detainee operations. Judge advocates were at the forefront in helping commanders address their legal obligations in detainee operations.

The JA on the ground must be prepared to address issues concerning detainee status and treatment in the absence of guidance from higher authorities, and adapt local procedures to implement guidance from the highest levels of the United States government. For example, enemy forces in Afghanistan consisted primarily of elements of the Taliban regime and the al Qaeda terrorist organization.[141] The Taliban regime did not control all Afghan territory, nor did it enjoy wide international recognition as Afghanistan's legitimate government.[142] Al Qaeda is a transnational terrorist organization that controls no territory and has no fixed location.[143] Taliban and al Qaeda forces

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[138] *Id.*

[139] *See* briefing by COL Richard E. Gordon, former Staff Judge Advocate, Coalition Forces Land Component Command, to the Army Judge Advocate General's Corps Graduate Course in Charlottesville, Va. (20 Feb. 2004) [hereinafter Gordon Briefing].

[140] Id.

[141] *See CLAMO's OEF/OIF Lessons Learned Volume I,* Section II for a detailed discussion of combat operations in Afghanistan.

[142] *See id.*

[143] *See id.*

sometimes fought together, and both groups essentially ignored the LOAC.[144] So what was the status of any individual captured from these two organizations?

The legal issues associated with detainee operations in Afghanistan were initially unresolved. The following discussion developing these legal issues in their operational context draws heavily upon the experiences of the 10th Mountain Division SJA, who was one of the first JAs to deploy with conventional forces in support of OEF. In mid-December 2003, the 10th Mountain Division deployed a brigade combat team to Sherbergan in Northern Afghanistan. One of the Northern Alliance generals, General Dostum, had captured over 3800 Taliban and Al Qaeda prisoners and was keeping them imprisoned in one of his prisons. These were not prisons that Americans are familiar with. Instead, picture mud cells with no sanitation, no electricity, no climate control, no creature comfort of any kind, packed with men and spread out over an area the size of about ten football fields. General Dostum was and still is a very powerful warlord who controls most of northern Afghanistan. He offered to let the United States screen his 3800 captives to see if we wanted any of them for intelligence purposes or for prosecution. This was a unique opportunity that posed a lot of legal issues: what were our responsibilities for the prisoners' care, feeding, and welfare if we screened them even though they were not under U.S. control or jurisdiction? . . .[145]

> [W]e worked out a deal whereby General Dostum would get some extra help and equipment in exchange for our access to his prisoners. The CG was also concerned about this mission because it would place U.S. soldiers in great danger inside a prison fortress, similar to the one in which CIA Agent Michael Spann was killed during an uprising in Mazar-e-Sharif (MeS) in November. A battalion of 10th Mountain Division infantry, 1-87 Infantry, which was guarding Camp Stronghold Freedom in [Uzbekistan], had been sent to MeS as a Quick Reaction Force to help quell that uprising in November. The brigade commander and G-3 worked out in excruciating detail the techniques, tactics, and procedures (TTPs) that our soldiers would follow to conduct this screen, which was clearly a non-Mission Essential Task List (non-METL) mission that had never been trained for. A JAG officer was sent with the brigade combat team for three important reasons: to protect the CG's equities, to ensure the Geneva Conventions principles were followed as a matter of U.S. policy, and to

[144] *See, e.g.*, Hayden Interview. *See also* Interview with MAJ Dean L. Whitford and SSG Jerome D. Klein, Group Judge Advocate and Legal NCOIC, 5th Special Forces Group, in Charlottesville, Va. (19 Aug. 2003) [hereinafter 5th Group AAR] (noting that Taliban and al Qaeda fighters often feigned surrender to gain a military advantage over their opponents).

[145] Colonel (then Lieutenant Colonel) Kathryn Stone deployed to Uzbekistan in December 2001, moved into Afghanistan in February 2002, and redeployed to Fort Drum, New York on 31 May 2002, about the same time XVIIIth Airborne Corps JAs began arriving. *See* Interview with COL Kathryn Stone, former Staff Judge Advocate, 10th Mountain Division, in Charlottesville, Va. (7 Oct. 03) [hereinafter Stone Interview].

> [liaise] with the International Committee of the Red Cross and the media.[146]

After U.S. personnel had gained access to the Northern Alliance detainees, the 10th Mountain SJA visited the prison where the detainees were being kept. She found that the detainees were being treated humanely and that the procedures JAs had helped develop in Uzbekistan were being implemented "flawlessly."[147] She added: I did not handle any legal issues while I was in Sheberghan. [CPT Soucie] had already taken care of all of them by the time I arrived, because at that point the screening procedure was in place and somewhat routine. One of his issues dealt with whether the press could photograph the prisoners, which was a tricky issue because, technically, the U.S. had no jurisdiction over General Dostum's prisoners at that point, yet Geneva Convention Article 13 prohibits photographing prisoners for the sake of public curiosity. We were also concerned about assuming any level of responsibility for ensuring compliance with the Conventions regarding that group of prisoners since General Dostum, and not the U.S., had control and jurisdiction over them at that point. [CPT Chris Soucie] properly advised that the photographs could be taken, but the press could not photograph either the method of operation, or a prisoner's face. Other issues that Chris handled dealt with the method of DNA collection ([collecting] hair [samples] and swabbing mouths); and whether we could provide on-the-spot medical treatment since we did not "own" the prisoners (we could). An interesting side note is that, about two weeks after the brigade completed the screening operation in Sheberghan, CENTCOM finally sent out a message detailing the procedures that we were supposed to follow. . . . "Thankfully, what we had done was in compliance with CENTCOM's instructions, and we did follow CENTCOM's guidance in our future screening operations."[148]

As the U.S. began detaining personnel, the most difficult unsettled issue was the status of Taliban and al Qaeda detainees.[149] JAs sought guidance from CENTCOM and CFLCC headquarters in Kuwait.[150] Procedures slowly developed, but JAs advised that

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[146] Colonel Kathryn Stone, former Staff Judge Advocate, 10th Mountain Division, Personal Experience Monograph, at 13-14 (2003) [hereinafter Stone Monograph] (emphasis added). Colonel Stone wrote her monograph as a student at the Army War College in Carlisle Barracks, Pennsylvania. The Command Judge Advocate for the Joint Special Operations Task Force–North (Task Force Dagger) also commented: Detainees taken into custody by Northern Alliance forces were treated as their [Northern Alliance] detainees even if the particular force was supported by U.S. special forces teams. Teams were given guidance by and through the [Special Operations Command Central] [C]ommander regarding actions to take in the event of LOAC violations by the supported forces. The supported Afghan forces screened detainees and would turn over any requested by the U.S [such as U.S. citizen John Walker-Lindh]. . . . The bulk of the Northern Alliance detainees taken to Sherbergan were collected after the fall of Mazar-i-Sharif, Taloqan, and Konduz. Supported Afghan forces customarily would release after surrender local Afghans and detain only Al Qaida, foreign fighters, and militant Taliban. Whitford OEF/OIF International Law AAR para. 3.

[147] Id.

[148] *Id.* at 7-8.

[149] Stone Telephone Interview.

detainees should be treated in a manner consistent with the GPW and GC, and this is what happened.[151]

JAs from the XVIIIth Airborne Corps began arriving in May of 2002, and according to the former Combined Joint Task Force 180 (CJTF-180) Chief of Operational Law: "In Afghanistan, it [was] *simple* . . . [detainees were] not granted EPW status and although the US treats them in a manner consistent with the Geneva Conventions and humanely, they do not get all of the rights of the 3rd Geneva Convention."[152] Although the legal issues involved in determining detainee status and treatment were complex, it was simpler for JAs after 7 February 2002, because on that day, President Bush issued the following guidance:

- The President has determined that the Geneva Convention applies to the Taliban detainees, but not to the al-[Qaeda] detainees.
- Al-[Qaeda] is not a state party to the Geneva Convention; it is a foreign terrorist group. As such, its members are not entitled to POW status. Afghanistan is a party to the Convention, and the President has determined that the Taliban are covered by the Convention. Under the terms of the Geneva Convention, however, the Taliban detainees do not qualify as POWs.
- Even though the detainees are not entitled to POW privileges, they will be provided many POW privileges as a matter of policy.[153]

More guidance concerning criteria for potential detainee transport to Guantanamo Bay, Cuba (Guantanamo) for potential criminal prosecution came forth on 25 February 2002. These criteria are classified. The U.S Secretary of Defense retained the authority to

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[150] *See* Memorandum, Majors Nicholas F. Lancaster & J. "Harper" Cook, Office of the Staff Judge Advocate, 101st Airborne Division (Air Assault), for Record, subject: MAJ Lancaster (101st ABN DIV (AASLT) Operational Law) Comments on CLAMO OEF/OIF DRAFT Lessons Learned, para. 2 (18 May 2004) [hereinafter Lancaster & Cook Memorandum] . ("Prior to CJTF-180 arriving in Bagram, there was very little guidance on detainee operations or policy through technical channels. The lesson for early deploying JAs is that they must be prepared to give advice with very little information.").

[151] *See* Stone Telephone Interview.

[152] MAJ Jeff A. Bovarnick, former Chief of Operational Law, CJTF-180, CJTF-180 Notes from the Combat Zone, at 4 (2003) [hereinafter Bovarnick CJTF-180 Notes].

[153] *See* Fact Sheet, the White House, Status of Detainees at Guantanamo at 1, 7 Feb. 2002, *at* http://www.whitehouse.gov/news/releases/2002/02/print/20020207-13.html [hereinafter White House Fact Sheet]; U.S. Secretary of Defense Donald H. Rumsfeld, News Briefing, 8 Feb. 2002, *at* http://defenselink.mil/newsFeb002 (referencing President Bush's decision of 7 Feb. 2002 with respect to al Qaeda and Taliban detainees). Although much of the legal analysis underlying the presidential decisions remains classified, *see* Office of the Staff Judge Advocate, JTF-160, Subject: LEGAL LESSONS LEARNED AT GTMO, at 3 (2002) ("Taliban do not meet the [GPW, Art. 4] criteria of militia who can receive POW status. . . . Taliban are not members of nor possess the attributes of regular armed forces, which requires distinguishing themselves from the civilian population and conducting their operations in accordance with [the] laws and customs of war.").

decide which detainees to transport to Guantanamo.[154] Although, as a policy matter, OEF detainees received EPW-like treatment, the traditional LOAC detention categories (EPW, RP, and CI) were not used during OEF. Rather, persons detained were either classified as "persons under control" (PUCs) or simply as "detainees." From December 2001 through June 2002, the majority of detainees were held at a classified location in Afghanistan, and at one point in January 2002, the detainee population at this classified location reached nearly 400 detainees.[155] Persons captured on the battlefield were initially brought to the classified location to establish their identity and determine if they met the criteria for potential transfer to Guantanamo. During this phase, detained personnel were classified as "PUCs."[156] Once the detainee's identity had been established and he clearly did not meet the criteria for shipment to Guantanamo, the detainee was normally released.[157]

Use of Force

Judge Advocates must be prepared to deal with issues arising from the application and interpretation of the rules for the use of force. Questions derived from this topic will prove to be among the most sensitive and difficult that JAs will face. Detainees are a potential source of valuable information, and the motivation to extract that information through interrogation may sometimes create strong temptation to test the limits of the LOAC. Questions often concern the legality of specific proposed interrogation techniques. The GPW, Article 17 prohibits the use of mental and physical torture and coercion during interrogation.[158] The GPW does not prohibit the detaining power from seeking information beyond the GPW, Art. 117 minimum (name, rank, etc.), information given voluntarily or provided in exchange for privileges.[159] The GC, Article 31 contains a similar prohibition against the use of coercion to obtain information. Torture is prohibited under all circumstances, regardless of the detainee's status.[160]

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[154] *See* Transcript of After Action Review Conference, Office of the Staff Judge Advocate, XVIIIth Airborne Corps, Fort Bragg, N.C. (30 Sept. to 1 Oct. 2003) [hereinafter XVIIIth Airborne Corps AAR Transcript].

[155] Lancaster & Cook Memorandum, para. 2.

[156] The term "PUC" did not develop until the XVIIIth Airborne Corps arrived in Afghanistan. Detainees were being the classified Short Term Holding Facility long before the term "PUC" started being used.

[157] *See id.* A classified message clarified that persons other than the Secretary of Defense were authorized to release detainees at any point until the decision to transfer to Guantanamo had been made. *See* XVIIIth Airborne Corps AAR Transcript.

[158] GPW, art. 17. Note that the GPW did not apply to Taliban and Al Qaeda detainees because they were not considered EPWs. See accompanying text (stating the U.S. position denying EPW status to Taliban and al Qaeda detainees); *but see* CJCSI 5810.01B, para. 4. The Armed Forces of the United States will comply with the law of war during all armed conflicts, however such conflicts are characterized, and, unless otherwise directed by competent authorities, the US Armed Forces will comply with the principles and spirit of the law of war during all other operations. *See also DEP'T OF DEFENSE, DIR. 2311.01E, LAW OF WAR PROGRAM (9 May 06), Id.*

[159] *See* GPW COMMENTARY, at 163-4 ("[A] [s]tate which has captured prisoners of war will always try to obtain information from them. Such attempts are not forbidden . . . .") (citations omitted).

[160] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, June 26, 1987, 1465 U.N.T.S. 85. *See also* AR 190-8, para. 2-1(d). Prisoners may be interrogated in the combat

Although most of the specific issues JAs handled are classified, JAs advised within the spirit of the LOAC and implementing regulations.[161] In Afghanistan, placing an experienced attorney at Bagram as the dedicated legal advisor helped resolve these and other difficult issues. In this challenging environment, commanders and JAs must aggressively foster a climate of respect for the LOAC, and JAs should continuously review and monitor specific interrogation methods. Legal issues also arose concerning rules for the use of force while guarding detainees.[162] Reserve component guards brought differing standards based upon their military and/or civilian experience.[163] JAs developed more detailed standardized rules and training for the use of force at Bagram.[164]

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zone. The use of physical or mental torture or any coercion to compel prisoners to provide information is prohibited. Prisoners may voluntarily cooperate with [psychological operations] personnel in the development, evaluation, or dissemination of [psychological operations] messages or products. Prisoners may not be threatened, insulted, or exposed to unpleasant or disparate treatment of any kind because of their refusal to answer questions. Interrogations will normally be performed by intelligence or counterintelligence personnel *Id. See generally* U.S. DEP'T OF ARMY, FIELD MANUAL 34-52, INTELLIGENCE INTERROGATION, at 1-10 -1-12 (28 Sept. 1992) (highlighting pertinent sections of the Geneva Conventions).

[161] *See* OEF/OIF Vol. I at page 40, Section III.A.3 (discussing the law and regulatory structure concerning detainee operations).

[162] *See id.*

[163] *See id.*

[164] *See id.*

II.F. ENVIRONMENTAL ISSUES

Environmental law is "the body of law containing the statutes, regulations, and judicial decisions relating to [military] activities affecting the environment to include navigable waters, near-shore and open water and other surface water, groundwater, drinking water supply, land surface or subsurface area, ambient air, vegetation, wildlife, and humans."[165]

II.F.1. Proactive Measures

Deployment veterans recommend that environmental teams be available from the outset of the deployment for two reasons: environmental force protection and creating a record for the purpose of evaluating claims after U.S. forces leave the site.[166]

Environmental force protection

Terrain considered operationally important to commanders may be environmentally suspect or even dangerous to U.S. forces if the site is used a base camp.[167]

The group judge advocate for 5th Special Forces Group (Airborne) reported that early in Operation Enduring Freedom, his unit "encountered potentially health-damaging chemical contamination and arranged for a CHPPM site survey [U.S. Center for Health Promotion and Preventive Medicine]. The unknown risks might otherwise have led to relocation of the staging and headquarters elements, resulting in significant operational disruption. As it was, CHPPM recommended mitigating measures, averting any operational pause."[168]

Creating a record

Conducting an early environmental survey of property used by U.S. forces can set a baseline for measuring later claims of environmental damage. Judge advocates in Bosnia[169] and Iraq[170] report using such surveys in the site closure process when force requirements dictated the closure of particular camps.

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[165] U.S. DEP'T OF ARMY, FIELD MANUAL 27-100, LEGAL OPERATIONS, para. 3-6 (1 Mar. 2000) [hereinafter FM 27-100] (internal citations omitted).

[166] *See* pg. 168 Balkans LL.

[167] *Id*

[168] Legal Lessons Learned From Afghanistan and Iraq, Volume I (CLAMO, 1 August 2004), p. 172, n. 109.

[169] *See* pg 163, n. 440, Balkans LL.

[170] Legal Lessons Learned From Afghanistan and Iraq, Volume II (CLAMO, 1 September 2005), p. 179.

In Iraq, 1st Armored Division judge advocates developed a checklist for forward operating base (FOB) closures to ensure that all legal-related tasks associated with FOB closure were completed before the FOB was turned over to another entity. A judge advocate accompanied the physical inspection of every FOB being closed, and prepared a memorandum noting environmental conditions, improvements, and changes to the property relevant to potential claims regarding U.S. use of the facilities.[171] Specific environmental conditions inspected were removal of hazardous materials, Class IV property, and fill of waste burn pits.[172]

II.F.2. Analyzing Environmental Law Issues

Based on its deployment experience in Bosnia, 1st Armored Division OSJA recommended that an environmental law expert accompany any deploying task force.[173] In the absence of expert counsel, judge advocates may take as a point of departure the following summary.[174]

The key statute in the field is the National Environmental Policy Act (NEPA).[175] Although domestic statutes generally do not apply in overseas operations, the considerations contained within NEPA do apply if the operation results in environmental impact inside the United States. NEPA does not prohibit actions; instead it creates a documentation requirement that ensures decision makers consider the environmental impact of federal actions. The required documents are usually referred to as either environmental assessments (EA) or environmental impact statements (EIS). The production of those documents can cause substantial delay in planned federal actions.

Executive Order No. (EO) 12,114 creates "NEPA-like" rules for overseas operations, but only applies to major federal actions that create significant effects on the environment outside of the United States. DoD has implemented the provisions of EO 12,114 with Directive 6050.7,[176] which is in turn implemented by the Army in AR 200-2, Environmental Effects of Army Actions.[177]

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[171] Exemplars of the checklist and closure memorandum were intended to be included in Legal Lessons Learned From Afghanistan and Iraq, Volume II (CLAMO, 1 September 2005), as Appendices D-2 and D-3, but were omitted from the bound publication and added as loose leaf inserts.

[172] Legal Lessons Learned From Afghanistan and Iraq, Volume II (CLAMO, 1 September 2005), p. 179, n. 967.

[173] Legal Lessons Learned From Afghanistan and Iraq, Volume I (CLAMO, 1 August 2004), p. 167-8.

[174] This summary is a generalized account of the analysis in a 3rd Infantry Division information paper included in Legal Lessons Learned From Afghanistan and Iraq, Volume I (CLAMO, 1 August 2004), as Appendix E-5.

[175] 42 U.S.C. §§ 4321-4370 (1973).

[176] Department of Defense Directive 6050.7, Environmental Effects Abroad of Major Department of Defense Actions, 31 March 1979.

[177] Department of the Army, Army Regulation 200-2, Environmental Effects of Army Actions, 23 December 1988; see also, Field Manual (FM) 3-100.4, Environmental Considerations in Military Operations (1 June 2000).

There are four types of environmental events described within the EO.

(a) Major federal actions that do significant harm to the global commons;

(b) Major federal actions that significantly harm the environment of foreign nation that is not involved in the action;

(c) Major federal actions that are determined to be significantly harmful to the environment of a foreign nation because they provide to that nation: (1) a product, or involve a physical project that produces a principal product, emission, or effluent, that is prohibited or strictly regulated by Federal law in the United States because of its toxic effects to the environment create a serious public health risk; or (2) a physical project that is prohibited or strictly regulated in the United States by Federal law to protect the environment against radioactive substances;

(d) Major federal actions outside the United States that significantly harm natural or ecological resources of global importance designated by the President or, in the case of such a resource protected by international agreement binding on the United States, designated for protection by the Secretary of State.

Exemptions

If one of the conditions listed above is implicated, military leaders should seek either an exemption to the requirement or, alternatively, draft an environmental study for review.

(a) *The Participating Nation Exception.* Most overseas contingency operations do not generate the first, third, or fourth types of environmental events listed above in paragraph 2a. Accordingly, a premium is placed upon the interpretation of the second type of environmental event. Therefore, the threshold issue is whether the host nation is participating in the operation. If the nation is participating, then no study or review is technically required, nor is it necessary to seek an exemption.

(b) *General Exemptions.* DoD Directive 6050.7 enumerates ten situations that are excused from the procedural and other requirements of EO 12,114, including actions "taken by or pursuant to the direction of the President or a cabinet officer in the course of armed conflict."[178]

[178] "E2.3.3.1.3. Actions taken by or pursuant to the direction of the President or a cabinet officer in the course of armed conflict. The term 'armed conflict' refers to: hostilities for which 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.A. § 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. This exemption applies as long as the armed conflict continues." EO 12,114, 44 Fed. Reg. 1957 (1979).

(c) *Additional Exemptions*. The Department of Defense is authorized to establish additional exemptions that apply to DoD operations. Based on national security considerations, the Assistant Secretary of Defense (Manpower, Reserve Affairs, and Logistics) may exempt U.S. forces from the requirement to prepare environmental documentation.[179] Echelons above division must take affirmative steps to secure such exemptions.

II.F.3. Environmental Law Examples

In Iraq, the 101st Airborne Division SJA had to consider the environmental law implications of spreading fuel as a dust abatement measure at an aircraft refueling point.[180] Citing military necessity, judge advocates "ensured that a record was made of the location, what and how much we dispersed."[181] Note that this action comports with an exception to environmental assessment requirements of the applicable Executive Order, but (a) documentation is prudent for reasons discussed above and (b) invocation of the "armed conflict" exemption should be forwarded through channels for approval by the Assistant Secretary of Defense (Manpower, Reserve Affairs, and Logistics).

Judge advocates noted that although "the Haiti intervention did not frequently implicate these [environmental law] areas," redeploying units realized that there could be issues of liability for environmental damage at sites such as a sewage disposal location.[182] Noting that an Executive Order extended NEPA considerations to overseas federal actions, though without creating a cause of action for violations, judge advocates applied a "common sense" standard "to prevent unnecessary damage to the (already disastrous) environment of Haiti."[183]

Judge advocates accompanying forces deployed in relief operations following Hurricane Mitch in 1998-1999 found that disposal of medical waste was "the predominant environmental issue" for US forces because some host nations lacked the capability to properly dispose of such waste.[184] Silver by-products from x-ray procedures

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[179] "E2.3.3.2.1. In these [national security] circumstances, the head of the DoD component concerned is authorized to exempt a particular action from the environmental documentation requirements of this enclosure after obtaining the prior approval of the Assistant Secretary of Defense (Manpower, Reserve Affairs, and Logistics), who, with the Assistant Secretary of Defense (International Security Affairs), shall consult, before approving the exemption, with the Department of State and the Council on Environmental Quality. The requirement for prior consultation is not a requirement for prior approval." *Id*

[180] Legal Lessons Learned From Afghanistan and Iraq, Volume I (CLAMO, 1 August 2004), p. 172, n. 109.

[181] *Id*

[182] Law and Military Operations in Haiti, 1994-1995; Lessons Learned for Judge Advocates (CLAMO, 11 December 1995), p. 126, n. 415.

[183] *Id*

[184] Law and Military Operations in Central America: Hurricane Mitch Relief Efforts, 1998-1999; Lessons Learned for Judge Advocates (CLAMO, 15 September 2000), p. 109.

were returned to the United States for disposal, and insecticides were only left in the custody of host nation authorities.[185]

[185] *Id*

II.G. FOREIGN/HUMANITARIAN ASSISTANCE

II.G.1. US Government – Host Nation Interaction

Judge advocates deployed to peace operations in the Balkans encountered an "intertwining of mission-directed spending (including protection of the force issues) and humanitarian assistance"[186] that would later be encountered in the *de facto* occupation of Iraq. Separation of powers generally, and the so-called Purpose Statute[187] specifically, prohibit the Army or any executive branch agency from spending federal money without Congressional authorization.

Units arriving in the devastated area of operations in Bosnia were confronted with requests to construct or rebuild everything from sewage pumps to garbage dumps.[188] Because the Bosnia mission was not on a Humanitarian and Civic Assistance (HCA) mission, rebuilding and relief for displaced persons and refugees was a mission for international organizations (IOs) and non-governmental organizations (NGOs). The implementation and stabilization force missions were to provide a secure and safe environment for such organizations.[189]

Thus judge advocates in Bosnia were obliged to object, on fiscal law grounds, to proposals such as using Operations and Maintenance (O&M) funds to share the cost of building roads and bridges that were not necessary for military operations.[190] Moreover, even bridges used by U.S. forces could not be donated by being left in place at the conclusion of operations.[191]

Judge advocates deployed to Kosovo faced similar issues of using O&M funds for construction and humanitarian relief.[192] Also, units redeploying to Germany from the Balkans at the conclusion of operations wished to leave behind certain materiel, for which judge advocates had to find exceptions to the general rule. One exception considered was 10 U.S.C. § 2557 (previously 10 U.S.C. § 2547), *Excess Nonlethal*

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[186] LAW AND MILITARY OPERATIONS IN THE BALKANS, 1995-1998; LESSONS LEARNED FOR JUDGE ADVOCATES (CLAMO, 13 November 1998), 145.

[187] 31 U.S.C. § 1301(a) (2000).

[188] LAW AND MILITARY OPERATIONS IN THE BALKANS, 1995-1998; LESSONS LEARNED FOR JUDGE ADVOCATES (CLAMO, 13 November 1998), 146.

[189] *Id.*

[190] The prospect of using O&M funds in a cost-sharing enterprise with a host nation creates a no-win dichotomy: those not operationally necessary are not a proper use of O&M funds, and those operationally necessary cannot be augmented by non-U.S. funds.

[191] LAW AND MILITARY OPERATIONS IN THE BALKANS, 1995-1998; LESSONS LEARNED FOR JUDGE ADVOCATES (CLAMO, 13 November 1998), 147, n. 383.

[192] LAW AND MILITARY OPERATIONS IN KOSOVO, 1999-2001; LESSONS LEARNED FOR JUDGE ADVOCATES (CLAMO, 15 December 2001), 69 ("The most persistent fiscal law issue faced by Task Force Hawk involved the donation of Army property to the civilian population.").

Supplies: Humanitarian Relief, under which the Secretary of Defense may make available for humanitarian relief purposes any Department of Defense (DoD) nonlethal excess supplies.[193]

Note, however, that commanders may consider military property "excess" that is not truly excess under the applicable statute. In Albania in 1999, Task Force Hawk had 80,000 gallons of aircraft fuel that were no longer needed once its mission ended.[194] Because the fuel was still useful to the government and not truly excess, Task Force Hawk transported 30,000 gallons to Task Force Falcon in Kosovo and transferred the remainder to the Albanians as "payment-in-kind" for services provided by Albania to U.S. forces.[195] The transfer was accomplished using a third-party transfer under an Acquisition and Cross-Servicing Agreement (ACSA).[196] An ACSA is an agreement with a foreign government or international regional organization that allows DoD to acquire and transfer logistical support on a replacement-in-kind (RIK), equal value exchange (EVE), or cash reimbursement basis.[197] In the present example, there was not yet an ACSA with Albania, so United States Army, European Command (USAREUR) transferred the fuel to the Supreme Allied Commander, Atlantic (SACLANT), who designated the Albanians as his agent for delivery.[198]

A different but related concept to "excess" materiel is evaluation of whether military property used in an operation can be donated because the transportation and recovery costs outweigh the value of the property. Units redeploying from Albania also wished to transfer wooden guard towers and wooden tables and chairs built on-site to the Albanian government.[199] The property was of minimal value, and, once disassembled,

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[193] *Id.* "Nonlethal excess supplies" refers to property that is in Defense Reutilization and Management Office (DRMO) channels, and may include all property except real property, weapons, ammunition, and any other equipment or materiel designed to inflict bodily harm or death. Property is "excess" if it is no longer required for the needs and discharge of responsibilities of the relevant military service. Excess supplies furnished by the military under authority of 10 U.S.C. § 2557 are transferred to the U.S. Agency for International Development (USAID). Funding authority for DoD transportation of the supplies may be provided from Overseas Humanitarian, Disaster, and Civic Assistance (OHDACA) under 10 U.S.C. § 2561 (previously 10 U.S.C.§ 2551). *See* U.S. DEP'T OF DEFENSE, MANUAL 4160.21-M, DEFENSE MATERIEL DISPOSITION (18 Aug. 1997). The unwieldy process can be discouraging; *see infra* note 17.

[194] LAW AND MILITARY OPERATIONS IN KOSOVO, 1999-2001; LESSONS LEARNED FOR JUDGE ADVOCATES (CLAMO, 15 December 2001), 70.

[195] *Id.*

[196] *Id.* at 71.

[197] U.S. DEP'T OF DEFENSE, DIR. 2010.9, MUTUAL LOGISTIC SUPPORT BETWEEN THE UNITED STATES AND GOVERNMENTS OF ELIGIBLE COUNTRIES AND NATO SUBSIDIARY BODIES (30 Sept. 1988).

[198] LAW AND MILITARY OPERATIONS IN KOSOVO, 1999-2001; LESSONS LEARNED FOR JUDGE ADVOCATES (CLAMO, 15 December 2001), 71. SACLANT required the Albanian Ministry of Defense to hold SACLANT harmless from any liability regarding the quality of the fuel. *Id.*, at 71, n. 139.

[199] LAW AND MILITARY OPERATIONS IN KOSOVO, 1999-2001; LESSONS LEARNED FOR JUDGE ADVOCATES (CLAMO, 15 December 2001), 71.

would have amounted to scrap wood, so it was classified as "consumed" by the operation, since the recovery cost exceeded the value.[200]

A similar conclusion was reached by the Air Force following Operation Shining Hope.[201] The Air Force compared the cost of recovering and redeploying certain tents and other materiel to the cost of replacement. The materiel had a value of approximately $6 million, whereas disassembling and transporting the items would have cost approximately $8 million. The Air Force, with the concurrence of the Joint Chiefs of Staff (JCS) legal office, decided to leave the materiel in place.[202]

In Afghanistan, units assigned to train and support the newly formed Afghan National Army (ANA) also faced "intertwined" spending. O&M funds could not be used for ANA security assistance.[203] Instead, State Department funds (often referred to as "Title 22 funds" because the Foreign Assistance Act falls under Title 22 of the U.S. Code) had to be used. In essence, when a DoD unit is being funded by Title 22 funds, the DoD assets (personnel and materials) can be used to accomplish State Department missions (in this instance, security assistance).[204] Units identified support requirements to the Office of Military Cooperation—Afghanistan, which provided fund cites through military channels.[205]

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[200] *See DoD* MANUAL 4160.21-M, at ch. 8.

[201] LAW AND MILITARY OPERATIONS IN KOSOVO, 1999-2001; LESSONS LEARNED FOR JUDGE ADVOCATES (CLAMO, 15 December 2001), 72.

[202] For a contrasting example, see LAW AND MILITARY OPERATIONS IN KOSOVO, 1999-2001; LESSONS LEARNED FOR JUDGE ADVOCATES (CLAMO, 15 December 2001), 72-73, regarding nonperishable foodstuffs. Faced with the difficulty of having food declared excess through veterinary channels, and transferring it to USAID, Task Force Hawk units instead arranged to transport the food to U.S. units in Kosovo.

[203] LEGAL LESSONS LEARNED FROM AFGHANISTAN AND IRAQ, VOLUME I (CLAMO, 1 August 2004), 151.

[204] *Id.* Appendix E-2, LEGAL LESSONS LEARNED FROM AFGHANISTAN AND IRAQ, VOLUME I (CLAMO, 1 August 2004) contains a CJTF-180 information paper outlining the various Title 22 funding authorities and appropriations used for supporting the ANA. For a classified discussion of the fiscal analyses behind the initial determinations of how ANA support would be funded, see MAJ Karen H. Carlisle, *This Is Not Your Father's Fiscal Law: Funding the Global War on Terrorism* 37-40 (2003) (unpublished manuscript, on file in CLAMO SIPRNET Database *at* http://www.us.army.smil.mil. The Database is one of the legal knowledge communities within the "Collaborate" section of the site. The site requires registration. If not a member of the U.S. Army, an applicant will need the user name of an Army sponsor. Contact CLAMO if an Army sponsor is needed.).

[205] *Id.* at 152.

II.G.2. US Government – Coalition Forces Interaction

The U.S. has Acquisition and Cross-Servicing Agreements (ACSAs)[206] with most of the countries that are most likely to be in coalition with U.S. forces.[207] Judge advocates deployed with coalition forces in Kosovo found that by 1999, ACSA operations had matured to a level where few issues arose, even though the mission required an extensive use of ACSAs for logistics support.[208] However, judge advocates must be prepared to advise on ACSA issues until trained logisticians arrive to provide ACSA support and accounting. Further, broad coalitions may include countries with which the U.S. does not yet have an ACSA.

In Kosovo, troops from the United Arab Emirates (UAE) and the Ukraine arrived to participate in KFOR, even though neither country had an ACSA with the U.S.[209] USAREUR was tasked to review all logistical support requirements for the two countries' task forces. The support included billeting, meals, communications, quality of life, and, for the UAE, AH-64 aviation parts and maintenance facilities. Ultimately, the support was provided through Foreign Military Sales (FMS) cases. As a practical matter, the everyday approach to capturing the costs and forwarding the amounts to higher headquarters was the same as if the support was provided pursuant to an ACSA.[210]

The Defense Security Cooperation Agency (DSCA) prepared two Foreign Military Sales (FMS)[211] cases for the UAE. At the same time, USAREUR prepared a Memorandum of Agreement (MOA),[212] with the expectation that both documents would be signed before the UAE began putting troops on the ground. The MOA specified the types of logistic support, by class that USAREUR and Task Force Falcon would provide. Later issues regarding the cost of various forms of support made clear the desirability that such MOA restate U.S. law concerning the provision of goods and services, and that during MOA negotiations, it be made clear that the U.S. must capture all support costs and bill them to the country provided the support.[213] Also, judge advocates should

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[206] ACSAs allow DoD to enter into agreements with other eligible countries for the reciprocal provision of logistics support. Acquisitions and transfers are on a cash-reimbursable, replacement-in-kind (RIK), or equal value exchange (EVE) basis. 10 U.S.C. §§ 2341-2350 (2000).

[207] A current list of ACSAs can be found on the SUPRNET at http://j4.js.smil.mil/projects/acsa/acsa.htm.

[208] LAW AND MILITARY OPERATIONS IN KOSOVO, 1999-2001; LESSONS LEARNED FOR JUDGE ADVOCATES (CLAMO, 15 December 2001), 150.

[209] The U.S. and the Ukraine entered into an ACSA on 19 November 1999.

[210] LAW AND MILITARY OPERATIONS IN KOSOVO, 1999-2001; LESSONS LEARNED FOR JUDGE ADVOCATES (CLAMO, 15 December 2001), 151.

[211] The Foreign Military Sales Program is a security assistance method by which eligible governments purchase defense items based on contracts managed by DoD as an FMS "case." 22 U.S.C. §§ 2761-62 (2000).

[212] LAW AND MILITARY OPERATIONS IN KOSOVO, 1999-2001; LESSONS LEARNED FOR JUDGE ADVOCATES (CLAMO, 15 December 2001), 152.

[213] *Id.* at 153.

remember that the terms of the FMS case will control the transaction, and that the MOA is a supporting instrument.

The Ukrainian forces arrived for the Kosovo mission with short notice to DoD officials, and before any support agreements were in place.[214] When the Ukrainian advance party showed up with little notice, USAREUR instructed Task Force Falcon to provide the minimum level of support necessary (water, food, shelter), and track the costs.[215] The day after the Ukraine contingent arrived in theater, U.S. Army Security Assistance Command initiated three FMS cases in support of the Ukrainian deployment. The FMS cases were funded with $700,000 from Foreign Military Financing (FMF)[216] funds. When the FMS cases were completed, the accumulated costs were rolled into the FMS cases.

Forces from the UAE again appeared, in the absence of an ACSA, in the coalition in Operation Enduring Freedom. UAE forces arrived in Afghanistan with very little organic support and turned to CJTF-180 for assistance.[217] Task force JAs requested guidance from CENTCOM and, in the interim, the CJTF-180 commander authorized provision of basic life support materials—food, water, shelter, emergency medical care—to the UAE forces, with specific instructions to carefully account for all costs.[218] Ultimately, CENTCOM, in coordination with the DOS, negotiated a mission-specific agreement (not an ACSA, which would have had general applicability beyond just the OEF mission) with the UAE that outlined the type and amount of support the U.S. would provide and to what extent the UAE would reimburse the costs.[219]

II.G.3. US Government – International Government Organization (IGO) Interaction

In Bosnia, Implementation Force (IFOR) units worked closely with and provided significant logistical support to the Office of the High Representative (OHR), the International Police Task Force (IPTF), the International Committee for the Red Cross (ICRC), the U.N. High Commissioner for Refugees (UNHCR), the International Criminal Tribunal for the Former Yugoslavia (ICTY), and the Organization for Security and Cooperation in Europe (OSCE).[220]

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[214] *Id.* at 152.

[215] *Id.* at n. 217.

[216] Foreign Military Financing is a security assistance method by which eligible governments receive congressional appropriations to assist in purchasing U.S. defense items. 22 U.S.C. §§ 2363-64.

[217] LEGAL LESSONS LEARNED FROM AFGHANISTAN AND IRAQ, VOLUME I (CLAMO, 1 August 2004), 153.

[218] *Id.*

[219] The agreement is on file in the CLAMO SIPRNET Database.

[220] Law and Military Operations in the Balkans, 1995-1998; Lessons Learned for Judge Advocates (CLAMO, 13 November 1998), 44.

As elsewhere, inter-agency working groups were key to developing relationships. IFOR created a Civil-Military Cooperation team (CIMIC) which rendered technical advice and expertise to the various international and non-governmental organizations, IFOR units, various commissions, the Entity Armed Forces, and local authorities. The 350-person CIMIC included IFOR personnel, attorneys, educators, public transportation specialists, engineers, agriculture experts, economists, public health officials, veterinarians, communication experts, and other experts.[221]

As part of the peace implementation and stabilization process, IFOR and the subsequent Stabilization Force (SFOR) provided the secure environment for elections.[222] The Organization for Security and Cooperation in Europe (OSCE) was the lead international organization for elections. The IFOR/SFOR mission to create conditions allowing for free elections translated into U.S. forces providing security at elections sites and along routes to the polling stations and sites, and transportation to the polling stations.[223] This support required significant military police, civil affairs, and transportation support.[224]

In Kosovo, Task Force Falcon provided support to the ICTY in the form of a dedicated squad, with a lieutenant or a senior NCO, several vehicles, a GP medium tent, a generator, and a laboratory tent with running water at Camp Bondsteel.[225] Later, the investigators wanted an engineer company to excavate a well. The JAs assisting the ICTY were aware of an NGO capable of supporting the request and were able to link the NGO with the ICTY.[226]

Support for UN operations in Kosovo direct requests for support from UN representatives and also KFOR taskings that contained embedded support requirements.[227] Judge advocates rightly saw these as legally objectionable taskings from KFOR. There were also constant issues over use of dining facilities, medical facilities, and the Army and Air Force Exchange Service (AAFES) by UN workers—particularly Americans working with the UN.[228] Although an ACSA is authorized by statute,[229] there

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[221] *Id.*

[222] *Id. at* 137.

[223] *Id.*

[224] This provision of support, of course, also raised questions about the use of O&M funds in support of OSCE. Task Force Eagle judge advocates determined that such funds were expendable because election support had become a military mission and were civil-military actions rather than civil and humanitarian support. *Id.* at n. 351.

[225] LAW AND MILITARY OPERATIONS IN KOSOVO, 1999-2001; LESSONS LEARNED FOR JUDGE ADVOCATES (CLAMO, 15 December 2001), 117. The lessons learned summary cites the NATO OPLAN as authority for this support – notwithstanding the fact that military orders do not answer fiscal law questions. Query whether the summary answers the question of how Task Force Falcon support to the ICTY was properly funded.

[226] *Id.* at 118.

[227] *Id.* at 158.

[228] *Id.*

is no ACSA between the U.S. and the UN, and there was no other source for reimbursement between the UN and the U.S. Army in Kosovo.[230] With no mechanism for reimbursement, UN workers could not just "sign in" to the dining facilities as members of the forces of other countries were allowed to do, but rather had to pay for meals when eating in the U.S. dining facility.[231] The USAREUR Commander, however, was able to grant UN workers access to AAFES in accordance with AR 60-20.[232]

II.G.4. US Government – Non-Governmental Organization (NGO) Interaction

Numerous nongovernmental agencies and private voluntary organizations preceded or accompanied the multinational military forces (MNF) deployed to Haiti in 1994.[233] In accordance with United States military doctrine, the MNF established a Civil Military Operations Center (CMOC).[234] A subordinate element of the CMOC, called the Humanitarian Assistance Coordination Center (HACC), served as the primary interface between all humanitarian organizations and military forces.[235] The CMOC consisted of key staff members from the United States JTF and military liaison personnel from other countries, as well as representatives from the Agency for International Development and the Office of Foreign Disaster Assistance, from the International Committee of the Red Cross (ICRC), from various United Nations agencies, from agencies of foreign governments, and from various private voluntary organizations.[236] This diverse group met daily to discuss problems and coordinate both short and long-term actions. The MNF staff judge advocate attended these meetings at least once a week.[237]

In Kosovo, the limited ability of the military to provide humanitarian support, and the restrictions placed on the limited support that the military can provide, placed the onus on NGOs to provide humanitarian relief.[238] Understanding which NGOs were

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[229] 10 U.S.C. § 2341-42 (2000).

[230] For possible mechanisms to recoup U.S. support to UN operations, see LAW AND MILITARY OPERATIONS IN KOSOVO, 1999-2001; LESSONS LEARNED FOR JUDGE ADVOCATES (CLAMO, 15 December 2001), 159, n. 241.

[231] *Id.* at 159.

[232] U.S. DEP'T OF ARMY, REG. 60-20, ARMY AIR FORCE EXCHANGE SERVICE OPERATING POLICIES, para. 2-11(b)(4) (15 Dec. 1992).

[233] LAW AND MILITARY OPERATIONS IN HAITI, 1994-1995; LESSONS LEARNED FOR JUDGE ADVOCATE (CLAMO, 11 December 1995), 93. Also, Appendix S of that volume contains a list of NGOs conducting humanitarian relief in Haiti.

[234] *See* DEP'T OF ARMY, FIELD MANUAL 41-10, CIVIL AFFAIRS OPERATIONS at C-1 (11 Jan. 1993).

[235] LAW AND MILITARY OPERATIONS IN HAITI, 1994-1995; LESSONS LEARNED FOR JUDGE ADVOCATE (CLAMO, 11 December 1995), 93.

[236] *Id.* at 94.

[237] *Id.*

[238] LAW AND MILITARY OPERATIONS IN KOSOVO, 1999-2001; LESSONS LEARNED FOR JUDGE ADVOCATES (CLAMO, 15 December 2001), 126.

operating within a task force area allowed JAs to provide a better range of options when reviewing humanitarian projects.[239] Civil Affairs (CA) sections maintained a list of NGOs and the types of aid the NGOs could provide.

Judge advocates reported that the most important lesson learned from the Hurricane Mitch relief operation in 1998-99 was the need for better interagency and inter-organizational coordination.[240] Initially, neither JAs nor commanders had a clear understanding of the manner in which IOs and NGOs operated, or how to work with them cooperatively.[241] The relief operation forces deployed to Central America found that many NGOs had an extensive knowledge of the region that would greatly benefit U.S. commanders.[242] Identification of the other U.S. government organizations, foreign government organizations, and NGOs working in the area is recommended as the first step toward better greater efficiency.[243]

At the tactical level, the joint task force commander's (CJTF) options for improved coordination include forming a Humanitarian Operations Center (HOC) and a Civil Military Operations Center (CMOC).[244] The HOC does not command and control in the military sense, but attempts to build a consensus for mutual assistance and unity of effort.[245] The HOC should consist of decision-makers from the JTF, UN agencies, the Department of State, USAID/OFDA, regional NGO and PVO representatives, other IOs, such as the ICRC, and host nation authorities.

II.G.5. Humanitarian Assistance

A vexing question in deployment operations is when O&M dollars can be used to fund operations that have humanitarian motives or effects. Tactical units generally only receive O&M appropriations, which are to be used for all day-to-day and "necessary and incident" operational expenses for which another funding source does not exist.[246] Under

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[239] *Id.* at 127.

[240] LAW AND MILITARY OPERATIONS IN CENTRAL AMERICA: HURRICANE MITCH RELIEF EFFORTS, 1998-1999; LESSONS LEARNED FOR JUDGE ADVOCATES (CLAMO, 15 September 2000), 37.

[241] *Id.*

[242] *Id.* at 38.

[243] *Id.*

[244] *Id.* at 39. A primary reference on military coordination with the participants in humanitarian relief operations is DEPARTMENT OF THE ARMY FIELD MANUAL 100-23-1, HA MULTISERVICE PROCEDURES FOR HUMANITARIAN ASSISTANCE OPERATIONS (31 Oct. 1994).

[245] *Id.* at 40.

[246] The General Accounting Office (GAO), which oversees federal government expenditures and accounting, has set forth a three-part test for determining whether an expenditure is proper:

1. An expenditure must fit an appropriation (or permanent statutory provision), or must be for a purpose that is necessary and incident to the general purpose of an appropriation;

2. The expenditure is not prohibited by law; and

the Foreign Assistance Act (FAA),[247] development assistance and security assistance are DOS, not DoD responsibilities.

Judge advocates report that a recurring issue during deployments has been to what extent O&M dollars could be used to fund activities that appeared to approach State Department security assistance and development assistance under the FAA.

In Bosnia, a Task Force Eagle BCT commander wanted to purchase donuts and coffee for bus passengers subjected to searches – as a force protection measure dubbed Operation Iron Donut.[248]

In the early days of the mission in Kosovo, commanders used O&M funds for humanitarian relief to prevent the precarious situation from slipping into an even greater humanitarian disaster.[249] The Task Force Falcon Commander felt that the situation was so dire that failing to act would lead to a widespread disaster and continue to threaten the safety of U.S. troops.[250] Because no humanitarian funding was available, the commander acted under his inherent authority to protect the force and his authority to establish a secure environment in Kosovo and distributed approximately 12,000 gallons of fuel over a period of two weeks. This type of factually specific decision should not be made prior to coordinating with higher headquarters. DoD eventually approved the use of OHDACA funds for this purpose based on the Task Force request.

In Afghanistan, the SJA for the 10th Mountain Division faced a situation where operators wanted to keep an objective area clear of civilians by distributing supplies to the inhabitants of the nearby villages.[251] Recognizing a fiscal issue in the use of unit O&M funds for this purpose,[252] the SJA raised the issue through the chain of command, ultimately to the Office of the Legal Counsel (OLC) to the Chairman, Joint Chiefs of Staff. The SJA argued that the unit provided the supplies to facilitate mission

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3. The expenditure is not otherwise provided for, in other words, does not fall within the scope of some other appropriation.

Secretary of the Interior, B-120676, 34 Comp. Gen. 195 (1954).

[247] 22 U.S.C. §§ 2151 *et seq.* (2003).

[248] LAW AND MILITARY OPERATIONS IN THE BALKANS, 1995-1998; LESSONS LEARNED FOR JUDGE ADVOCATES (CLAMO, 13 November 1998), 147 and n. 385.

[249] LAW AND MILITARY OPERATIONS IN KOSOVO, 1999-2001; LESSONS LEARNED FOR JUDGE ADVOCATES (CLAMO, 15 December 2001), 159.

[250] *Id.* at 160.

[251] LEGAL LESSONS LEARNED FROM AFGHANISTAN AND IRAQ, VOLUME I (CLAMO, 1 August 2004), 147.

[252] Complicating the matter was a CENTCOM message that had listed approved categories of OHDACA humanitarian assistance, none of which seemed to apply. According to the dictum, *expressio unius est exclusio alterius*, CENTCOM had created a more restrictive policy for humanitarian assistance. See LEGAL LESSONS LEARNED FROM AFGHANISTAN AND IRAQ, VOLUME I (CLAMO, 1 August 2004), 148, n. 20.

accomplishment and that any humanitarian benefit was merely incidental.[253] This analysis did not persuade the OLC, which opined that this particular linking of O&M funds to mission accomplishment was tenuous and could lead down a slippery slope of fiscal analysis, particularly in a situation where other appropriations exist for the proposed activity.

The issuance of a military mission statement by the executive branch does not constitute independent fiscal authority to spend O&M funds in support of the mission when the mission begins to stray from "operations and maintenance" as traditionally understood by Congress.[254]

In Iraq, as the level of combat settled, the need to create a stable and secure environment called for measures that appeared to approach the realm of security assistance and development assistance as contemplated by the FAA, activities for which O&M ostensibly is not intended.[255]
The question became what money, if any, was available to fund these necessities in the interim period before Congress had a chance to speak to the issue in a new appropriations act and while the military was the only presence on the ground with the capability to implement effective change.

Several DoD civilian attorneys and military JAs argued that O&M could be used for development assistance-type and security assistance-type activities because these activities would help stabilize the situation in Iraq, a task which appeared to fit within the military mission and, moreover, was an obligation of an occupying power.[256] JAs advised commanders that O&M funds were appropriate to continue the prosecution of the war and were appropriate when any development or security assistance-type effect was a secondary consequence of a more traditional military activity.[257]

For example, an Army JA advised that unit O&M funds and assets could be used to unearth a large quantity of Iraqi gasoline discovered buried in the ground and to distribute it to Iraqi motorists lined up at gasoline stations because these lines were impeding the free movement of Army tactical vehicles around Baghdad.[258] For another example, a Marine Corps JA advised that unit O&M could be used under a force protection rationale to purchase soccer balls for a Marine Corps-sponsored Iraqi soccer

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[253] LEGAL LESSONS LEARNED FROM AFGHANISTAN AND IRAQ, VOLUME I (CLAMO, 1 August 2004), 149.

[254] LEGAL LESSONS LEARNED FROM AFGHANISTAN AND IRAQ, VOLUME I (CLAMO, 1 August 2004), 150, citing COL Richard D. Rosen, *Funding Non-Traditional Military Operations: The Alluring Myth of a Presidential Power of the Purse*, 155 MIL. L. REV. 1 (1998).

[255] LEGAL LESSONS LEARNED FROM AFGHANISTAN AND IRAQ, VOLUME I (CLAMO, 1 August 2004), 151.

[256] *Id.*

[257] *Id.* at 157.

[258] *Id.*

league: the league made the area safer for Marines by fostering goodwill and by keeping athletic Iraqi males off the streets.[259]

The broad scope of humanitarian assistance

Judge advocates have taken leading roles in the coordination of humanitarian relief efforts and in the establishment of judicial systems in war-ravaged regions.

In Haiti, judge advocates served as "judicial mentors" as well as courthouse building inspectors.[260] During the assessment phase of the mentorship program, the team conducted on-site evaluations of 178 justices of the peace, 15 prosecutors, 15 courts of first instance, 15 investigating judges, and over 100 civil registrars, as well as completing a photographic survey of courthouses.[261]

In furtherance of its professional mentorship program in Haiti, judge advocates advocated the establishment of a national judicial training center on the grounds of the former military academy and the creation of a supervision program to audit judicial processes, investigate corruption complaints, monitor training, and develop a code of judicial ethics.[262] Additionally, judge advocates obtained and distributed 208 sets of legal codes containing Haitian laws, and created, reproduced, and distributed more than 25,000 legal forms.[263]

Judge advocates in Iraq would later take on similar challenges, on a larger scale. In the south of Iraq, for instance, the I Marine Expeditionary Force (MEF) found that none of the courts in any of the seven provinces in its area were operational.[264] In the absence of policy guidance, commanders and JAs used varying approaches, usually involving phases of assessment, recommendation, and implementation.

For example, in April 2003, the SJA, V Corps, formed the Judicial Reconstruction Assistance Team (JRAT) to begin assessing the structural condition of each courthouse in the Baghdad area of operation.[265] JRAT members traveled to each courthouse in the Baghdad area and met with the judges and other court personnel.[266] Judge advocates then wrote numerous fragmentary orders directing units to secure courthouses and public

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[259] *Id.*

[260] LAW AND MILITARY OPERATIONS IN HAITI, 1994-1995; LESSONS LEARNED FOR JUDGE ADVOCATE (CLAMO, 11 December 1995), 105.

[261] *Id.*

[262] *Id.* at 106.

[263] *Id.*

[264] LEGAL LESSONS LEARNED FROM AFGHANISTAN AND IRAQ, VOLUME II (CLAMO, 1 September 2005), 34.

[265] *Id.*

[266] *Id.*

facilities, and prepared a final report with specific recommendations as to a course of action, which was forwarded to the Ministry of Justice and the Coalition Provisional Authority to support funding requests.[267]

Similarly, the legal team from the 101st Airborne Division (Air Assault) formed the Northern Iraq Office of Judicial Operations (NIOJO).[268] Members of NOIJO traveled throughout their area of operation, overseeing inspections and assessments of courthouses, and helping draft detailed schematic building plans and bills of quantities to facilitate reconstruction.[269]

In Kosovo, the Task Force developed a system whereby the Civil Affairs (CA) staff section prepared each potential humanitarian assistance project with cost estimates, photographs, and project details.[270] The project was reviewed by a group of staff officers, including a JA, before being sent to the Commander for action. The JA's review included consideration of the restraints of the Overseas Humanitarian, Disaster, and Civil Assistance (OHDACA) appropriation.

Operations related to the intervention in Kosovo included Operation Provide Refuge, a resettlement of Kosovar refugees into the former Yugoslav Republic of Macedonia (FYROM) and the U.S.[271] U.S. participation was part of a multinational effort to assist Kosovo and neighboring countries that received refugees forced out of Kosovo.[272] The Lead Federal Agency (LFA) for Operation Provide Refuge was the Department of Health and Human Services (DHHS),[273] whose senior representative to the task force directed the mission.[274] Fort Dix, which acted as a reception center, performed all budgeting and cost capturing for the joint task force.[275]

Operation Provide Refuge judge advocates recommend that JAs must understand that the DoD role in Military Support to Civil Authorities (MSCA) is unlike typical DoD operational missions because the LFA has responsibility for executing the mission, and DoD operates in a supporting role, only acting in response to LFA requests to provide

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[267] *Id.*

[268] *Id.*

[269] *Id.*

[270] LAW AND MILITARY OPERATIONS IN KOSOVO, 1999-2001; LESSONS LEARNED FOR JUDGE ADVOCATES (CLAMO, 15 December 2001), 156.

[271] LAW AND MILITARY OPERATIONS IN KOSOVO, 1999-2001; LESSONS LEARNED FOR JUDGE ADVOCATES (CLAMO, 15 December 2001), 176.

[272] *Id.*

[273] The Memorandum of Agreement between DoD and DHHS, effective 4 May 1999, can be found in Appendix V-3 to LAW AND MILITARY OPERATIONS IN KOSOVO, 1999-2001; LESSONS LEARNED FOR JUDGE ADVOCATES (CLAMO, 15 December 2001).

[274] LAW AND MILITARY OPERATIONS IN KOSOVO, 1999-2001; LESSONS LEARNED FOR JUDGE ADVOCATES (CLAMO, 15 December 2001), 180.

[275] *Id.* at 181.

specific support.[276] MSCA directives establish parameters concerning the types and amount of support DoD may provide to the LFA, and DoD cannot "volunteer" to do more than what the LFA requests.[277]

Operations in relief of Hurricane Mitch were conducted under the Humanitarian and Civic Assistance Program (HCA)[278] and the Humanitarian Assistance Program (HAP),[279] both of which are under the auspices of the Defense Security Cooperation Agency (DSCA).[280] The State Department must approve all HCA initiatives.[281] Humanitarian and civic assistance may not be provided (directly or indirectly) to any individual, group, or organization engaged in military or paramilitary activity. Typical HCA projects include medical, dental, and veterinary care provided in rural areas, construction of rudimentary surface transport systems, well drilling and construction of basic sanitation facilities, rudimentary construction and repair of public facilities, and other medical and engineering projects.[282]

In Operation Enduring Freedom, CENTCOM issued a message setting forth, as a policy matter, eleven approved categories of permissible humanitarian assistance, specifying the legal authorities and appropriations for each, as well as providing other requirements and guidance.[283]

The categories were:

(a) Public health surveys and assessments;

(b) Water supply/sanitation;

(c) Well drilling;

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[276] *Id.* at 184.

[277] An information paper on "MSCA Basic Principles" can be found at Appendix V-10, LAW AND MILITARY OPERATIONS IN KOSOVO, 1999-2001; LESSONS LEARNED FOR JUDGE ADVOCATES (CLAMO, 15 December 2001). *See* U.S. DEP'T OF DEFENSE, DIR. 3025.15, MILITARY SUPPORT TO CIVIL AUTHORITIES (18 Feb. 1997).

[278] Humanitarian and Civic Assistance (HCA) activities are conducted in conjunction with authorized military operations and are authorized by 10 USC § 401.

[279] The program is authorized by 10 U.S.C. § 2551 and its projects are funded by the Overseas Humanitarian, Disaster and Civic Action (OHDACA) account.

[280] LAW AND MILITARY OPERATIONS IN CENTRAL AMERICA: HURRICANE MITCH RELIEF EFFORTS, 1998-1999; LESSONS LEARNED FOR JUDGE ADVOCATES (CLAMO, 15 September 2000), 24.

[281] *Id.*

[282] *Id.*

[283] The memorandum can be found in Appendix E-1, LEGAL LESSONS LEARNED FROM AFGHANISTAN AND IRAQ, VOLUME I (CLAMO, 1 August 2004).

(d) Medical support and supplies;

(e) Construction and repair of rudimentary surface transportation systems and public facilities;

(f) Electrical grid repair;

(g) Humanitarian mine action mine awareness training;

(h) Mine display boards;

(i) Essential repairs/rebuilding for orphanages, schools, or relief warehouses;

(j) Animal husbandry/veterinarian training; and

(k) Victim assistance training for mine victims.

CENTCOM's fiscal guidance for activities whose primary purpose approached the realm of development assistance was to use traditional DoD humanitarian assistance statutory authorities and funding appropriations.[284] The problem with these traditional humanitarian assistance options was that OHDACA funds were limited and required lead time for project approval, and that *de minimis* HCA, as the name suggests, only supported minimal HCA activities.[285]

Humanitarian assistance using non-U.S. resources

In some instances, humanitarian and foreign assistance can be provided using resources that are not subject to U.S. fiscal law constraints because they are not U.S. resources. In Haiti, for example, newly formed police and military units were supplied with weapons in the possession of the U.S. following a weapons "buy-back" program.[286] Note that careful documentation was necessary to establish the provenance of particular weapons.[287]

On a much larger scale, units in Iraq relied heavily on funds – totally over one billion dollars in U.S. and Iraqi currency – captured during Operation Iraqi Freedom.[288]

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[284] LEGAL LESSONS LEARNED FROM AFGHANISTAN AND IRAQ, VOLUME I (CLAMO, 1 August 2004), 147

[285] *Id.*

[286] LAW AND MILITARY OPERATIONS IN HAITI, 1994-1995; LESSONS LEARNED FOR JUDGE ADVOCATE (CLAMO, 11 December 1995), 75.

[287] *Id.*

[288] LEGAL LESSONS LEARNED FROM AFGHANISTAN AND IRAQ, VOLUME I (CLAMO, 1 August 2004), 159.

Customary and codified international law provides that such captured resources may be used for reconstruction and relief.[289] Policy dictated that the money be handled through finance channels,[290] but JAs report that units relied on their trial counsels to supervise the processing of captured currency, including its use by commanders for reconstruction in what came to be called the Commanders Emergency Response Program (CERP).[291] Judge advocates also registered the frustration of commanders who were unable to use the funds quickly, owing to fiscal law concerns and bureaucratic obstacles, and recommend that JAs in future anticipate the capture of enemy currency and have a plan instituted that can more quickly accommodate military necessities and policy concerns.[292]

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[289] *See, e.g.*, HAGUE CONVENTION NO. IV RESPECTING THE LAWS AND CUSTOMS OF WAR ON LAND AND ITS ANNEX:

REGULATION CONCERNING THE LAWS AND CUSTOMS OF WAR ON LAND, ART. 43, OCT. 18, 1907, 36 STAT. 2277, 205

CONSOL. T.S. 277, ART. 53.

[290] See 10 U.S.C. § 3302(b) (2000) ("[A]n official or agent of the Government receiving money for the Government from any source shall deposit the money in the Treasury as soon as practicable without deduction for any charge or claim.").

[291] LEGAL LESSONS LEARNED FROM AFGHANISTAN AND IRAQ, VOLUME I (CLAMO, 1 August 2004), 159, n. 56.

[292] *Id.* at 160-2.

II.H. GENERAL ORDERS

Every operation conducted by the United States Army over the last 12 years has featured at least one General Order (GO), usually drafted by the Staff Judge Advocate, outlining prohibited activities deemed harmful to the mission by the commanding general. Usually such a document contains provisions governing the consumption of alcohol, gambling, carrying of unauthorized weapons and other munitions, currency exchange, war trophies, and respect for local culture. It is now accepted as a given that the GO's prohibition on the consumption of alcohol is essential to force protection and good order and discipline in an unstable environment.

General Orders can also be the source of many legal and morale issues.[293] Therefore, careful and deliberate crafting of the document by the SJA is a must. The blanket alcohol prohibition caused difficulties in Operation Joint Endeavor almost immediately. Local culture deemed consumption of some alcohol a necessary part of negotiating, both politically and in the business community.[294] Failure to accept an offered drink was viewed as a sign of weakness or impotence, and could be considered an insult. This illustrates why the 'Additional Exceptions' were granted for those serving with the British headquarters at Zagreb and the French headquarters at Sarajevo.[295] This also included others who "deem it advisable" to consume alcohol in their dealings with allies or local nationals, and those sent on leave to cities and islands in Croatia.[296] The lesson is clear. Don't allow the General Order you draft to carry any blanket prohibitions without considering the overall mission.

In lengthy operations like Bosnia, commanders must remember to reissue GO #1 for each transfer of authority or change of operation. One would not want a court-martial charge of violating Article 92 by disobeying the General Order for Operation Joint Endeavor to be dismissed because the violation occurred after Operation Joint Endeavor changed to Operation Joint Guard.[297]

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[293] Memorandum, Headquarters, U.S. Army Europe, subject: General Order #1, Operation Balkan Endeavor, Title: Prohibited Activities for US Personnel Serving in Operation Balkan Endeavor (28 Dec. 1995).

[294] Memorandum, General William W. Crouch, Commander in Chief, Headquarters, U.S. Army Europe and Seventh Army, for HQ USEUCOM, ATTN: USEUCOM Legal Adviser, subject: Exception to USEUCOM General Order 1 (date after Memorandum referenced in note 1).

[295] Memorandum, General William W. Crouch, Commander in Chief, Headquarters, U.S. Army Europe and Seventh Army, for HQ USEUCOM, ATTN: USEUCOM Legal Adviser, subject: Exception to USEUCOM General Order 1 (20 Jan. 1997).

[296] Memorandum, General William W. Crouch, Commander in Chief, Headquarters, U.S. Army Europe and Seventh Army, for HQ USEUCOM, ATTN: USEUCOM Legal Adviser, subject: Exception to USEUCOM General Order 1 (19 May 1997).

[297] This was a lesson learned cited by LTC Manuel Supervielle, Chair, International and Operational Law Department, The Judge Advocate General's School, based on court cases arising during Operations Desert Shield and Desert Storm. No documents to date have cited a similar problem in the Balkan operations, but it is one to remember given the ever changing operations.

Should the GO for an operation prohibit or restrict the relationships between soldiers and local nationals and perhaps even Troop Contributing Nation personnel? The decision rest solely on the commander's intent for the overall mission. A stability and support operation will require considerable interaction with the local population.

Finally, judge advocates and commanders must continually educate soldiers on the provisions of any GO. An excellent example is the typical weapons and ammunition policy most GOs will contain. Soldiers love souvenirs which are representative of their trade. For this reason attempts to prohibit the collection of weapons, ammunition, and military gear, as well as inert mementos made from the like, must be worded with extreme care. The initial General Order #1 for operations in Bosnia, which hoped to prevent acquisition of such items by outlawing the retention of property "seized or captured during military operations," failed to accomplish its goal.

Soldiers proceeded to find and retain abandoned property, as well as to purchase such items from local civilians.[298] Through the publication of a FRAGO the command resolved these issues, but future deploying forces need to be sensitive to the great importance of clarity in these situations.

Other difficulties with GOs come often not in their drafting but in their implementation. Although prosecution for violation of a GO does not require specific knowledge of the existence of the order,[299] at least one court has held that as a matter of fairness, military members should not be punished for violating a GO of which they had no knowledge.[300] Thus, it is incumbent upon Commanders and JAs to educate members of the command (including, if applicable, civilians accompanying the force) about any General Orders issued. The solution to this challenge is to comprehensively brief members of the command during pre-deployment preparations.

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[298] 1AD-AAR, at 42-43. Especially popular were mortar casings and small arms shells which had been polished and stamped with words or pictures—such as flags—to commemorate the operation. CPT Matthew D. Ramsey, comments *in* OJE-AAR, Vol. II at 153. There continues to be difficulty in employing a consistent standard across units and ranks in this area. *See* Memorandum, CPT John L. Clifton, IV, for Commander, Division Engineer, subject: Legal Opinion (2 Aug. 1996) (opining that a colonel could accept gifts of an inert mine and mine probe without violating the General Order #1).

[299] *See* Uniform Code of Military Justice (UCMJ), art. 92(3)b(1) (2002).

[300] *See* United States v. Charles Anthony Bright, 20 M.J. 661, 663 (N.M.C.M.R. 1985) ("It is abundantly clear that the courts are not willing to give punitive effect to general orders (the knowledge of which is conclusively presumed) when there is inadequate notice of such effect, . . . *fundamental fairness* dictates that the intended punitive effect be nullified.") (emphasis added).

II.I. HUMAN RIGHTS LAW

Recent operations have demonstrated that Judge advocates will often play a crucial role in providing training on basic human rights, not only to the armed forces and the police force of the host country, but also their judiciary. Because of their background in the rule of law and their perceived credibility, Commanders will turn to their legal advisor to lead efforts that reach this central pillar of respect for basic human rights in stability and support operations.

In training human rights, JAs must be aware that local legal professionals will often be suspicious of such training efforts, viewing them as an attempt to instill "Western" or "American" values. Legal teams recommended that to avoid this perception, JAs should seek the assistance of coalition JAs[301] and should look for international covenants on human rights that the country concerned, or other countries of similar cultural background, have signed. During training in Iraq on human rights this approached worked well. The International Covenant on Civil and Political Rights, for instance, had been signed by Iraq in March 1975. Legal teams were able to provide training on this covenant not as an American legal norm, but as an international covenant that had already been part of Iraqi law for almost thirty years.[302]

Judge advocates must also have some understanding of the relevance of various human rights treaties when dealing with coalition partners. For example, any United States commander in a coalition operation needs to have a JA who understands the most important laws of another coalition partner and the extent of the applicability of the European Convention of Human Rights (ECHR) to those coalition partners bound by it.[303] Other coalition partners may not have faced the same dilemma, but after the end of major combat operations for British forces the legal regime in Iraq had changed and therefore they were required to gather evidence when a fatal shooting occurred or if there was a death in territory under their control, not least to be able to defend the British Government in the event litigation was initiated against it in the British civil courts. Without some form of investigation and evidence collection, it is very difficult to refute potential claims, and it remained uncertain as to the precise legal environment governing

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[301] It was partly for this reason that the U.S. Defense Institute of International Legal Studies (DIILS) was on three occasions in 2005 loaned a British Army Legal Officer, Lt Col Richard Batty MBE who was the British Army exchange officer at the Center for Law and Military Operations at the JAG School to assist the DIILS mission in Afghanistan.

[302] 1CAV AAR,. The 1st Cavalry Division's Governance Support Team Justice recommended that the International Covenant on Civil and Political Rights is an excellent model for training human rights concepts, especially in Arabic countries because a translation into Arabic is readily available on the United Nations' webpage. Judge advocates must be familiar with the two Optional Protocols as well, and determine whether the country in question has adopted them.

[303] *See* Al-Skeini and Others v. Secretary of State [2005] H.R.L.R. 3 (Q.B. 2004) (holding that the UK was obliged to comply with the ECHR and the Human Rights Act because the legislation applied to UK military bases as territory under the control of the UK).

operations in the post conflict operation.[304] JAs are not expected to be experts on all the laws of other coalition partners, but they do need some knowledge so as to be alert to when they have to make further inquiries of the JAs of their coalition partners so that workarounds can be made during the planning phase to potential problems.

There was also the fact that while persons detained by British forces would be transferred to the Iraqi authorities at the earliest opportunity rather than held in internment, good quality tangible evidence of criminal activity obtained during detention operations was necessary for a successful prosecution.[305] All coalition forces seemed to need training on basic evidence gathering techniques and evidence preservation in order to preserve prosecution options later. This lesson also extended to any coalition partner having a role in an operation where individuals might be released to Iraqi authorities for prosecution.

Secondly, the UK in particular needed to address its human rights obligations, especially with regard to the death penalty. These obligations arise under European human rights law and domestic legislation, which places prohibitions on transferring persons to a jurisdiction where they may be subject to the death penalty.[306]

In addition to the above practical applications, JAs must of course have a foundation In the basics of Human Rights law. Customary International Law results from

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[304] *See, e.g.,* Major Nick Simpson, Legal Advisor HQ 1 Mechanized Brigade, After Action Report. (3 Nov. 2004) [hereinafter Simpson AAR] noting that HQ 1 Mechanized Brigade introduced the provisions of the Regulation of Investigatory Powers Act 2000 (RIPA), which provides the rules for the interception of logs, phone calls and e-mails of suspected criminals by the security and intelligence services. These provisions only directly impacted the British, but required some training on the appropriate procedures, extra staff work, and co-ordination).

[305] See Captain Chris Hamers, Royal Netherlands Army, After Action Report (15 Mar. 2005) [hereinafter Hamers AAR] (noting that there was a lot of discussion in Afghanistan when the handover of the ISAF was drawing closer. Various leases had been granted by the Afghan Transitional Authority (ATA) but the terms of these leases was not always clear with regard to reviews of the terms at a given time and when there was a change of an incumbent nation or unit and important paperwork was missing. The issues also affected camp development and expansion and led to unnecessary difficulties with 'entrepreneurial officials'. Issues also existed between coalition members as to ownership and control of buildings and the costs of improving them. A troop contributing nation may wish to sell a building to a new troop contributing nation when their forces leave or relocate. A six month cycle of purchase, improvement and sale could have been avoided if NATO had purchased all troop contributing nations 'owned' buildings within COMISAF's control).

[306] Relevant treaties, legislation and case law include: Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty CETS No.114 (28 Apr. 1983), Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty in all Circumstances CETS No.187 (3 May 2002), Art IV Extradition Treaty (UK-U.S.), Human Rights Act 1998 (UK), *Soering v UK* (1989) EHRR 439 (finding that, where the death penalty was likely to be imposed, extradition to the United States was a likely breach of the European Convention on Human Rights). COL Stone, 10th Mountain Division SJA, indicated that this was an important consideration in her area during OEF. Because the United States had set up GTMO and the potential for Tribunals, with the possibility of the death penalty, the UK Commander was worried that if his troops picked up detainees, his Government would not permit him to turn them over to U.S., even if the detainee was Osama bin Laden himself.

the consistent practice of norms, customs, and philosophy that nations, over a prolonged period of time, have come to accept as legal obligations. The U.S. accepts the position that certain fundamental human rights fall within the category of Customary International Law and that Customary International Law is legally binding under all circumstances.

The United States interprets human rights agreements or treaties to apply to persons living in the United States, and not to persons with whom government representatives may interact with in the international community. According to this interpretation, although treaties entered into by the U.S. become part of the "supreme law of the land," they are not necessarily enforceable in U.S. Courts. Generally, a treaty assumes a legal obligation if the U.S., at the time the agreement is signed, agrees that the agreement is self-executing. However, if the agreement is non-self executing, it is not legally binding unless there is a Presidential order or Congressional legislation passed to execute the provisions of the treaty. Having said that, certain treaty provisions may be legally binding if they attain Customary International Law status. For example, the Universal Declaration of Human Rights, adopted by the General Assembly of the United Nations in 1948, is not a binding international agreement or treaty. However, it contains fundamental human rights that have attained the status of Customary International Law which ***are*** binding on the U.S. Provisions of the Declaration that are not considered reflective of Customary International Law, are not legally binding on the U.S.

Customary International Law finds that all humans have the right to be free from State action which establishes, supports, or condones violations of what are commonly referred to as fundamental human rights. Nations violate Customary International Law when they engage in the practice of genocide, slavery, murder, kidnapping, torture, arbitrary detention, systematic racial discrimination, or a consistent pattern of violations of internationally recognized human rights.

II.J. INFORMATION OPERATIONS

Information Operations (IO) are a vital component of overall operations on the complex and nontraditional battlefields of the 21st century. IO will involve complex legal and policy issues . . . [and] IO planners must understand the different legal limitations that may be placed on IO across the range of military operations.[307] In past U.S. military operations legal personnel provided advice and assistance to those military personnel charged with attaining information superiority for coalition forces. Judge advocates (JAs) were members of information operations (IO) cells, providing key advice to a sophisticated IO planning process.

This process, known as "effects-based planning," combined the traditional lethal targeting process with that of IO planning to produce a desired effect on a target. In addition to IO planning, legal teams assisted embedded media and helped civil affairs (CA) personnel liaison with the local population and the many international organizations and nongovernmental organizations (NGOs) that operated in both Afghanistan and Iraq. Legal personnel learned many lessons from their work in assisting commanders to gain information superiority.

For example, the judge advocate must be trained and prepared to provide legal advice during the information operations planning and to understand how Judge advocates contribute to IO. War planners in both Operation Enduring Freedom (OEF) and Operation Iraqi Freedom (OIF) used IO in a multitude of ways to enable military operations.[308] JAs at all levels of command often played an important role in IO planning, advising commanders and their staffs on the legal issues associated with IO. As JAs quickly discovered, campaigns that give primacy to IO are legally intensive.[309]

Army doctrine provides that IO is part of the Judge Advocate General's Corps (JAGC) Operational Law support to commanders.[310] In the Marine Corps, the JA is not

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[307] JOINT CHIEFS OF STAFF, JOINT PUB. 3-13, JOINT DOCTRINE FOR INFORMATION OPERATIONS para. I-1a - 9 Oct. 1998) [hereinafter JOINT PUB. 3-13].

[308] For joint doctrine on IO, *see id. See also* U.S. DEP'T OF ARMY, FIELD MANUAL 3-13, INFORMATION OPERATIONS: DOCTRINE, TACTICS, TECHNIQUES, AND PROCEDURES (28 Nov. 2003) (describing Army IO doctrine) [hereinafter FM 3-13]; U.S. DEP'T OF NAVY, 3-40.4, MARINE AIR-GROUND TASK FORCE INFORMATION OPERATIONS [hereinafter MCWP 3-40.4].

[309] *See, e.g.*, Office of the Staff Judge Advocate, 82d Airborne Division, Operation Iraqi Freedom (OIF), After Action Report (AAR), at 2 [hereinafter 82d Airborne OIF AAR] ("Legal review was required of numerous information operations products, dissemination methodology, and miscellaneous initiatives."); Transcript of After Action Review Conference, Office of the Staff Judge Advocate, Task Force Tarawa, and the Center for Law and Military Operations, Camp Lejeune, N.C., at 14 (2-3 Oct. 2003) [hereinafter TF Tarawa AAR Transcript] (providing that the JA played an important role in planning a US Marine Corps unit's use of IO to remove an Islamic fundamentalist who had declared himself governor of a province in Iraq). LEGAL LESSONS LEARNED FROM AFGHANISTAN AND IRAQ: VOLUME I, MAJOR COMBAT OPERATIONS (11 SEPTEMBER 2001 TO 1 MAY 2003)132

[310] U.S. DEP'T OF ARMY, FIELD MANUAL 27-100, LEGAL SUPPORT TO OPERATIONS paras. 2.4(a) and 3.2 (1 Mar. 2000).

listed as a formal member of any Marine doctrinal IO staff, but can be included in IO planning if invited by the IO Officer to provide expert advice and opinions.[311]

During both operations, JAs assigned to the brigade operational law team (BOLT) provided IO advice to the maneuver brigades. Operational law attorneys generally provided support to IO cells and IO working groups (IOWGs) at division level and above. At those echelons, staff judge advocates (SJAs) should consider assigning a Separate JA to the IO cell, because meetings may be conducted simultaneously with other G-3 (Operations & Plans) meetings that an operational law attorney must attend, such as targeting meetings.[7]

During a recent deployment for OIF2, the III Corps SJA, assigned a separate JA to the V Corps IO Cell. In order for the IO cell to efficiently sustain offensive and defensive IO during hostilities and follow-on operations, an SJA with operational law knowledge must be readily available to answer over-the-shoulder questions and to be tasked to produce IO products that are legal in nature. The IO cell operates continuously and plans at high-velocity during hostilities and follow-on operations, and the need for legal advice is likewise continuous and required rapid response. Being embedded in the IO cell allows the SJA IO representative to focus on IO legal questions and products.[312]

In Afghanistan and Iraq, JAs also provided legal advice to psychological operations (PSYOP) teams, public affairs (PA) officers, and Civil Affairs (CA) personnel as part of IO planning. To do so, they had to understand both the legal issues involved and the IO planning process. In addition, legal teams recognized how their own missions contributed to the IO campaign and included them in the IO planning cycle.

Experience has demonstrated that to participate effectively in IO planning, the JA must understand the information operations planning methodology, including the military decision making process and the targeting process. Similar to other mission planning, IO planners used the military decision-making process (MDMP) to plan and synchronize IO.[313] Consequently, JAs had to be thoroughly familiar with the MDMP to effectively participate in the IO cells and working groups.[314]

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[311] MCWP 3-40.4, para. A-3. See also Major Thomas A. Wagoner, Marine Information Operations in the Peacekeeping Realm, at 16 (2004) [hereinafter Marine Information Operations in the Peacekeeping Realm].

[312] Memorandum, Captain Noah V. Malgeri, Current Operations Cell, Office of the Staff Judge Advocate, V Corps, for COL Marc Warren, Staff Judge Advocate, V Corps, para. 6 (15 May 2004) (comments from Captain Arby Nelson, OSJA, V Corps representative to the V Corps IO Cell).

[313] *See* JOINT PUB. 3-13, ch. V (providing joint doctrine on the IO planning process). *See also* FM 3-13, ch. 5 (outlining the Army's MDMP for IO planning); MARINE CORPS WARFIGHTING PUBLICATION 5-1, MARINE CORPS PLANNING PROCESS (5 Jan. 2001) (C1, 24 Sept. 2001).

[314] Commanders use the IO mission statement, IO concept of support, IO objectives, and IO tasks to describe and direct IO. The IO mission statement is a short paragraph or sentence describing what the commander wants IO to accomplish and its purpose; the concept of support is a statement of where, when, and how the commander intends to focus the IO element of combat power to accomplish the mission; the objectives are defined and obtainable aims that the commander intends to achieve using IO; and the IO tasks are developed to support accomplishment of one or more objectives. *See* FM 3-13, paras. 5-1 to 5-8.

In addition, units in both OIF and OEF generally used effects-based planning, Synchronizing lethal and nonlethal fires, which included offensive IO effects.[315] These effects-based planning meetings used the doctrinal targeting process of decide, detect, deliver, and assess (D3A).[316] Therefore, JAs also needed to be familiar with doctrine on the targeting process to effectively participate in IO planning.

As recognized in joint doctrine, IO may involve complex *legal* issues. Therefore, joint doctrine requires that all IO planners consider the following broad areas. (1) Domestic and international criminal and civil laws affecting national security, privacy, and information exchange. (2) International treaties and agreements and customary international law, as applied to IO. (3) Structure and relationships among US intelligence organizations and general interagency relationships, including nongovernmental organizations.[317]

Using the MDMP process, the IO cell conducts mission analysis to define the tactical problem and determine feasible solutions. During mission analysis the staff: analyzes the higher headquarters order; conducts the intelligence preparation of the battlefield; determines specified, implied, and essential tasks; reviews available assets; determines constraints; identifies critical facts and assumptions; conducts a risk assessment; determines initial commander's critical information requirements; determines the initial Intelligence, Surveillance, and Reconnaissance (ISR) annex; plans use of available time; writes the restated mission; conducts a mission analysis briefing; approves the restated mission; develops the initial commander's intent; issues the commander's guidance and warning order (WARNO); and reviews facts and assumptions. *Id.* para. 5-31. After the mission analysis briefing, the staff develops courses of action (COAs) for analysis and comparison based on the restated mission, commander's intent, and planning guidance. During COA, the G-7 develops or refines the following IO products to support each COA: IO concept of support; IO objectives; IO tasks to support each IO objective; IO input work sheets; IO synchronization matrix; IO-related target nominations; and the critical asset list. The staff then conducts a COA analysis (war-gaming) comparison. The staff then makes a recommendation to the commander in a COA decision briefing. The IO concept of support for the approved COA becomes the IO concept of support for the operation. The G-3 then issues a warning order (WARNO), which contains the IO contributions to the commander's intent and concept of operations; IO tasks requiring early initiation; and a summary of the IO concept of support and IO objectives. Finally, the staff refines the approved COA and issues an operations order or operations plan (OPORD/OPLAN). *See generally id.* paras. 5-12 to 5-130. Joint doctrine on the IO planning process is similar to the above-described Army process. *See* JOINT PUB. 3-13, note 1, ch. V.

[315] According to joint doctrine, a principle of targeting is that it is "effects–based." In achieving the [Joint Forces Commander's] objectives, targeting is concerned with producing specific effects. Targeting analysis considers all possible means to achieve desired effects, drawing from any available forces, weapons, and platforms. The art of targeting seeks to achieve desired effects with the least risk, time, and expenditure of resources. JOINT CHIEFS OF STAFF, JOINT PUB. 3-60, JOINT DOCTRINE FOR TARGETING para. I-4 (17 Jan. 2002) [hereinafter JOINT PUB. 3-60]. *See also* U.S. DEP'T OF ARMY, FIELD MANUAL 6-0, MISSION COMMAND: COMMAND AND CONTROL OF ARMY FORCES para. 6-105 (11 Aug. 2003).

[316] In the decide phase, the targeting team addresses targeting priorities and briefs high pay-off target lists, the intelligence collection plan, target selection standards, and the attack guidance matrix to the commander for decision. In the detect phase, the targeting team develops the information needs for target detection. These needs are expressed as priority intelligence requirements (PIR) and intelligence requirements (IR). Targets and suspected targets are then passed to the targeting team by a number of means, to include intelligence from subordinate units,

[317] JOINT PUB. 3-13, para. I-1.

In addition, specific legal issues often include: a law of war analysis of the intended wartime targets; special protection for international civil aviation, international banking, and cultural or historical property; and actions expressly prohibited by international law or convention.[318] Because of these legal considerations, JAs were integral to IO planning and execution during both operations. For example, as described in subsection a, above, JAs provided LOAC advice when IO planners proposed targeting enemy radio and television stations. Moreover, JAs analyzed proposed IO targets under the rules of engagement (ROE). For instance, prior to the start of the ground war in Iraq, the coalition could not target certain communication nodes because they were operating under the ROE for Operation SOUTHERN WATCH.[319] It wasn't until the transition to OIF ROE that these assets could be targeted. In addition, key representatives in the IO process that JAs often advised during operations in both Iraq and Afghanistan were PSYOP teams, CA, and PA personnel.

Judge advocates must review psychological operations themes and products for legal issues. The PSYOP representative integrates, coordinates, deconflicts, and synchronizes the use of PSYOP with other IO tools and missions. These PSYOP missions included operations planned to convey selected information to influence the enemy combatants and the local civilian population.[320] For example, JAs reviewed leaflet messages and messages to be broadcast over loudspeakers.[321]

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[318] *Id.* para. I-4a. The Army JA's IO-related responsibilities also include: advising the G-7 (assistant chief of staff, information operations) on the legality of IO actions being considered during planning; reviewing IO plans, policies, directives, and ROE issued by the command to ensure their consistency with U.S. DEP'T OF DEFENSE, DIRECTIVE 5100.77, DoD LAW OF WAR PROGRAM (9 Dec. 1998) [hereinafter DoD Dir. 5100.77] and the law of war; ensuring that IO law of war training and dissemination programs are consistent with DoD Directive 5100.77 and the law of war obligations of the US; and advising the deception working group on the legality of military deception operations and the possible implications of treaty obligations and international agreements on it. FM 3-13, para. F-32.

[319] Operation SOUTHERN WATCH was the name of the mission to monitor and control the airspace south of the 33d parallel in Iraq after the first Gulf War, see http://www.eucom.mil/Directorates/ECPA/index.htm?http://www.eucom.mil/Directorates/ECPA/Operations/osw/os (last visited 2 Apr. 2004).

[320] *See generally* U.S. DEP'T OF ARMY, FIELD MANUAL 3-05.30, PSYCHOLOGICAL OPERATIONS paras. 8-5 to 8-8 (1999).

[321] *See generally* Gordon Interview. A good example of problems that may occur when dropping leaflets over a wide area is explained by Captain Charles L. "Jack" Pritchard, Jr., 1st Brigade Combat Team, 3rd Infantry Division. Captain Pritchard writes that when he went to the unit EPW cage, he discovered that most of the individuals were people in civilian clothes who had "surrendered" because they were confused by leaflets that PSYOP had dropped on the city and believed that the Americans wanted them to come out of their homes and surrender. 1st Brigade Combat Team, 3rd Infantry Division, Judge Advocate narrative, at 6 (2003) [hereinafter 1BCT, 3ID Narrative]. In addition, before raiding a hospital where Iraqi enemy forces held personnel from the 507th Maintenance Company, TF Tarawa PSYOP personnel announced over loudspeakers that the raid was about to begin and that medical personnel should come out. *See* TF Tarawa AAR Transcript, at 104-05. At least one review of PSYOP operations during combat in Iraq concluded that the United States and Britain had "considerable success" in developing PSYOP products that caused inaction among the Iraqi military and helped expedite surrenders. The PSYOP effort involved 58 EC-130E Commando Solo sorties, 306 broadcast hours of radio, and 304 television hours. Teams prepared approximately 108 radio messages and over 80 different leaflets. During combat operations,

During OIF, a pre-D-day IO objective was to convince Iraqi soldiers not to fight and urge units to capitulate using, among other products, leaflet drops.[322] This effort continued throughout the war. To meet this objective, commanders expected their JAs to be the primary point of contact for all capitulation issues, to include securing capitulation agreements and ensuring that units complied with capitulation instructions.

Additionally, JAs anticipated that a successful IO campaign would result in more individual surrenders, which would then require additional legal advice on detention operations and treatment of enemy prisoners of war (EPWs). In one case, an EPW volunteered to tape a message to be broadcast to the Iraqi people stating that U.S. forces were not in Iraq to kill them. Fortunately, the unit's S-2 (intelligence officer) knew to obtain an opinion from his JA.[323]

Many deployed Staff Judge Advocates have advocated assigning a senior captain to assist in integrating public affairs (PA) and the civil affairs missions. PA supported IO through print and electronic products, news releases, press conferences, and media facilitation.[324] For example, combat cameras were used to show the Iraqi people that coalition forces were not looting the country and were, in fact, bringing humanitarian aid to the people. Moreover, when the Iraqi minister of information began claiming that U.S. troops were nowhere near Baghdad, combat camera was able to show that he was lying to the Iraqi people by broadcasting footage of U.S. troops in Baghdad.[325]

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coalition forces flew over 150 leaflet missions, dropping nearly 32 million leaflets. *See* ANTHONY H. CORDESMAN, THE IRAQ WAR: STRATEGY, TACTICS, AND MILITARY LESSONS 511-12 (2003); Assessment and Analysis Division, U.S. Air Force Central Command , OPERATION IRAQI FREEDOM—BY THE NUMBERS, at 8 (30 Apr. 2003).

[322] *See generally* 3ID AAR, at 269 (stating that during the pre-war phase, IO consisted of e-mail and leaflet drops, but that the leaflet drops, in particular, were negated when they were collected and those who read them were punished).

[323] 1BCT, 3ID Narrative, at 6. In the narrative, Captain Jack Pritchard, 1BCT JA writes that, after discussion with his SJA, he found little issue with this, as the identity of the EPW would remain undisclosed and there would be no public humiliation or risk of harm. "The only issue . . . raised was the [Geneva] Conventions' prohibition on using EPWs against their own military. As this prohibition was intended to prevent the unwilling use of EPWs against their own military as fighting soldiers, [they] agreed the use of the EPW's voice would not violate the prohibition." *Id. See* GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR art. 130, Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. 3364, 75 U.N.T.S 135 (providing that it is a grave breach of international law to compel an EPW to serve in the forces of the hostile power); *id.* at art. 13 (providing that EPWs must be protected against insults and public curiosity). *See also* U.S. DEP'T OF ARMY, REG. 190-8, ENEMY PRISONERS OF WAR, RETAINED PERSONNEL, CIVILIAN INTERNEES AND OTHER DETAINEES, para. 2-1(d) (1 Oct. 1997) ("Prisoners may voluntarily cooperate with PSYOP personnel in the development, evaluation, or dissemination ofPSYOP messages or products.").

[324] Although considering that CA brigades and battalions have a very top heavy rank structure, with senior field grade officers comprising most of the decision making slots, it may require a JA in the grade of at least 04 to effectively influence and coordinate such matters.

[325] *See generally* 3ID AAR, at 269 (stating that during the pre-war phase, IO consisted of e-mail and leaflet drops, but that the leaflet drops, in particular, were negated when they were collected and those who read them were punished).

In addition, the CA representative to the IO cell synchronized CA activities with the IO themes and mission.[326] In both OIF and OEF, CA missions positively influenced the local population, with JAs assisting in CA mission planning and execution - in particular as major combat operations wound down and stability operations began.[327]

There is another crucial aspect played by judge advocates in the IO mission that is often overlooked or ignored. Legal teams will play an important role in IO through their own missions such as paying claims and compensating Iraqis for requisitioned property. As the SJA for the 82d Airborne Division wrote: "JAs aggressively pursued and investigated foreign claims under the Foreign Claim Acts (FCA) in order to effectuate the purpose of the FCA. This engendered support from the local populace for US forces in spite of activities which resulted in loss to locals . . . ."[328] JAs similarly investigated the payment of private property requisitioned during combat operations.

Legal teams need to ensure that their missions are integrated into the overall IO planning process. These missions should be listed as tasks that contribute to a specific objective in the IO campaign and briefed to the commander as part of the IO plan. Incorporating legal tasks into the IO plan will serve to highlight how the legal team's work contributes to the overall unit mission and to educate other staff members on the roles and missions of their legal team.

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[326] U.S. DEP'T OF ARMY, FIELD MANUAL 3-05.401, CIVIL AFFAIRS TACTICS, TECHNIQUES, AND PROCEDURES para. 1-28 (23 Sept. 2003). *See also* JOINT CHIEFS OF STAFF, JOINT PUB. 3-57.1, JOINT DOCTRINE FOR CIVIL AFFAIRS para. II-8.c (14 Apr. 2003).

[327] *See, e.g.*, 82d Airborne OIF AAR at 2.

[328] *Id.*

II.K. LAW OF WAR/LAW OF ARMED CONFLICT

There has been much debate and confusing guidance issued on what, if any, aspects of the law of war (LOW) apply to certain operations involving the U.S. armed forces over the last 12 years. For the Judge Advocate practicing law or the paralegal assisting at the tip of the spear, clear, timely guidance on what rules will apply, has not always been forthcoming, but is an absolute necessity. Success in previous operations centered upon Judge Advocates relying upon existing Department of Defense (DoD) Directives and Memorandums as well as Chairman of the Joint Chiefs of Staff Instructions as legal authority for the characterization of an operation.

Prior to May 9, 2006, DoD Directive 5100.77 (DoD law of War Program) was the centerpiece of this reliance.[329] The Directive instructed service members to apply the law of war regardless of the type of operation. The same theme was echoed in paragraph four of the Chairman of the Joint Chief of Staff Instruction 5810 .01B:

The Armed Forces of the United States will comply with the law of war during all armed conflicts, however such conflicts are characterized, and, unless otherwise directed by competent authorities, the U.S. Armed Forces will comply with the principles and spirit of the law of war during all other operations.[330]

In the hand book published by the Center for Law and Military Operations (CLAMO) *"Legal Lessons Learned from Iraq and Afghanistan Volume II"*, there is an extensive discussion of the various machinations and discussions that occurred in Washington D.C. regarding the characterization of the Global War on Terror (GWOT). From these discussions, various and unclear guidance on the status of detainees apprehended during the GWOT was issued. In a 2006 U.S. Supreme Court Case, *Hamdan v Rumsfield,* many of the earlier decisions made by the administration regarding the status and disposition of the detainees were reversed. While these decisions and legal determinations may be fascinating from a historical and scholarly perspective, they are of limited relevance to the JA in the field, who is attempting to advise the commander on what to do on the ground or in a detention facility.

The lesson echoed through every U.S. military operation over the last twelve years is clear – ***apply the law of war as the standard in every military operation.*** While it may be important for the advising Judge Advocate to understand that such an

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[329] DoD Directive 5100.77 is replaced by DoD Directive 2311.01E dated May 9 2006. The only two substantive differences in the new directive is that the language "U.S. military personnel must comply with the spirit and principles of the law of war during all armed conflicts, no matter how the conflict is characterized" DoD DIR. 5100.77, para. 5.3.1 – is replaced by - "It is DoD policy that (m)embers of the DoD Components comply with the law of war during all armed conflicts, however, such conflicts are characterized, and in all other military operations." U.S. DEP'T OF DEFENSE, DIR. 2311.01E, DoD LAW OF WAR PROGRAM (9 May 2006).

[330] JOINT CHIEFS OF STAFF, INSTR. 5810.01B, IMPLEMENTATION OF THE DoD LAW OF WAR PROGRAM (25 Mar. 2002) [hereinafter JCSI 5810.01B].

application of the Law of War is a policy determination instead of *per* se law, it is also likely irrelevant. The Hague and Geneva Conventions, United Nations Charter and other base documents which form the foundation for the law of war, all provide clear guidance on the treatment of detainees and Prisoners of War, targeting, treatment of civilians, occupation law and countless other Law of Armed Conflict (LOAC) topics. In the absence of guidance to the contrary, JAs should invoke DoDD 2311.01E and CJCSI 5810.01B as your authority to follow the time honored constraints as described in these sources for the law of war.

II.K.1 Law of War Training

In every operation since at least 1994, the Judge Advocate has been entrusted by the command as the expert in the training on LOW issues. Recently, law of war training was revised in coordination with the Office of the Judge Advocate General to mandate specific learning objectives and direct that the training must be conducted by a qualified evaluator/instructor in a structured manner. Army Regulation 350-1 contains additional guidance. The following information is taken directly from a Department of the Army Message DTG: 240148Z AUG 05:

Soldiers and leaders require LOW training throughout their military careers commensurate with their duties and responsibilities. The requirements for training at the following levels are specified below:

(1) Level A training is conducted during initial entry training (IET) for all enlisted personnel and during basic courses for all warrant officers and officers.
(2) Level B training is conducted in MTOE units.
(3) Level C training is conducted in the Army school system (TASS).

Level A training provides the minimum knowledge required for all members of the army. The following basic law of war rules (referred to as the soldier's rules, which stress the importance of compliance with the law of war) will be taught during level A training:

(1) Soldiers only fight enemy combatants.
(2) Soldiers do not harm enemies who surrender. They disarm them and turn them over to their superior.
(3) Soldiers do not kill or torture enemy prisoners of war.
(4) Soldiers collect and care for the wounded, whether friend or foe.
(5) Soldiers do not attack medical personnel, facilities, or equipment.
(6) Soldiers do not destroy more than the mission requires.
(7) Soldiers treat civilians humanely.
(8) Soldiers do not steal. Soldiers respect private property.
(9) Soldiers should do their best to prevent violations of the law of war.
(10) Soldiers report all violations of the law of war to their superior.

Level B training is conducted in MTOE units for all unit personnel as follows:

(1) Training is conducted annually and conducted again prior to deployment directed by a deployment order or appropriate authority.

(2) Commanders will establish specific training objectives. A qualified instructor will conduct training in a structured manner and evaluate performance using established training conditions and performance standards. For the purposes of this training, a QUALIFIED INSTRUCTOR IS DEFINED AS A JUDGE ADVOCATE GENERAL'S CORPS OFFICER, OR A PARALEGAL NONCOMMISSIONED OFFICER CERTIFIED TO CONDUCT SUCH TRAINING BY A JUDGE ADVOCATE GENERAL'S CORPS OFFICER.

(3) Training will reinforce the principles set forth in the soldier's rules. Additionally, training will emphasize the proper treatment of detainees, to include the 5 S and T (search, segregate, silence, and speed to safe area, safeguard and tag). Soldiers will be required to perform tasks to standard under realistic conditions. Training for unit leaders will stress their responsibility to establish adequate supervision and control processes to ensure proper treatment and prevent abuse of detainees.

(4) In addition to the training described above, training of the law of war and detainee operations will be integrated into other appropriate unit training activities, field training exercises, and unit external evaluations at home station, combat training centers and mobilizations sites.

Army schools will tailor LOW training to the tasks taught in those schools. Level C training will emphasize officer, warrant officer and NCO responsibilities for:

(1) Their performance of duties in accordance either the law of war obligations of the United States.

(2) Law of war issues in command planning and execution of combat operations.

(3) Measures for the reporting of suspected or alleged war crimes committed by or against U.S. or allied personnel.

The Office of the Judge Advocate General has created a training package that effectively meets the above requirement. It is available at www.jagcnet.mil under the CLAMO subfolder and then under the additional subfolder named "law of war training."

The Judge Advocate General's School also teaches a wide variety of courses that are crucial to training young judge advocate in the art of instructing on the law of war. The Law of War and Operational Law Courses are both excellent vehicles to prepare any judge advocate to teach the law of war to soldiers or advice a commander on law of war issues. The dates for these courses are available at the JAG school site.

II.K.2 Legal Review on Weapons

Department of Defense regulations require that any weapon used by a member of the United States armed forces be in conformity with the Law of War. The origins of this requirement can be traced back to the legal premise or principle often defined as humanity. Article 22 of the Hague Convention (IV) Respecting the Law and Customs of

War on Land and its Annex (also called Hague IV) states that the rights of the belligerents to adopt means of injuring the enemy is not unlimited. Article 23 goes on to label several prohibitions on methods of waging warfare, including 23(e) stating that is especially forbidden to employ arms, projectiles, or materials calculated to cause unnecessary suffering.

Legal review of new weapons is also required under Article 36 of the first Protocol to the Geneva Conventions. The Department of Defense seeks to comply with the above by requiring the review of all U.S. weapons and weapons systems by the service TJAG for legality under the law of war.[331] A review occurs before the award of the engineering and manufacturing development contract and again before the award of the initial production contract.

II.K.3 Non-Lethal Weapons

Non-lethal weapons (NLW) are defined as weapons explicitly designed and primarily employed so as to incapacitate personnel or material, while minimizing fatalities, permanent injury to personnel, and undesired damage to property and the environment.[332] There are many other NLWs apart from Riot Control Agents (RCAs). They include riot control batons ("night sticks"), kinetic energy rounds (such as foam rubber, wooden baton and rubber ball projectiles) for various projectile weapons (such as the 12-gauge shotgun and the 40mm grenade launcher), high intensity lights, anti-vehicle barricades, and more. Prior to acquisition, each non-lethal munition or weapon receives a legal review by the Department of the Army's Office of the Judge Advocate General. As with RCAs, the primary issues with NLW are:

- When can NLWs be used?
- How should troops be trained with NLWs?

Numerous CLAMO after action reviews mention legal issues involving a less than lethal capability, be it riot control agent (pepper spray), a taser, some type of spray on restraint (such as sticky foam) or various types of laser weapons. Not only must these unconventional weapons first receive a legal review as described above, but there are other legal concerns. First it is important to remember that Non-Lethal Weapons are not necessarily non-lethal. Virtually any weapon can be used in a manner to cause death or great bodily injury. Thus, NLWs are not required to have zero probability of producing fatalities or permanent injuries.

Non-Lethal Weapons may be categorized into "systems":

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[331] Interim Guidance, Defense Acquisition, DEPSECDEF Memo, 30 Oct 2002, AR 27-53, AFI 51-402, and SECNAVINST 5711.8A

[332] DEP'T OF DEFENSE DIRECTIVE 3000.3 POLICY FOR NON-LETHAL WEAPONS, 9 July 1996, ASD(SO/LIC).

• Personnel Effectors. Personnel effectors include items such as riot batons, stingball grenades, pepper sprays, and kinetic energy rounds, designed to, at a minimum, deter, discourage, or at most, incapacitate individuals or groups.

• Mission Enhancers. Mission enhancers include items such as bullhorns, combat optics, spotlights, and caltrops.[333] These items are designed to facilitate target identification and crowd control. Additionally, these items provide a limited ability to affect vehicular movement.

International Initiatives.

The first review conference (October 1995) for the *United Nations 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*, also known as the *United Nations Convention on Conventional Weapons* (UNCCW), adopted a fourth protocol prohibiting the use of blinding laser weapons. The U.S is not a party to this protocol, but has fully implemented it.

• Protocol IV defines blinding laser weapons as "weapons specifically designed, as their sole combat function or as one of their combat functions, to cause permanent blindness to unenhanced vision, that is to the naked eye or to the eye with corrective eyesight devices."

• The U.S. military has no laser weapons which are specifically designed to cause permanent blindness to unenhanced vision. Devices such as range finders, target designators, or non-lethal weapons such as dazzlers are not blinding laser weapons.

Unless restricted by higher's Rules of Engagement, fire control measures, orders, or lack of availability, non-lethal weapons (other than RCAs) may be employed by commanders and troops any time force is authorized. There is no legal requirement to resort to use of non-lethal weapons where deadly force is warranted by the circumstances ruling at the time. Non-Lethal Weapons may even be used in conjunction with lethal weapons to enhance the effectiveness and efficiency of the lethal weapons, even in total combat.

There are several things to consider and plan for before employing NLW:

(a) Deadly Force and the Right of Self and Unit Defense remain. NLWs do not replace traditional means of deadly force. They are merely another option. NLW availability does not limit a soldier's inherent right of self-defense, nor does it limit a commander's inherent authority and obligation to use all necessary means available and to take all appropriate action in self-defense. Troops must still have deadly force available as an option when the mission so dictates.

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[333] Caltrop is a term of art for spiked weapons or barriers, such as spiked impediments lain on a road to prevent vehicular access to a given area.

(b) NLWs are not exclusive. ROE must clearly articulate and soldiers must understand (i.e. through training) that NLWs are an *additional* means of employing force for the particular purpose of limiting the probability of death or serious injury to noncombatants or belligerents.

(c) The Media. Commanders and troops alike must be prepared to handle media inquiries. Commanders should consider whether or not an Information Operations campaign addressing NLW is advisable. Preemptive engagement of the media can clarify the role and effects of NLWs.

A second reason to consider an Information Operations campaign addressing NLWs is the potential deterrent effect. If civilians know that the U.S. is permitted to use NLWs, they may hesitate to provoke a confrontation. If they believe NLWs are not available, they may be more likely to harass soldiers or marines, knowing they will not use deadly force unless absolutely necessary.

NLW employment can favorably influence both the immediate situation and the overall operational environment by reducing the risk of noncombatant fatalities and collateral damage and their accompanying negative effects on the attitudes and actions of noncombatants and even combatants (less anger and therefore justification to join an insurgency, alienation, remorse). However, in some circumstances, use of NLWs may have a provoking effect. As always, the leaders on the scene must exercise the best weapon we have—good judgment.

Cultural Implications

Implications of NLW employment will often hinge on the local culture(s) and beliefs involved. NLWs may be particularly useful in the following operational environments: domestic operations involving riot control, military operations in urban terrain (MOUT), and peacekeeping and enforcement. NLW capabilities dictate their applications. Capabilities may include:

(1) Counter-Personnel:

a) Influencing behavior and activities of a potentially hostile crowd.
b) Incapacitate personnel.
c) Seize personnel.
d) Deny personnel access to an area.

(2) Counter-Material:

a) Disable or neutralize vehicles or facilities without destroying them.
b) Deny vehicle access to certain areas or facilities.

Training With NLWs

Successful employment of NLWs depends on the chosen tactics, techniques and procedures (TTP) and on the training of the troops using the NLWs. Improper use of NLWs can be worse than not having NLWs available. Training with NLWs must be done at the individual, unit, and leader levels. Individual training topics should include the force continuum, crowd dynamics and control, crowd control formations, communication skills, Oleoresin Capsicum Aerosol (Pepper Spray) use, open-hand control, impact weapons, working dogs, apprehension and control operations, ROE and Law of War, non-lethal munitions and employment, barriers and physical security measures, and tactics.

Lessons in the employment of NLWs have been learned from operations such as those conducted by U.S. forces in Somalia and Haiti. These lessons include:

1) There is no legal requirement to resort to use of non-lethal weapons where deadly force is warranted by the circumstances ruling at the time.
2) Never use a NLW where it will place troops in undue danger.
3) Always have deadly force available in support of NLWs.

II.K.4. Occupation Law

Before the onset of Operation Iraqi Freedom, occupation law had occupied a rarely discussed, long neglected and seldom trained place on the spectrum of support to military operations. Not since the end of the Second World War had the United States undertaken the immense responsibility of governing/administrating an occupied territory for a prolonged period of time with our armed forces. The lack of U.S. government familiarity with the concept and the responsibilities that go along with it, led to immense initial problems with the U.S. led occupation force. Confusion to the situation was added to as the U.S. Government prevented U.S. personnel from using the legal term "Occupation" to describe the status quo in Iraq (instead occupation was referred to as "the O" word).

The fall of the Saddam Hussein regime and the lack of an easily identifiable and legitimate replacement Iraqi government resulted in the U.S. and Coalition Forces having to govern Iraq until a replacement Iraqi government could be instituted. This situation raised the issue of whether the international law of occupation should apply, as found in the 1907 Hague Convention IV and the 1949 Geneva Convention IV.[334] Article 42 of the 1907 Hague Convention IV states that "[t]erritory is considered occupied when it is actually placed under the authority of the hostile army." The United States and the United Kingdom, the two principal members of the Coalition Forces, indirectly acknowledged the application of these conventions to their activities in Iraq in communications with and

[334] Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949 [hereinafter GC IV], *reprinted in*, Int'l & Operational Law Dep't, The Judge Advocate General's Legal Center and School, Law of War Documentary Supplement, 236 (2005).

votes in the UN Security Council. In a joint letter of 8 May 2003 to the President of the UN Security Council, the United States and the United Kingdom stated:

> The States participating in the Coalition will strictly abide by their obligations under international law, including those relating to the essential humanitarian needs of the people of Iraq . . . . In order to meet these objectives and obligations in the post-conflict period in Iraq, the United States, the United Kingdom and Coalition partners, acting under existing command and control arrangements through the Commander of Coalition Forces, have created the Coalition Provisional Authority, which includes the Office of Reconstruction and Humanitarian Assistance, to exercise powers of government temporarily, and, as necessary, especially to provide security, to allow the delivery of humanitarian aid, and to eliminate weapons of mass destruction . . . .[335]

Subsequently, both countries, as permanent members of the UN Security Council, voted on 22 May 2003 for UN Security Council Resolution 1483.[336] This Resolution "recogniz[ed] the specific authorities, responsibilities, and obligations under applicable international law of [the United States and the United Kingdom] as occupying powers under unified command . . . " and called upon "all concerned to comply fully with their obligations under international law including in particular the Geneva Conventions of 1949 and the Hague Regulations of 1907."[337]

The 1907 Hague IV Convention contains a mixture of authorities (with limitations), responsibilities, and prohibitions of an occupying power. Under this Convention, an occupying power is permitted to, *inter alia*, collect taxes for the administration of the occupied territory,[338] requisition in kind and service contributions for the needs of the army of occupation, and take possession of the property of the occupied State and seize all means of transmitting news, persons or things and munitions.[339] Responsibilities include taking all measures in its power to restore and ensure public order and safety,[340] respecting, unless absolutely prevented, the laws in force in the occupied country,[341] respecting family rights, lives, private property and

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[335] Letter of 8 May 2003 from the Permanent Representatives of the United States of America and the United Kingdom of Great Britain and Northern Ireland to the President of the Security Council, S/2003/538.

[336] S.C. Res. 1483, U.N. SCOR, 58th Sess., 4761st mtg., U.N. Doc. S.RES/1483 (2003) [hereinafter S.C. Res. 1483].

[337] Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulation Concerning the Laws and Customs of War on Land, The Hague, 18 October 1907 [hereinafter 1907 Hague IV Convention], *reprinted in*, Int'l & Operational Law Dep't, The Judge Advocate General's Legal Center and School, Law of War Documentary Supplement, 148 (2005) .

[338] 1907 Hague IV Convention, arts. 48, 49

[339] *Id.* art. 53

[340] *Id.* art. 43.

[341] *Id.*

religious practices,[342] and treating municipal property and cultural institutions, even if State-owned, as private property.[343]

An occupying power is specifically prohibited from pillaging and from forcing the inhabitants to furnish information about the country's army or swear allegiance to the occupying power.[344] The 1949 Geneva Convention (IV) regulations for occupying powers, contained in Section III of the Convention, expand upon and add to the provisions of the 1907 Hague Convention. Of special significance to OIF were the provisions on guaranteed rights, the applicable internal law and limits on its modification, and the treatment of protected persons. Reflecting the negative experiences with "puppet" governments set up by the Nazis in occupied Norway and France during World War II, Article 47 of the Convention declares that protected persons in the occupied territory cannot be deprived of their rights under the Convention by any changes in the government of the occupied territory or by agreements between that government and the Occupying Power.[345] The domestic law applicable in Iraq was addressed by Article 64, which provides:

> [T]he penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention. Subject to the latter consideration and to the necessity for ensuring the effective administration of justice, the tribunals of the occupied territory shall continue to function in respect of all offences covered by the said laws. The Occupying Power may, however, subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfill its obligations under the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them.[346]

Article 65 goes on to require that any new laws be published and notice given to the inhabitants in their own language prior to coming into force and that such laws may not be retroactive.[347] Under Section III of Part III of the Convention, no forcible transfers

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[342] *Id.* art. 46.

[343] *Id.* art. 56.

[344] 54 *Id.* art. 45.

[345] *Id.* art. 47.

[346] *Id.* art. 64.

[347] 58 *Id.* art. 65. CPA Order Number 7 revived the 3rd edition of the 1969 Iraqi Penal Code with Amendments, except for parts of Part II and for capital punishment, which was suspended. CPA Memorandum Number 3 revived the 1971 Criminal Procedure rules with numerous suspensions and the addition of a rights warning. MAJ Sean Watts, The Law of Occupation, Power Point Presentation to the 43rd Operational Law Course (10 Mar. 2005) [hereinafter Watts Presentation] (on file in CLAMO).

or deportations of protected persons are allowed and the Occupying power is required, *inter alia*, to: Ensure education and care of children; Ensure hygiene and public health; Protect and respect property; and Permit relief consignments.[348] Protected persons are allowed to be interned if they meet the qualifications of Articles 41, 42, 43, 68 or 78 of the Convention. Section IV of Part III of the Convention contains the regulations for the treatment of such persons, e.g., the location of the internment, food and clothing, hygiene and medical attention, and religious, physical and intellectual activities.

Establishment of the Coalition Provisional Authority

In May 2003 the Coalition partners established the Coalition Provisional Authority CPA) to administer Iraq until a government was reconstituted. UN Security Council Resolution 1483 specifically acknowledged the CPA as the civil authority in Iraq.[349] The Resolution granted an extraordinary amount of power to the Coalition Forces with regard to Iraq's political and economic affairs, including granting them complete control over Iraq's oil revenues.[350] This authority, according to the resolution, would last until the installation of a representative, internationally-recognized government.

The CPA head was responsible for overseeing and coordinating all executive, legislative, and judicial functions necessary for temporary governance of Iraq. These functions included humanitarian relief, reconstruction, and assistance in forming an Iraqi interim authority. The immediate goal of the CPA was to provide basic humanitarian aid and services such as water, electricity, and sanitation.

Over the course of the fourteen months of its existence, the CPA focused on helping Iraqis build four foundational pillars for their sovereignty: Security, Governance, Essential Services, and Economy. In the governance area, the CPA worked with Iraqis to ensure the early restoration of full sovereignty to the Iraqi people. The 13 July 2003 establishment of a Governing Council (GC) and the 1 June 2004 establishment of the Interim Iraqi Government were major steps toward that goal. With regard to essential services, the CPA attempted to reconstitute Iraq's infrastructure, maintain oil production, ensure food security, improve water and sanitation infrastructure, improve health care quality and access, rehabilitate key infrastructures such as transportation and communications, improve education, and improve housing-quality and access.

Finally, the CPA tried to help the Iraqis build a market-based economy by:

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[348] GC IV, arts. 50-62.

[349] S.C. Res. 1483

[350] *Id.* Proceeds from the sale of petroleum were deposited into the Development Fund for Iraq, whose goal was to support the economic, humanitarian, and administrative needs of Iraqis. CPA had complete discretion over how these funds were spent in accordance with those goals. The Fund was audited by representatives of the International Advisory and Monitoring Board, whose members included UN, International Monetary Fund, World Bank, and Arab Fund for Social and Economic Development representatives.

- Modernizing the Central Bank, strengthening the commercial banking sector and re-establishing the Stock Exchange and securities market;
- Developing transparent budgeting and accounting arrangements, and a framework for sound public sector finances and resource allocation;
- Laying the foundation for an open economy by drafting company, labor and intellectual property laws and streamlining existing commercial codes and regulations; and
- Promoting private business through building up the domestic banking sector and credit arrangements.[351]

Article 6(3) of the 1949 Geneva Convention IV addresses the issue of when an occupation ends. That Article provides that the application of the Convention, except for selected articles, ceases one year after the "general close of military operations."[352] This rule was modified by the 1977 Protocol I to the Geneva Conventions, to which the United States is not a Party but which the United States recognizes, with certain exceptions, as generally reflecting customary international law. Article 3 of that Protocol provides that the application ceases when the occupation terminates.[353]

In any case, on 8 June 2004, the UN Security Council, acting under Chapter VII of the UN Charter, recognized in UNSC Resolution 1546 that "by 30 June 2004, the occupation will end and the Coalition Provisional Authority will cease to exist, and that Iraq will reassert its full sovereignty."[354] Due to security concerns, the United States and Coalition partners dissolved the Coalition Provisional Authority early and returned authority for governing Iraq to the Interim Iraqi Government on 28 June 2004. and deliver public services.[355] The new body shared responsibility for running the country under UNSC Resolution 1483, which continued to grant the CPA ultimate authority until a sovereign government could be elected and a new constitution ratified. Under Saddam Hussein's rule, the minority Sunni population had dominated the national political scene. The GC, on the other hand, was broadly representative of Iraq's population and included women and representatives of various religious and ethnic groups.

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[351] Coalition Provisional Authority, *at* http://en.wikipedia.org/wiki/Coalition_Provisional_Authority (last visited 18 Jan. 2005).

[352] GC IV, art. 6(3). On 1 May 2003, President Bush declared that major combat operations had ceased in Iraq.

[353] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, art. 3, *reprinted in*, Int'l & Operational Law Dep't, The Judge Advocate General's Legal Center and School, Law of War Documentary Supplement, 349 (2004).

[354] S.C. Res. 1546, U.N. SCOR, 59th Sess., 4987th mtg., U.N. Doc. S.RES/1546 (2004) [hereinafter S.C. Res. 1546].

[355] Iraqi Governing Council, *at* http://www.globalsecurity.org/military/world/iraq/igc.htm (last visited 18 Jan. 2005) [hereinafter IGC].

On 1 September 2003, a twenty-five member GC cabinet, composed of Iraqis who had been appointed by the GC, assumed the responsibility for the day-to-day operation of the government using the previous organization of the Iraqi government, except for ministries of defense, information and religious affairs. The chairman of the GC, which rotated on a monthly basis, acted during this time as prime minister.[356]

On 15 November 2003, a landmark agreement was reached to restore full Iraqi sovereignty by 30 June 2004, to create a permanent constitution, and to hold free, national elections. U.N. Security Council Resolution 1511 called for this schedule to be put in place. The agreement called for an interim constitution or Transitional Administrative Law (TAL). The TAL, which was signed on 8 March 2004, defined the structures of a transitional government and the procedures for electing delegates to a constitutional convention. The TAL guaranteed freedom of speech, the press, and religion (but still respected the Islamic identity of the majority of Iraqis). On 28 June 2004, the Iraqi Interim Government assumed all governmental authority from the CPA, and the TAL became the supreme law of Iraq.

[356] Iraqi Cabinet, *at* http://www.globalsecurity.org/military/world/iraq/cabinet-intro.htm (last visited 18 Jan. 2005).

II.L. LEGAL BASIS FOR CONDUCTING OPERATIONS

The 'lesson learned' encountered most frequently in each contingency operation on which CLAMO has collected AARs is the importance of understanding the legal basis for the operation (as well as the use of force in support of the operation). This particular lesson rings true both in domestic and international law and is a critical lesson for all judge advocates and paralegals to understand, as it is a question frequently asked by the media. The key questions are often stated as:

(a) What is the mission?
(b) How do domestic and international law support completing the mission?

Within the context of the mission, it has necessary for judge advocates to understand the command structure, particularly when conducting operations within a North Atlantic Treaty Organization (NATO) construct or when conducting operations with coalition partners. This command structure and the command and control of deployed forces may well be tied to the existence of international agreements and how they constrain or empower operations. Accordingly, judge advocates must understand the domestic and international law and agreements that authorize the conduct of the operation and how such laws and agreements impact the military's ability to prosecute the mission to a successful conclusion.

The legal basis for the operation may initially be somewhat fluid and judge advocates must be prepared to explain with precision the underpinnings of the operation. As a general rule of international law, the use of force by one state against another is prohibited[357] However, there are limited exceptions to this general prohibition.[358] While it is relatively easy from an academic perspective to describe the limited instances when force may be used, this is not always the case in the practical reality of national and international politics.

II.L.1. Operations in Haiti

Haiti first achieved independence in 1804, but suffered from internal tension and strain from then until 1994 when Operation Uphold Democracy began. After a series of successive coups, a presidential election was held on 16 December 1990. This election, which was deemed to have been free and fair, elected the Reverend Jean-Bertrand Aristide to the office of President. Subsequently, a military coup led by Lieutenant General Raoul Cedras removed President Aristide from power in September 1991.

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[357] U.N. CHARTER art. 2, para. 4

[358] U.N. CHARTER art. 51

Concerned with the deteriorating and repressive government of Cedras, the United Nations Security Council implemented a series of resolutions in 1993 and 1994[359] designed to encourage the return of Aristide to the Presidency. Ultimately, at Governors Island, New York, General Cedras and President Aristide signed an agreement calling for the resignation of Cedras and the return of Aristide by 30 October 1993.

Despite the Governors Island Agreement, events in October 1993 led to increased violence and instability within Haiti and 1993 concluded without Aristide's return to the Presidency.[360] Given the violence and instability, a steadily growing number of Haitians boarded boats and set out for the United States. Despite growing international frustrations, the de facto leaders of Haiti increased politically motivated intimidation and repression against Aristide supporters. These leaders did so through four main instruments: 1) the Haitian armed forces, or Forces Armees d'Haiti (FAd'H), which had constitutional responsibility for public security and law enforcement and which included a police force; 2) a group of paramilitary personnel in civilian clothes known as "attaches;" 3) a group of provincial section chiefs known as "Tons Tons Macoutes," whom military regulations declared to be adjuncts to the FAd'H; and, 4) the Revolutionary Front for Advancement and Progress of Haiti (FRAPH), which emerged in 1993 and had opened offices in most towns and villages and infiltrated poorer neighborhoods.

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[359] Between 16 June 1994 and 30 January 1995, the Security Council would eventually adopt 14 resolutions directly relating to the situation in Haiti, and over this time period, the President of the Security Council would issue nine statements pertaining to Haiti:

S.C. Res. 841 16 June 1993	S.C. Res. 905 23 Mar. 1994
S.C. Res. 861 27 Aug. 1993	S.C. Res. 917 6 May 1994
S.C. Res. 862 31 Aug. 1993	Pres. Statement 11 May 1994
Pres. Statement 17 Sept. 1993	S.C. Res. 933 30 June 1994
S.C. Res. 867 23 Sept. 1993	Pres. Statement 12 July 1994
Pres. Statement 11 Oct. 1993	S.C. Res. 940 31 July 1994
S.C. Res. 873 13 Oct. 1993	Pres. Statement 30 Aug. 1994
S.C. Res. 875 16 Oct. 1993	S.C. Res. 944 29 Sept. 1994
Pres. Statement 25 Oct. 1993	S.C. Res. 948 15 Oct. 1994
Pres. Statement 30 Oct. 1993	S.C. Res. 964 29 Nov. 1994
Pres. Statement 15 Nov. 1993	***1995 Activity***
Pres. Statement 10 Jan. 1993	S.C. Res. 975 30 Jan. 1995

[360] Pursuant to the Governors Island plan for the return of Aristide, about 200 lightly armed United States troops arrived in Port-au-Prince, Haiti's capital city, on 11 October. The ship carrying the soldiers, the *U.S.S. Harlan County*, turned around that day and left Haitian waters after a small group of gunmen demonstrated in the harbor. In response to this episode and to two days of violence instigated by the same group of gunmen, the United Nations on 13 October declared renewed sanctions against Haiti. The next day, assassins killed Justice Minister Guy Malary, an Aristide supporter, and two days later still, a group of international human rights monitors felt compelled to leave the country.

Given the increasing number of Haitians seeking asylum in the United States, in late June, 1994 the United States opened a refuge processing center at Guantanamo Bay Naval Base in Cuba. Shortly thereafter, U.S. policy on permitting Haitian migrants to seek asylum within the United States changed: Haitians would now be returned to Haiti or taken to "safe havens" in Guantanamo Bay, Panama, and elsewhere. Finally, on 31 July 1994, the UN Security Council authorized its member states to:

> form a multinational force under unified command and control and, in this framework, to use all necessary means to facilitate the departure from Haiti of the military leadership, consistent with the Governors Island Agreement, the prompt return of the legitimately elected President and the restoration of the legitimate authorities of the Government of Haiti, and to establish and maintain a secure and stable environment that will permit implementation of the Governors Island agreement[361]

On 15 September 1994, President Clinton stated that the United States would use force to remove the Cedras regime from power. In a final attempt to avoid this, President Clinton dispatched a team of mediators consisting of former President Jimmy Carter, General Colin L. Powell, and Senator Sam Nunn to Haiti to negotiate a peaceful resolution. On 18 September, as paratroopers from the 82d Airborne Division were flying toward drop zones in Haiti to remove the Cedras regime by force, Cedras agreed to step down. Unwilling to trust Cedras at his word, U.S. forces began peacefully entering Haiti in large numbers beginning on 19 September 1994.

By repudiating the Governors Island Agreement and frightening thousands of citizens to take to the high seas, the military junta threatened international peace and security and thus justified a temporary displacement of Haitian law and sovereignty. Despite the fact that the Haitian migrants created particular burdens for the United States, any forceful unilateral remedies taken against the de facto Haitian regime would have been legally questionable. However, a multilateral response pursued through duly constituted organs of the United Nations provided an international justification for use of force given the threat to the peace caused by the junta.[362]

The series of Security Council resolutions addressing the crisis in Haiti provided ample guidance to judge advocates on the ground. In particular, Resolution 940 authorized the multi-national force "to use all necessary means" to restore the Aristide government and "to establish and maintain a secure and stable environment.[363]" Resolution 944 provided further guidance and shaped the timing of the UN Mission in Haiti's (UNMIH).[364]

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[361] S.C. Res. 940, U.N. SCOR, 49th Sess., S/RES/940 (1994).

[362] U.N. CHARTER art. 39

[363] S.C. Res. 940, U.N. SCOR, 49th Sess., S/RES/940 (1994).

[364] S.C. Res. 944, U.N. SCOR, 49th Sess., 3430th mtg., at paras. 1 & 2

Finally, the Carter-Jonassaint agreement of 18 September—on its face a bilateral instrument—incorporated Resolutions 940 and 917 by reference and instructed U.S. forces that "the Haitian military and police forces will work in close cooperation with the U.S. Military Mission" and that "[t]his cooperation, conducted with mutual respect, will last during the transitional period required for insuring vital institutions of the country."

Security Council Resolution 940 then, was the underlying document that approved the use of force against the military junta within the parameters provided in international law. on the international stage.

II.L.2. Operations in Bosnia

The country of Yugoslavia has a history ripe with ethnic tension and bloodshed. Post World War II, Prime Minister Josip Tito declared the country the Federal People's Republic of Yugoslavia. Six republics were created based upon geography and historical precedent. These six - Serbia, Croatia, Slovenia, Bosnia and Herzegovina (BiH), Montenegro, and Macedonia, did not reflect the natural boundaries of the different ethnic groups, but were held together by the iron-fisted rule of Tito.

With the death of Tito and the fall of the Soviet Union, the Balkans returned to the ethnic bloodshed. In 1991, Slovenia declared its independence. Though the Serbian Yugoslav National Army (JNA) attempted to prevent the break-away, it was unable to defeat the better prepared Slovenians.

Croatia also declared independence but did not fare as well. Croatian Serb nationalists, with apparent backing from the JNA out of BiH and Serbia, seized about thirty percent of Croatia and proclaimed the independent Republic of Serb Krajina. Savage fighting, to include the near destruction of historical Dubrovnik, Vukovar, [365] and other civilian population centers, allegations of targeting civilians, and ethnic cleansing set the tone for the next three and one-half years of conflict in the Balkans. On September 25, 1991, the UN formally stepped into the Balkan conflict by imposing a weapons and military equipment embargo on all of the former Yugoslavia.[366] Then, pursuant to a U.N.-sponsored cease-fire between Croatia and the rebel Serbs, the JNA withdrew at the end of 1991 with control of roughly one-third of Croatia.

The UN, recognizing that the cease-fire would not hold, established the United Nations Protection Force (UNPROFOR).[367] After international recognition of Croatian,

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[365] *See generally,* IVO J. LEDERER, NATIONALISM AND THE YUGOSLAVS, NATIONALISM IN EASTERN EUROPE (Lederer et. al., eds.) (University of Washington Press 1969).

[366] S.C. Res. 713, U.N. SCOR, 46th Sess., 3009 mtg. at 14, U.N. Doc. S/Res/713 (25 Sep. 1991).

[367] S.C. Res. 743, U.N. SCOR, 47th Sess., 3055 mtg. at 14, U.N. Doc. S/Res/743 (21 Feb. 1992).

Slovenian, and Macedonian secession from Yugoslavia,[368] BiH held a referendum on independence and Bosnian Croats and Muslims voted for independence.

On April 5, 1992, people from all three Bosnian ethnic groups—Croats, Muslims, and Serbs—demonstrated in Sarajevo calling for peace. JNA-backed Serb nationalist snipers opened fire into the crowd. The next day, April 6, 1992, the war in Bosnia began in earnest between Bosnian government forces and Bosnian Serbs. The JNA, with artillery positioned on the high ground around Sarajevo, laid siege to the city. Responding quickly, on April 7, 1992, the UN authorized the full deployment of UNPROFOR, sending approximately 15,000 peacekeeping troops into Croatia, and later into BiH and the Former Yugoslav Republic of Macedonia (FYROM). On May 22, 1992, the UN admitted the country of Bosnia-Herzegovina as a full member.[369]

With the backing of the JNA, however, the militarily superior Bosnian Serbs controlled roughly sixty percent of BiH by the end of May. Because of the continued Serb aggression, the UN, at the end of May, imposed economic sanctions against Serbia.[370] As the conflict in BiH waged, the UN struggled to contain the conflict. On December 11, 1992, the UN expanded UNPROFOR's mandate to include monitoring the border between FYROM and the Federal Republic of Yugoslavia—Serbia and Montenegro (FRY).[371] The year 1992 ended with unabated fighting and continued ethnic cleansing. Allegations of systematic rape, torture, and murder of civilians permeated the news.

Fighting raged throughout 1993 and in BiH, the two sided conflict—BiH government forces against Bosnian Serbs forces— expanded dramatically as war broke out between the Bosnian Croats and Bosnian Muslims. In an effort to help contain the conflict, the United States committed several hundred troops to the UNPROFOR mission in FYROM[372]

On February 6, 1994, an artillery shell killed sixty-eight civilians in a Sarajevo market, maiming scores of others. This attack in Sarajevo and the continued siege of the previously declared safe-areas led NATO, at the request of the U.N., to step up involvement in Bosnia. The North Atlantic Council (NAC) authorized NATO air strikes against artillery and mortar positions around Sarajevo on February 9, 1994. Also, any heavy weapons not under UNPROFOR control found within a twenty-kilometer exclusion zone around Sarajevo would be subject to NATO air strikes.

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[368] In Jan. 1992, the then EC (now EU) recognized Croatian and Slovenian independence. Department of State Fact Sheet, subject: Chronology of the Balkan Conflict (6 Dec. 1995). Macedonia would later receive formal recognition as the Former Yugoslav Republic of Macedonia, hereinafter FYROM.

[369] S.C. Res. 755, U.N. SCOR, 47th Sess., 3079 mtg.. 14, U.N. Doc. S/Res/755 (20 May 1992) (recommended to the General Assembly that the BiH be admitted to membership in the United Nations).

[370] S.C. Res. 757, U.N. SCOR, 47th Sess., 3082 mtg.. 14, U.N. Doc. S/Res/757 (30 May 1992).

[371] S.C. Res. 795, U.N. SCOR, 47th Sess., 3147 mtg.. 14, U.N. Doc. S/Res/795 (11 Dec. 1992).

[372] S.C. Res. 842, U.N. SCOR, 48th Sess., 3239 mtg., U.N. Doc. S/Res/842 (18 Jun. 1993). The U.S force included 300 soldiers from USAREUR.

Also occurring in 1994 was the U.S. brokered Muslim-Croat federation,[373] which ended hostilities between these two warring factions. This federation set the conditions for a direct role for the Croatian army in support of the Bosnian Muslims against the Bosnian Serbs and would later be reflected in the General Framework Agreement for Peace (GFAP). Throughout 1993 and 1994 various groups worked to create a workable peace plan but were unable to craft something acceptable to all parties. While 1994 ended without a viable peace plan, it did end with greater NATO involvement, two sides to the conflict instead of three, and a new cease fire negotiated by former President Jimmy Carter which would last for four months.

Once this latest cease fire ended, fighting resumed in 1995. This year saw more NATO air strikes which lead Bosnian Serbs to hold 370 UNPROFOR troops hostage as human shields at potential NATO air targets. Despite the fact that the war appeared far from over, in June, the NAC approved plans for a NATO-led operation to withdraw UNPROFOR from BiH and Coatia.[374] Before this plan could be executed though, the Muslim-Croat federation seized and held territory in the northwest. This, coupled with a renewed NATO commitment to a month long decisive bombing campaign successfully damaged the military capabilities of the Bosnian Serbs and led to the Bosnian Serb control of only 50% of BiH by November 1995.[375]

With the new found parity in territory, diplomatic efforts to a solution again began. A United States-led mediation produced an October 5, 1995, cease-fire and brought the parties to the conflict to Dayton, Ohio, to work on a peace settlement.[376] Representatives from Serbia, Croatia, and the Bosnian Government all attended the conference. On November 21, 1995, the presidents of Croatia, Serbia, and Bosnia initialed the Dayton Peace Accord (DPA). The DPA, which is still in effect, is a wide-ranging peace agreement that gave birth to a single Bosnian state with the Bosnian Serbs, later named the Republika of Serpska (RS), controlling forty-nine percent and the Muslim-Croat Federation controlling fifty-one percent of the territory. Federal elections would occur within nine months of the formal signing of the agreement.

With the initialing of the Dayton Peace Accord, NATO expedited planning for a multinational Implementation Force (IFOR) to implement the military aspects of the

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[373] Agreed to by the Bosnian Government, Bosnian Croats, and Croatian Government.

[374] AFSOUTH OPLAN 40104 provided for the extraction of UNPROFOR under hostile conditions. At the direction of USAREUR, SETAF developed OPLAN Daring Lion. In Jun. 1993, SETAF participated in Mountain Shield at the Grafenwoeher Training Area to develop and validate OPLAN Daring Lion. In anticipation of conducting the UNPROFOR extraction, EUCOM issued a warning order to SETAF for OPLAN Daring Lion and CINCSOUTH released OPLAN 40104. As the Bosnia Peace Plan and the 5 Oct. 1995 cease-fire held, NATO decided not to use OPLAN Daring Lion. OPERATION JOINT ENDEAVOR: USAREUR HEADQUARTERS AFTER ACTION REPORT, Volume I at 27 (May 1997) [hereinafter USAREUR JOINT ENDEAVOR AAR]

[375] This bombing campaign was titled Operation Deliberate Force.

[376] On 1 Nov. 1995, the peace talks opened at Wright-Patterson Air Force Base, near Dayton, Ohio.

DPA. On December 5, 1995, NATO endorsed OPLAN 10405—OPERATION JOINT ENDEAVOR—the military plan for IFOR. This act set the stage for what was then the largest military operation in NATO history.[377] Then, on December 14, 1995, the parties[378] signed the official Balkan peace plan, the General Framework Agreement for Peace, in Paris, France (hereinafter GFAP).[379] The following day, the U.N. passed Security Council Resolution 1031, giving NATO a peace enforcement mandate under Chapter VII of the U.N. Charter to implement the military aspects of the Peace Agreement. On December 16, 1995, the NATO-led IFOR began OPERATION JOINT ENDEAVOR—the deployment of what would be, by February 1996, a 60,000 member multinational force with troop contributing nations from all 16 NATO allies and 18 non-NATO countries, including Russia.

Judge advocates, legal administrators, noncommissioned officers and legal specialists from the active and reserve components deployed in support of OJE and the continuing operations. Reserve Component judge advocates and legal personnel distinguished themselves by their seamless integration into existing organizations in Bosnia, the ISB in Hungary, and backfilling legal centers in Germany. Initially, fifteen judge advocates, one warrant officer, and twenty-three 71Ds deployed in support of TFE. Five judge advocates and six 71Ds deployed with 21st TAACOM(F) to the ISB in Hungary. Also with the ISB in Hungary, four judge advocates and four 71Ds deployed as part of USAREUR(F). Finally, one U.S. judge advocate augmented the U.K. and Dutch attorneys at the Allied Rapid Reaction Corps. TFE judge advocates provided full legal support to two brigade combat teams, an aviation brigade, a corps support group, a military police brigade, the division artillery staff, the Division Main in Tuzla, and the Division Rear. Judge advocates at every level—from NATO to the soldier on the ground—impacted SFOR operations in Bosnia. They:

- Helped craft the GFAP
- Assisted commanders at every level—from the coalition levelto the base camp in the Zone of Separation—with every aspect of the Rules of Engagement
- Helped negotiate, write, and interpret the crucial Status of Forces Agreements, Transit Agreements, Implementing and Technical Arrangements, and Acquisition and Cross-Servicing Agreements
- Provided contract and fiscal law support

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[377] Department of State Fact Sheet, subject: NATO Involvement in the Balkan Crisis (Bureau of European and Canadian Affairs 8 May 1997).

[378] President Franjo Trudjman, Croatia; President Alija Izetbegovic, Bosnia; President Slobodan Milosevic, Serbia.

[379] Bosnia-Herzegovina, Croatia, and the Former Republic of Yugoslavia were the parties that initialed the Dayton Peace Accords on 21 Nov. 1995. They formally signed in Paris, France, on 14 Dec. 1995 (signed by Bosnia-Herzegovina President Izetbegovic, Croatian President Tudjman, and Federal Republic of Yugoslavia President Milosevic). The base document is known as the General Framework Agreement for Peace in Bosnia-Herzegovina [hereinafter GFAP]. For text of the base document and Annex 1-A (Agreement on Military Aspects of the Peace Settlement) *see* Appendix E(5). The GFAP contains Articles I-XI and 11 Annexes. The Entity Armed Forces (EAFs) include the forces of the Bosnian Serbs, Bosnian Muslims, and Croatian National factions.

- Established responsive foreign claims procedures
- Assisted in the proper and effective administration of justice—of equal importance forward and in the rear detachments
- Supported soldiers and families both forward and in the rear detachments
- Developed expertise and procedures while participating in critical Joint Military Commission and bi-lateral meetings

The day-to-day advice judge advocates provided to commanders during the IFOR mission proved crucial. Judge advocates serving in isolated base camps performed every aspect of legal support to operations.

Operation Joint Guard

As IFOR's mandate—to *implement* peace—drew to a close, the North Atlantic Council (NAC) concluded that a reduced military presence[380]—a Stabilization Force (SFOR)—was required to *stabilize* the region and to allow continued work on the implementation of the civilian aspects of the GFAP. On December 12, 1996, the UN authorized SFOR to succeed IFOR with the same authority to implement the military aspects of the GFAP.[381]

OPERATION JOINT GUARD transitioned to OPERATION JOINT FORGE on 28 June 1998. While the goals and objectives of JOINT Guard were mirrored in JOINT FORGE, the new operation underscored a significant reduction in the size of the NATO forces supporting continued implementation of the GFAP. Over the last decade, U.S. forces in fifteen different unit iterations have maintained a continual presence supporting peace in the Balkans. The need for this task force finally ended on 24 Nov 2004 when Task Force Eagle populated by members of the 38th Infantry Division was disestablished.

Just as in OPERATION UPHOLD DEMOCRACY, the legal basis for OPERATIONS JOINT ENDEAVOR, JOINT FORCE, and JOINT GUARD was again enabling Security Council Resolutions authorizing the use of force in the enforcement of the General Framework Agreement for Peace. Annex 1A to the GFAP invited the Security Council to "establish a multinational military implementation Force" with its purpose to "establish a durable cessation of hostilities." This annex further authorized IFOR to "take such actions as required, including the use of necessary to ensure compliance" by the EAFs with the GFAP.[382] The Security Council, in Resolution 1031, authorized the use of force by IFOR by authorizing all member states to take all necessary measures to effect the implementation of and to ensure compliance" with the GFAP.

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[380] From 60,000 to about 31,000 in Bosnia-Herzegovina

[381] S.C. Res. 1088, U.N. SCOR, 51st Sess., 3723 mtg., U.N. Doc. S/Res/1088 (12 Dec. 1996).

[382] Para 2.b of Annex 1a to GFAP.

II.L.3. Operations in Kosovo

Operation Allied Force

The Balkans are historically significant for a number of ethnic groups. The Balkan province of Kosovo, however, holds special significant for two ethnic groups in particular, Serbians and Albanians.

Serbians view the province as the birthplace of their civilization for it is here that many of the defining events of their history have occurred. Accordingly, maintaining control over Kosovo as a Serbian province is a fundamental aspect of the Serbian national identity.[383] Conversely, the Albanians claim Kosovo based on their status as direct descendants of the ancient Illyrian tribes which inhabited a considerable amount of land in the Balkans—to include Kosovo—over 2,000 years ago, prior to the Greeks and centuries before the Slavic people, including the Serbs, migrated south into the Balkans.[384] Today the Albanians represent a significant majority–almost 90%–of the province's population.[385] Two themes emerge regarding Kosovo: the crisis arising in the 1990 had it roots in events occurring centuries before and Kosovo hold significant value for both Serbs and Albanians.[386]

After the death of Marshal Tito in 1980, the region experienced great destabilization over the next few years. Finally, the region devolved into a full-fledged civil war between Serbia and Kosovo in 1998.[387] Battles between Serbian police and military against the Albanian group, the Kosovo Liberation Army (KLA) resulted in the death of thousands and the displacement of hundreds of thousands.[388] Kosovo quickly became the foremost concern of the international community, posing grave humanitarian concerns and risking spillover into neighboring countries, which needed little to fan the existing embers of ethnic hatred and violence.[389]

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[383] *See* ASSOCIATION OF THE UNITED STATES ARMY, INSTITUTE OF LAND WARFARE, AUSA BACKGROUND BRIEF: ROOTS OF THE INSURGENCY IN KOSOVO 1 (June 1999) [hereinafter AUSA BRIEF].

[384] STEPHEN SCHWARTZ, KOSOVO: BACKGROUND TO A WAR *at* 8 (2000).

[385] *Id.*, at 12-13.

[386] For a developed explanation of the history of the region, *see* Kosovo Book, p. 8-43. .

[387] Kosovo, p 34.

[388] *Id.*

[389] Kosovo, p. 34, *citing* United Kingdom, Ministry of Defence, Kosovo: An Account of the Crisis—The Crisis Unfolds, *at* http://www.kosovo.mod.uk/account/crisis.htm (last visited 23 Oct. 2001) [hereinafter U.K. Account].

A six-country "Contact Group"[390] formed and initially called for negotiations on autonomy in place of armed conflict. Buttressed by internal support for his policies, former Serbian and now Yugoslavian President Slobodan Milosevic rejected the calls for Serbia to cease all military action in Kosovo and instead sent more troops into Kosovo, escalating the fighting during the summer months of 1998. As a result, the North Atlantic Council (NAC), NATO's governing body, directed that NATO explore and assess numerous military options to end the crisis in Kosovo.[391]

During this crisis, the UN Security Council adopted Resolution 1199 on 23 September 1998.[392] The resolution called for an immediate cease-fire, an international presence, and the immediate withdrawal of Serbian troops from within Kosovo.[393] To ensure compliance with this resolution, on 123 October 1998, NATO authorized air strikes in the event Milosevic and Serbia failed to comply.[394] On 16 October, Milosevic blinked and agreed to withdraw his forces from Kosovo.[395] NATO suspended the activation of its air strike order and the OSCE established the Kosovo Verification Mission (KVM).[396]

Unfortunately, tensions did not de-escalate and Kosovo resumed center stage for the international community when reports of a Serb massacre of forty-five Albanians in the village of Racak on 15 January 1999 were received. NATO issues a "solemn warning" to both sides that it would resort to military force if they did not heed the terms of the 16 October cease-fire. The Contact Group, fearing a return to violence in the absence of action announced a peace conference in Rambouillet, France on 6 February 1999. The Serbs and Kosovo Albanians were provided draft proposals on a potential resolution and given the opportunity to comment on the proposals.[397]

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[390] The six-member group included representatives from France, Germany, Italy, Russia, the United Kingdom, and the US. It was established by the 1992 London Conference on the Former Yugoslavia, which sought to give the international community a "better foundation to defuse, contain, and bring to an end the conflict in the former Yugoslavia" by establishing "a new, permanent negotiating forum, co-chaired by the United Nations and European Community." Press Release, Statement by Press Secretary Fitzwater on the London Conference on the Former Yugoslavia (Aug. 28, 1992), *available at* http://bushlibrary.tamu.edu/papers/1992/92082802.html

[391] Kosovo, 34 *citing* Organization for Security and Cooperation in Europe (OSCE), Kosovo: The Historical and Political Background, Kosovo/Kosova: As Seen, As Told at 4-5 (1999), http://www.osce.org/kosovo/reports/hr/part1/ch1.htm [hereinafter OSCE Brief].

[392] S.C. Res. 1199, U.N. SCOR, U.N. Doc. S/RES/1199 (1998), *available at* http://www.un.org./Docs/scres/1998/98sc1199.htm [hereinafter UNSCR 1199]. The UNSC acted pursuant to its authority under Chapter VII of the UN Charter, and the vote was unanimous, with China abstaining.

[393] Kosovo, at 35.

[394] Kosovo at 35.

[395] *Id.*

[396] *Id.*

[397] *See* Rambouillet Accords: Interim Agreement for Peace and Self-Government in Kosovo, *unsigned*, Fed. Rep. Yugo.–Serb.–Kosovo, U.N. Doc. S/1999/648 (1999). The Rambouillet Accords were a threeyear interim agreement designed to provide democratic self-government, peace, and security for all living in Kosovo. BUREAU OF EUROPEAN AFF., U.S. DEP'T OF STATE, UNDERSTANDING THE

While the Serbs initially indicated a willingness to sign the draft proposal, they subsequently reneged and as the negotiations ended, the violence in Kosovo intensified, the KVM withdrew, and NATO again threatened a strong military response.[398] Richard Holbrooke attempted one last effort on 22 March 1999 to convince Milosevic to sign the agreement and prevent the use of military force but his efforts failed. On 24 March, NATO forces initiated air strikes against Serbian targets and OPERATION ALLIED FORCE began. These air strikes did not immediately achieve the intended effect and initially lead to the intensification of Serbian-led assaults on Albanians. On 3 June 1999, Milosevic and the Serbian National Assembly accepted a peace plan. On 9 June, the Federal Republic of Yugoslavia and the Republic of Serbia signed the Military Technical Agreement with NATO and finally, on 10 June 1999, 78 days after the bombing had begun, OPERATION ALLIED FORCE came to an end when Serbian forces began leaving Kosovo.

The peace plan was memorialized in Security Council Resolution 1244 which created the UN Interim Administration Mission in Kosovo (UNMIK) and the international security force known as KFOR on 10 June 1999.[399] This peacekeeping mission was named OPERATION JOINT GUARDIAN.

Operation Joint Guardian

OPERATION JOINT GUARDIAN was a NATO led mission, which meant that overall control and responsibility for the mission belonged to the North Atlantic Council (NAC). Military control of KFOR began with NATO's Supreme Allied Commander, Europe (SACEUR), General Wesley Clark, who was dual-hatted as U.S. Commander-in-Chief, European Command (CINCEUCOM). UN Security Council Resolution 1244 provided the framework for the mission in Kosovo. The resolution delineated the responsibilities of the "international security presence" (KFOR) as well as the responsibilities of the "international civil presence" (UNMIK).

KFOR's responsibilities included:

- deterring renewed hostilities;
- demilitarizing the Kosovo Liberation Army (KLA) and other armed Kosovo Albanian groups;

RAMBOUILLET ACCORDS (Mar. 1, 1999), *available at* http://www.state.gov/www/regions/eur/fs_990301_rambouillet.html. The Accords set forth a framework to transform Kosovo into an autonomous province within the Yugoslav Federation and to achieve a final settlement for Kosovo in three years. *Id.* at 1-2. Pursuant to the Agreement, the FRY would withdraw all of its forces from Kosovo, the KLA would disarm, and NATO troops would enter Kosovo to keep the peace.

[398] Kosovo, at 37.

[399] S.C. Res. 1244, U.N. SCOR, U.N. Doc. S/RES/1244 (1999), *available at* http://www.un.org./Docs/scres/1999/99sc1244.htm [hereinafter UNSCR 1244].

- establishing a secure environment;
- ensuring public safety and order until the international civil presence could take responsibility for this task;
- supervising de-mining until the international civil presence could, as appropriate, take over responsibility for this task;
- •supporting, as appropriate, and coordinating closely with the work of the international civil presence;
- •conducting border monitoring duties as required; and
- •ensuring the protection and freedom of movement for itself, the international civil presence, and other international organizations.

UNMIK was responsible for:

- promoting the establishment, pending a final settlement, of substantial autonomy and self-government in Kosovo;
- performing basic civilian administrative functions where and as long as required;
- organizing development of provisional institutions for democratic and autonomous self-government (including elections);
- transferring administrative responsibilities to these institutions;
- facilitating a political process designed to determine Kosovo's future status, taking into account the Rambouillet accords;
- overseeing the transfer of authority from Kosovo's provisional institutions to institutions established under a political settlement;
- supporting the reconstruction of key infrastructure and other economic reconstruction;
- supporting, in coordination with international humanitarian organizations, humanitarian and disaster relief aid; maintaining civil law and order, including establishing local police forces and deploying international police personnel;
- protecting and promoting human rights; and
- assuring the safe and unimpeded return of all refugees and displaced persons to their homes in Kosovo[400]

UNMIK sought to accomplish these tasks through a four-pillared approach under the direction of the Senior Representative of the Secretary General (SRSG). Each pillar was headed by a different international organization as described below.[401]

- Civil Administration—under the UN: The civil administration pillar was responsible for governmental structures, public services, health services, energy, public utilities, post and telecommunications, and education.
- Humanitarian Assistance—led by United Nations High Commission for Refugees (UNHCR): The humanitarian assistance pillar oversaw the return of refugees,

[400] *Id.* at ¶ 9-11.

[401] For additional information on the UNMIK mission *see* http://www.unmikonline.org/intro.htm (last visited 9 Feb 2006)

improving shelter and water conditions, and landmine and unexploded ordnance removal.

- Democratization and Institution-Building—led by the Organization for Security and Cooperation in Europe (OSCE): The democratization and institution-building pillar oversaw the rule of law, police education, media affairs, human rights, and elections.
- Economic Reconstruction—managed by the European Union: The economic reconstruction pillar assisted in humanitarian relief, reconstruction, and rehabilitation, and prepared economic, social and financial policies with the goal of creating a viable market-based economy.

Security Council Resolution gave the SRSG tremendous authority including the ability to change, suspend, or repeal existing laws; appoint persons to perform functions within the interim administration; and issue legislation in the form of regulations. These regulations addressed a broad spectrum of topics involved with managing the government and many had significant legal implications.

The Military Technical Agreement between the KFOR and the Federal Republic of Yugoslavia and the Republic of Serbia required all FRY military forces to leave Kosovo and pull five kilometers behind the Kosovo-Serbia border, beyond an area described as the "Ground Safety Zone" (GSZ). The agreement further required all FRY aircraft and air defense systems to remain at least twenty-five kilometers beyond the Kosovo border, creating an "Air Safety Zone" (ASZ). Language in the MTA gave the KFOR Commander the authority to "take all action necessary to establish and maintain a secure environment" for all citizens of Kosovo.[402] Broad interpretation of this clause, originally intended for use against uncooperative FRY and Serb forces, provided the KFOR Commander great flexibility in addressing a multitude of problems including Kosovar Albanian violence.

Soldiers from the 1st Armored Division and 82d Airborne Division comprised the initial units of Task Force Falcon. Marines from the 26th Marine Expeditionary Unit, Special Operations Capable (MEU(SOC)) rounded out the maneuver units of Task Force Falcon. All of these forces were under the command of a headquarters element of 1st Infantry Division. By 10 July 1999, the core of Task Force Falcon, formed around the 1st Infantry Division, was in Kosovo and troops from Greece, Jordan, Poland, Russia, the Ukraine, and the United Arab Emirates (UAE) augmented Task Force Falcon to form MNB(E).

The initial Task Force Falcon mission was four-pronged:

- monitor, verify, and enforce as necessary the provisions of the MTA and the Undertaking to create a safe and secure environment;
- provide humanitarian assistance in support of UNHCR efforts;

[402] Military Technical Agreement between the International Security Force ("KFOR") and The Governments of the Federal Republic of Yugoslavia and the Republic of Serbia, 9 June 1999 [hereinafter MTA], available at http://www.nato.int/kosovo/docu/a990609a.htm (last visited 9 Feb 2006).

- initially enforce basic law and order, transitioning this function to the to-be-formed designated agency as soon as possible; and,
- establish/support resumption of core civil functions.[403]

Every aspect of the Task Force Falcon mission was legally intensive. The first prong required the interpretation and enforcement of legal documents. The second prong expressly made Task Force Falcon responsible for providing humanitarian assistance in support of the UNHCR efforts. The third prong put JAs at the center of the effort to enforce law and order. The final prong—to support resumption of core civil functions—would lead to numerous requests for Task Force Falcon assistance from the SRSG and UNMIK.

Much like operations in Bosnia, operations in Kosovo began under NATO control, required the use of force through air power, were sanctioned by the UN Security Council and ultimately led to a long term stabilization force require to maintain security and the rule of law. Seven year later, in 2006, the United States and other NATO nations continue their work to establish and maintain a secure environment for the citizens of Kosovo.

II.L.4. Operations in Afghanistan

On September 11, 2001, terrorists hijacked four planes, flew two of them into the twin towers of the World Trade Center, one of them into the Pentagon, and crashed the fourth in a field in Pennsylvania. In a short span of time more than 3,000 civilians from over eighty different nations perished.[404]

The international community quickly rallied to the aid of the United States. On 12 September, the UN Security Council issued Resolution 1368, unequivocally condemning the "horrifying terrorist attacks," regarding the acts, "like any act of international terrorism, as a threat to international peace and security," and recognizing the "inherent right of individual or collective self-defense in accordance with [Article 51} of the Charter."[405] That same day, NATO invoked Article V of the treaty for the first time in its history. In doing so, NATO recognized the individual and collective right of self defense, as described in Article 51 of the UN Charter, to come to the aid of the United States through armed force, if necessary, to restore and maintain the security of the North Atlantic area.[406] Shortly thereafter, the Security Council reaffirmed the "need to combat

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[403] *See* LTC Mark S. Martins, Deputy Staff Judge Advocate, 1ID, Task Force Falcon Interim After Action Review, Operational Law CLE, PowerPoint presentation, briefing slide 5 (3 Dec. 1999) [hereinafter Martins Presentation].

[404] The White House, *The Global War on Terrorism: The First 100 Days* at 3 (Dec. 2001), *available at* http://www.whitehouse.gov/news/releases/2001/12/100dayreport.html . (last visited 9 February 2006).

[405] S.C. Res. 1368, U.N. SCOR, 55th Sess., 4370th mtg., U.N. Doc. S/RES/1368 (2001).

[406] Article V of the NATO Charter states:

by all means, in accordance with the Charter of the United Nations, threats to international peace and security caused by terrorist acts."[407]

On 18 September 2001, the U.S. Congress passed a Joint Resolution, by a vote of 98-0 in the Senate and 420-1 in the House of Representatives, authorizing the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed or aided the terrorist attacks . . . or harbored such organizations or persons."[408] Working quickly to cut off terrorist funding, on 25 September 2001, President George W. Bush issued an Executive Order blocking the property of, and prohibiting transactions with, persons who commit, threaten to commit, or support terrorism.[409] Echoing the President's Executive Order, the UN Security Council issued a second resolution calling on all States to prevent and suppress financing of terrorist acts and to freeze funds and other assets of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the acts. The resolution also called on all States to prohibit their nationals or persons within their territories from making funds and other assets available for the benefit of terrorists.[410]

The United States quickly identified that the terrorist group, al Qaeda was the group responsible for the attack and on 20 September 2001, President Bush directed that the U.S. military begin planning a response. That evening, in a speech to Congress, President Bush called on the Taliban to close all terrorist training camps and turn over Osama bin Laden and his supporters.[411]

> The 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 and consequently they agree that, 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.

[407] S.C. Res. 1373, U.N. SCOR, 56th Sess., 4385th mtg. U.N. Doc. S.RES/ 1373 (2001)

[408] Authorization to Use Military Force, Pub. L. 107-40, 115 Stat. 224 (Sept. 18, 2001). Congress declared that this section was intended to constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution. *Id.* § 2(b).

[409] Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (Sept. 25, 2001) (blocking property and prohibiting transactions with persons who commit, threaten to commit, or support terrorism).

[410] S.C. Res. 1373, para. 1, U.N. SCOR, 56th Sess, 5385th mtg., U.N. Doc S/RES/1373 (2001). The resolution also called upon States to refrain from providing any support to terrorists, take steps to prevent the commission of terrorists acts or provide safe havens, prevent movement of terrorists or terrorist groups by effective boarder controls, and find ways to intensify and accelerate the exchange of operational information. *Id.* paras. 2, 3. In addition, the resolution established a Committee of the Security Council, consisting of all the members of the Council, to monitor implementation of the resolution and called upon all States to report to the Committee, no later than ninety days from the date of the resolution's adoption, the steps taken to implement the resolution. *Id.* para. 6.

[411] President George W. Bush, Address to the Joint Session of Congress and the American People (September 20, 2001), *at* http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html [hereinafter Bush Address, 20 Sept. 2001].

Although the United States retained primary responsibility for executing OPERATION ENDURING FREEDOM, the operation was a distinctly coalition military operation. Ultimately, twenty-seven nations eventually deployed more than 14,000 troops in support of OEF.[412] The initial campaign plan proposed that the United States would "destroy the al Qaeda network inside Afghanistan along with the illegitimate Taliban regime which was harboring and protecting the terrorists."[413] The basic plan was to directly attack Taliban military installations and al Qaeda terrorist camps with aircraft and cruise missiles, while using Special Forces to direct and support the existing Afghan Northern Alliance resistance forces with air-delivered precision weapons. Simultaneously, humanitarian aid would be air-dropped to the Afghan people.[414]

To execute this plan, two aircraft carriers (USS Enterprise and USS Carl Vinson) and their battle groups were directed to the Arabian Sea off the coast of Pakistan.[415] They were joined by the USS Pieleu Amphibious Ready Group (ARG), with the 15th Marine Expeditionary Unit (MEU) attached.[416] The aircraft carrier USS Kitty Hawk was also sent to the region from Japan (without most of its Carrier Air Wing) to support Special Operations Forces (SOF), including the Army's 160th Special Operations Aviation Regiment, Navy Sea, Air and Land forces (SEALs), and Air Force SOF.[417] The Air Force deployed B-52 bombers and B-1 heavy bombers to Diego Garcia in the Indian Ocean. In addition, F-16, F-15, F- 15E, and F-117 fighters were deployed to bases in countries in the Persian Gulf allied with the United States.[418] Special Forces and Central Intelligence Agency (CIA) agents began to infiltrate and link up with resistance groups in Afghanistan.

At 1230 hours Eastern Daylight Time, 7 October 2001, the U.S. military began combat operations in Afghanistan. As stated in his letter to the Congress, the President ordered combat action under his authority to conduct U.S. foreign relations as Commander-in-Chief and Chief Executive.[419] That same day, Ambassador John

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[412] Volume I, *at* 10, *citing* Operation Enduring Freedom: One Year of Accomplishment, *at* www.whitehouse.gov/infocus/defense/enduringfreedom.html (last visited 9 Mar. 2004).

[413] Volume I *at* 10, *citing* Operation Enduring Freedom—Afghanistan, *at* http://www.globalsecurity.org/military/ops/enduring.freedom.htm (last modified 10 February 2006) [hereinafter OEF Afghanistan].

[414] Volume I, *at* 10.

[415] Operation Enduring Freedom—Deployments, *at* http://www.globalsecurity.org/military/ops/enduring-freedom_deploy.htm (last modified 16 Mar. 2004) [hereinafter OEFDeployments]

[416] *Id.*

[417] *Id.*

[418] *Id.*

[419] *See* Letter from the President to the Speaker of the House of Representatives and the President Pro Tempore of the Senate (Oct. 7, 2001), *at* www.whitehouse.gove/news/releases/2001/10/2001109-6.html . *See also* Exec. Order 13,239, 66 Fed. Reg. 64,907 (Dec. 14, 2001) (designating September 19, 2001, as the date of commencement of combat activities in that zone for purposes of section 112 of the Internal Revenue Code (26 U.S.C. § 112)).

Negroponte, U.S. Permanent Representative to the UN, informed the UN Security Council of the U.S. actions and its legal basis for doing so. Not surprisingly, the basis was Article 51 of the UN Charter.[420]

Two weeks of around-the-clock attacks followed, at the end of which most al Qaeda training camps had been severely damaged, the Taliban air defenses destroyed, and "command and control" assets severely degraded.[421] Thereafter, on the night of 19 October, the ground war began in earnest with a strike by Army Rangers and Delta on the residence of Taliban leader Mullah Omar in the middle of Kandahar and on an airfield south of the city.[422] At the same time, A-teams from the 5th Special Forces Group were being helicoptered in to link up with Northern Alliance forces.[423]

On 9 November 2001, the Northern Alliance began its offensive with a push on Mazar-e-Sharif. After only one day of fighting the city fell to the forces of Generals Rashid Dostum and Mohammed Atta, triggering the collapse of Taliban forces throughout northern Afghanistan.[424] This included the immediate switching sides of numerous local commanders and their forces. Four days later, despite U.S. requests to stop short, the Northern Alliance army of General Fahim Khan moved into the capital city of Kabul. Only light resistance was encountered, the Taliban having fled the city the previous night.

On 25 November, the first extensive U.S. ground forces entered Afghanistan when Combined Task Force 58 (CTF-58) seized Forward Operating Base (FOB) Rhino, a dirt airfield at a former hunting camp near Kandahar in southern Afghanistan. Six CH-53E transport helicopters from the 15th and 26th Marine Expeditionary Unit (Special Operations Capable) (MEU(SOC)s) launched from the USS Peleliu, and after a nighttime refueling, landed Marine Company C 350 nautical miles away. A Marine KC-130 transport aircraft then landed additional Battalion Landing Team (BTL) 1/1 rifle

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[420] *See* Letter from John D. Negroponte, United States Permanent Representative to the United Nations, to Richard Ryan, President of the U.N. Security Council, 7 Oct. 2001, *at* http://www.usembassy.it/file2001_10/alia/a1100807.htm Ambassador Negroponte stated:

> In accordance with Article 51 of the Charter of the United Nations, I wish, on behalf of my Government, to report that the United States of America, together with other States, has initiated actions in the exercise of its inherent right of individual and collective self defense following armed attacks that were carried out against the United States on September 11, 2001.

[421] Volume I at 12, *citing* Encyclopedia: U.S. Invasion of Afghanistan, *at* http://www.nationmaster.com/encyclopedia/U.S.-Invasion-of-Afghanistan (last visited 9 Mar. 2004) [hereinafter Encyclopedia: Afghanistan].

[422] Frontline: Campaign Against Terror: Chronology, *at* http://www.pbs.org/wgbh/pages/frontline/shows/campaign/etc/cron.html (last visited 9 Mar. 2004) [hereinafter Frontline Chronology].

[423] *Id.*

[424] Encyclopedia: Afghanistan.

companies. The next day carrier-based F-14s and Marine AH-1 attack helicopters flying from FOB Rhino destroyed a column of BMPs attempting to attack the base.

On 1 December 2001, General Hamid Karzai's forces began to close on Kandahar from the north while forces of commander Gul Agha Sherizai moved in from the south. On 7 December, Kandahar fell, marking the end of the Taliban regime. However, Taliban leader Mullah Omar escaped prior to the capture of the city. The United States and the Northern Alliance stepped up attacks on the remnants of al Qaeda in the Tora Bora Mountains. In two weeks of heavy ground fighting and air strikes, hundreds of al Qaeda fighters were killed. By 17 December, the remainder fled to Pakistan, marking the end of the first phase of combat in Afghanistan.

On 29 January 2002, 1,600 soldiers from the 101st Airborne Division (Air Assault) replaced the Marines of CTF-58 at Kandahar airport and formed Task Force (TF) Rakkasan. At the end of March, the 5th Special Forces Group was replaced by the 3rd Special Forces Group.[425] Combined Joint Task Force 180 (CJTF-180), commanded by the 18th Airborne Corps Commander assumed responsibility for U.S. forces in Afghanistan in mid-May 2002.[426] In turn, it became CJTF-76 in April, 2004.[427]

Sponsored by the UN, Afghan factions met in Bonn, Germany in December 2001 to discuss the restoration of stability and governance to Afghanistan.[428] The resulting "Bonn Agreement," included a request to the Security Council that the Council send a UN endorsed, international security force to Afghanistan.[429] This request resulted in the passage of Security Council Resolution 1386 which authorized the presence of an security assistance force under Chapter VII of the UN Charter.[430] This resolution is implemented by the NATO-led security force, International Security Assistance Force. This command is the first NATO-led mission outside the Euro-Atlantic area.[431] Over 36 nations contribute forces to this mission aimed at improving the security situation in

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[425] OER Deployments.

[426] Volume I, *at* 14, *citing* Operation ENDURING FREEDOM—Operations, *at* http://www.globalsecurity.org/military/ops/enduringfreedom-ops.htm (last modified 16 Mar. 2004) [hereinafter OEF Operations].

[427] This change reflected that the 18th Airborne Corps Commander was no longer in command as 18th Airborne Corps soldiers had been replaced by members of the 25th Infantry Division. *See* Combined Joint Task Force 76 *at* http://www.globalsecurity.org/military/agency/dod/jtf-180.htm (last visited on 13 February 2006)

[428] U.S. Dep't of State, Bureau of South Asian Affairs, Background Note: Afghanistan, *at* http://www.state.gov/r/pa/ei/bgn/5380pf.htm (last visited 12 Feb 3006) [hereinafter DOS Afghanistan Background Note].

[429] *See* Afghan Bonn Agreement, *at* http://www.un.org/News/dh/latest/afghan/afghan-agree.htm (last visited on 13 February 2006).

[430] S.C. Res. 1386, U.N. SCOR, 56th Sess., 4443rd mtg., U.N. Doc. S.RES/ 1386 (2001) [hereinafter S.C. Res. 1386].

[431] *See* International Security Assistance Force Fact Sheet *at* http://www.afnorth.nato.int/ISAF/Backgrounders/BackWhatisISAF.htm (last visited on 13 February 2006).

Afghanistan.[432] While the ISAF mission was originally designed to support forces in and around the capital city of Kabul, the mission has expanded greatly with the creation of provincial reconstruction teams (PRTs) that have been quite active northwest of Kabul and are moving into the southern part of the country as well.[433] U.S. forces directly supporting ISAF are few in number as most of the U.S. forces in Afghanistan are assigned to either Combined Forces Command –Afghanistan (CFC-A) or the subordinate operational command to CFC-A, Combined Joint Task Force 75 (CJTF-76).

The Bonn Agreement also established the Afghan Interim Authority (AIA) and Hamid Karzai took office in Kabul on December 22, 2001 as Chairman of the AIA. The AIA remained in power for approximately 6 months while laying the foundation for a nationwide "Loya Jirga" (Grand Council) to be held in mid-June 2002. This election decided the structure of a Transitional Authority. The Transitional Authority, headed again by Hamid Karzai, renamed the government as the Transitional Islamic State of Afghanistan (TISA). One of the TISA's primary achievements was the drafting of a constitution ratified by a Constitutional Loya Jirga on January 4, 2004.[434]

Thereafter, on October 9, 2004, Afghanistan held its first national democratic presidential election. More than 8 million Afghans voted, 41% of whom were women. Hamid Karzai won and inaugurated on December 7 for a five-year term as Afghanistan's first democratically elected president.[435] Thereafter, elections were held for the lower house of Afghanistan's bicameral National Assembly on September 18, 2005 and the first democratically elected National Assembly since 1969 was inaugurated on December 19, 2005.

The legal basis underlying the United States' continued military presence in Afghanistan continues to be that of individual and collective self defense under Article 51 of the UN Charter. While the Taliban regime has fallen, and al Qaeda's operations disrupted, U.S. forces continue to operate to deny the enemy sanctuary in Afghanistan.[436] Additionally, the United States operates within the borders of Afghanistan, at the request of, and with the consent of the new government of Afghanistan.[437] Finally, the U.S. is participating in international efforts to deliver humanitarian aid, train the fledgling

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[432] *See* ISAF Operations, *at* http://www.afnorth.nato.int/ISAF/mission/mission_operations.htm (last visited on 13 February 2006).

[433] *Id.*

[434] *Id.*

[435] *Id.*

[436] *See Testimony on Operation Enduring Freedom, Hearing Before the Senate Armed Services Comm.*, 107th Cong. 3, July 31, 2002, *at* http://www.senate.gov/~armed_services/statemnt/2002/July/Rumsfeld2.pdf (testimony of Donald H. Rumsfeld, U.S. Secretary of Defense) (referencing continuing U.S. military operations in Afghanistan: "Our goal in Afghanistan is to ensure that the country does not, again, become a terrorist training ground. That work, of course, is by no means complete. Taliban and Al Qaeda fugitives are still at large.").

[437] *See* Joint Declaration of the United States-Afghanistan Strategic Partnership, *at* http://www.whitehouse.gov/news/releases/2005/05/20050523-2.html (last visited on 13 February 2006).

Afghan National Army, and provide security to the Afghan Government and society.[438] Thus, arguably, the legal authority provided under Chapter VII of the UN Charter as utilized in Security Council Resolutions 1386, 1413, and 1444 provides additional legal authority for U.S. activities.[439] In sum, the United States continues military operations in Afghanistan, with the consent of the Afghan government, under the inherent Article 51 right of individual and collective self-defense and in support of the ISAF's Chapter VII mandate.

II.L.5. Operations in Iraq

To understand the legal justification for the United States use of force against Iraq in 2003, it is helpful to begin with the unlawful invasion of Kuwait by Iraq in 1990. Immediately after this happened, the UN Security Council adopted Resolutions 660 (demanding Iraq's withdrawal from Kuwait) and 678 (authorizing the use of "all necessary means" to expel Iraq from Kuwait).[440] With the explicit authority of the UN Security Council, the U.S.-led coalition launched OPERATION DESERT STORM on 17 January 1991, forcefully and rapidly ejecting Iraqi forces from Kuwait.

In April 1991, the Security Council adopted Resolution 687. This resolution formalized the cease-fire between Iraqi and coalition forces, and obliged Iraq to "unconditionally accept the destruction, removal, or rendering harmless under international supervision," of its chemical and biological weapons and long-range ballistic missile capabilities. The Resolution also prohibited Iraq from acquiring or developing nuclear weapons.[441] Iraq initially complied (somewhat) with these requirements but over the next eight years became incrementally less observant of its obligations under Resolution 687, culminating with its cessation of all cooperation with the UN Special Commission (UNSCOM) and the International Atomic Energy Agency (IAEA) in 1998.

When Sadaam Hussein's regime refused to fully cooperate with UN weapons inspections, the Security Council imposed sanctions against Iraq to prevent further WMD development and to compel Iraqi adherence to international obligations. Continued noncompliance by Iraq with the requirements imposed by the UN, particularly its refusal to allow weapons inspectors full freedom of action in dismantling Iraq's WMD program, caused these sanctions to remain in place until the U.S.-led coalition removed the Ba'ath regime in 2003. Under the UN oil-for-food program, however, Iraq was allowed to export

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[438] *Id.*

[439] *See generally* NINA M. SERAFINO, CONGRESSIONAL RESEARCH SERVICE, PUB. NO. IB94040, PEACEKEEPING: ISSUES OF U.S. MILITARY INVOLVEMENT 4-5 (2d ed. 2003), *at* http://www.ncseonline.org/nle/crsreports/03Apr/IB94040.pdf (last visited 15 Mar. 2004).

[440] S.C. Res. 660, U.N. SCOR, 44th Sess., 2932nd mtg., U.N. Doc. S.RES/ 660 (1990); S.C. Res. 678, U.N. SCOR, 45th Sess., 2963rd mtg., U.N. Doc. S.RES/ 678 (1990) [hereinafter S.C. Res. 678].

[441] S.C. Res. 687, U.N. SCOR, 45th Sess., 2981st mtg., U.N. Doc. S.RES/ 687 (1991) [hereinafter S.C. Res. 687].

oil and use the proceeds to purchase goods to address essential civilian needs, including food, medicine, and infrastructure spare parts.[442]

The 1991 cease fire did not mean an end to hostilities, however, as intermittent combat between coalition forces and Iraq continued. In August 1992, in response to Saddam Hussein's attacks on Iraq's Kurdish minority in the northern part of the country and Shia Muslims in the southern part, in violation of UNSC Resolution 688,[443] "no-fly zones" were established over Iraq north of the 36th parallel and south of the 32nd (later expanded to the 33rd) parallel. The Combined Task Force (United States, United Kingdom, and Turkey) under OPERATION PROVIDE COMFORT (1992-96) and NORTHERN WATCH (1997-2003) enforced the northern no-fly zone from bases in Turkey.[444] Joint Task Force Southwest Asia (JTF-SWA) (United States, United Kingdom, France and Saudi Arabia) under OPERATION SOUTHERN WATCH (1992-2003) enforced the southern no-fly zone from bases in Persian Gulf countries and Navy aircraft carriers.[445]

Tensions flared in 1996 as Sadaam Hussein attacked Kurdish areas in Northern Iraq. The coalition response consisted of sea- and air-launched cruise missile attacks.[446] Similarly, on 16 December 1998, in response to Iraq bringing a halt to UN weapons inspections, the United States and the United Kingdom launched four days of air strikes with cruise missiles and aircraft, including the first combat use of the B-1 heavy bomber (OPERATION DESERT FOX).[447] Following these strikes, the coalition began a four-year "low-profile" war of attrition against Iraqi air defense and other military targets that lasted until the beginning of OPERATION IRAQI FREEDOM.[448]

Following OPERATION DESERT FOX, Iraq continued to deny access to UN weapons inspectors, resulting in growing concern that Saddam Hussein was reconstituting his chemical and biological weapons stockpiles and advancing his program for acquiring nuclear weapons. The events of 11 September 2001 led some within the U.S. Government to urge that the U.S. policy of containing Iraq be dropped and direct action be taken immediately against Saddam Hussein's regime. However, as noted previously, the United States focused initially on Afghanistan. Soon after the fall of the

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[442] DOS Iraq Background Note. *See* S.C. Res. 986, U.N. SCOR, 49th Sess., 3519th mtg., U.N. Doc. S/RES/986 (1995).

[443] S.C. Res. 688, U.N. SCOR, 2982nd mtg., U.N. Doc. S/RES/688 (1991).

[444] Operation Northern Watch, *at* http://www.eucom.mil/Directorates/ECPA/Operations/onw/onw.htm (last visited 9 Mar. 2004).

[445] Operation Southern Watch, *at* http://www.eucom.mil/Directorates/ECPA/Operations/osw/osw.htm (last visited 9 Mar. 2004).

[446] Operation Desert Strike, *at* http://www.globalsecurity.org/military/ops/desert_strike.htm (last modified 24 June 2003).

[447] Operation Desert Fox, *at* http://www.globalsecurity.org/military/ops/desert_fox.htm (last modified 8 Sept. 2002).

[448] American Friends Service Committee, Iraq War Timeline (Sept. 2003) [hereinafter Iraq War Timeline].

Taliban, however, President George W. Bush, in his State of the Union address on 29 January 2002, identified Iraq as part of "an axis of evil" and stated that the United States "would not permit the world's most dangerous regimes to threaten us with the world's most destructive weapons."[449]

In the face of continued Iraqi intransigence over revealing and destroying its WMD program, President Bush appeared before the UN General Assembly on 12 September 2002 to urge the UN to acknowledge the danger posed by Iraq or risk becoming irrelevant.[450] In this speech, President Bush made clear that the "United States will work with the U.N. Security Council for the necessary resolutions. But the resolutions will be enforced ... or action will be unavoidable."[451] This speech made clear that the United States would initially seek authorization for the use of force against Iraq from the Security Council but if the Security Council did not cooperate, the United States might well pursue unilateral action to enforce previous Security Council resolutions.[452]

This speech was followed by a Joint Resolution of Congress on 10 October 2002 authorizing the use of force against Iraq.[453] Eventually the U.N. Security Council passed Resolution 1441, which imposed tough new inspections on Iraq, precisely defined the actions that Iraq had to take to avoid being in material breach of the resolution, and threatened "serious consequences" in the event of Iraqi non-compliance.[454] The Security Council noted that Iraq had been and remained in material breach of its obligations under Resolution 687 and subsequent Resolutions and gave Iraq "a final opportunity" to comply with its disarmament obligations and submit to an "enhanced" inspection regime.[455] The resolution did not, however, provide authorizing language for the use of force.

After continued opposition to the inspections and inspectors by the Iraqi government, The United States, United Kingdom, and Spain proposed on 24 February 2003 that the Security Council authorize the use of force. This effort met strong resistance by Russia, France, and Germany and, as a result, proved unsuccessful. Thereafter, the United States decided to proceed with a "coalition of the willing" and commenced combat operations against Iraq on 19 March 2003.[456]

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[449] President George W. Bush, State of the Union Address, Jan. 29, 2002, *at* http://www.whitehouse.gov/news/releases/2002/01/20020129-11.html (last visited 31 August 2006) [hereinafter State of the Union Address].

[450] *Id.*

[451] President George W. Bush, Address to the United Nations General Assembly, Sept. 12, 2002, *at* http://www.whitehouse.gov/news/releases/2002/09/print/20020912-1.html (last visited 16 Mar. 2004) [hereinafter President Bush UN Address].

[452] Volume I, *at* 20.

[453] H.R.J. Res. 114. 107th Cong. (2002).

[454] S.C. Res. 1441, U.N. SCOR, 4644th mtg., U.N. Doc. S/RES/1441 (2002).

[455] *Id.*

[456] OEF/OIF Vol. I *at* 21.

The U.S. Government's asserted legal basis for the use of force in Iraq seemed straightforward--U.S. and coalition actions were a continuation of the actions authorized by the UN for the first Gulf War.[457] Resolution 678 authorized Member States to use "all necessary means to uphold and implement Resolution 660 and all subsequent relevant resolutions and to restore international peace and security in the area."[458] Resolution 687 then formalized the 1991 cease-fire and placed corresponding obligations on Iraq with respect to its WMD capabilities.[459] Resolution 1441 declared Iraq in material breach of Resolutions 660, 687, and others, gave Iraq a final opportunity to comply, and warned that Iraq would face "serious consequences" if violations continued.[460] Since Iraq had not complied with its obligations pursuant to these resolutions and because Iraq breached its obligations under Resolution 687 (which never terminated the authorization for the use of force in Resolution 678), the cease-fire was null and void and the authorization to use "all necessary means" to return peace and stability to the region contained in Resolution 678

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[457] The inherent right of self defense, codified in Article 51 of the UN Charter, has also been cited as a basis for OIF. In his 2004 State of the Union Address President Bush stated that:

> Our greatest responsibility is the *active defense* of the American people. . . . As part of the offensive against terror, we are also confronting the regimes that harbor and support terrorists, and could supply them with nuclear, chemical, or biological weapons. The United States and our allies are determined: We refuse to live in the shadow of this ultimate danger. . . . After the chaos and carnage of September the 11th, it is not enough to serve our enemies with legal papers. The terrorists and their supporters declared war on the United States, and war is what they got. . . . From the beginning, America has sought international support for our operations in Afghanistan and Iraq, and we have gained much support. There is a difference, however, between leading a coalition of many nations, and submitting to the objections of a few. America will never seek a permission slip to defend the security of our country

President George W. Bush, State of the Union Address (Jan. 20, 2004), *at* http://www.whitehouse.gov/news/releases/2004/01/print/20040120-7.html (last visited 14 February 2006)

Article 51 states that "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." Under Article 51, exercising the right of self-defense does not require explicit authorization, but it does require a predicate *armed attack.* Indeed, the U.S. exercised its inherent right of self-defense in Operation ENDURING FREEDOM without explicit Security Council authorization in response to the armed attacks of 11 September 2001.

Assuming Operation IRAQI FREEDOM was conducted wholly or partly in self-defense, it must have been *anticipatory* self-defense. The concept of anticipatory self-defense is not discussed in the U.N. Charter but is recognized in many international legal experts as part of customary international law though some disagree and believe that the concept was incorporated into, or superceded by, Article 51. Anticipatory self-defense appears to be explicitly recognized by the United States as its National Security Strategy of 2002 specifically contemplates that the thought the United States will "constantly strive to enlist the support of the international community, we will not hesitate to act alone, if necessary, to exercise our right of self-defense by *acting preemptively* against such terrorists, to prevent them from doing harm against our people and country." *See* NATIONAL SECURITY COUNCIL, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 6, Sept. 2002, *at* http://whitehouse.gov/nsc/nss.html .

[458] *See* S.C. Res. 660.

[459] *See* S.C. Res. 687.

[460] *See* S.C. Res. 1441.

remained in effect. Although an additional Security Council resolution explicitly authorizing the use of force might have been helpful, it was the U.S. position that such a resolution was not legally necessary.[461]

Critics of the U.S. Government's position argued that Resolution 1441 did not, by itself, provide the authority to use force against Iraq and that to acquire such authority necessitated an endorsing resolution authorizing such use of force.[462] Critics further contended that the U.S. Government's articulated position, in the absence of an explicit authorization of the use of force (as was the case in the first Gulf War in Resolution 678) depended upon its own interpretation of Security Council Resolution. This, they contended, ran counter to the plain language of Article 39 of the UN Charter, particularly given the markedly different interpretations of co-equal permanent members of the Council:

> The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken . . . to maintain or restore international peace and security.[463]

Although examination of the nuances of this disagreement is beyond the scope of this compendium, it is important to note that the debate continues to rage. One author, who framed the issue well stated:

> Iraq has become an occasion to revisit the issue [of the preemptive use of force]. Iraq had not attacked the U.S., nor did it appear to pose an imminent threat of attack in traditional military terms. As a consequence, it seems doubtful that the use of force against Iraq could be deemed to meet the traditional legal tests justifying preemptive attack. But Iraq may have possessed WMD, and it may have had ties to terrorist groups that seek to use such weapons against the U.S. If evidence is forthcoming on

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[461] In response to a reporter's question (in Spanish) concerning apparent French opposition to a draft Security Council resolution specifically authorizing the use of force in Iraq, the U.S. UN Representative, Ambassador Negroponte, stated (in Spanish):

> In the first place, I do not agree with you that the majority of the [Security] Council is against [the proposed Resolution authorizing force]. As I said before, we believe that if it were not for the threat of a veto [from France and Russia], it would have been very possible to win passage of our resolution. But, in the second instance, as I said in English, we think that there is full authority in Resolution 1441, Resolution 687 and 678 with regard to the possible use of force [against Iraq].

United States Permanent Representative to the United Nations, John D. Negroponte, Public Remarks following Security Council Consultations on Iraq, 17 Mar. 2003, *at* http://www.un.int/usa/03_035.htm .

[462] See Julia Preston, Threats and Responses: United Nations; Security Council Votes, 15-0, For Tough Iraq Resolution; Bush Calls it a 'Final Test', N.Y. TIMES, 9 Nov. 2002, at A1 ("France led the way in insisting that military action could be authorized only in a second stage, after the weapons inspectors did their work and if and when they detected Iraqi violations of the inspections regime.").

[463] U.N. CHARTER art. 39.

> both of those issues, then the situation necessarily raises the question that the Bush Administration articulated in its national security strategy, *i.e.*, whether the traditional law of preemption ought to be recast in light of the realities of WMD, rogue states, and terrorism. Iraq likely will not resolve that question, but it is an occasion to crystallize the debate.[464]

Using Security Council Resolution 1441 as well as the series of resolutions dating back to 1990 when 660 was first passed, the U.S. military and political leaders believed sufficient authority existed to join battle with Iraq.

[464] DAVID M. ACKERMAN, CONGRESSIONAL RESEARCH SERVICE, PUB. NO. RS21314, INTERNATIONAL LAW AND THE PREEMPTIVE USE OF FORCE AGAINST IRAQ 6 (2d ed. 2003).

II.M. INTELLIGENCE LAW

Because most deployed task forces will have significant outside intelligence assets, JAs must be prepared to provide intelligence law advice during operational deployments. This will include advising counterintelligence (CI) units about limitations on information collection and searches of U.S. persons.[465] Applicable directives and regulations prohibit physical surveillance of U.S. persons abroad to collect foreign intelligence, except to obtain significant information that cannot be reasonably acquired by other means.[466] The applicable directives and regulations also prohibit intelligence assets from conducting nonconsensual searches of U.S. persons without Attorney General approval.[467] JAs must also be prepared to give advice on issues regarding the interrogation of detainees pending criminal trial, intelligence contingency funds, low-level source operations, and the role of the G-2X. To appropriately advise CI assets, a JA will need to hold a Top Secret security clearance.

Intelligence Law in CONUS

The Department of Defense (DoD) has traditionally conducted only limited domestic and domestic support operations. Domestic operations are any military operation conducted in the U.S. where DoD is the lead federal agency. An example would be a homeland defense (HLD) operation. Domestic support operations specifically involve domestic support to civil authorities (DSCA).) Since the events of 9/11 and the hurricane season of 2006, DoD involvement in domestic and domestic support operations has grown. Domestic operations have increased as the USG fights the war on terror, and domestic support operations are on the rise due to the increase in natural disasters. The stand-up of US Northern Command in 2002 established a combatant commander in charge of both homeland defense (HLD) and defense support of civil authorities (DSCA).

The judge advocate's role is especially important during domestic and domestic support operations as the parameters under which DoD operates are different in the U.S. than they are overseas. For example, the lines between counterintelligence and force protection information are now blurred. Whereas one typically dealt with foreign information and the other domestic, both now involve elements of foreign and domestic information. Military commanders' need for information and intelligence within the homeland is on the rise – they expect force protection information and counterintelligence to be integrated into domestic support operations due to a heightened

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[465] *See* Exec. Order No. 12,333, 3 CFR 200 (1981) [hereinafter Exec. Order No. 12,333]; U.S. DEP'T OF DEFENSE, DIR. 5200.27, ACQUISITION OF INFORMATION CONCERNING PERSONS AND ORGANIZATIONS NOT AFFILIATED WITH THE DEPARTMENT OF DEFENSE (7 Jan. 1980); U.S. DEP'T OF ARMY, REG. 381-10, U.S. ARMY INTELLIGENCE ACTIVITIES (1 July 1984) [hereinafter AR 381-10].

[466] *See* Exec. Order No. 12333, ¶ 2.4(d); AR 381-10, ¶ 2(D), 9(C)(2).

[467] *See* Exec. Order No. 12333, ¶ 2.4(b), 2.5; AR 381-10, ¶ 7(C)(2)(b).

awareness of potential terrorist threats. These needs and expectations pose unique issues in the information and intelligence gathering arena. DoD intelligence components are subject to one set of rules referred to as intelligence oversight which is laid out in DoD regulation 5240.1-R. Everyone else in DoD, except for the Military Criminal Investigation Organizations (MCIOs), are subject to a different set of rules governed by DoDD 5200.27. Therefore, the commander must direct his need for information or intelligence to the right component – the component with the capability and authority to achieve the commander's intent. Intelligence is the domain of the DoD intelligence component; information comes from non-intel DoD components. Figuring out the nature of the data and the right unit to gather it are areas that often require judge advocate input.

In light of today's changing environment, commanders and their staffs should carefully consider the different rules when planning domestic and domestic support operations. This section examines the proper role of DoD intelligence components during these operations; the rules regarding the collection, retention, and dissemination of information about U.S. persons; and the judge advocate's (JAs) responsibilities in this area.

DoD

DoD intelligence components[468] have traditionally had limited involvement in domestic and domestic support operations. There are two reasons for this. One, as mentioned above, until recently DoD itself has not typically conducted many domestic or domestic support operations. Two, when these types of operations have been conducted, the role of DoD intelligence components has been limited due to its mission to conduct

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[468] DoD intelligence components are defined in DoDD 5240.1 as all DoD Components conducting intelligence activities (defined as foreign intelligence or counterintelligence), including the following:

a. The National Security Agency/Central Security Service (NSA/CSS).
b. The Defense Intelligence Agency (DIA).
c. The offices within the Department of Defense for the collection of specialized national foreign intelligence through reconnaissance programs.
d. The Office of the Deputy Chief of Staff for Intelligence (ODCSINT), U.S. Army.
e. The Office of Naval Intelligence (ONI).
f. The Office of the Assistant Chief of Staff, Intelligence (OACSI), U.S. Air Force.
g. Intelligence Division, U.S. Marine Corps.
h. The Army Intelligence and Security Command (USAINSCOM).
i. The Naval Intelligence Command (NIC). [No longer in existence]
j. The Naval Security Group Command (NSGC).
k. The Air Force Intelligence Agency (AFIA).
l. The Electronic Security Command (ESC), U.S. Air Force.
m. The counterintelligence elements of the Naval Security and Investigative Command (NSIC). [Now called the Naval Criminal Investigative Service (NCIS)]
n. The counterintelligence elements of the Air Force Office of Special Investigations (AFOSI).
o. The 650th Military Intelligence Group, Supreme Headquarters Allied Powers Europe (SHAPE).
p. Other intelligence and counterintelligence organizations, staffs, and offices, or elements thereof, when used for foreign intelligence or counterintelligence purposes. The heads of such organizations, staffs, and offices, or elements thereof, shall, however, not be considered as heads of the DoD intelligence components for purposes of this Directive.

DoD "intelligence activities."[469] Current DoD policy interpretation is that intelligence activities only include foreign intelligence (FI) and counterintelligence (CI).[470] There is little need for FI or CI in a domestic support operation. And when FI or CI is needed for a domestic operation, the intelligence oversight rules limit what can be collected. Now that both of these operations have increased, there is a greater need for intelligence assets and capabilities.

DoD intelligence components are governed by four primary references. 50 U.S.C. § 401 et seq, The National Security Act of 1947, establishes a comprehensive program for national security and defines the roles and missions of the intelligence community and accountability for intelligence activities. Executive Order (EO) 12333, *United States Intelligence Activities*, lays out the goals and direction of the national intelligence effort, and describes the roles and responsibilities of the different elements of the US intelligence community.[471] DoD Directive (DoDD) 5240.1, *DoD Intelligence Activities,*[472] and DoD 5240.1-R, *Procedures Governing the Activities of DoD Intelligence Components that affect United States Persons*[473] implement the guidance contained in EO 12333 as it pertains to DoD. In addition, each Service has its own regulation and policy guidance.

These authorities establish the operational parameters and restrictions under which DoD intelligence components may collect, produce, and disseminate FI and CI. Implicit in this authorization, by the definition of FI and CI, is a requirement that such intelligence relate to the activities of international terrorists or foreign powers, organizations, persons, and their agents. Moreover, to the extent that DoD intelligence components are authorized to collect FI or CI within the United States, they may do so only in coordination with the Federal Bureau of Investigation (FBI), which has primary responsibility for intelligence collection within the United States.[474]

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[469] DoD Regulation 5240.1-R

[470] *"Foreign intelligence"* means information relating to the capabilities, intentions, and activities of foreign powers, organizations, or persons, but not including counterintelligence except for information on international terrorist activities. Exec. Order No. 12,333, U.S. Intelligence Activities, para. 3.4(d) (Dec. 4, 1981) [hereinafter EO 12333]. *"Counterintelligence"* means information gathered and activities conducted to protect against espionage, other intelligence activities, sabotage, or assassinations conducted for or on behalf of foreign powers, organizations, or persons, or international terrorist activities, but not including personnel, physical, document, or communications security programs. *Id.* para. 3.4(a).

[471] *Id.*

[472] U.S. DEP'T OF DEFENSE, DIR. 5240.1, DOD INTELLIGENCE ACTIVITIES (25 Apr. 1988) [hereinafter DoDD 5240.1].

[473] DoD Regulation 5240.1-R.

[474] EO 12333, para 1.14(a); Agreement Governing the Conduct of Defense Department Counterintelligence Activities in Conjunction with the Federal Bureau of Investigation (5 April 1979); and Supplement to 1979 FBI/DoD Memorandum of Understanding: Coordination of Counterintelligence Matters Between the FBI and DoD (20 June 1996).

When DoD intelligence components are conducting FI or CI, the intelligence oversight (IO) rules apply. These rules govern the collection, retention, and dissemination of information concerning U.S. persons.[475] A U.S. person includes individuals, many unincorporated associations and U.S. corporations. Special emphasis is given to the protection of the constitutional rights and privacy of U.S. persons so the IO rules generally prohibit the acquisition of information concerning the domestic activities[476] of any U.S. person.[477] In accordance with EO 12333, DoD has established IO rules in DoDD 5240.1 and DoD regulation 5240.1-R, that apply to all DoD intelligence components.[478]

DoD regulation 5240.1-R is divided into fifteen separate procedures that govern the collection, retention, and dissemination of intelligence. Collection of information on U.S. persons must be necessary to the functions (including FI or CI) of the DoD intelligence component concerned.[479] Procedures 2 through 4 provide the sole authority by which DoD components may collect, retain, and disseminate information concerning U.S. persons. Procedures 5-10 set forth the applicable guidance with respect to the use of certain collection techniques to obtain information for foreign intelligence and counterintelligence purposes. Procedures 11 through 15 govern other aspects of DoD intelligence activities, including the oversight of such activities. In addition to the procedures themselves, the Defense Intelligence Agency has published an instructive manual entitled *The Intelligence Law Handbook* (September 1995), to provide additional interpretive guidance to assist legal advisers, intelligence oversight officials, and operators in applying DoD 5240.1-R. See also *Appendix 9-11, Policy Guidance for Intel Support in CONUS.*

In the absence of any foreign nexus, DoD intelligence components generally perform non-intelligence activities. A non-intelligence activity would be any activity that is conducted by or with a DoD Intelligence Component asset or capability, but which does not involve FI or CI; for example, the collection, retention, production, and dissemination of maps, terrain analysis, and damage assessments for a DSCA mission. When a DoD intelligence component asset or capability is needed for a non-intelligence

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[475] Judge Advocates must read these authorities before advising a commander on the collection of information in a domestic support operation or any other operation that may entail collecting intelligence on a U.S. person.

[476] *"Domestic activities"* refers to activities that take place within the United States that do not involve a significant connection with a foreign power, organization, or person. DoD 5240.1-R, Procedure 2, para. B3.

[477] *"United States person"* means a United States citizen, an alien known by the intelligence agency concerned to be a permanent resident alien, an unincorporated association substantially composed of United States citizens or permanent resident aliens, or a corporation incorporated in the United States, except for a corporation directed and controlled by a foreign government or governments. EO 12333, para. 3.4(i).

[478] DoDD 5240.1, para. 2.3, does not apply to authorized law enforcement activities carried out by DoD intelligence components having a law enforcement mission.

[479] *Id.* 4.2.1.

activity, specific authorization from the Secretary of Defense is required for both the mission and use of the DoD intelligence component capability or asset.[480] The IO rules do not apply to non-intelligence activities so the SECDEF authorization must be sure to include any restrictions placed upon the assets or capabilities used in the domestic or domestic support operation.

Whether DoD intelligence components are conducting an intelligence activity or a non-intelligence activity for domestic operations or domestic support operations, certain rules universally apply to data and imagery collected from overhead and airborne sensors. Geospatial data, commercial imagery, and data or domestic imagery collected and processed by the National Geospatial Intelligence Agency (NGA) is subject to specific procedures covering the request for geospatial data or imagery and its use. Judge advocates should ensure that they are familiar with NGA policy on requests for geospatial data or imagery and its authorized use. Additionally, DoDD 5210.52, *Security Classification of Airborne Sensor Imagery and Imaging Systems*, and DIA Regulation (DIAR) 50-30, *Security Classification of Airborne Sensor Imagery,* provide specific guidance on mandatory security classification review of all data collected by airborne sensor platforms to determine whether it can be disseminated.

In providing guidance to Commanders on authorized use of DoD intelligence component capabilities and assets, and the products derived from the data collected, it is also important for judge advocates to understand the various platforms, their sensors, and how they operate. Issues to consider include: whether the sensor is fixed or moveable, whether the platform with the sensor can have its course altered during a mission, how is the data collected, transmitted and processed, and the specific purpose of its mission. For example, a Unmanned Aerial Vehicle (UAV) may transmit data by live feed only to a line-of-sight receiver, or by satellite to a remote location. Evidence of a criminal act "incidentally" collected during an authorized mission using DoD Intelligence Component capabilities can be forwarded to the appropriate law enforcement agency (LEA); however, altering the course of an airborne sensor (such as a UAV) from an approved collection track to loiter over suspected criminal activities would no longer be incidental collection, and could result in a Posse Comitatus Act (PCA) violation unless specifically approved in advance.

Certain data contains classified metadata which may need to be stripped at a remote site before it can be disseminated in an unclassified manner. Different platforms require different operational support, which requires planning on where it is positioned, considering the intended use. A domestic support operation using DoD intelligence component capabilities which includes support to law enforcement agencies (LEAs) will probably require a separate mission authority approval by SECDEF and will need to consider whether the data is to be exclusively transmitted to the LEA, and where the LEA agents are located to control or direct use of the assets. Whether the collection platform and data transmission is wholly owned, operated and received by a DoD intelligence component, a DoD non-intelligence component, or a combination of both will require

[480] *Id.* at 2.2.3

careful consideration by judge advocates of the applicable rules and operational parameters and restrictions applicable for the mission.

DoD non-intelligence components also have restrictions. These restrictions relate to the acquisition of information concerning the activities of persons and organizations not affiliated with DoD. This type of information is often needed when conducting domestic operations, especially domestic support operations. Within the DoD, the Military Criminal Investigative Organizations (MCIOs) have primary responsibility for gathering and disseminating information about the domestic activities of U.S. persons that threaten DoD personnel or property

DoD components, other than the intelligence components, may acquire information concerning the activities of persons and organizations not affiliated with the DoD only in the limited circumstances authorized by DoDD 5200.27, *Acquisition of Information Concerning Persons and Organizations Not Affiliated with the Department of Defense.* DoDD 5200.27 provides limitations on the types of information that may be collected, processed, stored, and disseminated about the activities of persons and organizations not affiliated with DoD. Those circumstances include the acquisition of information essential to accomplish the following DoD missions: protection of DoD functions and property, personnel security, and operations related to civil disturbances. The directive is very explicit and should be referred to when determining authority for this type of information.

Judge advocates are responsible for the following during intelligence gathering operations: advising the commander and staff on all intelligence law and oversight matters within their purview; advising on the permissible acquisition and dissemination of information on non-DoD affiliated persons and organizations; recommending legally acceptable courses of action; establishing, in coordination with the Head Intelligence Officer (J-2/G-2/S-2/N-2) and the Inspector General (IG), an intelligence oversight program that helps ensure compliance with applicable law and policy; reviewing all intelligence plans, proposals, and concepts for legality and propriety; and training members of the command who are engaged in intelligence activities on all laws, policies, treaties, and agreements that apply to their activities.

In order to properly perform these duties, JAs advising commanders during domestic and domestic support operations should know and understand a variety of key types of information. Judge advocates must be familiar with the missions, plans, and capabilities of subordinate intelligence units, and all laws and policies (many of which are classified) that apply to their activities. At a minimum, JAs should be familiar with the restrictions on the collection, retention, and dissemination of information about U.S. persons and non-DoD persons and organizations, the approval authorities for the various intelligence activities performed by subordinate units, and the requirement to report and investigate questionable activities and certain federal crimes.[481] JAs must also be familiar with the jurisdictional relationship between intelligence and counterintelligence activities

[481] DoD 5240.1-R, at procedure 15.

as well as the parallel jurisdictions of force protection and law enforcement activities. Finally, JAs should establish close working relationships with the legal advisors of supporting intelligence agencies and organizations, all of whom can provide expert assistance.

II.N. RULE OF LAW/JUDICIAL REFORM

The planning and support of Rule of Law initiatives must begin with a thorough understanding of current United States Policy, the roles of other government agencies in supporting such projects, and the rapidly evolving Stability, Support, Transition and Reconstruction (SSTR) doctrine. Further, because recent doctrinal developments, a National Security Presidential Directive[482] and other agency proclamations[483] place Rule of Law initiatives into the context of SSTR operations, Staff Judge Advocates facing an upcoming deployment should expect the Command to look to the OSJA along with Civil Affairs leadership to take on operational responsibilities in this area. Emphasis will continue to grow as DoD Directive 3000.05 establishes DoD policy that stability operations as a core U.S. military mission to be given priority comparable to combat operations.

The confluence of these recent policy proclamations coupled with the growing recognition of the role of Rule of Law and judicial reconstruction operations will lead to greater command emphasis in this area. Although an area of rapid doctrinal evolution, Judge Advocates confronted with a requirement to develop or execute a Rule of Law component of an SSTR "plan"[484] can leverage an increasingly sophisticated collection of "lessons learned" from past operations that have had a Rule of Law or judicial reconstruction component. Also, other agencies and NGOs can be a source of reports and materials that provide can provide additional insight.[485]

To be successful in this arena, Judge advocates must:

(a) Become familiar with the developing doctrine and policies surrounding Stability, Support, Transition and Reconstruction.[486]
(b) Identify early all of the agencies involved in Rule of Law or Judicial Reconstruction projects and establish a liaison between the command, the local nationals and these

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[482] NATIONAL SECURITY PRESIDENTIAL DIRECTIVE (NSPD) 44, MANAGEMENT OF INTERAGENCY EFFORTS CONCERNING RECONSTRUCTION AND STABILIZATION (7 Dec. 2005) [hereinafter NSPD-44].

[483] *See, e.g.*, "President Issues Directive to Improve the United States' Capacity to Manage Reconstruction and Stabilization Efforts," US Dept. of State Fact Sheet (Dec. 14, 2005), *available at* www.state.gov/r/pa/prs/ps/2005/58067.htm.

[484] It is most likely that SSTR initiatives will be carved up and placed into their appropriate line of operation during the planning process. For example, Rule of Law efforts would be found in a Governance line of operations and projects designed to restart an economy would be in an economic development or economic pluralism line of operation.

[485] Both USAID and the USIP have excellent web pages that provide access to a large collection of specialized materials that can aid operational planners in a host of topics ranging from Rule of Law programs specifically to governance and civil society broadly. See respectively www.usaid.gov and www.usip.org.

[486] *See* U.S. DEP'T OF DEFENSE, DIR. 3000.05, MILITARY SUPPORT FOR STABILITY, SECURITY, TRANSITION, AND RECONSTRUCTION (SSTR) (28 Nov. 2005) [hereinafter DoDD 3000.05].

entities and aggressively pursue the development of an interagency working group to synchronize efforts and resources even if it is *ad hoc* in nature[487];
(c) Senior Judge Advocates should push for the development of a Rule of Law and Judicial Reconstruction plan prior to deployment of forces; tactical level judge advocates should expect to execute operations in a vacuum[488];
(d) Anticipate and develop competence in this aspect of modern asymmetrical operations and the role that such operations play in extending the ability of the nation under reconstruction to quell insurgency and insurrection[489];
(e) Understand the significant procedural differences that exist between common law and civil law jurisdictions; develop an understanding of key substantive law provisions as they relate to criminal law, business formation[490], and the resolution of issues related to real estate and squatters[491];
(f) Upon deployment immediately develop a network of local contacts within the legal community and identify their key centers of gravity[492];
(g) Assess and constantly reassess the capabilities and resources needed by the local legal community to include physical plant, systems, and training requirements[493];
(h) Assess the ability of the key players in justice operations to communicate and synchronize operations with a particular focus on the relationship among the courts, the police and those responsible for prisoner transport and incarceration[494];
(i) Be prepared to develop and execute programs designed to increase respect for the Rule of Law and coordinate closely with other staff sections in the process[495];

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[487] CENTER FOR LAW AND MILITARY OPERATIONS, LEGAL LESSONS LEARNED FROM AFGHANISTAN AND IRAQ, VOLUME II: FULL SPECTRUM OPERATIONS, 24-5 (1 Sep. 2005) [hereinafter OIF, Vol. II]

[488] *Id* at 23-5.

[489] For an excellent treatise on counterinsurgency doctrine, *see* DAVID GALULA, COUNTERINSURGENCY WARFARE: THEORY & PRACTICE (Preager 1964).

[490] As the DoD takes on greater responsibility for SSTR operations, Judge Advocates may find commanders concerned with areas of foreign law that Judge Advocates would never be asked to consider under US law. See DoDD 3000.05. For example, Commanders involved in operations in transitional societies such as Iraq will place great emphasis on improving the underlying economic opportunity for local nationals. *See* MG Peter W. Chiarelli & MAJ Patrick R. Michaelis, *Winning the Peace: The Requirement for Full Spectrum Operations*, MILITARY REVIEW 4, 13 (July-August 2005). This will lead to a myriad of legal questions such as: What kind of business organizations are permitted; can foreigners own land or stock or can they serve as joint venture partners; how are commercial disputes resolved and are the systems functioning; and, how are squatters removed from buildings, etc. Answers to these questions may require the translation of documents, meetings with local attorneys and judges, or reliance on assistance from other agencies or organizations.

[491] CENTER FOR LAW AND MILITARY OPERATIONS, LAW AND MILITARY OPERATIONS IN THE BALKANS, 1995 – 1998: LESSONS LEARNED FOR JUDGE ADVOCATES, 95-98 (13 Nov. 1998) [hereinafter Balkans LL].

[492] OIF, Vol. II, at 27.

[493] *Id.* at 36-9.

[494] CENTER FOR LAW AND MILITARY OPERATIONS, LAW AND MILITARY OPERATIONS IN HAITI, 1994 – 1995: LESSONS LEARNED FOR JUDGE ADVOCATES, 102-5 (11 Dec. 1995) [hereinafter Haiti LL].

[495] OIF, Vol. II, at 31-32 & 41-42..

(j) Understand local customs and protocol when meeting with local officials – anticipate the need and value for the development of personal relationships[496].

JAs Must Understand Developing Doctrine

Judge Advocates must understand the evolving roles and responsibilities of commanders under the evolving policies, procedures and interagency coordination required to execute potential SSTR responsibilities. The United States Department of State (DOS) has the responsibility to lead efforts to integrate interagency efforts to "prepare, plan for, and conduct" SSTR operations and to "harmonize" these with US military plans and operations.[497] This interagency process is governed by the procedures outlined in NSPD-1 during active "contingency response" or SSTR mission.[498]

Notwithstanding the lead integration responsibility placed with DOS by NSPD-44, DoD Directive 3000.05 requires that military operations integrate SSTR operations into contingency planning and operations and that they be provided a priority consistent with combat operations.[499] Further, SSTR operations are broadly defined to include competencies beyond those associated with traditional military operations and planning. These include: police, prison and judicial system reconstruction,[500] activities designed to reconstitute economic vitality,[501] and efforts to promote representative government.[502] The lack of significant bodies of expertise in these arenas will lead commanders to look to Judge Advocates and Civil Affairs Officers for assistance with the planning and execution of such operations.

Consistent with NSPD-44, the Directive notes that "indigenous, foreign, or U.S. Civilian Professionals" are the most suitable elements to conduct SSTR operations.[503] However, this does not relieve military commanders of their responsibility to plan for, and potentially execute SSTR operations unilaterally if necessary. The Directive states: "military forces shall be prepared to perform all tasks necessary to establish or maintain order when civilians cannot do so."[504]

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[496] *Id.* at 29.

[497] NSPD-44.

[498] *Id.*

[499] DoDD. 3000.05 at para. 4.1.

[500] Id. at para. 4.3.1.

[501] Id. at para. 4.3.2. Note that this may quickly lead to circumstances in which tactical level Judge Advocates are looked to by their commanders to provide briefings on host nation commercial, banking or private property ownership laws. Prior to deployment, great efforts are warranted to gather all available translations of local law and regulation to facilitate this analysis as required.

[502] *Id.* at para. 4.3.3.

[503] *Id.* at para. 4.3.

[504] *Id.*

Interagency Coordination & the Need for an Integrated Rule of Law Plan

The need for interagency coordination in SSTR operations is both recognized and required.[505] The linkages necessary to establish such a coordinated response are not fully developed and judge advocates involved in Rule of Law initiatives will need to aggressively identify and make contact with their counterparts in other agencies.[506] Note that notwithstanding the need to coordinate with other agencies, it does not relieve the Armed Forces of the requirement to execute such operations unilaterally if necessary.[507] Further, though other agencies may be tasked with the responsibility of developing comprehensive Rule of Law programs and strategies, delays in their development, problems in translating plans into action, or a lack of funding may prevent execution by "lead agencies" for a significant period of time. As such, Judge Advocates at all levels must be prepared to begin executing such programs immediately until such time they can be merged into a larger framework.[508]

As such, attempts to synchronize operations with other agencies need to be undertaken to the fullest extent possible while also developing a vertically integrated strategy within military command channels to begin action unilaterally if necessary. These operations should be carefully crafted and integrated into the campaign planning process and tied to the accomplishment of desired effects. Commanders and Judge Advocates at the tactical level need to be prepared to respond to breakdowns in the legal system without the benefit of guidance or assistance.[509]

When entering maturing theaters such as Iraq, Afghanistan or the Balkans, it is critical that Judge Advocates supporting operations become aware of activities designed to support the Rule of Law. In Iraq, the MNFI Office of the Staff Judge Advocate has developed a fully integrated relationship with the broader Rule of Law community along with a detailed roster of offices and individuals involved in Justice Operations. This resource also provides an overview of the various missions conducted by various governmental and non-governmental actors supporting rule of law missions.[510] The MNFI Rule of Law Inventory notes that coordination among the stakeholders in this arena has "proven difficult" and that the purpose of the guide is to provide an overview of active participants and to provide key points of contact to facilitate coordination.[511] This MNFI product should be considered as a model for use in current or future theaters in which rule of law operations are on-going. Effective interagency coordination such as

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[505] *See, e.g.*, DoDD 3000.05 & NSPD-44.

[506] OIF, Vol. II, at 23-24.

[507] DoDD 3000.05.

[508] OIF, Vol. II, at 25-28.

[509] OIF, Vol. II, at 24-25.

[510] MNFI (OSJA), Rule of Law Programs in Iraq: March 2006 Inventory (March 2006)

[511] *Id.* at 4.

this will help operators mitigate rule of law efforts that suffer from "a lack of strategy and a lack of capacity."[512]

II.N.1 The CPA & Military ROL Efforts in Iraq

The Coalition Provisional Authority (CPA) attempted to coordinate many initial efforts to reconstitute the Iraqi judiciary through its Ministry of Justice Advisory Team (MOJAT). The MOJAT constituted of personnel from a variety of backgrounds to include the US Department of Justice, attorneys assigned with various US Attorney's offices and uniformed judge advocates. The activities undertaken by the MOJAT included: supporting efforts to vet Iraqi judges and prosecutors; establishing and supporting training programs for lawyers and judges; and conducting assessments of the physical locations of the courts as well as their effectiveness.

Understand How SSTR/Rule of Law Initiatives Are Part of the Warfighter's Mission [513]

Classic counterinsurgency warfare theory and practice focuses upon the need of the legitimate government to build up its domestic institutions necessary to defeat the insurgency without setting conditions favorable to the recruiting efforts of the enemy.[514] While more traditional kinetic operations continue to play a role through full spectrum operations, commanders recognize the need to rely heavily on their non-kinetic lines of operations to achieve stability and their other desired effects.[515] Further, the enemy will attempt to create instability to damage the legitimacy of the Government while also seeking to present itself as the solution to the very problems that they are creating. In Iraq, the Shiite political figure Muqtada Al Sadr achieved various degrees of success through the application of this strategy. Sadr created instability and challenged the legitimacy of the Iraqi government through an information operations campaign coupled with attempts to portray his forces as the providers of essential services[516] and security[517] to include the operation of his own court system.[518]

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[512] MILLER, LAUREL & ROBERT PERITO, SPECIAL REPORT: ESTABLISHING THE RULE OF LAW IN AFGHANISTAN 6 (USIP 2004)(hereinafter AFGHANISTAN REPORT). It should be noted that as it relates to capacity to conduct Rule of Law operations, no agency appears to have such an organic capability. At best, such capacity can be cobbled together from skill sets from among the various agencies. In environments where active combat operations are on-going, the military may be the only agency that can provide the force protection necessary to maintain freedom of movement on the ground. Efforts to conduct Rule of Law operations from the relatively safe confines of a "green zone" by having local judicial personnel travel to the FOB for meetings is ineffective and may signal a lack of commitment or fear.

[513] Much of this section is an extract of an article currently being written by Major Jeff Spears entitled: Hammarabi's Hammer: Justice Operations in Counterinsurgency Warfare.

[514] *See* GALULA, at 115-121.

[515] *See* MG Peter W. Chiarelli & MAJ Patrick R. Michaelis, *Winning the Peace: The Requirement for Full Spectrum Operations*, MILITARY REVIEW 4, 4 (July-August 2005).

[516] Id. at 6.

Judge advocates involved in the development of Rule of Law initiatives must understand their importance in the larger strategic context in order to function effectively in a broader staff. If an effective system of justice is not developed that is recognized as legitimate and capable of providing a system to maintain law and order, the insurgency will seek to develop a *de facto* system of justice.[519] Once these systems are in place, they will be used by the insurgency to punish both criminals and to intimidate or try and execute locals who support the Government.[520] Although many successful or enduring insurgencies from Algeria to Nepal have utilized the tactics to varying degrees, many planners do not immediately recognize the connection of Rule of Law programs to the ultimate aim of defeating the insurgency. The establishment of effective justice operations assist in the defeat of the insurgency by providing a forum for the legitimate processing of captured insurgents, while also denying "key terrain" to the insurgent who can only take on such roles to the extent that a vacuum exists[521].

Commentators and academicians have made this link as well. The furtherance of rule of law initiatives in the Balkans have been viewed as effective denial operations against al Qaeda. In a 2002 editorial, David Phillips, a member of the Council of Foreign Relations, succinctly stated why the establishment of the Rule of Law is essential for stabilization and security. Phillips noted: "An effective justice system nips the whole process in the bud by confronting corruption, prosecuting organized crime and eliminating conditions conducive to terrorist activity.[522]" Phillips' prognosis and its underlying rationale is consistent with developing SSTR theories and policies. Further, it demonstrates the direct relationship between the establishment of the Rule of Law through the development of functioning institutions such as police forces and judicial systems and the accomplishment of key decisive effects. Recent DOS briefings regarding SSTR operations have noted this connection and the resulting ability of to reduce military force levels in a post conflict situation as domestic law enforcement and judicial capabilities[523] become more robust.

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[517] Ellen Knickmeyer, *Rights Under Assault in Iraq, U.N. Unit Says*, THE WASH. POST A18 (May 24, 2006).. Though illegal, Sadr continues to seize opportunities to enter vacuums and present himself as an alternative to the legitimate government by providing security during periods of increased violence.

[518] *Id.*

[519] *Id.*.

[520] Ellen Knickmeyer, *Rights Under Assault in Iraq, U.N. Unit Says*, THE WASHINGTON POST FOREIGN SERVICE, A18 (May 24, 2006) (citing evidence that Mahdi's Army operated an illegal court to investigate and try individuals.) .

[521] *See* GALULA, at 78-9. (noting that popular support is conditional and that this support can only be obtained after effective "military and police operations against the guerrilla units" has been achieved. *See also* JOHN A. NAGL, LEARNING TO EAT SOUP WITH A KNIFE xiv-xvi (Chicago Edition 2005).

[522] David Phillips, *Rule of Law: Keeping the Balkans Free of al Qaeda*, THE WALL STREET JOURNAL EUROPE (Feb. 13, 2002), *available at* http://www.cfr.org/publication/4344/rule_of_law.html

[523] Christopher Hoh, US Department of State OCRS Presentation, *Building America's Conflict Transformation Capabilities* (22 Feb. 2006). Hoh predicts that modest early financial commitments can result in billions of dollars in savings as it will hasten the ability of the USG to reduce troop levels after the end of major combat operations.

II.N.2. The Central Criminal Court of Iraq

The Central Criminal Court of Iraq (CCCI) represents an effort to leverage the domestic criminal justice system to target insurgency activity as well as public corruption. The CCCI was established by CPA order and has since been integrated into the Iraqi judicial landscape. Because of the nature of the cases – those involving insurgent attacks – coalition solders and civilians are often critical witnesses in the prosecution of these cases and play an important role in identifying and preserving evidence at the scene.

The CCCI has been effective at combating insurgency activity and as of August 2006 had successfully prosecuted 1128 cases.[524] Successful prosecution requires of judge advocates an understanding of the substantive and procedural criminal law of the host nation.[525] This basic principle will also require judge advocates to learn the tendencies of the local judges.[526] Commanders and tactical units will look to judge advocates for advise on what evidence needs to be preserved and how it must be maintained to be admissible in court. Further, many judge advocates will find themselves serving as either prosecutors before an investigative chamber or with the responsibility of identifying and preserving evidence and preparing witnesses to testify in cases involving their individual units. Again, proper preparation of these cases requires that Judge Advocates familiarize themselves with the fundamentals of the host nation's substantive and procedural criminal law.

Pragmatic considerations related to security of the judges and their families should be considered when establishing courts such as the CCCI. As judges before the CCCI handle cases by their nature that are related to some of the most dangerous insurgent forces in Iraq, judges are naturally concerned about their safety and the safety of their family. At times, this concern leads to acquittals or dismissals that are tainted by the specter that the release was secured by intimidation as opposed to a reliance on the evidence. Practical solutions may be to house judges and their families in a fortified "green zone" and to hold the hearings of the investigative chamber at the interment facilities.[527]

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[524] *Iraq Weekly Status Report*, BUREAU OF NEAR EASTERN AFFAIRS, US DEPT. OF STATE 23 (August 9, 2006).

[525] See E-mail from Major Chris McKinney. Major McKinney has processed cases into the Investigative Chamber of the CCCI.

[526] *Id.* Major McKinney notes that individual investigative judges at the CCCI interpret Iraqi procedural law differently. For example, some judges permit US CCCI prosecutors to ask questions of the accused whereas others limit direct questioning to the judge.

[527] *Id.*

II.N.3. Enduring Freedom/Afghanistan

In Afghanistan, Rule of Law planners recognized the need to synchronize efforts among numerous local, Office of Security Cooperation – Afghanistan (formerly known as the Office of Military Cooperation – Afghanistan) and local national constituencies.[528] Initial discussions were held in Kabul among the various constituencies resulting in a commitment of the parties to training in key areas such as the law of armed conflict and planning for military justice reform.[529]

These efforts by DIILS in Afghanistan were followed by a high level planning meeting in Washington DC during April 2004. The key participants included the equivalent of the DoD General Counsel for Afghanistan as well as the Judge Advocate General of the Afghan National Army (ANA). These high level meetings also included briefings and a visit to The Judge Advocate General's Center and School in Charlottesville and culminated with an agreement on the part of the Afghan delegation to pursue targeted initiatives.[530] These agreed initiatives included those calculated to strengthen the concept of civilian control of the armed forces and the jurisdiction of military courts. These early efforts set the conditions for successful execution of a variety of programs to include the execution of broadly attended seminars focused on procedural and substantive reform of the Afghan system of Military Justice.[531]

Develop Comparative Law Knowledge & Build Local Relationships

It is unlikely that the United States will find itself conducting combat operations in any common law jurisdiction in the foreseeable future. As such, a basic understanding of the underlying system of justice needs to be undertaken. Understanding the procedures utilized by a Civil Law system will prove particularly helpful in mature legal systems such as exist in Iraq.[532] While the substantive law may appear similar, the procedures in place to process a case through trial, to protect the rights of the accused or attack the validity of evidence differ significantly from those employed in common law jurisdictions.

Commanders will also become concerned about the resolution of various legal issues for a variety of operational reasons. This will require the Judge Advocate to understand the applicable local substantive laws, the procedures used to enforce the law, and whether the court system to enforce the law is functioning effectively. Commanders often require advice about arrest and release procedures used by local courts, a wide variety of issues related to commercial and business law the resolution of which may

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[528] See *DIILS Programs with Afghanistan: February 2004 – May 2006* at 1(hereinafter "DIILS Report").

[529] *Id.*

[530] *Id.*

[531] *Id.* at 2.

[532] OIF, Vol. II, at 29-30.

affect operations designed to improve the economy, and how to access the judicial system to resolve issues related to squatters.[533]

Judge advocates and others involved in various legal reform and Rule of Law projects in Afghanistan found bridging the gap between western common law jurisdictions and the Afghan civil law system difficult.[534] As with Iraq, Afghanistan has a legal tradition influenced by the traditions brought be a series of invading Armies and occupiers. Further, unlike Iraq, Afghanistan continues to maintain a strong Sharia law influence.[535] Further, efforts were further frustrated by local commitment to procedures that are alien to the US UCMJ. Particularly, the Afghan Judge Advocates were committed to the concept that prosecutors could appeal an acquittal or other final outcome that was perceived as favorable to the Defense.[536] When Afghan advocates learned that this prosecutorial appellate right had been stripped "mysteriously" from the final draft that was enacted, there was an intellectual, if not more concrete, uproar from the Afghan jurists.[537]

Although these tasks are difficult, the development of local relationships with key members of the local bar will prove to be of great assistance. The development of these local relationships will also facilitate the continuing process of system assessment and improvement[538]. Further, in Iraq and Afghanistan the personal relationships and professional respect that developed among the local and western attorneys helped to keep the process moving forward even when controversial topics would cause progress come to a temporary halt. This was particularly true with regard to the lengthy and at times heated process of building consensus in the context of Afghan military justice reform.[539]

Assess Key Justice Sector Institutions and their ability to Synchronize Operations

For the justice system to function effectively, its constituent parts must be able to synchronize operations. Assessments must look both at the internal functioning of the courts, police functions, and the prison system, and the manner in which these systems

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[533] This can be a very difficult undertaking and relates to the need to establish a good network of contacts within the legal community. For example, there is a significant problem with squatters in Iraq but it is a difficult area of the law to develop. One unit was able to utilize its connectivity to obtain a copy of a pre-invasion Ministerial Order that served to provide severe criminal punishment for squatting without a color of right. Once obtained and translated, the unit was able to better advise locals with disputes on how to utilize the courts as a tool for the resolution of such issues.

[534] Major Sean M. Watts & Captain Christopher E. Martin, *Nation Building in Afghanistan:Lessons Identified in Military Justice Reform,* THE ARMY LAWYER (May 2006) (hereinafter *Watts Article*)..

[535] *Id.*

[536] *Id.*

[537] *Id.*

[538] OIF, Vol. II, at 27.

[539] See Watts Article

interact with one another.[540] A court system may be effective at applying the law and trying cases. However, if the Justice System lacks the ability to ensure the presence of an accused at trial or to effectively transfer a prisoner for incarceration in a manner that guarantees his release at the end of his sentence, it cannot be said to be effective.

Conducting assessments is a specialized skill. Judge Advocates and other subject matter experts assigned to military units, however, may be the only individuals available to provide any insight into the functionality of the judicial system. While strategies should be explored to extend the organic competence of the organization on the ground, Judge Advocates and others must be prepared to conduct rudimentary assessments so as to ensure the basic functionality of the system until specialists can be identified to assist in a comprehensive review of the system[541].

Develop Initiatives to Increase Public Support for the Rule of Law

Establishing connectivity with the various constituencies of the legal community can be an effective precursor to the development of programs to develop public support for the Rule of Law. Further, close interaction with organizations such as USAID, OTI, DOJ and USIP can be fruitful in assisting local attorneys develop programs targeted for their communities. Understanding the desires of progressive local lawyers as well the funding and support capabilities of other US government agencies can lead to results that support the overarching mission. In Iraq, such efforts by judge advocates operating at a tactical level assisted OTI in identifying progressive local attorneys to support Rule of Law or human rights training programs for local lawyers, for local professionals and for the establishment of legal aid clinics in areas of Baghdad plagued by violence and corruption.[542]

Understand Local Customs and Protocol & Work to Establish Professional Relationships

Prior to engaging local leaders, judge advocates should work with cultural advisors to gain a greater understanding of local social customs and protocols.[543] This is particularly important in societies such as Afghanistan where the local population has been historically suspicious of the judiciary or outsiders.[544]

This is also important when seeking to reform the legal system in general. As discussed above, certain substantive and procedural aspects of a system may be so firmly

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[540] *See* CENTER FOR LAW AND MILITARY OPERATIONS, LAW AND MILITARY OPERATIONS IN HAITI, 1994 – 1995: LESSONS LEARNED FOR JUDGE ADVOCATES, 102-05 (11 Dec. 1995).

[541] OIF, Vol. II, at 40-41.

[542] *See Springs Interview.*

[543] JUDY BARSALOU, TRAUMA AND TRANSITIONAL JUSTICE IN DIVIDED SOCIETIES 8 (USIP 2005).

[544] *See* AFGHANISTAN REPORT at 5.

entrenched that efforts to depart from them will lead to difficulties. In Afghanistan, a lack of an early understanding of the history of the Afghan legal traditions hampered efforts to reform the system.[545] Further, translation errors and other misunderstandings caused significant difficulties after reforms had been enacted. Lastly, a lack of understanding of civil law traditions hampered efforts at reform by Western lawyers schooled in the common law tradition.[546]

[545] *See Watts Article.*

[546] *Id.*

II.O. POST CONFLICT STABILITY OPERATIONS

> *You can fly over a land forever; you may bomb it, atomize it, pulverize it and wipe it clean of life – but if you desire to defend it, protect it, and keep it for civilization, you must do this on the ground, the way the Roman Legions did, by putting your young men in the mud.*[547]

The goal of the United States Army is to fight and win America's wars. However, recent operations have shown that the mission does not always end when the major war fighting against regular armed forces is over. The stabilization period poses new sets of challenges as the U.S. military attempts to create safe, stable and secure environments in regions that have seen only strife in recent years and decades. Following hostilities, stability operations may be required to provide a secure environment that allows civil authorities to resume control. The military activities that support stability operations are diverse, continuous, and often long-term. Their purpose is to promote and sustain regional and global stability.[548] Army forces conduct 10 types of stability operations.[549] As the majority of lessons learned in the past decade have been compiled from Peace Operations (PO), this chapter will focus on them.

Although definitions for these operations are not necessarily settled[550] PO are military operations to support diplomatic efforts to reach a long-term political settlement and are categorized as Peace-Keeping Operations (PKO) and Peace Enforcement Operations (PEO). PKO are military operations undertaken with the consent of all major parties to a dispute, designed to monitor and facilitate implementation of an agreement (cease fire, truce, or other such agreements) and support diplomatic efforts to reach a long term political settlement. PEO involve the application of military force, or threat of its use, normally pursuant to international authorization to compel compliance with resolutions or sanctions designed to maintain or restore peace and order. Such operations do not require the consent of the states involved or of other parties to the conflict. Additional types of Military Operations Other than War (MOOTW), such as Humanitarian Assistance and Non-combatant Evacuation Operations may complement POs. U.S. military POs support political and diplomatic objectives.[551] The key concepts of POs are: consent, impartiality, transparency, restraint, credibility, freedom of

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[547] T.R. FEHRENBACH, THIS KIND OF WAR (1963).

[548] U.S. DEP'T OF ARMY, FIELD MANUAL 3-0 OPERATIONS (14 June 2001).

[549] *See id.* The ten types of stability operations are 1) Peace Operations; 2) Foreign Internal Defense; 3) Security Assistance; 4) Humanitarian and Civic Assistance; 5) Support to Insurgencies; 6) Support to Counter drug Operations; 7) Combating Terrorism; 8) Noncombatant Evacuation Operations; 9) Arms Control; 10) Show of Force.

[550] For example the United Nations Protection Force (UNPROFOR) in Bosnia Herzegovina in the 1990s was a Peace Keeping mission, but at the time there was no peace to keep.

[551] JP 3-07.3, Peace Operations; FM 3-07.31, Multi-Service Tactics, Techniques, And Procedures For Conducting Peace Operations, 26 October 2003.

movement, flexibility, civil-military operations, legitimacy, and perseverance.[552] This chapter looks at recent operations conducted in order to maintain the peace both after the conclusion of hostilities and to provide stability in a post occupation environment.

Judge advocates must understand the type of operation and the legal authority behind the mission. POs are conducted on the basis of appropriate legal authority. The mandate outlines the parameters of the authorized mission. It establishes both the political and military objectives as well as its scope of authority.[553] A clear mandate shapes not only the mission that we perform, but also the way we carry it out.[554] When attempting to determine what laws apply to U.S. conduct in an area of operations, a specific knowledge of the exact nature of the operation is necessary. In POs, mandates may seem overbroad, allowing and intructing the force to do "whatever is necessary" to enforce the peace. For example, in Bosnia, the Implementation Force (IFOR) struggled with defining the exact parameters of its mission. In a pure legal sense, the IFOR was required or authorized to implement Annex 1-A of the Dayton Accord, which did not contain a well-defined mission statement.[555] In the absence of a well-defined mission statement, resourceful JAs gained insight into the nature of the mission by turning to other sources of information.

The reality of modern MOOTW is that a mission will rarely fit neatly into a specific doctrinal category. Most operations are fluid situations, made up of multi-faceted and interrelated missions. Peace Operations, whether peacekeeping, peace enforcement, or nation building, have taken on a life of their own in the past decade. These types of operations confront traditional categories of International Law and present significant legal challenges to JAs. Judge advocates must understand and relate the national and international political and legal frameworks affecting the specific operation. Because the primary body of law intended to guide conduct during military operations (the law of war) is not normally triggered during MOOTW, the judge advocate must turn to other sources of law to craft resolutions to issues during such operations. Application of an "analogized" version of the law of war was employed to fill in the gap created by the absence of specific legal guidance, and to provide the command with imperative "specifics."

United States Troops in Operation Uphold Democracy were contributing to a "peace enforcement" action authorized by a UNSCR that expressly invoked Chapter VII

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[552] FM 3-07 at 4-14

[553] FM 3-07 at 4-2.

[554] See Kenneth Allard, Institute for National Strategic Studies- Somalia Operations: Lessons Learned (1995), at 22.

[555] *See* Dayton Accord, at Annex 1A, arts I and VI. – (1) prevent "interface with the movement of civilian population, refugees, and displaced persons, and respond appropriately to deliberate violence to life and person," and (2) ensure that the parties "provide a safe and secure environment for all persons in their respective jurisdictions, by maintaining civilian law enforcement agencies operating in accordance with internationally recognized standards and with respect for internationally recognized human rights and fundamental freedoms.

of the UN Charter. United States Soldiers participating in the United Nations Mission in Haiti (UNMIH) were "peacekeepers," members of a type of force authorized under Chapter VI of the Charter. The Haiti Mission: 1) Ensure the departure of the military regime; 2) Restore the freely elected government of Haiti; and 3) Establish a secure and stable environment in which the people of Haiti could begin to rebuild their country.

UNSCR 1031 concerning Operation Joint Force in Bosnia is a good example of the Security Council using Chapter VII to enforce the peace, even when based on an agreement. Most JAs understand that peace operations rarely fit neatly under the legal framework of the Law of War or any other legal architecture. In the Balkans, the three Entity Armed Forces ("EAFs")[556] laid down their arms in October 1995 and the parties[557] signed the General Framework Agreement for Peace (GFAP), agreeing to cooperate "with all entities involved in the implementation of the peace settlement"[558] as detailed in 11 separate annexes. Thirty-six nations contributed military forces or logistical support to this peace enforcement action, authorized by a Security Council resolution that expressly invoked Chapter VII of the United Nations Charter.[559] Acting under this U.N. mandate, NATO[560], in its first-ever out of area deployment, led 60,000 multinational forces into Bosnia to enforce the peace. Never before had so many nations participated in a multinational operation based entirely on a newly created international agreement, namely the GFAP.

Various international agreements and operational documents broadly defined the scope of the mission in Bosnia and how soldiers could use force. Commanders at all levels looked to judge advocates for innovative solutions to very complex problems. For Bosnia, JAs needed to understand Chapter VII of the U.N. Charter, all applicable U.N. Security Council Resolutions, the GFAP and all relevant annexes, all OPLANs and ROE annexes, and applicable U.S. policy on the application of the Law of War in peace operations.[561]

The mandate of the MNF in Haiti was not military victory or occupation of hostile territory; rather it was "to establish and maintain a secure and stable environment." [562]

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[556] The Entity Armed Forces (EAFs) include the forces of the Bosnian Serbs, Bosnian Muslims, and Croatian National Forces.

[557] The Republic of Bosnia and Herzegovina, the Republic of Croatia, and the Federal Republic of Yugoslavia (made up of Serbia and Montenegro).

[558] Bosnia-Herzegovina, Croatia, and the Former Republic of Yugoslavia were the parties that initialed the Dayton Peace Accords on 21 Nov. 1995. They formally signed in Paris, France, on 14 December 1995. The base document is known as the General Framework Agreement for Peace in Bosnia-Herzegovina [hereinafter GFAP].

[559] S.C. Res. 1031, U.N. SCOR, 50th Sess., 3607 mtg., U.N. Doc. S/Res/1031 (15 Dec. 1995).

[560] Under the Command of the multinational, Headquarters of the Allied Rapid Reaction Corps (HQ ARRC).

[561] U.S. DEP'T OF DEFENSE, DIR. 5100.77, DoD LAW OF WAR PROGRAM paras. D.1. & E.1.a.(3) (10 Jul. 1979).

[562] S.C. Res. 940, U.N. SCOR, 49th Sess., 3413th mtg., at para. 4, U.N. Doc. S.RES/940 (1994).

Moreover, the Carter-Jonassaint Agreement with the agreement of President Aristide government, resulted in an entry of forces that was based on consent and not hostilities between nations. Under these circumstances, the treaties and customary legal rules constituting the law of armed conflict do not strictly apply.[563] The law of armed conflict includes rules pertaining to the conduct of combat and safeguards that must be provided in time of war to the wounded and sick, to prisoners of war, and to civilians.[564] As a matter of policy rather than legal obligation, U.S. forces elected to treat potentially hostile persons detained during the operation as if they were prisoners of war. Humanitarian organizations and scholars commended this approach, given the overarching purpose of the Geneva Conventions of 1949 to accord basic fairness and other protections to persons taking no part in ongoing hostilities and to eliminate unnecessary suffering associated with conflict. Judge Advocates in Haiti discovered that quite a few of the 143 articles of the Geneva Convention Relative to the Treatment of Prisoners of War did not translate neatly from their intended wartime context into an operation other than war.[565]

The background legal regime differs in an OOTW. Haitian public property that fell into the hands of U.S. soldiers remained Haitian public property, unless sold through the weapons buyback program.[566] *General Order Number 1(c)* covered non-combat souvenirs in a separate provision and stated "no weapon, munitions, or military article of equipment captured *or acquired* by any means other than official issue may be retained for personal use or shipped out of the [joint operations area] for personal retention or control".[567] Although it had a different international legal character, conduct that violated provision General Order 1(c) was nevertheless punishable under the Uniform Code of Military Justice and several other federal laws.

The peerless service support structure of the United States military will encounter great demand during operations other than war. Many of those seeking the available services will be foreign nationals and other individuals not normally eligible to receive them. The Army regulations governing medical care did not expressly provide for many categories of individuals who fell ill or sustained injuries in Haiti.[568] However, it does authorize care for "persons outside the United States who are otherwise ineligible when a

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[563] *See, e.g.,* Geneva Convention Relative to the Treatment of Prisoners of War, Aug 12, 1949, art. 2, 6 U.S.T. 3316, 75 U.N.T.S. 135, [hereinafter Geneva Convention III].

[564] U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE (July 1956) [hereinafter FM 27-10].

[565] *See, e.g.,* Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 2, 6 U.S.T. 3316, 75 U.N.T.S. 135, [hereinafter Geneva Convention III]

[566] RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 206

[567] *See* CENTER FOR LAW AND MILITARY OPERATIONS, LAW AND MILITARY OPERATIONS IN HAITI, 1994-1995: LESSONS LEARNED FOR JUDGE ADOVCATES 129 (1995) [hereinafter Haiti LL].

[568] *See* DEP'T OF ARMY, REG. 40-3, MEDICAL, DENTAL, AND VETERINARY CARE, para. 4-25 (15 Feb. 1985).

major overseas commander determines the care to be in the best interest of the United States.[569]

An additional difficulty arises in peace operations because of the unusual intertwining of mission-directed spending (including protection of the force issues) and humanitarian assistance (HA) that can be provided only subject to its own statutory authority. [570] Units initially arriving in the Bosnia-Herzegovina area of operations were quickly confronted with civic requests to construct or rebuild everything from sewage pumps to garbage dumps. The JAs proactively advised commanders that most such projects were not permissible subjects for Operation and Maintenance funds.[571] IFOR/SFOR was "merely" to provide a secure and safe environment for such organizations to operate in.[572]

The missions in both Bosnia and Kosovo were operations as a result of consent-based peace agreements. In Bosnia-Herzegovina, the GFAP, and its military annex, defined the roles and responsibilities of the EAFs and the multinational force. Recalling that the EAFs voluntarily agreed to the terms of the GFAP, the IFORs role was to assist, in an even-handed manner, the EAFs to implement the peace agreement. Finally, IFOR provided a secure environment for the multitude of other organizations responsible for implementing the civilian aspects of the GFAP.

As IFOR's mandate drew to a close, SFOR was required to stabilize the region to help keep the peace and to allow continued work on the implementation of the civilian aspects of the GFAP. On December 12, 1996, the U.N. authorized[573] SFOR to succeed IFOR with the same authority to implement the military aspects of the GFAP.

In 1999 the rapid transition in Kosovo from an international armed conflict to there being a peacekeeping force was just one example of change faced by JAs and legal specialists. The nineteen member nations of NATO, along with twenty other troop contributing nations (TCNs), combined to conduct Operation Joint Guardian, the

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[569] *See id.*

[570] *See* 10 U.S.C. § 401(a) *and* U.S. DEP'T OF DEFENSE DIR. 2205.2, HUMANITARIAN AND CIVIC ASSISTANCE (HCA) PROVIDED IN CONJUNCTION WITH MILITARY OPERATIONS (6 Oct. 1994). Other than De Minimus activities, HCA activities require approval of the Secretary of State. HCA activities must promote the security interests of both the United States and the assisted country, the operational readiness skills of the participating armed forces, and the foreign policy interests of the United States. There are other limits, also, such as the HCA may not be given directly or indirectly to any individual, group or organization engaged in military or paramilitary activities..

[571] Interview with MAJ Mike Isaaco (11 May 1998). 1ST ARMORED DIVISION OFFICE OF THE STAFF JUDGE ADVOCATE AFTER-ACTION REPORT, SEPTEMBER 1995 – DECEMBER 1996 at 16 (1st Armored Division Office of the Staff Judge Advocate 1997) [hereinafter 1AD-AAR].

[572] *See e.g.,* Information Paper, CPT Ralpf J. Tremaglio, III, Office of the Staff Judge Advocate, subject: Support for Returnees and Displaced Persons (1 Jan. 1997) (which concluded, for example, support was limited to emergency medical treatment to save life or limb and to distributing NGO medical supplies as "true volunteers," not pursuant to any official tasking).

[573] S.C. Res. 1088, U.N. SCOR, 51st Sess., 3723 mtg., U.N. Doc. S/Res/1088 (12 Dec. 1996)

NATO[574] peacekeeping mission in Kosovo. On 10 June 1999, pursuant to Chapter VII of the United Nations (UN) Charter, the UN Security Council passed Resolution 1244 (UNSCR 1244)[575] which authorized the deployment of an international security force under UN auspices. A Military Technical Agreement between FRY and International Security Force ("KFOR") provided the framework for the peace enforcement operation.[576] The initial Task Force Falcon mission was four-pronged: 1) monitor, verify, and enforce as necessary the provisions of the Military Technical Agreement and the Undertaking to create a safe and secure environment; 2) to provide humanitarian assistance in support of UNHCR efforts; 3) to initially enforce basic law and order, transitioning this function to the to-be-formed designated agency as soon as possible; and, 4) to establish/support resumption of core civil functions.[577]

Every aspect of the KFOR and the Task Force Falcon mission was legally intensive. The first prong required the interpretation and enforcement of legal documents. The second prong expressly made Task Force Falcon responsible for providing humanitarian assistance in support of the UNHCR efforts. This second prong was a markedly broader mandate than peacekeepers in Bosnia faced. 27 judge advocates were going to be at the center of the effort to enforce law and order—the third prong—because of JA training and experience in the law. The final prong—to support resumption of core civil functions—would lead to numerous requests for Task Force Falcon assistance

On 1 May 2003, President George Bush declared an end to major combat operations in Iraq and Afghanistan. Although major combat operations had ended, the U.S. and its Coalition Forces continued to conduct offensive operations in both Afghanistan and Iraq, using military force to root out terrorists and insurgents. At the same time, Coalition Forces conducted stability and support operations ("SASO"), bringing needed reconstruction and reform and to government services as well as humanitarian assistance to private citizens.

JAs must anticipate that once combat operations wind down, stability operations may involve the U.S. military in establishing and enforcing the rule of law and assisting in rule of law reconstruction. Commanders will expect their JAs to be the expert in these areas. Therefore, prior to deployments JAs should identify local law and be familiar with the system of justice in their area of operations (AO).

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[574]Under the Command of the multinational, Headquarters of the Allied Rapid Reaction Corps (HQ ARRC).

[575] S.C. Res. 1244, U.N. SCOR, U.N. Doc. S/RES/1244 (1999) [hereinafter UNSCR 1244], *available at* www.un.org/Docs/scres/1999/sc99.htm (last visited 1 August 2006).

[576] Military Technical Agreement between KFOR and the Government of FRY and the Republic of Serbia, 9 June 1999 [hereinafter MTA]. A copy of the MTA is located in Appendix IV-1, of LAW AND MILITARY OPERATIONS IN KOSOVO: 1999-2001 (2001) [hereinafter Kosovo LL)

[577] *See* LTC Mark S. Martins, Deputy Staff Judge Advocate, 1ID, Task Force Falcon Interim After Action Review, Operational Law CLE, PowerPoint presentation, briefing slide 5 (3 December 1999) [hereinafter Martins Presentation] .

Legal teams in deployed environments are faced with ever-changing requirements when it comes to military justice.[578] Ongoing mission requirements often presented significant obstacles in processing military justice actions, but deployed JAs were able to successfully meet commander's requirements in an efficient manner. For example, even though military justice actions were put on the "back burner" during combat operations in Iraq to allow JAs to focus on other areas,[579] the full gamut of military justice remedies for misconduct, including courts-martial, were used during full spectrum operations. Numerous JAs asserted that there seemed to be a direct correlation between the rise in misconduct with the greater amount of free time given to service members as contingency operations progressed. Nevertheless, unlike the major combat operations phase of the mission, JAs were able to successfully prosecute many of these service members in theater for their offenses.[580]

Judge advocates employed a broad range of legal alternatives to courts-martial in order to allow commanders to maintain good order and discipline during full spectrum operations. Prior to transitioning to SASO, commanders were justifiably more concerned with conducting combat operations than with some of the more minor military justice issues.[581] Moreover, service members spent their time attending to more pressing needs such as maintaining their weapons or equipment and focusing on their mission during combat operations. As SASO began, however, soldiers were able to establish a daily 'routine,' which often included more free time than before. When combined with restricted movement, few organized activities, and other limited constructive alternatives, this free time occasionally resulted in soldiers' engaging in misconduct.

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[578] *See* Captain Michael Banks, 18th Military Police Brigade, After Action Report (1 Dec. 2003) [hereinafter Banks AAR].

[579] *See* CENTER FOR LAW AND MILITARY OPERATIONS, THE JUDGE ADVOCATE'S LEGAL CENTER AND SCHOOL, U.S. ARMY, LEGAL LESSONS LEARNED FROM AFGHANISTAN AND IRAQ, Volume I: MAJOR COMBAT OPERATIONS (11 September 2001 – 1 May 2003) [hereinafter Volume I, Afghanistan and Iraq, Legal Lessons Learned]; *see also,* Interview with Colonel Richard O. Hatch, former Staff Judge Advocate, 101st Airborne Division, in Charlottesville, Va. (Oct 8, 2003) [hereinafter Hatch Interview] (noting that JAs and commanders were too busy to handle military justice during combat).

[580] *See* After Action Review Conference, Office of the Staff Judge Advocate, 4th Infantry Division (Task Force Ironhorse), and the Center for Law and Military Operations, The Judge Advocate General's Legal Center and School, U.S. Army, in Ft. Hood, TX, (8 Sept 2004) [hereinafter 4 ID AAR].

[581] *See* CENTER FOR LAW AND MILITARY OPERATIONS, THE JUDGE ADVOCATE'S LEGAL CENTER AND SCHOOL, U.S. ARMY, LEGAL LESSONS LEARNED FROM AFGHANISTAN AND IRAQ, Volume II: FULL SPECTRUM OPERATIONS [hereinafter Volume II, Afghanistan and Iraq, Legal Lessons Learned].

II.P. RULES OF ENGAGEMENT

Military operations over the last fifty years amply demonstrate that significant and recurring issues will arise regarding the creation, training, and implementation of rules of engagement.[582] The fundamental question of how to apply force and against whom routinely challenges commanders, soldiers, and staff officers during combat operations, stability and reconstruction operations, and even disaster relief operations.[583] The context of each operation will markedly affect how the ROE are crafted. Clearly, ROE for a disaster relief operation will differ markedly from those found in combat operations. For that matter, the ROE in effect for a disaster relief operation performed outside the US borders will differ substantially from the rules for the use of force used when providing relief from natural and man-made disasters within the US.

Despite the fact that the ROE will largely depend upon the context of the current military operation, the lessons judge advocates have captured regarding ROE are remarkably consistent from operation to operation. These recurring lessons are identified below and if limited time is available to prepare before deployment, these lessons are the ones it is recommended that an SJA focus on.

ROE will be delivered "just in time" and not substantially before deployment preparations begin

Rules of engagement are generally recognized to consist of three distinct, but supporting categories.[584] Each of these categories: policy, legal, and military, contribute their own frustrations and delay in producing an ROE annex for military operations. However, the legal and military components to an ROE annex pale in comparison to the significant policy issues that must be resolved before such an annex is approved and released. The most significant U.S. policy issues are reserved for the President or the Secretary of Defense.[585] Adding a layer of complexity is the negotiation that must take place among coalition allies contributing forces to such operations.[586] As a result, judge advocates must prepare commanders and staffs for the issuance of "just in time" ROE. This preparation should include both a plan for production of ROE pocket cards while deployed to intermediate staging bases immediately before combat operations commence

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[582] Rules of engagement are defined as directives issued by competent military authority that delineate the circumstances and limitations under which US forces will initiate and/or continue combat engagement with other forces encountered. JOINT CHIEFS OF STAFF PUBLICATION 1-02, DEP'T OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS 416 (1 April 2001)[hereinafter Joint Pub. 1-02].

[583] See e.g. [reference to Haiti, Bosnia, Kosovo, OIF and OEF LLs books]

[584] *See* Captain Ashley Roach, USN, *Rules of Engagement*, NAVAL WAR C. REV. 46, 48 (1983)

[585] Such a basic question as to whether a force is declared hostile is a decision withheld to the President and quite clearly carries with it great domestic and international political implications.

[586] P60 – Bosnia. P128 – Kosovo – the ROE for Kosovo required the consensus of all NATO member nations through the approval of the NAC.

as well as a plan for the coordinated production of such pocket cards for coalition forces.[587]

Judge advocates must take the lead in drafting and modifying the ROE

Although the ROE annex is not likely to be approved until just before combat operations commence, the creation of the draft annex typically occurs at the tactical/operational level of command.[588] Commanders and planners understand that ROE is ultimately their responsibility but given that ROE frequently deal with legal issues, they often default to the servicing judge advocate to ensure the ROE annex is obtained, understood, and forwarded to subordinate units for training. Given this, judge advocates must energetically pursue the drafting and coordination of the ROE annex with all military elements expected to be participating in the upcoming operation. This is particularly true when dealing with allies in a coalition operation. This is also particularly difficult given the likely security classification of the ROE when still in draft form.[589] Even considering the preceding points, however, judge advocates are best able to influence the development of the ROE as the annex is being drafted.[590] Key to this process is the coordination between higher and lower levels of command and, to the extent possible, with coalition partners.[591] Judge advocates serve their commanders well when proactively coordinating and drafting the ROE annex and any necessary modifications to the annex.

The absence of an approved ROE annex does not limit units from vigorously pursuing a robust ROE training plan

Recognizing that ROE for coalition operations take time to create and coordinate, judge advocates must be prepared to deploy without the final ROE having been approved.[592] Necessarily, this means that training undertaken at home station cannot precisely be tailored to include all instances where the ROE will be tested. Recognizing this, however, a robust training plan should still be pursued using scenario based training before deployment, and before and during combat operations.[593] Not having a final ROE annex approved does not constrain commanders from engaging in such training.

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[587] P. 62 Bosnia

[588] See eg Vol. I, p91.

[589] As an example, the ROE for Operation Enduring Freedom were classified at the top secret level when originally approved. It was only immediately before the commencement of hostilities that the security classification was down graded to secret. This prevented some judge advocates without a top secret clearance from accessing the ROE until just before combat operations began. See Vol I, p. 91.

[590] See Haiti, p 43. Judge advocate

[591] Haiti, p. 43-44. Vol I, p. 91.

[592] P. 60 - Bosnia

[593] P.133 Kosovo.. p. 66 Bosnia

US forces generally operate under Standing Rules of Engagement that are in effect until modified by supplemental measures.[594] These SROE recognize the inherent right of unit self-defense and permit the use of force in response to a demonstration of hostile intent or upon the commitment of a hostile act.[595] Separate from actions taken in self-defense, offensive operations generally include the identification of a hostile force. Once designated as hostile, an opposing force can be targeted and eliminated on sight.

Soldiers generally understand the concept of a designated hostile force. Regardless of the lack of existence of an approved ROE annex, commanders and planners can relatively easily plan for, and conduct, training against a hostile force that is as yet, unidentified. As an example, it is not difficult when planning offensive operations against a particular regime to expect that the military of that regime will be designated as a hostile force.

What has proven to be more problematic is the training of the proper reaction to a demonstration of hostile intent or to the commission of a hostile act. In principle, soldiers understand these concepts but the application of the concepts to reality present myriad difficulties. This is an area, experience demonstrates, where commanders and planners should focus on during predeployment scenario based training.[596] This training can easily focus on the 95+% of soldiers who simply need to understand shoot/don't shoot decisions.[597] Higher level ROE such as the withhold authority for a certain type of artillery munition can be trained as necessary when the final ROE annex is approved. The very nature of this latter type of ROE, however, makes it applicable to a far smaller subset of the overall force and thereby makes it easier to train rapidly and efficiently. Realistic scenario based training for the soldiers faced with the hostile intent/hostile act self-defense situations has proven to be quite effective and is something that judge advocates should strongly recommend that commanders undertake.[598]

Understand the definitions of terms used in ROE annexes as well as their source

A simple lesson learned frequently in contingency operations is the need for judge advocates to have a clear understanding of the definitions of doctrinal terms found in ROE annexes. Judge advocates must also understand when new terms not found in doctrine have been created for operational reasons. When new terms take life, judge advocates must ensure that a common understanding of the terms is held with higher and subordinate organizations as well as with other services within DoD. Decisions by

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[594] CJCSI 3121.01B Standing Rules of Engagement [hereinafter SROE]. While it is generally true that US forces operate under the SROE, as modified by supplemental ROE measures, this is not always the case. As an example, soldiers under the operational control of the Commander of the Implementation Force or the Commander of the Stabilization Force I Operation Joint Endeavor and Joint Guard did not operate within the parameters of the SROE but instead under the NATO ROE in effect at the time.

[595] *Id.*

[596] P. 132, 133 – Kosovo, P 89-91, Vol I, P. 40 – Haiti., Bosnia – 63.

[597] P. 132-33, Kosovo

[598] P. 63, Bosnia. P 40-42, Haiti. P. 98-100, Mitch. P. 145, Vol II., p. 92 Vol I.

commanders on the targeting of certain individuals or structures often hinge on how judge advocates interpret and apply the terms found within the ROE annex. Given this, judge advocates must have a developed and nuanced comprehension of terms such as "positive identification," "likely identifiable threat," "time sensitive target," "troops in contact," "no strike list," "observed fires, and "templated targets"[599]

A simple but useful starting point with these definitions is the DoD Dictionary.[600] An approved DoD definition exists if the term is contained in this dictionary. However, if it is not found in the dictionary or embedded in some other form of joint doctrine, judge advocates should not assume that there is a commonly held understanding across different levels of command and different services as to the precise meaning of a term. When this occurs, judge advocates must work to resolve any lack of clarity in such phrases across the different levels of command.

Anticipate questions regarding protection of foreign nationals

A significant issue that has arisen numerous times in peace enforcement operations is the level of force to be used in the protection of foreign nationals. Many may recall the images of the Haitian coconut vendor being clubbed to death by Haitian police forces within full view of US forces.[601] While ROE for such an event had been recently promulgated, it had not been disseminated to US forces before the brutal beating was captured on television.[602] Two important points can be made from this: such issues should be anticipated during the drafting of the ROE annex and once ROE are approved to intervene in such situations, the ROE should be disseminated and trained as quickly as possible.

Recognize that the ROE will not all be found in one particular document

Judge advocates, commanders, and planners frequently expect all rules of engagement to be found in one particular document – the ROE annex. While it is true that most of the ROE applying in a particular operation are to be found in this annex, it is not true that all applicable directives will be contained in the annex. By definition, ROE are "[d]irectives issued by competent military authority that delineate the circumstances and limitations under which US forces will initiate and/or continue combat engagement with other forces encountered."[603]

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[599] P. 96-103, Vol I, 137-39 Vol II. K63

[600] JP 1-02.

[601] P. 38 – Haiti.

[602] Haiti – p 38. This particular issue was the subject of an interesting exchange between the C,JCS and SECDEF in Nov, 2005. The Chairman, in response to a question indicated that US forces had a responsibility to prevent the inhumane treatment of Iraqi citizens by Iraqi police forces. SECDEF, however, believed that there was only a need to report such treatment to the appropriate Iraqi authorities. *See* Washington Post, Dana Milbank, Nov, 30, 2005, "Rumsfeld's War on Insurgents."

[603] *See* JP 1-02.

Clearly then, ROE can derive from multiple sources and judge advocates must be diligent in identifying these sources so as to understand the different constraints and limitations that exist on the application of force.[604] These source include, but are not limited to the standing rules of engagement (SROE), mission-specific ROE authorization serials issued by higher commands, Execute Orders (EXORDS), fragmentary orders (FRAGOS), special instructions (SPINS) for air operations, the CENTCOM Collateral Damage Estimation Policy Methodology (CDEM), and fire support control measure (FSCM) documents. Some have argued that FSCM do not constitute ROE but review of the DoD Dictionary definition indicates that these control measures are ROE.[605] Confusion occurs when judge advocates assume that ROE are only found in serial messages containing supplemental measures to the standing rules of engagement and judge advocates must guard against this mentality.

ROE can generally only be rescinded by the issuing authority

If ROE are "directives issued by competent military authority" it stands to reason that the amendment of these directives in a manner that materially alters the intent of the issuing authority may only be done by the commander issuing the directive or his superior commander. Stated another way, it is generally understood that if a corps commander withholds the authority to use illumination rounds to his level, a division commander uses such rounds at his peril if release authority has not been obtained. The converse of this is not necessarily true, however. If a corps commander has not withheld the authority to use illumination rounds, a subordinate division commander is not precluded from doing so. Given this, judge advocates must nonetheless understand that while subordinate commanders may have the authority to further restrict the applicable ROE, some combatant commanders require that such restrictions be coordinated with them before implementation,[606] therefore thought should be given by judge advocates to coordinate any material tightening of any rule of engagement delivered as a supplemental measure to the SROE. There is also a new requirement in the SROE to report to SECDEF any measures the command takes to "restrict" ROE, although this has been interpreted very broadly in the field.

Prepare for questions on the use of riot control agents and warning shots

Questions regarding the use of riot control agents (RCA) and of warning shots are a staple in nearly every contingency operation. With respect to RCA, the key international document is the Chemical Weapons Convention (CWC), which dictates the

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[604] P. 80-89, Vol I.

[605] As an example, a division commander may withhold authority to his level to use illumination rounds over populated areas.

[606] The OIF USCENTCOM message provided that "if operationally require, subordinate commanders will promulgate additional ROE and/or amplified ROE guidance applicable to forces under their command and submit them to CDR USCENTCOM for review and/or approval.

non-use of "as a method of warfare."[607] Unfortunately, the CWC does not define "method of warfare. The U.S. is a party to the CWC, as are all our major coalition partners.[608]

U.S. policy on its obligations under the CWC is contained in classified and unclassified documents.[609] U.S. RCA policy distinguishes between war and military operations other than war (MOOTW) and between the offensive and defensive use of RCA in war. RCAs may be used in armed conflicts, where permission is granted through the chain of command. As an example, RCA have been authorized for use in both OEF and OIF. Specifically, RCA can be used:

- To control rioting EPWs;
- To reduce or avoid civilian casualties, where enemy forces use civilians to mask or screen attacks;
- During rescue missions for downed aircrew and passengers and escaping prisoners;
- In rear echelon areas to protect convoys from civil disturbances, terrorists and paramilitary activities; and
- For security operations for the protection or recovery of nuclear weapons.[610]

Before deployment and during the shaping of the ROE annex, judge advocates must clearly understand the context of the operation they will be participating in and ask their commanders the question as to whether the option for using RCA is desirable.[611] If so, judge advocates should work to request the authority to employ RCA early in deployment planning and should request that the authority to grant "weapons release" be delegated down to the suitable level of command.[612]

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[607] Convention on the Prohibition of the Development, Production, Stockpiling, and Use of Chemical Weapons and on Their Destruction, 13 January 1993, 32 I.L.M. 800 [hereinafter CWC], art.1(5).

[608] 161 States have ratified the CWC. Major non-signatories (at Apr. 2004) include Iraq, North Korea, Syria, Lebanon, and Egypt.

[609] Executive Order No. 11850, Renunciation Of Certain Uses In War Of Chemical Herbicides And Riot Control Agents 40 F.R. 16187, 8 Apr. 1975, 50 U.S.C. Section 1511 [hereinafter Ex Ord. No. 11850], and Chairman of the Joint Chiefs of Staff Instruction 3110.07B (16 Feb. 2001, classified SECRET). *See also* White House Memorandum for the Secretary for Defense, Use of Riot Control Agents to Protect or Recover Nuclear Weapons. (10 Jan. 1976)

[610] *See* Ex Ord. 11850.

[611] Ironically, the ability to use RCA is often a quite contentious issue. Anecdotal evidence is that when authority to us it is obtained, it is infrequently used. Vol II, p. 148.

[612] During operations in the Balkans, the Supreme Allied Commander, Europe delegated RCA authority to the Commander, Implementation Force and later to the Commander Stabilization Force. This authority was later delegated to the Commander, Allied Reaction Corps (COMARRC). What this meant for the Commander of US forces in Task Force Eagle was that he needed COMARRC approval to employ RCA. This cumbersome approval process occasionally made it difficult to authorize the use of RCA in a rapid fashion. *See* Balkans LL p 70.

Coupled with the authority to employ RCA is the need to deploy RCA and other riot control measures (RCM).[613] The use of RCM and specifically of RCA is something that military police units routinely train for as riot/crowd control fits squarely within their mission set. However, not every infantry battalion or logistics battalion may receive such training. Simply possessing the equipment does not ensure that the unit is trained on its use and as a result, judge advocates should ensure units receive proper utilization training before conducting operations where the use of RCA and RCM is authorized.[614] Care should also be taken when using RCA to the concerns of coalition partners about its use as many coalition members have a different view on the whether RCA can be used in military operations at all.[615]

The use of warning shots is also often a contentious issue with commanders. Two camps exist, those who believe in their use in certain situations and those who do not believe warnings shots are ever an effective tool. Whether warning shots are effective or not is not the critical issue for judge advocates. Judge advocates must simply know whether they are authorized by the ROE and position of their particular commander regarding the use of such warning shots.

Kinetic and non-kinetic cross border operations.

Cross border operations into the sovereign territory of a non-party to the conflict have the potential to cause an international incident and a resulting media frenzy. The ability to conduct such operations though is a frequently recurring issue.[616] As a result, such operations - kinetic or non-kinetic – are generally tightly regulated by the ROE. Though specifics about such operations are classified, a few generic lessons learned may still be identified for judge advocates.

Non-kinetic cross border effects are generally the results of either strategic communications (STRATCOM) effects or information operations (IO) effects. When evaluating STRATCOM/IO plans, JAs must first identify the target audience and the desired effect. Often times in both OEF and OIF, desire existed to spread such messages across the borders of neighboring countries. When the IO plan has a target audience that may be across an international border it is critical to examine the method of dissemination of that message—is it a leaflet drop, a radio broadcast, television broadcast, internet messages,[617] hand bills being carried across a border, or some other

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[613] Riot control measures (RCM) includes such tools as batons, shields, tear gas, pepper spray, rubber bullets, water cannons etc.

[614] Balkans, p. 70.

[615] As an example, the UK believes that the CWC places a total prohibition on the use of RCAs in an armed conflict. For a good general discussion of the issues surrounding use of RCA see Barbara H. Rosenberg, *Riot Control Agents and the Chemical Weapons Convention*, Open Forum on the Challenges to the Chemical Weapons Ban, 1 May 2003 *available at* http://www.fas.org/bwc/papers/rca.pdf

[616] See e.g. Vol I, p109, Vol II 146-148

[617] Judge advocates also need to be very conscious of international borders when reviewing electronic warfare plans and computer network operations. *See also* the International Telecommunication

creative means of disseminating the message? In all such cases, JAs must be prepared to give accurate advice on permissions and limitations under not only the ROE but international law as well.

A simple solution, if obtainable, is the permission of the affected country. Obtaining permission is generally not easy, however. Accordingly, judge advocates must understand the level at which the authority to approve cross-border operations is reserved and be prepared to ensure planners understand this during the course of mission planning.

Other areas where non-kinetic effects may cross international borders are in the areas of electronic warfare (EW) and computer network operations (CNO). Judge advocates need to be aware that specific ROE authorizations are required for EW and CNO.[618] The most common form of EW is jamming of either communications or radar signals. These effects seem harmless enough to operators and planners who may not realize or appreciate that these acts are normally considered hostile acts which can justify a necessary and proportional response up to and including deadly force. Accordingly, JAs should review EW plans and ensure adequate authority exists to execute as planned or, if needed, help draft the required message traffic requesting EW authorities.

Similarly, computer network operations have great potential to cross international borders. Before proceeding with CNO, the JA must work closely with the special technical operations (STO) representatives. The STO representatives should have legal points of contact for the judge advocate. Prior to execution, every STO operation goes through a review and approval process which includes a legal review. In cases where a STO is executed by an operational level command without a JA, or a JA read into the program, the legal review will be preformed at the next level in the chain of command with a JA read into STO programs. A good learning point for JAs is to be aggressive in insisting upon being read into all programs in which the unit is participating.

Producing kinetic effects across international borders is an area where the JA must be confident he or she has the most current guidance from the combatant command and below. The JA must make sure they are synchronized with the operations section with respect to cross border operations. If a discrepancy exists, resolve it quickly. Judge advocates should not accept answers that involve ROE classified above their "need to know." If such a thing exists, JAs must be read in to evaluate the message content to be positioned to provide accurate advice on cross border operations.

Convention, Nairobi, 6 Nov. 1982, 32 U.S.T. 3821; T.I.A.S. 9920 (entered into force for the United States 10 January 1986)(for implications of intentionally broadcasting into sovereign nations without their permission and the effect of a state of international armed conflict). *See also* the United Nations Convention on the Law of the Sea, Dec. 10, 1982, U.N. Doc. A/CONF.62/122), 21 I.L.M. 1261 (entered into force on Nov. 16, 1994)(for implications of broadcasting from the high seas into a sovereign nation without that nation's consent).

[618] *See* SROE.

II.Q. TREATIES AND OTHER INTERNATIONAL AGREEMENTS

International Law affects all military operations outside of the United States. International Law consists of international agreements, such as treaties, and customary international law. International agreements prescribe the rights, duties, powers, and privileges of nations relative to particular undertakings.[619] Judge Advocates have often found themselves with the responsibility to determine the applicability of international agreements, to negotiate these agreements, and to implement or ensure compliance with an agreement.

For judge advocates deploying into mature theaters, in practice the most important international agreements are usually Status of Forces Agreements (SOFAs), followed by logistics support agreements, such as Acquisition and Cross Servicing Agreeements (ACSAs). Recent missions such as Operation Joint Endeavor/Guardian/Forge, have operated under the terms of international agreements as well. Also, Coalition Operations have required JAs to be familiar with certain treaties that may limit or affect actions by the U.S.'s coalition partners. When helping to negotiate contracts during contingency operations, JAs must be familiar with the policies of the Department of Defense (DoD) and their individual service policies on negotiating international agreements to ensure that they follow policy, as required.[620] For example, only certain individuals have authority to negotiate and conclude "international agreements."[621]

Missions in Bosnia and Kosovo operated under the terms of international peace agreements. On November 21, 1995, the Presidents of Croatia, Serbia, and Bosnia initialed the Dayton Peace Accord (DPA). The DPA, which is still in effect, is a wide-ranging peace agreement that gave birth to a single federated Bosnian state. With the initialing of the DPA, NATO expedited planning for a multinational Implementation Force (IFOR) to implement the military aspects of the DPA. On December 14, 1995, the parties[622] signed the official Balkan peace plan, the General Framework Agreement for Peace, in Paris, France (GFAP). The following day, the UN passed Security Council Resolution (UNSCR)1031, giving NATO the peace enforcement mandate, under Chapter VII of the UN Charter,[623] to implement the military aspects of the Peace Agreement. On December 16, 1995, the NATO-led IFOR began Operation Joint Endeavor.

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[619] DEP'T OF ARMY FIELD MANUAL 3-07, STABILITY AND SUPPORT OPERATIONS (20 Feb 2003) [hereinafter FM 3-07]. *See Also* U.S. DEP'T OF DEFENSE, DIR. 5530.3, INTERNATIONAL AGREEMENTS, E2.1.1. (11 Jun. 1987) [hereinafter DoDD 5530.3]; *see also* CHAIRMAN, JOINT CHIEFS OF STAFF, INSTR. 2300.01B, INTERNATIONAL AGREEMENTS (1 Nov. 2003); U.S. DEP'T OF ARMY, REG. 550-51, INTERNATIONAL AGREEMENTS (15 Apr. 1998).

[620] *See, generally,* DoDD 5530.3.

[621] *Id.*

[622] President Franjo Trudjman, Croatia; President Alija Izetbegovic, Bosnia; President Slobodan Milosevic, Serbia

[623] UN CHARTER, chapter VII.

The GFAP, and its military annex, defined the roles and responsibilities of the parties and the multinational force and included the following among its comprehensive provisions:

- Broad justification for the use of force
- Specific timelines for action
- New terms of art such as Zone of Separation (ZOS) and Inter-Entity Boundary Line (IEBL)
- Status of various police forces and other organizations
- Rules on the withdrawal, demobilization, and control of forces and weapons
- Instructions on freedom of movement for IFOR
- The mandate for Joint Military Commissions
- Directives on the release of prisoners
- Status of Forces Agreements between NATO and Croatia and NATO and Bosnia

Judge advocates provided advice on every aspect of the GFAP. While the agreement contains many details, the language is sufficiently broad to allow commanders flexibility in enforcing the peace. The often cited "silver bullet clauses"[624] in UNSCR 1031 and the GFAP should be considered for inclusion in future peace enforcement operations.

In Kosovo, a Military Technical Agreement (MTA) between NATO and the Governments of the Federal Republic of Yugoslavia (FRY) and the Republic of Serbia provided the framework for the peace enforcement mission there. The agreement was signed on June 9, 1999, and provided for a multinational NATO force (KFOR) to implement the military aspects of the peace agreement. Language in the MTA provided the KFOR Commander the authority to take all action necessary to establish and maintain a secure environment for all citizens of Kosovo. Broad interpretation of this clause, originally intended for use against uncooperative FRY and Serb forces, provided the KFOR Commander flexibility in addressing a multitude of problems including Kosovar Albanian violence and the in the absence of a functioning police service, the detention of serious criminals and their continued detention when local judges had inexplicably ordered their release in contravention of the evidence.

Sponsored by the UN, Afghan factions opposed to the Taliban met in Bonn, Germany in early December 2001 and agreed on a political process to restore stability and governance to Afghanistan. The meetings produced the "Bonn Agreement,"[625] under

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[624] Annex 1-A of the GFAP authorized the IFOR "to take such actions as required, including the use of necessary force, to ensure compliance with this annex and to ensure its own protection..... The parties understand and agree that the IFOR Commander shall have the authority, without interference or permission of any Party, to do all the Commander judges necessary and proper, including the use of military force, to protect the IFOR and to carry out the responsibilities listed above..., and they shall comply in all respects with the IFOR requirements.

[625] Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions, 41 I.L.M. 1032 (Jan. 4, 2002), *available at*

which an Afghan Interim Authority (AIA) was formed and took office in Kabul on 22 December 2001. In June 2002, the Interim Authority gave way to a Transitional Authority headed by now-President Karzai. The Bonn Agreement also included a request to the UN Security Council that the Council consider sending a UN-mandated force to Afghanistan.[626] The Council acted on the request by adopting Resolution 1386, authorizing the presence of an International Security Assistance Force (ISAF) under Chapter VII of the UN Charter.[627] The ISAF's mandate included taking "all necessary measures" to create a secure environment in Kabul and its surrounding areas.[628] It has since been expanded to include all of Afghanistan. Although the United States conducts military operations in support of the ISAF's Chapter VII mandate, the U.S. chain-of-command is entirely separate, and does not fall under the ISAF.

Child Soldiers

Prior to deployment, JAs must ensure that Commanders understand the implications of treaties to which the United States and/or its Coalition Partners are a party. On 23 January 2003, the Optional Protocol on the Involvement of Children in Armed Conflict (the Child Soldiers Protocol) entered into force in the United States.[629] The protocol requires the parties to "take all feasible measures to ensure that members of their armed forces who have not attained the age of eighteen years do not take a direct part in hostilities."[630] The Senate ratified the treaty subject to certain understandings regarding the definitions of "feasible measures" and "direct part in hostilities." The term "feasible measures" means those measures that are practical or practically possible, taking into account all the circumstances ruling at the time, including humanitarian and

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http://www.uno.de/frieden/afghanistan/talks/agreement.htm (last visited 9 Jul. 2004) [hereinafter Afghanistan Provisional Arrangement].

[626] Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions, 41 I.L.M. 1032 (Jan 4, 2002) [hereinafter Afghanistan Provisional Arrangement].

[627] S.C. Res. 1386, U.N. SCOR, 56th Sess., 4541st mtg., U.N. Doc. S.RES/ 1386 (2001) [hereinafter S.C. Res. 1386]

[628] S.C. Res. 1386, paras. 1,3.

[629] Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, July 5, 2000, S. TREATY DOC. NO. 106-37, 39 I.L.M. 285 (2000) [hereinafter Child Soldier Protocol]. On 10 January 2000, U.S. and United Nations (UN) negotiators agreed to the Child Soldier Protocol. Former President William J. Clinton signed the Protocol on 5 July 2000; the Senate gave its advice and consent to ratification of the Protocol on 18 June 2002; the State Department deposited it with the UN Secretary-General on 23 December 2002 and, according to article 10.2 of the Protocol, it entered into force thirty days after the date of deposit.

[630] *Id.* art. 1. The Protocol also provided that a state party permitting voluntary recruitment into their national armed forces under the age of 18 must maintain safeguards to ensure that:

(a) Such recruitment is genuinely voluntary;
(b) Such recruitment is carried out with the informed consent of the person's parents or legal guardians;
(c) Such persons are fully informed of the duties involved in such military service;
(d) Such persons provide reliable proof of age prior to acceptance into national military service.
Id. art. 3

military considerations; The phrase "direct part in hostilities:" (i) means immediate and actual action on the battlefield likely to cause harm to the enemy because there is a direct causal relationship between the activity engaged in and the harm done to the enemy; and (ii) does not mean indirect participation in hostilities, such as gathering and transmitting military information, transporting weapons, munitions, or other supplies, or forward deployment.[631]

Prior to 2003, the United States had service members deployed to Afghanistan in support of OEF who were under the age of eighteen. These service members, however, were serving in combat support and combat service support positions performing sustainment operations only.[632] In early January 2003, in anticipation of the 23 January effective date of the Child Soldiers Protocol, DoD directed the services to implement a plan to ensure compliance with the Protocol. The Department of Army directed commanders to immediately identify service members under the age of eighteen who were already serving overseas and take all "feasible measures" to ensure they did not take direct part in hostilities until they turned eighteen.[633] This included all service members deployed in support of both OEF and Operation IRAQI FREEDOM. The Third Infantry Division (3ID), for example, counted ten Soldiers who were seventeen years of age as they prepared to deploy for combat. Those Soldiers were immediately moved into positions at the brigade level that would not involve them in direct combat in Iraq.[634]

The Marine Corps also directed commanders to take all feasible measures to ensure Marines under eighteen years of age did not take part in hostilities. For future deployments, legal personnel must be aware of the Child Soldiers Protocol and the U.S. obligations under this treaty. Moreover, they need to ensure that commanders, with the support of their adjutants and personnel specialists, identify service members who are under the age of eighteen and comply with implementing Service policy on the status of these service members.

Mines

The key international legal document concerning anti-personnel landmines (APL) is the Ottawa Treaty.[635] The Ottawa Treaty prohibits States party from developing,

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[631] *See* Executive Report of Committee, Treaty Doc. 106-37(a) Optional Protocol No. 1 to Convention on Rights of the Child on Involvement of Children in Armed Conflict, § 2(2)(A) and (B), 148 Cong. Rec. S5454 (daily ed. Jun. 12, 2002) [hereinafter Executive Report of Committee].

[632] *Id.*

[633] *See* Message, 211720Z Jan 03, Deputy Chief of Staff, G-1, subject: Implementation of Army Procedures to Comply with Child Soldiers Protocol (Age 18 Standard for Participation in Combat) (providing that on 16 Jan. 2003 the Principal Deputy Under Secretary of Defense (Personnel and Readiness) directed the services to implement their plans to ensure compliance with the Child Soldier Protocol).

[634] Information Paper, Third Infantry Division, subject: Seventeen Years Old (17yo) [sic] Service Members participating in Direct Combat para. 4 (8 Feb. 2003).

[635] Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Landmines and on Their Destruction, 18 Sep. 1997, 36 I.L.M. 1507. [hereinafter Ottawa Treaty].

producing, acquiring, stockpiling, retaining or transferring APL, either directly or indirectly, and from assisting, encouraging or inducing any of these prohibited activities.[636] Most of our coalition partners have ratified the Ottawa treaty.[637] However, the United States is not a party and does not consider the Ottawa Treaty to be customary international law. Rather, the United States is subject to the provisions of Amended Protocol II to the Certain Conventional Weapons Convention,[638] and domestic policy,[639] which does not prohibit the use of APL but sets out restrictions on their use. As a result, the United States could employ APL during OEF and OIF, but most coalition partners could not.

When the employment of APL arises in coalition operations it is important for JAs to understand the parameters of the APL prohibition for the particular coalition partner. These parameters will not necessarily be the same for each partner, as they will depend on interpretation and policy. The question of what constitutes "assistance" is the most complicated aspect of APL use in coalition operations. The prohibition on assistance may impact on a mission in many subtle but important ways, such as on coalition partner ability to be involved in air-to-air refueling, transport, or even mission planning. Where U.S. forces are reliant on the provision of these types of services from a coalition partner, it is imperative that "workarounds" are established early so as to not to interfere with the mission.[640] While several major partners have issued unclassified guidance on their national interpretation of their obligations,[641] there is insufficient detail in these documents for mission planning.

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[636] *Id.* art 1(1). The treaty defines "Anti-personnel mine" as: a mine designed to be exploded by the presence, proximity or contact of a person and that will incapacitate, injure or kill one or more persons. Mines designed to be detonated bythe presence, proximity or contact of a vehicle as opposed to a person, that are equipped with anti-handling devices, are not considered anti-personnel mines as a result of being so equipped. *Id,* art 2.

[637] There are 141 States party including Afghanistan, Australia, Canada, Denmark, Germany, Italy, Japan, Norway, Poland, Ukraine, and the UK (at 30 Mar. 2004). For current statistics see http://www.icbl.org/treaty/(last visited 30 Mar. 2004

[638] 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 (and Protocols), 10 October 1980, 19 I.L.M. 1523 [hereinafter UNCCW]; Amended Protocol II to the Convention on Prohibition or Restrictions on the Use of Certain Conventional Weapons which may be Deemed to be Excessively Injurious or to Have Indiscriminate Effects (ratified by the United States on 24 May 1999).

[639] The policy in effect during OEF and OIF was President William Jefferson Clinton, Statement at the White House, (16 May 1996) available in LEXIS, News library, ARCNWS file. The current U.S. policy is outlined in U.S. Department of State, Landmine Policy White Paper (27 Feb. 2004) at http://www.state.gov/t/pm/rls/fs/30047.htm .

[640]. In relation to U.S. Special Forces operating with U.K. and AS Special Forces during OEF and OIF, MAJ Whitford reported: guidelines were established ahead of time to avoid assistance issues where, for example, a coalition officer might be the fires coordinator on duty. It also recognized the difference between calling fires (use function) and clearing fires (safety function).Whitford E-mail.

[641] 21 In relation to APL *see* Landmines Act 1998 (UK) (as long as the UK military member does not actually lay the APL, the statute does not prohibit participation in the operation); Anti-Personnel Mines Convention Implementation Act 1997 (Canada) (can participate in an operation with a State that uses APL but may not actively assist). Declaration to the Ottawa Convention by Australia: Australia will interpret the

Riot Control Agents

The permissible use of Riot Control Agents (RCAs) during armed conflict was topical during both OEF and OIF.[642] The key document is the Chemical Weapons Convention (CWC), which requires that RCAs not be used "as a method of warfare."[643] However, the term "method of warfare" is not defined. The United States is a party to the CWC, as are all of our major coalition partners. Accordingly, the interoperability issue arises due to interpretation and policy rather than law. United States RCA policy regarding its obligations under the CWC distinguishes between war and military operations other than war (MOOTW) and between offensive and defensive use in war. RCAs may be used in armed conflicts such as OEF and OIF, when permission is granted through the chain of command. An alternative interpretation of the term "method of warfare' is that the CWC places a total prohibition on the use of RCAs in an armed conflict. The UK subscribes to this latter interpretation, indicating that UK forces would not be involved in operations using RCAs during an armed conflict, nor transport RCAs. JAs should always consult with British Army lawyers as to the British position as they may not officially regard the situation as an armed conflict. As with APL, these differences in national viewpoints may impact on coalition operations. It is critical that JAs understand these differences and assess the potential impact on their particular mission.

International Agreements

Besides understanding and interpreting International Agreements, some JAs have found themselves creating and negotiating such agreements. JAs from the 101st Airborne Division helped negotiate a multi-billion dollar contract to provide electrical power to northern Iraq. This required the JAs to be proficient in the international electricity and oil product industries to educate the command on terms and concepts, and draft and negotiate contracts. In the end, these JAs helped strike a deal with a Turkish corporation for sufficient electricity to provide a reliable source of constant power to Mosul, something that had not been available for more than a decade.[644] These JAs also helped negotiate a deal with Syria to bring electrical power into Iraq in exchange for crude oil.[645] They further tackled a difficult issue surrounding the unfreezing of assets of an Iraqi

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word "assist" to mean the actual and direct physical participation in any activity prohibited by the Convention but does not include

[642] *See, e.g.*, Kerry Boyd, *Military Authorized to Use Riot Control Agents in Iraq,* ARMS CONTROL TODAY, May 2003 *at* http://www.armscontrol.org/act/2003_05/nonlethal_may03.asp

[643] Convention on the Prohibition of the Development, Production, Stockpiling, and Use of Chemical Weapons and on Their Destruction, 13 January 1993, 32 I.L.M. 800 [hereinafter CWC], art.1(5). 25 161 States have ratified the CWC. Major non-signatories (at Apr. 2004) include Iraq, North Korea, Syria, Lebanon, and Egypt.

[644] Office of the Staff Judge Advocate, 101st Airborne Division (Air Assault) Operation Iraqi Freedom (OIF) After Action Review (AAR), at 66 (24 Sept. 2004) [hereinafter 101st ABN DIV AAR].

[645] *Id.*

Cement Company that had been frozen by Syria and Jordan. To prevent collapse, the company needed access to their accounts in those countries to pay open contracts.[646]

Judge advocates must expect difficulties with information flow on international agreements. Well-crafted agreements mean little if the lower level government employees do not get the word. For example, a transit agreement allowing U.S. forces to move through Austria does not mean much to the uninformed customs official or border guard.[647] Judge advocates should have copies of all necessary agreements for all key advance party personnel. This is particularly true since planning, deployment, and mission execution will likely occur simultaneously.

II.Q.1. Status of Forces Agreements

Status of Forces Agreements (SOFAs) are international agreements between two or more governments that provide various privileges, immunities and responsibilities, and enumerate the rights and responsibilities of individual members of the deployed force. The necessity for a SOFA depends on the type of operation. Enforcement operations do not depend on, and may not have the consent of the host authorities, and therefore will not normally have a SOFA. Most other operations should have a SOFA or other international agreement to gain some protection for military forces from host nation jurisdiction. Personnel participating in a UN mission typically will have special protection. In some case, the state to which the UN is deploying forces may grant those forces "expert on mission" status. This refers to Article VI of the Convention on the Privileges and Immunities of the United Nations, and grants complete criminal immunity. Alternatively, the UN may negotiate a SOFA, which they term a Status of Mission Agreement (SOMA). The UN Model SOMA provides for exclusive criminal jurisdiction in the sending state.

For Operation Uphold Democracy an agreement was finally reached on December 22, 1994 between the Governments participating in the Multinational Force (MNF) and the Republic of Haiti on the Status of MNF in Haiti on December 22, 1994. This agreement covered a number of topics, including, but not limited to: MNF Member States Flag and Vehicle Markings, Communications, Travel and Transport, Use of Haitian facilities by MNF Personnel, Obtaining goods and services on the local economy, local hirings, currency, status of MNF personnel, identification, uniforms, military police arrest, jurisdiction, and settlement of disputes. When this agreement—the MNF SOFA—went into effect, early issues that arose included the questions whether locally hired Haitians could use the Post Exchange and whether certain United States service-members on military flights needed to pay a $25 "departure fee" to Haitian authorities[648].

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[646] *See* Office of the Staff Judge Advocate, 101st Airborne Division (Air Assault), Northern Cement Company Contracts, PowerPoint presentation (undated).

[647] *See* the European Command Legal Advisor's comments OJE-AAR).

[648] Memorandum, LTC Arthur L. Passar, AMSMI-GC-AL-D, to Staff Judge Advocate, U.S. Army Material Comman, subject: After Action Report, Legal Support to Joint Logistics Support Command, Joint Task Force 190, Haiti, Operation Uphold Democracy, September 1994-March 1995, at para. 6h(iv) (11 May 1995) [hereinafter Passar AAR].

When advising commanders or soldiers on legal issues in a foreign country without the benefit of a SOFA, appreciation of that country's legal system takes on practical significance. Operational lawyers in Haiti appreciated the need for legal materials on Haiti and resourcefully solicited them from a variety of places; however, the paucity of material written in English limited the extent to which judge advocates could become knowledgeable of Haitian law. The need for attorneys in the force to have such knowledge—for example in the areas of claims and civil affairs—is distinct from the need for troops to be aware of local laws and customs. Both needs, however, reaffirm the wisdom of having prior and current country law studies and country studies available for distribution to deploying units.

As soon as the MNF had established a secure and stable environment in Haiti and the Aristide government had resumed power, some agreement became necessary to define the legal status of United States troops on Haitian soil. Without this the troops would be subject to Haitian laws and these could impede their activities and frustrate the political, diplomatic, and strategic objectives that impelled their deployment. Yet for four reasons, modern operations other than war often make the rapid conclusion of a comprehensive and detailed status of forces agreement difficult.

First, the hope that the deployment will be short in duration and the presence of many other pressing demands on diplomatic resources tend to make the conclusion of a SOFA a less than urgent priority. [649] Second, the host nation—if it has a functioning government at all—often may have no well-developed or efficient apparatus with authority to negotiate and conclude agreements. Third, even if the host nation is ready, willing, and able to become party to a SOFA, our own laws and regulations place significant though understandable constraints on who may negotiate and conclude international agreements with foreign states and on how that process must occur.[650] Fourth, United States forces may be present representing either the nation or a variety of multinational entities, creating a need for bilateral as well as multilateral instruments.

Eventually, three different agreements governed the legal status of different United States soldiers in Haiti. The status of forces agreement defined the privileges, immunities, and responsibilities of the MNF. A United Nations Status of Mission

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[649] For small missions of a short duration, standing authority exists for the Department of Defense to negotiate and conclude simple status of forces agreements that provide members of the contingent the same status as members of the technical and administrative staff of the United States Embassy, who are granted criminal immunity and a few other limited privileges by preexisting international law. *See* Dep't of State, Action Memorandum, Circular 175 Procedure: Request for Blanket Authority to Negotiate and Conclude Temporary Status of Forces Agreements with the Sudan and Other Countries (Nov. 4, 1981) (approved by Ambassador Stoessel on Nov. 6, 1981) (citing Vienna Convention on Diplomatic Relations, Apr. 18, 1961, arts. 27, 29-35, 23 U.S.T. 3227, 500 U.N.T.S. 95).

[650] *See, e.g.,* Case Act of 1972, Pub. L. No. 92-403, 86 Stat. 619 (codified at 1 U.S.C. § 112b); UNITED STATES DEP'T OF STATE, CIRC. NO. 175 PROCEDURE (1974); DEP'T OF DEFENSE, DIR. 5530.3, INTERNATIONAL AGREEMENTS (June 11, 1987); DEP'T OF ARMY, REG. 550.51, AUTHORITY AND RESPONSIBILITY FOR NEGOTIATING, CONCLUDING, FORWARDING, AND DEPOSITING OF INTERNATIONAL AGREEMENTS (1 May 1985).

agreement, defined the status of Americans serving with UNMIH. The agreement entered into force on 21 March 1995. A bilateral agreement between the United States and Haiti, governed those individuals who served in Haiti outside the umbrella of these international forces.[651]

It is critical that JAs understand a host nation's legal and military cultures. JAs must be aware of the "conflict of laws" and have an understanding of the differences between civil and common law legal systems. Language barriers, definition of terms, and differing government and legal systems cause difficulty in implementing already concluded agreements. Judge advocates must educate themselves on these host nation practices. This is particularly true for the Partnership For Peace (PfP) countries that had little experience in implementing SOFA or transit agreements.[652] PfP countries, recently emerging from the stifling bureaucracy of Soviet control, were unfamiliar with how a SOFA works (e.g., terms, conditions, responsibilities).[653] For example, taxes were a very politically sensitive issue in Hungary as at the time the operation began they had only dealt with taxes within the last seven years—since the end of the Soviet regime. For Operation Joint Endeavor, Hungary was the first PfP country to deal with thousands of deployed troops and civilians within its borders and the application of a SOFA to that situation. Lack of detailed U.S. knowledge about the way the Hungarian system operated made the situation more challenging. To reduce future problems, U.S. commands should inform PfP countries on the terms and conditions of the PfP and NATO SOFAs and their respective responsibilities, as well as learning about other countries legal and military cultures.[654]

The inability to negotiate a Status of Forces Agreement prior to the arrival of military forces creates significant problems. In late 1998, Allied Forces Southern Europe (AFSOUTH) was immediately subordinate to Supreme Headquarters Allied Powers Europe (SHAPE).[655] Upon deployment of a verification force[656] to the Former Yugoslav Republic of Macedonia (FYROM), SHAPE did not authorize the AFSOUTH Deputy Legal Advisor (KVCC-LA) to conduct any formal Status of Forces Agreement (SOFA)

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[651] *See also* Convention on the Privileges and Immunities of the United Nations, Feb. 13, 1946, 1 U.N.T.S. 15 (Convention acceded to by Haiti on 6 Aug. 1947). Note that there existed other agreements between the United States and the many nations and international organizations represented in Haiti. *See, e.g.,* Agreement Between the United States of America and the United Nations Organization Concerning the Provision of Assistance on a Reimbursable Basis in support of the Operations of the UN in Haiti (Sept. 19,1994), *cited in* Memorandum, CPT Fred K. Ford, Chief of Claims and Legal Assistance, Multinational Forces Haiti, MNF-SJA, to Director of the Combined Joint Staff, subject: Treatment of UN Personnel at MNF Medical Facilities (16 Feb. 1995) .

[652] *See* LTC Pribble, remarks *in* OJE-AAR, vol I.

[653] *Id.*

[654] LTC Pribble and LTC Thompson, remarks *in* OJE-AAR, vols. I and II.

[655] LAW AND MILITARY OPERATIONS IN KOSOVO: 1999-2001 LESSONS LEARNED FOR JUDGE ADVOCATES

[656] The name for the verification force was KVCC.

negotiations with the FYROM authorities.[657] The KVCC-LA was encouraged, however, to determine what the FYROM posture towards a SOFA and its provisions might be. Acting pursuant to this nebulous charter, the KVCC-LA was able to broker tentative agreements between relevant members of the KVCC staff and FYROM authorities on wide-ranging issues typically addressed in a SOFA. Such issues included tax exclusion, criminal and civil status of the members of the force and those accompanying the force, communications frequencies, road tolls, hiring procedures, foreign claims waivers, and airport access.[658]

At this point—late October 1998—the KVCC-LA reported to the "NATO Legal Advisor"[659] through SHAPE and AFSOUTH legal channels that all parties concerned were prepared to enter into a SOFA. The NATO Legal Advisor determined that an exchange of letters was more appropriate than a single-document SOFA.[660] The basic Exchange of Letters was not signed until 23-24 December 1998.[661] The roughly two-month legal void between the first arrival of KVCC elements and the final signing of the Exchange of Letters led to significant interim problems. For one example among several,[662] NATO funds could not be obligated, absent a formal agreement, for facilities leasing and construction costs of the various troop contributing nations arriving in theater. Faced with the untenable situation of not having a signed agreement, yet needing to establish suitable headquarters facilities before the onset of cold weather, ad hoc informal agreements sprang up between NATO units and local FYROM army units. The resulting hodgepodge of agreements lacked uniformity and failed to address many key billing and cost-sharing concerns, contributing to a deterioration of relations between NATO and several ministries within the FYROM government.[663] The Exchange of Letters, when it did come, was regarded by many as inadequate and lacking in clarity and detail.

The lesson learned for JAs from this AFSOUTH experience can be separated into two parts. First, sending military forces into a host nation without the protections and procedures contained in a SOFA or like instrument is clearly problematic. JAs must be prepared to assist those responsible for negotiating SOFA, to provide input into the issues that the SOFA should address, and to persist in requesting a SOFA in a timely fashion. The JA should voice this concern early and make every effort to facilitate expeditious

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[657] LTC Virginia P. Prugh, former AFSOUTH Deputy Legal Adviser, AFSOUTH After Action Report (10 Sept. 2001) [hereinafter AFSOUTH AAR].

[658] *See id.*

[659] The sole attorney advising the private office of the NATO Secretary General was a civilian, Mr. Baldwin DeVitz.

[660] *See* AFSOUTH AAR, at 5-6.

[661] *See id.* at 7.

[662] Other examples included difficulties in securing the use of Skopje (Petrovec) Airport for NATO forces and the unwillingness of FYROM authorities to grant tax exemptions for construction efforts absent a formal agreement. *See id.* at 7-8.

[663] *See id.* At 7-8

SOFA negotiation. Second, the JA should actively seek the authority to negotiate SOFA provisions.[664] The fact that the KVCC-LA reported meeting prohibitive resistance when these steps were taken should not discourage future JAs from attempting the same.

Several legal challenges emerged from CAS during the period between the February 1999 disbanding of UNPREDEP and the completion of Operation Allied Force. The end of the UNPREDEP mission meant the end of the UN status for U.S. TFAS forces which had been based on the relevant UN Status of Mission Agreement (SOMA).[665] At this point in time, the 23-24 December 1998 Exchange of Letters concerning the Basic Agreement between NATO and FYROM, previously discussed in the AFSOUTH section, only applied to the KVCC and its extraction force. It was not until 21 April 1999 that even this inadequate Exchange of Letters was extended to apply to all NATO forces in FYROM.[666] Thus, Task Force Sabre and Task Force Falcon operated without a SOFA or like instrument in place for nearly two months. The lack of a SOFA resulted in a variety of challenges. Border crossing issues arose, from refusal to admit U.S. soldiers to demands for fees to preventing the movement of contractor vehicles.[667] Criminal jurisdiction issues were unclear.[668] Efforts to expand the CAS infrastructure into a more robust staging base met resistance.[669] Reaching agreement on runway usage fees and billing for utilities at CAS was a constant struggle.[670] Army JAs attempted to fill this legal void by proposing that the Partnership for Peace (PfP) SOFA[671] applied and by negotiating a separate consignment agreement for CAS.[672] Army JAs achieved a measure of success in arguing the PfP SOFA's applicability and hammering out the terms of the more detailed consignment agreement for CAS.[673] One problem with

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[664] Approval authorities and procedural requirements governing the involvement of DoD personnel in negotiating agreements are delineated in DoDD 5530.3, (C1, 18 Feb. 1991).

[665] *See* LTC Mark S. Martins, Deputy Staff Judge Advocate, 1id, Task Force Falcon Interim After Action Review, Operational Law CLE, PowerPoint presentation, notes to briefing slide 24 (3 Dec. 1999) [hereinafter Martins Presentation].

[666] *See* Information Paper, LTC Jeff McKitrick, International Law and Operations Division, USAREUR, subject: Agreements with FYROM (2 Feb. 2000).

[667] *See* Martins Presentation, at notes to briefing slide 28.

[668] *See id.* At notes to briefing slide 24.

[669] *See id.*

[670] *See* E-mail from CPT James A. Bagwell, Operational law Attorney, Task Force Falcon (Rear), to CPT Alton L. Gwaltney, III, CLAMO (31 Mar. 2000) .

[671] Agreement between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces, June 15, 1951, 4 U.S.T. 1792. *See Also* Agreement Among the States Parties to the North Atlantic Treaty and the Other States Participating in the Partnership for Peace Regarding the Status of their Forces, June 19, 1995, T.I.A.S. No. 12,666 [hereinafter PfP SOFA].

[672] Accommodation Consignment Agreement for Army Compound "Strasho-Pindjur/Camp Able Sentry" at Petrovec Airfield, Skopje, U.S.-MK [FYROM Ministry of Defense], Apr. 19, 1999.

[673] Lieutenant Colonel Mark Martins, the Task Force Falcon Legal Adviser and, at one point, the Task Force Falcon Chief of Staff, paints a vivid picture of just how these efforts transpired: " The last half of April for me was a series of smoke-filled rooms, Turkish coffee, and byzantine negotiations at the [FYROM] Ministry of Defense...." Martins Presentation, at notes to briefing slide 24.

negotiations with the FYROM Government was that it did not function well and in a coordinated manner. This was in part because a Government Minister and his Deputy could be from different political parties making agreements difficult to negotiate and make effective.

JAs then faced an additional hurdle. Even though some level of consensus was reached that the PfP SOFA applied, this information did not always filter down to lower levels, such as to FYROM border guards who continued to demand fees and obstruct border crossings. As an example of a response to this problem, the Task Force Sabre Commander tasked a JA to accompany a particularly sensitive reconnaissance mission to ensure that the terms of the SOFA were communicated to the guards at a FYROM–Albania border station.[674] Despite the efforts of JAs to apply the PfP SOFA and to negotiate a consignment agreement, and despite the later applicability of the theater-specific Exchange of Letters, many key details, particularly in the realm of contractor support, were left unanswered. The Exchange of Letters had been agreed for a small force and was inadequate for the NATO force. The most notable example was the omission of any language clarifying the status to be enjoyed by civilian contractors such as Brown & Root.[675] JAs argued, with varying degrees of persuasiveness, that the contractors should be considered members of the force under the PfP SOFA and, later, under the technical annexes of the Exchange of Letters.[676]

As members of the force, civilian contractors would receive the same criminal procedural protections as U.S. soldiers and face less resistance—such as licensing requirements and fees—when crossing FYROM borders. Operating in the absence of a clearly applicable SOFA—or with a SOFA that did not adequately address key issues and was poorly drafted—gave JAs the opportunity to display their legal mettle through a combination of creative arguments and persistent negotiations. Such legal skills will surely be needed the next time U.S. forces are called into a country where there is not a well developed and functioning government and SOFA production lags behind military requirements. Even when it was thought that the Exchange of Letters was clear, the FYROM government did not see it as such as was demonstrated when a Norwegian Captain was involved in a fatal road traffic accident and the FYROM authorities refused to release him to Norway's jurisdiction. JAs must also be prepared to advise and assist U.S. allies about treatment of contract logistics personnel and to argue that these personnel are a crucial extension of the military force.

Even though operations in Kosovo were framed under consent-based agreements, there was no SOFA between the U.S. and the FRY or NATO and the FRY or UNMIK. Commanders want to know the status of soldiers serving in a foreign country, especially the protections for both soldiers and civilians accompanying the U.S. forces when faced with criminal allegations. Despite the MTA's reference to a "to be negotiated" SOFA, no

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[674] *See id.* At notes to briefing slide 28.

[675] *See* CLAMO, Kosovo After Action Review Conference (12-14 June 200); Transcript at 360-61. [hereinafter KOSOVO AAR]

[676] *See* KOSOVO AAR, at 361.

SOFA existed through the first two years of the operation. KFOR and UNMIK, through guidance included in a classified declaration, set forth SOFA-like provisions for soldiers and civilians performing the KFOR mission in Kosovo.[677] In August 2000, 14 months after the start of the mission, the SRSG promulgated regulatory guidance concerning the status of soldiers.[678]

II.Q.2. *Acquisition and Cross-Servicing Agreements (ACSAs)*

An ACSA is an agreement with a foreign government or international regional organization that allows DoD to acquire and transfer logistical support without resorting to oftentimes slow and inflexible contracting procedures. Under an ACSA, U.S. Forces and those of an eligible country[679] may provide logistics support, supplies and services on a reciprocal basis upon coordination with the Secretaries of Defense and State.[680] The primary benefit of cross-servicing is that such support, supplies and services may be reimbursed through replacement in kind; trade of support, supplies or services of equal value; or cash. In a multinational setting, much of the logistical support is achieved through ACSAs.

Unfortunately, neither contracting personnel nor most judge advocates had significant training in ACSAs when Operation Joint Endeavor began.[681] Task Force Eagle addressed this problem by designating a single point of contact for cross-servicing agreements during the operation.[682] The multinational coalition of forces in Kosovo required an extensive use of ACSAs for logistics support by and to the U.S. For example, all coalition countries drew fuel supplies from the French. While JAs were prepared to address ACSA issues based on the previous lessons learned in Bosnia,[683] the operations ran smoothly at the Task Force level and required little JA involvement. The G-4 section identified an ACSA point of contact, and the pre-deployment training prepared the Task Force to address ACSA issues. While legal sections for each rotation had an identified POC for ACSA issues, few issues arose.[684] However, prior to trained logisticians arriving

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[677] Joint Declaration, Commander KFOR, UN SRSG, Kosovo (17 Aug. 2000) (classified NATO document).

[678] *See* U.N. MISSION IN KOSOVO, REG. 200/47

[679] All NATO countries, plus non-NATO countries designated by the Secretary of Defense.

[680] *See* 10 U.S.C. §§ 2341 – 2350.

[681] MAJ Susan Tigner, comments *in* OJE-AAR, Vol. I at 238.

[682] LTC Maher, comments *in* OJE-AAR, Vol. I at 240.

[683] THE CENTER FOR LAW AND MILITARY OPERATIONS, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, LAW AND MILITARY OPERATIONS IN THE BALKANS 1995-1998; LESSONS LEARNED FOR JUDGE ADVOCATES 152-53 (1998) [hereinafter BALKANS].

[684] CLAMO, Kosovo After Action Review Video Teleconference with 1AD (19 Mar. 2001) Read Ahead Packet at § III, ¶ E.

to provide ACSA support and accounting, JAs need to be prepared to advise the command on ACSA issues.[685]

The lack of an ACSA can cause problems. For example, in Bosnia most all of the troop contributing nations working with the U.S. forces in MND-N had ACSAs with the United States. Russia, Romania and others did not. Thus, they were not supposed to use our dining facilities or receive any other support in kind. However, European Command-Supreme Allied Headquarters Europe (EUCOMSHAPE) used a "work around." They considered the EUCOM-SHAPE ACSA a basis for exchanging support with these nations as long as they would abide by the reimbursement terms of that ACSA and the EUCOM J4. The Legal Advisor approved this arrangement.

Judge advocates must also be prepared to provide logistical support through agreements other than ACSAs. There is no legal authority to provide free logistical support to foreign militaries. This axiom was severely tested when troops from the United Arab Emirates (UAE) and the Ukraine arrived to participate in KFOR. USAREUR faced the challenge of providing logistical support to troops from the UAE and the Ukraine, even though neither country had an ACSA with the U.S.[686] USAREUR was tasked to review all logistical support requirements for the two countries' task forces. The support included billeting, meals, communications, quality of life, and, for the UAE, AH-64 aviation parts and maintenance facilities. Ultimately, the support was provided through Foreign Military Sales (FMS) cases, as discussed below. For the Task Force, the everyday approach to capturing the costs and forwarding the amounts to higher headquarters was the same as if the support was provided pursuant to an ACSA.

Support can be provided through a Foreign Military Sales Case, with specifics detailed in a memorandum of agreement. In August 1999, the Defense Security Cooperation Agency prepared two FMS cases for the UAE. FMS cases are normally used to provide military hardware and equipment to foreign nations, but in this instance they were tailored to provide logistical support to the UAE while serving as part of Task Force Falcon.[687] The UAE funded the FMS cases with $11.3 million and received support pursuant to the FMS case.[688] The UAE's participation in KFOR was unique in that their troops were not only part of KFOR, but they also served as part of Task Force Falcon. It was therefore necessary to prepare a Memorandum of Agreement (MOA) with detailed

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[685] *See* Kosovo AAR, at 361 (noting "[t]he agreement is just the first step. What doesn't happen a lot of times [early in the deployment] is you don't have the trained, the school-trained logistics personnel who know how to collect and who know how to account for the stuff the other services are getting from you or you're getting from the other services. In some areas it worked well . . . but there were a lot of other areas where I didn't see the tough accounting occurring.") (quoting LTC Mark Martins, Deputy Staff Judge Advocate, 1ID).

[686] The U.S. and the Ukraine entered into an ACSA on 19 November 1999.

[687] The Foreign Military Sales Program is a security assistance method by which the U.S. provides defense articles and training to further national policy. Eligible governments purchase defense items based on contracts managed by DoD as an FMS "case." 22 U.S.C. §§ 2761-62 (2000).

[688] Kosovo AAR.

command and control, training, aircraft configuration, and claims provisions. USAREUR prepared this MOA at the same time the FMS cases were being prepared, with the expectation that both documents would be signed before the UAE began putting troops on the ground. The MOA also specified the types of logistic support, by class that USAREUR and Task Force Falcon would provide.

The Ukrainian forces arrived for the Kosovo mission with short notice to DoD officials, and before any support agreements were in place.[689] The day after the Ukraine contingent arrived in theater, U.S. Army Security Assistance Command initiated three FMS cases in support of the Ukrainian deployment. The FMS cases were funded with $700,000 from Foreign Military Financing (FMF) funds.[690] Essentially, the U.S. funded the Ukraine deployment, and the $700,000 was expended prudently to provide basic life support.

In addition to ACSAs, recent congressional appropriations have allowed the DoD to use Operation and Maintenance funds to provide logistical support to coalition forces supporting military and stability operations in Iraq, and have also provided over $1 Billion to reimburse key cooperating nations for logistical and military support provided to U.S. Military operations in connection with military action and Iraq and the global war on terrorism.

[689] When the Ukrainian advance party showed up with little notice, USAREUR instructed Task Force Falcon to provide the minimum level of support necessary (water, food, shelter), and track the costs. When the FMS cases were completed, the accumulated costs were rolled into the FMS cases. E-mail from LTC Richard Sprunk, Office of the Army General Counsel, to Maj Cody Weston, CLAMO (16 Oct. 2001) [hereinafter Sprunk E-mail] .

[690] Foreign Military Financing is one security assistance method by which the U.S. provides defense articles and training to further national policy. Eligible governments receive congressional appropriations to assist in purchasing U.S. defense items. 22 U.S.C. §§ 2363-64. The U.S. added another $4.3 million in FMF funds to the Ukraine's FMS case after the Ukrainian troops arrived in Kosovo.

II.R. UNITED NATIONS

Since the United Nations (UN) came into existence in 1945, its purposes, as set forth in its Charter, are to maintain international peace and security; to develop friendly relations among nations; to cooperate in solving international economic, social, cultural and humanitarian problems and in promoting respect for human rights and fundamental freedoms; and to be a centre for harmonizing the actions of nations in attaining these ends.[691] Many recent U.S. missions have been under the authority of the UN, either through United Nations Security Council Resolutions (UNSCR) or the right of self-defense stated in Article 51 of the UN Charter. It is important for judge advocates (JAs) to understand the role of the United Nations in recent operations. It is also important for judge advocates to understand how to deal appropriately with the UN. This Chapter will discuss unique issues that JAs have had to address in Military Operations. It will also address the measures employed by the UN in recent conflicts and peace operations, usually in the form of UNSCRs.

Diplomacy, tact, and awareness of institutional values and constraints are required of the judge advocate when he or she interacts with the United Nations. These skills are identical to those required when dealing with other United States agencies or with non-governmental organizations (NGOs). A great example of these skills was demonstrated during the detailing of a U.S. Army General as the Force Commander of the United Nations Mission in Haiti (UNMIH) upon completion of Operation Uphold Democracy. Because the UNMIH was a subsidiary organ of the UN, established pursuant to a SCR,[692] the Secretary General and the Under-Secretary General for Peacekeeping Operations expected that the Force Commander would keep them fully informed about organizational, deployment, and operational matters. These expectations of prompt and thorough reports were consistent with a relationship that the United Nations described as a "chain of command" between it and the Force Commander.[693]

The UNs perspective of the relationship between its political and policy organs and the Force Commanders of United Nations operations caused it to seek various guarantees of loyalty: an employment contract; a letter of appointment; a loyalty oath.[694] The issue was raised as to whether a serving U.S. Army general could or should sign such instruments. The answer was "no",[695] but the details were important, and the legitimate

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[691] United Nations website, available at http://www.un.org/aboutun/basicfacts/unorg.htm . Visited 28 July 2006.

[692] *See* UNSCR Res. 867, U.N. SCOR, 48th Sess., UN Doc. S/RES/867 (1993), at paras. 2, 3 & 4; *See* S.C. Res. 867, U.N. SCOR, 49th Sess., U.N. Doc. S/RES/867 (1994), at paras. 5,9,10 & 11. *See* S.C. Res. 964, UN SCOR, 49th Sess., UN Doc. S/RES/964 (1994), at para. 5.

[693] *See* Letter from Kofi Annan, Under-Secretary-General for Peacekeeping Operations, the United Nations, to Major-General Joseph W. Kinzer, Force Commander, UNMIH, subject:General Guidelines for the Force Commander, paras. 5-7 (1 Mar. 1995).

[694] *See* Memorandum from Legal Counsel to the Chairman of the Joint Chiefs of Staff to MG Kinzer, subject: Legal Issues Involving Your Detail as UNMIH Commander (3 Feb. 1995)

[695] *See id.*

interests of both the U.S. and the UN could be honored if communications and legal opinions were crafted with attention to those details. Law and policy precluded Major General Kinzer from signing an employment contract or letter of appointment with the United Nations.[696] The same sources also appeared to prohibit his swearing a loyalty oath to the United Nations.[697] Judge advocates on the joint staff provided timely and accurate advice to Major General Kinzer on this matter and thus prevented an awkward situation from developing.[698] A high level exchange of communications between the United States government and the United Nations subsequently satisfied all parties and cleared the way for Kinzer's assumption of duties.

The UN forces that preceded the Implementation Force (IFOR) in Bosnia had brought a great deal of property into the theater. IFOR took over much of this equipment from the UN pursuant to Section 607 of the Foreign Assistance Act (this Act allows the U.S. and UN to enter into reciprocal support agreements). JAs had to remind commanders that this property was not free. Before agreeing to accept a piece of equipment from the UN, resource managers had to determine that: (1) There was a true need for the property in question; and (2) The cost of reimbursement to the UN would be less than the cost for the U.S. logistical system to acquire or bring the equipment into the theater.[699]

In Kosovo, issues of support to the UN presented themselves in a variety of ways. Often there were direct requests for support from UN representatives; other times, the HQ of the Kosovo Force (KFOR) taskings would contain embedded support requirements. One tasking, which was part of a KFOR and UN Office for Project Services Memorandum of Understanding (MOU), would have required the U.S. to expand the size of the Task Force ammunition holding area to accommodate the requirements of the MOU addressing de-mining activities.[700] Another KFOR tasking would have required

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[696] *See* Message, Office of United States Secretary of State to United States Mission to the United Nations, subject: Military Assistant for United Nations Senior Military Advisor Major General Baril (190153Z Oct 93) ("There is no legal authority that allows U.S. Military Personnel to contract with the UN for the performance of official duties."); UNPA, at § 7 (permitting individuals detailed to the United Nations, on approval of the President, to receive direct payment of allowances and other perquisites); Exec. Order No. 10,206, 3 C.F.R. (1951) (delegating approval authority to the Secretary of Defense); Memorandum, Secretary of Defense, subject: Policy on United Nations (UN) Allowances (27 Jan. 1994) (establishing general policy that unless authorized on a case by case basis, United States personnel may not receive direct supplemental allowances from the United Nations); Memorandum, Secretary of Defense to Secretaries of the Military Departments and Chairman of the Joint Chiefs of Staff, subject: Receipt of UN Allowances and Perquisites by the Commanding General, Military Forces, United Nations Mission in Haiti (UNMIH) (29 Mar. 1995) (authorizing MG Kinzer to receive direct payment from the UN for the purpose of fulfilling UN representational responsibilities, payable based on completion of the representational duties and upon presentation of receipts, but also stating that "[n]o other allowances or perquisites offered by the UN incident to that detail are allowed").

[697] *See* Memorandum, at para 2b

[698] *See id.* .

[699] 1AD-AAR at 50.

[700] *See* Memorandum for Record, Operational Law Attorney, Task Force Falcon, subject: Legal Review of MOU between KFOR and UNOPS (9 Mar. 2000).

Task Force Falcon to transfer C4 explosive, blasting caps, detonation cord, and time fuses on a reimbursable basis to a civilian de-mining organization working under UN guidance.[701] JAs rightly saw these as legally objectionable taskings from KFOR. There were also constant issues over use of dining facilities, medical facilities, and the Army and Air Force Exchange Service (AAFES) by UN workers, particularly Americans working with the UN. UN representatives would often question the Task Force Commander directly on U.S. support.[702] Although an acquisition and cross servicing agreement (ACSA) is authorized by statute,[703] there is no ACSA between the U.S. and the UN, and there is no other source for reimbursement between the UN and the U.S. Army in Kosovo.[704] With no mechanism for reimbursement, UN workers could not just "sign in" to the dining facilities as members of the forces of other countries were allowed to do. USAREUR required UN workers to pay for meals when eating in the U.S. dining facility.[705] Even though some American members of the United Nations Mission in Kosovo Police force (UNMIK-P) stated they were promised medical care at the U.S. facility as part of their employment contract, as a matter of law, U.S. army physicians could only treat UN workers in cases where there was a danger of loss of life, limb, or eyesight. The USAREUR Commander granted UN workers access to AAFES in accordance with AR 60-20.[706]

On September 25, 1991, the UN stepped formally into the Balkans conflict by imposing a weapons and military equipment embargo on all of the former Yugoslavia.[707] In February 1992, the UN Security Council established the United Nations Protection Force (UNPROFOR) as a peacekeeping force for the crisis in the former Yugoslavia. UNPROFOR's mission was to create the conditions for peace and security in the former

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[701] *See* Memorandum, Deputy Legal Advisor, Task Force Falcon, to Assistant Task Force Engineer, Task Force Falcon, subject: Transfer of Explosives to Civilian De-mining Companies (15 Aug. 2000).

[702] *See* E-mail from Legal Advisor, Task Force Falcon, the Chief, International and Operational Law, USAREUR, (20 Sept. 1999).

[703] *See* 10 U.S.C. § 2341-42 (2000)

[704] Support to the UN may be provided in a variety of ways. As mentioned in the text, support may be provided through an ACSA; however, the UN has chosen not to enter into an ACSA with the U.S. Support may be provided through the UN Participation Act, 22 U.S.C. § 287d (2000), which allows the President to authorize personnel, supplies, services, and equipment for non-combat UN activities. Support may be provided through the Foreign Assistance Act, section 607, 22 U.S.C. § 2357 (2000), which allows the U.S. to provide support on an advance of funds or on a reimbursable basis to friendly foreign countries and the UN. Support may also be provided through the Arms Export Control Act, 22 U.S.C. § 2761-62 (2000) and through the Economy Act, 31 U.S.C. § 1535 (2000). None of these provisions were applicable to the UN operations in Kosovo. An outline for fiscal law in military operations is provided in Appendix IV-37. Teaching Outline, General Officer Legal Orientation, MAJ Kevin Walker, Contract and Fiscal Law Department, The Judge Advocate General's School, U.S. Army, Fiscal Law in Military Operations (May 2000).

[705] *See* E-mail from CPT Eric Young, Operational Law Attorney, USAREUR, to CPT Alton L. Gwaltney, III, CLAMO (20 June 2001).

[706] U.S. DEP'T OF ARMY, REG. 60-20, ARMY AIR FORCE EXCHANGE SERVICE OPERATING POLICIES ¶ 2-11(b)(4) (15 Dec. 1992).

[707] UNSCR 713, UN SCOR, 46th Sess., 3009 mtg. at 14, U.N. Doc. S/Res/713 (25 Sep. 1991).

Yugoslavia and assist in the delivery of humanitarian assistance. On April 7, 1992, the UN authorized the full deployment of UNPROFOR, sending approximately 15,000 peacekeeping troops into Croatia, and later into Bosnia Herzegovina (BH) and the Former Yugoslav Republic of Macedonia (FYROM).[708] As the conflict in BH continued unabated, the UN took steps to contain the conflict. UN actions included expanding the troop numbers for UNPROFOR, establishing a no-fly zone over BH,[709] strengthening the existing embargo,[710] and negotiating numerous cease-fire agreements. Heavy fighting continued unabated until November 1995.[711] Finally, in December 1995 the UN passed SCR 1031, giving NATO the peace enforcement mandate, under Chapter VII of the UN Charter,[712] to implement the military aspects of the peace agreement that was reached.

In Iraq, the UN gave support to the rebuilding effort in UNSR 1500,[713] which formally established an Assistance Mission in Iraq. On 19 August 2003, five days after the passage of that resolution, a suicide bomber blew up a cement mixer full of explosives in the U.N. compound in Baghdad, killing, among others, Sergio Vieira de Mello, the UN Secretary General's Special Representative in Iraq.[714] The attack, coupled with another outside the headquarters on 22 September 2003, prompted UN Secretary-General Kofi Annan to pull out all but a skeletal foreign staff from Iraq and re-evaluate foreign missions of the United Nations. It wasn't until January 2004 that UN experts were sent back to Iraq to assist with the limited mission of determining when elections were feasible.[715] The experts agreed with the United States that direct elections in Iraq were not feasible before the planned turnover of sovereignty.[716]

II.R.1. Security Council Resolutions

Under the UN Charter, the Security Council has primary responsibility for maintaining international peace and security. Chapter VII of the United Nations Charter,

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[708] UNSCR 757, UN SCOR, 47th Sess., 3082 mtg.. 14, UN Doc. S/Res/757 (30 May 1992)

[709] UNSCR 781, UN SCOR, 47th Sess., 3122 mtg.. 14, UN Doc. S/Res/781 (9 Oct. 1992). This ban worked after the United States stepped in and said that it would participate in enforcing the nofly zone.

[710] UNSCR 87, UN SCOR, 47th Sess., 3137 mtg.. 14, UN oc. S/Res/787 (16 Nov. 1992).

[711] Examples of aggression included: Serb forces seizing UN weapons from various UN depots; the Bosnian Serbs respondng to NATO airstrikes by taking captive 370 UNPROFOR troops and using them as human shields at potential NATO air strike targets; and the June 2 shooting down of a United State Air Force plane. As a consequence, in June 1995, the NAC approved plans for a NATO-led operation to support the withdrawal of UNPROFOR from BH and Croatia.

[712] UN CHARTER, chapter VII (*See* Appendix E(2)).

[713] UNSCR, UN SCOR, 58th Sess., 4808th mtg., UN Doc. S.RES/1500 (2003).

[714] Dexter Filkins and Richard A. Oppel Jr., *Huge Suicide Blast Demolishes U.N. Headquarters In Baghdad; Top Aid Officials Among 17 Dead,* NY Times, August 20, 2003, at A1.

[715] Warren Hoge, *Annan Signals He'll Agree To Send UN Experts to Iraq,* NY Times, January 20, 2004, at A1.

[716] Steven R. Weisman and Warren Hoge, *U.S. Expected to Ask United Nations to Keep Trying for an Agreement,* NY TIMES, February 21, 2004, at A6.

entitled "Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression," gives the Security Council authority to determine what measures should be employed to address acts of aggression or other threats to international peace and security. UNSCRs have provided the basis for many recent military operations.

Haiti

The series of SCRs addressing the crisis in Haiti put abundant meat on the legal framework justifying the deployment and provided useful guideposts to JAs on the ground. On 31 July 1994 the UNSC cleared the way for an invasion. In Resolution 940, it voted 12 to 0—with two abstentions—to authorize member states to form a multinational force under unified command and control and, in this framework, to use all necessary means to facilitate the departure from Haiti of the military leadership, consistent with the Governors Island Agreement, the prompt return of the legitimately elected President and the restoration of the legitimate authorities of the Government of Haiti, and to establish and maintain a secure and stable environment that will permit implementation of the Governors Island agreement[717] Resolution 944 provided further direction to the MNF and guided the timing of UNMIH's deployment.[718]

Bosnia

Between September 1991, and September 1998, the UNSC adopted 93 resolutions concerning the crisis in the Balkans. An index of these resolutions is available at Appendix E(4) of Law and Military Operations in the Balkans 1995-1998, Lessons Learned for Judge Advocates. This subchapter will focus on those resolutions which heavily influenced the roles of JAs involved in these operations.

In February 1992, the Security Council adopted resolution 743 establishing UNPROFOR and followed with UNSCR 749 authorizing the full deployment of the force on 7 April 1992. The largest, most expensive and complex peace operation in UN history, the force deployed to Croatia, Bosnia-Herzegovina, and the FYROM. Its mandate was to "create conditions of peace and security required for the negotiation of an overall settlement of the Yugoslav crisis."[719]

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[717] UNSCR UN SCOR, 49th Sess., S/RES/940 (1994).

[718] *See* UNSCR UN SCOR, 49th Sess., 34230th mtg., at paras. 1 & 2, U.N. Resolution provided additional guidance for the MNF.

[719] *See* UN Dep't of Public Information, *UN Protection Force, Former Republic of Yugoslavia* 1-2 (Sept. 1996), *at* http://www.un.org/Depts/DPKO/Missions/unprof_b.htm. On 11 December 1992 UNSCR 795 authorized the establishment of the force's presence in FYROM. UNPROFOR's mandate was extended by subsequent resolutions through March 1995. The U.S. contribution to UNPROFOR was called Task Force Able Sentry (TFAS), which was established on 12 July 1993 at Camp Able Sentry (CAS), FYROM. On 31 March 1995, in UNSCR 983, the UNSC again extended the mandate of UNPROFOR, but determined that the force in FYROM would be thereafter known as the UN Preventive Deployment Force (UNPREDEP). This force's mandate was similar to that of its predecessor, namely, "to monitor and report any developments in the border areas, which could undermine confidence and stability in the FYROM and threaten its territory."

On July 13, 1992, the Security Council adopted Resolution 764, which reaffirmed that all parties to the Yugoslav conflict must comply with international humanitarian law, particularly the 1949 Geneva Conventions. It also stated that all persons who commit or order the commission of grave breaches of those conventions are individually responsible for war crimes.[720] This had no practical effect and continued allegations of widespread torture and killing prompted the United Nations Security Council on October 6, 1992 to ask the Secretary General to establish a Commission of Experts to investigate the alleged war crimes.[721] The Secretary General established a five member Commission that began investigating allegations in November 1992.

Despite diplomatic efforts, including numerous SCRs, the fighting continued throughout the early 1990s in the Former Yugoslavia. On November 21, 1995, the parties – The Republic of Bosnia and Herzegovina, the Republic of Croatia, and the Federal Republic of Yugoslavia initialed the Dayton Peace Accords and on December 14, 1995, formally signed the General Framework Agreement for Peace (GFAP).

The following day, the UN passed SCR 1031, giving NATO the peace enforcement mandate, under Chapter VII of the UN Charter, to implement the military aspects of the Peace Agreement. On December 16, 1995, the NATO-led Implementation Force ("IFOR") began Operation Joint Endeavor—the deployment of what would be, by February 1996, a 60,000 member multinational force with troop contributing nations from all 16 NATO allies and 18 non-NATO countries, including Russia. The mandate authorized IFOR to take all necessary measures to effect the implementation of and to ensure compliance with Annex 1-A of the Peace Agreement (Dayton Accords). The resolution also authorized all measures to assist IFOR and authorized IFOR to defend itself from attacks or threats of attacks. Resolution 1031 provided for the transfer of authority from UNPROFOR to IFOR. The Council decides to establish the Implementation Force for one year. UNSCR 1088 December 12, 1996 authorizes the IFOR follow-up: the Stabilization Force.

Kosovo

In the mid 1990s, the Kosovo Liberation Army (KLA) and other ethnic Albania groups, sporadically attacked Serbian police and civilians in Kosovo. In response, the Federal Republic of Yugoslavia (FRY) police and Serbian military forces began violent crackdowns against ethnic Albanians. Amid the unearthing of evidence of additional massacres and the continued rejection of peace overtures by Milosevic, the UN Security Council (UNSC) adopted UNSCR 1199 on 23 September 1998. [722] The resolution called

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[720] UNSCR UN SCOR, 47th Sess., 3093 mtg., UN Doc. S/Res/764 (13 Jul. 1992).

[721] UNSCR 780, UN SCOR, 47th Sess., 3119 mtg., UN Doc. S/Res/780 (6 Oct. 1992).

[722] UNSCR 1199, UN SCOR, UN Doc. S/RES/1199 (1998), *available at* http://www.un.org./Docs/scres/1998/98sc1199.htm [hereinafter UNSCR 1199]. The UNSC acted pursuant to its authority under Chapter VII of the UN Charter, and the vote was unanimous, with China abstaining. In addition to UNSCR 1199, the Security Council responded to the violence in Kosovo by adopting resolutions1160 (determining that the situation in Kosovo constituted a threat to international peace and

for an immediate cease-fire, an international presence, and the immediate withdrawal of Serbian troops from within Kosovo.[723] Tensions began to rise again after the Serb massacre of 45 Albanians in the village of Racak in January 1999.

In passing UNSCR 1244, the UNSC formally declared its adoption of the general principles upon which the political solution to the Kosovo crisis would be based[724] and announced its decision to deploy an international civil presence and an international security presence under UN auspices within Kosovo. The international civil presence was entitled the United Nations Interim Administration Mission in Kosovo (UNMIK), and the international security presence was known as KFOR. UNSCR 1244, enacted on 10 June 1999, provided the framework for the mission in Kosovo. The resolution delineated the responsibilities of the "international security presence" (KFOR) as well as the responsibilities of the "international civil presence" (The United Nations mission in Kosovo) (UNMIK).

Afghanistan

From the mid-1990s the Taliban regime in Afghanistan provided sanctuary to Osama bin Laden, a Saudi national who had fought with the mujahidin against the Soviets, and provided a base for his al Qaeda terrorist network. The UN Security Council repeatedly sanctioned the Taliban for these activities.[725] The al Qaeda network was responsible for the horrific and unforgettable terrorist attacks on September 11, 2001. At the urging of the United States, two UN Security Council Resolutions followed in rapid succession after the September 11 attacks.[726] Resolution 1368 condemned the "horrifying terrorist attacks" and recognized "the inherent right of individual or collective self-defense in accordance with [Article 51] of the Charter." In Resolution 1373, the Security Council "Reaffirm[ed] the need to combat *by all means*, in accordance with the Charter of the United Nations, threats to international peace and security caused by terrorist acts." This resolution called on all States to prevent and suppress financing of terrorist acts and to freeze funds and other assets of persons who commit, or attempt to

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security and condemning the excessive force by Serbian police and all acts of terrorism by the KLA), and 1203 (endorsing the October 1998 cease-fire agreement and further condemning all acts of violence and terrorism).

[723] UNSCR 1199.

[724] The general principles included, among others: an immediate and verifiable end of the violence and repression in Kosovo; withdrawal of all FRY military, police, and paramilitary forces; deployment of effective international civil and security presences, and substantial NATO participation in such presences along with unified command and control; establishment of an interim administration as directed by the UNSC; the safe and free return of all refugees and displaced persons; a political process providing for both substantial self-government in accordance with the Rambouillet Accords and the demilitarization of the KLA; and a comprehensive approach to the economic development and stabilization of the region. UNSCR 1244, at annexes 1-2; Background to the Conflict, at 2.

[725] *See, e.g.,* UNSCR 1267, UN SCOR, 54th Sess., 4051st mtc., UN Doc. S/RES/1267 (1999); UNSCR , UN SCOR, 55th Sess., 4251st mtg., UN Doc. S/RES/1333 (2000).

[726] UNSCR 1368, UNSCR, UN SCOR, 56th Sess., 4385th mtg. UN Doc S.Res/1373 (2001) [hereinafter S.C. 1373].

commit, terrorist acts or participate in or facilitate the acts. The resolution also called on all States to prohibit their nationals or persons within their territories from making funds and other assets available for the benefit of terrorists.[727]

After U.S. led Coalition forces drove the Taliban regime from power in Afghanistan, the UNSC adopted Resolution 1386, authorizing the presence of an International Security Assistance Force (ISAF) under Chapter VII of the UN Charter.[728] The ISAF's mandate included taking "all necessary measures" to create a secure environment in Kabul and its surrounding areas. Resolution 1386 authorized the establishment of an International Security Assistance Force (ISAF) to assist the Afghan Interim Authority. Additionally, this Resolution authorized member states participating in the ISAF to "take all necessary measures to fulfill its mandate..." The period May 2003 to June 2004 saw a change in its command, as well as increases in its mandate, activities, and composition. On 11 August 2003, the conduct of the ISAF mission became the responsibility of the North American Treaty Organization (NATO), the first time NATO had conducted an operation outside of Europe. [729] Originally limited to providing security in Kabul, the ISAF's mandate was broadened two months later on 13 October 2003 by UNSC Resolution 1510 to include the rest of Afghanistan and additional tasks. Specifically, the resolution authorized: expansion of the mandate of the [ISAF] to allow it . . . to support the Afghan Transitional Authority and its successors in the maintenance of security in the areas of Afghanistan outside of Kabul and its environs, so that the Afghan Authorities as well as the personnel of the [U.N.] and other international civilian personnel engaged, in particular, in reconstruction and humanitarian efforts, can operate in a secure environment, and to provide security assistance for the performance of other tasks in support of the Bonn Agreement.[730]

Iraq

The UN Security Council involvement in resolutions leading up to Operation Iraqi Freedom are fully covered in section II.M.5 of this compendium under the subchapter pertaining to the legal basis for conducting operations.

II.R.2. UN Reports

In an interim report published within four months of the date of its establishment, the UNCommission of Experts concluded that grave breaches— such as willful killing, "ethnic cleansing," mass killings, torture, rape—and other crimes had been committed in the Former Yugoslavia. In response, the Security Council on February 22, 1993, decided

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[727] http://www.globalsecurity.org/military/agency/dod/jtf-180.htm (last visited 14 Mar. 2005).

[728] UNSCR 1368.

[729] International Security Assistance Force – ISAF, *at.* http://www.afnorth.nato.int/ISAF/Backgrounders/BackWhatisISAF.htm (last visited 9 Aug. 2006).

[730] UNSCR 1510, UN SCOR, 58th Sess., 4840th mtg., UN Doc. S.RES/1510 (2003).

to establish an international tribunal to prosecute the offenders,[731] called the International Criminal Tribunal for Former Yugoslavia (ICTY). On May 25, 1993, the Security Council, acting pursuant to Chapter VII of the U.N. Charter, formally established the tribunal and enacted the tribunal's constitutive statute.[732] On February 11, 1994, pursuant to Article 15 of the statute, the eleven appointed judges of the newly established Tribunal adopted rules of procedure and evidence.[733] The rules of international law that apply in conflict vary depending on whether the conflict is international or internal in nature.

While this distinction is important in several respects, it is most important in terms of this discussion because the concept of individual responsibility for grave breaches of humanitarian law does not extend to internal armed conflict. While a general duty exists among the parties to suppress violations of humanitarian law, no specific duty exists to punish individuals responsible for the commission of such violations.[734] Stated simply, in order for the tribunal to acquire jurisdiction to try individuals for "grave breaches" such as willful killing, torture, or willfully causing great suffering, it would first have to make a determination that the conflict was international and not internal in nature.

While space precludes this report from examining each aspect of this question, the Commission of Experts concluded that "the character and complexity of the armed conflicts concerned, combined with the web of agreements on humanitarian issues the parties have concluded among themselves, justify an approach whereby [the Commission] applied the law applicable to international armed conflicts to the entirety of the armed conflicts in the territory of the former Yugoslavia.[735] In reaching this conclusion, the Commission placed great emphasis on a series of agreements entered into by the principle parties to the conflicts. The United Nations admitted these parties to membership in the United Nations by resolutions adopted in May 1992.[736] The Republic of Slovenia, the Republic of Bosnia and Herzegovina, and the Republic of Croatia, entered into a series of agreements brokered by the ICRC. In the Croatian conflict for example, the parties agreed to apply the Geneva Conventions and Additional Protocol I in

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[731] UNSCR 808, UN SCOR, 48th Sess., 3175 mtg., UN Doc. S/RES/808 (22 Feb. 1993). The report was submitted to the Security Council.

[732] UNSCR 827, UN SCOR, 48th Sess., 3175 mtg., UN Doc. S/RES/827 (25 May. 1993).

[733] INTERNATIONAL TRIBUNAL FOR THE PROSECUTION OF PERSONS RESPONSIBLE FOR SERIOUS VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW COMMITTED IN THE TERRITORY OF THE FORMER YUGOSLAVIA SINCE 1991: RULES OF PROCEDURE AND EVIDENCE, UN Doc. IT (adopted 11 Feb. 1994, entered into force 14 Mar. 1994) (reprinted in 33 I.L.M. 484-554 (1994)).

[734] *See generally* preliminary remarks of the International Committee of the Red Cross to UNSCR at 2. Page 54 of ICTY Paper, The International Criminal Tribunal for the Former Yugoslavia.

[735] UN Doc. S/25274 at 14. ICTY Paper, at 54.

[736] G.A. Res. 236, 237, and 238, UN GAOR, 46th Sess., UN Docs. A/RES/236,237,238 (adopted 22 May 1992).

their entirety.[737] Included in this agreement were provisions concerning individual criminal responsibility for grave breaches.

Agreements concerning conflicts in Bosnia-Herzegovina, however, were less extensive and, while they provided for punishment of violations, they excluded the concept of individual criminal responsibility.[738] Despite the determination of the Commission, the applicability and enforceability of these agreements remains in doubt. The few decisions rendered by the Tribunal have failed to shed much light on the issue of the enforceability of the agreements. Neither, unfortunately, has the Tribunal resolved the question of jurisdiction as it relates to the nature of the conflict. In its August 1995 decision on defense motions contesting the jurisdiction of the court in the case versus Dusan Tadic, the Tribunal made no finding regarding the nature of the armed conflict in question. Rather, the Tribunal took a much narrower approach, holding that the requirement of international armed conflict does not appear on the face of Article 2, which confers subject matter jurisdiction to prosecute grave breaches of the Geneva Conventions.[739]

[737] Addendum (23 May 1992) to the Memorandum of Understanding (27 Nov. 1991). ICTY Paper, at 54.

[738] Letter from Canada to the UN pursuant to UNSCR (1992) and 780 (1992) concerning Human Rights Violations in Yugoslavia, UN Doc. S/25392, at 30 (9 Mar. 1993).

[739] UN International Criminal Tribunal for the Former Yugoslavia, Prosecutor Against Dusko Tadic, Case No. IT-94-I-T, Decision on the Defense Motion on the Jurisdiction of the Tribunal.

II.S. WAR CRIMES

Many of the conflicts that will involve the United States Army over the next 20 years will be rooted in ethnic, religious or cultural causes. War crimes and the apprehension of those suspected of committing such atrocities will continue to be a major issue for judge advocates to address. While there are many legal issues that arise in the overall category of war crimes, there are two of particular concern in this discussion. The first concerns the legal authorities under which war crime tribunals are constituted, and the second involves issues connected with the apprehension and detention of alleged war criminals.

Legal authority to address war crimes and jurisdiction

The rules of international law that apply in conflict can vary depending on whether the conflict is international or internal in nature. While this distinction is important in several respects, it is most important in terms of this discussion because the concept of individual responsibility for grave breaches of humanitarian law does not extend to internal armed conflict. While a general duty exists among the international community to suppress violations of humanitarian law, no specific duty exists to punish individuals responsible for the commission of such violations.[740] Stated simply, in order for an international tribunal to acquire jurisdiction to try individuals for "grave breaches" such as willful killing, torture, or willfully causing great suffering, it would first have to make a determination that the conflict was international and not internal in nature. In the Balkans conflict, a Commission of Experts concluded that "the character and complexity of the armed conflicts concerned, combined with the web of agreements on humanitarian issues the parties have concluded among themselves, justify an approach whereby [the Commission] applied the law applicable to international armed conflicts to the entirety of the armed conflicts in the territory of the former Yugoslavia."[741]

In reaching this conclusion, the Commission placed great emphasis on a series of agreements entered into by the principal parties to the conflicts. The United Nations admitted these parties to membership in the United Nations by resolutions adopted in May 1992.[742] The Republic of Slovenia, the Republic of Bosnia and Herzegovina, and the Republic of Croatia entered into a series of agreements brokered by the International Committee for the Red Cross (ICRC). In the Croatian conflict, for example, the parties agreed to apply the Geneva Conventions and Additional Protocol I in their entirety.[743] Included in this agreement were provisions concerning individual criminal responsibility

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[740] *See generally* preliminary remarks of the International Committee of the Red Cross to U.N.S.C. Res. 808, at 2. Page 54 of ICTY Paper, The International Criminal Tribunal for the Former Yugoslavia.

[741] U.N. Doc. S/25274 at 14. ICTY Paper, at 54.

[742] GA. Res. 236, 237 and 238, U.N. GAOR, 46th Sess., U.N. Docs. A/Res/236,237,238 (adopted 22 May 1992).

[743] Addendum (23 May 1992) to the Memorandum of Understanding (27 Nov. 1991), ICTY Paper, at 54.

for grave breaches. Agreements concerning conflicts in Bosnia-Herzegovina, however, were less extensive and, while they provided for punishment of violations, they excluded the concept of individual criminal responsibility.[744] Despite the determination of the Commission, the applicability and enforceability of these agreements remains in doubt. The few decisions rendered by the Tribunal have failed to shed much light on the issue of the enforceability of the agreements. Neither, unfortunately, has the Tribunal resolved the question of jurisdiction as it relates to the nature of the conflict.

In its August 1995 decision on defense motions contesting the jurisdiction of the court in the case versus Dusan Tadic, the International Tribunal for the former Yugoslavia made no finding regarding the nature of the armed conflict in question. Rather, the Tribunal took a much narrower approach, holding that the requirement of international armed conflict does not appear on the face of Article 2, which confers subject matter jurisdiction to prosecute grave breaches of the Geneva Conventions.[745] The foregoing discussion does not mean that judge advocates need to know the nuances of the international justice system or the intricacies of international law as it relates to the inner-workings of such a tribunal. It does illustrate that topics such as the Law of War and the Geneva Conventions, which some believe are inapplicable or outdated, remain as important as ever—even in peacekeeping operations.

Apprehension of Alleged War Criminals

As a party to the Geneva Conventions, the United States has a responsibility to search for persons who have committed grave breaches of the Conventions and to prosecute them, regardless of nationality.[746] The chief means by which the United States fulfills this responsibility is by three domestic mechanisms that allow prosecution of war crime suspects: general courts-martial,[747] military commissions,[748] and federal courts.[749]

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[744] Letter from Canada to the U.N. pursuant to U.N.S.C. Res. 771 (1992) and 780 (1992) concerning Human Rights Violations in Yugoslavia, U.N. Doc. S/25392, at 30 (9 Mar. 1993).

[745] U.N. International Criminal Tribunal for the Former Yugoslavia, Prosecutor Against Dusko Tadic, Case No. IT-94-I-T, Decision on the Defense Motion on the Jurisdiction of the Tribunal.

[746] Geneva Convention for the Amelioration of the Conditions of the Wounded and Sick in Armed Forces in the Field, art. 49, Aug. 12, 1949, 6 U.S.T. 3114; Geneva Convention for the Amelioration of the Conditions of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, art. 50, Aug. 12, 1949, 6 U.S.T. 3217; GPW, art. 129.

[747] 10 U.S.C. § 818 (2000) (UCMJ art. 18). To invoke this provision; however, the suspect must be subject to the Uniform Code of Military Justice. UCMJ jurisdiction. For a general discussion of forum selection issues *see* THE JUDGE ADVOCATE GENERAL'S DEPARTMENT, UNITED STATES AIR FORCE, AIR FORCE OPERATIONS AND THE LAW: A GUIDE FOR AIR AND SPACE FORCES, 1st ed., 144-146 (2002).

[748] 10 U.S.C. § 821 (2000) (UCMJ art. 21) (authorizes the use of military commissions, tribunals or provost courts).

[749] War Crimes Act of 1997 (18 U.S.C. § 2401) (grants federal courts jurisdiction to prosecute any person inside or outside the United States for war crimes where a U.S. national or a member of the U.S. armed forces is either the accused or the victim). Generally, this would be the appropriate U.S. forum for persons

Alternatively, the United States may assist in the prosecution of war crimes suspects at an international tribunal.[750]

DoD Directive 2311.01E sets out responsibilities for the reporting and investigation of possible, suspected or alleged violations of the law of war.[751] The directive delegates responsibility for DoD-wide reporting and investigation policy to the Secretary of the Army. Combatant Commanders are responsible for ensuring that investigations and reporting requirements are completed. The directive specifically defines a reportable incident as "A possible, suspected, or alleged violation of the law of war, for which there is credible information, or conduct during military operations other than war that would constitute a violation of the law of war if it occurred during an armed conflict."[752]

Pursuant to Army policy, the U.S. Army Criminal Investigation Division (CID) has investigative jurisdiction over suspected war crimes in two instances. The first is when the suspected offense is a violation of the UCMJ.[753] The second is when the Department of the Army Headquarters directs the investigation.[754] War crimes investigations can also be conducted with organic unit assets and legal support, using Army Regulation 15-6. Finally, a commander may also have Reserve Component Judge Advocate General Service Organization (JAGSO) teams available to assist in the investigation. JAGSO teams perform judge advocate duties related to international law, including the investigation and reporting of violations of the law of war, the preparation for trials resulting from such investigations, and the provision of legal advice concerning all operational law matters.[755]

In early 2002, the Secretary of Defense gave the Secretary of the Army overall responsibility for the investigation of suspected war crimes and acts of terrorism. In turn, the Secretary of the Army directed that CID exercise overall investigative responsibility. CID established the Criminal Investigation Task Force (CITF) to conduct worldwide criminal investigations to substantiate or dismiss alleged or suspected war crimes or acts of terrorism.

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not subject to UCMJ jurisdiction, although additional considerations would be necessary for a non-U.S. suspect apprehended in the U.S. when the alleged crimes did not involve any U.S. nationals.

[750] For example, through an ad hoc tribunal such as the International Criminal Tribunal for the Former Yugoslavia, created 25 May 1993 by S.C. Res. 827, U.N. SCOR, 47th Sess., 3217th mtg., U.N. Doc. S/Res/827 (1993).

[751] DoD DIR. 2311.01E DoD LAW OF WAR PROGRAM, May 9 2006.

[752] *Id.* para 3.2.

[753] U.S. DEP'T OF ARMY, ARMY REGULATION 195-2, CRIMINAL INVESTIGATION ACTIVITIES, app. B (30 Oct. 1985).

[754] *Id.* para. 3-3a(7).

[755] CPA Memo No. 3, sec. 1.

Judge Advocates will be required to support the War Crimes Investigation Unit (WCIU). During OIF, primary responsibility for the investigation of alleged war crimes for the Theater was assigned to the War Crimes Investigation Unit (WCIU), 3d Military Police (CID) Group. Based in Kuwait, its role was to investigate and prepare cases for the prosecution of all war crimes, crimes against humanity, and atrocities committed by the former Iraqi regime.[756] In early April 2003, four JAs formed the legal support cell to the WCIU. The major tasks they undertook during the first month in that role included:

- Drafting a field guide of substantive war crimes offenses to assist CID;
- Investigative and legal guidance in high profile matters including the ambush and subsequent treatment of members of 507th Maintenance Company, and crimes by the "55 Most Wanted"
- Leading and coordinating investigative efforts in An Nasiriyah, Iraq that ultimately led to the identification and detention of several potential war crimes suspects; and
- Providing guidance on the investigation of mass gravesites.

There were several challenges to the effectiveness of the WCIU in this early stage. First, it was not clear in which forum any potential suspect would eventually be prosecuted. Accordingly, the JAs were required to provide legal guidance without the benefit of knowing either the precise elements of offenses or the particular evidentiary requirements. The approach taken by the WCIU was to use the offenses drafted for the military commissions as guidance, as these were unique to the war crimes environment.[757] However, the WCIU JA felt that the lack of jurisdictional certainty detracted from the effectiveness of investigations. Resolving the question of forum needs to be a high priority for JAs assigned to future WCIUs. A practical challenge for the legal support cell was integration into the CID structure. The WCIU was essentially a CID activity and the existing CID structure of field agents and case managers did not anticipate close interaction between CID and JAs during the investigation phase. Rather, there was an expectation that the role of the JA would be purely to review the material collected once the investigation was complete.[758] JAs should be aware of this expectation when determining the best way to liaise with CID. The effectiveness of the WCIU was also constrained by outside influences. Its location outside Iraq made it difficult to influence high-level decision-making on war crimes issues, and to contact witnesses and collect evidence. Resource constraints affected the speed with which investigative leads could be pursued. Accordingly, while the WCIU had primacy over investigations in theory, other units formed their own war crimes investigation teams.[759] While these factors are frustrating, JAs should always be prepared for less than ideal conditions and plan accordingly.

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[756] 5th Group AAR, p.132 .

[757] 12th LSO AAR.

[758] *Id.*

[759] *Id.*

Unauthorized Individual Soldier Actions

A unique situation arose during the Haiti operation involving the issue of whether a soldier's personal interpretation of broad policy pronouncements about human rights violations or his own religious and philosophical views could justify disregard of command orders. They cannot.

The accused was United States Army Captain Lawrence Rockwood, a counterintelligence officer assigned to the 10th Mountain Division with place of duty in Haiti at the Combined Joint Task Force 190 Headquarters, located in the Light Industrial Complex in Port-au-Prince.[760] On the evening of 30 September 1994, Captain Rockwood was scheduled for duty as the senior officer in charge of the J-2 Counter-Intelligence Human Intelligence Cell in the Headquarters. A perimeter wall surrounded the secure compound that included the Headquarters, and security guards imposed on those seeking to leave the compound a minimum of two vehicles per convoy and two persons per vehicle. Captain Rockwood, armed with a loaded M-16 rifle, avoided the security guards by jumping over the perimeter wall. Then he traveled about six kilometers to the National Penitentiary, where Haitian authorities remained responsible for the prisoners, and demanded entry. After learning that Captain Rockwood was making an unannounced appearance at the prison, Major Lane, the military attaché at the United States embassy, went to the prison in order to prevent an altercation. Captain Rockwood then insulted Major Lane and denounced the chain of command, claiming that President Clinton's televised speech on 15 September gave him authority to prevent human rights abuses. About two hours later, Major Lane succeeded in calming Captain Rockwood down, convinced him to unchamber the round in his rifle, and got him to leave the prison.

The charges consisted of failure to go to his place of duty at the Headquarters on the evening of 30 September; violation of an order not to leave the compound without the proper convoy; dereliction in performance of the duty to leave only in a proper convoy; going from his place of duty at the hospital ward to which he was taken after leaving the prison; disrespect to Lieutenant Colonel Bragg, whom he confronted and shouted down after leaving the hospital; disobedience to Lieutenant Colonel Bragg, who repeatedly had ordered him to "stop talking," and to "lower his voice" during the post-hospital confrontation; and conduct unbecoming an officer and gentleman for the entire course of events leading up to his departure from the prison. On 14 May 1995, a general court-martial at Fort Drum, New York, found Captain Rockwood guilty of all but two charges pertaining to the convoy procedures. It sentenced him to dismissal and total forfeiture of pay and allowances.

CPT Rockwood's case is instructive, and its facts and legal principles bear emphasis with deploying soldiers. The transcript of Captain Rockwood's May 1995 statement before a Congressional subcommittee, is reprinted at *Appendix V* of the

[760] Unless otherwise noted, the information in this paragraph and the two following it is based upon the 14 volume record of trial of United States v. Rockwood (10th Mountain Div. 22 Apr. & 8-14 May 1995).

CLAMO publication on *Law and Military Operations in Haiti 1994-95*. It contains many of the arguments the accused and counsel forwarded at his court-martial. Appendix V also reprints contrasting testimony from a retired judge advocate Colonel, who provided the subcommittee a well-reasoned summary of why, in the end, Captain Rockwood's affirmative defenses of duress and justification failed.

III. ADMINISTRATIVE LAW

III.A. AAFES / MCCS

Whenever the Force remains deployed for any significant length of time AAFES is sure to follow in short order. As soon as the first field exchange is established, the issue of access to exchange facilities by non-DoD personnel will present itself.[1] Fortunately however, Army Regulations 60-10 and 60-20, as well as Marine Corps Order P1700.27A, address this issue in great detail. In addition to these regulations, the judge advocate needs to remember to examine applicable status of forces agreements and contracts[2] which may address access to exchange facilities. As with many other administrative law issues, preparing for this issue prior to deployment by establishing clear guidance and policies in advance will prevent judge advocates from being distracted by this issue during operations.

Other issues associated with military exchanges that should be anticipated include dealing with AAFES or MCCS complaints of competition from local vendors who may have gained access to forward operating bases prior to AAFES or MCCS, as well as the level of support units will provide to exchange activities in remote locations.[3] In Iraq and Afghanistan these issues were resolved by executing memorandums of understanding with the respective exchange systems outlining the procedures to be followed when these circumstances arise.[4]

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[1] *See , Law and Military Operations in Haiti 1994-1995: Lessons Learned for Judge Advocates* at 407, [hereinafter HAITI LESSONS LEARNED]; *Law and Military Operations in The Balkans 1995-1998: Lessons Learned for Judge Advocates* at 184 [hereinafter BALKANS LESSONS LEARNED]; *Law and Military Operations in Central America: Hurricane Mitch Relief Efforts, 1998-1999 Lessons Learned for Judge Advocates* at 91 [hereinafter MITCH LESSONS LEARNED]; *Law and Military Operations in Kosovo: 1999-200: Lessons Learned for Judge Advocates* at 159 [hereinafter KOSOVO LESSONS LEARNED].

[2] Be vigilant for contract terms for locally hired employees which may conflict with Service regulations and status of forces agreements. *See,* BALKANS LESSONS LEARNED at 184.

[3] *See,* Legal Lessons Learned from Afghanistan and Iraq: Volume II at 236.

[4] *Id.*

III.B. ARTIFACTS AND WAR TROPHIES

From the first Center for Law and Military Operations (CLAMO) publication through the most recent, one of the most consistently reported after action items within the administrative law discipline is handling the seemingly insatiable desire to collect and take home either unit historical artifacts[5] or war trophies. How many times have deployed judge advocates heard something like the following: *Judge, the boss wants to take home some AKs and RPG launchers. Make it happen and make sure we're all legal on this one.* The confusion and consternation created by lack of clear policy on retention of either historical artifacts and/or war trophies prior to unit redeployment is well documented each time a unit returns from an operational deployment.[6]

III.B.1. Background

The rules on retention of enemy property as souvenirs generally can be classified into two broad categories, each with its own separate regulatory scheme: (1) historical artifacts; and (2) war trophies. Two Army regulations, AR 870-29, *Historical Activities: Museums and Artifacts*, and AR 608-4, *Control and Registration of War Trophies*, address obtaining artifacts. These regulations are further modified by theater, country and command specific orders and policies. Such local guidance is often published in fragmentary orders (FRAGOs). Judge Advocates are often involved in staffing and providing advice on the application or develop of local policy in this area. As such, Staff Judge Advocates anticipating deployment orders should ensure that their administrative law section is familiar with the underlying regulations and have collected the appropriate theater specific policies or FRAGOs ahead of deployment. After deployment, judge advocates should remain engaged in the process and advise their commanders to begin the process early if there is a desire to bring historical artifacts back upon redeployment.

Each theater of operation brings its own challenges that will continue to evolve as the theater matures. Notwithstanding, judge advocates can expect to encounter the following issues:

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[5] U.S. DEP'T OF ARMY, REGULATION 870-20 ARMY MUSEUMS, HISTORICAL ARTIFACTS, AND ART, glossary at 45 (11 January 1999) [hereinafter AR 870-20], defines an historical artifact as follows: Any object that has been designated by appropriate authority as being historically significant because of its association with a person, organization, event, or place, or because it is a representative example of military equipment that has been accessioned into the Army Historical collection. Artifacts will cease to perform their original function. *See also,* U.S. MARINE CORPS, ORDER P5750.1G W/ CH 1 para. 4006.2.a. (28 Feb. 1992) [hereinafter MCO P5750.1G] which defines historical artifacts in part as, specimens of enemy material which may have historic value. Such items might include battle-damaged equipment, maps and orders showing evidence of battlefield use, and other battlefield objects that will best delineate the nature of the enemy, or the characteristics of the operations in which Marine units are engaged.

[6] *See,* HAITI LESSONS LEARNED at 127; BALKANS LESSONS LEARNED at 355-372; KOSOVO LESSONS LEARNED at 146; Legal Lessons Learned from Afghanistan and Iraq, Volume *I* at 194-200; Legal Lessons Learned from Afghanistan and Iraq: Volume I at 243-249.

(a) Customs Regulations. Judge advocates must be familiar with the US customs regulations or those of the nation where the unit's home station is located (for example, Germany). Items that may be taken as a war trophy under service regulations or the law of war may nonetheless violate custom regulations. Soldiers redeploying are not exempt from customs regulations nor are commanders authorized to permit exceptions to customs regulations even when using military transport to military bases.

(b) Numerous Requests. Judge advocates should anticipate numerous requests by individual units to bring back items as historical items. Many items of interest will not be eligible for a variety of reasons. As staffing is time consuming and the approval processing slow, JAs will best serve their commanders by being aware of current policies as they relate to the processing of historical artifact requests.

(c) Lawful War Trophies & Artifacts. Judge advocates must understand what may or may not be seized as a war trophy under the laws of war.

(d) Expect Lengthy Delays in Processing. Requests for approval for a unit to redeploy with a historical artifact are slow. As such, judge advocates should be proactive in encouraging their commands to submit such requests early in the deployment and to educate their commanders on what is likely to be approved.

III.B.2. Discussion

(a) In Bosnia, General Order I and Commander Stabilization Force (COMSFOR) General Order I contained provisions concerning the acquisition of public and/or private property and "war trophies." Commanders had to consult and comply with the provisions of these General Orders as well as U.S. law and military regulations regarding the importation of firearms, ordnance, and other dangerous items. General Order I prohibited individual members of the Stabilization Forces (SFOR) from taking, possessing, or shipping captured or confiscated public or private property (to include weapons seized in the course of military operations) for personal and/or private use. It also prohibited all personnel participating in the SFOR mission from importing, exporting, purchasing, or possessing weapons, ammunition, or ordnance (other than those officially issued) while in the SFOR theater of operations (TO). As an exception to this rule, units could retain property other than firearms or ammunition obtained during the course of military operations within the SFOR TO as unit "historical artifacts." Guidance on historical artifacts was provided by higher headquarters.

(b) Both AR 870-29, *Historical Activities: Museums and Artifacts*, and AR 608-4, *Control and Registration of War Trophies*, address obtaining artifacts, however, these two regulations do not provide specific guidance for retaining property confiscated during peacekeeping operations as historical artifacts. In Kosovo, this regulatory gap was addressed by local commanders in consultation with the Center for Military History (CMH). After discussion with CMH, United States Army, European Command (USAREUR) decided the best approach was to submit requests from the Task Force,

through the chain of command, to USAREUR for review and recommendation. USAREUR then forwarded the requests to the CMH for action as an exception to the current policy. Because of the sensitive nature of these requests, the CMH decided to forward all requests to the Vice Chief of Staff of the Army for review.[7]

Processing unit requests to retain seized items for historical purposes consumed JAs' time on each of the first four rotations to Kosovo. Marines in Kosovo during the first month of the operation were unable to resolve the issue prior to redeployment.[8] At the Task Force level, JAs were responsible for drafting and disseminating the implementing procedures of the USAREUR policy. In conjunction with the Assistant Chief of Staff, G4 (Logistics) (G-4), JAs detailed the internal procedures for requests in a FRAGO to units in the Task Force.[9] Exceptions to the policy were processed slowly. The Task Force did not receive a final decision on the requests until nine months after they were submitted. By that time, the units were out of Kosovo and providing the historical items to the units became extraordinarily difficult.

(c) Disposition of enemy military property became a major issue for JAs in both Operation Enduring Freedom (OEF) and Operation Iraqi Freedom (OIF). Units and individual service members wanted to retain such property as either artifacts or war trophies, respectively. Judge advocates needed to be prepared to provide detailed advice and guidance on processing unit historical artifacts. In the Army, the CMH has overall responsibility for the designation and recovery of historical artifacts in contingency operations.[10] Generally, the CMH deploys military and civilian personnel to recover historical artifacts.[11] The recovery team is responsible for identifying, collecting, registering, and returning to the United States all significant historical artifacts, in coordination with unit commanders.[12] In the Marine Corps, commanders in the field and their supporting legal advisors coordinate with the Marine Corps Museums Branch

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[7] *See* E-mail from John Alva, USAREUR, ODCSLOG, to MAJ Steve Russell, XO, 1-26 Infantry (30 May 2000).

[8] All information on Marine Corps operations in Kosovo was obtained from Memorandum, Staff Judge Advocate, 26th Marine Expeditionary Unit (MEU) (SOC), to Commanding Officer, 26th MEU (SOC), subject: Quick Look After Action Report Joint Guardian (18 July 1999) ¶ 4, [hereinafter MEU AAR].

[9] *See* KOSOVO LESSONS LEARNED, *supra,* note 1, at Appendix IV-32.

[10] The Army defines the term "historical artifact" as follows: Any object that has been designated by appropriate authority as being historically significant because of its association with a person, organization, event, or place, or because it is a representative example of military equipment that has been accessioned into the Army Historical Collection. Artifacts will cease to perform their original function. AR 870-20, Para. 1-4(b),

[11] *Id.* para. 4-4(a). Local commanders are responsible for providing force protection and support services to these individuals. *Id.* para. 4-4(b).

[12] *Id.* para. 4-4(e). The specific Customs and Border Protection procedures for importing historical artifacts into the United States are outlined in an e-mail from Robert J. Colbert, Bureau of Customs and Border Protection, to LtCol Laulie Powell, U.S. Marine Corps Forces Central Command (MARCENT), subject: Information: War Trophies Point of Contact with Customs and Border Protection (13 May 2003).

Activity, Marine Corps Combat Development Command, who is responsible for designating captured enemy material as historical artifacts.[13]

During OEF, units were required to request permission through their Service Component Commanders to US Central Command (CENTCOM) for authorization to transport enemy equipment out of the CENTCOM area of responsibility (AOR) for historical display purposes. The request had to include confirmation from the appropriate official that the requested item was of historic value and would be accepted as an historic artifact or designated as an historic artifact.[14] A detailed flow chart of how captured property was disposed of during OEF is at Appendix G-2 of *Volume I, Afghanistan and Iraq Legal Lessons Learned.* CENTCOM published similar guidance for OIF.[15] During OIF, CENTCOM specifically allowed only unserviceable captured enemy equipment to be transported out of the AOR as historical artifacts.[16] Appendix G-3 of *Volume I, Afghanistan and Iraq Legal Lessons Learned* contains an example of a Marine Corps unit's request to retain captured Iraqi property. Judge advocates should assist their commanders in drafting requests to designate enemy equipment as historical artifacts. The request must make clear that the equipment is for unit, not individual, retention. Additionally, the request should contain information regarding why a particular piece of enemy equipment has historical importance and value to the unit. This is especially true if the equipment is not unique, such as an AK-47.[17] Further, as Iraq began to reconstitute its civilian police and military forces, many weapons of interest to units as historical artifacts were also in high demand by the developing Iraqi security forces. In both Iraq and Afghanistan the coalitions began training indigenous security forces. Consequently, captured serviceable equipment was needed during the reformation of these forces, and generally could not be taken back to the United States as either war trophies or unit historical artifacts.[18]

Individual units wanted to bring home many items as historical artifacts. Like individual war trophies, the underlying service guidelines on unit historical artifacts were thoroughly explored in *Volume I, Afghanistan and Iraq Legal Lessons Learned.* Generally, units must request approval through their service to have the item designated

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[13] *See* MCO P5750.1G, *supra,* note 5.

[14] Message, 042021Z Mar 02, USCENTCOM, subject: USCENTCOM Legal Guidance for Operation Enduring Freedom (Disposition of Captured Enemy Equipment), para. 1.D to 1.E [hereinafter CENTCOM OEF Captured Enemy Equipment Message].

[15] Message, 181636Z Apr 03, USCENTCOM, subject: Legal Guidance for OIF (Disposition of Captured Enemy Equipment), paras. 1.D to 1.F [hereinafter CENTCOM OIF CapturedEnemy Equipment Message].

[16] *Id.* para. 1.D.

[17] *See, e.g.*, E-mail from Maj. Ian D. Brasure, USMC, Staff Judge Advocate, 26th Marine Expeditionary Unit (Special Operations Capable), to Maj. Kevin M. Chenail, USMC, Office of the Staff Judge Advocate, Coalition Forces Land Component Command (3 Apr. 2003). Major Brasure also stated that during OEF it was helpful in obtaining historical artifact status to point out that a particular weapon, such as an AK-47, was so commonplace on the battlefield that it was not useful for Afghan follow-on forces.

[18] *See, e.g.,* Message, 181630Z Mar 04, USCENTCOM, subject: CFC FRAGO 09-528 War Souvenirs in the ITO (U) .

as an historical artifact. In the Army, for instance, the CMH is the approval authority. Once service approval is obtained, the unit had to request permission through their Service Component Commander to CENTCOM for authorization to transport the enemy equipment out of Afghanistan or Iraq for historical display purposes.[19] A procedure to designate items as historical artifacts was in place that allowed several hundred artifacts to be approved for transportation from Afghanistan to the United States during the period covered by Volume I (11 September 2001 – 1 May 2003). In March 2003, at about the same time OIF began, DoD issued guidance requiring the Secretary of Defense to authorize unit artifacts.[20] As a result, many units serving in Iraq redeployed to home station leaving behind their requested enemy military equipment.

In October 2003, CENTCOM reissued legal guidance on the disposition of captured enemy equipment. The guidance generally restated earlier pronouncements that all requests for authorization to transport unserviceable captured enemy equipment out of the CENTCOM AOR must be made through service component commanders and include documentation of compliance with: (1) appropriate component service regulations; (2) requirements to demilitarize any weapons or weapons systems; and (3) customs regulations on importing requested items into the United States.[21] The guidance also reflected that many units did not understand the type of property that could be seized under International Law and CENTCOM GO-1A. Specifically, private or public property may only be seized during operations on order of the commander when based on military necessity.[22] Yet, units were requesting items to be designated as unit historical artifacts that clearly appeared to fall outside these rules, including works of art, silver tea service sets, sculptures, china dining sets, glassware sets, serving platters, copies of the Koran, prayer rugs, wooden display cases, various ornamental items, and even license

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[19] *See* Message, 181636Z Apr 03, USCENTCOM, subject: Legal Guidance for OIF (Disposition of Captured Enemy Equipment), paras. 1.D to 1.F ; Message, 181636Z Apr 03, USCENTCOM, subject: Legal Guidance for OIF (Disposition of Captured Enemy Equipment), paras. 1.D to 1.F .

[20] U.S. DEP'T OF DEFENSE, REGULATION. 4500.9, DEFENSE TRANSPORTATION REGULATION, Part V, Chap. 503, para. A.3. (Mar. 2003).

[21] *See* Message, 071657Z Oct 03, USCENTCOM, subject: Legal Guidance (Disposition of Captured Enemy Equipment), paras. 1.E. and 1.F. [hereinafter Legal Guidance (Disposition of Captured Enemy Equipment)] . Other CENTCOM legal guidance messages concerning the disposition of captured enemy equipment included Message, 042021Z MAR 02, USCENTCOM, subject: USCENTCOM Legal Guidance for Operation Enduring Freedom (Disposition of Captured Enemy Equipment); Message, 101604Z SEP 02, USCENTCOM, subject: USCENTCOM Legal Guidance for Operation Enduring Freedom (Disposition of Captured Enemy Equipment); Message, 181558Z Apr 03, USCENTCOM, subject: Legal Guidance for OIF (Disposition of Captured Enemy Equipment). The Army's Center for Military History did not require, and therefore would not approve, requests for common items such as AK-series weapons, RPG launchers, anti-aircraft guns, and Soviet style tanks and artillery pieces. They would only accept these items if a specific curator requested a specific item that had a clearly documented relationship to a unit or event that related to his story line. Memorandum, U.S. Army Center of Military History, subject: Acquisition of Weapons (23 Sept. 2003).

[22] *See* Annex to Hague Convention No. IV Regulations Respecting the Laws and Customs of War on Land, art. 23, para. (g) (1907); Commander, U.S. Central Command, Gen. Order No. 1A (29 Dec. 2000), para. 2k(1), [hereinafter CENTCOM GO-1A].

plates.[23] If such items were requested, they had to be accompanied by an explanation of the military necessity which required such property to be seized and an explanation of why such property should not be returned to the Coalition Provisional Authority for the use and benefit of the Iraqi people.[24]

In addition, Reserve Component (RC) units had particular difficulty in obtaining approval for unit artifacts because they often did not have DoD museums near their home station. The Army's CMH, however, allowed RC units one weapon or weapons system per location (i.e., armory or drill hall). The CMH devised a system whereby the RC unit requested that CMH accept the historical item and earmark the item specifically for that unit. The unit then had to ship the item to the Army's Museum Clearinghouse in Anniston, Alabama. Once the item was entered into the museum inventory system in Anniston, it was shipped to the RC unit.[25] Ultimately, Multi-National Forces Iraq (MNF-I) required that a commander appoint a temporary artifact responsible officer (TARO) to be responsible for the safety and security of the requested items. The TARO served as the primary point of contact for all matters regarding items under consideration for designation as artifacts.[26] Because the approval process contained very formal procedures that required attention early in the deployment, the 1st Cavalry Division OSJA recommended that units begin the submission process six months prior to redeployment.[27] Moreover, the legal team at III Corps noted that at their level of command (CJTF-7), reconciling and tracking the requests created many problems, because once requests were approved, the units had to be notified and then make arrangements to return to theater to collect the items.[28]

JAs must know the current service process for certification of historical artifacts and be prepared to answer command questions on transportation of artifacts back to their home station.

The biggest point of emphasis to be taken from all these reports is the old legal assistance adage; an ounce of prevention is worth a pound of cure. Pushing for clear policy guidance and implementation prior to deployment will save countless man hours and hard feelings which accompany the process at or about the time of redeployment when commanders are given the bad news that the weapons aren't coming home with the unit.

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[23] Multinational Corps Iraq, Fragmentary Order 619, 312025 Aug 04, subject: Removal of Historical Property from Iraq, para. C.3.A.6.

[24] *Id.* para. C.3.A.7.

[25] Multi-National Forces Iraq, Information Paper, subject: Historical Property Request Procedures, para. 5 (24 Aug. 2004) [hereinafter Historical Property Request Procedures).

[26] Multi-National Forces Iraq, Fragmentary Order 259, subject: MNF-I Policy on Historical Property, para. 3.C.3.E. (31 Aug. 2004) [hereinafter MNF-I FRAGO 259].

[27] After Action Report, Office of the Staff Judge Advocate, 1st Cavalry Division, at 5 (Feb. 2005) [hereinafter 1CAV AAR].

[28] Office of the Staff Judge Advocate, Combined Joint Task Force Seven (III Corps), First After Action Report, Administrative Law AAR Topics (Apr. 2004) [hereinafter III Corps 1st Quarter AAR].

Fundamental to understanding the issues associated with historical artifacts and war trophies is to be able to understand the distinction between historical artifacts and war trophies. The fundamental distinction being that historical artifacts[29] are items that are retained by armed forces museums and never become personal property while war trophies[30] are items that are retained by individuals and become personal property.[31]

Generally, "War souvenirs" are items of enemy public or private property used as war materiel acquired in a specific theater of operations and are authorized to be retained by proper authority.[32] CENTCOM policy on retention of war souvenirs applied to all U.S. military personnel and civilians serving with, employed by, or accompanying the U.S. armed forces in the Iraqi theater of operations.[33] The policy authorized retention only of specific items as war souvenirs, and only when authorized by a proper reviewing authority. Failure to comply with implementing policy subjected individuals to administrative or disciplinary action under the UCMJ, Office of Personnel Management Regulations, or other U.S. laws and regulations.

Critical to the success of providing war trophy guidance is to provide a specific list of *Authorized and Prohibited Items.* For example, in OEF and OIF, CENTCOM policy authorized the following specific items to be retained as war souvenirs prior to 29 September 2005:

- Helmets and head coverings;
- Uniforms and uniform items such as insignia and patches;

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[29] *See,* AR 870-20; MCO P5750.1G; OPNAVINST 5750.13; AFI 84-103 for component service historical artifact guidance. Definition of the terms is also provided in Part V of DoD 4500.9-R at V-503-7.

[30] Personal War Trophy or Souvenir. A souvenir collected by an individual participating in a military engagement as a memento of the engagement, owned as individual personal property, and registered with Department of Defense Form 603. Collection and shipment of personal war trophies is strictly forbidden without an official authorization by the President of the United States and designation by the Secretary of Defense. No United States administration has authorized personal war trophies since 13 March 1973. Part V of DoD 4500.9-R at V-xx, and also V-503-1 at paragraph A.3.

[31] The current administration authorized collection of war trophies for a brief period from February 2004 to July 2004. *See,* DepSecDef MEMO of 11 Feb 04, subject: War Souvenirs, CFC FRAGO 09-528, DTG 181630Z MAR 04 and USCENTCOM Message 291917Z Sep 05, subject: Legal Guidance (Disposition of Captured Enemy Equipment), and Partial Waiver of USCENTCOM General Order Number 1A, 14 Feb 04.

[32] CENTCOM Message, 181630Z Mar 04, subject: CTC FRAGO 09-528 War Souvenirs in the ITO, para. 3.C.1 [hereinafter CENTCOM War Souvenir Policy]. A war souvenir is "acquired" if it is captured, found abandoned, or obtained by any other lawful means. *Id.* para. 3.C.3. The property is "abandoned" if it is left behind by the enemy. *Id.* para. 3.C.2. The U.S. CENTCOM policy implements interim guidance from the Deputy Secretary of Defense. Memorandum, Deputy Secretary of Defense, for Commander, US Central Command, subject: War Souvenirs (11 Feb. 2004). *See also,* 10 U.S. C. § 2579 (2000) (authorizing the Secretary of Defense to prescribe regulations allowing service members to retain as a souvenir enemy material captured or found abandoned). War souvenirs are also sometimes referred to as "war trophies."

[33] CENTCOM War Souvenir Policy, *supra* note 36, para. 3.B.1. *See also,* USCENTCOM 291917ZSEP 05, which terminates the period specified for lawful retention of war souvenirs.

- Canteens, compasses, rucksacks, pouches, and load-bearing equipment;
- Flags;
- Knives or bayonets, except for those defined as "weaponry," below;
- Military training manuals, books, and pamphlets;
- Posters, placards, and photographs;
- Currency of the former regime; and
- Other similar items that clearly pose no safety or health risk, and are not otherwise prohibited by law or regulation.[34]

The policy prohibited retention of the following items.

- Items taken from the dead or prisoners of war or other detained individuals, including items bought or traded;
- Weaponry, including:
  - Weapons;
  - Weapons systems;
  - Firearms;
  - Ammunition;
  - Cartridge casings;
  - Explosives of any type;
  - Switchblade knives;
  - Knives with an automatic blade opener including knives in which the blade snaps forth from the grip on pressing a button or lever or on releasing a catch with which the blade can be locked (spring knife); or by weight or by swinging motion and is locked automatically (gravity knife); or by any operation, alone or in combination, of gravity or spring mechanism and can be locked;
  - Club-type hand weapons, such as blackjacks, brass knuckles, or nunchaku; or
  - Blades that are particularly equipped to be collapsed, telescoped or shortened; or stripped beyond the normal extent required for hunting or sporting; or concealed in other devices, such as walking sticks, umbrellas, or tubes.[35]
- Items deemed to be of value or serviceable for a future Iraqi national defense forces;
- Items that pose a safety or health risk;
- Items obtained under circumstances that expose individual or coalition forces to unnecessary danger or are otherwise contrary to existing orders or policies, such as looting private or public property or wandering the battlefield or other unsecured area;[36] or
- Personal items belonging to enemy combatants or civilians including letters, family pictures, identification cards, and "dog tags."[37]

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[34] CENTCOM War Souvenir Policy.

[35] *Id.* para. 3.C.4.

[36] *Id.* para. 3.B.5.

[37] *Id.* para. 3.C.5.

In addition, items cannot be retained as individual war souvenirs if they have intelligence value or are of value or serviceable for the Iraqi national defense forces.[38]

Current guidance from CENTCOM[39] for the Iraqi theater of operations prohibits importation of historical artifacts captured after Iraqi sovereignty, 28 June 2004.[40] All previous policies still apply for historical artifacts captured either in Afghanistan or those captured in Iraq prior to 28 June 2004.

[38] *Id.* paras. 3.B.4.A. and 3.b.4.D.

[39] USCENTCOM Message 291917Z Sep 05, subject: Legal Guidance (Disposition of Captured Enemy Equipment)

[40] *Id. para. 2.A.*

III.C. PASSPORTS AND VISAS

Even though deployed forces will almost always be exempt from any passport requirements and visa fees,[41] experience shows that there are still other passport and visa issues that are quite often overlooked. For example, civilians contract employees or other civilians assisting the forces with things like agricultural inspections are not always exempt from passport requirements and visas.[42] In addition to civilians either accompanying or assisting the Force, there are still others who are often forgotten about until the last minute before they are required to travel. Included in this group are witnesses required for both military tribunals and courts-martial,[43] as well as local nationals who are being medically evacuated. Close coordination with interagency representatives who can coordinate with State Department officials is essential to resolving these passport and visa issues quickly and efficiently.[44] It should be noted that if an interagency coordination group and/or a joint interagency coordination group (JIACG) exists, judge advocates must ensure that organization is not by-passed. Leaving JIACG out of the loop will only lead to duplication of effort at some point and create confusion for the State Department officials working the issue, which ultimate will delay or stifle processing the passport or visa.

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[41] *See*, HAITI LESSONS LEARNED at 266, 283; The BALKANS LESSONS LEARNED at 276, 331.

[42] *See*, MITCH LESSONS LEARNED at 53, Legal Lessons Learned from Afghanistan and Iraq: Volume II at 175.

[43] *See* KOSOVO LESSONS LEARNED at 144, fn 182.

[44] *See*, Legal Lessons Learned from Afghanistan and Iraq: Volume II at 242.

III.D. ETHICS/JER

Without exception the most frequently reported ethics issue from deployed theaters is acceptance of foreign gifts.[45] Nearly every AAR is filled with information papers and products produced to inform commanders about the rules and regulations associated with accepting foreign gifts. Department of Defense Directive 1005.13 spells out the policy and procedures for handling foreign gifts.[46] In addition to the policy and procedures outlined in the directive, it should also be noted that the General Services Administration (GSA) re-establishes what constitutes gifts of "minimal value," every three years. GSA most recently, as of January 1, 2005, established "minimum value" gifts as those that have a fair market value in the United States of $305 or less at the time of donation.[47]

Following closely behind foreign gifts as a commonly reported ethics issue is the confidential financial disclosure reports.[48] The first thing that is often noted about the reporting requirements is that a 180 day extension is available for those required to report while in a combat zone.[49] However, as a practical matter, it may be better to advise required filers to consider reporting without the extension, since it will only get more difficult with time to accurately track and report financial information beyond 18 months. This is especially true when required filers are not likely to see a significant reduction in operational tempo whether they are forward deployed or back in the continental United States.

Another ethics issue that merits mention in this forum is the ever present issue of gifts to the troops and troop solicitation of gifts.[50] With respect to gifts to the troops, the most important thing to remember is that troops may not solicit gifts.[51] With the wave of patriotism that often follows the initial period of engagement in foreign conflicts, there is often a flood of donations and gifts to deployed service members. The issues that follow

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[45] See, BALKANS LESSONS LEARNED at 185; MITCH LESSONS LEARNED at 33; KOSOVO LESSONS LEARNED at 161; Legal Lessons Learned from Afghanistan and Iraq: Volume I at 213; Legal Lessons Learned from Afghanistan and Iraq: Volume II at 233.

[46] Department of Defense Directive 1005.13, Foreign Gifts and Decorations, 19 Feb 2002 at para. 4. *Also note,* 5 U.S.C § 7342, Foreign Gifts and Decorations Act, Department of Defense Regulation 5500.7, the Joint Ethics Regulation at para. 2-300.b, and Marine Corps Order P5800.16A, Legal Administration Manual (LEGADMINMAN) Aug 31, 1999 at ch 12, gifts.

[47] 41 CFR Part 102-42, January 12, 2005.

[48] *See,* BALKANS LESSONS LEARNED at 186; Legal Lessons Learned from Afghanistan and Iraq: Volume I at 217; Legal Lessons Learned from Afghanistan and Iraq: Volume II at 231.

[49] 50 U.S.C. App. 101 § (g)(2)(A)(2000); EXEC. ORDER NO. 12,744, 56 Fed. Reg. 2,663 (Jan. 21, 1991).

[50] KOSOVO LESSONS LEARNED at 211; Legal Lessons Learned from Afghanistan and Iraq: Volume II at 231.

[51] DEP'T OF ARMY, REGULATION. 1-100, GIFTS AND DONATIONS (15 Nov. 83) at 2 para. 5.e. [hereinafter AR 1-100]; DEP'T OF ARMY, REGULATION, 1-101, GIFTS FOR DISTRIBUTION TO INDIVIDUALS, (1 May 81) at 1 para. 7 [hereinafter AR 1-101]; U.S. MARINE CORPS, ORDER P5800.16A MARINE CORPS MANUAL FOR LEGAL ADMINISTRATION (LEGADMINMAN) at para. 12-3 [hereinafter MCO P5800.16A].

are identification of the appropriate gift acceptance authority,[52] and ensuring service members did not solicit gifts.

[52] 10 U.S.C §2601, General Gift Funds; AR 1-101, at 1, para. 6; MCOcP5800.16A at para. 12-2.7; When identifying the appropriate gift acceptance authority, it is often helpful to remember that MWR and/or Marine Corps Community Services (MCCS) can often times serve as a gift acceptance authority when a commander is unable to. For example, Service regulations prohibit accepting gifts of alcohol; MWR/MCCS may be able to accept gifts of alcohol. Transportation of gifts to MWR via MILAIR may also prove more advantageous in certain circumstances as well. It may also be helpful to keep in mind that MWR/MCCS may be able to solicit corporate sponsorship or gifts from corporations. *See,* DEP'T OF ARMY REGULATION, 215-1, MORALE, WELFARE, AND RECREATION ACTIVITIES AND NONAPPROPRIATED FUND INSTRUMENTALITIES (1Dec. 04) at para. 7-39 and 7-47 [hereinafter AR 215-1]; U.S. MARINE CORPS, ORDER P1700.24A, MARINE CORPS COMMUNITY SERVICES MANUAL (8 Nov. 99) at para. 3004.7.b.(5).

III.E. FOIA/PRIVACY ACT

Freedom of Information Act (FOIA) and Privacy Act (PA) issues will not disappear when a unit deploys in support of military operations.[53] One can expect the same volume of FOIA requests and PA questions to arise while deployed that were routinely fielded in garrison. With that in mind however, there are a few examples of FOIA and PA issues that are relatively unique to the deployed environment.

First, when dealing with databases for non-U.S. citizens, do not get stumped by the question of whether or not the PA applies. For example detainee databases and or medical patient databases for non-U.S. citizens are not subject to the PA.[54]

FOIA and PA issues unique to the operational context might include the unfortunate circumstances of friendly fire investigations. Collateral reports prepared for family presentations must be redacted in accordance with the FOIA as well as the PA before being given to family members.[55] While safety investigations certainly are not unique to deployed settings, they are very prominent in deployments. In safety investigations, confidentiality of witnesses and statements is paramount to obtaining an open and honest evaluation of the facts and circumstances surrounding an accident or mishap and providing lessons learned to prevent the same or similar accident or mishap from happening again. However, it should be noted that while the government can do everything it can to protect the confidentiality of witnesses, it cannot promise that statements made during safety investigations will not be disclosed in response to a valid FOIA request.[56]

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[53] *See* HAITI LESSONS LEARNED at 125.

[54] *Id.*, at 68, fn 222.

[55] *See,* Legal Lessons Learned from Afghanistan and Iraq: Volume I at 208.

[56] *See,* Legal Lessons Learned from Afghanistan and Iraq: Volume I at 394-395.

III.F. INSPECTIONS

The issue of inspections is a relatively underreported area in most AARs received to date. If one were to speculate as to a cause for that under-reporting, it may be that administrative inspections are one of the first areas to go by the way-side during deployments. However, as theaters mature a decision to jettison administrative inspection procedures may soon prove regrettable. Eventually the inspector general's (IG) office is going to show up. Whether that visit is prompted by an official complaint or as an assistance visit is irrelevant. Accordingly, an IG inspection is inevitable.

Most of the sparse information gathered concerning administrative inspections during operational deployments is focused on personnel and equipment inspections leading to confiscation of contraband items under applicable General Orders.[57]

[57] *See,* HAITI LESSONS LEARNED at 315, 320, 325,and 330; Legal Lessons Learned from Afghanistan and Iraq: Volume I at 378. Other administrative investigation checklists may be found at MITCH LESSONS LEARNED at 97, 343, 345; KOSOVO LESSONS LEARNED at 395; Legal Lessons Learned from Afghanistan and Iraq: Volume I at 378.

III.G. INTERNET USE

The majority of AARs will at some point tout the virtues of the Internet as a research tool. Other sections of AARs will also report the new and novel ways the Internet can best be exploited in total effects based operations. However, in the context of administrative law very little has yet been reported on Internet use policies and procedures.

All Internet policies and procedures are based upon section 2-301 of the Joint Ethics Regulation.[58] Other key documents to have at hand when crafting effective Internet use policies and procedures include DAJA-SC (600-50a), of 8 Jan. 97, SUBJECT: Permissible Use of Federal Government Communications Resources, and Under Secretary of the Navy Memorandum OF 5 FEB. 97 Subj: GUIDLINES FOR INTERNET WEB BROWSING WITHIN THE DEPARTMENT OF THE NAVY HEADQUARTERS NETWORK (DNHN).

The following is an example of an Internet policy memorandum:

UNITED STATES MARINE CORPS
15th MARINE EXPEDITIONARY UNIT (SOC)
From: Commanding Officer, 15th Marine Expeditionary Unit
To: Distribution List
Subj: 15th MEU SHIPBOARD INTERNET USAGE POLICY 1-00
Ref: (a) CINCPACFLT Pearl Harbor, HI 210151Z FEB 98
(b) MARADMIN 197/99, Information Assurance Bulletin 1-99
(c) NIPRNET Bandwidth Management Policy Afloat, 251905Z JUN 99
(d) MARADMIN 541/99, Information Assurance Bulletin 2-99
1. Per references (a), (b), and (c), the policy for worldwide web
access and unclassified LAN usage is outlined below.
2. **Punitive Nature**. This instruction is punitive in nature. Failure to comply with the policy and guidance contained in this instruction will result in administrative and/or punitive action under the Uniform Code of Military Justice (UCMJ).
3. **Official Use**. Due to limited bandwidth on board ship, information flow will be assured to units vice individuals. Official Internet use is defined as that which is not prohibited by law, regulation, instruction, or command policy, to include:
a. Obtaining information to support the 15th MEU mission.

[58] Department of Defense Regulation 5500.7, *Joint Ethics Regulation* (JER).

b. Obtaining information to enhance the professional skills of Marine Corps personnel.

4. **Prohibited Use.** Although reference (b) authorizes more liberal use of worldwide web and unclassified LAN at shore-based commands, due to physical, network, and communication limitations while deployed the following uses are PROHIBITED:

a. Illegal, fraudulent, or malicious activities.

b. Introducing classified information into an unclassified system or environment.

c. Accessing, storing, processing, displaying, distributing, transmitting, or viewing material that is pornographic, racist, promotes hate crimes, or is subversive in nature.

d. Storing, accessing, processing, or distributing classified, proprietary, sensitive, for official use only or privacy act protected information in violation of established security and information release policies.

e. Obtaining, installing, copying, pasting, transferring, or using software or other materials obtained in violation of the appropriate vendor's patent, copyright, trade secret or license agreement.

f. Knowingly writing, coding, compiling, storing, transmitting or transferring malicious software code, to include viruses, logic bombs, worms, and macro viruses.

g. Partisan political activity, religious lobbying, or advocacy of activities on behalf of organizations having no affiliation with the Marine Corps, DON or DoD.

h. Disseminating religious materials outside an established command religious program.

i. Fund raising activities, either for profit or non-profit, unless the activity is specifically approved by the command (i.e., welfare and recreation car washes).

j. Gambling, wagering, or placing of any bets.

k. Writing, forwarding, or participating in chain letters.

l. Posting personal home pages.

m. Participating in chat rooms, or any form of internet discussion groups.

n. Any unofficial use of the internet, or LAN except for those provisions contained in paragraph 5 below. Unofficial use includes "surfing" the internet for information not related to your military duties, and using the internet to view catalogs or purchase personal items.

5. **Email**. In accordance with references (c) and (d), accessing and

logging into commercial accounts, such as Hotmail, AOL, etc., via
worldwide web interface from the Marine Corps Enterprise Network (MCEN) **is not authorized**. Under no circumstances will official government correspondence or data files be sent, forwarded to, or created on commercial services of any kind. However, this ***does not prohibit*** the exchange of email between MCEN and commercial email accounts ashore.
6. **Software**. All software and drivers will be held, inventoried, and loaded by S-6 personnel. All software requires licensing. Downloading and installing of software without a proper license is unauthorized and will not be performed by the S-6.
7. **Privacy**. All users are reminded to have ***no expectation of privacy*** in their use of government information systems. As a general rule, S-6 personnel will not read personal email. However, use of the Internet and email over the MCEN is subject to monitoring, interception, and recording by S-6 personnel and/or any other government agent.
8. **Action**. Seniors throughout the chain of command will ensure all
members of the command are aware of the policies and prohibitions set forth in this instruction. Any violation of the above will result in the immediate suspension of internet privileges and/or email accounts and may result in administrative and/or disciplinary action. Training must be conducted to specifically advise the members of your unit or section of the policies and prohibitions contained in this instruction.
9. Points of contact for this matter is the MEU S-6[59]

[59] 15th MEU SHIPBOARD INTERNET USAGE POLICY 1-00, dated 11 Feb 00.

III.H. INVESTIGATIONS

Judge advocates often fail to adequately account for the time, effort, and resources required to adequately process the large volume of all varieties of administrative investigations that arise from military operations.[60]

III.H.1. AR 15-6[61] and JAGMAN[62] Investigations

The most consistent theme with respect to AR 15-6 investigations and JAGMAN investigations is that the judge advocate must be proactive in advising the investigating officers.[63] If the judge advocate waits for the investigating officer(s) to ask questions, then it will often be too late in the process to correct the problems without completely starting the investigation over from the beginning.

Judge advocates should be aware when to advise convening authorities to consider an administrative investigation, rather than a command investigation.[64] AR 15-6 provides very clear guidance on factors to be considered when deciding what level of investigation to initiate.[65] However, in spite of what seems to be very clear guidance on factors to be considered, be prepared for commanders' decisions to initiate full command investigations in order to document the actions of their units.

In addition to efficiently managing administrative investigations, AARs, as well as common sense, have shown that standardizing administrative investigation procedures proves invaluable.[66] This is even more true as the volume of investigations begins to rise and the number of high profile investigations continues to grow. Standardization of tracking procedures is also required in order to provide accurate status updates to the commanders who are being consistently quizzed on the progress and status of investigations.

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[60] *See,* HAITI LESSONS LEARNED at 131; BALKANS LESSONS LEARNED at 185; KOSOVO LESSONS LEARNED at 147-48; Legal Lessons Learned from Afghanistan and Iraq: Volume I at 200; Legal Lessons Learned from Afghanistan and Iraq: Volume II at 223.

[61] U.S. DEP'T OF ARMY REGULATION 15-6, PROCEDURES FOR INVESTIGATING OFFICERS AND BOARDS OF OFFICERS (20 SEP 1996), [Hereinafter AR 15-6].

[62] DEP'T OF NAVY, JUDGE ADVOCATE GEN. INSTR. 5800.7D, MANUAL OF THE JUDGE ADVOCATE GENERAL (JAGMAN).

[63] *See,* HAITI LESSONS LEARNED at 131; BALKANS LESSONS LEARNED at 186; MITCH LESSONS LEARNED at 429; KOSOVO LESSONS LEARNED at 147.

[64] *See,* Legal Lessons Learned from Afghanistan and Iraq: Volume I at 203; Legal Lessons Learned from Afghanistan and Iraq: Volume II at 200.

[65] *See,* AR 15-6 at para. 1-4.b.(1)(a)-(e). *See also,* JAGMAN at para. 0205.

[66] *See,* KOSOVO LESSONS LEARNED at 147.

III.H.2. Line of Duty Investigations[67]

A non-traditional context judge advocates are reporting encountering line of duty investigations in increasing numbers is in processing mobilized reserve component members for release from active duty (REFRAD).[68] Prior to their release from active duty, the mobilized reservist must have a line of duty determination made with respect to any injuries received while mobilized. This determination is critical to the reservist receiving the appropriate level of benefits and is also important to the service in that the reservists' billet cannot be filled again until the injured reservist is actually released from active duty.

III.H.3. Mishap and Safety Investigations

The most often reported lesson learned with respect to safety investigations is recognize that there will be both a command investigation (designed to get to the facts and circumstances surrounding an accident), and a safety investigation (intended to find out the cause of the accident to prevent repetition of the same or similar accidents) being conducted simultaneously concerning the same accident or mishap. Judge Advocates should recognize the existence of simultaneous investigations and coordinate investigative efforts to facilitate maximum evidence and statement sharing.[69] While certain parts of safety investigations remain confidential,[70] the majority of the evidence collection and facts not in controversy may be shared with the command investigation team. Another investigation that may also be occurring concurrently is a separate friendly-fire investigation. This type of investigation is almost always going to be accompanied by media interest and often further increases the tension between the different investigative teams. If the JA is not carefully coordinating and managing the investigative efforts, then the situation could get out of control.

An additional lesson learned about safety investigations is the need to be sensitive to the investigative requirements of coalition partners when an accident or mishap involves more than just U.S. Forces.[71] Coalition partners should always be given free access to witnesses and unclassified and/or releasable evidence to facilitate completion of

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[67] *See Generally,* U.S. DEP'T ARMY REGULATION 600-8-4, LINE OF DUTY POLICY, PROCEDURES, AND INVESTIGATIONS, (15 APR. 2004)*; See also* JAGMAN *supra* note 65, at para. 0220 .

[68] *See,* Legal Lessons Learned from Afghanistan and Iraq: Volume II at 230.

[69] *See* MITCH LESSONS LEARNED at 403; Legal Lessons Learned from Afghanistan and Iraq: Volume I at 203.

[70] Even though the intent of safety investigations is to protect the confidentiality of witnesses and statements in order to get to the actual cause of accidents and mishaps without fear of prosecution or adverse administrative action, statements may still be subject to disclosure upon a valid FOIA request.

[71] *See,* KOSOVO LESSONS LEARNED at 379; U.S. DEP'T OF ARMY REGULATION 385-42, INVESTIGATION OF NATO NATION AIRCRAFT OR MISSILE ACCIDENTS AND INCIDENTS (15 May 80). Sensitivity to the requirements of coalition partners investigations is also greatly magnified during friendly fire investigations. *See,* DEP'T OF DEFENSE, INSTR. 6055.7, ACCIDENT INVESTIGATION, REPORTING, AND RECORD KEEPING (3 Oct. 00) at encl. 4 § E4.7.

their independent investigation as expeditiously as possible. However, U.S. witnesses should seek advice from a judge advocate prior to providing a statement to coalition investigators in order to be fully cognizant of any potential liability that may follow.

III.H.4. Financial Liability Investigations[72]

While financial liability investigations are mentioned in previous CLAMO publications, there are no significant lessons to point out beyond the obvious fact that property and equipment will be damaged, lost, or stolen, thereby requiring a report of survey and a determination of financial liability.

It should be noted that as of 7 July 2006, the Financial Liability Officer's Guide requires use of DD form 200 (Financial Liability Investigation of Property Loss) vice DA Form 4697 (Department of Army Report of Survey).[73]

*III.I. LABOR/EMPLOYMENT LAW**

*III.J. LAW OF MILITARY INSTALLATIONS**

[72] General references pertaining to reports of survey include the following: DEP'T OF DEFENSE REGULATION, 7000.14, Vol. 12, Chap. 7, FINANCIAL LIABILTY FOR GOVERNMENT PROPERTY LOST, DAMAGED OR DESTROYED; DEP'T OF ARMY REGULATION. 735-5, POLICIES AND PROCEDURES FOR PROPERTY ACCOUNTABILITY (28 Feb. 05); U.S. DEP'T OF ARMY, PAMPHLET 735-5, FINANCIAL LIABILITY OFFICER'S GUIDE (7 Jul. 06) [hereinafter DA PAM 735-5]; JAGMAN, *supra* note 65, at para. 0249, LOSS OR EXCESS OF GOVERNMENT FUNDS OR PROPERTY.

[73] DA PAM 735-5 at para. 1-9. The JAGMAN also requires use of DD form 200.

III.K. MEDICAL ISSUES

Determining whether or not someone is eligible for treatment at a DoD medical treatment facility (MTF) does not seem like it is an issue that will come up that often or take up much time. However, there will be many requests to provide medical care to foreign nationals not entitled to medical treatment at DoD facilities.[74] To resolve these issues judge advocates need to be familiar with chapter 3 of AR 40-400, patient administration.[75] The MTF manual, DoD 6010.15-M,[76] and AR 40-3[77], the Army medical care regulation, are also sources that will provide valuable policy and procedure information necessary to dispose of the requests expeditiously.

The associated issue that almost always follows is the fiscal one of whether or not the person not normally entitled to treatment at a DoD MTF is eligible for air transportation to and from the medical treatment facility.[78] Some of the same issues also arise as a result of either DoD civilians and/or civilian contractors finding themselves in need of medical care.[79] The following medical care matrix[80] is a good starting point to get a general idea of who is and is not eligible for some level of care at a DoD MTF and whether or not any care provided is reimbursable. If the matrix does not cover the situation at hand, the next best place to look is chapter 3 of AR 40-400.[81]

MEDICAL CARE MATRIX

CATEGORY	MEDICAL/DENTAL	OTHER INFORMATION
AAFES (local nationals)	YES- Life, limb & eyesight only	

[74] *See* HAITI LESSONS LEARNED at 129; Legal Lessons Learned from Afghanistan and Iraq: Volume II at 242.

[75] DEP'T OF ARMY, REGULATION. 40-400, PATIENT ADMINISTRATION (12 Mar. 01). Of particular relevance is paragraph 3-20 which addresses medical care outside the continental United States and care for certain foreign nationals. Paragraph 3-50 is also a very important paragraph to be familiar with. Paragraph 3-50 addresses Service Secretary designees. Service Secretaries, as well as other prominent government officials, e.g. POTUS, Cabinet members, members of Congress, may designate foreign nationals as eligible for treatment at DoD MTFs when they don't fit into any other category of eligibility.

[76] DEP'T OF DEFENSE, MANUAL, MILITARY TREATMENT FACILITY UNIFORM BUSINESS OFFICE MANUAL (Apr. 97).

[77] DEP'T OF ARMY REGULATION. 40-3, MEDICAL, DENTAL, AND VETRINARY CARE (3 Apr 06).

[78] DEP'T OF DEFENSE INSTR. 6000.11, PATIENT MOVEMENT (9 Sep. 98); DEP'T OF DEFENSE, REGULATION. 4515.13, AIR TRANSPORTATION ELIGIBILITY (Nov. 94). [hereinafter DoDR 4515.13] Remember to account for the passport and visa requirements associated with transporting foreign nationals out of theater, and back, for treatment at a DoD MTF. *See,* KOSOVO LESSONS LEARNED at 144, fn 182.

[79] *See,* Legal Lessons Learned from Afghanistan and Iraq: Volume I at 216.

[80] Medical Care Matrix (unknown author), taken from the CLAMO internal database.

[81] AR 40-400, *supra* note 75, Chap. 3, Persons Eligible for Care in Army MTFs and Care Authorized.

AAFES (U.S. employees)	YES- 2	
American National Red Cross	YES 1, 2	
Brown & Root (local nationals)	YES- Life, limb & eyesight only	
Brown & Root (US employees)	YES- 3	CONTRACT
DOD Civilian Employees	YES- 4, 6	
ICTY	YES- Life, limb & eyesight only	
NATO military personnel (w/ ACSA)	YES- 5	
NATO military personnel (w/out ACSA)	YES- if have reciprocal agreement w/ the country-otherwise, life, limb & eyesight only- 5	
NAFI, MWR (local nationals)	YES- Life, limb & eyesight only	
NAFI, MWR (US employees)	YES	Invitational Travel Orders
Non-Governmental Organizations	YES- Life, limb & eyesight only	
Non-NATO KFOR military (w/ ACSA)	YES-5	
Non-NATO KFOR military (w/out ACSA)	YES- if have reciprocal agreement w/ the country- otherwise, life, limb & eyesight only- 5	
OSCE	YES- Life, limb & eyesight only	
Political Advisor (POLAD)	YES- 6	
TRW (US citizen employees/translators)	YES- 2	CONTRACT
TRW (local nationals)	YES- Life, limb & eyesight only	
UNHCR	YES-Life, limb & eyesight only	
United Nations	YES- Life, limb & eyesight only	
US Congressional Staff (US citizen employees on official business)	YES- 6	
US Embassy Personnel (US Citizen employees on official business)	YES- 6	
US Government Employees	YES- 6	
USAID (non-US citizen employees)	YES- 7	

1. *DODD 1330.5.V.C.4.e(2) states that in foreign areas "where it is not precluded by applicable Status of Forces or other country to country agreements, or by the capability of or the fulfillment of a military mission, the overseas commander may make...available...hospitalization and medical care on a space-available basis for Red Cross personnel, for personal and family needs." See also AR 40-400, Chap. 3, para. 3-42.*

2. *Reimbursable*

3. *Reimbursable. Medical, Medevac, and Mortuary Services are provided to Brown and Root American employees in accordance with contract # DACA78-99-D-0003, clause 52.0200-4006. BRSC is a cost-plus contract and the U.S. pays Brown and Root's costs plus a service fee. Therefore, the contracting officer may not bill out the costs. All costs must still be reported to the contracting officer.*

4. *DODI 1400.32, para. 6.1.4 states that "civilian employees shall receive the same immunizations as given to military personnel in theater." DoDI 1400.32, para. 6.1.10 states that "provisions shall be made for medical care of civilian employees in a theater of operations." Finally, DoDI 1400.32, para. 6.1.11 sets forth that "civilians shall receive medical and dental examinations...." See also AR 40-400, Chap. 3, para. 3-15.*

5. *NATO and non-NATO KFOR member nations are provided medical treatment pursuant to ACSAs or reciprocal agreements. The amount of medical care provided must be accounted for by nation providing care and reported through appropriate channels.* ***RUSSIA*** *does not have an ACSA.*

6. *AR 40-400, Chap. 3, para. 3-15, medical treatment of US citizens who are employees of DoD or other federal agencies is authorized.*

7. *AR 40-400, Chap. 3, para. 3-27, medical treatment of USAID/ Dept. of State personnel, without respect to nationality is authorized.*

Other commonly reported medical issues include pre-deployment vaccination programs[82] and medical support for detainees.[83]

[82] *See generally,* DEP'T OF DEFENSE, INSTRUCTION. 6205.2, IMMUNIZATION REQUIREMENTS (9 Oct. 86); and DEP'T OF DEFENSE, INSTRUCTION. 6205.4, IMMUNIZATION OF OTHER THAN U.S. FORCES (OTUSF) FOR BIOLOGICAL DEFENSE (14 Apr. 00).

[83] DEP'T OF DEFENSE INSTRUCTION. 2310.08E, MEDICAL SUPPORT FOR DETAINEE OPERATIONS (6 Jun. 06). This being a relatively new instruction, as yet CLAMO has not received any significant feedback on any issues associated with implementation. However, the instruction appears to be a straight forward document that does not present any "new" or novel requirements; it simply formalizes what had already been common practice with providing medical support to detainee operations in the past.

III.L. MILITARY PERSONNEL LAW

Military personnel law continues to be an important part of the deployed judge advocate's core competencies. The two leading areas of military personnel law that have been reported on in previous CLAMO publications are administrative separations and conscientious objectors.

III.L.1. Administrative Separations

The challenge of administrative separations in a deployed environment seems to be weighing the pros and cons of either taking on the logistical challenges associated with an administrative separation in theater,[84] waiting to process the separation until redeployment, or sending the individual back to home station for processing prior to redeployment. When deployments are anticipated to be of a fairly brief duration the tendency is to wait for redeployment. However, recent experience in Iraq has shown that when deployments of longer duration are expected, and as the theater matures, it is more likely that administrative separations will occur in theater rather than home station.[85]

III.L.2. Conscientious Objectors[86]

Preparation to deal with the "flood" of conscientious objectors prior to operational deployments often consumes more time, attention, and resources than dealing with the three or four[87] packages that actually appear once a deployment order is actually received.[88] Recent experience has shown that units are inclined to deploy with conscientious objectors while their status is being finally adjudicated.[89]

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[84] Legal Lessons Learned from Afghanistan and Iraq: Volume II at 204-205.

[85] *Id.*

[86] *See* 50 U.S.C. App. § 456(j) (2000), *implemented by* U.S. DEP'T OF DEFENSE, DIR. 1300.6, CONSCIENTIOUS OBJECTION (20 Aug. 1971) (C4, 11 Sept. 1975); U.S. DEP'T OF ARMY, REG. 600-43, CONSCIENTIOUS OBJECTION (15 May 1998); U.S. MARINE CORPS, ORDER 1306.16E, CONSCIENTIOUS OBJECTORS (21 Nov. 1986).

[87] In a flash of the blindingly obvious, units report the number of conscientious objector packages rises when more units deploy. Legal Lessons Learned from Afghanistan and Iraq: Volume II at 242.

[88] *See* HAITI LESSONS LEARNED at 125.

[89] Legal Lessons Learned from Afghanistan and Iraq: Volume I at 215.

III.M. MORALE, WELFARE AND RECREATION / MARINE CORPS COMMUNITY SERVICES

One of the leading Morale, Welfare and Recreation (MWR) / Marine Corps Community Services (MCCS) issues that has been consistently reported is determining who is entitled to access MWR/MCCS facilities and events.[90] Normally, the answer is relatively easily obtained by looking to either the MWR regulation or the MCCS manual.[91]

Other MWR / MCCS issues that are not as intuitive or readily apparent are issues associated with logistical support to MWR in the deployed environment. These issues include, medical support to MWR / MCCS personnel,[92] and logistics support to MWR / MCCS.[93]

Another aspect of MWR / MCCS that should not be overlooked is their ability to solicit commercial sponsors.[94] While individual service members are prohibited from soliciting either donations or commercial sponsorship,[95] MWR / MCCS is not under the same prohibition. [96] Beyond simply being able to solicit commercial sponsorship, MWR / MCCS also has the ability to obtain logistics support for transportation and distribution to individuals. For example, if a commercial entity wanted to give steaks to deployed troops, after finding a gift acceptance authority authorized to accept such a gift, the donor would be responsible for transporting the gift to the troops as well as distributing it to the troops. However, if the gift is made to MWR / MCCS, the gift may be eligible for space available transportation via MILAIR and civilian personnel cooking and serving the steaks may also be authorized to travel via MILAIR as overseas entertainers.[97]

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[90] *See* BALKANS LESSONS LEARNED at 432; KOSOVO LESSONS LEARNED at 377; Legal Lessons Learned from Afghanistan and Iraq: Volume II at 232-233.

[91] *See* AR 215-1, *supra* note 52 at Chap. 6, Eligibility; U.S. MARINE CORPS, ORDER P 1700.27A, MARINE CORPS COMMUNITY SERVICES POLICY MANUAL (8 Nov. 99) [hereinafter MCO P1700.27A] at Chap. 1 section 2, Eligibility.

[92] *See, Medical Care Matrix above* .

[93] *See*, AR 215-1; MCO P 1700.27A at App. C, support to APF; and DoDR. 4515.13, *supra* note 78. See also, DEP'T OF ARMY REGULATION 215-6 ARMED FORCES PROFESSIONAL ENTERTAINMENT PROGRAM OVERSEAS (15 Jan. 87) [hereinafter AR 215-6]; U.S. MARINE CORPS, ORDER P1710.23B, ARMED FORCES PROFESSIONAL ENTERTAINMENT PROGRAM OVERSEAS (15 Jan. 87) [hereinafter MCO P1710.23B].

[94] *See,* AR 215-1; MCO P1700.27A; Legal Lessons Learned from Afghanistan and Iraq: Volume II at 232-233.

[95] AR 1-100, *supra* note 51, at 2 para. 5.e.; AR 1-101, *supra* at 1 para. 7; MCO P5800.16A *supra* note 51, at para. 12-3.

[96] AR 215-1 at 7-47; MCO P1700.27A at para. 3004.7b.(5).

[97] *See*, AR 215-6, and MCO P1710.23B, *supra* note 93 .

IV. CIVIL LAW

IV.A. CONTRACT LAW

IV.A.1. Contract Law

Senior JAs continue to note their desire to have more contract and fiscal law familiarity among their attorneys.[1] Staff judge advocates noted that junior JAs often have little or no exposure to contract and fiscal law issues in the garrison environment. A partial explanation of this shortcoming is found in the responsibilities of deployable JAs in garrison. Some Offices of the Staff Judge Advocate (OSJAs) do not generally review contract actions while in garrison, and many others use civilian attorneys in the contract law function. A shortage of contract and fiscal law experience made reviewing these actions more difficult—or at a minimum, more time consuming. Attorneys had to grapple with unfamiliar concepts and procedures before providing sound legal advice on specific issues.

IV.A.2. Deployment Contracting

Unfamiliarity with this area of law is doubtless a greater burden in a deployed environment where access to research materials is likely to be limited. As one JA reported, "fully forty percent of the long term substantive issues I touched at DREAR had some fiscal or contracting aspect involved."[2] Unfamiliarity with contract and fiscal law has the potential to greatly affect legal operations. Several suggestions based on lessons learned are offered to improve proficiency in contract and fiscal law. Prior to deployment:

(a) Identify an attorney to be the office contract and fiscal law 'expert' to train and assist other JAs;

(b) Get administrative law attorneys 'school trained' by The Judge Advocate General's Legal Center and School (TJAGLCS);

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[1] E-mail from Colonel Kathryn P. Sommerkamp, to Lieutenant Colonel Pamela M. Stahl, subject: Interagency Symposium, (17 Nov. 2004) [hereinafter Sommerkamp E-mail]; Lieutenant Colonel Thomas E. Ayers, Notes from After Action Review Conference, Office of the Staff Judge Advocate, 82d Airborne Division and Center for Law and Military Operations, Fort Bragg, N.C., (17-19 June 2004) [hereinafter Ayres Notes]

[2] Lieutenant Colonel Paul S. Wilson , DSJA, 101st Airborne Division (Air Assault), Thoughts on Contracting (6 Jan. 2004) (Microsoft Word document contained in E-mail from Lieutenant Colonel Richard M. Whitaker, Staff Judge Advocate, 101st Airborne Division (Air Assault), to Lieutenant Colonel Pamela M. Stahl, Director, Center for Law and Military Operations (8 Jan. 2004).

(c) Have all administrative law attorneys practice some contract law as a matter of course in garrison;

(d) Have operational law attorneys practice contract law as a matter of course in garrison;

(e) Stop civilianizing contract law positions.

Acquire Access to Contract Documents

An issue running throughout legal lessons of contract formation and administration is that of acquiring access to the contract documents themselves. Judge advocates repeatedly mentioned the difficulty in acquiring copies of the contracts they were asked to review.[3] Judge advocates found it particularly difficult to locate contracts involving inter-agency transfers or the federal supply schedules, as the base contract would often be formed and managed somewhere in the United States.[4]

Another factor adding to the difficulty in locating and acquiring actual contracts was the diversity of contracting agencies. For example, a JA for Combined Joint Task Force Seven (CJTF-7) in Iraq noted that during his deployment he provided advice related to contacts created not only by his own command, but by U.S. Army Europe, Army Material Command, the Defense Intelligence Agency, Central Intelligence Agency, the Coalition Provisional Authority, the Departments of State, Justice, and Interior, U.S. Agency for International Development (USAID), and others.[5] The lessons learned here are to anticipate that contract documents will often be unavailable, and to identify points of contact to assist in locating contracts early in the process.

Prepare to Influence Contract Statements of Work

The Statement of Work (SOW) is "[t]he portion of a contract that describes the actual work to be done by the contractor by means of (1) specification/s or other minimum requirements, (2) quantities, (3) performance dates, (4) time and place of performance of services, and (5) service requirements."[6] The SOW is an essential element of government contract formation, as it serves as the baseline against which

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[3] *See, e.g.,* Major Francis (Abe) Dymond, Notes from Interagency Symposium, Charlottesville, VA, (8-9 Nov. 2004) [hereinafter Dymond Notes]; Major David T. Crawford, Notes from After Action Review Conference, Office of the Staff Judge Advocate, 101st Airborne Division (Air Assault), and the Center for Law and Military Operations, Fort Campbell, Ky. (20-21 Oct. 2004) [hereinafter Crawford Notes].

[4] *Id.* This did not seem to be the case for contracts actually created by the command where the attorney worked, but with contracts initially created by other commands or agencies.

[5] Dymond Notes, *supra* note 3, p.131.

[6] RALPH C. JASH, JR. & STEVEN L. SCHOONER & KAREN R. O'BRIEN, THE GOVERNMENT CONTRACTS REFERENCE BOOK: A COMPREHENSIVE GUIDE TO THE LANGUAGE OF PROCUREMENT (2d ed. 1998) [hereinafter A COMPREHENSIVE GUIDE TO THE LANGUAGE OF PROCUREMENT].

progress, and subsequent contract changes are measured during contract performance. Consequently, effective legal input in drafting the SOW pays dividends over the entire life of the contract.

Deployed JAs working with government contracts noted a recurring problem with contracts formed with inadequate SOWs. The SOW is found in Part I. C. of standard government contracts[7] and sets forth a description of the work/tasks/products/ deliverables to be completed under the contract. The contractor relies on the accuracy of the SOW when determining his price, and submitting his offer to complete the work. In the deployed environment, contracts sometimes were hastily put together by individuals with limited training and/or expertise in either government contracting or the particular supply or service contracted for.

Reviewing JAs face a difficult challenge when a deficient SOW is identified in contract solicitation.[8] Reviewing attorneys realize that returning all deficient requirements documents for clarification of the SOWs, (or re-writing SOWs themselves) would slow the contracting process, probably be perceived as obstructionist, and delay filling the commander's requirements. This problem is simply defined as one of selecting between expediency and quality. Attorneys may address these shortcomings by using their judgment to weigh the desirability of complete technical compliance with the need for contracts to fill commander's requirements rapidly. Where the attorneys determine a SOW contains only minor deficiencies or pose a relatively low risk of trouble in contract administration, the attorneys can make minor corrections, without having to return the SOW for additional clarification.[9]

Prepare to Address Issues of Contract Scope

Another problem specifically identified by JAs working in the contracting field in a deployed setting was that of scope. The term "contract scope" encompasses "all work that was fairly and reasonably within the contemplation of the parties at the time the contract was made."[10] Government procurement regulations permit contracting officers to make unilateral changes to existing contracts, so long as those changes fall within the original scope of the contract. This provision has obvious utility in a deployed environment where evolving missions and conditions are likely to impact on contract

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[7] U.S. General Services Administration, SF Form 33, Solicitation Offer and Award (Sept. 1997).

837 *See generally* Ch. 13, Contract Changes, CONTRACT LAW DEP'T, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, CONTRACT LAW DESKBOOK, (Fall 2004)[hereinafter Contract Law Deskbook].

[8] A solicitation is defined as: A document, sent to prospective contractors by a Government agency, requesting the submission of offers or of information. This generic term includes invitations for bids (IFBs) requests for proposals (RFPs) and requests for quotations (RFQs). *See* A COMPREHENSIVE GUIDE TO THE LANGUAGE OF PROCUREMENT.

[9] *See* Dymond Notes, *supra* note 3.

[10]A COMPREHENSIVE GUIDE TO THE LANGUAGE OF PROCUREMENT,GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. 43.201 (July 2004) [hereinafter FAR].

requirements and performance. Determining whether a change to a contract, or a task order placed against an existing contract was within the scope of the original contract posed a daunting task for reviewing JAs.[11]

Scoping determinations were particularly difficult for contracts involving inter-agency transfers, or the federal supply schedules as base contract, and thus, the SOW necessary to make an informed scoping determination would normally be formed and managed somewhere in the United States. This is another manifestation of the previously mentioned problem of accessing actual contract documents.

The scoping problem was further complicated by the general scarcity of contract oversight in the deployed environment. Contract attorneys noted that a single contracting officer's representative (COR),[12] as an additional duty, might be expected to oversee a contract being executed in locations all across Iraq and report back to a contracting officer in the United States.[13] As this situation made it difficult to obtain either timely or accurate information from the COR, contracting officers and reviewing attorneys had little information to work with when making scoping determinations.

As long as the military relies on contractors to meet deployed logistics requirements, advising contracting officers and their customers in scoping determinations will remain a frequent and challenging task for JAs. Judge advocates can reduce the difficulty of this task by taking steps to anticipate requests for this advice. Helpful steps include communicating with contracting and ordering officers to identify and acquire copies of contracts receiving repeated orders, and establishing contact with CORs either directly or through other legal personnel.

Execute Requirements Contracts with Caution

Judge advocates reviewing contract actions must anticipate problems that might result from executing requirements contracts,[14] and advise contracting officers and

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[11] A scoping determination has serious implications for contract performance. Changes within the scope of the original contract may be ordered by the contracting officer by exercising the changes clause in the original contract. Changes that fall outside the scope of the contract are considered "cardinal changes" and require formation of a new contract, often causing significant delay. *See* Contract Law Deskbook, *supra* note 7, at Ch. 13.

[12] The COR is an employee of a contracting activity designated by a contracting officer to perform certain contract administration activities. A COR is an authorized representative of a contracting officer within the scope of his or her authority, but is rarely given the authority to enter into contractual agreements or modifications. A COMPREHENSIVE GUIDE TO THE LANGUAGE OF PROCUREMENT,*supra* note 6.

[13] Dymond Notes, *supra* note 3.

[14] Requirements contracts provide for filling all actual purchase requirements of designated Government activities for specific supplies or services during a specified contract period, with deliveries to be scheduled as orders are placed. The contractor is legally bound to such a contract because the Government's promise to buy its requirements constitutes consideration. A requirements contract may be used when the Government anticipates recurring requirements but cannot predetermine the precise quantities of supplies or services that designated Government activities will need. A COMPREHENSIVE GUIDE TO THE LANGUAGE OF PROCUREMENT, *supra* note 6.

commanders on these potential problems. Permitted by the Federal Acquisition Regulation (FAR), requirements contracts generally provide for the contractor to fulfill all the government contracting activity's actual requirements for the designated supply or service throughout the term of the contract.[15] The selection of this contract type during contingency operations "may be more difficult because customer needs may easily be overstated or understated."[16] Once a requirements contract is executed, the contract is breached if the government purchases supplies or services within the scope of the requirements contract from another source.[17]

An example provided by JAs of the 101st Airborne Division (Air Assault) highlights lessons learned regarding requirements contracts. [18] After the conclusion of major combat operations in Operation Iraqi Freedom, the 101st Airborne conducted Stability and Support Operations in the Mosul area of Iraq. Part of these operations included an attempt to restore some civil aviation to the Mosul airport. As part of this effort the division contracted with a global express air delivery service to fly the division's mail and other express deliveries into Mosul. This operation proved to be successful, and provided a benefit to the local economy as well as helping to meet the division's logistical needs.[19]

This initial success spurred an attempt to contract with other air delivery services to further expand civil aviation operations. The expansion was hindered by the type of contract initially used to procure air delivery services. This was a requirements contract, and the contractor correctly complained that the division would violate the contract terms by contracting with other providers for the same services.[20] The contractor made an additional complaint that reinforces contract formation lessons discussed earlier. As the SOW was worded broadly—presumably to maximize flexibility by permitting the command to use this express air delivery service for a wide variety of requirements—the contractor argued it should be the exclusive non-military means of air delivery.[21] Careful analysis of whether a requirements type contract best suits the mission might avoid such difficulties in the future.

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[15] *Cf.* JOHN CIBINIC JR. & RALPH C. JASH, JR. FORMATION OF GOVERNMENT CONTRACTS (3d ed. 1998) (noting that requirements-type contracts have be used to purchase all supplies and services in excess of those that can be provided by a Government activity or to purchase a stated percentage of the activity's requirements).

[16] Army Federal Acquisition Regulation Manual No. 2, Contingency Contracting, para 8-4 (c).

[17] Datalect Computer Servs. Inc. v. United States, 56 Fed. Cl. 178 (2003), *see also,* Contract Law Deskbook, *supra* note 7 at Chapter 3. III. D.

[18] This example was provided to the author by Major David T. Crawford, and Captain Savas T. Kyriakidis, Notes from After Action Review Conference, Office of the Staff Judge Advocate, 101st Airborne Division (Air Assault), and the Center for Law and Military Operations, Fort Campbell, Ky. (17-19 May 2004) [hereinafter 101st ABN DIV Administrative Law Notes].

[19] *Id.*

[20] *Id.*

[21] The issue of how broadly the contract's SOW should be interpreted never rose to the level of a formal dispute. *Id.*

Know the Acquisition Review Board Process

Deployed JAs working with contract and fiscal law issues reported the necessity of understanding the Acquisition Review Board (ARB), Corps Acquisition Review Board (CARB), or Joint Acquisition Review Board (JARB) process.[22] A JARB in one form or another will be part of any joint command's logistics operation as joint commanders are obliged "to activate an acquisition review board to integrate the acquisition flow with the overall theater logistics operation."[23] Understanding the purpose and process of the JARB gives JAs who advise the JARB itself, or units submitting requirements to the JARB, the opportunity to improve legal services by identifying acquisition problems early enough to avoid frustrating delays.

The JARB assists the commander in making funding decisions. The JARB does not determine or approve requirements. It reviews proposed expenditures to "ensure they meet bona-fide needs of the command and reflect the best value to the United States to accomplish the mission and achieve required standards."[24] Subordinate commanders determine their requirements, and submit requests for recommendation. The JARB exists to assist the commander in allocating limited financial resources where they best meet mission requirements.

The JARB itself is comprised of voting members and advisors as determined by the commander.[25] A JA serves as a non-voting advisor to the JARB, and reviews all packets submitted to the JARB for legal sufficiency prior to presentation. The JARB's final product (sometimes called validation) is a recommendation to the commander on whether a reviewed requirement should be funded. Not every logistics requirement must be submitted to the JARB for consideration. A consistent policy for forces in OIF required requirements costing more than $200,000 to be submitted to the command's JARB for review and recommendation to the commander.[26] The JARB process also assisted the commander in ensuring that certain purchases met security and

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[22] Lieutenant Colonel Dale N. Johnson, Notes from After Action Review Conference, Office of the Staff Judge Advocate, 1st Armored Division, and the Center for Law and Military Operations, Wiesbaden, Germany (13-14 Dec. 2004) [hereinafter Johnson Notes]; 10th Mountain Division (Light) Office of the Staff Judge Advocate, After Action Report: CJTF 180 OEF IV (Power Point presentation on file with CLAMO).

[23] *Army Federal Acquisition Supplement Regulation 2 (Contingency Contracting)*, para 2-1 (a)(6), (Oct. 2001) *at*http://wwwlafsc.army.mil/gc/files/AFARS.doc (last visited 4 Jan. 2004).

[24] Headquarters, CJTF-7, Annex A to Chapter 8, to CJTF-7 Standing Operating Procedures (CJTF-7 Acquisition Review Board (CARB)), (131530DNOV03), para 1, [hereinafter CARB SOP].

[25] *See id,* para. 8 (naming voting members as representatives of the C1, C3, C4, C6, C7, and C8; and the Staff Judge Advocate, Contracting Officer and other subject matter experts as required as non voting advisors). *See also* JARB for Dummies, Ch. 2 (naming each staff section C1 through C9 as voting members, and advisors as members with expertise in contracting and other legal fields).

[26] *See, e.g.,* CARB SOP; Headquarters, MNF-I, FRAGO 328 (MNF-I FY-05 Budget Execution Policy and Fiscal Guidance) (061500COCT04) (directing that all expenditures over $200K must be approved by the CARB/JARB).

interoperability standards.

To meet this goal, the JARB reviewed certain categories of requirements regardless of cost. Judge advocates found that they must stay current with these special categories, to ensure requirements were prepared for and routed through the JARB when necessary:

(a) requests for non-tactical vehicles (including busses and all-terrain vehicles);

(b) requests for tactical communications equipment or encryption devices;

(c) requests for automation equipment (computers, servers etc.);

(d) requests for cell phone or satellite internet service;

(e) requests for re-locatable buildings;

(f) requests for base support services or improvements;

(g) requests for replacements or augmentation to authorized MTOE equipment.[27]

Judge advocates advising units sending requirements to the JARB assisted the staff by reviewing requirements documents for completeness and anticipating questions that were asked by the JARB.[28] Judge advocates found that they needed to review all the documents prepared for submission to the JARB, and if possible, should consult the attorney advising the JARB to help avoid legal deficiencies. Checklists were available to assist attorneys reviewing JARB requests for completeness.

The JARB required the following documents:

(a) Justification memorandum: This memorandum stated the requirement, to include the purpose, background information, scope of work, total cost, and impact if the requirement is not approved. Common errors cited include failing to include the entire project in the requirement, and failing to obtain the correct signature.

(b) Funding documentation: Requirements submitted to the JARB were required to include properly completed and appropriate funding documents. These were either a Purchase Request and Commitment for local purchases and new contracts, or a Military Interdepartmental Purchase Request generally used when placing an order against an existing contract.

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[27] JARB for Dummies, ANNEX A.

[28] *See* CARB SOP, para. 9 (listing the following as questions that should be asked by board members during the ARB.

(c) Statement of Work: A complete statement of work (SOW) was needed to fully describe what was required and the performance standards to be enforced during the contract.[29]

(d) Independent Government Cost Estimate. The Independent Government Cost Estimate (IGCE) is the Government's estimate of the resources and projected cost of the resources a contractor will incur in the performance of a contract. These costs include direct costs; such as labor, supplies, equipment, or transportation and indirect costs; such as labor overhead, material overhead, as well as general and administrative (G&A) expenses, profit or fee.[30]

Reviewing JAs found that they had to ensure that the ICGE is actually the government's independent estimate, rather than a cost estimate solicited from a potential contractor, a cited failure of some projects submitted to the JARB.[31]

Avoid, and Prepare to Address, Unauthorized Commitments

Unauthorized commitments were a legal problem mentioned by a number of JAs regarding civil law activities after major combat operations. An unauthorized commitment is defined as an agreement that is nonbinding solely because the government representative who made it lacked the authority to enter into that agreement.[32] Only the heads of agencies, the heads of contracting activities, and certified contracting officers have authority to commit the expenditure of government funds.[33] Contracting officers may further delegate the authority to make micro-purchases in writing to selected individuals, called ordering or purchasing officers.

When unauthorized commitments occurred it was unlikely they were caused by individuals with ill intent, but by people with the "intention to do great things in the short time allotted."[34] In an example of such an unauthorized commitment provided by Task Force Olympia, a young Army specialist (E-4), with no purchasing authority bought a motor pool for $50,000. The environment in post-major conflict operations is rife with the temptation and opportunity for individuals to engage in unauthorized commitments.

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[29] CARB / BCARB Checklist, *supra* note 27.

[30] Army Contracting Agency, *Independent Government Cost Estimate, at* http://www.carson.army.mil/doc/Independent%20Government%20Cost%20Estimate%20(IGCE).htm (last visited Jan. 14, 2005).

[31] JARB for Dummies, Ch. 3.5.

[32] FAR, *supra* note 17, Pt. 1.602-3.

[33] *Id.at* pt. 1.602-1(a) (stating that contracting officers are appointed in writing on an SF 1402, Certificate of Appointment (also known as a warrant), and have actual authority to commit the expenditure of government funds to the extent of their appointment).

[34] Coalition Provisional Authority Baghdad, Memorandum, subject: Unauthorized Commitments (14 Apr. 2004) [hereinafter Unauthorized Commitment Memorandum].

In Iraq, at least three factors contributed to this condition: 1) commanders and their action officers were challenged by an almost innumerable combination of mission-related and force sustainment requirements; 2) by definition, the U.S. government acquisition process was foreign to local businesses that could supply goods and services in Iraq; and 3) military purchases in Iraq provided a direct benefit to the Iraqi population in terms of economic stimulus, and fostered good will between the military and the local population.[35]

In this context, it is easy to understand the occurrence of unauthorized commitments, and to predict that many will be explained as an expeditious means to mission accomplishment. Ultimately, unauthorized commitments often become a hindrance to mission accomplishment because of the significant administrative burden necessary to them. Commanders and other individuals in positions at risk of engaging in unauthorized commitments would benefit from pre-deployment training on the authority to commit government resources, and both the likely and potential ramifications of unauthorized commitments.[36]

IV.A.3. LOGCAP Contracting

The Department of Defense uses contractors to provide U.S. forces that are deployed overseas with a wide variety of services because of force limitations and a lack of needed skills. These services are acquired through normal contracting procedures as well as through the Logistics Civil Augmentation Program (LOGCAP).[37] The types of services contractors provide to deployed forces include communication services, interpreters, base operations services, weapons systems maintenance, gate and perimeter security, intelligence analysis, and oversight of other contractors.

The presence of many contractors in Iraq raised numerous issues addressed by deployed JAs. Legal issues concerning civilians accompanying the force, both DoD civilian employees and contractors, have been identified repeatedly in after action reports from various military operations.[38] Not surprisingly, the issue typically raised in the past was labeled: understanding the "status" of contractor employees. The question of contractor employee "status" might, at first glance seem to pertain almost solely to the

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[35] Lieutenant Colonel Paul S. Wilson, Notes from After Action Review Conference, Office of the Staff Judge Advocate, 101st Airborne Division (Air Assault), and the Center for Law and Military Operations, Fort Campbell, Ky. (20-21 Oct. 2004) [hereinafter LTC Wilson Notes].

[36] Sommerkamp E-mail, *supra* note 1.

[37] *See* U.S. DEP'T OF ARMY, REG. 700-137, LOGISTICS CIVIL AUGMENTATION PROGRAM (16 Dec. 1985) [hereinafter AR 700-137] (defining the LOGCAP as "The Army's premier capability to support global contingencies by leveraging corporate assets to augment Army current and programmed Combat Support/Combat Service Support (CS/CSS) force structure).

[38] *See* CENTER FOR LAW AND MILITARY OPERATIONS, LAW AND MILITARY OPERATIONS IN THE BALKANS 1995-1998: LESSONS LEARNED FOR JUDGE ADVOCATES 151 (13 Nov. 1998) [hereinafter BALKANS LESSONS LEARNED]; CENTER FOR LAW AND MILITARY OPERATIONS, LAW AND MILITARY OPERATIONS IN HAITI, 1994-1995: LESSONS LEARNED FOR JUDGE ADVOCATES 142 (11 Dec. 1995) [hereinafter HAITI LESSONS LEARNED].

question of when the contractor employees are entitled to POW treatment under the provisions of Geneva Conventions. This status question is also a factor in the determination of whether and how contractor employees and other civilians may be armed, as discussed below. Previous AARs have addressed the status of contractor employees in terms of the commander's ability to enforce orders intended to maintain good order and discipline (e.g., General Order 1) against contractor employees, as well as issues regarding entry, customs, and others.

Medical commanders seek advice from deployed JAs on the interpretation and application of this policy, particularly as it relates to reimbursement for medical services provided. Contract employees seek medical care for various services, from broken limbs to minor ailments.[39] Medical professionals treat these conditions based on availability of providers, and as Army policy requires reimbursement for medical services, the command JA should seek to collect contracts providing for cost-reimbursement of government-provided medical services. The contracts should then be collected in a database to aid in collecting reimbursement through third-party billing.

Collecting the contracts and relevant clauses was more difficult, and less helpful than initially anticipated. The medical treatment facilities asked contractor employees to provide copies of their contract when seeking medical care. Although this requirement produced several contracts, most of them were silent on the issue of reimbursement for medical services.[40] The absence of documentation may not have significantly impacted the medical care provided to U.S. citizen contract employees as doctors understandably did not want to tell a U.S. citizen "No, we're not going to fix your broken arm."

For cases of U.S. personnel requiring prompt treatment, medical personnel were likely to provide care regardless of contractual or policy provisions.[41] Obtaining reimbursement for medical services remained problematic even in cases where contract documents were available and contained provisions for reimbursable medical treatment. To meet the rest of its operational needs, medical treatment facilities lacked sufficient deployed personnel to capture and track this type of treatment for third-party billing.

Related to the issue of medical care is the transportation of the remains of contractor personnel killed while deployed. Addressing the many legally-related issues regarding contractors on the battlefield could be simplified greatly, and occasionally eliminated altogether if considered and addressed in the contract itself. Though it is unlikely every potential situation could be anticipated and written into a contract, many should be considered for inclusion in any contract that anticipates contractor employees supporting military operations. These include:

(a) Areas of deployment (to include potential hostile areas) and their associated risks;

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[39] Mayer Transcript, at 9.

[40] *Id.*

[41] *Id.*

(b) Physical/Health limitations that may preclude contractor service in an theater of operations;

(c) Contractor personnel reporting and accountability systems to include plans to address contractor personnel shortages due to injury, death, illness, or legal action;

(d) Specific training or qualification(s) that will be required by civilian contractors to perform within a theater of operations, e.g. vehicle licensing, NBC, weapons;

(e) Reimbursement for government provided services, e.g. medical/dental;

(f) A plan to transition mission accomplishment back to the government if the situation requires removal of contractors.

Future contracts may address many of the operational events that effect contractors accompanying the force by utilizing a current standardized clause developed for this precise purpose. This draft clause includes consideration of various deployed contractor employee issues ranging from clothing and equipment issue, to visas and customs. Until including such clauses in contracts becomes universal practice, JAs should expect to continue advising commanders on difficult issues of providing support to contractors on the battlefield.

IV.B. FISCAL LAW

A recurring theme in recent operations' after action reports (AARs) is the importance of understanding fiscal law,[42] defined as the "application of domestic statutes and regulations to the funding of military operations, and support to non-federal agencies and organizations."[43] Not only do fiscal law questions abound during military operations, but the answers were often difficult and required coordination with higher levels of command. Throughout operations in Afghanistan and Iraq, judge advocates continued to express concern regarding their comfort level in advising commanders on contract and fiscal law matters. Of the multitude of requests to CLAMO for operational law assistance during combat operations in OIF, by far the most represented legal discipline was civil law – in particular, fiscal law.[44]

In addition to understanding fiscal law, there is also the need to integrate fiscal law expertise into staff planning. Many recent AARs have suggested that a fiscally savvy JA should always be present in tactical operations centers and should at least be a "back bencher" at every staff meeting.[45] Furthermore, some suggest that this fiscal JA should be a strong willed personality given that fiscal issues at times require advising "no" to a commander's proposed course of action.[46]

The most common fiscal issue arising out of recent operations has been which "pot of money" could be used for different purposes. In more precise terminology, the issue was how not to run afoul of the Purpose Statute requirement that congressional "[a]ppropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law."[47] This issue most often manifested itself in

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[42] *See, e.g.*, MAJ Jeff Bovarnick, Chief, Operational Law, Combined Joint Task Force 180, CJTF-180 Notes from the Combat Zone (2003) [hereinafter Bovarnick CJTF-180 Notes] ("Almost daily, a new fiscal law issue comes up, but there are many recurring issues"); Interview with Maj Thomas Wagoner, former Staff Judge Advocate, 15th Expeditionary Unit (Special Operations Capable), in Charlottesville, Va. (2 Dec. 2003) ("Fiscal law – it ain't sexy, but it's what the boss wants to know."). Additionally, Col William D. Durrett, the SJA for I Marine Expeditionary Force, opined at the November 2003 XVIIIth Airborne Corps Rules of Engagement Conference that fiscal law issues were numerous during his initial deployment to Iraq, and that developing a sophisticated understand ding of fiscal law was a priority for his unit's redeployment to Iraq in Spring 2004.

[43] U.S. DEP'T OF ARMY, FIELD MANUAL 27-100, LEGAL SUPPORT TO OPERATIONS para. 3-6 (1 Mar. 2000) [hereinafter FM 27-100].

[44] The general consensus among the CLAMO staff is that fiscal law questions comprised at least one-third of all requests for assistance from the field during the periods of major combat hostilities in OEF and OIF.

[45] *See, e.g.*, Transcript of After Action Review Conference, Office of the Staff Judge Advocate, XVIIIth Airborne Corps, Fort Bragg, N,C. (30 Sept. to 1 Oct 2003) [hereinafter XVIIIth Airborne Ciros AAR Transcript].

[46] *See id. But see* Bovarnick CJTF-180 Notes ("The Fiscal Law attorney could easily make enemies on the staff by constantly saying no; however the judge advocate will quickly become an ally by working through the issue and finding a way to accomplish the mission with the proper finding source.").

[47] 31 U.S.C. § 1301(a) (2000).

the context of whether Operation and Maintenance dollars could be used to fund certain aspects of the operations. Although Congress provides the Department of Defense (DoD) over 100 separate appropriations in a typical fiscal year, tactical units (ordinarily, Army Corps, Marine Expeditionary Force, and subordinate units) generally only receive O&M appropriations, which are to be used for all day-to-day and "necessary and incident" operational expenses for which another funding source does not exist.[48] Two of the more common activities for which other funding sources exist, yet in which DoD units often find themselves involved, are development assistance (providing education, nutrition, agriculture, family planning, health care, environment, and other programs to resolve internal political unrest and poverty) and security assistance (providing supplies, training, and equipment to friendly foreign militaries).[49] Under the Foreign Assistance Act (FAA), Congress determined that these activities, development assistance and security assistance, are State Department, not DoD responsibilities. [50]

The predominant fiscal issue during OEF and OIF was to what extent O&M dollars could be used to fund activities that appeared to approach State Department security assistance and development assistance under the FAA, and if O&M dollars could not be used, what alternative funding sources were available. Issues regarding the proper DoD role within the FAA fiscal framework arose during OEF in three primary areas: 1) military provision of humanitarian assistance to the local Afghan population; 2) training and support for the Afghan National Army; and 3) support for coalition military forces.

The development assistance prong of the FAA includes activities often referred to by the military as humanitarian assistance. For OEF, CENTCOM issued a message outlining humanitarian assistance fiscal guidance.[51] The message stated that three statutes constituted the possible legal authorities for military provision of humanitarian assistance for the purposes of OEF: 1) 10 U.S.C. § 401 (humanitarian and civic assistance (HCA)), funded by service O&M or, if a "minimal" expenditure (known as *de minimus* HCA), by unit O&M (CENTCOM delegated to CJTF-180 commander the authority for

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[48] The General Accounting Office (GAO), which oversees federal government expenditures and accounting, has set forth a three-part test for determining whether an expenditure is proper:

1. An expenditure must fit and appropriation (or permanent statutory provision), or must be 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 otherwise provided for, in other words, does not fall within the scope of some other appropriation.

Secretary of the Interior, B-120676, 34 Comp. Gen. 195 (1954).

[49] *See* 22 U.S.C. §§ 2151 *et seq.* (2003) (The Foreign Assistance Act).

[50] For a more detailed explanation of the Foreign Assistance Act and its fiscal impact on the DoD, see INTERNATIONAL AND OPERATIONAL LAW DEPARTMENT, THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER AND SCHOOL, 2006 OPERATIONAL LAW HANDBOOK 251-64 (2006) [hereinafter 2006 OPLAW HANDBOOK].

[51] Message, 152020Z Jul 02, U.S. Central Command, subject: USCINCCENT Guidance for Humanitarian Assistance During Operation Enduring Freedom (OEF) [hereinafter CENTCOM OEF HA Guidance].

determining the appropriate minimal amount;[52] 2) 10 U.S.C. § 2557 (excess nonlethal supplies for humanitarian relief); and 3) 10 U.S.C. § 2561 (humanitarian relief and other humanitarian purposes worldwide). Funding for activities under 10 U.S.C. §§ 2557 and 2561 would come from the Overseas Humanitarian, Disaster, and Civic Aid (OHDACA) appropriation (in other words, not O&M).[53]

The message set forth, as a policy matter, eleven approved categories of permissible humanitarian assistance, specifying the legal authorities and appropriations for each, as well as providing other requirements and guidance. The categories were:

(a) Public health surveys and assessments;

(b) Water supply/sanitation;

(c) Well drilling;

(d) Medical Support and supplies;

(e) Construction and repair of rudimentary surface transportation systems and public facilities;

(f) Electrical grid repair;

(g) Humanitarian mine action mine awareness training;

(h) Mine display boards;

(i) Essential repairs/rebuilding for orphanages, schools, or relief warehouses;

(j) Animal husbandry/veterinarian training; and

(k) Victim assistance training for mine victims.[54]

The CENTCOM message shows that fiscal restrictions were in place regarding the unfettered use of O&M for humanitarian assistance during OIF. Thus, JAs played an important role in ensuring that proposed military humanitarian-assistance-appearing activities comported with the CENTCOM and congressional fiscal rules. If the proposed activity did not fit the rules, the JA had to advise the commander that the activity was not legally supportable. But JAs first struggled to find creative ways to support their commanders within the bounds of fiscal law.

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[52] CENTCOM OEF HA Guidance, para. 2(A)(7)(A).

[53] CENTCOM OEF HA Guidance, para. 2.

[54] *Id.* para. 3(H).

One particular fact pattern from OEF is illustrative. The SJA for the 10th Mountain Division faced a situation where an operator-proposed raid tactic raised a humanitarian assistance fiscal issue. Pursuant to raids into rural areas to locate weapons caches or enemy personnel, operators wanted to distribute various supplies to the locals in nearby villages to help keep the objective area clear of civilians and to facilitate intelligence collection. Recognizing a fiscal issue, the SJA raised the issue through the chain of command, ultimately resulting in a dialogue with the Office of the Legal Counsel to the Chairman, Joint Chiefs of Staff. The fiscal issue was readily apparent: the provision of supplies to the local populace appeared to be a form of humanitarian assistance that would not be authorized unless it satisfied the CENTCOM guidance or somehow could be classified as an operational expense appropriately funded with O&M. Giving the supplies away did not seem to fit any of the eleven CENTCOM-approved humanitarian assistance categories. The only category that allowed materials to be given away was "medical support and supplies" under the statutory authority of 10 U.S.C. § 2557, whereas the other categories all contemplated the provision of some type of training or rudimentary repair work. Thus, the proposed raid tactic appeared to violate the CENTCOM fiscal policy.[55]

The SJA for the 10th Mountain Division argued that using O&M was proper because the humanitarian benefit was merely incidental to mission accomplishment. However, this argument did not convince the Office of Legal Counsel to the Chairman, Joint Chiefs of Staff. The Office had concerns that this line of thinking could lead down a slippery slope of fiscal analysis, especially when other appropriations exist for the proposed activity.[56] In this case, the OHDACA appropriation existed for the purpose of such an expenditure, and the fact that the CENTCOM Commander's policy did not authorized such an expense, was irrelevant for purposes of the legal analysis.[57]

In general terms, the argument of justifying O&M expenditure for any activity that supports the military mission seems to be a logic that, taken to its extreme, would violate the principles underlying fiscal law. The mere executive branch issuance of a military mission statement does not constitute independent fiscal authority to spend O&M funds in support of the mission when the mission begins to stray from "operations and maintenance" as traditionally understood by Congress.[58] The OEF raid fact pattern demonstrates the lesson that JAs should understand the considerations that go into

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[55] As a *legal* matter, the OHDACA funds under the statutory authority of 10 U.S.C. § 2561 could have been used to provide the supplies under the broad heading of "other humanitarian purposes," but the CENTCOM categories imposed a more restrictive fiscal *policy*. *See* E-mail from LTC Kelly. D. Wheaton, Office of Legal Counsel to Chairman, Joint Chiefs of Staff, to LTC Charles N. Pede, Staff Judge Advocate, 10th Mountain Division (9 Aug. 2002) [hereinafter Wheaton E-mail] ("In theory, HA [OHDACA] funds could be used to purchase the basic supplies/equipment that you need .... I recognize that the HA program [§ 2561] is not currently executed in this manner. That is a process/policy issue, however, not a legal issue.")

[56] Wheaton E-mail.

[57] *Id.*

[58] *See* COL Richard D. Rosen, *Funding Non-Traditional Military Operations: The Alluring Myth of a Presidential Power of the Purse*, 155 MIL. L. REV. 1 (1998).

determining which pot of money is appropriate for activities that approach the realm of development/humanitarian assistance. They must also be able to implement that understanding in fashioning fiscal law arguments to support the commander.

Another ORF example of the proper DoD role within the FAA fiscal framework was the military provision of training and support to the newly formed Afghan National Army (ANA). The State Department has primary responsibility for training and supporting friendly foreign militaries, and for security assistance. Accordingly, O&M funds could not be used for ANA security assistance. Instead, State Department funds (often referred to a "Title 22 funds" because the FAA falls under Title 22 of the U.S. Code) had to be used. In essence, when a DoD unit is being funded by Title 22 funds, the DoD assets (personnel and materials) can be used to accomplish State Department missions. In Afghanistan, the DoD unit on the ground[59] would identify a support need for the ANA. They would then confirm with OMC-A [Office of Military Cooperation-Afghanistan] Comptroller that funding is available and that CTF-82 would be reimbursed for the support provided. CTF-82 would then submit the request for support to Joint Logistics Command (JLC). JLC would source and task the appropriate support organization to provide the support and the support would be provided to the ANA. After the support was provided, JLC would report the costs of support to CJTF-180-CJ8, which would receive fund cite from OMC-A Comptroller, and then prepare the necessary cost transfer documentation to ARCENT[60] for processing.[61]

In addition to the lesson of understanding that training support to the ANA required DoS, not O&M funds, an issue arose regarding how actual ANA operational missions would be funded once the forces had been trained. In order to avoid delays in employing forces trained through a security assistance program, JAs should help proactively resolve how the forces will be funded once they are ready for operations.

The primary fiscal issue during the early months of OIF was how to fund the operation as it transitioned from a traditional O&M funded combat mission to something less than full-scale combat, an evolving situation that quickly began to look like a military occupation. As the level of combat settled, the need to create a stable and secure environment called for measures that appeared to approach the realm of security assistance and development assistance as contemplated by the FAA. Funding was needed "to hire, train, and equip the [Iraqi] police force; clear the rubble from government buildings and city streets; hire sanitation workers and other municipal employees; clean up the courts and hire judicial personnel" and to reestablish "power, water, sewer, police, and fire support for Baghdad."[62]

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[59] In this situation, the unit was Combined Task Force 82 (CTF-82), a subordinate command to CJTF-180.

[60] Army Central Command.

[61] Office of the Staff Judge Advocate, Combined Task Force 82, Mid-Point AAR, at 6 (1 Jan. 2003).

[62] 3d Infantry Division (Mechanized), After Action Report, Operation IRAQI FREEDOM, at 289 (2003) [hereinafter 3ID AAR].

The question became what money, if any, was available to fund these necessities in the interim period before Congress had a chance to speak to the issue in a new appropriations act and while the military was the only presence on the ground with the capability to implement effective change. The fiscal options that JAs pursued fell into three general areas: 1) an argument to use O&M to fulfill the international legal obligations as an occupying power; 2) traditional DoD humanitarian assistance funds; and 3) Iraqi currency captured on the battlefield.

Several DoD civilian attorneys and military JAs argued that O&M could be used for development assistance-type activities because these activities would help stabilize the situation in Iraq, a task which appeared to fit within the military mission and, moreover, was an obligation of an occupying power. The typical four-pronged argument stated: 1) The U.S. is an occupying power in Iraq, whether *de facto* or *de jure*;[63] 2) occupying powers are required under international law to restore and maintain public order and safety and to provide food and medical care to the population;[64] 3) fulfilling this requirement is necessary and incident to military operations; and, thus 4) O&M is an appropriate funding source, even for activities that otherwise normally would fall under the purview of DoS-funded development and security assistance. DoD Office of the General Counsel subscribed to this view, stating that DoD appropriations were available for the following: 1) planning and preparing for activities that DoD reasonably anticipates it may be required to perform during the post-conflict phase of Iraq operations; 2) responding to emergencies and protecting the civilian populace, civil infrastructure and natural resources; and 3) other actions that are reasonably necessary to fulfill DoD's responsibilities, including those duties that occupying forces must perform under international law.[65]

Many judge advocates involved in OIF during the period of major combat operations did not reach the conclusion that O&M could be used to fund development assistance-type and security assistance-type aspects of an occupation.[66] Indeed,

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[63] *See* U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE para. 355 (18 July 1956) (c1, 15 July 1976) (setting forth the U.S. understanding of the international legal standard for a military occupation).

[64] *See, e.g.,* Hague Convention No. IV Respecting the Laws and Customs of War on Land and its Annex: Regulation Concerning the Laws and Customs of War on Land, art. 43, Oct. 18, 1907, 36 stat. 2277, 205 Consol. T.S. 277 [hereinafter Hague IV] ("[t]he authority of the legitimate power having passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety"); 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, art. 55 ("[t]o the fullest extent of the means available to it, the Occupying Power has the duty of ensuring the food and medical supplies of the population").

[65] E-mail from Mr. Matt Reres, Deputy General Counsel (Ethics and Fiscal), Office of the General Counsel, U.S. Army, to MAJ Alton L. Gwaltney, III, Director, Training and Support, Center for Law and Military Operations (19 Mar. 2003) (quoting guidance from the Office of General Counsel, Department of Defense ("Below [the quoted language] is what I received from DoD OGC.")) [hereinafter 19 March 2003 Reres E-mail].

[66] For example, CENTCOM issued guidance in March 2003 that humanitarian assistance activities during operations in Iraq were to be funded with traditional humanitarian assistance appropriations, not with O&M

CENTCOM's fiscal guidance was that, in the realm of development assistance, traditional humanitarian assistance authorities and appropriations should be used.[67] That is not necessarily to say, however, that all JAs based their opinions on strict adherence to *long-time legal limitations*. Many JAs used a more creative counterargument to using O&M to fund occupation activities:

(a) it is true that international law imposes obligations on the occupying power;

(b) the occupying *power* refers to the government, not the military;

(c) U.S. domestic law thus must be consulted for fiscal guidance on how the international obligations will be funded and implemented, whether by DoD or another agency like DoS; and

(d) Congress has created separate authorizations and appropriations for development and security assistance that should be used, rather than O&M, until Congress states otherwise.[68]

These conflicting viewpoints suggest the lesson that JAs at all levels should have a more proactive fiscal posture. Subordinate JAs should anticipate activities where the use of O&M might be questionable and push the issue higher for resolution and coordination. Higher-level JAs should either anticipate the issue themselves or seek to resolve and coordinate a uniform answer. The guidance should then be widely disseminated.

Despite the previously mentioned debate, O&M funds were used in Iraq as the mission transitioned to include stability and support operations. JAs advised commanders that O&M funds were appropriate to continue the prosecution of the war, and when any development or security assistance-type effect was a secondary consequence of a more traditional military activity. For example, an Army JA advised that unit O&M funds and assets could be used to unearth a large quantity of Iraqi gasoline discovered buried in the ground and to distribute it to Iraqi motorists lined up at gasoline stations. These lines

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(save for *de minimus* HCA). Message 222048Z Mar 03, U.S. Central Command, subject: USCINCCENT Guidance for Humanitarian Assistance During Operation Enduring Freedom (OEF) and Operation Iraqi Freedom (OIF) [hereinafter CENTCOM OEF and OIF Humanitarian Assistance Guidance]. *See also* Lieutenant Colonel Mark Martins, *No Small Change of Soldiering: The Commander's Emergency Response Program (CERP) in Iraq and Afghanistan,* ARMY LAW., Feb. 2004, at 4-5 [hereinafter *No Small Change of Soldiering*] ("Uncertainty concerning the nature and scope of projects that could be funded under this authority [O&M for occupation obligations], combined with the conservative mechanisms and habits of financial management, inhibited direct expenditure of O&M funds to locally purchase goods or services for humanitarian requirements.")

[67] *See* CENTCOM OEF and OIF Humanitarian Assistance Guidance.

[68] *See, e.g., No Small Change of Soldiering,* at 4 n24 ("Still, authority to use DoD funds [to fund an occupation] attenuates as Congress undertakes to discharge the U.S. treaty obligation with legislation and funding apportioned to various executive branch agencies, thereby relieving DoD of the necessity of doing so.").

were impeding the free movement of Army tactical vehicles around Baghdad. Thus the JA advised that O&M could be used because the motivation to distribute the gasoline was to facilitate military tactical movement, and the humanitarian benefit to the local population merely was an incidental consequence.[69] For another example, a Marine Corps JA advised that unit O&M could be used under a force protection rationale to purchase soccer balls for a Marine Corps-sponsored Iraqi soccer league: the league made the area safer for Marines by fostering goodwill with the local population and by keeping athletic Iraqi males off the street.[70] As with many of the fiscal issues in OEF and OIF, reasonable minds might disagree on this analysis.

There were, however, other funding options for the occupation. CENTCOM's fiscal guidance for activities whose primary purpose approached the realm of development assistance was to use traditional DoD humanitarian assistance statutory authorities and funding appropriations. Similar to the 2002 guidance for OEF, unit O&M could be used for *de minimus* HCA under 10 U.S.C. § 401, while OHDACA was to be used for other humanitarian purposes under 10 U.S.C. § 2561. The problem with these traditional humanitarian assistance options was that OHDACA funds were limited and required lead time for project approval, and that *de minimus* HCS, as the name suggests, only supported minimal HCA activities.[71] Commanders and JAs then looked to a third possibility: captured Iraqi currency.

Operations in Haiti presented fiscal law questions in the context of operations and maintenance appropriations and military construction appropriations. In Haiti, Army JAs correctly identified that neither O&M funds nor military construction (MILCON) funds could be spent to build basketball courts for other nations' forces, to provide supplies for members of the International Criminal Investigation and Training Assistance Program (ICITAP), or to improve certain roads.[72] Frequently, when requests originated from another United States Agency providing support to the Haitian people, the proper approach was to elevate the issue to higher authorities so that appropriate transfers of funds could be made from that agency to the Army pursuant to the Economy Act.[73] On

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[69] Interview with COL Lyle Cayce, Staff Judge Advocate, 3d Infantry Division, in Charlottesville, VA (7 Jan. 2004) [hereinafter Cayce Interview].

[70] *See* Transcript of After Action Review Conference, Office of the Staff Judge Advocate, Task Force Tarawa, and the Center for Law and Military Operations, Camp Lejeune, N.C. at 149, 155 (2-3 Oct. 2003) [hereinafter TF Tarawa AAR Transcript]; Telephone Interview with LtCol William Perez, USMC, Deputy Staff Judge Advocate, II Marine Expeditionary Force, and former Staff Judge Advocate, Task Force Tarawa (8 Jan. 2004) [hereinafter Perez Interview].

[71] Maj. M.J. Steele, Forward Deployed Comptroller, I Marine Expeditionary Force, Operation Iraqi Freedom Lessons Learned and After Action Report, at 16 (6 Aug. 2003) [hereinafter I MEF Comptroller AAR] (stating that, to be effective, humanitarian assistance projects required "massive amounts of money").

[72] *See* CENTER FOR LAW AND MILITARY OPERATIONS, THE JUDGE ADVOCATE GENERAL'S SCHOOL , U.S. ARMY, LAW AND MILITARY OPERATIONS IN HAITI, 1994-1995, LESSONS LEARNED FOR JUDGE ADVOCATES 141 (11 Dec. 1995) [hereinafter Haiti Lessons Learned].

[73] 31 U.S.C. 1535.

other occasions, senior authorities determined that operational needs justified the continued expenditure of operational and maintenance funds.

One of the biggest lessons learned from operations in Bosnia was the need for procurement and fiscal law expertise in peace operations.[74] In the freewheeling world of a peace operation, the purpose requirement became a dangerous trap for well-intentioned commanders and staffs. During Operation Joint Endeavor three limitations in particular proved troubling for U.S. Forces: morale programs, civil-humanitarian affairs, and the special rules regarding construction.

To keep the morale of Joint Endeavor Soldiers high despite demanding work under difficult conditions, the command wished to establish a program based on the DoD Directive authorizing Rest and Recuperation (R & R) programs.[75] Commanders initially intended to fly soldiers to recreation centers in Germany, paying for their food and lodging from appropriated funds. The same funds would pay for buses to take them back to their home stations, and pay for hotel rooms there if they had previously given up assigned quarters.[76] The problem with this idea is that the DoD Directive requires soldiers in the R & R program to be in a leave status once they arrive at the R & R site.[77] Judge advocates had to inform the command that soldiers in a leave status accumulate only personal expenses, which cannot be paid for from appropriated funds.[78]

A second fiscal difficulty arose in Bosnia because of the unusual intertwining of mission-directed spending (including protection of the force issues) and humanitarian assistance (HCA) that can be provided only subject to its own statutory authority.[79] Units arriving in the war torn area of operations were quickly confronted with civic requests to construct or rebuild everything from sewage pumps to garbage dumps. JAs proactively

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[74] Interview with LTC Denise K. Vowell, Staff Judge Advocate, 1st Infantry Division (Fwd), in Germany (27 Jan. 1998 and 22 Feb. 1998) [hereinafter Interview with LTC Vowell]; Interview of CPT Paul N. Brandau, Chief of Military Justice and Administrative Law, 1st Armored Division (Fwd), at Tuzla (5 Feb. 1998).

[75] U.S. DEP'T OF DEFENSE, DIR. 1327.5, LEAVE AND LIBERTY (24 Sep. 1985). [hereinafter DoDD 1327.5]

[76] MAJ Paul Hancq's comments *in* OPERATION JOINT ENDEAVOR, AFTER-ACTION REVIEW, Vol. I at 213 (Heidelberg, Germany 24-26 Apr. 1997) [hereinafter OJE-AAR].

[77] " Transportation to and from R & R areas shall be provided on a space-required basis, and travel time shall not be charges to the service member's leave account. However, the actual period in the R & R area shall be charged to the service member's leave account." DoDD 1327.5 at para 17.b.(1).

[78] MAJ Paul Hancq, comments *in* OJE-AAR, Vol. I at 213.

[79] *See* 10 U.S.C. § 401(a) *and* U.S. DEP'T OF DEFENSE, DIR. 2205.2, HUMANITARIAN AND CIVIC ASSISTANCE (HCA) PROVIDED IN CONJUNCTION WITH MILITARY OPERATIONS (6 Oct. 1994). Other than *de minimus* activities, HCA activities require approval of the Secretary of State. HCA activities must promote the security interests of both the United States and the assisted country, the operational readiness skills of the participating armed forces, and the foreign policy interests of the United States. There are other limits, also, such as the HCA may not be given directly or indirectly to any individual, group, or organization engaged in military or paramilitary activities.

advised commanders that most such projects were not permissible expenditures of O&M funds.[80]

Roads and bridges provided fertile ground for JAs to tighten the fiscal reigns. One commander wanted to pursue what seemed like a great idea – cost sharing the expense of repairing 380 kilometers of MSR road with Hungary. The issue was raised whether or not the U.S. had an operational need for the work. If not, we could not contribute to the repairs. If we did need the work, we had to pay all the costs, or risk violating the miscellaneous receipts statute or receiving prohibited augmentation of appropriations.[81] Another short-lived proposal was to "donate" some of our bridges by leaving the structure in place at the operations end.[82]

Support to the elections was also a sticky issue. Under terms of General Framework Agreement for Peace (GFAP), IFOR/SFOR forces were tasked to promote conditions for free elections. U.S. Forces were tasked to provide security at polling stations and along routes to and from the polling station, and even to provide transportation. A unique issue arose involving the purchase of donuts and coffee for the locals as an improvised force protection measure.[83]

Commanders in Kosovo also faced pressures to act in support of numerous requests for humanitarian and civil support. Operations in Kosovo received funds from the appropriation for Overseas Humanitarian, Disaster, and Civic Aid (OHDACA). Task Force Falcon (TFF) received $5 million in a two-year appropriation for urgent humanitarian assistance.[84] Many restrictions were placed on the use of these funds, including project cost limitations, limits on the types of projects the Task Force could undertake, and a requirement to use certain legal authorities for the expenditures. TFF developed a system whereby the CA staff section prepared each potential humanitarian assistance project with cost estimates, photographs, and project details. The project was

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[80] 1st ARMORED DIVISION OFFICE OF THE STAFF JUDGE ADVOCATE AFTER-ACTION REPORT, SEPTEMBER 1995- DECEMBER 1996 (1ST Armored Division Office of The Staff Judge Advocate 1997) [hereinafter 1AD-AAR].

[81] A detailed analysis of this issue was done by MAJ Paul D. Hancq, Deputy Chief, Contract Law Division, OJA, USAREUR.

[82] In MND-N alone, there were at least 20 AVLB bridges, 4 Bailey bridges, 9 ARRC bridges, and 2 float bridges. Besides the funding restrictions, there was also a directive by CINCUSAREUR requiring recovery of all U.S. bridging assets at the operations conclusion, whenever that may be.

[83] *See* Memorandum for Resources Management, subject: Operation Iron Donut (6 Oct 1996)

> During national elections, elements of 2BCT conducted operation 'Dobro Donut' at the bus transload points in their area of responsibility. At these points, civilians were offloaded from their buses and searched. Besides being time consuming, the process was invasive. Donuts and coffee were provided to give the civilians something to do while being searched, and to quell their hostilities toward both the searching and TF Eagle soldiers involved in the process. The lack of violence at these 'feed and search' points speaks for the overwhelming success of this tactic.

[84] *See* Message, 131310Z AUG 99, USCINCEUR, subject: USKFOR Program Approval and Funding for Urgent Humanitarian Needs.

reviewed by a group of staff officers, including a JA, before being sent to the Commander for action. The JA's review included consideration of the restraints of the OHDACA appropriation.[85] Even with this system in place, problems with OHDACA spending still arose.

Problems arose when contractors performed work beyond that for which the Task Force contracted. For example, a contractor working on roof repairs to a school – a permissible project under the OHDACA appropriation and approved by the Task Force Commander – was contacted by the school administrator and asked to add new ceilings or new lights to the school. TFF did not request these repairs, and in some circumstances, the work exceeded the rudimentary repairs authorized by the DoD policy governing the use of OHDACA funds.[86] The contractor would make the repairs and attempt to bill the Task Force for the repair work, but such requests for additional payments were denied.[87]

In addition to finds for Humanitarian assistance, the nature of the mission in Kosovo sometimes led to justification for the spending of O&M funds for certain items and services. For example, deployment into and out of Kosovo posed a logistics hurdle for U.S. KFOR planners.[88] Many existing lines of communication were unable to support the movement of U.S. heavy equipment. One such logistical issue arose with the need to improve a railroad loading dock in Gerlick, Kosovo, to support a palletized loading system to offload U.S. goods shipped into Kosovo by rail. The U.S. could not get approval from Serbia for the necessary repairs because this immediately followed the Allied Force bombing campaign. JAs attempting to determine an appropriate authority to improve the railroad facility looked to the MTA.[89] In the MTA, KFOR was given the authority to "take all necessary action" to carry out the mission. The U.S. used this language as a rationale for making the necessary improvements to the rail station.

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[85] Understanding the operations of the numerous NGOs within Kosovo aided in the overall quality of the legal review. JAs knowledgeable in the available NGO resources and understanding the legal restrictions placed on spending were able to provide better advice on the overall handling of humanitarian assistance projects. For example, because funding categories for humanitarian assistance by military forces were limited, some projects could only be undertaken by a joint NGO/Task Force effort. *See* Memorandum, CPT Paula Schasberger, former Deputy Legal Advisor, Task Force Falcon, to CLAMO, subject: Comments to AAR for Kosovo, ¶ 1(f) [hereinafter Schasberger Memo].

[86] One such "mission expansion" project included adding a new boiler to a school for heating. The boiler was not compatible with the pipes in the school and when the boiler was fired, all the pipes blew apart. Other examples included adding indoor bathrooms to schools that previously had no indoor plumbing; retiling floors; and purchasing and installing electrical substation transformers, this improving the electrical system beyond preconflict condition.

[87] *See* MAJ Brian Goddard & LTC Richard Sprunk, Operation Joint Guardian; Contract and Fiscal Law Issues, PowerPoint presentation (2000).

[88] The acting Operations Officer for Military Traffic and Management Control is quoted as saying, "[Kosovo] has got to be one of the hardest places to get to in the world." John R. Randt, Landing the Kosovo Force, *at* http://www.almc.army.mil/alog/JanFeb00/MS519.htm (last visited 17 Aug. 2006).

[89] Military Technical Agreement between KFOR and the governments of FRY and the Republic of Serbia. The MTA gave KFOR the authority to take all necessary action to establish and maintain a secure environment for all citizens of Kosovo.

The transportation of Serb school children in HMMWVs and nontactical vehicles (NTVs) also hinged on the interpretation of the SACEUR Operational Plan to determine whether such transportation was a necessary and incident expense to meet the requirements of the Purpose statute.[90] SACEUR, in an NCA-approved mission plan, directed Task Force Falcon to observe and prevent interference with the movement of civilian populations and to respond appropriately to deliberate threats to life and property as part of the overall TFF mission. TFF thought it necessary to transport Serb schoolchildren because of recent attacks on Serb convoys, including the intentional bombing of a Serb shopping convoy.[91] Based on these facts, the JA opined that the support was appropriate.[92]

The early days of the mission in Kosovo led to urgent requests from the local population to prevent the precarious situation from slipping into an even greater humanitarian disaster. Almost immediately upon KFOR's entry into Kosovo, the 800,000 Kosovar refugees in Camps in Albania and FYROM flooded back into the Kosovo province,[93] resulting in clashes between the Kosovar Albanians and Serbs. In addition, crops planted in the spring, before the NATO bombing campaign, were ripe and going to spoil if not harvested. There was no fuel to enable the farmers to harvest their crops. TFF viewed the employment of field workers as crucial to force protection and securing the Kosovo community, because workers in fields would not be burning homes and formulating plans to remove Serbs from Kosovo. The TFF Commander felt that the situation was so dire that failing to act would lead to a widespread disaster and continue to threaten the safety of U.S. troops. Because no humanitarian funding was available, the commander acted under his inherent authority to protect the force and his authority to establish a secure environment in Kosovo and distributed approximately 12,000 gallons of fuel over a period of two weeks.[94] This type of factually specific decision should not

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[90] *See* Memorandum, Deputy Legal Advisor, Task Force Falcon, to Resource Management, Task Force Falcon, subject: Serb Escort Missions (17 Mar. 2000). [hereinafter Serb Escort Memo]. The fact-specific determinations frequent in fiscal law opinions often lend themselves to disagreements over appropriate use of funds. E-mails sent to various JAs asking for their technical expertise with this issue led to entirely different responses.

[91] Because Kosovar Serbs were not were not able to move freely around Kosovo, U.S. Forces accompanied convoys of Kosovar Serbs to the Kosovo-Serbia border so the Kosovar Serbs could shop for groceries and other items in Serbia. The convoys typically ran two times a week.

[92] Serb Escort Memo, ¶ 3a. The JA noted that this support could not be without end" "[T]he ultimate goal is to transfer these types of actions to the United Nations Mission in Kosovo (UNMIK). Additionally, the Task Force, through the G-5, could attempt to coordinate with Non-Governmental Organizations for support for these missions until UNMIK is prepared to take responsibility." *Id.* ¶ 4(i)/

[93] The United Nations High Commissioner for Refugees estimated that there were 445,000 refugees in Albania, 345,000 refugees in FYROM, and 70,000 refugees in Montenegro. ASTRI SUHRKE ET AL., THE KOSOVO REFUGEE CRISIS: AN INDEPENDENT EVALUATION OF UNHCR'S EMERGENCY PREPAREDNESS AND RESPONSE ¶ 31 (Jan. 26, 2000), http://www.unhcr.org/cgi-bin/texis/vtx/research/opendoc.pdf?tbl=RESEARCH&id=3ba0bbeb4 (last viewed 17 Aug. 2006).

[94] *See* LTC Mark S. Martins, Deputy Staff Judge Advocate, 1ID, Task Force Falcon Interim After Action Review, Operational Law CLE, PowerPoint presentation, at notes to briefing slide 26 (3 Dec. 1999) [hereinafter Martins Presentation].

be made prior to coordinating with higher headquarters. DoD eventually approved the use of OHDACA funds for this purpose based upon the Task Force Request.[95]

The TFF Joint Visitors Bureau (JVB) maintained a robust schedule of visitors to the Task Force. The hundreds of visitors included the President of the United States, leaders of foreign countries, military leaders, and entertainers. JAs were constantly facing issues involving gifts – from coins, posters, hats, and jackets to bronze Falcon Statues – for these visitors. Commanders and staffs regularly desired to use appropriated funds, either directly or under the Brown and Root contract, to purchase these gifts. While JAs vigilantly explained the gift-giving rules in a variety of formats, including information papers, legal reviews, e-mails, charts, and personal counseling, the message required constant repeating.

In Bosnia, the greatest amount of fiscal questions came from the construction area. Confusion often arose as to the distinctions between repair, maintenance, and construction, especially when it came to work on existing roads and bridges. In Bosnia, engineers were useful in making that determination.[96] The obvious impact of such a determination is what funds are available to support the project.

Many of the problems arose when commanders and staff officers sought to use O&M funding for construction projects in the million dollar range. When JAs reminded commanders and staff of the legal limits on their authority to spend funds for construction, they sometimes responded by stressing the need for the construction to accomplish their "title 10 responsibility."[97] It probably added to the confusion that during the course of the deployment the statutory ceiling for O&M use for construction was raised from $300,000 to $500,000.[98] In an oversimplified view, this changed the three-tier "structure" of construction spending to O&M appropriations for $500,000 and less, Minor Military Construction, Army, for $500,001-$1.5 million, and specific approval through the Specified Military Construction Program (MILCON appropriations) for amounts over $1.5 million. The important lesson for JAs is that they must stay aware of current law and use technical channels in complex fiscal issues. There is no operational exception to fiscal law in the construction area.[99]

In OIF JAs needed to understand the relationship between construction appropriations, procurement appropriations contingency construction, and leasing. At the start of the Iraq war, MILCON appropriations, rather than O&M funds had to be used for

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[95] *See supra* text accompanying notes 91-93.

[96] *See* CENTER FOR LAW AND MILITARY OPERATIONS, THE JUDGE ADVOCATE GENERAL'S SCHOOL , U.S. ARMY, LAW AND MILITARY OPERATIONS IN THE BALKANS, 1995-1998, LESSONS LEARNED FOR JUDGE ADVOCATES at 148 (13 Nov. 1998) [hereinafter Balkans Lessons Learned].

[97] MAJ Paul D. Hancq, comments *in* OJE-AAR, Vol I, at 215.

[98] See 10 U.S.C. § 2805(c). The change was accomplished by Public Law 104-201 (1996).

[99] MAJ Paul D. Hancq, comments *in* OJE-AAR, Vol I at 216.

construction projects exceeding $750,000.[100] Similarly, O&M dollars could not be used to purchase investment end items or systems exceeding $250,000 or any centrally managed item (such as tactical or nontactical vehicles) regardless of cost; rather, procurement appropriations had to be used.[101]

A possible exception to the general construction rule just mentioned is the use of O&M dollars for construction during combat or declared contingency operations.[102] After much discussion between DoD and Army regarding the availability of O&M funds, Congress states in its April 2003 Emergency Wartime Supplemental Appropriation that MILCON funds had to be used for all operations regardless of the intended temporary use of the construction.[103] Then, in November 2003, Congress carved out a broad exception to this rule by providing temporary authority for the use of O&M for urgent operational construction requirements of a temporary nature in support of OIF and the Global War on Terrorism.[104]

A type of structure that caused a construction verses procurement fiscal debate is what is known as a "relocatable building". A relocatable building is "a building designed to be readily moved, erected, disassembled, stored, and reused."[105] Relocatable buildings typically are considered personal property,[106] and thus can be funded with unit O&M dollars or, if over the $250,000 investment end item threshold, with procurement dollars. However relocatable buildings used in places of permanent construction when the duration of the required use is unknown must be considered real property and funded under a construction analysis.[107] The issue JAs faced was whether a structure could be classified as a relocatable building; if so, whether the structure was personal or real property; and depending on the answer, how the structure should be funded.

Another area which triggers fiscal rules is leases. One recurring example during OEF and OIF of items that were obtained through operating leases rather than purchase was commercial nontactical vehicles. Units determined that more vehicles were needed to

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[100] *See* 10 U.S.C. § 2805(c) (2000).

[101] *See, e.g.,* Department of Defense Appropriations Act for Fiscal Year 2004, Pub. L. No. 108-87, § 8040, 117 Stat. 1054, 1081 (30 Sept. 2003) [hereinafter 2004 DoD Appropriations Act]; U.S. DEP'T OF DEFENSE, DoD FINANCIAL MANAGEMENT REGULATION, vol. 2A, ch. 1, para. 010201(D)(1) (June 2002) [hereinafter DoD FMR, vol. 2A, ch. 1].

[102] *See* 10 U.S.C. § 101(a)(13)(200) (defining contingency operation).

[103] *See* Emergency Wartime Supplemental Appropriation for the Fiscal Year 2003, Pub. L. No. 108-11, § 1901, 117 Stat. 587 (2003).

[104] *See* Emergency Supplemental Appropriation for Defense and for the Reconstruction of Iraq and Afghanistan for Fiscal Year 2004, Pub. L. No. 108-106, § 1301, 117 Stat. 1209 (2003).

[105] U.S. DEP'T OF DEFENSE, INSTR. 4165.56, RELOCATABLE BUILDINGS para. C(2)(a) (13 Apr. 1988) [hereinafter DoD INSTR. 4165.56].

[106] *See id.* para D(3).

[107] *See id.*

meet the transportation requirements of dispersed and fluid areas of operations.[108] Yet vehicles are supposed to be purchased with procurement dollars because, even though they typically do not exceed the $250,000 threshold, they are considered centrally managed items.[109] The purchase of vehicles is centrally managed because Congress sets a cap on the number of vehicles that each service can acquire in a given fiscal year.[110] Accordingly, to avoid violating the congressional cap, units in OEF and OIF used O&M –funded operating leases to acquire the use of NTVs.[111] These leases often were very expensive, however, and units had to wade through the detailed procedural rules and restrictions governing NTV operating leases, such as what level of command can approve the lease depending on its length.[112]

Commander's Emergency Response Program

Army and Marine Corps units captured well over one billion dollars of Iraqi currency during OIF. [113] A CFLCC policy was in place for both OEF and OIF dictating that any captured enemy currency would be turned in to Army Finance personnel for accounting and management. The issue became how this captured currency could be used to support operations.

Prior to creation of the CDF and the later emergence of the CERP, many JAs expressed concern over their inability to immediately use the captured funds for the benefit of the Iraqi people. JAs argued that international law authorized using captured enemy currency for military purposes, to include fulfilling the obligations of an occupying power.[114] The frustration of Army and Marine Corps JAs and comptrollers

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[108] *See, e.g.,* LTC Paul Wilson, Deputy Staff Judge Advocate, 101st Airborne Division (Air Assault), Thoughts on Contracting (6 Jan. 2004) (Microsoft Word document contained in E-mail from LTC Richard M. Whitaker, Staff Judge Advocate, 101st Airborne Division (Air Assault), to LTC Pamela M. Stahl, Director, Center for Law and Military Operations (8 Jan. 2004)) [hereinafter Wilson E-mail].

[109] *See supra* text accompanying note 113.

[110] *See e.g.,* 2004 DoD Appropriations Act, 117 Stat. 1063 (authorizing the Army to purchase four new vehicles required for personnel security, not to exceed $180,000 per vehicle).

[111] *See e.g.,* Wilson E-mail.

[112] *See* U.S. DEP'T OF DEFENSE, REG. 4500.36-R, MANAGEMENT, ACQUISITION, AND USE OF MOTOR VEHICLES paras. C3.2.4.2 to C3.2.4.3 (29 Mar. 1994) (C1, 30 Sept. 1996) (dividing leases into short – (60 days or less) and long-term (greater than 60 days) leases, requiring, *inter alia*, approval of the head of the DoD component or designee for long-term lease of commercial vehicles outside the United States).

[113] *See* 3ID AAR, at 289 ("the division confiscated almost 1 billion dollars from Baghdad palaces"); TF Tarawa AAR Transcript, at 122-23; *No Small Change of Soldiering*, *supra* note 26, at 3.

[114] *See, e.g.,* MAJ Robert F. Resnick, Chief, Criminal Law, 3d Infsntry Division, Operation Iraqi Freedom After Action Review at 6 (25 Apr. 2003) ("CENTCOM/CFLCC unduly restricted the Division's use of captured money (both dinars and dollars) from the regime. I believe the law was much more clear than did CENTCOM regarding our ability to use this money for SASO [stability and support operations] projects. CENTCOM's conservatism in this area jeopardized all that we achieved."); TF Tarawa AAR Transcript, *supra* note 30, at 122. Hague IV, *supra* note 24, art. 53, states, "An army of occupation can only take possession of cash, funds, and realizable securities which are strictly the property of the States, depots of

seems very understandable in light of the instability they have encountered on the ground. But it is also understandable for higher commands to have policy reasons for centrally managing the money – for instance, having a transparent centralized system better able to withstand public scrutiny than an ad hoc system in which individual units capture money and spend it on their own, and the desire to more effectively allocate the funds from a higher command with a broader perspective on overall operational requirements.[115]

Possibly the most significant development for legal personnel during full spectrum operations in Iraq, and later Afghanistan, was the creation and administration of the Commander's Emergency Response Program (CERP). The genesis of CERP was the collection of seized Iraqi cash into an Office of Reconstruction and Humanitarian Assistance (ORHA)-managed account known as the Commander's Discretionary Fund (CDF). As the military's normal financial controls, intended to protect the expenditure of Congressional appropriations, were inapplicable to seized Iraqi funds, a special procedure was established to administer these funds.[116] Taking over for the ORHA, the Coalition Provisional Authority (CPA) renamed the CDF the CERP.[117]

The CJTF-7 put the seized Iraqi assets, and the CERP into action by issuing implementing guidance in a FRAGO.[118] Numerous additional FRAGOs implemented changes and expansions to the program in its first few months of existence. These FRAGOs gave commanders the authority to use the seized Iraqi funds to conduct reconstruction assistance in their areas of operation. The CERP defined reconstruction broadly as "the building, repair, reconstitution, and reestablishment of the social and material infrastructure of Iraq,"[119] The FRAGOs permitted purchasing goods and services to support a non all-inclusive list of projects to address the humanitarian needs of the Iraqi people, including:

- Water and sanitation infrastructure;
- Food production and distribution;
- Healthcare;
- Education;

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arms, means, of transport, stores and supplies, and generally, all movable property belonging to the State which may be used for operations of the war."

[115] Indeed, a 30 April 2003 memorandum from the President to the Secretary of Defense directed DoD to consult with various U.S. agencies to develop a transparent and wee-documented system to govern the use, accounting, and auditing of seized Iraqi funds. *See No Small Change of Soldiering,,* at 3 n.17.

[116] Memorandum, The President to the Secretary of Defense, subject: Certain State-or Regime-Owned Property in Iraq (30 Apr. 2003).

[117] Headquarters, Combined Joint Task Force 7, FRAGO 89 (Commander's Emergency Response Program (CERP) Formerly the Brigade Commander's Discretionary Fund) to CJTF-7 OPORD 03-036 (192346JUN03) [hereinafter FRAGO 89].

[118] Headquarters, U.S. Army V Corps, FRAGO 104M to OPORD Final Victory (establishing a "Brigade Commander's Discretionary Recovery Program to Directly Benefit the Iraqi people") (070220LMAY03) [hereinafter FRAGO 104M].

[119] FRAGO 89, para 3.B.

- Telecommunications;
- Transportation;
- Rule of law
- Effective governance;
- Irrigation;
- Purchase or repair of civic support vehicles;
- Repairs to civic or cultural facilities; and payments to day laborers to perform civic cleaning.[120]

Certain categories of projects were specifically prohibited by the CERP FRAGO, these included:

- Direct or indirect support to CJTF-7 forces, to include coalition forces;
- Entertainment of the local Iraqi population;
- Any type of weapons buy-back program or rewards program;
- The removal of unexploded ordinance;
- Duplication of services available through local municipal governments;
- Support to individuals or private businesses; and
- Paying salaries or pensions to the civil work force.[121]

Judge advocates helped commanders put CERP funds to use, and Iraqi people to work on an extremely broad range of projects throughout Iraq. Commanders' use of the CERP and the immediate benefits this program provided to the Iraqi people gained national media attention.[122] The CERP was extraordinarily popular with commanders, and was expanded by the CPA to include non-U.S. Coalition Forces. Commanders approved literally thousands of CERP-funded projects in the firs few months of the program's existence, spending tens of millions of seized dollars in the process.[123] To help maintain the CERPs success Congress appropriated $180 million to fund CERP projects as part of an Emergency Supplemental Appropriations Act on 30 September 2003.[124]

The funds appropriated for the CERP infused new cash into the program, and the appropriations language contained several provisions significant to JAs. The appropriated CERP dollars permitted commanders to continue implementing projects

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[120] *Id.*

[121] *Id.* para 3.D.

[122] Ariana Eunjung Cha, *Military Uses Hussein Hoard for Swift Aid,* WASH POST, Oct. 30, 2003, at A01 [hereinafter *Military Uses Hussein Hoard for Swift Aid*].

[123] *No Small Change for Soldiering,* at 8.

[124] Emergency Supplemental Appropriations Act for Defense and for the Reconstruction of Iraq and Afghanistan, 2004 Pub. L. No. 108-106, § 1110, 117 Sta. 1209, 1215 [hereinafter Emergency Supplemental Appropriation].

quickly, without the administrative strictures normally associated with acquisitions[125] by stating that the appropriated CERP funds could be used "notwithstanding any other provision of law."[126] The appropriation language did, however, limit the use of these somewhat, by specifying the purpose of "urgent humanitarian relief and construction requirements."[127] Recognizing the CERPs success in Iraq as a valuable tool of commanders towards mission accomplishment, Congress in the emergency appropriation, authorized creation of a CERP to benefit the people of Afghanistan.[128]

Although new guidance for administering the CERP with appropriated funds (CERP-APF) was issued,[129] practical changes to administration of the program were minimal, and remained largely transparent to units in the field.[130] The new guidance emphasized that as CERP-APF was funded with U.S. Government funds, it was now liable to greater financial scrutiny and fiscal controls. The following example demonstrated how JAs applied the CERP-APF guidance: Operating in the Al Anbar Province of Iraq, the 82nd Airborne Division identified the need for a trucking company both to bring reconstruction supplies into the community, and to provide some of the division's own logistics requirements. Several benefits would be derived from a functioning Al Anbar trucking company. The division could contract locally for hauling capacity, relieving some of the burden from the division's own limited capacity, the company itself would provide jobs to Iraqi citizens, and interaction between the division and local business people would likely benefit the often mentioned "hearts and minds" element of the OIF mission.[131] A privately-owned trucking company operated in the area before the war, but its equipment was badly damaged, and no longer functioned. The command believed providing start-up funds to the trucking company was an idea candidate for the CERP because of the obvious humanitarian benefit. The OSJA identified a potential violation of CERP guidance prohibiting use of CERP funds for the direct benefit of individuals or private businesses.[132] As the benefits of obtaining the

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[125] GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. 43.201 (July 2004) [hereinafter FAR]. U.S. Dep't of Army Federal Acquisition Reg. Supp. (July 2004) [hereinafter AFARS].

[126] Emergency Supplemental Appropriation, *supra* note 124.

[127] *Id.*

[128] *Id; see also,* Message, 092041ZDEC03, Headquarters U.S. Central Command to Commander, ARCENT and CJTF-180, subject: Combined Forces Command Fragmentary Order 07-231 Commander's Emergency Response Program (CERP) – Appropriated Funds (CERP-APF);

[129] Message, 092024ZDEC03, Headquarters U.S. Central Command to Commander CJTF-7, subject: Combined Forces Command Fragmentary Order 07-231 Commander's Emergency Response Program (CERP) – Appropriated Funds (CERP-APF); CJTF-7 FRAGO 107 to OPORD 03-036; CJTF-7A, Information Paper, Subject: Sources of FY04 Funding for Projects Benefiting the Civilian Population of Iraq (5 Feb. 2004).

[130] Captain Timothy P. Hayes, Notes from After Action Review Conference, Office of the Staff Judge Advocate, 1st Armored Division, and the Center for Law and Military Operations, Wiesbaden, Germany, (13-14 Dec. 2004) [hereinafter Hayes Notes].

[131] Lieutenant Colonel Thomas Ayres, Notes from After Action Review Conference, Office of the Staff Judge Advocate, 82d Airborne Division and Center for Law and Military Operations, Fort Bragg, N.C., (17-19 June 2004) [hereinafter Ayres Notes].

services of a local trucking company were undeniable, the OSJA struggled with a means of funding the start-up costs. Ultimately, the OSJA determined that O&M funds could indirectly provide the Al Anbar trucking company's startup costs. As no other trucking company was readily available, the division could contract with the company for some of the division's logistics needs. The trucking company would use some of those funds for start-up costs, and once the company was up and running, it could use additional hauling capacity for the relief and reconstruction effort.[133]

The CERP continued to evolve in Iraq after the transfer of sovereignty. New FRAGOs tailored the program as operational needs evolved. Thus far, the CERP has been a "powerful tool that contributed greatly to the 'occupation' mission and had a strong positive impact on winning hearts and minds."[134]

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[132]*See* FRAGO 89.

[133]*See* Ayres Notes.

[134]*See* Sommerkamp E-mail, *supra* note 1.

V. CLAIMS

The processing of claims for property damage or loss and personal injuries that inevitably occur during military operations requires careful planning well in advance of the deployment of troops. Judge Advocates ("JAs") mostly rely on the Foreign Claims Act during deployments to satisfy the numerous claims made against military commanders.[1] When the claims process works well, the payment of legitimate claims has been cited as a force multiplier capable of enhancing a unit's force protection in a hostile environment.[2] Conducting effective claims operations also helps foster positive relations with local nationals by preserving goodwill.[3] Judge Advocates should also recognize that the efficient and expeditious processing of personnel claims helps maintain good morale while Service members are deployed.[4] Thus, it behooves JAs to develop claims strategies that can and have historically proven to make important contributions to the military commander's overall mission success.[5]

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[1] Foreign Claims Act (FCA). 10 U.S.C. § 2734. Under 10 U.S.C. § 2734 (a), meritorious claims for property losses, injury or death caused by service members or the civilian component of the U.S. armed forces may be settled to "promote and maintain friendly relations" through the prompt settlement of meritorious claims. *Id.*

[2] *See, e.g.*, LESSONS LEARNED FROM IRAQ AND AFGHANISTAN, Volume I, Major Combat Operations (11 September 2001 – 1 May 2003) (hereinafter "LL. VOL I") § F. CLAIMS 175, 180-181, nn.2-3 & 32-33.

[3] *See e.g.*, LAW AND MILITARY OPERATIONS IN THE BALKANS 1995-1998, (hereinafter "BALKANS LL"), § N. CLAIMS 160 n.427 (noting comments made by one judge advocate that claims payments were used to make payments to farmers for the deprivation of grazing land or spot repairs to roads damaged by military equipment).

[4] *See e.g., Id.* at 162-163.

[5] *See generally*, LAW AND MILITARY OPERATIONS IN HAITI 1994 -1995, (hereinafter "HAITI LL"), § M. CLAIMS 144 (noting that "prompt investigation, adjudication, and payment of foreign claims contributed to the goodwill of the Haitian people toward U.S. forces, which in turn contributed to the security of those forces").

V.A. PRE-DEPLOYMENT PLANNING

Once notified of an impending deployment, judge advocates should designate claims commissions and seek out planning assistance from the United States Army Claims Service (USARCS).[6] For claims operations in support of Operation UPHOLD DEMOCRACY (Haiti), USARCS provided deploying judge advocates with "off the shelf" appointment packages for those individuals designated as claims commissions. The identification of claims commissions and appointment coordination with USARCS is a vital part of the pre-deployment planning process.

During Operation Joint Endeavor (Balkans), JAs were employed as foreign claims commissions throughout a geographically dispersed area of operations.[7] Operating in support Operation Joint Endeavor, paralegals were also valuable in the overall effort to decentralize the investigation and settlement of foreign claims.[8] Training a large number of JAs and paralegals on claims operations prior to deployment will significantly improve the efficiency with which foreign claims are investigated and processed.[9]

Determining the personnel composition of the claims section is a key component of pre-deployment planning. During Operation Iraqi Freedom (OIF), paralegals were, and still are, an excellent resource for taking on significant responsibilities relating to the investigation and settlement of claims.[10] During pre-deployment planning, consideration should also be given to how interpretation and translation services will be obtained to support the processing of foreign claims.[11] While the task of obtaining language services

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[6] Information about the United States Army Claims Service can be readily accessed on the internet through the JAGCNET website (http://www.jagcnet.army.mil/). See also, sister service claims regulations and activities. e.g. DEP'T OF AIR FORCE, REG. 51-501, TORT CLAIMS (9 Aug. 02) [hereinafter AFI 51-501]; U.S. DEP'T OF NAVY, JUDGE ADVOCATE GENERAL, INSTR. 5890.1, ADMINISTRATIVE PROCESSING AND CONSIDERATION OF CLAIMS ON BEHALF OF AND AGAINST THE UNITED STATES (17 Jan. 91) [hereinafter JAGINST 5890.1]. Pursuant to C.F.R. §750.13, Claims: Single Service Responsibility, and DEP'T OF DEFENSE, DIR. 5515.8, SINGLE-SERVICE ASSIGNMENT OF RESPONSIBILITY FOR PROCESSING CLAIMS (9 Jun. 90), the Army, Air Force, or Navy is assigned sole responsibility for processing claims in different countries across the globe. For example, at the beginning of OEF and OIF, the USAF was assigned single service claims responsibility for both Afghanistan and Iraq. This meant all claims were required to go through the USAF claims service for final adjudication.

[7] *See*, BALKANS LL at 154.

[8] *Id.*, n.428 (citing comments made by MAJ Jody Prescott that Task Force Eagle was able to resolve foreign claims swiftly by decentralizing their investigation and settlement).

[9] *See* DEP'T OF ARMY, REG. 27-20, CLAIMS para. 2-2(d)(1)(a) (1 July 2003) [hereinafter AR 27-20] (noting that commanders can appoint commissioned officers, warrant officers, noncommissioned officers, or qualified civilian employees to investigate claims incidents).

[10] *See generally*, LEGAL LESSONS LEARNED FROM AFGHANISTAN AND IRAQ: VOLUME II, FULL SPECTRUM OPERATIONS (1 MAY 2003 TO 30 JUNE 2004) (hereinafter "VOL II LL") § E. CLAIMS 187 nn.17-19, (noting how paralegals successfully performed most of the claims investigations and processing for several Division SJA offices).

[11] *Id.* at 188, n.21 (referring to how one SJA employed interpreters for claims intake/investigations and translators for translating claims-related paperwork).

may not be resolved prior to deployment, advance planning for acquiring these services should be undertaken to minimize potential delays.[12]

Claims personnel can expect to do a great deal of traveling during a deployment and sometimes under hazardous conditions.[13] Recent combat operations in Operation Enduring Freedom (OEF) and OIF demonstrate the inherent hazards of vehicular movement in a hostile fire zone.[14] Judge Advocates and paralegals who will be conducting claims operations should dedicate themselves to pre-deployment training in rifle marksmanship, convoy operations, map reading, and global positioning system (GPS) use. Since most claims teams do not have dedicated vehicle assets, pre-deployment planning can also address how claims teams will travel throughout the area of operations.[15]

Judge advocates can assist commanders by recommending that personnel claims procedures be established prior to deployment. Service members can only recover payment for personal items lost or damaged during a deployment if the items were reasonably possessed.[16] The task for JAs is to assist commanders with publishing a list of what personal items can be reasonably possessed during a deployment before the service members even depart their home station.[17] One JA who served in Iraq has suggested that commands should publish guidance on what personal items will be considered reasonable, or even unreasonable, so service members are put on notice about how their personnel claim will be handled should they need to file one.[18]

Depending on the anticipated length a deployment, many service members will have to place their personal property into some type of long-term storage. The United States Army Claims Services has reported most recently during OEF and OIF that the two most common personnel claims involve damage to personally owned automobiles (POVs) and personal gear stolen or removed without accountability from barracks rooms.[19] Judge advocates can assist commanders by calling their attention to this problem and offering several recommendations on what preventative measures can be taken to mitigate the impact of post-deployment personnel claims on the command.[20]

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[12] *See generally*, VOL II LL 190-191.

[13] *Id.* at 189.

[14] *Id.* at 188-189.

[15] *Id.* at 189 (noting that deployed claims teams in OIF usually did not have assigned vehicles to conduct claims operations).

[16] *See* AR 27-20, para. 11-11.d. ("The type of property claimed and the amount or quantity claimed was reasonable or useful under the attendant circumstances for the claimant to have used or possessed incident to military service or employment"). See also JAGINST 5890.1 at § A para. 5.

[17] BALKANS LL at 162.

[18] *See* VOL I LL at 190, n.89.

[19] *See* LL VOL I at 191, nn.90-91.

[20] *Id.*

Choosing the Correct Legal Standard

Judge advocates in a deployed environment are often faced with the challenge of applying host nation liability standards to pay foreign claims. In Bosnia, host nation law could not be used to hold contractors liable for vehicular accidents caused while operating military vehicles.[21] For judge advocates supporting operations in Kosovo, verifying property ownership in Albania also proved to be difficult.[22] During OEF, one judge advocate noted that Islamic religious law, commonly referred to as Sharia, was the only law widely applied throughout Afghanistan.[23] Since the judge advocate was unfamiliar with how to apply Sharia to pay for the death of a donkey, the more familiar general tort principles were relied upon to analyze the claim.[24]

To overcome the challenges of applying host nation law, judge advocates can acquire the services of local lawyers to assist in claims operations. In Haiti, locally hired interpreters were able to assist judge advocates by acquiring information about Haitian law.[25] During OIF, one unit directly hired local lawyers to assist in determining local law.[26] The use of local attorneys can help judge advocates understand the intricacies of applying local law and customs. However, one staff judge advocate who hired Iraqi attorneys to assist in processing foreign claims cautions that careful oversight of local attorneys does need to be maintained.[27]

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[21] *See* BALKANS LL at 156 (stating that claims personnel had to rely on general tort liability principles to bypass host nation law so that tort liability could be assigned to the contractor drivers and not the vehicle owners – the U.S. military).

[22] *See* LAW AND MILITARY OPERATIONS IN KOSOVO: 1999-2001 (hereinafter "KOSOVO LL"), § d. Foreign Claims 68.

[23] *See* VOL I LL at 187, n.69.

[24] *Id.*

[25] *See* HAITI LL at 148.

[26] *See* VOL I LL at 187, n.72.

[27] *See* VOL II LL at 191 (noting that local attorneys provided inconsistent legal advice and allowed personal bias to affect recommended judgments).

V.B. FOREIGN CLAIMS SERVICE

Judge advocates have developed various techniques to assist local nationals with filing foreign claims in a deployed environment. In Bosnia, Task Force Eagle judge advocates delivered claims services to a largely rural and scattered population by conducting operations out of a military tactical vehicle.[28] These "claims convoys," as they became known, would make scheduled stops, along a predetermined route, where claimants could meet and file foreign claims.[29] The claims convoy included, "a Class A agent, a translator, and support personnel traveling together to intake, investigate, and pay claims."[30]

Because they work closely with local nationals, civil affairs personnel can also help promote claimant access to the foreign claims system.[31] Civil affairs personnel in Bosnia assisted with claims intake and facilitating claims investigations.[32] During OEF, one judge advocate stated that civil affairs personnel were able to arrange convoy security and locate interpreters to conduct claims operations.[33] Civil affairs personnel are also usually versed in local customs and possess some knowledge about local leaders. In Iraq, JAs also worked with public affairs officers to publicize claims related information using local radio, print and television media.[34]

Distributing claims forms printed in the host nation's language is a proven and successful technique for promoting claims intake. In Haiti, military drivers were provided with preprinted forms that could be distributed in the event of a traffic accident.[35] Providing service members with a preprinted form helps facilitate the accurate recording of events surrounding a potential claims incident.[36] Likewise, important details about the foreign claims process can be included on these forms and demonstrate the Command's willingness to address legitimate grievances.[37] Producing

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[28] *See* BALKANS LL at 157-158.

[29] *Id.* at 158.

[30] *Id.* at 157.

[31] *See generally*, BALKANS LL at 158.

[32] *Id.* at 158 (highlighting how civil affairs personnel assisted with manning a claims office in Brcko at least one day per week).

[33] *See generally*, VOL I LL at 77 (citing how commanders would combine civil affairs activities, information operations activities and claims activities for logistical and security reasons).

[34] *See generally*, VOL II LL at 193 (describing how claims personnel developed an information operations campaign to publicize claims related information throughout local Iraqi communities).

[35] *See* HAITI LL at 151.

[36] *Id.*

[37] *See generally*, VOL II LL at 193 (noting how JAs developed pre-printed claims packets in Arabic prior to deployments in support of OEF and OIF).

claims packets in the host nation language can also be incorporated into the overall pre-deployment planning process.[38]

Conducting Claims Operations

Conducting successful claims operations requires that judge advocates are capable of communicating with foreign claimants in the local language.[39] Since most claims offices are not staffed with military linguists, language services will likely have to be acquired either before or during a deployment. In Operation UPHOLD DEMOCRACY, JAs employed Haitian translators conversant in French and Creole to assist claimants with understanding the meaning of the various claims forms.[40] Likewise, language interpreters can also be very helpful with instructing claims personnel on local customs and cultural nuances that may impact claims adjudication.[41] In Kosovo, interpreters helped identify individuals who wanted to abuse or defraud claims personnel.[42] During OIF, one claims office hired a local mechanic to verify the authenticity of auto damage claims.[43] Thus, the use of local nationals promotes claimant access to the claims system and can also assist claims personnel with understanding local law and customs.

Force protection concerns, limited vehicle assets, and a geographically dispersed population are all factors that challenge JAs to carefully plan the security and logistical aspects of delivering claims services.[44] Claims personnel can almost always count on having to travel outside of the defensive perimeter of a forward operating base to investigate and pay foreign claims. Judge advocates also largely rely on the combat units to which they are attached to provide them with transportation support on the battlefield.[45] In Kosovo, JAs enlisted Military Police support to obtain both convoy security and transportation to conduct claims operations throughout that country.[46] In Afghanistan, JAs were able to coordinate and combine claims missions with civil affairs and psychological operations missions.[47] Judge advocates are therefore well served to

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[38] *Id.*

[39] *See e.g.*, HAITI LL at 148; KOSOVO LL at 69; VOL I LL at 186; and, VOL II at 190.

[40] HAITI LL at 148.

[41] *See e.g.*, VOL I LL at 187 (describing how one unit claims officer was able to accurately ascertain the value of a donkey only after consulting with a interpreter).

[42] *See generally*, KOSOVO LL at 69; VOL II LL at 191.

[43] VOL II LL at 192 (noting that the use of an independent mechanic's estimate of auto damage claims saved the claims office over forty thousand dollars).

[44] *See e.g.*, KOSOVO LL at 67, n.119 (recalling one judge advocate's account of how she was threatened with physical harm by a claimant demanding compensation).

[45] *See* LESSONS LEARNED VOL I at 188, n.75 (citing FM 27-100, para. 4.4.2. as providing the doctrinal basis for legal personnel to rely on the units to which they are attached to provide transportation support).

[46] *Id.* at 67.

[47] *See* LESSONS LEARNED VOL I at 188.

establish solid working relationships with those commanders and staff sections that control transportation assets.[48]

Claims personnel should be prepared to develop strategies for handling claims arising out of the negligent acts caused by non-U.S. military personnel. During peace enforcement operations in the Balkans, claims personnel were inundated with claims for damages caused by non-U.S. military NATO forces.[49] While NATO command policies precluded the payment of claims in the Balkans, U.S. military commanders worked to settle claims to promote good relations with the local populace.[50] In Iraq, one judge advocate noted that several Coalition partners lacked any compensatory process for addressing the negligent acts caused by their own forces.[51] Like the Balkans, U.S. commanders sought ways to settle claims from non-U.S. military personnel to promote goodwill between the local Iraqi populace and the Coalition.[52] Finally, judge advocates should not attempt to pay claims filed against the U.S. for damage caused by contractors because these claims are not payable under the Federal Torts Claims Act (FCA).[53]

Investigating Fraudulent Claims

Claims personnel operating in a deployed environment should always remain vigilant against fraudulent and exaggerated foreign claims. In Haiti, claims judge advocates realized that the best approach to combating fraudulent claims was essentially a preventative one.[54] By requiring the submission of authentic records, detailed documentation, pictures, and other "hard" evidence to substantiate filed claims, JAs were able to implement a rigorous but fair claims system.[55]

In Iraq, numerous claims have been filed for auto accidents between civilians and military vehicles.[56] To discourage multiple claimants from seeking compensation arising out of a single accident, one SJA office implemented a policy that only the registered vehicle owner, and not the driver, could properly bring a claim against the U.S.[57] After

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[48] *See generally*, VOL II LL at 190 (noting one judge advocate's observation of how tactical commanders supported claims personnel and welcomed the distribution of claims payments to the local populace).

[49] *See* BALKANS LL at 156.

[50] *Id.* at 160.

[51] *See* VOL II LL at 194, n.65 (citing the opinion of one judge advocate who concluded that the complete absence of any compensatory scheme on the part of non-U.S. military forces only eroded good relations with the Iraqi populace).

[52] *Id.*

[53] U.S. DEP'T OF ARMY, REG. 27-20, CLAIMS, para. 2-40.

[54] HAITI LL at 151.

[55] *Id.*

[56] VOL II LL at 188-189.

[57] *Id* at 189 (describing how procedures that required vehicle owners to also produce valid identification and vehicle registration to provide proof of ownership).

proving ownership of the vehicle, claimants also had to produce pictures of the alleged vehicle damage and a picture of the front license plate.[58] This information was then loaded into a local database that could be checked to ensure judge advocates did not accept multiple claims for the same vehicle.[59]

Judge advocates can also prevent paying out duplicate claims by reviewing the USARCS foreign claims database.[60] During OIF however, access to the USARCS foreign claims database was not always readily available to claims personnel.[61] Thus, judge advocates should be prepared to develop and use a foreign claims log to track the number and type of claims being paid within an area of operations. Deployed claims personnel should then coordinate for the sharing of foreign claims logs with other deployed claims offices to reduce the opportunity for claimants to fraudulently file multiple claims.[62]

Adjudicating and Paying Foreign Claims

One of the most challenging aspects of claims operations is addressing the myriad of issues caused by the FCA combat activities exception to paying foreign claims.[63] As at least one judge advocate has noted in military operations other than war ("MOOTW"), "there is a gray area between combat and combat related activity."[64] In the Balkans, often characterized as a peace enforcement operation,[65] commanders struggled to resolve the tension between paying foreign claims arising out of combat-like activities and the command policy that dictated that such claims would not be paid.[66]

For claims personnel operating in support of OEF and OIF, where combat operations were being conducted, JAs often wrangled over the gray area that lies between actual combat and combat-related activity.[67] In Iraq, prior to 1 May 2003, all foreign

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[58] *Id.*

[59] *Id.*

[60] Judge advocates who are appointed as Foreign Claims Commissions can obtain access to the database by requesting permission through the U.S. Army Claims Service, Tort Claims Division, Foreign Torts Branch, Fort Meade, Maryland 20755-5360 (Comm 301-677-7009/DSN 923-7009) for further information and guidance.

[61] A foreign claims log example can be found in the INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER & SCHOOL, U.S. ARMY, JA 422, OPERATIONAL LAW HANDBOOK (2006) at 194.

[62] *See* VOL II LL at 192.

[63] *See generally*, 10 U.S.C. § 2734 (providing that the FCA provides for the settlement and payment of claims caused by or incident to non-combat activities).

[64] BALKANS LL at 159, n.425.

[65] *Id.* at 41, n.102 (citing U.N. Security Council Resolution 1031, giving the North Atlantic Treaty Organization the peace enforcement mandate under U.N. Charter, Chapter VII).

[66] *See generally*, BALKANS LL at 159-160.

[67] *See generally*, VOL I LL at 179.

claims were essentially treated as excludable combat claims unless proven otherwise.[68] As combat operations in Iraq and Afghanistan have transitioned over to Stability and Support-type operations, the volume of foreign claims being adjudicated by claims personnel has significantly increased. Judge advocates cannot alone rely on operational descriptions such as Full Spectrum Operations or Stability and Support Operations to define whether or not the combat activities exclusion applies in a given circumstance. The reality of these operations is that Service members are still conducting combat activities and claims personnel will have to carefully examine each claim on its own individual merits.[69]

When claims cannot be paid for reasons of policy or law, military commanders have developed various means to compensate local nationals as a show of goodwill. In Kosovo, service members would routinely perform minor repairs to roads and bridges damaged by the heavy vehicles operated by U.S. forces (a.k.a., "maneuver damage").[70] In Iraq, one staff judge advocate was able to creatively recast an otherwise excludable combat claim for the consumption of a large volume of soda by thirsty service members as a contract issue.[71] In that instance, the SJA was able to obtain contract ratification from a contract officer and thereby resolved the dispute allowing his commander and the Iraqi businessman to maintain positive relations.[72]

In both Iraq and Afghanistan, humanitarian assistance (HA) and humanitarian civic assistance (HCA) funds have been used to provide humanitarian assistance to villages and neighborhoods where one or several combat excluded claims may have arisen.[73] While the funds cannot be used as a direct payment to an aggrieved person or family, the funds can be used build schools, hospitals, or provide humanitarian assistance in the local area where the alleged grievance may have occurred. In OEF, this type of payment was made to build a school in memoriam to several children who were killed by Afghan forces who were training with U.S. forces.[74] Thus, commanders can acknowledge the impact an action may have on a particular community without necessarily treating the underlying incident as a claim against U.S. forces.

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[68] *Id.* at 180, n.26 (citing to the Combined Joint Task Force – 7 Claims SOP for Iraq).

[69] *See generally*, VOL II LL at 197 (describing how the FCA combat activities exception is still applied in Iraq to exclude shooting incidents at traffic control points and when Service members justifiably return fire in other self-defense situations).

[70] *See e.g.,* KOSOVO LL at 163 (noting that if a tracked vehicle knocked down a wall, then combat engineers might be dispatched to make repairs to the damaged wall); *see also*, BALKANS LL at 160 (describing how spot repairs would be made on those portions of roadway damaged by U.S. military equipment).

[71] VOL I LL at 181-182 (describing how the owner of a soda factory demanded compensation after Service members had consumed large amounts of soda after occupying the factory as a temporary headquarters).

[72] *Id.*

[73] *See generally*, LL VOL I at 182 (describing how JAs tried to coordinate the delivery of humanitarian assistance through civil affairs channels when claims could not be paid due to combat related activity).

[74] LL VOL I at 182, n.41.

For judge advocates and commanders serving in Iraq, the Commanders Emergency Response Program (CERP) funds have provided an alternate funding source to pay certain types of claims.[75] The CERP funds have been made available for commanders to pay, among other things, claims that might not otherwise be compensable under the FCA. For example, these funds have been used to pay solatia-like payments for the unintentional deaths of local nationals that would not otherwise qualify as solatia payments.[76] Judge advocates therefore play an instrumental role in advising commanders when CERP funds can be used to pay claims that would otherwise be denied under the FCA.[77]

[75] *Id.* at 185; *see also*, LL VOL II at 195.

[76] *See* Captain Karin Tackaberry, *Judge Advocates Play a Major Role in Rebuilding Iraq: The Foreign Claims Act and Implementation of the Commander's Emergency Response Program*, ARMY LAW., Feb. 2004, at 42.

[77] *See* LL VOL II at 196-197.

V.C. DEATH CLAIMS AND SOLATIA PAYMENTS[78]

One of the most challenging aspects of deployed claims operations is handling compensatory claims for the unintentional death of a local national or solatia payments to surviving family members where local law and custom recognize this practice. As a matter of policy, claims personnel are not authorized to make solatia payments except in those geographic regions where such payments are widely recognized as a customary cultural norm.[79] Neither Solatia nor condolence payments are an admission of liability; however, commanders want to use these payments as an expression of sympathy towards surviving family members. As previously noted, Commanders and judge advocates have observed that solatia payments contribute to a unit's overall force protection and mission accomplishment by acknowledging those unintentional injuries and deaths inflicted upon local nationals.[80]

In Haiti, where the local law was based on civil code traditions, JAs deployed in support of Operation UPHOLD DEMOCRACY discovered they did not have a standing body of local law upon which to discern compensatory amounts for the loss of a life.[81] Judge advocates were then left to develop their own compensation system for making death claim payments to surviving family members. In these situations, JAs will want to coordinate with USARCS in developing a compensation system that can be consistently applied throughout the deployed area of operations.

In Iraq and Afghanistan, claims funds were not initially made available for the compensation of accidental injury or death caused by U.S. forces until the cessation of major combat operations had been declared.[82] However, once the general prohibition had been lifted, claims personnel sought out the assistance of local attorneys with determining the value of death or injury claims based on local law and customs.[83] In November 2004, a DoD policy memorandum clarified that solatia payments could be made by commanders in both Afghanistan and Iraq.[84]

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[78] *See generally*, HAITI LL at 149, n.514 (explaining that solatia payment are made to the surviving members of someone who has been killed; and, that solatia payments represent an expression of sympathy without regard to liability or fault, in accordance with local law and custom). See also, Combined Forces Command- Afghanistan Fragmentary Order 224 (261404Z APR 06) at para. 3.B.5.H.1. for information on CERP condolence payments in Afghanistan.

[79] *See supra* note 68.

[80] LL VOL II at 196.

[81] HAITI LL at 149.

[82] *See generally*, LL VOL I at 179, n.23 (citing to a Combined Forces Land Component Command (CFLCC) Claims information paper that declared all FCA claims arising within Iraq to be automatically classified and prohibited as combat activity claims).

[83] LL VOL II at 194.

[84] *See* Memorandum, Department of Defense, Office of General Counsel, for Staff Judge Advocate, U.S. Central Command, through Legal Counsel to the Chairman of the Joint Chiefs of Staff, subject: Solatia (24 Nov. 2004).

In Iraq, judge advocates have recommended using CERP funds to make solatia-like payments for claims otherwise excluded under the FCA's combat activities exception.[85] Prior to making solatia or solatia-like payments using CERP funds, judge advocates can assist commanders by investigating the circumstances that give rise to such payments and ensuring payments are not being paid out to individuals who were conducting combat activities against U.S. forces.[86]

[85] LL VOL II at 198 (noting one judge advocate's observation that while the solatia-like payments were nominal in amount, the payment was nonetheless "received well by both the individual claimants and local leaders").

[86] *Id.* (It is also likely that Commanders would not want to compensate the surviving family members of individuals who were injured or killed while attacking U.S. forces either).

V.D. PERSONNEL CLAIMS

The amount of personal items service members acquire before and during a deployment is usually proportional to the length of that deployment.[87] Experience has demonstrated that service members who have access to a Post Exchange (PX) or Base Exchange (BX) may purchase high value items like digital cameras or televisions during a deployment.[88] Problems can arise within a unit when commanders refuse to compensate service members for the loss or damage of personal property, especially high value items, acquired during a deployment.[89] If a commander does not establish a reasonable personal property list prior to deployment, then any subsequent decisions to compensate some personnel claims but not others may be viewed as wholly arbitrary.[90] To mitigate this problem, judge advocates can work with commanders to establish a pre-deployment list of what personal items will be accepted as reasonable for purposes of paying personnel claims. Finally, several judge advocates have noted that developing the ability to pay personnel claims prior to re-deployment significantly improves service member morale and enhances trust in the Command.[91]

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[87] *See* BALKANS at 161.

[88] *See Id.* at 162; *see also* LL VOL I at 199.

[89] *See generally*, LL VOL I at 198-199.

[90] *See supra* note 14; *see also* LL VOL I at 199.

[91] *See generally*, BALKANS LL at 162; LL VOL I at 198; and, LL VOL II at 189-190.

VI. LEGAL ASSISTANCE

Legal Assistance is the provision of personal civil legal services to [military members], their family members, and other eligible personnel.[1]

Legal assistance is the commander's tool to help military service members and their families resolve their personal legal problems,[2] and it is an especially important legal mission prior to and during a deployment.[3] The theory behind deployed JAs providing legal assistance services is that when deployed service members have their legal affairs in order, they are better able to focus on and accomplish their mission.[4] Troublesome legal issues concerning child custody, divorce, civil lawsuits, debt collection, and other issues often have a negative impact on a service member's performance of duty and morale, regardless of rank. Personal legal issues left unresolved may not only reduce combat effectiveness, but they may also grow into disciplinary issues requiring greater command attention.[5] When deployed, legal personnel should be prepared to handle many of the same legal assistance issues they commonly see in garrison.[6]

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[1] U.S. DEP'T OF ARMY, FIELD MANUAL 27-100, LEGAL SUPPORT TO OPERATIONS para. 3-13 (1 Mar. 2000) [hereinafter FM 27-100]. One JA commented "JAs should familiarize themselves with those groups of individuals entitled to legal assistance as well as the limitations placed thereon." E-mail from CPT Fredrick Horton Jr., 4th Infantry Division OSJA, subject: Legal Assistance Feedback para. 1 (13 May 2004) [hereinafter Horton E-Mail].

[2] FM 27-100, para. 3-14.

[3] *See* INTERNATIONAL AND OPERATIONAL LAW DEPARTMENT, THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER AND SCHOOL, 2004 OPERATIONAL LAW HANDBOOK, at 323 (2003) [hereinafter 2004 OPLAW HANDBOOK] ("From an operational standpoint, the legal assistance [program] must ensure that [service members'] personal legal affairs are in order prior to deployment, and then, in the deployment location, to meet the Soldiers' legal assistance needs as quickly and efficiently as possible.").

[4] CENTER FOR LAW AND MILITARY OPERATIONS, DEPLOYED MARINE AIR-GROUND TASK FORCE (MAGTF) JUDGE ADVOCATE HANDBOOK, 164(15 Jul. 2002) [hereinafter MAGTF]; *See also* CENTER FOR LAW AND MILITARY OPERATIONS, LAW AND MILITARY OPERATIONS IN HAITI, 1994 – 1995: LESSONS LEARNED FOR JUDGE ADVOCATES, (11 Dec. 1995) [hereinafter Haiti LL].

[5] *Id.*. at 323.

[6] *See, e.g.,* Interview with LTC Sharon E. Riley, Staff Judge Advocate, 1st Armored Division, in Charlottesville, Va. (10 Oct. 2003) [hereinafter Riley Interview].

VI.A. PREVENTIVE LAW PROGRAMS

An aggressive preventive law program can significantly reduce the detrimental effects of the most common legal assistance pitfalls that deployed service members frequently encounter. Army legal doctrine suggests time-tested methods such as SRP processing, legal briefings, radio and television advertisements, bulletin-board postings, and newspaper articles.[7] Other methods to "get the word out" include Family Readiness Group (FRG) briefings and to perform on-the-spot will counseling and POA preparation and execution at the FRG briefings.

The legal assistance office at each respective base or station often has a preventive law program already developed that can be oriented to the needs of the deploying soldiers. Arrangements can usually be made to offer the preventive law period of instruction at the legal assistance office on a recurring basis. If this is not feasible, a legal assistance attorney should attempt to go directly to the units during block training periods and schedule times when judge advocates and/or paralegals can conduct legal briefings.

The most efficient method for reaching Soldiers and Marines is the "teach the teacher" method.[8] This method requires units to nominate a representative to receive a period of instruction and return to the unit to conduct further instruction. To lend credibility to this method, staff noncommissioned officers and/or company grade officers are preferred. The importance of getting the command group behind a preventive law program is key to the program's success. The person or group conducting this training is unimportant, so long as the information being presented is relevant and timely.[9] Finally, a useful part of a preventive law program can also be presented on the deploying unit's web page.[10] By coordinating with the Communications Officer (G-6 or S-6) and Public Affairs Officer (PAO), JAs can easily establish an SJA section on the web page where preventive law information can be accessed by both service members and their families.

VI.A.1. Soldier Readiness Programs (SRP)s

Placing service members' legal affairs in order is one of many tasks units should accomplish prior to deploying. Recent operations have shown that many legal assistance tasks can be accomplished en masse as part of Soldier Readiness Processing (SRP).[11]

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[7] U.S. DEP'T OF ARMY, REG. 27-3, THE ARMY LEGAL ASSISTANCE PROGRAM (21 Feb. 1996) [hereinafter AR 27-3].

[8] MAGTF at 171.

[9] *Id.*

[10] *Id.*

[11] The term "SRP" is often used interchangeably with other similar terms, such as "EDRE" (Emergency Deployment Readiness Exercise), "SRC" (Soldier Readiness Check), "CRC" (Contingency Readiness

SRP has such manifest value that it has become Army doctrine.[12] Service members must receive a legal briefing concerning wills and powers-of-attorney (POAs) and be afforded the opportunity to make or update them before deployment.[13] Legal assistance counseling must also be available.[14]

SRP legal processing brings inherent tension between the need to advise large numbers of service members and the duties of confidentiality[15] and diligence.[16] JAs should consider drafting and distributing pre-deployment legal packets with information on wills, powers of attorney, and other relevant topics to company-size units so that Soldiers arrive at the SRP with all the necessary documents and information for efficient processing.[17] Additionally, pre-deployment legal packets will allow Soldiers and family members to talk and think about their legal needs in order to prepare questions and gather the information necessary to designate beneficiaries and other important designations.[18]

Check), and others. These terms all refer to the same or similar method of processing large groups of personnel. For clarity, this Publication will use the term "SRP" throughout.

[12] FM 27-100, para. 3-14. *See also* U.S. DEP'T. OF ARMY, REG. 600-8-101, PERSONNEL PROCESSING (IN-, OUT-, SOLDIER READINESS, MOBILIZATION, AND DEPLOYMENT PROCESSING), at 10 (18 July 2003) [hereinafter AR 600-8-101] (describing SRP operations).

[13] AR 600-8-101, para. 4-6(b) (providing that wills and other legal documents will be drafted onsite when appropriate); U.S. DEP'T OF NAVY, OFFICE OF THE JUDGE ADVOCATE GENERAL INSTR. 5801.2, NAVY-MARINE CORPS LEGAL ASSISTANCE PROGRAM para. 7-2a (1) (a) (11 Apr. 1997) ('A legal assistance attorney will individually and privately interview each client who requests a will (it is recognized that in some emergency situations or under field conditions, "individually and privately" may involve the attorney and client meeting at a table in a gymnasium or in a mess tent, for example, vice in a private office, however, in all circumstances there must be a one-on-one meeting between attorney and client).'). *See generally* U.S. DEP'T OF NAVY, OFFICE OF THE JUDGE ADVOCATE GENERAL INSTR. 5800.7C, MANUAL OF THE JUDGE ADVOCATE GENERAL ch. VII (3 Oct. 1990) (C4, 15 Mar. 2004) [hereinafter JAGMAN] (describing generally the Navy/Marine Corps legal assistance program).

[14] *See* AR 600-8-101, *supra* note 6, para. 4-6. The regulation does not specifically state that Soldiers must be able to consult with an attorney on site.

[15] *See* U.S. DEP'T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS rule 1.6 (1 May 1992) [hereinafter AR 27-26] (providing that an Army attorney owes a duty of confidentiality to his or her client); U.S. DEP'T OF ARMY, REG. 27-3, THE ARMY LEGAL ASSISTANCE PROGRAM para. 4-8 (21 Feb. 1996) [hereinafter AR 27-3]; U.S. DEP'T OF NAVY, OFFICE OF THE JUDGE ADVOCATE GENERAL INSTR. 5803.1B, PROFESSIONAL CONDUCT OF ATTORNEYS PRACTICING UNDER THE COGNIZANCE AND SUPERVISION OF THE JUDGE ADVOCATE GENERAL, rule 1.6 (11 Feb. 2000) (C1, 12 Dec. 2002) [hereinafter JAGINST 5803.1B] (providing that Navy and Marine Corps attorneys owe a duty of confidentiality to their clients). Note that the Army and Navy/Marine Corps confidentiality provisions are extremely similar.

[16] *See* AR 27-26, rule 1.3 ("A lawyer shall act with reasonable diligence and promptness in representing a client and in every case will consult with a client as soon as practicable and as often as necessary after undertaking representation."). *See also id.* rule 8.5(f) ("Every Army lawyer subject to these Rules is also subject to rules promulgated by his or her licensing authority or authorities.").

[17] *See* LAW AND MILITARY OPERATIONS IN THE BALKANS 1995-1998, at 183 (1998) [Hereinafter BALKANS LESSONS LEARNED].

[18] Balkans at 494.

Prior to Operation Iraqi Freedom (OIF), the U.S. Army's Third Infantry Division (3ID) legal assistance office (LAO) implemented a comprehensive and innovative legal assistance program. The 3ID LAO processed thousands of active and reserve component Soldiers for deployment.[19] 3ID Judge Advocates (JAs) conducted SRP briefings for large groups of Soldiers dealing with basic legal assistance topics such as wills and POAs,[20] and the Service members Civil Relief Act (SCRA).[21] After receiving their initial legal briefing, personnel moved to the SRP legal station, where paralegal Soldiers conducted an initial screening. Soldiers with no legal needs were quickly identified and moved on to the next non-legal station, but others were able to execute POAs at a table near the front of the SRP line. Two JAs were dedicated solely to will preparations at computer workstations. Modular dividers provided a private atmosphere for will consultation and execution.[22] Although the primary purpose of SRP legal operations was to execute POAs (and wills as appropriate), JAs also provided individual advice on minor legal matters. The limitations of the SRP setting prohibited legal counseling on all but minor legal issues. Clients with issues requiring more privacy, research, or time were given regular office appointments with a legal assistance attorney.[23]

VI.A.2. Debtor/Creditor Issues & Financial Management

Preventive law topics should be oriented toward the legal challenges typically experienced by deployed service members. Debt collection, financial management, and consumer rights issues present some of the most common problems for deployed service members. Collecting debts is an interesting trade and certainly a trade with its fair share of smoke and mirrors. A *debt collector* is a business or individual who is in the business of collecting debts. A *creditor* is the business or individual to whom the debt is originally owed. The distinctions between these two entities are important, since state and federal

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[19] *See* Transcript of After Action Review Conference, Office of the Staff Judge Advocate, 3d Infantry Division, and the Center for Law and Military Operations, Fort Stewart, Ga., at 117 (18-19 Nov. 2003) hereinafter 3ID AAR Transcript]. The augmented 3ID LAO processed thousands of Soldiers and prepared over 6,700 powers-of-attorney and 1,200 wills. *Id.*

[20] Legal personnel conducting briefings explained what wills and POAs are and when they may be required, but they also explained that Soldiers should not grant a general POA when a special POA would suffice. JAs explained that many Soldiers may not need a will if they are unmarried with no dependents and have few assets. *See id.*

[21] Service members Civil Relief Act, 50 U.S.C. §§ 510-594 (2003) [hereinafter SCRA]. The purpose of the SCRA is to postpone or suspend some of the civil obligations of military personnel to allow them to give full attention to their military duties. The SCRA was formerly titled the Soldiers' and Sailors' Civil Relief Act (SSCRA) of 1940. Although the former SSCRA became the SCRA within the time period covered by this Publication, the Act will be referred to as the SCRA throughout this Publication. For a more detailed discussion of the 2003 SCRA, see John T. Meixell, *Service members Civil Relief Act Replaces Soldiers' and Sailors' Civil Relief Act*, ARMY LAW., Dec. 2003, at 38, *available at* https://www.jagcnet.army.mil/laawsxxi/cds.nsf [hereinafter *Service members Civil Relief Act Replaces Soldiers' and Sailors' Civil Relief Act*].

[22] 3ID AAR Transcript, at 118.

[23] *Id.* at 120.

laws often establish different laws based on the status and relationship with the debtor.[24] For example, the Fair Debt Collection Practices Act (FDCPA)[25] prohibits a *debt collector* from contacting an unrelated third party concerning the debt, i.e., commanding officer or sergeant major; however, laws pertaining to *creditor* contact with third parties may permit such contact.

While most debt collection agencies are very reputable and follow the law to the letter, many agencies regularly cross the line in their collection efforts.[26] Judge advocates dealing with those agencies that have crossed the line should note that these businesses frequently become very receptive to alternative dispositions for a client's case when violations are brought to their attention that may affect their ability to be in business.[27]

Financial management is truly the key to avoiding many of the pitfalls of maintaining credit accounts and other financial obligations for service members. Title 15, Chapter 41, addresses Consumer Credit Protection and includes the Fair Credit Billing Act and the Truth in Lending Act.[28] During deployments, a lot of issues arise simply due to the ability or inability of the service member to consistently pay just debts in a timely manner.[29] While this topic is most appropriately addressed at the unit level by concerned and knowledgeable staff noncommissioned officers, preventive law programs and unit briefs should make mention of financial management. Furthermore, most major Army installations have regularly scheduled classes on financial management. Legal assistance offices also may offer similar classes. With the advent of online banking and bill paying services being offered by most banks, service members have few excuses when asserting an inability to make payments in a timely fashion. Establishing these services is simple, provided that service members are aware of such options.

Perhaps one of the bigger challenges faced by judge advocates and other family care services is not with soldiers, but in equipping military spouses with budgeting skills, debt restructuring information, and a clear understanding of the career and life consequences of failing to employ sound financial management strategies.[30] During the Haiti deployment, many families' financial matters came under great strain because the

[24] MAGTF at 178.

[25] Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692-92o (2002).

[26] *Id.*

[27] *Id.*

[28] *See* 15 U.S.C. § 1601-44, 1661-65 (2002).

[29] MAGTF at 181.

[30] Haiti Lessons Learned at 121. *See also, e.g.,* DEP'T OF ARMY, REG. 608-1, ARMY COMMUNITY SERVICE PROGRAMS, para. 9-3 (30 Oct. 1990) (describing the basic prevention education program, the financial counseling program, and the debt liquidation assistance program); David D. Lennon, Bankruptcy Overview for Military Legal Assistance Attorneys (1992) (on file in the library of The Judge Advocate General's School).

civilian spouse suddenly inherited the responsibility to balance the checkbook while lacking the skills or the maturity to make ends meet.[31]

Consumer laws are numerous and run the gamut from product warranty issues to door-to-door sales transactions. Consumer scams involving military service members are abundant. Many consumer scams often fall into familiar categories, including magazines offers, vacuum cleaners, and encyclopedia sales.

Additionally, some units reported dealing with significant debt-related legal assistance issues upon reintegration.[32] The most common issues often related to accounts that the service member was unaware had gone into collection, such as outstanding utility bills and debt related to overspending during the deployment as a result of service members earning extra money.[33] As mentioned above, these issues are best addressed prior to deployments, along with subsequent fiscal responsibility 'reminders' during deployments.

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[31] *Id.at 122. See also* DEP'T OF ARMY, REG. 600-15, INDEBTEDNESS OF MILITARY PERSONNEL, para. 1-5 (14 Mar. 1986); DEP'T OF ARMY, REG. 27-3, THE ARMY PREVENTIVE LAW PROGRAM, para. 3-4 (30

Sept. 1992) [hereinafter AR 27-3].

[32] *See* 101st ABN DIV AAR, at 40; 1AD AAR at 16.

[33] *See* 1AD AAR.

VI.B. ISSUES DURING DEPLOYMENT

VI.B.1. Family Law issues

Separation and divorce issues are some of the most frequent legal issues that the JA will encounter while deployed. Since marital discord is often very debilitating to deployed Soldiers, the JA must be able to provide assistance in a manner that is both professional and sensitive to the situation. Experienced and sincere counseling is one of the JA's most important roles in separation and divorce cases. Clients are often blinded by anger or despair and the ability of the JA to provide some semblance of order to the situation is often the first important step towards resolution. While there is no single cause for the marital discord, geographic separation, often for long periods of time, is always a contributing factor and the cause for much frustration on the part deployed service members.

Separation agreement worksheets can often be a useful measure as to whether or not the couple is really serious about becoming separated or divorced.[34] Additionally, the separation agreement worksheet will give the JA and client the important first indication of whether the husband and wife can agree on serious matters such as property and asset/debt distribution, child custody, and whether might be good candidates for an uncontested divorce.

Judge advocates will likely find that initiating a divorce while a service member is deployed is unlikely, since retaining counsel, court appearances, and other obstacles make meaningful progress difficult. However, with the JA's assistance, the client can effectively set the conditions for a divorce upon the client's return to CONUS. Reviewing applicable divorce laws pertaining to anticipated divorce issues of the case should be discussed with the client to ensure his/her ability to take action when time and circumstances permit. Finally, the Service member's Civil Relief Act (SCRA) may be invoked prior to issuance of a final decree in these (and all other) civil actions; the SCRA is discussed below in more detail.

One less-common legal assistance issue occurred when several of service members have had to cancel or delay their wedding and/or travel plans because of last minute extensions in theater.[35] These incidents occurred because service members relied upon redeployment guidance when making wedding and travel plans.[36]

In some cases, depending on the state, marriages could be performed by proxy or by Video Teleconferencing (VTC).[37] At the time of this writing, four states offer this service: Texas, Montana, Colorado, and solely for service members stationed abroad,

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[34] MAGTF at 184.

[35] *See* 1AD AAR at 5-6.

[36] *Id. See also* 101st ABN DIV AAR at 38.

[37] *Id.*

California.[38] The state of Montana offers double-proxy marriages. That is, neither party need be physically present to bind one another in a valid marriage.[39]

Non-Support of Dependents

Claims of non-support of dependents against a service member tend to get the attention of the command very quickly. The non-deployed spouse typically initiates non-support claims by letters to the command, complaints to congressional representatives, or via a legal assistance attorney. The bottom line is that all Soldiers are expected to provide adequate and continuous support for their lawful dependents and comply with the terms of separation agreements and court orders.[40] When there is a separation agreement or court order, judge advocates should simply compare the facts of the case to the obligations established in the documents. In cases where no separation agreement or court order exists, the individual is required to provide monetary support pursuant to regulation, particularly if adequate support is not currently being provided.[41]

Prepare for last minute (predeployment) family care plan failures

Commanders are required to follow the family care plan guidance in Army Regulation 600-20, Army Command Policy.[42] Even so, when faced with the specter of long-term deployments, many family care plans will fail just before deployment. Many failures are legitimate—care providers will often back out at the last minute. Some soldiers, however, view family care failures as a means of avoiding deployment. Commanders have options: among others, they can deploy the soldier, keep them in the rear, or keep them in the rear and begin separation procedures.[43] If the commander

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[38] *Id.* The California proxy marriage law is limited to service members serving abroad. State Bill 7 was sponsored by Republican Sen. Jim Brulte of Rancho Cucamonga and Senate President Pro Tem John Burton, D-San Francisco and signed into law by Governor Arnold Schwarzenegger on September 10, 2004. Because it was passed as an urgency measure to allow service members stationed overseas to marry, the law took effect immediately. The law allows marriage-by-proxy in California for members of the armed forces who are stationed far away in wars or conflicts. It allows them to give their power of attorney for someone to stand in for them during their wedding ceremony. Documents have to be signed and acknowledged by a notary or by two military officers. *See also* Montana Code Annotated 40-1-301 (2) which provides: If a party to a marriage is unable to be present at the solemnization, he may authorize in writing a third person to act as his proxy. If the person solemnizing the marriage is satisfied that the absent party is unable to be present and has consented to the marriage, he may solemnize the marriage by proxy. If he is not satisfied, the parties may petition the district court for an order permitting the marriage to be solemnized by proxy.

[39] *Id.*

[40] See Army Regulation 608-99.

[41] *Id.*

[42] Army Regulation 600-20, Army Command Policy.

[43] Balkans at 492. Legal Assistance attorneys further recommend discussing this with commanders and encouraging them to provide service members an adequate amount of time to remedy a deficient family care plan while being mindful that some service members may attempt to use this as a subterfuge to depart theater.

deploys the soldier, a family member may be left without care. On the other hand, leaving the soldier behind may cause a critical gap in the unit, especially if the soldier is in a critical or shortage MOS. This situation can hurt morale if Soldiers perceive that the family care plan failure was intentionally used to get out of the deployment, or when another soldier, possibly untrained for a particular MOS, will have to pick up the slack as an additional duty. Regularly validating family care plans prior to deployment will serve to minimize last minute family care plan failures.[44]

VI.B.2. Landlord/Tenant Issues

Landlord/tenant problems are another common issue that frequently arises several months into the deployment.[45] While many deployed Soldiers have spouses that can take care of landlord/tenant problems by visiting the local legal assistance office, many service members are not represented by family members back home and must rely on JAs for assistance. The most common consumer law landlord/tenant issues deal with security deposits and termination of leases due to the deployment.

Loss of a security deposit can be either significant or inconsequential, depending on the amount of the security deposit and the service member's rank/salary. All states have specific laws governing the proper amount and use of security deposits.[46] In many states, upon proper termination of the lease, security deposits must be returned within a required amount of time, or a full accounting of security deposit deductions must be provided in writing to the tenant. If the landlord does not meet prescribed timelines, the entire amount of the security deposit may be returned to the tenant, regardless of whether the landlord may have justification to make certain deductions. Even if the client has terminated the lease improperly, or the landlord is truly entitled to the security deposit, a professional, polite request that the landlord consider its return have also been successful in the past.[47]

Proper lease termination can come in many different forms. Termination by expiration of the lease term is the most common means and one that generally does not present many legal problems. However, leases that are terminated early frequently present problems if they are not handled correctly. The use of a military lease clause detailing the circumstances of when early lease terminations are permitted is essential to any military tenant. Military lease clauses are often addendums to the lease and are usually accepted by landlords when they are negotiated prior to the signing of the lease. Typical military lease clause provisions permit early termination if the tenant receives order to PCS, deploy, etc. As with any contract, much of the content of a military lease clause can be negotiated. Finally, while leases may not address the subject of early

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[44] *Id.* at 494.

[45] MAGTF at 193.

[46] *Id.*

[47] *Id.* at 194.

termination by military tenants, many state laws permit early termination under certain circumstances for military tenants.[48]

VI.B.3. Vehicles

JAs will likely encounter vehicle repossession issues while deployed. Repossessions usually occur due to the inability of the client to properly manage an automobile loan.[49] With a few minor exceptions, once a car has been repossessed, neither the client nor the JA will likely have much success in getting the car back into the client's possession, as these cars are usually resold rather quickly. If a client's car has been repossessed, the JA should determine whether the circumstances of the repossession were proper under the law. The SCRA governs installment contracts and may be very useful in repossession cases, depending on when the service member entered into the installment contract for the automobile. If the installment contract for an automobile was entered into before the service member came on active duty, the repossessing agent must have first been granted repossession approval by a court.[50] However, as is often the case, many car loan installment contracts are entered into after the service member has begun active military service.

VI.B.4 The Service Members' Civil Relief Act

The Service Member's Civil Relief Act (SCRA)[51] is useful legislation which can be brought to bear on behalf of military service members, and knowledge of its many parts can reap significant rewards for your clients. Generally speaking, the SCRA is most commonly invoked in two circumstances: to initiate a stay of proceedings and to enforce maximum interest rate charges in revolving accounts.[52]

Stay of Proceedings

During deployments, it is inevitable that service members will receive notice that they are party to a lawsuit in which the court requires their presence at a trial or hearing during the deployment. Barring extenuating circumstances, leave will likely not be granted. Therefore, JAs should take advantage of the SCRA's 'stay of proceedings' provision by assisting clients in submitting timely notification to the court. Since many people aren't aware of the protections afforded by the SCRA, efforts to educate service members should occur at predeployment legal briefings and family briefings. If the court decides to deny a stay of proceedings and the court grants a default judgment to the opposing party, the SCRA may be used to reopen default judgments in certain instances.

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[48] MAGTF at 195.

[49] MAGTF at 191.

[50] SCRA, 50 U.S.C. App. § 531 (2002).

[51] 50 U.S.C. App. §§ 501-94 (2002).

[52] MAGTF at 186, OEF/OIF Vol I, etc.

Several units noted that pre-existing court dates became an issue later on in deployments, whereupon service members began to seek legal assistance on how to handle these pre-existing court dates back at home station.[53] Communication with home station regarding these cases was difficult due to reduced or unreliable means of communications and time zone differences. In many cases, these service members were well-aware of the pending court dates before they deployed, but failed to seek legal assistance prior to deploying.[54] One suggestion to address this issue is to add a warning to the predeployment legal briefing that court dates may be rescheduled in light of a deployment if the service member visits the LAO before deploying. Another method to preempt such problems is to educate the chain of command that service members who are aware of court dates should seek Legal Assistance sooner rather than later.[55]

Maximum Rate of Interest

One simple way to save service members money is by continually educating them about the SCRA's benefits as they pertain to the maximum rate of interest. The SCRA permits military members to reduce interest rates on debts that were incurred prior to entering active military service if military service has materially affected their ability to pay the obligation.[56] Credit cards, car loans, or almost any other type of financial obligations incurred after coming on active duty should have interest rates capped at 6%.[57]

[53] OEF/OIF LL VOL I at 219; *See also* 1AD AAR.

[54] *Id.*

[55] *Id.*

[56] 50 U.S.C. App. § 526 (2002).

[57] *Id.*

VI.C. ESTATE PLANNING

In a deployed context, estate planning is normally limited to the preparation of two major estate planning documents: the will and the power of attorney. Most service members should receive their wills and powers of attorney from the local legal assistance office prior to deployment or as part of the Soldier Readiness Program (SRP).

VI.C.1. Wills

The drafting and execution of a simple will is a relatively easy process. The process begins by educating the service members regarding simple estate planning information and identifying those who are the likely candidates for obtaining a will. For those needing a will, the JA should provide them with a will worksheet. Time permitting, the JA should then personally review the will worksheet with the client; this personal contact ensures the worksheet is filled out correctly, permits the client to ask questions, and satisfies the JA's professional responsibility requirements.[58] Once the worksheet is complete, the JA or a legal clerk can draft the document using the DL Wills program and the will is then executed. Obviously, wills that exceed the capabilities of the DL wills program and/or the experience of the JA should be avoided.

Despite a vigorous SRP process, LAOs should expect a rush in demand for wills when units receive official notice of deployment.[59] For instance, in preparing for deployment to Haiti, judge advocates in the 10th Mountain Division prepared and supervised the execution of approximately 1600 wills at the around-the-clock soldier readiness check site, despite earlier efforts to draft and execute wills at scheduled SRPs.[60]

VI.C.2 Powers of Attorney

Drafting and executing a power of attorney (POA) requires a similar process as wills, including the personal interaction between JA and client. POAs are among the most useful tools for deployed service members, and clients frequently request this document prior to and during deployments for many different reasons. Special POAs are preferred and can be drafted to suit the individual needs of the client, whether it may be the authority to register a car, purchase a house, or access bank accounts. Special POAs present fewer problems than general POAs, which can confer almost unlimited power over the affairs of the deployed service member. It is a failure of the JA's fiduciary duties and likely an ethical violation to provide the client with a powerful general POA

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[58] MAGTF at 189.

[59] *See* Haiti Lessons Learned at 118.

[60] *Id.* It should be noted that these were predominantly simple wills that excluded trusts or specific bequests. Soldiers with families or more complicated estates and preferences were handled by exception, through individual appointments at the legal assistance office.

without first explaining the sizeable authority the client is extending to the designated attorney-in-fact.[61]

Anticipate POA Issues In Case of a Deployment Extension

During Operation Iraqi Freedom, First Armored Division was unexpectedly extended just short of their redeployment date.[62] Powers of Attorney typically designed to expire at the end of one year were insufficient in length to cover the extension.[63] As a result, several families were inconvenienced when agencies would not accept the expired POA.[64] To acquire a new POA with a raised notary seal in its original form from Iraq would have taken several weeks. First Armored Division created a system to solve the problems by scanning original POAs and e-mailing them to families as well as communicating with local agencies and banks to ensure compliance with the scanned POAs.[65] In light of 1st Armored Division's extension, and the earlier extension of 3rd Infantry Division, LAOs must anticipate unit extensions in theater and plan to ensure coverage for the entire period of the service member's absence.[66]

Notarial Services

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[61] MAGTF at 190. *See also* Haiti Lessons Learned at 122, whereupon an example of a general POA that went bad involved a client of Lieutenant Colonel Mark Rassas, U.S.A.R., a highly respected Clarksville trial attorney and Chief of Legal Assistance, Fort Campbell, Kentucky during Operations Desert Shield and Storm. The client was a staff sergeant, married but childless, who deployed to Saudi Arabia with the 101st Airborne Division (Air Assault) in late 1990. The spouse remained in the Fort Campbell area and possessed a general power of attorney that the staff sergeant had obtained from the legal assistance office and delivered to the spouse prior to deployment. In the space of a few months, the spouse used the power of attorney to purchase a home, a new car, and elaborate furnishings. The spouse then abandoned the home, taking the car and many of the furnishings to another state. The soldier—who sought legal assistance in the spring of 1991 and at that time became Lieutenant Colonel Rassas' client—returned to find no money in the joint checking account held with the spouse. This staff sergeant also faced numerous creditors who were unhappy not only because payments on the furnishings and automobiles had lapsed, but because the property in which they held security interests had vanished. Even as the country was celebrating the battlefield victory over Saddam Hussein's forces, this combat veteran was preparing to file a petition in bankruptcy court. Similar cases arise in all military services, and may involve abuse of special powers. A young airman stationed at Hurlburt Field, Florida, about to deploy to Saudi Arabia for 6 months in 1991, obtained a special power of attorney for his girlfriend so that she could manage his financial affairs while he was out of the United States. Though he was advised of the potential risks involved, the airman nevertheless insisted that he wanted the girlfriend to have the ability to access money in his accounts. Toward the end of the deployment, letters from his girlfriend stopped, and the airman began to receive calls from his First Sergeant regarding inquiries from creditors about delinquent bills. Upon return from the deployment, the airman learned that the girlfriend had removed all funds from the checking and savings accounts and moved to California with another man.

[62] *See* 1AD AAR at 4.

[63] *Id.*

[64] *Id.* Legal Assistance attorneys recommend discussing this with commanders and encouraging them to provide service members an adequate amount of time to remedy a deficient family care plan while being mindful that some service members may attempt to use this as a subterfuge to depart theater.

[65] *Id.*

[66] *See* Legal Lessons Learned from Afghanistan and Iraq, Volume I at 228.

The performance of notarial acts pursuant to 10 U.S.C. § 1044a does not require the use of a seal.[67] Despite this federal exemption for the use of a seal, businesses occasionally may not recognize a POA unless it has a raised seal. While a seal provides no more legal efficacy to legal documents notarized by a military member, many businesses have become accustomed to seeing a seal on documents that purport to be "legal."

[67] *See* 10 U.S.C. § 1044a.

VI.D. NATURALIZATION

Many service members wanted to take advantage of changes in U.S. naturalization policy pursuant to a Presidential Executive Order allowing expedited naturalization for non-citizen U.S. military members.[68] Others inquired about marrying or adopting a foreign national. Executive Order 13,269[69] expedites the naturalization of aliens and non-citizen nationals serving on active duty military status during the global war on terrorism. The Order makes aliens and non-citizen nationals serving honorably on active duty during the period beginning 11 September 2001, and terminating on an as yet undetermined date, eligible for immediate citizenship. Although the Executive Order provides the legal authority for expedited citizenship, the details concerning processing citizenship applications overseas were initially unclear. During Operation Iraqi Freedom, for example, deployed JAs quickly found themselves facing large numbers of service members interested in becoming citizens as Iraq transitioned to stability operations.[70] Also, JAs in Afghanistan (Enduring Freedom) began assisting service members in the naturalization process shortly after the executive order became effective in 2002 by organizing a "Citizenship Day" at several locations to assist non-citizen service

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[68] 67 Fed. Reg. 45,287 (July 8, 2002); For an in-depth discussion of contemporary immigration issues as they relate to military personnel and their dependents, see Lieutenant Colonel Pamela M. Stahl, *The Legal Assistance Attorney's Guide to Immigration and Naturalization*, 177 MIL. L. REV. 1 (2003), *available at* https://www.jagcnet.army.mil/laawsxxi/cds.nsf [hereinafter *The Legal Assistance Attorney's Guide to Immigration and Naturalization*].

[69] *Id.*

[70] *See* OEF/OIF Lessons Learned Volume I at 230, (noting that large numbers of Soldiers expressed interest in expedited citizenship and that Soldiers instinctively went to JAs for assistance rather than to their servicing personnel office); *see also* Riley Interview, (observing that the number of non-citizen Soldiers assigned or attached to the 1AD was over 2,000 and that JAs played a large part in helping Soldiers prepare for citizenship). 1AD JAs began laying the groundwork to assist Soldiers complete the path to citizenship. *See id.*

members.[71] Another potential issue related to citizenship is the non-citizen status of military dependents.[72]

[71] *Id.* For example, CJTF-180 LA JA CPT James T. Hill organized a successful "Immigration Day" event on 16 September 2002. Before the event, CPT Hill's staff posted flyers at the U.S. base at Bagram and at smaller bases nearby. After the event, he wrote a detailed after action review. The biggest challenges were helping service members fill out numerous forms and taking photographs and fingerprints. Legal assistance attorneys should be prepared to field immigration law questions relating to military dependents. In his after action review, CPT Hill referenced two publications which were of great help in answering questions from Soldiers. They are United States Citizenship and Immigration Services, A Guide to Naturalization (February 2004), *at* http://uscis.gov.graphics/services/natz/English.pdf .; and Office of Citizenship Services, United States Citizenship and Immigration Services, Naturalization Information for Military Personnel (4 Mar. 2004), *at* http://uscis.gov/graphics/services/natz/militarybrochure7.pdf . The pamphlet also states: Recent legislation has called for additional benefits to members of the military. These benefits will go into effect on October 1, 2004.

- **No fees** will be charged when you file for naturalization.

- The naturalization process will be made available overseas to members of the Armed Forces at U.S. embassies, consulates, and where practical, military installations abroad.

[72] Although a detailed discussion of this issue is beyond the scope of this Publication, see *The Legal Assistance Attorney's Guide to Immigration and Naturalization*, at 31-33 for detailed discussion of the effect of a service member's deployment upon a dependent's petition for removal of conditional permanent resident status.

VI.E. DEPLOYING THE LEGAL ASSISTANCE OFFICE

Managing Potential Conflicts of Interest

Many JAs found themselves working as the sole command attorney or in a small group of attorneys far from dedicated legal assistance or trial defense JAs.[73] This predictably created potential conflicts-of-interest, but JAs found effective ways to provide legal assistance while avoiding conflicts. The first step to avoiding conflicts is to study applicable service regulations and relevant state bar guidance.[74] Note that service regulations do not provide a "combat exception" from conflict rules, and even if they did, state bar guidance would still apply. JAs must also remember that their client is normally their military service (such as the Department of the Army) and not their individual commander.[75] Likewise, if JAs enter into an attorney-client relationship with an individual service member, they may not be able provide legal advice to their commander and may even prohibit discussion of an issue with a commander.[76] No regulation prohibits an attorney from establishing an attorney/client relationship with an individual service member, but command JAs should exercise care to prevent them from being conflicted from giving legal advice to their commander.

Client Tracking

The best way to avoid conflicts of interest is through the implementation of an automated tracking system. Though routine and thorough client tracking in garrison is something all Legal Assistance Offices (LAOs) take very seriously, in a deployed environment there are some obstacles to effective client tracking.[77] This is particularly true when units are geographically dispersed.[78]

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[73] *See* OEF/OIF Lessons Learned Volume I at 226.

[74] *See* AR 27-26, rule 1.7 (providing rules governing conflicts-of-interest for Army legal personnel); U.S. DEP'T OF NAVY, OFFICE OF THE JUDGE ADVOCATE GENERAL, PROFESSIONAL CONDUCT OF ATTORNEYS PRACTICING UNDER THE COGNIZANCE AND SUPERVISION OF THE JUDGE ADVOCATE GENERAL (11 Feb. 2000) (providing rules governing conflicts-of-interest for Navy and Marine Corps legal personnel).

[75] *See* AR 27-26 at 1.4 (rule 1.13 also states "Except when representing an individual client . . . an Army lawyer represents the Department of the Army acting through its authorized officials."); JAGINST 5803.1B, para. 6(a) ("The executive agency to which assigned ([the Department of the Navy] in most cases) is the client served by each covered USG attorney unless detailed to represent another client by competent authority.").

[76] *See, e.g.,* AR 27-26 rule 1.7 (providing general conflict guidance for Army JAs); JAGINST

5803.1B, *supra* note 9 (providing general conflict guidance for Navy/Marine JAs).

[77] OEF/OIF LL VOL II at 216; *see also* After Action Review Conference, Office of the Staff Judge Advocate, 10th Mountain Division, and the Center for Law and Military Operations, at Fort Drum, NY, Power Point Presentation at 53 (17 Jun. 2004) [hereinafter 10th MNT DIV AAR].

[78] *See* Legal Lessons Learned from Afghanistan and Iraq, Volume I at 225.

During OIF and OEF, individual attorneys at various levels sometimes conducted legal assistance locally with little or no system for tracking. If no system is emplaced to consolidate client information across a unit, there is obviously a risk that there will be a conflict of interest.[79] For a variety of reasons, many units have reported significant problems tracking clients in a deployed environment.[80]

10th Mountain Division, for instance, like many units who have deployed in the Global War on Terror, did not implement the Client Information System (CIS) in Afghanistan due to geographical dispersion of units and limited computer connectivity.[81] Instead, all Legal Assistance attorneys completed client cards with the intent to enter the data into the Ft. Drum CIS system upon redeployment.[82] Prior experience in the division indicated that merging two CIS databases, that is, a deployed database with the garrison database at 10th Mountain Division, was difficult.[83] Some units recommended sustaining a regular system of mailing client cards to the rear.[84] Both of these systems, however, may fail to protect against conflict if, for instance, the home station LAO has seen the spouse while the deployed LAO has seen the service member.[85]

Establishing a same-time system for client tracking and at all logical units—brigades, LAO, and rear detachment—may prevent the risk of conflict.[86] If reliable access to NIPR is available, consider developing a web-based client information system—through a shared document posted to the Army Knowledge Online (AKO) website, for example—that allows entry from remote locations.[87] This will diminish the

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[79] OEF/OIF LL VOL I at 216; *see also* After Action Review Conference notes, Office of the Staff Judge Advocate, 82d Airborne Division, and Center For Law and Military Operations, at 4 [hereinafter 82d ABN DIV AAR]. *See also* 10th MNT DIV AAR at 53 .

[80] *See generally* Volume I, Afghanistan and Iraq, Legal Lessons Learned, para IIIH. *See also* 10th MNT DIV AAR at 53; 82d ABN DIV AAR at 4.

[81] OEF/OIF LL VOL I at 217.

[82] *Id.*

[83] *Id.*

[84] *Id.*

[85] *Id.*

[86] *See id.; see also* 82d ABN DIV AAR, at 1. Lieutenant Colonel Thomas A. Ayres, 82d Airborne Division Staff Judge Advocate, relayed that the 82d Airborne Division effectively used a collaboration site. The collaboration could be used for client tracking, but in this case it was used for criminal law. The Division Commander took his flag with him and left no rear commander with General Court Martial Convening Authority (GCMCA). The OSJA at home station scanned all documents and posted them on the AKO collaboration site for retrieval and action. This proved far faster and more effective than mailing the documents forward or relying on the Division Commander's single and unpredictable fax machine. The deployed OSJA then reciprocated once the documents bore the signature of the Commander. By analogy, and depending on access to NIPR, the AKO collaboration site might be one way for deployed Legal Assistance JAs and the home station LAO to effectively track clients.

[87] *Id.*

risk of conflict or the risk that a JA may inadvertently prosecute a former client or advise a commander on a UCMJ matter regarding a former client.[88]

Another recommendation is to ensure that the Office of the Staff Judge Advocate (OSJA) deploys a Chief of Client Services.[89] 10th Mountain Division reported that although several attorneys practiced both legal assistance and claims, no single JA had overarching responsibility for managing services, conflicts, or reporting.[90] Their recommendation was to identify one person to manage the legal assistance workload for the Division, thereby ensuring that conflicts will be avoided.[91]

Tax Assistance

Different units look at a number of variables when deciding whether or not to provide tax assistance services, ranging from availability of technology for electronic filing to personnel issues. If a deployment will take place during tax-filing season, service members will likely expect legal personnel to offer tax-preparation assistance. Deployed legal personnel should have a plan to manage this issue.[92]

Space and Equipment

Many units do not have abundant access to unclassified internet and phone lines.[93] In fact, several legal teams reported that the LAO competed with the Morale, Welfare, and Recreation (MWR) lines.[94] At some locations, JAs even resorted to using MWR lines to conduct legal research, because they were the only unclassified internet access available.[95] In addition, some units had no designated, confidential area in which to conduct legal assistance.[96] When possible, legal assistance personnel should have a dedicated space for their work with sufficient cover to maintain confidentiality, as well as a dedicated priority phone line and unclassified internet terminal.[97] Space and equipment

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[88] *See* 10th MNT DIV AAR at 53.

[89] *Id.* at 54.

[90] *Id.*

[91] *Id. See also* OEF/OIF LL VOL I at 217.

[92] *See* Riley Interview, (noting that despite the availability of tax filing deadline extensions, Soldiers wanted to be able to file their taxes as soon as possible so that their families could use their tax refund).

[93] See 10th MNT DIV AAR; 82d ABN DIV AAR at 1; 101st ABN DIV AAR, at 41.

[94] *See* 10th MTN DIV AAR, at 6; 101st ABN DIV AAR, at 41.

[95] *See* 101st ABN DIV AAR, at 41.

[96] *See* After Action Review Conference, Office of the Staff Judge Advocate, V Corps, and Center For Law and Military Operations Heidelberg, Germany (17-19 May 2004) [hereinafter V Corps AAR]. *See also* 82d ABN DIV AAR, *supra* note 7, at 6 (briefing by, MAJ Dan Froehlich, 3/82d ABN DIV emphasizing the lack of communication resources at remote FOBs scattered in and around Fallujah, Iraq in mid-2003).

[97] *See* V Corps AAR at 23.

issues should be worked out with the unit prior to deployment and exercised during unit predeployment exercises so that units are aware of the LAO needs.

Paralegals Work at Dispersed Locations

The Army JAG Corps continues to undergo transformation into Brigade Combat Teams (BCTs) pursuant to the Army Modular Force Structure.[98] The 3d Brigade, 82d Airborne Division, was divided into four forward operating bases (FOBs) scattered in and around Fallujah.[99] By mid-2003, the Brigade's Area of Operations (AO) included Fallujah and two corners of the Sunni triangle. The area was notoriously dangerous, making the 3d Brigade's experience in core legal disciplines different than most. One of those differences was that there was scarcely any travel between the various units that comprised the 3d Brigade Combat Team (BCT)—the roads were simply too dangerous. For a significant amount of time, there were no TA-1042A/U Digital Non-Secure Voice Terminal (DNVT) communications between the BCT units. The only means by which the JA could communicate with Battalions and other subordinate units was through Tactical Communication Satellite (TACSAT). Additionally, there was no internet access for several months. Given this operational environment, it was very difficult to exercise legal visibility over FOBs. Therefore, paralegals in outlying areas had to be empowered, becoming the eyes and ears of the JA on various issues, to include legal assistance.[100]

[98]TJAG Policy Memo 06-7Location, Supervision, Evaluation, and Assignment of Judge Advocates in Modular Force Brigade Combat Teams, 10 January 2006; TJAG Sends, 31 January 2006, Army Strategic Planning Guidance 2005; TJAG Sends, 9 December 2005, Empowering Our Paralegals.

[99] *See* 82d ABN DIV AAR, *supra* note 7, at 6 (briefing by MAJ Dan Froehlich, 3/82d ABN DIV).

[100] *Id.*

VII. MILITARY JUSTICE

Military Justice is the administration of the Uniform Code of Military Justice (UCMJ), and the disposition of alleged violations by judicial (courts-martial) or nonjudicial (Article 15, UCMJ) means.[1]

The purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States.[2]

The UCMJ[3] and implementing regulations[4] place high due process standards on the military justice (MJ) system. During times of conflict, as always, military members deserve the highest protections. Judge advocates (JAs) continue to work with commanders during contingency operations to exercise swift and sound justice in sometimes austere conditions.

Unfortunately, every deployment encounters a small minority of military members who choose to discredit themselves by their misconduct. In the words of one JA, "Wherever there are troops, there will be criminal activity."[5] The Manual for Courts-Martial (MCM) mandates that commanders address misconduct quickly,[6] while observing due process standards.

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[1] U.S. DEP'T OF ARMY, FIELD MANUAL 27-100, LEGAL SUPPORT TO OPERATIONS para. 3-3 (1 Mar. 2000) [hereinafter FM 27-100].

[2] MANUAL FOR COURTS-MARTIAL, UNITED STATES, PREAMBLE, para. 3 (2002 Edition) [hereinafter MCM].

[3] 10 U.S.C. §§ 801-941 (2002) [hereinafter UCMJ].

[4] *See* U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE (6 Sept. 2002) [hereinafter AR 27-10]; U.S. DEP'T OF AIR FORCE, INSTR. 51-201, ADMINISTRATION OF MILITARY JUSTICE (26 Nov. 2003) [hereinafter AFI 51-201]; U.S. DEP'T OF AIR FORCE, INSTR. 51-202, NONJUDICIAL PUNISHMENT (7 Nov. 2003) [hereinafter AFI 51-202]; U.S. DEP'T OF NAVY, OFFICE OF THE JUDGE ADVOCATE GEN. INSTR. 5800.7C, MANUAL OF THE JUDGE ADVOCATE GENERAL (JAGMAN) (C4, 15 Mar. 2004) [hereinafter JAGMAN].

[5] Office of the Staff Judge Advocate, Combined Task Force-82, Mid-Point AAR, at 5 (1 Jan. 2003) [hereinafter 82d Mid-Point OEF AAR].

[6] *See* MCM, at R.C.M. 303 ("Upon receipt of information that a member of the command is accused or suspected of committing an offense or offenses triable by court-martial, the immediate commander shall make or cause to be made a preliminary inquiry into the charges or suspected offenses."). R.C.M. 303 is only one example of the many obligations the MCM places upon commanders to expeditiously handle suspected UCMJ violations. *See also* U.S. DEP'T. OF ARMY, REG. 600-20, ARMY COMMAND POLICY, para. 4-6a. (13 May 2002) ("Military authority is [to be] exercised *promptly*, firmly, courteously and fairly.") (emphasis added).

Deployed MJ is challenging,[7] but units must be prepared to successfully handle MJ in difficult environments. In many contingency operations, MJ "shuts down" during the heat of battle,[8] but resumed almost immediately after heavy combat ended.[9] During full spectrum operations, military justice actions pose greater challenges than those encountered during combat operations due to the increased frequency and severity of misconduct.[10] The logic in conducting MJ while deployed is that service members "need to see the results of misconduct"[11] to deter future misconduct. Units must decide whether to handle misconduct in the deployed theater or to send service members suspected of more serious offenses back to home station for prosecution due to austere deployed conditions and mission requirements.

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[7] *See, e.g.,* Interview with MAJ Robert F. Resnick and CPT Charles L. Pritchard, Chief of Criminal Law and Senior Trial Counsel, Third Infantry Division, in Charlottesville, Va. (20 Nov. 2003) [hereinafter Resnick and Pritchard Interview] (noting that many factors made processing MJ difficult during OIF, including sometimes unreliable communication and automation equipment, geographically dispersed JAs and commanders, and the fast-moving pace of operations). *See also* E-mail from MAJ Laura K. Klein, Advanced Operational Law Studies Officer, Center for Law and Military Operations , to LTC Pamela M. Stahl, Director, Center for Law and Military Operations (22 Oct. 2003) ("[Commanders] know and understand the logistical challenges in the field vs. garrison—multiply the [article] 15, chapter, court-martial witness/investigation challenges faced in garrison by 100 in a field environment.").

[8] *See, e.g.,* Interview with COL Richard O. Hatch, former Staff Judge Advocate, 101st Airborne Division, in Charlottesville, Va. (8 Oct. 03) [hereinafter Hatch Interview] (noting that JAs and commanders were too busy to handle MJ during combat).

[9] *See, e.g.,* CPT Dennis C. Carletta, Trial Counsel, Third Infantry Division, Division Artillery/ Brigade Operational Law Team (BOLT), Operation Iraqi Freedom After Action Review, at 5 (24 Apr. 2003) (noting that MJ actions resumed during stability and support operations for a "variety" of wartime infractions).

[10] *See, e.g.,* Interview with CPT Jason Denney, DREAR Trial Counsel, 82nd Airborne Division,Operation Iraqi Freedom After Action Review in Fort Bragg, N.C. (June 22, 2004) (noting that military justice actions increased during stability and support operations).

[11] Resnick and Pritchard Interview. *See also* MCM, R.C.M. 1001(g) (discussing the "generally accepted" sentencing philosophy of general deterrence).

VII.A. JURISDICTION

Dividing a unit into a deployed main body and a non-deployed rear detachment creates MJ jurisdictional and processing challenges. Fortunately, past operations have shown how to effectively manage these challenges.[12] During the majority of deployments, Army commanders have considered the four following deployment-tested courses of action when addressing jurisdictional issues. Each approach has advantages and disadvantages.[13]

- Transfer rear detachment jurisdiction to another General Court-Martial Convening Authority (GCMCA);
- Leave the "division flag" (GCMCA) behind (a rear detachment general officer assumes command);
- Set up a rear provisional command with GCMCA (requires Secretary of the Army approval); or
- Change nothing and shuttle military justice actions between the home station and the deployed setting.

JAs commonly use the term "jurisdiction" to refer broadly to the closely related concepts of "venue" and "jurisdiction."[14] The following JA quote clarifies the distinction:

The term *jurisdiction* is sometimes used imprecisely to describe *venue* (which commander should act as a convening authority in a case), not to describe a court-martial's legal authority to render a binding verdict and sentence [jurisdiction]. Under the UCMJ [Rule for Court-Martial 601(b) (discussion)] any [convening authority] may refer any case to trial. However, as a matter of policy JAs should ensure the [convening authority] with administrative control (ADCON) over the accused service member exercises primary UCMJ authority.[15]

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[12] *See generally* INTERNATIONAL AND OPERATIONAL LAW DEPARTMENT, THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER AND SCHOOL, 2006 OPERATIONAL LAW HANDBOOK, (2006) [hereinafter 2006 OPLAW HANDBOOK] *See also* Interview with COL Lyle Cayce, former Staff Judge Advocate, Third Infantry Division, in Charlottesville, Va. (7 Jan. 2004) [hereinafter 2004 Cayce Interview] (mentioning CLAMO's series of Lessons Learned Publications for Judge Advocates in which CLAMO discusses MJ lessons learned and noting that deploying JAs regularly refer to these Publications when considering possible jurisdictional alignment options).

[13] *See* The Center for Law and Military Operations, The Judge Advocate General's Legal Center and School, Law and Military Operations in the Balkans (1995-1998): Lessons Learned for Judge Advocates, 170 (1998) (discussing four available court-martial jurisdictional alignment options for deploying units) [hereinafter Balkans Lessons Learned].

[14] Telephone Interview with MAJ Christopher T. Fredrikson, Professor of Criminal Law, The Army Judge Advocate General's Legal Center and School (12 Apr. 2004).

[15] *See* 2006 OPLAW HANDBOOK, ch. 9 (discussing MJ in the deployed setting). One OSJA further comments that:

Identifying jurisdictional authority for purposes of imposing punishment through military justice actions continues to be a highly debated and contentious topic among commanders as well. For example, it is understandable when a commander wants to retain the authority to punish service members under their commands, regardless of where such service members are located. Nevertheless, due to geography and various other factors, it is often more beneficial to employ a type of "area jurisdiction" concept.[16]

The only way to entirely avoid the issue is to ensure that attachment orders clearly

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> There is no single source of authority for commanders, G1, G3, and OSJA personnel on this topic. Instead, each staff proponent receives different implementing guidance from its own technical chain, often resulting in a unit that is created without the true legal authority to handle disciplinary cases in a punitive manner. To this day, units continue to create what they believe are proper provisional rear commands [in accordance with Army Regulation] 220-5, but they fail to take the necessary steps to ensure the "commanders" of such units possess actual UCMJ authority. *[Headquarters, Department of the Army] should publish a single, official source of definitive guidance on this issue.*

E-mail from Colonel Kevan F. Jacobson, Staff Judge Advocate, 21st Theater Support Command, subject: Review of the Draft Legal Lessons Learned from Afghanistan and Iraq: Volume I, Major Combat Operations (11 September 2001 – 1 May 2003), (14 May 2004) (emphasis added) [hereinafter Jacobson E-Mail].

[16] *See generally* U.S. ARMY EUROPE (USAREUR) REG. 27-10, LEGAL SERVICES (MILITARY JUSTICE) (25 January 2002) (stating that area Courts-Martial jurisdiction bases General Court-Martial Convening Authority jurisdiction upon the physical location within USAREUR. Jurisdiction extends over USAREUR commands and their subordinate units, individual U.S. Army personnel or personnel assigned to U.S. Army units, including United States Army National Guard (ARNG) and United States Army Reserve (USAR) units attached to USAREUR.

state the relationship between units while clearly delineating UCMJ authority.[17] However, it is unlikely that all attachment orders will always specifically address UCMJ authority. Therefore, it is important for JAs to identify orders that are unclear as to jurisdictional issues early-on and establish proper UCMJ authority before any misconduct occurs. Although it is fair to say that a significant number of UCMJ jurisdictional issues arise among Reserve and National Guard units, active duty units are certainly not immune from this problem, particularly for those units that have assets assigned in a variety of locations within an area of operations.[18]

Specific examples of jurisdictional alignment are detailed below, whereupon Army and Marine JAs implemented formal and informal measures to clarify matters of MJ venue/jurisdiction (hereinafter "jurisdiction" generally).[19] These examples come from Operations Iraqi Freedom and Enduring Freedom, which are the most topical examples available at the time period this publication was printed.

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[17] For example, the majority of attached units are designated as being under either operational or tactical control of the assigned "parent" unit. *See* JOINT CHIEFS OF STAFF, JOINT PUB. 1-02, DoD DICTIONARY OF MILITARY AND ASSOCIATED TERMS (12 Apr. 2001)(as amended through 30 Nov. 2004) [hereinafter JP 1- 2], which defines operational control (OPCON) as the authority to perform those functions of command over subordinate forces involving organizing and employing commands and forces, assigning tasks, designating objectives, and giving authoritative direction necessary to accomplish the mission. Operational control includes authoritative direction over all aspects of military operations and joint training necessary to accomplish missions assigned to the command. Operational control normally provides full authority to organize commands and forces and to employ those forces as the commander in operational control considers necessary to accomplish assigned missions; it does not, in and of itself, include authoritative direction for logistics or matters of administration, discipline, internal organization, or unit training.

Contrast OPCON with Tactical Control (TACON), which is defined as command authority over assigned or attached forces or commands, or military capability or forces made available for tasking, that is limited to the detailed direction and control of movements or maneuvers within the operational area necessary to accomplish missions or tasks assigned. Tactical control is inherent in operational control. Tactical control may be delegated to, and exercised at any level at or below the level of combatant command. Tactical control provides sufficient authority for controlling and directing the application of force or tactical use of combat support assets within the assigned mission or task.

Finally, Administrative Control (ADCON) is defined as 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, unit logistics, individual and unit training, readiness, mobilization, demobilization, discipline, and other matters not included in the operational missions of the subordinate or other organizations.

[18] As an example, many Military Intelligence and Military Police units are known to have assets spread out over large geographical areas within their theater of operations.

[19] This chapter focuses on issues of jurisdiction/venue associated with courts-martial. These issues should not be confused with the related issue of authority to impose nonjudicial punishment. Nonjudicial punishment authority is discussed in AR 27-10.

VII.A.1. Operation ENDURING FREEDOM

Initial OEF deployments happened so quickly after 11 September 2001 that there was scarcely any time to plan jurisdictional alignments.[20] In fact, there was "very little" MJ during the initial combat operations phase.[21] Following this initial phase, Combined Joint Task Force-180 (CJTF-180), commanded by an Army lieutenant general, was formed in May 2002 as the combined joint operational headquarters in Afghanistan. The CJTF-180 CG requested GCMCA status from the Secretary of Defense.[22] The Secretary approved the request on 8 October 2002, almost six months after it had been submitted. The lesson here is to expect requests for approval of GCMCA status for a joint task force commander to proceed only after great deliberation.[23] After the CTJF-180 commanding general (CG) gained GCMCA status, special and summary court-martial jurisdictional alignments were created within the command.[24]

Elements of the 82d Airborne Division (82d) began deploying to Afghanistan in June 2002 after months of pre-deployment planning. In late August 2002, the 82d CG deployed to Afghanistan and brought his MJ flag with him. Prior to deploying, the 82d had considered several jurisdictional alignment options, including seeking GCMCA status for the 82d rear detachment commander at Fort Bragg. The CG did not pursue this option, primarily because the future status of the 82d in Afghanistan was initially uncertain. Based on his Staff Judge Advocate's (SJA's) recommendation, the 82d CG decided to manage all court-martial actions from Afghanistan. Technology made this manageable.[25]

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[20] Telephone Interview with COL Kathryn Stone, former Staff Judge Advocate, 10th Mountain Division (14 Apr. 2004). The 10th Mountain Commander took his MJ flag with him to Afghanistan and, as such, COL Stone remained the SJA for home station (Fort Drum, New York) MJ actions. Coordinating these actions from Uzbekistan (initially) and then Afghanistan with poor communications resources and, at times, a lack of first hand case knowledge, proved challenging. Soldiers often arrived with orders simply assigning them to the "CENTCOM AOR" with no indication of where they would be assigned. Once in theater, COL Stone briefed all arriving unit commanders that soldiers would be assigned to a local GCMCA if a case of minor misconduct occurred or sent back to their home station in instances of more serious misconduct. JAs tried to maintain a UCMJ summary and special courts-martial jurisdictional alignment chart, but this proved impractical. Despite these challenges, MJ operations generally caused few problems during this initial combat phase, probably because of the intense focus on combat operations.

[21] *See* Interview with COL Kathryn Stone, former Staff Judge Advocate, 10th Mountain Division, in Charlottesville, Va. (7 Oct. 2003) [hereinafter Stone Interview].

[22] UCMJ, art. 22(a) (2002) ("General courts-martial may be convened by . . . [following a list of specifically designated positions and types of commanders] any other commanding officer designated by the Secretary concerned . . . ."). Because CJTF-180 was a joint command, the Secretary of the Defense was the proper authority to approve this request.

[23] Interview with COL David L. Hayden, former Staff Judge Advocate, XVIIIth Airborne Corps, in Charlottesville Va. (8 Oct. 2003) [hereinafter Hayden Interview] (noting that the slow progress of this request was disconcerting).

[24] *Id.*

[25] *See* 82d Mid-Point OEF AAR. Nearly all actions were scanned by the OSJA Rear [Bragg] to the OSJA Forward [Afghanistan] for action by the GCMCA. Thus, [r]eferral packets, Chapter 10 [administrative separation in lieu of court-martial] requests, and Pre-Trial Agreements were all scanned and emailed to the

Shortly after his arrival in Afghanistan, the 82d CG learned that Combined Task Force 82 (CTF-82) (consisting of the 82d division headquarters and a brigade task force from the 82d) would remain in theater as an Army two-star command subordinate to CJTF-180.[26] At the behest of the 82d CG, his SJA prepared a request to the Secretary of the Army[27] to designate the CTF-82 Commander as a GCMCA. Even though the CG believed it was not likely that CTF-82 would convene a court-martial in the deployed theater, he sought GCMCA status in large part to enable him to appoint investigating officers in special circumstances in accordance with Army Regulation 15-6.[28] When the CTF-82 CG's request for GCMCA status was approved, he promulgated a MJ Policy creating special and summary court-martial jurisdictional alignments within the command.[29] This document required continuous review and updating because subordinate task forces were comprised of many units from different locations. The language also had to be general enough to account for frequent rotations of subordinate units.[30]

The CTF-82 CG returned briefly to Fort Bragg, and on 8 October 2002, he relinquished command of the 82d (while retaining command of CTF-82). This required staff sections, including the SJA, to provide two separate staffs. In response to this challenge, the 82d Deputy SJA at Fort Bragg served as the SJA to the new 82d CG, while the lieutenant colonel who normally served as the 82d SJA remained in Afghanistan as

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SJA, printed off by the SJA, acted upon and signed by the GCMCA, then scanned again and emailed back to the OSJA Rear. The original documents were also mailed back to Fort Bragg. Post Trial Recommendations and Final Actions were emailed in word documents for the SJA or SJA and CG signature, then scanned and emailed back. The one caveat was that for final action in order to meet the requirement. We believe the system worked well overall and no case suffered undue delay as a result of the measures taken while deployed. *Id.* at 10.

[26] *Id.*

[27] Because CTF-82 was an Army command, the Secretary of the Army was the proper authority to approve this request.

[28] Although any general officer may initiate an investigation under Army Regulation 15-6, the Regulation states:

> Only a *general court-martial convening authority* may appoint a formal investigation or board . . . or an informal investigation or board . . . for incidents resulting in property damage of $1,000,000 or more, the loss or destruction of an Army aircraft or missile, an injury and/or illness resulting in, or likely to result in, permanent total dis[a]bility, or the death of one or more persons.

U.S. DEP'T OF ARMY, REG. 15-6, PROCEDURES FOR INVESTIGATING OFFICERS AND BOARDS OF OFFICERS para. 2-1a(3) (30 Sept. 1996) [hereinafter AR 15-6] (emphasis added).

[29] 82d Mid-Point OEF AAR, at 10. *See also* AR 27-10, para. 5-2(a)(2) ("*Contingency Commands.* Commanders exercising GCM authority may establish deployment contingency plans that, when ordered into execution, designate provisional units under [Army Regulation] 220-5, whose commanders are determined by the GCM authority to be empowered under [UCMJ] Article 23(a)(6) to convene SPCM [special courts-martial].") (emphasis in original).

[30] *See* 82d Mid-Point OEF AAR, at 10.

the CTF-82 SJA.[31] This command structure remained in place until the end of major hostilities (and beyond) in Afghanistan on 1 May 2003.[32]

Although neither CJTF-180 nor CTF-82 convened any general or special courts-martial in Afghanistan, they did handle a moderate volume of less serious misconduct, including one summary court-martial.[33] Cases involving more serious misconduct were transferred to the United States for prosecution due, in part, to the austere conditions in Afghanistan at the time.[34] The command structure and jurisdictional alignments in Afghanistan had reached a mature state by the fall of 2002. Meanwhile, U.S. forces gathered in the Persian Gulf, for what would become Operation Iraqi Freedom.

VII.A.2. Operation IRAQI FREEDOM

Coalition Forces Land Component Command (CFLCC)

The Coalition Forces Land Component Command (CFLCC) was the combined OIF (and OEF) land component command and was commanded by an Army lieutenant general. To achieve unity of command for OIF ground forces, the CFLCC Commander also commanded the U.S. Third Army and U.S. Army Forces Central Command (ARCENT). CFLCC headquarters was located at Camp Doha, Kuwait.

The CFLCC Commander elected to bring his Third Army MJ flag with him to Kuwait.[35] Thus, he was the GCMCA for all subordinate units not organic to a unit commanded by a GCMCA or attached to such a unit for MJ jurisdictional purposes. As such, the CFLCC Commander did not act as the GCMCA for large units like the Third Infantry Division and the First Marine Expeditionary Force (each had their own GCMCA in theater), but he acted as the GCMCA for all other subordinate Army units not attached to a unit commanded by a GCMCA. Unlike other large deployed units, CFLCC did not publish a policy creating special and summary court-martial jurisdictional alignments within the deployed command.

Although CFLCC commanded all OIF ground forces, the CFLCC/Third Army permanent legal staff, which had deployed from Fort McPherson, Georgia, was small.[36] Thus, when Reserve Component legal personnel from the 12th Legal Support

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[31] *See id.*

[32] *See id.*

[33] At the mid-point of its deployment, the CTF-82 legal staff had processed seventeen summarized nonjudicial punishment (NJP) proceedings, seventy-three Company Grade NJP proceedings, and fifty-seven Field Grade NJP proceedings. *See id.*

[34] *See id.*

[35] *See* After Action Review Conference, 12th Legal Support Organization and Center for Law and Military Operations, Charlottesville, Va. (12-13 Feb. 2004) [hereinafter 12th LSO AAR].

[36] There are currently only six military attorneys permanently assigned to the Office of the Staff Judge Advocate for U.S. Third Army/ ARCENT at Fort McPherson, Georgia.

Organization (12th LSO) arrived in Kuwait in early March 2003, they were quickly integrated into CFLCC legal operations, including MJ.[37] One 12th LSO JA became the chief of military justice for CFLCC.[38]

CFLCC differed from other major deployed units in that a sizable CFLCC contingent of active duty military personnel were permanently assigned to Camp Doha, Kuwait. Most deployed units planned to return service members suspected of serious misconduct to their home-station for prosecution, but at least for those Soldiers assigned to Camp Doha, Kuwait was their "home station." Despite the lack of a courtroom or confinement facility in Kuwait,[39] CFLCC held three UCMJ Article 32 pretrial investigations for several Soldiers permanently assigned to Camp Doha.[40] In addition, the CFLCC CG selected general and special courts-martial panels before combat operations began.[41]

Combat operations tested the CFLCC MJ plan. CFLCC JAs coordinated MJ actions with (at times) up to six geographically dispersed brigade command judge advocates (CJAs). In most cases, these CJAs were not experienced MJ practitioners and relied upon CFLCC for advice and guidance.[42] Perhaps the larger lesson is that SJAs should consider committing experienced personnel to MJ operations in the deployed theater, even when experienced legal personnel are in high demand. One CFLCC JA stated, the "focus on criminal law needs to be there, even during war."[43]

U.S. Army Europe and V Corps

The Army's V Corps is based in Heidelberg, Germany, and commanded by a lieutenant general. V Corps' advance elements began deploying to Qatar in October 2002, and by late February 2003, virtually the entire V Corps SJA Office had deployed to Kuwait with the Corps.[44] Before deploying, the V Corps CG weighed his jurisdictional alignment options, and he decided to request that the Secretary of the Army create a rear provisional unit and that the commander of that unit be designated a GCMCA. The

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[37] *See* 12th LSO AAR.

[38] MAJ Sebastien "Phil" Lenski had over four years of previous active duty MJ experience, including duty as a Trial Defense Counsel at Fort Richardson, Alaska, and as the Chief of MJ at Fort Jackson, SC. *See id.*

[39] Both these deficiencies were later rectified. *Id.*

[40] *Id.* (noting that these investigations were held in full chemical protective gear).

[41] The CFLCC Commander selected more than one panel during OIF because the constant rotation of personnel through Kuwait quickly made panel selections obsolete. *Id.*

[42] *Id.* (noting that although most of these CJAs were reserve component JAs, active duty JAs frequently also lacked sufficient MJ experience to act independently).

[43] *See id.*

[44] *See* Interview with LTC Jeffery R. Nance, former Chief of Operational Law, V Corps, in Charlottesville, Va. (8 Oct. 2003) [hereinafter Nance Interview].

Secretary of the Army granted both requests, with the provisional unit being designated "V Corps Rear (Provisional)" and commanded by a brigadier general.[45]

Military case law calls attention to the potential jurisdictional pitfalls inherent in handling courts-martial during deployments.[46] With these challenges in mind, V Corps JAs took great care to help convening authorities lay a careful processing trail for all pending courts-martial by taking the following measures.

- The V Corps Rear Commander memorialized his assumption of command by formal memorandum;
- U.S. Army Europe and Seventh Army revised the existing U.S. Army Europe (USAREUR) GCMCA area jurisdiction policy to account for the creation of new subordinate provisional units;
- The V Corps Rear Commander promulgated a policy aligning special and summary courts-martial jurisdictions within his Command; and
- The V Corps Commander requested, in writing and by individual case name, that the V Corps Rear Commander take jurisdiction of courts-martial at the post-trial phase, and the V Corps Rear Commander similarly memorialized his acceptance of jurisdiction.[47]

Although the Secretary of the Army approved the creation of V Corps Rear as a provisional command with GCMCA on 30 January 2003,[48] the V Corps Rear Commander did not immediately take command. During the interim, V Corps courts-martial continued with the panel previously selected by the V Corps Commander.[49] V Corps JAs carefully monitored the status of deployable panel members to ensure the availability of a court-martial panel at all times. The V Corps Commander did not transfer jurisdiction of those cases in which charges had been preferred prior to 21 February 2003, although he later transferred jurisdiction for post-trial matters. This required the V Corps CG to take action on cases while deployed, and reliable

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[45] The request and approval memoranda are at Appendices I-2 and I-3. When the Secretary of the Army approved the creation of the V Corps Rear (Provisional) Command with a commander having GCMCA status, he did the same for the 21st Theater Support Command, the 1st Infantry Division (at the time both of these units were preparing for possible deployment to Turkey), and the Southern European Task Force (SETAF).

[46] *See, e.g.,* United States v. Newlove, No. 20020536 (Army Ct. Crim. App. Aug. 20, 2003). A recitation of the details of the case is not crucial to understanding the holding: a unit commander and a rear provisional commander both with GCMCA status are separate convening authorities and cannot exercise their authority interchangeably.

[47] Note that in this instance, the V Corps Commander (a lieutenant general) asked the V Corps Rear Commander (a brigadier general) to accept jurisdiction and take action "*as you deem appropriate*" (emphasis added). It would seem advisable to include this language to avoid any appearance of unlawful command influence. *See* MCM, R.C.M. 104 (defining unlawful command influence).

[48] *See* OEF/OIF LL Volume I.

[49] *See* Interview with MAJ Tiernan Dolan, former Senior Trial Counsel, V Corps, in Charlottesville, Va. (22 Jan. 2004) [hereinafter Dolan Interview].

communications made this possible.[50] The V Corps Rear Commander subsequently selected a court-martial panel and began referring cases to trial in his own capacity.[51]

Due to careful forethought and proactive measures, V Corps courts-martial continued with few problems. The most difficult MJ challenge was carefully monitoring rear detachment special and summary court-martial jurisdictional alignments as units deployed. In the words of one V Corps JA, "You need to do it early and often."[52]

Throughout OIF, the V Corps Rear (Provisional) command handled all general and special courts-martial, but deployed JAs handled less serious misconduct in the deployed theater.[53] Deployed JAs also faced challenges trying to manage jurisdictional alignments. Before combat operations began, deployed V Corps JAs attempted to maintain a "jurisdiction book" to track alignments, but with the great quantity of attachments and fast-moving events, the task quickly became prohibitively difficult. In the event of a serious incident of misconduct, the V Corps SJA plan was to seek to attach the accused Soldier to the nearest unit commanded by a general court-martial convening authority, if the Soldier was not already attached to or a member of such a unit.[54]

First Armored Division

The Army's First Armored Division (1AD) is headquartered in Wiesbaden, Germany, and commanded by a major general. Although 1AD did not participate in combat operations before 1 May 2003, the unit received orders to deploy to Iraq well before then. 1AD JAs began deploying to Iraq in late April 2003. 1AD and V Corps Rear JAs worked together to resolve many MJ issues before the division deployed.[55] Unlike some other large Army units in Europe, the 1AD CG decided not to establish a rear provisional unit. Instead, he took advantage of the existing V Corps Rear jurisdictional structure. This proved relatively easy, as 1AD normally falls within the V Corps command structure. The U.S. Army Europe Commander published a memorandum through his SJA establishing that non-deployed 1AD units and Soldiers would fall under the V Corps Rear jurisdictional alignment structure.[56] The 1AD Commander then used the process described above to request that the V Corps Rear Commander accept jurisdiction of all 1AD cases at the post-trial stage, which the V

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[50] *Id.* (noting that the V Corps CG took actions such as considering requests for administrative separation in lieu of court-martial, expert witness requests, and panel member excusals).

[51] *See* Dolan Interview.

[52] *See id.*

[53] *See* Interview with LTC James J. Diliberti, former V Corps Deputy Staff Judge Advocate, in Charlottesville, Va. (9 Oct. 2003).

[54] *See id.*

[55] *See* Dolan Interview.

[56] *See id.*

Corps Rear Commander did.[57] The 1AD Commander kept jurisdiction of cases in which charges had been preferred but transferred cases once they reached the post-trial phase.[58]

1AD deployed during the investigation of two murder cases.[59] After nearly all 1AD JAs had departed, V Corps Rear JAs took responsibility for these two cases and brought them to court-martial with the benefit of pre-trial agreements.[60] Although the defense counsel in both cases asked the government to produce many deployed witnesses, all witness availability issues were resolved without motion litigation.[61] Nonetheless, JAs must be sensitive to the difficulty involved in producing deployed court-martial witnesses.

Third Infantry Division

The Army's Third Infantry Division (Mechanized) (3ID) is headquartered at Fort Stewart, Georgia, and commanded by a major general. 3ID's Second Brigade (2BDE) deployed to Kuwait in September 2002, as part of Operation Desert Spring,[62] where it remained until the rest of the Division joined it in Kuwait in January 2003. During Operation Desert Spring, the 2BDE conducted MJ as a deployed special court-martial convening authority (SPCMCA), sending serious cases of misconduct back to Fort Stewart for prosecution. Before deploying to Kuwait, the 3ID CG decided to bring his UCMJ flag with him. Establishing a rear provisional command was not necessary because, at the time OIF planning was occurring, a Secretary of the Army General Order designated the Fort Stewart Installation Commander as a GCMCA. Normally, the 3ID Commander is also the Fort Stewart Installation Commander, and a colonel commands the Fort Stewart Garrison (managing the daily operation of Fort Stewart).[63] When the 3ID CG deployed, he transferred command of the Installation to the Garrison Commander, who immediately became a GCMCA by virtue of the SECARMY General Order. The Garrison Commander took action on existing courts-martial in his capacity as the acting Installation Commander until the 3ID Commander returned to Fort Stewart.[64]

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[57] *Id.*

[58] *See* Dolan Interview.

[59] *See id.*

[60] *See id.*

[61] *See id.*

[62] *See* GlobalSecurity.org, *at* http://www.globalsecurity.org/military/ops/desert_spring.htm (noting that Operation Desert Spring was part of an ongoing operation in Kuwait that provided a forward presence and control and force protection over Army Forces in Kuwait).

[63] *See* E-Mail from MAJ Robert Resnick, Chief of Military Justice, Third Infantry Division, to CPT Daniel Saumur, Deputy Director, Center for Law and Military Operations (27 Jan. 2004) [hereinafter Resnick 27 Jan. 2004 E-mail]. On a typical large Army installation, the installation commander is a major general. The garrison commander, typically a colonel, is responsible for day-to-day management of the installation and reports to the installation commander.

[64] *See id.*

When the 3ID reconstituted in Kuwait, the 3ID CG issued a policy memorandum revising the special and summary court-martial jurisdictional alignment for forces in the deployed theater. In garrison, jurisdictional alignment normally followed the five brigade structure of the division, but the revised jurisdictional alignment followed the deployed Brigade Combat Team (BCT) structure.[65] Although the 3ID handled significant amounts of minor misconduct during the deployment, it did not try any general or special courts-martial in the deployed theater before it redeployed in August of 2003.[66]

101ST Airborne Division (Air Assault)

The 101st Airborne Division (Air Assault) (101st) is based at Fort Campbell, Kentucky, and commanded by a major general. Before deployment, the 101st CG chose to bring his MJ flag with him to Iraq. As at Fort Stewart, the Fort Campbell Garrison Commander (a colonel) became the acting Installation Commander and acquired GCMCA status by virtue of the same Secretary of the Army General Order.[67] Before deploying, the 101st CG issued a policy designating rear provisional units.[68]

Our [Fort Stewart] installation commander was a [colonel] who remained [at Fort Stewart] and served as the GCMCA. The [3ID] CG relinquished installation command and took the division [MJ] flag with him. . . . Thus, for the desert, we used the 3ID jurisdiction. Fort Stewart, and the installation commander, was able to proceed on everything without transferring jurisdiction as the [Garrison Commander] was the installation commander and had that authority. When the CG returned and reassumed the installation, he had that jurisdiction, and [the 3ID CG reassumed installation command].

Id.

[65] *See* E-mail from MAJ Robert Resnick, Chief of Military Justice, Third Infantry Division, to CPT Daniel Saumur, Deputy Director, Center for Law and Military Operations (21 Jan. 2004).

> The CG is the only GCMCA for the Division. All Brigade commanders are SPCMCA, subordinate to the CG. Thus, in Garrison, everything worked out with Brigade jurisdiction. Companies were assigned to battalions which were assigned to brigades. In deployment, per [Army doctrine], we have the [brigade combat teams]. The issue there is that battalions from DISCOM [Division Support Command], DIVARTY [Division Artillery], and DIVENG [Division Engineers] get sliced over to the maneuver brigades. This changes the UCMJ alignment for those units from their organic brigade to the BCT commander. The organic brigade commanders would have preferred to keep UCMJ jurisdiction, but with their battalions dispersed, it was not feasible. As to the CG's authority, as the GCMCA and as the commander, this clearly falls under his authority. These are his subordinate units. [The Department of the Army] determined who to slice to the [brigade combat teams].

Id.

[66] *See* Resnick and Pritchard Interview.

[67] *See* OEF/OIF LL Volume I (explaining the process by which an acting garrison commander acquires GCMCA status in the absence of the installation commander, by virtue of Secretary of the Army General Order #10).

[68] *See* Interview with COL Richard O. Hatch, former Staff Judge Advocate, 101st Airborne Division, in Charlottesville, Va. (20 Feb. 2004) [hereinafter Supplementary Hatch Interview] (noting that the JA

Unlike other large deployed units, the 101st had an extremely serious act of misconduct before the invasion of Iraq. In the early hours of 23 March 2003, grenades were rolled into each of three tents occupied by the leadership of the 1st Brigade. In addition, two officers were hit by small arms fire as they emerged from their tents. In the attack, two officers were killed,[69] and fifteen others wounded, including the First Brigade Trial Counsel.[70] The perpetrator, Army Sergeant Hasan Akbar, was returned to Fort Campbell for prosecution due, in part, to the lack of a confinement facility in Kuwait and the need to focus on military operations.[71]

Although at that time, the 101st CG made the decision not to try any general or special courts-martial in the deployed theater, the 101st did handle some minor to moderately severe misconduct with nonjudicial punishment, summary courts-martial, and administrative reprimands.[72] Special and summary court-martial jurisdiction followed

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proposed jurisdictional alignment scheme served as the framework document for creating the rear detachment unit structure).

[69] Air Force Major Gregory Stone and Army Captain Christopher Seifert.

[70] CPT Andras M. Marton, although seriously injured, is recovering and remains on active duty at the time this Publication was being drafted. *See also* Supplementary Hatch Interview (noting that a 139th LSO JA, MAJ Roger Nell, deployed to replace CPT Andras M. Marton). MAJ Nell deployed as the 1st Brigade Trial Counsel, a position he had previously held while on active duty.

[71] *See* Hatch Interview. CFLCC and V Corps JAs assisted with the Akbar pre-trial confinement process. SGT Akbar was initially confined at the U.S. Army confinement facility at Mannheim, Germany, but when it appeared that the Akbar case might be handled as a capital case, SGT Akbar was transferred the U.S. Army confinement facility at Fort Knox, Kentucky. *See* Supplementary Hatch Interview. *See also* Memorandum, Majors Nicholas F. Lancaster & J. "Harper" Cook, Office of the Staff Judge Advocate, 101st Airborne Division (Air Assault), for Record, subject: MAJ Lancaster (101st ABN DIV (AASLT) Operational Law) Comments on CLAMO OEF/OIF DRAFT Lessons Learned, para. 5 (18 May 2004). The 101st Chief of Justice [COJ] and [Deputy Staff Judge Advocate (DSJA)] were made aware of the situation a couple hours later at the [Division Rear Command Post]. By the time the sun came up, the DSJA, LTC Rich Whitaker, and COJ, CPT Lancaster, along with the Senior Defense Counsel, MAJ Dan Brookhart, were at the crime scene. While CPT Lancaster walked the scene with [Army Criminal Investigators], MAJ Brookhart counseled the accused for the first time. Later that night, all three 101st JAs traveled to Camp Virginia, Kuwait, where CPT Lancaster and MAJ Brookhart represented the government and defense respectively at the [pretrial confinement] hearing. The hearing was held in a tent at Camp Virginia. That night Akbar was transported to Camp Doha and held in a temporary confinement facility until he could be flown to Mannheim Germany. V Corps JAs were of great assistance by providing a military magistrate, CPT Jeannie Smith, a place to conduct the hearing, and assisting the 101st with several [U.S. Army Europe] specific forms required in order to get Akbar into confinement in Mannheim. Much of this coordination was done over the partially reliable [tactical] phone and the rest was accomplished by scanning and email, as there was no fax capability with the 101st. The entire pre-trial process in US v. Akbar is a case-study in how to conduct deployed military justice from a technology standpoint, and our experience echoes that of every other deployed unit in that scanning and emailing capability was absolutely essential. Without the ability to scan and email documents, military justice would revert back to stone tablets and chisels in a deployed environment.

Id.

[72] *See* Hatch Interview.

the functional deployed brigade structure, and the CG selected deployed general and special courts-martial panels in late April 2003.[73]

Marine Corps Units

Due to their expeditionary mission and structure, in 2003 deployed Marine units took a different approach to GCM jurisdictional alignment than did the Army units described above. The experience of Task Force Tarawa (TF Tarawa) is illustrative. TF Tarawa was formed specifically for the deployment to Iraq and consisted of the 2nd Marine Expeditionary Brigade (2d MEB) headquarters and attached units. A Marine brigadier general commanded TF Tarawa, which fell under the 1st Marine Expeditionary Force (I MEF) during the deployment to Iraq.[74] A MEF is roughly equivalent to an Army Corps and is commanded by a major general.[75] The TF Tarawa and I MEF[76] Commanders were statutory[77] GCMCAs, and both brought their UCMJ flags to Iraq.[78] During peacetime, the 2nd MEB is a notional headquarters unit embedded within the 2nd MEF (II MEF) at Camp Lejeune, North Carolina. In Iraq, the 2nd MEB/TF Tarawa took command of attached elements of the 2nd Marine Aircraft Wing (II MAW) and 2nd Fleet Service Support Group (2d FSSG). Both the II MAW and the 2d FSSG are normally part of II MEF, and their Commanding Generals have statutory GCMCA status. Nevertheless, by the TF Tarawa Operational Plan Legal Annex, all Marines attached to TF Tarawa fell under the GCM convening authority of the TF Tarawa CG.[79] The TF Tarawa CG promulgated a policy providing that subordinate commanders retained special and summary court-martial convening authority over the Marines under their operational control.

The Marines were able to avoid the home station GCM jurisdictional alignment challenges Army units encountered because nearly all Marine Corps installations with large deployable units have a non-deployable installation commander (normally a major general) with GCMCA status. This eliminates the

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[73] *See id.* (noting that although the 101st CG did not want to convene a special or general court-martial in theater, he took the time to pick SPCM and GCM panels, at the urging of his SJA, to ensure panels were available in case they were needed).

[74] Transcript of After Action Review Conference, Office of the Staff Judge Advocate, Task Force Tarawa, and the Center for Law and Military Operations, Camp Lejeune, N.C., at 5 (2-3 Oct. 2003) [hereinafter TF Tarawa AAR Transcript].

[75] Telephone Interview with LtCol William Perez ,USMC, former Staff Judge Advocate, Task Force Tarawa (28 Jan. 2004) [hereinafter Perez Interview].

[76] Although a MEF is normally commanded by a major general, I MEF was commanded by a lieutenant general during OIF. *Id.*

[77] *See* UCMJ, art. 22(a)(5) (2002) ("General courts-martial may be convened by— . . . (5) the commanding officer of . . . an Army Group, an Army, an Army Corps, a division, a separate brigade, or a corresponding unit of the Army *or Marine Corps.*") (emphasis added).

[78] *See* Perez Interview.

[79] Several months before deploying, the II MAW, II FSSG, and 2d MEB Staff Judge Advocates met to discuss and settle these jurisdictional issues informally. *See id.*

need to create a rear provisional command or have a garrison commander assume command as an acting installation commander. Due to the expeditionary nature of the Marine Corps, Marine JAs are comfortable dealing with the jurisdictional implications of deployments and complicated task organizations. GCMCA jurisdiction generally follows the functional arrangement described above, and potential jurisdictional conflicts are almost always resolved informally. [80] TF Tarawa's experience followed standard Marine practice and functioned well.[81]

Although the TF Tarawa deployment involved very little misconduct,[82] commanders administered some nonjudicial punishment aboard ship, in Kuwait, and in Iraq.[83] In one more serious case, a male Marine was suspected of sexually assaulting a female Marine in Kuwait. The male marine was returned to Camp Lejeune for trial. By the time charges were preferred against the suspected Marine, his CG had returned to Camp Lejeune and was able to take action as the GCMCA.[84]

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[80] Telephone Interview with Maj Ernest H. Harper ,USMC, Professor of Criminal Law, Judge Advocate General's Legal Center and School (28 Jan. 2004).

[81] *See* Perez Interview.

[82] *See id.*

[83] *See id. See also* CENTER FOR LAW AND MILITARY OPERATIONS, DEPLOYED MARINE AIR-GROUND TASK FORCE (MAGTF) JUDGE ADVOCATE HANDBOOK at 89 (2002) (discussing nonjudicial punishment administration while aboard ship) [hereinafter MAGTF HANDBOOK]. A senior Marine JA deployed to OIF adds:

> Because Marines and Sailors do have the right to refuse [nonjudicial punishment] even in a combat environment (despite not having the right to refuse when attached to or embarked in a vessel), the [Marine Logistics Command] determined that the presence of an [Legal Services Support Section] capable of trying court-martial cases in the field was essential to preventing the potential wholesale refusal of nonjudicial punishment. E-mail from LtCol Bruce Landrum, USMC, to LTC Pamela Stahl, Director, CLAMO (7 May 2004). Lt Col Landrum stated that a Marine Legal Services Support Section (LSSS), deployed to Kuwait during OIF with the 1st FSSG (part of I MEF). Elements of another LSSS deployed as part of the Marine Logistics Command, also in Kuwait. *Id.*

[84] *See* Perez Interview.

VII.B. MILITARY JUSTICE AT HOME STATION

During a deployment, the command's attention is focused on operations in the forward setting, but past experience demonstrates that JAs must make preparations to handle military justice at the deploying unit's home station.[85] As discussed above, these preparations should include clarifying command relationships for non-deployed personnel, establishing rear detachment jurisdictional alignments, and (as necessary) transferring active court-martial cases to a rear detachment GCMCA.

Deployed units should be able to focus on the combat mission, while successfully handling MJ in the rear, by taking the following additional measures.

- Developing habitual relationships with reserve component legal personnel and integrating them into deployment planning;
- Leaving experienced active duty legal personnel at the home station; and
- Taking measures to dispose of ongoing MJ matters before deployment.

In many contingency operations, units deploy the majority of their active duty legal personnel.[86] In many cases, reserve component[87] personnel stepped in to help handle legal affairs at the home station. For example, in Operation Iraqi Freedom, members of the 174th Legal Support Organization (LSO) helped manage legal affairs at Fort Stewart during 3ID's deployment.[88] Likewise, the 139th LSO and 3397th Garrison Support Unit (GSU) managed legal affairs at Fort Campbell during the 101st deployment in Iraq.[89] The 174th and 139th LSC and the 3397th GSU were successful, in large measure, because they had habitual relationships with the Fort Stewart and Fort Campbell SJA Offices, respectively.[90] In addition, they were activated in time to work with deploying active duty JAs before the 3ID and 101st deployed.[91] Although some of the 174th LSO JAs were experienced civilian criminal law advocates, they were sometimes unfamiliar with the details of court-martial practice and the fact patterns of

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[85] *See, e.g.,* BALKANS LESSONS LEARNED, at 178 (discussing the challenges associated with handling rear detachment military justice actions).

[86] *See* Dolan Interview; Hatch Interview; Transcript of After Action Review Conference, Office of the Staff Judge Advocate, 3d Infantry Division, and Center for Law and Military Operations, Fort Stewart, Georgia, at 1 (18-19 Nov. 2003) [hereinafter 3ID AAR Transcript].

[87] The term "Reserve Component" is used in this Publication to refer both to National Guard and Army Reserve Soldiers.

[88] It is important to note that many Reserve Component legal personnel also deployed to Iraq and Afghanistan, often for long periods of time, and were involved in all aspects of military operations. *See, e.g.,* LTC Kirk G. Warner, 12th Legal Support Organization Senior Deployed Judge Advocate, The 12th LSO Team in Support of Operation Iraqi Freedom (7 February to 12 October 2003) (2003).

[89] *See* Supplementary Hatch Interview.

[90] *See id*; 3ID AAR Transcript.

[91] *See* 3ID AAR Transcript; Supplementary Hatch Interview.

ongoing cases.[92] They successfully overcame these challenges by working with active duty JAs to discuss cases and court-martial practice.[93]

Other SJAs choose to leave experienced active duty JAs at the home station to manage MJ matters. For instance, the V Corps Senior Trial Counsel remained in Germany and managed MJ matters for the V Corps Rear Command when the Corps deployed in support of Operation Iraqi Freedom.[94] Similarly, the 3ID Deputy Staff Judge Advocate did not deploy to Iraq in 2003. He stayed at Fort Stewart to help manage legal affairs at Fort Stewart, including MJ.[95] The lesson here is that units should attempt to leave at least one experienced active duty MJ practitioner[96] at the home station to manage MJ.

Before a deployment, mission constraints often factor more heavily into case disposition than they otherwise might.[97] Commanders resolve MJ matters on a case-by-case basis, weighing many factors, including the merits and equities of the case, the SJA's advice, and mission requirements. As described above, witness availability and deployment of active legal personnel can make trying courts-martial challenging. In addition, non-deployed personnel pending court-martial or administrative separation are often disciplinary challenges.[98] Commanders preparing to deploy can often minimize these potential distractions by resolving many cases through pre-trial agreements, requests for discharge in lieu of court-martial, and administrative separations.[99] Commanders and SJAs should be careful not to hold wholesale MJ "fire sales," but taking reasonable measures to expeditiously resolve cases is always advisable.[100]

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[92] *See* 3ID AAR Transcript.

[93] *See id.*

[94] *See id.*

[95] *See* 3ID AAR Transcript.

[96] Reserve Component JAs and legal personnel typically do not have experience conducting courts-martial unless they have been on active duty. This generally proved true during OIF. *See* 12th LSO AAR.

[97] *Id. See also* Dolan Interview.

[98] *See, e.g.,* Supplementary Hatch Interview ("Do not underestimate the amount of work these Soldiers will cause to rear detachment [officers-in-charge] and stay-behind trial counsels."). Many of these Soldiers committed further misconduct while the division was deployed. *Id.*

[99] V Corps JAs approached defense counsel in many cases and explicitly stated that they were willing to dispose of cases more generously (to the accused) than they otherwise might. In some instances, defense counsel may have mistaken these overtures as the government's unwillingness or inability to prove the case rather than a straightforward desire to dispose of the case expeditiously. *See* Dolan Interview. The 101st CG wanted to try to separate Soldiers with disciplinary problems, as appropriate, to fill "slots" with other personnel. *See* Supplementary Hatch Interview.

[100] *See* Supplementary Hatch Interview.

VII.C. GENERAL ORDERS

General orders (GOs) proscribe specified conduct by members of a command.[101] In past operations, general officers in command have issued a "GO #1" to prohibit certain conduct, such as the consumption of alcohol and the taking of war trophies.[102] Although GOs #1 will vary slightly from operation to operation, JAs need not start from scratch in drafting them. Examples from past operations may provide useful templates.[103]

The difficulty with GOs #1 comes often not in their drafting but in their implementatio Although prosecution for violation of a GO does not require specific knowledge of the existen of the order,[104] at least one court has held that as a matter of fairness, military members should not be punished for violating a GO of which they had no knowledge.[105] Thus, it is incumbent upon Commanders and JAs to educate members of the command (including, if applicable, civilians accompanying the force) about GO #1.[106] The solution to this challenge is to comprehensively brief members of the command during pre-deployment preparations.[107]

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[101] UCMJ art. 92c(1)(a) (2002)

[102] *See, e.g.,* BALKANS LESSONS LEARNED

[103] One OSJA added the following comments with respect to drafting General Orders #1. GOs #1 should also be tailored to the particular geographic location and cultural environment in which the unit will operate. Coordination with G5, and US forces personnel permanently stationed in that location (e.g., Defense Attaches, MILREPs, FAOs, etc.) are critical prior to issuing a GO #1.

[104] *See* UCMJ, art. 92(3)b(1) (2002).

[105] *See* United States v. Charles Anthony Bright, 20 M.J. 661, 663 (N.M.C.M.R. 1985) ("It is abundantly clear that the courts are not willing to give punitive effect to general orders (the knowledge of which is conclusively presumed) when there is inadequate notice of such effect, . . *fundamental fairness* dictates that the intended punitive effect be nullified.") (emphasis added).

[106] *See, e.g.,* BALKANS LESSONS LEARNED ("[J]udge advocates and commanders must continually educate Soldiers on the provisions of GO #1."). Issues may also arise concerning the applicability to civilians accompanying the force. *See* 101st Airborne Division (Air Assault), Operation Iraqi Freedom Lessons Learned, at 14 (2003).

4. ISSUE

Civilians crossing the berm into Iraq were required to sign statements acknowledging that [CENTCOM] General Order #1 applied to them.

RECOMMENDATION

Do better research prior to deployment into whether or not the language in the waiver existed already in the contracts of civilians. If higher headquarters still feel compelled to reinforce particular areas of a civilian's employment contract, then some type of training should be scheduled to emphasize those areas. As an absolute last resort, signing waivers should occur before deployment, not hours before [crossing the line of departure (LD)].

DISCUSSION

Hours before the scheduled LD of the Division, higher headquarters circulated a document for the signature of every civilian that would travel across the berm into Iraq. These signatures were required prior to allowing civilians across the border. Higher headquarters gave G1 responsibility for compliance. A frantic several hours ensued where G1 personnel attempted to identify 1) what

Since U.S. Central Command's publishing of GO #1A in December 2000,[108] many subordinate general officers in Iraq and Afghanistan chose to issue their own supplemental GO #1.[109] JAs preparing for future contingencies in these areas of operations should refer to these and other general orders from previous operations.[110]

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civilians we had with us, 2) where they were currently located, 3) whether or not each individual civilian would travel into Iraq, and 4) how to get the document to the civilian for a signature. The requirement, which was completely unforeseen by anyone on division staff, surfaced so late as to serve as a serious distractor from operational planning and preparation and to offend many, if not most, of the civilian employees who already understood the "rules" under which they were serving their country.

Id. at 14. *See also* Hatch Interview.

[107] *See* Hatch Interview; AR 27-100 (noting the importance of predeployment briefings concerning GO #1).

[108] *See* Headquarters, United States Central Command, Gen. Order No. 1A (19 Dec. 2000) (hereinafter CENTCOM GO-1A). CENTOCOM GO-1A predated both OEF and OIF.

[109] Subordinate general officers in command may wish to publish their own GOs to prohibit conduct not prohibited by GOs issued by higher military authority, or merely to reemphasize preexisting GOs with their personal authority.

[110] For examples of General Orders #1 from past operations other than OEF or OIF, see the 2006 OPLAW HANDBOOK. *See also* CENTER FOR LAW AND MILITARY OPERATIONS, DEPLOYED JUDGE ADVOCATE RESOURCE LIBRARY, SEVENTH EDITION (2006). This is a DVD set of documents and resources useful to deploying JAs.

VII.D. MILITARY JUSTICE IN A JOINT ENVIRONMENT

Due to the increasingly joint nature of military operations, [111] JAs must be ready to advise commanders on the implications of handling MJ in a joint environment. This lesson has perhaps its greatest application in the special operations community. The experience of the Army's 5th Special Forces Group (5th Group) in Afghanistan and Iraq illustrates the lesson.[112] During OEF and OIF, the 5th Group formed the core of a joint special operations task force (JSOTF), incorporating members of other military services, and commanded by an Army colonel (the 5th Group Commander).

Prior to deployment, the JSOTF Commander, with the advice of his Command Judge Advocate (CJA), decided to keep MJ along service command lines.[113] In other words, the JSOTF/5th Group Commander would handle MJ matters for Army personnel, and cases involving members of other services would be turned over to the appropriate service for handling. Interestingly, the 5th Group Commander requested special court-martial convening authority from United States Army Special Operations Command (USASOC), but the request was denied.[114]

Army Reserve Civil Affairs (CA) units during OIF1 had particular problems administering justice, as no command took responsibility for them as GCMCA or SPCMCA. Neither V Corps, the Marines, nor the Reserve HQ (USACAPOC) provided justice support nor accepted GCMCA authority, leading to a vacuum of jurisdiction.

The greatest number of JSOTF's non-Army members were Air Force (AF) personnel. The JSOTF Commander was well-positioned to handle potential misconduct by AF members in Iraq because one of the JAs attached to the JSOTF in Iraq was an Air Force JA.[115] Before deploying, the JSOTF CJA and the AF JA mentioned above made

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[111] *See* JOINT CHIEFS OF STAFF, JOINT PUB. 1-02, DOD DICTIONARY OF MILITARY AND ASSOCIATED TERMS (12 Apr. 2001) (as amended 17 Dec. 2003), [hereinafter DOD DICTIONARY] (defining the term "joint" as "activities, operations, organizations, etc., in which elements of two or more Military Departments participate"). In his Arrival Message to the Army upon his swearing in as the 35th Army Chief of Staff, GEN Peter J. Schoomaker reflected upon how the Army has changed in the last twenty years. He stated (drawing upon his involvement in the failed attempt to rescue U.S. Hostages in Iran in 1980), "We did not know that we were at the start of an unprecedented movement to *jointness* in every aspect of our military culture . . . a movement that must continue." *See* GEN Peter J. Schoomaker, Arrival Message (1 Aug. 2003), *at* http://www.army.mil/leaders/csa/messages/1aug03.htm (emphasis added).

[112] The 5th Group deployed for OEF, returned to its home station at Fort Campbell, Kentucky, and deployed again for OIF. *See* Interview with MAJ Dean L. Whitford and SSG Jerome D. Klein, Command Judge Advocate and Legal NCOIC, 5th Special Forces Group, in Charlottesville, Va. (19 Aug. 2003) [hereinafter 5th Group AAR].

[113] *See id.*

[114] *See id.*

[115] *See id.*

detailed plans to handle potential investigations and misconduct involving AF personnel. The 5th Group CJA made similar plans with appropriate Navy JAs. Thus, he was ready to handle misconduct by any JSOTF military personnel.

The 5th Group Legal Noncommissioned Officer brought copies of the UCMJ as well as service-specific MJ regulations to Afghanistan and Iraq. This highlights the larger lesson that JAs need not make themselves experts in the MJ regulations of other services. Rather, they need only know where to look for guidance and deconfliction[116] when carefully comparing the regulations of one service with those of another. A commander offering nonjudicial punishment generally must follow the applicable service regulation of the service member being offered nonjudicial punishment.[117] For example, if an Army Commander wishes to offer nonjudicial punishment to an AF member, the servicing JA should reference both the AF and Army regulations, but the commander must follow the AF nonjudicial punishment regulation.[118]

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[116] *See* AR 27-10; AFI. 51-201; JAGMAN.

[117] AR 27-10, states:

> An Army commander is not prohibited from imposing nonjudicial punishment on a military member of his or her command solely because the member is a member of another armed [S]ervice. . . . An Army Commander may impose punishment upon a member of another Service only under the circumstances, and according to the procedures, prescribed by the member's parent service.

Id. para. 3-8c. AFI 51-202, states:

> The multiservice commander, when imposing [nonjudicial punishment] on an Air Force member, follows this instruction, including the guidance applicable to joint force commanders . . . Before initiating any [nonjudicial punishment] action, ensure the multiservice commander has command authority over the member involved, the appellate authority is identified, and administrative processing issues are understood.

Id. para. 2.6 (citations omitted). *See also* JAGMAN:

> [A] multiservice commander or officer in charge to whose staff, command or unit members of the naval service are assigned may impose nonjudicial punishment upon such individuals. A multiservice commander, alternatively, may designate one or more naval units, and shall for each such naval unit designate a commissioned officer of the naval service as commanding officer for the administration of discipline under article 15, UCMJ.

Id. para. 0106d.

[118] *Id.* For further discussion on this subject, s*ee also* Major Mark W. Holzer, *Purple Haze: Military Justice in Support of Joint Operations,* ARMY LAW., 1 (July 2002); Captain William H. Walsh & Captain Thomas A. Dukes, Jr., *Note & Comment: The Joint Commander as Convening Authority: Analysis of a Test Case,* 46 A.F. L. REV. 195 (1999).

VII.E. SUMMARY COURTS-MARTIAL

There are alternative measures rather than general and/or special courts-martial to address less serious misconduct—administrative reprimands, nonjudicial punishment, and summary courts-martial. Common misconduct which might warrant these alternative measures include violations of GO #1 (especially alcohol consumption), violations of prohibitions against sexual activity ("no-sex orders"), military offenses (especially disrespect), and drug offenses (to a limited extent).[119] Deployed units have found that summary courts often prove to be the best way to handle minor misconduct.

"The function of a summary court-martial is to promptly adjudicate minor offenses[120] under a simple procedure."[121] UMCJ Article 24 details who may convene a summary court-martial,[122] and Rule for Court-Martial 1301[123] gives further guidance. Implementing service regulations also apply.[124]

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[119] *See* Hayden Interview; 3ID AAR Transcript. Almost all units noted that misconduct was very uncommon, especially during the combat phase of operations. *See, e.g.,* Hatch Interview. However, certain misconduct and offenses among service members are reported as being more common than others. For a recent example from Operation Iraqi Freedom, *See* After Action Review Conference, Office of the Staff Judge Advocate, 4th Infantry Division (Task Force Ironhorse), and the Center for Law and Military Operations, The Judge Advocate General's Legal Center and School, U.S. Army, in Ft. Hood, Tx. (8 Sep. 2004) [hereinafter 4 ID AAR] (stating in part that many Article 15s were processed for General Order #1 violations, including alcohol, fraternization, and disrespect. Courts-martial included those for drugs (in particular valium, which could be purchased at local pharmacies), wrongful appropriation, AWOL and desertion (the Commanding General deployed Soldiers charged with the last two offenses).

[120] The MCM defines minor misconduct.

> Whether an offense is minor depends on several factors: the nature of the offense and the circumstances surrounding its commission; the offender's age, rank, duty assignment, record and experience; and the maximum sentence imposable for the offense if tried by general court-martial. Ordinarily, a minor offense is an offense which the maximum sentence imposable would not include a dishonorable discharge or confinement for longer than 1 year if tried by a general court-martial. The decision whether an offense is "minor" is [ultimately] a matter of discretion for the commander.

[121] MCM, R.C.M. 1103(b).

[122] The UCMJ provides:

> [A] summary court-martial may be convened by— (1) any person who may convene a general or special court-martial; (2) the commanding officer of a detached company or other detachment of the Army; (3) the commanding officer of a detached squadron or other detachment of the Air Force; or (4) the commanding officer or officer in charge of any other command when empowered by the Secretary concerned.

UCMJ, art. 24(a) (2000).

[123] *See* MCM, R.C.M. 1301 (concerning Summary Courts-Martial).

[124] *See also* U.S. DEP'T OF ARMY, PAM. 27-7, GUIDE FOR SUMMARY COURT-MARTIAL TRIAL PROCEDURE (15 Jun. 1985); Faculty, The Judge Advocate General's School, *Summary Court-Martial, Using the Right Tool for the Job,* ARMY LAW., 52 (July 2002).

Summary courts offer a streamlined procedure and a flexible range of punishments. Most significantly, the accused at a summary court-martial does not have the right to counsel, although representation by military or civilian defense counsel is not prohibited.[125] In addition, the summary court officer need not be a military judge or JA.[126] This generally relaxed due process is balanced by the accused's right to decline trial by summary court-martial.[127] The potential for injustice is also moderated by relatively light authorized punishments.[128]

In 2003, the 3ID used summary courts extensively in Iraq.[129] Given the lack of a confinement facility in theater, executing sentences to confinement proved impractical.[130] In this instance, confinement would have required two military escorts to bring the Soldier to the Army Confinement Facility in Mannheim, Germany, and to reverse the process at the end of the period of confinement. Commanders did not want to "reward" Soldiers for their misconduct with a "free trip" to Germany.[131] One remedy to this paradox was approving sentences of hard labor without confinement.[132] This allowed punishment to be executed in theater and acted to deter other misconduct because Soldiers saw the potentially unpleasant results.[133]

During 2003 in Iraq, hard labor without confinement proved an especially effective punishment for several reasons. The authorized punishment of extra duty as a result of nonjudicial punishment might appear equally appropriate. "Extra duties [as a result of nonjudicial punishment] involve the performance of those duties in addition to

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[125] *See* MCM. *But see,* AR 27-10, para. 5-22(b) ("*except when military exigencies require otherwise*, the [summary court-martial officer] will grant the accused an opportunity to consult with qualified defense counsel before the trial date . . .") (emphasis added). MJ practitioners should note the distinction between the opportunity to consult with defense counsel before trial and the right to be represented by defense counsel at trial. Note also that AR 27-10 does not state that consultation with defense counsel need be in person. Consultation by telephone would seem to satisfy the rule.

[126] MCM, para. (a) ("A summary court-martial is composed of one commissioned officer on active duty.").

[127] MCM, R.C.M. 1303.

[128] *Id.* at R.C.M. 1301, para. (d) (and discussion).

> Under this rule, confinement cannot exceed thirty days, or hard labor without confinement cannot exceed forty-five days. Other permissible punishments include restriction to specified limits for up to 60 days, reduction to the lowest enlisted grade, and forfeiture of two-thirds of one month's pay. For Soldiers in the rank of E-5 and above, the sentence may not include confinement or hard labor without confinement, and reduction may only be to the next lowest grade. *Id.*

[129] *See* Resnick and Pritchard Interview.

[130] There is now a confinement facility at Camp Arifjan, Kuwait, capable of separately housing officer and enlisted pre-trial and post-trial confinees of both sexes for up to six months.

[131] *See* Resnick and Pritchard Interview.

[132] *See id.; see also* MCM, R.C.M. 1003(b)(6) (and discussion) (defining hard labor without confinement and providing rules for calculating the equivalency of confinement and hard labor without confinement).

[133] *See* Resnick and Pritchard Interview.

those normally assigned."[134] Although the definition of hard labor without confinement is similar,[135] in practice, 3ID JAs in Iraq viewed the latter as qualitatively different (worse) than the former and gave those Soldiers sentenced to hard labor without confinement the most unpleasant tasks to perform.[136] It is important to note that everyone in Iraq was working extremely long hours, and someone had to perform those unpleasant jobs.[137] Other authorized summary court punishments were situationally inappropriate. Restriction to specified limits had little meaning when everyone was restricted to base camps, and monetary forfeitures would likely only hurt family members. At least for the 3ID, summary courts were the tool of choice to rectify common misconduct such as disrespect and malingering. Performing unpleasant tasks in the desert had a strong tendency to deter further misconduct.[138]

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[134] MCM, part V, para. 5c(6).

[135] *See id.* R.C.M. 1003(b)(6) (discussion) (describing hard labor without confinement as "performed in addition to other regular duties."). With the 3ID, common punishments following a summary court sentence of hard labor without confinement included filling sandbags and cleaning latrines. *See* Resnick and Pritchard Interview.

[136] *See* Resnick and Pritchard Interview. *But see* 12th LSO AAR (explaining why the 12th LSO did not like summary-courts, as summarized below). JAs should work with commanders responsible for the execution of punishments of hard labor without confinement to ensure that punishments are carried out legally. The punishment certainly must not be of a nature to cause physical harm or the undue risk thereof. This was an important concern in the hot desert conditions of Iraq. For this reason, some JAs disfavored hard labor without confinement (and therefore summary-courts) because Soldiers were only able to work outside for about ten minutes of each daylight hour. In addition, other Soldiers were taken away from their tasks to oversee Soldiers performing hard labor. *See* 12th LSO AAR.

[137] *See* 12th LSO AAR.

[138] *See id.*

VII.F. URINALYSIS

Commanders often want the ability to conduct urinalysis testing to maintain good order and discipline, but units are often unable to do so until a more mature theater is established.[139] Although setting up a system through which urinalyses can be conducted is not normally a JAG function, it is an unwritten rule that "it [normally] wouldn't have happened without JA support and coordination with brigade commanders, the Division Surgeon (DIVSURG) and the Provost Marshall's Office (PMO)."[140] Further coordination with one of the CONUS-based Drug Testing Labs[141] is also required in order to actually perform the drug testing.

Each unit is responsible for providing a qualified Unit Alcohol Drug Coordinator (UADC) to oversee the urinalysis program.[142] The UADC is also responsible for providing the necessary resources for urinalysis testing, such as bottles and UA monitors, as well as logistical support to maintain proper chain of custody of the samples. The Marine Corps' Legal Services Support Team (LSST) in Operation Iraqi Freedom tried two fully contested special courts-martial in Iraq involving drug offenses. The trials required flying a drug expert from the Naval Drug Screening Laboratory in San Diego, California, to Iraq and the production of unit urinalysis coordinators and observers who had not deployed with their respective units. Early determination of the drug expert's availability for trial and the timely production of drug lab documents were essential for successful prosecution of these cases.[143]

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[139] *See* After Action Review Conference, Office of the Staff Judge Advocate, 101st Airborne Division (Air Assault), and the Center for Law and Military Operations, The Judge Advocate General's Legal Center and School, U.S. Army, in Ft. Campbell, Ky., at 43 (21 Oct. 2004) [hereinafter 101st ABD AAR]; *see also,* After Action Review Conference, Office of the Staff Judge Advocate, 1st Armored Division (1AD), in Wiesbaden, Germany (8 Sep. 2004) [hereinafter 1AD AAR].

[140] *See* OEF/OIF LL VOL II.

[141] Fort Meade Drug Testing Lab (Fort Meade, Maryland) and Tripler Drug Testing Lab (Honolulu,Hawaii).

[142] *See* U.S. DEP'T OF ARMY, REG. 600-85, ARMY SUBSTANCE ABUSE PROGRAM 1-6(i), 1-6(z)(bb), 1-25, 1-26 (15 Oct. 2001). Note that the term "UADC" is another commonly used acronym for the Unit Prevention Leader (UPL). *Id.* 1-6(z)(bb).

[143] *See* Lieutenant Colonel Mark K. Jamison, USMC, Legal Services Support Team (Iraq), Operation Iraqi Freedom II, After Action Report, (13 Nov 2004) [hereinafter Jamison AAR].

VII.G. CID

In a deployed setting, Criminal Investigation Division (CID) involvement is required in a number of investigations, to include war crime allegations and non-combat related U.S. service member deaths. As a result of this expanded role during deployments, CID has less time [during deployments] to focus on conducting "traditional" investigations into criminal misconduct committed by U.S. service members.[144]

Accordingly, individual units are often required to conduct their own preliminary investigations under Rules for Courts-Martial (RCM) 303.[145] Another factor that makes the CID mission more difficult is that Military Police Investigators (MPI), the organization responsible for investigating lower-level crimes, remain in garrison since they generally do not deploy.[146] For these reasons, JAs must recognize that CID will not be available to investigate crimes to the same extent that they would in garrison. Therefore, legal teams must be prepared to advise their commanders to conduct their own investigations, with the JAs taking the burden of advising investigating officers regarding the scope of investigation, preserving evidence, and adhering to applicable regulations.[147]

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[144] In these instances, note that a commander may choose to order members of his/her command to conduct a formal or informal investigation into allegations of misconduct under *Army Regulation 15-6.*

[145] *See* MCM, R.C.M. 303 (2002) (stating that "Upon receipt of information that a member of the command is accused or suspected of committing an offense or offenses triable by court-martial, the immediate commander shall make or cause to be made a preliminary inquiry into the charges or suspected offenses."). The Discussion section of R.C.M. 303 continues, stating: The preliminary inquiry is usually informal. It may be an examination of the charges and an investigative report or other summary of expected evidence. In other cases a more extensive investigation may be necessary. Although the commander may conduct the investigation personally or with members of the command, in serious or complex cases the commander should consider whether to seek the assistance of law enforcement personnel in conducting any inquiry or further investigation.

[146] See OEF/OIF LL VOL II.

[147] *Id.*

VII.H. PRETRIAL CONFINEMENT

When service members commit serious crimes, commanders may desire to place the offender into pretrial confinement.[148] In a deployed environment, confinement facilities are not easily accessible.[149] Accessibility may be limited for a variety of reasons, including the type of geography or terrain that must be traversed, distance to the confinement facility, necessary manpower and/or guard escort requirements, time constraints, administrative processing requirements, and the vehicles and/or aircraft needed to transport the accused to the confinement facility.[150] Although all commanders want to be able to confine a Soldier when necessary, they often do not take these accessibility considerations into account. Prior to deployment, it is important that JAs explain to commanders the obligations and logistical limitations placed upon units when they put a service member in confinement.[151] Furthermore, paralegals must understand confinement procedures and have the ability to coordinate with confinement facilities both within and outside the theater of operations.[152] It is invaluable to have a knowledgeable paralegal that is responsible for coordinating all the details to properly confine an accused, from in-processing to release.[153]

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[148] *See* MCM, R.C.M. 304 (defining pretrial restraint as the moral or physical restraint on a person's liberty which is imposed before and during disposition of offenses. Pretrial restraint may consist of conditions on liberty, restriction in lieu of arrest, arrest, or confinement.).

[149] *See* 1AD AAR.

[150] OEF/OIF VOL II at 201.

[151] *Id.*

[152] *Id.*

[153] *Id.*

VII.I. ALTERNATIVES TO COURT-MARTIAL

VII.I.1. Nonjudicial Punishment

Nonjudicial punishment provides commanders with an essential and prompt means of maintaining good order and discipline and also promotes positive behavior changes in service members without the stigma of a court-martial conviction.[154]

Different military justice concerns should be addressed at each stage of the operation. Nevertheless, court-martial and NJP procedures remain largely unchanged in a deployed setting. Therefore, judge advocates should be aware of the "field due process" myth throughout the full spectrum of operations.[155]

Judge advocates should employ a broad range of legal alternatives to courts-martial in order to allow commanders to maintain good order and discipline during deployments. During combat operations, service members spend their time attending to pressing needs such as maintaining their weapons or equipment and focusing on their mission. Once military support to stabilization, security, transition and reconstruction (SSTR) operations[156] began, however, Soldiers were able to establish a daily 'routine,' which often included more free time than before. When combined with restricted movement, few organized activities, and other limited constructive alternatives, this free time occasionally resulted in soldiers' engaging in misconduct.[157]

Judge advocates must strive to conduct military justice as if they were still in garrison and avoid appearances that "field due process" is in effect. This extends to processing times and proper level of disposition for each case, as well as ensuring that the punishment fits the crime. The phrase "field due process" suggests that there are instances when a Soldier is given lighter punishment for misconduct than he/she would normally have received in a non-deployed setting. Although many JAs found that they were able to consistently process military justice actions through adjudication in a fair and proper manner, many also stated that they knew of examples where "field due process" was used.[158]

Of course, commanders ultimately determine the nature and extent of punishment that service members will receive for committing certain offenses. However, JAs must continue to advise commanders regarding the importance of avoiding appearances of

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[154] *See* MCM, pt. V-1, para. 1.c.

[155] 2006 OPLAW HANDBOOK.

[156] DEPARTMENT OF DEFENSE DIRECTIVE 3000.05, Military Support to Stabilization, Security, Transition and Reconstruction Operations, 28 November 2005.

[157] OEF/OIF LL VOL II at 203.

[158] *See* Volume I, Afghanistan and Iraq, Legal Lessons Learned, at 233

inconsistent treatment while in a deployed environment versus case resolution in garrison. The best way for JAs to accomplish this goal is to provide commanders with the ability to designate the appropriate level of disposition (including court-martial, nonjudicial punishment, etc.) and by processing each action fairly and efficiently beginning at the commencement of hostilities.[159]

VII.I.2. Administrative Separations

There are numerous provisions for administratively separating service members from the Army, although those displaying a pattern of misconduct or those who have committed serious misconduct not rising to the level of court-martial are the most common.[160] Judge Advocates were confronted with significant obstacles when processing service members for administrative separations.

Army Regulation 635-200, Active Duty Enlisted Administrative Separations (AR 635-200), for example, requires Soldiers to undergo a medical evaluation when he/she is being administratively separated under chapters 5 (paragraphs 5–3, 5–11, 5–12, and 5–17[161] only), 8, 9, 11 (paragraph 11–3b only), 12, 13, 14 (section III only), 15, and 18.[162] Also, mental evaluations are required for Soldiers being processed for separation under chapters 13, 14 (sec III), 15, or when a Soldier being processed for discharge under chapter 10 requests a medical examination.[163]

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[159] *Id.* Although there will undoubtedly be some administrative and logistical considerations when processing military justice actions during hostilities, even difficult cases can be treated consistently with prior planning—i.e., it may not be realistic to try Courts-martial while deployed initially, but if service members who have committed serious misconduct are quickly transported to the rear detachment for trial, the message to service members is that offenses committed while deployed are dealt with in the same manner as home station. For less serious misconduct that is handled through non-judicial means, JAs can encourage commanders to maximize good order and discipline within his/her unit by using different ways to impose punishment. For example, an alternative to immediately executing imposed punishment is to suspend all or a portion of the punishment. The commander can inform the offending service member that the punishment will remain suspended for a certain amount of time where without further misconduct the punishment will be "rescinded." In this particular example, the service member's "reason" to behave properly would be to avoid having his/her pay docked, rank reduced, etc. *See* AR 27-10, paras 3-21- 3-28 (discussing execution, clemency, suspension, vacation, mitigation, remission, setting aside and restoration of punishment).

[160] *See generally* U.S. DEP'T OF ARMY, REG. 635-200, ACTIVE DUTY ENLISTED ADMINISTRATIVE SEPARATIONS, para. 14-12b, 14-12c. (14 JUL. 2004) [hereinafter AR 635-200]. *See* AR 635-200, para. 1-32. *See also* U.S. DEP'T ARMY, REG. 40-501, STANDARDS OF MEDICAL FITNESS para. 8–23 and table 8–2 (1 Feb. 2005) [hereinafter AR 40-501].

[161] A command-directed mental health evaluation performed in connection with separation under paragraph 5–17 will be performed by a psychiatrist, doctoral-level clinical psychologist, or doctoral-level clinical social worker with necessary and appropriate professional credentials who is privileged to conduct mental health evaluations for the DoD components.

[162] *See* AR 635-200, para. 1-32. *See also* U.S. DEP'T ARMY, REG. 40-501, STANDARDS OF MEDICAL FITNESS para. 8–23 and table 8–2 (1 Feb. 2005) [hereinafter AR 40-501].

[163] AR 635-200, para. 1-32(e)(f). Soldiers being considered for separation under paragraph 5-13 must have the diagnosis of personality disorder established be a psychiatrist or doctoral-level clinical psychologist

Legal teams have had considerable difficulties attempting to meet the regulatory requirements relating to medical and/or mental evaluations before administratively separating a service member during a deployment. To start, there are not a great number of physicians deployed into theater. Next, of those physicians that are in theater, their priority was not to examine service members being separated from the military, but rather to concentrate on combat casualties. Finally, as difficult as it was to locate a medical doctor, it was nearly impossible to locate mental health specialists, such as psychologists or psychiatrists, to perform a mental health evaluations, as required for certain chapters when separating a service member from the military.[164]

Judge advocates found several solutions to these difficult situations. One solution was to personally approach medical personnel and establish an informal system whereby service members being administratively separated were given priority for evaluations.[165] Other deployed JAs took advantage of the language contained in AR 635-200, which states that "separation will not be delayed for completion of the physical," by effectively completing all of the administrative requirements for separation except the medical and/or mental evaluation.[166] The service member was then subsequently sent back to home station where the medical and/or mental evaluation was completed and the separation process was completed expeditiously.

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with necessary and appropriate professional credentials who is privileged to conduct mental health evaluations for the DoD components.

[164] *See* OFFICE OF THE STAFF JUDGE ADVOCATE, 1ST INFANTRY DIVISION, AFTER ACTION REVIEW INTERIM REPORT, (2004) [hereinafter 1ID AAR]. For mental health examination requirements, *see generally* AR 635-200.

[165] *See* After Action Review Conference, Office of the Staff Judge Advocate, V Corps, and the Center for Law and Military Operations, The Judge Advocate General's Legal Center and School, U.S. Army, in Heidelberg, Germany (27 Apr. 2004) [hereinafter V Corps AAR Transcript]

[166] See OEF/OIF LL VOL II at 206.

VII.J. CIVILIANS ACCOMPANYING THE FORCE

There are several ways that jurisdiction may be exercised over civilians and contractors. Determining whether criminal jurisdiction exists over contractors may depend upon the "type" of contractor involved in misconduct, as well as any applicable written provisions within the contract itself.[167] Furthermore, civilians may be subject to the Military Extraterritorial Jurisdiction Act (MEJA), which establishes Federal jurisdiction over offenses committed outside the United States by persons employed by or accompanying the Armed Forces, or by members of the Armed Forces who are released or separated from active duty prior to being identified and prosecuted for the commission of such offenses, and for other purposes.[168]

Persons "serving with or accompanying the force" may also be subject to trial by court-martial for an offense under the UCMJ.[169] However, the charged offense(s) against a person accompanying the force must have occurred under a war formally declared by Congress.[170] Therefore, it is likely that MEJA will control in many cases by attaching Federal jurisdiction (rather than UCMJ jurisdiction) for criminal offenses committed by persons accompanying U.S. forces. For offenses that do not rise to the level of criminal conduct for prosecution under MEJA, commanders have several options, including barring the offender from military installations in the area of operations, sending the offender back to the continental United States (CONUS), requesting that a reprimand be given, or that the offender's position be terminated by the contracting agency. Furthermore, "battlefield" contractors need to understand that they must be familiar and comply with applicable Department of Defense regulations, directives, instructions, general orders, policies, and procedures, U.S. and host nation laws, international laws and regulations, and all applicable treaties and international agreements (e.g., Status of Forces

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[167] *See* U.S. DEP'T OF ARMY, FIELD MANUAL 3-100.21, CONTRACTORS ON THE BATTLEFIELD (6 Nov.2002) [hereinafter FM 3-100.21]; U.S. DEP'T OF ARMY, REG. 715-9, CONTRACTORS ACCOMPANYING THE FORCE (29 Oct. 1999); Policy Letter, Coalition Forces Land Component Command, subject: Uniform

Policy Letter (26 Nov. 2002); Policy Memorandum, Headquarters, U.S. Dep't of the Army, subject: Contractors on the Battlefield (12 Dec. 1997); U.S. DEP'T OF ARMY, FIELD MANUAL 100-10-2, CONTRACTING SUPPORT ON THE BATTLEFIELD (4 Aug. 1999) [hereinafter FM 3-100.21]. *See also* Policy Memorandum, Coalition Forces Land Component Command, subject: Managing Contractors on the Battlefield (17 Mar. 2003) (distinguishing between contingency contractors and sustainment contractors).

[168] See 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) (implementing 18 U.S.C. 3261-67, Military Extraterritorial Jurisdiction Act (MEJA), as required by 18 USC § 3266, as approved by Deputy Secretary of Defense Paul Wolfowitz on March 3, 2005). Department of Defense instruction 5525.11 calls upon each of the Uniformed Services to implement MEJA into their respective service regulations. Note that MEJA is anticipated to apply during times of declared war as well as peacetime.

[169] *See* UCMJ art. 2(a)(10) (2002).

[170] OEF/OIF LL VOL I at 209.

Agreements, Host Nation Support Agreements, Geneva Conventions, and Defense Technical Agreements) relating to safety, health, force protection, and operations under their contract.[171]

[171] *See* Solicitations Provisions and Contract Clauses, 48 CFR § 5152.225-74-9000(a)(3) (2004).

VII.K. TRIAL DEFENSE SERVICE

> *In 1970, with all the [1st Cavalry Division] lawyers located at the division main headquarters, such activities as interviewing witnesses for trial, advising convening authorities located outside of Phuoc Vinh and, in some instances, actively conducting trials at firebases, required traveling by air. Additionally, troops normally did not come into headquarters for personal legal assistance or to file claims; judge advocates brought legal services to them . . . [T]hanks to the division chief of staff, Col. Edward C. Meyer, a helicopter was dedicated one-half day a week for use by the Army lawyers. It was known as the "lawbird" on the days it flew.*[172]

At some time during every deployment, commanders become aware of the importance of having one or more Trial Defense Service (TDS) JAs available to counsel service members regarding their legal rights and responsibilities. Unfortunately, commanders often don't recognize the benefits of this valuable resource while in garrison and remain unaware of TDS' importance until needed during deployments. Recent deployments have confirmed that TDS attorneys are a hot commodity, as evidenced by the large number of clients seen during OEF and OIF, coupled with very full work schedules.[173]

To make matters more difficult, many large units (sometimes in excess of 3000-4000 Soldiers) often deploy without TDS legal support, increasing the burden on defense counsel in theater.[174] Accordingly, TDS JAs' availability were often limited, at best. Furthermore, having a limited number of TDS counsel in theater often required these JAs to travel extensively throughout the area of operations to meet with clients.[175]

Several solutions to help avoid having TDS attorneys constantly on the road would be to utilize video teleconferencing (VTC) units and engage in telephonic communications whenever possible. As noted above, TDS JAs are often a limited asset in light of both the number of service members needing counsel and the amount of misconduct requiring TDS consultation while in theater. Moreover, while the force was generally very disciplined, the number of soldiers needing assistance with low level issues combined with a few high profile cases put a significant strain on deployed TDS counsel.[176]

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[172] COLONEL FREDERIC L. BORCH III, JUDGE ADVOCATES IN COMBAT: ARMY LAWYERS IN MILITARY

OPERATIONS FROM VIETNAM TO HAITI , at 46 (2001).

[173] OEF/OIF LL VOL II at 209.

[174] *Id. See also* 4 ID AAR, at 5 (comments by MAJ Nathan Ratcliff, Regional Defense Counsel, Region IX, regarding the limitations placed on TDS attorneys in the Iraqi Theater of Operations).

[175] *Id.*

[176] *Id.*

Although communications during the early stages of an operation may be sporadic, communications generally become more stable as SSTR progressed, giving TDS attorneys greater ability to conduct VTCs and telephone consultations with clients rather than forcing service members to travel on dangerous routes.[177] In particular, the ability to consult clients via telephone is particularly valuable, especially since they are more readily available than VTC sites.

Another way to avoid putting legal personnel onto hazardous roads and/or airspace is to consider consolidating TDS offices at major bases and/or life support areas, establishing TDS "cells." This would provide a geographical "area" for legal support that would allow defense counsel to provide legal services to a large number of deployed service members while establishing consistent office hours.[178]

[177] *Id.*

[178] *See* 4 ID AAR, at 5

VII.L. REDEPLOYMENT

It is important that units "return to normal" as quickly as possible upon redeployment. As stated in FM 27-100, upon returning to home station, units should strive to conduct their business in the same manner that they did prior to deployment.[179] However, changing jurisdictional alignments, rescinding General Orders, and making other required adjustments can often be a difficult process. Deployed legal teams must also keep in mind that upon redeployment there might be a significant number of individual cases which must be transferred back to the appropriate, realigned jurisdiction prior to adjudication. One of the most valuable lessons for JAs to take away from the wide variety of military justice issues which arise during deployments is the importance of addressing as many of the aforementioned concerns as possible prior to deployment.

[179] *See* FM 27-100 (1 Mar. 2000); *See also* OEF/OIF Volume I, at 214.

VIII. COALITION OPERATIONS[1]

Almost every time military forces have deployed from the United States it has been as a member of – most often to lead – coalition operations.[2]

Introduction

A war fighting coalition was created soon after the attacks of 11 September 2001. The United States began laying the legal and political framework for building a coalition to conduct Operation Enduring Freedom (OEF) in Afghanistan. Although operational control remained with the United States, OEF was always to be a coalition military operation. Eventually twenty-seven nations deployed more than 14,000 troops in one role or another in support of OEF. As with all coalitions, this one has continued to evolve as the mission has changed and from the summer of 2006 has taken the form of an Alliance operation with the headquarters of NATO's Allied Rapid Reaction Force (HQ ARRC) assuming command of the ongoing and evolving mission.

On 7 October 2001, the U.S. Permanent Representative to the UN informed the UN Security council that, in accordance with Article 51 of the Charter of the United Nations, the United States of America together with other states had commenced operations in Afghanistan that day and stated that the legal basis for this was exercising the inherent right of individual and collective self defense.

Both Operation OEF and Operation Iraqi Freedom (OIF) were multinational operations, [3]consisting of multiple willing States, [4]and led by the United States. Multinational operations pose unique challenges, as the respective capabilities, political will and national interests of each partner will impact on its role in the coalition. The challenge for commanders is to synchronize the contributions of coalition partners so as to project focused capabilities that present no seams or vulnerabilities to an enemy for

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[1] A better title arguably would be "Coalition, Multinational and Alliance Operations". This compendium was compiled by Lt Col Richard Batty MBE. BA. (Hons), British Army. Adjutant Generals Corps (Army Legal Services) (AGC-ALS). Currently Director Coalition Legal Operations, Center for Law and Military Operations, The Judge Advocate General's Legal Center and School with previous work by Squadron Leader Catherine Wallis BA. LLB (Hons), Grad.Dip.Mil.Law, M.Int.Sec.Stud. Legal Officer, Royal Australian Air Force. Formerly Director, Coalition Legal Operations, Center for Law and Military Operations, The Judge Advocate General's Legal Center and School.

[2] General Robert W RisCassi, *Principles for Coalition Warfare,* JOINT FORCE QUARTERLY, Summer 1993.

[3]OEF and OIF are examples of multinational operations and coalition action. Multinational operation is a collective term to describe military actions conducted by forces of two or more nations, usually undertaken within the structure of a coalition or alliance: JOINT CHIEFS OF STAFF, JOINT PUB. 1-02, DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS 307 (12 Apr. 2001) (as amended through 17 Dec. 2003) [hereinafter DoD Dictionary]. Coalition Action is multinational action outside the bounds of established alliances, usually for single occasions or longer cooperation in a narrow sector of common interest:

[4]For force compositions *see,*OEF/OIF Vol. 1, Road to War, pg 10, note 29 & pg 21, note 102.

exploitation.[5] The JA is involved in this synchronization process through identifying the legal "friction points" between coalition partners and proposing solutions to eliminate or reduce their impact on the operation. Both the United States and other coalition governments place high importance on this process.[6]

By early in OIF, the coalition consisted of forty-eight countries—Afghanistan, Albania, Angola, Australia, Azerbaijan, Bulgaria, Colombia, Costa Rica, Czech Republic, Denmark, Dominican Republic, El Salvador, Eritrea, Estonia, Ethiopia, Georgia, Honduras, Hungary, Iceland, Italy, Japan, Kuwait, Latvia, Lithuania, Macedonia, Marshall Islands, Micronesia, Mongolia, Netherlands, Nicaragua, Palau, Panama, Philippines, Poland, Portugal, Romania, Rwanda, Singapore, Slovakia, Solomon Islands, South Korea, Spain, Turkey, Uganda, Ukraine, United Kingdom, United States, and Uzbekistan. Contributions from Coalition member nations ranged from direct military participation, logistical and intelligence support, specialized chemical/biological response teams, over-flight rights, humanitarian and reconstruction aid, to political support. JAs need to keep up to date with who joins and leaves the coalition. The size and capabilities of the Coalition forces involved in operations in Iraq have been the subject of much debate, confusion and misleading information from all sorts of interested parties with different agendas. To help maintain their own credibility and to be accurate in their dealings with others who may have hidden agendas, JAs must take care to ensure that they are capable of identifying which countries are taking part in a much more limited role such as training the Iraq security forces or providing engineers for civil projects.

On 8 June 2004, UN Security Council Resolution (UNSCR) 1546 was passed, endorsing the formation of the Interim Iraqi Government. On 28 June 2004, the Coalition Provisional Authority ended the country's military occupation and transferred authority to the Iraqi Interim Government, thereby ending the second chapter of OIF and changing the nature of the coalition. UNSCR 1546 extended the mandate of the Coalition's military force in Iraq under the title of Multi-National Force-Iraq (MNF-I) and its subordinate command, Multinational Corps-Iraq (MNC-I).

Resolving coalition issues can be challenging and frustrating as complex legal and policy issues may be exacerbated by language difficulties, lack of interoperability in

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[5] *See* JOINT CHIEFS OF STAFF, JOINT PUB. 3-16, JOINT DOCTRINE FOR MULTINATIONAL OPERATIONS I-4 (5 Apr. 2000) [hereinafter JOINT PUB. 3-16].

[6] *See* JOINT PUB. 3-16 at I-12 (Nations cannot operate effectively together unless their forces are interoperable); Ministry of Defence (UK) OPERATIONS IN IRAQ: LESSONS FOR THE FUTURE (11 Dec. 2003) *t* http://www.mod.uk/publications/iraq_futurelessons/index.html UK forces must be organized, trained and resourced for interoperability with partners.); Minister for Defence (Australia):

> The memberships of allied groups and coalitions will vary, depending on the nature of the threat and the nature of the necessary response. These coalition parties will be operating under varied domestic and international legal obligations. This dilemma highlights the critical importance of ongoing constructive engagement by Australians, including our military lawyers, with the forces of our allies and coalition partners.

Minister for Defence (Australia) Senator Robert Hill, speech to the Defence Legal Service Conference (28 Jan. 2004) at http://www.minister.defence.gov.au/HillSpeechtpl.cfm?CurrentId=3478.

communications, and differences in training.[7] Further, it cannot be expected that coalition partners will have the same level of legal support as deployed U.S. forces.[8] Most coalition partners do not have paralegal support and their attorneys may be higher (or lower) ranking than one might expect, or may even be deployed civilian attorneys.

It is important for members of the coalition to address and learn from the identified legal issues. The British Prime Minister's Strategy Unit published a Report stating, "[f]or the foreseeable future, United Kingdom foreign policy is likely to underpin its conflict prevention activities with the regeneration or sustainment of fragile states."[9]

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[7] The challenges of operating in a coalition are expressed in Joint doctrine.

> Often the Multinational Force Commander (MNFC) will be required to accomplish the mission through coordination, communication, and consensus, in addition to traditional command concepts. Political sensitivities must be acknowledged and often the MNFC (and subordinates) must depend on their diplomatic as well as warrior skills.

JOINT PUB. 3-16, *supra* note 5 at I-1. One of the key difficulties in communications is lack of coalition access to the SIPRNET. *See, e.g.*, E-mail from MAJ Philip Wold USAF, former Chief, Operations Law, 9 AF/ USCENTAF to SQNLDR Catherine Wallis, Royal Australian Air Force, Director, Coalition Legal Operations, Center for Law and Military Operations (7 Apr. 2004) [hereinafter Wold E-mail]:

> A large amount of operational information--obviously classified--is transmitted via SIPRNET on U.S. systems. However, access to the SIPRNET is strictly controlled. If you anticipate that the SIPRNET / US classified computer systems are going to form the core for how information is transmitted, an effort must be made to have sufficiently authorized coalition members have access to the systems if they want to have access to the same kind of information / situational awareness as their counterparts.

Id. This was also an important issue for Combined Joint Special Operations Task Force – West (OIF):

> The most critical issue was access to or use of SIPRNET or other classified means or modes of operational tracking, planning, and execution. This was never satisfactorily resolved in terms of clear authority. JCS and CENTCOM issued clear authority down only so far as the component commands (e.g., CJSOCC, CFLCC, CFACC), and subordinate combined commands such as ours had extreme difficulty in obtaining clear guidance on permissible applications. Our situation was enhanced by SOCOM authorities, but the problems were systemic. We established firewalls, protocols, reporting and investigation requirements where problems arose, and successfully prosecuted the mission without loss of life or injury due to lack on communication. Clearer rule and authority on the sharing of classified information and access to classified systems are needed for task forces such as our combined joint special operations task force established over three US SF battalions, one UK SAS, and one AUS SAS.

E-mail from MAJ Dean Whitford, Staff Judge Advocate, Joint Special Operations Task Force Dagger (OEF) and Staff Judge Advocate, Combined Joint Special Operations Task Force – West (OIF) to SQNLDR Catherine Wallis, Royal Australian Air Force, Director, Coalition Legal Operations, Center for Law and Military Operations (14 May. 2004) [hereinafter Whitford E-mail]

[8] *See* THE JUDGE ADVOCATE GENERAL'S DEPARTMENT, UNITED STATES AIR FORCE, AIR FORCE OPERATIONS AND THE LAW: A GUIDE FOR AIR AND SPACE FORCES, 1st Ed, (2002) 339-340 [hereinafter USAF OPLAW] (also discussing the different roles and rank structures of other legal services).

[9] PRIME MINISTER'S STRATEGY UNIT, CABINET OFFICE, INVESTING IN PREVENTION, AN INTERNATIONAL STRATEGY TO MANAGE RISKS OF INSTABILITY AND IMPROVE CRISIS RESPONSE (2005) (U.K.). *See also,* U.K. JOINT WARFARE PUBLICATION 3-50 (2d Ed.), THE MILITARY CONTRIBUTION TO PEACE OPERATIONS *at* 1-1. (2003) (hereinafter JWP 3-50]

Clearly, the U.K. understands that this concept will be a key feature in each country's foreign policy in the foreseeable future.[10] The goal of the U.S. for future of operations appears to be much the same, "to make stabilization and reconstruction missions one of [its] core competencies."[11] Accordingly, lessons learned in the area of coalition operations in conflict prevention is clearly an area that shall continue to be studied.

The British House of Commons Defence Committee's sixth report of the 2004 -05 session acknowledges that the transition from war-fighting to peace enforcement in OEF proved to be one of the major challenges:

> It is difficult to avoid concluding that the Coalition, including British Forces, were insufficiently prepared for the challenges represented by the insurgency....We are concerned that there is some evidence that the extensive planning, which we all knew took place in both the U.S. and the UK, did not fully respect the extent of that range.[12]

That being the case, it would seem impossible for all the coalition legal advisors to have prepared fully for the challenges they might face as "operations since May 2003 saw the coalition confronted by a range of post-conflict challenges many of which it seemed not to have foreseen."[13] The amount of training, both military and legal, was also deemed by some coalition members to be insufficient.[14]

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[10]*See* JWP 3-50, note 5.

[11]*See* DEFENSE SCIENCE BOARD, OFFICE OF THE UNDER SECRETARY OF DEFENSE FOR ACQUISITION, TECHNOLOGY, AND LOGISTICS (Dec., 2004) at 14.

[12]*See* HOUSE OF COMMONS, SIXTH REPORT FROM THE DEFENCE COMMITTEE, IRAQ: AN INITIAL ASSESSMENT OF POST CONFLICT OPERATIONS, H.C. 65-I, 2004-05 SESS. (2005)[hereinafter House of Commons Sixth Report].

[13]*Id.*

[14]Report submitted by Captain Ardan Flowaij, Legal Advisor, Netherlands Battlegroup (NLBG), Camp Smitty, Iraq to CLAMO (Feb., 2005)(stating that further pre-deployment training in the NLBG was required in communications and combat drills as well as specific legal problems in the NLBG AOR. As this training did not occur in the Netherlands, it had to occur while deployed which was not the optimal solution).

VIII.A. COALITION PARTNERS OPINIONS, POLICY AND INTERPRETATIONS OF INTERNATIONAL LAW

JAs must understand how other coalition partners view the legal basis of the use of force and their interpretations of international law. Also, JAs should be aware of coalition political concerns and public sensitivities.

It is as essential for JAs to be as culturally, legally and politically aware of all their coalition partners[15] as it is of the enemy, otherwise there is the risk losing the support of coalition members. This can only be achieved by interaction and sharing of information and opinions between coalition JAs. Understanding the differing views, both for and against, of the use of force and the related policy considerations will help JAs provide informed and better advice to commanders and will strengthen the coalition. This objective is one that can be started well before operations and must be continued throughout the whole period of operations. Regular meetings and/or telephone contact with coalition JAs will assist as well as keeping an eye on the international media, opinions of the international legal community, other Governments and other bodies such as the UN.

Most coalition JAs will face many similar legal issues and may not have anything like the legal resources made available to the U.S Army from the U.S. Army JAG Corps. However, a coalition partner may have past, relevant, operational experience in a whole host of matters ranging from dealing with terrorists, detainee operations, war crimes investigations, joint and multinational administrative or criminal investigations, capitulation agreements, parole or cease fire agreements, to issues concerning uniforms. In any event there seems little point in all coalition JAs working on the same legal issues and keeping their conclusions to themselves.

For some coalition partners the issue of the legality of the use of force is not as clear as it is in other countries. Since coalitions are "of the willing" it is important to understand the stance of other governments and the concerns of their voters and be sensitive to these issues. The U.S. Government has asserted that the legal basis for the use of force in Operation OIF, which commenced on 19 March 2003, was that coalition actions were a continuation of the actions authorized by the UN for the first Gulf war and the exercise of the inherent right of self defense against terror and regimes that harbor and support terrorists that could supply them with nuclear, chemical, or biological weapons. The British Government arguably had a more difficult public and politicians to convince that there was a legal basis for the use of force. Rightly or wrongly, in the United Kingdom that debate has never really gone away and has dogged the British

[15] Army JAs must take care to involve AAR comments not just from their own and coalition partners JAs but should bear in mind that Navy, Air Force, Marine and Coast Guard JAs are often attached to stretched legal offices. i.e. In the HQ of the 1st Kosovo Force in 1999, two U.S. Marine Corps JAs were attached to do vital work.

Prime Minister, Tony Blair. France, Germany and Russia were clearly not convinced that there was a clear legal basis for war. The British Government in the light of all of this had been keen to obtain a further resolution from the Security Council, but clearly, a further resolution was not going to be achievable.

Tony Blair obtained thirteen pages of private legal advice, concerning the legality of military action, on 7 March 2003 from Lord Goldsmith, the Attorney General. At the time the British Government refused to release this legal advice, which apparently was not even shown to the Prime Minister's fellow cabinet members. Ten days after providing the private and classified "secret" legal advice, Lord Goldsmith gave further legal advice in a parliamentary answer. In this, no mention was made of the earlier caveats that he had made. The British Government eventually released a copy of the private legal advice to the Prime Minster, after it had become available over the internet. The British Government did not attempt to justify its membership of the coalition because Iraq breached its obligations under Resolution 678, thereby making null and void the ceasefire. Instead the arguments made to the public were that Iraq was likely to have weapons of mass destruction and these were an imminent threat. In the light continuing violence in Iraq and a lack of significant evidence to support the Government's major contentions, many commentators feel that the Prime Minster and the British Government have been on the back foot on matters concerning Iraq, not just from the media but within their own political party.

Interpreting international law is not an exact science and members of the coalition in OEF and OIF used fundamentally different approaches. Judge advocates tend to use their own regulations (which should comply with international law) to reach a legal conclusion. British legal officers tend to look at the source of the law itself. Non U.S. coalition officers will not, and cannot, be expected to be familiar with all the U.S. Army Regulations and Field Manuals. However, because U.S. policy and interpretations are incorporated in the U.S. Army regulations, coalition officers may wish to separate U.S. policy from strict international law.

These different approaches did not necessarily lead to problems between coalition members,[16] but at times there appears to have been a disconnection between the view of one coalition partner and another.[17] Fundamental cultural, legal or political differences in

[16]*See* E-mail from Lieutenant Colonel Graham Coombes, Office of the General Counsel, Coalition Provisional Authority to CLAMO (18 Apr. 2005) [hereinafter Coombes E-mail] , at note 8 (noting that the U.S. and UK forces had different geographical AOR which allowed them to follow their own legal and policy considerations, and avoid any blatant conflict of views to surface and damage the coalition).

[17]*See, e.g., id.* (noting that the U.S. and the UK could have substantively disconnected views on the law of detention. Lt Col Coombes noted that some coalition members believed that U.S. lawyers would effectively structure their legal opinions to conform to U.S. Government policy. According to Lt Col Coombes, it is possible that U.S. lawyers regarded the policy as the correct legal position and, therefore, substantiated their legal opinion with international law when possible. Regardless of the impetus, the U.S. policy would be put into effect in any event.)

the interpretation of international law existed, for example, as to the role of the CPA.[18] Further, the language coalition partners used in documents could vary enormously and lead to challenges.[19] Given the above, effort should be undertaken by all coalition members to address these challenges during routine interoperability training and exercises so as to mitigate these challenges while conducting contingency operations.

[18]*But cf., id.* (stating that often the Australian and British views were very similar and that these two countries generally found it very easy to work together. Both countries were of the opinion that international law permitted the CPA to make the minimum changes to the Iraqi law necessary for the occupation, and that it was not the role of the CPA to overhaul the Iraqi system with a U.S. model as a template--i.e. with detailed regulations on the banking system and intellectual property. Although the British and Australians did not share the U.S. view on the role of the CPA, both countries reviewed U.S. proposals and made constructive comments on any proposals).

[19]*See, e.g., id.* (referring to the interplay between the British Military and the UK Foreign and Commonwealth office (FCO), and the U.S. military and U.S. civilians. Lt Col Coombes notices that each had a very different style of drafting documents dealing with draft UN resolutions in the run up to the handover of power from the CPA to the Iraqis).

VIII.B. BE AWARE OF THE DOMESTIC LAW, POLITICS, CIVILIAN AND MILITARY CULTURE AND HISTORY OF COALITION MEMBERS AS WELL AS THE HOST NATION

In addition to understanding one's own domestic law, policy and interpretation of international law, coalition partners must also understand the host nation's laws, policies, and interpretation of international law. It can often be difficult for coalition partners to accurately assess the host nation's laws.[20]This proved to be the case in OEF, OIF and in the various missions in Kosovo in 1999.[21]Interpreters have proved to be a rich source of information on local customs and practices.[22] Furthermore, it is also necessary for coalition partners to be aware of coalition partners' legal systems and fundamental laws that may impact operations. British and Australian legal officers have the benefit of similar procedures and approaches to legal issues but these differ from those of the U.S. and other European coalition members. One way to fill this apparent gap in understanding is to provide lawyers in the coalition with advanced training on the similarities and differences in approaches and practices, thereby identifying and addressing potential frictions early.

Both U.S. and other coalition officers need a basic awareness of each others' history, constitution, force levels and structure, [23]as well as cultural differences and need to anticipate how these factors will impact decisions, interpretations and conduct.[24] It

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[20]*See* E-mail from Professor Charles H B Garraway, Stockton Professor of International Law, U.S. Naval War College, to Lt Col Batty, Director Coalition Legal Operations, Center for Law and Military Operations, The Judge Advocate General's Legal Center and School (7 Mar. 2005) (recognizing that effective transitional justice on OIF required one to access local legislation, local expertise, and involve local Iraqis from the start. Professor Garraway acknowledges that it is difficult to obtain translations of relevant Iraqi legislation, e.g. the Criminal Procedure Code, and there were some translation problems with the documents that were collected).

[21] There were problems verifying property ownership in Albania and there was some debate in Kosovo as to which criminal code should apply in Kosovo, the FRY criminal code or the Kosovo criminal code. HQ KFOR partially resolved the issue for issues in the Former Yugoslav Republic of Macedonia by employing several local lawyers. Whilst this may be achievable in the rear, security issues may make it difficult elsewhere.

[22] *See* CENTER FOR LAW AND MILITARY OPERATIONS, LAW AND MILITARY OPERATIONS IN KOSOVO, 1999 – 2001: LESSONS LEARNED FOR JUDGE ADVOCATES, 168, n. 5 (15 Dec. 2001) [hereinafter Kosovo LL].

[23]*See, e.g.,* E-mail from Major John Bridley to CLAMO (11 Mar. 2005) (recognizing that, perhaps understandably, U.S. judge advocates would not realize that the Australian politicians had considerable ability to reach their deployed personnel because the force levels were so small).

[24]*See, e.g.,* Major Nick Simpson, Legal Advisor HQ 1 Mechanized Brigade, After Action Report. (3 Nov. 2004) [hereinafter Simpson AAR](noting that HQ 1 Mechanized Brigade introduced the provisions of the Regulation of Investigatory Powers Act 2000 (RIPA), which provides the rules for the interception of logs, phone calls and e-mails of suspected criminals by the security and intelligence services. These provisions only directly impacted the British, but required some training on the appropriate procedures, extra staff work, and co-ordination).

may not be necessary for members of the coalition to have detailed knowledge of other coalition partners' applicable domestic law and policy, but even a limited comprehension can aid understanding, for example of any delays in implementing requested actions. One method for providing coalition members with context for their coalition partners' laws and policy might be through additional training for coalition legal officers in pre-deployment training. The British, Australian and German exchange officers at CLAMO may be able to assist the U.S. with this effort. In addition, U.S. legal exchange officers based at the OP law Branch in Warminster, UK and Sydney, Australia could assist UK Army Legal Services (ALS) Officers and Australian Army Legal Corps (AALC) Officers prior to deployment.

For U.S. personnel, Executive Orders, Presidential finding and official statements by the President effectively constitute orders, in contrast to decisions by British Ministers which do not carry quite the same weight. The reason for this is the U.S. President is Commander in Chief of U.S. forces as well as being head of the executive branch of government. He has almost exclusive authority in dealing with U.S. international affairs. Therefore, his decisions on policy carry great weight for U.S. officers. In the UK, however, the Queen is the titular head of the armed forces. The Prime Minister and government have the de facto authority but they are clearly seen as politicians rather than being at the top of the chain of command. Similarly, a more developed understanding of the different cultural backgrounds coalition members bring to such operations is crucial. A telling example is realized in comparing the U.S. concept of the duty day not ending until all missions are complete with those of other nations. Such cultural differences must be identified and understood to make coalition operations more effective.[25]

Another important example of the need to understand aspects of coalition partners' laws is the applicability of the European Convention of Human Rights (ECHR) to those coalition partners bound by it.[26] Coalition partners may not have faced the same dilemma, but British forces were required to gather evidence when a fatal shooting occurred to be prepared to defend the British Government in the event litigation was initiated against it in civil courts. Without some form of investigation and evidence collection, it is very difficult to refute potential claims, and it remained uncertain as to the precise legal environment governing British operations in the post conflict operation. There was also the fact that while persons detained by British forces would be transferred to the Iraqi authorities at the earliest opportunity rather than held in internment, good quality tangible evidence of criminal activity obtained during detention operations was necessary for a successful prosecution. [27] All coalition forces seemed to need training on

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[25]*See, e.g.,* Coombes E-mail, at note 8 (noting that many U.S. officer colleagues of Lt Col Coombes at the CPA worked close to 18-hour days with almost a missionary zeal, a practice which Lt Col Coombes did not adopt. The U.S. culture appeared to be, if the boss was in the office so were all of his staff. In Lt Col Coombes' opinion, this practice could be counter productive because some staff were simply too tired to be effective and fresh).

[26]*See* Al-Skeini and Others v. Secretary of State [2005] H.R.L.R. 3 (Q.B. 2004) (holding that the UK was obliged to comply with the ECHR and the Human Rights Act because the legislation applied to UK military bases as territory under the control of the UK).

[27]*See* Simpson AAR, at note 18.

basic evidence gathering techniques and evidence preservation in order to preserve prosecution options later. This lesson also extended to any coalition partner having a role in an operation where individuals might be released to Iraqi authorities for prosecution.

VIII.C. INTERACTION BETWEEN COALITION JAs

Previous, continuous, and regular interaction between coalition JAs during the mission assists and improves the likelihood of mission success and understanding between coalition partners and the host nation. The U.S. army JAG Corps has huge legal resources when compared to other countries. A U.S. JA needs to be located in all the key decision making centers. Consideration should be given to attachments where a U.S. JA could give assistance and gain valuable experience.[28]

One way of approaching management of coalition legal issues and policy constraints is through:

(a) early and ongoing liaison to identify any differences;

(b) resolution of those differences where possible; and

(c) where resolution is impossible, ensuring that the differences are not overstated and that action is taken to ensure that the differences are properly factored into the planning and execution of missions.[29]

The development of relationships between coalition/alliance attorneys is an important aspect of this process. During Operation Joint Guardian it soon became clear that absolutely no government functions existed in Kosovo – no police and courts, no postal system, schools, health care, water/sewage, and electric. There was also no sign that the civil administration that was due to run the country under the Special Representative of the Secretary General was going to be up and running these functions in a matter of days, which was vital. The importance of the Rule of Law mission is impossible to overstate and was not a mission that had been anticipated as the UN was expected to fulfill that role immediately. Accordingly it was for the five multi national brigades, with troops from 19 nations, to start these vital services. Considerable coordination was necessary to ensure some uniformity of practice and consistency and weekly KFOR legal meetings became the norm and much sharing of information between the JAs from many nations.

During OEF and OIF several coalition partners had both deployed legal staff and legal "reach back" capabilities. Some of these coalition attorneys were located at Coalition Forces Land Component Command (CFLCC), Coalition Forces Special Operations Component Command (CFSOCC) and Combined Forces Air Component Command (CFACC); others came into contact with U.S. JAs because their units were co-

[28] For some of the time a U.S. JA was provided to KFOR HQ in Pristina during Operation Joint Guardian.

[29] E-mail from SQNLDR Chris Hanna, Royal Australian Air Force, former Legal Officer Strategic Operations Division to SQNLDR Catherine Wallis, Royal Australian Air Force, Director, Coalition Legal Operations, Center for Law and Military Operations (21 Apr.2004).

located with U.S. forces.[30] Some coalition attorneys made contact with U.S. JAs on a daily basis, particularly during mission planning stages.[31]

Several attorneys reported that developing good relations with coalition partner attorneys as early as possible was of great benefit to the overall success of the operation. For example, the senior Australian attorney in OIF commented that attending Central Command (CENTCOM) conferences with his United States and UK counterparts immediately prior to OIF, allowed them to "hit the ground running" on commencement of operations, both in terms of preparation for specific issues and more generally because of the rapport developed between them.[32] A USAF JA reported that:

> (O)n any number of occasions we were able to discuss developing situations and ensure all parties were aware of potential coalition limitations before they became "showstoppers" because of this proximity and our interaction.[33]

Accordingly, JAs should become familiar with the legal resources of the coalition partners in their area of responsibility and ensure that lines of communication are open to deal with substantive issues as they arise.[34]

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[30]*See, e.g.*, MAJ Nicholas F. Lancaster, Chief, Operational Law Division, 101st Airborne Division, MEMORANDUM FOR RECORD, SUBJECT: MAJ Lancaster (101st ABN DIV (AASLT) Operational Law) Comments on CLAMO OEF/OIF DRAFT Lessons Learned, 18 May 2004. (hereinafter Lancaster AAR) (reporting that the JAs in Kandahar shared an office with the Canadian JA assigned to 3rd Princess Patricia's Canadian Light Infantry). Also Whitford E-mail, at note 7 (reporting that, with regard to Task Force Dagger, in OEF, the US JAs merely were co-located with their coalition counterparts; while in OIF, there was a combined joint special operations TF headquarters for three U.S. SF battalions, one U.S. infantry battalion, one U.K. SAS, and one AUS SAS).

[31]Executive Order No. 11850, Renunciation Of Certain Uses In War Of Chemical Herbicides And Riot Control Agents 40 F.R. 16187, 8 Apr. 1975, 50 U.S.C. Section 1511 [hereinafter Ex Ord. No. 11850], and Chairman of the Joint Chiefs of Staff Instruction 3110.07B (16 Feb. 2001, classified SECRET). *See also* White House memorandum for the Secretary for Defense, Use of Riot Control Agents to Protect of Recover Nuclear Weapons. (10 Jan. 1976)

[32] GPCAPT Paul Cronan, Royal Australian Air Force, former J06, Headquarters Australian Theatre, Interview with SQNLDR Catherine Wallis, Royal Australian Air Force, Director, Coalition Legal Operations, Center for Law and Military Operations (18 Feb. 2004) [hereinafter Cronan interview]

[33] Wold E-mail written to SQNLDR Catherine Wallis, Royal Australian Air Force, former Director Coalition Operations, Centre for Law and Military Operations.

[34] A novel approach was taken by MAJ Dean Whitford, former Staff Judge Advocate, Combined Joint Special Operations Task Force – West (OIF), and MAJ John Bridley, Australian Army, former Command Legal Officer, Special Operations Command:

> We also formed a local bar association, which made for somewhat of a novelty, but encouraged contact among all the attorneys either stationed or passing through our command, including base support, civil affairs, coalition, and even civilian attorneys serving in line positions.

Whitford E-mail, note 7.

After May 2003, when the nature of the operations changed, both OEF and OIF continued to be multinational operations and coalition actions, consisting of multiple willing states led by the U.S. Many coalition personnel worked with each other for the first time but, apparently, without specific coalition legal pre-deployment training for these particular operations or significant multi-national legal exercises.[35] The post-conflict situation facing the coalition did not match the pre-conflict expectations; therefore, many of the differences among the coalition have only become clear with the benefit of hindsight. However, other interoperability issues could have been addressed prospectively. Since the U.S. was by far the biggest contributor of forces to the Coalition,[36] non U.S. coalition lawyers would have benefited from working with U.S. forces before ground combat began. In the alternative, coalition forces could have better understood the differences in opinion, approaches and practices more easily had they attended a relevant course at the U.S. Army's Judge Advocate General's Legal Center and School in Charlottesville, Virginia. In the absence of previous operational coalition experience, it would have been quite useful to have training or guidance on coalition operations,[37] for example, on the issues that a UK coalition officer could address, i.e. what was U.S. national and what was coalition work.[38]

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[35]*See* Coombes E-mail, (noting the absence of this type of training but stating that coalition legal officers seemed to find real value in any multi-national experience they have had in their earlier careers).

[36]In February, 2005, the U.S. had some 150,000 service personnel out of a total of around 175,000. *See* House of Commons 6th Report at note 2 at 248. As of 18 February 2005 in addition to the U.S. and UK, the contributions were Italy (3116), Netherlands (1368), Denmark (485), Lithuania (131), Czech Republic (102), Romania (747), Japan (536), Bulgaria (495), Mongolia (130), Poland (2,500), Slovakia (105), Ukraine (1589), Albania (74), Kazakhstan (29), Macedonia (34), Azerbaijan (154), Estonia (47), Latvia (117), El Salvador (380), South Korea (3,700), Australia (282), Armenia (46), Norway (9). *Id.*

[37]E-mail from Lieutenant Colonel Whitwham, Chief Military Operations Law, Office of the Staff Judge Advocate, Multi-National Coalition Iraq to CLAMO (2 Jun. 2005)[hereinafter Whitwham E-mail].

[38]*Id.* At times Lt Col Whitwham felt as if he was doing a U.S. officer's job in a U.S. HQ rather than a coalition officer's job in a coalition HQ. He was often asked questions on U.S. national policy, regulations, or U.S. investigations –areas not properly in his area of expertise.

VIII.D. COALITION PROPERTY, FACILITIES, EQUIPMENT AND FISCAL RULES

Cooperation and uniformity of approach and practice concerning the use of property and facilities is beneficial to all coalition members.

Still another lesson learned is that of the necessary to maintain a repository of relevant archives and a documentary trail of the use and responsibilities of areas and facilities, because coalition members may change or move between facilities.[39] Judge advocates serve their clients well when they anticipate these challenges and are prepared for them when they arise.

Some coalition countries, such as the U.S. are bound by very strict fiscal rules at to what can and cannot be done with mission funds, for example support to the UN requires reimbursement. Other nations such as the UK may not be bound by such rules.[40] A British commander may have great personal discretion as to how to apply funds for the overall success of a mission. Judge advocates should be aware of such variations within the coalition as it may assist to resolve short term fiscal problems which can greatly assist the overall mission.

On Operation Joint Guardian the importance of Brown and Root operations was not understood by the U.S. allies. Judge advocates must ensure that the message is passed on as it will be vital for allies to appreciate such matters it could be useful in making arrangements for border and customs negotiations as well as the status of particular contractors who are providing vital logistical support.

Acquisition and cross-servicing agreements (ACSA) for logistics support by and to the U.S. will need considerable JA input early on in a coalition operation. Once operations have matured the arrangements for cash-reimbursable payment, replacement in kind or equal value exchange should be well established. It should be remembered that there is no legal authority to provide free logistical support to foreign militaries so JAs

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[39]See Captain Chris Hamers, Royal Netherlands Army, After Action Report (15 Mar. 2005) [hereinafter Hamers AAR] (noting that there was a lot of discussion in Afghanistan when the handover of the ISAF was drawing closer. Various leases had been granted by the Afghan Transitional Authority (ATA) but the terms of these leases was not always clear with regard to reviews of the terms at a given time and when there was a change of an incumbent nation or unit and important paperwork was missing. The issues also affected camp development and expansion and led to unnecessary difficulties with 'entrepreneurial officials'. Issues also existed between coalition members as to ownership and control of buildings and the costs of improving them. A troop contributing nation may wish to sell a building to a new troop contributing nation when their forces leave or relocate. A six month cycle of purchase, improvement and sale could have been avoided if NATO had purchased all troop contributing nations 'owned' buildings within COMISAF's control).

[40] For example the budget for the deployment of the British led NATO Corps HQ on KFOR 1 (HQ ARRC) was approved after the mission was completed, seemingly without any major problems.

may have give advice on agreements other than ACSA.[41] The country receiving the support should be made aware of the costs that they will incur.[42]

[41]Early during the KFOR Operation it was deemed important that Ukraine and the United Arab Emirates (UAE) participated in the operation. There were no ACSAs between those countries and the U.S. therefore costs had to be captured and then forwarded to higher headquarters. Support was then provided to the UAE through a foreign military sales case with a case being made having been tailored to provide logistical support. The UAE then funded the FMS case. For the Ukraine Foreign Military Financing funds were provided for as long as possible, after which they moved from the U.S. Camp Bondsteel to the Polish Battalion in order to save money.

[42] In the KFOR mission the UAE were vocal about the costs that they incurred.

VIII.E. COALITION COMMUNICATIONS AND COALITION COHESION MUST BE A PRIORITY.

Full access to the SIPR net and JAGC net would improve efficiency and compatibility of the most important coalition legal partners.

Legal officers' time and that of the other office staff was wasted by non U.S. judge advocates having to ask questions and be briefed on the current situation, or other matters, upon which everyone else in the office had been informed via the SIPR net. This could lead to coalition legal officers feeling "blind" and disadvantaged without SIPR access, or at the very least being poorly informed as they would be just about the only person that did not see things flash across their computer screen. If a coalition legal officer is in a position of responsibility and including responsibility for other coalition lawyers this, through no fault of his own, could affect his credibility when compared to his U.S. counterpart and this may reflect in the perception of others and affect the officer's ability to contribute fully and be an effective manager.[43]

It would appear that in OIF the CPA multinational lawyers who had access to an internal e-mail system did not have quite the same communication problems. However, there were other problems and access to the SIPR net was difficult as their never appeared to be an intent that this communication system would be used by coalition officers. [44]

A lesson to learn for both the U.S. and the British was that even in June 2004 there was not particularly good communication from the office of the SJA at Multinational Corps Iraq to the UK and MND SE.[45] This issue simply made it more difficult for Army Legal Services officers to obtain a UK or other coalition members' view point, or for the coalition members to consult with each other. Furthermore, it inhibited the potentially beneficial contribution of views other than those held by U.S. forces. It was, accordingly, important for ALS officers to remain aware of the British

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[43]As reported by Nicholas Wade & Eric Schmitt, *Bush Approves Use of Tear Gas in Battlefield*, NEW YORK TIMES 2 Apr. 2003.

[44]E-mail from Lieutenant Colonel Whitwham, Chief Military Operations Law, Office of the Staff Judge Advocate, Multi-National Coalition Iraq to CLAMO (2 June 2005) [hereinafter Whitwham E-mail] note 10, noting that the Divisions were primarily using SIPR. Further see Lt Col Coombes E-mail where he stated that many units did not have CENTRIX on their desk so it was hardly used, but this is the system that embedded coalition officers had access to. CENTRIX could be used to contact fellow staff in the same HQ, as they knew this is what coalition used, but others outside the HQ did not know this, so often there would not be a reply to a question that had posed using this means).

[45]*See id.* This did improve with time. The situation may have occurred partially as a result of it being a U.S. dominated HQ and therefore it was designed and primarily set up for U.S. business.

view/perspective on any particular matter and not "go native," thereby defeating the purpose of having a British officer doing the job.[46]

With poor communications and their small numbers, coalition officers did not always feel like part of a multi-national team.[47] Other coalition officers noted the same sentiment.[48] It is unlikely that U.S. personnel had a similar experience. In fact, the domination of U.S. forces and the focus on U.S. standard operating procedures would have been an advantage to U.S. personnel. Such an environment can lead to potentially negative effects on coalition cohesion and work to undermine the chain of command. An example of this might be where orders were issued theatre-wide but only seem to apply to U.S. forces and not their coalition allies as well.

To create and preserve a feeling of a fully functioning coalition in a U.S. Corps Headquarters, it would be helpful to identify a dividing line between the major force/resources providers' national policy and procedures and coalition matters.[49] That this point arose is, perhaps understandable, given the fact of the scale and synergy of U.S. Forces. However, given the disproportionate number of U.S. personnel in the OIF and OEF coalition, care must be taken by such personnel to not think in a national mindset rather than in that of a coalition mindset. Guidance from the leadership of the coalition might have helped address this matter.[50] This challenge was exacerbated by the fact that there were both an Australian and British National Support element (UKNSE), but not a separate U.S. HQ.

Judge advocates need to be aware of changes that may affect coalition cohesion. In Kosovo for example, during the period 1999 – 2001 the NATO military chain of command should have flowed from Supreme Headquarters Allied Powers Europe (SHAPE). However, the U.S. inserted a U.S. command component with the creation of a

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[46]*See* Whitwham E-mail, note 10. As a result of his location, it was straight forward for Lt Col Whitwham to keep in regular contact with the British Deputy Commanding General at MNC I, but this may not always be the case.

[47]*See* Coombes E-mail, note 8. It was clear that at the very top there were fundamental differences of approach. Mr Bremer was the top U.S. civilian official and received his orders from Washington. Mr Greenstock, from the UK, could give a British view and hoped to have some influence but he did not make the decisions. This fact was understandable as the U.S was providing the vast majority of the money and resources and was taking the vast majority of the casualties but it did not make for the feeling of there being a team. Things were simply done by the U.S. in a U.S. manner and as they wished. A symbol of this was at the end of the CPA the building became the U.S. Embassy.

[48]*See* Whitwham AAR, note 10, (stating that "The HQ at all times felt like a U.S. Headquarters with a little of a coalition feel").

[49]*See id,* (noting that there appeared to be a lack of understanding or consideration of the coalition and it was not in reality a coalition HQ, not the least because operational planning was done on a U.S. basis i.e. FRAGOs were issued in U.S. terms, referring to U.S. regulations and distributed to all units).

[50]The root of the problem so far as the OSJA Multinational Corps Iraq was concerned was, everyone was doing both U.S. and coalition business. For some issues the distinction was obvious, such as discipline. For others it was not so clear. It would have been useful to have had guidance on what was clearly coalition business vice U.S. business. *See* Whitwham E-mail note 10.

joint task force. This led to the chain of command having a more distinctive U.S. flavor for U.S. forces, which could create confusion for U.S. forces and her partners and less cohesion between nations sharing broadly the same mission.

Military Justice is an import part of unit cohesion and discipline. Public opinion can also be shaped by how coalition partners deal will criminal and administrative misconduct by members of the force and therefore sharing of information, where possible, particularly in the inevitable high profile cases, is desirable. Military Justice must therefore play a role in a coalition and in maintaining coalition cohesion. Accordingly JAs need to be aware of coalition partners systems for military justice and should take an interest in how particular offences committed by soldiers are dealt with, not least as they may need to assist public affairs officers in dealing with media questions. This will help reduce any tensions between partners and maintain a consensus and assist in identifying prevalent offences across the coalition.

VIII.F. ROE

JAs must understand different national rules of engagement as they will impact U.S. operations and must be prepared to assist and cooperate with other coalition partners in drafting their own ROE.

For some coalition nations their recent experience may be in peace support or peacekeeping operations. To the extent possible, JAs should assist in the drafting of coalition partners ROE particularly if that partner is likely to be involved in combat operations with the U.S. Conversely as a mission evolves from war fighting to anti-terrorist activities and then towards peace keeping/enforcement the ROE change. A coalition partner may have relevant experience of the necessary ROE which may assist the U.S. and other coalition partners draft revisions and also lead to a consistent approach across the coalition.

Unlike in an alliance deployment, such as NATO where standard ROE can be developed and trained with[51], in coalition operations ROE are found in such a wide variety of ever changing documents and sources, which are not necessarily all marked "Rules of Engagement" that it is very difficult for a JAG to have a complete and up to date set at his or her disposal. The ROE themselves for a war-fighting mission may be the easy part for JAs. Dealing with collateral damage assessments, special instructions for air operations, priority and restrictive targets can make the whole issue far more complicated, not least when the nature and interpretation of the type of operation changes from the point of view of one coalition partner to another. Fragmentary Orders (FRAGOs) are likely to be highly relevant in disseminating tactics, techniques and procedures for a particular kind of operation, for example dealing with looters or manning check points.

When personnel and equipment are being moved into theater and numerous nations with different requirements are transiting there will be national ROE and specific legal issues. For example, the host nation law of self defense and the provision of security to the force. Cooperation between coalition JAs as this process is being negotiated and in the initial stages of transiting a nation can prove valuable in making the coalition more efficient.

JAs are always involved in the training of national ROE. Training is inevitably flexible as ROE often arrive later than is desirable. JAs should ensure that some of the training includes reference to coalition partners ROE where it is relevant. Consideration

[51] Even for an Alliance mission ROE may not be straight forward. For the Kosovo mission in 1999 the consensus of all NATO member nations was required, thereby having 19 independent governments considering political guidance and this was with the benefit of the constant and well established North Atlantic Council. Soldiers and Marines in fact had to understand multiple ROE, not just for the mission in Kosovo, but for the initial staging base in the Former Yugoslav Republic of Macedonia. If soldiers accompanied their equipment they faced various rules for up to six different host nations during transit. Each country had different rules on whether soldiers could be armed and when they could use deadly force to particular threats to property.

should be given to assisting other coalition JAs in their training of ROE by sharing vignettes and informing major combat partners of any request for changes and changes made to the ROE where security caveats permit this.

For both OEF and OIF, each coalition partner was subject to national ROE. Since this was the case it can be argued that changes to the ROE were easier to obtain than in an alliance operation, such as Kosovo, as the request for change can be made through the national chain of command, rather than having to be approved by all the nations in an alliance operation.[52] These ROE were different than U.S. ROE (to varying extents) and reflected the individual law and policy of each coalition partner and their national interpretation of what exactly they mean by ROE.[53] Much of the ROE remain classified which makes discussion of the issues impossible in an unclassified forum. This raises interoperability issues when coalition partners operate in the same geographical area, and/or on the same mission as U.S. forces. One ground mission example concerns U.S. Special Forces, who possessed weapons that were not in the U.K. or Australian inventory, but were considered operationally significant for a mission during OIF. Accordingly, some individual U.S. Special Forces personnel were attached to U.K. and Australian teams to provide that particular capability.[54] Working this closely it was imperative that JAs, planning staff and commanders understood the differences between the various national ROE and the impact that these differences could have on the operation.

There is the need for all JAs within a coalition to understand all the ROE terms that are used. When a new term is adopted it would greatly assist other coalition partners if they could be provided with the rationale and the interpretation that such terms have been given as this will assist in understanding between partners and prevent confusion and assist prevent ROE from becoming over complicated. For example the term "positive identification" first appeared for U.S. land forces in OEF. The term was then used in OIF ROE with further definition. Since coalition forces can be expected to be involved in joint missions clarity is essential.

Judge advocates must understand and resolve ROE classification issues. One or more coalition partners may request a copy of the U.S. ROE. However, ROE classification precludes access without approval from higher authority, which in the early

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[52] In an alliance operation such as Kosovo requests for modifications to the ROE should be made through both the operational and national chain of command. In a coalition operation there is only the need to request the change to the ROE through the national chain of command but it is in the interest of coalition unity and cohesion if partner nations can be warned of requests and changes granted to a nations ROE.

[53]Coalition national ROE for OEF and OIF can be viewed on SIPRNET at http://www.centcom.smil.mil

This is in contrast to the situation in Kosovo, where common NATO ROE was used. *See* CENTER FOR LAW AND MILITARY OPERATIONS, LAW AND MILITARY OPERATIONS IN KOSOVO, 1999-2001: LESSONS LEARNED FOR JUDGE ADVOCATES 127-35 (15 Dec. 2001). [hereinafter KOSOVO LESSONS LEARNED]

[54]Whitford E-mail, note 7.

days of OIF was CENTCOM.[55] Conversely, U.S. JAs may request a copy of a coalition partner's ROE but full access may not be granted.

Where information sharing is permitted, early coalition access to U.S. ROE greatly improves interoperability. This is because independently drafted national ROE will contain not only differences resulting from different national law and policy, but also differences resulting from different drafting styles or circumstances. For example, identification criteria or the circumstances where deadly force may be employed may differ from the U.S. ROE, not from any disagreement with the U.S. perspective, but purely because the drafters chose different words. While the former differences cannot be avoided, the latter create extra (and often unnecessary) hurdles to interoperability.

This is illustrated by the contrasting experience of Australian forces in OEF and OIF. For both operations, Australia provided small numbers of specialist forces that operated closely with U.S. forces rather than in a separate AO.[56] For OEF, the short planning time frame resulted in no prior visibility of the U.S. ROE. Therefore, on arrival in theater, the Australian ROE was not consistent. The inconsistencies then became an additional issue requiring resolution during the operation. Australian attorneys described this as playing "catch up" and felt it impacted negatively on their operational ability.36 In contrast, during the more deliberate planning for OIF, UK and Australian attorneys were invited to attend a number of CENTCOM sponsored ROE conferences.[57] The UK and Australia were then able to draft their ROE with knowledge of the likely U.S. ROE, ensuring that the ROE could be as consistent as possible, prior to the commencement of operations.

In some circumstances where access to U.S. ROE is not granted there may be other solutions. For example, in OEF the United States worked alongside Afghan forces trained by U.S. Special Forces. However, there was no permission to share U.S. ROE with Afghan forces. The solution was that U.S. forces assisted in the creation of Afghan ROE that was sufficiently similar to the U.S. ROE to allow participation in joint operations.[58]

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[55]*See* MAJ Jeff Bovarnick, Chief, Operational Law, CJTF-180, CJTF-180 Notes from the Combat Zone, at 4 (2003). "[T]he vast majority of the coalition forces have not engaged in combat operations since WWII. In joining the Global War on Terrorism, they join the coalition ready to help capture and kill Al Qaeda and Taliban. Fighting alongside the United States, understandably they want to review the U.S. ROE. Because of the classification of the ROE, we cannot simply hand it over. On a nation by nation basis, CENTCOM will determine what nation we can release redacted versions of the ROE to, usually reserved for those nations performing large combat operations with the United States".

[56]For details of the Australian contribution see Department of Defence website for OP Slipper (Afghanistan) *at* http://www.defence.gov.au/opslipper/ and OP Falconer (Iraq) *at* http://www.defence.gov.au/opfalconer/default.htm .

[57]Cronan interview, note 12.

[58]E-mail from COL David L. Hayden, former Staff Judge Advocate, XVIIIth Airborne Corps, to SQNLDR Catherine M. Wallis, Royal Australian Air Force, Director, Coalition Legal Operations, Center for Law and Military Operations (5 Mar. 2004) [hereinafter Hayden E-mail]. The OEF ROE can be found in the CLAMO SIPRNET Database.

Judge advocates must review coalition ROE for differences that affect interoperability.

Lessons learned from recent multinational exercises and operations reflect significant differences in how various countries understand and view the application of military force through the ROE. These factors can severely limit or expand a Multinational Commander's ability to use a national contingent's capabilities.

> *The United States places an importance on the ROE that other nations may not share, attaches meaning to terms with which other nations' forces may not be familiar, and implements ROE within a context of doctrine that may differ markedly from that of other nations. When operating with forces from non-English-speaking countries, these differences will be accentuated.*[59]

While the precise ROE differences during OEF and OIF cannot be discussed at this security classification, the areas where differences occur are common to many coalition operations. Two common points of difference are self-defense and use of force terminology.

Self-defense is subject to different national interpretations. For the United States:

> A commander has the authority and obligation to use all necessary means available and to take all appropriate action to defend that commander's unit and other US forces in the vicinity from a hostile act or hostile intent. Force used should not exceed that which is necessary to decisively counter the hostile act or intent and ensure the continued safety of US forces or other persons and property they are ordered to protect. US forces may employ such force in self-defense only so long as the hostile force continues to present an imminent threat.[60]

But some States require specific ROE to authorize self-defense. Others believe that the right of self-defense is inherent but have different criteria for when the right is triggered.[61] Differences in interpretation may also arise in relation to the ability of commanders to limit soldiers acting in self-defense, the ability (or requirement) to fire warning shots and the ability to act in defense of coalition forces in the absence of

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[59]U.S. DEP'T OF ARMY, FIELD MANUAL 27-100, LEGAL SUPPORT TO OPERATIONS 8.4.2 (1 Mar. 2000) [hereinafter FM 27-100].

[60]DOD DICTIONARY, note 3. Also *see* CHAIRMAN, JOINT CHIEFS OF STAFF, INSTR. 3121.01A, STANDING RULES OF ENGAGEMENT FOR U.S. FORCES (15 Jan. 2000) [hereinafter SROE]

[61]For an example of the interoperability issues this may raise see KOSOVO LESSONS LEARNED, note 32 at 129-30 (concerning the French interpretation that only a hostile act (not hostile intent) may trigger self-defense).

specific ROE.[62] Unit self-defense rules in relation to protection of property may also differ.[63] Where self-defense is a primary basis for the use of force, it is important to avoid the assumption that the coalition partner has the same understanding of the term as U.S. forces. One solution is to discuss the mission in advance and clarify how each partner would respond to particular situations.[64]

The use of force terminology in the ROE may also be different. Each national ROE serial may use different terminology for the use of force such as hostile act, declared enemy, hostile intent, or likely and identifiable threat. This particular difference is more likely where there is no sharing of ROE information between coalition partners in the planning stage. For example, on OEF, the United States introduced the new term "likely and identifiable threat" in the ROE.[65] As this was a new term,[66] never seen previously by coalition partners, their OEF ROE did not contain this term. Where this type of difference occurs, each nation may have different requirements for the use of force on the same operation.

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[62]The precise self-defense rules of many States are classified. However, the range of responses considered to be self-defense can be explained in general terms through an example:

> A man approaches a coalition position and fires at the position. Before any person returns fire, he lowers the weapon so that it points toward the ground and runs away. The man is not part of a declared hostile force and coalition forces must act in accordance with self-defense in responding to this situation.

Three different self-defense responses to this situation are:

- Shoot the man immediately – he continues to be a threat to life and may be killed in self-defense.
- Potentially shoot the man, but not immediately – he continues to be a threat to life but the soldier must use graduated force to remove the threat, such as calling him to stop and/or firing a warning shot, prior to making a decision to shoot.
- Cannot shoot the man – as the weapon is not pointing at any person he is no longer a threat to life and therefore cannot be killed in self-defense. He can, however, be arrested and if he becomes a threat to life in the course of the arrest he may be killed.

While U.S. Forces would adopt the first response, certain coalition forces would adopt one of the two other responses.

[63]For example, U.K. law does not permit the use of lethal force to defend property unless the situation is also life threatening.

[64]For example, COL Kathryn Stone, former SJA, 10th Mountain Division, related the following incident during OEF: Once, the Brits came to me and outlined a plan for a hut-to-hut search for weapons in a particular village. We walked through the ROE – what they could and could not do – and they were satisfied. Stone E-mail, note 11.

[65]The OEF ROE can be found in the CLAMO SIPRNET Database.

[66]*See* Lessons Learned: Rules of Engagement; Understand the Relationships Between New and Standing ROE Terms: Positive Identification (PID), Likely and Identifiable Threat (LIT), Hostile Act and Hostile Intent, and Declared Hostile Forces.

Further, use of force terms used in U.S. doctrine do not necessarily have the same meaning in the doctrine of the coalition partner. For example, the United States and the United Kingdom have different doctrine concerning "hostile intent." U.S. doctrine defines hostile intent as:

> The threat of imminent use of force by a foreign force or terrorist unit against the United States, U.S. forces, or other designated persons or property.[67]

According to U.S. doctrine, the use of lethal force is always authorized in response to a demonstration of hostile intent.[68] In contrast, U.K. doctrine describes hostile intent in the following terms:

> The ROE profile must give guidance on events that can be interpreted as a demonstration of hostile intent. These may include: Detection of heavy jamming of communications emanating from hostile or potentially hostile territory. Units moving into weapon launch positions and preparing to fire, launch or release weapons against forces, shipping, aircraft or territory of own or designated friendly nations.

Further, use of force in response to hostile intent is not automatically authorized, but must be specifically authorized in the ROE.[69] Thus, while the U.S. meaning of hostile intent is constant and use of force in response is always permitted, the U.K. meaning is mission specific and use of force in response must be specifically authorized. JAs must ensure that they understand the coalition partner's meaning of use of force terminology in advance of a mission,[70] so that they can identify ROE differences and assess the impact that they may have on a particular operation or mission.[71]

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[67]SROE, note 40.

[68] *Id.*

[69]*Id.*

[70]*See* MAJ Michael L. Roberts, *A Call for Multinational ROE Doctrine*, unpublished manuscript, 16-18 (discussing the confusion that arises from a lack of standardization of ROE terminology).

[71] *See, e.g.*, Interview with COL Kathryn Stone, former Staff Judge Advocate, 10th Mountain Division, in Charlottesville, Va. (7 Oct. 2003) [hereinafter Stone interview]. (You needed to be cognizant of coordinating and understanding the different ROE in effect for various units). A useful checklist for identifying issues concerning ROE is contained in America/Britain/Canada/Australia (ABCA), *Coalition Operations Handbook* 13-11, 1 Nov. 2001.

1. Are there generic ROE that all nations have agreed to?
2. What is the impact on each participating nation of the ROE?
3. How does each nation disseminate ROE to its soldiers?
4. Have the ROE been distributed to the soldiers and training conducted prior to deployment?
5. What are the key differences in ROE across the coalition?
6. Are there national "red cards" or points of contention concerning ROE that the commander must know?

MAJ Thomas Cluff USAF, former JA, Combat Plans Division, Combined Air Operations Center, described the role of USAF JAs in understanding and disseminating coalition ROE to US planning staff:[72]

> "The U.S. JAs assigned to combat plans and strategy had a round table discussion early on with the UK and AUS JAs concerning each country's ROE and approval authorities for the various types of targets. We also discussed UK and AUS political sensitivities, which helped us to better understand their ROEs. Of course, this also helped develop good working relationships b/f OIF began. Because of their small numbers, they were not as involved in combat plans as we were. We were able to use our knowledge of their ROE to spot/resolve/explain coalition unique targeting concerns to U.S. planners".

Further, identifying differences can help ensure that coalition partners are not placed in politically difficult situations.[73] Where there are multiple partners involved, this process can become complicated. During OIF, CJTF-7 maintained an ROE matrix for all countries in theater to assist in planning.[74]

Differences in ROE may also have positive consequences. For example, MAJ Whitford, Staff Judge Advocate, Joint Special Operations Task Force Dagger (OEF) and Staff Judge Advocate, Combined Joint Special Operations Task Force – West (OIF), reported in relation to working with U.S., UK and Australian Special Forces:

> One thing to note is that this can be a strength of combined operations. Difference[s] between ROE permitted us to employ national forces where the use of another national force might raise issues. There were situations where U.S. ROE was more constrained or was not as clear on a particular point and where a coalition force clearly could execute the mission or take a particular action. The other helpful thing to watch for is expansive

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7. Are there ROE on the use of indirect fire?

8. Is there a dichotomy between force ROE on the use of indirect fire and national force protection?

9. Does each nation have a common or clear understanding of the terms used in the ROE?

10. Has the use of certain systems or equipment – such as defoliants, riot control agents, land mines – been evaluated for its impact in relation to the ROE?

[72]Comments of MAJ Thomas J Cluff USAF, former JA, Combat Plans Division, Combined Air Operations Center in E-Mail from MAJ Philip Wold USAF, former Chief, Operations Law, 9 AF/ USCENTAF to SQNLDR Catherine Wallis, Royal Australian Air Force, Director, Coalition Legal Operations, Center for Law and Military Operations (12 Apr. 2004).

[73]This consideration did affect OEF planning and operations: Hayden E-mail, note 38.

[74]MAJ Patricio Tafoya U.S.M.C. Judge Advocate CJTF 7, Notes from III Corps Pre-deployment Conference, (12-14 Nov. 2003). MAJ Dean Whitford reported that he "had copies of all three ROE side by side in a six-sided binder at my desk at all times, and did a read-through of each with coalition members of the command.": Whitford E-mail, note 7.

coalition ROE that include detailed guidance on the law of war as applied to the particular operation, something U.S. ROE does not include. These applications can be extremely helpful in analyzing particular situations as they arise.[75]

[75] *Id.*

VIII.G. BE AWARE OF THE POTENTIAL IMPACT OF DIFFERENT NATIONAL APPROACHES TO TARGETING

> *We need to understand going in the limitations that our coalition partners will place upon themselves and upon us. There are nations that will not attack targets that my nation will attack. There are nations that do not share with us a definition of what is a valid military target, and we need to know that up front.*[76]

Each coalition partner is likely to have different targeting rules as a result of differences in law and policy. Due to security classification these differences may only be discussed in general terms, however, as with ROE, the important lesson is to be aware of where differences may occur and the potential impact on U.S. operations.

Even in an alliance operation it is important to be aware of differing sensitivities of countries that make up the force. Even if it is not strictly a legal matter, JAs may be well placed to advise on this issue as a result of reading the views of international lawyers. For example during Operation Allied Force in addition to strictly military targets, NATO aircraft targeted "dual-purpose" objects. Targeting bridges, trains and electric power stations may not have caused too much debate in the alliance but selection of other targets, such as television stations led much debate in the international legal community, politicians and international newspapers.

Commonly, there will be differences in the national assessments of particular targets. One method of characterizing these differences is by source: intelligence, law or policy.

VIII.G.1. Intelligence

Each coalition partner will apply his own intelligence information to a potential target. Different intelligence assessments will affect the permissibility of a target as this assessment forms the factual basis to which the law and policy are applied. For example, whether a particular building is or is not an ammunition factory or the particular role of an individual in the enemy regime. Intelligence differences are particularly a factor in assessing Time Sensitive Targets (TSTs).[77] Intelligence differences can be reduced through information sharing, but this is often not permissible due to classification.

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[76]Lieutenant General Michael Short USAF, Commander of Allied Air Forces, Southern Europe, quoted in Amnesty International, NATO/FRY, "Collateral Damage" or Unlawful Killings? Violations of the Laws of War by NATO During Operation Allied Force, AI Index: EUR 70/18/00 (June 2000), available at http://www.web.amnesty.org/ai.nsf/index/EUR700182000 [hereinafter Amnesty report].

[77]A Time Sensitive Target (TST) is a target requiring immediate response because it poses (or will soon pose) a danger to friendly forces or is a highly lucrative, fleeting target of opportunity: DoD DICTIONARY note 3. In Iraq, some TST U.S. targeting decisions were made alone, with coalition partners only being able to check a GO/NO GO box without being privy to some of the information in the U.S.

VIII.G.2. Law

Differences may occur due to differing treaty obligations, or due to different interpretations of the obligations contained in those treaties. For example, even among signatories to GP1[78] there are differences of opinion concerning the definition of a military objective in Art. 52(2) GP1.[79]

VIII.G.3. Policy

Some targets may not be politically acceptable to some coalition partners despite their permissibility under international law. These may either be prohibited outright or require national government approval before engagement.[80]

As a result of the interaction of the above factors some targets were permissible for some coalition partners and not permissible for others. The type of targets in OIF that were particularly susceptible to variations in national viewpoint were symbols of the regime such as royal palaces and statues of Saddam Hussein,[81] communications facilities

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decision matrix. Where coalition forces are involved in a shooting or supporting role, sharing targeting information fully may result in more GO than NO GO boxes: E-mail from SQNLDR Patrick Keane, Royal Australian Air Force, former Legal Officer, Combined Air Operation Center to SQNLDR Catherine Wallis, Royal Australian Air Force, Director, Coalition Legal Operations, Center for Law and Military Operations (18 Feb. 2004). Note however, that there is no operational impact where the boxes are being used solely to deconflict friendly coalition forces.

[78]Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1125 U.N.T.S. 48, [hereinafter GP1]. Although the United States is not a Party to the 1977 Protocol I Additional to the Geneva Conventions, it is bound by this article to the extent that it codifies customary law.

[79]Article 52(2) provides, in part, 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 definite military advantage. *Id.* States may come to different conclusions regarding whether certain objects are military objectives. Objects that are commonly disputed include television and radio stations. *See* KOSOVO LESSONS LEARNED *supra* note 32 at 51-53. See further Theodore Meron, *The Humanization of International Law*, 94 AM. J. INT'L L. 239, 276-77 (2000).

[80]The Australian targeting requirements are a good illustration of this point. Australia received targets on the U.S.-developed strike lists but assessed them according to Australia's own legal obligations. Several target categories were subject to Australian ministerial approval before they could be engaged. Department of Defence (Australia) THE WAR IN IRAQ: ADF OPERATIONS IN THE MIDDLE EAST 2003 13 (23 Feb. 2004) *at* http://www.defence.gov.au/publications/lessons.pdf

[81]Widely reported as destroyed for psychological affect. *E.g.* BBC News, *UK force 'destroy' Saddam statues*, (29 Mar. 2003) *at* http://www.drumbeat.mlaterz.net/March%202003/UK%20forces%20'destroy'%20Saddam%20statues%20032903a.htm.

such as television and radio stations,[82] and civilian (non-uniformed) officials of the Iraqi regime.[83]

For JAs involved in targeting it is important to be aware of the impermissible and problematic target types for each coalition partner and the way in which this may impact on a particular mission.66 Recognize that an impermissible target influences not only a coalition partner's ability to deliver a weapon onto that target but may also affect the level of permissible support that may be given to U.S. engagement of the target. For example, if the target is impermissible then that coalition partner may also be prohibited from refueling strike aircraft, providing airborne early warning and control or participating in the planning for that particular mission. Where U.S. forces are reliant on these services from a coalition partner, it is imperative that "workarounds" are established early so as to preclude mission interference. These may include exclusion from missions involving certain target types, establishing alternative target approval chains to avoid placing staff officers in potentially awkward positions, or simply briefing U.S. plans staff in advance of any potential difficulties or sensitivities.

[82]*See* discussion Anthony Dworkin, *Iraqi Television: A Legitimate Target?* Crimes of War Project (27 Mar. 2003) *at* http://www.crimesofwar.org/special/Iraq/brief-tv.html.

[83]*For example*, the non-uniformed regime officials who appeared on the "Personality Identification Playing Cards" *at* http://www.defenselink.mil/news/Apr2003/pipc10042003.html (last visited 16 Mar. 2004). The United States announced that these 55 individuals could be "pursued, killed or captured": Brig Gen Brooks, as reported in Associated Press, *U.S. Distributes Most Wanted List* (11 Apr. 2003) *at* http://www.foxnews.com/story/0,2933,83894,00.html.

VIII.H. WEAPONS AVAILABLE TO A COALITION

Some coalition partners will not be permitted to use the full range of weapons that may be available to U.S. forces. The weapons capabilities available to each force may be different. This may be due to one, or a combination, of three reasons. First, the coalition partner may have different legal obligations, such as being a signatory to a treaty to which the United States is not a party and which the United States does not consider customary international law (legal reasons). Second, the United States and the coalition partner may both be legally bound by a provision of international law, by treaty or custom, but may interpret their obligations differently (interpretation of law). Finally, the difference may not result from law at all, but from the application of domestic policy (policy reasons). The two weapon capabilities that are most affected by these differences are anti-personnel landmines (APL) and riot control agents (RCAs). JAs must be prepared to articulate the rationale for use of some weapons that other coalition partners may not have or be prepared to use but a JA must plan for alternatives.

VIII.H.1. Anti-Personnel Landmines (APL)

The key international legal document concerning APL is the Ottawa Treaty.[84] The Ottawa Treaty prohibits States party from developing, producing, acquiring, stockpiling, retaining or transferring APL, either directly or indirectly, and from assisting, encouraging or inducing any of these prohibited activities.[85] Most of the coalition partners of the U.S. have ratified the Ottawa treaty.[86] However, the United States is not a party and does not consider the Ottawa Treaty to be customary international law. Rather, the United States is subject to the provisions of Amended Protocol II to the Certain Conventional Weapons Convention,[87] and domestic policy,[88] which does not prohibit the use of APL but sets out restrictions on their use. As a result, the United States could employ APL during OEF and OIF, but most coalition partners could not.

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[84]Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Landmines and on Their Destruction, 18 Sep. 1997, 36 I.L.M. 1507. [hereinafter Ottawa Treaty].

[85]*Id.* art 1(1). The treaty defines "Anti-personnel mine" as: a mine designed to be exploded by the presence, proximity or contact of a person and that will incapacitate, injure or kill one or more persons. Mines designed to be detonated by the presence, proximity or contact of a vehicle as opposed to a person that are equipped with anti-handling devices, are not considered anti-personnel mines as a result of being so equipped. *Id,* art 2.

[86]There are 141 States party including Afghanistan, Australia, Canada, Denmark, Germany, Italy, Japan, Norway, Poland, Ukraine, and the UK. For current statistics see http://www.icbl.org/treaty/).

[87]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 (and Protocols), 10 October 1980, 19 I.L.M. 1523 [hereinafter UNCCW]; Amended Protocol II to the Convention on Prohibition or Restrictions on the Use of Certain Conventional Weapons which may be Deemed to be Excessively Injurious or to Have Indiscriminate Effects (ratified by the United States on 24 May 1999).

[88]The policy in effect during OEF and OIF was President William Jefferson Clinton, Statement at the White House, (16 May 1996) available in LEXIS, News library, ARCNWS file. The current U.S. policy is outlined in U.S. Department of State, Landmine Policy White Paper (27 Feb. 2004) at http://www.state.gov/t/pm/rls/fs/30047.htm.

When the employment of APL arises in coalition operations it is important for JAs to understand the parameters of the APL prohibition for the particular coalition partner. These parameters will not necessarily be the same for each partner, as they will depend on interpretation and policy.

The question of what constitutes "assistance" is the most complicated aspect of APL use in coalition operations. The prohibition on assistance may impact on a mission in many subtle but important ways, such as on coalition partner ability to be involved in air-to-air refueling, transport or even mission planning. Where U.S. forces are reliant on the provision of these types of services from a coalition partner, it is imperative that "workarounds" are established early so as to not to interfere with the mission.[89] While several major partners have issued unclassified guidance on their national interpretation of their obligations,[90] there is insufficient detail in these documents for mission planning. In many cases, the precise national interpretation and policy may be classified, as is the case for both the UK and Australia.[91] JAs should seek the assistance of coalition attorneys to advice on their State's current position in these grey areas.

VIII.H.2. Riot control agents (RCAs)

The permissible use of RCAs during armed conflict was topical during both OEF and OIF.[92]The key document is the Chemical Weapons Convention (CWC), which requires that RCAs are not used "as a method of warfare." [93] However, the term "method of warfare" is not defined. The United States is a party to the CWC, as are all our major

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[89] In relation to U.S. Special Forces operating with U.K. and AS Special Forces during OEF and OIF, MAJ Whitford reported: guidelines were established ahead of time to avoid assistance issues where, for example, a coalition officer might be the fires coordinator on duty. It also recognized the difference between calling fires (use function) and clearing fires (safety function). Whitford E-mail, note 7. While the national policy may be classified, it may nevertheless be releasable to the United States. Copies of policies releasable to the United States are on file with the International and Operations Law Department, The Judge Advocate General's Legal Center and School.

[90]In relation to APL *see* Landmines Act 1998 (UK) (as long as the UK military member does not actually lay the APL, the statute does not prohibit participation in the operation); Anti-Personnel Mines Convention Implementation Act 1997 (Canada) (can participate in an operation with a State that uses APL but may not actively assist). Declaration to the Ottawa Convention by Australia:

> Australia will interpret the word "assist" to mean the actual and direct physical participation in any activity prohibited by the Convention but 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.

[92]*See, e.g.*, Kerry Boyd, *Military Authorized to Use Riot Control Agents in Iraq,* ARMS CONTROL TODAY, May 2003 *at* http://www.armscontrol.org/act/2003_05/nonlethal_may03.asp

[93]Convention on the Prohibition of the Development, Production, Stockpiling, and Use of Chemical Weapons and on Their Destruction, 13 January 1993, 32 I.L.M. 800 [hereinafter CWC], art.1 (5).

coalition partners.[94] Accordingly, the interoperability issue arises due to interpretation and policy rather than law.

The United States interpretation of its obligations under the CWC is contained in classified and unclassified policy. United States RCA policy distinguishes between war and military operations other than war (MOOTW) and between offensive and defensive use in war. RCAs may be used in armed conflicts such as OEF and OIF, where permission is granted through the chain of command. The types of circumstances where approval may be granted include:

- To control rioting EPWs;
- To reduce or avoid civilian casualties, where enemy forces use civilians to mask or screen attacks;
- During rescue missions for downed aircrew and passengers and escaping prisoners;
- In rear echelon areas to protect convoys from civil disturbances, terrorists and paramilitary activities; and
- For security operations for the protection or recovery of nuclear weapons.[95]

CS (tear) gas was approved for use on OIF. Secretary of Defense Donald Rumsfeld indicated that there were circumstances when use of RCAs would be appropriate in war.[96] The examples he cited were:

> "when you are transporting dangerous people in a confined space. [like an airplane, or]. when there are enemy troops, for example, in a cave in Afghanistan, and you know that there are women and children in there with them, and they are firing out at you, and you have the task of getting

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[94] 161 States have ratified the CWC. Major non-signatories (at Apr. 2004) include Iraq, North Korea, Syria, Lebanon and Egypt.

[95] Ex Ord. No. 11850, note 26. Australia has a similar viewpoint regarding permissible use of RCAs during armed conflict: This does not mean riot control agents cannot be used at all in times of conflict; however, use of such agents should be authorized by the Chief of the Defence and only then in specific circumstances. When considering the use of riot control agents, specialist legal advice should be sought. Situations where the use of riot control agents may be considered are:

a. to control rioting prisoners of war (PWs);

b. rescue missions involving downed aircrew or escaped PWs;

c. protection of supply depots, military convoys and other rear echelon areas from

civil disturbances and terrorist activities;

d. civil disturbance where the ADF is providing aid to the civil power; and

e. during humanitarian evacuations involving Australian or foreign nationals.

ROYAL AUSTRALIAN AIR FORCE, OPERATIONS LAW FOR RAAF COMMANDERS, DI (AF) AAP 1003, par.9.16 (2nd 2004).

[96] Hon. Donald Rumsfeld, Secretary of Defense, Testimony before the 108th Congress House Armed Services Committee, 5 Feb. 2003, *at* http://armedservices.house.gov/schedules/2003.html#feb03

at them. And you would prefer to get at them without also getting at women and children, or non-combatants".

An alternative interpretation of the term "method of warfare' is that the CWC places a total prohibition on the use of RCAs in an armed conflict. The UK subscribes to this latter interpretation, indicating that UK forces would not be involved in operations using RCAs in Iraq, nor transport RCAs.

As with APL, these differences in national viewpoints may impact on coalition operations. It is critical that JAs understand these differences and assess the potential impact on their particular mission.

JAs can provide great assistance to planners if they research and are aware which coalition partners are able to use RCAs and which countries troops have experience of using them. The ability of a coalition partner to use RCAs may depend on whether that particular country is of the opinion that at that particular point in time there is an armed conflict or peace enforcement or peace support operation or something in between. The British army had experience of using RCAs during the 30 years of troubles in Northern Ireland.

VIII.I. DETAINEES, INTERNEES, CAPITULATION AGREEMENTS, LOCAL CEASEFIRE AGREEMENTS AND PAROLE

Coalition arrangements for detainees and internees must be discussed between partners and finalized early as well as the potential need for capitulation agreements, local cease-fire agreements, and the granting of parole.

In Kosovo JAs from most of the NATO nations were, at short notice and for the first time since the post –World War II occupations of Germany and Japan, heavily involved in a law and order mission, including detention of criminals and non-criminal detainees[97]. Although Kosovo was a NATO alliance mission as opposed to a coalition mission and the fact that the force was deployed after a peace agreement had been reached, some useful analogies and experiences of multiple nations can be seen. Considerable delays in deployment and training of UN police and building and manning of prisons meant that at short notice, soldiers had to be trained to adapt from traditional combat roles to peace keeping and policing roles. This meant training on arresting civilians and collecting evidence and well as running detention facilities to a standard acceptable to the international and local community[98].

In both OEF and OIF, detainee operations occupied JAs more than any other international law issue. It is a subject area that is complex and potentially sensitive between coalition partners, particularly where there is a theatre level internment facility and there are differences of opinion in how to deal with detainees' status. Those that wish to weaken the coalition can exploit such sensitivities; hence many coalition partners like the UK are not prepared to make any comments in an unclassified forum. Having said that, two coalition partners, the UK and Australia, were very concerned with arrangements for the handling of detained persons in a coalition environment.[99] For both operations, there were sound practical reasons for not operating separate national facilities as well as funding and resource issues. The fact that certain coalition members did not have sufficient resources in theatre to run their own sufficiently large facilities means that they are sensitive to making any constructive criticism of the U.S. forces who provided the necessary manpower and facilities. However, in operating coalition facilities or assigning detainee responsibility to only one partner, there were a number of issues that needed to be addressed.

First, there were different national interpretations of determining enemy prisoner of war (EPW) status and for the procedures involved. The issue did not concern

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[97] U.S. army JAs were able to draw on the lessons of Operation Restore Hope in Haiti.

[98] *See* LAW AND MILITARY OPERATIONS IN KOSOVO:1999-2001 LESSONS LEARNED FOR JUDGE ADVOCATES, CLAMO, U.S. Army JAG school 15 December 2001 pages 97- 120 for detail.

[99] *See* Interview with COL David L. Hayden, Staff Judge Advocate, XVIIIth Airborne Corps, in Charlottesville, Va., at 2 (7 Oct. 2003) [hereinafter Hayden Interview].

treatment, as all coalition partners agreed that the detainees were to be treated as EPWs. Status was more problematic. Due to the nature of OEF, detained persons included Taliban, Al Qaeda and foreigners supporting the Taliban. National interpretations potentially differed both on whether a particular category of person, such as a Taliban soldier, was an EPW, and also as to when an Art. 5 Tribunal was required.[100] The UK withheld its position from the public due to security classifications, but expressed the view that it was for each State to make its own determination as to status.[101]

Secondly, the UK in particular needed to address its human rights obligations, especially with regard to the death penalty. These obligations arise under European human rights law and domestic legislation, which places prohibitions on transferring persons to a jurisdiction where they may be subject to the death penalty.[102]

Finally, a State that captures an EPW retains responsibility for that EPW and the capturing State must have a method of tracking all detainees (as potential EPW), even if they are transferred to a coalition partner facility.[103]

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[100]For detail of the U.S. position see International Law Lesson: Detainee operations, *infra*

[101]Mr Hoon, Secretary of State for Defence (UK) in the House of Commons (12 Feb. 2002):

> **Ann Clwyd:** To ask the Secretary of State for Defence, ...if he will specify the appropriate guidance to the UK forces operating in Afghanistan to ensure compliance wth the UK's international legal obligations; and if prisoners captured in Afghanistan by UK forces will be accorded prisoner of war status under the Geneva Convention.
>
> **Mr. Hoon:** I am withholding the specific details of the guidance referred to, in accordance with Exemption (1a) of the Code of Practice on Access to Government Information. Whether any detainee is a prisoner of war depends on the facts of each individual case. It is for the Detaining Power in the first instance to take a view.

At
http://www.publications.parliament.uk/pa/cm200102/cmhansrd/vo020212/text/20212w09.htm#column_17

[102]Relevant treaties, legislation and case law include: Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty CETS No.114 (28 Apr. 1983), Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty in all Circumstances CETS No.187 (3 May 2002), Art IV Extradition Treaty (UK-U.S.), Human Rights Act 1998 (UK), *Soering v UK* (1989) EHRR 439 (finding that, where the death penalty was likely to be imposed, extradition to the United States was a likely breach of the European Convention on Human Rights). COL Stone, 10th Mountain Division SJA, indicated that this was an important consideration in her area during OEF. Because the United States had set up GTMO and the potential for Tribunals, with the possibility of the death penalty, the UK Commander was worried that if his troops picked up detainees, his Government would not permit him to turn them over to U.S., even if the detainee was Osama bin Laden himself. Stone E-mail, note 11.

[103]Art 12: Prisoners of War may only be transferred by the Detaining Power to a Power which is party to the Convention and after the Detaining Power has satisfied itself of the willingness and ability of such transferee power to apply the Convention. When prisoners of war are transferred under such circumstances, responsibility for the application of the Convention rests on the Power accepting them while they are in its custody. Nevertheless, if that Power fails to carry out the provisions of the Convention in any important respect, the Power by whom the prisoners of war were transferred shall, upon being notified by the Protecting power, take effective measures to correct the situation or shall request the return of the prisoners of war. Such requests must be complied with. There was also a question, which remains unresolved, regarding the legal obligations of a State that transports EPWs on behalf of another State. Under GPW,

During OEF there were early negotiations with the UK and Australia concerning detainees. No State, other than the United States, had adequate facilities to handle detainees. The OEF solution was that the United States would take detainees into U.S. custody, even if detention occurred during a multinational mission, but, in principle, the United States would not take detainees seized during a unilateral (no U.S. participation) mission. The U.K. made plans to take their detainees home if necessary, but that eventuality never occurred.[104]

In the initial stages of OEF, as a result of the short time frame before operations were began, it was difficult to discuss between coalition JAs some of the wide variety of legal issues that the nature of the enemy presented. Since the Taliban regime was not widely recognized, together with the mixed composition of the forces faced and the tactics used, unusual legal issues were faced. The lesson for coalition JAs must be that consultation and sharing of information is sometimes not possible for a period of time after an operation has began and therefore training in a wide variety of scenarios is essential in a JAs career.

Coalition JAs can expect to have requests for information about detainees from each other as well as the expected higher HQ, the ICRC and the media. Such requests can be sensitive and scenarios and responses need to be inserted into JAs training. In the modern battlefield detainees can come from a huge variety of countries and particular attention should be paid to scenarios where a detainee is the citizen of a coalition partner and this may have political ramifications and affect the public opinion of a coalition partner.

However, there remained difficulties associated with information and handling when detainees were captured on multinational missions. MAJ Lancaster, former Chief, Operational Law, 101st Airborne Division, reported:

> One problem there never was a good solution for was the issue of providing information on detainees captured in operations with coalition participation. When coalition forces were part of an operation that resulted in the capture of detainees, they sometimes expressed a need for information on those detainees, however once the detainees were inside

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obligations are placed on Detaining Powers and Accepting Powers. It is not clear whether a coalition partner who merely transports an EPW on behalf of the Detaining Power is an agent of the Detaining Power or becomes obligated under GPW as an Accepting Power for the period of transportation: *See* E-mail from SQNLDR Belinda Crooks-Burns, Royal Australian Air Force, former Legal Officer 86WG to SQNLDR Catherine Wallis, Royal Australian Air Force, Director, Coalition Legal Operations, Center for Law and Military Operations (9 Mar. 2004) . Other detainee issues that arose in the coalition context and merit further research include procedures for the investigation of the death of an EPW under circumstances where the cause of death is unknown or cannot be determined, what special conditions of combat prevent taking of prisoners of war and the treatment of surrendered places or forces under local cease-fire agreements or articles of capitulation: Whitford E-mail, note 7.

[104]Hayden interview, note 67; Hayden E-mail, note 38.

> the STHF [short term handling facility], almost no information was permitted to be shared. This also greatly hampered intelligence gathering, as members of the capturing units were never allowed inside the STHF, and the MI personnel that handled most interrogations rarely left their JIF.[105]

For OIF, the United States, UK, and Australia negotiated a trilateral arrangement establishing procedures for the transfer of EPWs, civilian internees, and civilian detainees.[106] Key aspects of the arrangement included:

- the ability to transfer these persons as mutually determined;
- a requirement for the accepting power to return the person to the detaining power on request;
- release or removal outside Iraq solely by mutual agreement;
- full rights of access by the detaining power, while the person is in the custody of the accepting power;
- sole responsibility of the detaining power for classification of potential EPWs;
- primary jurisdiction of the detaining power over pre-capture offences but with favorable consideration to a request by the accepting power to waive jurisdiction; and
- costs met by the detaining power.

This was a workable solution that addressed the three major issues and may provide a model for future operations. The lesson for JAs is to recognize that the detainee issue is of particular importance to a number of our regular coalition partners. Therefore, detainee-handling arrangements need to be finalized as early as possible in an operation.

JAs need to be aware of not only their own law, policy and regulatory structures but those of their coalition partners as well. This is vital when one country is providing the vast majority of detention facilities and taking detainees from their coalition partners. The matter is best addressed by early and regular contact between JAs from potential coalition partners with presentations and explanations being given of potential friction points and discussions of potential solutions. It was not absolutely clear to British forces as to what extent the European Convention of Human Rights (ECHR) would apply to their detention operations, as it was a new area of practice. British ALS officers would however have considerable experience and also be conscious of the changing operational and political environment, which could impact on their views as to their obligations under the ECHR. Coalition partners may have operational guidance on EPWs, assuming this is in an unclassified format the sharing of such information can only assist solve potential problems.

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[105] Lancaster AAR, note 10.

[106] 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).

In neither volume one nor volume two, of the CLAMO publications, legal lessons learned from Afghanistan and Iraq, are the issue of capitulation agreements, local ceasefire agreements, or parole discussed in detail from a coalition perspective. What is clear is that the potential mass surrender and capture of Iraqi forces is something that all coalition members faced and the limited resources that the coalition had at its disposal to deal with this issue would affect all coalition partners. In the future, it would appear that in military exercises and in the training of JAs, all coalition partners should place more emphasis on the importance of capitulation agreements, local ceasefire agreements and parole and that such matters should be addressed in any training or pre-deployment planning between coalition JAs.

U.S. Army JAs proposals to negotiate capitulation agreements and local ceasefire arrangements and releasing EPWs subject to parole agreements is exactly the sort of legal issue that could be worked and shared with all JAs in the coalition to alleviate a common concern and save valuable JA assets from separately having to consider and find solutions to the same problems. It would appear that, although late in the day, U.S. Army JAs researched and realized the potential importance of the old LOAC concept of capitulation, which could have the effect of reducing the operational impact of sustaining and protecting EPWs whilst also complying with the LOAC. U.S. Army JAs and British Army Legal Services (ALS) officers did discuss concerns about some of the inflexibility of capitulation agreements and the potential that they could be seen to be negotiating away the rights of a soldier to have EPW status and how local cease-fire arrangements had the potential to avoid this problem.

JA exchange programs, attending other coalition partners Op Law courses and studying previous operational experience from other countries as well as ones own and early interaction and conferences to discuss potential common legal problems and solutions would greatly assist the coalition and its cohesion and efficiency.

VIII.J. ALL COALITION PARTNERS MUST UNDERSTAND AND ACCEPT THAT SOME COALITION PARTNERS MAY HAVE DIFFERENT POLITICAL AND LEGAL INTERPRETATIONS AND LIMITATIONS PLACED ON THEIR FORCES

VIII.J.1. Internees and Detainees

Coalition arrangements and handling techniques for detainees must be discussed, understood, and refined. Differences in terminology and practice existed between members of the coalition which could lead to complications and misunderstandings.[107] In the post-occupation period in Iraq, aside from the U.S. and UK, most of the coalition was not permitted to get involved in detention operations. The U.S. did not have the same restrictions as the UK (i.e. detention was not permissible for intelligence exploitation alone). The U.S. used the word "detainee" to describe both detainees and security internees. During occupation, the UK classified detained persons as either detainees or security internees. Detainees were individuals suspected of committing criminal offences. Security internees were individuals who were suspected of being a threat to public safety.[108] Despite pre-dating the Iraqi Interim Government, UNSC 1546, dated 8 June 2004, provided the legal authority for UK personnel to apprehend, detain and intern persons for the maintenance of security and stability in Iraq in the post-occupation period. However, the grounds for determining whether an individual would be detained for suspected criminal activity in the post-occupation period was based on whether there was a reasonable suspicion that the individual had committed a criminal offence.[109]Individuals had to either be handed over to the Iraqi criminal justice system/Iraqi Police Service (IPS) or released.[110]

The policy across the coalition regarding capturing detainees varied greatly, depending on national caveats. United States forces would more readily detain individuals whereas the UK forces would detain individuals only if really necessary and then they would try to transfer hand them to the Iraqi Police service (IPS). The Italian

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[107] *See* Interview of Captain Mynors, ALS Officer at HQ, NDS SE with Lt Col Richard Batty, Director, Coalition Operations, Center for Law and Military Operations (14 March 2005).

[108] *Id.*

[109] *Id.*

[110] *See* Whitwham E-mail, note 10 (noting that during the period of his deployment many U.S. practices had changed. Prison facilities had improved and there had been more appeals and reviews resulting in many releases. The U.S. numbers of detainees had dropped from about 7,000 to 5,000 by the end of his tour. UK detainees had dropped from about 100 to 27. He stated that he had arrived in Iraq a few weeks after the Abu Ghraib publicity. He did not have any internee or detainee issues of any significance. The matter became a force issue (Multi National Force Iraq) rather than a Multi National Corps matter i.e. a strategic rather than a tactical issue if persons were being held for longer periods).

approach mirrored that of the British while the Dutch stopped detaining people after the Iraqi Interim Government surprisingly reintroduced the death penalty.

U.S. JAs need to possess, a basic grasp of the European Convention on Human Rights (ECHR) and the European Court of Human Rights and their potential impacts on coalition partners.[111] While certain political and legal differences of opinion and approaches did not affect the U.S., the existence of the European Convention and Court impacted the other members of the coalition. British Army Legal Services lawyers were quite aware of the possibility of a court ruling extending the applicability of the European Convention on Human Rights to territory in Iraq under British control and undertook substantial efforts to comply with the requirements of the Convention as a result. By the end of the tour, the High Court judgment in the case of Al-Skeini and others confirmed that ECHR applied to Iraqi territory under the control of the UK. These decisions affected a number of areas, including investigations.

VIII.J.2. Rules of Engagement/Use of Force.

The legal framework for the use of force may differ substantially between coalition partners with fundamental consequences. These differences must be studied and understood by coalition partners to insure clarity of purpose and mission while planning joint operations. Great effort must be made to stay current on the nuanced positions of different coalition members as these positions evolve as operations unfold. As a result, coalition legal advisors must be aware of the current legal and policy positions of their respective governments and other coalition partners. Coalition legal advisors should also endeavor to inform fellow coalition legal advisors of changes in their respective legal and policy positions, and the potential impact that such changes may have on operations. They must further bring such changes to the attention of operational planners. Coalition collaboration in drafting ROE must also be embraced.[112] In Afghanistan, such collaboration appeared to occur between members of the coalition, but work needed to be done to keep the "national caveats matrix" up to date and useful to the chain of command and the operators.[113]

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[111] *See* Hamers AAR, note 23 (stating that writing a detention policy for Afghanistan led to differences of opinion between U.S. and European legal advisors. Captain Hamers further stated that if European law and jurisprudence was more widely featured in Operational law handbooks, a considerable amount of time and misunderstanding would be saved as well as the delays in getting ISAF detention policy on such key issues as transferring detainees to local authorities, the role of the LEGAD and POLAD before, during and after the detention, cooperation with the ICRC, the standards of detention facilities operations and the duration of detention).

[112] *See,* Folwaij Report, note 4 (noting the NL forces used the ROE of MND (SE) which was prepared by UK forces without consultation from other members of the forces that made up MND (SE). Captain Folwaij further states that each country did then make their own caveats to the ROE for political reasons or because of their own domestic legislation).

[113] *See* Hamers, note 23 (noting that there was discussion on ROE and the issue of extended self

defense, between the U.S., UK, CA and NL legal advisors. There were differences of opinion as to whether an Apache flying on a QRF mission was operating under the principle of extended self defense or under the ROE and this was relevant when the weapons release authority was being considered. Further to make the national caveat matrix more workable the lesson identified and put into practice was to divide the ROE

With the end of major combat operations in Iraq, the legal framework for the use of force by UK forces changed to the application of UK law vice that of the law of armed conflict. The British Government viewed the situation as one of law enforcement and, the relevant UK use of force authorization became that of self defense. This position contrasted with the U.S. position that a state of international armed conflict continued to exist in Iraq.

The U.S. view on the existence of an international armed conflict granted the U.S. greater latitude to respond to spikes in violence that occurred in May, August and September, 2004. It also appeared, however, that the British ROE were also regarded as sufficiently robust and comprehensive to complete required missions. However, this required a robust interpretation of the ROE by UK troops in contact.[114] As an example, a number of "clearance" operations to re-establish freedom of movement were conducted in Al Amarah and Basrah and these operations did not constitute offensive operations. However, plans were created to assault and clear Mahdi Militia strongholds and had these plans been executed, it is likely that the British would have required Ministerial authorization for war fighting ROE.

In the lead up to the transfer of authority (TOA) to the Iraqi Interim Government on 28 June 2004, HQ I Mechanized Brigade in Basra had a significant increase in their legal work load as they prepared, trained, and introduced new MND (SE) policy and procedures on stop, search, detention and internment. I Mech Bde had anticipated the creation of a fundamentally different legal regime from that in existence during their deployment.[115] A policy for recording and investigating shooting incidents had to be prepared and reviewed in light of the volatile operational tempo prevailing in theatre. An existing shooting investigation policy proved to be practically incapable of being supported given the prolonged, high intensity engagements experienced in May, August and September 2004. While the purpose of the policy was proper– to record events in anticipation of future litigation at the European Court of Human Rights – adherence to the policy was difficult at best.[116]

The UK shooting and investigation policy serves to highlight a fundamental difference in the legal environment in which the UK and U.S. forces operated, and how

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matrix into 'use of force caveats' and 'employment caveats'. Consultation and communication between coalition members on ROE was used to ensure similar conduct by coalition members and proved useful for some new NATO members, for example – Estonia, Lithuania, Latvia and Bulgaria, all of whom did not issue 'Soldiers cards' to their troops. To facilitate this, a standard 'Soldiers card' was introduced and briefed at newcomers' briefings and to national contingent commanders and senior national representatives and was made part of the commanders OPLAN. Captain Hamers further stated that the importance of a weapons release authority matrix became evident when NL Apache came into the Afghan theatre as there were the two missions running side by side).

[114] *See,* Simpson, note 18.

[115] *Id.*

[116] *See, e.g.* McCann v UK, 13 Eur. H. R. Rep. 597 (1995).

these divergent understandings can have a significant impact on one member of the coalition and not the others. During the period of international armed conflict, it was clear that British soldiers enjoyed combatant immunity when killing enemy combatants. The legal position with respect to the use of force changed significantly in May 2003 to one of a self-defense environment. This constrained operational environment became difficult and divisive. Though it was transitioned to at a time when it was anticipated that the operational environment was becoming more benign, this was far from the reality of operations on the ground. While the aim was to work to comply with the potential application of the ECHR, this aim proved unrealistic at best given that the operational environment was filled with high intensity contacts. Some saw this approach to the use of force as a "Home Counties standards in an operational theatre." There were also principled concerns that the criminal investigation of soldiers who made decisions on the use of lethal force on a daily basis would negatively affect operational effectiveness and morale.

This concern became a reality in February, 2005 when a hearing took place in the Central Criminal Court, Royal Courts of Justice in London.[117]Trooper Kevin Williams of the 1st Battalion of the Kings Regiment was facing a charge of murder for actions resulting in the death of an Iraqi that Trooper Williams and others were trying to subdue. On the night of 2 August 2003, Trooper Williams had been on patrol when he and others of his unit came across some Iraqis moving ammunition. Some Iraqis were detained but one escaped only to be caught a short while later. A struggle ensued and Williams shot the Iraqi in the back of the head causing his death. Williams claimed that he acted in self-defense as he believed the Iraqi was trying to get hold of a pistol to kill or seriously injure Williams or one of his fellow soldiers. The case received huge publicity and demonstrated a widely held concern in the UK and its military about such prosecutions. Trooper Williams faced charges in the civilian criminal courts after the Army Prosecution Authority referred the case to the Attorney General when Williams' commanding officer refused to charge him. The Judge noted that "there are many people who genuinely believe that the prosecution of Trooper Williams is a betrayal of British soldiers who risk their lives for their country and who are expected to make difficult decisions in split seconds".[118]

Differences in ROE also impact the ability of personnel embedded with another coalition partner to function effectively and make joint operations far more complex. With U.S. and British soldiers working alongside each other, there were some tensions, difficulties, and a lack of understanding of the differences in their respective ROE as well as the reason for those differences within the coalition in relation to the level of force that could be used to defend property.[119] Towards the end of 2004, the UK position changed due to the belief that the situation on the ground had altered and deteriorated to a state of non-international armed conflict across Iraq between various insurgent groups and the

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[117] *See* Crown Prosecution Service Press Release *R. v. Kevin Williams* (7 Apr. 2005), *available at* http://www.cps.gov.uk/news/pressreleases/120_05.html (last visited 30Aug. 2005).

[118] Id.

[119] *See* Coombes E-mail, note 8.

Iraqi Interim Government. Such differences of opinion will have a major impact on the permissible actions of a nation's forces. Such distinctions do little to enhance coalition coherence and understanding unless military lawyers are aware of the different coalition partners' legal positions, either major or subtle, are cognizant of any different approaches to a situation, and are capable of explaining those positions and approaches to both soldiers and commanders.

The change in the position for British Forces meant that UK Forces might have occasion to use force in accordance with the Law of Armed Conflict, as opposed to defensive/law enforcement measures, and brought UK Forces closer to the U.S. legal footing. The revision of the legal framework altered the position of UK forces, allowing a more robust position by permitting offensive attacks against designated hostile elements, i.e. those insurgent groups assessed to be engaged in armed conflict with the Iraqi Interim Government and those operating under the command or in conjunction with the hostile elements. It was clear that the UK Attorney General would take an interest in any offensive operations and that the more robust stance was only to be adopted where the defensive/law enforcement measures were insufficient.

VIII.K. DEVELOP A PLAN TO COORDINATE INVESTIGATIONS

Investigations during coalition operations can take on a more complex nature than one might expect. Their scope can present unusual challenges which will vary with each operation. War crimes investigations can be anticipated and may take the form of allegations against the host nation regime, against the opposing forces or against coalition forces. There is the issue of who is to conduct these investigations and if there are no outside investigators available where they would normally be warranted, military investigators or service personnel must receive some training as they may be required to step into the vacuum. There is always the potential of war crimes investigations being made of coalition troops and that may not present JAs with many unexpected issues, but if a unit had personnel attached from a number of coalition partners this may present some unique issues. There are likely to be ordinary criminal investigations made against military personnel as well as host nation civilian if there is a collapse in the domestic rule of law infrastructure. Administrative investigations may have to involve personnel from more than one coalition country to be effective and this will present issues some of which can be anticipated and addressed before a deployment. Coordination and discussions between JAG personnel will assist address these issues which can prove to be very high profile, if for example the investigation involves a blue on blue incident which leads to the loss of life.

During OEF and OIF JAs were required to conduct, or provide advice on, a range of investigations, including accident investigations and war crimes investigations. War crimes investigations will likely gain the attention of the world media and human rights organizations. Although such investigations are not in the domain of the military, members of a coalition may have to accept in the absence of an international or local organization tasked and capable to conduct investigation. The coalition may have to provide some capability to make investigations or at the very least preserve sites of potential interest or provide security for those sights.

When working in a coalition, incidents that give rise to investigations may involve members of more than one coalition partner. For example, the accidental bombing in April 2002 of a Canadian unit by a U.S. F-16 in Afghanistan and the 23 March 2003 shoot down of a U.K. warplane by a U.S. Patriot missile battery near the Iraq–Kuwait border.[120]

Coalition partners will have their own national requirements for investigations and for this reason it may not be possible for all partners to adopt the same policy. A V Corps JA described the impact of these differences.[121]

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[120]See Michael Moran, "Friendly Fire" Is All Too Common: British Know Better Than Most the Dangers of Teaming With U.S. Military, MSNBC, (Mar. 23, 2003) at http://msnbc.msn.com/id/3340194.

[121]E-mail from LTC Jonathan Kent, Chief, Administrative and Civil law, V Corps to SQNLDR Catherine M. Wallis, Royal Australian Air Force, Director, Coalition Legal Operations, Center for Law and Military Operations (6 Apr. 2004).

> What should and should not be reported through legal channels and command channels was a constant source of tension. While this issue remains unresolved I feel it is important that JAs discuss what incidents each coalition partner will investigate and what information will be released. For example blue on blue incidents, check point shootings, and engagement of apparently unarmed civilians, were all issues that coalition partners each had distinctly different approaches to the identification, investigations, and release of information. Coalition partners felt no obligation to follow CJTF7 SOP absent some affirmative agreement from their national element.[122]

While there is no simple solution, the lesson suggested is that early discussion of procedures for handling incidents may minimize the impact of national policy differences on the operation.[123]

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[122] *Id.*

[123] *See* Wold E-mail, note 7 (reporting that "not discussing how these types of incidents will be handled beforehand just makes the job tougher later on.")

VIII.L. UNDERSTAND THE LIMITATIONS ON COALITION EXCHANGE PERSONNEL IN U.S. UNITS

The United States has a number of permanent exchange positions with other States. When a U.S. unit deploys, those foreign exchange personnel may also deploy with the U.S. force. These foreign personnel may or may not come from States who are members of the coalition. Conversely, U.S. personnel on exchange with coalition partners may deploy to the AO as part of their exchange country force. This occurred during both OEF and OIF.

One issue that may not be readily apparent to commanders is that these exchange personnel must comply with their own domestic law while they are on operations. Accordingly, problems may arise if an exchange officer has domestic law that is more restrictive than the exchange nation law. For example, issues may arise for coalition personnel serving with U.S. forces in the areas of use of APL, use of RCAs, use of lethal force or pursuit across international borders. Conditions may be placed on the activities of these personnel by their government.[124] For example, an Australian soldier on exchange with a U.S. unit would not be permitted to use APL, and may have needed to be excluded from a particular mission that involved APL use.

It is important that commanders are advised of the limitations of their exchange personnel from the outset in order to ensure that this issue does not derogate from the success of the operation.

[124] An example of these restrictions (classified SECRET) is held on file with CLAMO. *See also* Comments by GEN Peter Cosgrove, Chief of Defence Force (Australia), as reported in Cynthia Banham, *We learnt our lesson in Iraq, says ADF,* THE SYDNEY MORNING HERALD (24 Feb. 2004) *at* http://www.smh.com.au/articles/2004/02/23/1077497517476.html (Australian personnel on exchange with the U.S. or UK forces needed to abide by Australian rules: "we just needed to ensure that our officers--working very usefully with coalition forces--knew what the differences were, conveyed those to their superiors, and that that was factored into their tasking.")

VIII.M. LIAISE WITH COALITION PARTNERS TO REDUCE THE IMPACT OF DIFFERING STANDARDS OF BEHAVIOR

During the post conflict period of both OEF and OIF, some coalition elements continued to be based with U.S. forces. The differing rules and standards of conduct remained in place so that coalition partners were responsible for the discipline of their own forces.[125] Such differences between coalition partners and their civilians and contractors can lead to tensions. However, coalition members can avoid such tensions if they understand the different positions of other coalition members, and treat them with discretion and mutual respect.[126]

Similarly, coalition members must be cognizant of different national policies on war trophies. In Operation Joint Guardian, OEF and OIF a coalition war trophy policy never existed and there was some support for attempting to reach such a policy, or at least some consistent approach.[127] The different policies among coalition partners led to a feeling of "haves" and "have-nots."All coalition partners will face issues of the distinction between war trophies and historical artifacts and to the extent possible there should be consistency across the coalition.

Finally, investigations into misconduct by personnel continue to require careful consideration in multi-national operations. The issue of who has the authority to investigate and take administrative and disciplinary action must be clear to all involved in the chain of command.[128]

During both OEF and OIF, some coalition elements were situated on U.S. controlled bases. For example, at Bagram Air Force Base, the U.S. Base Commander had coordinating authority over the location of coalition forces on the base, as well as their conduct and security.[129] These coalition elements will need to be able to access orders

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[125] See CENTER FOR LAW AND MILITARY OPERATIONS, THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER AND SCHOOL,U.S.ARMY,LEGAL LESSONS LEARNED FORM AFGHANISTAN AND IRAQ,VOLUME 1:MAJOR COMBAT OPERATIONS (11 September 2001 – 1 May 2003) at 129 (1 Aug 2003).

[126] *See* Lt Col Coombes AAR, note 8.

[127] *See* Squadron Leader Renee Jensen, Royal Australian Air Force, After Action Report (27 Jan. 2005) [hereinafter Jensen AAR] (stating that she was in total support of such a uniform coalition approach. SQNLDR Jensen stated that Australia started to allow war trophies albeit with limitations but that individuals found ways around the rules which led to a complete ban which proved unpopular).

[128] *See* Hamers AAR, note 23 (stating that this issue was raised after allegations of misconduct by ISAF HQ personnel. There was a "requirement to remind some that the HQ command is authorised to initiate a fact finding mission but this must be done in close cooperation and coordination with the national contingent commander or senior national representative of the accused to recognise national legal issues since the authority to conduct disciplinary or administrative action lies with the national contingent.").

[129] Hayden E-mail, note 38.

and publications that apply to them as "tenants." This may be coordinated through the respective national attorneys.

Coalition partners are responsible for the discipline of their own force. Operating in close proximity to coalition partners exacerbates issues arising from the different policy approaches of each nation. While U.S. forces are generally subject to overarching orders detailing minimum standards of behavior, such as CENTCOM General Order No. 1a, coalition partners may not necessarily issue such orders or may issue orders that are more or less strict.[130]

For example, U.S. forces in both OEF and OIF were subject to CENTCOM General Order No. 1a, which prohibits several forms of conduct including the consumption of alcohol in some countries. However, some coalition partners faced no such restriction. British forces when on operations may be ordered not to drink alcohol, but are normally expected to follow what is known as "the two can rule". What exactly the two can rule means depends on the guidance given by the command. It could range from literally being able to purchase two cans of beer within a 24 hour period, which are opened and should then be consumed at that time and place to observing the spirit of the rule, which is not getting drunk. On operation Joint Guardian, British forces in the KFOR 1 HQ were permitted to drink wine, beer and spirits but all were to be consumed in moderation. Soldiers and officers who broke the rule would be removed from theatre in disgrace. During OEF, U.S. soldiers were tempted to drink alcohol around coalition forces, and this became a growing discipline problem in some areas.[131] Also reported was dissatisfaction amongst CENTCOM forces, which were subject to restrictions on the purchase of antique firearms and other weapons and souvenirs, while coalition forces on the same base were not.[132] In contrast, one JA reported that the coalition forces in his area had quite a harsh approach to motor vehicle accidents, resulting in more severe action against the individual than the United States would have taken in similar circumstances.[133]

While the United States cannot impose its standards on coalition forces, liaison on these issues is appropriate as behavioral standards may affect internal discipline or the coalition relationship with the local population. Local coalition commanders may well be sympathetic to these issues and ensure consistent standards are applied.[134]

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[130] *See* further USAF OPLAW, note 8 at 346.

[131] Hayden E-mail, note 38.

[132] Stone E-mail, note 11.

[133] Hayden E-mail, note 38.

[134] *See* Kalnins E-mail, note 13 (reporting that the coalition attorneys met weekly to discuss camp management of common issues including alcohol and other disciplinary matters).

VIII.N. Conclusion

When preparing an AAR wide consideration needs to be given to coalition issues and to capture as many of these as possible. Care must be taken not to just look at one particular HQ, particularly a national one, as many valuable lessons could be lost.[135] Many of the coalition legal issues from Afghanistan and Iraq carried over from the war-fighting phase to post conflict operations. However, unanticipated issues and substantial challenges arose as well. Coalition members continued to have different legal, political, and policy obligations, as well as different interpretations of shared obligations between coalition members. The successful management of coalition legal issues and policy constraints was often achieved by early and continuous liaison in order to better understand the stance of a coalition partner.

Recording the legal experiences of deployed legal officers and collating legal lessons learned in a format that can be used in future training is essential to preserve the experiences of serving legal officers, but it is not necessarily easy for all coalition partners. The U.S. Army has incredible judge advocates resources when compared to other coalition partners. The U.S. Army's Judge Advocate General's Corps has a well established system for collecting and using legal lessons learned that can then be maintained in the public domain and used for training. Other coalition partners do not have the extent of resources to devote to collating post operational tour reports, and even when these exist, security classifications can often prevent disclosure of identified legal issues. Legal lessons learned, or a record of operational legal issues encountered, would normally appear as a chapter in a HQ after action report, the whole of which would likely have a security classification. Added to the issue of security classification is the reluctance of a number of coalition partners to provide comments that are published in the public domain and could be seen as critical of other coalition partners. The development of working relationships between coalition legal advisors to understand and learn about potentially different approaches and legal views is an important aspect of successfully working together as an integrated coalition. The U.S., UK, and Australian legal exchange programs should be strengthened even more as it is a primary means of fostering the type of interoperability training that was at times quite a challenge in OEF and OIF. A better understanding of the significant legal issues encountered during this time frame must be incorporated into all coalition legal officers' training if they are to succeed in future coalition operations.

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[135] LAW AND MILITARY OPERATIONS IN KOSOVO 1999 -2001 CENTER FOR LAW AND MILITARY OPERATIONS U.S. ARMY JUDGE ADVOCATE GENERAL'S SCHOOL 15 DECEMBER 2001 deals largely with lessons learnt in the exclusive U.S. or dominated army HQ. Little information appears to have been collected from the HQ of the Kosovo Force where there were U.S. JAs and the U.S. was the second biggest troop contributing nation in the multi national HQ.

IX. INTERAGENCY OPERATIONS

Introduction

Every major military operation in which the United States has participated over the last 12 years, the Department of Defense (DoD) has required the cooperation and assistance from differing United States Government (USG) entities. On numerous occasions, the failure of U.S. commanders to understand the nature, role, limitations and capabilities of these organizations has led to confusion on the battlefield and in subsequent actions an unnecessary expenditure of resources or needless risking of lives. As a tribute to the reputation of judge advocates (JA's), they will often be called upon to act as the command's "professional liaison officer." This will require them to communicate and work with these other USG agencies. It is therefore crucial to understand aspects of the chain-of-command, organization, responsibilities, and structure of such agencies.

History

The stance of the United States towards initiating or participating in activities overseas was drastically altered by the experience of World War II and its aftermath. Among the major indicators of the changed U.S. attitude was the U.S. supported establishment of the United Nations. Moreover as the Cold War developed the U.S. found itself involved in activities that required more than military support. Indeed some aspects of these activities involved stabilization, reconstruction, nation-building and other civil-oriented matters. Often the expertise for such activities was not available in the U.S. military, which is organized, equipped and trained for war fighting. Recognizing the need the U.S. expanded the capabilities of the U.S. Department of State and established the U.S. Agency for International Development (AID). In addition, with some planning and preparation, in appropriate circumstances, the U.S. could draw upon specialized expertise of other civilian agencies such as Agriculture, Commerce, Treasury, and health related organizations. As these civil activities became more prevalent, the need for coordination with the often concurrent military activities was apparent.

As the Cold War drew to a close and in its aftermath, the U.S. has been obliged to face an increasing number of foreign crises that have been complicated and urgent, and have often involved complex interactions between economic, military, political, cultural, religious, and other forces. These crises have underscored the need for cooperation between the U.S. military, the foreign policy agencies, and a variety of other civilian agencies, depending upon the circumstances.

There are a number of different circumstances where interagency cooperation can be of considerable importance to the successful implementation of U.S. policy and accomplishment of U.S. goals. Some of the most prominent possibilities are set forth below.

IX.A. RECONSTRUCTION AND STABILIZATION

Many parts of the world have unfortunately become characterized by governmental instability and occasionally almost total failure. In addition ethnic strife and violent religious conflict have erupted in various locales. These problems have too frequently resulted in armed conflict and terrorism that often is a direct threat to regional security, stability and international peace. The international community and the U.S. have recognized that many of such crises could benefit from reconstruction and stabilization activities. An additional benefit, of course, would be the reduction in the threat to international peace and order. In this regard the U.S. has recently taken steps to plan for and organize its potential response to the need for reconstruction and stabilization assistance.

To this end the Department of State has established an Office of Reconstruction and Stabilization to lead U.S. efforts at assisting other countries. Also, the Department of Defense has recently promulgated a Directive providing guidance for military support for Stability, Security, Transition, and Reconstruction (SSTR). Significantly, the President has issued a new Presidential directive delineating responsibilities for such efforts.

IX.A.1. Department of State - Office of the Coordinator for Reconstruction and Stabilization

In July 2004, the Secretary of State established the Office of the Coordinator for Reconstruction and Stabilization (S/CRS) to lead U.S. efforts at assisting other countries in transition from conflict and to help them reach a sustainable path toward peaceful, democratic and market-oriented societies. The Coordinator reports directly to the Secretary of State.

The S/CRS Office was founded with the agreement of the National Security Council in order to coordinate U.S. planning activities across federal agencies. The emphasis will be to strengthen the U.S. Government's institutional capacity to deal with crises in failing states and to reconstruct and stabilize societies recovering from conflict and civil strife. The S/CRS will engage interagency partners to identify states at risk of instability and focus attention on policies and strategies to prevent or mitigate conflict.

In particular, the S/CRS goal is to provide an operational field response to post-conflict situations that will emphasize transformational diplomacy to include, among other things: facilitation of peace implementation processes; coordination with international and local institutions and individuals that are developing transition strategies; implementation of transitional governance arrangements; encouragement of conflicting factions to work together; development of strategies to promote transitional security; coordination with other USG agencies and the U.S. military; coordination with foreign agencies and armed forces; and, if necessary, preparation of a diplomatic base on the ground.

Active Response Corps

Operational experiences in Haiti, Somalia, the Balkans, Afghanistan, and Iraq have demonstrated vividly that a civilian field presence is essential in the very first stages of a reconstruction/stabilization mission, both to keep Washington informed of the situation and to shape the tactical-level environment for follow-on civilian elements. Accordingly, the Department of State is planning on forming an Active Response Corps (ARC) of State Foreign and Civil Service personnel who will be a select, dedicated full-time, specially-trained group for short-notice deployment as "first responders" to reconstruction or stability operations. The deployments may be with or without U.S. military forces, and possibly in conjunction with or attached to a UN or international mission. When not deployed, ARC personnel will be training, in USG exercises, or in State Department bureaus assisting with preparing and planning for countries or regions facing reconstruction or stabilization challenges.

The State Department is utilizing volunteers from State Foreign and Civil Service personnel. Training is important to the success of the ARC, and all personnel will receive training in area studies, emergency first aid, personal and group security, field communications systems and living in a field environment. Personnel will be frequently participating in staff and field exercises with the military, other agencies, and partner countries.

Standby Response Corps

The State Department is also planning to establish a Standby Response Corps (SRC) of volunteer Foreign and Civil Service Officers. These individuals will supplement the skills available in the ARC and be prepared to follow on behind the ARC to support transition efforts over the longer term. These officers will continue to perform their current duties in the Department or overseas, but as resources permit will participate in training or in exercises with the S/CRS or ARC.

IX.A.2. Department of Defense

DoD Directive Number 3000.05: Military Support for Stability, Security, Transition and Reconstruction (SSTR) was promulgated in recognition of the need for policy and direction in such crises. This Directive establishes DoD policy, provides guidance on stability operations, and assigns responsibilities within the DoD for planning, training, and preparing to conduct and support stability operations pursuant to the legal authority of the Secretary of Defense (see, 10 U.S.C. 113,153) and the responsibilities assigned in the Strategic Planning Guidance, FY 2006-2011, March 2004. The Directive applies to the OSD, the Military Departments, CJCS, Combatant Commands, and all other organizational entities in the DoD (i.e. the "DoD Components").

Policy

DoD policy is that stability operations are a core U.S. military mission that the Department of Defense shall be prepared to conduct and support. They shall be given priority comparable to combat operations and explicitly addressed and integrated across all DoD activities including doctrine, organizations, training, education, exercises, materiel, leadership, personnel, facilities, and planning. U.S. military forces shall be prepared to perform all tasks necessary to establish or maintain order when civilians cannot do so.

Goals

The immediate goal of stability operations is to provide security, restore essential services and meet humanitarian needs. More long-term goals are to develop local capacity for securing essential services, a viable market economy, rule of law, democratic institutions and a robust civil society.

Tasks

Many stability operations are best performed by indigenous, foreign, or U.S. civilian professionals. Nevertheless, as noted above, the U.S. military must be prepared to perform all tasks necessary. Stability operations tasks may include: rebuilding indigenous institutions including various types of security forces, correctional facilities, and judicial/law enforcement systems necessary to secure and stabilize the environment; revive or build the private sector, encouraging citizen-driven, bottom-up economic activity and constructing necessary infrastructure, and; developing representative governmental institutions.

Interagency and Intergovernmental Cooperation

Successful stability operations need proper integration of civilian and military efforts. DoD will be prepared to work with other U.S. agencies, foreign governments and forces, international organizations, and U.S. and foreign non-governmental organizations, and the private sector.

DoD will lead and support the development of military and civilian teams, and participation shall be open to personnel from other U.S. agencies, foreign sources, international organizations, nongovernmental organizations and the private sector. Assistance and advice shall be sought from the Department of State and other U.S. agencies.

IX.A.3 Presidential Directive

On December 7, 2005, President Bush issued National Security Presidential Directive (NSPD) 36, providing that the Secretary of State shall coordinate and lead integrated U.S. Government efforts, involving all U.S. Departments and Agencies with

relevant capabilities, to prepare, plan for, and conduct stabilization and reconstruction activities. When the U.S. military is involved, the Secretary of State shall coordinate such efforts with the Secretary of Defense to secure harmonization with any planned or ongoing U.S. military operations across the spectrum of conflict.

The goal of these improved capabilities should enable the United States to help governments abroad exercise sovereignty over their own territories and prevent those territories from being used as a base of operations of safe haven for extremists, terrorists, organized crime groups or others that pose a threat to U.S. foreign policy, security, or economic interests.

Conclusion

The establishment of the S/CRS, coupled with the issuance of the new DoD Directive, together with the guidance provided by the new Presidential Directive provides an opportunity for the United States to plan ahead and coordinate future responses to emergencies in failed states requiring some level of U.S. involvement in reconstruction and stability operations. The designation of the State Department as lead in this area, but with the requirement for coordination with the DoD when the U.S. military is involved will provide an opportunity for fruitful cooperation within the USG that should lead to much more efficient and effective future U.S. responses to international crises. In particular the new DoD policy that stability operations are a core responsibility provides the opportunity to view such problems in a new perspective. Hopefully, these new approaches will help avoid some of the difficulties that the U.S. has encountered in previous efforts to address such issues in countries such as Bosnia, Afghanistan and Iraq.

IX.B. CONTINGENCY OPERATIONS

Although foreign policy crises have confronted the U.S. for many years, from the early 1990's the U.S. has faced a number of difficult problems in a relatively short period of time that have required interagency cooperation among the Department of State, the Department of Defense, and many other civilian agencies. During the Clinton Administration, the need to improve interagency cooperation was recognized and Presidential Decision Directive (PDD) 56 - Managing Complex Contingency Operations, was promulgated on 20 May 1997, to address the problem. The structure of interagency cooperation established by PDD 56 was changed on 13 February 2001 by the issuance of National Security Presidential Directive (NSPD) 1 by the Bush Administration. NSPD 1 provided that oversight of interagency operations would be performed by appropriate regional National Security Council Policy Coordination Committees.

A non-exhaustive list of different contingency operations and examples of agencies that could be involved in interagency cooperation in each follows.

IX.B.1. Natural Disaster Assistance

Conducted at the request of the country to be assisted, such operations provide material assistance to alleviate physical, social, and economic consequences of acts of nature such as hurricanes, tsunamis, earthquakes and epidemics. Some examples include assistance for the Indian Ocean tsunami in 2005, the Indonesian earthquake in 2006, and the Central American hurricane in 1998. Some of the USG agencies involved in relief efforts were DoD, State, the Agency for International Development (AID), Agriculture, the Forest Service, and the Department of Health and Human Services (HHS). Some international organizations also participated, including the Cooperative for Assistance and Relief Everywhere (CARE), Catholic Relief Services, and Medicins Sans Frontieres (Doctors Without Borders).

IX.B.2. Peacekeeping

This category includes peacekeeping, peace enforcement, and peace building. Such operations help establish the security, political, legal and economic conditions required to begin rebuilding countries that have been the locale of armed conflict. These operations are distinguished from stability and reconstruction operations principally because their scope is narrower and the timeframe much more limited. Representative tasks would include enforcement of ceasefire agreements, policing, administration of detention facilities, establishing court systems, apprehending suspected war criminals, and removing mines and unexploded ordinance. Examples of such operations include Afghanistan, Kosovo, Bosnia, Haiti and Somalia. U.S. agencies involved have been DoD, State, AID, Justice and HHS. International organizations participating in aspects of such operations have been the UN High Commissioner for Refugees (UNHCR), The International Committee of the Red Cross (ICRC), and the Oxford Committee for Famine Relief (Oxfam).

IX.B.3. Noncombatant Evacuation Operations

Noncombatant evacuation operations (NEO) are conducted by U.S. military forces to evacuate U.S. citizens, as well as certain foreign nationals (such as diplomats, aid workers and other foreign nationals that may be in great peril if left in place), from dangerous situations, either man-made or natural. For the most part, the U.S. conducts NEOs in other nations under its authority pursuant to international law to protect its citizens when those nations are unable or unwilling to provide necessary protections, however, in some circumstances the U.S. may be acting under the aegis of international humanitarian emergency relief. Depending on the situation, NEOs may or may not be conducted with the permission of the country in which they occur. Representative tasks include transport, food supply, communications, facility security for the evacuation area (often a U.S. Embassy) and provision of medical assistance. Examples of NEOs were in Somalia in 1991 and Liberia in 1996. The geographic Combatant Commander has overall responsibility for the military aspect of the operation, and maintains close cooperation with the State Department regarding foreign affairs considerations. The Marines, usually based on Navy ships offshore, and supported as necessary by the Army and Air Force, are often tasked with executing NEOs.

IX.C. U.S. GOVERNMENT AGENCIES

There are a host of issues that can arise in contingency operations. In addition, reconstruction and stabilization operations could possibly encompass issues that would cover the entire gamut of governmental functions. Such operations or their aspects could therefore entail the participation of a wide number of U.S. Government civilian agencies. Although it would not be feasible to describe every possibility, there are five agencies that are active in the most typical operations. The Department of State, the Agency for International Development, the Department of Agriculture, the Department of Justice, and the Department of Health and Human Services.

IX.C.1. Department of State

The Department of State (DOS) is the lead U.S. Government Agency for formulating and implementing U.S. foreign policy. DOS also is responsible for coordinating and leading U.S. Government efforts for stabilization and reconstruction operations. DOS advances the national security, economic and other interests of the U.S. with foreign governments and public ands private international organizations. DOS supports and coordinates activities of DoD and other U.S. government agencies that involve foreign affairs. In addition, DOS is responsible for U.S. consular services in other countries to help and protect U. S. citizens abroad and also evaluates foreigners for visas to visit or immigrate to the United States.

The DOS employs diplomacy to advocate and support U.S. policies to foreign governments, foreign groups, and international organizations and bodies. Also DOS endeavors to obtain the positions of foreign governments on issues important to the U.S. and to ascertain the views and attitudes of foreign populations on such issues. DOS posts abroad (embassies, consulates and other establishments) actively gather information about political, economic, military, and other matters of interest or concern to the U.S. DOS conducts negotiations for treaties and other international agreements, provides policy and fiscal oversight for economic development, military and foreign assistance programs, and coordinates international activities of U.S. sate and local agencies.

Structure

DOS consists of its headquarters located in Washington, some support offices in the U.S., and field offices at embassies, missions and consulates around the world. The principal DOS headquarters elements are its regional and functional bureaus. The six regional bureaus are African, East Asia and Pacific, European and Eurasian, Near East, South Asian, and Western Hemisphere. The seven functional bureaus are Political-Military; Population, Refugees and Migration; Democracy, Human Rights, and Labor; International Narcotics and Law Enforcement; International Organization; Consular Affairs; and Diplomatic Security. These bureaus are often involved in contingency operations, as appropriate or directed, in the areas for which they are responsible. In addition, embassies and other field posts may also be involved. So for example, a natural

disaster could require the participation of DOS personnel from the regional bureau, one or more functional bureaus, and the local embassy.

DOS also has a legal office, the Office of the Legal Adviser (L), that provides legal advice to the Secretary, and through the Secretary to the National Security Council and the President on all problems arising in the course of DOS activities. Sub-divisions of L exist to advise the regional and functional bureaus. The Legal Advisor is responsible for maintaining copies of all U.S. treaties and international agreements, and reporting of same to Congress in fulfillment of the requirements of the Case-Zablocki Act.

Overseas the DOS maintains diplomatic and consular offices in almost every country in the world. A U.S. Ambassador (Chief of Mission), heads U.S. embassies and is the President's personal representative. As such, the Ambassador is the senior U.S. official, and by law coordinates, directs, and supervises all USG activities and representatives in that country. Ambassadors do not, however, control USG personnel working for the head of a U.S. Mission to an international organization, or U.S. military personnel operating under the command of a geographic Combatant Commander.

IX.C.2. Agency for International Development

The Agency for International Development (AID) is an independent Agency operating under the overall foreign policy guidance from the Secretary of State. AID formulates and executes U.S. foreign economic and development assistance policies, and is the lead USG agency for foreign disaster assistance. AID provides humanitarian assistance and development assistance. Humanitarian assistance usually consists of short term disaster assistance, emergency food programs, and other temporary aid. Developmental assistance supports long term economic growth, agriculture and trade, health, and democracy and conflict prevention.

AID's responsibilities for response to natural and manmade disasters are of particular importance to contingency operations. Aid programs focus on disaster prevention, preparedness and mitigation; timely delivery of disaster relief and short term rehabilitation supplies and services; preservation of civil governance during crisis; support for democratic institutions during transition periods; and enhancing local capacity to anticipate and deal with disasters.

Structure

AID is directed by an Administrator, who reports to the Secretary of State and the President. The headquarters of AID is in Washington, and like the DOS, AID's organization is mainly in geographic and functional bureaus. AID has four geographic bureaus, Sub-Saharan Africa, Asia and the near East, Latin America and the Caribbean, and Europe and Eurasia. The principal functional bureau with responsibilities for contingency operations is the Bureau for Democracy, Conflict and Humanitarian

Assistance. In turn, this bureau is divided into five offices, Foreign Disaster Assistance, Food for Peace, Private and Voluntary Cooperation, Transition Initiatives, and Democracy and Governance. There is also a legal office, the Office of the General Counsel, which is sub-divided into offices to provide advice to the functional and geographic bureaus.

Overseas AID maintains bilateral country missions, regional offices, and missions to international organizations. The staffing and organization of overseas offices is often dependent upon the scope and expected duration of the AID assistance program in a particular country.

IX.C.3. Department of Agriculture

The Department of Agriculture (USDA) is the lead U.S. Government agency for policy matters relating to agriculture, forests and food supply. USDA programs for international humanitarian food aid, long-term agricultural development, and forest disaster assistance are of particular importance in contingency operations. Ordinarily USDA provides assistance by distribution of excess U.S. commodities, furnishing technical and scientific agricultural expertise, supplying disaster assistance training, and, as appropriate, delivering logistics assistance.

Structure

USDA is composed of a headquarters in Washington, D.C., various domestic elements, and agricultural counselors and attaches located mainly in U.S. embassies world-wide. The headquarters is the home location of the Secretary of Agriculture. Of chief relevance to contingency operations are the international food and development programs that are administered by the Foreign Agricultural Service (FAS) supported by the Farm Service Agency.

The USDA's overseas activities are the responsibility of the FAS. These include market development, international trade agreements, food aid programs, and the collection and analysis of market information. The Farm Service Agency handles the procurement, storage and transportation of commodities on behalf of the FAS.

The U.S. Forest Service has extensive experience and capability in emergencies that take place in remote areas, therefore it provides management and technical support that relates to disaster assistance, preparation, and response in such emergencies.

IX.C.4. Department of Justice

The Department of Justice (DOJ) is the chief law enforcement agency of the United States. The Attorney General of the United States is the head of DOJ. The Federal Bureau of Investigation (FBI) and the Drug Enforcement Administration (DEA) are parts of DOJ. The U.S. Attorneys that prosecute offenders and represent the U.S. Government in court are part of DOJ. The DOJ has a huge domestic mission that

involves every aspect of legal representation and advice for and to the U.S. Government. For purposes of contingency operations, the Criminal Division of DOJ is of most relevance, as it has oversight of programs that assist in the development of foreign police forces, prosecutors and judicial officers.

The Criminal Division of DOJ develops and enforces criminal laws domestically, but also negotiates with foreign governments for assistance in criminal law enforcement matters and provides assistance to foreign criminal justice systems based on international law, human rights and the rule of law. Within the Criminal Division are the International Criminal Investigative Program (ICITAP) and the Overseas Prosecutorial Development, Assistance and Training Office (OPDAT). These two sub-divisions are of particular importance to contingency operations.

ICITAP provides technical advice, training, mentoring, equipment and internships to develop foreign police agencies (and enhance existing police forces) in the context of peacekeeping operations and assistance programs. OPDAT coordinates the training of foreign judges and prosecutors. It often operates in close coordination with U.S., embassies for this purpose. Additionally, OPDAT is involved in efforts both public and private to show and explain the U.S. legal system and criminal justice process to foreign visitors.

Structure

The DOJ is composed of a headquarters in Washington, DC, and is headed by the Attorney General of the United States. There are DOJ offices throughout the U.S., mostly headed by U.S. attorneys. Although the domestic operations of DOJ would seldom impact contingency operations, there are 39 separate components that are the responsibility of Assistant Attorney Generals or of U.S. Attorneys. As noted above, the Criminal Division, the ICITAP, and the OPDAT support contingency operations.

IX.C.5. Department of Health and Human Services

The Department of Health and Human Services (HHS) protects the health and human services for all Americans. HHS directs more than 300 programs, including medical and social science research, disease prevention and control, immunization, food and drug regulation, health research, aging, children and families, and medicare and medicaid. Clearly the main mission of HHS is domestic. Of importance to contingency operations, however, are the Public Health Service (PHS) and the Office of International Affairs.

The PHS includes a uniformed service of about 6000 professional health care officers. The National Institutes of Health (NIH) conduct and support research in human diseases, human growth, environmental contaminants, and mental and physical disorders. They also collect, disseminate, and exchange information about medicine and health domestically and internationally. The Center for Disease Control and Prevention (CDC) protects health both at home and abroad by serving as the U.S. focal point for the

development and application of disease prevention and control, environmental health, and health education activities. It also cooperates with public and private foreign health entities.

The Office of International Affairs represents HHS to other governments, international organizations and the private sector on international and refugee health issues. It also develops U.S. policy positions on health issues and works with other agencies to advance and support these policies both domestically and internationally.

Structure

HHS is headquartered in Washington, DC, and its chief officer is the Secretary of HHS. There are eleven operating divisions, eight public health agencies and three human services agencies. Although the chief component of HHS is domestic, the PHS is of particular importance to contingency operations, as it contains the NIH and CDC. The Office of International Affairs is within the Office of the Secretary of HHS.

IX.D. INTERNATIONAL AND NON-GOVERNMENTAL ORGANIZATIONS

There are numerous international and non-governmental organizations (NGO's) that can, under appropriate circumstances, become involved in contingency operations. The principal international organization that is likely to be involved is the United Nations (UN). However, there are regional organizations such as the North Atlantic Treaty Organization (NATO), the Organization of American States, and the Organization of African Unity that could be a factor. Moreover, there are many international organizations such as the International Atomic Energy Agency, the International Labor Organization, the International Energy Agency, and the Organization for the Prohibition of Chemical Weapons that conceivably could play a role, albeit specialized, in some operations. Some discussion of the UN and NATO, the most likely organizations to be encountered in contingency operations follows.

IX.D.1. United Nations

The UN includes as members almost every country in the world. Upon joining the UN countries agree to accept the obligations of the UN Charter. The best known of these obligations is the renunciation of the use of force in international relations except in self-defense or with the authorization of the UN. The Charter gives the UN Security Council (UNSC) the primary responsibility for maintaining international peace and security. The UNSC can take measures, including the use of force, to enforce its decisions. The UNSC is the only UN component that can authorize the use of force. The UNSC prefers peaceful solutions and seldom authorizes the use of force, instead often imposes economic sanctions or arms embargos, or sends peacekeeping missions to crisis areas.

Two UN organizations most likely to be encountered in contingency operations are the UN High Commission for Refugees (UNHCR) and UN peacekeepers. The UNHCR is found around the world, wherever there are refugees. Currently its staff of more than 5,000 people provides help to more than 19 million people in 120 countries. In addition to emergency relief (e.g. food, shelter, medical care), the UNHCR seeks to protect refugees and help them restart their lives.

UN peacekeepers are ordinarily volunteered by the armed forces of member countries that are neutral and not involved in a particular crisis area. Planning for peacekeeping missions is done by the UN Department of Peacekeeping Operations. The mandate of individual peacekeeping operations is set by the UNSC and varies depending on the particular elements of the crisis area where they are to be sent. UN peacekeepers do not impose peace by armed force, instead they are deployed with the consent of the parties to a crisis in order to stabilize a situation and keep a peace that may be fragile.

IX.D.2. North Atlantic Treaty Organization

NATO was first created in 1941 and after WWII was principally concerned with the defense of Western Europe from a possible attack from the Soviet Union. The focus of NATO has however changed as a result of the momentous events that led to the collapse of the USSR and the changes in threats of recent years. Now, in addition to its important mutual defense responsibilities, NATO engages in peacekeeping operations, manages crises, and promotes cooperative approaches to European security including measures of arms control and disarmament.

In recent years NATO has deployed peacekeeping forces in Bosnia, Kosovo, and the Former Yugoslav Republic of Macedonia. NATO has also assumed the International Security Force mission in Afghanistan.

IX.D.3. Non-governmental Organizations

NGOs exist in a wide variety of extremely diverse categories. Most operate to provide medical, relief, and emergency assistance for housing and food and fuel, although some emphasize human rights. NGO's seldom have hierarchical structures and operate informally and flexibly. They are often found in high-risk, volatile areas and situations and thus their presence is to be expected in contingency operations. A few NGO Emergency relief organizations are as follows.

(a) International Committee of the Red Cross

The ICRC is independent and has special status from the Geneva Conventions. Usually with the assistance of local national Red Cross societies, it provides disaster relief such as the distribution of food, water, medicine and hygiene items and procuring shelter. The Geneva Conventions assign additional specific tasks for the ICRC to perform.

(b) Doctors Without Borders

Founded in 1971 by a group of French Doctors it provides emergency medical help to countries with insufficient or non-existent health care capabilities.

(c) CARE

Started after WWII and focused on Europe, CARE now works in countries world-wide. CARE concentrates on development and emergency programs and has country agreements (similar to status of forces agreements) in every country in which they operate. CARE distributes food, water and medicine, aids in agricultural rehabilitation, distributes tools, seeds and building supplies, and helps repair community infrastructures.

IX.E. INTERAGENCY COOPERATION

IX.E.1. National Security Council

The National Security Council (NSC) is the principal coordinating body for all national security issues, including contingency operations. The NSC is actually at the top of the pyramid of a system that includes DOS, DoD, and a number of other agencies as required. In addition, other agencies or entities can become involved as necessary depending upon the circumstances. Typically, issues are addressed by interagency committees or working groups at lower levels before being escalated to higher levels for decisions. In cases of interagency disagreements, the issues are moved to higher levels for resolution and if necessary referred all the way up to the NSC for resolution by principals (i.e. the respective departmental secretaries). If an issue or course of action cannot be agreed by the NSC, then for final resolution it can be taken to the President for decision.

Currently, the development, implementation, and coordination of U.S. national security policies is managed day-to-day by the Policy Coordination Committees (PCC) established under the aegis of the NSC. Under the current Administration there are six regional PCCs and eleven functional PCCs. Each Administration usually makes changes and establishes different PCCs. As noted above, if issues or policies cannot be agreed at the working levels they are referred upwards to more senior levels until resolved.

IX.E.2. U.S. Embassy Country Teams

At each U.S. Embassy, the Ambassador has senior advisers from the political, economic, administrative, consular and security sections of the Embassy. Together with the Ambassador and Deputy Chief of Mission (DCM) these individuals are collectively known as the "country team". In situations involving contingency operations the country team will usually be supplemented by senior representatives of other USG agencies that are to participate in the operation.

The country team system provides the basis for rapid consultation, coordination and action on issues and contingencies as they occur in real time. Moreover the country team provides the foundation for effective execution of U.S. policies. The U.S. area military commander (e.g. the Combatant Commander) is not under the authority of the Ambassador; however the commander (or his representative) would very frequently participate in, or at least be aware of, the meetings of the country team and the actions planned or taken by the team.

IX.E.3 Civil Military Operations Centers

The Commander of a Joint Task Force formed to take action in a contingency operation may establish a Civil-Military Operations Center (CMOC) to coordinate and facilitate the humanitarian operations of U.S., allied, and other multinational military forces with those of international and local relief agencies, and with host country

authorities. The CMOC provides the primary interface between the military forces involved and relief agencies and screens requests for support by all civilian agencies for support from the military forces and forwards them to the task force for action.

Other Interagency Coordination

As there are many potential contingencies, there are also many variations in the possible organization and structure of response centers. Among the permutations are formations of a disaster assistance response team, a humanitarian assistance coordination center, or a humanitarian operations center. Furthermore, different issues of each contingency operation can mandate the involvement of different USG agencies to deal with the resultant problems. Some examples: the Department of Commerce to advise on trade and tariff laws, business practices, natural resources business matters, and other economic issues; the Department of the Treasury on currency and monetary policies and issues; the Department of Agriculture on agricultural markets, production, and animal and plant health issues; the Department of Justice on legal issues such as criminal extradition; the Immigration and Naturalization Service on admittance of foreign nationals into the United States; and the Department of Homeland Security on issues relating to the security of the borders of the United States.

X. HOMELAND SECURITY OPERATIONS

"It is not a good idea to shake hands for the first time and exchange business cards at the scene of a disaster site."[1]

X.A. COUNTERDRUG OPERATIONS

Counterdrug support operations have become an important activity within the Department of Defense (DoD). All DoD support is coordinated through the Office of the Defense Coordinator for Drug Enforcement Policy and Support (DEP&S), which is located within the Office of the Assistant Secretary of Defense for Special Operations and Low Intensity Conflict (ASD (SO/LIC)). Unlike other support to civil authorities provided by DoD, which must be reimbursed by the agency receiving support, DoD support to counterdrug operations is funded through annual DoD appropriations. For FY04, Congress appropriated nearly $836 million for DoD counterdrug support. The Office of the DEP&S channels that money to the providers of counterdrug support.

X.A.1. Detection and Monitoring

DoD is the lead federal agency (LFA) for detection and monitoring (D&M) of aerial and maritime transit of illegal drugs into the United States.[2] D&M is therefore a DoD mission. Although a DoD mission, D&M is to be carried out in support of federal, state, and local law enforcement authorities.[3] 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. Detection and monitoring missions involve airborne (i.e., Airborne Warning and Control Systems (AWACS)), seaborne (primarily U.S. Navy (USN) vessels), and land-based radar (to include Remote Over The Horizon Radar (ROTHR)) sites.

Federal funding for National Guard counterdrug activities, to include pay, allowances, travel expenses, and operations and maintenance expenses is provided pursuant to 32 U.S.C. § 112. The State must prepare a drug interdiction and counterdrug activities plan. The Office of the DEP&S reviews each State's implementation plan and disburses funds.

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[1] Adm. Timothy J. Keating, Commander, North American Aerospace Defense Command and U.S. Northern Command (USNORTHCOM), February 3, 2006

[2] 10 U.S.C. § 124

[3] Note the statute does not extend to D&M missions covering land transit (i.e., the Canadian and Mexican borders).

X.A.2. Additional Support

Congress has given DoD additional authorities to support federal, state, local, and foreign governments that have counterdrug responsibilities. These authorities have not been codified. Many of the public laws authorizing such support are reproduced in the notes following 10 U.S.C. § 374 in the annotated codes.[4] The statute permits broad support to federal, state, and local as well as foreign authorities (when requested by a federal counterdrug agency, typically the Drug Enforcement Agency (DEA) or a member of the State Department country team that has counterdrug responsibilities). These authorities are *not* exceptions to the Posse Comitatus Act (PCA);[5] therefore, any support provided must comply with the restrictions of the PCA. Additionally, any domestic training provided must comply with the Deputy Secretary of Defense policy on advanced training.

Authorized support includes maintenance and repair of equipment; transportation of personnel (U.S. and foreign), equipment, and supplies in the continental United States (CONUS)/outside the continental United States (OCONUS); establishment of bases of operations CONUS/OCONUS; training of law enforcement personnel, to include associated support and training expenses; detection and monitoring of air, sea, surface traffic outside the United States, and within twenty-five miles of the border if the detection occurred outside the United States; construction of roads, fences, and lighting along U.S. border; linguist and intelligence analyst services; aerial and ground reconnaissance; and establishment of command, control, communication, and computer networks for improved integration of law enforcement, active military, and National Guard activities.

Approval authorities are contained in the Chairman of the Joint Chiefs of Staff Instructions (CJCSI) 3710.01A. Non-operational support—that which does not involve the active participation of DoD personnel—including the provision of equipment only, use of facilities, and formal schoolhouse training, is requested and approved in accordance with Department of Defense Directive (DoDD) 5525.5 and implementing Service regulations. For operational support, the Secretary of Defense (SECDEF) is the approval authority. The approval will typically be reflected in a CJCS-issued deployment order.

The SECDEF has delegated approval authority for certain missions to Combatant Commanders, with the ability for further delegation by the Combatant Commander, but no lower than a flag officer. The delegation from SECDEF depends on the type of support provided, the number of personnel provided, and the length of the mission.[6] Requests for DoD support must meet the following criteria:

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[4] The primary authority is the National Defense Authorization Act of 1991, Pub. L. No. 101-510, § 1004 (1991) (as amended).

[5] The PCA is discussed in Section X.D. below.

[6] *See* CJCSI 3710.01A. For example, certain missions along the southwest border of the U.S., the delegation runs from SECDEF to NORTHCOM to Joint Task Force North (JTF-North).

- The support request must have a clear counterdrug connection;
- The support request must originate with federal, state or local agency having counterdrug responsibilities;
- The request must be for support that DoD is authorized to provide;
- The support must clearly assist with counterdrug activities of the agency;
- The support is consistent with DoD support of the National Drug Control Strategy (NDCS);
- The DEP&S priorities for the provision of support;
- The multi-jurisdictional, multi-agency task forces that are in a high intensity drug trafficking area (HIDTA);
- The individual agencies in a HIDTA;
- The multi-jurisdictional, multi-agency task forces not in a HIDTA;
- The individual agencies not in a HIDTA;
- All approved CD operational support must have military training value.

Under § 1206, in the National Defense Authorization Act of 1990,[7] Congress directed the armed forces, to the maximum extent practicable, to conduct training exercises in declared drug interdiction areas. In § 1031, the National Defense Authorization Act of 1997, Congress authorized, and provided additional funding specifically for enhanced support to Mexico. The support involves the transfer of certain non-lethal specialized equipment such as communication, radar, navigation, and photo equipment. Under § 1033, the National Defense Authorization Act of 1998, Congress authorized, and provided additional funding specifically for, enhanced support to Colombia and Peru. Section 1021, the National Defense Authorization Act of 2004,[8] expands the list of eligible countries to include Afghanistan, Bolivia, Ecuador, Pakistan, Tajikistan, Turkmenistan, and Uzbekistan.[9]

[7] Pub. L. No. 101-189, 103 Stat. 1563 (1989).

[8] Pub. L. No. 108-134, 117 Stat. 1391 (2003).

[9] This authority to provide support to any one of these governments under § 1021 expires 30 Sept. 2006.

X.B. DISASTER RELIEF/CONSEQUENCE MANAGEMENT

X.B.1 The Department of Defense's Homeland Defense Mission

The February 2006 Quadrennial Defense Review Report (QDR) states DoD's homeland defense mission: "At the direction of the President or the Secretary of Defense, the Department of Defense executes military missions that dissuade, deter or defeat external attacks upon the United States, its population, and its defense critical infrastructure." [10] The role of DoD includes "identifying and characterizing threats at the earliest possible time so that, where possible, they can be prevented, disrupted, interdicted, or otherwise defeated." [11] The areas covered range from the air domain, where DoD has "primary responsibility for defending U.S. airspace and protecting the nation's air approaches" to the maritime realm, where DoD "works alongside the Department of Homeland Security to integrate U.S. maritime defense--optimizing the mutually supporting capabilities of the U.S. Navy and the U.S. Coast Guard." [12] If directed by the President, DoD may also "reinforce the defense of the land approaches to the United States."[13]

In addition, at the direction of the President or SECDEF, DoD may provide support to civil authorities for "designated law enforcement and/or other activities and as part of a comprehensive national response to prevent and protect against terrorist incidents or to recover from an attack or a disaster."[14] DoD's humanitarian contributions during the relief efforts for Hurricanes Katrina and Rita fall within this category.[15]

X.B.2. The Department of Defense's Response to Huricanes Katrina and Rita—Planning for the Future

Anticipating circumstances in which future catastrophes may overwhelm civilian resources, the QDR recommends two ways to improve DoD's domestic response:

> ***(1) the Department will provide U.S. NORTHCOM with authority to stage forces and equipment domestically prior to potential incidents when possible.***

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[10] U. S. DEP'T OF DEFENSE, Quadrennial Defense Review Report, 26 (6 Feb 2006) (hereinafter QDR) *available at* http://www.defenselink.mil/qdr/report/Report20060203.pdf .

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id.*

> ***(2) The Department will also seek to eliminate current legislative ceilings on pre-event spending.*** (Emphasis added) [16]

The Department of Defense strives "to improve the homeland defense and consequence management capabilities of its national and international partners and to improve the Department's capabilities by sharing information, expertise and technology as appropriate across military and civilian boundaries." [17] In order to achieve these goals, DoD intends to "leverage(e) its comparative advantages in planning, training, command and control and . . . develop(e) trust and confidence through shared training and exercises." [18] In order to form a successful homeland defense, efforts must be made to "standardize(e) operational concepts, develop(e) compatible technology solutions and coordinate(e) planning."[19]

With those purposes in mind, DoD will work with the Department of Homeland Security and with state and local governments to improve homeland security capabilities and cooperation. These collective efforts are designed to improve interagency planning and scenario development and enhance interoperability through experimentation, testing and training exercises. As the *National Maritime Security Policy* and the *Strategy for Homeland Defense and Civil Support* emphasize, defending the homeland in depth and mitigating the consequences of attacks highlight the need for the following types of capabilities: Joint command and control for homeland defense and civil support missions, including communications and command and control systems that are interoperable with other agencies and state and local governments. Finally, both air and maritime domain awareness capabilities must provide increased situational awareness and shared information on potential threats through rapid collection, fusion and analysis.[20]

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[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] QDR at 26-27.

X.B.3. The Issues

Judge Advocates (JAs) supporting domestic operations should be aware that they are dealing with a developing paradigm. Doctrine is not firmly established and the terminology changes as new entities are created to respond to the increased threat of domestic terrorism and the occurrence of natural disasters. One of these new entities is the Office of the Assistant Secretary of Defense for Homeland Defense (ASD(HD)) which was created by the National Defense Authorization Act of Fiscal Year 2003.[21] Along those same lines, in 2002, the DoD established USNORTHCOM to consolidate existing missions that were previously executed by other military organizations within a single unified command.[22] Furthermore, President George W. Bush proposed the creation of the non-DOD DHS in June of 2002.[23] The entities involved during domestic operations appear to be increasing, as are the various doctrine involved; e.g. the National Response Plan became effective in December of 2004.[24] There will not be certainty and resolution of some issues until these entities and body of knowledge more fully matures. For example, the traditional roles of sovereignty and fiscal responsibility currently are being examined. Although many underlying response issues have not yet been resolved, the importance and recognition of these issues is highlighted by the lessons learned below.

The JAs involved in homeland security also bring a wide range of perspectives to the table. For example, reserve component (RC) JAs supporting the active component (AC) may approach many of the issues differently than reserve component JAs, and within the RC, the National Guard (NG) JAs may respond differently than the army reserve (USAR) JAs. Consequently, lessons learned may be somewhat different, depending on the JA's role and status.

Below are a number of issues confronted by JAs in domestic operations. It is not comprehensive or in order of priority, and many of these issues overlap. However, nearly all of these issues were raised repeatedly, recognized by active, reserve, and NG JAs, and acknowledged across all the agencies involved in the Hurricane Katrina humanitarian relief effort.

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[21] *See* Bob Stump National Defense Authorization Act of 2003, Pub. L. No. 107-314, § 902.

[22] Unified Command Plan 2002.

[23] *Department of Homeland Security June 2002 - George W. Bush, available at* http://www.dhs.gov/interweb/assetlibrary/book.pdf.

[24] The National Response Plan (NRP) was published in December 2004 and was effective 15 December 2004. At that time, the phasing out of the Initial National Response Plan (INRP), the Federal Response Plan (FRP), the U.S. Government Domestic Terrorism Concept of Operations Plan (CONPLAN), and the Federal Radiological Emergency Response Plan (FRERP) began. The NRP is located at DOPLW Handbook, Vol. II at App. 5-24. The INRP was published on 30 September 2003, pursuant to the Homeland Security Act of 2002, (6 U.S.C. § 101). The NRP serves to orchestrate the various federal plans for disaster assistance into one comprehensive plan. The NRP further established the processes and structure for the delivery of federal assistance to manage the consequences of any major disaster or emergency declared under the Stafford Act.

- Response Plans
  - Development
    - Homeland Security Presidential Directives (HSPD)
    - National Response Plan (NRP)
    - National Incident Management System (NIMS)
    - Stafford Act
    - Insurrection Act
    - Natural Disaster vs. Terrorist Event (chemical ,biological, radiological, nuclear, or high-yield explosive (CBRNE))
  - Review
  - Training
- Command and Control (C2)
  - Dual status commander?
    - 32 USC § 315
    - 32 USC § 325
    - Pre-event unified C2 organizational structure?
  - Collaboration with state, local, federal, and private agencies
- Posse Comitatus (PCA)
  - Law enforcement vs. humanitarian relief
    - Search and rescue
    - Entry into private dwellings
    - Security operations
    - Traffic control points
    - Evacuation of Civilians
    - Sharing information with law enforcement
    - Curfew enforcement
  - Use of Title 10 vs. Title 32/ State Active Duty (SAD) forces
- Use of state military forces under 32 USC § 502(f) vs. Chapter 9
  - Pay
  - Tort immunity under Federal Tort Claims Act (FTCA)
  - Uniformed Services Employment and Reemployment Rights Act (USERRA) or similar state laws
  - Servicemembers's Civil Relief Act (SCRA) or similar state laws
  - Medical treatment
  - Disability benefits
  - Authority to involuntarily order servicemembers to duty
- Rules for the use of force (RUF)
  - Standing rules for the use of force (SRUF)
  - Working with state law enforcement
- Immediate response authority (IRA)
  - Appropriate response
  - Reimbursement
- Emergency Management Assistance Compact (EMAC)
  - Memoranda of Agreement (MOA)/Memoranda of Understanding (MOU)

        - Ability to perform law enforcement
        - Credentialing out of state medical personnel
    - State and local law
- Integration of state emergency management operations centers, federal emergency operations centers, and other external agencies' Mission Assignments
- Collection and use of intelligence information
- Loan and lease of equipment/Reimbursement
- Pre-positioning of assets
    - Defense Coordinating Officer (DCO)/Defense Coordination Element (DCE)
    - Prearrange support contracts for required resources
    - Unified mobile disaster assessment cell
- Claims
- Contracts
- Legal assistance
- International assistance
- Access of media/Assist in public affairs
- Environmental law/Hazardous substances
- Military Justice
- Debris removal/Indemnification
- Damage to military installations
- Standards of conduct

X.B.4. The Process

When directed, DoD responds to a catastrophic event in accordance with DoDD 3025.1,[25] DoDD 3025.15,[26] Chairman of the Joint Chiefs of Staff (CJCS) Contingency Plan (CONPLAN) 0500-98,[27] and the NRP.[28] The request for military assistance for consequence management would normally come from the lead federal agency (LFA). Under the NRP, the Federal Emergency Management Agency (FEMA), within the DHS, would most likely be the LFA in a catastrophic event.

The request for military assistance is submitted to ASD(HD) for approval, who then forwards the request to the Joint Staff for execution. The Joint Director of Military Support (JDOMS) issues an Execute Order (EXORD) to Commander, USNORTHCOM or Commander, U.S. Pacific Command (USPACOM), depending upon which Area of

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[25] U.S. DEP'T OF DEFENSE, DIR. 3025.1, MILITARY SUPPORT TO CIVIL AUTHORITIES (15 Jan. 1993).

[26] U.S. DEP'T OF DEFENSE, DIR. 3025.15, MILITARY ASSISTANCE TO CIVILIAN AUTHORITIES (18 Feb. 1997).

[27] Chairman of the Joint Chiefs of Staff Concept Plan 0500-98, Military Assistance to Domestic Consequence Management Operations in Response to a Chemical, Biological, Radiological, Nuclear, or High-Yield Explosive Situation [hereinafter CONPLAN 0500-98].

[28] *Supra* note 21.

Responsibility encompasses the catastrophic event. The Combatant Commander then orders the Commander, JTF-CS, to conduct consequence management operations.

There are five phases of military support in consequence management:

(a) situation assessment;

(b) deployment;

(c) assistance to civil authorities;

(d) transition to civilian agencies; and

(e) redeployment.[29]

The responding units always remain under the command and control of the designated Joint Task Force Commander, if a separate joint task force is created. This commander will transfer control to civilian organizations as soon as circumstances permit.

The units performing consequence management operations will normally not be armed. Nevertheless, the unit may deploy with weapons stored in containers. The Rules for the Use of Force in CJCS CONPLAN 0500-98 provide authority for the use of force, including deadly force, for individual and unit self-defense.[30]

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[29] U.S. DEP'T OF HOMELAND SECURITY, JOINT PUB 3-26, HOMELAND SECURITY (2 Aug. 2005) (hereinafter JP 3-26), at IV-10. A copy of JP 3-26 may be found online at: http://www.fas.org/irp/doddir/dod/jp3_26.pdf#search=%22JOINT%20PUB.%203-26%22 (last visited on 28 Aug. 2006)

[30] CONPLAN 0500-98, *supra* note 24, Ann. C, App. 16.

X.C. NATIONAL RESPONSE PLAN[31]

The NRP, last updated on 25 May 2006,[32] became effective on 15 December 2004 with a phased implementation process during the first year.

[31] A copy of the complete NRP is located at DOPLAW Handbook, Vol. II, App. 5-24 or online at: http://www.dhs.gov/dhspublic/interweb/assetlibrary/NRP_FullText.pdf.

[32] A copy of the Notice of Change to the National Response Plan is located at: http://www.dhs.gov/interweb/assetlibrary/NRP_Notice_of_Change_5-22-06.pdf.

The following table summarizes the critical modifications of CH-1of the Notice of Change (9 May 2006):

	Topic	Background	Affected NRP Sections
A	Multiple Joint Field Offices	This change explicitly clarifies that multiple Joint Field Offices may be established in support of an incident (for both regional-level and nationwide incidents).	Page 28 Page 34 Page 68 ESF #5-2
B	Principal Federal Official (PFO) and Federal Coordinating Officer (FCO) roles and responsibilities	This change clarifies PFO and FCO roles and responsibilities, and provides the flexibility to designate a single individual as both PFO and FCO (with additional Deputy PFO and FCO designations as appropriate) during certain highly complex or geographically dispersed incidents other than terrorism (e.g. a hurricane with multi-state impact).	Page 33 Page 34
C	DoD JTF Commander and JTF HQ	This change provides that if a JTF is established, consistent with operational requirements, its command and control element will be collocated with the PFO at the Joint Field Office to ensure coordination and unity of effort.	Page 28 Page 42
D	Structure of the JFO Sections	This change provides for the integration of the Emergency Support Functions into the JFO Sections rather than as stand-alone entities.	Page 27 Page 37
E	Domestic Readiness Group	This change recognizes the formation of the HSC Domestic Readiness Group (DRG) and explains the roles and responsibilities of the DRG relative to other NRP entities.	Page 10 Page 17 Page 22 Page 23 Page 52 Page 75
F	Catastrophic Incident Annex	This change broadens the scope of the Catastrophic Incident Annex and differentiates response procedures for no-notice incidents as opposed to those allowing for pre-incident staging of Federal assets.	Page 43 Catastrophic Incident Annex

The NRP establishes a comprehensive, national, all-hazards approach to domestic incident management across a spectrum of activities. It is predicated on the National Incident Management System (NIMS). The NIMS is a nationwide template enabling government and nongovernmental responders to respond to all domestic incidents. It provides the structure and mechanisms for national-level policy and operational coordination for domestic incident management. It does not alter or impede the ability of federal, state, local, or tribal departments and agencies to carry out their specific authorities. It assumes that incidents are typically managed at the lowest possible geographic, organizational, and jurisdictional level.

X.C.1. Incidents of National Significance

The NRP distinguishes between incidents that require DHS coordination, termed "Incidents of National Significance," and the majority of incidents occurring each year that are handled by responsible jurisdictions or agencies through other established authorities and existing plans. Incidents of National Significance are those high-impact events that require a coordinated and effective response by an appropriate combination of federal, state, local, tribal, private-sector, and nongovernmental entities in order to save lives, minimize damage, and provide the basis for long term community recovery and mitigation activities.

G	Quick Reference Guide	This change provides a new Supplement to the National Response Plan for the quick reference of senior government, non-government organizations, and private sector leadership.	Page xii Page xvi Page 97
H	Interagency Incident Management Group and Homeland Security Operations Center	This change reflects the establishment of the National Operations Center as the successor to the Homeland Security Operations Center, and reformulates the former IIMG as a senior advisory council and adjudication body for the Secretary of Homeland Security in his role as the Federal incident manager.	All occurrences in the NRP
I	Incident of National Significance	This change clarifies the applicability of the National Response Plan through scaled and flexible activation of NRP coordination and reporting mechanisms.	All occurrences in the NRP
J	ESF #13 Coordinator	This change removes the Department of Homeland Security as a co-coordinator and primary agency for ESF #13 – Public Safety and Security. The Department of Justice will have sole responsibility as ESF Coordinator and primary agency.	ESF #13
K	Mitigation	This change recognizes the reorganization of the DHS Mitigation program within ESF-14 and the Joint Field Office Operations Section which occurred after the NRP was implemented in April 2005.	Page 12 Page 29 Page ESF v Page ESF vii ESF #14

X.C.2. Roles and Responsibilities

The NRP specifies the roles and responsibilities of the following parties:

(a) Governor
(b) Local Chief/Executive Officer
(c) Tribal Chief/Executive Officer
(d) Secretary of Homeland Security
(e) Attorney General
(f) Secretary of Defense
(g) Secretary of State
(h) Nongovernmental Organizations (NGOs)
(i) Private Sector
(j) Citizen Involvement

X.C.3. Emergency Support Functions (ESFs)

The NRP, like previous federal response plans establishes a coordination mechanism to provide assistance to state, local, and tribal governments or to federal departments and agencies conducting missions of primary federal responsibility. These ESFs may be selectively activated for both Stafford Act[33] and non-Stafford Act incidents.[34]

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[33] Disaster Relief Statutes (Stafford Act), 42 U.S.C. § 5121.

[34] This table lists the scope and the designated coordinating agencies:

ESF #	ESF	Lead Federal Agency
1	Transportation	Department of Transportation
2	Communications	Department of Homeland Security/National Communications System
3	Public Works and Engineering	Department of Defense/U.S. Army Corps of Engineers
4	Firefighting	Department of Agriculture
5	Emergency Management	Department of Homeland Security/FEMA
6	Mass Care, Housing, and Human Resources	Department of Homeland Security/FEMA
7	Resource Support	General Services Administration
8	Public Health and Medical Services	Department of Health and Human Services
9	Urban Search and Rescue	Department of Homeland Security/FEMA

X.C.4. NRP Coordinating Structures

The following NRP coordinating structures are used to manage Incidents of National Significance.

(a) Incident Command Post (ICP). The field location at which the primary tactical-level, on-scene incident command functions are performed. The ICP may be collocated with the incident base or other incident facilities and is normally identified by a green rotating or flashing light.

(b) Area Command (Unified Area Command). An organization established to oversee the management of multiple incidents that are each being handled by an Incident Command System (ICS) organization or to oversee the management of large or multiple incidents to which several Incident Management Teams have been assigned. Area Command has the responsibility to set overall strategy and priorities, allocate critical resources according to priorities, ensure that incidents are properly managed, and ensure that objectives are met and strategies followed. Area Command becomes Unified Area Command when incidents are multi jurisdictional. Area Command may be established at an Emergency Operations Center (EOC) facility or at some location other than an ICP.

(c) Local Emergency Operations Center (EOC). The physical location at which the coordination of information and resources to support local incident management activities normally takes place.

(d) State Emergency Operations Center (SEOC). The physical location at which the coordination of information and resources to support state incident management activities normally takes place.

(e) Homeland Security Operations Center (HSOC). The HSOC is the primary national-level hub for domestic incident management operational coordination and situational awareness. The HSOC is a standing 24/7 interagency organization fusing law enforcement, national intelligence, emergency response, and private-sector reporting. The

10	Oil and Hazardous Materials	Environmental Protection Agency
11	Agriculture and Natural Resources	Department of Agriculture
12	Energy	Department of Energy
13	Public Safety and Security	Department of Justice
14	Long Term Community Recovery and Mitigation	Department of Homeland Security/FEMA
15	External Affairs	Department of Homeland Security

HSOC facilitates homeland security information-sharing and operational coordination with other federal, state, local, tribal, and nongovernmental EOCs. In order to perform these functions, the HSOC will establish and maintain real-time communications links to other federal emergency agencies, as well as those at the state, regional, and nongovernmental level.

(f) Interagency Incident Management Group (IIMG). The IIMG is a federal headquarters-level multi agency coordination entity that facilitates federal domestic incident management for Incidents of National Significance. The Secretary of Homeland Security activates the IIMG based on the nature, severity, magnitude, and complexity of the threat or incident. The Secretary of Homeland Security may activate the IIMG for high-profile, large-scale events that present high probability targets, such as National Special Security Events (NSSEs), and in heightened threat situations. The IIMG is comprised of senior representatives from DHS components, other federal departments and agencies, and nongovernmental organizations, as required. The IIMG membership is flexible and can be tailored or task-organized to provide the appropriate subject-matter expertise required for the specific threat or incident.

(g) National Response Coordination Center (NRCC). The NRCC is a multi-agency center that provides overall federal response coordination for Incidents of National Significance and emergency management program implementation. FEMA maintains the NRCC as a functional component of the HSOC in support of incident management operations. The NRCC monitors potential or developing Incidents of National Significance and supports the efforts of regional and field components. The NRCC resolves federal resource support conflicts and other implementation issues forwarded by the Joint Field Office (JFO). Those issues that cannot be resolved by the NRCC are referred to the IIMG.

(h) Regional Response Coordination Center (RRCC). The RRCC is a standing facility operated by FEMA that is activated to coordinate regional response efforts, establish federal priorities, and implement local federal program support. The RRCC operates until a JFO is established in the field and/or the Principal Federal Officer, Federal Coordinating Officer, or Federal Resource Coordinator can assume their NRP coordination responsibilities. The RRCC establishes communications with the affected state emergency management agency and the NRCC, coordinates deployment of the Emergency Response Team-Advance Element (ERT-A) to field locations, assesses damage information, develops situation reports, and issues initial mission assignments.

(i) Strategic Information and Operations Center (SIOC). The FBI SIOC is the focal point and operational control center for all federal intelligence, law enforcement, and investigative law enforcement activities related to domestic terrorist incidents or credible threats, including leading attribution investigations. The SIOC serves as an information clearinghouse to help collect, process, vet, and disseminate information relevant to law enforcement and criminal investigation efforts in a timely manner. The SIOC maintains direct connectivity with the HSOC and IIMG. The SIOC, located at FBI Headquarters, supports the FBI's mission in leading efforts of the law enforcement community to detect,

prevent, preempt, and disrupt terrorist attacks against the Unites States. The SIOC houses the National Joint Terrorism Task Force (NJTTF). The mission of the NJTTF is to enhance communications, coordination, and cooperation among federal, state, local, and tribal agencies representing the intelligence, law enforcement, defense, diplomatic, public safety, and homeland security communities by providing a point of fusion for terrorism intelligence and by supporting Joint Terrorism Task Forces (JTTFs) throughout the United States.

(j) Joint Field Office (JFO). The JFO is a temporary federal facility established locally to coordinate operational federal assistance activities to the affected jurisdiction(s) during Incidents of National Significance. The JFO is a multi agency center that provides a central location for coordination of federal, state, local, tribal, nongovernmental, and private-sector organizations with primary responsibility for threat response and incident support. The JFO enables the effective and efficient coordination of federal incident-related prevention, preparedness, response, and recovery actions. The JFO utilizes the scalable organizational structure of the National Incident Management System (NIMS) Incident Command System (ICS). The JFO organization adapts to the magnitude and complexity of the situation at hand, and incorporates the NIMS principles regarding span of control and organizational structure: management, operations, planning, logistics, and finance/administration. Although the JFO uses an ICS structure, the JFO does not manage on-scene operations. Instead, the JFO focuses on providing support to on-scene efforts and conducting broader support operations that may extend beyond the incident site. In the event of multiple incidents, multiple JFOs may be established at the discretion of the Secretary. When incidents impact the entire nation or multiple States and localities, multiple JFO's may be established regionally. In these situations, one of the JFOs may be designated to serve as the primary JFO and provide strategic leadership and coordination for the overall incident management effort, as designated by the Secretary of Homeland Security.

(k) Joint Operations Center (JOC). The JOC Branch is established by the Senior Federal Law Enforcement Officer (SFLEO) (e.g., the FBI Special Agent-in-Charge (SAC) during terrorist incidents) to coordinate and direct law enforcement and criminal investigation activities related to the incident. The JOC Branch ensures management and coordination of federal, state, local, and tribal investigative/law enforcement activities. The emphasis of the JOC is on prevention as well as intelligence collection, investigation, and prosecution of a criminal act. This emphasis includes managing unique tactical issues inherent to a crisis situation (e.g., a hostage situation or terrorist threat). When this branch is included as part of the JFO, it is responsible for coordinating the intelligence and information function (as described in NIMS) which includes information and operational security, and the collection, analysis, and distribution of all incident related intelligence. Accordingly, the Intelligence Unit within the JOC Branch serves as the interagency fusion center for all intelligence related to an incident.

X.C.5. Field-Level Organizational Structures which Manage the Incident in the Field

JFO Coordination Group[35]

The following are potential members of the JFO Coordination Group:

(a) Principal Federal Official (PFO). The PFO is personally designated by the Secretary of Homeland Security to facilitate federal support to the established ICS Unified Command structure and to coordinate overall federal incident management and assistance activities across the spectrum of prevention, preparedness, response, and recovery. The PFO ensures that incident management efforts are maximized through effective and efficient coordination. The PFO provides a primary point of contact and situational awareness locally for the Secretary of Homeland Security. However, the Secretary may, in other than terrorism incidents, choose to combine the roles of the PFO and Federal Coordinating Officer (FCO) (see below) in a single individual to help ensure synchronized federal coordination. In situations where the PFO has also been assigned the role of the FCO, deputy FCOs for the affected States will be designated to provide support to the PFO/FCO and facilitate incident management span of control.

(b) Federal Coordinating Officer (FCO). The FCO manages and coordinates federal resource support activities related to Stafford Act disasters and emergencies. The FCO: assists the Unified Command and/or the Area Command and works closely with the Principal Federal Official (PFO), Senior Federal Law Enforcement Official (SFLEO), and other Senior Federal Officials (SFOs). In Stafford Act situations where a PFO has not been assigned, the FCO provides overall coordination for the federal components of the JFO and works in partnership with the State Coordinating Officer (SCO) to determine and satisfy state and local assistance requirements.

(c) Senior Federal Law Enforcement Official (SFLEO). The SFLEO is the senior law enforcement official from the agency with primary jurisdictional responsibility as directed by statute, Presidential directive, existing federal policies, and/or the Attorney General. The SFLEO directs intelligence/investigative law enforcement operations related to the incident and supports the law enforcement component of the Unified Command on-scene. In the event of a terrorist incident, this official will normally be the FBI Senior Agent-in-Charge (SAC).

(d) Federal Resource Coordinator (FRC). The FRC manages federal resource support activities related to non-Stafford Act Incidents of National Significance when federal-to-federal support is requested from DHS by another federal agency. The FRC is responsible for coordinating the timely delivery of resources to the requesting agency. In non-

[35] The JFO Coordination Group functions as a multiagency coordination entity and works jointly to establish priorities (single or multiple incidents) and associated resource allocation, resolve agency policy issues, and provide strategic guidance to support Federal incident management activities. Generally, the PFO, in consultation with the FCO and SFLEO, determines the composition of the JFO Coordination Group.

Stafford Act situations when a federal department or agency acting under its own authority has requested the assistance of the Secretary of Homeland Security to obtain support from other federal departments and agencies, DHS designates an FRC. In these situations, the FRC coordinates support through interagency agreements and memoranda of understanding (MOUs).

(e) State/Local/Tribal Official(s) like a State Coordinating Officer (SCO), who serves as the state counterpart to the FCO and manages the state's incident management programs and activities.

(f) Governor's Authorized Representative, who represents the governor of the impacted state and local area representatives.

(g) Senior Federal Officials (SFOs) from other federal departments or agencies.

JFO Coordination Staff

The JFO structure will normally include a Coordination Staff. The JFO Coordination Group determines the extent of this staffing based on the type and magnitude of the incident. The roles and responsibilities of the JFO Coordination Staff are summarized below:

(a) Chief of Staff. The JFO Coordination Staff may include a Chief of Staff and representatives providing specialized assistance, which may include support in the following areas: safety, legal counsel, equal rights, security, infrastructure liaison, and other liaisons.

(b) External Affairs Officer. The External Affairs Officer provides support to the JFO leadership in all functions involving communications with external audiences. External Affairs includes: Public Affairs, Community Relations, Congressional Affairs, State and Local Coordination, Tribal Affairs, and International Affairs, when appropriate. Resources for the various External Affairs Functions are coordinated through ESF #15. The External Affairs Officer also is responsible for overseeing operations of the Federal Joint Information Center (JIC) established to support the JFO. The JIC is a physical location where public affairs professionals from organizations involved in incident management activities work together to provide critical emergency information, crisis communications, and public affairs support. The JIC serves as a focal point for the coordination and dissemination of information to the public and media concerning incident prevention, preparedness, response, recovery, and mitigation.

(c) Defense Coordinating Officer (DCO). If appointed by DoD, the DCO serves as DoD's single point of contact at the JFO. With few exceptions, requests for Defense Support of Civil Authorities (DSCA) originating at the JFO will be coordinated with and processed through the DCO. The DCO may have a Defense Coordinating Element (DCE) consisting of a staff and military liaison officers in order to facilitate coordination and support to activated Emergency Support Functions (ESFs). Specific responsibilities of the

DCO (subject to modification based on the situation) include processing requirements for military support, forwarding mission assignments to the appropriate military organizations through DoD-designated channels, and assigning military liaisons, as appropriate, to activated ESFs.

JFO Sections

(a) Operations Section

(1) Response and Recovery Operations Branch
(2) Law Enforcement Investigative Operations Branch/Joint Operations Center (JOC)
(3) For National Special Security Events (NSSEs), a third branch, the Security Operations Branch, or Multi agency Command Center (MACC).

(b) Planning Section

(1) Logistics Section
(2) Finance and Administration Section (Comptroller)

JFO Response Teams

Joint field-level organizational structures also include response teams that are ready to deploy in response to threats or incidents. These teams include the following:

(a) ERT Advance Element (ERT-A). The ERT-A conducts assessments, and initiates coordination with the state and initial deployment of federal resources. It is headed by a team leader from FEMA and is composed of program and support staff and representatives from selected ESF primary agencies. Each FEMA region maintains an ERT ready to deploy during the early stages of an incident to the state EOC or to other locations to work directly with the state to obtain information on the impact of the event and to identify specific state requests for federal incident management assistance. The affected area to establish field communications, locate and establish field facilities, and set up support activities.

(b) National Emergency Response Team (ERT-N). The National Emergency Response Team (ERT-N) deploys for large-scale, high-impact events, or as required. An ERT-N may pre-deploy based on threat conditions. The Secretary of Homeland Security determines the need for ERT-N deployment, coordinating the plans with the affected region and other federal agencies. The ERT-N includes staff from FEMA Headquarters and regional offices as well as other federal agencies.

(c) Federal Incident Response Support Team (FIRST). The FIRST is a forward component of the ERT-A that provides on-scene support to the local Incident Command or Area Command structure in order to facilitate an integrated inter jurisdictional response. The FIRST is designed to be a quick and readily deployable resource to support the federal response to Incidents of National Significance. The FIRST deploys within two

hours of notification, to be on-scene within twelve hours of notification. FEMA maintains and deploys the FIRST. Upon the subsequent deployment of an ERT, the FIRST integrates into the Operations Section of the JFO.

(d) Domestic Emergency Support Team (DEST). The DEST may be deployed to provide technical support for management of potential or actual terrorist incidents. Based upon a credible threat assessment, the Attorney General, in consultation with the Secretary of Homeland Security, may request authorization through the White House to deploy the DEST. The PFO and a small staff component may deploy with the DEST to facilitate their timely arrival and enhance initial situational awareness. Upon arrival at the JFO or critical incident location, the DEST may act as a stand-alone advisory team to the FBI SAC providing required technical assistance or recommended operational courses of action.

(e) Other Field-Level Organizational Structures Response Teams:

(1) Damage assessment teams
(2) The Nuclear Incident Response Team (NIRT)
(3) Disaster Medical Assistance Teams (DMATs)
(4) HHS Secretary's Emergency Response Team
(5) DOL/OSHA's Specialized Response Teams
(6) Veterinarian Medical Assistance Teams (VMATs)
(7) Disaster Mortuary Operational Response Teams (DMORTs)
(8) National Medical Response Teams (NMRTs)
(10) Scientific and Technical Advisory and Response Teams (STARTs)
(11) Donations Coordination Teams
(12) Urban Search and Rescue (US&R) task forces and incident support teams
(13) Federal Type 1 and Type 2 Incident Management Teams (IMTs)
(14) Domestic Animal and Wildlife Emergency Response Teams and mitigation assessment teams

X.C.6. Implementation of the NRP

After the President has made a major disaster or emergency declaration, he may direct any federal agency to use its authorities and resources in support of state and local response efforts to the extent that provision of the support does not conflict with other agency emergency missions. Under the Stafford Act, FEMA, now a part of the DHS (DHS), serves as the lead federal agency (LFA) for disaster response and recovery activities. Consequently, the authority to direct federal agencies to use their resources in support of state and local response efforts has been delegated from the President to the Secretary of DHS, the DHS regional director, and the FCO.[36] Under the NRP, the Secretary of DHS appoints a FCO, who is responsible for coordinating the delivery of federal assistance to the affected state(s), local government(s) and disaster victims. The FCO works closely with the SCO, appointed by the governor, to oversee disaster

[36] National Response Plan, Dec. 2004.

operations for the state. The SCO also serves as the Governor's Authorized Representative (GAR) and is generally empowered to execute all necessary documents for disaster assistance on behalf of the state.

X.D. RULES FOR THE USE OF FORCE

In June of 2004, the G8 Summit[37] was held at Sea Island Georgia. In addition to civilian law enforcement, both the Georgia NG and the DoD coordinated security efforts for the event. It was determined that NG personnel would perform their mission in Title 32 status.[38] The state law of Georgia was changed to give NG personnel in a Title 32 status the authority to arrest or detain individuals.[39] Finally, the Governor of the State of Georgia and the President of the United States entered into an authorization and consent pursuant to 32 USC §325 and a memorandum of agreement to establish a dual status commander.[40]

Execution of this mission for the G8 Summit required months of analysis and preparation. What is the military being asked to do? Can the mission be accomplished with home-state NG personnel? Will NG (Title 32) personnel from other states be needed? Will Active Duty (Title 10) personnel be used? There were consultations with local, state, and federal agencies. State law issues had to be resolved. Rules for the use of force (RUF) issues had to be resolved in consultation with the Georgia State Attorney General, including whether to use of out-of-state NG personnel for law enforcement purposes.[41]

This section will begin with a discussion of the Posse Comitatus Act. It will then discuss the applicable provisions of the U.S. Code addressing military support to civilian

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[37] The leaders of Canada, France, Germany, Italy, Japan, Russia, United Kingdom, and the United States meet annually in a relaxed setting, largely free of bureaucracy. It is not a legal entity and there are no formal rules of procedure. This means it is does not compete with official organizations such as the United Nations or World Trade Organization. Its purpose is to addresses a wide range of international economic, political, and social issues.

[38] A number of factors were considered in making this decision. These included pay, tort immunity under the Federal Tort Claims Act (FTCA), employment protection under the Uniformed Services Employment and Reemployment Rights Act (USERRA), service members protection under the Servicemembers Civil Relief Act (SCRA) or similar state laws, medical treatment, disability benefits, and authority to involuntarily order service members to duty. An additional concern involved a state law issue.

[39] Georgia law provided that NG personnel shall have the same arrest powers as law enforcement officers when ordered to into state active duty (SAD) by the governor in response to an emergency. There was no state law giving law enforcement arrest powers to NG personnel performing duty pursuant to Title 32. That problem was resolved by obtaining a change in state law, whereby, the Governor, in his discretion, could grant law enforcement arrest powers to members of the NG performing duty pursuant to Title 32 in response to an emergency declared by the Governor.

[40] A dual status commander is a National Guard Commander, who is placed in a Title 10 status, yet retains his Title 32 status. He is thereby authorized to command both Title 10 and Title 32 personnel.

[41] Georgia has a statute in its state military code that authorizes the Governor of Georgia to request the Governor of another state to send NG forces from that state into Georgia to assist the military or police forces of Georgia who are engaged in defending the state. However, Georgia is a signatory of the Emergency Management Assistance Compact (EMAC). The version of EMAC adopted by Georgia does not authorize or permit the use of NG forces from an outside state for law enforcement purposes.

law enforcement and the DoD regulations that implement this guidance. Finally, this section will conclude with a discussion of the standing rules for the use of force.

The primary statute restricting military support to civilian law enforcement is the Posse Comitatus Act (PCA). The PCA states:

> Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both.[42]

Congress enacted the PCA to limit direct military involvement with civilian law enforcement activities to enforce the laws of the United States absent Congressional or Constitutional authorization.[43] The PCA is a criminal statute and violators are subject to fine and/or imprisonment. The PCA, especially its current viability after the terrorist attacks of September 11, 2001, has been the subject of recent debate.[44] It must be remembered that the PCA does not prohibit all military involvement with civilian law enforcement. A considerable amount of military participation with civilian law enforcement authorities is permissible, either as indirect support, or under one of the numerous PCA exceptions.

In addition to the PCA, 10 U.S.C. ch. 18, *Military Support for Civilian Law Enforcement Agencies*[45] and DoD Directive (DoDD) 5525.5, *DoD Cooperation with Civilian Law Enforcement Officials,* also provide guidance in this area.[46] Both authorities

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[42] Posse Comitatus Act, 18 U.S.C. § 1385. The phrase "posse comitatus" is literally translated from Latin as the "power of the county" and is defined in common law to refer to all those over the age of 15 upon whom a sheriff could call for assistance in preventing any type of civil disorder. *See generally* United States v. Hartley, 796 F.2d 112, 114, n.3 (5th Cir. 1986).

[43] United States v. Red Feather, 392 F. Supp. 916, 922 (W.D.S.D. 1975).

[44] *See, e.g.*, Nathan Canestaro, *Homeland Defense: Another Nail in the Coffin for Posse Comitatus*, 12 WASH. U. J. L. & POL'Y 99 (2003); Com. Gary Felicetti & Lt. John Luce, *The Posse Comitatus Act: Setting the Record Straight on 124 Years of Mischief and Misunderstanding before Any More Damage is Done*, 175 MIL. L. REV. 86 (2003); Tom A. Gizzo, Esq. & Tama S. Monoson, *A Call to Arms: The Posse Comitatus Act and the Use of the Military in the Struggle Against International Terrorism*, 15 PACE INT'L L. REV. 149 (2003); Sean J. Kealy, *Reexamining the Posse Comitatus Act: Toward a Right to Civil Law Enforcement*, 21 YALE L. & POL'Y REV. 383 (2003); Richard K. Kohn, *POSSE COMITATUS: Using the Military at Home: Yesterday, Today, and Tomorrow*, 4 CHI. J. INT'L L. 165 (2003); Michael Noone, *Posse Comitatus: Preparing for the Hearings*, *id.* at 193.

[45] *See* Hayes v. Hawes, 921 F.2d 100, 103 n.3 (7th Cir. 1990) (noting that 10 U.S.C. ch. 18 specifically incorporates 18 U.S.C. § 1385 and provides the primary restriction on military participation in civilian law enforcement activities).

[46] U.S. DEP'T OF DEFENSE, DIR. 5525.5, DOD COOPERATION WITH CIVILIAN LAW ENFORCEMENT OFFICIALS (15 Jan. 1986) [hereinafter DoDD 5525.5].

provide additional guidance regarding restrictions the PCA placed on the military when supporting civilian law enforcement agencies.[47]

On its face, the PCA only applies to active duty members of the Army and the Air Force. In fact, federal courts have consistently read the plain language of the Act to limit its application to these two services.[48] However, 10 U.S.C. § 375 directs the Secretary of Defense to promulgate regulations that prohibit "direct participation by a member of the Army, Navy, Air Force, or Marine Corps in a search, seizure, arrest, or other similar activity unless participation in such activity by such member is otherwise authorized by law."[49] The Secretary of Defense subsequently prohibited these activities in DoDD 5525.5,[50] and, as a result, the restrictions placed on Army and Air Force activities in the PCA now apply to the Navy and Marine Corps.[51] The PCA does *not* apply to the Coast Guard unless it is operating under the command and control of the DoD.[52]

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[47] Service regulations that implement DoDD 5525.5, *id.* note 8, are U.S. DEP'T OF ARMY, REG. 500-51, SUPPORT TO CIVILIAN LAW ENFORCEMENT (1 Aug. 1983) [hereinafter AR 500-51]; U.S. DEP'T OF NAVY, SECRETARY OF THE NAVY INSTR. 5820.7B, COOPERATION WITH CIVILIAN LAW ENFORCEMENT OFFICIALS (28 Mar. 1988) [hereinafter SECNAVINST 5820.7B]; and U.S. DEP'T OF AIR FORCE, SECRETARY OF THE AIR FORCE INSTR. 10-801, ASSISTANCE TO CIVILIAN LAW ENFORCEMENT AGENCIES (15 Apr. 1994) [hereinafter AFI 10-801].

[48] *See, e.g.*, United States v. Yunis, 924 F.2d 1086, 1093 (D.C. Cir. 1991) (citing congressional record that earlier version of measure expressly extended PCA to the Navy but final version deleted any mention of application to the Navy); United States v. Roberts, 779 F. 2d 565 (9th Cir. 1986), *cert. denied*, 479 U.S. 839 (1986).

[49] Hayes, *supra*, note 40, at 102-103 (10 U.S.C. § 375 makes the proscriptions of 18 U.S.C. § 1385 applicable to the Navy). *See also* Yunis, note 10, at 1094 ("Regulations issued under 10 U.S.C. § 375 require Navy compliance with the restrictions of the Posse Comitatus Act....").

[50] *See* DoDD 5525.5, *supra* note 41, para. E4.3; AR 500-51, *supra* note 9, para. 2-1(d); SECNAVINST 5820.7B, *supra* note 9, para. 9(a)(3); AFI 10-801, *supra* note 9, ch. 2.1. Exceptions to this prohibition as it applies to the Navy or Marine Corps may be granted by the Secretary of Defense or the Secretary of Navy on a case by case basis. *See also* Yunis, *supra,* note 10, at 1094 (affirming that DoDD 5525.5 requires the Navy to comply with the restrictions of the Posse Comitatus Act).

[51] SECNAVINST 5820.7B, *supra* note 42, para. 9(a)(3).

[52] 14 U.S.C. § 2.

The PCA also applies to Reserve[53] members of the Army, Navy, Air Force, and Marine Corps who are on active duty, active duty for training, or inactive duty training ***in a Title 10 duty status***. Members of the National Guard performing active duty for training or inactive duty training ***in a Title 32 duty status*** are not subject to the PCA. Only when members of the National Guard are ***in a Title 10 duty status (federal status)*** will they be subject to the PCA. Members of the National Guard also perform additional duties in a State Active Duty (SAD) status and are not subject to PCA in that capacity.[54] Civilian employees of the DoD are only subject to the prohibitions of the PCA if they are under the direct command and control of a military officer.[55]

Finally, the PCA does not apply to a member of the Army, Navy, Air Force, or Marine Corps when they are off duty and acting in a private capacity. A service member is not in a private capacity when assistance is rendered to civilian law enforcement officials under the direction or control of DoD authorities.[56]

The Standing Rules for the Use of Force

The Standing Rules for the Use of Force (SRUF) provide the operational guidance and establish fundamental policies and procedures governing actions taken by DoD forces performing civil support missions (e.g., military assistance to civil authorities and military support for civilian law enforcement agencies) and routine Service functions (including anti-terrorism/force protection (AT/FP)) within the US and its territories. It also applies to land-based homeland defense missions occurring within the US and its territories. The SRUF also apply to DoD forces, civilians and contractors performing law enforcement and security duties at all DoD installations within or outside the US and its territories, unless otherwise directed by the Secretary of Defense. The SRUF supersede CJCSI 3121.02, RUF for DoD Personnel Providing Support to Law Enforcement Agencies Conducting CD Operations in the United States, the rules for the use of force in

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[53] The Reserve includes Reservists in the: Selected Reserve (SelRes), Guard/Reserve Units Individual Mobilization Augmentees (IMAs), Active Guard/Reserve Personnel Individual Ready Reserve (IRR), and Inactive National Guard (ING). "The Ready Reserve consists of units or individuals, or both, liable for active duty under the provisions of 10 U.S.C. §§ 12301-12302. The Ready Reserve is comprised of the Selected Reserve and the Individual Ready Reserve (IRR) / Inactive National Guard(ING)." 10 U.S.C. § 10142.

The SelRes is comprised of: Reserve/Guard Units: Unit members are Guard/Reserve personnel assigned to Reserve organizations and perform in drill periods and annual training as a minimum. Individual Mobilization Augmentees consist of Reserve personnel assigned to Active component organizations who perform in drill periods and annual training. Active Guard/Reserve (AGR) is comprised of Reserve personnel on full-time active duty or full-time National Guard duty to provide support to the Reserve Components. All Members of the SelRes are in an active status. *Id. at* § 10143.

[54] *See* CENTER FOR LAW AND MILITARY OPERATIONS, DOMESTIC OPERATIONAL LAW (DOPLAW) HANDBOOK FOR JUDGE ADVOCATES, VOLUME I, Chp 10 (18 Jul. 2006) [hereinafter DOPLAW HB, Vol. I], Reserve Components - Special Issues, for a detailed discussion of National Guard and Reserve status.

[55] DoDD 5525.5, *supra* note 41, para. E4.2.

[56] *Id.*

the DoD Civil Disturbance Plan (Garden Plot) and the use of force guidance contained in DoD Directive 5210.56, Enclosure 2.

The SRUF apply to Title 10 forces performing both homeland defense missions and defense support to civil authorities missions. These rules do not apply to NG forces in either state active duty or Title 32 status.[57] *Active duty JAs should coordinate with their National Guard counterparts when operating in a joint environment for situational awareness of the rules the National Guard is using.*

There are certainly variations between the states in the National Guard's authority to take actions requiring use of force in a law enforcement,[58] law enforcement support,[59]or security operation. For example, some states by statute give the National Guard all the authority of peace officers.[60] In other states, the National Guard has only those peace officer-type powers enjoyed by the population at large.[61] Other states take a middle position and provide that the National Guard has specific peace officer authority only in specified situations.[62] Depending upon the language of the state statutes involved, these grants of or limitations on the National Guard's authority to act as peace officers may apply to National Guard personnel conducting operations in a Title 32 status, an

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[57] NG in a Title 32 or SAD status operate under the RUF of the affected state(s).

[58] Because the Posse Comitatus Act, 18 U.S.C. § 1385 (2000) [hereinafter PCA] does not apply to the National Guard when not in federal status or under federal control, there is no federal law prohibiting the National Guard from participating in direct law enforcement actions. Whether the National Guard forces of any state may otherwise participate in such actions therefore depends upon the law of the individual states. Concerning application of the PCA to the National Guard, *see also* text *infra* subparagraph C.2.

[59] Law enforcement support for the purposes of the National Guard is usually taken to mean assistance provided to civilian law enforcement agencies at their direction or request. It may mean something else for the purposes of the application of the PCA to active duty federal military forces.

[60] For example, Arkansas law provides the following:

> (a) Whenever such forces or any part thereof shall be ordered out for service of any kind, they shall have all powers, duties, and immunities of peace officers of the state of Arkansas in addition to all powers, duties, and immunities now otherwise provided by law.

ARK. CODE ANN. § 12-61-112(a).

[61] *See, e.g.*, Iowa RUF for the airport security mission "Task Force Freedom Flight - Airport Security Instructions," para. 4, and its reliance, for the purposes of arrest of civilians committing crimes in the presence of National Guard personnel, on Iowa Code § 804.9, granting ordinary citizens the power of arrest; Nebraska Rules of Interaction (ROI) #02, 2 Oct. 2001, para. 7 ("You must apply the use of force rules that apply to a private citizen under state law"); and Use of Force and Arrest Powers of New York National Guard Soldiers, para. 5 ("a National Guardsman's power and authority under New York state law are the same as any other citizen"). When conducting SAD missions in the wake of the 11 Sept. 2001 terrorists attacks, the NYARNG had no greater power than the normal citizen regarding arrest authority. Although a New York State Emergency Act provided a mechanism for the NYARNG to be designated as peace officers, that provision was not used because to be designated as peace officers the Act also required a lengthy training period.

[62] *See, e.g.*, GA. CODE ANN. § 38-2-6 to 38-2-6.1.

SAD status, or both.[63] Regardless, the National Guard JA must participate in the effort to tailor the RUF to the particular mission and the policies of the state Adjutant General, even if those needs and policies dictate a more restrictive RUF than is actually allowed by state law.[64]

Given the doctrine of Federal Supremacy Clause immunity, it should be clear that federal active duty Soldiers have less reason to consider themselves bound by the exact restrictions of a state's criminal law, and more reason to follow the requirements of the SRUF than do National Guard personnel acting in a Title 32 or SAD status. For this reason, National Guard JAs acting in domestic law enforcement support or security operations involving both active component and National Guard personnel executing a mission in a state status should pay close attention to the RUF for those operations if active duty Soldiers and National Guard Soldiers serve similar roles or have similar duties. The RUF applicable to National Guard personnel in those situations must be most respective of state limitations on law enforcement-type activities by the National Guard (such as searches and seizures) and the use of force to support those activities.[65]

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[63] For example, Ark. Code Ann. § 12-61-112 applies "Whenever" National Guard forces are ordered to "service of any kind," but Ga. Code Ann. § 38-2-6 to 38-2-6.1, when read *in toto*, provide that the Governor has the power "in case of invasion, disaster, insurrection, riot, breach of the peace, combination to oppose the enforcement of the law, or imminent danger thereof" to declare an emergency ordering the National Guard into "the active service of the state" and granting the National Guard the authority to "quell riots, insurrections, or a gross breach of the peace or to maintain order."

[64] For the purposes of the airport security mission, some states adopted more restrictive RUF than state law allowed. *See, e.g.*, Annex E Rules of Engagement (ROE), para. 2, as approved by Wisconsin Attorney General Doyle (4 Oct. 2001) (in which Wisconsin National Guard authorities explained that the effect of Wis. Stat. Ann. § 939.22(22) was to grant National Guard personnel the authority of peace officers, but that the policy of the National Guard was to grant only those "specified tasks of the requesting civil authorities denoted by special operations orders").

[65] This does not necessarily imply that state RUF will *always* be more restrictive than the SRUF. For example, in civil disturbance support operations in which NGR 500-1 applies, when federal equipment is used the RUF provides that deadly force may be used for the prevention of the destruction of "property vital to public health and safety" (undefined). Some states followed this authorization for the purposes of the airport security operation, even though that operation was not a civil disturbance operation, but was an airline security operation. *See, e.g.*, Missouri RUF for airport security mission ("Commander's Guidance on Use of Force"), Force Continuum Deadly Force, para. 3c. In contrast, the analogous provision of the SRUF, authorizes the use of deadly force to protect president-designated assets vital to national security, which by definition is property the theft or sabotage of which must create an "imminent threat of death or serious bodily harm."

XI. DOCTRINE, ORGANIZATION, TRAINING, MATERIAL, LEADERSHIP, PERSONNEL, AND FACILITIES (DOTMLPF) AND COUNTRY MATERIALS

Contingency operations continue to introduce new lessons in the field of doctrine, organization, training, material, leadership, personnel, and facilities (DOTMLPF). For the first time since Operations DESERT SHIELD and STORM, both small contingency unit legal teams and entire unit offices of the staff judge advocate (OSJA) deployed as a whole. The rotation of units to both Operation IRAQI FREEDOM (OIF) and Operation ENDURING FREEDOM (OEF) revealed that the Judge Advocate General's Corps (JAGC) is on the cutting edge of new technologies and that legal personnel are generally well-trained to support their mission. Large-scale deployments, however, also expose holes in the area of equipment authorizations for OSJA assets. Further, the deployments revealed that legal personnel must be highly trained in basic military skills, as the legal mission in today's contemporary operational environment requires legal personnel to traverse the battlefield to accomplish their mission.

XI.A. ARMY DOCTRINE

Prior to the publishing of FM 27-100[1], *Legal Support to Operations*, in March of 2000, doctrine for the JAGC was based upon individual office standard operating procedures, word of mouth, and relevant Army regulations such as 27-*10 Military Justice* or AR 27-20 *Claims* and those few Army publications that made reference to legal support to operations. With the introduction of FM 27-100, the JAGC for the first time attempted to describe the mission and operations of JAGC organizations, units and personnel supporting Army operations. FM 27-100 recognized that legal support must be thoroughly integrated into all aspects of operations to ensure compliance with law and policy and to provide responsive, quality, legal services to units involved in combat and contingency operations. In many ways, FM 27-100 provided a clear doctrinal basis for legal training, organization and material development. It also defines the six core legal disciplines and, for the first time, defined the mission of the JAGC.

With the end of the cold war, the development of the joint and expeditionary mindset, and the introduction of the modular force concept, the structure and organization of the United States Army and the JAGC have changed. JAGC doctrine is currently being re-written to reflect these fundamental changes, and to synchronize the doctrine for legal support to operations with Army doctrine writ large.

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[1] *See also, Draft* JOINT CHIEFS OF STAFF, JOINT PUB. 1-04, LEGAL SUPPORT TO MILITARY OPERATIONS *(6 MAR. 06).*

XI.B. ARMY ORGANIZATION (FORCE STRUCTURE)

The transformation of Army brigades to the modular force design increased the overall manpower of the brigade. Although the brigade has grown in numbers the amount of office space or "real estate" has remained unchanged. In many cases, the growth of the BCT has doubled forcing JAs and 27Ds to restricted working environments.

* Lessons learned have not been captured for deployed units that have transformed under the Modular Force Structure.

XI.C. TRAINING, MDMP, AND READINESS

XI.C.1. Army

(a) Annexes

Judge Advocates and Noncommissioned Officers Must Provide Training to Service members at the Battalion Level.

The distance between Forward Operation Bases (FOBs) often made it difficult for the BJA and NCOIC to maintain visibility over legal actions in the outlying subordinate units. The implementation of the modular force structure increases the visibility of the BJA and NCOIC by embedding a paralegal at the battalion level. The "plug and play" concept does not work as well with the battalion paralegal until he or she is trained to operate independently. It is the Brigade Paralegal NCOIC's responsibility to prepare these battalion paralegals to spot developing legal issues and continue to professionally develop his/her service members.

(a) Annexes. The legal annex to the operations order remains one of the most important products produced by the office of the staff judge advocate. Experience has demonstrated the importance of including every possible detail in such an annex. For example, a battalion commander will be hard pressed to demand the return of the 27D paralegal that is assigned to his battalion (usually for use in performing routine administrative duties) if the division operations order states in the legal annex that all legal assets will be utilized in a consolidated brigade legal center. Included below is a sample legal annex from Task Force 134:

GENERAL GUIDANCE: *In conducting military operations, military commanders must remain aware of the obligations and limitations placed upon them by customary and conventional international law as well as domestic law. Commanders should seek and incorporate legal guidance in all phases of the planning and execution of this operation.*

(b) FSOPs

Standardize Information Management: Tracking, Storing, and Filing.

At bigger offices there were a large number of JAs and paralegals preparing work product while deployed. These offices found that they must have standardized information tracking, storing, and filing systems.[2] For example, once in theater, V Corps developed a tracking system for all of their legal opinions that allowed them to monitor actions, develop trends, and answer questions from higher headquarters on the details of legal actions. BOLTs also experienced problems maintain accountability over actions.

[2] Center for Law and Military Operations, Legal Lessons Learned from Afghanistan and Iraq, Vol I: Major Combat Operations (11 Sep 2001 – 1 May 2003), pg. 274 (1 Aug 2004), [hereinafter OIF, Vol I]

Given the complexity of many task organized brigades and the dispersal of subordinate units, actions could easily become lost. Therefore, BOLTs needed to maintain a tracking and storage system, as well.[3]

In addition, OSJAs found that they had to have a system for identifying, consolidating, and disseminating important information. This was made easier in most cases by unit websites. Many OSJAs had their own section of the unit website wherein they posted information for general use, such as information papers, important fragmentary orders, and situational reports.[4] Hence, it was imperative that OSJAs had someone schooled in website management. Although unit websites were an excellent tool for posting information, reviewing and identifying important information on the website proved time intensive. Therefore, OSJAs should assign specific personnel to review and retrieve information pertinent to legal operations from websites, as well as from various meetings and video teleconferences.[5]

To maintain accountability of actions legal offices also needed to have a standardized storage and filing system. An excellent recommendation by a V Corps JA is that the Field Standard Operating Procedure (FSOP) should provide for how documents will be saved and stored in a central location on each computer or on a network accessible drive. This will ensure that another member of the OSJA can easily locate and retrieve the document, when necessary.[6] In addition, there must be sufficient space for files to be stored, in particular as the mission expands and section files become more voluminous.[7]

(c) Military Decision Making Process (MDMP)

Ensure Noncommissioned Officers Receive Operational Law Training to Help Judge Advocates Maintain 24 Hour Operations.

Paralegal NCOs and their Marine Corps counterparts continue to perform many operational law tasks. These NCOs brief troops on Law of War (LOW), Code of Conduct, and Rules of Engagement (ROE). They also helped JAs cover 24-hour operations, targeting boards, and overlapping meetings. Therefore, it was important that these NCOs had operational law training to provide supplemental insight and spot potential legal issues while manning the tactical operations centers (TOCs).

Given many NCOs' operational law mission, it is imperative that SJAs and chief paralegal NCOs ensure these NCOs receive operational law training through home

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[3] OIF, Vol I, pg. 275.

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *See, e.g.*, After-Action Review: Operational Iraqi Freedom, Sergeant Darienne LaVine, Noncommisioned Officer In Charge, Military Justice Division, V Corps, para. 4 (undated).

station NCO Professional Development Classes. Paralegals also should be afforded the opportunity to receive schoolhouse training in operational law. For example, paralegals involved in supporting operational legal issues should attend operational law courses at the Army's Judge Advocate General's Legal Center and School, such as the Operational Law and Law of War short courses.[8] Moreover, when authorized on the modified table of organization and equipment (MTOE),[9] SJAs should send their eligible NCOs to the battle staff course at Fort Bliss or via teleconference whenever possible.[10]

(d) Office Mission Essential Task List (METL)

Ensure that Legal Personnel Have Appropriate Security Clearances Prior to Deployment.

At a minimum, a secret level security clearance is essential for any JA and 27D. The modular force transformation has created "mini-OSJA's" at the brigade level. The JA and 27D role has incorporated these service members into key positions within the brigade and battalions which require a minimum of a secret security clearance. Leaders must ensure that service members without clearances work on the EPSQ as part of their reception and integration into the unit. As of 1 June 2005, all new accessions into the 27D MOS career management field are required to have a secret clearance. Service members who entered service prior to 1 June 2005 are required to possess a secret clearance NLT 1 October 2008.[11]

Legal Teams Notified For Deployments Must Begin Coordinating the Transfer of Legal Office Authority Downrange as Soon as Possible.

Conduct a deliberate, systematic relief with the unit that you replace. Demand an accurate and complete accounting of all their "due outs" to higher headquarters and to local claimants. . . . Get into the weeds of the files and SOPs [standard operating procedures] for the unit replaced. Plan the agenda for the battle hand-off before you get there.[12]

As legal offices approached their redeployment dates, and new legal teams were selected to replace them, it was imperative that the deploying legal personnel begin coordinating the transfer of the legal mission as soon as possible. The OSJA at III Corps, for example, attempted to establish a good communications link with the OSJA, CJTF-7

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[8] The Judge Advocate General's Legal Center and School (TJAGLCS) website is located at www.jagcnet.army.mil/TJAGLCS. ATRRS information and dates of courses are located on this website.

[9] The duty MOS on the MTOE will reflect a 2S identifier for a Battle Staff NCO authorized position.

[10] The Battle Staff NCO course is located at the United States Army Sergeants Major Academy at Fort Bliss, Texas. The website for the course is http://usasma.bliss.army.mil/BSNCOC.

[11] U.S. Dep't of the Army, Pamphlet 611-21, Military Occupational Classification and Structure, Chapter 10 (23 Jun. 2003).

[12] OIF, Vol II, 274

in Iraq who they would replace. They found that it was imperative that there be a JA representative on the pre-deployment site survey (PDSS) conducted by the unit. Having a JA visit the legal team they will replace is critical in gaining deployment information to effect a well-organized transition. This allows the JA to get read-in on all pending legal actions and understand the UCMJ jurisdictional alignment, among other issues. If a JA is unable to travel into theater on a PDSS, the legal team should look for other ways to get a JA into theater.[13]

Through coordination with the legal team in theater, the OSJA found that they were better able to devise a training schedule tailored to their specific mission.[14] Additionally, the legal team leadership must ensure that all database information is transferred to the incoming legal personnel. As one legal office discovered, "[h]andover of database materials is just, if not more, crucial as face-to-face RIP [relief in place] activities."[15]

Integrate Reserve and National Guard Into Legal Operations.

For the first time since Operations DESERT SHIELD and STORM, many OSJAs at both corps and division deployed to theaters as a whole, leaving few active duty assets to cover operations in garrison. This, in turn, led to U. S. Army Reserve (USAR) legal personnel playing an extremely vital role in maintaining garrison operations. In addition, many USAR and Army National Guard legal personnel were mobilized and deployed to both Afghanistan and Iraq. Ultimately, it was the training that they received at their units, the Combat Training Centers (CTC), and during yearly rotations at sponsoring active duty OSJAs that better prepared them for their legal missions. Furthermore, this training allowed a smooth transition when it came to deployment operations.[16]

First, active duty legal personnel must continue to foster a habitual relationship with USAR legal personnel who may back-fill the garrison legal office. OIF and OEF proved that reserve legal personnel must be trained on how to perform their mission individually and collectively as if they will be called to active duty at any time.[17] It is imperative that active duty OSJAs integrate their reserve counterparts into any training that they may receive. As the former Staff Judge Advocate for the 101st Airborne Division noted, the 174th and 139th Legal Support Organizations and the 3397th Garrison Support Unit were successful in back-filling departing active duty legal personnel "in large measure because they had habitual relationships with the Fort Stewart

[13] *Id.*para. 2.b.

[14] *Id.*

[15] *Id.*

[16] OIF, Vol I, 258 -259

[17] *Id.*

and Fort Campbell SJA Offices."[18] In addition, USAR legal personnel, especially those at the more senior grades, must ensure that they are accessible to back-fill deploying SJA offices to provide the appropriate level of leadership.[19]

In addition to USAR legal personnel who back-filled deployed OSJA members at home station, many Reserve Component legal personnel, both USAR and National Guard members, deployed to Afghanistan and Iraq. Because many times deployed SJA offices had no visibility over what legal assets had deployed into their area of operations, the OSJA found it difficult to integrate Reserve Component legal personnel into their commands. Although SJA offices did their best to attempt to locate these JAs and enlisted paralegals and make them part of the OSJA team, sometimes they were not successful.[20] The lesson in this regard is that, absent a better personnel system that allows SJAs to easily identify legal assets assigned or attached to their units, both Active and Reserve Component legal personnel who deploy must continue to attempt to locate their counterparts to coordinate the legal mission.

Finally, Army JAs learned that it is still very difficult to mobilize Reserve Component legal personnel for active duty. As one SJA reported, "[e]ven when just one service member wanted to come, and the Reserve units wanted him to come, and the active units wanted him to come, it took individualized monitoring."[21] The best course of action in such situations seems to have been to call everyone involved and personally coordinate the mobilization.[22]

XI.C.2. Combat Training Centers (CTCs)

Units rotating through a CTC must be prepared in the six core legal disciplines prior to arrival at the CTC. CTCs are designed to replicate battlefield conditions upon which the unit can spot its shortcomings and enhance the performance at the completion or during the rotation. It becomes a rude awakening for units that arrive at the CTC with the expectation of an instructional type setting.

Battle Command Training Program (BCTP)

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[18] E-mail from Colonel Richard O. Hatch, former SJA, 101st Airborne Division, to Lieutenant Colonel Pamela M. Stahl, Director, Center for Law and Military Operations, at 2 (19 Apr. 2004).

[19] OIF, Vol I, 258 -259

[20] *Id.*

[21] E-mail from Colonel Patrick W. Lisowski, Staff Judge Advocate, III Corps, to Colonel Christopher M. Maher, Staff Judge Advocate, U.S. Army Forces Command, and others, subject: Lessons Learned – Ten Places for Suggested Improvements, at 2 (21 Apr. 2003).

[22] *Id.* (noting that the "[m]ost successful course of action was to call everyone involved (which took a long time to figure out) and find out exactly what piece of paper each of them needed, and promise beer or first borns.").

The BCTP, the Army's capstone combat training center, is located at Fort Leavenworth, Kansas. BCTP supports realistic, stressful training for ASCC/ARFOR, Corps, Division, and Brigade commanders and supports Army components participating in joint exercises to assist the CSA in fulfilling his duties to provide trained and ready units to win decisively on the modern battlefield and to conduct contingency operations worldwide. BCTP uses simulation centers worldwide to train commands and staffs.

BCTP is composed of four Operations Groups (OPGPs A, B, C, and D) as well as a Headquarters, and the World Class Opposition Forces (WCOPFOR). The three JAs assigned to BCTP, the Operational Law Observer Controllers (OPLAW OCs), are assigned to the Headquarters and support each of the Operations Groups (OPGPs). Each OPGP is commanded by a colonel (Commander, Operations Group or COG) and has a unique mission. OPGPs A and B focus primarily on division and corps warfigther exercises (WFX). These two OPGPs have a combined capability to conduct 14 division WFXs per year. A corps WFX equals two division WFXs, as both OPGPs are required. They also conduct seminars, mission rehearsal exercises (MREs), and advanced-decision making exercises (ADMEs) for units deploying in support of peacekeeping operations. OPGP C focuses on training National Guard brigades and the Army's new Initial Brigade; and conducts 14 brigade rotations per year. Prior to each WFX conducted by OPGPs A, B, or C, each OPGP conducts a WFX seminar at Fort Leavenworth, Kansas or at the training unit's home station. OPGP D focuses on ASCC/ARFOR training and Army components participating in joint exercises. OPGP D does not normally conduct its own exercises. Instead, it observes its training audience while participating in a joint-conducted exercise.

BCTP differs from NTC, JRTC, and CMTC in that there is no tangible maneuver "box" at BCTP. Instead, all training is performed via computer simulation and centers around a notional computer-generated "box." Many spontaneous legal issues arise naturally during the course of a WFX (such as targeting issues, fratricides, and civilians on the battlefield). Additionally, OPGPs A, B, and C insert legal and information operations issues (such as law of armed conflict, ROE, international agreements, justification of the use of force, contract and fiscal law, military justice, foreign claims, and legal aspects of joint, inter-agency, non-governmental and international organization coordination) into the training scenario. JAs should also be prepared to face traditional issues, such as weapons utilization and targeting. The number of legal "events" inserted depends on the training unit and the SJA's training objectives; however, the JA Observer trainers have increased the number of events from about sixty to about ninety over the past training year. Many of the new events are focused at legal NCOs. The idea is to stress all members of a unit's legal team. Recent training units have reported experiencing a healthy degree of training stress. For corps and division WFXs, many of these issues are inserted via the "Green Cell," which is a neutral information operations exercise control cell tasked to bring greater training realism to the exercise. Normally, two JAs will be tasked to support the contractors in the "Green Cell" to provide legal guidance regarding the information operations issues and to insert the legal/operational law issues into the WFX.

Approximately 100 days before an OPGP A, B, or C exercise actually begins, the OPGP plans and executes a five to seven day Battle Command Seminar at Fort Leavenworth, Kansas. The Seminar is designed to afford the CG an opportunity to focus on the military decision-making process (MDMP) and build his battle command staff. A reduced staff from the training unit deploys to Fort Leavenworth, Kansas, to either the Battle Seminar Facility (for OPGPs A and B seminars) or the Leadership Development Center (for OPGP C Seminars), where they focus on doctrine and tactics. TRADOC Regulation 350-50-3 requires the Staff Judge Advocate and the Chief, Operational Law, attend the Battle Command Seminar.

The nature of operations at BCTP varies, as each WFX is geared to the training commander's METL. Once the exercise actually begins, the JAs working in the "Green Cell" insert events into the exercise and the BCTP OC team observes the training unit's response to these and any naturally occurring legal events during the WFX. Every OPGP A, B, or C rotation includes at least two formal COG-lead AARs, lasting about 2 hours. In addition, the judge advocate OC team conducts an informal AAR for the JAs undergoing training.

Joint Multi-National Readiness Center (JMRC)

The JMRC is located at Hohenfels, Germany. Until recently, JMRC was loosely considered the "NTC of Europe," focusing on force-on-force maneuver training. However, JMRC now boasts state-of-the-art MOUT and ancillary training facilities that allow JMRC to provide training in both combat operations and military operations other than war (MOOTW). The JMRC provides training across the spectrum of conflict, using scenarios developed from recent operations (Iraq and Afghanistan) and mission rehearsals to prepare forces for deployment or likely contingency operations. The JMRC focuses on brigade and below commands and staffs, force-on-force maneuver training for armored and mechanized infantry battalions, company-level situational training exercises (STXs), and individual replacement training (IRT) for forces entering the Iraq and Afghanistan theaters of operations.

The maneuver "box" at the JMRC is 10 km x 20 km in area. The size of the "box" is ideal for battalion task force sized elements. Typically, a brigade headquarters will deploy to the JMRC and serve as the higher headquarters as each of its battalions rotates through their training exercise. At least twice during each rotation, two battalions operate in the "box" at one time. During these periods, the brigade headquarters also deploys into the "box" and operates with the two battalions, conducting both defensive and offensive operations. The brigade judge advocate functions within the brigade headquarters, responding to legal issues both during "brigade ops" and when only one battalion is in rotation. JMRC offers training in both high-intensity conflict (HIC), force-on-force scenarios, and low-to-mid-intensity conflict (LIC/MIC), and military operations other than war (MOOTW). Except for mission-specific rehearsal exercises, JMRC uses the same general scenario. The HIC portion generally involves three neighboring countries, Sowenia, Vilslakia, and Juraland. Sowenia is a fledgling democracy and an ally with the United States and NATO. The Vilslakian government was recently overthrown by a military coup and is now making claims to a small portion of Sowenia, inhabited mostly

by ethnic Vilslakians. Juraland struggles to remain neutral. The scenario begins either as a PSO scenario that moves to HIC when the Vilslakians cross the international border or it begins as a HIC rotation once the Vilslakians have already crossed the border.

JMRC conducts approximately 5 brigade rotations (up to 63 days each) per year, each with imbedded battalion rotations (25 days each). JMRC also conducts two Mission Rehearsal Exercises (up to 28 days each) per year and teaches 4 Individual Readiness Training Situational Training Exercises (IRT STX) per month. Each brigade rotation is comprised of up to 3 task forces and 1 Cavalry squadron. Rotations typically employ the 3-5-14-3 day rotational task force window model: 3 day deployment/MILES draw; 5 day company focus lane training (STXs); 14 day force-on-OPFOR maneuver exercise in movement to contact/attack/defend stages; and a 3 day recovery.

JAs can expect to encounter numerous legal issues at JMRC, whether involved in HIC or LIC/MIC. Issues that routinely arise include weapons and targeting, claims resulting from maneuver damage, the Law of War, armed civilians, and civilian protection.

There is currently one JA O/C at CMTC. The role of the JA O/C is to teach, coach, and mentor the JAs involved in the exercise. An AAR is conducted at the culmination of the unit's training exercise and the unit is provided a Take Home Package.

Joint Readiness Training Center (JRTC)

The JRTC is located at Fort Polk, Louisiana. This CTC focuses primarily on training brigade combat teams in full spectrum operations in preparation for deployment to Iraq or Afghanistan. This is accomplished through the use of tough, realistic training conditions.

Each fiscal year, JRTC conducts ten Mission Rehearsal Exercises (MREs). A single rotation consists of 16 days. This time is divided roughly as follows: Days 1-8 consist of situational training exercise (STX) lanes. Days 8-16 lead the BCT through a Relief-in-place with a predecessor BCT to assume operations in the "box." In addition to the approximately 3,500 troops supporting the brigade, there may also be as many as 1,500 troops supporting the rotation as divisional Sustainment Brigades, Aviation units, Logistics task forces and combat hospitals.

The current scenario places the brigade in the fictional province of Talatha, tailored to replicate the brigade's ultimate destination in either Iraq or Afghanistan. Upon arrival, small units gear up for the STX lanes and live fire exercises, specifically designed by recent OIF & OEF veterans to replicate the threats and TTPs used in theater. Simultaneously, the brigade's leaders receive specialized training in detainee operations, cultural awareness and conducting one-on-one engagements with host-nation leaders. They also receive the CJTF-21 OPORD for the BCT's mission in Talatha on D-5, continuing a flow of information that began three months before the unit's arrival. On D-4, the outgoing unit (replicated by JRTC's own Operations Group planners) provides an Operations and Intelligence brief. Various aspects of the surroundings are discussed

including what would be classified data on the activities, tactics, techniques, and procedures (TTPs) of unfriendly elements. The brigade staff and its subordinate battalions begin their planning process to accomplish their mission: to establish a safe and secure environment. There are rehearsals, pre-combat inspections, maintenance, training within the unit and any other manner of preparation that leaders from squads to the brigade commander deem necessary.

The first real interaction between the brigade's leaders and Talathans occurs on D-2 at an Interagency Coordination Meeting. This IACM brings role playing non-governmental organizations (NGOs), International Organizations (IOs) and village leaders together to become familiar with the unique challenges facing TALATHA on a first hand basis. On D-1, the BCT leaders receive an AO orientation in a right-seat-ride with their Observer/Controllers, and TOA is complete at midnight.

Behind the scenes, a cast of over 1000 role players have inhabited familiar (at least to them) 18 villages with about 600 buildings of varying sophistication. The demographics generally match what would be seen in Iraq. Role players include JRTC's famous 1st Battalion, 509th Infantry (Airborne) Opposing Force; civilians on the battlefield - each with an identity for the rotation; and cultural role players (Arabic, Kurdish, Afghan Persian, Pashtun, etc. speaking residents of the U.S.A. brought to JRTC specifically to give a foreign voice to the environment). Throughout the course of the exercise, the BCT may receive claims for damage, conduct personnel recovery operations, host a congressional delegation, conduct raids for high-value targets in coordination with Special Operations Forces, or open new police stations, to name a few.

Like the conflicts in Iraq and Afghanistan, Talatha is a legally rich training environment. Judge advocates immediately face challenges ranging from interpretation of the ROE for non-declared-hostile threat forces to targeting to claims preparation. Unlike the JRTC of the Cortina era, the nature of full-spectrum stability and reconstruction operations challenges JAs and paralegals to master detainee processing, training and equipping host nation armed forces and police and liaison with non-governmental and international organizations. Balancing the lethal and non-lethal aspects of the brigade fight, Judge Advocates play key roles in the Fires & Effects Coordination Cell, often becoming dominant players in the effects assessments of kinetic operations and taking the lead in planning consequence management. The workload of the new transformed BCTs requires Brigade Judge Advocates to rely heavily on their OpLaw JAs and well-trained paralegal service members to observe all aspects of the fight at both brigade and battalion level and forward thorough, accurate and concise recommendations for the BJA's review.

There are four observer/controllers (O/Cs) at JRTC, three JAs and one 27D NCO. Their role is to teach, coach, and mentor the Brigade Operational Law Teams (BOLTs) involved in the exercises in an effort to help rotational JAs and paralegal service members improve their respective contributions to their unit's mission. These O/Cs also provide coverage to JAs supporting Divisional and SOF units. After-action reviews (AARs) are conducted after each operational phase and a final exercise review occurs at

the exercise conclusion (ENDEX). Later, a Take Home Packet (THP) capturing O/C observations is provided to the BOLT and the unit.

National Training Center (NTC)

The NTC is located at Fort Irwin, California, in the middle of the Mojave Desert. The NTC focuses primarily on training Brigade Combat Teams (BCTs) across the entire spectrum of military operations, from low-to-high intensity conflict. This training is accomplished through the use of professional civilian role players incorporated into realistic joint and combined arms training in contingency-based scenarios. In addition to Company-level situational training exercise (STX) and civilian engagement opportunities, the NTC also provides comprehensive force-on-force maneuver and live fire training.

The maneuver box at the NTC is as large as the state of Rhode Island-1,001 square miles. The depth and width of the battle space gives brigade elements the unique opportunity to exercise all of its elements in a realistic environment from interaction with local indigenous populations and associated insurgent forces to opposition from heavy military forces. This is often a unit's only opportunity to test its combat service and combat service support elements over a doctrinal distance prior to deployment to a combat Theater. BCTs must be able to communicate through up to 8 communications corridors, evacuate casualties over 40 kilometers, and navigate at night in treacherous terrain with few navigable features or distinguishable roads. Other environmental conditions such as a 40 to 50 degree diurnal temperature range, winds over 45 knots, and constant exposure to the sun and dust stresses every system and service member to their limit.

Each fiscal year, NTC conducts ten (10) rotations, each rotation typically consisting of 28 days. The first 5 days (RSOI 1-5) are spent generating combat power and integrating into the 52nd ID (M) battlespace. During this period, there are host nation visits, demonstrations, stability and reconstruction operation (SRO) missions, media events and attacks by Anti Iraqi Forces (AIF) insurgents. The second phase, training days 6-14, is force-on-force/Mission Rehearsal (MRE) training where BCTs exercise systems and TTPs across low-high intensity operations, supported with the use of MILES equipment. Throughout this phase of operations are numerous live fire opportunities. The NTC is the only facility in the U.S. Army that allows a full Brigade Combat Team to conduct both a live fire attack and a live fire defense integrating all of the warfighting functions, including the incorporation of live/virtual/constructive joint assets. The final 5 days of the operation is regeneration of combat power and redeployment.

JAs can expect to encounter numerous legal issues during all phases of the rotation. During the RSOI phase, JAs can expect to encounter issues involving fiscal operations, ROE, escalation of force, international agreements, and claims as well as emergency legal assistance and trial counsel duties. Also, in all phases, issues relating to civilians on the battlefield, media representatives, non-governmental organization visits, local government concerns and requests, insurgent activity, and EPWs are typically

encountered. Throughout the rotation, JAs are usually responsible for tracking fratricide, law of war violation reports and other investigations, and are heavily involved in the planning and execution of fiscal operations across the Area of Operations. Regeneration has little legal "play," but this is where many "real world" issues surface.

There are two JA O/Cs and one 27D NCO at NTC. They are responsible for teaching, coaching, and mentoring the JAs involved in the exercise and replication of the 52nd ID (M) SJA. There are a number of individual section "Hummer top" AARs as well as BCT-wide AARs throughout the rotation.

XI.C.3. Pre-deployment Training Material

Senior Leaders Must Devise a Comprehensive Pre-deployment Training Program to Prepare Legal Teams for Deployment.

According to Army doctrine, the SJA, in conjunction with the DSJA, Chief Paralegal NCO, and Legal Administrator, trains the SJA section for wartime deployment.[23] In today's contemporary operational environment all legal personnel must be trained Soldiers and Marines. They must have acute situational awareness and the basic military skills and training to react and counteract during an attack.

This training begins with a comprehensive home station training program. In preparation for deployment, OSJAs instituted a pre-deployment training schedule for all office personnel on legal matters, staff operations, and military skills.[24] Legal personnel often commented that JAs and paralegals must train together, rather than have separate training programs.[25] Additionally, all personnel need to go through pre-deployment training and preparation, even if they are not initially planning to deploy. Many times, OSJAs had to bring legal personnel forward into theater to replace personnel who had to leave, or because of increasing mission requirements. Getting replacements or additional personnel into theater goes more smoothly when they have already gone through pre-deployment training.[26]

As soon as possible, legal teams need to become familiar with the operational order (OPORD) that will guide their mission. This will assist in their planning and pre-

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[23] *See* U.S. Dep't of Army, Field Manual 27-100, Legal Support to Operations para. 5.7 (1 Mar. 2000) [hereinafter FM 27-100].

[24] OIF, Vol I, 260

[25] OIF, Vol I, 261; Kosovo LL, 172; Center for Law and Military Operations, Law and Military Operations in Haiti, 1994 – 1995: Lessons Learned for Judge Advocates, 166 -167 (11 Dec. 1995) [hereinafter Haiti LL]; Center for Law and Military Operations, Law and Military Operations in Central America: Hurricane Mitch Relief Efforts, 1998 – 1999: Lessons Learned for Judge Advocates, 138 -139 (15 Sep. 2000) [hereinafter Mitch LL].

[26] *Id.*

deployment training.[27] Also, legal personnel must understand staff operations, including the military decision-making process (MDMP). Moreover, many OSJAs drafted their own fragmentary orders (FRAGOs), which required them to learn the proper format for FRAGOs and how to staff them.[28]

By necessity, programs must contain training on combat lifesaving skills, map reading and land navigation, convoy operations, Single Channel Ground and Air Radio System (SINCGARS) communication, reading a Signal Operating Instruction (SOI), weapon's proficiency, and driving and performing preventive maintenance on a HMMWV and other military vehicles.[29] In addition, because of the dangerous environment in which legal personnel often operated, they needed to be trained on various weapon systems, such as the 50 caliber machine gun and other crew served weapons. They also needed to be taught how to react to direct fire, basic squad movements and tactics, and proper building of a fighting position.[30] Moreover, for forward deployed legal personnel (and later for legal teams conducting the judicial reconstruction mission), advanced tactics training was necessary. Paralegals were sometimes called upon to clear and secure buildings, pull security for convoys on the move, and deal with civilians on the battlefield in hostile situations.[31]

The pre-deployment training program must also include planning sessions during which the entire office participates in packing and load planning.[32] All legal personnel should know what equipment the SJA office has, and what equipment and supplies should be packed to conduct 24-hour operations in a deployed environment. This is especially important if a small number of legal personnel are deploying separately and

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[27] *Id.*.

[28] *See, e.g., id.* (Captain Noah Nalgeri, Office of the Staff Judge Advocate, V Corps, commenting that as a battle captain in the V Corps Main Headquarters, he drafted and staffed FRAGOs).

[29] Colonel William A. Hudson, Staff Judge Advocate, 3d Infantry Division, stated:

> [I]t's amazing that the reason the JAG was so swift pulling out of the courthouse and going to Baghdad is the fact that they knew how to drive, they didn't screw around and they did it and did it right. The convoy operation was key. In the convoy up and the convoy back, we didn't have any breakdowns of vehicles in the JAG. I think that's a testament to how we took care of our own . . . .

OIF, Vol I, 262.

[30] *See* AAR Comments Operations DESERT SPRING/IRAQI FREEDOM, Captain Chester J. Gregg, Judge Advocate, 2d Brigade, 3ID, (25 Apr. 2003) [hereinafter Gregg AAR].

[31] *See, e.g., id.;* V Corps AAR Transcript, OIF, Vol I, 262

[32] *See, e.g.,* V Corps AAR Transcript, OIF, Vol I, 262; After Action Review, Operation IRAQI FREEDOM, MAJ Robert F. Resnick, Chief, Criminal Law, OSJA, 3ID, at 1 (25 Apr. 2003) [hereinafter Resnick AAR].

may otherwise be unaware of their equipment and supply needs.[33] In addition, OSJAs should ensure that their SIPR laptops are packed, stored, and moved together so that time is not wasted once personnel arrive in theater trying to locate these computers.[34]

In addition to home station pre-deployment training, JAs and enlisted paralegals routinely commented that their time at the combat training centers (CTCs) was a vital training experience.[35] For example, one JA advised that if the unit plan calls for one enlisted paralegal to go, send four for the experience.[36] The same is true for JAs. Time at the CTC with the brigade also assists legal personnel in establishing a relationship with the Brigade Commander and staff, which may prove invaluable when requesting equipment, supplies, and other support during deployments.[37]

The lesson is that senior trainers need to go beyond Common Task Training (CTT) to train for warfare. For training updates based on current operations to aid in developing effective training for OSJA personnel, trainers should seek advice from legal personnel assigned to the CTCs, contact CLAMO for the latest legal lessons learned, and check with the Center for Army Lessons Learned (CALL) for updates on Army-wide lessons learned from current operations.

Internet Working Station

Internet Working Station (IWS) has proven itself as a useful tool for many divisions. The Internet Working Station has the ability to post information for all users to view or you can create a link for OSJA personnel only. IWS allows for two way communication between superior and subordinate users at different locations. IWS have been used to post trackers (15-6 investigations/Military Justice/Foreign Claims), Command Judge Advocate Critical Information Requirements (CJA CIR's), new FRAGO's, etc. The OSJA/BCT's design of their IWS webpage will determine how useful it will be.

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[33] *See, e.g.,* Corporal Brandi M. Ferguson, OSJA, 3ID, Operation Iraqi Freedom After Action Review, (30 Apr. 2003) [hereinafter Ferguson OIF AAR] (recommending that everyone pack all of the items that are on the mandatory packing lists).

[34] V Corps AAR Transcript, OIF, Vol I, 262.

[35] *See, e.g.,* Ferguson OIF AAR, ("[t]he War Fighting Exercises were a great way in which to train service members for a possible Combat/Hostile situation.").

[36] Interview with Captain Pat Parson, Judge Advocate, 2d Armored Cavalry Regiment, by Lieutenant Colonel Judith Robinson, OIF Study Group Collector, Center for Army Lessons Learned, in Baghdad, Iraq, (14 May 2003).

[37] *See, e.g.,* MAJ Jeff A. Bovarnick, Chief, Operational Law, CJTF-180, CJTF-180 Notes from the Combat Zone, at 1 (2003) ("pre-deployment training and preparation for the specific deployment is essential. Schoolhouse and exercise training give you the fundamental tools to work with, but situational awareness of the operation and staff integration are the final keys to success for judge advocates and paralegals.").

XI.D. MATERIALS

Communications Equipment

The day of the Digital Nonsecure Voice Terminal (DNVT) is starting to phase out. Voice-Over-Internet Protocol (VoIP) has taken the lead as the innovative way of communicating in a deployed environment. VoIP converts the voice signal from your telephone into a digital signal that travels over the Internet. This clear and reliable connection has time and again proven to be cutting edge technology in Global War on Terrorism.

Digital Sender

Digital senders have become an integral part of the OSJA. Pre-deployment Site Surveys (PDSS) personnel should identify what automation they will be adopting from the previous rotation. At a minimum, the incoming unit should ensure that a digital sender is available wherever they will post a JA and 27D. Digital senders allow documents to be scanned, transferred into to a PDF format, and emailed/saved for archiving purposes. Justification of having a digital sender is simple, 1) it reduces the amount of personnel being put in harms way, 2) what used to take multiple man hours and high risk convoys are no longer needed, and 3) documents can be transferred form one area to another in minutes.

Plan for the specific challenges of your environment.

> *Our personnel took great care with their equipment, protecting it during travel, servicing often, and vigilantly cleaning.*[38]

In the heat and dust of Iraq and Afghanistan, systems breaking and malfunctioning were a daily occurrence. As with almost all equipment, however, if service members fail to take care of the automation equipment, it will break sooner rather than later. Therefore, in both operations it was extremely important that Soldiers and Marines develop a daily regimen to perform preventive maintenance on their automation equipment, just as they would on their weapons and vehicles.

The sand in both Afghanistan and Iraq was very fine and powdery and almost invisible to the human eye when carried with the air and wind. This powder would often get in the exposed opening of computers and cause damage to internal components. Hard drives, motherboards, printer heads, and especially disc drives were extremely susceptible to this sand. Therefore, legal personnel had to find ways to protect their equipment.[39] These measures included:

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[38] Matheis AAR, OIF, Vol I, 271.

[39] *Id.*

- Daily backups of equipment;
- Saran Wrap or plastic keyboard covers to protect keyboard from sand and water;
- Covering computer vents with commercial home dryer sheets to prevent micro particles of sand from getting in computers and damaging major components;
- Canned air and anti-static wipes;[40] and
- Shaving brushes to clean exposed computer parts.[41]

USB Portable Storage Device (more commonly known as Thumb Drives) and Portable Hard Drives

If there was one item of equipment that legal personnel thought was the single best piece of automation equipment for deployments to both Afghanistan and Iraq, it was the thumb drive.[42] With conditions of extreme heat and excessive dust, legal personnel discovered a new means of storing and transferring data during a time when automation systems constantly failed. The thumb drive—compact, lightweight and relatively inexpensive—was the most durable and reliable piece of data storage equipment used in the desert. It allowed users to store and carry large files[43]on a durable medium that had both read and write capabilities. Legal personnel found the thumb drives particularly useful during times when they did not have access to their individual workstation, but they had access to another computer. Files could be placed on any thumb drive, plugged into the Universal Serial Bus (USB) port of any computer and used on that computer.

Legal personnel also used thumb drives to store classified documents from a classified computer. The advantage of using a thumb drive on a classified system was that these drives were easy to carry. They could be worn around the neck or placed in the individual's pocket. OSJA security managers need to ensure that users understand that thumb drives used to store classified documents must be treated as hard drives when it comes to storing any classified information.[44] Also, they took up minimum space when stored in a GSA–approved classified storage container. Some offices, such as the OSJA for the 82d Airborne Division, used these devices exclusively to store and transfer data.[45]

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[40] *See, e.g.,* 3ID AAR Transcript, (comments by CW2 Dorene L. Matheis, Legal Administrator, 3ID). There were many home remedies recommended that did not work, including covering the entire computer with saran wrap (which caused computers to overheat) and putting pantyhose over them (which did not keep the sand out).

[41] Task Force Rakkasan Brigade Operational Law Team Interim Deployment AAR, (11 Mar. 2003) [hereinafter TF Rakkasan AAR]; 3ID AAR Transcript, (comments by CPT Chester Gregg, Brigade Judge Advocate, 2nd Brigade, 3ID, that the best thing to keep computers clean was old horse hair shaving brushes).

[42] OIF, Vol I, 277.

[43] As of the date of Publication, the specifications allow the larger drives to store up to 2GB of information.

[44] E-mail from CW2 Eddie R. Hernandez, Legal Automation Army-Wide System Office, Office of the Judge Advocate General, to Colonel George L. Hancock, Jr., Chief, Legal Technology Resources Office, Office of The Judge Advocate General, para. 6 (14 May 2004) [hereinafter CW2 Hernandez E-mail].

[45] 82d Airborne OIF AAR, OIF, Vol I, 277.

Court Reporter Support

The restructuring of the brigades under the modular force structure does not include a court reporter in the BCT MTOE. This void has left the BCTs relying on the main OSJA to provide court reporters. Court reporter support in a garrison environment is easily manageable; however, providing support in a deployed environment has proven to be much more difficult. XVIII Airborne Corps experienced the difficulty of providing court reporter support outside of Camp Victory because of the amount of bulky equipment that had to accompany the court reporter.[46]

Courts-martial will not stop because of deployments. With operations forward and in the rear comes the hardship of court reporter support. Because of the Army wide shortage of court reporters, OSJA's must ensure that their command can sustain courts-martial operations. Rotation of a single court reporter in and out of country becomes problematic because of instability of transportation in and out of country. To reduce the hassle of transporting a single court reporter a second court reporter must be requested via HRC, request Reserve/National Guard court reporter support, or home grow a court reporter from the OSJA's enlisted ranks.

[46] SFC Cherie Barnett, OSJA, HQ, XVIII Airborne Corps and Fort Bragg, Operation Iraqi Freedom After Action Review, (23 Mar. 2006) [hereinafter Barnett OIF AAR] (recommends implementation of court reporting equipment that is durable and easier to transport).

XI.E. LEADERSHIP

Deploy Selected Noncommissioned Officers and the Legal Administrator or Automation Noncommissioned Officer Early.

During both OEF and OIF, SJAs deployed paralegal noncommissioned officers (NCOs) with the advance party to assist with legal operations setup.[47] Both work and sleep tents had to be set up, OSJA equipment had to be located and retrieved from conexes, and HMMWVs had to be serviced—NCOs make this happen.

In addition, the legal administrator or automation NCO should deploy early. With many sections and a multitude of automation and telecommunications systems to include key command and control (C2) systems for commanders, it was an extremely difficult job for a unit G-6 or Director of Information Management (DOIM) to maintain the unit's key automation and telecommunications systems during the fight. Unfortunately, many times OSJA personnel were not a high priority for automation work orders and communication issues when their systems went down. Legal personnel also must consider the implications of G-6 personnel working on some of the JAGC software applications, as it may compromise the attorney/client confidentiality because these programs would allow viewing of legal documents such as client cards. If G-6/DOIM personnel have access to confidential attorney-client information, the OSJA should have them sign a confidentiality and non-disclosure agreement.[48]

Given the above, the Legal Administrator or automation NCO should deploy with the OSJA, if possible with the advanced party. These service members give the OSJA an expert in troubleshooting and maintaining OSJA automation assets. In addition, they are able to act as liaison officers with the G-6/DOIM personnel and, using the proper automation jargon, may be permitted to use G-6/DOIM assets to repair and supplement OSJA equipment.[49]

Unlike the Army, with smaller teams and fewer assets, the Marine JAs did not ordinarily deploy the Legal Admin officer (the equivalent of the Army's Legal

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[47] *See* Interview with Colonel David L. Hayden, former Staff Judge Advocate, XVIII Airborne Corps, in Charlottesville, Va. (7 Oct. 2003) [hereinafter Hayden Interview].

[48] The agreement was drafted by the Office of The Judge Advocate General Technology Office, U.S. Army. According to an Army General Counsel opinion, the G6 has statutory responsibility for the security and confidentiality of data on Army information systems. The solution to protecting information used by Army organizations is to properly train systems administrators about data confidentiality requirements. "Confidentiality or non-disclosure agreements . . . provide administrative control and accountability to prevent unauthorized disclosure of confidential or sensitive information." Memorandum, Mr. Steven Morello, General Counsel for the Department of the Army, for Chief Information Officer/G6 (5 Feb. 2004).

[49] OIF, Vol I, 256-257.

Administrator).[50] Therefore, the JA and enlisted Marine had to provide their own automation support, or attempt to obtain assistance from the unit G-6/S-6.

Establish Immediate Contact with Other Legal Personnel in Theater.

When possible, prior to deployment legal personnel should obtain a roster of higher headquarters and subordinate unit OSJA members and schedule a meeting, either in person or through video tele-conference (VTC).[51] This will facilitate coordination among legal technical channels once deployed into theater. If this is not possible, both Army and Marine Corps legal teams reported that it was imperative that they established immediate contact with higher headquarters legal personnel once they deployed into theater. On many occasions, legal personnel were able to contact their counterparts to seek opinions and perspectives on legal issues, and thus obtain answers to legal issues that may already have been considered by other units.[52]

In addition, OSJAs that receive notice pre-deployment that other units will be attached to their command should immediately contact legal personnel assigned to those units to integrate them into the legal team. Legal and service member pre-deployment training at those attached units, for example, should mirror the OSJA's training schedule.[53] Moreover, OSJAs should review the attached unit's legal standard operating procedures (SOPs), reporting requirements, and unit training, including rules of engagement (ROE) training, for compliance with command standards.[54]

Leaders Must Routinely Visit Legal Teams.

> *You can't get things done sitting on your FOBs [forwarding operating bases] all day. It is also boring staring at a computer. Danger is more than a FOB outside of Tikrit—get out there.*[55]

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[50] *Id.*

[51] *See, e.g.*, After Action Review Comments – OSJA, 21st Theater Support Command (forward), Operation Iraqi Freedom – Republic of Turkey, at 5 (2003) [hereinafter 21st TSC AAR).

[52] *See, e.g.*, After Action Report, Operation IRAQI FREEDOM, Major Stuart Baker, Deputy Group Judge Advocate, 10th Special Forces Group, to Group Judge Advocate, 10th Special Forces Group, at 2 (1 Sep. 2003).

[53] *See, e.g.*, 3d Infantry Division (Mechanized), After Action Report, Operation IRAQI FREEDOM, at 282-83 (2003) [hereinafter 3ID OIF AAR] (noting that the 3ID SJA and Chief Legal NCO must make temporary duty trips to the Fort Benning legal office to ensure integration of the legal team into Fort Stewart's OSJA).

[54] Interview with LTC Flora D. Darpino, Staff Judge Advocate, 4th Infantry Division, by Lieutenant Colonel Judith Robinson, OIF Study Group Collector, Center for Army Lessons Learned, in Tikrit, Iraq, at 2 (26 May 2003) [hereinafter Darpino Interview].

[55] 1ID 1st Quarter AAR, OIF, Vol, 276 (referring to one of FOBs in their area of operation named "FOB Danger).

During 10th Mountain Division's rotation in Afghanistan, the Chief Paralegal Noncommissioned Officer (CPNCO) recommended that leaders must make routine face-to-face contact with each enlisted paralegal while deployed. This is particularly important because there will be legal teams from nonorganic units, including RC units, whom leaders have not met.[56] The NCO leadership at other units echoed this comment, recommending that the CPNCO visit all the brigades and battalions where paralegals are embedded to ensure the paralegals are properly trained and know their technical chain of command.[57]

XI.E.1. Family Readiness Group (FRG) Issues

Service members will remain effective in a combat environment knowing their family at home is well cared for. There is not a "cookie cutter" method of creating an FRG. Every FRG will be unique in its own way due to location, personnel, etc. Successful FRGs have relied on the participation between leaders, service members, and family members. Leaders must take an interest in their service members and their family. FRG members have the inherent duty to, 1) be active participants, 2) solicit new members; including junior service members and their families, and 3) incorporate Reservists/National Guard members. The camaraderie developed in the FRG has proven to be an invaluable tool during deployment and beyond.

The Family Readiness Group (FRG) is a unit commander's program formed in accordance with AR 600–20. Normally FRGs will be established at the company level, with battalion and brigade levels playing an important advisory role. FRGs are not a morale, welfare, and recreation program; a NAFI: a private organization; or a nonprofit organization. An FRG is a command-sponsored organization of service members, civilian employees, family members (immediate and extended) and volunteers belonging to a unit.[58]

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[56] After Action Review Conference, Office of the Staff Judge Advocate, 10th Mountain Division, and the Center for Law and Military Operations, in Fort Drum, N.Y., Power Point Presentation (17 Jun. 2004) [hereinafter 10th MNT DIV AAR].

[57] OIF, Vol II, 276-277.

[58] U.S. Dep't of Army, Reg. 608-1, Army Community Service Center, Appendix J, para. J-1 (21 Jul 2006)

XI.F. PERSONNEL

Ensure that Office Personnel Have Tactical Drivers Licenses.

Both JAs and paralegals routinely commented that legal teams must have military drivers' licenses that enable them to drive high-mobility multipurpose wheeled vehicles (HMMWVs) and other office military vehicles. All legal personnel assigned to the V Corps tactical operations center, for instance, had to have a license to take turns driving the HMMWV while on the move.[59]

In Long Deployments, Consider Rotating Duty Positions.

During long deployments, legal teams found it useful to rotate personnel into different jobs.[60] The V Corps JAs and paralegals found it boosted their morale to be given the opportunity to learn a new job.[61] Similarly, other SJAs reported that they tried to ensure that their personnel switched jobs whenever possible to keep legal personnel fresh. They recommended that personnel job stability must be balanced against personal needs and interests of the deployed legal teams.[62]

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[59] *See, e.g.,* Memorandum, Major Daniel G. Jordan, V Corps Tactical Operational Center Judge Advocate, for Acting Deputy Staff Judge Advocate, Headquarters, V Corps, subject: OIF AAR Comment Input, para. 3.c (28 Apr. 2004); Memorandum, Captain Noah V. Malgeri, Current Operations Cell, Office of the Staff Judge Advocate, V Corps, for COL Marc Warren, Staff Judge Advocate, V Corps, subject: OSJA After Action Review, Operation Iraqi Freedom, para. 7 (15 May 2004) ("All members should have a HMMWV license: The long convoy necessitated maximum use of different drivers and T/Cs.").

[60] As Major Daniel G. Jordan, OSJA, V Corps, commented:

> If you keep somebody—because that is shift work, and especially if you're the night shift, that is one of those jobs that can get to you after months of 7 days a week everyday. [Colonel Marc Warren, SJA, V Corps] was very good especially at rotating those people out and into some other job that was equally busy or more busy, but something different, something to keep their minds mentally—it's almost like exercising your brain muscles to keep them in shape because you're not just doing the same thing over and over again. You're actually getting the chance to do something else makes life a little bit easier.

Round Table Discussion, *id.*, at 20.

[61] Captain Noah V. Malgeri, OSJA, V Corps, commented:

> If you're doing the same job, I just recommend that one of the techniques that's practiced by JAG managers in this type of environment is to make sure that people are exposed to different circumstances at certain set times. If you're doing for example legal assistance, or anything, if you're the claims guy for 4 months, you're not doing it 5 days a week. You're doing it 7 days a week . . . .

Round Table Discussion, *id.*, at 19.

[62] 4ID AAR; After Action Report, Office of the Staff Judge Advocate, 1st Cavalry Division, at 29 (Feb. 2005) [hereinafter 1CAV AAR].

Prior to Deployment, Ensure Personnel are Identified and Appointed to Perform Various Legal Missions.

As legal teams prepared to deploy, they had to consider whether both the rear detachment and forward deployed OSJAs contained personnel properly appointed to perform certain functions for the offices. These duties included military magistrates, victim/witness liaisons, field ordering officers and paying agents, and special assistant U.S. attorneys (SAUSAs). In addition, it was imperative that the OSJA leadership coordinate early with the Trial Defense Service (TDS) to ensure defense counsel support during the deployment.

(a) Appoint Victim/Witness Liaisons Prior to Deployment.

The legal team must consider who will perform victim/witness liaison duties both in garrison and downrange. Often, civilian personnel perform these duties at home station and, therefore, the SJA must appoint additional victim/witness liaisons from within the ranks of those who will deploy. Deployed legal teams reported that they assigned JAs, legal administrators, and senior noncommissioned officers (NCOs) to perform these duties. Moreover, the number of victim/witness liaisons that were needed depended on many variables, to include whether unit personnel were located in close proximity to the headquarters and the security situation in their area of operation. In addition, legal teams often appointed additional victim/witness liaisons, if necessary, once they deployed.[63]

Fourth Infantry Division, for instance, appointed two victim/witness liaisons: one captain and one legal administrator. The focus of their duties was on service member sexual assault victims.[64] First Cavalry Division OSJA designated their legal assistance attorney as the Division liaison and had three additional JAs who were located with brigade combat teams assigned as victim/witness liaisons, as well. These individuals were trained prior to deployment.[65] Additionally, the OSJA, 1st Infantry Division, appointed ten legal personnel as victim/witnesses liaisons. The large number of victim/witness liaisons was necessary because units operated on numerous FOBs and the security situation made it very difficult to travel between these FOBs.[66]

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[63] The victim/witness liaison coordinator for 1st Infantry Division, for example, reported that it was very easy to appoint additional liaisons, once the need was identified. E-mail from Captain Zahid N. Quraishi, Office of the Staff Judge Advocate, 1st Infantry Division, to Lieutenant Colonel Pamela M. Stahl, Director, Center for Law and Military Operations (8 Sept. 2004) [hereinafter Quraishi E-mail].

[64] 4ID AAR, OIF, Vol II, pg. 278 (also noting that victim/witness liaison duties took a significant amount of time and that it was difficult to provide services to other FOBs because of security concerns).

[65] *See* Memorandum, Multi-National Corps-Iraq (III Corps), to Director, Center for Law and Military Operations, The Judge Advocate General's Legal Center and School, subject: Victim Witness Programs in the Iraqi Theater, para. 6 (28 Sept. 2004); E-mail from Lieutenant Colonel Christopher J. O'Brien, Staff Judge Advocate, 1st Cavalry Division, to Lieutenant Colonel Pamela M. Stahl, Director, Center for Law and Military Operations (8 Sept. 2004).

[66] Quraishi E-mail, *Id.* at note 69.

Legal teams also need to consider whether they have the assets to provide victim/witness liaison assistance to foreign nationals. First Infantry Division reported that they had the contacts in place through the Iraqi legal community to have a local national appointed as the victim/witness liaison.[67]

(b) Consider Appointing a Field Ordering Officer and Paying Agent.

As stability and support operations began and deployments stretched beyond a few months, OSJAs found it necessary to replenish supplies. Virtually every OSJA recommended that the legal office train and appoint a Field Ordering Officer (FOO) and/or paying agent.[68] Legal teams routinely commented that it would have been very difficult, if not impossible, to quickly replenish supplies without access to a FOO and paying agent. The OSJA at III Corps recommended that a FOO and paying agent should be designated and provided the necessary training as soon as the notice of deployment is

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[67] *Id.*

[68] *See, e.g.,* 10th MNT DIV AAR. The field ordering officer is generally defined as follows.

> (c) When justified, the chief of the contracting office may appoint a unit member as an ordering officer. The ordering officer acts as an agent (under written direction from the chief of the contracting office) for the supporting contracting office to make local purchases (LP). Ordering officers are normally nominated by commanders and appointed by the designated HCA [head contracting authority] . . . and trained and supervised by the appointing authority or his designee (the contracting officer).
>
> . . .
>
> (e) Purpose for which ordering officers may be appointed and references as to limitations of their authority are—
>
> (1) To purchase with imprest funds.
>
> (2) To purchase over-the-counter and not exceeding $2,500.00.
>
> (3) To place unilateral delivery orders against pre-priced indefinite delivery type supply and service contracts provided such contract terms permit and all orders are placed within the monetary limitations of the contract terms.

U.S. Dep't of Army, Federal Acquisition Reg., Manual No. 2 (Contingency Contracting), App. E, para. E-2 (Nov. 2003).

In contrast, paying agents are appointed by the commander.

> The appointment letter shall contain the paying . . . agent's name, rank or grade, SSN and duty station; the name, rank or grade and station of the DO [disbursing officer] . . . the duties and responsibilities of the agent; a description of the type of payments or currency conversions to be made by the paying agent; the maximum amount of funds to be advanced to the agent; the period of time the appointment covers; and, the agent's acknowledgement of acceptance of the appointment . . . . Appointments may be for a specific transaction, for a specific period of time, or for an indefinite period of time.

U.S. Dep't of Defense, Reg. 7000.14, DoD Financial Management Regulation, Vol. 5, chap. 2, para. 020604 (May 2001).

received, if not earlier.[69] The 101st Airborne Division (Air Assault), for example, had a paralegal appointed as a paying agent. Although this Soldier was lost to the office on many occasions when he was required to go on purchasing trips, the office found that the "easy access to FOO operations and funds more than makes up for the loss."[70] A copy of a FOO appointment order is in OIF Lessons Learned Volume II at Appendix J-1. A copy of a Paying Agent Appointment is in OIF Lessons Learned Volume II at Appendix J-2.

(c) If Required, Remember to Request Appointment of a Special Assistant United States Attorney and Train that Individual Prior to Deployment.

Another issue that JA leaders must consider immediately upon notification of deployment is staffing the Special Assistant U.S. Attorney (SAUSA) position. The U.S. Attorney must make these appointments, and the SJA memorandum requesting the appointment may take some time to process. Therefore, if the OSJA plans to deploy their SAUSA and backfill the position with another JA, the memorandum should be completed as soon as possible so that Magistrate's Court is not delayed or disrupted due to the deployment of the only SAUSA. In addition, if a RC JA will be appointed as the SAUSA, this person should be identified even prior to notification of deployment so that training periods can be used to integrate the RC appointee into the Magistrate Court operation.[71]

(d) Determine as Early As Possible Which Trial Defense Service Office will Support Units and How the Support will be Provided.

As soon as the legal team is notified of deployment, the JA leadership should contact the TDS to determine what TDS office and which counsel will support their units and how that support will be provided. One OSJA commented that it took over a month for a decision on which office would support one of their outlaying brigades and get a TDS attorney to visit the unit.[72] In addition, the legal team must determine prior to deployment what the TDS standard operating procedure will be for seeing clients. For example, will the defense counsel travel to different FOBs for Article 15 counseling or will every service member be required to go to the Division FOB for counseling?[73]

Additionally, paralegal support to TDS must be identified as soon as possible prior to deployment so that these paralegals can begin training on their new mission and be prepared to quickly assimilate into the TDS operation once they arrive in sector.

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[69] First Quarter After Action Report, Office of the Staff Judge Advocate, III Corps, Administrative Issues (Jun. 2004). The OSJA, III Corps noted that the FOO is normally an officer and the paying agent is normally an E-7 or above. They recommended that the FOO and paying agent should attend the required classes, have the orders issued appointing them as the FOO and paying agent and be prepared to start purchasing supplies and equipment as soon as notice of the deployment is received. *Id.*

[70] 101st ABN DIV AAR, OIF Vol II, pg. 279.

[71] *Id.*

[72] OIF, Vol II, pg. 280.

[73] *Id.*

Moreover, if TDS RC augmentees will be mobilized and deployed in support of the mission, they must receive their orders well in advance of their deployment to ensure they can deploy with the unit they will be supporting.[74]

Leaders Must Take Care of Their service members.

In particular during the long deployments in support of OEF and OIF, JAGC leaders had to monitor the morale and welfare of their subordinates. Leaders must ensure that their service members have the proper training, equipment, supplies, and life support to perform their missions. They should routinely talk with each individual service member and keep the lines of communication open. Leaders must ensure that service members are getting sufficient sleep; they also should ensure that the mail is picked up every day and be aware of who is not receiving mail. Senior NCOs must also ensure service members receive only their fair share of unit taskings. Service members reported that guard duty was very stressful and that leaders should ensure that service members are not required to work during the day if they are pulling an all-night guard shift. Moreover, NCOs should check on their service members performing these extra duties, ensuring that they have sufficient water, food, and sleep.[75]

Additionally, leaders need to monitor service member movement in and out of theater. Senior NCOs must have a plan for reception of service members moving into theater. These service members should be picked up at the reception station and briefed on their mission. Although this sounds easy, it was not. The CPLNCO for 1st Armored Division, for example, spent many hours on the phone coordinating with individuals who could track the progress of service members traveling downrange. It was imperative that he keep in constant contact with the garrison OSJA so that they could tell him when the service member deployed. Similarly, deployed JA leaders must ensure that the garrison OSJA knows when a service member is returning to home station. That way, the OSJA can coordinate for family members to be present upon the service member's return and that a representative from the OSJA is there to receive the service member.[76]

Reserve Component service members need particular care after they return to the United States. Once these service members return to home station from their demobilization sites in the United States, they are given very little time before leaving active duty. The 39th Brigade Combat Team (BCT), for example, had seven days with their unit after returning to Arkansas before leaving active duty. This does not give leaders much time to observe their service members that may need special attention.[77] Leaders should also consider asking their command to allow key individuals from the OSJA to remain in an active duty status to assist with legal issues that may unexpectedly

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[74] *Id.*

[75] OIF, Vol II, pg. 280-281.

[76] *Id.*

[77] *Id.*

arise. The 39th BCT SJA requested that one JA captain be left in a Title 10 status, for example, to handle service member personnel claims for property damaged during the deployment. Additionally, JAs in a Title 10 status may be needed to assist in the prosecution of UCMJ actions that are still pending from the deployment.[78]

Leaders also must make sure that family members are kept informed. Several OSJAs used newsletters to keep family members informed of their mission.[79] Moreover, leaders should ensure that service members have the opportunity to keep in contact with their family members by giving them access to e-mail for personal correspondence and allowing them the time to make use of available video teleconferencing and telephones. Further, a family member should be appointed as a liaison to other family members in the legal office. The liaison can provide an invaluable service by keeping family members informed of the office mission, the welfare of their loved ones, and other information. Leaders must strive to reach out to these family members so that they are provided with needed information. First Armored Division, for instance, appointed a liaison to the family members and hosted potlucks and other social events with them.[80]

[78] *Id.* (noting that a JA in a Title 32 status cannot adjudicate claims under the Personnel Claims Act or prosecute cases under the UCMJ).

[79] *See, e.g.*, Office of the Staff Judge Advocate, 1st Cavalry Division, Newsletters.

[80] OIF, Vol II, pg. 281, 1AD AAR, Rear Detachment Legal Operations notes.

XI.G. FACILITIES

Ensure Experienced and Sufficient Personnel Remain at Home Station to Continue Garrison Legal Operations.

During deployments in support of OEF and OIF, legal teams routinely commented that rear-detachment operations must be made a priority when preparing to deploy. The office of the staff judge advocate (OSJA) at III Corps prepared a staff analysis to determine the minimum number of persons—including officers, legal administrators, paralegals, and civilians—required to maintain rear operations. Such an analysis assists the OSJA in deciding whether to request reserve component (RC) legal assets to backfill garrison operations. From this baseline, they then prepared a memorandum to Forces Command identifying rear operational needs. This memorandum was separate from their request for RC legal personnel to fill the Joint Manning Document (JMD) for the OSJA, Combined Joint Task Force Seven (CJTF-7).[81] Those legal offices requesting RC personnel found that this can sometimes be a long process, as discovered by the OSJA leadership at V Corps, for example, who began requesting RC personnel in December 2002; the first RC legal assets did not arrive in V Corps pursuant to that request until May 2003.[82] Further, once these RC assets are identified, the OSJA must prepare for their arrival just as they would for any incoming personnel. For instance, a sponsor should be appointed to ensure their smooth transition into the office.[83]

Many legal teams recommended that the OSJA leave behind experienced personnel to assist the new OSJA leadership. The SJA, 4th Infantry Division, for example, left behind an experienced major to take care of pending legal actions.[84] Not only can these experienced legal personnel provide invaluable institutional knowledge to the new OSJA leadership, but they should act as a conduit between the new leadership and family members who may be unfamiliar with new personnel.

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[81] The purpose of this memorandum was to give as much advanced notice as possible to FORSCOM and the Personnel, Planning, and Training Office, OTJAG, that they would require Reserve augmentation to perform rear operations. The memorandum also served notice that personnel requirements could change once the Joint Manning Document was completed.

[82] Major Juan A. Pyfrom, Round Table Discussion, Transcript of After Action Review Conference, Office of the Staff Judge Advocate, V Corps, and the Center for Law and Military Operations, Heidelberg, Germany, at 21 (17-19 May 2004) [hereinafter Round Table Discussion]. *See also* Lieutenant Colonel Richard C. Gross, Deputy Staff Judge Advocate, V Corp, After Action Review Conference, Office of the Staff Judge Advocate, V Corps, notes (17-19 May 2004) [hereinafter Gross Interview] (commenting that the RC legal personnel who assisted the garrison legal offices at V Corps through contingency temporary tours of active duty (COTTDADs) were invaluable).

[83] *See, e.g.,* After Action Review Conference, Office of the Staff Judge Advocate, 1st Armored Division, with the Center for Law and Military Operations, in Wiesbaden, Germany, Rear Detachment Legal Operations notes (13-14 Dec. 2004) [hereinafter 1AD AAR] (providing that once RC personnel were identified a sponsor was appointed and a welcome packet forwarded to the personnel).

[84] After Action Review Conference, Office of the Staff Judge Advocate, 4th Infantry Division, and the Center for Law and Military Operations, at Fort Hood, Tx., at 1 (8 Sept. 2004) [hereinafter 4ID AAR].

In addition, if RC personnel are to backfill garrison operations, they should have a habitual training relationship with their active component counterparts.[85] These RC personnel must learn office systems, to include case management systems, and become comfortable with them prior to the deployment.[86] Moreover, OSJAs should strive to adopt the rear-detachment structure as early as possible so that the leadership can answer questions and assist while the new personnel are settling into their positions. For example, the OSJA, 1st Infantry Division recommended that the SJA should take the rear-detachment SJA to appointments with the commanding general to observe the relationship and manner of presenting actions to the convening authority. Moreover, the deputy SJA and other branch chiefs must ensure that personnel assuming their duties meet the primary staff members and commanders whom they will support.[87] Also, the stay-behind OSJA leadership must be trained on staff processes, as some units reported that once personnel deployed, the rear detachments suffered a breakdown in staff processes, with various staff sections taking actions directly to the commanding general without coordination with other staff sections, including the SJA office.[88]

Further, to ensure proper leadership in the garrison office, the active component leadership should consider integrating the RC leaders into the rating chain for all legal personnel at home station—both active duty and reserve. This will facilitate a clear chain of command and ensure that the reserve OSJA leadership is unmistakably established.[89]

Deploying OSJAs must also consider the physical facility that the stay-behind personnel will inherit. Those deploying should remove their personal items from their offices and leave their office keys. This will allow replacement personnel to more easily occupy office space and conduct their legal mission.[90]

Once deployed, OSJAs reported that they routinely consulted and coordinated with their rear detachment. For example, Soldiers who missed movement had to be sent downrange; injured personnel had to be medically evacuated and then redeployed in some instances; witnesses at home station courts-martial had to be sent back for trial; and separation in lieu of courts-martial cases had to be returned to home station for further processing.[91] All of these cases required extensive coordination with the garrison SJA

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[85] *See, e.g., id.* 1; After Action Review Conference, Office of the Staff Judge Advocate, 101st Airborne Division (Air Assault), and the Center for Law and Military Operations, in Fort Campbell, Ky., at 4 (21 Oct. 2004) [hereinafter 101st ABN DIV AAR Conference].

[86] 101st ABN DIV AAR Conference, (providing that the total number of cases and actions actually increased after the Division deployed, including 1,000 personnel claims that the deployed claims office sent to the rear for processing).

[87] Office of the Staff Judge Advocate, 1st Infantry Division, After Action Report Iraq (Mar/Apr/May), at 5 (May 2004) [hereinafter 1ID 1st Quarter AAR].

[88] OIF, Vol II, pg. 272-274.

[89] Operation Iraqi Freedom (OIF) After Action Review (AAR), Office of the Staff Judge Advocate, 101st Airborne Division (Air Assault), (24 Sep. 2004) [hereinafter 101st ABN DIV AAR].

[90] *Id.* 1AD AAR, Rear Detachment Legal Operations notes.

[91] *Id.* 1ID 1st Quarter AAR.

office. In addition, legal teams reported that it was imperative that deployed OSJAs keep the garrison office informed of the latest service member redeployments. Garrison offices must make it a top priority to ensure that family members are notified when service members will return and to ensure an OSJA representative meets the service member when he or she arrives home.[92]

Given the above, SJAs learned that they must leave behind a robust legal office to handle myriad rear detachment legal issues and assist the forward deployed legal team. This may be a particular problem for reserve organizations and headquarters that may not be staffed to support numerous activated RC personnel.

[92] 1AD, for example, was notified that they would be extended in theater for three months beyond their original twelve month deployment. Several 1AD OSJA personnel had already redeployed to home station when the notification was received and had to be called off leave to return to Iraq. Moreover, the garrison legal office took on the task of calling all 1AD legal personnel family members and informing them of the extension so that they would not have to hear it through rumor or from the media.

XI.H. COUNTRY MATERIALS

Prior to Deployment, Legal Personnel Should Be Trained on the Country's Law and Legal System.

JA's deploying in support of OIF, in particular, voiced concern that they had not anticipated they would need to know Iraqi law and understand its legal system. Once major combat operations wound down and stability operations began, however, JAs quickly discovered that they would play an integral role in rebuilding the Iraqi justice system. To do so, they needed to know what that justice system was—the penal and civil codes.[93] A V Corps JA assigned to work on the Phase IV, post-combat plan noted that he began searching for Iraqi law while in theater in March of 2003 on the Internet.[94] One Marine Corps JA recommended that JAs should have assembled an inter-service task group to gather available information on Iraqi law, and hired Iraqi lawyers to assist in the effort. The information gathered could then have been disseminated to all JAs in theater.[95]

The lesson here is that JAs must anticipate that once combat operations wind down, stability operations may involve the U.S. military in enforcing the rule of law and in judicial reconstruction. Commanders will expect their JAs to be the expert in these areas. Therefore, prior to deployments JAs should identify local law and be familiar with the system of justice in their area of operations (AO).

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[93] *See, e.g.*, After Action Report, Operation Iraqi Freedom, Maj Kevin M. Chenail, USMC, Operational Law Attorney, Coalition Forces Land Component Command, at 1 (2003) [hereinafter Chenail OIF Lessons Learned]. During the early part of OIF, CLAMO was helpful in finding translations of the Iraqi penal code for JAs in theater.

[94] *See* V Corps AAR Transcript, (comments from CPT Travis W. Hall, Office of the Staff Judge Advocate, V Corps).

[95] *Id.*

ACKNOWLEDGEMENTS

The Center for Law and Military Operations assumes full responsibility for any errors contained in this publication and gratefully acknowledges the assistance of the following TJAGLCS staff and faculty members in reviewing this publication and preparing the final draft:

MAJ Jeremy Ball
MAJ Chris Brown, ARNGUS
MAJ Sean Condron
LTC Suzy Mitchum
MAJ John Rawcliffe
MAJ Dave Scott
MAJ Sean Watts
CW3 Dale Trexler
LCDR James Benoit, USN
Maj Craig Burton, USAF
MAJ Howard Hoege
MAJ Mike Norris
MAJ Mark Ries
LtCol Thomas Wagoner, USMC
LTC Noël Woodward

The Center also acknowledges the assistance of all the judge advocates, legal administrators, and paralegals of the U.S. Army and U.S. Marine Corps who contributed their time and effort to this compendium. While too numerous to name, these legal teams' after action reports, lessons learned compilations, individual journals, and CLAMO conferences and interviews were essential to an understanding of the continuingly complex legal issues found in recent operations. We sincerely hope that legal personnel will find this resource valuable in preparing for future training events and deployments.

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